


RULS - AD - 1985 - 230

9/13/85

In Hills v. Bernards:

- letter
 - 2 copies of Notice of Motion for Removal of Stay + Transf
 - 2 copies of Certification of Ferguson
 - Original + 1 copy of Brief
 - Original + 2 copies of proposed form of Order for
- 

Pgs - 31

FARRELL, CURTIS, CARLIN & DAVIDSON

ATTORNEYS AT LAW
43 MAPLE AVENUE
P. O. BOX 145
MORRISTOWN, N. J. 07960
(201) 267-8130

9/27

EDWARD J. FARRELL
CLINTON J. CURTIS
JOHN J. CARLIN, JR.
JAMES E. DAVIDSON
DONALD J. MAIZYS
LOUIS R. RAGO
LISA J. POLLAK
HOWARD P. SHAW
CYNTHIA H. REINHARD
MARTIN G. CRONIN

Motion to 10/4

171 NEWKIRK STREET
JERSEY CITY, N.J. 07306
(201) 795-4227

OF COUNSEL
FRANK J. VALGENTI, JR.

FILED

RULS - AD - 1985 - 230

September 13, 1985

Ocean County Clerk's Office
Courthouse
Toms River, New Jersey 08754

Re: The Hills Development Company
v. The Township of Bernards, et al.
Docket No. L-030039-84 P.W.

Dear Sir or Madam:

Enclosed for filing are the following:

1. Two copies of Notice of Motion for Removal of Stay and Transfer, returnable September 27, 1985;
2. Two copies of Certification of Nancy Ferguson;
3. Original and one copy of Brief;
4. Original and two copies of proposed form of Order for Removal of Stay and Transfer to Council on Affordable Housing.

Please stamp and return the extra copy of the Notice of Motion, in one of the enclosed postpaid envelopes.


If our motion is granted, please return a conformed copy of the signed Order in the other enclosed postpaid envelope.

Ocean County Clerk's Office
Page Two
September 13, 1985

By copy of this letter, we are serving copies of all papers upon all counsel, and we are filing the original Notice of Motion and Certification with the Clerk of the Superior Court.

Very truly yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: 
Howard P. Shaw

HPS/sjm
Encl.

cc: Clerk of the Superior Court (by mail)
Henry A. Hill, Esq. (by hand)
Arthur H. Garvin, III, Esq. (by mail)
Mr. H. Steven Wood (by mail)

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
Morristown, New Jersey 07960
(201) 267-8130

Attorneys for Defendants, The Township of Bernards, et al.

THE HILLS DEVELOPMENT COMPANY,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	SOMERSET/OCEAN COUNTY
	:	(Mt. Laurel II)
vs.	:	
	:	Docket No. L-030039-84 P.W.
THE TOWNSHIP OF BERNARDS, et al.,	:	
	:	Civil Action
Defendants.	:	
	:	NOTICE OF MOTION FOR REMOVAL
	:	<u>OF STAY AND FOR TRANSFER</u>

TO: HENRY A. HILL, JR., ESQ.
BRENER, WALLACK & HILL
204 Chambers Street
Princeton, New Jersey 08540

PLEASE TAKE NOTICE that on September 27, 1985 at 9:00 in the forenoon or as soon thereafter as counsel may be heard, the undersigned, Farrell, Curtis, Carlin & Davidson, and Kerby, Cooper, Schaul & Garvin, attorneys for defendants, will move before the Honorable Eugene D. Serpentelli, at the Courthouse in Toms River, New Jersey for an Order removing the stay of this matter previously entered by the Court and transferring the matter to the Affordable Housing Council in accordance with Section 16 of the Fair Housing Act (L. 1985, c. 222).

In support of this Motion defendants shall rely on the pleadings and previous motion papers in this matter, the Certification of Nancy Ferguson, and the accompanying Brief.

A proposed form of Order accompanies this Notice of Motion. Oral argument is requested.

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Defendants
Mayor and Township Committee of
the Township of Bernards

By: Howard P. Shaw
Howard P. Shaw

KERBY, COOPER, SCHAUL & GARVIN
Attorneys for Defendant,
Planning Board of the Township of
Bernards

By: Arthur H. Garvin, III, Esq.
Arthur H. Garvin, III, Esq.

Dated: September 13, 1985

PROOF OF SERVICE

I certify that on September 13, 1985, I caused the original of this Notice of Motion and supporting Certification to be mailed to the Clerk of the Superior Court by first-class mail, for filing; I caused copies of same, and original of a Brief and form of Order to be filed by hand with the Clerk of Ocean County; and I caused copies of all of the above to be served upon all counsel by hand.

Howard P. Shaw
Howard P. Shaw

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants, The Township of Bernards, et al.

THE HILLS DEVELOPMENT COMPANY,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	SOMERSET/OCEAN COUNTY
	:	(Mt. Laurel II)
vs.	:	
	:	Docket No. L-030039-84 P.W.
THE TOWNSHIP OF BERNARDS, et al.,	:	
	:	Civil Action
Defendants.	:	
	:	CERTIFICATION OF
	:	<u>NANCY FERGUSON</u>

I, NANCY FERGUSON, certify as follows:

1. I am Secretary to the Planning Board of the Township of Bernards. In that position I have access to the records of the Planning Board.

2. The minutes and other records of the Planning Board show, with respect to Hills Development Company ("Hills") and the property owned by it in Bernards Township, that:


a. Hills received preliminary approval for 29 large-lot, single family dwelling units, designated as Section 1A, on October 8, 1981;

b. Hills received final approval for Section 1A, and preliminary approval for an additional 35 large-lot, single family dwelling units (Section 1B) on September 6, 1984;

c. Hills has not filed any applications for zoning approvals from at least November 1984 (when Township Ordinance 704 was enacted) to date;

d. Hills did present a conceptual map to the Planning Board's Technical Coordinating Committee ("TCC") showing 2,750 proposed dwelling units, which was reviewed by the TCC and discussed with representatives of Hills on March 19, 1985, and as to which the Technical Coordinating Committee had serious design questions regarding portions of the plan.

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.


NANCY FERGUSON

Dated: September 12, 1985

FILED

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants, The Township of Bernards, et al.

THE HILLS DEVELOPMENT COMPANY,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	SOMERSET/OCEAN COUNTY
	:	(Mt. Laurel II)
vs.	:	
THE TOWNSHIP OF BERNARDS, et al.,	:	Docket No. L-030039-84 P.W.
Defendants.	:	Civil Action

DEFENDANTS' BRIEF IN SUPPORT OF
MOTION TO TRANSFER TO COUNCIL ON
AFFORDABLE HOUSING

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants,
The Township of Bernards, et al.

KERBY, COOPER, SCHAUL & GARVIN
9 DeForest Avenue
Summit, New Jersey 07901
(201) 273-1212
Attorneys for Defendant, Planning
Board of the Township of Bernards

On the Brief:

James E. Davidson, Esq.
Howard P. Shaw, Esq.
Arthur H. Garvin, III, Esq.

STATEMENT OF FACTS

This Brief is being submitted in support of defendants' Motion for Transfer of this action to the Affordable Housing Council pursuant to to §16 of the Fair Housing Act (L. 1985, c.222). In order to fully understand the issues and the relationship of the parties, a review of the historical setting is necessary. The historical information set forth herein was brought to the Court's attention in defendants' Brief in Opposition to plaintiff's Motion for Summary Judgment in July of 1984. It is, however, repeated here so as to provide continuity. Plaintiff is apparently a joint venture made up of Allan-Deane Corporation and other entities, and is the successor in interest to Allan-Deane (See Complaint). Because of this continuity of interest, plaintiff and its predecessor will both at times be referred to herein as "plaintiff" or "Hills".

The tract owned by Hills is approximately 1050 acres. At the time of purchase, the property was located in the R-3A zone which permitted the development of one unit for every three acres. Thus, under that zoning (and after an allowance for roads, etc.) approximately 350 units could be built on the property.

In 1976, Allan-Deane brought an action against Bernards Township, Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-25645-75 P.W., alleging that Bernards

violated the dictates of Mt. Laurel I (So. Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 [1975]) and requesting that the court increase the gross density for development of the property among other requests for relief. Copies of the Second Amended Complaint and Pretrial Order in that matter are attached to the Certification of Harry M. Dunham as Exhibits A-1 and A-2. (The Dunham certification was submitted in opposition to the July 1984 Summary Judgment Motion.) The parties agreed to a settlement of the Allan-Deane matter and a Judgment was entered on March 18, 1980. A copy of that Judgment is attached to Mr. Dunham's Certification as Exhibit A-3. That Judgment (together with an attached letter dated February 1, 1980) specifies, in some detail, the type of development and flexibility which was to be incorporated in the Bernards Township Zoning Ordinance in order to permit construction of a variety and choice of housing for "all income groups".

The Bernards Township Land Development Ordinance was originally adopted in 1980. In drafting the 1980 ordinance and the subsequent modifications which resulted in the 1982 ordinance many planners were consulted. A very important part of the process was the actual input of plaintiff and its experts. (See Certification of Marshall Frost, pages 3 - 14, for an explanation of the creation of the ordinance. Mr.

Frost's Certification was submitted in opposition to plaintiff's July 1984 Motion for Summary Judgment as referred to above.)

The resulting ordinance permitted the construction of houses for all income groups by the removal of net density requirements and cost generative provisions not required by health and safety.

Plaintiff has built no housing on its property which was the subject of the 1976 lawsuit. A year after the Judgment was entered, plaintiff submitted a conceptual development plan for its property which included 1275 units, the lowest priced of which was \$155,000. (See Exhibit E to Certification of Harry M. Dunham.) Plaintiff has not pursued that application, except to the extent of 64 units of low density single family dwellings of which 29 received preliminary approval from the Planning Board in 1981 and final approval in September 1984, and 35 received preliminary approval in September 1984. (See Certification of Nancy Ferguson, accompanying this Brief.)

The R-8 and R-5 zones (as now described in the Bernards Township Land Development Ordinance), respectively, were the subject of the Allan-Deane v. Bernards Township litigation brought by plaintiff, referred to above, and also an action entitled Lorenc v. Bernards Township, Docket No. L-6237-74 P.W. (Lorenc Final Supplementary Judgment is attached to the Dunham Certification as Exhibit B). In each case, the litigation involved a claim or claims by the property owners that they were

prohibited by the existing zoning ordinance from the construction of Mt. Laurel housing because of density requirements in the zoning ordinance, and because of cost-generative provisions. In each case, a judgment was put on the record based on Mt. Laurel which (1) provided a substantial increase in density; (2) provided for greater flexibility in zoning; and (3) provided for the removal of cost-generative provisions. In each case, the respective plaintiff participated in formulating the language of the Judgment. In each case the ordinance was amended to comply with the Judgment. The 1982 ordinance embodied the amendments which arose out of those litigations.

Prior to the commencement of this action, plaintiff had not submitted an application for preliminary approval of any part of its project (except as earlier indicated), although as part of the approval process of other aspects of its project a conceptual map was submitted (see Dunham Certification).

Based upon that map, and upon the project report of plaintiff (Exhibit E to Dunham Certification), it is apparent that the plaintiff intended to develop its property without Mt. Laurel housing, at least until it purportedly decided otherwise in the spring of 1984. Then, the attorney for plaintiff forwarded to the Planning Board a letter dated April 10, 1984, setting forth various thoughts and proposals and threatening litigation unless certain density and other requirements were

met. The deadlines stated in that letter were so short that enactment process would have had to be substantially complete in less than thirty days, a totally unrealistic time frame. (See letter of Henry Hill dated April 10, 1984, attached to Complaint in this action.)

This action was commenced on May 8, 1984, twenty-eight days after the date of Mr. Hill's letter. The action involves the same property which was the subject of the Allan-Deane matter and demands a five-fold increase in density, and is based on the dictates of Mt. Laurel II, So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983).

~~Answers were filed by the defendants in June, 1984.~~ Discovery was commenced by service of Interrogatories in June, 1984. ~~A Motion for Summary Judgment was heard in July, 1984 and was denied by Order of the Court dated August 3, 1984.~~ In November, 1984 the defendant, Township of Bernards, adopted Ordinance 704 which provides for increased density in two zones within the township and other provisions intended (a) to insure the construction of lower income housing which meets the standards and guidelines set forth in Mt. Laurel II, and (b) to provide a realistic opportunity for the construction of a variety of housing types and for a variety of income levels in the township. (Article 1101, Ordinance 704; a copy of Ordinance 704 is attached to this Brief as Exhibit A.) Under that ordinance plaintiff was permitted to construct up to 2750

dwelling units. (Article 1104-2, Ordinance 704) Twenty percent (20%) of such dwelling units shall be affordable for lower income households. (Article 1110, Ordinance 704) Ordinance 704 also modified other provisions of the Bernards Township Land Development Ordinance in order to remove any unnecessary cost generating features.

Subsequent to the adoption of that ordinance, the parties attempted to settle the litigation based on Ordinance 704. In furtherance thereof, the Court entered an Order dated December 19, 1984 staying the action and precluding builders remedies. The period of such stay has been extended to date.

The Court also appointed George Raymond as the Court appointed expert to review the Amended Land Use Ordinance and to report to the Court as to its compliance with Mt. Laurel II, and to assist the Court and the parties in resolving any outstanding issues where requested.

Mr. Raymond reviewed Ordinance 704 and other materials submitted to him by the parties and has counselled the parties in an attempt to further the settlement of the matter. Mr. Raymond submitted a report dated June 12, 1985 to the Court in which he reviews Ordinance 704 and makes certain recommendations to the Court regarding the Bernards Township's fair share and compliance package.

Subsequent to the Supreme Court's decision in Mt. Laurel II, the legislature commenced consideration of legislation in

POINT I

THIS ACTION SHOULD BE TRANSFERRED
TO THE AFFORDABLE HOUSING COUNCIL
PURSUANT TO THE INTENT AND PROVISIONS
OF THE "FAIR HOUSING ACT".

This motion to transfer is brought in accordance with the provisions of the "Fair Housing Act" (L. 1985, c.222; N.J.S.A. 52:27D-301 et seq.), hereinafter referred to as the "Act". The Act became effective on July 2, 1985 and is the legislative response to the decision of the Supreme Court in So. Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mt. Laurel II), (see legislative findings -- Act §2).

The legislative findings make it very clear that (1) the legislature intended that the method of satisfying the Mt. Laurel obligation is better left to the legislature (Act §2b) and (2) the interests of all citizens (including low and moderate income families) is best served by a comprehensive planning and implementation response to the obligation. (Act §2c.)

The Act also sets forth specific declarations in Section 3 as follows:

"The Legislature declares that the statutory scheme set forth in this act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the Supreme Court. The Legislature declares that the State's preference for the resolution of existing and future disputes involving

exclusionary zoning is the mediation and review process set forth in this act and not litigation, and that it is the intention of this act to provide various alternatives to the use of the builder's remedy as a method of achieving fair share housing." (Emphasis added.)

In furtherance of its express intention to provide comprehensive planning and implementation, and of its express preference for resolving "existing and future disputes involving exclusionary zoning" by use of "the mediation and review process set forth in this Act and not litigation . . ." (Act §3) (emphasis added), the legislature provided, in Section 16, specific regulations relating to the transfer of existing cases to the Affordable Housing Council. Those regulations address two distinct situations: (i) Where an action was instituted less than 60 days before the effective date of the Act, the person instituting the action "shall file a notice to request review and mediation with the council . . ." (Act §16b); (ii) Where (as here) an action was instituted more than 60 days before the effective date of the Act, any party to the litigation desiring a transfer may file "a motion with the court to seek a transfer of the case to the council". (Act §16*)

In the latter situation, the statute specifies only one criterion for denying the motion. That criterion is as follows:

* The Second Official Copy Reprint (advance sheet) of the Act shows a §16 and a §16b, but no paragraph expressly labeled "16a".

"In determining whether or not to transfer, the court shall consider whether or not the transfer would result in a manifest injustice to any party to the litigation." (Act §16)

Thus, on a transfer motion the only issue which the statute directs the Court to consider is whether the transfer would result in "manifest injustice" to a "party to the litigation." The Act does not give the Court any other basis for denying a transfer application. By contrast, the Act strongly and repeatedly expresses the legislative preference for the specified comprehensive administrative mechanism over Court adjudication of affordable housing cases (e.g., Act §§2a through 2h, 3, 16, 17a, 17b). This combination of a strong legislative statement of preference for administrative proceedings, with the specification of a very narrow and stringent basis for denying a transfer application, indicates that unless the court affirmatively finds that manifest injustice will result, it should grant the application for transfer.

The Supreme Court itself, in Mt. Laurel II, stated unequivocally its preference for a legislative remedy over a judicial one, and stated also that the courts should and would defer to the legislative remedies if and when they were enacted. "We have always preferred legislative to judicial action in this field," the Court said. 92 N.J. at 212. "[P]owerful reasons suggest, and we agree, that the matter is better left to the Legislature." Id. (emphasis added). "[T]he

complexity and political sensitivity of the issue . . . make it especially appropriate for legislative resolution . . ." 92 N.J. at 213, n.7. Consequently "[o]ur deference to . . . legislative and executive initiatives [such as the Municipal Land Use Law and the State Development Guide Plan] can be regarded as a clear signal of our readiness to defer further to more substantial actions." 92 N.J. at 213.

Therefore, in the absence of a specific finding that "manifest injustice" will result from the transfer of an action to the Affordable Housing Council, the Court should "defer" to the legislative initiative which is designed to produce lower income housing through comprehensive regional planning and central administration.

"Manifest injustice" does not exist merely because plaintiff has commenced an action pursuant to Mt. Laurel II, nor even because such action has been pending for some time. If that were enough to constitute "manifest injustice", then the Act's provision for transfer of existing cases, instituted more than 60 days before the Act's effective date, would be rendered illusory and meaningless.

The term "manifest injustice" has been interpreted in cases where, as here, the issues involved retroactive application of statutes to existing situations. (The present matter involves application of Act §16 to an existing lawsuit.) In Gibbons v. Gibbons, 86 N.J. 515, 522-524 (1981), the Supreme Court

discussed in detail such retroactive applications, and stated that retroactivity is appropriate where, for example, the Legislature expressly states an intent to apply the statute retroactively, or where the statute is ameliorative or curative. Id. The Act (§16) expressly applies to permit the transfer of existing actions, and it is obviously intended to be curative of the shortage of lower income housing and of the absence of statewide and regional planning for the purpose of solving that shortage. Thus, it fits into at least two categories of retroactivity.

But, said Gibbons, even if a statute is subject to retroactive application, before so applying it a court must inquire into whether "manifest injustice" to a party will result therefrom.

"The essence of this inquiry is whether the affected party relied, to his or her prejudice, on the law that is now to be changed as a result of the retroactive application of the statute, and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retroactively."

Id., at 523-524.

The test includes, therefore, the following factors:

- (1) Reliance to the prejudice of the party; and
- (2) Deleterious and irrevocable consequences arising out of the reliance.

Thus, in order to meet the test of manifest injustice the party opposing application of the statute (here, plaintiff

Hills) must show a very high level of harm together with reliance on the existing law. In that regard, it is noteworthy that plaintiff acquired the property in question well before the decision in Mt. Laurel II -- the law which is being changed as a result of retroactive application of the Act. (See Ferguson Certification, which shows that plaintiff Hills received a preliminary approval for several units as early as 1981.) Thus, plaintiff could not have relied upon Mt. Laurel II when it invested in that land. Also, in the 10 months since Bernards Township adopted Ordinance 704, which provides for mandatory set-asides for lower income housing and which gives plaintiff a sizable density increase to facilitate construction of such housing, plaintiff has not filed an application for approval of any housing on the property whatsoever. (See Ferguson Certification.)*

In State, Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 498 (1983), the court again discussed "manifest injustice", holding:

"[W]hen the Legislature has clearly indicated that a statute should be given retroactive effect, the courts will give it that effect unless it will violate the constitution or result in a manifest injustice."

* Plaintiff has received a density bonus under Ordinance 704, and by virtue of the temporary moratorium provision of the Act (§28) plaintiff cannot presently be awarded any "builder's remedy" in this court proceeding. This is an additional reason why retroactive application of §16, to transfer this case from the Court to the council, would not cause significant prejudice or harm to plaintiff.

The court stated that the due process clause does not prohibit retroactive civil legislation unless "the consequences are particularly harsh and oppressive," Id., at 499, and indicated that retroactive application is particularly appropriate where the statute is designed to protect an important public interest. It is submitted that the public interest in providing affordable housing and in doing so in the context of sound comprehensive planning is of paramount importance, and that the Supreme Court recognized its importance in Mt. Laurel II. E.g., 92 N.J. at 215 (discussing State Development Guide Plan as a "conscious determination of the State . . . as to how best to plan its future"); 92 N.J. at 238 ("[Z]oning in accordance with regional considerations is not only permissible, it is mandated . . ."; "The Constitution of the State of New Jersey does not require bad planning."). Transferring this matter from a judicial forum to a legislatively created administrative forum, specifically designed to promote that public interest and to implement it, hardly seems a harsh and oppressive result.

Ventron, supra, involves the application of the environmental Spill Act, N.J.S.A. 59:10-23.11 et seq., to existing industrial and other facilities. The court pointed out that the Spill Act does not so much change substantive liability as it establishes new remedies for tortious acts recognized by prior law. The court pointed out that:

"A statute that gives retrospective effect to essentially remedial changes does not unconstitutionally interfere with vested rights. Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 381 (1954)."

The Fair Housing Act expressly acknowledges the substantive rights and obligations described in Mt. Laurel II (Act §2), and does not impair that substantive law. Rather, it provides a new forum and alternative remedies designed to implement that law.

Another line of cases holds that when legislation affecting an action is amended while the matter is before the Court (trial or appellate), the Court should apply the statute in effect at the time of its decision. See, e.g., Kruvant v. Mayor of Cedar Grove, 82 N.J. 435, 440 (1980). The purpose of this principle is to "effectuate the current policy declared by the legislative body -- a policy which presumably is in the public interest. By applying the presently effective statute, a court does not undercut the legislative intent." Id., at 440. See also Orleans Builders and Developers v. Byrne, 186 N.J. Super. 432, 445 (App. Div. 1982), certif. denied, 91 N.J. 528 (1982) (court upholds statute requiring new administrative scheme for regulating Pinelands). Where legislation creates a new forum designed to process cases of a particular type, it is appropriate for the Court to transfer a pending case of that type to the newly-created jurisdiction of such forum. See, e.g., Patrolman's Benev. Assn. v. Montclair, 70 N.J. 130 (1976), ordering transfer of a labor dispute to the Public Employment

Relations Commission (PERC), after a trial court decision and two levels of appeal, because PERC's jurisdiction had been legislatively expanded during the pendency of the appeal.

In the current matter it is apparent that in enacting the Fair Housing Act the legislature intended a policy to regulate the construction of Mt. Laurel housing through a comprehensive administrative procedure; that the Act results in essentially remedial changes; and that no "harsh or oppressive" consequences, as the terms are used in the case law, will result to plaintiff if the matter is transferred.

CONCLUSION

For the reasons stated above this matter should be transferred to the Affordable Housing Council.

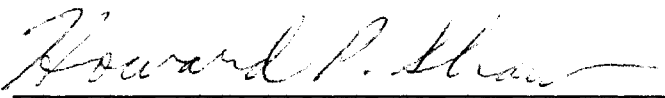
KERBY, COOPER, SCHAUL & GARVIN
Attorneys for Defendant,
Planning Board of the Township of
Bernards

By:


ARTHUR H. GARVIN, III

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Defendants,
Mayor and Township Committee of the
Township of Bernards

By:


HOWARD P. SHAW

September 13, 1985

BRIEF A

9-13-85

11/11/85
FARRELL, CURTIS, CARLIN & DAVIDSON

ATTORNEYS AT LAW

43 MAPLE AVENUE

P.O. BOX 145

MORRISTOWN, N. J. 07960

(201) 267-8130

171 NEWKIRK STREET

JERSEY CITY, N. J. 07306

(201) 795-4227

OF COUNSEL

FRANK J. VALGENTI, JR.

EDWARD J. FARRELL

CLINTON J. CURTIS

JOHN J. CARLIN, JR.

JAMES E. DAVIDSON

DONALD J. MAIZYS

LOUIS P. RAGO

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CYNTHIA H. REINHARD

MARTIN G. CRONIN

September 17, 1985

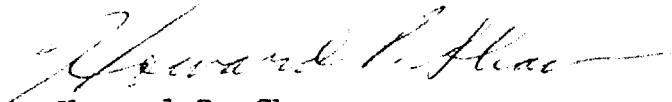
Henry A. Hill, Jr., Esq.
Brener, Wallack & Hill
2-4 Chambers Street
Princeton, New Jersey 08540

Re: The Hills Development Company
v. The Township of Bernards, et al.
Docket No. L-030039-84 P.W.

Dear Henry:

Pursuant to our telephone conversation with Judge Serpentelli's law clerk this afternoon, I was informed that the return date for our Motion for Removal of Stay and Transfer originally returnable September 27, 1985 was not available. The new return date is October 4, 1985 at 10:00 a.m.

Very truly yours,



Howard P. Shaw

HPS/sjm

cc: Honorable Eugene D. Serpentelli
Arthur H. Garvin, III, Esq.
Mr. H. Steven Wood

Bernards Twp.

ORDINANCE #704

AN ORDINANCE OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS AMENDING THE LAND USE ORDINANCE OF THE TOWNSHIP OF BERNARDS

BE IT ORDAINED by the Township Committee of the Township of Bernards in the County of Somerset and State of New Jersey that:

WHEREAS, the Supreme Court of New Jersey, in the case known as Mount Laurel II, has announced a rule of law requiring that every municipality in New Jersey must provide a realistic opportunity for the construction of its fair share of a regional need for low and moderate income housing; and

WHEREAS, litigation is pending against the Township of Bernards in which it is alleged that the present Land Development Ordinance of the Township of Bernards fails to comply with the mandates of Mount Laurel II, and

WHEREAS, through prior enactments the Township of Bernards has provided density bonuses to developers and has otherwise provided a realistic opportunity for the construction of low and moderate income housing; and

WHEREAS, it is found to be in the best interests of the Township of Bernards to amend its Land Development Ordinance so as to further ensure the actual construction and availability of a fair share of low and moderate income housing in the Township of Bernards.

NOW THEREFORE, BE IT ORDAINED that the Land Development Ordinance of the Township of Bernards be amended as follows:

1. There is added to said Land Development Ordinance a new Article 1100, as set forth in Appendix A to this amendatory Ordinance.

2. Section 202, Definitions, is amended in the following manner:

(A) Inserting, after Subsection 122, Lot Width, the following new subsections:

122 A Lower Income Household: A household meeting the income eligibility limits for a household designated as low and very low contained in N.U.D. Section 8 Rental Assistant Program Income by Family Size for the appropriate housing region for various size households, or other generally accepted state or federal agency standards.

122 B Lower Income Housing: Those dwelling units which are affordable to purchase or rent by a lower income household using not more than 28 percent of the family income for sales housing and 30 percent for rental housing.

(B) Inserting, after Subsection 180, Retail Sales and Service, the following new Subsection:

180 A Reviewing Body: The Planning Board, except where otherwise required by N.J.S.A. 40:55 D-1 et seq.

3. Section 405, Conditional Uses, Subsection C, Specific Requirements, paragraph 6, Commercial Development — PRD-4 only, is amended by deleting paragraph f, and replacing the same with the following:

f. The maximum development shall be limited to 30,000 square feet of gross leasable floor area for the first 800 dwelling units of the PRD-4 and 1000 square feet of gross leasable floor area for each additional 20 dwelling units of the PRD-4 thereafter, not to exceed an overall total of 50,000 square feet of gross leasable floor area, and provided that the Board shall find that the intent of the proposed commercial uses, singularly and in combination, serve a local and not a regional market.

4. Section 405, Conditional Uses, Subsection 10, Apartment within a single family residence, is amended in the following manner:

(A) Deleting paragraph a, in its entirety, and replacing the same with the following:

a. The number of apartments within a single-family residence shall be limited to one, and shall be located within the principal building or an out-building existing at the time of passage of this amendment.

(B) Deleting paragraph b, in its entirety.

(C) Deleting paragraph e, in its entirety, and replacing the same with the following:

e. The exterior appearance of the principal structure shall not be substantially altered or its appearance as a single-family residence changed.

f. The minimum size of apartments shall conform to FHA minimum unit size by bedroom count.

5. The Zoning Map of the Township of Bernards, Somerset County, New Jersey, dated June 2, 1980, and revised through December 14, 1982, Map 1 of 2, is hereby amended in the manner shown in the attached Appendix B to this amendatory ordinance, and the map attached as said Appendix B is hereby adopted and is declared to be part of the Land Development Ordinance of the Township of Bernards.

BE IT FURTHER ORDAINED that if any part of this Ordinance is declared invalid, such invalid part shall not affect or invalidate the remainder of this Ordinance, PROVIDED, however, that in the event that any provision for a mandatory set-aside, as specified in Section 1110 A., is declared invalid all property owners to whom such provision was intended to apply shall nonetheless be required to include a reasonable number of lower income dwelling units as part of any development on such property.

BE IT FURTHER ORDAINED that this Ordinance shall take effect immediately upon final passage and publication, provided, however, that the provisions of this Ordinance shall expire one year from its effective date, unless further extended by ordinance, unless on or before such expiration date a Mt. Laurel II judgment of repose is entered by the Law Division of the Superior Court of New Jersey with respect to the Land Development Ordinance of the Township of Bernards.

APPENDIX A

ARTICLE 1100 — REGULATIONS APPLICABLE TO THE R-5 AND R-8 ZONING DISTRICTS PROVIDE AND LOW AND MODERATE INCOME HOUSING

11.01. Purpose

The purpose of this Article 1100 is to establish procedures for approving PRD developments in the R-5 and R-8 zoning districts in order to comply with the provisions of Mt. Laurel II. The regulations and controls contained in this Article shall be interpreted to assure the construction of lower income housing which meets the standards and guidelines set forth in Mt. Laurel II. Any provisions of any other ordinances or Articles in conflict with this Article 1100 and which imposes restrictions or limitations not related to health and safety shall be inapplicable to developments under this Article 1100.

It is also the intent of this Article to provide a realistic opportunity for the construction of a variety of housing types and income levels in the Township, including housing for lower income households; and to encourage the development of such lower income housing, and other housing, by providing specific land use regulations addressing those needs. These regulations are designed to meet the mandate of Mt. Laurel II.

1102 Regulations Applicable to the R-5 and R-8 Zones as Part of the PRD-2 and PRD-4 Options

A. Application Procedure

1. Applicant shall submit required plans and documents to the Planning Board for review and approval. The Planning Board shall distribute the plans to those agencies required by law to review and/or approve development plans and to Township agencies which normally review development plans.

2. The Planning Board shall hold a public hearing in accordance with N.J.S.A. 40:55D-46.1 on the application. The initial hearing shall be held not less than thirty (30) days nor more than forty-five (45) days from the date of submission of a complete application.

3. Applicants with 10 or more acres may elect to submit a Concept Plan in accordance with Section 707 as part of a PRD application in any R-5 or R-8 zone. In the alternative, applicant may follow procedures for subdivision and site plan approval set forth elsewhere in this ordinance. Once a GDP is approved, applicant shall proceed as provided in this ordinance for subdivision and/or site plan approval.

1103 Use Regulations.

A. Permitted Uses

1. Dwelling, One-Family
2. Townhouse
3. Dwelling, Two-Family
4. Dwelling, Multi-Family
5. Public parks, playgrounds, conservation areas, and municipal facilities
6. Common Open Space
7. Planned Development

B. Accessory Uses

1. Personal recreational facilities
2. Accessory buildings
3. Off-street parking and garages
4. Fences
5. Signs

C. Conditional Uses

1. Essential Services
2. Nursery schools
3. Private recreation uses with lights
4. Retail and service commercial under PRD-4 option in accordance with Section 405 requirements

1104. Minimum Tract Size and Gross Density

1. Minimum Tract Size. The minimum tract size for other than single or two-family development in either zone shall be 10 acres.

2. The maximum number of dwelling units shall be as follows:

R-5; PRD-2: 5.5 dwelling units/acre on lands defined as Drylands in Article 200 and 1.0 dwelling unit per acre on lands defined as lowlands in Article 200, which is transferable pursuant to this ordinance and subject to a maximum of 6.5 dwelling units/acre of dry land.

R-8; PRD-4: 5.5 dwelling units/acre, up to maximum of 2,750 dwelling units in the zone.

1105. Minimum Tract Setback

All development shall maintain a 50-foot minimum buffer to all exterior property lines. Said buffer shall be bermed or landscaped and remain unoccupied except for entrance roads or utilities. Buffers may include minimum yard

requirements for all single-family, two-family and townhouse development

1106. Schedule of Area, Bulk and Yard Requirements

Permitted Uses	Minimum Lot Area (sq. ft.)	Minimum Lot Width	Minimum Yards			Maximum Building Coverage	Maximum Height
			Front	Side one/both	Rear		
Dwelling, One-Family Townhouse	5,000	50'	25'	10'/15'	25'	20%	35'
Dwelling, Two-Family (horizontally separated)	6,000	60'	25'	10'/15'	25'	40%	35'
Dwelling, Two-Family (vertically separated)	3,000 unit	30'	25'	0/10'	25'	40%	35'
Dwelling, Multi-Family	N/A	N/A	N/A	N/A	N/A	35%	35'

1107. Distance Between Buildings

The minimum distance between townhouses and multi-family buildings shall be as follows:

A. Windowless wall to windowless wall	20 feet
B. Window wall to windowless wall	30 feet
C. Window wall to window wall	
Front to front	75 feet
Rear to rear	50 feet
End to end	30 feet
D. Any building face to right-of-way	25 feet
E. Any building face to collector street curb	40 feet
F. Any building face to arterial street curb	50 feet
G. Any building face to common parking area	12 feet

The Planning Board may reduce the above distances by not more than 20 percent if there is an angle of 20 degrees or more between buildings and if extensive landscaping and buffers, which provide necessary screening and shielding, are placed between buildings, and further provided that the reductions assist in meeting the objective of this Article and do not create any adverse negative impacts.

1108. Minimum Off-Street Parking Requirements

1. Off-street parking shall be provided as follows:

Dwelling unit with one (1) bedroom for less: 1.5 spaces

Dwelling unit with two (2) bedrooms or more: 2.0 spaces

2. An additional ten (10) percent (of that computed in #1 above) off-street parking shall be provided for visitors.

3. All common off-street parking shall be located within 300 feet of the dwelling unit served.

1109. Minimum Floor Area for Dwelling Units

1 bedroom:	550 square feet
2 bedroom:	660 square feet
3 bedroom:	850 square feet

1110. Lower Income Housing Requirements

A. Number of Lower Income Dwelling Units Required

All developments on contiguous parcels of land totalling ten (10) acres or more as of 10/2/84 in the R-5 and R-8 zones shall be developed in accordance with the PRD requirements and shall be required to provide twenty (20) percent of all dwelling units to be affordable for lower income households, except as provided below:

1. A minimum of 15 percent moderate income housing only shall be required in developments which have received conceptual approval prior to July 1, 1984, and which have not received preliminary or final approval.

2. A minimum of 12 percent moderate income housing only shall be required in developments where the maximum sales price of any housing unit will not exceed \$100,000 per unit (in 1983 dollars).

As used in this Section A, a parcel is considered "contiguous" even though it is traversed by one or more roadways, so long as the land on both sides of the roadway is in common ownership. Lands acquired after 10/2/84 may not be combined to form a new contiguous parcel and may not be added to, or considered a part of, a contiguous parcel which existed on or before that date.

B. Eligibility Standard

1. Except as provided above, one-half of all lower income units shall meet HUD Section 8, or other assisted housing programs, eligibility requirements for very low income and one-half shall meet HUD eligibility requirements for lower income.

2. Applicant may substitute alternate comparable standards (other than HUD) where appropriate and to the satisfaction of the Planning Board.

C. Housing Cost Component

In computing the eligibility of purchasers or renters for sales or rental housing, not more than 30 percent of family income may be used for rent and not more than 28 percent of family income may be used for purchase of sales housing. The following costs shall be included:

Rental Units: Gross Rent

Sales Unit: Principal and Interest

Insurance

Taxes

Condominium or homeowners association fees

D. Subsidies

Government subsidies may be used at the discretion of the applicant to fulfill the requirements of the section. The lack of said subsidies shall in no way alter or diminish the lower income requirements of this ordinance.

E. Sale and Resale and Rental of Lower Income Housing

1. All lower income dwelling units shall be required to have covenants running with the land to control the sale or resale price of units or to employ other legal mechanisms which shall be approved by the Planning Board Attorney and will, in his opinion, ensure that such housing will remain affordable to persons of lower income.

2. The owner of all rental units shall provide legal documentation to be approved by the Planning Board Attorney to assure that rental units will remain affordable to persons of lower income.

3. In the event no low or moderate income purchaser is found within 60 days from the day a unit is offered for sale or resale, the low income unit may be sold to a moderate income purchaser or, if none is available, to any interested purchaser, and the moderate income unit, to any interested purchaser at a price which meets the eligibility requirements as described above. Resale controls shall remain in effect for any subsequent resales.

4. The Township and the applicant may develop reasonable qualifications for occupants of lower income housing. Selection procedures shall be directed and administered by a Township official appointed each year as the Housing Administrator by the Township Committee. The Township Committee may arrange for third party administration of resale, and tenant selection of lower income housing.

5. The developer shall formulate and implement a written affirmative marketing plan acceptable to the Planning Board. The affirmative marketing plan shall be realistically designed to ensure that lower income persons of all races and ethnic groups are informed of the housing opportunities in the development, feel welcome or seek or buy or rent such housing, and have the opportunity to buy or rent such housing. It shall include advertising and other similar outreach activities.

6. Sales prices and rents may be increased in accordance with the annual Metropolitan New York Regional Consumer Price Index for Housing of the Department of Labor plus reimbursements for documented monetary outlays for reasonable improvements and reasonable costs incurred in selling the unit.

7. Rental units may be converted to condominium units after 15 years, but the sales price shall meet Mt. Laurel II guidelines and be priced to allow persons meeting low and moderate income eligibility standards to purchase such unit.

F. Phasing of Lower Income Housing

1. Lower income housing shall be phased in accordance with the following schedule:

Percentage of Total Dwelling Units	Minimum Percentage of Lower Income Dwelling Units
25	0
50	25
75	100
100	—

The above percentages shall refer to the percentage of total dwelling units having certificates of occupancy.

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2. Any development in the R-5 and R-8 zoning districts for which a conceptual plan, subdivision, or site plan has been approved shall be considered a single development for purposes of this paragraph "F" regardless of whether parts or sections are sold or otherwise disposed of to persons or legal entities other than the one which received approval. All such approvals and conditions of approvals shall run with the land.

G. Waiver of Fees

Notwithstanding any ordinance requirement of the Township of Bernards, the applicable approving agency shall waive the following fees for every unit designated as lower income housing in the R-5 zoning district:

1. Subdivision and site plan application fees;
2. Building permit fees, except State and third party fees;
3. Certificate of occupancy fees;
4. Pro-rated part of the engineering fees, applicable to lower income housing;
5. Off-tract improvement fees

In addition, the applicable approving agency shall waive off-tract improvement fees for every unit designated as lower income housing in the R-8 zoning district

1111. Common Open Space Requirements

A. A minimum of twenty (20) percent of the land area of any development other than single or two-family housing and which may include environmentally restricted land, shall be designated for conservation, open space, recreation and/or other common open space

B. All property owners and tenants shall have the right to use the common open space

C. Common open space may be deeded to the Township, if accepted by the Governing Body, or to an open space organization or trust, or to a private non-profit organization charged with the provision of recreation activities for the residents of the development

D. All common open space deeded to an open space organization, trust, or private organization, shall be owned and maintained as provided for in N.J.S.A. 40:55D-43

1112. Engineering and Construction Design

A. Drainage

1. Where non-structural means of controlling surface runoff, such as swales, is feasible and adequate such non-structural means shall be considered.

2. The system shall be adequate to carry off the storm water and natural drainage water which originates not only within the lot or tract boundaries but also that which originates beyond the lot or tract boundaries at the time of development. No storm water runoff or natural drainage water shall be so diverted as to overload existing drainage systems or create flooding or the need for additional drainage structures on other private properties or public lands without proper and approved provisions being made for taking care of these conditions.

3. Techniques for computing water runoff shall be as indicated in Sections 511 and 613 of the Bernards Township Land Development Ordinance

4. Where required by the Township and as indicated on an improved development plan, a drainage right-of-way easement shall be provided to the Township where a tract or lot is traversed by a system, channel or stream. The drainage right-of-way easement shall conform substantially with the lines of such watercourse and, in any event, shall meet any minimum widths and locations as shown on any official map and/or master plan.

B. Lighting

1. Street lighting shall be provided for all street intersections, parking areas, and anywhere else deemed necessary for safety reasons

2. Any outdoor lighting such as building and sidewalk illumination, driveways with no adjacent parking, the lighting of signs, and ornamental lighting, shall be shown on the lighting plan in sufficient detail to allow a determination of the effects upon adjacent properties, roads, and traffic safety from glare, reflection, and overhead sky glow in order to recommend steps needed to minimize these impacts

3. The maximum intensity of lighting permitted on roadways shall be as required in Section 612 of this Ordinance.

C. Sanitary Sewers

Where required and where a public or private treatment and collection system is provided, the developer shall design and construct such facilities in accordance with the N.J.D.E.P. permit requirements and in such a manner as to make adequate sewage treatment available to each lot and structure within the development from said treatment and collection system. If a public or private treatment and collection system is included as part of a development application, the developer shall install sewers, including connections to each home to be constructed.

D. Streets

1. All developments shall be served by paved streets in accordance with the approved subdivision and/or site plan, all such streets shall have adequate drainage

2. Local streets shall be planned so as to discourage through traffic

3. The minimum public street right-of-way and cartway and the minimum private street cartway shall be in accordance with the following schedule:

	R.O.W.	Cartway
a. Collector street (no parking on either side)	50'	26'
b. Local street with parking on one side only	50'	26'
c. Local street with no on-street parking	40'	24'
d. Local street with on-street parking on both sides	50'	30'

4. Street design and construction standards shall be as required in Sections 509, 607, and 608 of this Ordinance except as noted below

a. Cul-de-sacs shall be no more than 1,250 feet in length and shall provide access to no more than 80 dwelling units. A turnaround shall be provided at the end of the cul-de-sac with a paved turning radius of 40 feet and a R.O.W. radius in the case of public streets of 50 feet.

b. The pavement standard for all roads shall be a base course of four (4) inches of Bituminous Stabilized Base, Mix No. 1 placed on a compacted, unyielding subgrade, with a surface course of two (2) inches of Bituminous Concrete, type F.A.B.C. — 1, Mix #5 applied in accordance with State highway specifications. If sub-base material is unsatisfactory, four (4) inch stone, sub-base material may be required.

E. Water Supply

Where public water is available, adequate water service, in terms of adequacy of flow and pressure, shall be made available to each lot or building within the development. The system shall be designed and constructed in accordance with the requirements and standards of the agency or authority having water supply jurisdiction

1113. Waivers

Notwithstanding any provisions set forth elsewhere in this Article, the Planning Board may waive any engineering and construction design requirements contained in this Article, in order to achieve the objectives of this Article, provided that the Planning Board shall be satisfied that such a waiver does not jeopardize the public health and safety, and the same is consistent with the intent and purpose of this ordinance.

Passed on first reading October 2, 1984

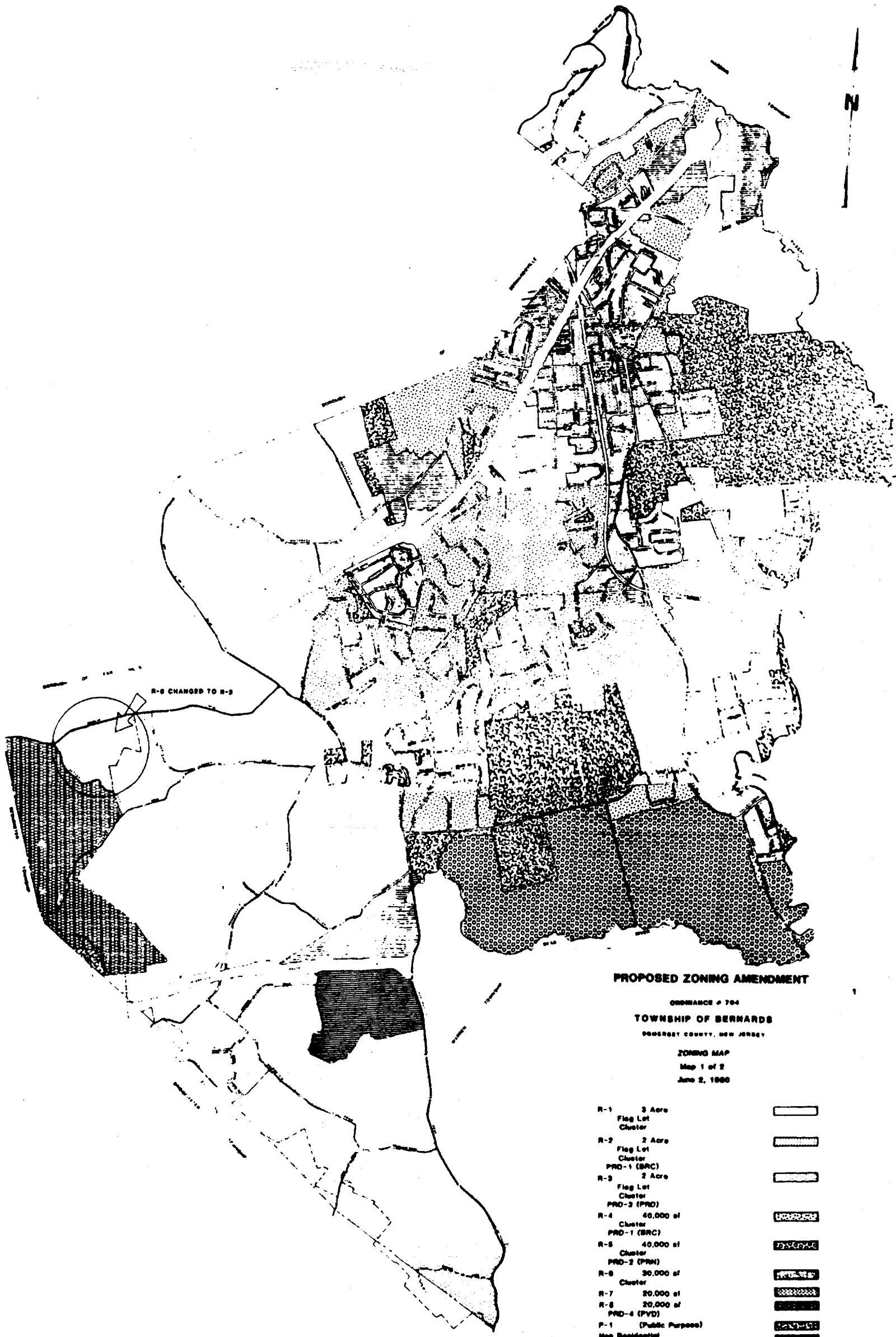
PUBLIC NOTICE

Notice is hereby given that the above ordinance was duly read and passed on final reading and adopted at a meeting of the Township Committee of the Township of Bernards in the County of Somerset, held on the 12th day of November one thousand nine hundred and eighty four

Bernards Township Committee
William B. Wahl
Mayor

Attest:
James T. Hart
Township Clerk

11/22/84



PROPOSED ZONING AMENDMENT

ORDINANCE # 704

TOWNSHIP OF BERNARDS

SOMERSET COUNTY, NEW JERSEY

ZONING MAP

Map 1 of 2

June 2, 1988

R-1	3 Acre Flag Lot Cluster	
R-2	2 Acre Flag Lot Cluster	
PRO-1 (BRC)		
R-3	2 Acre Flag Lot Cluster	
PRO-3 (PRD)		
R-4	40,000 of Cluster PRO-1 (BRC)	
R-5	40,000 of Cluster PRO-2 (PRN)	
R-6	30,000 of Cluster	
R-7	20,000 of	
R-8	20,000 of PRO-4 (PVD)	
P-1	(Public Purpose) Non Residential	
	(See Map 2 of 2)	

SCALE 1" = 1000'

REVISED NOVEMBER 3, 1988

REVISED DECEMBER 14, 1982

PROPOSED REVISION INTRODUCED OCTOBER 2, 1984

THIS MAP WAS PREPARED BY THE TOWNSHIP OF BERNARDS AND IS NOT TO BE USED FOR ANY OTHER PURPOSE WITHOUT THE WRITTEN CONSENT OF THE TOWNSHIP ENGINEER. THE TOWNSHIP ENGINEER'S OFFICE IS LOCATED AT 1000 MAIN STREET, BERNARDS TOWNSHIP, NEW JERSEY.