

RULS - AD - 1985 - 390

11/13/85

In Hills Dev. Co. v. Bernards:

- Letter from Hirsch to Judge Clifford
- Notice of Motion requesting court dissolve a stay of trial court proceedings

Pgs - 18

NOV 1 1985

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November 13, 1985

FILE NO. 3000

RULS - AD - 1985 - 390

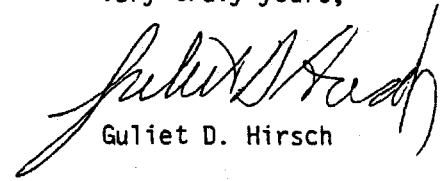
The Honorable Robert L. Clifford
Supreme Court of New Jersey
Court House
Morristown, NJ 07960

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

Dear Justice Clifford:

With respect to the above captioned matter, please find enclosed a Notice of Motion wherein Plaintiff-Hills Development Company requests that this Court dissolve a stay of all trial court proceedings imposed by the Superior Court, Appellate Division. In support of said application, a letter memorandum is also enclosed herewith.

Very truly yours,


Guliet D. Hirsch

GDH:klp

enclosures

RECEIVED

NOV 1 1985

JUDGE SERPENTELLI'S CHAMBERS

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Princeton, New Jersey 08540
(609) 924-0808
Attorneys for Plaintiff/Movant

THE HILLS DEVELOPMENT COMPANY, :	SUPREME COURT OF NEW JERSEY
Plaintiff/Movant :	
vs. :	
THE TOWNSHIP OF BERNARDS in the :	Docket No. L-030039-84 P.W.
COUNTY OF SOMERSET, a municipal :	CIVIL ACTION
corporation of the State of New Jersey, :	(<u>Mt. Laurel II</u>)
THE TOWNSHIP COMMITTEE OF THE :	
TOWNSHIP OF BERNARDS, THE :	
PLANNING BOARD OF THE TOWNSHIP :	
OF BERNARDS and the SEWERAGE :	NOTICE OF MOTION FOR DISSOLUTION
AUTHORITY OF THE TOWNSHIP :	OF STAY. R. 2:9-8
OF BERNARDS, :	
Defendants/Respondents :	

To:	James E. Davidson, Esq.	Arthur H. Garvin, III, Esq.
	Farrell, Curtis, Carlin & Davidson	Kerby, Cooper, Schaul & Garvin
	43 Maple Avenue	9 DeForest Avenue
	Morristown, New Jersey 07960	Summit, New Jersey 07901

PLEASE TAKE NOTICE that the undersigned counsel for Plaintiff, The Hills Development Company will move on an emergent basis before the Honorable Robert J. Clifford on November 14, 1985 at a time which shall be set by the Court for an Order dissolving the stay of trial court proceedings issued by the Superior Court, Appellate Division on November 12, 1985.

11-14-85
EDG

PLEASE TAKE FURTHER NOTICE that, in support of the instant application, Plaintiff will rely upon the letter memorandum filed and served herewith.

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

By: 

Thomas F. Carroll

Dated: November 13, 1985

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(609) 924-0808
ATTORNEYS FOR PLAINTIFF/MOVANT

THE HILLS DEVELOPMENT COMPANY,

Plaintiff/Movant

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/Respondents

: SUPREME COURT OF NEW JERSEY

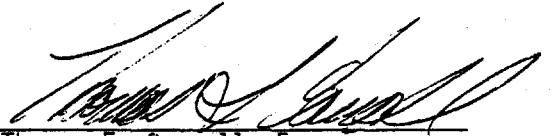
: (Mt. Laurel II)

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

: CIVIL ACTION

: PROOF OF SERVICE

I hereby certify that on November 13, 1985 I caused to have hand-delivered copies of the within Notice of Motion and Letter Memorandum to the Honorable the Chief Justice, the Associate Justices of the New Jersey Supreme Court, James E. Davidson, Esq. and Arthur H. Garvin, III, Esq.


Thomas F. Carroll, Esq.

DATED: November 13, 1985

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Δ CERTIFIED CIVIL TRIAL ATTORNEY

November 13, 1985

FILE NO.

Honorable Robert J. Clifford
New Jersey Supreme Court
Hughes Justice Complex
CN-970
Trenton, New Jersey 08625

(Hand-delivered to Chambers of all Justices)

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

Dear Justice Clifford:

Please accept the following letter brief in support of Plaintiff - The Hills Development Company's emergent application for an Order dissolving the stay of all trial court proceedings, which stay was issued by the Appellate Division of Superior Court on November 12, 1985.

Interlocutory appeals have been proscribed in Mt. Laurel II cases. Mt. Laurel II, 92 N.J. 285. The legislature made no attempt to change this rule through the Fair Housing Act. It is therefore difficult to see why a stay is justified pending the outcome of an application which the Appellate Division should not grant. The harm which may result to Bernards Township, absent the stay, is simply participation in a one-day trial proceeding in which the probable result is a final judgment of compliance. This judgment would protect Bernards

from further litigation over its zoning scheme and would not preclude appeals and stay applications if Bernards so desired.

In balancing the relative harms, we respectfully request that the stay be dissolved and the Compliance hearing be permitted to proceed on November 18, 1985.

PROCEDURAL HISTORY

Annexed to this letter brief is a procedural history of the above-captioned litigation.

STATEMENT OF FACTS

The above-captioned matter is exclusionary zoning litigation filed on May 8, 1984 pursuant to Southern Burlington County N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"). In September of 1984, Defendant-Bernards Township ("Bernards") contacted The Hills Development Company ("Hills") and offered to settle the litigation.

Bernards thereafter applied to the trial court for the entry of an Order immunizing the Township from further builder's remedy lawsuits¹ and staying the instant litigation. The Township was advised by the trial court that such an Order could be entered if Bernards stipulated the invalidity of its prior ordinance and its fair share obligation.

On November 12, 1984, Bernards adopted a revised land use ordinance (Ordinance #704) pursuant to which Hills' property was rezoned for an inclusionary development which would contain 550 low and moderate income housing units.

¹ See J.W. Field Company, Inc. v. Township of Franklin, ___ N.J. Super. ___ (1985), slip opinion at 8-12.

On December 19, 1984, the trial court entered an Order which: acknowledged the revision of Bernards' land use ordinance so as to accommodate over 1,000 units of lower income housing; immunized Bernards from builder's remedy lawsuits; and stayed the proceedings below. Due to Bernards' rezoning of Hills' land and its representations concerning its desire to voluntarily comply and settle with Hills, Hills did not contest the entry of said December 12, 1985 Order.

Thereafter, the parties and the court-appointed Master met on numerous occasions in order to discuss relatively minor ordinance revisions and the drafting of a stipulation of settlement and proposed form of judgment. The Township requested three extensions of the original grant of builder's remedy immunity and all three requests were granted. When requesting the third such extension, Bernards' counsel advised the trial court (on June 12, 1985) that an agreement had been reached to settle this matter and requested a compliance hearing date be scheduled. (See June 12, 1985 letter, Appendix A).

In June of 1985, the court-appointed Master issued a report recommending a judgment of compliance with respect to said Ordinance #704 subject to relatively minor conditions.

On August 7, 1985, the parties met and finalized settlement document language. On August 12, 1985, (some 40 days subsequent to the effective date of the Fair Housing Act), Bernards' counsel advised Hills that the Defendant Township Committee would not execute the settlement documents. Bernards' counsel also advised that the Township Committee believed it could derive a lower fair share obligation pursuant to the Fair Housing Act (L. 1985, c.

222) and that, should Hills decline to accept a lower number of approved units, a motion to transfer this litigation to the Council on Affordable Housing ("the Council") would be filed pursuant to Section 16 of the Fair Housing Act.

Said motion to transfer was filed and denied by the trial court on October 16, 1985. In response to the Hills motion requesting a compliance hearing, the trial court scheduled a one-day hearing for November 18, 1985 at 10:00 a.m. The purpose of the hearing was to review Ordinance #704 which was voluntarily enacted by Bernards Township on November 12, 1984 and which rezoned the Hills and other properties for lower income housing purposes. Ordinance #704 was set to "expire" on November 18, 1985, but the expiration clause was "removed" by Ordinance adopted the night of November 12, 1985. A companion ordinance (Ordinance #746) was introduced at that time which is designed to short-circuit the Hills "concept approval" application. This application was discussed informally in March of 1985 and formally submitted on October 15, 1985, and would provide for 550 units of lower income housing on the Hills property.

Bernards filed a Law Division motion to stay all trial court proceedings and said motion was denied on November 1, 1985. Said motion also sought an extension of immunity from builder's remedy lawsuits. This latter request was granted. Bernards thereafter filed a motion in the Appellate Division (on one business day's notice) seeking a stay of trial court proceedings pending decision by the Appellate Division on leave to appeal. Said motion was granted on November 12, 1985.

LEGAL ARGUMENT

POINT I

DEFENDANTS HAVE NOT DEMONSTRATED
ENTITLEMENT TO A STAY OF ALL TRIAL COURT
PROCEEDINGS AND IRREPARABLE HARM WILL
RESULT IF THE STAY IS NOT DISSOLVED.

It is incumbent upon the party requesting a stay 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), see also, Duke v. Duke, 70 N.J. Eq. 149 (Ch. 1905) (considerations are possibility of success, hardship in continuing to litigate).

It is respectfully submitted that Bernards has not demonstrated, and is unable to demonstrate, any of the prerequisites which would justify a stay of trial court proceedings. The only possible prejudice which would result from denial of such a stay would be the attendance at the one-day compliance hearing scheduled for November 18, 1985. Following said hearing and the entry of a judgment of compliance, Bernards would clearly be entitled to appeal any or all issues raised below. Hills therefore respectfully submits that the Appellate Division clearly erred when it reversed the trial court's exercise of its discretion in denying the stay.

(a) Need to Preserve The Status Quo

The status quo to be preserved pending appeal involves an exclusionary zoning suit against Bernards Township which was effectively settled, with a municipal ordinance fully adopted and all parties making substantial preparations for a hearing to result in the issuance of a judgment of compliance to Bernards. After deciding to renege on its numerous representations that the case was fully settled,² Bernards moved to transfer to the Council on Affordable Housing and subsequently requested a stay. The trial court's decision not to transfer was in part based on collateral estoppel principles governing the Hills right to rely on the settlement previously negotiated. The hearing scheduled for November 18, 1985 is in fact the only proceeding which Bernards seeks to avoid through the stay. The hearing is to determine the constitutional sufficiency of an ordinance which is and will continue to be in effect during any appellate proceedings. The hearing will offer Bernards the opportunity to argue that its fair share should be lowered, pursuant to the Fair Housing Act. It is truly difficult to understand why Bernards seeks to interrupt this process with a stay.

(b) Probability of Success

With respect to Bernards' probability of success on appeal, it should first be noted that this Court has strongly stated its position as to interlocutory appeals in Mount Laurel litigation:

² The last such representation to the trial court was contained in a letter which was sent after both houses of the state legislature had passed the bill, amended in response to the specific language of Governor Kean's veto message which was then signed by Governor Kean.

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.

Mount Laurel II, supra, 92 N.J. at 285 (emphasis added).

It should be noted that the legislature did not attempt to change this principle through the Fair Housing Act, with respect to transfer motions or any other trial court decisions.

Assuming that the Appellate Division grants Bernards' application for leave, Bernards' 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. 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. The probability of Bernards' ability to demonstrate the trial court's abuse of its discretion is negligible.

(c) Irreparable Harm

Finally, there is nothing to indicate that Bernards will suffer any injury, irreparable or otherwise, if trial court proceedings are concluded. The trial court proceedings which Bernards seeks 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 Appellate Division stay were sustained, this matter would lie dormant and the very injury to plaintiffs sought to be avoided by the trial court would result.

CONCLUSION

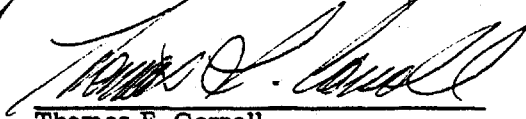
For the foregoing reasons, the Hills respectfully submits that the Appellate Division's reversal of the trial court's denial of a stay was entirely without basis and the stay imposed by the Appellate Division should be dissolved.

Respectfully submitted,

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

By:


Gulliet D. Hirsch


Thomas F. Carroll

Dated: November 13, 1985

PROCEDURAL HISTORY

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

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

July 18, 1985	Meeting with Township counsel to review Memorandum of Agreement and proposed Order of Judgment.
August 7, 1985	Meeting with Township counsel; proposed Order of Judgment and Memorandum of Agreement deemed acceptable by all parties.
August 12, 1985	Telephone call from Township counsel indicating Township Committee unwilling to execute settlement documents.
August 26, 1985	Meeting with representatives of Township wherein Hills advised that Township intends to seek transfer to Affordable Housing Council unless Hills agrees to accept lower number of units.
September 13, 1985	Hills' receipt of motion to transfer to Affordable Housing Council.
September 20, 1985	Hills serves opposition to Township's motion to transfer and cross-motion for judgment of compliance.
October 4, 1985	Oral Argument on Township's motion to transfer to Affordable Housing Council and on Hills' cross-Motion for judgment of compliance; trial court issues oral opinion denying Township motion to transfer.
October 16, 1985	Court enters Order memorializing denial of Township's Motion to Transfer.
October 23, 1985	Township serves motion on short-notice to stay trial court proceedings and for immunity from further builder's remedy lawsuits.
November 1, 1985	Trial court denies motion for stay of trial court proceedings and extends grant of immunity from further builder's remedy lawsuits.
November 7, 1985	Township serves Appellate Division motion to stay trial court proceedings which motion is heard November 12, 1985 at 10:30 a.m.
November 12, 1985	Appellate Division reverses Law Division denial of Township's stay application.

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(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

Honorable Eugene D. Serpentelli
Page Two
June 12, 1985

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

AM-185-8515

ORDER ON
MOTIONS/PETITIONS

L-30039-84

THE HILLS DEVELOPMENT COMPANY

VS

THE TOWNSHIP OF BERNARDS ET AL

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-185-8515
MOTION NO. M-858-85
BEFORE PART F

JUDGES: GREENBERG
LONG

FILED
APPELLATE DIVISION

NOV 12 1985

Elizabeth McLaughlin

Clerk

NOVEMBER 7, 1985

MOVING PAPERS FILED

ANSWERING PAPERS FILED

DATE SUBMITTED TO COURT

DATE ARGUED

DATE DECIDED

NOVEMBER 8, 1985

NOVEMBER 8, 1985

NOVEMBER 12, 1985

RECEIVED

NOV 12 1985

JUDGE MORTON I. GREENBERG

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS
HEREBY ORDERED AS FOLLOWS:

MOTION/~~PETITION~~ FOR
STAY PENDING DISPOSITION OF
MOTION FOR LEAVE TO APPEAL

GRANTED DENIED OTHER

X		
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SUPPLEMENTAL:

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

Elizabeth McLaughlin
Clerk

REC'D.
APPELLATE DIVISION

NOV 12 1985

Elizabeth McLaughlin
Clerk

FOR THE COURT:

Morton I. Greenberg

P.J.A.D.

MORTON I. GREENBERG

WITNESS, THE HONORABLE MORTON I. GREENBERG, PRESIDING
JUDGE OF PART F, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION,
THIS 12TH DAY OF NOVEMBER, 1985.

Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

meg