RULS - AD - 1985 - 380

11/8/85

In Hills Dev. Co. v. Bernards:

- Letter to court from Davidson
- Brief, appendix, and proposed form of order

PGS - 137

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FILE NO. 3000-04-02

November 8, 1985

RULS - AD - 1985 - 380

Honorable Virginia A. Long, J.A.D.
Superior Court of New Jersey
Hughes Justice Complex
CN-976
Trenton, NJ 08625

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

Dear Judge Long:

This office is in receipt of a motion filed in this Court in the above-captioned matter wherein Defendants seek a stay of all trial court proceedings. We are advised that said motion has been made returnable on Tuesday, November 12, 1985 at 10:30 a.m. On behalf of Plaintiff, The Hills Development Company, enclosed please find the original and two copies of a brief, appendix and proposed form of order in opposition to said motion.

Kindly have one copy of the brief, appendix and proposed form of order stamped "filed" and return same to the messenger for delivery to this office. By copy of this letter, the Honorable Eugene D. Serpentelli and counsel for Defendants are being provided with copies of said brief, appendix and proposed order.

Respectfully submitted,

Thomas F. Carroll

TFC:klp

CC: The Honorable Eugene D. Serpentelli (w/enclosures)
James E. Davidson, Esq. (w/enclosures)
Arthur H. Garvin, III, Esq. (w/enclosures)

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FILE NO. 3000-04-02

November 12, 1985

Superior Court of New Jersey
Elizabeth McLaughlin
Appellate Division Clerk
CN-006
Trenton, NJ 08625

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

Dear Ms. McLaughlin:

Please be advised that this law firm represents The Hills Development Company in the above-captioned matter. In response to a Motion filed by Defendants wherein leave is sought to appeal from entry of an interlocutory order, I enclose an original and five copies of a brief and appendix in opposition to said Motion. Also enclosed is a proof of service.

By copy of this letter, copies of said pleadings are being provided to the Honorable Eugene D. Serpentelli and counsel for Defendants.

Very truly yours,

BRENER, WALLACK & HILL

By: Thomas F. Carroll

TFC:klp

enclosures

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

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 al.

Defendant(s)

SUPERIOR COURT OF NEW JERSEY
SOMERSET/OCEAN *COUNTY*
LAW *DIVISION*

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

CIVIL ACTION

A copy of the within Notice of Motion has been filed with the Clerk of the County of *at* *New Jersey*

.....

Attorney(s) for

The original of the within Brief & Appendix *has been filed with the Clerk of the Superior Court in Trenton, New Jersey.* (Appellate Division).

.....
Thomas F. Carroll, Esq.
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 November 12, *19* 85 *, I, the undersigned,* delivered to James E. Davidson, Esq. and Arthur H. Garvin, III, Esq.
Attorney(s) for Defendants
at 43 Maple Avenue, Morristown, NJ 07960 and 9 DeForest Avenue, Summit, NJ 07901
by messenger *, ~~xxxxxxxxxxxxxxxxxxxx~~, the following:*

Brief and Appendix in Opposition to Motion Seeking Leave to Appeal from entry of Interlocutory Order

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: November 12, *19* 85 .

.....
Thomas F. Carroll, Esq.
Attorney for PLAINTIFF

BRENER, WALLACK & HILL
2-4 Chambers Street
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(609) 924-0808
Attorneys for Plaintiff/Respondent

THE HILLS DEVELOPMENT COMPANY, Plaintiff/Respondent 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/Movants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION Sat Below: Honorable Eugene D. Serpentelli

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO STAY TRIAL COURT PROCEEDINGS

BRENER, WALLACK & HILL
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Princeton, New Jersey 08540
(609) 924-0808
ATTORNEYS FOR Plaintiff/Respondent

On the Brief:
Henry A. Hill, Esq.
Thomas F. Carroll, Esq.

STATEMENT OF FACTS

On May 8, 1984, Plaintiff, The Hills Development Company ("Hills"), filed its Complaint in this matter.[1] (Da47) ("Da" references are to Appendix supplied by Movant). In said Complaint, Hills alleged, inter alia, that the land use ordinances of Movant-Defendant, Township of Bernards ("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 5, 1984. (Da86). 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 the trial 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 was obligated 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.; Pa2 to Pa3) ("Pa" references are to Appendix submitted herewith).

A draft immunity order (which was not entered) was submitted to the trial court by counsel for Bernards under letter of September 18, 1984. (Pa 11).[2]

On October 2, 1984, Bernards introduced Ordinance #704 (Da 109), the Township's response to its Mount Laurel obligation. On October 10, 1984, Bernards

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[1] The Movant's Statement of Facts refers to pre-Mount Laurel II litigation which occurred between the parties. Hills will not discuss same except to question its relevance to any issue in this matter.

[2] "Immunity orders" have been entered in a number of Mount Laurel II cases. Most commonly, such orders immunize municipalities from further builder's remedy lawsuits in exchange for a stipulation of ordinance invalidity and a "pledge" to voluntarily comply (rezone) within a specified period of time. See, J.W. Field Co., Inc. v. Tp. of Franklin, ____ N.J. Super. ____ (Law Div. 1985) (Docket No. L-6583-84 PW, Decided January 3, 1985), slip op. at 8-12.

applied to the trial court and submitted an Order which indicated that Bernards sought to achieve voluntary compliance and settlement of this litigation. (Pal3). In said proposed Order, Bernards again requested immunity from further builder's remedy suits and a stay of discovery in this litigation. By letter dated October 16, 1984 (Pal4), the trial court indicated that the proposed immunity order could not be entered. Counsel for Bernards was advised by the trial 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. (Pal4) (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 (Pal5), which provided immunity from further builder's remedy suits until April 30, 1985, was entered by the trial court on December 19, 1984.[3]

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[3] The Movant-Defendant's "Statement of Facts" indicates that no depositions have been taken, discovery has not been completed and that no trial has yet been held. Due to the Defendant's representations to the trial court concerning its decision to voluntarily comply and settle this litigation, completion of discovery was rendered unnecessary. (Da37). With respect to the indicated absence of a trial, the Defendant's land use ordinance (stipulated to be compliant by Bernards and Hills) is to be subject to a compliance hearing to be held on November 18, 1985. (Pal8). Bernards also mentions only the two immunity orders entered below. As discussed in the text herein, Bernards was granted three extensions of the original order granting immunity from builder's remedy lawsuits. Bernards has been immunized from builder's remedy lawsuits from December 19, 1984 to the present.

Due to Bernards' representations to Hills concerning the Township's desire to voluntarily comply and settle this matter, Hills did not contest the stay of litigation requested by Bernards and contained in the immunity order of December 19, 1984. (Da156 to Da157).[4]

Subsequent to the entry of the December 19, 1984 immunity order, representatives of the parties met on numerous occasions in order to resolve the relatively minor differences which existed. (Affidavit of Hall; Pa4 to Pa8). Items which were negotiated included certain cost-generative ordinance provisions, design standards, "fast-track" approval provisions, fee waivers for lower income units, off-tract improvements and sewer-related issues.[5] (Affidavit of John H. Kerwin, President of Hills Development Company; Da158, Da160).

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 the court below, again assuring the court that this matter was near settlement and that a continuation of immunity and the litigation stay was justified. The trial court then entered an Order, on April 29, 1985, continuing the immunity and litigation stay until May 15, 1985. (Pa99).

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[4] In addition to the representations made to the trial court in this litigation, 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. A settlement was reached with respect to this litigation under which the developer was allowed to proceed without changing his plans and Bernards would receive credit in recognition of its expressed good faith and diligence in seeking Mt. Laurel compliance. (Pa85 to Pa86).

[5] As to the items which were negotiated, it should be noted that the court-appointed Master largely concurred with Hills' positions. (Da132 to Da138, Master's Report). At the compliance hearing to be held in this matter on November 18, 1985, the trial court will determine whether Ordinance #704 should be revised as per some or all of the Master's recommendations.

Additional discussions involving the Master and the parties' representatives thereafter ensued. (Affidavit of Hall; Pa6 to Pa8). 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 the trial court. By way of letter dated May 13, 1985, the 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. (Pa102).

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 the trial 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 [the court-appointed Master] 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. (Pa103). (emphasis added)

During this period, alternative drafts of a Stipulation of Settlement passed back and forth between the parties. (Affidavit of Hall; Pa5 to Pa8).

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; Pal05) (Pa7).

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; Pa7 to Pa8).

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; Pa8).[6]

On August 12, 1985, Bernards' counsel telephoned counsel for Hills and advised that the Township Committee refused to sign settlement documents

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[6] 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. (Pa 5 to Pa 8). The Movant's Statement of Facts unfairly attempts to minimize Hills' attempts to develop pursuant to Bernards' Ordinance #704. Bernards' acknowledges the two concept plans submitted pursuant to the Township's land use ordinance but Bernards also asserts that Hills has taken "no other action in furtherance of construction" and "no significant steps toward... producing Mt. Laurel housing." (Db5). This position is contrary to the record.

concerning the agreement as negotiated. Bernards' counsel further advised that the Committee intended to explore its options pursuant to the Fair Housing Act. (L. 1985, c. 222). Bernards' counsel indicated that he was instructed to seek a lower number of units to be built by Hills. (Affidavit of Hall; Pa8 to Pa9). 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. (Ibid.).

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

The court below heard oral argument on Bernards' motion to transfer, and Hills' cross-motion for a judgment of compliance, on October 4, 1985. Following lengthy oral argument (Pa19 to Pa98) on transfer motions brought by Bernards and two other municipalities, the court delivered an oral opinion denying Bernards' motion to transfer. (Da3 to Da46). On October 16, 1985, the trial court entered an Order denying the Township's motion to transfer. (Da1). Bernards' motion for a stay of all trial court proceedings was served on October 23, 1985. Said motion was argued on November 1, 1985 and denied on that date. (Pa106). By way of correspondence dated October 28, 1985, the trial court advised that a compliance hearing will be held on November 18, 1985. (Pa18). The trial court does not anticipate that the compliance hearing will require more than one day of testimony. (Pa109).

This brief and its appendix are filed in opposition to Bernards' motion for leave to appeal from an interlocutory order. The Movant's Statement of Facts refers to certain conclusions of fact and law made below. (Db5 to Db6). The merits of said findings are discussed infra.

POINT I

DEFENDANTS HAVE NOT DEMONSTRATED ENTITLEMENT TO A STAY OF ALL TRIAL COURT PROCEEDINGS AND THE REQUEST FOR A STAY SHOULD THEREFORE BE DENIED.

Pursuant to the trial court's oral opinion of October 4, 1985, (Da3 to Da46), an Order was entered by the trial court on October 16, 1985 (Da1) wherein the Court memorialized its decision to deny the Defendants' motion to transfer this litigation to the Council on Affordable Housing. Defendants have filed an application seeking leave to appeal from said interlocutory Order.

Rule 2:9-5 provides in pertinent part that:

> [n]either an appeal, nor motion for leave to appeal, nor a proceeding for certification, nor any other proceeding in the matter shall stay the proceedings in any court in a civil action or summary contempt proceeding, but a stay with or without terms may be ordered in any such action or proceeding in accordance with R. 2:9-5(b).

Rule 2:5-6, which governs appeals from interlocutory orders, provides in pertinent part that:

> [t]he filing of a motion for leave to appeal shall not stay the proceedings in the trial court or agency except on motion made to the court or agency which entered the order or if denied by it, to the appellate court.

On November 1, 1985, the trial court denied Defendants' motion to stay trial court proceedings, (Pa106). The trial court did, however, grant Defendants' request for immunity from further builder's remedy lawsuits. (Affidavit of Thomas F. Carroll, Esq.; Pa110-50 to Pa111-10).

The question of whether to grant a request for a stay rests within the sound discretion of the court. Doughty v. Somerville & Easton R.R Co., 7 N.J. Eq., 629, 632 (E. & A. 1848); Ratzer v. Ratzer, 29 N.J. Eq. 162 (Ch. 1878); Jewett v. Dringer, 29 N.J. Eq., 199, 200 (Ch. 1878), rev'd on other grounds, 30 N.J. Eq. 291 (E. & A.

1878). As noted by the court in Jewett:

> Such applications are always addressed to the sound discretion of the court. And while it is quite manifest this power is indispensable to an efficacious administration of justice, yet it is also quite obvious, unless it is exercised with the utmost caution and discrimination, it may be made the instrument of wrong and ruin. Id. at 200.

"The rule of discretion in these matters is to determine whether or not the refusal of a stay will operate to defeat the object of the appeal". Grausman v. Porto Rican - Am. Tobacco Co., 95 N.J.Eq. 155, 167 (Ch. Div. 1923) aff'd 95 N.J.Eq. 223 (E.& A. 1923). An order should not be stayed if the effect of the stay would be to destroy the right established or protected by the order. In re Hudson County Newspaper Guild, 61 N.J.L.J. 37 (Ch. Div. 1938).

It is incumbent upon the moving party to demonstrate a need to maintain the status quo and a reasonable possibility of success on appeal. Grausman, supra, 95 N.J.Eq. at 167-168. See also Mc Michael v. Barefoot, 85 N.J. Eq. 139 (E.&.A. 1915). The moving party is also required to demonstrate that operation of the order or judgment below pending appeal will cause irreparable injury to the appellant. Grausman, supra, 95 N.J.Eq. at 167. Mere inconvenience and annoyance do not justify granting the extraordinary relief of a stay. Riehle v. Heulings, 38 N.J. Eq. 83, 85 (Ch. 1884) aff'd 38 N.J. Eq. 652 (E.&.A. 1884).

With respect to the need to preserve the status quo, Defendants are asking this Court to stay a compliance hearing pending disposition of Defendants' motion seeking leave to appeal Judge Serpentelli's October 16, 1985 Order. Allowing this case to lie dormant pending appeal would result in the very harm sought to be avoided by this Court when it denied Defendants' transfer application, that is, delay in the resolution of this matter. (Da40 to Da44). There is no need to preserve the status quo in this matter. To the contrary, there is a constitutional imperative underlying the trial court's desire to hold a compliance hearing and adjudicate this matter to its conclusion.

Defendants limit their stay request to the period ending upon this Court's decision as to whether to grant Defendants' application for leave. Such a stay would obviously be of little benefit to the Defendants and, if leave were granted, Defendants would certainly move to extend the stay. As this Court is aware, the question of whether to grant a stay is discretionary and, once a stay is issued, it is not likely to be lifted unless its original issuance appeared to be an abuse of discretion. In fact, this was a central reason underlying the trial court's denial of the stay application below. (Affidavit of Thomas F. Carroll, Esq.; Pa110-30). The trial judge anticipates that the compliance hearing will require one day uof testimony. (Ibid.). In light of the potential harm to lower income persons and Hills resulting from a stay of indefinite duration, Hills submits that the instant application should be denied.

With respect to Defendants' probability of success on appeal, it should first be noted that the likelihood of this Court granting leave to appeal the interlocutory Order of October 16, 1985 seems quite remote. Our Supreme Court has strongly stated its position as to interlocutory appeals in Mount Laurel litigation:

> The municipality may elect to revise its land use regulations and implement affirmative remedies "under protest." If so, it may file an appeal when the trial court enters final judgment of compliance. Until that time there shall be no right of appeal, as the trial court's determination of fair share and non-compliance is interlocutory. Stay of the effectiveness of an ordinance that is the basis for a judgment of compliance where the ordinance was adopted "under protest" shall be determined in accordance with the usual rules. Proceedings as ordered herein (including the obligation of the municipality to revise its zoning ordinance with the assistance of the special master) will continue despite the pendency of any attempted interlocutory appeals by the municipality.

Southern Burlington County N.A.A.C.P v. Township of Mount Laurel ("Mount Laurel II"), 92 N.J. 158, 285 (1983)(emphasis added).

While the above proscription may not be absolute, the holding clearly indicates that it is unlikely that the Township's appeal will be heard by this Court.

Assuming that this Court granted the Defendants' application for leave, Defendants' probability of success on the merits would indeed be remote. The standard on appeal would be whether the trial court's denial of the Township's transfer application amounted to an abuse of discretion.[7] As the trial court's well-reasoned and thorough 43 page opinion concluded, evidence of the injustice which would occur upon transfer was indeed evident and manifest. (Da43 to Da44). The probability of the Defendants' ability to demonstrate the trial court's abuse of its discretion is negligible.

Finally, there is nothing to indicate that the Defendants will suffer any injury, irreparable or otherwise, if their request for a stay is denied. The trial court proceedings which Defendants seek to stay would entail a compliance hearing and, ultimately, the entry of a judgment of compliance. A finding that the Defendant Township's revised ordinance is constitutional would certainly not be injurious to the Township. On the other hand, if the stay were issued, this matter would lie dormant and the injury to plaintiffs sought to be avoided by the trial court on October 4, 1985 would result.

In support of its application, Defendants allege that the trial court does not have jurisdiction to issue a judgment of compliance. Here, Defendants assert that the trial court erronously denied Bernard's transfer application and that jurisdiction rests with the Council. This issue has been extensively briefed with respect to Defendants' motion for leave. Suffice to say here that the Legislature specifically envisioned that certain cases would be retained by the courts. Fair Housing Act, Section 16(a). In the exercise of its discretion, the trial court held that this case should not be transfered to the Council.

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[7] See discussion infra concerning Defendants' asserted erroneous conclusion of law made below (i.e that the trial court erred in considering the interests of lower income people when it evaluated the question of transfer).

Defendants also assert that the trial court will be determining its fair share obligation pursuant to an "inapplicable standard" (i.e. the AMG/Consensus methodology, the methodology employed in countless Mount Laurel II lawsuits). Defendants argue that said methodology is "contrary to the Fair Housing Act". The Fair Housing Act does not call for application of a methodology. It envisions that criteria and guidelines will be adopted some months hence pursuant to which municipalities will submit fair share obligations subject to Council review. If the Act allows for "lower" fair shares, it is unconstitutional. In any event, Defendants' position lead to one result: no cases could be retained by the courts and adjudicated until it is someday possible to calculate a fair share pursuant to Council regulations. Such a result would be contrary to both the legislative intent and our Constitution. It should also be noted that, due to Defendants' year-long representations concerning Bernards' intention to voluntarily comply, Bernards has been granted extensive reductions in its fair share as calculated pursuant to the judiciary's accepted methodology. (Da 123 to Dal31 (Master's Report); Pa85 to Pa86).[8]

Defendants argue that, if the trial court enters a judgment of compliance, development will commence and irrevocably harm the Township. First, the Township may appeal the judgment of compliance and, upon a proper showing, acquire a stay. Even if a stay were not granted, the process of development application would require a period of months to complete. Defendants represent that Hills' pending development application will proceed regardless of whether a stay is entered by this Court. (Db13 to Db14). Since development cannot commence for months in any event, the Township will suffer no "irrevocable harm" due to development taking place "contrary to law".

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[8] In this regard, it must be noted that Defendants intend to submit at the compliance hearing a consultant's report and testimony concerning the Township's fair share obligation pursuant to the Act. The trial court has not foreclosed such evidence. (Affidavit of Thomas F. Carroll, Esq.; Pa110-20). However, since one could not calculate a fair share pursuant to the Act (in the absence of clairvoyance), it is somewhat doubtful whether such evidence will be receptively considered.

Defendants submit that "it is difficult to estimate the amount of litigant and court time that will be necessary in order to present the evidence of the case" at the compliance hearing. (Db6). At the oral argument of Defendants' Law Division motion for a stay, the trial judge had no difficulty in rendering such an estimate. In fact, due to Defendants' and Hills' stipulations concerning the compliance of the ordinance, and the Master's recommendation of approval with minor revisions, the trial judge estimates that the compliance hearing will require one day: November 18, 1985. (Affidavit of Thomas F. Carroll, Esq.; Pa109-10). Therefore, denial of this stay will certainly not subject Defendants to any burdensome trial proceedings.

The Defendants argue that they will have no effective way to challenge "a court-determined fair share number" since, if held in compliance, the Township will be the "prevailing party". (Db8 to Db9). In Mount Laurel II, 92 N.J. 158, 285, our Supreme Court specifically held that a municipality may act "under protest." If it does so, "it may file an appeal when the trial court enters final judgment of compliance." Ibid. At such time, the Township may appeal any or all perceived trial court errors and, if entitled, acquire a stay.

CONCLUSION

For the foregoing reasons, Hills submits that the Defendants have not demonstrated entitlement to the extraordinary relief of a stay. Hills, therefore, respectfully requests that the Township's application be denied in all respects. A proposed form of Order reflecting said request is enclosed herewith.

Respectfully submitted,

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

By: _____
Thomas F. Carroll

Dated: November 8, 1985

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

THE HILLS DEVELOPMENT COMPANY, Plaintiff/Respondent 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/Movants	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. L-030039-84 P.W. CIVIL ACTION (Mt. Laurel II) ORDER

This matter having been opened to the Court by Farrell, Curtis, Carlin & Davidson, attorneys for Defendants/Movants (James E. Davidson, Esq. appearing), in the presence of Brener, Wallack & Hill, attorneys for Plaintiff/Respondent (Henry A. Hill, Esq. appearing), for an Order staying trial court proceedings pending determination of the pending Motion for Leave to Appeal, and for good cause shown,

IT IS on this _____ day of November, 1985.

ORDERED that the Motion for a stay of trial court proceedings is hereby denied.

Virginia A. Long, J.A.D.

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

THE HILLS DEVELOPMENT COMPANY, Plaintiff/Respondent 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/Movants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) Docket No. L-030039-84 P.W. CIVIL ACTION Sat Below: Honorable Eugene D. Serpentelli

PLAINTIFF'S APPENDIX IN OPPOSITION TO MOTION TO STAY TRIAL COURT PROCEEDINGS

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

Contents of Appendix

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 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;

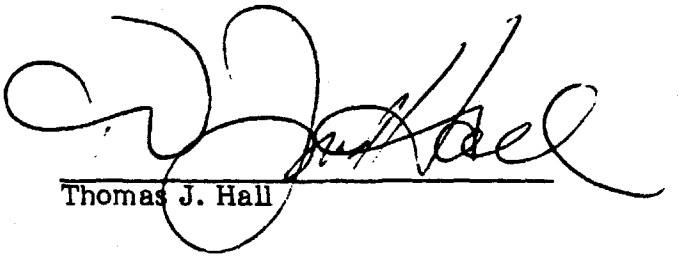
44. Mr. Davidson also discussed the fact that the ordinance adopted by the Township as part of its Mount Laurel II response, Ordinance #704, would "self-destruct" on November 12, 1985, and indicated that it was likely that any application for development approval filed by Hills under Ordinance #704 would 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. Paulmier
My Commission Expires
10-26-88

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(201) 795-4227

September 18, 1984

Honorable Eugene D. Serpentelli, J.S.C.
Court House, CN-2191
Toms River, New Jersey 08754

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

Dear Judge Serpentelli:

Enclosed are an original and two copies of a proposed Order Staying Discovery and Intervention for 45 days in the referenced matter. We have been asked to submit this Order to the Court on behalf of all counsel, and to respectfully request that the Order be signed and filed. All counsel have signed their consent.

Counsel and other representatives of the parties have been actively engaged in discussions aimed at producing a settlement which will be acceptable to the parties and the Court. All counsel agree that those discussions are at a stage where it would be beneficial to have the enclosed Order entered, in order to enable counsel and the parties to focus their time and efforts upon the attempt to reach a settlement and to prepare and consider an ordinance which would be the centerpiece of such settlement.

If the Order is entered, please return a conformed copy to us in the enclosed postpaid envelope. We are certain

that all counsel would be available to confer with Your Honor, in person or by telephone, to discuss the Order in case you have any questions.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: James E. Davidson

JED:nmp
Enclosure

cc: Henry A. Hill, Esq.
Arthur E. Garvin, III, Esq.

KERBY, COOPER, SCHAUL & GARVIN
COUNSELLORS AT LAW

RUSSELL T. KERBY, JR.
JOHN W. COOPER
ROBERT F. SCHAUL
ARTHUR H. GARVIN III
PHYLLIS B. STRAUSS

9 DE FOREST AVENUE
SUMMIT, NEW JERSEY 07901
201-273-1212

RICHARD C. MOSER
OF COUNSEL
JERRY FITZGERALD ENGLISH
OF COUNSEL

October 10, 1984

Honorable Eugene D. Serpentelli
Court House, CN-2191
Toms River, NJ 08754

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

Dear Judge Serpentelli:

Please find enclosed an original and three copies of the proposed form of Order to be executed by Your Honor in connection with the 45 day stay in this matter. If the Order is in a form satisfactory to Your Honor, all parties respectfully request that Your Honor execute same and that a copy be returned to the office of the undersigned in the enclosed, stamped envelope.

Your Honor's kind attention to this matter is most appreciated.

Respectfully yours,

ARTHUR H. GARVIN, III

AHG:pd
Enclosures
cc: Farrell, Curtis, Carlin & Davidson
Brener, Wallack & Hill

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI

OCEAN COUNTY COURT HOUSE
C. N. 2191
TOMS RIVER, N. J. 08753

October 16, 1984

Arthur H. Garvin, III, Esq.
Kerby, Cooper, Schaul & Garvin, Esqs.
9 De Forest Avenue
Summit, N. J. 07901

Re: Hills Development Co. v. Township of Bernards et al

Dear Mr. Garvin:

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 shae 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.

Very truly yours,

Eugene D. Serpentelli

Eugene D. Serpentelli, JSC

EDS:RDH

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.	:	ORDER STAYING ACTION AND
	:	PRECLUDING BUILDERS' REMEDIES
	:	FOR 90 DAYS

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, Kerby, Cooper, Schaul & Garvin, Attorneys for The Planning Board of the Township of Bernards, and Brener, Wallack & Hill, Attorneys for Plaintiff, The Hills Development Company and the Court having been informed that the Defendant, Township of Bernards has amended its land use ordinance to provide for

more than 1000 units of low and moderate income housing pursuant to Mount Laurel II; and the Court having been further informed that the parties are in settlement negotiations with regard to some aspects of the aforesaid amendment and other issues; and the Court being satisfied that such voluntary settlements of Mount Laurel II cases may be in the public interest;

It is on this 19th day of DECEMBER, 1984;

1. Ordered that this matter including all discovery and motions, is stayed by a period of 90 days;

2. Ordered that pending this stay period, during which the parties will have an opportunity to complete the settlement of this matter in compliance with Mount Laurel II, any person who shall commence an action, or who shall apply to intervene in this action, against any or all of the Defendants upon Mount Laurel II grounds shall not be permitted to seek or have a builder's remedy in such action;

3. Ordered that George M. Raymond, 555 White Plains Road, Tarrytown, New York 10591-5179 be appointed 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.

4. Ordered that the parties may apply to this Court for an extension of the stay herein ordered if further time is needed to work out this settlement.

Eugene D. Serpentelli

Eugene D. Serpentelli, J.S.C.

This Order is consented to both in form and substance.

Henry A. Hill, Esq.
Brener, Wallack & Hill
Attorneys for Plaintiff
The Hills Development Company

James E. Davidson, Esq.
Farrell, Curtis, Carlin & Davidson
Attorney for Defendants,
The Township of Bernards, et al.

Arthur H. Garvin, III
Kerby, Cooper, Schaul & Garvin
Attorney for Defendant
Planning Board of the Township
of Bernards

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI
ASSIGNMENT JUDGE

OCEAN COUNTY COURT HOUSE
C.N. 2191
TOMS RIVER, N.J. 08754

October 28, 1985

MEMORANDUM

RE: The Hills Development Co. v Township of Bernards et als.

Henry A. Hill, Esq.

Arthur H. Garvin, III, Esq.

James E. Davidson, Esq.

George M. Raymond

This will confirm that the compliance hearing in the above referenced matter has been set down for Monday, November 18, 1985 at 10:00 a.m.

If there are any counsel to whom a copy of this notice has not been directed, kindly see that they are advised.

Mr. Davidson is to file proof of publication of the notice of compliance hearing with the court prior to the hearing date.

EDS:RDH

Eugene D. Serpentelli, A.J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-30039-84 P.W., et al

THE HILLS DEVELOPMENT COMPANY,

Plaintiff,

vs.

BERNARDS TOWNSHIP,

Defendant,

And Consolidated Cases.

TRANSCRIPT
OF
MORNING SESSION

October 4, 1985
Toms River, New Jersey

B E F O R E:

HONORABLE EUGENE D. SERPENTELLI, J.S.C.

A P P E A R A N C E S:

BRENER, WALLACK & HILL, ESQUIRES,
BY: HENRY A. HILL, ESQUIRE
and
THOMAS J. HALL, ESQUIRE,
For Hills Development Company;

MC DONOUGH, MURRAY & KORN, ESQUIRES,
BY: JOSEPH E. MURRAY, ESQUIRE,
For Z. V. Associates;

FRIZELL & POZCYKI, ESQUIRES,
BY: DAVID J. FRIZELL, ESQUIRE
and
KENNETH E. MEISER, ESQUIRE,
For Pozcyki, et als;

GAYLE GARRABRANDT, C.S.R.
Official Court Reporter

A P P E A R A N C E S (Contd.):

FARRELL, CURTIS, CARLIN & DAVIDSON, ESQUIRES,
BY: JAMES E. DAVIDSON, ESQUIRE,
For Bernards Township;

HAROLD G. PIERSON, ESQUIRE,
For Borough of Watchung;

GAGLIANO, TUCCI, IADANZA & REISNER, ESQUIRES,
BY: JAMES H. GORMAN, ESQUIRE,
For Manalapan Township;

JOHN MC DERMOTT, ESQUIRE,
For Muscarelle.

THE COURT: All right. This is the return date of three motions to seek transfer to the Council on Affordable Housing, which have been consolidated only for the purposes of oral argument. Seems as though it was just an hour ago I finished five of these and five other municipalities.

What I'd like to do is have all of the cases argued, and thereafter I will, if I can, rule on them orally today; otherwise, of course, reserve decision.

All right. Suppose we start with Manalapan.

MR. GORMAN: Your Honor, James Gorman, representing Manalapan Township. We have asked for a transfer to the Housing Council; in the alternative, relief of a phase-in schedule to be imposed by the Court.

I'd like to point out firstly that we have gotten no opposition papers from Joseph Muscarelle, one of the named plaintiffs. There's been no briefs, no affidavits received by our office. I don't know if any have been filed with the Court. Makes it a little hard to argue in a vacuum, but we have not received anything.

Under Section 16, the issue is whether or not a transfer will result in manifest injustice to a party. Plaintiffs Pozcyki and Parser, in their reply, go through a number of different arguments, all of which I believe, except for one, are irrelevant.

The first argument they made, and I am sure that's been made in the other cases as well, is that it will cause a delay. The schedule cited in their brief is the schedule imposed by the Legislature, and I don't believe that we can really do much about that. That's the will of the Legislature.

We have been waiting a long time for the Legislature to act, and there's no argument made that the provisions for the various scheduling, the implementation of the Housing Council, are in any way unconstitutional. It's just that it's going to cause a delay. We are all stuck with that. Manalapan Township happens to like being stuck with that. The plaintiff obviously does not.

THE COURT: You concede that it would take longer to get it through the Housing Council than it would be to complete the case here?

MR. GORMAN: In Manalapan Township's case, Your Honor, I think it is fairly clear that it would take longer.

THE COURT: Okay.

MR. GORMAN: The other argument made by them is that the Housing Council has nothing to do. Well, that argument only makes sense if you assume that the Housing Council's got to adopt all the fair share number established in the proceeding before Your Honor.

I don't think that's necessarily the way the statute reads; and in fact, I think that's reading a lot into it. The Housing Council, I believe, could establish a number higher, possibly lower, and it would have to implement the -- sorry -- review the housing element. It would have to look at adjustments of the fair share. I think all the obligations and the responsibilities of the Housing Council would come into play in this case, just like any other case. There's no res judicata imposed by the Housing Council.

THE COURT: There's no transfer of the record, even, expressly provided for in the Act. And it appears as though they can start from scratch in your case.

MR. GORMAN: Yes, Your Honor, so that argument was made by the plaintiffs, and I do not believe it is relevant.

Another argument made is that the age of the case somehow has something to do with the transfer. The age of the case, I think, Your Honor, only is relevant as it applies to the manifest injustice issue. If it's twenty years old or two months old, it doesn't really matter, if there's no injustice. So again, I think that's a smoke screen.

The next argument made is that, somehow, Manalapan Township is wearing the black hats again, and they're wearing the white hats. We're recalcitrant, we're defiant, we are this, we are that.

Your Honor, I don't think that has any place here. We have a right under the Fair Housing Act to make the motion. We are seeking a transfer, and I think the recitation of the previous years of litigation and what's happened and what the Appellate Division said and what Judge Lane said is all irrelevant to this motion before Your Honor today.

Lastly, we come to probably the only

issue that has any bearing on the manifest injustice, and that is the expenditure of funds by the plaintiffs, specifically Poczycki and Parser.

There's been no allegations and no evidence submitted that Joseph Muscarelle has been manifestly injured by, or would be manifestly injured by, a transfer to the Housing Council. But as to the affidavit of Mr. Poczycki, Sr., on the expenditure of funds during this year, apparently approximately $200,000 or in excess of $200,000 had been expended; and that affidavit was submitted in a previous motion before Your Honor last month.

There's been no allegation or thought that the expenditure of funds was in vain. If they had to spend money to develop this property, they're going to have to do it whether it's on a settlement or a judgment by Your Honor, or whether it's an arbitration-mediation procedure through the Housing Council. It's going to cost money to develop the property.

The only argument I think that they have is, they spent the money sooner than anticipated. There's no real allegation that they

have spent money that they will not have to spend in the future if they go to the Housing Council.

The application fees haven't been paid yet. They have paid some fees for sewer hook-ups. They have paid engineering planning fees, legal fees; and all those things are going to have to be paid whether they develop the property through a court order or whether they do it through the mediation process, through the Housing Council. And I think that sole issue is the only evidence and the only fact before Your Honor on the issue of manifest injustice.

The other arguments made by the plaintiff are really smoke screens. You come right down to it, it's whether or not they have been manifestly injured, and it's not just a simple injury. It has to be manifest, and I don't believe we have one here.

There's no proof at all that they somehow have spent extra money if this case is transferred. And again, I just want to reiterate that we have no evidence, no affidavits or briefs from Muscarelle on that point.

In the alternative, Your Honor, if it's not transferred to the Housing Council, we seek a

phase-in pursuant to Section 23. I guess the initial threshold question is whether or not there is an action pending.

The wording of the statute says: A municipality which has an action pending. And it's clear that Manalapan Township still has an action pending in Superior Court. Maybe the statute's inartfully drafted, but on the simple reading of the statute, there's a case pending in Superior Court.

THE COURT: Well, I think you've got to read the whole phrase, and then it becomes very clear what it means. It says: A municipality which has an action pending or a judgment entered against it.

That means there's an action pending against it. It's not the municipality that's brought the action, obviously.

MR. GORMAN: Well, I guess, Your Honor, it depends on where you punctuate the sentence. If you put a comma after "action pending," and have the phrase "against it" modify "judgment," then I believe our argument --

THE COURT: Well, the comma isn't there. The comma is: A municipality which has an action

pending or a judgment entered against it after the effective date of this Act comma. And then it goes on to talk about a different set of facts.

You are suggesting that it's not clear there that they're intending to deal with somebody sued the municipality and the action is pending or a judgment has been entered after the effective date of the Act?

MR. GORMAN: Your Honor, yes. The way I read that first section, in Section 23, I believe it has two parts: A municipality which has an action pending, or a municipality which has a judgment entered against it. And I think that's a fair reading of the statute.

THE COURT: Okay. Well then, you wouldn't read it, then, in -- counterposed to the second scenario, which is a municipality which had a judgment entered against it prior to the date, and from which an appeal is pending?

The first sentence up to the comma, the first part of the sentence up to the comma deals with something happening after the effective date. And the second part deals with something happening prior to the effective date. Would you agree with that?

MR. GORMAN: Yes, Your Honor.

THE COURT: Okay.

MR. GORMAN: Your Honor, if under our reading of the statute Manalapan Township clearly has an action pending in Superior Court, the phase-in schedule is mandatory under the Act, the plaintiffs Poczycki and Parser, taken separately, have more than a six-year phase-in period for certificates of occupancy, which are slightly different than the final approvals phase-in in the Act.

However, the plaintiff Muscarelle only has a four-year phase-in, and if you combine the two, which is really the way that the application is being presented to Manalapan Township, it comes out to be less than a six-year phase-in, and the Act requires as a minimum that you have a six-year phase-in for the number of units that has been established as the fair share of Manalapan Township.

So whether you combine them as a whole and say they're less than six years, or whether you look at the two plaintiffs individually and find that Muscarelle's less than six, Poczycki's more than six, either way, Manalapan Township

believes that there's a need to phase in the units over a longer period of time.

And the language in the Act, if our interpretation of the way that Section 23 is phrased is correct, the mandatory phase-in would require, I believe, a plenary hearing to establish some of the factors listed in Section 23A.

THE COURT: Well, can we agree in this case that there was a consent order for partial judgment entered prior to the effective date of the Act?

MR. GORMAN: Your Honor, I think that's been established.

THE COURT: Okay. Then how does that fit into the statute? It would appear that the statute doesn't cover phasing in those circumstances, because it didn't want to deal with some very difficult legal, maybe constitutional, issues, which would have related to the judgments of the Courts and divesting of rights of parties under judgments prior to the effective date of the Act.

As to Muscarelle and Poczycki and Parser, as opposed to the balance of the fair share in

Manalapan, hasn't Manalapan committed itself, by a judgment which has not been appealed, to a phasing schedule prior to the effective date of the Act?

MR. GORMAN: Your Honor, I think that's something for you to decide. We have not appealed the consent order. We filed motions last month and were heard. The consent order was upheld. There's an action pending, and that's the basis for Manalapan Township's request for a phase-in.

THE COURT: If the balance of the fair share of Manalapan of a hundred and fourteen units, I think, over and above that which is consumed by the partial judgment, was phased until, let's say, 1992, would the average phasing of the entire nine hundred fair share be six years?

MR. GORMAN: If the balance of the one-fourteen has to be after 1990; is that --

THE COURT: Yeah.

MR. GORMAN: I think that the average is, if I had a pen and paper to work it out, probably, very close or over six years.

THE COURT: All right. Let me just explore two other areas briefly. You say that the age of the case should have nothing to do with

it. This is now the -- I think it's correct to say that it's the second-oldest Mount Laurel litigation in the state and, if not, it may be the third. I don't know. But it's right up there.

You don't see that the fact that it's been pending for nine years, or in that vicinity, is related to the question of manifest injustice to the extent that it can be resolved in court within X period of time, and can be resolved in the Housing Council in Y period of time?

You don't see that the age is related in that fact and, B, that one can make a reasonable assumption that a case that is nine years old has taxed the resources of all of the parties involved, municipality and the plaintiff, there's been an extraordinary amount of money spent on it, that that's not related to injustice?

MR. GORMAN: Your Honor, that there might be a relationship? I'm not arguing that. Sure, obviously, the longer something goes on, you might be able to show a longer period that you have been harmed or you have spent money.

I'm just saying that the pure chronological age of this case has nothing to do with whether or not -- has nothing to do with the

issue of injustice. There was nothing raised at that point in their brief, other than the case is old.

If you want to argue that the case is old and we have spent money, or if you want to argue something deriving from the age of the case, fine. But just the fact that it's old has nothing to do with whether or not there's an injustice.

THE COURT: The only other question I have is, I didn't hear any mention of the interests of the third parties to the Mount Laurel case.

MR. GORMAN: Your Honor --

THE COURT: I mean, we talked about the plaintiff. We talked about the defendant municipality. We didn't talk about the most important party.

MR. GORMAN: Your Honor, we didn't talk about that, because the Legislature didn't talk about that. In Section 16, the issue is whether there's any manifest injustice to a party. And clearly, there's no third party represented in this case representing interests of other people. There are no third-party beneficiaries entitled to standing under that section of the Act.

The Act clearly says: Injustice to a

party. And the only parties here are the developers and Manalapan Township.

THE COURT: In other words, Manalapan takes the position that lower-income people are not parties to Mount Laurel litigation.

MR. GORMAN: Your Honor, they are not a party to this litigation. They may have an interest in it, and if they had wanted to, I am sure that an organization representing those persons could have intervened.

But there is no -- there is no party in this action here other than the plaintiffs and -- the plaintiff developers and the defendant municipality.

THE COURT: The only reason they're in court is because the Court, the Supreme Court, has induced them to bring an action on behalf of those parties and to represent their interests; otherwise, the Court wouldn't have given them the prospect of builder's remedy. Why give such a windfall to the developers unless they wanted to accomplish the vindication of a constitutional obligation?

MR. GORMAN: Your Honor, I think by looking at the prior proposed wording of the Act,

and looking at the Act as it got adopted, I think draws that distinction.

The Act as it was originally proposed had language in Section 16 which said that the transfer will be denied -- let me go back -- transfer shall be required unless the Court determines that a transfer of the case to the Council -- I got my negatives wrong again. Let me start again.

It refers to the realistic opportunity for low- and moderate-income housing. And I think under that wording of the Act, you could look at whether or not, independent of -- third-party beneficiaries would be harmed or helped by a transfer.

But under the wording of the statute as it was enacted, it says it would result in a manifest injustice to any party. And clearly, there are no other parties to this litigation.

Also, I must point out that that is not an issue that was stressed or, I believe, even mentioned in the brief of Poczycki and Parser. I don't believe that they have raised that issue. And clearly, no one else has.

I understand Your Honor's position, and

I can see the rationale for it; however, it's not the Act that was adopted.

THE COURT: Well, Mount Laurel itself, Mount Laurel II, says in a rather lengthy discussion and footnote that this litigation is class action litigation, essentially, public interest litigation brought on behalf of a class.

I mean, it says that expressly. Are we to assume that the Legislature said we are going to ignore that?

MR. GORMAN: I think by looking at the proposed language and the adopted language for Section 16, that inference is clear, that the language referring to the realistic opportunity for housing to be built was dropped.

THE COURT: It seems to me if you take that argument to its logical extreme, you have just rendered the statute unconstitutional, because then it's not answering the needs of the class which the Court says, as a minimum, any act must.

This isn't an act that protects the rights of municipalities and plaintiff builders, or deals with that. It deals with the rights of lower-income people. That was the purpose of

requiring legislation, to define their rights.

And if you take the position that the whole question revolves around the rights of the plaintiffs and defendants, then the Act has missed its mark totally, and you've -- I don't know how a Court could sustain it, if that's the case.

I am not suggesting for a moment that you are right in your position, nor that I think that the Act is not constitutional. But I think that kind of argument will certainly lend to a conclusion like that. Okay? Anything further?

MR. GORMAN: No, Your Honor.

THE COURT: Thank you. All right. Mr. Meiser, I guess.

MR. MEISER: Your Honor, I think this case is unique in one important feature. Last night, we were before the Planning Board, as part of the consent order and part of the ongoing process, to get preliminary or general concept plan approval for the 886 low- and moderate-income units which were agreed to by the consent order.

I don't think there's any case in the state in which a motion to transfer is made in which we are actually mid-stream, not of

litigating, but of going through the administrative process to get the housing built.

Assuming that the motion to transfer is denied, according to our time schedule, we are to have the decision of the Planning Board by the end of the year, and then go immediately to the process for preliminary and final approvals.

So I think the situation really is unique, in addition to the fact that it's the second-oldest case in the state. So if the Court is going to balance the question of how quickly low-income housing would be provided through this method versus going to the administrative agency, there's simply no question the housing is imminent, perhaps more imminent than any other town in the state where this type of motion is made.

I think the second thing that is unique about this case is that the plaintiffs have expended $208,000 in getting sewer applications for the number of units permitted by the consent order and in their general development plan. If the town is right, if there were a transfer, we start all over, it's conceivable that the Council could say: No, we want you to build up in northern Manalapan, and don't provide a single

unit of low-income housing down in southern Manalapan.

In essence, every penny that's been spent in reliance on this consent order could be wiped out. So we think, just like the cases on Wednesday, this is the one end of the spectrum in which there can be no doubt there is manifest injustice.

On the second point, as to what Section 23 means, now I think the best that Manalapan can come up with is that there's two possible ways of construing the statute. I mean, I think that's the best you can make out of their argument.

Assuming for the moment that the statute's ambiguous, which we don't concede, I think you do need to analyze that in the light of the underlying policy. I think the underlying policy is not to undo what has already been done, not to undo the consent orders that have already been entered into.

I think in Section 22, the Legislature thought about cases that have been settled and said: Let's give them first priority in the state moneys that are being appropriated as part of this Act, and let's make sure that the judgment of

repose is airtight.

And I think those are the benefits by Section 22 that were given to towns such as Manalapan.

If we get to the point that the statute is ambiguous in twenty-three, I think policy insists that it be read in a meaningful way. I don't think it is a meaningful way to read this section to undo a consent order that the Township voluntarily, knowingly and willingly entered into last year.

I also don't think there's an ambiguity. I think "against us," as the Court points out, applies to both situations, actions pending and to judgments. And I think that's the clear meaning of the language.

Finally, I would point out that it was circulated throughout the State Administrative Office of the Courts' summary of the cases. I think one reason that Section 22 was put in there was that through the Administrative Office of the Courts' direct release and through other sources, people knew the cases had been settled. And those settled cases which, according to the Administrative Office of the Courts, did include

Manalapan, were the cases that were being provided for in Section 22.

Finally, I point out my opinion on the remainder of this case. The Town did agree to rezone a certain amount of units that are not provided for through the Poczycki and the Muscarelle developments. We think that the Court does have power to allow a phasing schedule for those remaining units.

We think, though, that it should be done not according to Section 23, but according to the Court's inherent jurisdiction. And the Court has granted phasing schedules in Bedminster. We know it's been considered in Cranbury.

I think the Court has all the discretion in the world to say eight years or nine years or whatever the Court chooses. But we don't feel that a phasing schedule's imposed by Section 23, because we don't feel that Section 23 applies to any part of this Act.

So when we are suggesting that we don't care, we don't have an opinion as to what the phasing schedule should be, I am sure the master may have an opinion. But we think the Court should make it clear it's doing so according to

its own inherent powers.

THE COURT: You don't think that the hundred and fourteen units fall under this section?

MR. MEISER: No, I don't. And the reason I don't is this, that we believe that the Town consented to rezone those one hundred fourteen units, and that there's no action pending to force them to rezone those units. That's also something the Town voluntarily agreed to do.

We are not coming into court and saying we insist for full satisfaction that there need be a hundred, two hundred other units. We are saying that there was a voluntary, willing consent agreement, and as part of its bargain, as part of a contract the Town is free to enter into, it said: We will do one more thing.

In view of that, I think again the Court would be stretching the language of twenty-three to say that there is an action pending as to that matter. I think that what, really, Section 23 applies to does not apply to any part of this Manalapan case.

Finally -- and this is just for the Court's information, because it's not crucial to the issue, but the Court should note the word in

23D -- more than six years is not mandatory. 23D states: The Court shall consider whether to -- I'm sorry. Let me get the exact section.

It says in 23D that the Court shall consider a phasing schedule. Then in 23E, it shall -- it says that the following time periods shall be guidelines, and it's referring to, on E, below Subsection 3, the first paragraph, the following timetables shall be guidelines.

So that's a key word, I think, "guidelines." It's certainly something that the Court should take into consideration. But if you go down the actual language within the section, first we have -- that's just a guideline. Then we get a town which has an obligation between 500, 999, shall be entitled to consideration. And that's a key word.

It doesn't say it's entitled to get a certain number of years. It's entitled to consideration of a phase-in schedule, at least six years.

What that means to me, that word, "consideration," is that the Court could decide six years, could decide eight years, but it also could decide under certain factors that: Well,

yes, I have considered more than six years, but under the circumstances I decided five years or four years.

I think it's clear that, in most cases, the Court will come out with at least six years under these situations; but the point I am making is, it's not required to do so even if this applied.

So what we are saying is that in this case, Section 23 does not apply either to our part of the agreement or to the remainder of the case, and that the Court should have the master make its own recommendation as to what's appropriate. And twenty-three simply isn't applicable to any part of this case.

THE COURT: The ordinance which was introduced on first reading, did it do anything about phasing the hundred and fourteen units? Either one of you.

MR. GORMAN: No, Your Honor.

THE COURT: No.

MR. MEISER: It did not. And, you know, the Township's position back in May was, it was satisfied, just let us get that adopted. The master had very minor changes, none of which

applied to phasing, and said: You do that, and I'll recommend six-year repose. And nothing has happened since.

THE COURT: All right, thank you. Mr. McDermott, I understand that you are relying upon the argument of Mr. Meiser.

MR. MC DERMOTT: That's true, Your Honor.

THE COURT: Okay, thank you. That covers Manalapan. All right. Should we take Watchung next, Mr. Pierson?

MR. PIERSON: Your Honor, Harold Pierson appearing for the Borough of Watchung. Initially, I want to point out to the Court that Watchung, the Watchung case is a relatively new case as I view it, based upon what I've been able to determine.

The complaint was filed, I understand, the latter part of December of 1984. The Borough was served in mid-January of 1985.

And in reading the Act, we have two basic categories of cases under Section 16 when we get into the question of transfer to the Council, and -- those that are filed within sixty days of the effective date of the Act, and those

that are subsequent or, in any event --

THE COURT: Excuse me.

(Brief interruption.)

MR. PIERSON: The Watchung case is probably less than a hundred eighty days from the effective date of the Act, would be the date of filing. I am not going to get into the subjective standard that is set up in the Act about manifest injustice, other than to point out to the Court that I can't think -- if the Watchung case can't fit into a category that was envisioned by the Legislature for transfer, then I don't know what case could.

Certainly, there may be some element of injustice that could be argued. But I suspect that manifest injustice means something that is elevated beyond that.

There would be, under the time schedules that are set forth in the Act, perhaps a further delay to the plaintiff and some, perhaps, minimal expense. I have no idea what expense the plaintiffs have incurred, but I don't envision they could be a very substantial one.

Nevertheless, the time frame, if we are able to argue that, is a time frame that is

established by the Legislature itself, and it also is the -- in the same Act, we have the test or the criteria set up of manifest injustice, so that I don't think you can relate one to the other in terms of saying that manifest injustice is predicated upon that.

What I am more concerned with, Your Honor, in this case a consent order was entered on June 19th, 1985; and at that time, the parties envisioned a possible transfer of this case, because although neither myself or my adversary, Mr. Murray, had any drafts or any inside information, the word was out that this was in the works.

THE COURT: Something was cooking.

MR. PIERSON: And with that in mind, we provided in paragraph eight of the consent order as follows, and I will read, if Your Honor --

THE COURT: I know what you are going to read, and I think you should read it for the record. But I have to tell you, I don't think that envisioned a transfer. I think it envisioned an adjustment of your number based upon the Council being there and maybe coming down in some future time with numbers.

But go ahead.

MR. PIERSON: I was going to develop that as part of my argument this morning, Your Honor.

THE COURT: Yeah.

MR. PIERSON: From paragraph eight of the consent order entered June 19th, 1985, this follows: "The affirmative obligations of the Borough of Watchung to amend its land development ordinances as herein provided shall be without prejudice to its right to apply to the Court for approval for modification of the provisions of this order pertaining to the Borough's fair share obligation, or the determination or the implementation thereof, to conform to legislative enactments subsequent to the date hereof, upon a showing of good cause for said modification.

"In the event, however, that the Borough does elect to pursue such modification, the rights of the plaintiff herein to a builder's remedy as set above shall not be impaired or removed from the jurisdiction of this Court."

I think what I had contemplated, and I think I had conversations with Mr. Murray concerning this, was a possible dual-forum

resolution or bifurcation of the proceeding whereby the, conceivably, the Court would retain jurisdiction of that portion of the case dealing specifically with this plaintiff, and that the implementation of Mount Laurel as far as the Borough would then be left to the Council.

Certainly, we had a master appointed in this, and I would assume if that resolution would be acceptable to the Court, then the Court would have the benefit of a master's report as it applied to this plaintiff, and whatever resolution that the Borough makes with respect to this would then be subject to Your Honor's review and approval or rejection, as far as the overall picture is concerned.

That essentially is what I am asking Your Honor to do at this time, is to transfer the action subject, however, to the provision that is set forth in the consent order that there would be a retention of jurisdiction as far as this plaintiff is concerned on that limited basis.

THE COURT: That language, though, seems to say the opposite thing, doesn't it? It seems to say that the matter will stay here subject to your having a right to show that if you were

before the Housing Council, you would have done better, and then ask the Court in its discretion to lower you.

And I wouldn't vouch for the fact that we discussed it in this case, but typically, I recall that while the legislation was pending, having seen drafts of it, I used to say that it wasn't clear to me at all if we were going to include this kind of language, that the Housing Council was going to have a number down there for your town or for any other town, and that maybe it was just language without a meaning; that the legislation as it was developing and as, in fact, it was passed, at least on the face of it, appears to not authorize or encourage the Council to develop fair share numbers for each town but, rather, to react on an ad hoc basis to applications for certification.

Now, how they can do that, I'm not sure. But, theoretically at least, I suppose we could go for many, many years before we would know what Watchung's number was unless you applied, unless they're going to become a body which issues a housing allocation report like we had in 1978, and then everybody is given a number, most of

which were higher than the numbers we are dealing with today. And then it would be a different story.

But as I understood the provision of that in your order -- and that's in a couple of other orders -- of settlement, the idea was that if you could demonstrate you would have done better before the Housing Council, then this Court should consider that.

And I think that's fair under the circumstances, given the fact that you would voluntarily settle. But the phrasing of it seems to very squarely presume that it's not going to be transferred, that it's going to stay here, doesn't it?

MR. PIERSON: Well, it was probably -- if that is the interpretation that the Court would place upon it, I'd have to plead guilty to --

THE COURT: That may be hindsight on my part.

MR. PIERSON: Poor draftsmanship.

THE COURT: No. I think maybe that's hindsight, but it -- my understanding of its meaning was, we've got it settled, but, Judge, we don't want to have to explain to our people that

by being good guys and settling it, we did so to their detriment, and we want to be able to come back and show you that we might have done better before the Housing Council, and we want you to be reasonable and treat us fairly if that happens.

And that's how I understood that provision. One thing about the time schedule, your case is somewhat different than some of the others in terms of its length. It's one of the newer cases. But the question arises in my mind as to why that's relevant.

If age isn't relevant if it's very old, why should it be relevant if it's new, if, aside from the cost factors involved, forgetting that, if the case is essentially in the same posture as a case that's been litigated for nine years?

In other words, Manalapan's at a point, after nine years, where you are after a year. What's the difference? If your case can be resolved quickly and fairly, what difference should it make that you should then, in effect, start all over again and take another route that may take a good deal longer?

MR. PIERSON: Well, I raise the time issue essentially because it was developed here

on the opposite end, and the indication was that it perhaps does have some meaning in trying to determine what the Legislature intended.

We are trying to find out what it meant when it, in Section 16, it sets forth if it's -- time must be important if they're saying in one instance that if this case was filed within sixty days of the effective date of this Act, you're in. If it's more than sixty days, you file a motion. And, okay, you're going to get it, provided there isn't manifest injustice.

THE COURT: Do you have any idea why they picked sixty days?

MR. PIERSON: I have no idea. I wish they'd picked a hundred and eighty.

THE COURT: Your lobby isn't what it used to be.

MR. PIERSON: But I don't know if I can answer it any clearer than that, Your Honor.

THE COURT: There's a portion of that Act, if you look at it closely, that you could almost write a town name in next to it, you know, as you go through it. But you can't write Watchung in next to the sixty days.

MR. PIERSON: Unfortunately.

THE COURT: Okay. Anything else, Mr. Pierson?

MR. PIERSON: That's all I have, Your Honor.

THE COURT: Thank you. Mr. Murray.

MR. MURRAY: Your Honor, with respect to Watchung, we have somewhat a substantial difference between it and its neighboring community, Warren Township. As of this moment, in Watchung, pursuant to David Kinsey's recommended schedule, the date of December 1 is a date on which John Chadwick, the municipal planner, has agreed that he can have its full compliance ordinance in place for review by the master.

That would put us within a timetable of completion of this matter no longer than that projected for Warren Township, because the remaining items, that period being indicated on Wednesday of four months or five months, we are in the same position of completion, of satisfying the objective of having this party, the people that we are involved with, not only the developer, but the ability to put into place the housing that is going to be the goal on this case, as we all recognize it to be here, a lot sooner than

any other methodology that's enacted within the statute.

I have indicated in my brief the problems with the best-scenario timetable of yours, which took us to September 1987, could it take us conceivably to not even participating in the mediation process if this matter is transferred.

We have capsulized in this case, with the aid of the Court, the twenty-one days of trial in that methodology situation, and come up with a settlement discussion and conference and agreement to a figure. And I do recognize and recall now that at the time the statute was being put together in the spring, the parties on both sides were concerned as to what that statute was going to do to the figures, not so much as to what it was going to do with where we were going to complete this case.

And it's for that reason that the modification language in paragraph eight of this consent order, I believe, was inserted. In fact, when we had our meeting with David Kinsey in August, I think the parties all recognized that we are going to be dealing with the guidelines of that Council, not even before -- I mean, even

before they're put together, that Mr. Kinsey's going to incorporate it in his report, some of the features of the stated guidelines in the statute, notwithstanding the absence of further guidelines by the Council.

THE COURT: I -- just to interrupt you on that point, I was interested to see that Mr. Kinsey, who, by the way, if his work is as good generally as is evidenced by what's in the -- your brief, appendix to your brief, I take some credit for having appointed him.

But I was interested to see that in his directive to the parties in terms of categories or criteria to be considered in developing the ordinance, he said, obviously, the Mount Laurel principles; and then he said environmental factors, utilities and infrastructure, location and accessibility, sort of overall planning factors that we indicated -- it was argued on Wednesday that a Court couldn't handle, and this is essentially what the master was telling you to do.

He was on the right track, as far as I am concerned.

MR. MURRAY: Yes. He's indicated to John Chadwick to come up with an alternate figure

if you utilize solely the state guidelines that are set forth in the statute. And I think if Mr. Kinsey does that, the Borough of Watchung now has the benefit of both worlds to a great degree, plus, as it should be stated, the ability to do this in a much shorter period of time.

I do argue in my brief the claim of vested rights arising out of that order. I don't think we can bifurcate this matter with any reasonableness unless we take it in the reverse situation, which I discussed with Mr. Pierson on the way down, I had Mr. Kinsey complete his report submitted here, and then make your motion at that time to transfer to the Council, rather than make your motion now.

But I can't see any case being held in two different forums concurrently. It would just be too much. Therefore, it is our request that this matter not be transferred; that the opportunity being at hand to get this completed efficiently with a community that has worked to date in good faith to expedite this matter, which it has evidenced by that consent order, let's keep them where we can do the best in this situation.

THE COURT: What about the notion that if this, being one of the youngest cases in the court, if I don't transfer this one, I'm not going to transfer any of them?

MR. MURRAY: That doesn't follow, because we may have a case that is even older than this one wherein the parties -- and particularly in the Morris County areas, with Judge Skillman. He isn't working on the consent orders as effectively as maybe other Courts are doing -- but even if we have clients that may not want to enter into consent orders, wherein the parties now have to move for summary judgment to get to that stage.

The age of the case versus the activity in the case I think is important. A case may be nine years old where both sides have sat and done nothing, but -- I can't see that happening, but two or three years old with nothing done.

We have eliminated the need for discovery. We have eliminated the need for gearing up to argue the elements that would have to be proven in the Watchung case. They have conceded the invalidity of the ordinance.

A case that is two months old and has

reached the point that we have, I don't think is any different, if you look at the objective of both the statute and Mount Laurel to put the housing in place.

Age of the case is a factor only if what has occurred in that case is an aid to getting to that goal. If nothing's occurred, irrespective of the age of the case, then I think you can consider the absence of activity versus the activity.

THE COURT: All right. Thank you. All right, and Bernards, Mr. Davidson.

MR. DAVIDSON: James E. Davidson, Farrell, Curtis, Carlin and Davidson, for Bernards Township.

Your Honor, I don't want to repeat all the arguments that you have heard today as well as the ones you heard Wednesday, basically much of which are the same thing with regard to the legislative intent to bring cases before the Administrative Agency and the Court.

The only exception to transfer motions, as we read the statute, is manifest injustice to a party. I don't want to argue. I heard your ruling. I'm a party already, so I don't want to

argue too much.

I don't agree with it, and I don't think that a party -- limiting a party in this instance in transfer motions makes that constitutional or even gets close to it.

As far as I am concerned, you already ruled on that. I don't think that should make any difference in my case. The time period contemplated by the Act -- excuse me. Yeah. The time period contemplated by the Act, be it eighteen months or two years, whatever it takes to get the agency going and hearing cases, is not -- should not arise to manifest injustice by itself.

The Act contemplated that would occur. And manifest injustice has to mean something much greater than that. I think the prior case law, the Gibbons case, Ventron case, all those other cases, clearly indicate that manifest injustice has to be some irrevocable harm that can't be cured. Our case --

THE COURT: Let me just interrupt you at that point, because this is the, I would say, the main area of defense by the municipalities that I have heard repeatedly.

I mean, I think they all have said: Look, if it's going to take eighteen months, that's what the Legislature -- the Legislature knew it, or whether it's sixteen months or two years, whatever. And that can't equate to a reason not to transfer. They contemplated it.

But didn't the Legislature also contemplate that there may be cases that were -- that shouldn't be transferred because of manifest injustice? The answer to that is clearly yes, that's what the statute says.

And how -- we know the Legislature didn't contemplate, as between those two items, that there might be cases unnecessarily delayed, so why do we assume that the time schedule under the Act could not form a part of manifest injustice?

MR. DAVIDSON: I don't assume that. I say, in and of itself, it's not manifest injustice. If you have a case like five cases you heard on Wednesday, which were all going to be over in two, three, four months, and you compared them with two years, I think the argument can be made that that's manifest injustice.

But I -- just because it's going to take

two years under the Act, and if we go through the Court proceeding, which I am not so sure that's so fast, either, it's going to take a year-and-a-half; and therefore, there is manifest injustice. That's what I am saying.

THE COURT: Okay.

MR. DAVIDSON: Not a flat-out rule that it's going to take -- you can't if it's going to take two years.

THE COURT: I think we are on line there. I certainly would agree with that. That's the legislative prerogative. If -- I mean, if we start a case at point one today in the courts, and point one in the Council, even putting aside the provision dealing with anything within sixty days, I would agree with you.

MR. DAVIDSON: The case in the Bernards case, it started in May of '84. Issue was joined, I believe, in July of '84. Motions were heard in July of '84. Case was stayed in December of '84. We have been working on serious settlement negotiations since that period of time.

We adopted an ordinance in November of 1984. The ordinance has not been challenged by any pleading.

The case, insofar as the Court proceedings go, is really nowhere. We have had interrogatories. We have had no depositions. Again, we have nothing with regard to Ordinance 704.

THE COURT: It's a fact, though, that the Court called to set up a compliance hearing date on this. I think that's --

MR. DAVIDSON: That's correct.

THE COURT: So that when you say it's nowhere, we were ready to put the compliance package through.

MR. DAVIDSON: Well, on a -- on the basis of a proposed settlement, yes.

THE COURT: Yes, I understand. I think the reporter got my, "yes." And you go ahead.

MR. DAVIDSON: Okay. And when Russ Peschieri called me, I indicated to him that; and it was after the Act had been passed. And the question he asked me, of course, is: Do we still want to settle, because the Act was passed?

Maybe that wasn't the one you told him to ask me, but it was one of the ones he did ask me. I said I wasn't sure, I would have to get back to him.

It took, you know, two or three calls before I became more sure that it was getting pretty doubtful, and --

THE COURT: My point only was, Mr. Davidson, that we called each municipality who had notified us that they wanted a compliance hearing, and said: Do you still wish to proceed? Because with each compliance hearing we held in August, I read them their rights, so to speak, because I didn't -- you know, there's an Act, and, you know, you have a right to make a motion for a transfer, and do you still, nonetheless, want to proceed? And the five of you did put through -- waived their rights, so to speak. And that's the same calling that you got.

But the point was that this case would be over now, but for the fact that Bernards decided not to proceed.

MR. DAVIDSON: That's correct, if we had reached the settlement.

THE COURT: Well, you advised the Court you had a compliance ordinance.

MR. DAVIDSON: Well, I think my ordinance does comply. That's not everything that was involved in the settlement, though. In

fact, that's very little of what was involved in the settlement.

If we wanted to settle on Ordinance 704, we could have settled in January. We didn't have to go till July, August, September.

THE COURT: But in July -- in June, when you wrote to me, you said: We've got a compliance ordinance. We're ready for a hearing.

MR. DAVIDSON: That's correct.

THE COURT: And at that point, if I had a hearing and I approved your ordinance, in August or September, we would have been done.

MR. DAVIDSON: Well, Your Honor, what happened, of course, is that -- is that, obviously, was overly-optimistic. I sent up a proposed agreement to them. They sent it back to me. It was all changes all over it. I sent it back to them, those changes weren't what we want, so on, so forth. Didn't settle.

THE COURT: Well, I don't care about the plaintiff for a minute, okay? I'm not concerned about that. You said: We have a compliance ordinance that we thought, we think, we still think, is compliant, and we want a hearing, and tough if the plaintiff doesn't like it. We want

a hearing.

And I would have said, and was -- not would have said. We did say, let's go if you'd still like to go.

At that point, we would have had a hearing, and Hills would have jumped up and down about what was wrong with the ordinance. And I would have heard it, and you would have told me it was okay.

And then I would have either approved it, rejected it, or approved it with conditions, which has been the most usual result, the last result, approval with conditions.

So we would have, theoretically, by today, been done. Not theoretically. I think actually been done.

MR. DAVIDSON: Okay. That's really not what my letter meant, if that's the procedure you had in mind, and the difference being that Hills had a number of other things, okay, that were very important to them, presumably, that were part of the package, so to speak.

Okay. Now, I was assuming that until those things were worked out, and when those things were worked out, and we were very close to

working them out, that all those would be part of, and certainly Hills wanted this part of, your ultimate judgment in the case.

Now, of course, what happened, on July 2nd, the new statute was passed. No question about that. I assume if the new statute hadn't passed, we would have had probably a very good chance of completing it. But at this stage, the case is a long way from trial or compliance or whatever it is.

As you say, Hills is going to jump up and down.

THE COURT: Well, so what? They jump up and down a lot. They've been doing it for years in this court. Why can't we schedule the compliance hearing for your matter in the next few weeks, and you present me Ordinance 704, which you say complies, and let me so determine?

MR. DAVIDSON: Well, because right now I don't want to be bound by Ordinance 704.

THE COURT: Okay.

MR. DAVIDSON: I have another -- I mean, I'm not saying that as a fact. I'm saying that as a possibility. I mean, we have our planner working on a new housing element. We may or may

not come up with an ordinance that's slightly different than 704, might be a lot different than 704. I don't know. I still think 704 complies, though.

THE COURT: Okay.

MR. DAVIDSON: I was here on Wednesday, and you ran through a number of factors that people had raised, some of them relevant, some not relevant.

They included age of the case; complexity of litigation; stage of the litigation; number and nature of previous dates.

THE COURT: Number and nature of what?

MR. DAVIDSON: Dates. That's what my notes have.

THE COURT: No. It's number and nature of previous determinations of substantive issues.

MR. DAVIDSON: Okay. Number five I couldn't -- number five I couldn't read at all. Six was need for record; conduct of parties; likelihood of -- I couldn't read that, either; statewide policy; harm by delay; will it cause great delay; will we lose the land for Mount Laurel housing; will it tend to facilitate or expedite housing.

I think we come out on the good side of all those issues. And to reiterate the same question -- and I heard Mr. Neisser here the other day and some other gentleman here the other day trying to answer the question of what cases should be transferred and what cases shouldn't be transferred.

The dates they suggested -- one of the items they suggested, they thought was very serious, should be -- should be considered, was: Had the case been tried?

I don't know if that's an ultimate determination or not. I certainly think it's relevant. As you obviously are trying to point out, it's -- you are trying to weigh the time, how much more time is it going to take, versus how much time is it going to take.

I'm not so sure that that should be the total basis for a ruling; however, in our case, again, if you can't transfer our case, I don't think you can transfer them. Our case is just -- it's nowhere.

THE COURT: Let me be clear, Mr. Davidson. Suppose I deny the motion for transfer and schedule you on a compliance hearing. Since

the immunity that you are granted is up to the time you have a compliance hearing, and I schedule you for a compliance hearing in the end of this month or November, are you going to come in and say, we do not support Ordinance 704?

MR. DAVIDSON: No, but I come in and argue that you can tell me that Ordinance 704 complies, but we are going to want to amend it.

THE COURT: Okay. So you are going to say: We think it complies, but here's the change we'd also like to make.

MR. DAVIDSON: Probably.

THE COURT: So we really are somewhere. I'm going to say: Well, I find Ordinance 704 does or does not comply. I find that you do or do not have the right to make those changes.

And if I find you comply, it's academic. And if you thereafter make the changes, then I assume if they're detrimental to somebody, I'll hear from them. And we are done, aren't we?

MR. DAVIDSON: I assume if they're detrimental to somebody, it's a 16B case. I don't see why it comes back here.

THE COURT: I don't understand that kind of --

MR. DAVIDSON: Well, if Ordinance 704 is good, and we want to amend Ordinance 704, and somebody doesn't like it, he's got to bring an action. He's under 16B.

THE COURT: I'm not going to pass on that issue.

MR. DAVIDSON: I know you're not. I know you're not. But --

THE COURT: What you are saying is if, once the Court has completed Mount Laurel litigation and then the Town, the next day, changes its ordinance and puts in cost generation and removes all of the exclusionary nature of the ordinance, it's then a Housing Council case?

MR. DAVIDSON: Well --

THE COURT: You have to test me on that one, because I won't entertain that.

MR. DAVIDSON: I'm not saying that. I'm not saying that.

THE COURT: All right. Well then, I'm not sure where we are at. My understanding -- and this is why I think it is very important that we clarify where we are on this case. I would agree, if we are nowhere, if we are at point one, and point ten is the end, then probably the case

should be transferred. But my impression was that if I deny your transfer motion, I can set a compliance hearing.

MR. DAVIDSON: Well, let me go into your compliance hearing, Your Honor. I don't know what Hills thinks is the matter with Ordinance 704. I don't know if they think anything's the matter with Ordinance 704. If they do, I want to have discovery on it.

THE COURT: It's too late. The game is over at this point. You had a certain period of time within which to develop an ordinance, extended three times, as I recall, by Court --

MR. DAVIDSON: We developed an ordinance last November.

THE COURT: Let me finish. And you developed it, and Mr. Raymond has submitted a report almost concurrent with your letter asking for a hearing, saying the ordinance is okay, with some changes, nothing that I saw that -- to be devastating to the essential nature of the ordinance.

So the next logical step, if I had the time in July, I would have heard you. Now, how can we be nowhere under those circumstances?

I say all right, if I deny this motion today, I'll hear you on Ordinance 704, which you are satisfied with, which you'd like to change, but which you still think complies. I assume you're not going to change it not to comply.

MR. DAVIDSON: No, I would hope not.

THE COURT: Okay. Well, then --

MR. DAVIDSON: We try not to do that.

THE COURT: It would make it more compliant. So I'm going to say to you, you don't need to make it more compliant if it's compliant; and if you are making those changes, I'll consider them anyhow. You know what Hills' objections are, based upon their red-lining of your stipulation. They may be wrong or right.

I mean, I assume they're always going to try to get as much as they can. But they can continue to object as long as they want, as long as you've got a compliant ordinance. So why can't we complete this case before the end of the year, at least?

MR. DAVIDSON: Well, what you are doing, it seems to me, is -- I don't know where Hills is on -- you know, you're settling a case. I don't think the parties, you are saying, have compliance.

THE COURT: I'm not settling it. The heck with Hills, if I can put it in the vernacular. I'm not settling.

You have said to the Court -- you know, this has happened before. It's happened in several other municipalities. The plaintiff hasn't been satisfied. They just say seven's not enough, or six isn't enough, or whatever.

I -- too bad. I'm not looking for settlement. I'm looking for a compliance ordinance. And I would be happy if you settled it. Make it much easier. Then I won't have to listen to a lot of acrimony.

But the point is that if you complied and you did so in accordance with the law, by that I mean if you're subject to builder's remedy, you have recognized it reasonably; and if you are not, then it doesn't make any difference. Then the fact that Hills has objections and may continue to object for ad infinitum really is irrelevant.

MR. DAVIDSON: Well, okay.

THE COURT: So I think what you are saying to me is, because you can give us a compliance ordinance in a relatively short period of time, that may be determinative of whether or

not to transfer.

MR. DAVIDSON: Ordinance 704 is on the books. It's been on the books since November. They haven't done anything. They have built not one house of any kind or put any application of any kind.

We have people that are building on -- under our ordinance now. I don't need a compliance hearing to have people building housing in my town. They're building now. What do I need it for?

THE COURT: Because you were sued.

MR. DAVIDSON: They haven't said anything about 704.

THE COURT: But you need it because you were sued, and you're subject to a builder's remedy here if -- under Mount Laurel II, and you are under a court order to revise, and you're under a court order to submit a compliant ordinance. And that's why you need it.

MR. DAVIDSON: But the determination you are making is whether or not -- you're -- I assume you think that because it will get done earlier here, they'll start building their housing there earlier. I don't think that's a

valid assumption at all. They're not going to like the ordinance, why are they going to rush out and do it?

THE COURT: No, that's not the assumption I am making. The assumption I am making is that the Mount Laurel Doctrine will have then been vindicated more rapidly, and that the opportunity for Hills or anybody else is there to build housing.

MR. DAVIDSON: The opportunity is there to build housing now, and it's been there since November.

THE COURT: Good. Then why do you want to transfer it?

MR. DAVIDSON: The statute says I can transfer it unless there's manifest injustice to a party. There is no manifest injustice to a party.

THE COURT: I mean, if you're happy with the ordinance, why would you want --

MR. DAVIDSON: I didn't say I was happy with the ordinance, Your Honor. I said the ordinance complied.

THE COURT: Okay. All right.

MR. DAVIDSON: But you can't assume

that they're going to rush out and build housing for lower- and moderate-income people. We've got people that are doing it, though, under that ordinance.

THE COURT: Let me say that whether Hills will build or not in this matter does have some relevancy, but it's of relatively minor importance.

MR. DAVIDSON: The determination is whether or not a party's going to suffer manifest injustice.

THE COURT: Of course.

MR. DAVIDSON: And they're not.

THE COURT: Yeah. The party I'm talking about is the lower-income people.

MR. DAVIDSON: They're not, either.

THE COURT: If I could find as a certainty, for example, that somebody was going to build, regardless of -- be it Hills or otherwise, by the more rapid adoption of the compliance ordinance, that would be very relevant to manifest injustice.

And you're telling me there's people out there doing it now. That tells me that if I transfer this case to the Housing Council, you

can withdraw Ordinance 704, and the people out there doing it for the lower-income people can no longer do it.

MR. DAVIDSON: They came in and got preliminary, final subdivision approval.

THE COURT: But the traditional people under 704 who come in and build for lower-income people. I mean, it seems to me you have argued for the proposition that if you leave 704 in place, forgetting Hills, we are going to get lower-income housing. You said: We're getting it.

Now, if I transfer this to the Housing Council, you withdraw 704, as is your right, but at that point, am I not free to ask whether there isn't manifest injustice to the lower-income people? Would they have, would any loss --

MR. DAVIDSON: I don't think the issue is whether whether or not we withdraw Ordinance 704 is a manifest injustice; it's whether you transfer it is a manifest injustice.

I'm truncating the argument. The argument is, you're -- the Court should transfer these cases unless they can show manifest injustice to a party.

Your assuming that your transferring it

is, one, we are going to withdraw 704 and nobody's going to build low- and moderate-income housing, there's no basis for that.

THE COURT: Well, I take it you intend to submit a different housing element.

MR. DAVIDSON: That's correct. I don't know what the housing element is. I don't know that it will have any effect at all on our low- and moderate-income housing.

I am sure it will be intended to comply with the statute that was passed by the Legislature as to what our low- and moderate-income housing ought to be. And that's our right.

THE COURT: See, on one hand, I know for sure we've got an ordinance that's going to produce lower-income housing now; and, on the other hand, I don't know what's going to happen when you go to the Housing Council.

MR. DAVIDSON: Yes. Okay. Assume that's true. But that's what they're there for, and they're to give us the low -- the amount, the type, whatever it may be, of lower/moderate income housing that's proposed under the statute.

What you are saying is, Mount Laurel II, we get more; therefore, I won't transfer it.

THE COURT: No, I didn't say we get more. I said we're getting it immediately.

MR. DAVIDSON: Well --

THE COURT: You may end up with a higher number before the Housing Authority.

MR. DAVIDSON: Absolutely.

THE COURT: So I'm not talking about that. I'm talking about the immediacy of it. And to me, that relates to manifest injustice.

MR. DAVIDSON: Well, you're just reading out the whole statute, then.

THE COURT: Okay. Tell me how.

MR. DAVIDSON: Because the statute gives them two years to set up. If that was the only criterion, then the manifest injustice is out. That's not the only criterion. Manifest injustice to a party.

You're saying and assuming that we are going to get this housing sooner, necessarily. That's just not so. So if we change 704, we're not going to remove 704 and remove all low- and moderate-income housing from the town.

Again, again -- can't remember where I was now.

THE COURT: Let me interrupt you so you

can remember. I'm not assuming anything. You were the one who told me that the Town has people building now under 704, which I assume means that you are getting lower-income housing.

MR. DAVIDSON: That's correct.

THE COURT: So I'm not assuming a thing. I would be assuming, if you went to the Housing Council, that there would be some potential delay involved, if you wished. Not necessarily. You may be right and leave 704 in place. I don't know. But if you wish, there could be some delay.

MR. DAVIDSON: Let me assume that's true. But you could assume that.

THE COURT: Okay.

MR. DAVIDSON: I don't think that's even close to manifest injustice, if you assume there could be delay.

THE COURT: Okay. Anything further?

MR. DAVIDSON: No. That's enough.

THE COURT: All right. Going to be Mr. Hill, or people who really know what the brief says?

MR. HILL: I'll give it a try, Your Honor. I have read it.

Your Honor, the last sentence of

Ordinance 704 says: This ordinance shall take effect immediately upon final passage and publication, provided, however, that the provisions of this ordinance shall expire one year from its effective date unless further extended by ordinance, unless on or about such expiration date, a Mount 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.

That was in the ordinance when it was passed, and we believe it was passed on November 12th, 1984 and, under its terms, will expire on November 12th, 1985.

There is confusion as to the publication date. It may be November 20th. But it does expire, like a Mission Impossible tape, if this Court hasn't passed on it, sometime in November.

As we have been listening to the argument, Mr. Kerwin, who is the president of Hills, has handed me a couple of notes. You know, he wants to make it very clear to me that Hills is satisfied with Ordinance Number 704. We told Mr. Davidson that in September.

The densities -- 704 increases our density from two units per acre with no low and moderate, to five-and-a-half units per acre with twenty percent low and moderate. And Hills has agreed and still agrees in this court to build five hundred and fifty low and moderate units, fifty percent low, fifty percent moderate. And that's thirty-one percent on incremental units.

We have also agreed on another piece of property, which is zoned one unit for every two acres, that if, as part of this settlement, that if Bernards will allow us to sewer it with our own sewer plant, with our own sewer pipes, we would pay twenty percent or add an additional sixty-eight units.

So Hills has agreed to build six hundred eighteen low- and moderate-income units; and, as our affidavits show, we have been in discussion with Bernards. We have prepared plans and concept plans, which is the preliminary to submitting formal applications for preliminary and final approval. And those plans have come back with comments and have been revised, and the plan attached to the affidavit and to the court submission is the latest revision, hopefully

responsive to Bernards' request.

The changes that have been negotiated -- there's only one fact that isn't before this Court. We received new papers day before yesterday -- in fact, I received them when I came back from oral argument, and watching you on the earlier cases -- were allegations that these negotiations were held without authority of the Municipality.

And in speaking with Mr. Raymond, who told me this before, and I called him --

MR. DAVIDSON: Object, Your Honor. I don't want to hear anything about what somebody else said.

MR. HILL: Mr. Raymond is the Court-appointed master.

MR. DAVIDSON: Hearsay.

THE COURT: He can't have any communications with -- even with me indirectly, under the decision, so it would be inappropriate for you to tell me what he said.

MR. HILL: Well, I believe that all portions of this package have been accepted. The affidavits before Your Honor show that we were summoned to a meeting, we attended a meeting with

Bernards, where we were informed that their fair share in August was considerably less than the numbers that they had agreed to and that which are provided in the master's report. That number, I believe, is 1,509, plus a -- minus a credit for settling of 302, minus a credit which this Court apparently gave Bernards in some related litigation, Zirinsky or Spring Ridge, which credit I assume Mr. Davidson takes the position he could take with him to the -- if this case were transferred, to the Affordable Housing Council.

THE COURT: Well, no. Let me interrupt you on that. I don't know if that's fair to say. You seem not to have knowledge of that.

MR. HILL: I have had hearsay knowledge.

THE COURT: Let me just place on the record what occurred. The plaintiff -- Spring Valley, isn't it?

MR. DAVIDSON: Ridge.

THE COURT: -- Spring Ridge, was included in the rezoning and took the position that they were already developing, and it would be impossible for them to have a mandatory set-aside in light of the fact that they were in construction.

The Township denied that and took the position that the ordinance, which required a lesser set-aside for them, was proper. And at a management conference, I suggested that, given the magnitude of the construction that was going to occur in Bernards, and given the fact that I would have considered phasing their fair share in any event, given the fact that they were voluntarily complying, and some other factors of equitable considerations, that I would permit them simply to delete Spring Ridge from their zoning ordinance and delete from their fair share the amount of units Spring Ridge would have produced.

And so their fair share was reduced by one hundred and forty-one units. The order is unsigned, because it was contingent upon the compliance package going through.

And it was submitted to this Court in July, and it sits unsigned. It's signed by all of the parties, but unsigned by me. That's the status of the case.

MR. HILL: Well, the master's report which has been submitted to Your Honor assumes a fair share, with that credit and that twenty percent credit for compliance, of 1,066 units.

The master says that Ordinance 704 provides 839 hard units.

Judge Skillman sometimes refers to units as hard versus soft units, which are done through rehabilitation and a program that turns existing housing into several units through variances or whatnot.

But there are 839 hard units in this package, of which Hills proposes to provide six hundred eighteen units. And Mr. Kerwin -- the second one of Mr. Kerwin's notes is that if we could have a judgment, Hills is prepared to guarantee that five hundred fifty of those units will be built before the year 1990, it has terminated.

Hills has not been sleeping on its rights. Hills expects to deliver in Bedminster over eight hundred units in the year 1985, two hundred sixty of which are Mount Laurel units, out of which a hundred eighty-five are presently occupied, and all but five of the rest are under contract and have scheduled closings.

So Hills' organization, the affidavits say, can now produce over a thousand units a year and at our present rate of sales and construction

we will have completed the -- all development of all lands owned by Hills in Bedminster sometime in 1986, and we expect by then to be building in Bernards and begin delivering units at a rate of at least a thousand units per year in Bernards.

If Your Honor will look at the map, you will see that in order to get our sewer and our water and the roads up to the top of the hill in Bedminster, we have to go through Bernards, and that -- and that that part of the development, the infrastructure, is being built today. Once it's in, the whole of the organization's efforts can be turned to building in Bernards and the top of the hill in Bedminster.

And we expect to continue at the rate of at least a thousand units a year, 200 of which in all cases would be low- and moderate-income units, so that we feel that we have a ready, willing, able developer, that delay factor -- that the most important indicia of manifest injustice, if the Court reads in as one of the parties the low- and moderate-income population awaiting to be sheltered, that the Court's handling of this case could result in occupied units before the Affordable Housing Council would

be prepared, would be set up and prepared to begin studying the zoning issues in Bernards.

We don't understand, frankly, Bernards's position in their last brief. They say they're happy with Ordinance 704. We have always been happy with the densities in Ordinance 704.

There are a package of amendments which everybody worked out, which are -- and which have been recommended for packaging by the Planning Board to the Township Committee as part of this settlement, which settlement went on the rocks purely because of some perception that there were better deals to be had before some other agency.

The first we knew of it -- and this is also in the affidavits, Your Honor -- we went to this meeting, and we were told, with a master present, that the Town believed their fair share was considerably lower than these numbers which were on file with the Court at that time, and which the Court was proposing to -- had it adjourned, a hearing on -- or no hearing on it had been set, and were asked to bargain for some lower numbers.

And the master objected, said he had no authority to even get involved in that

conversation, that he was --

MR. DAVIDSON: Excuse me, Your Honor. Henry Hill's statement of the facts should not be before Your Honor. It's not accurate. It's hearsay. It's irrelevant.

THE COURT: Yeah, only to the extent that it's in an affidavit filed with the motions.

MR. HILL: Anyway, we -- as a result of that hearing, everybody retreated, and this motion, you know, which was threatened at the time, was brought.

And we feel that this case can be settled promptly, in fact, was settled, and that if this Court could see fit to have a hearing on Ordinance Number 704 before it self-destructs by its own terms, that the issue may, you know -- that all, all the disputes between the parties could be at an end.

The ordinance is analyzed, the suggested recommendations in order to make it compliant are all before Your Honor, in the master's report.

And we, as Your Honor's aware -- and I'm not sure whether that motion is before Your Honor or not -- we have a subsidiary motion to have the matter heard of what Bernards has

tendered, brought before Your Honor. And Hills is prepared, if necessary, to -- to do what they can to bring the Town into compliance so that they don't lose Ordinance 704.

THE COURT: Let me ask you, so I'm clear. You're happy and can live with Ordinance 704. If I scheduled a compliance hearing on Monday, I'd hear no objection from Hills?

MR. HILL: You would -- Your Honor, that's correct. We would live with 704. We think that in order to bring Bernards into compliance, some additional things need to be done, and part of the settlement package was that he would do them in return for additional permission to do certain things in Bernards.

THE COURT: Yeah, but that's negotiations. That's not what I am asking you. I am saying if we had a hearing on Monday, would I hear you object to any aspect of 704?

MR. HILL: No, Your Honor.

THE COURT: Okay. And --

MR. DAVIDSON: We would.

THE COURT: Are you -- do you find acceptable the recommended changes which Mr. Raymond has made to the --

MR. HILL: Yes, Your Honor.

THE COURT: You wouldn't disagree with them?

MR. HILL: We don't disagree with anything that he proposes.

THE COURT: So you would sit passively and not say a word about the ordinance in terms of objection?

MR. HILL: That's correct, Your Honor.

THE COURT: My goodness, that's enough to persuade me right there. Okay. Anything further, Mr. Hill?

MR. HILL: No. Thank you, Your Honor.

THE COURT: Mr. Davidson, you wish to be heard?

MR. DAVIDSON: Well, not much. The question you asked Mr. Hill, though, I assume that we would object. I'd say the number's too high. I would object to some of the -- one of the things that -- and Mr. Hill stated it in a way today that was not anywhere near my recollection.

One of the things that Mr. Raymond has is a consideration for extra units for sewers. Consideration for extra units for sewers was never

part of anything but George's methodology of trying to get extra units, never a consideration of ours. Any sewers -- that extension was directed by or handled by us directly on its own merits, without regard to getting any extra units out of Hills.

We didn't want any extra units out of Hills, and they didn't want to give us any extra units.

THE COURT: All right. Just --

MR. DAVIDSON: When you hold your compliance hearing, Your Honor, I'm going to come in and, I assume, and argue that you shouldn't do it because the ordinance, the number in the ordinance is higher than we would expect it to be.

THE COURT: All right. Well, let me just follow the scenario for a minute. Assuming I find today that there would be manifest injustice, for whatever reason, and I set a compliance hearing, you're going to come in and say: We are not ready to proceed, because we don't believe our ordinance complies to what?

MR. DAVIDSON: I'm saying, Your Honor, that I am not going to say it doesn't comply. It does comply. But I am going to be arguing to

you that you can't, you shouldn't foreclose me from going under the Act just because it complies.

THE COURT: No, no. I said assuming I have denied your right to go under the Act today, and I set a compliance hearing.

MR. DAVIDSON: What you said is, you denied my motion to transfer. I'm going to argue before you that you have to follow the Act also.

THE COURT: Oh, on the number, you mean? Of course, the Act doesn't set numbers. It doesn't even have a methodology.

MR. DAVIDSON: It defines the terms, though, that I think are now the law.

THE COURT: So you would be looking for a hearing on what? I don't understand.

MR. DAVIDSON: I'm not looking for a hearing. I mean, I would come in and argue to you, Your Honor, that the number that we have in 1704 (sic) complies, okay? However, we want to use the Act substantively and direct our planning as the Act makes us, and that the number that we should be stuck with is a lesser number.

THE COURT: Okay. Suppose I conclude that you don't have a right to do that, that the Act either says you stay here or you go there.

You can't do it both ways. And suppose I conclude that.

Are you then going to withdraw 704, or are you going to offer it as your compliant ordinance?

MR. DAVIDSON: I don't know. I don't know the answer to that question.

THE COURT: Because it seems to me if you withdraw it, then the, under -- the normal scenario would be that I would direct a master to prepare one for us, which would be 704, with some modifications.

MR. DAVIDSON: If I may --

THE COURT: And we would be back where we were.

MR. DAVIDSON: If I can assume what I would do, if I decided to withdraw 704, I'd replace it.

THE COURT: I don't think you can. That's the point. The time's up. And either you go with what got you here, or you don't have a compliant ordinance.

In other words, there was a time limitation under your immunity orders, and --

MR. DAVIDSON: For me to do what, Your

Honor?

THE COURT: The time limitation said: Submit a compliant ordinance within X amount of days, and that was extended three times. And you really had two choices, not to submit or to submit. And you chose to submit.

Now, I would not preclude your right to withdraw it; but on the other hand, I wouldn't give you the right over and above that to say: Now I want some more time to draw a new one.

MR. DAVIDSON: I'm not suggesting that, Your Honor, and -- but I will suggest to you, sir, that until you make certain findings, and even if you do, you cannot prevent me from passing legislation.

THE COURT: Okay.

MR. DAVIDSON: I am suggesting that one of the things that might occur is, we would amend 704 to be what we think is going to be proper under the Act.

THE COURT: Okay.

MR. DAVIDSON: Then again, we might not. I don't know the answer to the question that you asked, what would we do.

THE COURT: All right. Anything further?

All right. I don't believe that I have to withhold the rendering of a decision in this matter. I am going to render an oral opinion. It's going to take about an hour, and I apologize in advance to those of you who have heard a portion of it at least. But for the purposes of the record, I am going to have to repeat it.

Since it's going to take that amount of time, and we have been going for well over an hour-and-a-half, I think the best thing to do would be to break for lunch, and we will start up right after one o'clock.

(Whereupon the luncheon recess was taken.)

(End of morning session.)

* * * * *

C E R T I F I C A T E

I, GAYLE L. GARRABRANDT, Certified Shorthand Reporter and Notary Public of New Jersey, do certify the foregoing to be a true and accurate transcript of my original stenographic notes taken in the above matter to the best of my knowledge and ability.

GAYLE L. GARRABRANDT, C.S.R.
License No. XI00737

DATED: 10-31-95

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,	:	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.	:	ORDER STAYING ACTION AND
	:	PRECLUDING BUILDERS' REMEDIES
	:	FOR A PERIOD ENDING
		MAY 15, 1985

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, Kerby, Cooper, Schaul & Garvin, Attorneys for The Planning Board of the Township of Bernards, and Brener, Wallack & Hill, Attorneys for Plaintiff, The Hills Development Company and the Court having been informed that the Defendant, Township of Bernards has amended its land use ordinance to provide for

more than 1000 units of low and moderate income housing pursuant to Mount Laurel II; and the Court having been further informed that the parties are in settlement negotiations with regard to some aspects of the aforesaid amendment and other issues; and the Court being satisfied that such voluntary settlements of Mount Laurel II cases may be in the public interest; and the Court having entered an Order staying this action and precluding builder's remedies for 90-days; and the parties having requested an extension until May 15, 1985; and for good cause shown;

It is on this 29 day of April, 1985;

ORDERED that this Court's Order dated December 19, 1984 is extended in all respects for a period ending May 15, 1985.

Eugene D. Serpentelli, A.J.S.C.

This Order is consented to both in form and substance.

Henry A. Hill, Esq.
Breiner, Wallack & Hill
Attorneys for Plaintiff
The Hills Development Company

Howard P. Shaw, Esq.
Farrell, Curtis, Carlin & Davidson
Attorney for Defendants
The Township of Bernards, et al.

Arthur H. Garvin, III
Kerby, Cooper, Schaul & Garvin
Attorney for Defendant
Planning Board of the Township
of Bernards

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI

OCEAN COUNTY COURT HOUSE
C.N. 2191
TOMS RIVER, N.J. 08754

May 13, 1985

Mr. George Raymond
Raymond, Parish, Pine & Weiner, Inc.
555 White Plains Road
Tarrytown, N. Y.
10591-5179

Re: Hills Development v. Township of Bernards

Dear Mr. Raymond:

I wish to acknowledge your letter of May 8, 1985. I note that the first immunity order in this matter was entered on December 19, 1984 allowing for 90 days in which to provide a compliance package. By the extension of the immunity to June 15, 1985 the township would have had six months to complete the compliance package.

I will honor your request for an extension to June 15, 1985 with the express understanding that no further extension will be granted. I also note that if matters can be resolved sooner, the compliance package will be submitted before the expiration date.

Very truly yours,

Eugene D. Serpentelli,
A. J. S. C.

EDS:RDH
copy to:
James Davidson, Esq.
Thomas J. Hall, Esq.

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FRANK J. VALGENTI, JR.

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

June 12, 1985

The Honorable Eugene D. Serpentelli
Judge of the Superior Court
Ocean County Court House
Toms River, New Jersey 08754

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

Dear Judge Serpentelli:

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.

Respectfully submitted,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: James E. Davidson

JED/sjm
cc: Arthur H. Garvin III, Esq.
Henry A. Hill, Jr., Esq.
Mr. George Raymond

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* MEMBER OF N.J. & D.C. BAR
** MEMBER OF N.J. & PA. BAR
* MEMBER OF N.J. & N.Y. BAR
** MEMBER OF N.J. & CA. BAR
^ CERTIFIED CIVIL TRIAL ATTORNEY

FILE NO. 3000-04-02

June 24, 1985

The Honorable Lawrence L. Lasser
Presiding Judge, Tax Court of New Jersey
Richard J. Hughes Complex
CN-975
Trenton, New Jersey 08625

RE: The Hills Development Company v. Bernards Township
Docket No. 18-02044A-83C

Dear Judge Lasser:

This is to inform you that The Hills Development Company, after consultation with the Township of Bernards, has decided to withdraw its complaint in this case, and respectfully requests that you dismiss this matter. At the present time, this matter is scheduled to be heard before Your Honor on June 27.

Thank you very much for your consideration to this request.

Sincerely,

Thomas J. Hall

TJH:klp

cc: Louis Rago

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 ORDER

This matter having been opened to the Court by Farrell, Curtis, Carlin & Davidson, attorneys for Defendants, Township of Bernards, Township Committee of the Township of Bernards and the Sewerage Authority of the Township of Bernards, James E. Davidson, Esq. appearing, and Kerby, Cooper, Schaul & Garvin, attorneys for Defendant Planning Board of the Township of Bernards, Arthur H. Garvin, III, Esq. appearing, in the presence of Brener, Wallack & Hill, attorneys for Plaintiff -The Hills Development Company, Thomas F. Carroll, Esq. appearing, and the Court having reviewed the Defendants' motion for a stay of all trial court proceedings and the

moving certification and the responding letter memorandum submitted and having considered the arguments of counsel;

IT IS on this 1 day of November, 1985

ORDERED that Defendants' motion for a stay of all trial court proceedings be and the same hereby is denied in all respects.

Eugene D. Serpentelli, A.J.S.C.

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/OCEAN COUNTY (Mt. Laurel II) : : Docket No. L-030039-84 P.W. : : CIVIL ACTION : : AFFIDAVIT IN LIEU OF TRANSCRIPT : :

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

Thomas F. Carroll, of full age, upon his oath deposes and says:

1. I am an associate of the law firm of Brener, Wallack & Hill, counsel to Plaintiff in the above-captioned matter.

2. On November 1, 1985, I attended the oral argument before the Honorable Eugene D. Serpentelli with respect to the

Movant-Defendant's motion for a stay of all trial court proceedings.

3. I have ordered the transcript of said oral argument (Exhibit A to this affidavit) but I have been informed that said transcript will not be available prior to submission of Plaintiff's brief and appendix in opposition to Defendant's motion for stay of trial court proceedings.

4. During the course of said November 1, 1985 oral argument, Judge Serpentelli advised that he does not anticipate that the compliance hearing in this matter, scheduled for November 18, 1985, will require more than one day of testimony.

5. Also during the course of said oral argument, counsel for Defendants, Arthur H. Garvin, III, Esq., asserted that a compliance hearing would prejudice the Township in that the fair share methodology adopted by the trial courts results in a higher fair share obligation for Bernards Township than that which would result from application of provisions contained within the Fair Housing Act.

6. Mr. Garvin also indicated that a Township consultant, Dr. Harvey Moskowitz, had prepared a report which purports to analyze Bernards Township's fair share obligation pursuant to the provisions contained within the Fair Housing Act and that Defendants would desire to introduce evidence based on said analysis at the compliance hearing scheduled for November 18, 1985 at 10:00 a.m.

7. Judge Serpentelli advised that the Act does not set forth any

formula pursuant to which a municipality may calculate a fair share obligation and that the Council on Affordable Housing will not even issue fair share "criteria and guidelines" for some months hence.

8. Judge Serpentelli also indicated that it did not seem logical to pick and choose certain of the Act's provisions (e.g. the two-to-four county regions envisioned and the "one-to-one" credit provision) and contend that the Act will result in significantly different fair share calculations.

9. Nevertheless, Judge Serpentelli did not foreclose the Defendants from introducing evidence concerning fair share methodology variations allegedly based upon the Act's provisions, Township counsel has advised that Defendants intend to offer such evidence and whether such evidence will be received and given weight is to be determined at the November 18 compliance hearing in this matter.

10. In addition to the reasons outlined in the Garvin affidavit expressed by Judge Serpentelli in denial of Defendants' trial court stay motion, His Honor stated that: denial of the stay will not defeat the purpose of the appeal and, following a judgment of compliance, Defendants can appeal any or all issues; Defendants will not suffer any significant inconvenience by reason of their attendance at a one day compliance hearing; and a stay, once issued, is not likely to be lifted in the absence of an abuse of discretion and, in such a case, production of lower income housing may be delayed for a period of time which may amount to years.

11. As Defendants requested in their stay application below, Judge Serpentelli continued the Township's immunity from builder's remedy

suits pending the scheduled compliance hearing so as to eliminate any real harm which may have otherwise occurred due to Defendants' attendance at a one day compliance hearing.

Thomas F. Carroll

Sworn to and subscribed
before me this 8th day
of November, 1985.

Kathi L. Paulmier

AFFIDAVIT OF THOMAS F. CARROLL, ESQ.

BRENER, WALLACK & HILL

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△ CERTIFIED CIVIL TRIAL ATTORNEY

November 5, 1985

FILE NO. 3000-04-02

Ms. Gloria Mathey
Ocean County Court Stenographers
Ocean County Court House
Toms River, NJ 08753

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

Dear Ms. Mathey:

This will confirm our conversation of November 4, 1985 wherein I requested the transcript of the November 1 proceedings (motion for stay) before Judge Serpentelli in the above-captioned matter. As we discussed, you are to bill us for your services.

Very truly yours,

Thomas F. Carroll

TFC:klp

ASSEMBLY MUNIC. GOVT. COMM. STATEMENT TO S.C.S. FOR S.2046 and S.2334

ASSEMBLY MUNICIPAL GOVERNMENT COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR

SENATE, Nos. 2046 and 2334

[OFFICIAL COPY REPRINT]

STATE OF NEW JERSEY

DATED: FEBRUARY 28, 1985

This bill provides for a legislative response to the Mt. Laurel II decision. The bill encompasses a comprehensive housing planning and financing assistance mechanism which provides an alternative to the planning mechanisms and remedies currently being enforced by the courts. The Assembly committee amendments would:

1. Provide for a 12 month moratorium period, during which the imposition of the builder's remedy by the courts would be prohibited.

2. Require the Attorney General to seek a declaratory judgment within 30 days of the effective date as to the constitutionality of the moratorium.

3. Extend the time which a municipality has to file its housing plan with the council from 10 months to 12 months within the protected period of the planning process.

4. Clarify that the legislation does not require a municipality to raise or expend its revenues in order to provide housing.

5. Establish that a court in determining whether to transfer pending lawsuits to the council must 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.

6. Clarify that municipal fair share is determined after crediting the municipality for adequate low and moderate income housing currently provided.

7. Clarify that regional housing need estimates must be adjusted by the council as municipal fair shares are adjusted based on available land, infrastructure considerations, or environmental or historic preservation factors.

8. Declare the State's preference for the review and mediation process, rather than litigation, for resolving exclusionary zoning disputes, and the Legislature's intent to provide in the act alternatives to the use of the builder's remedy.

9. Require council determinations regarding certification to be in writing.

10. Provide for a more extensive role for the proposed State Planning Commission in assisting the council and for the New Jersey Mortgage and Housing Finance Agency in reviewing housing project plans and administering resale controls.

The committee reported the bill favorably.

MINORITY STATEMENT

By Assemblymen Kline and Colburn

Although we are pleased that the committee accepted many of the suggestions offered by the Republicans, we cannot accept this bill, as amended, because it fails to remove the courts from Mount Laurel-like litigation.

This bill does not prevent the courts from continuing in their current direction. Pending Mount Laurel cases may continue to be litigated, ridiculous housing quotas established in the Warren township decision and builder's remedy may still be applied to municipalities throughout New Jersey, and the decisions of the State Housing Council, as established by this bill, may be negated by the courts.

The Republicans offered an amendment that tied this bill to the Legislature's positive action to place a constitutional amendment *(ACR-145—Alboha)* on the ballot. This amendment guarantees that the courts will no longer be able to interfere in local zoning the way the Supreme Court did in its Mount Laurel II decision. Nothing short of a constitutional amendment would achieve this goal. This amendment also would bar imposition on the builder's remedy should the proposed moratorium be struck down by any court decision.

The Republicans also offered an amendment that required the courts, to transfer all pending litigation to the Housing Council. The language, as amended, is a step in the right direction, but does not go far enough. It is patently unfair to set up two bodies which can establish two separate housing standards. This bill could create that very situation.

It is also unfair that municipalities, which already have settled Mount Laurel cases, to now find themselves in the position of having accepted unreasonable quotas set by the courts, while a Housing Council generates new and less burdensome quotas. This bill does nothing to protect or reward those municipalities which have met far more than their obligation. Specifically, the Republican amendment protected these settled municipalities from further suits for the 12-year period following the enactment of this legislation.

While the adopted amendments allow the municipalities to adjust the figures given to them by the Housing Council in accordance with important factors, such as environmental concerns and historic preservation, the adjustment does not take into account farmland preserva-

tion and the adequacy of existing public facilities. The Republican amendment included these necessary factors in any adjustment of housing quotas.

Finally, it must be underscored that there is nothing in this bill that prevents the Housing Council from using the same housing formula and imposing the same outlandish housing quotas as the courts did in the Mt. Laurel II decision and the subsequent Warren township decision.

The Republican amendment gave the Housing Council clear direction in the way the council must develop its formula. This direction uses realistic definitions of "prospective need," thereby ensuring that ephemeral projections and equations do not determine the future housing needs of a municipality.

This bill, no doubt, will be touted as the majority party's answer to Mount Laurel II. It may be a partial answer, but it is our belief that it is woefully inadequate. Even worse, we believe that this solution may turn out to be as bad as the Mount Laurel II decision. Should this occur, however, the members voting in favor of this bill will no longer be able to point their fingers at the courts. They will have to accept responsibility for the mess they created.