

RULS-AD-1985-400

11/20/85

Hills Motion to Modify Terms of Stay

p. 114

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FILE NO. 3000-

November 20, 1985

HAND DELIVERED

RUIS - AD - 1985 - 400

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

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

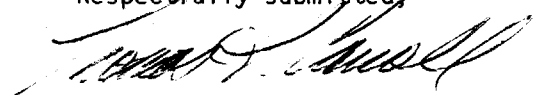
Dear Judge Serpentelli:

Pursuant to my conversation with Your Honor's law secretary, I enclose a notice of motion on short-notice which motion is returnable on November 22, 1985 at 2:00 p.m. The within motion seeks to preliminarily enjoin Bernards Township's adoption of proposed Ordinance #746 or any other ordinance which would affect compliance and/or the presently pending development application submitted by Plaintiff. Proposed Ordinance #746 is scheduled to be adopted on November 26, 1985.

In support of the within motion, please find enclosed a letter memorandum, affidavits and exhibits. The original and two copies of a proposed form of Order are also enclosed.

I understand that Your Honor's chambers did not receive a copy of the Order entered by the Supreme Court with respect to Plaintiff's motion to dissolve the stay issued by the Appellate Division. Please find same enclosed.

Respectfully submitted,



Thomas F. Carroll

TFC:klp

CC: James E. Davidson, Esq. (w/enclosure - Hand Delivered)
Arthur H. Garvin, III, Esq. (w/enclosure - Hand Delivered)

THE HILLS DEVELOPMENT COMPANY,

Plaintiff-Movant,

v.

O R D E R

THE TOWNSHIP OF BERNARDS in the
COUNTY OF SOMERSET, etc., et al.,

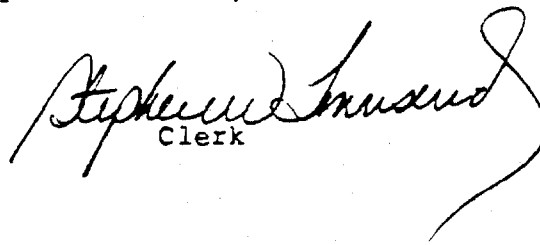
Defendants-Respondents.

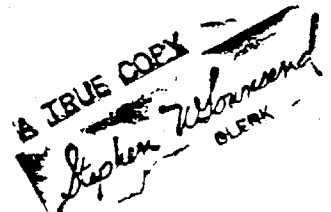
This matter having been duly presented to the Court, and
good cause appearing;

It is ORDERED that the motion to dissolve the stay
in this matter imposed by the Superior Court, Appellate Division,
is denied; and it is further

ORDERED that the stay shall remain in effect pending the
resolution of the appeal in the within matter now pending before
this Court; provided, however, that plaintiff may make applica-
tion for a modification of this Order or other appropriate relief
based upon any proposed municipal action that might affect the
municipality's ability to satisfy its Mt. Laurel obligations or
upon any other relevant change in circumstances.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice,
at Trenton, this 14th day of November, 1985.


Clerk

A TRUE COPY

CLERK

11/20/85

2/14/90 of
11/20/85

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(609) 924-0808
Attorneys for Plaintiff

THE HILLS DEVELOPMENT COMPANY :	SUPERIOR COURT OF
Plaintiff :	NEW JERSEY
vs. :	LAW DIVISION-
THE TOWNSHIP OF BERNARDS in the :	SOMERSET COUNTY/OCEAN COUNTY
COUNTY OF SOMERSET, a municipal :	(Mt. Laurel II)
corporation of the State of New Jersey, :	Docket No. L-030039-84 P.W.
THE TOWNSHIP COMMITTEE OF THE :	CIVIL ACTION
TOWNSHIP OF BERNARDS, THE :	NOTICE OF MOTION TO
PLANNING BOARD OF THE TOWNSHIP :	MODIFY TERMS OF STAY
OF BERNARDS and the SEWERAGE :	
AUTHORITY OF THE TOWNSHIP :	
OF BERNARDS :	
Defendants :	

TO: James E. Davidson, Esq.
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Arthur H. Garvin, III, Esq.
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PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff in the above-captioned matter will move on short-notice before the Honorable Eugene D. Serpentelli of the Superior Court of New Jersey, Law Division, Somerset/Ocean

County, at the Ocean County Court House, Toms River, New Jersey on November 22, 1985 at 2:00 o'clock in the afternoon or as soon thereafter as counsel may be heard for an Order:

1. Enjoining the referral to and review by the Planning Board, public hearing, second reading and adoption of Ordinance 746 and the taking of any official action on any other ordinance which would amend, repeal or delete any provision of the Defendant Township's land use ordinances which concern the Township's response to its Mt. Laurel obligation and/or the presently pending development application submitted by Plaintiff; and
2. Directing that the Plaintiff's pending development application be processed by Defendant Planning Board in accordance with applicable law including N.J.S.A. 40:55D-1 et seq. and Bernards Township Ordinances.

It is requested that the relief requested herein shall remain in effect pending resolution of the Defendant Township's appeal which appeal has been certified to the Supreme Court.

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

I hereby certify that copies of the aforementioned documents were hand-delivered to counsel for Defendants on this date.

Oral argument is requested.

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

By: 
Thomas F. Carroll

November 20, 1985

-2-

BRENER, WALLACK & HILL

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November 20, 1985

FILE NO.

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

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

Dear Judge Serpentelli:

Please accept the following letter memorandum in lieu of a formal brief in support of The Hills Development Company's within application. In this application, Hills seeks to enjoin Defendant Bernards Township Committee from taking any action to amend, delete or repeal Ordinance No. 707(E), or any other ordinance affecting the Bernards compliance program and/or Hills' pending development application, pending resolution by the Supreme Court of the certified appeal brought by Defendants. Moreover, it is requested that Bernards be directed to process Hills' pending development application in accordance with applicable law. In essence, it is requested that the status quo be preserved since this matter is now stayed.

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. Pursuant to Bernards' offer to settle, the Township adopted Ordinance 704 (Exhibit "A") which rezoned Hills' land for an inclusionary development (5.5 dwelling units per acre with a 20% mandatory set-aside). In return for its pledge to voluntarily comply, this Court has immunized Bernards from further builder's remedy lawsuits.

Bernards and Hills have both stipulated that said ordinance complies with Mount Laurel II. The court-appointed Master recommends conditional approval of the compliance ordinance.

Between September, 1984 and August, 1985, representatives of the parties met and discussed the details of Hills' proposed inclusionary development pursuant to Ordinance 704 (adopted November 12, 1984).

Set forth as Appendix A to Ordinance 704 and adopted by reference in same is "Article 1100". (See Exhibit "A" to this brief). Section 1102(A)(3) of said Article provides that:

Applicants with 10 or more acres may elect to submit a Concept Plan in accordance with Section 707 as part of a PRD application in any R-5 or R-8 zone. In the alternative, applicant may follow procedures for subdivision and site plan approval set forth elsewhere in this ordinance. (emphasis added.)

* The parties were also engaged in Mount Laurel I litigation which litigation is not directly relevant to this motion.

Ordinance 707 is set forth as Exhibit "B".

Ordinance 707 has been in effect since May 13, 1982. Numerous major planned developments (at least 2,200 units) have received conceptual approval pursuant to Ordinance 707 since its adoption. (Affidavit of Peggy A. Schnugg).

As set forth in the Affidavit of John H. Kerwin, President of The Hills Development Company, submitted herewith, representatives of the Township have consistently insisted that Hills submit an application for "Conceptual Approval" in accordance with Ordinance 707.* Hills was told that no "piecemeal" preliminary site plan or subdivision applications would be entertained and that an overall Conceptual Approval application must be submitted pursuant to Ordinance 707. (Affidavit of Kerwin). Moreover, in the "Memorandum of Agreement" drafted by Bernards' counsel (but not executed by the Township Committee), it was stipulated that Hills would file a Section 707 Conceptual Approval application and gain vested rights pursuant to the terms of said ordinance. (Exhibit "C").

In March of 1984, Hills submitted a "sketch" concept plan to the Defendant Planning Board Technical Coordinating Committee ("TCC") as per Section 707(B)(1). (Affidavit of Kerwin). On March 17, 1984, the parties met to discuss the plan. The TCC perceived some design problems with respect to said plan and Hills' proposed development was redesigned in accordance with those perceived problems. (Affidavit of Kerwin).

* As discussed further infra, Section 707 "Conceptual Approval" is, in fact, an alternative form of preliminary approval of a Planned Development.

On October 17, 1985, Hills submitted a comprehensive Conceptual Approval Application to the TCC pursuant to Ordinances 704 and 707. (A copy of said plan is provided to the Court herewith). Applications for Conceptual Approval pursuant to Section 707 must include the application fee, copies of the plat, the completed application form, a development plan, a circulation plan, a utility plan, a drainage plan, an environmental assessment as per Section 708 of the ordinance and a staging plan. (See Ordinance 707, Exhibit "B"). Hills commissioned various consulting and engineering firms to conduct all of these studies in preparation for submission of the pending application. (Affidavit of Kerwin). This Application was prepared at a cost of approximately \$250,000.00. In addition, Hills paid a \$74,360.00* application fee to the Township (required by Ordinance 707) on October 17, 1985. (Ibid.) On November 12, 1985, Hills' consultants and its attorney met with the TCC for the purpose of discussing said Conceptual Approval Application. (Affidavit of Hall).

Section 707(E) currently provides, in pertinent part, that:

1. Conceptual approval shall confer upon the applicant the right to develop in accordance with those aspects of the conceptual plan approved ... (emphasis added).

On November 12, 1985, the Defendant Township Committee introduced on first reading Ordinance 746. Proposed Ordinance 746 (Exhibit "D") would delete the above Ordinance 707(E) and replace same with the following language:

X Conceptual approval shall not confer any development rights upon the applicant. (emphasis added).

* Actually, the total application fee is \$297,440.00. Thus far, Hills has been required to pay 25% of the total, or \$74,360.00

A vote on the adoption of proposed Ordinance 746 upon second reading is scheduled for November 26, 1985. Ordinance 746 is an obvious attempt to frustrate Hills' proposed inclusionary development.

In seeking stays of this matter, Defendants have represented to the Appellate Division and the Supreme Court that they would continue to process Hills' pending development application. (Exhibit "E" at 13-14; Exhibit "F" at 4). Defendants did not mention that, on the evening of November 12 (the date the Appellate Division imposed a stay), an ordinance would be introduced which would render that pending development application absolutely meaningless.

Since the compliance hearing in this matter has been stayed, Hills respectfully requests that Bernards be enjoined from revising any ordinance which will be the subject of that compliance hearing or bear on the ability of a developer to gain approvals pursuant to Bernards' compliance ordinance.

ARGUMENT

POINT I

THE TERMS OF THE STAY SHOULD BE MODIFIED AND DEFENDANT BERNARDS TOWNSHIP SHOULD BE ENJOINED FROM TAKING ANY ACTION WHICH WOULD AFFECT COMPLIANCE OR HILLS' PRESENTLY PENDING DEVELOPMENT APPLICATION.

An Order entered by the Supreme Court on November 14, 1985 (Exhibit "G"), provides, in pertinent part, that:

plaintiff may make application for a modification of this Order or other appropriate relief based upon any proposed municipal action that might affect the municipality's ability to satisfy its Mount Laurel obligations or upon any other relevant change in circumstances.

An earlier Order entered by the Supreme Court (Exhibit "H") provides that jurisdiction in this matter remains in the Superior Court, Law Division.

Mr. Keith M. Endo, Deputy Clerk of the Supreme Court, has advised Hills that this application must be initially brought before this Court. Hills seeks herein to preserve the status quo pending the Supreme Court's resolution of Bernards' appeal of this court's denial of transfer.

Pursuant to the Township's directive, Hills has now submitted two plans in an attempt to gain approval for its inclusionary development pursuant to Ordinance 704 and the Ordinance 707 process referenced therein. As indicated, the latter Conceptual Approval Application, pending for some 33 days now, was prepared at a total cost to Hills of approximately \$325,000.00 (including the requisite development application fee). (Affidavit of Kerwin). Hills has met with TCC members in order to discuss said application. If proposed Ordinance 746 is adopted as scheduled on November 26, 1985, said development application will be rendered meaningless and Hills will have expended some \$325,000.00 in vain. Moreover, Hills would be compelled to abandon the exercise and, as discussed below, production of lower income housing will be immeasurably delayed.

If the pending application were processed and development rights were conferred upon Hills as per Ordinance 707(E), Hills could expeditiously commence "pre-development" activities including site-clearing, grading, installation of sewer, water and cable T.V. lines, preliminary roadwork and drainage basin construction, etc. Such pre-development activities are necessary before any actual construction can take place in a planned development of the magnitude proposed by Hills:

"Simply by reason of the magnitude of the project, the developer may intend to proceed only with very limited portions in terms of the actual implementation of the foreseeable future after rezoning. For example, the developer may begin with single family and multifamily residences as well as certain recreational elements, leaving complete implementation of commercial or light industrial elements for later developing or staging. Under the circumstances it might be economically prohibitive to compel the developer to incur the substantial engineering and architects' fees necessary to complete detailed site plans for the entire projected PUD. Practically speaking, it may not be wise to pin a developer to a detailed site plan at the outset, since his experience in developing the initial stages might well dictate decisions on the remaining stages different from those projected at the outset...The intent of the (preliminary site plan) provision is, as indicated, to permit the municipality and the developer to reach agreement on the basic design; naturally, the plan would include the locations of the projected uses, the interior transportation network, detail on the residential areas, dwelling types, and a computation of defined residential density. Also, the sketch would indicate the open space and recreational system, grading, drainage, water and sewage network of the community at large, accessory school, fire, police, cultural and other community facilities and some indication of the use and ownership of abutting lands."

F. Aloï, "Implementation of a Planned Unit Development", 2 Real Estate Law Journal, Number 2, page 523 (1973).

If, on the other hand, Ordinance 707 is amended, Hills would be compelled to commence preparation of an entirely different application pursuant to Bernards' preliminary approval ordinance. This application would take between three to six months to prepare. After submission, Bernards would have the time permitted by law to examine the application for completeness and determine whether to approve same (Approximately 5 months). After approved, site preparation and infrastructure installation could take place. Due to this lapse of time, it is likely that an entire construction season could elapse.

Therefore, an amendment of Ordinance 707 equals a very lengthy delay of actual construction.

The stay of the compliance hearing in this matter was granted following the Township's representation that, since Hills' pending development application would be processed regardless of whether a stay was entered, Hills would incur no harm upon issuance of a stay. (Exhibit "E" at 13-14; Exhibit "F" at 4). Equity compels that Bernards now be enjoined from negating a basis upon which the stay was issued. If Bernards is not so enjoined, Hills and lower income people will suffer the irrevocable effect of the stay issued upon circumstances which will no longer be present.

Whether or not our Supreme Court decides that this matter should be transferred to the Council on Affordable Housing, Bernards has represented that its inclusionary ordinance (Ordinance 704) will remain in place. (Exhibit "I"). If Bernards' compliance package is altered, Hills may be foreclosed from gaining the approvals to which it would have otherwise been entitled. Again, this result would work clear irreparable injury to both Hills and lower income people. Bernards should, therefore, be enjoined from altering its compliance package pending the Supreme Court's disposition of the appeal before it.

- (i) **This Court is empowered to modify the terms of the stay and enjoin Bernards from amending its compliance ordinance.**

As discussed above, the Orders entered by the Supreme Court expressly provide this Court with the authority to apply for "relief based upon any proposed municipal action that might affect the municipality's ability to satisfy its Mt. Laurel obligations." (Exhibit "G"). Bernards' proposed

Ordinance 707 amendment is obviously intended to prevent Hills from proceeding with construction of its proposed inclusionary development. The proposed amendment or any other action bearing on Bernards' ability to satisfy its obligation should be stayed.

The Mount Laurel II opinion gives the courts express authority to order a municipality to adopt a compliant ordinance. Id. at 278, 285-286. Implicit in that authority is the authority to prevent a municipality from amending that ordinance in a manner which would make actual production of lower income housing less realistic.* The Defendant Township stipulated the invalidity of its prior ordinance and agreed to voluntarily comply. In return, Bernards has been immunized from builder's remedy lawsuits for the past eleven months. This Court is empowered to permanently enjoin Bernards from diluting the effectiveness of its compliance ordinance. (See also Exhibit "G" specifically authorizing the instant application).

(ii) The Ordinance 707 approval process is authorized by the Municipal Land Use Law

The "vested" Conceptual Approval permitted pursuant to Bernards' Ordinances 704 and 707 is authorized. Prior to Hills' Ordinance 707 application, Bernards approved numerous developments pursuant to the Ordinance by the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

A Section 707 Conceptual Approval Application for a planned development is exceptionally comprehensive. It is to be distinguished from an

* In fact, this Court is authorized to direct that development applications be approved by the municipality, 92 N.J. at 286. In essence, Hills merely requests that Bernards be directed to review Hills' application, a much less intrusive directive.

"informal review" submitted pursuant to N.J.S.A. 40:55D-10.1. A N.J.S.A. 40:55D-10.1 informal review may be made when a developer "intends to prepare and submit an application for development." No fees may be required for such a review and such a review may not confer development rights. Ibid. In contrast, a Section 707 Conceptual Approval Application is, indeed, a development application. An application fee, in this case \$74,360.00 is required. Moreover, Section 707 expressly confers development rights upon approval of an application submitted pursuant to the ordinance. A Section 707 application is clearly intended to be an alternative form of preliminary application for approval of a planned development and, specifically in the context of planned developments, such an approval process is authorized.

In adopting the Municipal Land Use Law ("MLUL"), the legislature incorporated by reference many of the procedures, standards and policies of the Municipal Planned Unit Development Act. In order to carry out the policy behind the MLUL of providing "one stop shopping" for the developer, many of the PUD procedures are incorporated into the site plan and subdivision sections of the MLUL.

The requirements for preliminary site plan approval are contained in N.J.S.A. 40:55D-46a. This section of the MLUL permits municipalities to adopt site plan review ordinances which require the developer to submit site plans and engineering documents in "tentative form for discussion purposes" for preliminary approval. Where architectural plans are required to be submitted, "preliminary" plans and elevations may be required. The language of this preliminary site plan approval section of the MLUL leaves no doubt as to the

legislative intent that preliminary site plan applications contain less detailed and less complete information than is required to be submitted for final site plan approval. Municipalities are thus relatively free to define submission requirements for site plan approval with one proviso: that applicants not be required to submit site plans or other documents in other than tentative form.

As discussed above, a Section 707 Conceptual Approval Application is exceptionally comprehensive. Along with copies of the plat, the application form and the fee, an applicant must submit a development plan, a circulation plan, a utility plan, a drainage plan, an environmental assessment and a staging plan. Hills commissioned a number of consulting and engineering services to prepare the requisite plans and, as stated, all of these plans were submitted along with the other application documents. Although Section 707 is labeled "Conceptual Approval Applications," the requirements are akin to those required pursuant to a conventional N.J.S.A. 40:55D-46 preliminary approval ordinance.

Another section of the MLUL deals directly with procedural requirements for planned development preliminary site plan approval. This section, N.J.S.A. 40:55D-39c(1), authorizes municipal ordinances to set forth any variations from ordinary standards for preliminary and final approval in order to "provide the increased flexibility desirable to promote mutual agreement between the applicant and the planning board on the basic scheme of a planned development at the stage of preliminary approval." This language would be mere surplussage if construed to authorize no more for planned developments than regular preliminary approval procedures applicable to all other types of

development under N.J.S.A. 40:55D-46.* N.J.S.A. 40:55D-39c(1) recognizes that it is simply impractical to compel submission of application documents of sufficient detail to satisfy a conventional N.J.S.A. 40:55D-46 ordinance insofar as large planned developments are concerned. In short, the Bernards planned development approval procedure is the only feasible method for processing a planned development of any magnitude and the procedure is clearly authorized.

(iii) Bernards should be estopped from asserting lack of legislative authority for its Section 707 approval process.

Again, over the course of the past year, Bernards' officials and representatives have consistently advised Hills to present its development application pursuant to Ordinances 704 and 707. At extraordinary expense, Hill has submitted one "sketch" concept plan and the presently pending Section 707 application.

Bernards now asserts that its suggested course of action, pursuant to its own ordinances, is not authorized and that its approval process must, therefore, be amended. Assuming, arguendo, that the Bernards approval process is not specifically authorized, Bernards should be estopped from asserting such a lack of authorization so as to deny Hills the rights to which it would otherwise be entitled.

* However, even this section of the MLUL, which also covers more conventional developments, requires preliminary site plan submission documents to be in "tentative form for discussion purposes." The municipal power to vary preliminary site plan approval standards under N.J.S.A. 40:55D-39c(1) for planned developments must be evaluated in light of the requirements of this section.

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

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

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

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

Bernards induced Hills to submit its development application pursuant to Ordinance 707. Hills would not have done so if Bernards had advised that such an application would be an exercise in futility. (Affidavit of Kerwin). The application presently pending before the Planning Board cannot be submitted pursuant to the Bernards' preliminary application provisions and the entire application would have to be abandoned. If Bernards were permitted to amend

Ordinance 707, Hills would have expended some \$325,000.00 on a meaningless exercise. (Affidavit of Kerwin). In addition to the resources expended on the two plans prepared to date, Hills and the lower income people to be benefited would suffer the harm resulting from needless and inequitable delay of Hills' proposed development i.e. increased carrying costs and delay in production of lower income housing.

Moreover, as discussed above, Bernards has acquired appellate court stays based, in part, upon its representations that it would continue to process Hills' development application. Hills took the Township at its word and did not contest such statements. Had Bernards advised the appellate courts and Hills of its intention to render Hills' application meaningless, Hills surely would have asserted this element of harm in opposing the stays and the stays may have been denied. In sum, this Court is authorized to preserve the status quo, Ordinance 707 is authorized and, even if it were not, Bernards should be estopped.

If this Court were to decline to stay the adoption of Ordinance 746, Hills and the lower income beneficiaries of Hills' development would suffer clear hardship. Hills would be compelled to abandon a meaningless \$325,000.00 exercise. This will result in both an extraordinary, needless expense and delay of construction of Hills' proposed inclusionary development.

Conversely, if the requested restraint is issued, Bernards will suffer no harm whatsoever. It will continue to process Hills' application in a meaningful manner as it has done with other applications. Bernards has represented to the appellate courts that this very scenario would take place.

CONCLUSION


Bernards has recently implored that the appellate courts preserve the status quo. The stays entered in this matter were intended to accomplish Bernards' requested result. The maintenance of the status quo requires that both parties refrain from altering the existing situation. Hills therefore respectfully requests that the adoption of Ordinance 746 or any other ordinance or action affecting compliance or Hills' development application be enjoined and that Bernards be directed to process Hills' pending development in accordance with applicable law. As with the Supreme Court stay temporarily enjoining the compliance hearing in this matter, Hills requests that said stay be issued until such time as the Supreme Court resolves the appeal before it.

Respectfully submitted,

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

Dated: November 20, 1985

By:


Thomas F. Carroll

10/11/84

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2-4 CHAMBERS STREET
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(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
:
:

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

Peggy A. Schnugg, of full age, having been duly sworn according to law upon her oath deposes and says:

1. I am employed as a planner with the law firm of Brener, Wallack & Hill, attorneys for The Hills Development Company in the above captioned matter.
2. As part of my responsibilities with this firm, I have attended a

number of Bernards Township Committee meetings to monitor discussions concerning The Hills Development Company.

3. On November 12, 1985, I attended a regular meeting of the Bernards Township Committee at which an ordinance regarding conceptual approval was introduced and passed on first reading.
4. This ordinance was "Ordinance #746, An Ordinance of the Township Committee of the Township of Bernards Amending Section 707 of the Land Development Ordinance Which Provides for the Conceptual Approval of Development Plans for Residential Cluster Development and Planned Development". (Exhibit D)
5. Notice of the introduction and first reading of Ordinance #746 was published in "The Bernardsville News" on November 14, 1985 (notice attached).
6. Articles in "The Bernardsville News", issues dated March 15, 1984 and February 13, 1985, indicate that conceptual approval has been granted under the existing Section 707(E) of the Bernards Township Land Use Ordinance to at least the following developments: Spring Ridge, Society Hill, Two Brooks Farm and Coddington Farms (articles attached).


Peggy A Schnugg
Peggy A Schnugg

Sworn to and subscribed
before me this 20th day
of November, 1985.

Susan M. Rouze

SUSAN M. ROUZE
A Notary Public of New Jersey
My Commission Expires March 18, 1990

For more information call Family Service
at 538-5260.

PUBLIC NOTICE

Bernards Twp.

ORDINANCE #748

The foregoing ordinance, having been introduced and passed on first reading by the Township Committee of the Township of Bernards in the County of Somerset on 11/12/85 and then ordered to be published according to law, will be further considered for final passage and adoption and a public hearing held at a meeting of said Township Committee to be held at the Municipal Building, Cotlyer Lane, Basking Ridge, N.J. in said Township on 11/26/85 at 8:00 p.m., when and where, or at such time and place to which said meeting may be adjourned, all persons interested will be given an opportunity to be heard concerning said ordinance.

By order of the Township Committee
James T. Hart
Township Clerk

ORDINANCE #748

AN ORDINANCE OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS AMENDING SECTION 707 OF THE LAND DEVELOPMENT ORDINANCE WHICH PROVIDES FOR THE CONCEPTUAL APPROVAL OF DEVELOPMENT PLANS FOR RESIDENTIAL CLUSTER DEVELOPMENT AND PLANNED DEVELOPMENT.

WHEREAS, Section 707(E) of the Land Development Ordinance of the Township of Bernards is contrary to the statutory approval procedures for preliminary and final subdivision and site plan approvals.

NOW, THEREFORE BE IT ORDAINED that Section 707(E) of the Land Development Ordinance is hereby deleted and repealed and is replaced with the following:

"E. Conceptual approval shall not confer any development rights upon the applicant."

2. This ordinance shall take effect immediately upon final passage and publication in accordance with law.

P.F. \$18.60

11/14/85

Municipal Court

SPRING RIDGE HOUSING

TBN 3/15/84 p. 13

Township Wants 7

BERNARDSVILLE
wing dispositions were
own in Bernardsville
ourt Wednesday, Feb. 29,
roll A. Boynton:
Ader, Tysley Street, Ber-
aving the scene of an ac-
ne, \$15 costs, 60-day license

Fahey, Flintlock Court,
lle, unregistered motor
line, \$10 costs.

A. Driscoll, IV, Long Hill
gton, careless driving, \$50

dy, Kenvil, speeding,
costs.

lumbus, New Brunswick,
fine, \$10 costs.

wing dispositions were
own in Bernardsville
ourt by Judge Carroll A.
Wednesday, March 7:

man, Mine Mount Road,
lle, driving under the
alcohol, \$275 fine, \$15 court
nths license revocation.

rahs, Childs Road, Ber-
eeding, \$70 fine.

Fahie, Dublin, Pa., driv-
s license was suspended,
costs, six-months revoca-
lersey driving privilege.

cord Lane, Basking
es iving, \$80 fine, \$20
cting traffic, \$20 fine, \$15

Frigerio, New Vernon,
fine, \$15 costs.

Yonker, Annin Road,
e, passing on the right, \$70

ddence, Seney Drive, Ber-
lure to remove snow from
fine, \$10 costs.

EDMINSTER
wing dispositions were
n in Municipal Court on
1. 28, by Judge Robert C.

elizzone, Bridgewater,
e zone, \$50 and \$15 court

in fire zone, \$50 and \$15 court costs.

Virgil P. Andersen, Morristown
Road, Basking Ridge, parking in fire
zone, \$50 and \$15 court costs.

Donald W. Baubles, Randolph,
parking in fire zone, \$50 and \$15 court
costs.

Ellen Bradley, Bridgewater, parking
in fire zone, \$50 and \$15 court costs.

Laura Kates, Oldwick, parking in fire
zone, \$50 and \$15 court costs.

Jonathan C. Brody, Westfield,
parking in fire zone, \$50 and \$15 court
costs.

Marion L. Clark, Bridgewater,
parking in fire zone, \$50 and \$15 court
costs.

Robert W. Curran, Bridgewater,
parking in fire zone, \$50 and \$15 court
costs.

Doris Dobossy, Bridgewater, parking
in fire zone, \$50 and \$15 court costs.

Margery A. Eichkorn, Bridgewater,
parking in fire zone, \$50 and \$15 court
costs.

Alice M. Furman, Douglas Road, Far
Hills, parking in fire zone, \$50 and \$15
court costs.

Robert M. Golden, Bridgewater,
parking in handicapped zone, \$50 and
\$15 court costs.

Richard T. Holmberg, Bridgewater,
parking in handicapped zone, \$50 and
\$15 court costs.

Jill Jarvis, 247 Washington Valley
Road, Pluckemin, parking in fire zone,
\$50 and \$15 court costs.

Harry B. Johnson, Bridgewater,
parking in handicapped zone, \$50 and
\$15 court costs.

Robin A. Kinney, Bridgewater,
parking in handicapped zone, \$50 and
\$15 court costs.

Joanne Kramlick, Layton Road, Far
Hills, parking in fire zone, \$50 and \$15
court costs.

David F. LaFever, Bridgewater,
parking in fire zone, \$50 and \$15 court
costs.

Lynne Legge, Pluckemin, allowing
dog to run at large, \$10 and \$10 court
costs.

Drita Lika, Bridgewater, parking in
handicapped zone, \$50 and \$15 court

By **DAVID POLAKIEWICZ**
BERNARDS TWP. — The inclusion
of some affordable housing units in the
Spring Ridge complex may evolve into
a legal battle between the township and
the project's developers.

The Planning Board granted final
approval for 280 of Spring Ridge's 1,220
units last Thursday. None of the units
approved were low- or moderate-cost
homes mandated by last year's Mount
Laurel II decision and the planners and
developers seemed to have distinct
differences on whether any should be in
the future.

"For the record, we are not request-
ing approval for such units (Mount
Laurel) anywhere in this tract," said
Frank Harding, attorney for Spring
Ridge.

When conceptual approval was
granted for the Spring Ridge develop-
ment last summer, the board included a
condition that the plans were subject to

change based on future s
mining the amount of affi
ing the township was to p

The studies are still un
the planners did not
stipulation in last week's
ordinance will be drawn i
ing months after the com
studies.

"It would be difficult i
condition without any
provisions," Steven Wo
administrator, said this v

Despite comments by
representatives, Woo
statements that the tow
affordable housing wi
included in some stage of

Spring Ridge has plan
more units that will be i
the planners in October
affordable housing amo
could depend on wheth
Laurel ordinance is in pl

Flemington Race Car Show Features 20 Speedway Stars

FLEMINGTON — A preview of the
1984 Flemington Speedway Season
at the Flemington Mall will feature
more than 20 of the race cars that
run at the local track from Wed-
nesday, March 14 until Sunday
March 18.

Modified stock cars that will be
driven by Billy Osmun, Billy Pauch,
Karl Freyer, Joe Coverdale,
Tommy Mutchler, Ty Constantino,
and Art Lentini will highlight the
show.

Defending Flemington Fair
Speedway Sportsman Champ, Scott
Pursell will have his new creation
on display, as well as Bill
McCarthy's car for 1984. The Kirk
Wilson asphalt modified that will be
driven by Glenn Sullivan will also

Cox III, Phil Cox and
The midget racers of
Mike Miller and Lan-
be on display, along
Serridge's sprint car.

The show will also
carts, VW Sprints, m
micro stocks, BMX
more. There will be i
featured on Friday ev
16), and a radio-cont
exhibition on both S
Sunday.

Many of the top r
from the Speedway v
ing at the show fro
daily, including Ray
who just returned fr
Olympics in Yugoslis

Large Numbers Nothing New To Bernards Township Planners

By DAVID POLAKIEWICZ, Staff Writer

BERNARDS TWP. — Planning officials clearly have a difficult job trying to maintain some degree of the township's rural character of the past while being besieged by developers who want to build offices and homes.

The attempt to strike that balance has made local zoning matters a type of "juggling act." Residents want as little new construction as possible but developers have the legal right to build.

The state Supreme Court's Mount Laurel II housing decision alerted many New Jersey towns to the importance of planning matters. In Bernards, learning to cope with developments comprising hundreds of housing units is nothing new. Several zoning suit settlements from the 1970's have made township officials used to dealing with large numbers.

A status report on development as of Jan. 1, 1985, compiled by Peter Messina, township engineer, illustrates that.

According to the report, a total of approximately 7,150 housing units have recently been completed, are under construction or approved, or have been accounted for in "feelers" or preliminary proposals brought before the board's technical committee.

In addition, about 910,000 square-feet of office space is completed, approved or being constructed. About 2,050,000 square-feet more could be added if several preliminary plans are eventually followed through.

Housing

The Spring Ridge complex, a redesign of the old Commonwealth plans, has final approval for 280 of the 4,220 units slated for 326 acres off King George Road. By the end of 1984, 220 building permits had been granted.

But the developers of the complex, Lawrence Zirinaky of New York City and Lanier of Parsippany, have filed suit against the town for mandating that 141 moderate-income units be included. The builders want the entire development to be market-priced housing.

The outcome of the suit could affect Hills Development Hills' 1,100 acres of property along the Bedminster border is currently zoned for 3,025 units, which includes 550 affordable homes. The property was zoned under the Mount Laurel II decision in 1984.

townhouses on 30 acres when finished. Lord Sterling Village, being built on 77 acres off South Maple Avenue, consists of 150 townhouses and 25 single-family homes. The tract is the former site of the Somerset Hills Airport. A total of 120 building permits have been issued for the townhouses.

The fourth BRC development, Countryside, totaling 150 townhouses, is located on 29 acres off Mount Airy Road adjacent to the Somerset Hills Cemetery. The complex received 150 permits and 110 certificates by the end of 1984.

Maple Run, the last BRC complex to be approved, contains 64 townhouses on a 21.5-acre tract off Madisonville Road and North Maple Avenue and is under construction.

Aside from the BRC complexes, two other major complexes have received approvals.

Summit at Basking Ridge, formerly the Sherbrook at Bernards development, has preliminary approval for 134 clustered single-family homes between Stonehouse and Knollcroft Roads. Final approval has been granted for 15 of the homes and five building permits have been issued.

* Two Brooks Farm, a 132-unit clustered single-family home complex, received conceptual approval in 1983. A total of eight of the homes have also received preliminary approval. The development will be built on 152.7 acres bordered by Lake Road to the north and the Harrison Brook to the west.

A proposal has also been received for 98 townhouses and a conference center on the Pennbrook Country Club property.

Several subdivisions are planned or being built.

Colonial Ridge, comprising 93 single family homes, is under construction south of Stockmar Drive.

* Coddington Farms, a 71 single-family home development, has received conceptual approval for the corner of Mountain and Martinsville Roads.

Darren Woods, a 21 single-family home development off Sunset Lane, has received preliminary approval.

Stons Ridge, a four-lot development on Somersville Road, is under construction.

Stacy Village, a nine-lot subdivision on Mount Airy Road, has received eight

townhouses on a tract off King George Road.

Sherbrook at Bernards II would consist of 150 single-family homes off Stonehouse Road.

About 510 units could be built on the Kirby property south of Valley Road between the Spring Ridge and Society Hill developments.

Offices

Among the office complexes finished in the past year are four with at least 60,000 square-feet of space.

The Basking Ridge Corporate Plaza opened in 1984 with Parolator Inc. as its main tenant. The complex consists of 212,000 square-feet of space on 30 acres off Route 202 near Van Dorn Road.

The Liberty Corner Executive Center, a three-story structure with 84,000 square-feet of space, has been completed near the intersection of Martinsville Road and Interstate 78.

Summit at Mount Airy, a 71,000 square-foot building in front of the Hooper Holmes building on Mount Airy Road, was completed in 1984. Dun & Bradstreet is leasing the structure.

The Science Management Corporation building on Allen Road was also finished. The 60,000 square-foot, three-story structure sits on a 15-acre tract.

In addition to these offices, the 325,000 square-foot Mount Airy V building, housing Crum & Forster, was completed in 1983.

Several other office buildings have been approved.

The Allen-Ten building, a 70,000 square-foot, two-story structure will be built on an 11.3-acre tract on Allen Road near the Dead River.

The Becht building, an 8,361 square-foot office, is under construction on Church Street.

A 25,000 square-foot building, recently received approval for a tract off Route 202, north of the Basking Ridge Corporate Plaza.

The new 50,000 square-foot offices of the United States Golf Association are under construction on the association's property off Liberty Corner Road.

The Millington Quarry's new 3,500 square-foot office building was completed in 1984.

Several other tracts are possibilities for office buildings.

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

THE HILLS DEVELOPMENT COMPANY, :	SUPERIOR COURT OF NEW JERSEY
Plaintiff :	LAW DIVISION
vs. :	SOMERSET/OCEAN COUNTY
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 :	AFFIDAVIT IN SUPPORT OF
TOWNSHIP OF BERNARDS, THE :	MOTION TO MODIFY TERMS
PLANNING BOARD OF THE TOWNSHIP :	OF STAY
OF BERNARDS and the SEWERAGE :	
AUTHORITY OF THE TOWNSHIP :	
OF BERNARDS, :	
Defendants. :	

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

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

1. I am President of The Hills Development Company ("Hills"), a builder and developer in Somerset County, a resident of Bedminster, New Jersey, and a member of the Somerset-Morris Homebuilders Association. I am responsible for the

day-to-day operations of Hills, am familiar with the requirements of Mount Laurel II, and have been actively involved in the decisions of Hills with respect to the development of that portion of the Hills' property located in Bernards Township ("Bernards").

2. Over the course of the past year, I have attended numerous meetings held with respect to the settlement of the above-captioned matter.

3. On numerous occasions, representatives of Bernards Township strongly recommended that Hills first pursue a "Conceptual Approval Application" pursuant to Section 707 of Bernards' land use ordinances and that "piecemeal" preliminary and final applications would not be considered or accepted by the Planning Board.

4. In March of 1985, a draft concept plan of Hills' proposed inclusionary development was submitted to the Defendant Planning Board's Technical Coordinating Committee ("TCC").

5. Pursuant to the TCC recommendations in March of 1985, Hills' planners and consultants commenced preparation of a comprehensive Conceptual Approval Application as per Section 707.

6. Due to the comprehensive requirements of Ordinance 707, I instructed my attorneys to permit inclusion of language in settlement documents regarding submission of a Conceptual Approval Application only if such an application would indeed vest Hills with development rights as presently provided in Ordinance 707.

7. The final "Memorandum of Agreement" (Exhibit "C") drafted by Bernards' attorneys provided that Hills' Conceptual Approval Application pursuant to the terms of Sections 704 and 707 of Bernards' ordinance would be processed and would vest Hills' development rights.

8. Pursuant to the provisions of Ordinance 707, it was necessary to commission the following consulting and engineering firms to prepare the following studies and reports for inclusion in Hills' Conceptual Approval Application:

- (a) Richard B. Reading Associates: "Project Description and Statistics Report - Details of Demographic and Fiscal Impact for The Hills, a Planned Rural and Village Development in Bernards Township, Somerset County, New Jersey;"
- (b) Sullivan Arfaa, P.C.: "Land Classification Report" and "Open Space Report;"
- (c) Raymond A. Ferrara, Ph.d.: "Natural Features Report" and "Environmental Impact Assessment;"
- (d) T&M Associates: "The Hills - Land Coverage and Drainage Report, Bernards Township, Somerset County, NJ", "The Hills - Erosion and Sediment Control Report, Bernards Township, Somerset County, NJ," and "Conceptual Sewer Plan for Portion of Bernards Township within Hills Development;"
- (e) John D. Van Dorpe, P.E.: "Engineer's Report for 'The Hills' Water System"; and
- (f) Orth-Rodgers & Associates, Inc.: "Traffic Impact Analysis of Proposed Hills Development, Bernards Township, Somerset County, New Jersey;"
- (g) Betz Converse Murdoch, Inc.: Report concerning delineation of Wetlands.

9. In addition, my attorneys prepared a "PUD Master Declaration of Covenants, Conditions and Restrictions" and a "Neighborhood Condominium Master Deed" which were also required for the Conceptual Approval Application.

10. On October 17, 1985, a comprehensive Conceptual Approval Application was submitted to Bernards for processing. As required pursuant to Ordinance 707, all of the above studies and reports were submitted as part of the application. The cost to Hills for the preparation of this application was approximately \$250,000.00.

11. Also on October 17, 1985, Hills provided Bernards with a check in the approximate amount of \$74,360.00 in order to cover 25% of the application fee required by Ordinance 707. (invoice attached). Bernards accepted this check on that date.

12. The Bernards Township Committee is scheduled to vote on November 26, 1985 (after public hearing and second reading) on the adoption of Ordinance 746. This ordinance would delete Ordinance 707 language which confers certain important rights, including vesting, upon the applicant. As President of Hills, I would never have authorized preparation of a Section 707 application if I had known that Bernards intended to amend Ordinance 707 so as to remove the ordinance language granting vested development rights upon approval of such applications.

13. If Bernards is able to amend Ordinance 707, Hills will have expended some \$325,000.00 on an application which is absolutely meaningless.

14. In order to submit an application pursuant to Bernards' "preliminary approval" ordinance, Hills would be compelled to start anew and retain consultants to commence preparation of the various plans, maps, studies and reports which would be required pursuant to the ordinance. I estimate that this process would require a period of three to six months.

15. Following the submission of a new "preliminary" application, it would require a period of some three to four months (excluding any extensions) to gain any approvals pursuant to the preliminary application ordinance.

16. "Pre-development" activities could commence as soon as the pending Conceptual Approval Application is deemed approved if Ordinance 707 is not amended. (Exhibit "B", Ordinance 707 (E)). If a new application must be submitted and processed, such pre-development activities could not commence until nine to twelve months have lapsed. Therefore, an entire construction season may be lost and construction of Hills' inclusionary development may be delayed for a year beyond that necessary if Hills' pending application is processed and approved pursuant to Ordinance 707.

Sworn to and subscribed
before me, this 20th
day of November, 1985

Susan M. Rolze

SUSAN M. ROLZE
A Notary Public of New Jersey
My Commission Expires March 18, 1990

John H. Kerwin

John H. Kerwin
President of The Hills
Development Company

THE HILLS DEVELOPMENT CO.

P.O. BOX 500
 PLUCKEMIN, NJ 07978
 PLUCKEMIN, N.J.

SOMERSET TRUST COMPANY
 BEDMINSTER, NJ 07921

No

90551

55-312/212

****74,360 Dollars and No Cents****

551

10-15-85

\$74,360.00

Partnership of Bernards
 Collyer Lane
 Basking Ridge, N.J. 07920

[Handwritten Signature]
 COPY NOT NEGOTIABLE

⑈000551⑈ ⑆021203129⑆ 07 4997⑈

THE HILLS DEVELOPMENT CO.

DATE	INVOICE NUMBER	DESCRIPTION	AMOUNT	DEDUCTIONS		NET AMOUNT
				PARTICULARS	AMOUNT	
10-14-85 Pr	Memo	Subdivision Concept	\$74,360.00			\$74,360.00

Fee for Conceptual Approval 1600

OCT 2 9 1985

Total \$ 74,360.00 Paid By Check No. _____ Date 1/1

NOTE: THIS FORM WILL NOT BE ACCEPTED WITH ANY ALTERATIONS OR ADDITIONS.

501-30M-185
 502-30M-185

EXHIBITS IN SUPPORT OF THE HILLS DEVELOPMENT COMPANY'S MOTION TO MODIFY TERMS
OF STAY

ALL STATE LEGAL SUPPLY CO : COMMERCE DRIVE, OXFORD, NEW JERSEY 07046

Bernards Twp.

ORDINANCE #704

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f. The maximum development shall be limited to 30,000 square feet of gross leasable floor area for the first 500 dwelling units of the PRD-4 and 1000 square feet of gross leasable floor area for each additional 20 dwelling units of the PRD-4 thereafter, not to exceed an overall total of 50,000 square feet of gross leasable floor area, and provided that the Board shall find that the intent of the proposed commercial uses, singularly and in combination, serve a local and not a regional market.

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

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

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

(B) Deleting paragraph b, in its entirety.

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

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

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

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

BE IT FURTHER ORDAINED that if any part of the Ordinance is declared invalid, such invalid part shall not effect or invalidate the remainder of the Ordinance. PROVIDED, however, that in the event that any provision for a mandatory set-aside, as specified in Section 1100.A, is declared invalid all property owners to whom such provision was intended to apply shall nonetheless be required to include a reasonable number of lower income dwelling units as part of any development on such property.

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

APPENDIX A

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

11.01. Purpose

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

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

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

A. Application Procedure

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

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

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

11.03. Use Regulations

A. Permitted Uses

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

B. Accessory Uses

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

C. Conditional Uses

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

11.04. Minimum Tract Size and Gross Density

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

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

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

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

11.05. Minimum Tract Setback

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

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

1105. Schedule of Area, Bulk and Yard Requirements

Permitted Uses	Minimum Lot Area (sq. ft.)	Minimum Lot Width	Minimum Yards			Maximum Building Coverage	Maximum Height
			Front	Side one/both	Rear		
Dwelling, One-Family	5,000	50'	25'	10'/15'	25'	20%	36'
Townhouse	N/A	16'	25'	N/A	20'	60%	35'
Dwelling, Two-Family (horizontally separated)	6,000	60'	25'	10'/15'	25'	40%	36'
Dwelling, Two-Family (vertically separated)	3,000	30'	25'	0/10'	25'	40%	35'
Dwelling, Multi-Family unit	N/A	N/A	N/A	N/A	N/A	35%	35'

1107. Distance Between Buildings

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

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

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

1108. Minimum Off-Street Parking Requirements

- Off-street parking shall be provided as follows:
Dwelling unit with one (1) bedroom for less: 1.5 spaces
Dwelling unit with two (2) bedrooms or more: 2.0 spaces
- An additional ten (10) percent (of that computed in #1 above) off-street parking shall be provided for visitors.
- All common off-street parking shall be located within 300 feet of the dwelling unit served.

1109. Minimum Floor Area for Dwelling Units

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

1110. Lower Income Housing Requirements

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

- A minimum of 15 percent moderate income housing only shall be required in developments which have received conceptual approval prior to July 1, 1984, and which have not received preliminary or final approval.
- A minimum of 12 percent moderate income housing only shall be required in developments where the maximum sales price of any housing unit will not exceed \$100,000 per unit (in 1983 dollars).

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

B. Eligibility Standards

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

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

C. Housing Cost Component

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

- Rental Units: Gross Rent
- Sales Unit: Principal and Interest
- Insurance
- Taxes
- Condominium or homeowners association fees

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

E. Sale and Resale and Rental of Lower Income Housing

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

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

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

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

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

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

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

F. Phasing of Lower Income Housing

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

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

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

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

G. Waiver of Fees

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

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

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

1111. Common Open Space Requirements

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

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

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

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

1112. Engineering and Construction Design

A. Drainage

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

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

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

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

B. Lighting

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

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

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

C. Sanitary Sewers

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

D. Streets

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

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

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

	R.O.W.	Cartway
a. Collector street (no parking on either side)	50'	28'
b. Local street with parking on one side only	50'	26'
c. Local street with no on-street parking	40'	24'
d. Local street with on-street parking on both sides	50'	30'

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

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

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

E. Water Supply

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

1113. Waivers

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

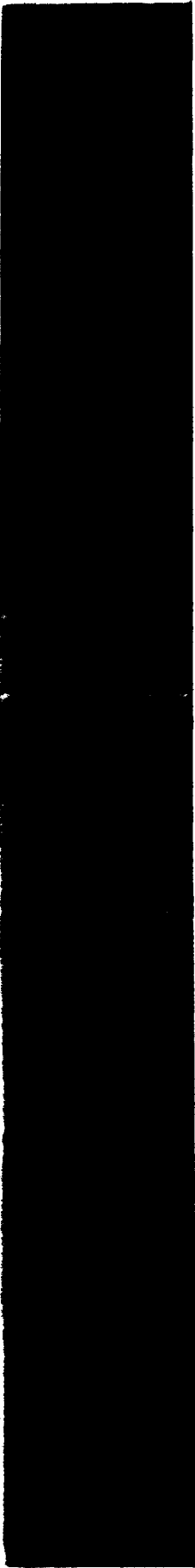
Passed on first reading October 2, 1984

PUBLIC NOTICE

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

Bernards Township Committee
William B. Wahl
Mayor

Attest:
James T. Hart
Township Clerk

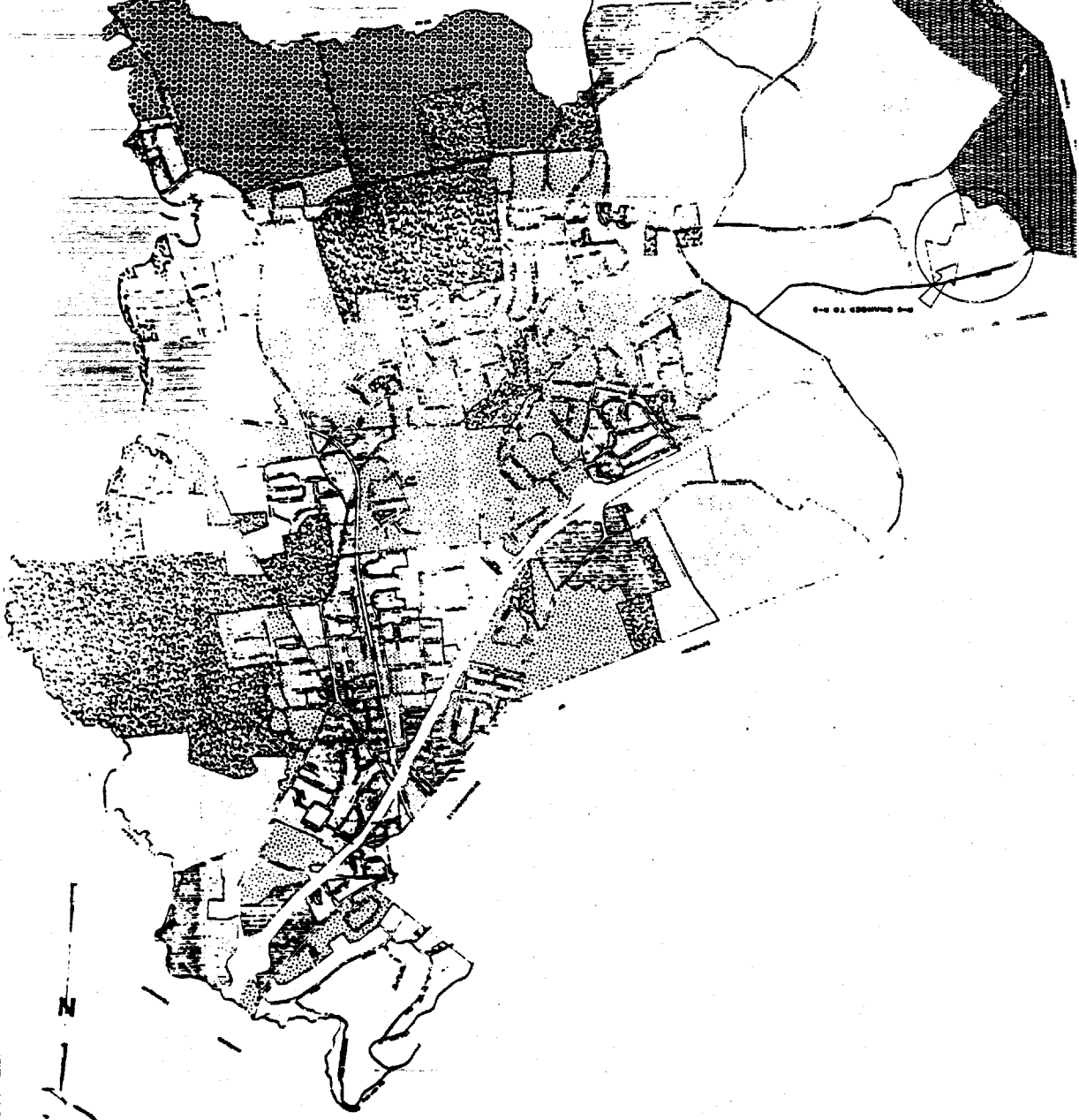


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DATE 1 OF 2
 DATE 2, 1980

TOWNSHIP OF BERNARDS

PROPOSED ZONING AMENDMENT



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Map No. 1 of 2
 Date 2, 1980
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 R-100 2 Acres

conditions for a minor subdivision/flag lot shall not be changed at any time providing that the approved Development Plan shall have been duly recorded. A copy of the recorded instrument shall be given to the secretary of the Planning Board or Zoning Board of Adjustment, as the case may be.

5. If the application is classified as a major subdivision, or if it is determined that variance action will be necessary, the Board shall deny the application for minor subdivision approval and shall so notify the applicant in writing within seven days of the date of decision.

F. Distribution of Approved Plat. The secretary of the Board shall forward copies to each of the following within ten (10) days of the date of decision:

Applicant (2)

Municipal Engineer (1)

Construction Official or Zoning Officer (1)

Tax Assessor (1)

County Planning Board (1)

Health Officer (1)

*+ statute provides
for process of 1 year
than 3 yrs regarding
preliminary approval.*

707. SUBMISSION OF APPLICATIONS FOR CONCEPTUAL DEVELOPMENT PLANS FOR RESIDENTIAL CLUSTER AND PLANNED DEVELOPMENT

A. General.

At the applicant's option, a conceptual Developmental Cluster Development or Planned Development for review and approval by the Board prior to any preliminary Plan submission.

B. Procedure for Submitting Application for Conceptual

1. The applicant may submit to the Administrative 15th day of the calendar month preceding the next regularly scheduled monthly meeting of the Board, but not later than the first day of the calendar month in which such meeting is to be held, six (6) copies of the plat in accordance with Section 707C. hereinbelow for purposes of classification, discussion and appropriate action; four (4) copies of the completed application form; and the fee in accordance with Section 901 of this Ordinance. The Administrative Officer shall first process the application through the TCC and certify the application as complete or notify the applicant in writing of any deficiencies within forty-five (45) days of the submission. If the application has been found to be complete, the Administrative Officer shall forward it to the

appropriate Board secretary, who shall issue an application number. Once an application has been assigned a number, such number shall appear on all papers, maps, plats, and other documents submitted for processing in conjunction with the application. If the application has been found to be incomplete, it shall be returned to the applicant who may submit an appropriately revised application as in the first instance.

2. The appropriate Board secretary shall forward one copy of the submission to the County Planning Board for review and comment.
3. Additional copies of the submission may be requested from the applicant to be forwarded to other individuals, offices, and agencies for information, review and comment.

C. Information Required for Conceptual Approval.

1. General. The conceptual review is intended to provide the applicant with a review and discussion by the Board of major areas of concern such as traffic circulation, access, drainage, environmental impacts, methods of providing utilities, water and sewerage, intensity of development, and project scheduling. Additionally, by providing a review of these items, preliminary and final Development Plan submissions for each of the phases of the development can address site-oriented problems within a previously established framework encompassing the development of the entire tract.

2. Specific Submission Requirements.

a. A key map of the tract superimposed on a map of a section of the Township showing all roads and streets within one-half mile of the proposed development at a scale of one inch equals not more than 2,000 feet.

b. Title Block

1. Name of development, municipality and county.
2. Name and address of developer.
3. Scale.
4. Date of preparation.
5. Development application number.
6. Name and address of person(s) preparing the application and the signature, date, seal, and license number.

c. Name and address of the owner or owners of record, and authorized agent, if any.

d. Signature of the applicant and, if the applicant is not the owner, the signed consent of the owner.

e. Graphic scale and north arrow.

f. Revision box and date of each revision.

- g. A project constraints map showing wetlands, flood plains, slopes in excess of fifteen percent (15%), buffer areas (including areas of landscape screening) and treed areas.
- h. A conceptual Development Plan indicating the total number of dwelling units; buffer areas (including areas of landscape screening); if housing types are shown, the set back of the housing units from roads, alternate housing types and existing development; anticipated recreation areas, anticipated type(s) of accessory buildings and, if applicable, retail development. The plan should reflect the scope and type of development and probable areas of development. Detailed information is not required. However, sufficient information should be provided to show that the level of anticipated development can be accomplished on the tract in accordance with the provisions of this Ordinance.
- i. A conceptual circulation plan indicating the proposed location of roadways providing circulation through the site, typical roadway sections, locations of access to the site and anticipated improvements to existing on-tract roadways, as well as off-tract roadway improvements, if required. The roadways should be shown in sufficient detail to establish their locations, and ensure that grades and curvature are satisfactory for the volumes of traffic anticipated. Additionally, pedestrian and bicycle circulation should be addressed.
- j. A conceptual utility plan indicating how water, gas, electricity, telephone, CATV, and if applicable, sewerage will be provided for the development. The plan should show the general utility pattern throughout the proposed development and should address the locations and required crossings of improvements that will be installed prior to any submissions for preliminary approval of individual phases of the development.
- k. A conceptual drainage plan indicating the size and location of detention (or retention) facilities, drainage patterns and major stream crossings. Information shall be provided in sufficient detail to ensure that the storm water management system provided will be adequate for the site and that it will allow the anticipated level of development to take place.
- l. An environmental assessment in accordance with Section 708 reflecting total development of the tract. Once submitted and reviewed, the assessment will form the basis for preliminary submission(s). Only when modifications occur on individual Development Plans for each phase, which may, in the opinion of the Board, result in a change to the overall impacts examined in the original environmental assessment, will revisions to the original environmental assessment be required at the time of the preliminary submission(s). Those portions of the environmental assessment dealing with site specific information may be submitted as an addendum to the

environmental assessment at the time of preliminary submission.

- m. A staging plan showing anticipated stages of construction, relating the sequence of construction of on-tract and off-tract improvements, accessory structures, recreation facilities, etc. to the sequence of construction of the principal buildings.
- n. If, during the course of review, the Board finds that additional information is required prior to acting on the application, such information may be requested of the applicant.

D. Action by the Township

- 1. The Board shall take action on conceptual plans within 95 days after the certification by the Administrative Officer of the submission of a complete application. Failure by the Board to act within the prescribed time period shall constitute approval.
- 2. Prior to taking action on any conceptual plan, the Board shall set forth the reasons for such action, with or without conditions, or for the denial. The Board shall address whether the conceptual plan would or would not be in the public interest, including, but not limited to, findings of fact based on the following:
 - a. That the total number of dwelling units is allowed under this Ordinance and that, after reviewing the conceptual plan, the constraints map, and other documentation submitted by the applicant, there is a reasonable expectation that the number of dwelling units shown can be constructed.
 - b. That the amount of non-residential development is in accordance with this Ordinance, and the location, if shown, is reasonable to service the project, and the surrounding community.
 - c. That the circulation pattern established by the conceptual plan adequately services the project, and, based upon the information submitted by the applicant, can be constructed to the regulations and standards set forth in this Ordinance.
 - d. That the utilities plan submitted by the applicant shows that adequate utilities will be available for the project, and the general location and pattern of installation of these utilities will adequately service the conceptual plan.
 - e. That the drainage plan submitted by the applicant adequately addresses storm water management, and the drainage structures shown are of sufficient size to be reasonably expected to accommodate the necessary storm water detention.
 - f. That the staging plan submitted by the applicant will result in the construction of the project in an orderly manner, with a minimum impact to adjacent development.

- g. That the environmental assessment adequately addresses the impacts anticipated from development of the conceptual plan, or those items which should be addressed more fully at the time of preliminary submission(s).
3. After reviewing the information submitted by the applicant, the Board may take action to grant or deny approval as set forth below:
 - a. Grant approval - If, after reviewing the material submitted by the applicant, the Board is satisfied with the conceptual plan, the Board shall approve the application for conceptual plan approval in writing. Such approval shall set forth those aspects of the conceptual plan which have been reviewed and approved. The items approved will be determined by the extent of information provided by the applicant, but approval shall include:
 1. The total number of dwelling units.
 2. The amount of non-residential development, if applicable.
 3. The circulation pattern.
 4. The utilities plan.
 5. The drainage plan.
 6. Critical areas that will not be developed.
 7. The staging plan.
 8. The environmental assessment.

Approval of preliminary and final Development Plans shall be conditional upon conformance with the approved conceptual plan submitted in accordance with the provisions of this Ordinance.

- b. Deny approval - If, after reviewing the material submitted by the applicant, the Board is not satisfied with the conceptual plan, the Board shall deny the application for conceptual plan approval in writing, setting forth the deficiencies in the plan. Such disapproval shall in no way prohibit the applicant from submitting a new conceptual plan addressing those deficiencies or from proceeding with the submission of a preliminary Development Plan.
- E. Effect of Conceptual Approval.
1. Conceptual approval shall confer upon the applicant the right to develop in accordance with those aspects of the conceptual plan approved by the Board as set forth in Section 707C.3.a. above for a period of ten (10) years, except that all preliminary and final approvals for individual development plans shall be obtained within that ten (10) year period.
 2. If the approval of the conceptual plan includes a condition to the effect that on-tract and/or off-tract improvements may be constructed prior to the submission of preliminary development plans,

construction may occur, but only within the sequence indicated on the staging plan and only after all plans and specifications have been submitted to and approved by the Township Engineer in accordance with the provisions of this Ordinance and only when all guarantees have been posted in accordance with the requirements of this Ordinance.

F. Modifications to an Approved Conceptual Plan.

1. The applicant may, at any time, submit a revised conceptual plan as in the first instance for review and action by the Board. Based upon the revisions requested, the Board may waive some or all of the supporting documentation at the request of the applicant. If the revised conceptual plan is not approved by the Board, the original conceptual plan shall remain in effect. If the revised conceptual plan is approved by the Board, such approval shall not extend the period for which the conceptual approval was originally granted as set forth in 707D hereinabove.
2. The Board may request that the applicant consider the submission of a revised conceptual plan. The applicant shall be under no obligation to accept the suggested revisions. If the applicant agrees to the revisions, and submits the revised conceptual plan, there shall be no additional fee for review of the conceptual plan and the Board may extend the time period for which the conceptual plan approval is in effect.

706. SUBMISSION OF PRELIMINARY PLATS AND PRELIMINARY PLANS

A preliminary submission is required of all subdivisions classified as major subdivisions and of all development proposals requiring site plan review.

A. Procedure for Submitting Preliminary Plats and Preliminary Plans.

1. Submit to the Administrative Officer after the 15th day of the calendar month preceding the first regularly scheduled monthly meeting of the Board but not later than the 1st day of the month in which said meeting is to be held, (14) copies of the preliminary Development Plan in accordance with Section 708C. through F. below; 4 copies of any protective covenants or deed restrictions applying to the lands to be subdivided or developed; 3 copies of the completed application form; and the fee in accordance with Section 901 of this Ordinance. The Administrative Officer shall first process the application through the Technical Coordinating Committee and certify the application as complete or notify the applicant in writing of any deficiencies within forty-five days of the submission. If the application has been found to be complete, the Administrative Officer shall forward it to the appropriate Board secretary who shall issue an application number. Once an application has been assigned a number, such number shall appear on all papers, maps, plats and other documents submitted for processing in conjunction with the application. If the application has been found to be incomplete, it shall be returned to the applicant who may submit an appropriately revised application as in the first instance.

ALL STATE LEGAL SUPPLY CO. ONE COMMERCE DRIVE, CRANFORD, NEW JERSEY 07016

EDR12C

given for internalization of traffic within Hills' properties, as set forth in the Memorandum of Understanding, dated _____ concerning the off-tract improvements. That Memorandum of Understanding, including the timing of the construction of off-tract improvements, is attached hereto as Appendix E, attached hereto and made a part hereof as if set forth at length herein. *Appendix E attached*

13. Hills and the Township of Bernards stipulate and agree that the Bernards Township Land Development Ordinance as amended by Ordinance #704 and as further amended as set forth in ~~Appendix B attached hereto~~ *Appendix B attached hereto* Schedule A of the Judgment in this matter shall control the development of the Hills properties.

14. The parties stipulate that the Concept Plan Map attached hereto as Appendix F and made a part hereof as set forth herein will serve as a general guide to the development within properties which it owns in the Township. Hills shall provide engineering details, as quickly as possible, for the planned development of Schley Mountain Road and Allan Road. The Township shall implement a timely review and approval process of said road plans, specifically with regard to that portion of Schley Mountain Road which begins in Bedminster Township and provides access to Block 59, Lots 1.01 and 1.02 as shown on the Tax Maps of Bedminster Township.

15. The parties stipulate that the Concept Plan provides an overall general guide to the development of Hills property and

-12-

Appendix C further contains a schedule for payments, based on a cost per unit to be constructed, and indicates that 50% of the allocated cost for road improvements shall be paid when a building permit is issued and 50% shall be paid when the unit receives a certificate of occupancy, as well as setting forth a schedule of improvements in conjunction with the Hills building program.

Hills shall be permitted to build in accordance with the generalized layout, with regard to number of buildings, generalized location of roads, density ranges, and other particulars noted on the map. Hills shall submit detailed preliminary and final applications for each subdivision and site plan for the Planning Board's review, as provided by ordinance as provided herein.

17.

The Municipal Board is advised by the Planning Board.

The parties stipulate that Hills shall draft, and the Township shall review and approve, a plan for the construction and operation of lower income housing to be built by Hills. The parties stipulate that no decision has been reached, at this time as to whether such housing shall be for sale, rental housing, or a combination of the two forms of ownership and use when developed, and thereafter reviewed and approved by the Court, this housing plan shall be made part of the Order in this case. ~~delete~~

18.

The development of the Hills property shall not be affected by any municipal action arising out of any State, County ^{OR} municipally imposed moratorium or phasing schedule, except to that portion of the development which relates to the 68 additional units which ^{MAY} ~~are~~ be phased in during the period of 1991 to 1994, as hereinabove described.

see letter

19.

This agreement and any terms hereof may be modified by the parties hereto by a written agreement. Any such modification shall not result in the Township being unable to

16. The Township's Land Development Ordinance shall be further amended to include revised standards for subdivisions, substantially in accord with the language set forth in Appendix C, attached hereto.

ALL STATE LEGAL SUPPLY CO. ONE COMMERCE DRIVE, CRANFORD, NEW JERSEY 07016

E06120

ORDINANCE 746

AN ORDINANCE OF THE TOWNSHIP COMMITTEE
OF THE TOWNSHIP OF BERNARDS AMENDING
SECTION 707 OF THE LAND DEVELOPMENT
ORDINANCE WHICH PROVIDES FOR THE
CONCEPTUAL APPROVAL OF DEVELOPMENT PLANS
FOR RESIDENTIAL CLUSTER DEVELOPMENT
AND PLANNED DEVELOPMENT.

WHEREAS, Section 707(E) of the Land Development Ordinance of the Township of Bernards is contrary to the statutory approval procedures for preliminary and final subdivision and site plan approvals.

NOW, THEREFORE BE IT ORDAINED that Section 707(E) of the Land Development Ordinance is hereby deleted and repealed and is replaced with the following:

"E. Conceptual approval shall not confer any development rights upon the applicant."

2. This ordinance shall take effect immediately upon final passage and publication in accordance with law.

will be introduced Nov. 26TH

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
P.O. Box 145
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants/Appellants, Township of Bernards, et
als.

THE HILLS DEVELOPMENT COMPANY, : SUPERIOR COURT OF NEW JERSEY
: APPELLATE DIVISION
Plaintiff/Respondent, :
: Docket No.
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 : Civil Action
PLANNING BOARD OF THE TOWNSHIP :
OF BERNARDS and the SEWERAGE :
AUTHORITY OF THE TOWNSHIP OF :
BERNARDS, : LETTER BRIEF IN SUPPORT
: OF MOTION FOR STAY
: BEFORE THE TRIAL COURT
: PENDING DETERMINATION OF
Defendants/Appellants. : MOTION FOR LEAVE TO APPEAL.
:

Sat Below:

Hon. Eugene D. Serpentelli

TO: The Honorable Judges of the Appellate Division

PROCEDURAL HISTORY

This is a Mt. Laurel action. This action was commenced on
May 8, 1984. Answers were filed by defendants on June 5,

1984. Discovery was commenced by service of Interrogatories in June, 1984. No depositions have been taken and discovery has not been completed. No trial on any issue has been held. (See discussion below of Order dated December 19, 1985).

Cross-Motions for Summary Judgment were heard in July, 1984 and were denied by Order of the Court dated August 3, 1984.

On November 12, 1984 defendant, Township of Bernards, adopted an ordinance (Ordinance 704) which amended the Township's Land Development Ordinance in order to better insure the construction of lower income housing which meets the standards and guidelines set forth in So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) (Mt. Laurel II), and to provide a realistic opportunity for the construction of a variety of housing types and for a variety of income levels in the township.

Subsequent to the adoption of Ordinance 704, and at the request of all the parties, the Trial Court entered an Order dated December 19, 1984 which order (stayed) the matter and appointed George Raymond as the "Court appointed expert." A subsequent order dated July 17, 1985 extended the stay until the Court has passed upon the compliance package of the Township of Bernards. The Court appointed expert submitted his report dated June 12, 1985, in which he reviews Ordinance 704 and makes certain recommendations to the Court regarding Bernards Township's fair share and proposed compliance package. Such

report is based on various concepts (i.e., the "consensus methodology" for determining a municipality's fair share) which existed prior to the adoption of the "Fair Housing Act" (L. 1985, c.222).

The Fair Housing Act was adopted on July 2, 1985. Pursuant to §16 of the Fair Housing Act a motion to transfer this matter to the Council on Affordable Housing was filed on September 13, 1985. The matter was argued on October 4, 1985 and the Court entered an Order on October 16, 1985 denying the motion. A motion requesting leave to appeal the denial of the motion to transfer was filed in the Appellate Division on October 31, 1985. A motion to the trial court for a stay pending determination of the motion for leave to appeal was denied on November 1, 1985. The reasons for the trial court's denial of the stay are summarized in the enclosed Affidavit of Arthur H. Garvin, III, Esq.

STATEMENT OF FACTS

Plaintiff (hereinafter referred to as "plaintiff" or "Hills") is the owner of tract of land in excess of 1000 acres in the Township of Bernards. It has owned the property since prior to 1976 at which time the property was located in a low density zone (1 unit for every 3 acres). Prior litigation under Mt. Laurel I resulted in a settlement which provided increased density, greater flexibility and removal of cost

generating features. The zoning ordinance of the Township of Bernards was amended accordingly. Notwithstanding the prior settlement, no housing of any kind be it Mt. Laurel I or other housing has been constructed on plaintiff's property.

This action was commenced on May 8, 1984. The action involves the same property which was the subject of the earlier litigation and demands a five-fold increase in density, and is based on the dictates of Mt. Laurel II, So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983).

As noted earlier, in November, 1984 the defendant, Township of Bernards, adopted Ordinance 704 which provides for increased density in two zones within the township and contains other provisions intended (a) to insure the construction of lower income housing which meets the standards and guidelines set forth in Mt. Laurel II, and (b) to provide a realistic opportunity for the construction of a variety of housing types and for a variety of income levels in the township. (Article 1101, Ordinance 704)

Subsequent to the adoption of Ordinance 704 the property owners in one of the zones which permits and requires Mt. Laurel housing proceeded with various development applications in order to obtain approval of their projects which include Mt. Laurel housing. One applicant has received final approval of a development which will provide 100 units of Mt. Laurel housing which is now under construction. A second applicant has

received conceptual approval of a development which will provide 90 units of Mt. Laurel housing. The application process and the development of the zone (including the Mt. Laurel housing) is continuing at the present time. (Certification of Peter Messina, Da 139a)¹

The other zone in which Mt. Laurel housing is permitted and required is all within the tract of land owned and controlled by plaintiff. Since the enactment of Ordinance 704 (in November, 1984), plaintiff has filed no application for subdivision, site plan, or otherwise relating to that part of its property upon which Mt. Laurel housing is required.² The only relevant document submitted was a proposed conceptual plan which plaintiff discussed, in March 1985, with the Planning Board's Technical Coordinating Committee (TCC), as to which the TCC raised a number of serious design questions. (See Ferguson Certification, Da 144a)

With the Fair Housing Act having been enacted, with other Mt. Laurel development applications proceeding properly and expeditiously, and with plaintiff not having taken any

¹ The Facts stated herein and the citations to appendix and transcript are referenced in the motion papers, brief, appendix and transcript previously submitted to the Appellate Division in support of Defendants-Appellants motion for leave to appeal which was filed on October 31, 1985.

² We are informed that Hills has filed for conceptual approval for the development of its property since the trial court's denial of the motion to transfer. 10/17/85

significant steps toward developing its property or toward producing Mt. Laurel housing, the Township elected, pursuant to the provisions of the Act, to apply to the court for transfer of this matter to the Council on Affordable Housing in accordance with the Act.

The Court denied the motion. As noted earlier a motion for leave to appeal was filed on October 31, 1985 and a motion to the trial court for a stay was denied on November 1, 1985. (See Davidson Certification)

The trial court has set down Monday, November 18, 1985 at 10:00 a.m. as the time for a "compliance hearing" in this matter. (See Davidson Certification) At the compliance hearing it is expected that substantial evidence will be taken relating to the Mt. Laurel "fair share" of the Township of Bernards, and to an analysis of Ordinance 704, in order to determine whether the Township of Bernards complies in fulfilling its Mt. Laurel II obligation. 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. Subsequent to the presentation of evidence it is expected that the court will determine whether or not the Township of Bernards, in fact, has fulfilled its Mt. Laurel II obligation in accordance with the law as the trial court understands it.

On defendants' motion for leave to appeal, the only issue involves the interpretation of §16 of the Fair Housing Act, L.

1985, c.222, and whether the trial court erred in refusing to transfer this case to the Council on Affordable Housing, pursuant to said §16. If the defendants' interpretation is correct and if the matter should be transferred, then the court in question lacks jurisdiction to hold a compliance hearing and to make a determination relating to the Township of Bernards' fair share and compliance package. If the hearing is held prior to the time that the Appellate Division determines the application for leave to appeal, the defendants will suffer prejudice in the following areas:

1. The status quo will not be preserved pending determination of the Township's motion for leave to appeal.
2. The Township will be subjected to development based upon an improperly determined fair share number. The Township's fair share number should be determined by the Council on Affordable Housing pursuant to the statutory guidelines of the Act and the Council's regulations, rather than by the trial court pursuant to (as the court has indicated) the so-called "consensus" methodology (Tr. 29, Da 31a). The consensus methodology is in direct conflict with some of the statutory guidelines, including number of counties in the region, definition of prospective need, and use of overrides above the need actually attributable to the individual municipality. The Township believes that the statutory criteria will yield a lower fair share number for this particular Township, yet if the trial

court proceeds (in the manner it has indicated), Bernards Township will be bound -- at least pending an appeal -- by a higher "consensus" fair share number, which in turn will determine the number of Mt. Laurel and market units which the Land Development Ordinance must allow to be built. Any developer who obtains preliminary approval under the ordinance during that period will lock in the right to construct such higher numbers of units, N.J.S.A. 40:55D-49, even if subsequent reversal of the trial court results in referral to the Council and/or a lower, statutory fair share number.

3. The Township may not have any effective way to challenge a court-determined fair share number after it has been determined. If the trial court proceeds, declares the Township's fair share number, and as its legal holding declares that Township's ordinance #704 complies with Mt. Laurel II, then it is at least arguable that (a) the Township will be deemed to have prevailed below, because of the holding that it is in compliance, and (b) as a prevailing party, the Township will have no way to appeal from the finding as to fair share, even though the Township might believe the finding to be erroneously high. Such finding could then (at least arguably) collaterally estop the Township if it amended its ordinance to reflect a lower fair share number and then was sued for alleged failure of the new ordinance to satisfy the court-declared fair share. This would be avoided if the trial court proceeding is stayed

pending an appellate decision on transfer of this case to the Council, which would be bound to determine fair share according to the statutory standards.

4. If the Township's motion for leave to appeal is granted, and the appeal is successful, jurisdiction of this case would be in the Council and no longer with the trial court. Proceeding to trial before a court which we believe lacks jurisdiction is a waste of both the court's and the parties' time and resources.

ARGUMENT

THE PROCEEDINGS IN THE TRIAL COURT
SHOULD BE STAYED PENDING DETERMINATION
OF DEFENDANTS/APPELLANT'S MOTION FOR
LEAVE TO APPEAL.

Until the fundamental issue currently before the Appellate Division is finally determined the status quo of the subject of the litigation must be maintained. Zaleski v. Local 401, United Elec., etc. Workers of America, 6 N.J. 109, 115 (1951); Christiansen v. Local 680 of the Milk Drivers &c., 127 N.J. Eq. 215, 220, (1939). The extent to which the opposing parties' rights would be materially infringed must also be considered in determining whether to grant a stay. Christiansen v. Local 680 of the Milk Drivers & C., supra. at 220. At the compliance hearing it is expected that the merits of this action will be determined including a determination of the fair share number of the Township of Bernards and whether or not its existing ordinance, Ordinance 704, complies with and fulfills the Township's obligation to provide housing for low and moderate income families. Such a determination will be binding on the parties.

In its prior motion before the court and in its motion for leave to appeal in the Appellate Division the Township contends that pursuant to Section 16(b) of the Fair Housing Act, L. 1985, c.222., this matter should be transferred to the Council on Affordable Housing pursuant to the intent and purposes of the

Fair Housing Act. Thus, it is contended that the court does not have jurisdiction to make the determinations at the scheduled compliance hearing. The court below has before it a methodology for determining fair share and compliance which the defendants contend is contrary to the Fair Housing Act. Notwithstanding this, the court has indicated that it intends to determine this matter pursuant to that methodology (Tr 29, Da 31a). The result of using that methodology is that the determination of the municipality's fair share and compliance package will be made by a court not having jurisdiction under an inapplicable standard.

It is recognized that in a normal situation this set of circumstances is appealable upon the conclusion of the matter. However, that is not where the problem arises. Under Mt. Laurel II, So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) there is no appeal as of right until the court issues a judgment of compliance which includes modification of the existing ordinance in accordance with the court's decision arrived at at the compliance hearing. The result of this is that the ordinance that the court reviews must either remain in effect or be modified and placed in effect before an appeal as of right exists. Such ordinance must provide the applicable fair share as decided by the court whether or not it is the correct fair share or (consequently) the correct compliance ordinance. Thereafter, the municipality's options include

appealing the judgment of compliance while the ordinance is in effect or moving for a stay of the effectiveness of the ordinance during the appeal.

The result of these alternatives is that the ordinance (if the post-judgment stay is granted) would not be operative. This, of course, would preclude any developer from developing Mt. Laurel housing during the period of the stay because (a) incentive provisions would not be in effect, and (b) mandatory set-aside provisions would not be in effect. Since Bernards Township's current ordinance includes both incentives and set-asides, if Bernards Township has to seek such a post-judgment stay it would be taking a step backward from its existing voluntary actions in furtherance of Mt. Laurel II.

The alternative, if the stay is denied, is that the developer would construct the housing in a manner contrary to the proper interpretation of Mt. Laurel II and the Fair Housing Act. *NSI with*

Thus either no Mt. Laurel housing would be built or, in the second instance, housing would be built in a manner and in numbers contrary to the proper interpretation of the law. The first option results in a slowing of Mt. Laurel housing construction and would appear to be in nobody's best interest. The second option causes irrevocable harm to the municipality if the municipality is correct.

The requested stay at this juncture solves that problem at least over the immediate time period. If the matter is not heard by the trial court housing for low and moderate income families which is currently being produced will presumably continue to be produced and, therefore, the adverse result of the first option discussed above will be avoided. In addition, the municipality would not be faced with the situation of having a determination made prior to the time that the court determines which court has jurisdiction and would not be left in a situation in which housing must be built even though the same may result in being contrary to law.

Neither the actual party to this litigation (Hills) nor the persons purportedly represented by that party (lower income families) will suffer prejudice by this application. The application requests a stay only for the period ending at the time that the Appellate Division determines whether or not to grant defendant's motion for leave to appeal. It is our understanding that answering papers are due in less than a week, and the matter can be decided soon thereafter.

Plaintiff has before the Township an application for conceptual approval of its project. This application will continue before the Township Planning Board in accordance with law. No delay in that process will occur because the stay is granted at this time in this matter. (In that regard subsequent to receiving conceptual approval plaintiff will necessarily have

to apply for preliminary approval, presumably both as to site plan and subdivision. This process has not even started.) Thus, no delay will occur to the plaintiff because of the granting of this application for a stay.

Lower income families will not suffer prejudice because the existing ordinance which has been in effect since November 12, 1984 has been providing lower income housing in Bernards Township which is now being constructed. A stay in this matter will not effect such construction.

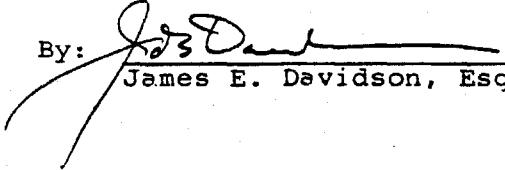
CONCLUSION

For the reasons stated above, the stay should be granted until the motion for leave to appeal is decided by the Appellate

Respectfully submitted,

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Defendants/Appellants,
Township of Bernards, Township
Committee of the Township of
Bernards and the Sewerage Authority
of the Township of Bernards

By:


James E. Davidson, Esq.



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Attorneys for Defendants/Appellants, Township of Bernards, et
als.

THE HILLS DEVELOPMENT COMPANY,	:	SUPREME COURT OF NEW JERSEY
	:	
Plaintiff/Respondent,	:	
	:	Docket No.
vs.	:	
	:	Sat Below:
THE TOWNSHIP OF BERNARDS in the	:	
COUNTY OF SOMERSET, a municipal	:	Morton I. Greenberg, J.A.D.
corporation of the State of New	:	Virginia A. Long, J.A.D.
Jersey, THE TOWNSHIP COMMITTEE	:	
OF THE TOWNSHIP OF BERNARDS, THE	:	Civil Action
PLANNING BOARD OF THE TOWNSHIP	:	
OF BERNARDS and the SEWERAGE	:	
AUTHORITY OF THE TOWNSHIP OF	:	LETTER BRIEF IN OPPOSITION
BERNARDS,	:	TO APPLICATION TO DISSOLVE
	:	STAY GRANTED BY THE
Defendants/Appellants.	:	<u>APPELLATE DIVISION</u>
	:	

PROCEDURAL HISTORY

Defendants rely upon the Procedural History contained in
Defendants' Brief in support of their Motion for Stay, filed
with the Appellate Division, except to add that on November 12,
1985, the Appellate Division entered an Order staying

proceedings in the trial court pending resolution of the motion for leave to appeal.

STATEMENT OF FACTS

Defendants rely upon the Statement of Facts contained in their Brief in support of their Motion for Stay and their Brief in support of motion for leave to appeal, filed with the Appellate Division.

In addition, it is respectfully requested that the Court take judicial notice of the enactment by Bernards Township of an Ordinance repealing the "sunset" provisions of its "Mt. Laurel" ordinance, Ordinance 704 (Ev. R. 9; see attached Certification of James E. Davidson).

I

This matter is apparently being brought on by plaintiff seeking to have a stay previously issued by the Appellate Division dissolved. We have received telephone notice of the application only and therefore we are not aware of the basis of the application other than plaintiff's contention that the action of the Appellate Division in granting the stay was improper.

The stay granted by the Appellate Division is not a final judgment and is therefore an interlocutory order.

An appeal of an interlocutory order is only maintainable "when necessary to prevent irreparable injury." R.2:2-2(b). We assume this application is being brought under R.2:9-5(b) which

provides in part that the grant of a stay by the Appellate Division "may be reviewed on motion to the Supreme Court on notice to the Appellate Division . . ." In that the normal motion procedures are not being followed (R.2:8), R.2:9-8 appears applicable. Glassboro v. Gloucester Cty. Bd. of Freeholders, 98 N.J. 186 (1984). R.2:9-8 provides as follows:

"2:9-8 Temporary Relief in Emergent Matters.

When necessary, temporary relief, stays, and emergency orders may be granted, with or without notice, by a single Justice of the Supreme Court or, if the matter is pending in the Appellate Division, by a single judge thereof, to remain in effect until the court acts upon the application. The Chief Justice shall in accordance with a schedule to be filed with the Clerk of the Supreme Court, designate for each county at least one Justice to whom an application for such relief in the Supreme Court shall be made, if such Justice is available."

Plaintiff will not suffer the irreparable injury required under R.2:2-2(b) (required if this is an appeal); nor is the matter emergent or one in which temporary relief is necessary as required by R.2:9-8.

II

The granting of the stay by the Appellate Division maintains the status quo until such time as the Appellate Division has the opportunity to decide whether it will grant Defendants' motion for leave to appeal. As noted in Defendants' Motion for Leave to Appeal filed in the Appellate Division, Defendants' claim is that the matter should be transferred to the Council on Affordable Housing pursuant to §16(b) of the Fair

Housing Act, and that the trial court does not have jurisdiction to hear the case.

In granting the stay the court indicated its concern that the decision of the trial court in refusing to transfer the matter was contrary to the intent and purpose of the statute and that the Legislature had set up an administrative process which was intended to remove the housing cases from the courts except in a limited area specifically described in the statute.

It is also clear that the court properly found that no harm would result to the Plaintiff by the granting of the stay and that the failure to grant the stay would result in substantial harm to the Defendants.

This is so for the following reasons:

(1) The Township of Bernards adopted a Mt. Laurel ordinance (Ordinance 704) in November, 1984 which is producing housing for low and moderate income families. The ordinance is effective as to plaintiff's property and has been for approximately a year. No development has occurred on plaintiff's property although a recent application for conceptual approval has been filed. This will presumably continue and the stay will have no effect on this process. Plaintiff specifically does not object to Ordinance 704 and has admitted that it complies with the dictates of Mt. Laurel II.


Therefore the stay will have no effect on the construction of housing for the poor nor will it affect plaintiff's

development rights.

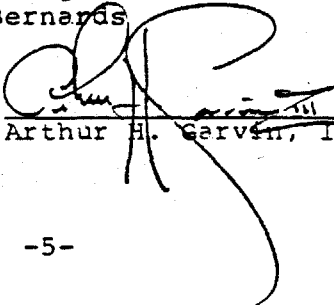
(2) As to the Defendants, a dissolution of the stay will result in the trial court's (rather than the Council's) deciding the various Mt. Laurel II issues including fair share and compliance. If the trial court holds its housing, Defendants will presumably will be bound its decision (even though they contend that the court has no jurisdiction). The Decision will be based on non-statutory law and will prevent the Defendants from receiving the various benefits of the Fair Housing Act. Developers receiving approvals under the Ordinance will receive the protection set forth in the Municipal Land Use Law, especially N.J.S.A. 40:55D-42: (This point is more specifically set forth in Appellate Division Letter Brief, pages 11-14.)

The stay maintains the status quo without causing harm or damage to any person or party. In this situation, there is no adequate reason to dissolve the stay.

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By: 
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Attorneys for Defendant/Appellant
Planning Board of the Township
of Bernards

By: 
Arthur H. Garvin, III, Esq.

Dated: November 13, 1985

THE HILLS DEVELOPMENT COMPANY,

Plaintiff-Movant,

v.

O R D E R

THE TOWNSHIP OF BERNARDS in the
COUNTY OF SOMERSET, etc., et al.,

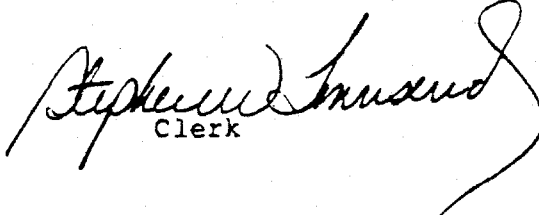
Defendants-Respondents.

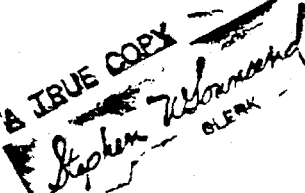
This matter having been duly presented to the Court, and
good cause appearing;

It is ORDERED that the motion to dissolve the stay
in this matter imposed by the Superior Court, Appellate Division,
is denied; and it is further

ORDERED that the stay shall remain in effect pending the
resolution of the appeal in the within matter now pending before
this Court; provided, however, that plaintiff may make applica-
tion for a modification of this Order or other appropriate relief
based upon any proposed municipal action that might affect the
municipality's ability to satisfy its Mt. Laurel obligations or
upon any other relevant change in circumstances.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice,
at Trenton, this 14th day of November, 1985.


Clerk

A TRUE COPY

CLERK

THE HILLS DEVELOPMENT COMPANY,

Plaintiff-Respondent,

v.

(L-030039-84 P.W.)

THE TOWNSHIP OF BERNARDS in the
COUNTY OF SOMERSET, etc., et al.,

Defendants-Appellants.

It is ORDERED that pursuant to Rule 2:12-1, the motion for leave to appeal from the Order of the Superior Court, Law Division, Somerset County, entered in this cause on October 16, 1985, and now pending in the Superior Court, Appellate Division, is hereby certified directly to this Court; and it is further

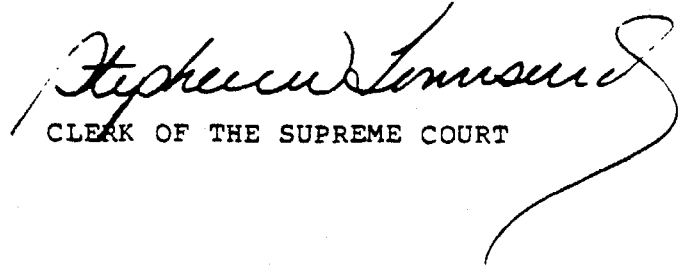
ORDERED that leave to appeal is granted; and it is further

ORDERED that the Clerk of the Appellate Division shall transmit briefs, appendices, and transcripts filed in that court to the Clerk of this Court, and all parties shall forthwith file with the Clerk of this Court four additional copies of all briefs and appendices that have previously been filed with the Appellate Division; and it is further

ORDERED that jurisdiction in these matters otherwise remains in the Superior Court, Law Division; provided, however, that any party may make an application to the Law Division to

stay further proceedings in that court pending the resolution of the within appeal and provided further that direct review of the disposition of such a stay application may be sought from this Court by any aggrieved party.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice,
at Trenton, on this 13th day of November, 1985.


CLERK OF THE SUPREME COURT

TRUE COPY
Stephen W. Bernard
CLERK

(2) Secondly the time period required by the various start-up procedures of the statute had to be known to the legislature and cannot result in "manifest injustice" in and of itself. Although the court indicated that time in and of itself could not be within the meaning of the term as intended by the legislature (Tr 39-1, Da 41a) it did, however, ignore that conclusion and applied precisely that standard.

(3) The court's conclusion that housing will result sooner (we assume that had to be its ultimate conclusion) merely because its trial-type hearing will terminate sooner is entirely speculative. We would expect that in the Bernards Township situation that its Mt. Laurel ordinance will be satisfactory (It apparently is now) and that no further proceedings will be necessary. Alternatively, the court's proceedings and decisions (if based on the report of the court appointed expert and the "consensus methodology") will not necessarily be satisfactory to all interested parties and will not result in immediate termination of the proceedings.

(4) Finally, and most importantly, there is no reason to conclude, in this matter, that the court's decision will result in any increase in the speed of development of lower income housing. It should be emphasized that Bernards Township already has in place an ordinance requiring mandatory set-asides and providing certain bonuses or give-backs, all for the purpose of better ensuring compliance with the Mt. Laurel obligation.

Ordinance 704 was adopted in November 1984. Since that time a number of developers have shown an interest in developing lower income housing as part of their development where permitted or required. One hundred units have received final approval.

(Da 139a) Another ninety units have received conceptual approval. (Da 139a) Other developments appear to be in the process of completing development applications. The only area in the Township (where permitted) which has not been subject to development application for low and moderate income housing is that area controlled by plaintiff.

Clearly plaintiff could have submitted development applications many months ago. (We again note that plaintiff has represented to the court that it has no objection to Ordinance 704.) Just as clearly, plaintiff could submit such applications now, and transfer of this case to the council would not change or impede that. It is assumed that they will do so when it is in their own best interest, not Bernards' best interest and not the best interest of lower income families. The decision by the body having jurisdiction (court or council), however, will not dictate the development timetable or speed the development.

Development is proceeding and will continue to proceed. The trial court did not seem to consider this reality. If the matter proceeds before the Council, development will proceed in accordance with the applicable ordinance. If the matter proceeds before the court, there is no reason to believe that development will proceed any quicker.

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November 21, 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:

This letter memorandum is being submitted in opposition to the motion of plaintiff, Hills Development Company, to enjoin the Bernards Township Committee and the Bernards Township Planning Board from further considering or enacting proposed Ordinance #746.

Plaintiff's moving papers were not received at our office until late afternoon, Wednesday, November 20. The short time to respond precludes us from briefing this matter as fully as we would like to, but we are submitting this letter memorandum to at least direct the court to some of the pertinent issues, and to cases which address those issues. We might raise other issues at oral argument.

The Honorable Eugene D. Serpentelli
Page Two
November 21, 1985

The short time also precludes our obtaining affidavits which we might otherwise submit. We note that plaintiff's planner, Ms. Schnugg, attended the Township Committee Meeting at which Ordinance #746 was introduced on first reading on November 12, but plaintiff chose to wait 8 days, until less than 48 hours before the return date, to serve its papers.

We note, also, that plaintiff's moving papers are replete with misstatements of fact and with misleading references to the Township's Land Development Ordinance. Some of these, though not all, are referred to below and/or in the accompanying Certification of James E. Davidson.

The pertinent issues include at least the following:

1. The present motion bears no relation to Mt. Laurel II, and therefore is in the wrong court. Under the Bernards Township Land Development Ordinance ("BTLDO"), Article 707, applying for conceptual approval is completely optional with the applicant, and proposed Ordinance 746 would not change that. We cannot see how Ordinance 746 can have any impact upon the development of lower income housing. With all due respect, this motion should be brought in a separate action which should be venued in Somerset County, where Bernards Township is located, R. 4:3-2(a)(2). The instant dispute does not involve issues which would invoke the special jurisdiction of the "Mt. Laurel II" courts.

2. A court may not ordinarily enjoin a legislative body "from performing some legislative function, such as amending a zoning ordinance." Passaic Jr. Chamber of Commerce v. Passaic Housing Auth., 45 N.J. Super. 381, 392 (App. Div. 1957); Ringwood Solid Waste Manage. Auth. v. Ringwood, 131 N.J. Super. 61, 65-66 (Law Div. 1974). Hills is asking the court to improperly interfere with the legislative process. The proper time to challenge an ordinance is after it is enacted, not before. Whatever claim Hills might make that proposed Ordinance #746 should not apply to Hills Development Company, such individualized claim cannot possibly impair the right and power of the Township Committee to enact legislation that will govern all properties throughout the Township, such as Ordinance #746.

3. The present Section 707.E. of the BTLDO is ultra vires. Ordinance #746 corrects this, and brings Section 707.E. within the authority of the Municipal Land Use Law ("MLUL"). The Supreme Court has held that a municipality may not confer upon a developer greater protection, by virtue of an approval, than the protection which the zoning enabling statute authorizes. Hilton Acres v. Klein, 35 N.J. 570, 578 (1961) (municipality may not grant more than three years protection for preliminary [then, "tentative"] approval). A municipal act which purports to confer such unauthorized protection is ultra vires. Debold v. Township of

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Monroe, 110 N.J. Super. 287, 290 (Ch. Div. 1970), aff'd o.b., 114 N.J. Super. 502 (App. Div. 1971), certif. denied, 59 N.J. 296 (1971).

N.J.S.A. 40:55D-10.1 is the MLUL section which authorizes review of concept plans, and it expressly states that "[t]he developer shall not be bound by any concept plan for which review is requested, and the planning board shall not be bound by any such review." Existing Section 707.E. does purport to bind the planning board, for ten years. It is in direct contravention of MLUL §10.1, and thus is ultra vires. It is thus legally ineffectual even without being repealed, and Ordinance #746 merely brings the language of Section 707 into conformity with MLUL §10.1.

Section 707.E. is ultra vires, as well, because Section 707 does not concern a type of development approval which Article 6 of the MLUL authorizes a planning board to give. N.J.S.A. 40:55D-37 to 58. These include the traditional preliminary and final subdivision and site plan approvals. Various provisions of the MLUL regulate the procedures for and effect of such approvals. One critical requirement is that on every application for development the board must hold a public hearing, upon notice to the public, and open to public participation. N.J.S.A. 40:55D-10, 40:55D-12. There is no requirement of any public notice or public hearing on a conceptual application under either MLUL §10.1 or

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BTLDO Section 707. Thus it would be ultra vires to give Section 707 the same or greater effect than a preliminary approval, yet that is what the present Section 707.E. purports to do.

Even if conceptual approval under Section 707 were construed to suffice as preliminary approval (which would render superfluous the many references therein to preliminary approval), still that result would entitle plaintiff to only three years' protection, N.J.S.A. 40:55D-49; Hilton Acres v. Klein, supra, and plaintiff would have no grounds to complain of repeal of the ten-year provision of Section 707.E.

4. Even if Section 707.E. is legally valid, it is unquestionably within the power of the Township Committee to amend its zoning ordinance. Morris v. Postma, 41 N.J. 354, 362 (1964).

5. Plaintiff is not entitled to a preliminary injunction because it will suffer no irreparable harm if Ordinance #746 is enacted. Irreparable harm to plaintiff is one of the requisites for a preliminary injunction. Crowe v. DiGioia, 90 N.J. 126, 132 (1982). Plaintiff's allegation that it will lose money because of the proposed amendment, including money spent on the application for conceptual approval, is spurious. First, a reading of Section 707, regarding conceptual approval, and Section 708, regarding preliminary approval (Exhibit A, attached), shows that contrary to Mr. Kerwin's Affidavit (#8) the terms of Section 707 do not

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require, on a conceptual application, many of the reports which plaintiff has prepared, including the Project Report, Open Space Report, Natural Features Report, Erosion and Sediment Control Report, and Traffic Report. Beyond that, however, Section 707 contains numerous passages which state that even after conceptual approval, an applicant must apply for preliminary approval (see, e.g., Sections 707.A., 707.C.1., 707.C.2.1., 707.D.2.g., 707.D.3.a. and b., 707.E.1., 707.E.2.), and all of the reports which Hills lists as having been prepared for its conceptual application are reports which, under BTLDO Section 708, would have had to be prepared for its application for preliminary approval, anyway.

The fee which Hills attempts to paint as an "application fee" for a conceptual application (letter brief, p. 10) is not that at all. Table 901 of the BTLDO (Exhibit B, attached) shows that there is no fee for a conceptual application, but that an applicant who "chooses" to submit such application is required at that time to pay an advance of 25% of the fee for the application for preliminary approval -- which application he will be required to submit after he pursues the conceptual application procedure. Again, this fee is money which Hills would have had to pay toward

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its preliminary application, anyway.*

Moreover, even though the conceptual approval process is not binding, it does serve the very valuable purposes of, among other things, providing a framework for eventual preliminary approval applications (see Section 707.C.1.); allowing for informal discussion of the proposed development with the Technical Coordinating Committee ("TCC") and the planning board, whereby the applicant can learn of potential objections to the proposal, and revise or eliminate such problematic items, before spending time and effort on a formal application for preliminary approval; and by virtue of such informal discussion, enabling the TCC and planning board to obtain a thorough understanding of a major development project which, if presented out of the blue in a complete preliminary approval application, might be incomprehensible and therefore objectionable to the Board.

The allegation that the amendment of Section 707.E. will cause great delay in the application process also is absurd.

* Plaintiff's claim that a conceptual approval application under Section 707 is an application for development (letter brief, p. 10) ignores the plain language of Section 707, which says that a conceptual application "may" be submitted "at the applicant's option", and N.J.S.A. 40:55D-3, which defines "application for development" as an application which is "required" by the ordinance. An "optional" application plainly is not "required."

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First, there is no reason to believe that the planning board would, as plaintiff suggests, fail or refuse to continue to process the conceptual application in a meaningful way. Second, the anticipated preliminary approval application of which plaintiff complains so bitterly is required even under the present Section 707. Third, under express terms of the ordinance a conceptual application is and has been at the applicant's option, and while that procedure was and will remain a valuable practical procedure, plaintiff was never under a legal obligation to pursue a conceptual approval prior to its preliminary approval. Finally, plaintiff's lament that it must necessarily discontinue its conceptual application apparently is based upon the speculative presumption that members of the planning board, after having indicated conceptual approval of aspects of plaintiff's proposal, will then turn around and render it useless by rejecting the same proposal in an eventual preliminary application. Against the spectre of enjoining the municipal legislative power, such speculative presumption should not be entertained.*

* To avoid future misstatement of our position, we note that we are not making any representation as to what action the planning board or any other municipal body might or might not take in the future. Sound planning concerns, including possible developments in statutory or common law, might prompt planning board members to deviate from a previously granted conceptual approval. But the plain language of MLUL §10.1 seems designed precisely to preserve that flexibility for the planning board, and therefore such possibility cannot give rise to any legal objection.

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Finally, plaintiff's flat statement that construction of site work "could commence" upon approval of the conceptual application (Kerwin Affidavit ¶16; letter brief p. 6) ignores the first word of present Section 707.E.2., which is "if". That section allows such construction, "prior to the submission of preliminary development plans", only "if" such early construction is allowed by the planning board as a condition of its approval. There is no evidence before the court as to whether, or to what extent, such early construction would be allowed by the planning board, and the word "if" precludes any claim of reliance by Hills in this particular regard.

6. Plaintiff has no legal basis for an estoppel.

Plaintiff's contention that the Township of Bernards is estopped from amending §707 is inapplicable to this situation. Initially, it should be pointed out that "[r]eliance upon representations . . . which were unauthorized and contrary to law created no estoppel against the Township." Debold v. Township of Monroe, supra at p. 293. The alleged statements described in Paragraph 3 of Mr. Kerwin's Affidavit are contrary to the explicit language of §707 and the MLUL. Further when a party raises estoppel as an issue, the truth concerning the fact which was allegedly represented must be unknown to the party claiming the estoppel. Clark v. Judge, 84

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N.J. Super. 35, 54 (Ch. 1964) aff'd o.b., 44 N.J. 550 (1965).

Thus Mr. Kerwin's allegations in Paragraph 3 of his Certification do not give rise to estoppel.

The provisions of §707(E) are ultra vires for a number of reasons (see Paragraph 3 hereof). As noted in Gruber v. Mayor, etc., Raritan Tp., 39 N.J. 1, 15 (1962) there is a distinction between municipal acts which are ultra vires in the primary sense -- beyond the jurisdiction of the municipality -- and municipal acts which are ultra vires in the secondary sense - irregular exercise of a power. The MLUL sets forth the jurisdiction of the municipality and the Planning Board. Section 707(E) is contrary to §10.1 of the MLUL and is not permitted by other provisions of the MLUL. The provisions of §707(E) are beyond the jurisdiction of the municipality. An estoppel based upon detriment in reliance is precluded. Gruber v. Mayor, etc. Raritan Tp., Ibid. at p. 15; Debold v. Township of Monroe, supra, at p. 295.

7. Plaintiff's allegation of estoppel raises numerous factual issues, including questions as to whether plaintiff really relied upon Section 707.E., the amount of expenditures which were actually made based upon such reliance, an itemization of those expenditures, the extent to which such expenditures would have had to be incurred anyway, etc. These issues will require extensive

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discovery and a factual trial. The Committee's power to legislate for the Township should not be suppressed while Hills' individual claim of special circumstances is adjudicated.

Factual material previously submitted to this court by plaintiff, in its Appendix in opposition to defendants' Motion to Transfer, casts serious doubt upon the veracity of any allegation that plaintiff has relied upon Section 707.E. As early as November 28, 1984 a memorandum by plaintiff's consultant, Mr. Mizerny (Exhibit W, second memorandum) sets forth elements which he "recommend[s] . . . be incorporated into the submission requirement" for concept plan approval. Among his suggestions for what "should be" (as contrasted with what is) are that "[t]he approved Concept Plan should be vested for a minimum of ten (10) years," and that the construction of major improvements "should not be the subject of a formal site plan application and approval." The memorandum further recognized "the responsibility of obtaining site plan and/or subdivision approval for the proposed buildings and their appertinant [sic] infrastructure."

In a January 14, 1985, memorandum to Special Master George Raymond (Exhibit O, second page), plaintiff's counsel stated their understanding that "[t]his Concept Plan will be, therefore,

outside the existing Ordinance."*

8. The Township's attorneys did not represent that Ordinance 704 would remain in place in its present form. Exhibit I, to which plaintiff's brief refers to support that allegation, does not say anything of the sort. In addition, plaintiff's brief before the Appellate Division (at page 19, fn. 11, copy attached as Exhibit C) made clear to that court that Ordinance #704 was not certain to continue in effect, and even attached the transcript pages of oral argument in the present court (copies attached as Exhibit D) in which the Township's attorney repeatedly stated that Ordinance #704 might be modified or even withdrawn. Clearly, in granting the stay, the appellate courts had that possibility before them.

9. The proposed amendment of Section 707 is not an attack upon Hills, as alleged by plaintiff (letter brief, p.5). The record of this court shows that at least as early as January, 1985, the Township's attorneys submitted a Brief in the case of Spring Ridge Associates v. Township Committee of Bernards

* We note that these two memoranda further show that it was plaintiff's attorneys, and not the Township's attorneys, who injected into settlement proposals the requirement for a specific provision granting vested rights based upon the conceptual approval. (Compare the contrary implication in plaintiff's letter brief, p.3.) Presumably, plaintiff assumed that if a settlement agreement were consummated, the court would enter a judgment confirming its terms, which Order would allegedly validate such provision.

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Township, Docket No. L-012580-85 P.W. (copy attached as Exhibit E), in which they raised the apparent invalidity of Section 707.E.1. This was two months before Hills submitted a "sketch concept plan" to the Technical Coordinating Committee (plaintiff's letter brief, p.3).

10. The relief requested is overbroad. Even if plaintiff were entitled to enjoin the enactment of proposed Ordinance #746, its request to enjoin any possible amendment of the BTLDO which would affect the Township's "response to its Mt. Laurel obligation" is overbroad, vague, and unsupportable. Among other reasons, the extent of the Township's "Mt. Laurel obligation" has not yet been determined, and so there would be no way for the Township to determine the scope of such requested prohibition.

For all of the above reasons, it is respectfully submitted that the motion for an injunction should be denied. Counsel for the Planning Board has authorized us to represent that he joins in this Brief.

Respectfully submitted,

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

By: 
Howard P. Shaw, Esq.

HPS/sjm
cc: Clerk, Superior Court
Clerk, Somerset County Court
Henry A. Hill, Jr., Esq.
Arthur H. Garvin, III, Esq.

construction may occur, but only within the sequence indicated on the staging plan and only after all plans and specifications have been submitted to and approved by the Township Engineer in accordance with the provisions of this Ordinance and only when all guarantees have been posted in accordance with the requirements of this Ordinance.

F. Modifications to an Approved Conceptual Plan.

1. The applicant may, at any time, submit a revised conceptual plan as in the first instance for review and action by the Board. Based upon the revisions requested, the Board may waive some or all of the supporting documentation at the request of the applicant. If the revised conceptual plan is not approved by the Board, the original conceptual plan shall remain in effect. If the revised conceptual plan is approved by the Board, such approval shall not extend the period for which the conceptual approval was originally granted as set forth in 707D hereinabove.
2. The Board may request that the applicant consider the submission of a revised conceptual plan. The applicant shall be under no obligation to accept the suggested revisions. If the applicant agrees to the revisions, and submits the revised conceptual plan, there shall be no additional fee for review of the conceptual plan and the Board may extend the time period for which the conceptual plan approval is in effect.

708. SUBMISSION OF PRELIMINARY PLATS AND PRELIMINARY PLANS

A preliminary submission is required of all subdivisions classified as major subdivisions and of all development proposals requiring site plan review.

A. Procedure for Submitting Preliminary Plats and Preliminary Plans.

1. Submit to the Administrative Officer after the 15th day of the calendar month preceding the first regularly scheduled monthly meeting of the Board but not later than the 1st day of the month in which said meeting is to be held, (14) copies of the preliminary Development Plan in accordance with Section 708C. through F. below; 4 copies of any protective covenants or deed restrictions applying to the lands to be subdivided or developed; 3 copies of the completed application form; and the fee in accordance with Section 90I of this Ordinance. The Administrative Officer shall first process the application through the Technical Coordinating Committee and certify the application as complete or notify the applicant in writing of any deficiencies within forty-five days of the submission. If the application has been found to be complete, the Administrative Officer shall forward it to the appropriate Board secretary who shall issue an application number. Once an application has been assigned a number, such number shall appear on all papers, maps, plats and other documents submitted for processing in conjunction with the application. If the application has been found to be incomplete, it shall be returned to the applicant who may submit an appropriately revised application as in the first instance.

2. The appropriate Board secretary shall forward two copies of the submission to the County Planning Board for review and action.
 3. Additional copies of the submission may be requested from the applicant to be forwarded to other individuals, offices and agencies for information, review and comment.
- B. Transfer of Ownership of Land Within a PRD
1. A portion of land within a PRD which has received conceptual approval may receive Preliminary and Final Subdivision approval from the Board.
 2. The application shall meet the requirements of Section 706 and shall incorporate by reference the approved conceptual plan.
 3. The approval shall be subject to such conditions as the Board deems necessary to ensure that development will occur in accordance with all aspects of the approved conceptual plan.
- C. Format for Preliminary Development Plans.
1. Each submission shall be at a scale of 1" equals 50' for a tract up to forty acres in size; 1" equals 100' for a tract over forty acres in size. Each submission shall be on one of three of the following standard sheet sizes: 8½ x 13 inches, 15 x 21 inches, or 24 x 36 inches unless an alternate sheet size is approved by the Township Engineer. If one sheet is not sufficient to contain the entire tract, the map may be divided into sections to be shown on separate sheets of equal sizes, with reference on each sheet to the adjoining sheet.
 2. The application shall be submitted in bound sets of drawings. Each set of drawings shall be broken down according to the following criteria:
 - a. Title sheet
 - b. Site survey and layout plan
 - c. Clearing, grading and drainage plan
 - d. Landscape plan
 - e. Lighting, signing and striping plan
 - f. Erosion and sedimentation control plan
 - g. Utilities plan
 - h. Building plans and elevation
 - i. Township standard details

- j. Public improvement construction documents. Two sets of construction plans (and specifications) shall be submitted as separate documents in addition to being part of the complete submission. Drawings shall be at a scale of 1" = 30', in the format set forth in Article 800. The degree of completeness required at the time of preliminary submission will depend upon the implementation schedule. If the applicant plans to construct public improvements prior to submission for final approval, the plans should show sufficient detail to allow a thorough engineering review. If, however, the applicant does not plan to construct the improvements prior to submission for final approval, the plans may be graphical, giving typical sections, center line geometry, typical details, limits of construction, general drainage structures, etc.

D. Details Required for Preliminary Development Plans.

1. A key map showing the entire tract and its relation to the surrounding areas, at a scale of one inch equals not less than 2,000 feet.
2. Title block:
 - a. Name of development, municipality and county.
 - b. Name and address of developer.
 - c. Scale.
 - d. Date of preparation.
 - e. Name, address, signature and license number of the professional engineer and other professionals who prepared the drawing.
 - f. Application number.
3. Certification that the applicant is the owner or purchaser under contract for the land.
4. Name and address of the attorney representing parties, if any, giving the name of each client represented.
5. Graphic scale and north arrow.
6. Revision box.
7. Signature block.
(See Signature Block on following page.)

Signature Block. (Section 707.C.7)

- a. Plan (or plat) of.....
Lot..... Section..... Map..... Zone.....
Date Scale
- Application.....
- b. I consent to the filing of this Development Plan with the Planning Board/Zoning Board of Adjustment (only include appropriate Board) of the Township of Bernards.
.....
Owner Date
- c. I hereby certify that I have prepared this Development Plan and that all dimensions and information are correct.
.....
Name Title & License No.
- d. I have reviewed this Development Plan and certify that it meets all codes and ordinances under my jurisdiction.
.....
Township Engineer Date
- e. To be signed before the issuance of a construction permit: I hereby certify that all the required improvements have been installed or a bond posted in compliance with all applicable codes and ordinances.
(If improvements installed)
.....
Township Engineer Date
- (If bond posted)
.....
Township Clerk Date
- f. Approved by the Planning Board/Zoning Board of Adjustment(only include appropriate Board).
Preliminary/Final(Circle one).....
.....
Chairman Date
-
Secretary Date

8. All existing tract boundary or lot lines with lengths of courses to 100ths of a foot and bearings to half minutes, the error of closure not to exceed 1 to 10,000. The tract boundary or lot lines shall be clearly delineated. All bearings shall be in the New Jersey Plane Coordinate System.
9. Existing block and lot number(s) of the lot(s) to be developed as they appear on the municipal tax map.
10. Name and address of the owner or owners of record and the names and addresses of all property owners within 200 feet of the extreme limits of the tract as shown on the most recent tax list prepared by the Township Tax Assessor. Lot and block number of each bordering lot.
11. Municipal boundaries within 200 feet of the tract and the names of the adjoining municipalities.
12. Zoning district boundaries affecting the tract.
13. The location of any portion which is to be developed in relation to the entire tract.
14. Acreage of the tract to be developed to the nearest tenth of an acre.
15. Existing contours at two foot intervals where slopes are less than 15% and at five foot intervals when 15% or more; referred to a known datum and indicated by a dashed line. All contours shall be based upon U.S.C. & G.S. datum.
16. Locations of all existing structures showing front, rear and side yard setback distances, and an indication of whether the existing structures and uses will be retained or removed.
17. The locations and dimensions of all existing railroad rights-of-way, bridges, culverts, water and sewer mains, gas transmission lines and light tension power lines within the tract and within 200 feet of its boundaries.
18. The locations and extent of all existing easements or rights-of-way, whether public or private, affecting the tract, including a statement of the limits and purpose of the easement rights.
19. The names, exact location and width along the property line of all existing streets, recorded streets, or streets shown on an official map or Master Plan of the Township within the tract and within 200 feet of it.
20. The locations and species of all existing trees or groups of trees having a diameter in excess of six (6) inches (D.B.H.). The location of all wooded areas and the approximate number of trees per acre shall be shown when the tree count is more than 25 trees per acre.

21. All existing water courses, including lakes and ponds, and drainage rights-of-way within the tract or within 200 feet thereof.
22. Unique natural features or historic sites or structures within the tract and within 200 feet thereof. The applicant should refer to the Township's Natural Resources Inventory.
23. A copy of all existing protective covenants or deed restrictions of every nature affecting the premises sought to be developed or any part thereof and including a statement as to whether such deeds or covenants are of record. A copy or abstract of the deed or deeds or other instruments by which title is derived with the names of all owners shall also be presented with the application.
24. The boundaries and dimensions of any proposed new lot(s), proposed block and lot numbers as provided by the Township Engineer upon written request, and the area of each proposed lot in square feet.
25. A sketch of the proposed layout or disposition of remaining lands, if any.
26. All public property and property proposed to be dedicated in the tract, accurately outlined and described with existing or proposed uses designated.
27. The location and use of all property to be reserved by covenant in the deed for the common use of all property owners or otherwise.
28. All proposed easements or rights-of-way, whether private or public, the limits and purpose of the easement rights being definitely stated on the plan.
29. Proposed grading at two foot intervals, where slopes are less than 15%, and at five foot intervals when slopes are 15% or more; referred to a known U.S.C. and G.S. datum and indicated by a solid line.
30. For site plans, the location of all proposed buildings, structures, signs and lighting facilities, together with all dimensions necessary to confirm conformity to this Ordinance.
31. For site plans, the location and design of any off-street parking areas or loading areas, showing size and location of bays, aisles, and barriers.
32. All means of vehicular access and egress to and from the tract or site onto public streets, showing the size and location of drive-ways and curb cuts, including the possible utilization of traffic signs, signals, channelization, acceleration and deceleration lanes, additional width and any other devices necessary to prevent a difficult traffic situation.

33. Plans, typical cross sections, centerline profiles, tentative grades and details of all streets which are proposed to be improved, both within, abutting, and off the tract, including curbing, sidewalks, storm drains, and drainage structures. Sight triangles, the radius of curblines and street sign locations shall be clearly indicated at intersections.
34. Plans of proposed improvements and utility layouts including sewers, storm drains, water, gas, telephone and electricity showing feasible connections to any proposed utility systems. If private utilities are proposed, they shall comply fully with all local, county and state regulations. If service will be provided by an existing utility company, a letter from that company stating that service will be available before occupancy will be sufficient. When individual on-site water supply or sewerage disposal is proposed, the system shall be designed in accordance with Article 500 and shall be accompanied by the necessary approvals. If on-site septic systems are proposed, the results of percolation tests shall be submitted with the application along with the approval of the Board of Health.
35. The application shall include plans and computations for any storm drainage systems including the following:
 - a. The size, profile and direction of flow of all existing and proposed storm sewer lines within or adjacent to the tract and the location of each catch basin, inlet, manhole, culvert and headwall with the invert elevations of each.
 - b. The location and extent of any proposed dry wells, ground water recharge basins, detention basins or other water or soil conservation devices.
36. When a stream is proposed for alteration, improvement or relocation or when a drainage structure or fill is proposed over, under, in or along a running stream, evidence of approval or of the request for approval, required modifications, or lack of jurisdiction over the improvement by the New Jersey Division of Water Policy and Supply shall accompany the application. In addition, the following documentation shall be submitted to the Township:
 - a. Cross-sections of water courses and/or drainage swales to scale showing the extent of flood plain, top of bank, normal water levels and bottom elevations at the following locations:
 - 1) At any point where a water course crosses a boundary of the tract.
 - 2) At fifty foot intervals for a distance of 300' upstream and downstream of any point of juncture of two or more water courses within the tract and within 1,000 feet downstream of the tract.

- 3) At a maximum of 500' intervals, but not less than two locations, along each water course which runs through the tract or within 200' of the tract.
 - b. The delineation of the floodway, flood hazard and wetland areas within and adjacent to the tract.
 - c. The total acreage in the drainage basin of any water course running through or adjacent to the tract in the area upstream of the tract.
 - d. The total acreage in the drainage basin to the nearest downstream drainage structure and the acreage in the tract which drains to the structure.
 - e. The location and extent of any existing and proposed drainage and conservation easements and of stream encroachment lines.
 - f. The location, extent and water level elevation of all existing or proposed lakes or ponds within and adjacent to the tract.
37. When ditches, streams or water courses are to be altered, improved or relocated, the method of stabilizing slopes and measures to control erosion and siltation, as well as typical ditch sections and profiles, shall be shown.
38. Proposed shade trees, screening, buffering and, in the case of site plans, landscaping, shown on a separate landscaping plan. The landscaping plan shall be prepared in accordance with the following requirements.
- a. The landscape plan shall be prepared by a professional in the field, such as a professional landscape architect as defined by the American Society of Landscape Architects.
 - b. The landscape plan shall be based upon the topographic and tree survey as required in this Article.
 - c. The plan shall identify and describe each type of intended landscape treatment and shall clearly state the objective of each such treatment and the condition in which said item(s) or area(s) are to be maintained.
 - d. The plan shall show:
 - 1) Existing vegetation and whether or not it will remain.
 - 2) Existing individual trees in excess of six (6) inches (DBH), identified by species and showing the approximate crown limits.
 - 3) Contiguous stands of trees with intergrown crowns which will be preserved.

- 4) Existing and proposed contours and site clearance and grading limits.
 - 5) Limits of excavation, haul roads, stockpile areas, staging areas and the temporary and ultimate landscaping of each.
 - 6) Areas with special soils or slope conditions (existing and/or proposed).
 - 7) Specifications for proposed topsoiling, seeding, soil amendment and mulching.
 - 8) Proposed planting schedule:
 - a) Proposed plantings shall be shown on the landscape plan by symbols appropriately scaled to represent the sizes at the time of planting (beds shall be shown in outline).
 - b) A schedule shall be provided giving scientific and common plant names (re: Standard Plant Names, J. Horace McFarland Co., publishers), sizes at the time of planting (American Association of Nurserymen increments), quantities of each kind of plant and proposed planting dates.
 - 9) For site plans, the plan shall show paths, steps, handrails, lighting, signs, site furniture and play equipment, mail boxes, refuse storage devices, fences, retaining walls, surface drainage courses and inlets, and utilities to be located at or above-ground.
 - 10) Details, cross sections, materials, surface and finished grade elevations as necessary for review and evaluation by the Board.
 - 11) Notes regarding special maintenance requirements during the period of establishment and the limits of any such special maintenance areas.
 - 12) Notes regarding permanent or temporary site maintenance commitments.
 - 13) If soil is to be removed or brought to the site, the quantity, method of transportation and steps to be taken to protect public streets shall be described.
39. The proposed location, direction of illumination, power, and type of proposed outdoor lighting, with isolux lines drawn on a copy of the site plan.
40. For a site plan, preliminary elevations and plans of all buildings and structures, showing windows, doors, architectural treatment,

roof treatment, roof appurtenances and screening, floor elevations and proposed methods of energy conservation and the locations, dimension and legend(s) of all proposed signs. The Board may request that architectural renderings of the building(s) and sign(s) be provided to show and document the proposed architectural treatment. For a subdivision, the approximate basement and first floor elevation for each house.

41. Proposed permanent monuments.
42. A Soil Erosion and Sediment Control Plan as specified in Section 515.
43. The Board reserves the right to require additional information before granting preliminary approval when unique circumstances affect the tract and/or when the application for development poses special problems for the tract and surrounding area. However, the need for such additional information shall not affect the determination of the completeness of the submission of the application for development.
44. No application shall be deemed complete unless all fees required at the time of submission have been paid.

E. Corporate Disclosure. Any corporation or partnership applying for permission to subdivide a parcel of land into six (6) or more lots or applying for a variance to construct a multi-family dwelling of twenty-five (25) or more units or applying for approval of a site to be used for commercial purposes shall submit to the Board a list of the names and addresses of all stockholders or individual partners owning at least 10% of its stock of any class or at least 10% of the interest in the partnership, as the case may be. If another corporation or partnership owns 10% or more of the stock of the applicant corporation, or 10% or greater interest in the applicant partnership, as the case may be, that corporation or partnership shall list the names and addresses of its stockholders or individual partners holding 10% or more of its stock or 10% or greater interest in the partnership, as the case may be, and this requirement shall be followed by every corporate stockholder or partner in a partnership, until the names and addresses of the non-corporate stockholders and individual partners exceeding the 10% ownership criterion have been listed.

F. Support Documentation. Each application not classified as a minor subdivision or minor subdivision/flag lot shall be accompanied by a Project Report. This report shall include the various items listed hereafter and shall be accompanied by the necessary maps, exhibits, etc. Where maps or exhibits have been submitted to fulfill the requirements of Section 708D above, they may be referenced in the Project Report.

I. Project Description and Statistics Report. A written statement describing the application, the intended use, the total area of land involved, any transfers of development rights, the total floor area proposed, a schedule comparing the minimum requirements for

parking and coverage set forth in this Ordinance with the proposed development, and including, as well:

- a. A report describing the number of residential units by type to be constructed.
- b. The anticipated sales price of each unit type.
- c. The acreage of Open Space.
- d. The square footage of non-residential construction and its value.
- e. The anticipated age characteristics of the population in the following categories:

Pre-school - 0 to 6 years

Elementary school children - 6 to 12 years

Secondary school children - 13 to 18 years

Young adults - 19 to 35 years

Primary adults - 36 to 54 years

Mature adults - 55⁺ years

- f. The relationship of the proposed development to the Township's Master Plan and the location of any parks, playgrounds, school sites, Open Space or other public areas which are so designated on the Master Plan or Official Map of the Township and which lie within the area proposed to be developed.

2. Land Classification map and report containing the following:

- a. Environmentally restricted lands as defined in Article 200 of this Ordinance.
- b. Restricted lands as defined in Article 200 of this Ordinance.
- c. Unrestricted lands as defined in Article 200 of this Ordinance.
- d. A slope map of the site with minimum contour intervals of five feet, showing the following gradients:

25% or greater

15% to 25%

10% to 15%

0% to 10%

- e. A soils map based on soil conservation data and/or developed from detailed on-site testings. If the latter method is utilized, a detailed description with supporting documentation shall be submitted.
 - f. A vegetation and special features map showing all woodlands, individual trees in excess of 6" (DBH), significant tree masses, existing buildings, roads and trails, and flowing streams, drainageways and ponds.
3. A Natural Features Report. This report shall include:
- a. A report summarizing the natural features and constraints of the site as related to the proposed land development.
 - b. The number of acres and the percent of the total site each classification enumerated represents.
 - c. A determination of how the site planning for the site has integrated the natural features in order to minimize adverse impacts on the natural systems, and how areas for common open space were selected to minimize such impacts.
 - d. An identification of unavoidable adverse impacts (if any) and the steps to be taken to minimize those impacts.
4. Open Space Plan and Report. This submission shall include the following:
- a. An open space plan. This shall consist of a map showing all areas of the site to be designated as Open Space and the designation of each area according to its potential use - active recreation, passive recreation or environmental protection. The map shall also show the size of each of the designated areas in acres and its percentage relationship to the site as a whole. It shall show all proposed buildings, facilities, or other forms of development in such Open Space.
 - b. An open space report. This report shall include:
 - 1) An evaluation of the Open Space Plan and how it relates to the Township's standards for Open Space and how the plan is integrated into the overall Development Plan as well as its relationship to both the pedestrian and vehicular circulation plan and how it integrates those identified sensitive areas in the Natural Resources Inventory.
 - 2) A statement relating the Open Space Plan to any existing or proposed Township Open Space and/or recreational facilities.
 - 3) A description of the form of organization proposed to own and maintain the common Open Space; a substantive

representation of the Master Deed, where applicable; summaries of the substance of covenants relating to the Open Space itself and to the maintenance organization; and an estimated schedule of fees to be charged.

5. Land Coverage and Drainage Plan report. This submission shall include the following:
 - a. All parts of the site which will be covered by paving, building roofs or other impervious cover. Each category shall be denoted on the map legend as to the number of acres involved and the percent of the total site it represents.
 - b. All parts of the site in which tree cover shall be altered and, in the map legend, the acres to be altered and a notation as to the percentage this represents of the total treed area of the site.
 - c. The sub-drainage areas of the site and the points at which storm drainage leaves the site. This shall be performed for the site prior to as well as after improvement. The acreage of each area shall be noted in the map legend.
 - d. All drainage improvements, including retention/detention ponds and basins, dams, major drainage swales, culverts, and storm water pipes in excess of 6" in diameter.
 - e. A drainage impact evaluation defining the current storm water discharge on the unimproved site by drainage area and for the total site for a 100 year storm of 24 hour duration, using Somerset County procedures; the acres in cover types (i.e., trees, lawn, impervious) after improvement; the storm water discharge after improvements; the total increase in storm water drainage for the total site, as well as for each of its subdrainage areas; and a description of all improvements proposed to control the additional storm water discharge to meet the Township's standards such that improvement of the land shall not increase peak runoff over that which presently exists. If alternate standards, methods, and factors are utilized, they must be in addition to those required and shall include a clear, concise explanation in the report submitted.
6. Erosion and Sedimentation Control Plan and Report. This submission shall include the following:
 - a. Calculations of the estimated soil loss from the site in an unimproved state, and calculations of the estimated soil loss during construction based upon Soil Conservation Service data or alternate data acceptable to the Board.
 - b. A plan showing the general location of any structure or device that is intended to minimize soil erosion and control sedimentation.

- c. **An erosion and sedimentation control report. This report shall include:**
 - 1) **A clear, concise explanation of structures, devices and techniques to be utilized during and after construction to minimize soil erosion and control sedimentation.**
 - 2) **An evaluation of the effectiveness of the proposals.**

- 7. **Sewer and Water Plan and Report. This submission shall include the following:**
 - a. **A sewer and water plan. This shall consist of a map showing the proposed location of major collection and distribution lines serving the proposed development, how and where these lines will tie into existing sewer and water systems, or, the location of an on-site sewage disposal facility or water processing facility (if applicable).**

 - b. **A sewer and water report. This report shall include:**
 - 1) **An explanation of plans to tie into existing sewer or water facilities and information on the status of efforts to have such tie-ins approved by the appropriate authorities; a description of any proposed sewage treatment and water processing facilities to be built on the site. Where a Federal, State, County, or regional agency must approve any such facility before it can be built, a copy of the application to each such agency should also be submitted along with an outline of all approvals by non-Township agencies which are required for the erection and operation of such a plant.**
 - 2) **Calculations of water demands and sewage generation resulting from the proposed development.**
 - 3) **A statement of existing sewer and/or water systems to determine their capacity, documented by a letter from appropriate agency. This evaluation shall state the capacities, if any, of existing systems and relate these capacities to projected demands and generations to determine what, if any, adverse impacts are to be expected.**
 - 4) **If the projected sewage generation and/or water demand will exceed the identified capacities of the available systems, then a detailed report describing what improvements shall be implemented to provide the necessary sewerage and/or water for the project.**
 - 5) **If an independent, on-site, interim sewage treatment facility is proposed, then a description and analysis of the projected quality of the water discharged from the system and an analysis of the impact of that discharge**

on any stream or underground aquifer likely to be affected by it, together with a description of how the applicable requirements of Article 500 will be complied with.

- 6) Data and methods for calculating sewage generation and water demand for the capacity/demand evaluation.

8. **Circulation Plan and Traffic Report.** This submission shall include the following:

- a. A circulation plan. This shall consist of a map showing streets, roads, parking areas and pedestrian/bicycle pathways. The cartway and right-of-way width for all streets, roads and pathways shall be shown on the map. The dimension and capacities of parking areas shall also be shown on the map. The map shall also show landscaped areas in or immediately adjacent to any part of the proposed circulation system.

b. A circulation and traffic report. This report shall include:

- 1) An evaluation of the internal circulation plan and how it relates to the anticipated traffic volumes, how layout relates to the terrain, and any proposed deviation from the standards of this Ordinance.
- 2) An evaluation of the external circulation systems and the impacts of the traffic to be generated by the proposed development.
- 3) A designation as to what intersection(s) the generated traffic will affect. If traffic is projected to flow to more than one intersection, then a traffic study performed by a Professional Engineer, indicating the flows of the anticipated traffic to the multiple intersections shall be undertaken. This study shall clearly and concisely define the standards and methods utilized to document this analysis.
- 4) Calculations of the number of motor vehicle trips expected to enter and leave the site for the peak hour (PHT) and on a daily basis (ADT), and the number of trucks.
- 5) Calculation and analysis of the impact of the traffic to be generated by the development on the identified intersections.
- 6) Data, methods and factors for calculating traffic generation for the capacity/demand evaluation.
- 7) A description of the adverse impacts, and steps to be taken to minimize these impacts.

9. **Utilities Plan and Report.** This submission shall include the following:
 - a. A map showing any and all easements and lands subject to covenants for the purpose of providing natural gas, electricity, oil, telephone or CATV.
 - 1) A portion of the submission may be shown as a separate map or may be included as part of the Sewer and Water Plan submission (Article 708.F.7).
 - 2) A typical cross section of the common utility easement and trench, if applicable, shall be shown on the Utilities Plan.
 - b. A utilities report. This report shall include:
 - 1) Arrangements and written statements from each utility company or distribution service serving the area stating its ability to provide the service or commodity in the quantity necessary to adequately service the development.
 - 2) A written statement from all utilities willing to share a common easement.
10. **Development Schedule Plan.** If project construction is extended over more than one year, a map showing the location of the first phase of the development and the anticipated location of each successive phase shall be submitted and shall include:
 - a. The number by type of dwelling units and, where applicable, other uses, indicating gross leasable areas for each type of use in each phase.
 - b. The amount and location of Open Space.
 - c. The location and type of community structures and facilities.
 - d. The location of all public improvements or other improvements necessary to completely define the Development Plan.
11. **Variances, Exceptions and Modifications.** This report shall describe any modifications proposed from the standards set forth in Article 600, any exceptions requested from the regulations of Article 500 and any variances applied for from the requirements of Article 400 of this Ordinance. For each modification, exception or variance request, detailed substantiation shall be submitted.
12. **Easements and Covenants.** This report shall contain the substance of any easements or covenants to be imposed upon the use of the land, structures or other improvements within the development which are not presented elsewhere in the application.

13. **Township Environmental Impact Assessment.** The reports described in Article 708.F.1 through 12 may be submitted separately or as part of the Township Environmental Impact Assessment. The applicant is encouraged to submit each report as a separate chapter in the Environmental Impact Assessment and, as a final chapter, present the information described in Section 708F.13c and d. If this procedure is used, repetitious information described below may be deleted if no loss in clarity or continuity occurs.

a. The Board shall require for all Development Plans (other than a minor subdivision or minor subdivision/flag lot) that an Environmental Impact Assessment be submitted as set forth in this Article. This requirement shall also apply to all public or quasi-public projects unless such are exempt from the requirements of local law by supervening County, State or Federal law. The Board may, at the request of the applicant, waive the foregoing requirement if sufficient evidence is submitted to support a conclusion that the proposed application will have a slight or negligible environmental impact. Portions of the foregoing requirement may also be waived upon a finding that a complete report need not be prepared in order to evaluate adequately the environmental impact of a particular application.

b. **Filing requirements -** The Environmental Impact Assessment requirements of this Ordinance cover the most complex cases and the entire contents may not be applicable to less complex projects. Therefore, an outline with discussion shall be submitted to the Board prior to the preparation of an Environmental Impact Assessment. The outline will address briefly the items described in Article 708.F.13.c. and d. below and discuss which of these items are environmentally significant with regard to the proposed project. The discussion shall describe the depth of study for these items and how their environmental impacts will be evaluated. Additionally, those items upon which the proposed project will have insignificant or no environmental impact shall also be discussed with the request that such items need not be addressed in the Environmental Impact Assessment. The approval of the outline does not relieve the applicant from the responsibility for evaluating additional area of potential environmental impact which may be revealed during the review of the Environmental Impact Assessment, nor does it prevent the Board from requesting the inclusion of additional items as necessary at a later date.

An Environmental Impact Assessment shall be submitted prior to the issuance of soil removal permits and prior to preliminary approval of all Development Plans but shall not be required for a minor subdivision or a minor subdivision/flag lot.

c. **Contents -** The Environmental Impact Assessment shall include the following:

- 1) **Plan and description of the Development Plan.** A description, complete with site plans, which shall specify the purpose of the proposed project, including products and services, if any, being provided, the regional, municipal and neighborhood setting, including buildings, roads, grading and regrading, adjacent natural streams and utility lines.
- 2) **Inventory of existing natural resources.** An inventory of existing natural resources at the site and in the affected region which shall describe air quality, water quality, geological character, soil characteristics, land form, hydrological features, wildlife, aquatic organisms, noise characteristics and levels, land use, history and archeology. Said inventory shall be referenced to applicable subject matter in the Township Natural Resources Inventory. Air and water quality shall be described with reference to standards promulgated by the Department of Environmental Protection of the State of New Jersey and soils shall be described with reference to the Somerset County Soil Survey and the criteria contained in the Somerset-Union Soil Conservation District Standards and Specifications.
- 3) **Assessment of environmental impact.** An assessment supported by environmental data of the environmental impact of the project upon the factors described in c.2) above. It shall also include an evaluation of: water use and depletion; the effects of projected liquid and solid wastes on quality and quantity of surface and ground water; air quality; traffic; and aquatic and terrestrial wildlife. The assessment shall also include an evaluation of the loss of open space and the social and economic effects on the community, including schools, parks, roads, police, fire, etc.
- 4) **Unavoidable adverse environmental impacts.** A discussion of any adverse environmental impacts and damages to natural resources which cannot be avoided with particular emphasis upon: air or water pollution; damage to plants, trees or wildlife systems; displacement of existing farms; increase in sedimentation and siltation.
- 5) **Steps to minimize environmental damage.** A description of steps to be taken to minimize adverse environmental impacts during construction, operation and completion both at the project site and in the affected region. Such description is to be accompanied by necessary maps, schedules and other explanatory data as may be needed to clarify and explain the actions to be taken.
- 6) **Alternatives.** A discussion of alternatives to the proposed project which might avoid some or all of the adverse environmental effects. The discussion should

include the reasons for the acceptability or nonacceptability of each alternative.

d. Details and matters to be evaluated

- 1) Sewerage Facilities. A description of the sewerage facilities that will be utilized including the following:
 - a) If disposal is to be on-site: data on underlying geology, water table, depth to bedrock, soils analysis, soil stratification for every sewage disposal site; topography, location and depth of aquifers, and depth, capacity, type of construction and location of all wells which have been recorded or can be obtained from interviews with adjacent property owners within 500 feet of the site; soil logs and percolation tests for each disposal site as witnessed by the Health Officer, and any other pertinent data.
 - b) If sewage disposal will utilize an interim on-site treatment facility: documentation as to methodology, quality of effluent and status of approvals in addition to the data.
 - c) If disposal is to be off-site: projected sewage discharges stated in average daily flows (gallons per day) for the initial phase of development and five year projections of same for each of the following land use categories: (1) residential discharges and (2) industrial/commercial discharges. Industrial-commercial discharges shall be described as follows: type of process; projected daily flows; physical characteristics, including temperature; biological characteristics; and chemical characteristics, including description of toxic components.
 - d) If treatment is to be by public facility: name of public facility, point of connection, and description of interconnecting facilities.
 - e) If project is to include treatment facilities discharging into a stream or watercourse in the Township: location of treatment facilities; receiving stream and data on stream classification; water quality; seven day low flow at 10 year frequency; description of treatment facilities and proposed effluent quality; and evaluation of initial and future deleterious effects on use of stream for water supply, recreation and aquatic and terrestrial wildlife. Evaluation shall include projected effects of nutrients on downstream ponds and lakes.
 - f) Compliance with all State and local health requirements.

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2) **Water Supply.** A description of the water supply that will be utilized, including the following:

- a) If supply is from on-site sources: location of water supply source(s); description of water supply facilities, including type, depth, and pumping rates; location and depth of all private and public water supplies and septic systems within 500 feet of the proposed water sources; and geologic evaluation of subsurface conditions including statements on the following:

Long term evaluation of the adequacy of the supply to serve the project (in terms of both quantity and quality);

Evaluation of possible interference with existing private and public water supplies within the same aquifer, and;

Evaluation of water table conditions and aquifer recharge capability.

- b) If supply is from public facilities off-site: name of public facility; point(s) of interconnection and description of interconnecting facilities; pressure requirements; and projected water usage stated in average daily usage (gallons per day), peak daily usage (gallons per day) and peak hourly usage (gallons per hour). Water usage shall also be projected for the initial phase of development and for 5 and 10 year periods for each of the following:

Residential usage (excluding lawn sprinkling);

Lawn sprinkling and irrigation;

Industrial/commercial usage (to include discharge to treatment facilities, discharge to streams without treatment, and other uses) and

Fire protection requirements.

- c) Compliance with all State (including Department of Environmental Protection, Division of Water Resources) requirements and local health regulations.

3) **Storm Water.** The following data and documentation:

- a) Peak rates and volumes of storm water runoff from the undeveloped site and projected to be generated by the site after the proposed development including rates for 10, 15, 25, 50 and 100 year storm frequencies using Somerset County procedures.

- b) Data on landscaping, including a vegetation map showing tree and ground cover existing on the site as compared with that proposed.
 - c) Changes in peak rates and volumes of storm water runoff and runoff coefficients expected to be caused by changes in land use and whether or not there will be any increased incidence of flooding caused by increased storm water runoff due to the proposed project.
 - d) Submission of plans showing the disposition of storm water and attempts to delay the time of concentration by the use of detention basins or other acceptable methods.
 - e) Submission of an erosion and sediment control plan in accordance with the requirements of Article 500.
- 4) Stream Encroachments. Evidence that a stream encroachment permit from the New Jersey Department of Environmental Protection, Division of Water Resources, for fill or diversion of a water channel, alteration of a stream, repair or construction of a bridge, culvert, reservoir, dam, wall, pipeline or cable crossing, has been applied for and/or obtained, if applicable.
 - 5) Flood Plains. Description of potential flood damage including a summary of flood stages from the Flood Maps (see Section 502.C.).
 - 6) Solid Waste Disposal. A plan for disposal by means of a facility operating in compliance with Federal, State, regional, County and local requirements.
 - 7) Air Pollution. A description of any changes in air quality to be produced by the proposed development, including the amounts or degree of smoke, heat, odor or substances to be created and added to the atmosphere by heating, incineration and processing operations.
 - 8) Traffic. A determination of the present traffic volumes and capacities of the road(s) serving the project and the nearest major intersections, and the projected impacts of the completed project on them. Also, a determination of any additional air pollution and noise to be caused by traffic from the completed project.
 - 9) Social/Economic. An analysis of the factors affecting the finances of the Township, including the estimated changes in tax receipts and fiscal outlay for municipal services; the estimated number and types of jobs to be provided; the number of school age children to be

produced; and any addition to existing municipal services which will be required by the project.

- 10) **Aesthetics.** A discussion of how the natural or present character of the area will be changed as a result of the proposed action.
- 11) **Licenses, permits, etc.** A list of all licenses, permits and other approvals required by municipal, County or State law and the status of each.
- 12) A copy of the Development Plan and application form.

G. Action by the Township.

1. Except for the County Planning Board, all individuals, offices and agencies to which copies of the submission were forwarded shall submit their comments and recommendations to the Planning Board or Zoning Board of Adjustment, as the case may be, within fourteen (14) days of their receipt of the submission. The Board shall distribute a copy of the Environmental Impact Assessment to the Environmental Commission for its review and may also distribute copies of the report to such other governmental bodies and consultants as it may deem appropriate. Any comments and advisory reports resulting from such review shall be submitted to the Board within 30 days of the distribution of the Environmental Impact Assessment to the Environmental Commission, other governmental body or consultant.
2. Upon the certification of the completeness of an application for a site plan involving 10 acres of land or less and 10 dwelling units or less or a subdivision containing 10 lots or less, the Planning Board shall grant or deny preliminary approval within 45 days of the date of such certification or within such further time as may be consented to in writing by the applicant. Upon the certification of the completeness of an application for a site plan involving more than 10 acres or more than 10 dwelling units or a subdivision containing more than 10 lots, or whenever an application includes a request for Conditional Use approval or for relief pursuant to Section 701.A. of this Ordinance, the Planning Board shall grant or deny preliminary approval within 95 days of the date of such certification or within such further time as may be consented to in writing by the applicant. Otherwise, the Planning Board shall be deemed to have granted preliminary approval.
3. Upon the certification of the completeness of an application for a variance pursuant to N.J.S.A.40:55D-70d involving a site plan, subdivision and/or Conditional Use approval pursuant to Section 701 B. of this Ordinance, the Zoning Board of Adjustment shall grant or deny preliminary approval within 120 days of the date of such certification or within such further time as may be consented to in writing by the applicant. Should the applicant elect to submit a separate application requesting approval of the variance and a subsequent application requesting approval of the

site plan, subdivision and/or Conditional Use, the 120 day period shall apply only to the application for approval of the variance and the time period for granting or denying the subsequent approval(s) shall be as otherwise provided in this Ordinance for approvals by the Planning Board.

4. All hearings held on applications for preliminary approval shall require public notice of the hearing in accordance with Article 300.
5. The recommendations of the County Planning Board and those of all other agencies and officials to whom the preliminary Development Plan is submitted for review shall be given careful consideration in the Board's decision on the application. If the County Planning Board or the Township Engineer approves the preliminary submission, such approval shall be noted on the Development Plan. If the Board acts favorably on the preliminary Development Plan, the chairman and the secretary of the Board (or the acting chairman and secretary where either or both may be absent) shall affix their signatures to at least ten copies and a reverse sepia of the Development Plan with a notation that it has been approved. The applicant shall furnish the copies and reverse sepia to the Board for signing.
6. Should minor revisions or additions to the Development Plan be deemed necessary, the Board may grant preliminary approval subject to specified conditions and the receipt of revised plans within 30 days from said approval. If the Board, after consideration and discussion of the preliminary Development Plan, determines that it is unacceptable or that major revisions are required, a notation to that effect shall be made on the Development Plan by the chairman of the Board (or the acting chairman in his absence) and the resolution memorializing such action shall set forth the reasons for rejection. One copy of the Development Plan and said resolution shall be returned to the applicant within 7 days of the date of decision. The Board shall reject the proposed project on an environmental basis only if it determines that the proposed project (a) will result in significant, long term harm to the natural environment and/or (b) has not been designed with a view toward the protection of natural resources.

H. Findings on the Application for Preliminary Approval.

- I. Resolution of Memorialization.** The memorialization of the granting or denial of preliminary approval by written resolution shall include not only conclusions but also findings of fact related to the specific proposal, and shall set forth the reasons for the grant, with or without conditions, or for the denial. Said resolution of memorialization shall set forth with particularity in what respects the plan would or would not be in the public interest, including but not limited to findings of fact and conclusions on the following:
- a. Specific findings - The Board shall make the following findings:
- 1) In what respects the plan is or is not consistent with the Township Master Plan.
 - 2) To what degree the plan respects the natural features of the site. The Board shall take note of:
 - a) The degree to which severely restricted lands have been encroached upon.
 - b) The degree to which stands of trees have been respected. Particular emphasis will be directed toward the preservation and integration into the plan of prime or unique tree stands and specimen trees.
 - c) The degree to which unique or sensitive natural features have been integrated into the common open space system to minimize adverse impact.
 - 3) Whether storm water runoff has been controlled on the site to meet the Township standard that no additional peak runoff shall be discharged during a 100 year storm of 24 hour duration.
 - 4) Whether the sewage effluent generated by the development can be disposed of in a manner that will not exceed the capacities of public systems or, if an on-site or interim facility is to be utilized, whether the sewage effluent generated will degrade any flowing stream or underground water resource.
 - 5) To what degree potable water demands generated by the development can be met from existing public or private systems. If a new on-site system is proposed, whether or not it will meet the demands of the development.
 - 6) To what degree the internal circulation system is able to handle the traffic generated by the development. To what degree the existing external circulation system is

capable of handling the traffic generated from the development.

- 7) The extent to which the plan departs from the provisions of Articles 400, 500 and 600 otherwise applicable to the subject property, including but not limited to density, bulk and use and the reasons why such departures are or are not in the best public interest.
 - 8) Whether the proposed Open Space system meets the standards of the Township and whether or not the proposals for maintenance and conservation of common Open space is reliable, and whether or not the amount, location and purpose of the Open Space are adequate.
 - 9) Whether general utilities are available to meet the demands of the development.
 - 10) Whether the development program meets the guidelines of the Township's Fair Share Housing Allocation as defined in the Master Plan.
 - 11) To what degree the erosion and sedimentation control plan addresses the need to minimize on-site erosion and provides adequate sedimentation control to minimize off-site as well as on-site adverse impacts.
- b. Additional findings for Residential Cluster. When considering applications for approval of any of this form of development, the Board shall further consider:
- 1) The physical design of the plan and the manner in which said design does or does not further the amenities of light and air, recreation and visual enjoyment.
 - 2) The relationship, beneficial or adverse, of the proposed development to the neighborhood in which it is to be established.
 - 3) In the case of a plan which proposes development over a period of years, the sufficiency of the terms and conditions intended to protect the interests of the public and of the residents and owners of the development in the implementation of the plan as submitted.
- c. Additional findings for Planned Residential and Planned Employment Development. When considering these forms of development, the Board shall make the following findings of fact and conclusions:
- 1) That departures by the proposed development from zoning regulations otherwise applicable to the subject property conform to this Ordinance.

- 2) That the proposals for maintenance and conservation of the common open space are reliable, and the amount, location and purpose of the common open space area adequate.
 - 3) That provision through the physical design of the proposed development for public services, control over vehicular and pedestrian traffic, and the amenities of light and air, recreation and visual enjoyment are adequate;
 - 4) That the proposed planned development will not have an unreasonably adverse impact upon the area in which it is proposed to be established;
 - 5) In the case of a proposed development which contemplates construction over a period of years, that the terms and conditions intended to protect the interests of the public and of the residents, occupants and owners of the proposed development in the total completion of the development are adequate.
2. Environmental Impacts. The steps to be taken to minimize adverse environmental impacts during construction and operation (See Section 708F.13.c.5.) and the alternatives which may be approved by the Board (See Section 708F.13.c.6) shall constitute conditions of the approval, together with such other conditions as the Board may impose. No Certificate of Occupancy shall be issued until compliance shall have been made with such conditions.
 3. Timing of Applications for Final Approval. In the event a Development Plan is granted preliminary approval, with or without conditions, the Board shall set forth in the resolution of memorialization the maximum time period within which an application for final approval of the Development Plan shall be filed or, in the case of a Development Plan which provides for development over a period of years, the sequence in which application for final approval of each part thereof shall be filed and the maximum time period within which all applications shall be filed. The resolution shall further set forth any specific drawings, specifications, covenants, easements and other information required to be included in the application for final approval in addition to those items set forth in Section 709B. The resolution may also set forth the form of performance guarantee(s) to be submitted at the time of the application for final approval(s).
1. Effect of Preliminary Approval. Preliminary approval shall confer upon the applicant the following rights for a three-year period from the date of the preliminary approval:
 1. That the general terms and conditions on which preliminary approval was granted shall not be changed, including but not limited to: use requirements; layout and design standards for streets, curbs and sidewalks; lot size; yard dimensions and off-tract improvements.

2. That the applicant may submit for final approval, on or before the expiration date of preliminary approval, the whole or a section or sections of the preliminary Development Plan.
3. That the applicant may apply for and the Board may grant extensions on such preliminary approval for additional periods of at least one year, but not to exceed a total extension of two years, provided that if the provisions of Article 600 of this Ordinance have been revised, such revised provisions may govern.
4. In the case of a subdivision or site plan involving fifty (50) acres or more, the Board may grant the rights associated with preliminary approval for such period of time, longer than three (3) years, as it shall deem reasonable considering the number of dwelling units and nonresidential floor area permissible under preliminary approval, economic conditions, and the comprehensiveness of the development. The applicant may thereafter apply for and the Board may thereafter grant an extension to preliminary approval for such additional period of time as shall be determined by the Board to be reasonable considering the number of dwelling units and nonresidential floor area permissible under preliminary approval, the potential number of dwelling units and nonresidential floor area of the section or sections awaiting final approval, economic conditions, and the comprehensiveness of the development; provided that if any of the provisions of Article 600 of this Ordinance have been revised, such revised provisions may govern.

J. Distribution of Preliminary Development Plan. The secretary of the Board shall forward copies to each of the following within ten (10) days from the date of decision:

Applicant (2)

Municipal Engineer (2)

Construction Official or Zoning Officer (2)

Tax Assessor (1)

County Planning Board (1)

Health Officer (1)

709. SUBMISSION OF FINAL DEVELOPMENT PLANS

A final submission is required of all Development Plans approved at the preliminary submission stage.

A. Procedure for Submitting Final Plans and Final Plans.

1. Within three years after the date of preliminary approval, the applicant shall submit to the Administrative Officer after the

income housing would, at the least, be delayed for a period of years. As acknowledged in Bernards' brief (Db23 to Db24), the currently effective Ordinance #704 will ensure the construction of lower income housing in the Township. Pursuant to Ordinance #704, Hills is prepared to expeditiously commence construction of its development. Barring any unforeseen catastrophes, Hills is prepared to guarantee construction of at least 550 units of lower income housing in the Township by 1990. (Affidavit of Kerwin; Dal 63).

At best, if Bernards were permitted to transfer this matter, timely construction of lower income housing in the Township would be an uncertainty. If Bernards were able to transfer this matter to the Affordable Housing Council it would be a number of years before any entity is authorized to commence construction of lower income housing in Bernards Township.¹¹ In many respects, Hills has already commenced such construction. (Affidavit of Kerwin; Dal 60 to Dal 62). The outcome of transfer would work clear hardship to the intended beneficiaries of this litigation and transfer was therefore properly denied.

(ii) Transfer of this matter would result in manifest injustice to Hills and transfer was, therefore, properly denied.

In denying transfer, the trial court did not focus on the pecuniary interests of Hills. The trial court found that transfer would result in manifest injustice to lower income persons and transfer was therefore denied. As discussed

¹¹ In its moving brief, Bernards asserts that the trial court erred when it concluded that transfer would profoundly delay construction of lower income housing. It must be noted that the Township's principle justification for transfer is the acquisition of a lower fair calculation pursuant to the Act's provisions. (See supra, p.10 n.9).

The Township advised the court below that the Township wished to submit a new housing element and that it may, indeed, attempt to withdraw Ordinance #704. (Pa79, Pa95). The trial court was, therefore, entirely justified in its conclusion. If, as Bernards now represents (Db24), the Township would not impede the Hills' inclusionary development regardless of whether this matter were transferred, the only tangible effect of transfer would be to avoid a judgment of compliance thereby leaving the Township exposed to additional lawsuits for a period of approximately two years. Transfer under such a scenario may result in manifest injustice to the Township. Therefore, in either event, transfer was appropriately denied.

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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

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

5 THE COURT: Okay.

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

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

13 THE COURT: Number and nature of what?

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

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

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

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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

1 Honor?

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

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

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

16 THE COURT: Okay.

17 MR. DAVIDSON: I am suggesting that one
18 of the things that might occur is, we would amend
19 704 to be what we think is going to be proper
20 under the Act.

21 THE COURT: Okay.

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

25 THE COURT: All right. Anything further?

SPRING RIDGE ASSOCIATES,
a New Jersey Partnership,
and LAWRENCE ZIRINSKY,
individually,

Plaintiffs,

v.

TOWNSHIP COMMITTEE OF BERNARDS
TOWNSHIP, AND PLANNING BOARD
OF BERNARDS TOWNSHIP.

Defendants.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION - SOMERSET COUNTY

: DOCKET NO. L-

: (Mt. Laurel)

DEFENDANTS, TOWNSHIP COMMITTEE OF BERNARDS TOWNSHIP AND
PLANNING BOARD OF BERNARDS TOWNSHIP'S SUPPLEMENTAL BRIEF

FARRELL, CURTIS, CARLIN & DAVIDSON
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Post Office Box 145
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Attorneys for Defendant, Township
Committee of Bernards Township

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

JAMES E. DAVIDSON, ESQ.
HOWARD P. SHAW, ESQ.
ARTHUR H. GARVIN, III, ESQ.
On the Brief

INTRODUCTION

As defendants have noted in their initial Brief, it is defendants' understanding that the matter presently before the Court is limited to the issue of whether Ordinance 704 is in violation of Judge Leahy's Order for Supplemental Judgment. Plaintiff's brief adverts to several issues, including some which are beyond that limitation, which require response. We respectfully request that the court accept this Supplemental Brief on behalf of Defendants.

ARGUMENT

I. THE CONCEPTUAL APPROVALS DO NOT EXEMPT PLAINTIFFS FROM ORDINANCE 704.

Contrary to suggestions in their brief, plaintiffs are not insulated from Ordinance 704 by virtue of conceptual approvals.

Section 707E.1. of the Bernards Township Land Development Ordinance states that conceptual approval allows the applicant to develop, for ten years, in accordance with those aspects of the conceptual plan approved by the Planning Board "as set forth in Section 707C.3.a. above [sic -- should be 707D.3.a.; there is no section 707C.3.a.]". Just as the items specified in the Supplemental Judgment are not touched by Ordinance 704, the aspects set forth in Section 707D.3.a. also are not touched by Ordinance 704. Those aspects are:

1. The total number of dwelling units.

2. The amount of non-residential development, if applicable.
3. The circulation pattern.
4. The utilities plan.
5. The drainage plan.
6. Critical areas that will not be developed.
7. The staging plan.
8. The environmental assessment.

Thus, whatever protection the Land Development Ordinance may confer for conceptual approvals, Ordinance 704 affects matters outside such protection.¹

¹ Research shows that it is uncertain, in any event, whether the Township's ordinance, insofar as it purports to confer certain protections based upon a conceptual approval, is a valid enactment. The pertinent section of the enabling statute, N.J.S.A. 40:55D-10.1, recites that "The developer shall not be bound by any concept plan for which review is requested, and the planning board shall not be bound by any such review." In an analogous situation, the Supreme Court held that a municipality lacked legal power to confer protection based upon a tentative approval for a period of time longer than the three years then specified in the Municipal Planning Act, N.J.S.A. 40:55-1.18. Hilton Acres v. Klein, 33 N.J. 570, 578-81 (1961). See also, Piscitelli v. Tp. Comm. of Tp. of Scotch Plains, 103 N.J. Super. 589 (Law Div. 1968), which held that a municipality lacks power to create an Architectural Review Board which is not authorized by the zoning enabling statute. Moreover, a land use enactment for which a municipality lacks legal authority is ultra vires and void, and cannot give rise to any estoppel based upon reliance. Hilton Acres, supra, at 581-82 ("there is a lack of equity in the owner and the public interest completely predominates"). It appears, in addition, that the scope and duration of protection sought by plaintiffs under a conceptual approval might exceed the protection conferred by statute for even preliminary or final approvals.

The alleged reliance by plaintiffs on conceptual approvals should have no bearing upon the validity of Ordinance 704 under the Supplemental Judgment, which is a separate and distinct instrument from the conceptual approvals. In addition, the nature and extent of any alleged reliance is a matter which will require substantial discovery concerning what was done, why it was done, what it cost, and other aspects, and is inappropriate for consideration in this summary hearing.²

There are no affidavits or documents before the court to give any basis for adjudicating the contention that plaintiffs' applications for conceptual approval, and the conceptual approvals themselves, were tantamount to preliminary approvals. Plaintiffs themselves have not treated the conceptual approvals for phases 1A and 1B as preliminary approvals, but instead made separate, subsequent application for preliminary approval.

II. RES JUDICATA IS NOT APPLICABLE.

Plaintiffs' citation of res judicata principles is inapposite. Res judicata pertains to a subsequent lawsuit, not a legislative enactment.

The doctrine applies where "a court of competent

² Plaintiffs' brief admits that the August, 1983, amended conceptual approval was conditioned upon compliance with eventual Mt. Laurel II ordinances. Consequently, there could not have been any reasonable reliance by plaintiffs after that date. The present lawsuit is in reality an attack upon that 1983 amended conceptual approval and its condition, and as such the suit is untimely and barred pursuant to R.4:69-6.

jurisdiction directly determines a right, question or fact distinctly put in issue," Plainfield v. Public Service Elec. and Gas Co., 82 N.J. 245, 257 (1980), quoting Washington Tp. v. Gould, 39 N.J. 527 (1963), or when "an issue of fact or law is actually litigated and determined . . . and the determination is essential to the judgment," Plainfield, supra, 82 N.J. at 258, quoting Restatement (Second) of Judgments, §68 (Tent. Draft No. 4, 1977). The issue of the validity of a mandatory set-aside, which is the essence of Ordinance 704, was not determined or actually litigated in Lorenc, nor, in the context of Lorenc, was it an issue "essential" to the judgment. The judgment and opinions do not even reflect that the issue of a set-aside was raised, or was considered by the court.

Even if, more than five years ago, the issue had been decided, where "there is a potential adverse impact upon the public interest which itself demonstrates a convincing need for a new determination of the issue," and where a public entity is a party, a court may properly "readdress previously adjudicated issues . . . despite the narrow confines of issue preclusion or res judicata." Plainfield, supra, 82 N.J. at 258-59. If the Lorenc Supplemental Judgment precluded Ordinance 704, then Mt. Laurel II dictates a re-examination.

Finally, the alleged effect of res judicata as argued by plaintiffs would be to enjoin the legislative power of a municipality and this, as noted in our main brief, would have

been an improper exercise by the Lorenc court.

CONCLUSION

For the additional reasons stated above, plaintiffs should be denied the relief requested in the First Count of the Complaint.

Respectfully submitted,

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Defendant,
Township Committee of Bernards Township

By: Howard P. Shaw
Howard P. Shaw

Dated: January 16, 1985

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
P.O. Box 145
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants, Township of Bernards, et als.

THE HILLS DEVELOPMENT COMPANY,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	SOMERSET/OCEAN COUNTY
	:	Docket No. L-030039-84 P.W.
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	:	Civil Action
PLANNING BOARD OF THE TOWNSHIP	:	
OF BERNARDS and the SEWERAGE	:	
AUTHORITY OF THE TOWNSHIP OF	:	
BERNARDS,	:	
	:	
Defendants.	:	CERTIFICATION OF
	:	<u>JAMES E. DAVIDSON</u>
	:	

I, JAMES E. DAVIDSON, certify as follows:

1. I am an attorney-at-law of the State of New Jersey and am a partner in the law firm of Farrell, Curtis, Carlin & Davidson responsible for the representation of the Defendants. I make this Certification in response to papers submitted by plaintiff on its motion to enjoin enactment of Ordinance #746.

2. The document attached as Exhibit C to plaintiff's moving papers is not part of any "final Memorandum of Agreement" among the parties, because the parties never reached any final agreement nor did counsel ever reach agreement on what should be submitted to the parties. This fact is made clear by the fact that said Exhibit C includes handwritten and pasted-on deletions and insertions which were proposed by plaintiff's counsel. Defendant's counsel did not indicate a willingness to incorporate such modification in the proposed document.

3. Moreover, the document from which Exhibit C was taken is a draft document which I, as attorney for Bernards Township, never submitted to the Township Committee for review, comment, or approval or rejection, in part because the attorneys for the two sides never settled upon a final form of such draft. (For further detail on this point, see my Certification dated October 1, 1985 which was submitted in opposition to plaintiff's motion to enter a compliance order.)

4. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.



JAMES E. DAVIDSON

Dated: November 21, 1985

Received

Fee \$74,360.00

(amount)

By _____

(name)

* Refer to attached fee computation.

BERNARDS TOWNSHIP PLANNING BOARD
APPLICATION FOR CONCEPTUAL APPROVAL

SYMBOL THE HILLS DEVELOPMENT COMPANY

Application is hereby made for approval of Conceptual X Preliminary _____ Final _____

Amended _____ approval of plans for erection of a building or buildings to be located in the _____ zone.

1. Owner's Name THE HILLS DEVELOPMENT CO. Phone 658-4400

Address P. O. Box 500, PLUCKEMIN, NJ 07978

2. Name and Address of Agent (if other than No. 1 above)

N/A

3. Interest of applicant if other than owner

N/A

4. Location LAYTON ROAD, MT. PROSPECT RD., LIBERTY CORNER RD. & SOMERVILLE RD.
(street)

173-1, 174-1.01, 174-22.01, 174-23, 1,057 ac.
(Tax Map Block) (Lot Numbers) (Total Area by Acreage)

5. The area will be used for the following purpose:

multi-family and single family residential and commercial development

6. List any zoning variances required and if so, in addition attach hereto as a separate rider your factual basis and legal theory for the relief sought.

N/A

7. Name and profession of person preparing plans PROFESSIONAL PLANNER N.J.LIC.#2634
(profession)

Name KENNETH J. MIZERNY, SULLIVAN & AREAA, P.C.

Address 2314 MARKET STREET, PHILADELPHIA, PA. 19103

Phone 215-567-7300

Briefly describe any prior or presently pending proceedings before the Bernards Township Board of Adjustment or Planning Board or any other Federal, State or Local Boards or Agencies involving the property which is the subject of this application.

BRIDGEWATER TOWNSHIP PLANNING BOARD, APPLICATION FOR INFRASTRUCTURE IMPROVEMENTS

FAR HILLS BORO COUNCIL, DISCUSSIONS re: ROAD IMPROVEMENTS

BEDMINSTER TOWNSHIP PLANNING BOARD, APPLICATION FOR INFRASTRUCTURE IMPROVEMENTS.

Signature of Applicant
JOHN KERWIN, PRESIDENT

CONSENT OF OWNER IF OTHER THAN APPLICANT

I, the undersigned, being the owner of the lot or tract described in the foregoing application, hereby consent to the making of this application and the approval of the plan submitted herewith.

Date October 16, 1985

N/A

Check List

APPLICATION FOR CONCEPTUAL APPROVAL OF DEVELOPMENT PLANS FOR RESIDENTIAL CLUSTER DEVELOPMENT AND PLANNED DEVELOPMENT

(Note: For details of all submissions, see Article 700.

Applicant shall check off all items as submitted, not applicable, or waiver requested.)

No.	Item	Submitted	Not Applicable	Waiver Requested	Planning Board
1)	Key map	✓			
2)	Title block				
	a. Name of development, municipality and county	✓			
	b. Name & address of developer	✓			
	c. Scale	✓			
	d. Date of preparation	✓			
	e. Development application number	✓			
	f. Name and address of person(s) preparing the application, and signature, date, seal, and license number	✓			
6)	Name and address of owner or owners of record, and the authorized agent, if any	✓			
7)	Signature of the applicant, and, if the applicant is not the owner, the signed consent of the owner	✓			
8)	Graphic scale and north arrow	✓			
9)	Revision box and date of each revision	✓			
10)	A project constraints map showing:				
	a. Wetlands	✓			
	b. Flood plains	✓			
	c. Slopes in excess of fifteen percent (15%)	✓			
	d. Treed areas	✓			
	e. Poor soils	✓			
11)	Conceptual Development Plan indicating:				
	a. Total number of dwelling units	✓			
	b. Buffer areas (including areas of landscape screening)	✓			
	c. Set back of the housing units from roads	✓			
	d. Housing types and existing development	✓			
	e. Proposed recreation areas	✓			
	f. Accessory buildings	✓			
	g. Nonresidential development	✓			

No.	Item	Submitted	Not Applicable	Waiver Requested	Planning Board
12)	A conceptual circulation plan indicating: a. Proposed location of roadways providing circulation through the site b. Typical roadway sections c. Locations of access to the site and anticipated improvements to existing on-tract roadways, as well as off-tract roadway improvements, if required d. Pedestrian and bicycle circulation	✓ ✓ ✓ ✓			
13)	Utility plan: a. Water b. Gas c. Electricity d. Telephone e. CATV f. Sewerage	✓ ✓ ✓ ✓ ✓ ✓			
14)	Drainage plan: a. Size and location of detention (or retention) facilities b. Drainage patterns c. Major stream crossings	✓ ✓ ✓			
15)	An environmental assessment in accordance with Section 708 reflecting total development of the tract. (Those portions of the environmental assessment dealing with site specific information may be submitted as an addendum to the environmental assessment at the time of preliminary submission.)	✓			

Check list prepared by: Rudolph W. Wittman, P.E. Date October 16, 1985

Check list reviewed by Township: _____ Date _____

Application found complete on _____

Application found incomplete on _____

Applicant notified on _____

The following waivers were granted: _____

The following waivers were denied: _____

ADDENDUM TO THE BERNARDS TOWNSHIP PLANNING BOARD APPLICATION
APPROVALS REQUIRED BY LOCAL, COUNTY, STATE AND OTHER AGENCIES

PERMITS	<u>APPROVALS</u>			
	Applicable	Non-Applicable	Pending	Received
Somerset county Planning Board				
Somerset County Road Opening Permit				
Bernards Township Sewer Authority				
N.J.D.E.P. a) Stream Encroachment				
b) Filling Floodplain				
c) Other				
Army Corp of Engineers a) Section 404				
b) Other				
N.J.D.O.T. a) Road Opening Permit				
b) Drainage Permit				

Not applicable to concept plan applications.

 Applicant's Engineer
 (signature)

 P.E. #

 Date

8/19/85

**Johns-Manville
Properties Corporation**

P. O. Box 500
3 Burnt Mill Road
Pluckemin, N. J. 07978
(201) 234-1377

Certification of Ownership

Pursuant to N.J.S.A. 40:55D-48.1

And N.J.S.A. 40:55D-48.2

John H. Kerwin, of full age, does certify the following:

1. I am President of the Hills Development Company and Vice President of the Allan-Deane Corporation and the authorized agent for both companies.

2. On November 20, 1980, the Allan-Deane Corporation entered into a joint venture with Ligone, Inc.; said joint venture being known as "The Hills Development Company", a New Jersey partnership.

3. I am filing this certification as required by N.J.S.A. 40:55D-48.1 and 40:55D-48.2 to inform the Board of the ownership of the Hills Development Company. The Hills Development Company is the new owner of all the real estate in Bedminster and Bernards Townships formally owned by Allan-Deane Corporation and should be considered the applicant in this matter from this point forward.

4. The Hills Development Company is equally (50%) owned by Ligone, Inc. and Allan-Deane Corporation.

5. The Allan-Deane Corporation is a wholly-owned subsidiary of the Johns-Manville Properties Corporation which, in turn, is a wholly-owned subsidiary of the public corporation, Johns-Manville Corporation.

6. As to Johns-Manville Corporation, I hereby certify in compliance with N.J.S.A. 40:55D-48.1 and N.J.S.A. 40:55D-48.2 that there are no stockholders owning at least 10% of the stock of any class.

7. As to Ligone, Inc. 50% of stock is held by Bravo Investments B.V. and the remaining 50% of stock is held by KA Investments B.V.

8. Both Bravo Investments B.V. and KA Investments B.V. are wholly-owned by Brabant N.V., a Netherlands Antilles Corporation.

9. As to Brabant N.V., it is 50% owned by Hussein Alharthy and 50% owned by Saleh Kamel.

10. The local address of Allan-Deane Corporation, Johns-Manville Properties Corporation and Johns-Manville Corporation, is P.O. Box 500, 3 Burnt Mills Road, Pluckemin, New Jersey 07978. The corporate headquarters for Johns-Manville Properties Corporation and the address of Johns-Manville Corporation is Ken-Caryl Ranch, Denver, Colorado 80217.

11. The address of Ligone, Inc., Bravo Investments B.V., KA Investments B.V. and Brabant N.V. is c/o Brabant Properties, 1 Brookhollow Drive, Santa Ana, California.

12. The address of Hussein Alharthy and Saleh Kamel is 1776 G. Street, N.W. Washington, D.C. 20006.

13. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

John H. Kerwin

Dated:

THE HILLS

FOR COMPUTATION

PER TABLE 901-Fees:

SUBDIVISION, PRELIMINARY PLAT, MAJOR FOR CONCEPTUAL APPROVAL, 25% OF FOLLOWING:

APPLICATION FEE	\$	250.00
CLUSTER RESIDENTIAL (R-8/PRD-4) \$100 x 2,750 units =		275,000.00
COMMERCIAL \$50 x 5.8 acres =		290.00
PLUS BUILDING \$0.02 x 50,000 sf. =		1,000.00
RESIDENTIAL (R-3/PRD-3) 273 Units less previously approved subdivisions consisting of 64 units* Net 209 new units, \$100 x 209 =		20,900.00
		<hr/>
TOTAL	\$	297,440.00
FEE, 25%	\$	74,360.00

* APPLICATION FOR THE HILLS SINGLE FAMILY
SECTION: 1A & 1B, 64 LOTS, JUNE 15, 1981.

THE HILLS

THE HILLS DEVELOPMENT COMPANY

ACREAGE COMPUTATIONS:

<u>LOT</u>	<u>BLOCK</u>	<u>PER BERNARDS TAX DUPLICATE</u>	<u>PER BERNARDS TAX MAPS</u>
1	173	339.66	339.66
1.01	174	58.58	712.74
22.01	174	4.65	3.88
23	174	1.70	1.70
	TOTAL	<u>404.59 *</u>	<u>1,057.98</u>

* PER ANNA KERR TAX COLLECTOR

NOTE: LOT 22.01 EXTENDS INTO BRIDGEWATER TOWNSHIP AND
IS SHOWN AS 14.20 TOTAL ACRES ON BERNARDS TAX MAP.

TOTAL USING 14,20 ACRES FOR LOT 22.01 IS THEREFORE: 1,068.30 ACRE



TOWNSHIP OF BERNARDS

COLLYER LANE
BASKING RIDGE, NEW JERSEY 07920
201-766-2510

October 4, 1985

Hills Development Co.
Box 500
Pluckemin, N.J. 07978

Attention: Rudolph Wittemann

Dear Sir:

This is to certify that property taxes are paid through Third Quarter 1985 on the following properties assessed to Hills Development Co. in our Township.

Block 173 Lot 1 QFarm - Mt. Prospect Road

Block 174 Lot 1.01 - 185 Liberty Corner Road

Block 174 Lot 1.01 - Mt. Prospect Road
QFarm

Block 174 Lot 22.01 - Old Stagecoach Road
(Deleted in 1986)

Block 174 Lot 23 - Old Stagecoach Road - is assessed to Hills Development Co. This property was placed on tax sale and the lien sold to the township of October 3, 1983. At the time of the sale, the property was assessed to Skyland Associates.

Anna W. Kerr
Anna W. Kerr, CTC
Tax Collector