RULS-AD-1985-240

9/20/85

- 2 letters to Judge Serpentelli re: brief in opposition to Motion to Transfer + in support of cross-motion for Judgment of Compliance
- Brief

Pgs - 107

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September 20, 1985 FILE NO. 3000-04-02

RULS - AD - 1985 - 240

The Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
100 Washington Street
Toms River, NJ 08753

HAND DELIVERED

RE: The Hills Development Company v. Tp. of Bernards, et als.
Docket No. L-030039-84 P.W.

Dear Judge Serpentelli:

On behalf of Plaintiff, The Hills Development Company, I enclose a brief, appendix and affidavits in opposition to Defendant Bernards Township's Motion to Transfer and in support of Plaintiff's Cross-motion for a Judgment of Compliance. Bernards Township's motion was made returnable on September 27, 1985. However, this will confirm my conversation with Your Honor's law clerk wherein we were advised that the Court had relisted Bernards' motion for October 4, 1985. Plaintiff has therefore made its Cross-motion returnable on October 4, 1985. By copy of this letter, all counsel are being advised of this new date.

The enclosed cross-motion, brief, appendix and affidavits are being hand-delivered on this date to counsel for Defendants. In addition, pursuant to R. 4:28-4(a), the Attorney General is being provided with the enclosures.

Thank you for your kind attention in this matter.

Respectfully submitted,

Thomas F. Carroll

TFC:klp

enclosures

CC: James E. Davidson, Esq. (w/enclosures)
Arthur H. Garvin, III, Esq. (w/enclosures)

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September 20, 1985

FILE NO. 3000-04-02

Ms. Eleanor Wiles
Office of the Attorney General
Hughes Justice Complex
4th Floor, West Wing
Trenton, NJ 08625

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

Dear Ms. Wiles:

Please be advised that this law firm represents The Hills Development Company, Plaintiff in a Mt. Laurel II action against Bernards Township. Bernards Township has recently filed a motion with Judge Serpentelli to transfer this case to the Council on Affordable Housing. Pursuant to R. 4:28-4, I hereby advise you (as the designee of the Attorney General) that in opposition to that motion, Hills Development Company is asserting that the Fair Housing Act is unconstitutional. The transfer motion and Hills' Cross-motion are now returnable on October 4, 1985.

I therefore enclose with this letter the following pleadings in this action, as required by R. 4:28-4:

1. Complaint and Amended Complaint in Lieu of Prerogative Writ;

2. Answer of Defendant-Township of Bernards;

3. Motion to Transfer to Affordable Housing Council filed by Township of Bernards; and

4. Brief, Appendix and Affidavits in Opposition to Motion to Transfer and in support of Cross-motion for Judgment of Compliance filed by Plaintiff, Hills Development Company.

If you have any questions, please direct them to my attention.

Very truly yours,

Thomas F. Carroll

TFC:klp

enclosures

cc: The Honorable Eugene D. Serpentelli
James E. Davidson, Esq.
Arthur H. Garvin, III, Esq.

BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540
(609) 924-0808
Attorneys for Plaintiff

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 TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION- SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION NOTICE OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

TO: James E. Davidson, Esq.
Farrell, Curtis, Carlin & Davidson
43 Maple Avenue
P.O. Box 145
Morristown, NJ 07960

Arthur H. Garvin, III, Esq.
Kerby, Cooper, Schaul & Garvin
9 DeForest Avenue
Summit, NJ 07901

PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff in the above-captioned matter will move before the Honorable Eugene D. Serpentelli of the Superior Court of New Jersey, Law Division, Somerset/Ocean County, at the Ocean

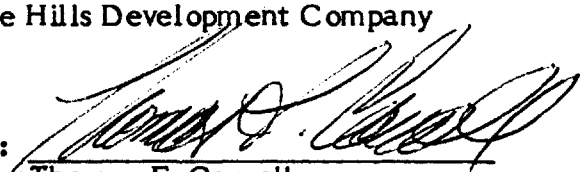
County Court House, Toms River, New Jersey on October 4, 1985 at 9:00 o'clock in the forenoon or as soon thereafter as counsel may be heard for an Order:

1. Declaring that the application for transfer to the Affordable Housing Council be denied;
2. Declaring that Ordinance #704 and the settlement previously offered by Bernards, which has been reviewed and recommended for approval by the court-appointed Master, be approved and a conditional judgment of compliance entered; and
3. Declaring that the "expiration clause" contained within Defendant Township Ordinance #704 is void in toto.

PLEASE TAKE FURTHER NOTICE that in support of this application, Plaintiff will rely on the affidavits, brief and appendix filed and served herewith.

Oral argument is requested.

BRENER, WALLACK & HILL
Attorneys for Plaintiff -
The Hills Development Company

By: 
Thomas F. Carroll

September 20, 1985

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September 20, 1985

FILE NO. 3000-04-02

John Mayson, Clerk
Superior Court of New Jersey
Hughes Justice Complex, 6th Floor
CN-971
Trenton, NJ 08625

RE: Hills Development Company v. Tp. of Bernards et als.
Docket No: L-030039-84 P.W.

Dear Mr. Mayson:

Enclosed herewith please find the following documents in regard to the above referenced matter:

( )	Complaint	( )	Request for Enter Default & Certification
( )	Complaint/Jury Demand	( )	Interrogatories
(X)	Proof of Filing/Mailing	( )	Release
( )	Answer	( )	Notice to Take Oral Depositions
(X)	Notice of Cross Motion	( )	Notice to Produce Documents
( )	Order	( )	Judgment
(X)	Proposed Order	( )	Acknowledgement of Service
( )	Affidavits	( )	Certification
( )	Stipulation	( )	Check in the amount of $_____
( )	Brief/Appendix		

Would you kindly:

(X) File and return a filed copy of the enclosures to us in the envelopee provided.
( ) Sign and return to us in the envelope provided.
( ) Have signed by the appropriate judge and return to us in the envelope provided.
( ) Serve.
( ) Have answered and return to us within the time provided by the Rules.

Very truly yours,

Thomas F. Carroll

TFC:klp
enclosures
CC: All on attached service list

SERVICE LIST FOR HILLS v. BERNARDS

The Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, NJ 08753

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John Mayson, Clerk
Superior Court of New Jersey
Hughes Justice Complex
CN-971
Trenton, NJ 08625

Mr. Dean Haines, Clerk
Ocean County Clerk's Office
Court House
Administration Building
Toms River, NJ 08754

Somerset County Clerk's Office
P.O. Box 3000
Court House Annex (A)
Administration Building
Somerville, NJ 08876

Attorney(s): BRENER, WALLACK & HILL
Office Address & Tel. No.: 2-4 Chambers Street, Princeton, NJ 08540 (609)-924-0808

Attorney(s) for PLAINTIFF

THE HILLS DEVELOPMENT COMPANY
Plaintiff(s)
vs.
THE TOWNSHIP OF BERNARDS, et als.
Defendant(s)

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

CIVIL ACTION

A copy of the within Notice of Motion has been filed with the Clerks of the Counties of Ocean and Somerset *at* Toms River and Somerville *New Jersey*

BRENER, WALLACK & HILL
Attorney(s) for Plaintiff

The original of the within Notice of Motion has been filed with the Clerk of the Superior Court in Trenton, New Jersey.

FILED
SEP 23 1985
DEAN HAINES, CLERK
COUNTY OF OCEAN

BRENER, WALLACK & HILL
Attorney(s) for Plaintiff

Service of the within

is hereby acknowledged this *day of* *19* .

Attorney(s) for

I hereby certify that a copy of the within Answer was served within the time prescribed by Rule 4:6.

Attorney(s) for

PROOF OF MAILING: On September 20, *19* 85 *, I, the undersigned,* trnsmtd *to* James Davidson, Esq.
Attorney(s) for Defendant and Arthur H. Garvin, III, Esq. Attorney for Defendant, Honorable Eugene D. Serpentel
at their respective addresses
by hand-delivery ~~mail, return receipt requested~~, *the following:*

Notice of Cross-Motion, Proposed Order, Affidavits and Brief/Appendix

R. 1:5-3 ~~The return receipt card is attached to the original hereof~~

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.

Dated: September 20, *19* 85 .

THOMAS F. CARROLL, Esq.

BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540
(609) 924-0808
Attorneys for Plaintiff

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 TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO TRANSFER AND IN SUPPORT OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540
(609) 924-0808
ATTORNEYS FOR Plaintiff

On the Brief:

Henry A. Hill, Esq.
Thomas F. Carroll, Esq.
Thomas Jay Hall, Esq.

TABLE OF CONTENTS

CHRONOLOGICAL HISTORY OF CASE

April 10, 1984	Hills formally requests zoning to ten (10) units per acre in the Raritan Basin and six (6) units per acre in the Passaic Basin or 7,500 units with 20% lower income setasides.
May 8, 1984	Hills files Complaint.
July 20, 1984	Court hears Hills' motion for Summary Judgment.
Early September 1984	Bernards offers to rezone Hills' 501 acres within the Raritan Basin to 5.5 units per acre providing Hills builds 20% lower income housing.
September 17, 1984	At meeting between Bernards Township representatives and Hills representatives, Bernards is advised that Hills representatives have recommended settlement consistent with densities proposed to Hills provided that issues relating to design standards, off-tract improvement liabilities and other technical issues can be worked out.
September 25, 1984	Owners of Hills Development Company formally authorize Hills management to settle litigation at densities offered by Bernards.
October 2, 1984	Ordinance #704, implementing settlement, introduced on first reading by Bernards Township Committee.
October 16, 1984	Court comments by letter to counsel for Bernards on Bernards Township's request for immunity, while Township sought to achieve voluntary compliance and settlement of litigation. Court advises: "I have previously been agreeable to granting immunity from builder's remedy suits if the township will stipulate the present invalidity of its ordinance and its fair share number."
October 22, 1984	Bernards Township governing body holds public hearing on Ordinance #704.
October 30, 1984	Planning Board of Bernards Township amends Bernards Township's Master Plan to provide for 5.5 units per acre density in Raritan Basin and recommends passage by Township of Ordinance #704.
November 5, 1984	Bernards Township Committee holds second public hearing on Ordinance #704; Hills comments, by letter, on proposed ordinance.
November 12, 1984	Third public hearing on Ordinance #704; ordinance adopted by Township Committee.

December 19, 1984	Court enters order which notes the passage of Ordinance #704 and the fact that it provides for over 1,000 units of lower income housing, appoints a Master and grants Bernards immunity from builder's remedy suits.
January 16, 1985	First meeting of Hills, Bernards and court-appointed Master. Hills submits written list of requested design and procedural changes, requests fee waiver for lower income housing and advises Master of its willingness to settle with densities proposed. Bernards and Master request Hills to submit concept plan and to prepare examples of proposed architecture.
January 28, 1985	Second meeting between parties and Master.
February, March and April, 1985	Planners meet to resolve design and procedural issues. Attorneys circulate Stipulation of Settlement. Issues relating to Hills' commercial and waiver of lower income fees resolved. Hills meets with committee of Bernards Planning Board for review of concept plan.
April 29, 1985	Immunity order extended to May 15, 1985.
May 3, 1985	Hills meets with Bernards Engineer and Planning Board for technical review of concept plan. Bernards requests a series of changes in plan.
May 8, 1985	Court-appointed Master requests further extension of immunity orders to June 15, 1985.
May 21, 1985	Planning Board agrees with technical ordinance amendments worked out between planners for Hills and Bernards. All design and procedural issues resolved.
May 24, 1985	Meeting of all parties to discuss language of Stipulation of Settlement.
June 5, 1985	At meeting, Bernards attorney acknowledges all issues resolved. States he must redraft Stipulation of Settlement in his own language so he can represent to his clients that no language was drafted by Hills' attorneys.
June 12, 1985	Council for Bernards writes to Court representing to it that an agreement has been reached and requesting compliance hearing date and additional extension of immunity.
June 24, 1985	Tax Appeal dismissed by Hills.
July 3, 1985	First draft Memorandum of Agreement (recast of Stipulation of Settlement) prepared by Township counsel.

July 18, 1985	Meeting with Township counsel to review Memorandum of Agreement and proposed Order of Judgment.
August 7, 1985	Meeting with Township counsel; proposed Order of Judgment and Memorandum of Agreement deemed acceptable by all parties.
August 12, 1985	Telephone call from Township counsel indicating Township Committee unwilling to execute settlement documents.
August 26, 1985	Meeting with representatives of Township wherein Hills advised that Township intends to seek transfer to Affordable Housing Council unless Hills agrees to accept lower number of units.
September 13, 1985	Hills' receipt of Motion to Transfer to Affordable Housing Council.

EXECUTIVE SUMMARY

The Bernards Township transfer application is unusual because Bernards Township had, in fact, achieved an apparent settlement of its Mount Laurel litigation prior to the passage of the Fair Housing Act. The Township, after at least four public hearings and lengthy public discussion of its options, had actually amended its master plan and enacted into law an ordinance providing for more than one thousand lower income units. In addition, after many meetings and negotiations with Plaintiff, Hills Development Company, the Township actually agreed upon all the design and procedural details of a settlement under which Hills would have built 618 lower income units. After going through all of the political anguish involved in convincing the public that settlement was in the public interest, actually enacting into law the ordinance which would implement the settlement and achieving a favorable recommendation from the court-appointed Master, the Township now seeks to withdraw from the settlement process, invalidate the ordinance which brings it into compliance, and go before the Affordable Housing Council to have its fair share reduced.

Hills takes the position that it has legitimately relied on the Township's representations, that hundreds of thousands of dollars have been expended on studies, engineering and concept maps requested by the Township and that a transfer at this stage would be a manifest injustice to Hills and the lower income people who would benefit by this settlement. Hills further argues that the Township's representations to the Court, based upon which the Township received court orders protecting it from further builder's remedy lawsuits, should estop Bernards from any transfer and that a transfer without compliance would be manifestly injust to those lower income households.

Finally, Hills argues that, to allow a Township such as Bernards which has adopted a plan which, at least in the view of the court-appointed Master, would have

been in compliance with Mount Laurel II, to in effect repeal that plan and the ordinance implementing it and go to the Affordable Housing Council with zoning it has stipulated to the Court to be noncompliant, would make a mockery of the entire Fair Housing Act.

STATEMENT OF FACTS

(a) Background of Negotiations Leading to Settlement

On May 8, 1984, Plaintiff, Hills Development Company ("Hills") filed its Complaint in this matter. In said Complaint, Hills alleged, inter alia, that the land use ordinances of Defendant, Township of Bernards were unconstitutionally exclusionary and in violation of Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"). Bernards' Answer to the Complaint was filed on or about June 6, 1984. In the month of June, 1984, interrogatories were exchanged.

During the months of June and July, 1984, various motions and cross-motions were filed. These motions included Hills' motion for summary judgment, Bernards' cross-motion for summary judgment and motions for protective orders. The oral argument on these motions was held before this Court on July 20, 1984. Due to factual assertions raised by Bernards in opposition to Hills' summary judgment motion, said motion was denied. Thereafter, Bernards acknowledged that it needed to amend its Land Development Ordinance and, in September of 1984, Bernards contacted Hills and offered to settle this matter. (Affidavit of Thomas J. Hall, Esq.).

A draft immunity order (which was not entered) was submitted to this Court by counsel for Bernards under letter of September 18, 1984. (Exhibit A).*

On October 2, 1984, Bernards introduced Ordinance #704 (Exhibit B), the Township's response to its Mount Laurel obligation. On October 10, 1984, Bernards applied to this Court and submitted an Order which indicated that Bernards sought to achieve voluntary compliance and settlement of this litigation. (Exhibit C). Bernards therefore again requested immunity from further builder's remedy suits and a stay of

---

* All Exhibit references are to Exhibits contained within the Appendix submitted herewith.

this litigation. By letter dated October 16, 1984 (Exhibit D), this Court indicated that the proposed immunity order could not be entered. Counsel for Bernards was advised by this Court:

> I have your letter of October 10, 1984 which enclosed a proposed order.
>
> The procedure being followed is not in accordance with my normal approach to granting immunity to builder's remedy suits. I have previously been agreeable to granting immunity from builder's remedy suits if the township will stipulate the present invalidity of its ordinance and its fair share number. The order as submitted merely delays the interim process for 45 days while the township attempts to resolve the matter. I do not believe that that is a healthy practice in Mount Laurel litigation given the procedure which I am willing to follow. I will be happy to confer with all counsel concerning the matter at your earliest convenience. (Exhibit D) (emphasis added).

Thereafter, Bernards submitted a revised order which indicated that the Township had amended its land use ordinance (Ordinance #704) so as to provide an opportunity for the construction of more than 1,000 units of lower income housing. This immunity order (Exhibit E), which provided immunity from further builder's remedy suits until April 30, 1985, was entered by this Court on December 19, 1984.

Due to Bernards' representations to Hills concerning the Township's desire to settle this matter, Hills did not contest the stay of litigation requested by Bernards and contained in the immunity order of December 19, 1984. (Affidavit of Hall).*

---

* In addition to the representations made to this Court in this litigation, Hills believes that additional representations were made by Bernards Township in an action involving Spring Ridge Associates (Lawrence Zirinsky) and Bernards Township heard by the court in the Spring of 1985. In the action, Bernards took the position that, in order to come into compliance with Mt. Laurel, it needed to assess a mandatory set-aside against the Spring Ridge Development of some 150 moderate income units, although this development had been approved and was under construction prior to the imposition of that requirement. Hills has been informed that some kind of settlement was reached with respect to this litigation under which the developer was allowed to proceed without changing his plans and Bernards would receive some kind of credit in recognition of its good faith and diligence in seeking Mt. Laurel compliance.

Subsequent to the entry of the immunity order, representatives of the parties met on numerous occasions in order to resolve the relatively minor differences which existed. (Affidavit of Hall). Items which were negotiated included the following*:

a) The ordinance contained a number of ambiguous, unnecessary and cost-generative standards which, in Hills' view, should have been relaxed for inclusionary developments. More specifically, Hills sought design standards which would enable construction of housing product types similar to those in Hills' adjacent inclusionary development in the Township of Bedminster;

b) Hills sought ordinance provisions which would allow for cost-reducing accelerated time frames for Planning Board review of applications for inclusionary developments (i.e. "fast track" provisions);

c) Hills sought ordinance provisions which would allow for waiver of fees for lower income housing units;

d) Bernards' off-tract improvements ordinance, ultimately found to be illegal in separate litigation, was considered by Hills to be excessive and a financial proposal to fund off-tract improvements directly attributable to Hills was proposed;

e) Alternative ways of sewering the Passaic Basin for development at its as-of-right density (one dwelling unit per two acres) were explored and meetings were held with NJDEP officials and representatives of Bernards and Hills for the purpose of reaching a solution to the sewer problem. Hills and Bernards reached an agreement whereby the Passaic Basin would be sewered through a system which would be connected to the EDC plant in Bedminster after a community septic system proposed by Hills was disapproved by N.J.D.E.P. (Affidavit of John H. Kerwin, President of Hills Development Company).

In April of 1985, it appeared that the differences could not be resolved prior to the April 30, 1985 expiration date of the immunity order. Bernards contacted this Court, again assuring the Court that this matter was near settlement and that a continuation of immunity and the litigation stay was justified. This Court then entered an Order continuing the immunity and litigation stay until May 15, 1985. (Exhibit G).

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* As to the items which were negotiated, it should be noted that the court-appointed Master largely concurred with Hills' positions. (Exhibit F, Master's Report).

Additional discussions involving the Master and the parties' representatives thereafter ensued. (Affidavit of Hall). It again appeared that the matter could not be completely resolved prior to the expiration of immunity (May 15, 1985). Another application for an extension of immunity was therefore presented to this Court. By way of letter dated May 13, 1985, this Court granted the request for an additional extension of immunity (until June 15, 1985) but with the express understanding that no further extensions would be granted. (Exhibit H).

As June 15, 1985 approached, it once again appeared that this matter could not be fully resolved prior to the expiration of immunity (June 15, 1985). Therefore, on June 12, 1985, counsel for Bernards wrote to this Court and represented to the Court:

> The parties in the above mentioned matter have arrived at an agreement to settle and conclude the above matter. Additionally, the Township has been working with George Raymond on all aspects of the Township's compliance package, and we believe we have reached an understanding which is satisfactory to Mr. Raymond and the municipality. I am in the process of drafting a proposed order and judgment which will be satisfactory to the parties and the Court. The drafting of the proposed judgment has proved difficult. It is my understanding that this process, including the drafting of the judgment, has delayed the filing of George Raymond's report, although Mr. Raymond has indicated to me that he expects to have his report filed by the end of this week.
>
> I respectfully request that the Court schedule a hearing date to review the proposed settlement and compliance package in order to dispose of the action and bring the matter to a conclusion. I would expect to submit all reports and documentation necessary for the Court's review well in advance of the hearing date. I would also respectfully request that the Order dated April 29, 1985 which was supplemented by the Court's letter dated May 13, 1985 be extended until such hearing date and until the matter is finally disposed of by the Court.
>
> Both my adversary and Mr. Raymond have indicated to me that they concur with this request. (Exhibit I). (emphasis added)

During this period, alternative drafts of language passed back and forth between the parties. (Affidavit of Hall).

Based on the Township's representation that the matter was settled, Hills requested the Tax Court to dismiss litigation Hills had filed against Bernards, since the underlying reason for the dispute would be rendered moot by the settlement. (Affidavit of Hall).

During the month of July, 1985, additional meetings were held. Throughout this process, the parties, including representatives from Bernards and Hills, worked diligently to settle remaining disputes concerning wording of specific sections of the Memorandum of Agreement, which by this time was being prepared by Township counsel. A revised, proposed form of Order of Judgment and Memorandum of Agreement were transmitted to Hills by Township counsel on July 3, 1985. By way of letter dated July 25, 1985, redrafted documents, acceptable to Hills, were returned to Bernards' counsel. (Affidavit of Hall).

On August 7, 1985, Hills once again met with Bernards' counsel. At this meeting, exceedingly minor wording changes were made to the settlement documents. As far as those present at this meeting were concerned, all issues were now resolved and the documents could be put in final form and presented to the Township Committee. (Affidavit of Hall).*

---

* The details of the process of drafting the various Stipulations of Settlement, Memoranda of Agreement and proposed form of Order of Judgment are set forth at length in the Affidavit of Hall. Briefly, Township counsel recast a Stipulation of Settlement drafted by Hills' attorneys and entitled the document "Memorandum of Agreement." This Memorandum of Agreement (Exhibit T-1) was drafted by Township counsel on July 3, 1985. Hills' attorneys suggested some minor changes and transmitted a "red-lined" version of the document to Township counsel. This red-lined version (Exhibit T-2) formed the basis of agreement on August 7, 1985. Hills is unaware as to whether the Memorandum of Agreement set forth as Exhibit T-2 has been formally redrafted by Township counsel for presentment to Township Committee. (Affidavit of Hall). Notwithstanding the fact that the settlement documents were not executed, Hills will, for the sake of brevity and clarity, sometimes refer herein to the parties "agreement."

On August 12, 1985, Bernards' counsel telephoned counsel for Hills and advised that the Township Committee refused to sign settlement documents concerning the agreement as negotiated. Bernards' counsel further advised that the Committee intended to explore its options pursuant to the Fair Housing Act. Bernards' counsel indicated he was instructed to seek a lower number of units to be built by Hills. (Affidavit of Hall). Implicit in the discourse was the notion that, should Hills refuse to accept a "new offer," Bernards would file a motion seeking "transfer" to the Affordable Housing Council as per Section 16 of the Fair Housing Act. (Affidavit of Hall).

On August 26, 1985, representatives of Hills and Bernards met, in the presence of the Court-appointed Master, to review the situation. Mr. Davidson made it clear that the Township Committee believed that it could obtain relief from what it considered a burdensome "fair share" number from the Affordable Housing Council, and that as a consequence, would not be required to have as many housing units built by Hills. He would, therefore, be seeking to transfer the case to the Council. (Affidavit of Hall).

On September 13, 1985, Hills was served with Defendant Bernards Township's motion to transfer to the Affordable Housing Council.

(b) Ordinance #704

The ordinance adopted by Bernards for the express purpose of Mount Laurel II compliance (Ordinance #704, Exhibit B) contains a unique clause. Pursuant to this clause, Ordinance #704 will expire if a judgment of repose is not entered within a year of its passage and publication unless further extended by ordinance, an action which, in light of recent events, the Township is not likely to undertake.*

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* **The Ordinance was approved by the Bernards Township Committee on November 12, 1984, and published in the Bernardsville News on November 22, 1984, and therefore, under its own terms, would expire on November 22, 1985.**

(c) Hills' Reliance on Ordinance #704 and its Efforts to Comply with that Ordinance

Hills began the process of revising its development plans in Bernards Township following the passage of Ordinance #704. The initial effort was placed on the revision of the Ordinance standards, so that the development could proceed in a cost-effective manner, similar to that underway in the inclusionary project located in the adjoining Bedminster Township. (Affidavit of Kenneth J. Mizerny).

Secondly, Hills was concerned with resolving certain outstanding issues which made it less feasible to construct the development as a whole, and which, primarily because of infrastructure investment needs, would be required to be resolved before overall developmental decisions could be made. For example, the resolution of the issue of sewering the Passaic Basin was important, inasmuch as designs for sewer trunk lines and water service lines were dependent, in part, on location of interior roads and decisions made by Bernards Township with respect to the placement of those pipes.

In March, 1985, sufficient detail had been gathered so that a generalized concept plan could be discussed with Bernards Township, and a plan was prepared and shown to the Bernards Township Planning Board Technical Coordinating Committee. (Affidavit of Mizerny).

Based on the feedback gathered by representatives at Hills at the Technical Coordinating Committee, planning consultant, and other technical staff level, Hills thereafter committed large sums of money to the development of infrastructure plans and the implementation of those plans. (Affidavit of Kerwin). Inasmuch as it is frequently necessary to plan for infrastructure improvements (such as collector roads, sewer lines, and the water tanks, pumps, and transmission lines necessary to provide potable water), large sums of money and effort must be invested in these areas in advance of preparation of plans designed to obtain development approvals.

This is particularly true when two aspects of a development, located in adjacent municipalities, are underway. Hills had undertaken to develop an inclusionary housing development in Pluckemin, New Jersey, and by virtue of rezoning resulting from Allan Deane v. Tp. of Bedminster, ___ N.J. Super. ___ (Law Div. 1985), additional development opportunities in Bedminster, including the rezoning of properties immediately adjacent to properties owned by Hills in Bernards' Township, became available. Hills integrated the joint planning for road systems, water systems and sewer systems for both the Highlands and Bernards. Given the desire on the part of everyone in Bedminster to move forward with inclusionary development, Hills accelerated the detailed planning for the reconstruction of Schley Mountain Road (which was to be the main collector road both for the Bedminster Highlands portion of the development as well as for the Bernards Township Development); drew up plans for an enlarged water tank to be built in Bridgewater Township, began the laborious process of obtaining approvals for an enlarged water tank and storage system, and commissioned plans and engineering designs for water transmission lines to service both the Bedminster Highlands and the Bernards sites. These studies, all designed with the goal of achieving the build-out of the Bernards' project at the level provided for under Ordinance #704, were begun as soon as possible and are being implemented today. (Affidavit of Mizerny, Affidavit of Kerwin).

In addition, Hills has prepared to apply for concept plan approval under Section 707 of the Bernards Land Development Ordinance, as it had planned to do from the beginning. That Ordinance requires extensive information, including a concept plan map, a circulation plan, a utility plan, a drainage plan, an environmental assessment, a staging plan, and a community facilities plan. These plans, requiring the services of professional consultants, were commenced months ago and will be ready for presentation in the near future. (Affidavits of Kerwin and Mizerny).

Moreover, as this Court is aware, the Environmental Disposal Corp. plant, located in Bedminster, was designed to serve both Bedminster and Bernards Townships, and provides service largely to inclusionary housing developments. As a result of Allan Deane v. Bedminster, the EDC Plant needed to be expanded; but the size of the plant expansion which has been contracted for reflected the size of the development permitted under Ordinance #704 as well as the results of Allan Deane v. Bedminster.

In sum, Hills has expended in excess of half a million dollars in planning and pre-start activities, directly attributable to the passage of Ordinance #704, the Township's representations and the decision to accept development in Bernards Township at the densities permitted therein. Work has been underway for months to prepare an acceptable concept plan, to develop water transmission lines, to size water storage tanks, and to provide road access to the area. Because of the need to accomodate construction schedules, reconstruction of the main access road to serve Bernards Township, Schley Mountain Road, has already begun, and that work has been sized to accommodate the entire Bedminster Highlands and Bernards Developments, rather than the Bedminster Highlands portion alone. (Affidavits of Kerwin and Mizerny).

Not accounted for in this recitation of real investments and planning projects underway is the potential impact on the work force of the Hills Development Company and the Hills' ability to provide lower income housing in Bernards. With over 185 employees currently working on the development projects in Bedminster, it has been contemplated that the Bernards projects would be commenced as soon as 1986 and, if development is going to be delayed in Bernards Township, the creative energies of this work force may have to be directed elsewhere, which will affect the ability of the Hills Development Company to provide an inclusionary development in Bernards Township.

In sum, Hills has expended inordinate time, energy and hundreds of thousands of dollars in reliance on the adoption of Ordinance #704 and the Township's representations to Hills and to this Court concerning Bernards' desire to settle this litigation.

This brief is filed in opposition to Bernards' motion to transfer to the Affordable Housing Council. This brief is also in support of Hills' Cross-motion wherein Hills requests that this Court enter a judgment of compliance, perhaps subject to conditions, thereby vindicating the constitutional mandate. Since Ordinance #704, which we (and the Master) believe should be deemed to be in compliance with Mount Laurel II, will expire if a judgment of repose is not entered prior to November 22, 1985, Hills respectfully requests that the judgment be entered prior to the expiration date. In the alternative, Hills requests that the Court either direct Bernards to adopt an ordinance to extend Ordinance #704 or declare the aforementioned "expiration clause" to be void in toto.

POINT I

MANIFEST INJUSTICE WOULD RESULT IF A TRANSFER TO THE COUNCIL ON AFFORDABLE HOUSING WERE GRANTED AND BERNARDS' MOTION TO TRANSFER SHOULD THEREFORE BE DENIED.

(a) The Fair Housing Act

Bernards Township has requested that this matter be transferred to the Council on Affordable Housing pursuant to Section 16 of the Fair Housing Act (L. 1985, c. 222). The substantial delay which will be encountered if transfer is granted is illustrated by the following analysis of the Act.

The Governor is required to nominate Council members within thirty (30) days of the effective date of the Act or August 1, 1985*. Confirmation by the Senate will then follow. (Section 5d). The major tasks of the Council, which include designating housing regions, estimating present and prospective need at the state and regional level, and providing criteria and guidelines for municipal determination and adjustment of fair share must be completed seven (7) months after confirmation of the last member of the Council or seven (7) months after January 1, 1986**, whichever is earlier (Section 7). Thus, at the earliest, if the last Council member is confirmed in early October, 1985, the Council's criteria and guidelines would have to be prepared by May 1, 1986; at the latest, this would occur by August 1, 1986.

In the event of transfer, the Council's administrative process would proceed as follows. Bernards Township would have to file a resolution of participation signifying its intent to file a housing element within four (4) months of the effective date of the Act, or November 2, 1985. (Section 9a). A housing element

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* This deadline was not met.

** Two interpretations of this deadline are possible: (1) Seven months after confirmation or January 1, 1986; (2) seven months after confirmation or seven months after January 1, 1986. This section was modified at the request of Governor Kean, whose veto message indicates that the second interpretation was intended.

and fair share plan would then have to be filed with the Council within five (5) months from the date of transfer or five months from the Council's promulgation of criteria, whichever occurs later. (Section 16). This deadline would fall between October 1, 1986 and January 1, 1987. Bernards could petition for substantive certification of its filed housing element anytime within six (6) years of filing, or between September 1, 1986 and January 1, 1993. (Section 13).

Plaintiffs are given only one avenue to participate before the Council: as an objector to a request for substantive certification. (Section 15a(1) and Section 14). If substantive certification is requested at the earliest possible time, the mediation and review process could continue to October 2, 1986, fifteen months after the effective date of the Act. (Section 19). Presumably, if the Council's criteria and guidelines were not available until August 1, 1986 and Bernards' housing element therefore was not due until January 1, 1987, an extension for mediation past the Section 19 deadline would be necessary. If the Council is to have the benefit of the full six months for review, mediation would end July 1, 1987. If the mediation efforts of the Council were unsuccessful, the matter would then be transferred to the Office of Administrative Law whose initial decision would be required within ninety (90) days, or between January and April, 1987. The Council would then have forty-five (45) days to consider the initial decision of the Administrative Law Judge and to render a decision. N.J.A.C. 1:1-16.5.

This process could then terminate, at the earliest, in February of 1987 or, at the least, November of 1987, with the filing of a notice of appeal with the Appellate Division of Superior Court. Thus, in the event of immediate transfer to the Council, it would be a minimum of seventeen (17) months before the mediation and administrative hearing process would conclude and the matter would be back in the judicial system.

In the event Bernards waited a full six years to petition for substantive certification (January 1, 1993), the Council would have six months to complete the mediation and review process (until July 1, 1993; See Section 19). If mediation and review was unsuccessful, the matter would be transferred to the Office of Administrative Law for initial decision by October 1, 1993. The Council's final decision would be required by November 15, 1993.

Bernards Township asserts that the Legislature clearly intended to substitute review and mediation procedures before the Council on Affordable Housing ("Council") for the judicial remedies set forth in the Mount Laurel II decision. The Township requests a transfer of this matter to the Council and argues that "manifest injustice" will not result to any party if the case is transferred.

The authorization to transfer jurisdiction over pending and future cases is contained in Section 16 of the Act. Two classes of litigation are recognized and treated separately in Section 16: cases filed more than sixty (60) days before the effective date of the Act and cases filed after that cut-off date. The first class of cases may only be transferred if "manifest injustice" will not result to any party. All cases which fall in the second class will be considered by the Council through a mandatory request by plaintiff for "review and mediation". (Section 16b). Thus, the Legislature's general preference for resolving "existing and future disputes" through the Council's review and mediation process (Section 3) must be interpreted in light of the system for transfer set up by Section 16. With respect to cases filed more than sixty (60) days before the Act became effective, transfer is not automatic; the parties have an option to request a transfer, and the court must consider the relative equities of the request.

(b) The Manifest Injustice Standard for Retrospective Application of Legislation

The use of the manifest injustice standard in determining whether statutes which express a legislative intent of retrospectivity should be so applied was analyzed in Dept. of Environmental Protection v. Ventron Corp., 94 N.J. 473, 498 (1983). Where the legislature has declared a preference for retrospective application, judicial inquiry will be made into whether manifest injustice or constitutional violations will result. Ventron Corp., supra at 498.

Retrospective application of statutes is generally disfavored:

> "It is fundamental principle of jurisprudence that retroactive application of new laws involves the high risk of being unfair. There is general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the action whose effects are to be judged by them. The hackneyed maxim that everyone is held to know the law is itself a principle of dubious wisdom, and nevertheless presupposes that the law is at least susceptible of being known. But this is not possible as to law which has not been made." Weinstein v. Investor Savings, 154 N.J. Super. 164, 167 (App. Div. 1977). (emphasis added).

This inquiry focuses upon whether the affected party relied to its prejudice on the law that is now to be changed as a result of retrospective application and whether the consequences of this reliance are so deleterious and irrevocable that it would be unfair to apply the statute retrospectively. Gibbons v. Gibbons, 86 N.J. 515, 524 (1981); Kingman v. Finnerty, 198 N.J. Super. 14 (App. Div. 1985). Considerations of fairness require that settled expectations honestly arrived at with respect to substantial interests ought not be defeated. 2 Sutherland, Statutory Construction, Section 41.05 (4th Ed.). Thus, in Kingman, retrospective application of a contingent fee schedule increase was denied in order to protect the general public's expectation regarding attorney's fees contracted for before the schedule was changed.

A separate framework has evolved for the due process analysis. Berkley Condo. Association v. Berkley Condo Residences, 185 N.J. Super. 313, 321 (Ch. Div. 1982). Due process prohibits retrospective application of civil legislation where the consequences are particularly harsh and oppressive. Department of Environmental Protection v. Ventron Corp., supra at 499. Also, a statute may not be given retrospective application where it would interfere with, impair or divest vested rights. City of Newark v. Padula, 26 N.J. Super. 25 (App. Div. 1953).

The concepts of "deleterious and irrevocable" and "harsh and oppressive" consequences are not precisely defined. Judicial decisions appear to be governed by elementary considerations of fairness and justice, and frequently a balancing test has been formulated which weighs public interests against private rights. Where private rights are impaired and the public interest furthered does not predominate over the impairment, the result will be considered harsh and oppressive. Rothman v. Rothman, 65 N.J. 219, 225 (1974); Berkley Condo Association, supra at 320; Department of Environmental Protection v. Ventron Corp., supra at 499. See also, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

(c) Application of Manifest Injustice and Due Process Criteria

(i) Transfer of this matter would result in manifest injustice to lower income persons, and must, therefore, be denied.

In analyzing whether manifest injustice would result to any party to this litigation if this matter were transferred, Bernards takes the position that this Court need only be concerned with the interests of Hills. Bernards is clearly in error. Both the nature of the constitutional rights at issue and the legislative history of the Fair Housing Act mandate that the interests of lower income households be considered.

Looking first to the legislative history, the transfer language was amended in the Assembly to provide that 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." The statement released by the Assembly Municipal Government Committee stated that the intent of the committee amendments was to consider "whether or not a manifest injustice to a party to the suit would result, and not just whether or not the provision of low and moderate income housing would be expedited by the transfer." Expediting the provision of low and moderate income housing is therefore an appropriate consideration on a transfer motion.

Indeed, even if the legislative history of the Act did not evince an intent to encourage judicial review of the interests of lower income households, an analysis of any manifest injustice to lower income households would nevertheless be constitutionally mandated. The Act's Section 16 reference to "any party to the litigation" must of necessity include lower income households since it is their constitutional rights that are being asserted.

In fact, such lower income persons are the real parties in interest since public interest groups and developers are granted standing "not to pursue their own interest, but rather as representatives of lower income persons whose constitutional rights allegedly have been violated by exclusionary zoning." Morris County Fair Housing Council v. Boonton Tp., 197 N.J. Super. 359 (Law Div. 1984). Therefore, in analyzing whether the manifest injustice standard would be met as a result of a transfer of this matter, a paramount consideration must be the interests of lower income households as well as the interests of Hills.

The devastating impact of transfer on lower income persons seeking housing in the Bernards Township region is clear. Transfer would certainly result in a substantial delay in construction of lower income housing in Bernards Township. Low interest rates, coupled with a general economic recovery and controlled inflation are making housing more affordable today than at any time in the past five years.

Unfortunately, these trends are not expected to continue. As interest rates rise, the costs of short-term financing will increase and eliminate the builder's ability to offer lower income housing. As litigation costs, carrying costs and land improvement costs increase over time without off-setting cash flow, the pressure on a builder to produce more traditional housing (non-setaside) increases. All of these factors make the production of lower income housing less likely.

In addition to the grave financial harm which Hills will incur if this matter is transferred and Ordinance #704 were permitted to expire, construction of lower income housing will, at the least, be delayed for a period of years. As acknowledged in Bernards' brief in support of transfer, the currently effective Ordinance #704 will insure the construction of lower income housing in the Township. (Bernards' brief at 5). Pursuant to Ordinance #704 and the parties' agreement, Hills is prepared to expeditiously commence construction of its development. Barring any unforeseen catastrophes, Hills is prepared to guarantee construction of at least 550 units of lower income housing in the Township by 1990. (Affidavit of Kerwin).

Naturally, if this matter is transferred and Ordinance #704 is permitted to lapse, Hills cannot assure the construction of lower income housing in the Township. The precise consequences of the expiration of Ordinance #704 are not entirely clear. At the least, transfer and the expiration of the ordinance would entail a substantial period of delay before Hills' property could again be zoned for an inclusionary development. In the absence of Ordinance #704, it is likely that the zoning of Hills' property would revert to the prior zoning of two dwelling units per acre. (See discussion, infra). In such an event, Hills would have no option but to assess its alternatives. If Hills' land did, in fact, revert to its prior zoning and if another inclusionary zoning scheme did not appear on the immediate horizon, Hills may, as a matter of financial necessity, be compelled to develop its land without a lower income component, in order to remain financially stable and keep its employees

and its contracts with sub-contractors, materialmen and suppliers. (Affidavit of Kerwin).

If Bernards is permitted to transfer this matter and abrogate its ordinance and the parties' agreement, timely construction of lower income housing in the Township would be, at best, an uncertainty. If Bernards were able to transfer this matter to the Affordable Housing Council it would most likely be a number of years before any entity is authorized to commence construction of lower income housing in Bernards Township. In many respects, Hills has already commenced such construction. (Affidavit of Kerwin). The outcome of transfer would work clear hardship to the intended beneficiaries of this litigation and transfer should therefore be denied.

(ii) Transfer of this matter would result in manifest injustice to Hills and must therefore be denied.

Defendant Bernards Township asserts that: (1) Hills did not rely on the "pre-existing" law (i.e., Mount Laurel II); and that (2) Hills would suffer no harsh consequences if this matter were transferred to the Affordable Housing Council. Nothing could be further from the truth.

With respect to Hills' reliance on the law, Bernards posits that, since Hills purchased its property prior to the publication of the Mount Laurel II decision, Hills can show no reliance. As set forth in the prior sections and below, not only did Hills rely on the law as articulated in Mount Laurel II, Hills also relied to its detriment on Bernards' adoption of Ordinance #704 and its continuous representations concerning its desire to settle this litigation. In fact, Hills' reliance was so pervasive and striking as to justify a conclusion that Bernards should be estopped from seeking a transfer of this matter. (See discussion infra).

In arguing against a finding of reliance by (or manifest injustice to) Hills, Bernards stresses the fact that Hills filed no preliminary subdivision or site plan applications since the adoption of Ordinance #704.

Section 707 of the Bernards Township Land Development Ordinance indicates that an applicant may submit a conceptual development plan for any planned development. In fact, Hills was informed by the Township's Planning Professionals that it would be necessary for Hills to submit a concept plan, inasmuch as the development contemplated required too many major roads, too many major transformations of the land, and was simply too large a project to be considered for typical subdivision and site plan development. (Affidavit of Mizerny).

In fact, as Bernards Township well knows, the development contemplates the creation of a major collector road (the Allen Road extension) along with creation of major public open spaces, a public school site, water transmission lines, and an extensive sewage collection system, all of which must be carefully designed before the first preliminary subdivision or site plan can take place.

Further, as Bernards Township well knows, discussions with the Township concerning the placement of the road system, the utility system (especially the sewage collector system), the school site and the public open space have been ongoing since January of this year.

In March of 1985, the Township Planning Board's, Technical Coordinating Committee reviewed the first sketch plan submitted by Hills for their initial comment. (Affidavit of Mizerny).

Moreover, as discussed at length both in a prior section and below, Hills was induced to engage in "planning and pre-start" activities, including plans, engineering and preliminary construction, at a cost of well in excess of $500,000, to submit the complete concept plan. Finally, with respect to Hills' expressed intention to submit a concept plan (Exhibit J), the Township Administrator has advised Hills that, sight unseen, the plan will be found to be "incomplete" and not processed. (Affidavit of Kerwin). The Township's argument concerning Hills' attempts to gain approvals is specious.

Bernards also asserts that, due to the builder's remedy moratorium set forth in Section 28 of the Fair Housing Act, an additional reason exists for a finding of a lack of prejudice or harm to Hills resulting from a transfer. First, Hills asserts that the moratorium provision is unconstitutional (although this issue may not yet be ripe for resolution). Second, Hills submits that, even if constitutional, the moratorium would not apply herein. Hills' land is not rezoned as a result of a builder's remedy; the Township chose the sites it wished to rezone, including that of Hills. If Bernards' motion to transfer is denied and if, as requested in Hills' Cross-motion, a judgment of compliance is entered, the Township's choice of rezoned lands will have been approved. Also, if the issue were ripe, Hills would submit that, due to the age of Hills' litigation with Bernards, the moratorium would not apply. Third, even if the moratorium were applicable, the period of the moratorium would be substantially shorter and, thus, less deleterious than would be the administrative process which is envisioned in the Fair Housing Act. Moreover, if this matter is transferred and Ordinance #704 is permitted to expire, Hills will have no inclusionary zoning and the question of delay due to the moratorium may become moot.

In sum, Bernards' arguments with respect to a lack of prejudice to Hills as a result of transfer are entirely without merit. If this matter is transferred and this Court prevents the expiration of Ordinance #704, Hills and lower income households will suffer grievous and totally unjustified prejudice due to the inordinate delay which would result from transfer. If this matter is transferred and this Court permits the expiration of Ordinance #704, the prejudice to the parties will be grossly compounded and, as set forth below, Hills will have expended approximately $1,000,000 in vain. (Affidavit of Kerwin).

Related to the question of manifest injustice, yet also distinct, is the question of estoppel.

A. The Township should be estopped from seeking transfer and/or resisting compliance.

Due to Bernards' adoption of Ordinance #704, and the Township's continuous representations to Hills and to this Court, Bernards should be estopped from: (1) contesting compliance; (2) seeking transfer of this matter to the Affordable Housing Council; and (3) taking any other action or position in an effort to resist a judgment of compliance or otherwise thwart the effectiveness of Ordinance #704.*

"[T]here is a strong recent trend towards the application of equitable principles of estoppel against public bodies where the interests of justice, morality and common fairness clearly dictate that course." Gruber v. Mayor and Tp. Com. of Raritan Tp., 39 N.J. 1, 13 (1962) (course of conduct between developers and township officials could give rise, under principles of equitable estoppel, to vested development rights not subject to later zoning amendment).

"Municipalities, like individuals, are bound by principles of fair dealing." Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 131 (1965). "In simple language, estoppel will be applied against a municipality in the interest of equity and essential justice. Morality and common fairness clearly dictate that course." Hill v. Bd. of Adjust of Eatontown, 122 N.J. Super. 156, 164-165 (App. Div. 1972).

> It is of the essence of equitable estoppel that one is precluded from taking a position inconsistent with that previously assumed and intended to influence the conduct of another, if such repudiation would not be responsive to the demands of justice and good conscience, in that it would effect an unjust result as regards the latter. Gitower v. United States Casualty Co., 140 N.J. Eq. 531, 536 (Ch. 1947).

Of course, reliance is an essential element of estoppel. See e.g., Clark v. Judge, 84 N.J. Super. 35 (Ch. Div. 1964) aff'd o.b. 44 N.J. 550 (1965).

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* As set forth infra, Hills' cross-motion seeks a judgment of compliance. Hills' estoppel argument is relevant to both its opposition to transfer and its request for a judgment of compliance.

(1) Actions undertaken by Hills in reliance upon Bernards' passage of Ordinance #704 and the Township's representations concerning its desire to settle this litigation.

As discussed in the reliance synopsis set forth following the Statement of Facts, supra, Hills has relied extensively on the existence of Ordinance #704, and has fully intended to develop in reliance on the rezoning provided by that Ordinance. In summary, the following specific actions were undertaken as a result of Ordinance #704 and the representations made by Bernards::

1) The reconstruction of Schley Mountain Road. This road is to be totally reconstructed and expanded to four lanes. The road was designed to accommodate the traffic from The Hills development in Bedminster and the 2,750 units in the Bernards Raritan Basin which would result pursuant to development under Ordinance #704. Hills was compelled to execute contracts for the construction of this road in the Summer of 1985, at a cost of $1,600,000, and Hills is now committed to the road's construction notwithstanding Bernards' attempt to eschew settlement, allow Ordinance #704 to expire and transfer this matter;

2) Hills has expended, or committed to the expenditure of hundreds of thousands of dollars for planning and material commitments for the EDC sewerage treatment plant, over one hundred thousand dollars of which was attributable to the planning for the proposed Bernards development which is permitted pursuant to Ordinance #704;

3) Hills has arranged for financing in the amount of $6,500,000 for the purpose of constructing the proposed infrastructure for the full Bernards development;

4) Hills has some 185 full-time employees on its payroll, partially pursuant to Ordinance #704, many of which will be laid-off if the Bernards development is not permitted to proceed;

5) Concept plan layouts of the entire 2,750 unit Bernards inclusionary development have been prepared at great expense and will be submitted to Bernards Township for review in the near future. (See also reliance synopsis supra and Affidavit of Kerwin).

As pointed out previously, the necessity to prepare detailed engineering plans for the reconstruction of Schley Mountain Road, and the investment of

considerable sums in the utility planning for sewage and water supplies, were necessary prior to the obtaining of preliminary approval for the Bernards project.

Hills, in sum, was working quickly on several fronts to move its development forward since the adoption of Ordinance #704, and the parties' first meeting with the Master on January 16, 1985.

Hills concentrated its efforts on first obtaining those reasonable changes in the design standards and other aspects of the land development ordinance which it felt desirable in order to properly plan and design its development; secondly on the need to obtain concurrence with Bernards Township for the extension of sewer lines throughout the entire development; and thereafter, on the work necessary to detail the concept plan for the development which was desired by Bernards Township; and on the efforts to tie in the inclusionary development process underway both in Bedminster Township (as a result of Allan Deane v. Bedminster) and as a result of Ordinance #704 in Bernards. (Affidavit of Mizerny).

The Affidavits, Statement of Facts, and Procedural History make clear that this case is not one where the plaintiff sat on his rights. Hills worked with the Township carefully, diligently, and truly believed, up until August 12, 1985, cooperatively.

As described in detail supra, the parties' differences were amicably resolved and, on August 7, 1985, the settlement documents were apparently finalized. (Affidavit of Hall). After this year-long process in which Hills clearly relied on the adoption of Ordinance #704 and the representations of the Defendant Township, the settlement documents were presented to the Township Committee. The Township Committee refused to execute documents outlining the agreement and, in lieu thereof, implied that Hills must entertain an entirely different "counter-offer" or risk a Township motion for transfer to the Affordable Housing Council. (Affidavit of Hall).

Principles of "fair dealing," equity and essential justice compel one result: Bernards must be estopped from seeking transfer of this matter, resisting the compliance of Ordinance #704 or otherwise pursuing any course of action (or non-action) in an effort to have Ordinance #704 lapse.

(iii) Public Interests Advanced

The private rights which would be impaired by transfer are therefore clear. What public interests would be advanced? The best, although not necessarily probable result of a mediation proceeding before the Council would be a rezoning by Bernards Township to provide affordable housing. There is no public benefit if the presently effective compliant ordinance is allowed to lapse and a new compliant ordinance is adopted sometime in the distant future. In the event Bernards refuses to rezone or comply with conditions for substantive certification which the Council imposes, the Council does not have the power to order compliance. Only this Court may order the zoning changes which can produce lower income housing.

The Supreme Court has declared that one of the main objects of its decision in Mount Laurel II was to end the continuing delays and limit the complexity of exclusionary zoning litigation. 92 N.J. at 200, 214. The Court's clear intention was to discourage multiple appeals and processes and dispose of matters in their entirety before the first appeal:

> The intent is to administer the Mount Laurel doctrine effectively. It is complex. Its administration is important not simply to those seeking lower income housing but to municipalities as well. We have no desire to deprive municipalities of their right to litigate each and every determination affecting their interest, but we believe that the present procedure, allowing numerous appeals, retrials, and ordinarily resulting in substantial delays in meeting the obligation, does not strike the proper balance." 92 N.J. 291.

The Legislature intended that the expedition of lower income housing be a primary consideration on any transfer motion. (See discussion, supra.). In light of the inevitable delay of almost two years and the effect of delay on housing production,

manifest injustice would result from transfer without any concommittant benefit to the public interest.

While not stated expressly, Bernards seems to assert that transfer is in the public interest because: (1) the Act is intended to be curative of the shortage of lower income housing and; (2) lower income housing should be provided in the context of sound comprehensive planning. (Bernards' brief at 13, 15).

As to the first asserted justification for transfer, a transfer of this matter will only serve to substantially delay construction of affordable housing. If this matter is transferred, it will be at least two years before any entity is in a position to commence construction of lower income housing. If, on the other hand, transfer is denied and a judgment of compliance is issued (see discussion, infra.), construction of affordable housing can be commenced expeditiously. In fact, pursuant to the currently effective Ordinance #704, Hills is in a position to guarantee construction of at least 550 units of lower income housing by 1990. (Affidavit of Kerwin).

With respect to the second asserted justification for transfer (sound comprehensive planning), Bernards neglects to mention that the Township itself voluntarily rezoned the lands of Hills and others. The Township made the choice to voluntarily comply and reap the benefits contained in the immunity order entered in this matter. The suitability of the Hills land was recognized both in the Master Plan amendments (Exhibit L) and by the Township's consultant, Dr. Moskowitz. (Affidavit of Hall). The Township does not now assert that its compliance package would result in unsound planning and, in fact, it would be unable to rationally do so. The Township acted in the same manner in which it would act if this matter were transferred: it chose the sites it wished to rezone. Transfer in the name of sound planning is, therefore, without basis.

In light of the clear manifest injustice which would result to lower income households and Hills if this matter were transferred, any public interest rationale for

transfer (if it exists) is far outweighed by the grievous harm which would result to the parties.

(iv) A municipality which has stipulated non-compliance with Mount Laurel II, and enacted a zoning ordinance found by a court-appointed Master to be fundamentally compliant should not be permitted to repeal that ordinance and transfer to the Affordable Housing Council, especially where the proposed justification for transfer is acquisition of a lower fair share obligation.

In response to cross-motions filed in connection with Denville Township's transfer motion, the State of New Jersey, represented by the Attorney General, has filed a brief arguing that the Fair Housing Act is not unconstitutional. In that 79 page brief, the Attorney General argues, inter alia, that the courts should not invalidate the Affordable Housing Act as unconstitutional since it is premature and speculative to assume that the Council will not properly effectuate the constitutional obligations and rights enunciated by the Supreme Court in Mount Laurel I and II. Relying heavily on the presumption of validity and the argument that the Affordable Housing Council may adopt regulations and procedures which, despite the language of the statute, would permit it to effectuate the constitutional mandate, the Attorney General takes the position that most of the issues raised are not ripe for judicial review.

The Bernards transfer motion is particularly interesting, in the context of these arguments, because the Township has: acknowledged that it has a fair share obligation of some 1,200 units under the AMG methodology; rezoned to provide over 1,000 lower income units; consented to the appointment of a Master who has found the compliance ordinance to be fundamentally compliant; entered into an agreement with Hills under which Hills has offered to build an additional 68 units of lower income units without a further density bonus or compensating market units; and, as recently as June 16, 1985, petitioned the Court to have this settlement approved. Bernards

now proposes, with the passage of the Fair Housing Act, to down-zone the Hills property, apparently to its former zoning, thus losing 618 lower income units, and seeks transfer to the Affordable Housing Council.

At an August 26, 1985 meeting, representatives of Bernards Township advised that Bernards was seeking transfer in order to gain a lower fair share obligation in the Affordable Housing Council. (Affidavit of Hall).

The larger legal issue raised by these tactics is whether or not the courts, having determined the order of magnitude of a municipality's obligation under Mount Laurel II, can accept a municipality's premise that it would be constitutional to transfer this matter for the purpose of allowing a municipality to gain a lower fair share.*

First, if this Court accepts the Attorney General's argument and finds that it is premature to declare that fair share calculations pursuant to the Act will be less than the obligation heretofore found by the courts, Bernards' justification for transfer is entirely speculative and, therefore, without basis.

If the Court accepts the premise that fair share calculations pursuant to the Act will be significantly less than heretofore calculated, the Act is unconstitutional and no transfers should be granted. The Supreme Court has held that municipalities of this State have an obligation to satisfy the state-wide need for

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* In this regard, it should be noted that the Act grants considerable flexibility to the Council in terms of the Council's obligation to draft fair share criteria and guidelines. However, utilizing the few "knowns" set forth in the Act (e.g., 2-4 county regions, the "one-to-one" credit mechanism), Alan Mallach has calculated Bernards' fair share obligation according to the two accepted methodologies (i.e. AMG/Consensus and CUPR). Mr. Mallach's analysis (Exhibit Z) reveals that, to the extent it is possible to determine given the unknowns, Bernards' fair share obligation is not likely to be significantly different than the calculations made thus far. In fact, giving Bernards "one-to-one" credit for all of its arguably creditable pre-1980 lower income units, Bernards' fair share obligation pursuant to the Act would be higher if the AMG methodology were utilized. (Exhibit Z at 2).

lower income housing. That need has been calculated and allocated pursuant to accepted methodologies. If, as Bernards suggests, fair shares under the Act will be lower than that necessary to satisfy the indisputable need, the Act is unconstitutional and transfer should be denied.

In sum, Bernards offers no legitimate reason for a transfer of this matter and, when weighed against the manifest injustice which would result upon transfer to lower income people and Hills, Hills respectfully submits that Bernards' motion should be denied.

POINT II

EXHAUSTION OF ADMINISTRATIVE REMEDIES BEFORE THE COUNCIL ON AFFORDABLE HOUSING IS CONTRARY TO THE INTERESTS OF JUSTICE AND NOT REQUIRED SINCE ISSUES OF LAW REMAIN TO BE DECIDED.

In the event that the Council would find that any ordinance offered by Bernards is not entitled to substantive certification, the Council would be absolutely powerless to order remedial action. Thus, the Council's mediation and review process pursuant to Sectinsity, bonus or compensating market units; and as recentlon 15 of the Act does not provide an administrative remedy which is "certainly available, clearly effective and completely adequate to right the wrong complained of." Baldwin Const. Co. v. Essex Cty. Bd. of Taxation, 24 N.J. Super. 252, 274 (Law Div. 1952), aff'd 27 N.J. Super. 240 (App. Div. 1953).

Only this Court has the authority to choose as a matter of law among available remedies. 92 N.J. at 192. When the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights. Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983).

If this matter were transferred, exhaustion of administrative remedies would entail "mediation and review." For the past year, this matter has been in a stage remarkably similar to the mediation and review envisioned by the Fair Housing Act. The parties have met regularly in an attempt to resolve differences. The parties had the invaluable assistance of the court-appointed Master whose function, at least in part, was that of mediator. In fact, as far as those present at the August 7, 1985 meeting were concerned, this matter had been completely mediated.

Notwithstanding the aforementioned mediation, Bernards asks this Court to transfer this matter to an administrative agency so that the same dispute can again be mediated. This new mediation would be incapable of enforcement by the

Council. On the other hand, pursuant to Ordinance #704, the parties' Memorandum of Agreement, the Master's report and the authority of this Court, the rights of the parties can be expeditiously adjudicated in this forum. If transfer were granted, an unenforceable mediation and review would require at least two years and, assuming that Hills would be willing and able to withstand the burdens which would result from such delay and uncertainty, Hills would be compelled to have the matter resolved in the forum in which we are now: the Superior Court.

Given that this matter has already been successfully mediated and that any further mediation and review would not be enforceable by the administrative agency, the interests of justice require that administrative remedies not be exhausted. Matawan v. Monmouth County Tax Board, 51 N.J. 291 (1968); New Jersey Civil Service Association v. State, 88 N.J. 605 (1982); Mount Laurel II, 92 N.J. at 342, n.73. The overriding public interest in prompt decisions in exclusionary zoning cases is a further reason why exhaustion should not occur. Matawan v. Monmouth County Tax Board, 51 N.J. 291 (1968).

POINT III

HILLS' CROSS-MOTION SHOULD BE GRANTED AND A CONDITIONAL JUDGMENT OF COMPLIANCE SHOULD BE ENTERED IN FAVOR OF DEFENDANT BERNARDS TOWNSHIP.

As discussed in the Statement of Facts, supra, Defendant Bernards Township introduced Ordinance #704 on October 2, 1984. Bernards also applied to this Court for an immunity order which would immunize the Township from further builder's remedy suits and stay this litigation. By way of letter of October 16, 1984 (Exhibit D), this Court denied the request for immunity and noted that the relief sought could be granted if Bernards would be willing to "stipulate the present invalidity of its ordinance and its fair share number." Thereafter, Bernards resubmitted an Order in accordance with this Court's directive which Order indicated that the Township had amended its ordinance to provide for more than 1,000 units of lower income housing. (Exhibit E). That ordinance, adopted November 12, 1984, was Ordinance #704.

Bernards therefore stipulated the non-compliance of its prior ordinance and agreed to rezone. Bernards now takes the position that it intends to resist a finding of compliance of its ordinance, allow the ordinance to lapse* and seek transfer to the Affordable Housing Council (Affidavit of Hall). Hills respectfully submits that this course of action should not be sanctioned.

The Mount Laurel II opinion grants to this Court the authority to enter a judgment of compliance in this matter. Bernards has submitted an ordinance which it has asserted to be compliant. Hills is likewise of the view that Ordinance #704 is fundamentally compliant although certain minor deficiencies should be corrected.

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* As discussed supra, Ordinance #704 contains a clause which would allow the ordinance to lapse unless: (1) a judgment of repose is entered prior to November 22, 1985; or (2) the Township adopts an ordinance extending Ordinance #704.

In Mount Laurel II, our Supreme Court outlined the procedure to be utilized upon a rezoning. Upon a finding of invalidity, a municipality is required to rezone prior to entry of a final judgment and the right to appeal. 92 N.J. at 218, 285, 290. By its own choice, Bernards chose to concede the invalidity of its ordinance and rezone in an effort to comply. There can now be one of two findings: (1) a judgment of compliance or; (2) "a judgment containing one or more of many orders available in the event of non-compliance." Id. at 290. For the following reasons, Hills respectfully requests that this Court deny Bernards' motion to transfer and enter a judgment of compliance.

(a) Defendant Bernards Township is under an obligation to seek a judgment of compliance.

Bernards received extraordinary relief when it stipulated the non-compliance of its prior ordinance. From December, 1984 to date, over 9 months, Bernards has been immunized from further builder's remedy suits and has been granted a stay of the instant litigation. The quid pro quo for this relief was a decision by Bernards to voluntarily comply with the Mount Laurel mandate. The Township has indeed adopted a fundamentally compliant ordinance. However, in a complete reversal of position, Bernards now seeks to avoid a judgment of repose, allow its Mount Laurel ordinance to expire, and go before the Affordable Housing Council for its review of Bernards' inclusionary housing goals. What Bernards will provide to the Council as its housing element is unclear: without the Hills, there is little realistic opportunity for the construction of affordable housing in any "growth area" of the Township. (Affidavit of Kerwin).

The quid pro quo for the relief granted to Bernards also entails the responsibility to seek a judgment of compliance. In fact, by way of letter dated June 12, 1985, (Exhibit I), Bernards requested a compliance hearing. Having gathered the

benefits of immunity and a stay of this litigation, Bernards should not now be permitted to abrogate its position and resist compliance. The benefits conferred on the Township carry an obligation - the obligation to seek compliance.

(b) Plaintiffs in Mount Laurel litigation, as well as the Court on its own motion, may seek a judgment of compliance.

Despite Bernards' aforementioned June 12, 1985 request for a compliance hearing, it would now appear that Bernards abandons its request. The question therefore arises as to whether a plaintiff may seek a judgment of compliance. For the following reasons, Hills submits that it has the right and, indeed, the duty, to move for a judgment of compliance.

Our Supreme Court has held that a builder's remedy will be awarded to a builder - plaintiff if, inter alia, such a plaintiff "vindicates the constitutional obligation." 92 N.J. at 218. In order to vindicate the obligation, Hills is compelled to seek a judgment of compliance thereby preventing Ordinance #704 from lapsing. Hills' request for a judgment of compliance is certainly not unprecedented. See, e.g., Morris County Fair Housing Council, supra, 197 N.J. Super. at 363. It is also beyond dispute that this Court is empowered to enter a judgment of compliance on its own motion. Hills respectfully requests that this Court exercise its authority and enter a judgment of compliance.

(c) The Defendant Township should be estopped from resisting compliance.

As argued in Point I (c) (ii) (A) supra, the Township should be estopped from: (1) resisting Plaintiff's efforts to vindicate the constitutional mandate or; (2) otherwise pursuing a course of action which would allow Ordinance #704 to lapse. Hills incorporates said argument herein and urges that Bernards be estopped from attempting to frustrate the constitutional mandate.

(d) Ordinance #704 is fundamentally compliant and a conditional judgment of compliance should be entered.

The court-appointed Master has extensively reviewed Ordinance #704 and expressed some relatively minor reservations with respect to the compliance of the ordinance. For example, the Master has found a shortfall of 68 lower income units in the compliance package. Hills has agreed to provide those 68 units of lower income housing on its Raritan Basin tract without any commensurate increase of market units on the tract. In return, Hills has asked to be "permitted" to develop the Passaic Basin tract at its as-of-right density. In order to do so, Hills need have only the support of Bernards in its application for expansion of the Environmental Disposal Corporation franchise area. In order to accomodate the 68 additional lower income units on the Raritan Basin tract, the gross density would be increased from 5.49 to 5.62 units per acre. The court-appointed Master has favorably reviewed this solution to the shortfall of lower income units. (Exhibit F, Master's Report at 8-10).

In addition, the Master expressed some definitional difficulties with Sections 1103 and 1104 of the Ordinance and some recommendations with respect to other relatively minor aspects of the compliance package (e.g. marketing plan guidelines, restrictions on condominium conversions, drainage requirements, development application processing and waiver of fees for lower income units) (See Exhibit F, Master's Report at 18-24). With the aforementioned minor exceptions, however, the Master recommended Court approval of Bernards' compliance package. (Exhibit F, at 21).

Clearly, the fundamental aspects of a compliance package are present in Ordinance #704. The only items with which the Master expressed concern are those which could easily be resolved by the entry of a judgment of compliance subject to conditions.

As mentioned above, our Supreme Court held that judicial review of a Mount Laurel ordinance would result in either a judgment of compliance or "a judgment containing one or more of many orders available in the event of non-compliance along with the action of the municipality conforming to such orders." 92 N.J. at 290. The Supreme Court also granted this Court vast discretion in ordering amendments to a revised ordinance in order to achieve compliance. Chief among these powers is the discretion to order : adoption of amendments and resolutions; that an ordinance is void in whole or in part; and that particular applications be approved. 92 N.J. at 285-286. In the event that the Court adopts the recommendations of the Master and finds Ordinance #704 to be fundamentally compliant but deficient in minor respects, Hills respectfully requests that the Court order the Defendant Township to revise or supplement its ordinance so as to satisfy the relatively insignificant concerns raised with respect to the ordinance.

Should this Court hold that compliance should be conditioned upon satisfaction of the above-described concerns, a question then arises as to the form of judgment/order to be entered in this matter. Hills respectfully submits that a judgment of compliance should be issued subject to conditions. When faced with a similar set of circumstances in Bedminster Township, (i.e. a fundamentally compliant ordinance with certain minor flaws) this Court entered a judgment of compliance subject to conditions. Allan-Deane Corporation v. Tp. of Bedminster, et al, ____ N.J. Super. ____ (Law Div. 1985).

In this Court's aforementioned Bedminster opinion, the judgment was issued subject to 10 conditions. Some of these conditions, such as aggressive pursual of the application for expansion of the Environmental Disposal Corporation ("EDC") franchise area by the EDC and the Township, formation of a housing corporation and elimination of the ordinance provision concerning a commercial option, are similar or identical to those which would be required pursuant to the Master's recommendations

in the instant matter. (Id., slip op. at 51-55, "Conditions of Approval"). Hence, Hills respectfully suggests that a judgment of compliance subject to conditions would be similarly appropriate in the instant matter. Should the Court so hold, Hills would also request that the Court declare that such a judgment of compliance subject to conditions is in form and substance a "judgment of repose" sufficient to prevent the lapse of Ordinance #704.

(e) A judgment of compliance must be entered prior to November 22, 1985 in order to prevent the expiration of Ordinance #704.

As discussed supra, Defendant Bernards Township has previously asserted that Ordinance #704 is compliant and, in fact, Bernards itself has requested a compliance hearing (Exhibit I). Since Ordinance #704 will expire if a judgment of repose is not entered prior to November 22, 1985, Hills respectfully requests that a judgment of compliance be entered prior to that date.

Notwithstanding the fact that Ordinance #704 will expire if a judgment of compliance is not entered prior to November 22, 1985, the Ordinance #704 "expiration clause" provides that said ordinance may be extended by adoption of an ordinance providing for such extension. Should this Court hold that a judgment of compliance may not be entered prior to November 22, 1985, Hills would request that this Court direct the Defendant Township to adopt an ordinance which would extend the effectiveness of Ordinance #704 beyond its "expiration date." The Mount Laurel II opinion gives this Court the express authority to order a municipality to adopt a compliant ordinance. 92 N.J. at 278, 285-286. Implicit in that authority is the authority to prevent a municipality from allowing its compliance ordinance to "expire."

POINT IV

THE "EXPIRATION CLAUSE" CONTAINED IN ORDINANCE #704 IS UNLAWFUL, INVALID AND UNCONSITUTIONAL AND THE CLAUSE IS THEREFORE A NULLITY.

As discussed above, the Ordinance adopted by the Defendant Township in response to its Mount Laurel II obligation, Ordinance #704, contains a clause which can be best described as an "expiration clause." This clause reads in full as follows:

> [T]his 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.

Hills respectfully submits that, whether or not this Court grants Bernards' motion or Hills' cross-motion, the adoption and exercise of the "expiration clause" is ultra vires, arbitrary, capricious, unreasonable, unconstitutional and otherwise unlawful. The clause is, therefore, a nullity and Ordinance #704 may not "expire". Due to the existence of the "expiration clause," the Ordinance is in the nature of an "interim ordinance". For the following reasons, this interim ordinance is invalid.

(a) The expiration clause would remove the existing zoning and result in a violation of N.J.S.A. 40:55D-62.

Prior to the passage of Ordinance #704, the Defendant Township Planning Board revised the Township Master Plan so as to recommend a density of 5.5 units/acre on the Hills' Raritan Basin land. (Exhibit L, Master Plan Amendments). The Defendant Planning Board adopted the master plan amendments on October 30, 1984. (Exhibit L). Ordinance #704 is substantially consistent with the land use plan element of the amended master plan as mandated by N.J.S.A. 40:55D-62. See also Route 15 Associates v. Jefferson Tp., 187 N.J. Super. 481, 486-487 (App. Div. 1982);

Pop Realty Corp. v. Springfield Tp. Bd. of Adj., 176 N.J. Super 441, 454 (Law Div. 1980). If Ordinance #704 were to expire, the zoning ordinance would be clearly contrary to the land use element. The expiration clause would, therefore, result in a violation of N.J.S.A 40:55D-62 and it is therefore contrary to statutory law.

(b) If Ordinance #704 were to "expire," the underlying zoning would clearly be unconstitutional.

The expiration of Ordinance #704 would have the result of "dezoning" the land of Hills and others whose lands were rezoned by virtue of the ordinance. If Ordinance #704 expired, the fundamentally compliant zoning would be replaced by either the prior zoning (0.5 units/acre with no mandatory setaside) or no zoning*. Defendant Bernards Township itself stipulated that the prior zoning was unconstitutional. Hills respectfully submits that a clause is unconstitutional if it permits the replacement of a fundamentally compliant ordinance with an ordinance which, by Bernards' own stipulation, is unconstitutional.

On the other hand, if Ordinance #704 were to expire, it may be argued that the land now zoned for Mount Laurel housing may be left with no zoning. If this were the legally mandated result, the same consequences would follow: the expiration clause would replace a compliant ordinance with a land use "scheme" which would clearly be unconstitutional (assuming that, if no zoning were in place, landowners would not voluntarily construct Mount Laurel housing). In either event, the expiration clause is unconstitutional.**

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* Hills was unable to locate any law which would answer this most unusual question. Hills can only assume that the "replacement zoning" would be decided pursuant to the remedial powers of this Court.

** Should this Court reach this issue and hold that the expiration clause would result in Hills' land being left with no zoning, this Court would presumably have the authority to enter judgment directing the Defendant Township to adopt a new ordinance zoning Hills' land for a high density inclusionary development.

c) Defendant Bernards Township Committee was not authorized to adopt the "expiration clause" and, even if it were, the clause is arbitrary, capricious and unreasonable.

"[A] municipality has no inherent power to adopt zoning or other land use ordinances; it may act only by virtue of a statutory grant of authority from the Legislature." Dresner v. Carrara, 69 N.J. 237, 241 (1976). If the Bernards "expiration clause" is to be found authorized, a statutory source for such authority must be found in the enabling legislation, the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 et seq. However, no such authority may be found in the MLUL.

The power to zone is authorized in N.J.S.A. 40:55D-62. Naturally, this statute does not explicitly authorize the expiration clause. The statute limits the power to adopt ordinances "relating to the nature and extent of the uses of land and of buildings and structures thereon." Ibid. Zoning ordinances "shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land." Ibid.

Similarly, N.J.S.A. 40:55D-65 ("Contents of zoning ordinance") limits municipal authority to the districting of uses, sizes of structures and lots, planned development regulations and other provisions directly related to the use of land. See also Dome Realty, Inc. v. Paterson, 83 N.J. 212, 226 (1980) (municipalities may regulate local land use and those matters bearing a close relation to the subject matter of local zoning ordinances such as the conditions and use of land and its improvements); Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 21 (1976), app. dism. and cert. den. sub. nom. Feldman v. Weymouth Tp., 430 U.S. 977 (1977) (ordinances adopted under enabling act must bear "real and substantial relationship to the regulation of land" and advance one of the purposes specified in the MLUL).

Read together, N.J.S.A. 40:55D-62, 40:55D-65 and the relevant case law authorize those municipal enactments which regulate the use of land. Municipalities are not ordinarily authorized to place time limits on the effectiveness of ordinances nor are they authorized to condition duration of ordinance effectiveness on the occurrence or non-occurrence of a certain event. The truth of this assertion is revealed by an examination of a MLUL provision, discussed below, which did grant a municipality the authority to adopt a "time constrained" ordinance.

The MLUL has permitted "interim zoning" under narrow and special circumstances. Pursuant to N.J.S.A. 40:55D-90b, a municipality is authorized to "adopt a reasonable interim zoning ordinance... pending the adoption of a new or substantially revised master plan or new or substantially revised development regulations." Such an interim ordinance may be extended for "no longer than an additional year for good cause and upon the exercise of diligence in the preparation of a master plan, development regulations or substantial revisions thereto..." Ibid. It would appear that the provisions of N.J.S.A 40:55D-90b have not been of avail to municipalities since May 31, 1979. Pop Realty Corp. v. Springfield Tp. Bd. of Adj., 176 N.J. Super. 441, 449 (Law Div. 1980); N.J. Shore Builders Ass'n v. Dover Tp. Committee, 191 N.J. Super. 627, 631 (Law Div. 1983). See also Lionel's Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 271-272 (Law Div. 1978) (municipalities afforded additional period of one year from February 1, 1977 in which to adopt land use regulations which meet "substantive requirements" of the MLUL); Windmill Estates v. Zoning Bd. of Adj., Totowa, 147 N.J. Super. 65,72, 75 (Law Div. 1976) rev'd on other grounds 158 N.J. Super. 179 (App. Div. 1978) (holding that municipalities may utilize N.J.S.A. 40:55D-90 in order to adopt interim zoning plans while the municipality prepares the necessary procedural changes to ultimately effectuate the MLUL and enjoining the municipality from adopting its then - extant ordinance or any substantially similar ordinance as its 40:55D-90 interim ordinance).

Even if the statute were in effect, however, it is clear that Bernards Township's interim ordinance provision is not authorized by the statute. The ordinance was not enacted pending adoption of a new or substantially revised master plan or set of development regulations. The ordinance is not a "stop-gap" ordinance which was permitted by 40:55D-90b. As discussed supra, Ordinance #704 was adopted after the master plan was substantially revised.

In sum, the MLUL does not authorize the adoption of an interim ordinance provision for purposes other than those articulated in N.J.S.A. 40:55D-90 and the pertinent case law is in accord. The Bernards Ordinance #704 was not adopted for the purposes outlined in 40:55D-90 and its expiration clause should, therefore, be declared ultra vires and void.

Even if this Court were to hold that the Defendant Township's expiration clause were legislatively authorized, the clause is unreasonable, arbitrary, capricious and not related to a permissible objective. The zoning power "is subject to constitutional limitations that it not be unreasonable, arbitrary or capricious and that means selected via such legislation shall have real and substantial relation to the objects sought to be obtained." Trombetta v. Atlantic City, 181 N.J. Super. 203, 226 (Law Div. 1981) aff'd 187 N.J. Super. 351 (App. Div. 1982). The regulation must be necessary for the common good and "then only by reasonable means substantially connected with the public interest designed to be advanced." Id., 181 N.J. Super. at 226. A zoning ordinance must "advance one of the several purposes specified in the" MLUL, Weymouth Tp., supra, 80 N.J. at 21, and the "provision must advance an authorized purpose in a manner permitted by the Legislature." Home Builders of So. Jersey, Inc. v. Berlin Tp., 81 N.J. 127, 137-138 (1979). The provision at issue, the expiration clause of Ordinance #704, neither serves a legitimate purpose nor does it bear a "real and substantial relation" to the purpose.

The purpose of the expiration clause is not legitimate; it is directly contrary to the constitutional doctrine enunciated in Mount Laurel II, that is, the expeditious production of lower income housing. The expiration clause would serve to eliminate satisfaction of the goal pronounced by our Supreme Court. On the legislative level, the Fair Housing Act purports to support the goal articulated in Mount Laurel II. Ordinance #704 serves the legitimate purpose of satisfying the constitutional mandate; the provision permitting it to expire does not. In short, frustration of Mount Laurel compliance is not a legitimate objective and an ordinance provision tailored to that end is invalid.

The expiration clause is also deficient in that it does not have a "real and substantial relation" to its illegitimate object. First, the one year time frame contained therein is certainly arbitrary and has no relation to any legitimate object. Second, the condition contained in the provision (acquisition of a judgment of repose within one year) impermissibly and arbitrarily places the future zone plan of the Township outside of its control. Regardless of the course which this controversy may have followed, acquisition of a judgment of compliance within one year would depend on a number of variables (including timely master review and the docket of the court). A real and substantial relation is therefore lacking, as well as a legitimate purpose, and the expiration clause is unreasonable, arbitrary and capricious.

In addition to the ultra vires, unreasonable, arbitrary and capricious nature of the expiration clause contained in Ordinance #704, the clause is unconstitutional.

(d) The Defendant Township is constitutionally mandated to adopt a compliant ordinance and its effort to allow its ordinance to lapse is unconstitutional and should not be sanctioned.

Assuming, arguendo, that the Ordinance #704 expiration clause is not otherwise unlawful, the clause flies in the face of Mount Laurel II and prior orders of this Court and it is, therefore, unconstitutional.

The immunity order of December 19, 1984 (Exhibit E) granted extraordinary relief to Bernards, including relief from further builder's remedy actions and a stay of this litigation. The quid pro quo for this relief was adoption of an ordinance in an effort to comply with the Mount Laurel mandate. In effect, Bernards' prior ordinance was held invalid and the Township was required to rezone (although, concededly, the direction to rezone was by way of a stipulation contained in an an immunity order rather than a summary judgment).* Moreover, in its attempt to prolong the relief contained in the December 19, 1984 immunity order, Bernards twice sought extensions of the order, advising this Court at one point that "agreement had been reached." (Exhibit I) Having derived such extraordinary benefits due to its passage of Ordinance #704, Bernards now seeks to merely let the ordinance "lapse" and seek transfer to the Affordable Housing Council. Such a course of action would clearly frustrate the constitutional mandate and the expiration clause should be held to be contrary to the same constitutional doctrine that was responsible for the adoption of Ordinance #704.

An analagous attempt to "condition" Mount Laurel compliance was found in the Mount Laurel case itself. Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 161 N.J. Super. 317 (Law Div. 1978). Following the remand ordered in Mount Laurel I, the Township of Mount Laurel adopted an ordinance which contained "control provisions." Said the court:

> The "control provisions" purport to equate the township's fulfillment of its "fair share" obligation with fulfillment of similar obligations by other municipalities in the county. Nowhere does the court declare the township's obligation to be equated to or dependent upon the action of other municipalities. The township may not place such a condition on its obligation. The "control provisions" of § 1708 are declared void in toto. (emphasis added)

Id. at 348.

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* Even if this were not the case, if Bernards had not engaged in the course of conduct described supra, it is a relative certainty that Bernards would have been compelled to rezone notwithstanding the entry of the immunity order.

The Law Division's holding on this point of law was affirmed in Mount Laurel II, 92 N.J. at 304, n. 54.

Similarly, the Township of Bernards is not constitutionally permitted to condition its obligation. A court of law must determine if the compliance zoning may be removed; not the Township. The expiration clause is therefore unconstitutional.

For the foregoing reasons, Hills respectfully requests that this Court hold that the expiration clause of Ordinance #704 is void in toto. In practical terms, holding such clauses to be lawful would permit municipalities to engage in a pattern of zoning which could be utilized to thwart all development, including that mandated by the Mount Laurel doctrine. For sound policy reasons, therefore, such zoning is not authorized and is contrary to the constitutional mandate articulated in Mount Laurel II.

POINT V

THE FAIR HOUSING ACT SHOULD BE INVALIDATED BECAUSE UNCONSTITUTIONAL SECTIONS ARE INTEGRAL TO THE ACT AND ARE NOT SEVERABLE*

Over ten years ago in the first Mount Laurel decision the Supreme Court declared that any zoning ordinance which did not serve the general welfare was unconstitutional. 67 N.J. 151, 174 (1975). The Supreme Court in the Mount Laurel II decision affirmed this doctrine:

> The constitutional basis for the Mount Laurel doctrine remains the same. The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare - in this case the housing needs - of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. 92 N.J. at 204.

In order to encourage voluntary compliance, simplify litigation and increase the effectiveness of the judicial remedy the Court set forth a series of rules which were declared necessary to effectuate the constitutional guarantee. See, Summary of Rulings, 92 N.J. at 214-219.

Hills asserts that any provision of the Fair Housing Act that conflicts with the standards announced in the Mount Laurel II decision is constitutionally defective. This Court is not faced with the task of the Supreme Court in evaluating the legislative response to the original Robinson v. Cahill decision; there the Court acknowledged that the State had never defined the contents of the educational

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* Should this Court deny Bernards' motion to transfer and grant Hills' cross-motion for a judgment of compliance, the issue of the constitutionality of the Fair Housing Act need not be reached. Should this issue be dispositive, however, Hills would request the opportunity to file a supplementary brief on the issue of whether the Fair Housing Act is indeed the "adequate" legislative response which the Supreme Court encouraged. 92 N.J. at 213.

opportunity required by the Constitution. 69 N.J. 449, 456 (1976). In contrast, the content of the constitutional obligation to zone for the general welfare was explicitly defined in Mount Laurel I, Madison and Mount Laurel II. If the Fair Housing Act exceeds the boundaries of authority delegated by the Constitution, the final decision as to validity rests with the courts. See Asbury Park Press, Inc. v. Wooley, 33 N.J. 1, 12 (1960). The following provisions of the Fair Housing Act are inconsistent with the pronouncements of our Supreme Court.

(a) The Definition of Region Conflicts With Mount Laurel II.

The Fair Housing Act defines housing region in Section 4(b):

> Housing region means a geographic area of no less than two nor more than four contiguous, whole counties which exhibit significant social, economic and income similarities, and which constitute to the greatest extent practicable the primary metropolitan statistical areas as last defined by the United States Census Bureau prior to the effective date of this Act.

This definition violates Mount Laurel II because it: (1) limits housing regions to between two and four counties; and (2) requires significant social, economic and income similarities within the region.

(i) The Two to Four County Limit.

The concept of housing region has long been defined as "that general area which constitutes more or less, the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning." 72 N.J. at 543; 92 N.J. at 256. Any arbitrary restriction of region will seriously interfere with the Mount Laurel objective that "the gross regional goal shared by the constituent municipalities be large enough fairly to reflect the full needs of the housing market area of which the municipality forms a part." Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 at 536 (1977).

The Supreme Court held in Mount Laurel II that the issues of region and regional need were particularly susceptible to judicial treatment. 92 N.J. at 253. In appointing three judges to handle all Mount Laurel cases, the Court expected that consistent determinations of region and regional need would emerge. To encourage consistent results, the Court granted presumptive validity to determinations of region and regional need and authorized intervention by potentially affected municipalities. 92 N.J. at 254. Numerous regional determinations have been made to date for: Denville Township (eleven county present need region, nine county prospective need region); Warren Township (eleven county present need, six county prospective need); Mahwah Township (eight county region); Washington Township (two county present and prospective need region); Bedminster Township (eleven county present need region and five county prospective need region); Montgomery Township (eleven county present need region and five county prospective need region); and Cranbury and Monroe Townships (eleven county present need region). With the exception of Washington Township, all regions exceed the two to four county limit in the Fair Housing Act. Clearly, large regions are consistent with the Court's admonition that regions be "large enough and sufficiently integrated economically to form legitimately functional housing market areas":

> For examples of regions large enough and sufficiently integrated economically to form legitimately functional housing market areas, we turn to some of the pioneering fair share allocation plans executed under official or quasi-official auspices. The Miami Valley (Dayton, Ohio) Regional Planning Commission includes five counties and 31 municipalities as far as 60 miles from the center of Dayton. The Metropolitan Washington GOG (see supra p. 529) covers 15-counties and local governmental jurisdictions, including the District of Columbia, San Bernardino County, California, although a county, occupies 20,000 square miles. The Metropolitan Council of the Twin Cities (Minneapolis-St. Paul) covers 7 counties, including almost 300 jurisdictions, with a total population of 1.9 million. The DVRPC, as already shown, comprises nine counties in Pennsylvania and New Jersey. The present significance of the cited plans is that their regions are of such size that it is difficult to conceive of a substantial

> demand for housing therein coming from any one locality outside the jurisdictional region, even absent exclusionary zoning. The essence of the cited plans is "to provide families in those economic categories (low and moderate) a choice of location. 16 Trends on Housing, No. 2 p. 2 (1972). Madison, supra, 72 N.J. at 538-539. (emphasis added).

The arbitrary restriction of region to two to four counties will result in many improper fair share decisions by the Council. The definition should be declared invalid.

(ii) The Requirement of Significant Social, Economic and Income Similarities.

The Fair Housing Act requires that the housing region be defined in a way so that "significant social, economic and income similarities" apply to municipalities within the region. The concept of significant social, economic and income similarities conflicts with the basic goal of the Mount Laurel doctrine -to open up the suburbs to low income families. That goal requires that a suburban municipality, which is proximate to a highly urbanized area and whose residential development is due to the influx of new residents from that area, be considered part of that central city's housing region. 67 N.J. at 161-162; 92 N.J. at 537.

This Court may take judicial notice of the fact that urban and suburban municipalities do not share significant social, economic and income similarities:

> Unfortunately, this unpleasant "vision" is to a large extent already with us, as can be seen by comparing the poverty and decay of Newark and Camden with the prosperity of many of their suburban neighbors. For a discussion of these urban-suburban disparities in New Jersey. See "Recession in Jersey: 'Dire' or 'Mild," The New York Times, June 28, 1982, at B1, Col. 3. As many commentators ranging from law review writers to national commissions have maintained, a major cause of this urban-suburban inequality has been suburban exclusionary zoning (citations omitted).
>
> As these commentators document, since World War II, there has been a great movement of commerce, industry, and people out of the inner cities and into the suburbs. At the same time, however, exclusionary zoning made these suburbs largely inaccessible to lower income households. Beside depriving the urban poor of an opportunity to share in the

> suburban development, this exclusion also increased the relative concentration of poor in the cities and thereby hastened the flight of business and the middle class to the suburbs. A vicious cycle set in as increased business and middle class flight led to more urban decay, and more urban decay led to more flight, etc.
>
> The provision of lower income housing in the suburbs may help to relieve cities of what has become an overwhelming fiscal and social burden. It may also make jobs more accessible for the unemployed poor. Deconcentration of the urban poor will presumably make cities more attractive for business and upper income residents to return to. 92 N.J. at 211.

Thus, any suburban municipality's region composed pursuant to the Act's definition would not be large enough to assure that a substantial demand for housing would not come from any one locality outside the jurisdictional region, even absent exclusionary zoning. 72 N.J. at 539.

(b) Various Standards for Adjusting Municipal Fair Share Conflict with Mount Laurel II.

Section 6 of the Fair Housing Act directs the Council to adopt criteria and guidelines for the municipal adjustment of present and prospective fair share. An amendment adopted in response to the Conditional Veto Message of Governor Kean requires criteria for adjustment whenever "the established pattern of development in the community would be drastically altered," and when "adequate public facilities and infrastructure capacities are not available, or would result in costs prohibitive to the public if provided". (Section 7c(2), (b) and (g)). Similarly, Section 7 directs the Council to "... in its discretion, place a limit, based on the percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the Council deems appropriate, upon the aggregate number of units which may be allocated to a municipality as its fair share of the region's present and prospective need for low and moderate income housing."

(i) Reductions Based on Existing Housing Stock and for Drastic Alteration to Local Community

The first and the third provisions quoted above are interrelated. Section 7c(2)(b) requires the promulgation of criteria to allow fair share adjustments whenever zoning for lower income housing would "drastically alter" the community, while the third provision allows the Council in its discretion on a case by case basis, to limit the fair share to a percentage of the existing housing stock in a municipality. Both of these provisions are a reward for exclusionary practices. A municipality's fair share may not be based on its probable future population since that population results from the municipality's exclusionary zoning. 92 N.J. at 258. Similarly, a municipality should not be able to avoid its obligation because of the magnitude of its current housing or population, since this is an even more direct result of exclusionary zoning. Ibid.

Other sections of the Act, particularly Section 23, specifically authorize the phase-in of municipal fair share obligations. The Legislature clearly did not intend Section 7 to also govern phasing, given the length and detail of Section 23 as well as the specific language of Section 7 which refers to "adjustments" and "limits" on fair share. Both Section 7c (2) (b) and Section 7 (e) are clearly contrary to the Supreme Court's direction that "formulae that have the effect of unreasonably diminishing fair share because of a municipality's successful exclusion of low income housing in the past shall be disfavored." 92 N.J. at 256. Both sections are constitutionally invalid.

(ii) Reductions For Inadequate Public Facilities And Infrastructure.

Another section of the Act has the effect of allowing further adjustments to fair share where a municipality has not planned for future growth through the expansion of public facilities and infrastructure. Section 7 (c) (2) (g) mandates fair share adjustments whenever "adequate public facilities and infrastructure capacities

are not available, or would result in costs prohibitive to the public if provided". Thus, a municipality's fair share would be reduced where infrastructure such as sewer lines are not available, regardless of an individual developer's ability to remedy this deficiency.

The Supreme Court in Mount Laurel I declared this excuse for exclusionary zoning to be insufficient:

> It is said that the area is without sewer or water utilities and that the soil is such that this plot size is required for safe individual lot sewage disposal and water supply. The short answer is that, this being flat land and readily amenable to such utility installations, the township could require them as improvements by developers or install them under the special assessment or other appropriate statutory procedure. 67 N.J. at 186.

As a general matter, municipalities have an obligation to plan for the "reasonable demands of a growing community" Reid Development Corp. v. Parsippany-Troy Hills Tp., 10 N.J. 229, 234 (1952). The Municipal Land Use Law also requires planning for future needs, since the zoning power may only be exercized after planning board adoption of a master plan, which master plan should include..."a utility service plan element analyzing the need for and showing the general location of water supply and distribution facilities, drainage and flood control facilities, sewerage and waste treatment, solid waste disposal and provision for other related utilities;" N.J.S.A. 40:55D-28.

Where public facilities such as roads, sewers or water lines cross the development site and must be upgraded or improved to serve the development, the planning board clearly may condition approval on upgrade. N.J.S.A. 40:55D-38 and N.J.S.A. 40:55D-53. Off-tract improvements may be financed either at municipal cost and expense, as a local improvement or partly/completely at the developer's expense. Divan Builders v. Planning Bd. Tp. of Wayne, 66 N.J. 582, 599 (1975); N.J.S.A. 40:55D-42. Therefore, since sufficient mechanisms exist for providing

adequate public facilities and infrastructure to setaside developments, any fair share reduction on this basis is arbitrary, capricious and contrary to the Mount Laurel doctrine.

Fair share reductions are also authorized where provision of public facilities or infrastructure would result in "costs prohibitive to the public". This type of fiscal zoning, or municipal exclusion of types of housing and people for local financial end, was declared to not serve the general welfare in Mount Laurel II:

> The township's principal reason in support of its zoning plan and ordinance housing provisions, advanced especially strongly at oral argument, is the fiscal one previously adverted to, i.e., that by reason of New Jersey's tax structure which substantially finances municipal governmental and educational costs from taxes on local real property, every municipality may, by the exercise of the zoning power, allow only such uses and to such extent as will be beneficial to the local tax rate. In other words, the position is that any municipality may zone extensively to seek and encourage the "good" tax ratables of industry and commerce, and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise. ....
>
> ....But we were not there concerned with, and did not pass upon, the validity of municipal exclusion by zoning of types of housing and kinds of people for the same local financial end. We have no hesitancy in now saying, and do so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose. While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government. It cannot legitimately be accomplished by restricting types of housing through the zoning process in developing municipalities. 67 N.J. 185-86 (emphasis added).

(c) Provisions of the Act Governing Settlements Violate Mount Laurel II.

Section 22 of the Act provides that "any municipality which has reached a settlement of any exclusionary zoning litigation prior to the effective date of this

Act, shall not be subject to any exclusionary zoning suit for six years following the effective date of this Act. Any such municipality shall be deemed to have a substantively certified housing element and ordinances, and shall not be required during that period to take any further actions with respect to provision for low and moderate income housing in its land use ordinances or regulations."

There are two problems caused by the Legislature's attempt to give absolute sanctity to settlements. First of all, the res judicata effect of a judicial determination of compliance should apply for six years, unless a "substantial transformation of the municipality" occurs during this time, in which case a valid Mount Laurel claim may be asserted. 92 N.J. at 292, n. 44. Section 22 precludes this reassessment from occurring. Additionally, Section 22 does not require either judicial or Council review of the settlement, thus conflicting with precedent holding that a hearing must be held on a proposed settlement and that a judgment of compliance not be effective until court approval is granted. Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359, 368-370 (Law. Div. 1984).

(d) The Moratorium on the Award of Builder's Remedies is Unconstitutional.

The Fair Housing Act imposes a moratorium on the award of builder's remedies:

> No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff. This provision shall terminate upon the expiration of the period set forth in subsection a. of section 9 of this act for the filing with the council of the municipality's housing element.
>
> For the purposes of this section, "final judgment" shall mean a judgment subject to an appeal as of right for which all right to appeal is exhausted.
>
> For the purposes of this section " exclusionary zoning litigation" shall mean lawsuits filed in courts of competent jurisdiction in this State challenging a municipality's zoning and land use regulations on the basis that the regulations do

> not make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people living within the municipality's housing region, including those of low and moderate income, who may desire to live in the municipality.
>
> For the purpose of this section "builder's remedy" shall mean a court imposed remedy for a litigant who is an individual or a profit-making entity in which the court requires a municipality to utilize zoning techniques such as mandatory set asides or density bonuses which provide for the economic viability of a residential development by including housing which is not for low and moderate income households. (Section 28) (emphasis added).

The moratorium terminates upon the expiration of the time period for filing municipal housing elements, and thus between September 1, 1986 and January 1, 1987*.

The builder's remedy was authorized in Mount Laurel II in order to achieve compliance with the constitution:

> In Madison, this court, while granting a builder's remedy to the plaintiff appeared to discourage such remedies in the future by stating that "such relief will ordinarily be rare". 72 N.J. at 551-52 n. 50. Experience since Madison, however, has demonstrated to us that builder's remedies must be made more readily available to achieve compliance with Mount Laurel. We hold that where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." 92 N.J. at 279-80 (emphasis added); See also, 92 N.J. at 290.

Since the builder's remedy is necessary for enforcement of the constitutional right and is an essential part of the right, the Legislature may not interfere with it. Morin v. Becker, 6 N.J. 457, 471 (1951). Furthermore, the moratorium violates the separation of powers clause of the New Jersey Constitution since it is an attempt to override the Supreme Court's constitutional power to make rules governing the

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* Hills submits that the moratorium does not apply to the instant matter. (See discussion supra).

administration, practice and procedure in all Courts. New Jersey Constitution, Art. 3, par. 1, and Art. 6, §2, par 3; Sears, Roebuck & Co. v. Katzmann, 137 N.J. Super, 106 (App. Div. 1975). When a statutory provision and a court rule are in conflict, the rule must prevail. Borough of New Shrewsbury v.Block 115, Lot 4, 74 N.J. Super 1. (App. Div. 1962); State v. U.S. Steel Corp., 19 N.J. Super 274, aff'd 12 N.J. 38 (1953).

The second deficiency of the builder's moratorium section is that it does not meet the due process mandate of the New Jersey Constitution, Article 1, Paragraph 1. Due process requires that the legislative purpose bear a rational relationship to a constitutionally permissible objective, Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028 (1963); U.S.A. Chamber of Commerce v. State, 89 N.J. 131, 155 (1982). Although the court should not review the wisdom of legislative action, it must determine whether such action is within constitutional limitations. N.J. Sports Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972).

No public purpose can be envisioned for the twelve to fifteen month moratorium. In the event that this case or any other case is not transferred to the Council on Affordable Housing, no public purpose is served by preventing the court from awarding an appropriate remedy authorized in Mount Laurel II. Any further delay is in fact clearly contrary to the public interest. 92 N.J. 199-200, 289-90, 291, 293, 341.

(e) The Preclusion of the Award of Builder's Remedies By the Council Violates Mount Laurel II.

The powers of the Council are set forth in detail in the Fair Housing Act. The Council must determine housing regions and regional need, adopt criteria and guidelines for fair share determination, adjustment and phasing (Section 7); propose procedural rules (section 8); approve regional contribution agreements (section 12); review petitions for substantive certification and grant, deny or conditionally issue substantive certification (section 14); engage in a mediation and review process where an objection to certification is filed or mediation is requested (Section 15).

The above-cited sections of the Act are completely silent on the availability of builder's remedies. Aside from the moratorium section, the remainder of the Act is also silent except for the strong statement of legislative intent in Section 3: "The Legislature declares 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." Where a municipality has petitioned for substantive certification of its housing element and ordinance, the Council is directed to issue certification if the plan is consistent with the Council's criteria and guidelines and the combination of eliminating cost-generative features and affirmative measures make achievement of the municipal fair share realistically possible. (Section 14a & b). The Council is not directed to consider whether vested builder's remedies are carried out in the municipal plan. The Council is similarly not directed to consider or empowered to award builder's remedies in the mediation and review process. Thus, builder's remedies are effectively removed.

As discussed in the preceding section on the builder's remedy moratorium, the builder's remedy is essential for enforcement of the constitutional right. Voluntary municipal compliance is encouraged under Mount Laurel II by the impending threat of the award of a builder's remedy. The system under the Fair Housing Act, in the absence of potential builder's remedy awards, contains no impetus for compliance. Municipalities have the option of filing a resolution of participation at any time; they may file a housing element at any time, and exhaustion of administrative remedies is not required if the housing element is filed before a lawsuit is commenced (section 9b). Once the housing element is filed with the Council, the municipality has six (6) years to request substantive certification (Section 13). Plaintiffs who file after 60 days before the effective date of the Act must seek mediation and review, and those who challenge requests for certification also must opt for the administrative process. If effective remedies are not

guaranteed, however, no developer will waste his time in an administrative challenge, and municipalities will have no reason to voluntarily comply. The Act's failure to preserve builder's remedies is a fatal flaw.

(f) The Administrative Process Pursuant to the Act Is Unconstitutional Because It Does Not Serve the Mount Laurel II Goals of Streamlining Litigation and Expediting Lower Income Housing Production

As discussed throughout this brief, efficient litigation processes and timely housing production are the primary goals announced by the Supreme Court in Mount Laurel II. 92 N.J. 199-200, 210, 286, 289-90, 291, 293, 341. The administrative process set up by the Fair Housing Act must serve these goals and thus the constitutional mandate, or be considered violative of the general welfare clause.

Two classes of litigation are created under the Act: (1) those filed more than 60 days before the effective date and (2) all other later-filed cases. (Section 16). The procedure in the second class of cases is as follows. Plaintiff must request review and mediation (Section 16b). If a municipal resolution of participation is filed within the Section 9a time period, exhaustion of the administrative remedies of the Act is required (Section 16b). The housing element must then be filed within five (5) months of the Council's promulgation of criteria. The municipality then may request substantive certification anytime within six (6) years of the filing of its housing element. (Section 13). Although plaintiff must request mediation and review, the Council is only empowered to act where an objection to substantive certification is filed. (Section 15b). Thus, if a municipality opted to wait up to six (6) years to request substantive certification, the administrative process would be dormant until that request was made and mediation and review was thereby triggered. Cases filed more than 60 days before the effective date of the Act and transferred to the Council would pursue the same course. (See discussion supra).

Surely the Supreme Court, in encouraging legislative action, did not intend to authorize such an administrative fiasco. With reference to the Housing

Allocation Report, the Court stated that it "was the kind of administrative action that arguably provided a means not only for resolving the litigated issues, but for achieving a much more substantial degree of voluntary compliance with Mount Laurel." 92 N.J. at 250-251. The administrative process set up by the Act does not encourage timely voluntary compliance; every municipality has the option to put off compliance for as long as seven (7) years. The system will not serve the goals of Mount Laurel and should be invalidated.

(g) Severance Is Not Appropriate and the Fair Housing Act Must Therefore Be Ruled Invalid

The severability clause in the Act (Section 32) is an aid in construction and not an inexorable command. State v. Lanza, 27 N.J. 516, 527 (1958). Severance will only be justified if there is "such a manifest independence of the parts as to clearly indicate a legislative intention that the constitutional insufficiency of the one part would not render the remainder inoperative." Affiliated Distillers Brands Corp. v. Sills, 60 N.J. 343, 346 (1972). Another test is whether the valid sections are so interwoven with the invalid clauses that they cannot stand alone. Inganamort v. Borough of Fort Lee, 72 N.J. 412, 422 (1977).

Hills contends that the following provisions of the Fair Housing Act conflict with Mount Laurel II: the definition of housing region, the authorization to reduce fair share based on existing housing stock, drastic alteration of the community or currently unavailable public facilities or infrastructure, the provision governing settlements, the builder's remedy moratorium and the administrative process set up by the Act.

The Legislature's intent in adopting the Fair Housing Act was to provide a "comprehensive planning and implementation response" to Mount Laurel II and to provide an administrative vehicle for resolving disputes outside of the judicial system. (Section 2 & 3). The Council's primary duties are to define regions,

promulgate fair share criteria and mediate disputes. In evaluating municipal compliance plans, the measuring stick is the regional need and fair share criteria promulgated pursuant to the Act. (Section 14a). Since the criteria for fair share and region are defective, the Council will not be able to properly certify municipal housing elements or mediate objections to substantive certification. Even the mediation process itself, which relies totally on good faith municipal efforts, is invalid. These sections of the Act are therefore so interwoven with the arguably valid remainder as to require a ruling that the entire Act is invalid. This Court should not rewrite the Act to remedy deficiencies, since to do so would usurp the legislative function. New Jersey State Policemen's Benev. Assoc. Local 29 v. Town of Irvington, 80 N.J. 271 (1979); Denbo v. Moorestown Tp. Burlington County, 23 N.J. 476 (1957).

CONCLUSION

For the aforementioned reasons, Plaintiff-Hills Development Company respectfully requests that this Court:

1) Deny Defendant Bernards Township's motion for transfer to the Affordable Housing Council;

2) Enter a judgment of compliance prior to November 22, 1985;

3) Declare the "expiration clause" a nullity; and

4) In the alternative, direct Defendant Bernards Township to adopt an ordinance extending the effectiveness of Ordinance #704 until further order of this Court.

Respectfully submitted,

BRENER, WALLACK & HILL

By: _____
Henry A. Hill

By: _____
Thomas J. Hall

By: _____
Thomas F. Carroll

Attorneys for Plaintiff -
The Hills Development Company

September 20, 1985

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ATTORNEYS FOR Plaintiff

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 TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION AFFIDAVIT IN OPPOSITION TO MOTION TO TRANSFER AND IN SUPPORT OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

STATE OF NEW JERSEY)
) SS:
COUNTY OF MERCER)

I, THOMAS JAY HALL, of full age, being duly sworn according to law, hereby depose and say:

1. I am an associate in the firm of Brener, Wallack and Hill, and have been assigned responsibilities in the above captioned case.

2. As part of those responsibilities, I have been asked to attend various meetings, to participate in discussions, to monitor statements of parties and their representatives, and to prepare reports and memoranda.

A reconstruction of events beginning with the filing of a Complaint by The Hills Development Company against Bernards Township on May 8, 1984, is set forth below.

3. A public meeting was held with the Bernards Township Planning Board on May 10, 1984, which included a presentation by the Township's Planner, Dr. Harvey S. Moskowitz, who outlined a variety of options which the Planning Board and Bernards Township could take in dealing with its Mount Laurel obligation, which Dr. Moskowitz indicated was approximately 1,272 units. [Dr. Moskowitz' reports were previously filed with this Court as part of motions filed by the Plaintiff in June, 1984.]

4. The period between May 10 and July 20, 1984 was occupied with discovery and motions and cross-motions for protective orders and summary judgment.

5. A hearing was held before the Honorable Eugene D. Serpentelli on July 20, 1984, with respect to the aforementioned summary judgment and discovery motions. While the summary judgment motions were denied, the Township apparently recognized that its existing Land Development Ordinance needed revision.

6. During the late summer, 1984, Bernards Township representatives informed counsel for Hills that the Township would be interested in settling the conflict. They indicated that, based on their planner's interpretation of their fair share and other zoning considerations, Bernards Township would need five hundred fifty (550) lower income units, equally divided between low and moderate income, to be built by Hills Development Company. The Township intended to re-zone the Raritan Basin portion of the Hills tract for 5.5 dwelling units per acre, with a twenty (20%) set-aside.

7. At a meeting held September 17, 1984, representatives of the Hills and the Township discussed the concepts of the proposal, but there was no draft

ordinance available for review. Hills expressed interest in pursuing settlement of the case as opposed to continuing litigation.

8. On September 18, 1984, a letter was sent from counsel for Bernards to the Court requesting the entry of an Order staying this litigation and immunizing Bernards from further builder's remedy suits. (See Appendix, Exhibit A; all Exhibit references herein are to Exhibits contained within the Appendix submitted herewith).

9. There was discussion between the Township and Court with respect to a proposed Order staying the litigation and providing immunity. A revised Order was submitted to the Court on October 10, 1984; and was rejected by the Court by letter of October 16, 1984. (Exhibit D).

10. On October 22, a public hearing was held in Bernards Township with the Bernards Township Committee and the Planning Board in attendance. The meeting focused around a discussion of the proposed Mount Laurel ordinance, which had been introduced on October 2 for first reading. At that hearing, the Township, and its special planning consultant, Dr. Moskowitz, reviewed the proposed ordinance and the planning rationale underlying it, including the proposed rezoning for the Hills. Dr. Moskowitz felt it was reasonable to rezone Hills due to the available infrastructure to serve the development. The meeting also included a discussion of the rationale for settling the case rather than continuing with litigation.

11. Also during October, Hills Development Company and its consultants began the process of examining the proposed ordinance with respect to its cost-generative and unnecessary standards.

12. On October 30, 1984, the Planning Board held a public meeting. Among the purposes of the meeting was adoption of amendments to the Bernards Township Master Plan in order to effectuate the Township's Mount Laurel II strategy (Exhibit L) and the making of recommendations with respect to the proposed Mount Laurel ordinance.

13. By letter dated November 5, 1984, I provided a four page memorandum to Bernards Township outlining difficulties which The Hills Development Company had with Bernards' proposed ordinance. (See Exhibit M). The letter also discussed several other areas of controversy between the Township and The Hills Development Company (including a sewer issue affecting property in the Passaic Basin and a pending matter in Tax Court) and suggested that it would be appropriate to settle all issues at once.

14. Bernards Township held a public hearing on November 5, 1984, and elicited considerable public comment on the proposed Ordinance.

15. **On November 12, 1984, the Township Committee adopted Ordinance #704 as its response to Mount Laurel II. (Exhibit B).**

16. **An Order was submitted by the Township and entered by the** Court on **December 19, 1984. This Order granted a 90 day stay of litigation and** immunity from other builder's **remedy suits. The Order also appointed George** Raymond as **Master in this** matter. (Exhibit E).

17. By letter dated January 3, 1985 (Exhibit N), counsel for Bernards Township provided George Raymond with a variety of material which Mr. Raymond had requested, including a copy of Ordinance #704.

18. A meeting with George Raymond and representatives of the Township and Hills was held on January 16, 1985. In advance of that meeting, I prepared a list of important issues which Hills wished to discuss. (Exhibit O).

19. That list formed the basis of the discussions which took place on January 16. At that meeting, it became clear that Hills and Bernards would be willing to settle this case, if agreement could be reached on all outstanding issues.

20. That meeting crystallized the thinking of both Bernards and The Hills, and is described in a Memorandum prepared by Harvey Moskowitz, The Township's Planner, Exhibit P).

21. At the urging of the Master and with the concurrence of the Township, on January 30, 1985, I sent a letter to Commissioner Hughey requesting a meeting to resolve the Passaic Basin sewer problem. (Exhibit Q).

22. During the month of February, discussions took place between consultants for Bernards Township and the consultants for Hills for prospective ordinance revisions. Hills also analyzed the off-tract improvement costs.

23. A meeting took place with representatives of Hills, the Township and the DEP on March 11, 1985. During the meeting, the NJDEP indicated it could accept a sewering scheme for the Passaic Basin which included either EDC or Bernards Township Sewerage Authority. DEP indicated that the choice was completely in the hands of the Township.

24. In March, 1985, a first draft of a proposed Stipulation of Settlement was prepared by me and transmitted to all parties.

25. Hills submitted a concept plan, to the Bernards Township Planning Board Technical Coordinating Committee, in draft form for discussion, in March, 1985.

26. I met and discussed the matter with the Defendants' attorneys, James Davidson, Esq., and Arthur Garvin, Esq. on March 29, 1985 and followed the meeting with a letter dated April 1, 1985, which included materials requested by the parties. (Exhibit R).

27. Concurrently, I requested the Tax Court to defer a scheduled hearing on the farmland assessment issue. Thereafter, I requested several other postponements from the Tax Court, until it appeared that the Township and Hills had achieved agreement.

28. A further exchange of correspondence between the parties occurred in April and a meeting of the parties was held on Wednesday, April 24.

29. At that point, it was agreed that there were still some relatively minor issues which needed to be resolved, although agreement was reached in principle on all major matters, including the extension of EDC's sewage collector lines to serve the Passaic Basin portion of the Hills' property.

30. A request was submitted by Bernards to the court to further extend the order granting immunity for additional builder's remedy suits until May 15, 1985. An Order granting this request was entered on April 29, 1985. (Exhibit G).

31. On May 8, 1985, the court-appointed Master wrote to the Court and requested an additional extension of immunity. This request was granted with the express understanding that no further extension would be granted. (Exhibit H).

32. Further discussions among the parties occurred in May, including a meeting held on May 24, 1985. Prior to that meeting, I redrafted the proposed Stipulation of Settlement and the appendices and provided them to counsel for Bernards Township.

33. In addition to the many meetings and conferences between the parties, there were numerous telephone calls made between the parties each month. Generally, the purpose of the telephone calls was to ascertain progress and to move the case along.

34. Additional redrafting of the Stipulation of Settlement was thereafter performed, and a meeting was held with Bernards Township on Wednesday, June 5, 1985 at which time counsel for Bernards Township indicated that he was satisfied that all of the issues were resolved as between Hills and Bernards Township, but that he would prefer having the final Stipulation of Settlement prepared by him rather than by the attorneys for the Plaintiff. We indicated that was not a problem and that, so long as the issues were resolved, we were not concerned with who drafted the Stipulation.

35. On June 12, 1985, counsel for Bernards wrote to the Court advising that agreement had been reached and requesting a compliance hearing date and an extension of immunity. (Exhibit I).

36. Also on June 12, 1985, George Raymond issued his report on the compliance package offered by the Township. While he generally supported the Township's efforts, he recommended changes in Ordinance #704 to comply with Hills' suggested design changes, and indicated that the Township's fair share of regional need would not be met unless some additional units were provided. He recommended that Hills supply 68 additional units of lower income housing, to be built during the period 1991-94 as a means of remedying the Township's shortfall. Hills agreed to provide the additional 68 units if the Township did not wish to contest the Master's recommendation.

37. On June 24, I requested that the Tax Court dismiss the appeal brought by Hills against Bernards Township. (Exhibit S). The action was in fact dismissed.

38. As we had agreed, Mr. Davidson redrafted the Stipulation of Settlement, and recast it as a "Memorandum of Agreement" (Exhibit T-1). The parties met again on July 18 to review the Memorandum of Agreement and a proposed Order of Judgment prepared by Mr. Davidson at which time it appeared that the only point of contention was the issue of 68 additional lower income units proposed to be built in the Raritan Basin to conform with the recommendations of the court-appointed Master.

39. There were other minor wording changes in dispute, but Hills provided additional language for Mr. Davidson's consideration, via a red-line markup (Exhibit T-2) of Mr. Davidson's original draft Memorandum of Agreement. We also reviewed the proposed Order of Judgment drafted by Mr. Davidson (Exhibit U), dismissing the

litigation and declaring the Township to be in compliance with Mount Laurel II, and indicated that the proposed Order of Judgment was acceptable to us, but we would not object to minor wording changes in it.

40. The parties met again on August 7 at which time Mr. Davidson indicated that the Memordandum of Agreement and proposed Order of Judgment were acceptable and that he was presenting the documents to the Township Committee. We have not seen a re-drafted Memorandum of Agreement and proposed Order, inasmuch as the responsibility for preparing the documents was Mr. Davidson's, but had assumed that some redrafted document was prepared for Mr. Davidson's presentation to the Committee.

41. On August 12, 1985, I received a telephone call from Mr. Davidson indicating that the Township Committee had decided not to authorize him to execute the Memorandum of Agreement. He indicated the Township would make a counter-offer to Hills which he did not think Hills would find acceptable.

42. On August 26, 1985, I attended a meeting in the Municipal Building of the Township of Bernards, with the following additional persons in attendance:

Henry A. Hill, Jr., Esquire and John H. Kerwin, representing The Hills Development Company;

Steven Wood, Township Adminstrator, and James Davidson, Esquire, representing Bernards Township; and

George Raymond, AICP, the court-appointed Master.

43. During the course of this meeting, Mr. Davidson informed all in attendance of the following:

a. Bernards Township had reviewed its options as a result of the legislation which had been enacted into law on July 3, 1985; and

b. Bernards Township would not execute the Memorandum of Agreement which he had drafted to settle all issues between Hills and Bernards;

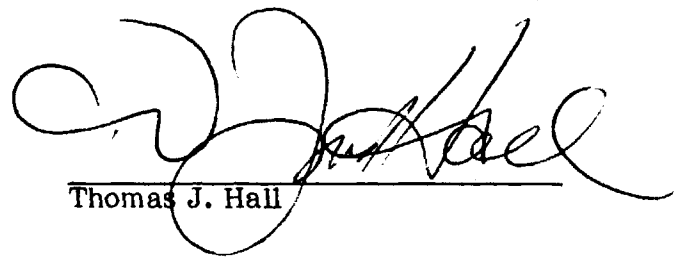
44. Mr. Davidson also discussed the fact that the ordinance adopted by the Township as part of its Mount Laurel II response, Ordinance #704, would "self-destruct" on November 12, 1985, and indicated that it was likely that any application for development approval filed by Hills under Ordinance #704 would not be considered until the Ordinance expired.

45. Mr. Davidson indicated that the Township Committee had authorized him to file the appropriate motion to transfer the matter from Court to Council, that the Committee had indicated that he was not to enter into any settlement agreement with Hills as drafted, and that the Committee was very interested in lowering the number of units to be built, both low and moderate income housing units as well as market units. Mr. Davidson indicated that he believed that Bernards would have its "fair share" reduced in proceedings before the Affordable Housing Council, and therefore, they would need fewer units from The Hills.

46. The clear implication was that if Hills would be willing to accept a substantial reduction in the total number of units permitted in the Raritan Basin pursuant to Ordinance #704, Bernards would not seek to transfer the case to the Affordable Housing Council. Hills was not willing to agree to a substantial reduction in units.

47. Mr. Raymond offered to attend the next meeting of the Township Committee, to inform them of the potential consequences of their actions, and Mr. Davidson indicated that Mr. Raymond would be welcome to do so, but that he (Mr. Davidson) did not believe such an effort would be effective in dissuading the Committee from its refusal to authorize him to execute the Memorandum of Agreement.

48. There has been no direct communication between the parties since the August 26 meeting. Attorneys for Hills were served with Bernards' transfer motion on September 13, 1985.



Thomas J. Hall

Sworn and subscribed to before me this 19th day of Sep. 1985

Kathie L. Faulmier

My Commission Expires
10-26-88

BRENER, WALLACK & HILL
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ATTORNEYS FOR Plaintiff

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 TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION AFFIDAVIT IN OPPOSITION TO MOTION TO TRANSFER AND IN SUPPORT OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

STATE OF NEW JERSEY)
) SS:
COUNTY OF SOMERSET)

John H. Kerwin, of full age, having been duly sworn according to law upon his oath deposes and says:

1. I am President of The Hills Development Company ("Hills"), a major builder and developer in Somerset County, a resident of Bedminster, New Jersey, and a member of the Somerset-Morris Homebuilders Association. I am responsible for the day-to-day operations of Hills, am familiar with the requirements of Mount Laurel II,

and have been actively involved in the decisions of Hills with respect to the development of that portion of the Hills' property located in Bernards Township ("Bernards").

Background to the Litigation

2. The Bernards portion of Hills' property comprises in excess of 1,046 acres, with 501 acres located in the Raritan Basin portion of Bernards Township and the remainder being located in the Passaic Basin portion of the Township.

3. Hills filed a lawsuit under Mount Laurel II against Bernards Township in May, 1984. At that time, the operative zoning of Hills' property in the Raritan Basin was two dwelling units per acre; and in the Passaic portion, one dwelling unit per two acres and no lower income housing was required in either zone under existing ordinances. In that lawsuit, we requested that our Raritan Basin lands be rezoned to allow 10 units per acre and that the Passaic portion of our property be rezoned to a gross density of 6 units per acre which rezoning would have allowed us to develop over 7,500 units on the property.

4. In response to the lawsuit, Bernards modified its zoning to provide 5.5 dwelling units per acre for the portion of Hills' property which lay in the Raritan Basin, and imposed a mandatory 20% setaside for lower income housing on the lands in the Raritan Basin portion of Hills' property. This zoning amendment, Ordinance #704, did not alter the zoning of the Passaic Basin portion of the Hills' land. This rezoning permitted the construction of a total of 2,750 units in the Raritan Basin plus the 273 units previously permitted in the Passaic Basin.

5. Bernards did not consult with Hills about specific ordinance language prior to the introduction and passage of Ordinance #704.

Hills rationale for settlement

6. Following the adoption by Bernards Township of Ordinance #704, Hills Management reviewed the advisability of settling the lawsuit on the basis of Ordinance #704.

7. The previous zoning, which was two to the acre, would have permitted us to build 1,002 units completely free of any obligation to build lower income housing, and the proposed new zoning would have permitted us an additional 1,250 market units along with 550 lower income units.

8. This was a higher ratio of low and moderate income units to market units than Mt. Laurel developers had previously found acceptable, but there were important considerations which led the management of Hills to favorably review the possibilities and recommend to the Board of Hills that we accept the terms of the Bernards offer.

9. During the development of the Bedminster portion of the Hills project, the management of Hills had developed a large and efficient organization, capable of producing housing in volume, thereby enabling Hills to meet the demands of the marketplace as quickly as possible. Prolonged litigation would cause major difficulties, both with the Hills' Bedminster development as well as the Hills' Bernards project, and, it was felt that it would place the effectiveness of the entire organization in jeopardy if the Hills completed the build-out in Bedminster and could not proceed in Bernards.

10. The Board of the Hills Development Company concurred with our analysis, and authorized the Hills' management on September 25, 1985 to settle with Bernards at the densities allowed in Ordinance #704. However, the Hills' management was requested to solve in the settlement the following issues affecting the development.

Issues of concern to Hills:

11. Deficiencies in Ordinance #704:

When Ordinance #704 was initially adopted by Bernards Township, there had been an attempt made not to involve the Hills, inasmuch as Bernards was facing

political pressure not to "give in to the developers". Therefore, the Ordinance was designed without our input, and, from our perspective, was deficient in the following ways:

(a) The design standards contained a number of ambiguous or unnecessary and cost-generative standards and had little relationship to the product types which Hills had been constructing in its inclusionary development on adjacent land in Bedminster Township;

(b) The Ordinance did not reflect any of the cost-reducing accelerated time frames for Planning Board review of projects which include lower income housing which "fast-track" provisions have been incorporated in many Mount Laurel II ordinances;

(c) There was no provision within the Ordinance for fee waivers for lower income housing, a standard element in Mount Laurel II ordinances which also offers a substantial cost-saving to inclusionary developers.

12. In addition, there were other important legal issues affecting Hills and Bernards which were negotiated (and ultimately resolved) so that the production of housing, including lower income housing, could begin promptly. These included:

(a) The Bernards "off-tract" improvements ordinance which our attorneys regarded as illegal (and which was ultimately declared illegal in litigation in which Hills was not involved). See New Jersey Builders Association v. The Mayor and Township of Bernards, decided February 25, 1985, Superior Court of New Jersey, Docket No. L-043391-83 P.W.

(b) Hills had hoped to begin a single-family lot program in the Passaic Basin portion of Bernards Township, for which it had received municipal approval, but for which a solution to a sewer issue had to be found. We wished to explore alternative ways of sewering that proposed development with Bernards, and regarded that portion of the development as an integral part of the overall Bernards project and as an important source of revenue, capable of assisting to offset costs incurred in other areas;

(c) As a result of what Hills believed to be an Assessor's error in 1982, the land within the lot program had been improperly assessed, and there was litigation pending against Bernards to correct the error.

It was the opinion of the parties that it would be desirable, in a settlement with Bernards, to dispose of all issues which were in dispute between the Township and Hills, and we devoted substantial time to resolving our differences with

the Township in the negotiations which took place between September, 1984 and July, 1985.

13. Hills, its attorneys and consultants met with the Township's attorneys several times during January, February and March 1985, and expended considerable effort, both in Hills' staff time and Hills' - paid consultant time, to meet with NJDEP, the Township, the court-appointed Master and other parties to resolve all issues which were considered to be directly or indirectly related to the Mount Laurel II case.

14. In March, 1985, the issues had been sufficiently crystalized to enable preparation of a draft Stipulation of Settlement and this Stipulation was the focal point of discussions during March-May, 1985.

15. By the end of May, 1985, all major issues of contention between the parties were resolved. It was agreed that the final draft Stipulation of Settlement would be prepared by Bernards' attorney, and drafting began on that document in June, 1985. Bernards Township's attorney advised Hills on June 5, 1985 that he considered all issues resolved and, on June 12, 1985, in fact wrote to the court to advise that agreement had been reached and requested from the court a hearing date for that settlement to be approved.

16. Despite the fact that all issues had been resolved and the settlement finalized, in early August of 1985 my attorneys advised me that Bernards had refused to execute the settlement documents presented to them, that the Bernards Township attorney had been instructed to prepare a "counter-offer" and that Bernards officials had threatened to seek transfer of this matter to the Affordable Housing Council in the event they could not reach agreement with Hills with respect to a substantial down-zoning of the Hills property.

17. Subsequent to Bernards' decision to refuse to execute the settlement documents, I was informed by Steven Wood, Bernards Township Administrator, that

an application submitted by Hills with regard to a concept plan will be logged in but somehow found to be incomplete, and no decision will be rendered prior to the expiration of the Ordinance on November 12, 1985.

18. Nevertheless, Hills intends to file a complete concept plan, in conformance with the Ordinance, as soon as final planning is complete.

Actions Taken in Reliance upon Ordinance #704 and Bernards' Representations.

19. In light of the adoption of Ordinance #704 and the Township's continuous representations to the Court and Hills that the Township wished to settle (and, in fact, that this matter was settled) Hills undertook a series of extremely costly actions in preparation for construction of the Bernards development. Actions taken by Hills in reliance on the adoption of Ordinance #704 and the Township's representations include the following:

(a) As a result of our original understanding with Bernards, we withdrew our suit in tax court against the Township with regard to the assessment of the property in the lot program, and did not file a protest against the 1985-86 assessment since, pursuant to our agreement, the underlying dispute would become moot;

(i) The statutory deadline to file an application under the Farmland Assessment Act and the general time for appeal of tax assessments have passed, all to the detriment of Hills;

(ii) There is no way that Hills can undertake meaningful construction on the lot program during this building season after September, 1985 and, therefore, Hills will be paying taxes at full development level on property which will be undeveloped, a scenario which would cost Hills many thousands of dollars which otherwise would not have been assessed;

(b) On the basis of the existing zoning, Hills has agreed to obtain additional sewage capacity from the Environmental Disposal Corp. (EDC) sewage plant. That additional demand makes financially possible the expansion of the plant and the expansion of the plant is mandated by this Court in the Bedminster case.

The EDC plant is financed through a N.J.E.D.A. bond issue in the amount of approximately $6,380,000, secured by property in Bernards. Failure to go forward with the Bernards development at the zoning provided for by Ordinance #704 would imperil the financing of the sewage plant and, hence, the investments of the numerous bondholders;

(c) Hills has also made substantial financial commitments for the reconstruction of Schley Mountain Road, which has been designed to be a four lane, main collector road to serve the entire Raritan Basin development, including the Bedminster Highlands at eight (8) dwelling units per acre and the Bernards property at the 5.5 dwelling unit per acre density. The design work has already been done, the approvals have been obtained and the contracts have been awarded. In order to expand the road, Hills was compelled to purchase three tracts of property in their entirety. It would not be necessary to totally reconstruct the road, at a cost of approximately $1,600,000, in the absence of the Bernards development. In the opinion of our traffic engineers, a road suitable for the demands of Hills/Bedminster traffic could be constructed for no more than $800,000;

(d) On the basis of the existing zoning, Hills has arranged to mortgage portions of its Raritan Basin project in order to obtain financing for the needed infrastructure development. The financing arranged in reliance on Ordinance #704 is in the amount of $6,500,000. The financing and security is based on the densities provided by the existing zoning of 5.5 units per acre. If Ordinance #704 were allowed to expire or is withdrawn, the security upon which the financing for much of the basic infrastructure for development is dependent would be substantially impaired;

(e) Pursuant to Ordinance #704 and the Stipulation of Settlement, Hills has expended many thousands of dollars for traffic engineering, transportation and improvement studies on surrounding roads including Routes 202/206, Allen Road and Schley Mountain Road, architectural design, storm water engineering, wetlands engineering and mapping (including a series of meetings with the Army Corps of Engineers) and market research, all of which will have been expenditures in vain if Ordinance #704 were to expire;

(f) Part of the draft Stipulation included the preparation of a concept plan for the development of the Bernards properties. In accordance with the provisions of Ordinance #704, Hills began work on the detailed concept planning. To date, hundreds of thousands of dollars have been expended in drafting a land use plan, a utilities plan, a circulation and traffic plan, and all other related documents, plans and studies, including an environmental impact statement and a community impact statement which are required by the Ordinance, and which will become useless in the event the Ordinance is allowed to expire;

(g) In anticipation of commencement of construction of its Bernards development, Hills has expanded its internal organization including the leasing of office space, expansion of its computer facilities and the development of a full-time, in-house construction staff. Hills presently has approximately 185 full time employees, the retention of which Hills may not be able to

assure if Hills is unable to commence construction of its Bernards development, all to the detriment of Hills, its employees and the lower income households which would benefit from Hills' inclusionary development;

(h) Hills had designed and obtained approval from Bridgewater Township for a water storage tank designed to serve The Hills projects without the Bernards additional units. It has now, in reliance on Ordinace 704, designed and is seeking approval from Bridgewater Township for a water tank which has been sized to serve the Bernards development. Without the additional Bernards units, Hills could have saved thousands of dollars in design, application and related fees.

In summary, Hills has expended a sum in excess of $500,000 on "planning and pre-start" in reliance upon Ordinance #704 and the Township's representations. If Ordinance #704 is permitted to expire, this money may have been spent in vain.

Most significantly, in reliance upon Ordinance #704 and the Township's representations that it wished to settle all issues arising due to this and other litigation, and our information that Bernards would not be receptive to "piecemeal" applications, Hills refrained from filing any formal development application following the November 12, 1984 adoption of Ordinance #704. It appeared to be the Township's earnest wish to cooperate with Hills to work out all problems, and we, in turn, had looked forward to a long-term cooperative relationship and did not want to prejudice that with any premature applications.

Now, the Township Administrator has advised me that any development application which Hills may file hoping to obtain vesting prior to the expiration of Ordinance 704 is most likely to be "incomplete".

Effect on Hills and Lower Income Households if Bernards were permitted to transfer to the Affordable Housing Council and if Ordinance #704 were to expire.

20. At the present time, there is a strong housing market, and it is feasible for Hills or other developers providing lower income housing opportunities to go forward with their inclusionary housing developments.

21. If Bernards is allowed to withdraw from its agreement with the Hills and if the expiration of Ordinance #704 is permitted, the ability of Hills to construct an inclusionary development would be seriously jeopardized. I believe the proposed transfer to the Affordable Housing Council is likely to cause two years of delay while the Township prepared its plan and the Housing Council prepared their regulations. My attorneys advise me that such a period of delay could easily be longer than two years. During this period of delay, the present housing market could well undergo a downturn. Such delay would make it far more difficult—probably impossible--for Hills to provide adequate numbers of lower income housing units to assist Bernards to meet its fair share obligation by 1990.

22. If Hills is permitted to commence construction pursuant to Ordinance #704 and the terms and conditions of the agreement as negotiated, Hills could complete the planning process, continue the process of installation of infrastructure, and commence the housing development process as early as 1986, with a view towards providing Bernards with significant numbers of lower income housing units by 1990. In fact, barring catastrophic developments, Hills would be prepared to guarantee the construction of all 550 lower income housing units required by the Ordinance by 1990.

23. If Ordinance #704 were permitted to expire or if Bernards were allowed to transfer to the Council, and Hills' ability to construct an inclusionary development were cast into doubt, Hills would be faced with carrying costs on the Bernards property of up to $10,000 per day, in addition to weekly cash flow obligations and payroll expenses for remaining employees.

24. At the present time, Hills has created a strong, effective construction and marketing organization. In order to keep an organization functioning, there must be a constant flow of work. In the event Ordinance #704 were to expire and Bernards were permitted to abrogate the agreement, Hills could not feasibly be "put on hold" while the issue of Mount Laurel zoning was settled.

Hills would have to assess the business consequences of waiting for the Affordable Housing Council, and there would be very strong economic pressure to begin the process of constructing on the Bernards property at two dwelling units per acre (assuming that this would be the underlying zoning on the site) without the construction of affordable housing (since, if Ordinance #704 were allowed to expire, there would be no ordinance requiring a mandatory set-aside of affordable housing, and it is economically unfeasible to build such affordable housing at a density of two dwelling units per acre).

25. Bernards has chosen to place the bulk of its affordable housing obligation on Hills. Other developers, including those with higher density zoning (6.5 dwelling units per acre) have either no obligation at all (Spring Ridge) or a very minor obligation (Hovnanian, a 12% setaside for moderate income housing only).

26. If Ordinance #704 is allowed to expire, not only would Hills suffer grave financial loss, it would also be impossible for Bernards to meet any substantial housing goal for lower income households, since:

(a) no exisiting developer, other than Hills, has any significant obligation to produce lower income housing; and

(b) if Hills is left with no choice but to build at two dwelling units per acre, it cannot provide lower income housing.

27. I am not aware of any other sizable tract of land in Bernards, other than Hills, which is in the "growth area" and which has sewerage available, which the Township could look to to provide substantial quantities of lower income housing. I am, frankly, at a loss to see how Bernards intends to provide its fair share of lower income housing without Hills, nor can I understand how Hills could provide lower income housing under the conditions which would result from the abrogation of the draft settlement.

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.

John H. Kerwin

Sworn to and subscribed before
me this 16th day of September, 1985

Kathie L. MacCracken

My Commission Expires 10-26-88

BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540
(609) 924-0808
ATTORNEYS FOR Plaintiff

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 TOWNSHIP OF BERNARDS and the SEWERAGE AUTHORITY OF THE TOWNSHIP OF BERNARDS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION AFFIDAVIT IN OPPOSITION TO MOTION TO TRANSFER AND IN SUPPORT OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

STATE OF PENNSYLVANIA)
) SS:
COUNTY OF PHILADELPHIA)

Kenneth John Mizerny, of full age, having been duly sworn according to law upon his deposes and says:

1. I am a professional planner licensed by the State of New Jersey and a landscape architect, employed by the planning and design firm of Sullivan & Arfaa, with principal offices at 2314 Market Street, Philadelphia, Pennsylvania, 19103. The purpose of this affidavit is to do the following:

a. To review Ordinance #704 and the remainder of the Land Development Ordinance currently in effect in Bernards Township, with respect to its potential compliance with Mt. Laurel II standards;

b. To outline steps which the Hills Development Company has taken to apply for development rights under that Ordinance; and

c. To indicate the consequences to the delivery of lower income housing if Bernards Township is allowed to delay the construction of the Hills project, through devices such as transfer to the Affordable Housing Council or permitting Ordinance #704 to expire.

Ordinance Review

2. I have been employed as a consultant to The Hills Development Company, with particular responsibilities for planning and coordination of The Hills Development Company's projects in Bedminster and Bernards Townships, New Jersey.

3. As part of my responsibilities, I have familiarized myself with ordinances, within and outside the State of New Jersey, and particularly those which have been adopted pursuant to the Mount Laurel mandate.

4. Hills Development Company (hereinafter "Hills"), has been actively involved in construction of a planned unit development (PUD) in the Township of Bedminster, adjacent to the Township of Bernards.

5. I have been actively involved in the planning for the Bedminster PUD, and have worked closely with Bedminster Township Planning Officials with respect to ordinance drafting, ordinance interpretation, and filing development applications in accordance with the ordinances.

6. I am also familiar with ordinance standards applicable in other New Jersey jurisdictions.

7. I have examined numerous ordinance standards for cost generative and ambiguous interpretations, inasmuch as these standards can create costly difficulties for developers.

8. As part of my responsibilities, I reviewed Bernards Township's Ordinance #704 in October, 1984. Based on previous analyses which I had performed for other municipalities, I examined the then-proposed ordinance to see if it contained cost generative standards. I applied two standards:

a. was the standard in the ordinance in excess of that necessary to protect the public health, safety and welfare; and

b. did the standard contain subjective or arbitrary provisions which could cause multiple interpretations and which would thereby extend the process of subdivision or site plan review or require the expenditure of additional money on redesigning and reengineering the development.

9. I also reviewed Ordinance #704 in light of its ability to permit the use of housing products which had been successfully built by Hills in Bedminster Township. Inasmuch as an ordinance which failed to permit the use of proven products would cause expensive work to be done in architectural redesigns and engineering, and inasmuch as Bedminster's ordinance had worked well to provide opportunities to build lower income housing, and since Bedminster was immediately adjacent to Bernards, such an ordinance comparison was deemed necessary.

10. I provided my review of Ordinance #704 via Memoranda, dated October 15, 1984 and November 28, 1984 addressed to John Kerwin, President of The Hills Development Company. I also requested the engineering firm of Lynch, Carmody, Guiliano and Karol, P.A. do an independent review of the engineering standards which was completed on March 4, 1985. Copies of these Memoranda are set forth as Exhibits V, W and X. (All Exhibit references are to Appendix).

11. In summary, while I found Ordinance #704 to be generally acceptable, I had objections concerning the setbacks, height limitations, the building separations, and similar bulk and yard requirements. In my view, modification of these standards would enable a developer to be more flexible, and provide more efficient and less costly planning and development. This is of particular importance in a development providing lower income opportunities.

12. The November 28, 1984 Memorandum was one of several discussed during a meeting held on January 16, 1985 and attended by representatives of the Bernards Township Committee and Planning Board, representatives of The Hills Development Company and the Special Planning Master, George Raymond.

13. At the January 16 meeting, Bernards Township agreed to make certain changes in Ordinance #704, reflecting the concerns contained in my Memorandum. Those changes and the concerns discussed by Hills and the Township are summarized in a January 23, 1985 Memorandum, drafted by the Township's Planning Consultant, Dr. Harvey S. Moskowitz, P.P. (Exhibit P).

14. Despite the initial agreement between the parties, however, it required several months of additional discussion before ordinance changes were drafted by Dr. Moskowitz and were designed to be incorporated in a revised ordinance prepared by Dr. Moskowitz. These proposed changes are described in Exhibit Y. I am not aware, to date, whether those ordinance amendments have been introduced by the Bernards Township Committee.

15. I also reviewed the Bernards Township Land Development Ordinance in light of New Jersey state law, and particularly the general purposes of the Municipal Land Use Law.

16. One of the purposes of the Municipal Land Use Law is to ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and state as a whole.

17. The Hills Development Company has property in Bernards Township bordering Bedminster Township. The Bedminster Township zoning adjacent to the site permits development ranging from ten dwelling units per acre to eight dwelling units per acre, with the eight dwelling unit per acre zoning immediately adjacent to the Hills project in Bernards Township.

18. It is my strong belief that the zoning provided for in Ordinance #704 is superior, in terms of sound planning and the Municipal Land Use Law, then was the case prior to the passage of Ordinance #704. The transition between eight dwelling units per acre and two dwelling units per acre as provided for in the prior ordinance was too abrupt and was not in accord with general planning principles. Ordinance #704, which provides for 5.5 dwelling units per acre on the site adjacent to the Hills Bedminster development, provides a far superior transition from a planning perspective.

19. On October 30, 1984, the Bernards Township Planning Board adopted amendments to the land use element of the master plan which recommended that the Raritan Basin portion of the Hills property be zoned at a density of 5.5 dwelling units per acre.

20. If Ordinance #704 were to expire, the Raritan Basin portion of Hills' property would be zoned at the prior zoning (one dwelling unit per 0.5 acre) or in the alternative, left with no zoning. Therefore, from a planning perspective, if Ordinance #704 were to expire, the resulting land use pattern would be clearly contrary to the land use element, a violation of soundly established planning principles and the Municipal Land Use Law.

21. Thus, it is my opinion as a professional planner that Ordinance #704, with the corrections as indicated in the Dr. Moskowitz Memorandum of May 21, 1985, and with the zoning providing the 5.5 dwelling units per acre adjacent to Bedminster represents sound planning and a compliance package which is in fundamental accord with what I understand to be the requirements of Mount Laurel II.

Steps Taken By Hills in Reliance on Ordinance #704

22. It is my understanding that Bernards Township has raised the issue of Hills' failure to file a development application under the provisions of Ordinance #704. Hills has not yet filed a formal application for the following reasons:

a. Hills believed that it was important to achieve certain changes that it regarded as desirable in the Ordinance before a full plan could be developed. Submission of a plan based on existing ordinance standards could mean the loss of certain building product types as well as loss of flexibility which had served both the public and the client well in prior development situations.

b. Notwithstanding this caution, Hills authorized the preparation of preliminary concept plans, to be done in accordance with the requirements of Section 707 of the Bernards Township Land Development Ordinance.

c. It was our clear understanding that Bernards Township would be hostile to any piecemeal submissions of development plans, without an overall approval of a concept plan. Hills wished to have Township approval before it spent substantial sums on engineering and other infrastructure investments for roads and utilities.

d. On March 18, 1985, representatives of the Hills met with members of the Bernards Township Technical Coordinating Committee (T.C.C.) to discuss a concept plan map on a preliminary, informal basis.

e. Members of the T.C.C. expressed reservations about certain aspects of the proposed plan, and indicated that their consultants would sit down with Hills' consultants to indicate what changes they thought desirable.

f. At a meeting held on May 3, 1985, between Harvey S. Moskowitz and Peter Messina, representing the Township of Bernards, and John Kerwin and myself representing Hills, we reviewed the entire Hills concept plan. Hills was asked to do the following things:

i. To redraw the plan to show intersections a minimum of 200 to 250 feet apart on collector roads;

ii. To provide better access to open space;

iii. To provide additional access to multi-family areas, so that no more than 80 dwelling units would be on any cul de sac or single road system;

iv. The loop road should be redrawn to show it as a loop road;

v. There should be deeper lots for lots fronting on collector streets;

vi. The plan should show additional buffer on properties next to single family areas where the property borders land not owned by Hills.

23. We took those comments, and based on our understanding of what the Township desired, began work on a revised concept plan, preparatory towards making a full development plan submission as soon as possible.

24. As part of my planning responsibilities, I have been coordinating preparation of community impact studies, transporation studies, environmental impact studies, and all the related studies which are required by Section 707 of the Ordinance.

25. It is my understanding that Hills Development intends to apply for a concept plan on approval for its entire Raritan and Passiac Basin project prior to October 1, 1985, inasmuch as its anticipated build out of units within Bedminster Township needs to be phased in accordance with its construction of infrastructure improvements in Bernards Township. The most recent concept plan containing the most recent revisions requested by the Planning Board is set forth as Exhibit J.

26. Withdrawal of the underlying zoning, as set forth in Ordinance #704, would make all of those plans worthless, despite the many hours of effort spent in preparation of them, since development of the properties at densities other than 5.5/acre would require totally different planning.

Consequences of Transfer to the Affordable Housing Council

27. Inclusionary development under Mt. Laurel is a recent phenomenon, but it certainly requires a healthy building market in order to survive.

28. The New Jersey building market has been characterized as a "boom and bust" building cycle, and it is problematic whether the current building cycle will survive more than another two years at its present pace.

29. In the event of a slowdown in the housing market, it will be more difficult for all builders providing inclusionary housing to continue to build at the current pace.

30. The only real effect of a transfer to the Affordable Housing Council would be to delay a project for at least two years, making it possible for a building "bust" to set in and rendering it impossible for a developer to be able to construct housing of any sort, much less affordable housing.

31. Similarily, even in a profitable building cycle, a developer needs to continuously plan and project for continuous activity on the part of his work crews, his suppliers, and his subcontractors. Failure to continue a building process, even during a healthy growth market, can render a specific project unfeasible.

32. Thus, if Hills were forced to turn away from development of the Bernards property, it would undoubtedly have to employ its planning, technical, and financial expertise elsewhere in order to keep the organization functioning during the healthy economy.

33. Ultimately, this would mean development of the Bernards project at lower density, without a mandatory inclusion of lower income units, at a later date than would result under Ordinance #704.

I certify that the foregoing statements made by me are true. I understand that if any statement contained herein is wilfully false, I am subject to punishment.

Kenneth John Mizerny

Sworn to and subscribed before me
this 18th day of Sept., 1985

VERONICA V. KOMANSKY, NOTARY PUBLIC
PHILADELPHIA, PHILADELPHIA COUNTY
MY COMMISSION EXPIRES DEC 26, 1987
Member, Pennsylvania Association of Notaries