RULS - AD - 1985 - 270

10/1/85

In Hills v. Bernards,

- 2 copies of Supplemental Notice of Motion
- 2 copies of Certifications of Davidson + Garvin
- 2 copies of Affidavits of Rago + Wood + Messina
- Original + copy of Brief
- Original + 2 copies of proposed form of Order

PGS - 69

FARRELL, CURTIS, CARLIN & DAVIDSON
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October 1, 1985

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

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

Dear Sir or Madam:

Enclosed for filing are the following:

1. Two copies of Supplemental Notice of Motion;

2. Two copies of Certifications of James E. Davidson, Esq., Arthur H. Garvin, III, Esq.;

3. Two copies of Affidavits of Louis P. Rago, Esq., Mr. H. Steven Wood and Mr. Peter Messina;

4. Original and one copy of Brief;

5. Original and two copies of proposed form of Order.

These defendants have not briefed the constitutional issues because it is our understanding that the court does not intend to hear constitutional issues at this hearing and further because the plaintiff has indicated in its brief that it will have a further opportunity to file a supplementary brief on whether the Fair Housing Act is an adequate response to the Supreme Court's decision in Mt. Laurel II.

We are familiar with the brief submitted by the Attorney General which is referred to in plaintiff's brief. It is our understanding that this brief has been submitted to Your Honor. We agree with and adopt the constitutional argument set forth therein.

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

Very truly yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: 
James E. Davidson

JED/sjm
Encl.
cc: Clerk of the Superior Court
Henry A. Hill, Esq.
Arthur H. Garvin, III,Esq.
Mr. H. Steven Wood

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

THE HILLS DEVELOPMENT COMPANY, Plaintiff, vs. THE TOWNSHIP OF BERNARDS, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. Civil Action SUPPLEMENTAL NOTICE OF MOTION FOR JUDGMENT DISMISSING THE ACTION FOR FAILURE TO STATE A CLAIM AND, IN THE ALTERNATIVE, FOR DISCOVERY

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

PLEASE TAKE NOTICE that on October 4, 1985 at 9:00 in the forenoon or as soon thereafter as counsel may be heard, the undersigned, Farrell, Curtis, Carlin & Davidson, and Kerby, Cooper, Schaul & Garvin, attorneys for defendants, will move before the Honorable Eugene D. Serpentelli, at the Courthouse in

Toms River, New Jersey for an Order dismissing this action for failure to state a claim and, in the alternative, for discovery.

In support of this Motion defendants shall rely on the pleadings and previous motion papers filed in this matter, and the papers submitted herewith.

Oral argument is requested.

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Defendants
Township of Bernards, et al.

By: _____
James E. Davidson

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

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

Dated: October 1, 1985

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

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

I, JAMES E. DAVIDSON, certify as follows:

1. I am a partner in the firm of Farrell, Curtis, Carlin & Davidson and am familiar with the matters stated herein.

2. This Certification is submitted in response to some of the factual allegations set forth in the Affidavits submitted by plaintiff, and the contentions of the plaintiff as set forth in their papers in opposition of the defendants' Motion to Transfer and in support of plaintiff's Cross-Motion for Judgment of Compliance.

3. Pursuant to recommendations in reports of consultant (now Township Planner) Dr. Harvey S. Moskowitz, which reports were commissioned following the decision in Mt. Laurel II in order to advise the Township with regard to its Mt. Laurel obligation and various alternatives for compliance therewith, the township adopted Ordinance 704, which is consistent with Dr. Moskowitz' reports and which is intended to adequately provide for the township's compliance with the Supreme Court's decision in Mt. Laurel II. This ordinance was adopted on November 12, 1984. The ordinance provides for the development of housing for low and moderate income families in two areas, one of which is a portion of the property owned by plaintiff herein.

4. Prior to the adoption of Ordinance 704 the parties jointly requested the court to enter an order staying the matter (including all discovery and motions) and precluding any non-party from commencing an action, or intervening in the present action, to seek or have a builders remedy in this action. The Township's purpose of this as stated in my letter dated September 16, 1984 (Exhibit A plaintiff's Appendix) was in order to permit the parties to engage in discussions aimed at pursuing settlement without outside interference. My clear recollection is that plaintiff initiated and was the moving force behind this request. Plaintiff appeared to be very concerned that if a third party was able to intervene and claim a builder's remedy that the plaintiffs share of the Mt. Laurel

II remedy would be diminished. The record indicates that Arthur Garvin, attorney for the Planning Board of the Township of Bernards submitted a revised Order to the Court on October 10, 1984 which was rejected by the Court by letter of October 16, 1984. In that letter the Court indicated that it had 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 Court also indicated that the Order as submitted by Mr. Garvin merely delays the interim process. The Township was unwilling to enter such a stipulation and did not pursue the stay request at that time.

5. Subsequent to the adoption of Ordinance 704 I submitted, by letter to the court, dated December 12, 1984, a proposed Order (consented to by all parties) which provided for a 90-day stay of the litigation and preventing third parties from obtaining a builders remedy based on the fact that we had adopted Ordinance 704 (and not on any alleged stipulation that our prior Ordinance was invalid). The Court entered the Order on December 19, 1984. That order also appointed George Raymond as the "court appointed expert to review the amended Land Use Ordinance and to report to the Court as to its compliance with Mt. Laurel II, and to assist the Court and the parties in resolving any outstanding issues where requested." In my letter to the court dated November 23, 1984, I indicated that it was our feeling that Ordinance 704 met the dictates of Mt. Laurel II

and that we were optimistic that other matters could be worked out so that the matter could be settled.

6. A number of meetings and discussions were held by the consultants for the township and Hills some of which included Mr. John Kerwin who is the president of Hills. It was made very clear that we, as attorneys, and other persons who appeared at such meetings and discussions, were carrying on negotiations but that we did not have the power or authority to bind the Township of Bernards and that the Township could only be bound upon the passage of a resolution accepting any proposed settlement. It was my feeling, and still is, that the Hill's attorneys are well aware of that situation (without our explanation) in that they deal with municipal governments on an everyday basis. It was specifically discussed with Mr. Hall (and I believe Mr. Hill) that in this specific instance I was unable to predict how the members of the Township Committee would vote. The plaintiff was made well aware that some members of the Township Committee opposed the settlement. On at least one occasion (and I believe more than one) Mr. Kerwin lamented that he was bargaining with people that did not have the power to settle the suit which resulted in his bargaining against himself. To my knowledge no member of the Township Committee ever sat in on or participated in the negotiations. On more than one occasion I mentioned to Mr. Hall (and I believe Mr. Hill) the real possibility that there would not be enough votes in favor of the settlement to

conclude it. Mr. Hall (and I believe Mr. Hill) acknowledged the problem. I specifically did this to be sure that they were aware of the possibility that a proposed settlement might not be approved by the Township Committee.

7. Nowhere in the Affidavits submitted by plaintiff is there an indication that either plaintiff or its attorneys were not aware that any settlement agreement would have to be approved in full by the Township Committee.

8. Throughout Mr. Hall's Affidavit he makes reference to "some relatively minor issues which needed to be resolved". He does not indicate what minor issues he is referring to, however, they apparently were not so minor as to be discarded. In Paragraph 34 of his Affidavit Mr. Hall indicates that "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 to have the final Stipulation of Settlement prepared by him." I do not recall that I ever made the comment that all issues were resolved. At the time of writing my June 12, 1985 letter I was of the opinion that we had arrived at a time when an agreement to settle the matter could be submitted to the Township Committee. Such agreement had not been drafted to our satisfaction nor had a proposed judgment been drafted. While I had discussed George Raymond's proposed report with Mr. Raymond on the telephone, his report had not been received. We did not receive his report until after the

date of my letter.

By letter of June 14, 1984 (Exhibit A attached), I sent Hills' attorney a draft Judgment and Memorandum of Agreement, and stated my concerns about whether several of the provisions thereto would in fact be acceptable to the Township Committee. I also noted that the draft had not been reviewed by the Township Committee or Mr. Garvin, the attorney for the Planning Board.

After a telephone conversation with Hills' attorney, Mr. Hall, to discuss his comments upon the draft Judgment and Agreement, I drafted what I had understood to be the agreement which was acceptable to Hills and which I was willing to submit to the Township Committee for consideration. I submitted the draft of that proposed Agreement to Hills' attorney in early July. My transmittal letter to Hills' attorneys (Exhibit B hereto) specifically told them that the proposed Agreement had not been reviewed by all of the members of the Township Committee, and that the Township Committee had not reviewed the newly enacted statute or determined its effect upon their decision about whether to enter into a settlement agreement.

My optimistic view of the prospects for an imminent settlement, as reflected in my letter of June 12, 1985, proved to be ill-founded.

In Mr. Raymond's report he recommended certain changes to Ordinance 704 including the providing of additional units. The

Township Committee did not have any desire to provide for an additional 68 units and Hills indicated that it had no desire to construct the additional 68 units. Mr. Raymond attempted to phrase the binding of Hills to construct the additional 68 units to Hills' desire to have sewer infrastructure provided to other Hills property (either by an affiliated corporation or by the Township) even though the property was located in a limited growth zone. No party to the litigation considered or negotiated with respect to those two items in that context. Mr. Raymond raised other points (including his method of fast-tracking) which were not considered acceptable.

In Paragraph 39 of Mr. Hall's Affidavit he refers to his red-line markup of my proposed settlement agreement. (He apparently sent this by letter dated July 18, 1985). It should be noted that the top of the proposed memorandum of agreement makes it very clear that such memorandum was only a draft. The following are some (but not all) of the changes that were made:

(a) Deletion of language in which the plaintiff would provide deeds, assignments, acknowledgements, etc. in order to restrict the development of the property as provided in the memorandum.

(b) A re-writing of the provisions relating to open space requirements surrounding its property including the deletion of large buffer areas requested by the municipality.

(c) A re-writing of the provisions relating to a

school site which severely changed the obligations of Hills with regard thereto and set up an unrealistic time frame which could result in the loss of the school site and/or the loss of the ability to sewer the school site prior to a time when the Township would expect a school to be built. They also modified a provision which would have provided that the school site (if not used for a school) would become permanent open space. The Hills version, in contrast, had the school site reverting to Hills.

(d) Hills also modified the proposed agreement to provide that the Bernards Township Sewerage Authority would agree to act as agent for Hills with regard to Hills sewer expansion.

(e) A suggestion for obtaining security relating to the use of temporary holding tanks was deleted.

(f) A provision relating to off-tract contributions of $3,240,000 was severely modified. The alternative suggestions by Hills required the documentation of various roads and allocations of the contribution, etc. There was also a provision relating to payment of the contribution.

All in all on a draft agreement of just over thirteen pages Hills proposed the deletion of 3 1/2 pages and insertions of 2 additional pages.

Paragraph 14 of the draft memorandum (page 12) refers to a concept plan to be attached which would serve as a general guide

to the Hills development. The agreement provides that such concept plan is acceptable to the Township and that Hills would obtain substantial rights and protection arising out of such plan. There was no concept plan.

Several additional items should be noted. The proposed memorandum of agreement was clearly a draft proposal of an agreement. To my knowledge no member of the Township Committee had ever seen the proposed memorandum of agreement. The suggestions made by Mr. Hall in his red-line markup were received by us subsequent to a meeting (held in mid-July) -- shortly after the effective date of the Fair Housing Act. At that meeting which was attended by Mr. Hill, Mr. Hall, Mr. Garvin, H. Steven Wood, the Township Administrator, and myself, we discussed in great detail how and whether this matter could be settled in view of the adoption of the Fair Housing Act. It was made very clear that we were skeptical. Mr. Hill presented a number of arguments as to why it would be to the committee's advantage to enter into a settlement agreement. At no time was it indicated that any party felt that a binding agreement had been reached. It is also my recollection that I had similar conversations with Mr. Hill and Mr. Hall subsequent to that meeting. Notwithstanding our reservations that the matter would be settled, we agreed to attempt to complete the paperwork so that if the matter could be agreed upon, we would have most of the paper work completed. It was in that context that Mr. Hall

thereafter submitted his red-line revisions of our proposed memorandum of agreement.

9. At that meeting or at a subsequent meeting (August 7, 1985, I believe) additional matters were discussed, one of which concerned a list of the roads that Hills expected to be constructed in accordance with the Township's off-tract improvement program. I indicated that I was not familiar with the roads on the list and that I would have to check them with Peter Messina, the Township Engineer. I discussed the list with Mr. Messina at a later date and he informed that the list did not properly reflect the improvements to be constructed under the program and that this list included a number of improvements which were to be constructed by Hills.

10. In plaintiffs moving papers reference is made to design and technical changes to Ordinance 704 which were allegedly agreed upon. No one has ever submitted a final list of agreed changes to me, nor have I ever submitted any such proposed changes to the Township Committee for their review. I am not aware that the Township Committee has ever reviewed any such changes. At one of the meetings referred to herein I raised that issue with Mr. Hall (and I believe with Mr. Hill and maybe Mr. Kerwin) who indicated that they were not fully familiar with the status of the technical changes either.

11. In Paragraph 40 of his Affidavit Mr. Hall states that I indicated that the memorandum agreement and the proposed

judgment were acceptable and that I was presenting the same to the Township Committee. I don't know if he means acceptable to me or to the Township. I do not recall the statement. I do know that the memorandum of agreement and judgment in their state as of that date, were not acceptable to me, and that several issues raised by Hills in its revisions thereto, concerning school site, off-tracts, open space, etc. had never even been considered by the Township Committee. I have not re-drafted the memorandum of agreement and, as noted above, nothing has been submitted to the Township Committee. At the meeting of August 7 with Mr. Hill and Mr. Hall, we again discussed whether or not this matter was settleable in view of the Fair Housing Act. Again, no participant at that meeting took the position that we already had a completed settlement. During this period of time (July and August) I specifically recall indicating that I was not overly optimistic that the Township Committee would be interested in the settlement. I also indicated that since June we had not had a full committee to discuss the matter because of vacations and other obligations and I further indicated that the decision of whether to settle or not was unlikely to be made until we had a full committee.

12. Meanwhile, during July, and shortly after enactment of the Fair Housing Act, I received a call from the Court's law clerk, Russ Burccheri, asking if we still wanted to schedule a compliance hearing, in view of the passage of the Act, and if so

what date we preferred. I told him that I did not know whether, in view of the Act, the Township Committee would still be interested in settling the case; and therefore he should not schedule a hearing. I had at least two other telephone conversations with Mr. Burccheri in July and August, to the same effect. In the August conversation I expressed doubt that a settlement would occur. I indicated to Hills' attorneys the essence of my conversations with Mr. Burccheri. With reference to the meeting of August 26, 1985, I do not recall indicating that Bernards Township would not execute the memorandum of agreement which I had drafted.

13. With regard to Paragraph 44 I do not recall that I personally discussed the "self-destruct" provision although the same was mentioned and I did not indicate in any way that "any application would not be considered until the ordinance expired."

14. With regard to Paragraph 45 I did indicate that the Township Committee had authorized me to file the appropriate motion to transfer the matter and that the Committee felt that the Fair Housing Act may result in a reduced fair share from that provided by the "consensus method". It was also acknowledged that this conclusion (reduced fair share) may be incorrect. If the fair share was reduced fewer units may be required from Hills.

15. Paragraph 46 is misleading. The discussion referred to therein was made for the purpose of seeing whether or not the

township should pursue with Mr. Raymond and the court its theory that the Fair Housing Act and the guideline referred to therein would result in a reduced fair share number for Bernards Township. If that were the case, it was suggested that some or part of the reduction would affect the Hills development. If, however, Hills would consider no number other than those provided in Ordinance 704, pursuing the matter before the Master and the Court would be futile.

16. With reference to Paragraph 47 the committee had never authorized me to reject the memorandum of agreement. As noted the Township Committee authorized me to make a motion to transfer.

17. Attached hereto (as Exhibit C) is a letter dated November 5, 1984 from Thomas J. Hall to me.

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.

JAMES E. DAVIDSON

Dated: October 1, 1985

COPY

June 14, 1985

Thomas J. Hall, Esq.
Brener, Wallack & Hill
2-4 Chambers Street
Princeton, New Jersey 08540

Re: Hills Development Company
v. Bernards Township
Docket No. L-030039-84 P.W.

Dear Tom:

Enclosed please find a proposed Judgment in the above matter. Attached to the Judgment is a proposed Memorandum of Agreement between the parties to be entered into in furtherance of the settlement. Please be advised that this is a draft and it has not been reviewed by my clients nor Art Garvin. I am especially concerned with some of the provisions relating to the sewage facilities and the concept plan.

The Judgment also contemplates the attachment of zoning amendments. These are the same amendments which were arrived at by Ken Mizerny, Harvey Moskowitz and Pete Messina. It is intended that they are to be supplemented by the change relating to Planning Board fee waiver for low and moderate units and the so called "fast-tracking". In that regard, it is our feeling that your proposal (and that set forth in George Raymond's report) is too inflexible to work for a large development such as yours in a municipality such as ours. We feel, however, that there is an accommodation that can be made which should be satisfactory to both parties.

Please review the documents and contact me at your convenience. I will be out of the office next week and during

Exhibit A

that period of time you may want to contact Art Garvin with any changes or suggestions you may have with regard to this draft.

Very truly yours,

James E. Davidson

JED/sjm
Encl.
cc: Arthur H. Garvin III, Esq.
Mr. George Raymond
Mr. Harvey Moskowitz
Mr. H. Steven Wood
Mr. Peter Messina

July 3, 1985

COPY

Thomas J. Hall, Esq.
BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540

Re: Hills Development Company
v. Bernards Township
Docket No. L-030039-84 P.W.

Dear Tom:

Enclosed please find a revised proposed Order of Judgment and Memorandum of Agreement in the above matter. I have made most of the changes that we discussed on the phone. In addition, I made some changes requested by Steve Wood. These latter changes, for the most part, relate to the construction of sewerage facilities. The proposed Order and Memorandum has not been reviewed by all of my principals.

We have not reviewed the new statute with our clients and do not know the effect, if any, this may have on our discussions.

Very truly yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By:
James E. Davidson

JED/sjm
Encl.
cc: Arthur H. Garvin III, Esq.
Mr. George Raymond
Mr. Harvey Moskowitz
Mr. H. Steven Wood
Mr. Peter Messina

Exhibit B

BRENER, WALLACK & HILL

ATTORNEYS AT LAW

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** MEMBER OF N.J. & PA. BAR
+ MEMBER OF N.J. & N.Y. BAR
++ MEMBER OF N.J. & GA. BAR
△ MEMBER OF PA. BAR ONLY

FILE NO.

November 5, 1984

James E. Davidson, Esq. 3000-04-02
Farrell, Curtis, Carlin and Davidson
43 Maple Avenue
Morriston, New Jersey 07960

Dear Mr. Davidson:

On behalf of The Hills Development Company, let me thank you for your letter to Henry A. Hill dated October 15, 1984, which enclosed a copy of the proposed amendments to the Bernards Township Land Development Ordinance. Both in your October 15th letter, and in meetings prior to the introduction of the ordinance and in subsequent telephone conversations, you have solicited our comments as to the settlement process. I have set forth our concerns and comments below.

At the outset, The Hills applauds the effort now underway to pass an ordinance which complies with Mount Laurel II standards. We recognize this is a difficult process, and believe that the Ordinance which we have seen is a good start towards an Ordinance which would enable us to settle the litigation we have brought against Bernards, and permit Bernards to obtain the repose which it seeks. Our comments, below, are offered in an attempt to be helpful, and to identify those points which we belive ought to be addressed as soon as possible. We have included comments as to issues in the proposed Ordinance as well as matters of concern to Hills which are outside of the Ordinance process.

I. The proposed Ordinance:

Page 3, section 404.f.
The Hills Development Company objects to the limit of 50,000 square feet of gross leasable floor area of commercial space. In initial conversations with Bernards, we had indicated that we were interested in 150,000 square feet of commercial as part of a package which included residential development at 5.5 du/ac.

Exhibit C

Section 1100

Section 1104: Contains a "cap" of 2,750 du; which does not reflect the fact that Hills has perhaps 20 acres of land in the R-8 zone which is in the Raritan basin, outside of the 500 acres ± about which most attention is focused. Hills intends to leave those 20 acres or so undeveloped and would like to transfer building credits from that area into the main landholding.

Section 1106: Contains a maximum building coverage requirement, which would hamper Hills ability to deliver lower income housing product. See the attached comments of Kenneth J. Mizerny, the project planner for Hills. Some of Mr. Mizerny's comments are highlighted in this letter, and we think that your office and Bernards' planner should look at all of Mr. Mizerny's comments.

Section 1106 also contains a height restriction of 35', and we think 45' feet would be preferable; and contains a front yard requirement of 25', while we think 10' would be preferable.

Section 1107. Please note Mr. Mizerny's comments.

Section 1110: We think a significant probability of unequal competitive advantage exists for those developers owning land in the R-5 zone as opposed to those owning land in the R-8 zone, both as to the percentage of units required and, as we will note below, in the concessions granted to developers in the R-5 zone not granted to the R-8 developers.

We have no comments at this time with respect to your proposed resale/marketing procedures. We are learning a great deal from the Bedminster project and may have some concrete suggestions for you based on our experience in Bedminster at a later time.

We would suggest modifying your phasing requirements to bring them in line with those used in Bedminster and approved by the Court, namely,

% low/moderate	% market
0%	up to 25%
25%	up to 50%
50%	up to 75%
100%	more than 75%

It would even be wise to permit some relaxation of these phasing requirements, since a developer may chose to do what Hills did in Bedminster—build all of the lower income units at once, after the market pattern of the unrestricted units was set.

Sections 1111 and 1112 : Please note Mr. Mizerny's comments.

II. Items outside the proposed Ordinance.

The proposed ordinance does not replace the existing Ordinance, and we have some major problems remaining with that. These include:

1. Submission requirements. We believe that the submission process is far more complex and cumbersome than is necessary for any protection of the public health, safety and welfare; would not withstand judicial scrutiny, and serves neither the Township nor the developer. You have recognized this by giving "fast-tracking" to other developers providing lower income housing; and we think that Hills is entitled to at least that much.

2. Waiver of fees. It is our understanding that your Planning Board has already waived fees for a competitive developer in the area so as to induce him to provide lower income housing. We understand that this waiver of fees was for the entire development, not just the lower income portion thereof. We would also like to have the development fees waived.

3. The Off-tract contributions need to be discussed between your engineer and ours, and a reasonable figure developed which both of our clients could agree to. We cannot live with the present formula with the higher density in place, and I think neither of us wants to leave this case with any issues unresolved.

4. We have some general problems with your design requirements. The building length, number, and mix requirements not only violate the previous (Leahy) Order, but also make it impossible for us to provide the kind of units which we are providing in Bedminster. Just one example: 605 D requires that no building have more than 8 units in it. In several of our product types, for which the architectural work is already done, for which construction has been completed, and for which there is an obvious market, we have buildings with 16 units or more, and we fail to see why we should either discard a winning formula or be forced to seek a waiver of this requirement. There are other design problems, such as the parking stall size requirement, the granite block curbing requirement, the shade tree requirement, and other illustrations referenced in our complaint. Rather than list all of the design problems in the letter, a better way to proceed with this is to have your planner and ours sit down together and work out a series of proposals which meet our mutual goals.

The tax issue we have previously discussed may well have worked itself out, in fact, since Hills intends to proceed to market the lots which were affected by the series of errors affecting the tax assessment. We may wish to review this, particularly if there is a delay in marketing those lots.

There is a significant problem we may face with respect to the lots we have begun to develop in the Passaic basin--the sewer issue. As you know, we had proposed serving the 268 ± units in the Passaic with a "community septic system", and have had some discussions with your Sewerage Authority as to how the systems would be monitored, serviced, and maintained. One proposal we had put forward was to have Environmental Disposal Corp. handle that process.

We have now learned that NJDEP is raising some questions as to the final approval of the community septic system proposal, based on preliminary data which they got from a project in Wisconsin. We have learned that later data seems to contradict the earlier findings and perhaps the issue can be resolved on a technical basis. However, we are also thinking that a better approach might well be to abandon the idea of a community septic system, and tie the lots into the Environmental Disposal Corp. plant or into the Bernards sewer system. If we do go forward with the EDC sewer possibilities, we would be willing to size the pipes, pumping station, and all other facilities so that they would serve only those lots we are zoned for in the Passaic and would covenant with you that we are not going to sewer any more areas within the Passaic basin.

Such a solution might be the best one, both from an immediate standpoint and also from a longer-run maintenance view, and we should discuss it. If this is a desirable way to proceed, Hills will have to work out the administrative problems with NJDEP and would have to expand its franchise area, and the cooperation of Bernards Township would be vital in both areas.

As I suggested, I am enclosing Mr. Mizerney's critique, and would be happy to assist in arranging meetings between Mr. Mizerney and your planning/technical staff, as well as between Bob Rodgers, our traffic engineer, and your engineering/technical staff. There are a series of important details which need to be resolved if we are to have a complete settlement of all issues in this case, which is, I think, the goal which both Hills and Bernards are trying to reach.

Best regards,

Thomas J. Hall

Enclosure
TJH-3
cc: Henry A. Hill
John Kerwin

SULLIVAN ARFAA
A PROFESSIONAL CORPORATION

MEMORANDUM

To: John Kerwin
Henry Hill
Thomas Hall
Pegi Schnugg

From: Ken Mizerny

Date: October 15, 1984

Re: Ordinance 704, Bernards Township
Project No. 840200

I have reviewed the above captioned ordinance and have the following comments.

1. Section 1106, Schedule of Area, Bulk and Yard Requirements.

My main objection here is the establishment of a maximum building coverage requirement for all unit types. Specifically, I have a problem with the 20% standard for one and two family dwellings and 35% for multifamily. The twenty percent for the single family will prohibit the Hills from developing the small lot product they are thinking about using. The 35% in the multifamily is very mariginal assuming a Village Green type product at 20-25 units per acre net density. If I recall correctly, the original 1981 settlement with Bernards excluded any type of building coverage requirement. We should stick to this. There is really no rational basis for having a building coverage requirement because stormwater runoff is computed using total impervious cover, not just building cover. Total impervious cover is a function of gross density, which in this case is established at 5.5 du/ac. The only thing a building coverage requirement does when coupled with other reasonable bulk standards is to place a back door limit on achievable net densities. In effect, it undermines the integrity of other bulk standards.

Additionally, I would like to see the front yard requirement of 25 feet reduced to 20 feet with the option in certain instances for a further reduction to 10 feet. This would enable us to use some of the site planning techniques we employed in Knollcrest.

Andrew T. Sullivan, AIA, AICP
Peter F. Arfaa, FAIA
Robert R. Heuser

Architecture, Planning, Landscape Architecture, Environmental Studies
2314 Market Street, Philadelphia, Pennsylvania 19103 (215) 567-7300
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2. Section 1107, Building Separation Requirements

I would recommend the following changes:

a. Reduce the front to front window wall to window wall separation from 75 to 60 feet.

b. Reduce the 25 foot requirement between any building face to R.O.W. to 20 feet with the ability to reduce further to 10 feet.

c. A new catagory should be added which allows that any building face with attached garages be permitted to be 5 feet from the edge of a cartway. This is the same as we have been doing in Fieldstone and Crestmont.

3. Section 1110F, Phasing for Lower Income Units

This should be modified to bring it in line with the requirement for Bedminster Township.

4. Section 1111, Common Open Space

Twenty percent common open space is required for all but single family detached housing. While this could work to our advantage since the Hills contemplates mostly single family, I think this provision could cause some contention during site plan and subdivision review. I'm sure the town is going to want to see more open space than the Hills is obliged to provide. I think it would be better to set out the standard for the whole project at the outset and avoid the inevitable controversy later.

5. Section 1112D, Streets

This provision requires that all streets provide a 40-50 foot minimum R.O.W. There is no relief for private streets. This could be particularly problematic in a townhouse product similar to Stone Run and Knollcrest.

6. In addition to the ordinance provisions above I would offer the following comments:

a. Unit Count: The ordinance puts a cap on the number of units in the Raritan Basin at 2,750 units; assuming 501 acres in the Raritan at 5.5 du/ac., the cap falls short by 5.5 units. Additionally, we can't get credit for that portion of the Water Tank site which falls in Bernards Township.

b. They did not give us any relief from the extensive submission requirements for Concept, Preliminary and Final approvals. Additionally, there is no accelerated approval process for developments containing lower income housing.

c. There is no waiver of fees for lower income housing.

d. There has been no adjustment to the Off-Tract Improvement Ordinance. With the new density we would be more than doubling our contribution.

e. The design standards for the commercial still have some strange requirements concerning number and sizes of buildings. We should ask that these be revised.

f. We should clarify, perhaps in letter agreement, that the Hills is no longer obliged to provide a school site or a 100 acre park.

g. The original consent judgement should be reviewed to identify those cost generative design standards which were excluded in the Judgement but, nevertheless, found their way into the Bernards Ordinance. These should be removed from the ordinance, at least for developments with lower income housing.

Kenneth J. Mizerny
Associate/Project Manager

KJM/cr

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

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

I, ARTHUR H. GARVIN, III, certify as follows:

1. I am a partner in the firm of Messrs. Kerby, Cooper, Schaul and Garvin and am the Attorney for the Planning Board of Bernards Township. I am familiar with the matters stated herein.

2. This Certification is submitted in response to some of the allegations set forth in the Affidavits submitted by plaintiff in opposition to the defendants' Motion to Transfer and in support of plaintiff's Cross-Motion for Judgment of Compliance.

3. On a number of occasions I was present at meetings between plaintiff's representatives and those of the Township where negotiations regarding settlement took place. It was always made clear to the other side that I as well as the other legal or technical representatives of the Township were not authorized or empowered to bind the Township of Bernards or the Planning Board in those negotiations. Specifically, the Planning Board of Bernards Township could only be bound upon the passage of a resolution accepting any proposed settlement.

4. It was my belief throughout the period of negotiations, and it still is, that plaintiff's legal representatives were and are cognizant that the settlement of litigation with municipal governments and/or planning boards is only finalized when the municipal body itself authorizes and accepts the settlement by resolution.

5. In one instance I specifically recall Mr. John H. Kerwin, the president of The Hills Development Company, exclaiming that he was bidding or bargaining against himself in the negotiations because those he was bargaining with could not bind the parties they represented.

6. At that last time I had contact with the other side no final agreement had been reached by the negotiators. The so-called red-line markup contained a number of changes and/or deletions of provisions that were of significant importance to the Planning Board.

Development Company and the Township of Bernards which has been more specificaly referred to in paragraph 19(a) in the Affidavit of John H. Kerwin.

2. There is a certain amount of clarification needed with regard to the tax appeal to which Mr. Kerwin refers. What was originally involved in that tax appeal was the issue of farmland assessment for tax year 1982. The manner in which Hills' tax appeal reached the Tax Court was by Hills' filing of a Complaint for correction of an error in the real property tax assessment pursuant to N.J.S.A. 54:2-41. No other tax appeals have been filed by the Hills Development Company subsequent to tax year 1982.

3. The attorney for Hills Development Company, Thomas J. Hall, Esq. and I discussed the relative merits of Hills' tax appeal on several occasions. I indicated to Mr. Hall that, in my opinion, the "errors" Hills were attempting to correct were not cognizable under N.J.S.A. 54:2-41 in that that statute was applicable to clerical errors such as typographical or transposition errors and not to mistakes in the actual making of an assessment which is what Hills was actually alleging. Martin Bressler, et al. v. Township of Maplewood, 190 N.J. Super 99 (App. Div. 1983). Hills was also attempting to bring into issue tax year 1983 (and possibly subsequent years as well) even though they had never filed an appeal for any tax year subsequent to 1982. Clearly, it was my opinion that the Tax

Court had no jurisdiction over the issues involved for the tax year 1982, let alone subsequent tax years where there were no appeals filed. In my opinion Hills' tax appeal basically was without merit and was lacking in significance to the Township of Bernards.

4. Subsequent to our conversations, Mr. Hall addressed a letter to the Honorable Lawrence L. Lasser, Presiding Judge of the Tax Court of New Jersey, wherein Hills withdrew its Complaint and requested that the Court dismiss the tax appeal. Hills was perfectly free to take such action and this action by Mr. Hall was not based upon any "arrangement" with me as to the merits of any other litigation.

LOUIS P. RAGO

Sworn to and subscribed
before me this 1st day of
October, 1985

SUZANNE MERZAROS
A Notary Public of New Jersey
My Commission Expires May 20, 1990

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

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

State of New Jersey:
ss:
County of Morris :

H. STEVEN WOOD, of full age, being duly sworn according to law, deposes and says:

1. I am the Administrator of Bernards Township and am familiar with the matters stated herein.

2. This Affidavit is submitted in response to some of the factual allegations set forth in the Affidavits submitted by plaintiff, and the contentions of the plaintiff as set forth in

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.

ARTHUR H. GARVIN, III

Dated: October 1, 1985

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

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

State of New Jersey:
ss:
County of Morris :

LOUIS P. RAGO, of full age, being duly sworn according to law, deposes and says:

1. I am a member of the Morristown law firm of Farrell, Curtis, Carlin & Davidson and, as such, am responsible for the handling of all real property tax appeals involving the Township of Bernards. I am, in fact, the attorney who was responsible for the file involving the Tax Court proceedings between Hills

their papers in opposition of the defendants' Motion to Transfer and in support of plaintiff's Cross-Motion for Judgment of Compliance.

3. I attended a number of meetings with the township's consultants and advisors and with Mr. John Kerwin, the president of the plaintiff in this matter and the plaintiff's attorneys and advisors. At no time had I or our attorneys or advisors been authorized by the Township Committee to complete the settlement of this matter. This fact was made known to the plaintiff and its attorneys and advisors on a number of occasions. I specifically recall Mr. Kerwin complaining about the fact that he was having settlement negotiations with persons not empowered to complete the settlement. He made the same complaint to me in a telephone conversation. I specifically recall hearing Mr. Davidson explain that we could not predict how the Township Committee would vote on the settlement and that some members of the Township Committee were opposed to the settlement. I believe, but I am not sure, that George Raymond, the court appointed expert was also aware of this problem.

4. At various times Mr. Davidson forwarded to me proposed Memoranda of Agreement and Judgment in this matter. The initial draft of a Judgment which had been prepared by Hills' attorneys was submitted to the Township Committee and was rejected. The later drafts were not submitted to the Township Committee because it was my understanding that they were not in final form

and that the parties' representatives had not agreed to either the language or the substance of the provisions. The Township Committee did not pass a resolution approving an agreement.

5. In the event that Hills had submitted either an application for approval of a conceptual plan for preliminary subdivision or site plan approval, the same would have been processed pursuant to the applicable procedures and law, provided in the Bernards Township Municipal Land Use Law, as amended by Ordinance 704. Any such application would not have been arbitrarily delayed.

H. Steven Wood

H. STEVEN WOOD

Sworn to and subscribed
before me this 1st day of
October, 1985

Marion C. Nixon

MARION C. NIXON-NOTARY PUBLIC OF N.J.
My Commission Expires September 20, 1988

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

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

State of New Jersey:
ss:
County of Morris :

PETER MESSINA, of full age, being duly sworn according to law, deposes and says:

1. I am the Township Engineer for the Township of Bernards and have been so since 1978. I am personally familiar with this litigation and the facts giving rise thereto and events which have happened since the inception of same.

2. At the present time the Planning Board of Bernards Township has approved, both preliminary and final, 100 lower income housing units on the tract owned by Hovnanian Company. Construction of these units is literally taking place at this time on the site.

3. Additionally, the tract known as the Kirby property being developed under the name of "the Cedars", has a conceptual approval from the Planning Board of Bernards Township for 90 lower income housing units.

4. There are additional projects in the PRN zone in Bernards Township which have not yet received approval in any form but which will produce additional lower income housing units.

5. During the course of the process resulting of the Bernards Township Committee's adoption of Ordinance 704, the Planning Board of Bernards Township ask that the Township Planner Dr. Harvey S. Moskowitz and I prepare a study of all sites available within the Township for the development of lower income housing. The results of that study were set forth in a memorandum by Dr. Moskowitz prior to the adoption of Ordinance 704. This memorandum could be made available at any time. The study showed that there were numerous additional sites within the township, including some property already owned by the township, which could be developed as lower income housing sites, but which were believed to be less appropriate for such

development than the sites set forth and at that time proposed under Ordinance 704.

6. I have been personally involved with the Hills engineering and technical representatives with respect to certain changes and modifications which Hills sought to be made to Ordinance 704. I am aware that there are statements contained in Affidavits submitted by plaintiff which would lead one to believe that such changes had either been completely resolved or were diminuous issues if not resolved.

7. While there were some consensus positions reached by myself and Dr. Moskowitz with plaintiff's representatives, no resolutions of such ordinance changes sought by Hills were ever specifically authorized by either the Planning Board or the Township Committee. In fact, I know that the following areas, which are of importance to Hills, still remain unresolved:

(1) Housing design -- patio homes with zero lot lines;

(2) The elimination of maximum housing size in a cluster development;

(3) Maximum building coverage;

(4) Building height restrictions;

(5) Curbing location and design standards;

(6) Building permit fees;

(7) Certain design waivers;

(8) Certain engineering standards; and

(9) The roadways covered by Hills' off-tract transportation contribution and the specific dollar allocations to such roadways. I was informed by Mr. Davidson that Hills had presented him with a list of road improvements which they indicated would be constructed as part of the Bernards Township Off-tract Improvement Program. The list included seven (7) improvements. Contrary to their assertion, four (4) of the improvements were not to be improved by the Township but were to be the sole obligation of Hills. These included: Schley Mountain Road; the intersection of Schley Mountain Road and Douglas Road; Layton Road; and, Douglas Road from Far Hills Road to the Hills entrance. One of the other improvements, Mt. Prospect Road is only partially in the improvement program. The other two, Allen Road and the Somerville Road extension are part of the off-tract improvement program.

8. In the Affidavit of Mr. Kerwin, he makes reference to a conceptual plan. Two representatives of Hills brought a conceptual plan to the Technical Coordinating Committee purportedly to solicit candid comments fromthe members of the Technical Coordinating Committee. The Technical Coordinating Committee found the concept plan contained numerous enginering and design deficiences and was substantially insufficient even

as a concept plan. No other concept plan has been submitted to date.

Peter G. Messina
PETER MESSINA

Sworn to and subscribed
before me this 1st day of
October, 1985

Marion C. Nixon
MARION C. NIXON · NOTARY PUBLIC OF N.J.
My Commission Expires September 20, 1988

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

DEFENDANTS' SUPPLEMENTAL BRIEF
IN OPPOSITION TO PLAINTIFF'S
CROSS-MOTION FOR JUDGMENT OF COMPLIANCE.

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Board of the Township of Bernards

On the Brief:

James E. Davidson, Esq.
Arthur H. Garvin, III, Esq.

POINT I

THE PARTIES DID NOT AGREE TO SETTLE THE CASE

Plaintiff's main contention in this matter is that the parties agreed to settle the case. This is factually inaccurate for a number of reasons. As pointed out in the various Affidavits submitted herewith it is clear that:

(a) The persons involved in the settlement conferences on behalf of the Township of Bernards did not have the authority to settle the matter and that those persons representing the plaintiffs were well aware of that fact.

(b) A municipality may only act pursuant to either an ordinance or a resolution duly adopted by its governing body. Woodhull v. Manahan, 85 N.J. Super. 157, 164 (App. Div., 1964) affirmed, 43 N.J. 445 (1964). No such action was taken by the governing body or the Planning Board of the Township of Bernards with regard to the alleged proposed settlement.

(c) The correspondence referred to and exhibited in both plaintiff's appendix and by defendants in this matter make it clear that many substantial issues were undecided at the negotiating level.

(d) Even if the negotiators had agreed on a proposed

settlement, such agreement was exeutory in that it was subject to the approval of the court in this matter. In order to approve such settlement and to execute a judgment in the matter, the Court would be expected to hold a substantial hearing similar to that described in Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359 (Law Div. 1984). No settlement agreement (if any) could be binding until that hearing was held. Additionally, it is noted that the Master's report in this matter and presumably plaintiff's position in this matter is not that Ordinance 704 on its face complies. The Master has suggested several modifications which are necessary before he believes a judgment of compliance should be granted. It is not entirely clear if the plaintiff takes the same position although they do mention on several occasions that Ordinance 704 basically complies and that what is required are some minor revisions. It should be noted here that plaintiff has not contested Ordinance 704 and has filed no supplemental pleading in this matter subsequent to the adoption of Ordinance 704. If plaintiff does not contest Ordinance 704 and if it is plaintiff's position that Ordinance 704 is basically compliant, the matter should be dismissed as there would be no dispute before the Court.

(e) In this state the rule of law is that settlement negotiations are made and carried on without prejudice to the parties. Thus, offers to compromise a pending controversy are

not admissible in evidence. The basis of this rule is founded in the policy that there should be no discouragement to amicable adjustment of disputes by a fear that, if not completed, one of the parties may be injured. Attempts in compromise have long been favored in the law. Rynar v. Lincoln Transit Co., Inc., 129 N.J.L. 525, 528, 529 (E. & A. 1942). In Winfield, etc., Corp. v. Middlesex, etc., Corp., 39 N.J.Super. 92 (App. Div. 1956), the court made the following statement with regard to offers of compromise:

> "The third, and presently most favored, viewpoint, is that which holds for exclusion on the basis of privilege, a rationale conceived in the social desirability of promoting settlements of controversies over disputed claims. McCormick, Law of Evidence (1954) §§ 76, 251, pp. 157, 539; McCormick, The Scope of Privilege in the Law of Evidence, 16 Texas L. Rev. 447, 457 (1938). This point of view was indirectly supported by the former Court of Errors and Appeals in Rynar v. Lincoln Transit Co., Inc., 129 N.J.L. 525, 528, 529 (E. & A. 1942), wherein, in maintaining that the settlement of a claim was not admissible as evidence of liability for negligence, it was said:
>
> '* * * The law favors compromises and because it favors them does not permit the bare fact of their occurrence to be interpreted as a guilty admission. It is clear -- and there is no contention otherwise -- that the disputed evidence of settlements was not admissible for the purpose of building up a case of liability against the bus company or its driver.'"

The same rule of law should be applicable to settlement negotiations in matters such as this. As pointed out by the Third Circuit in Outlook Hotel Co. v. St. John et al., 287 F. 115 (3rd. Cir. 1923),

"If every offer to buy peace could be used as evidence against him who presents it, then the policy of the law which favors the settlement disputes would never be attained.

'For this reason unaccepted offers to compromise claims or to purchase peace are inadmissible in evidence at the trial of controversies over the claims to which they appertain, and should not be permitted to affect the rights of the parties, or to influence the results of the trials.' Moffit-West Drug Co. v. Byrd, 92 Fed. 290, 292, 34 C.C.A. 351, 353.'"

Further, in Burns v. City of Des Peres, 534 F2d 103 (1976), cert. den., 429 U.S. 861 (1976), a case involving settlement negotiations in which a municipality was involved and involving constitutional allegations relating to the failure to rezone the plaintiff's property,the Court of Appeals made the following statement:

"In the present case the District Court ruled that all evidence relating to settlement negotiations by the parties between January 17, 1973, and May 29, 1973, would not be admitted in evidence. Burns argues that this ruling was erroneous because the negotiations between the parties were settlement negotiations, not compromise negotiations. Burns contends that although offers to compromise are generally inadmissible, offers of settlement are fully admissible. Burns' attempt to draw a fine semantical distinction between 'compromise' and 'settlement' serves no purpose. In a practical sense the technical distinction between offers to compromise and offers of settlement is largely illusory. However, although the record clearly supports the conclusion that the parties were actually engaged in compromise negotiations, it is not necessay to draw the distinction between compromise and settlement negotiations. We have recognized that evidence relating to both types of negotiation is inadmissible. Agrashell, Inc. v. Hammons Products Co., 479 F.2d 269, 288 (8th Cir.), cert. denied, 414 U.S. 1022, 1032, 94 S.Ct. 445, 38 L.Ed.2d 313 (1973); Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 139 (8th Cir. 1968)."

The negotiations that took place in this matter were never acted upon by the members of the Bernards Township Committee or Planning Board and no negotiations had ever reached the stage of finalization where such action could take place. Plaintiffs were well aware of this situation.

POINT II

THERE IS NO REASONABLE RELIANCE BY HILLS AND NO DETRIMENT SUFFICIENT TO CONSTITUTE MANIFEST INJUSTICE WARRANTING A DENIAL OF TRANSFER PURSUANT TO THE "FAIR HOUSING ACT."

Defendants in their moving brief at page 16 pointed to the line of cases holding that when litigation affecting an action is amended while the matter is before the Court (trial or appellate), the court should apply the statute in effect at the time of its decision. Principal among these cases are San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148 (1958), In re Petition of South Lakewood Water Co., 61 N.J. 230 (1972) and Kruvant v. Mayor of Cedar Grove, 82 N.J. 435 (1980). The plaintiff now answers that the new legislation (the "Fair Housing Act") should not be so applied to this case so as to warrant a transfer to the Affordable Housing Council. The plaintiff seeks to envoke the doctrine of reliance and alleges reliance to its detriment.

Let us examine reliance as alleged by the plaintiff, herein.

One must initially be mindful that the plaintiff, herein, is the same plaintiff who sued for and received in settlement a density increase to specifically provide for the construction of lower income housing in the Bernards Raritan basin in the matter known as Allan Deane Corporation v. The Township of Bernards, et al., Docket No. L-25645-75 P.W. That settlement was reduced to judgment in 1980 and thereafter this plaintiff did nothing to construct the lower income housing (or any other housing) in the

Bernards Raritan basin it would have this Court believe is so vital to the public interest. Not until post Mt. Laurel II did plaintiff seriously direct its attention to the Bernards Raritan basin. . . the reason: to seize an opportunity presented by the Mt. Laurel II decision to produce a yet additional number of market units in the Bernards Raritan basin which would yield profit theretofore unobtainable and probably unexpected.

To gain further initial insight and understanding as to what this plaintiff is really concerned about, let no one fail to remember that even before the enactment of Ordinance 704 on November 12, 1984, plantiff sought to introduce the issue of sewering its single family housing market units in the Bernards Passaic basin through its Environmental Disposal Corporation in a letter from its attorneys to the Bernards Township attorney dated November 5, 1984 (see Appendix C to James E. Davidson Certification). The Bernards Passaic basin sewering issue (clearly not a Mt. Laurel II issue) thereafter became wed to the Hills litigation. The assurance of the development of everyone of the plaintiff's Bernards Passaic basin market units (none are Mt. Laurel) through sewering became a principal goal for plaintiff in this litigation.

The specific allegations upon which plaintiff relies to show reliance are set forth in the Affidavit of John H. Kerwin dated September 18, 1985:

1. Kerwin Affidavit page 6, paragraph 19(a) - the tax

appeal issue. Comment: The tax court suit voluntarily withdrawn by plaintiff was a deliberate attempt by plaintiff to build a reliance argument. The tax court suit was without merit and the Tax Court had no jurisdiction to grant plaintiff relief. (see Louis P. Rago Certification). The defendants herein never entered into any agreement with nor asked anything of the plaintiff in terms of the settlement or dismissal of the tax court suit or any other tax assessment matter. Defendants had no interest in whether or not plaintiff withdrew the matter. That Hills chose not to protect any assessment or to file under the Farmland Assessment Act and that the time for appeal of tax assessments has now passed should not be relevant to the issue of reliance. Stated in the first paragraph page 3 of plaintiff's attorneys letter of November 5, 1984, to the Bernards Township attorneys is the following:

> "The tax issue we have previously discussed may well have worked itself out, in fact, since Hills intends to proceed to market the lots which were affected by the series of errors affecting the tax assessment. We may wish to review this, particularly if there is a delay in marketing those lots."

2. Kerwin Affidavit, page 6, paragraph 19(b) - Environmental Disposal Corporation sewerage plant expansion. Comment: Discovery is needed to ascertain the truth of plaintiff's allegations. Certainly the EDC plant expansion will be financed by alternate users who pick-up capacity not used in Bernards Township if that becomes the fact. Additionally there

is no reason to believe that the transfer to the Council will result in a significant decrease in the amount of capacity required for Hills development in Bernards Township. The conclusion is speculative.

3. Kerwin Affidavit, pages 7 and 8, paragraphs 19(c), (d), (e), (f), (g) and (h). Comment: All elements included in these paragraphs require discovery to ascertain the truth of plaintiff's allegations. It would appear that these elements are going to be required and necessary costs and expenses for plaintiff's development of its property in Bernards and Bedminster regardless of the outcome of lower income housing issues. Plaintiff's conclusions are speculative.

Throughout plaintiff's answering papers to defendants' application to transfer and in support of its Crossmotion herein, (see particularly, Kerwin Affidavit,page 7, paragraph 19(e) "all of which will have been expenditures in vain if Ordinance 704 were to expire;"; Kerwin Affidavit page 8 "If Ordinance 704 is permitted to expire, this money may have been spent in vain."; and Plaintiff's Brief pages 28 and 29 "Bernards now proposes, with the passage of the Fair Housng 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.") plaintiff seeks to convey the impression that what we now have before us is an "all or nothing" proposition: either plaintiff will build out its lower

income housing units in the Bernards Raritan basin under existing Ordinance 704 (550 units) or it will build none. No suggestion has ever been forthcoming from these defendants that no lower income housing would be sought from plaintiff in the Benards Raritan basin. To the contrary, defendants expect that some lower income housing units will be constructed on plaintiff's property in the Bernards Raritan basin, and will comply with their substantive fair share number which should be the same whether determined before this Court or under the procedures of the Affordable Housing Council. * This present round of litigation, sub judice, is only about which procedural mechanism is appropriate to yield what should be the same substantive result.

The principal of substantial economic reliance by a developer is clearly wnat plaintiff must prevail upon to defeat the retroactivity of the Fair Housing Act in this matter to the end that a transfer to the Affordable Housing Cuncil be ordered. The plaintiff should not prevail in that effort.

Defendant's recognize the substantial public interest to be served in the construction of housing for lower income persons. But there is also another substantial public interest to be protected in terms of Bernards Township and the region in which

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* Defendants would hope that the same law would apply in all bodies having jurisdiction.

it is located. Bernards Township should be developed from a Mt. Laurel housing perspective in the best way possible. The New Jersey Supreme Court in Mt. Laurel II recognized and acknowledged that an administrative rather than a judicial process would be best to achieve such development. That administrative process is now here in the form of the Fair Housing Act and its authors have had the experience of, at least, one and one half years of the Mt. Laurel II judicial results. The Act must be given a chance to produce the best result possible in fairness to the non-lower income public as well as the lower income public. In Bernards Township today the interests of lower income persons are being protected by production of Mt. Laurel housing in the PRN zone on the Hovnanian site and, shortly, to follow, on the nearby Kirby tract site. These two sites alone will produce a total of 190 lower income housing units. Additional housing is expected in that zone.

The danger to the public as a whole whether in Bernards Township or elsewhere, is that our Mt. Laurel judiciary and their appointed masters and experts have simply not had time enough to refine certain substantive elements of Mt. Laurel II to the point where the best result is achieved consistently. The tremendous changes that may be brought about to density by only what has evolved so far can bring about just those things the Supreme Court warned of in Mt. Laurel II: complete change

in the character of a community; unsolveable traffic circulation; and the inability of municipal infrastructure to meet demands generated. Such results will be unwanted by both the lower income public and the greater public at large of a municipality.

The plaintiff,herein, has not "proceeded" to do anything to bring about development of lower income housing under Ordinance 704. Every single action taken and expenditure incurred by plaintiff as alleged, assuming the truthfulness of same arguendo, was going to come about because plaintiff either 1). required same in connection with its Bedminster development, 2). required same because of its non-Mt. Laurel development of market units in Bernards Townshp or 3). required same because of whatever number of lower income housing units it will ultimately be mandated to set aside in the Bernards Raritan basin. Lastly, and as has always been the case since 1980 when this plaintiff first assumed a legal responsibility to produce Mt. Laurel (or Oakwood at Madison) housing, this plaintiff has not filed a single development application which provided for lower income housing.

Further, as reflected in the Certifications of James E. Davidson, Esq. and Arthur H. Garvin, III, Esq. dated October 1,1985, it was made very clear to plaintiff's representatives throughout the period following the institution of plaintiff's law suit that defendant's representatives legal or otherwise,

did not have the power or authority to bind the Township of Bernards. Plaintiff was put on notice by the Township Attorney that he was unable to say whether any form of negotiated settlement would be acceptable to a majority of the Township Committee.

The plaintiff herein is not only a sophisticated develper but also a most sophisticated litigant whose legal representatives are expert in the field of land use law and Mt. Laurel II. This plaintiff had to be aware that the legislature was going to pass legislation on the subject of lower income housing. Certainly, as initial drafts began to appear in 1985, the plaintiff must have believed that the legislature would act before plaintiff would be in construction. To think otherwise is simply incredible.

The plaintiff should not be permitted to claim reliance to its detriment for it can show none. Not only did plaintiff fail to commence construction, it failed to file one single preliminary application for development on its Bernards Raritan basin property. This plaintiff, objectively, had to know that the Mt. Laurel legislation, in whatever form it would ultimately take, would most surely alter the course of events in Bernards Township. To believe that plaintiff proceeded with no forethought or regard to legislative events is, again, incredible.

Lastly, as soon as defendant had had the benefit of

appropriate advice from their respective experts on the effect of the "Fair Housing Act" on Bernards Township, defendants' representatives gave notice to plaintiff of a concern as to the viability of settlement along the lines then being pursued. These defendants thereafter brought the present application to transfer this litigation to the Affordable Housing Council within an appropriate period of time.

POINT III

PLAINTIFF WILL NOT SUFFER MANIFEST INJUSTICE IF THIS MATTER IS TRANSFERRED TO THE AFFORDABLE HOUSING COUNCIL.

Plaintiff claims that the manifest injustice standards set forth in the Fair Housing Act (Section 16) would be met if this matter were transferred to the Fair Housing Counsel. It makes an analysis of the Act in which it concludes that a municipality will have 6-years before it has to petition for substantive certification of its filed housing element. This is an exceptional reading of the Act and one that should not be extended by the court. It would appear that if a motion to transfer is made, the same is and should be considered a petition for certification. Thus, it would appear that the time frame involved is probably somewhat in excess of a year but less than a year and a half. The actual procedure to be followed cannot be ascertained at this time and will not be until the counsel is able to promulgate its regulations and criteria. Several aspects are clear at this time:

1. The Legislature was aware at the time of the adoption of the Act that it would take time in order to fully implement the Fair Housing Act and its provisions and before the Affordable Housing Counsel could promulgate its regulations and criteria. Not only was it foreseen, but presumably it was intended. One thing that the Legislature did not want to occur

was to have a hit-or-miss consideration of these matters without full review of proper criteria. To argue that this period alone is enough to cause manifest injustice is much too short-sighted in view of the serious implications that have arisen under Mt. Laurel II and will arise under the Act. If this time frame was enough in and of itself to be manifest injustice, no case would be transferable.

2. The present case is still a relatively young case. The Complaint was brought in May of 1985 and issue was joined in June of 1985. Various motions were heard in July of 1985. Discovery has been commenced by way of Interrogatories. No depositions have been held. In November of 1985 the Township adopted an amendment (Ordinance 704) to its Municipal Land Use Law to provide a modification in the way it handled Mt. Laurel housing. No challenge has been made to Ordinance 704. No amendment has been made to plaintiff's pleadings to address Ordinance 704. No discovery has been held with regard to Ordinance 704. There is no reason to believe that the time frame in the court system would be any shorter than that afforded by the Fair Housing Act.

3. The issues involved in Mt. Laurel cases (and this matter) include serious planning issues for all municipalities and regions of the State as well as issues related to the proper application and construction of low and moderate income housing. These issues are both very difficult and very

important. (It should be noted that the Supreme Court granted a long stay in a number of litigated cases in order to properly decide Mt. Laurel II.) As noted in our earlier brief, the Legislature has decided that it strongly favors the mediation and review process as part of the overall solution to solve the existing problems. These procedures should not be evaded in order to grant speculative convenience to plaintiff.

4. Plaintiff in this matter has owned the property in question for more than a decade. It has participated in prior litigation which was settled. The Allan-Deane Corporaton v. The Township of Bernards, et al., Docket No. L-25645-75 P.W. One of the clear purposes of that settlement was to provide for the construction of housing which would help alleviate the shortage of housing for low and moderate income people under Mt. Laurel I, (Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) and Oakwood at Madison, Inc., et al. v. Township of Madison, et al., 72 N.J. 481 (1977) This information is set forth in detail in earlier proceedings in this matter. (see Dunham Affidavit). No construction whatsoever has taken place on the property although it is clear from reading the Judgment in the prior case that it was intended that housing which would help relieve the situation would result. Rather than construct that housing the plaintiff apparently decided to wait for a bigger bonanza if, and in the event that, the law changed in Mt. Laurel II. In doing so, no

additional housing was added to the housing stock in Bernards Township because of Hills efforts. Upon the change in law (Mt. Laurel II), the plaintiff in this matter again sued in order to gain more housing. When the Township amended its ordinance to provide for greater housing (November 12, 1985), the plaintiff was still not satisfied and carried on settlement discussions most of which related not to its Mt. Laurel housing but to other issues such as obtaining sewers for its market housing located on a different area of its property. The issues involved in the settlement negotiations had little to do with the Mt. Laurel aspects of plaintiff's development. (see proposed settlements in plaintiff's appendix) If time were such an important factor, the plaintiff could have accelerated the construction of its development long ago.

POINT IV

PLAINTIFF IS THE ONLY PARTY TO THIS ACTION.

Plaintiff also claims that the alleged delay in the construction of housing will result in manifest injustice to lower income families. The statute, however, makes it very clear that it's only the "party" to the action who can claim manifest injustice. The lower income persons are not parties to the action.[1] The only plaintiff in this action is Hills. Lower income persons have no control of this action, nor do they have any input whatsoever with regard to Hills or how they proceed. If the Legislature had intended to broaden those persons affected by "manifest injustice", it would have done so. The facts set forth in plaintiff's Brief pages 16 to 20 are speculative and are not necessarily likely to occur. It is interesting to note, however, that the word "guarantee" is now set forth therein relating to Hills' obligation to construct. Earlier in this litigation defendants argued that such a guarantee was required. Hills refused. (see Summary Judgment motion papers) Implicit in Hills' papers is the threat that Hills may not develop its property and provide any low and

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[1] Plaintiff cites Morris County Fair Housing Council v. Boonton Twp., supra. It is interesting to note that the court in that case defines the class of persons interested in the matter, such as low income persons, as "non-parties", 197 N.J. Super. at 364, 365.

moderate income housing.

Bernards is now in the process of and will continue to meet its obligation to provide housing for lower income families in accordance with the dictates of the Fair Housing Act and Mt.Laurel II. (see Messina Certification).

POINT V

Plaintiff apparently proposes a concept (Page 28 of its brief) that a court should not permit a municipality (or presumably the Affordable Housing Counsel) to modify any ordinance if the justification for such modification (either by transfer or by ordinance amendment or a combination thereof) is to acquire a lower fair share obligation (without regard to whether the same is justified). Furthermore, plaintiff contends that all this be done without agreement among the parties or a trial. No law is cited.

Some additional factors should be pointed out that are not entirely clear.

(a) The Township may or may not have a lesser fair share under the Fair Housing Act.

(b) The Fair Housing Act has many other provisions which relate to the construction of low and moderate income housing which may or may not be advantageous to municipalities but which are intended as part of the overall scheme to provide for lower income housing.

(c) The fair share calculation for any one municipality may be lower, the fair share calculation for some other municipality may be higher under the Act. Some fair share calculations may be the same. That does not make the Act unconstitutional.

The whole argument is based on a number of false and speculative factual and legal contentions.

POINT VI

In Point II of its Brief, plaintiff sets forth an argument which is completely contrary to the clear language of the statute and compares the settlement negotiations that have been going on with the mediation and review process held by the Affordable Housing Counsel pursuant to its regulations and criteria. There is absolutely no comparability. Plaintiff further seems to speculate that mediation and review before the Counsel would be useless. Defendant does not agree with that position and the same is clearly contrary to the intent and purpose of the Act.

POINT VII

In Point 3 of its brief plaintiff requests the court to grant conditional judgment of compliance entered in favor of the defendant. Several factual statements should, once again, be corrected.

1. Bernards has never stipulated that any prior ordinance did not comply.

2. Bernards has never indicated that it did not believe its current ordinance complied.

3. Bernards never indicated that it intended to have its present ordinance lapse.

The only fact stated correctly in plaintiff's Point 3 factual recitals is that defendant has made a motion to transfer this matter to the Affordable Housing Council. The issue involved is obviously unique. It would seem clear to the defendant that if the plaintiff believes Ordinance 704 is fully compliant that the case should be dismissed because the defendants should win. That, of course, is not what the plaintiff wants. The plaintiff is asking this Court to legislate (or prohibit the community from legislating) in the future without the municipality agreeing and without holding a trial. We know of no case that indicates that the court has that power. Additionally, the procedure suggested is clearly contrary to that set forth in Mt. Laurel II. 92 N.J. at 290 and Morris County Fair Housing Council v. Boonton Twp., supra.

On page 34 plaintiff states that a defendant is under an obligation to seek a judgment of compliance. No relevant law is cited nor any real reason why such is the case.

POINT VIII

Plaintiff claims that the clause which provides that the ordinance shall expire under certain circumstances is invalid for a number of reasons. Point A on page 39 indicates that it is invalid because it is a violation of 40:55D-62. While this is somewhat silly in and of itself it should be noted that Ordinance 704 with the expiration clause was passed by the Township Committee by a 4-1 vote. The rationale for the expiration clause is clear. In the event that the Mt. Laurel II judgment is not obtained within one year, for whatever reason, the ordinance would expire. Additionally it was clear from the very beginning of the Mt. Laurel II issues that alternative legislation was a real possibility. Thus, the Township clearly intended that it wanted its Mt. Laurel legislation to comply with that Mt. Laurel situation that would be of long term affect and not short term or short sighted. The ordinance was enacted in order to comply with the provisions of Mt. Laurel II. When and if that law was changed the municipality desired to be able to make necessary modifications to comply with the law in effect at the time. It recognized, of course, that those developers who obtained approvals either preliminary or final for their housing projects would gain the rights afforded them under the Municipal Land Use Law. To those that didn't it wanted it to be clear that Ordinance 704 would not be affective after November,

1985 unless a judgment of repose was in effect. Of course, what happened is that the law changed. A new statute was enacted. The municipality now desires, quite properly, to comply with the provisions of the Act as they are written. This plaintiff could have made application for preliminary subdivision approval or preliminary site plan approval or both. It did not do so. Furthermore, it seems quite clear that the provision in question is an integral part of the Act one in which the municipality relied on in voting in favor of the Act. In that situation as pointed out in plaintiff's Brief at page 60, severence of part of the ordinance such as requested here by plaintiff is improper.

CONCLUSION

For the reasons set forth herein, this matter should be dismissed or transferred to the Affordable Housing Council.

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Defendants, The
Township of Bernards, et al.

By: _____
James E. Davidson

Dated: October 1, 1985

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

This matter having been opened to the Court jointly by Farrell, Curtis, Carlin & Davidson, Attorneys for Defendants, The Township of Bernards, The Township Committee of the Township of Bernards, and the Sewerage Authority of the Township of Bernards, and Kerby, Cooper, Schaul & Garvin, Attorneys for The Planning Board of the Township of Bernards, and the Court having read the papers submitted herewith;

IT IS ON THIS day of October, 1985

ORDERED that the this matter be dismissed.

Eugene D. Serpentelli, J.S.C.

Papers received from movant:

( ) Notice of Motion
( ) Affidavit in Support of Motion
( ) Certification in Support of Motion
( ) Proposed Order
( ) Brief in Support of Motion
( ) Proof of Service

Papers received from respondent:

( ) Notice of Cross-Motion
( ) Affidavit in Support of Cross-Motion
( ) Certification in Support of Cross-Motion
( ) Affidavit in Opposition to Motion
( ) Certification in Opposition to Motion
( ) Proposed (counter) Order
( ) Brief in Support of Cross-Motion
( ) Brief in Opposition to Motion
( ) Proof of Service

Responsive papers received:

( ) Reply Affidavit
( ) Reply Certification
( ) Reply Brief
( ) Affidavit in Opposition to Cross-Motion
( ) Certification in Opposition to Cross-Motion
( ) Brief in Opposition to Cross-Motion
( ) Proof of Service

Other:

( )
( )
( )
( )