

RULS-AD-1985-420

11/22/85

Transcript of Proceedings

pg. 58

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET No. L-30039-84 P.W.

RULS - AD - 1985 - 420

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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 TOWN-)
SHIP OF BERNARDS and the)
SEWERAGE AUTHORITY OF THE)
TOWNSHIP OF BERNARDS,)
)
Defendants.)
)
-----)

Transcript of
Proceedings

Ocean County Courthouse
Toms River, New Jersey
November 22, 1985

B E F O R E:

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

(Appearances, Page 2)

ROSEMARY FRATANONIO, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, New Jersey

PERGAS CO. MAYORNE, N.J. 07002 FORM 1846

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

MESSRS. BRENER, WALLACK & HILL,
By: HENRY F. HILL, ESQUIRE,
-and-
By: THOMAS F. CARROLL, ESQUIRE,
Attorneys for Plaintiff Hills Development
Company.

MESSRS. FARRELL, CURTIS, CARLIN & DAVIDSON,
By: HOWARD P. SHAW, ESQUIRE,
Attorneys for Defendant Township of Bernards.

1 (November 22, 1985)

2

3 THE COURT: This is a motion by

4 Hills Development Company on short notice

5 to modify the terms of a stay entered by the

6 Supreme Court enjoining the second reading

7 and adoption of Ordinance 746, and directing

8 the plaintiff's pending development applica-

9 tion be processed by the defendant Planning

10 Board in accordance with applicable law.

11 I've read the moving papers and

12 scanned the response which just was received

13 today. Let me just go in reverse here. I'd

14 like to clarify what's happening.

15 Is it Mr. Shaw ?

16 MR. SHAW: Yes, Your Honor.

17 THE COURT: Okay. Nice to have you.

18 First time I think on the Township; isn't it?

19 MR. SEAW: No, the second time.

20 THE COURT: Second time.

21 MR. SEAW: Several months ago my

22 colleagues apparently saw the long-range

23 weather forecast and selected me for the

24 driving.

25 THE COURT: I wondered why at this

PERGAD CO., BAYONNE, N.J. 07002 - FORM 2088

1 ordinance is being amended. Why do we
 2 choose now to make this change? About a
 3 year ago, it seems to me, this matter was
 4 before the Court on an informal basis, and
 5 at that time the Court freshened the
 6 validity of the conceptual approval arrange-
 7 ment and nothing occurred, and the Town
 8 kept processing under conceptual approval.

9 I realize you're not withdrawing the
 10 arrangement, but you're withdrawing any
 11 rights that would vest and I just wondered
 12 what has precipitated the single line
 13 change of the ordinance.

14 MR. SHAW: Well, it's not quite
 15 accurate that nothing occurred. Unfortunately,
 16 the wheels of municipal government grind
 17 exceedingly slow.

18 It's my understanding that several
 19 months ago the Planning Board undertook a
 20 review of various aspects of the land
 21 development ordinance, the amendment of the
 22 conceptual approval condition was one of
 23 those, unfortunately, frankly, it got caught
 24 up with all the others and it took a lot of
 25 time to review, and the other revisions are

PERMANENT RECORDS SECTION

1 not out of the Planning Board yet, although
2 the committee is waiting for them and will
3 act on them when they're processed through.
4 The amendment to the conceptual approval
5 provision probably is not the only amendment
6 that will be considered.

7 In going through them we have noted
8 a number of other provisions which we, as
9 counsel, are concerned about and we presum--
10 ably will be proposing and have proposed
11 other revisions to it. I think they're part
12 of the reason that the specific provision
13 comes up now, the specific provision on the
14 vesting, so-called vesting, comes up now is
15 that not only Hills but other developers in
16 town had or will be coming in. They will
17 be coming in for conceptuials because many
18 developers come in for conceptuials on large
19 projects. It makes sense from a developer's
20 point of view to go through the process of
21 a give-and-take with members of the technical
22 coordinating committee and Planning Board to
23 get an idea of whether their idea for a
24 development is going to --

25 THE COURT: I don't know if it makes

1 sense under your argument. This ordinance
 2 is more detailed than a preliminary approval
 3 ordinance would normally be. In fact, more
 4 detailed than I've ever seen a preliminary
 5 approval ordinance and they get nothing for
 6 it. In this conceptual approval, I assume,
 7 was to be an ordinance arising under the
 8 Municipal Land Use Law. Since it has to have
 9 some statutory base, and I assume its
 10 so-called informal review of concept plan
 11 under 40:55D-10.1. This is hardly informal.
 12 I mean, the review is excruciatingly
 13 detailed. So I don't see any benefit to
 14 anybody unless there's something in there
 15 that serves as an inducement, which is the
 16 language that says it vests rights for 10
 17 years.

18 MR. SHAW: In fact, Your Honor, while
 19 I cannot compare it with ordinances from other
 20 times, I'm not familiar with those. There
 21 are two points to be made.

22 One, it is not as detailed and not as
 23 demanding as our preliminary approval ordin-
 24 ance. There are a number of reports in our
 25 preliminary approval ordinance that are

PENNAUD CO., BAYTONE, N.J. 07002 - FOUR 4088

1 required that are not required under this.

2 Secondly, and very importantly,
3 there's no hearing required, no public hear-
4 ing required on the conceptual approval as
5 is required by the statute and our ordinance
6 for preliminary approval. And there are
7 references there on 707 on conceptual
8 approvals which refer to the need to get
9 preliminary approvals after you've gotten
10 conceptual.

11 As a matter of fact, as I understand
12 it from speaking to Mr. Garvin, the Planning
13 Board attorney, who I'm here on behalf of,
14 the normal procedure is that an applicant
15 come in for conceptual, comes in then for
16 preliminary approval with reports that are
17 more detailed, far more detailed in many
18 cases than what comes in on a conceptual.

19 Just one example. On a conceptual
20 it's not unusual for an applicant to come in
21 with a map of his proposed development and
22 say, again, it's a hypothetical development,
23 our detention basin is going to be up in the
24 left-hand corner over here. It's not until
25 he comes in with preliminary approval, he

1 comes in with detailed engineering of that.
2 That's normal procedure. That procedure is
3 permissible under the conceptual approval
4 provisions presently in the ordinance, and
5 whatever may be the situation in other towns,
6 and whatever may be the validity of what
7 requirements we do have in Section 707, still
8 it's more --

9 THE COURT: Then you're not enforcing
10 your own ordinance because the ordinance
11 doesn't say that, you see.

12 For example, with regard to a detention
13 basin, the ordinance says a conceptual drain-
14 age plan indicating the size and location,
15 drainage patterns and major stream crossing
16 information shall be provided in sufficient
17 detail to ensure that the storm water manage-
18 ment system provided will be adequate for the
19 site in that it will allow the anticipated
20 level of development to take place.

21 Now, that would require a full report.
22 It would have to.

23 Now, if you're saying you're not abid-
24 ing by your ordinance, maybe then you're back
25 to an informal review.

1 MR. SHAW: It may be that, it may be
2 either of those.

3 In any event, the very crux of it is
4 the very four words which states at the
5 applicant's option. If the applicant does
6 not want to go through this procedure, he
7 does not have to. He is perfectly within
8 his rights to skip over the conceptual
9 approval, to go right to preliminary and
10 submit it. And, frankly, I'm surprised to
11 hear Hills contending that they are being
12 directed by officials, by the town, that they
13 have to submit a conceptual because Hills
14 are not babes in the woods and they're not
15 timid, certainly. They're not to be pushed
16 around. They don't let themselves be pushed
17 around, and they can read this ordinance
18 very plainly. If they wanted to, they could
19 simply have submitted a preliminary. They
20 could have done one of two things: Submitted
21 a preliminary or, if the town or Planning
22 Board refused to act on it, sue the Planning
23 Board on that.

24 THE COURT: Something must have
25 induced them to go through this review and

1 pay twenty-some thousand dollars in fees,
2 whatever the figure is.

3 MR. SHAW: In advance. That is not
4 a specific fee for conceptual. The table
5 we've attached to our brief, which we've
6 taken out of the ordinance, shows that there's
7 no fee for conceptual, there is a requirement
8 that 25 percent of the fee which will be
9 due and payable with respect to the pre-
10 liminary is payable as an advance when the
11 conceptual is submitted.

12 THE COURT: Well, that's neat, but to
13 me it's a fee. They can't make that appli-
14 cation without paying, can they? They can't
15 make a conceptual application without paying
16 25 percent.

17 MR. SHAW: Well, under the ordinance,
18 no, they cannot, but it's not an additional
19 amount that they're required to pay in order
20 to get the conceptual. When they come in on
21 the preliminary, they are not charged that
22 fee again.

23 THE COURT: Yes, I understand that.
24 Yes, I understand that.

25 Is it your position that the ordinance

1 is, as it presently stands, in light of its
2 tenure, vesting is ultra vires ?

3 MR. SHAW: Absolutely. It's a
4 mistake to enact it. It's a mistake, now
5 it's ultra vires in that respect and has no
6 binding.

7 THE COURT: You didn't disclose that
8 to the Appellate Division when you said in
9 your brief that the plaintiffs have before
10 the Township an application for conceptual
11 approval of its project, and this application
12 will continue before the Township Planning
13 Board in accordance with law.

14 I mean, I realize you're not expressly
15 addressing that point. If I read that and was
16 not aware of the little nuances, I would say,
17 well, what's the difference, the law is going
18 to stay the same, therefore, enter the stay.

19 MR. SHAW: We never focused on the
20 conceptual issue when we were preparing issues
21 before the Appellate Division. I didn't know
22 it was an issue and, frankly, we were very
23 surprised Hills was coming down to contest
24 it now,

25 THE COURT: At the time the brief was

1 filed in the Appellate Division, you knew you
2 were going to change the ordinance.

3 MR. SHAW: I would have to think back
4 on the sequence of timing, and I don't recall.

5 THE COURT: It's got to be yes. I
6 know when your brief was filed, and I know
7 when the ordinance --

8 MR. SHAW: It may well be, Your Honor.
9 If the ordinance is ultra vires, it's not
10 according to law. We don't think it has binding
11 effect. We briefed that before Your Honor
12 back in January in another case. We simply
13 don't think it has any binding effect.

14 The ordinance before Your Honor now
15 is a housekeeping ordinance, essentially.

16 THE COURT: And since January when you
17 acknowledged the invalidity of your ordinance,
18 you've been permitting Hills and others, I
19 assume, to proceed for conceptual approval
20 based upon a stated set of facts, including
21 the vesting commission. And we might say,
22 well, Hills is no babe in the woods, there
23 might be other babes there applying who might
24 say, well, I think this is perfectly valid.
25 As a matter of fact, I think there's a

1 statutory authority for it. And the town
2 let's them go and kept in the background is
3 the knowledge that they think it's invalid
4 and at the present time they can use it.

5 MR. SHAW: Well, first of all, as to
6 the extent that Hills relied on it, that's
7 got to be the subject of discovery before we
8 get to that situation.

9 THE COURT: I agree.

10 MR. SHAW: There are no so-called
11 babes in the woods complaining about the
12 ordinance. The only people complaining are
13 Hills.

14 Thirdly, if as we suggest the ordin-
15 ance is ultra vires, I think the Gruber case,
16 and I think it's the Bold case, make it
17 clear if we didn't have the power to enact
18 the ordinance they can't get an estoppel
19 based on that. We didn't. Frankly, we don't
20 think that there's veracity to their reli-
21 ance claim, and we think discovery, if it
22 comes to that, we don't think it should,
23 frankly we think there cannot be, as a matter
24 of law, be estoppel based on this ultra vires
25 provision. If it does come to that, we

1 think that discovery is going to show that
2 the reliance, supposed reliance, is not the
3 detriment that plaintiff contends it is.
4 Moreover, we submit that we will probably
5 show that the -- or we expect to be able to
6 show that the large portion of whatever
7 expenditures Hills did make in connection
8 with the conceptual is expenditures they would
9 have had to make under a preliminary appli-
10 cation anyway.

11 THE COURT: What crime would fall the
12 municipality to stay this pending the Supreme
13 Court?

14 MR. SHAW: First of all, it's the
15 harm to the system. We're in a constitutional
16 system of law and separation of powers. And
17 the law is quite clear that it is inappropriate
18 for the courts to intervene at the stage where
19 the municipality is during litigation, and
20 to step in and prevent the municipality from
21 legislating.

22 THE COURT: That system being our
23 system of law in the State of New Jersey or
24 judicial system?

25 MR. SHAW: The system of laws and

1 constitutional laws in the State.

2 THE COURT: What specific harm to
3 Bernards do we see?

4 MR. SHAW: The specific harm is
5 potentially that although the ordinance does
6 not have binding effect, if there are others
7 such as Hills out there, they may then come in,
8 comply with this ordinance in place, and even
9 if they have knowledge, that it is actual
10 knowledge that it's invalid, attempt to
11 portray some reliance on it and attempt to
12 obtain rights by estoppel based upon it,
13 which would not be possible if the ordinance
14 goes into effect. And beyond that, what
15 Hills is alleging is not an illegal amendment
16 of the ordinance. We have a right to amend
17 our ordinance.

18 What they are alleging, at most, is
19 special circumstances which say that they
20 should be exempt from this amendment of the
21 ordinance.

22 THE COURT: The Supreme Court order
23 in your case says any effort to make any
24 modifications, so we're in a very special
25 circumstance. I would recognize the general

1 law that you have a right to amend your
2 ordinance as you see fit, but the Supreme
3 Court said any change in circumstances can
4 be reviewed. This can certainly be deemed
5 a chance of circumstances.

6 MR. SHAW: Assuming that we are
7 correct that it is ultra vires and does not
8 have legal binding effect, it doesn't change
9 the circumstances to amend that.

10 THE COURT: But assuming you may be
11 incorrect on the ultra vires, then it's a
12 change of circumstance or may be a change of
13 circumstance.

14 MR. SHAW: Again, I fail to see how
15 it's a change in circumstance that has any
16 effect on the plaintiff's ability to produce
17 Mount Laurel housing.

18 THE COURT: Right now I'm not con-
19 cerned about their ability to reach Mount
20 Laurel housing, I'm not protecting that
21 right. I'm protecting whatever rights they
22 have as a plaintiff in the litigation to the
23 extent that they should be protected. So
24 let's not focus on the lower income people.

25 MR. SHAW: Well, regardless of lower

1 income people or who the development is
2 for, the change doesn't affect Hills' right
3 to proceed with its development. Conceptual
4 is always optional. It's always there to
5 not go conceptual, and they can still do
6 that now.

7 The issue that they raise is as to
8 the effect that a conceptual, if they get a
9 conceptual approval, may have, and that's
10 not something that is an immediate matter.
11 The conceptual is still under consideration
12 by the Planning Board in a technical
13 coordinating committee, it will continue to
14 be for a while, at any rate, and that process
15 will continue to go on.

16 THE COURT: Let's assume Mr. Hills
17 would get conceptual approval with normal
18 process.

19 MR. SHAW: From my understanding,
20 under the documents they've submitted, Your
21 Honor, we are at a handicap because of the
22 League of Municipalities convention, and
23 when we got the papers our people were out
24 of the town, unreachable, and I have not been
25 able to delve into that situation.

1 MR. HILL: Your ordinance says 25 days
2 from complete.

3 MR. SHAW: I don't plan to interrupt
4 Mr. Hill.

5 THE COURT: Don't interrupt.

6 MR. HILL: I'm sorry.

7 MR. SHAW: Your Honor asked about
8 conceptual approval. My understanding is
9 that under the documents that have been
10 submitted by Hills so far, that those docu-
11 ments are not acceptable from a planning
12 viewpoint, and that those documents probably
13 would not get conceptual approval. And
14 that's the very purpose of the conceptual
15 process, to have a give-and-take between
16 the developer and the Planning Board and its
17 staff so that problems like that can be
18 worked out.

19 THE COURT: So they're quite a ways
20 from getting conceptual --

21 MR. SHAW: From my understanding of
22 it, that's correct.

23 THE COURT: They haven't even really
24 filed a completed application, so to speak.

25 MR. SHAW: That I do not know. I do

1 not know the status of the application and
2 whether it will be determined to be complete.

3 THE COURT: The order of the Supreme
4 Court said that the stay shall remain in
5 effect pending the resolution of the appeal
6 in the within matter now pending before this
7 Court, that being the Superior Court, pro-
8 vided, however, that the plaintiff may make
9 application for modification of this order
10 or other appropriate relief based upon any
11 proposed municipal action that might affect
12 the municipality's ability to satisfy its
13 Mount Laurel obligation, or upon any other
14 relevant changes in circumstances.

15 Now, just follow me for a moment, if
16 you would.

17 The Municipal Land Use Law -- well,
18 let's back up. In the Hilton Acres case in
19 35 N.J. 570, our Supreme Court seemed to say,
20 I think it might be fair to say that they did
21 say that a municipality cannot adopt a land-
22 use regulation which would provide for greater
23 time periods of approval than that authorized
24 by the State statute. And a few years later,
25 in a Law Division case, in Piscitelli vs.

1 Scotch Plains, 103 New Jersey Super. 589,
2 Judge Fielger also knocked out a municipal
3 ordinance for an architectural review order.
4 Again, he said this is a municipal land-use
5 device not authorized by statute. As part
6 of the revision of Municipal Land Use Law,
7 it is entirely obvious to me, at least, and
8 I guess some of us because of inside law,
9 it's obvious on the reading of the provisions
10 that there was an effort, at least, to remove
11 some of the rigidity from the land-use
12 process created by the time spans established
13 in prior law, in the municipal law pre-
14 existing the provision. And it was obvious
15 that because of those spans, things that
16 both the municipality and the developer
17 shared in common, that is, the desire to
18 look at broader issues, the desire not to be
19 specifically bound by three-year limitations
20 or things of that sort, should be addressed.
21 And so, therefore, 639 of the Act they pro-
22 vided for discretionary consent of an ordin-
23 ance, and Section D, small (d), of Section
24 39 almost parrots the words of Hilton Acres
25 when it says provisions insuring in the cases

1 of development which propose construction
2 over a period of years, the protection of
3 the interest of the public and of the
4 residents, occupants and owners of the
5 proposed development in the total completion
6 of the development.

7 And what Hilton Acres had said is,
8 in setting time limits, we do that so as to
9 give adequate protection to all of those who
10 might be protected -- who might be unpro-
11 tected by the absence of time limits. And
12 so they were -- the drafters of the revision
13 to the Land Use Act were addressing them-
14 selves to that concern.

15 Then in Section 49, which deals with
16 preliminary approval, and in Section 52
17 dealing with final approval, the Legislature
18 then provided for substantial flexibility in
19 the time periods. And dealing with sub-
20 division sites, more than 50 acres, this
21 falls into that. I think we've got about a
22 thousand acres in here, a lot of acres.
23 They said you can extend for such period of
24 time as may be reasonable. You can go beyond
25 the three years without pinning it down, in

1 effect, trying to respond to some of the
2 problems created by having a fixed time
3 limit. And then they also said, and
4 furthermore you can engage in an informal
5 review under Section 10.2, and the developer
6 wouldn't be required to pay any fees and
7 nobody's going to be bound by it. The
8 developer will be bound by it, the Planning
9 Board wouldn't be bound by it. They tried
10 to introduce some flexibility into the
11 mechanisms for everybody's benefit, the
12 public, the developer and the municipality.

13 Now, the informal provision is where
14 your conceptual decision came from.

15 MR. SHAW: That's right.

16 THE COURT: It had to come from that
17 section. And the question is notwithstanding
18 the fact that this Court has raised some
19 skepticism about the validity of vesting
20 under that, isn't there at least an argument
21 that in light of the wording of Section 33,
22 of Section 49 and of Section 52, that, in fact,
23 vesting may be possible beyond the three
24 years and that 10 years may be seen as
25 reasonable when one goes through all of the

1 detail that a conceptual ordinance like
2 this requires.

3 So isn't there a possibility that
4 this ordinance is not ultra vires?

5 MR. SHAW: I think not, Your Honor.
6 I think that, in reading Section-- the pro-
7 vision of 39(d) that you referred to has to
8 be read in light of Section 49 and Section 52,
9 on 49 on preliminaries and 52 on finals.
10 And, Your Honor, those provisions deal
11 specifically with time limits for approval,
12 39(d) does not.

13 Your Honor, in referring to Section 49,
14 said that it gives, quote-unquote, the right
15 to give 10 years -- the right to give more
16 than three years' approval.

17 With all due respect, Your Honor, it
18 provides that the Planning Board may, based
19 upon facts before it, in its discretion grant
20 more than three years' protection.

21 THE COURT: That's what I meant.
22 When I say you, that's what I'm referring to.

23 MR. SHAW: That is quite different
24 from an ordinance which flat out, without a
25 hearing on a specific case, says all applicants

1 for conceptual approval get 10 years'
2 protection on it. That is not authorized.

3 THE COURT: Maybe the ordinance says
4 anybody who wants to go through this level
5 of denial and go through all of this, we're
6 satisfied that there will be a reasonable
7 or a comprehensive review which would justify
8 a 10-year period.

9 MR. SHAW: I don't think that's
10 authorized by the statute.

11 THE COURT: It may not be. It may be.
12 Isn't that the question, is it or is it not?

13 MR. SHAW: Well, obviously, one can
14 raise any question, Your Honor. I think the
15 answer to the question is, no, it's not
16 authorized by the statute, and that's why
17 Section 39, 49(d) says the Planning Board may
18 grant the rights to a period longer than three
19 years as may be provided by the Planning
20 Board and determined to be reasonable. The
21 Legislature did not confer upon the municipal
22 governing body the power to make those
23 determinations in advance for all applications.
24 It conferred on the Planning Board the dis-
25 cretion to use its expertise in individual

1 cases to make a determination as to whether
2 and what period of time such protection
3 under three years should be granted, and
4 then only in the cases of preliminary
5 approval.

6 Again, the -- to construe the
7 conceptual approval provisions in the Bernard's
8 ordinance as being at all equivalent of
9 preliminary requires a torturing of their
10 ordinance because the conceptual ordinance
11 itself repeatedly refers to a separate
12 preliminary approval allegation. Even as to
13 the fee schedule that Your Honor referred to,
14 or I referred to when discussing it before,
15 talks about paying a percentage of the fee
16 for the preliminary approval at the time of
17 conceptual. Implicit in that is that there's
18 going to be a preliminary after conceptual,
19 at which time the balance of the fee is going
20 to be due.

21 I don't think there's any reading --
22 any reasonable reading of the Bernard's ordin-
23 ance that can suggest that a conceptual
24 approval is intended as a substitute for
25 preliminary approval.

1 THE COURT: I'm not suggesting that
2 for a moment.

3 MR. SHAW: I think the plaintiff has.

4 THE COURT: Well, okay. I'm not
5 suggesting it, but what I am suggesting is
6 that if the ordinance is valid, it vests
7 some very significant rights, and the pre-
8 liminary approval would be a walk-through
9 essentially. It would be a freeze. And, as
10 a matter of fact, that's the intention of the
11 conceptual approvals, to assist in the process-
12 ing of preliminaries, because what used to
13 happen was you go in for a preliminary approval
14 on a small segment of the site, you know,
15 phase one of 27 phases, and the Planning Board
16 would say, wait a minute, we can't approve
17 this without seeing drainage plans and
18 without seeing road plans for the whole
19 thing, and in effect you would go through a
20 complete conceptual approval at the first
21 preliminary application. And that's why this
22 conceptual approach makes sense. No question
23 in my mind about that.

24 So that the issue then becomes after
25 conceptual approval, of course you've got to

1 go through preliminary approval, and I'm not
2 indicating to the contrary. Certainly, in
3 Hills' case, if they've got some vested
4 rights, it's going to be a lot easier, I
5 don't think you can argue, if they've got
6 vested rights.

7 Regardless of how detailed, they've
8 presented some impressive exhibits to the
9 Court, and it takes a good size cardboard
10 box which I'll be happy to return when we're
11 finished, and they're now going to have to
12 do that again on preliminary. And the
13 Planning Board is not going to have to read
14 it all again, and the engineers are not going
15 to have to plow through it again, and all
16 will be relevant to preliminary. That's the
17 purpose of it.

18 Now, you're pulling the rug out from
19 under their feet if -- I stress if -- they
20 can't gain anything by this application.

21 MR. SHAW: They do gain something.
22 Section C-1 of Section 707 talks about what
23 they gain. It says the conceptual review is
24 intended to provide the applicant with a
25 review and discussion by the Board of major

1 areas of concern. It lays a groundwork. A
2 lot of what is done on conceptual is not going
3 to have to be reread on preliminary,
4 obviously, and that's the purpose of it, to
5 work out problems. Even if there is no
6 vesting, certainly I'm not in a position to
7 represent that, if Hills goes through
8 conceptual and gets a conceptual approval,
9 or any applicant goes through conceptual and
10 gets conceptual approval, that when they
11 then come in for preliminary approval that
12 the Board is automatically going to approve
13 everything that came out of the conceptual
14 process. But I think that's what Section
15 10.1 is intended to say, that the Planning
16 Board did preserve that flexibility and is not
17 bound by the conceptual approval it gives.
18 There can be sound planning reasons that
19 occur, and I'm not going to speculate on what
20 they may be, why there may be a necessity for
21 a change from the time that a conceptual is
22 granted. But the process of conceptual gives
23 the applicant the opportunity to see what is
24 not going to apply and eliminate that. It
25 gives him a view into what the Planning Board

1 is thinking, and that is certainly an
2 advantage to the applicant instead of coming
3 in cold and having his application rejected
4 on a preliminary level.

5 THE COURT: It does kind of stick in
6 my claw that the principal argument before
7 the Appellate Division is that the Township
8 wants to maintain status quo. Regardless
9 of what you call it, this isn't maintaining
10 status quo. Maybe you perceive it as being
11 a minor change in the status quo, but it's
12 a change.

13 MR. SHAW: Well, Your Honor, I think
14 Your Honor is construing the status quo far
15 more broadly as was addressed in the Appellate
16 Division application.

17 THE COURT: Because we don't know how
18 the Appellate Division understood it, either.

19 MR. SHAW: We don't. But the issue
20 before the Appellate Division was whether the
21 Township should go through a compliance
22 hearing, and the issues we raised and the
23 concerns we raised were that a ruling could
24 come out of the compliance hearing before Your
25 Honor that would bind Bernards Township with

1 respect to such matters as a fair share
2 number, and as the method of complying with
3 the Mount Laurel ordinance there could be
4 binding on the Township and allow development
5 contrary to what we contend is authorized
6 by the Fair Housing Act. Those issues have
7 nothing to do with the vesting provision,
8 so-called vesting provision, of a conceptual
9 approval. As far as I know, that issue was
10 not before the Appellate Division and the
11 status quo that was referred to did not refer
12 to that. I think it's --

13 THE COURT: Well, the Appellate
14 Division won't know that. As I read your
15 papers before the Appellate Division, and I
16 haven't seen the papers before the Supreme
17 Court, I would assume there's a similar argu-
18 ment made to the Supreme Court that you want
19 to maintain the status quo.

20 Is that correct or incorrect?

21 MR. SHAW: Oh, yes.

22 THE COURT: And I think a judge reading
23 that would say, look, the town is representing
24 they're not going to do anything to hurt these
25 people and they're going to continue to process.

1 Now, you say, well, we're not hurting
2 them. That question's up for grabs, but it
3 would sure appear to me that the Court would
4 assume you weren't going to change anything
5 until come January, or whenever, or presumably
6 pretty soon the Supreme Court acts.

7 MR. SHAW: Let me pose a hypothetical.

8 Let's suppose that the ordinance stays
9 in place as it is and on its face provides for
10 10 years vesting. And to presumably preserve
11 the status quo, we're enjoined from taking
12 out what we contended was to be the ultra
13 vires provision. And Hills presumably pro-
14 ceeds with its conceptual application, and at
15 some point presumably gets conceptual
16 approval.

17 What happens at that point when they
18 now have conceptual approval under an ordinance
19 which purports to confer vested rights which
20 we believe is ultra vires? I don't think
21 that that result is a fair result to the
22 Township, while at the same time the result
23 that Hills is asking for is to stop us from
24 amending that.

25 THE COURT: Why don't we permit you to

1 adopt the ordinance and stay its effective-
2 ness as to what Hills pending the determination
3 of its validity and pending the determination
4 of the appeal before the Supreme Court?

5 MR. SHAW: That result occurred to me
6 in pondering these questions, and I must ask
7 the Court what is the effect of a stay of a
8 repealer of a provision that we contend should
9 not be in there?

10 What does that allow Hills to do that
11 they can't do now?

12 THE COURT: It allows the town to,
13 adopt the ordinance and it pulls on the issue
14 of Hills justifiable reliance on it, where it
15 gives validity to it in the first place.

16 MR. SHAW: Since the ordinance is not
17 a provision which is what can and cannot be
18 done but what effect certain actions will
19 have, I don't know how you can stay that kind
20 of provision.. It's in effect stay on an
21 interpretation of other provisions of the
22 ordinance.

23 THE COURT: Well, then, the only other
24 way that Hills -- I can protect Hills from not
25 getting unfairly hurt by this amendment is to

1 stay it today.

2 MR. SHAW: Well, I think not, Your
3 Honor, because Hills is still left with the
4 opportunity, unless Your Honor agrees with us
5 that this ordinance cannot give rise to an
6 estoppel as a matter of law because it's
7 ultra vires, and that I think is the holding
8 of the cases we've cited where an ordinance
9 is -- municipal action is ultra vires in the
10 primary sense, that is, the municipality
11 lacked power to make that action, that you
12 can't pass an estoppel on that.

13 If Your Honor does not agree with us
14 on that point today, then Hills is free to
15 pursue an action presumably for a declaratory
16 judgment to declare that based upon that
17 alleged estoppel theory, the provisions of
18 the proposed new Section 707(e) shall not
19 apply to Hills. But that's a matter of
20 estoppel and that's something that's going
21 to take discovery and a factual trial. But
22 it's open to Hills, it's open to Hills to
23 pursue that if they wish unless Your Honor
24 agrees with us.

25 A ruling that permits the ordinance to

1 go into effect presumably, it's passed by
2 the committee, does not take away Hills'
3 right to challenge the ordinance unless, as
4 I say, it's accompanied by an order, which
5 we contend also ought to be decided today,
6 that Hills cannot legally establish an
7 estoppel.

8 THE COURT: If this ordinance is not
9 ultra vires as it presently stands, do you
10 deny that Hills is in a position today to
11 claim that you may be changing their circum-
12 stances? In other words, if it's valid, if
13 the ordinance is valid today, by its change
14 it appears to me that at the very least Hills
15 is in a position to claim that it's going to
16 be more difficult for it and more time
17 consuming and more expensive, or whatever,
18 to obtain its approvals and, therefore, it
19 should be stayed under the Supreme Court order
20 if it is valid.

21 I'm not asking you to concede that for
22 a minute.

23 MR. SHAW: No, I understand that. I
24 think the answer still has to be no. If the
25 ordinance provided that you can get a conceptual

1 and then not go for a preliminary, then the
2 circumstances would be changed because then
3 the repeal of the 10-year provision would
4 say that someone who otherwise would have
5 protection and would not have to go for
6 preliminary is now going to have to go
7 through another step.

8 Now, under the ordinance as it stands,
9 Hills still has to go through that second
10 step. The 10-year vesting doesn't protect
11 them against the second step. They still have
12 to go through it. They still have to make
13 their application.

14 In order to presume that their
15 circumstances are changed, you have to take
16 the leap and speculatively presume that the
17 Planning Board is, in fact, going to give
18 approvals under the conceptual and say, yeah,
19 this stuff looks great to us, and then yank
20 the rug out of Hills on a preliminary.

21 There's no basis in the record for
22 making that kind of a presumption. I don't
23 think there could even be a suggestion made
24 that that's going to happen.

25 I think, taking that speculative leap,

1 and that's not the kind of basis in the
2 record that ought to serve for a finding that
3 the town is going to be enjoined --

4 THE COURT: You can't see that there
5 somewhere along the road now, and they're
6 going to have to start all over, wouldn't
7 that slow down their project?

8 MR. SHAW: I don't know what they have
9 to start all over with, Your Honor. They
10 have the --

11 THE COURT: You'll continue to process
12 the conceptual, you say, and then they can
13 go for their preliminary?

14 MR. SHAW: Which they would have to
15 do.

16 THE COURT: Withdraw the conceptual
17 and just go for the preliminary?

18 MR. SHAW: Which they can do now.

19 THE COURT: Okay. Who's going to talk?

20 MR. HILLS: Yes, I'd like to talk.

21 THE COURT: Let's take my questions
22 first.

23 How are you getting hurt here? Assuming
24 for a moment that we're not dealing with the
25 10-year validity, how are you getting hurt?

1 And then assume for a moment you are getting
2 a 10-year limit.

3 MR. HILL: The way we're getting
4 hurt, Your Honor, is that Hills is embarking
5 on a long development process and the first
6 thing we have to do is put in roads will be
7 sized depending on where the densities occur.

8 If we came in with a preliminary and
9 it just -- it cost, I'm told, by developers,
10 it costs about \$2,000 a unit to do engineering
11 for the preliminary. That sets out where
12 the lots are, the building size, this is to
13 attempt to vest the 5.5 acres per unit density,
14 costs about, if you took 750 units, it's
15 costing about \$180 a unit, and the purpose of
16 it is to try and get decisions from the
17 Township as to where the low and moderates
18 are going to be, where the densities are going
19 to occur, where the larger lots and where the
20 smaller lots should be so we can design our
21 detention basin, design our road system,
22 design our water system to provide for a
23 community that will be laid out in such a way.
24 If we started by applying for 300 units in
25 the first section of the development on

1 preliminary were the entire 2750 units, it
2 would cost somewhere over \$5 million just to
3 do the engineering.

4 THE COURT: You're assuming you can
5 go ahead and do any construction under the
6 conceptual approval.

7 MR. HILL: No. As soon as we get some
8 commitments from the town on the conceptual
9 approval, we will start moving preliminaries
10 as rapidly as our engineers can work. We don't
11 want to spend \$5 million doing all the engineer-
12 ing and have the town change it around like
13 it's dominoes.

14 THE COURT: Not changing it all, they're
15 saying you don't get any vested rights.

16 MR. HILL: Well, we need the vested
17 rights because, Your Honor, in this process
18 we're going to be dealing with a number of
19 Planning Boards. If they want something some-
20 where and we put the road in and start
21 spending money, so that the infrastructure is
22 designed, so the densities will be in one
23 place and not the other place, and a new
24 Planning Board in four years changes their
25 minds, we're wasting millions of dollars.

1 THE COURT: So you answered my initial
2 question, yes, you're going to construct
3 pursuant to the conceptual approval as opposed
4 to the subdivision approval.

5 MR. HILL: We're going to construct
6 pursuant to the conceptual approval as soon
7 as we have the Township focusing on whether
8 they like the plan, and if not, where they'd
9 rather see the densities. We will start
10 doing preliminaries as fast as our engineers
11 can work.

12 THE COURT: Well, follow me for a
13 minute, Mr. Hill.

14 You've gone in for conceptual approval
15 on your thousand acres and --

16 MR. HILL: Actually, that's only on
17 500 acres, Your Honor.

18 THE COURT: All right. Whatever. 500.
19 And you get your conceptual approval, and then
20 you file upon a hundred acres preliminary
21 approval. Are you going to rely on the
22 conceptual to construct all your roads and
23 your drainage and all of that while you're
24 processing the preliminaries?

25 MR. HILL: Yes, Your Honor. If a road

1 going through the preliminary is designed
2 eventually to be a collector for 1,000 units,
3 it's going to be larger than if it's going
4 to be a collector for a hundred units. And
5 we've got to know what the road is going to
6 be used for and how many units eventually
7 will funnel into it and how big the pipes
8 should be so we can lay the infrastructure
9 in a sensible way.

10 THE COURT: If I told you today that
11 this conceptual ordinance is ultra vires,
12 you would withdraw your application or appeal?

13 MR. HILL: Yes, Your Honor. We're
14 willing to take the risk. It seems to me that
15 Bernards can't have it both ways. If it's
16 ultra vires, us having vested rights can't
17 hurt them. If it isn't ultra vires, and it's
18 legal, we're going to get vesting for 2750
19 units. Of course, Bernards doesn't want to
20 vest those 2750 units in case Mount Laurel III
21 comes down and their fair share is less, their
22 intention is to down-zone us without allowing
23 us if they get the opportunity in that
24 litigation.

25 THE COURT: That's the purpose behind

1 that?

2 MR. HILL: That's the purpose behind
3 this attempt to take away vesting. It's clear
4 that the reason they want to take away our
5 vesting is so that they are in a position to
6 change our zoning. And with our vesting,
7 incidentally, vests our obligation to provide
8 550 low and moderate income units, vesting
9 goes both ways.

10 THE COURT: You said something I didn't
11 understand. They can't have it both ways.
12 If it is ultra vires, what?

13 MR. HILL: If it is ultra vires,
14 they're not going to be hurt by leaving this
15 ordinance in while these matters are settled
16 by the Supreme Court.

17 THE COURT: Because you can't rely on
18 them.

19 MR. HILL: Because we can't rely on it.

20 THE COURT: If it isn't ultra vires?

21 MR. HILL: If it isn't ultra vires,
22 their arguments are inappropriate to this
23 Court.

24 THE COURT: Why? They have a right to
25 change it, don't they?

1 MR. HILL: Well, they may have the
2 right to change it, except they've taken
3 away our right through getting a stay to
4 continue this litigation. And with that
5 stay is a caveat that they not change the
6 position to our detriment, and they're trying
7 to have it both ways.

8 THE COURT: Good answer. That was a
9 good answer. That's what I was working to.
10 I wanted to see what the effect of their
11 changing was.

12 Now, when saying good answer, I'm not
13 approving of your assumption for the change
14 of that ordinance because it is an assumption,
15 although it is a reasonable assumption.

16 MR. HILL: This is a difficult one.

17 Under Oakwood at Madison it outlaws us
18 cost generating a three-stage approval process
19 or the opinion seemed to say that. That was
20 an unfortunate concept for large developments,
21 because large developments really need to
22 have the planning done first, the Township
23 decide where do you want what, before going
24 in with the fine-tuned engineering, because
25 the fine-tuned engineering depends on what's

1 going to be impacted by what, and you have --
2 and part of PUD is planning a whole. One of
3 the unfortunate consequences of the Oakwood at
4 Madison language, which was maybe ripe for
5 what it was written for as cost generating
6 but carried with it an imperfect understanding
7 of very large developments is that every
8 town -- and I represented a number of towns
9 in those days -- had to change and make the
10 concept approval for large PUD's. And prior
11 to the 1975 act, there was a plan development
12 at which specifically required these kinds of
13 vested, I don't call it sketch plans, it's
14 much more than sketch plan, but this was to
15 be the application process during which the
16 mega-planning took place.

17 THE COURT: I was still practicing
18 between '75 and '79 and the conceptual approval
19 didn't come in until '79 but some of the
20 boards were just using it anyway. People
21 would come in, call the Planning Board chair-
22 man, and say, hey, Joe, could we come in and
23 let you see what you think of it. It existed
24 as a matter of fact. The lack of any
25 flexibility is precisely why the Act was

1 amended and why 10.1 came in even after that.

2 Let me ask you. Would you have any
3 objection that this ordinance be adopted with
4 a proviso that it be inapplicable as to
5 Hills development pending further order of
6 the Court? I mean, they got other people
7 they're concerned about, I guess.

8 MR. HILL: Your Honor, no. If I can
9 understand what the standard of proof is,
10 that we have the right to rely on it further --

11 THE COURT: No, I'm not ruling on that
12 yet, but I'm saying I can see at this moment
13 that I'm going to need additional briefing,
14 and at the same time the Township may have
15 a legitimate interest in not getting anybody
16 else relying on this, and to that extent they
17 should have a right to adopt the ordinance.

18 The only thing that would preclude
19 them from adopting the ordinance at this time
20 is the Supreme Court order. This Supreme
21 Court order says, in effect, if I understand
22 it properly, that if changed circumstances
23 are proven or, if there's an effort to frus-
24 trate Mount Laurel development, at this point
25 I can't tell either of those with any

1 certainty, then this Court first, and then
2 the Supreme Court on review, shall have the
3 right to modify the stay. But for that
4 provision the law is well settled that the
5 town could adopt whatever ordinance it wants
6 to adopt and then you litigate that.

7 And what I'm suggesting is that, as
8 long as you were protected by a proviso that
9 the ordinance will contain language, that it
10 shall not be applicable to the Hills' pending
11 application until such time as the pending
12 motion before this Court, you wouldn't have
13 any objection?

14 MR. HILL: I wouldn't have any objection,
15 Your Honor. And on a red herring issue as to
16 whether 10 years, this is their ordinance and
17 not ours, should be automatic, we have no
18 objection to their amendment to provide it
19 three years or such further time as may be
20 appropriate, given the magnitude of the
21 development, which is just using the language
22 of the Municipal Land Use Law. We're not set
23 on getting 10 years. We just want to -- we're
24 set on their focusing and deciding rather than
25 playing games with us in the conceptual

1 approval stage and then wasting our money
2 when we come in with preliminaries. That's
3 really what we want them to do, decide as if
4 it's for real so we can spend our \$5 million --

5 THE COURT: Well, I'm not altogether
6 clear at this point whether that can be
7 captured within a conceptual review ordinance.
8 It may be that the legislation is bad. The
9 legislation says that no rights are supposed
10 to vest 10.1. But then you got the other
11 legislation which I've pointed to, the other
12 sections which seem to give a Planning Board
13 some other rights by ordinance.

14 MR. HILL: You're going to have a
15 chance.

16 Incidentally, Your Honor, Judge
17 Skillman in Clinton Township and in Morris
18 Township approved, albeit there were no
19 objectors, conceptual approval language on
20 PUD that were part of Mount Laurel. You'll
21 have that question very shortly in focus in
22 Old Bridge where the developments are very
23 large and where, representing one of the
24 developers, wants some kind of assurance
25 before they bring in -- they spend 20 or

1 \$40 million on infrastructure, that there's
2 a process very much like this where they got
3 assurances. The way we've been handling it
4 in the context of a settlement, trying to get
5 the Court to approve it as a settlement, if
6 there's doubt as to its legality.

7 The order Your Honor suggests is
8 satisfactory and we'll take our chances when
9 and if the stays are listed to resolve this
10 issue. And I think in an application for a
11 stay it isn't really appropriate for the
12 Court to decide, you don't need to decide
13 finally on what's legal and what isn't legal.

14 THE COURT: That's true. Even if I
15 did, I couldn't today.

16 MR. HILL: Right.

17 THE COURT: Okay.

18 MR. HILL: Thank you, Your Honor.

19 THE COURT: All right, Mr. Shaw.

20 MR. SHAW: Yes. Thank you. A couple
21 of comments if I may.

22 First, although Mr. Hill talks about
23 the need to have the conceptual approvals
24 locked in in order to be sure he can go ahead
25 with his preliminaries, I presume there are

1 other conceptual approval ordinances out
2 there in other towns that large developers
3 operate under which do not contain the
4 mistaken provision that our ordinance con-
5 tains, and do not even on their face confer
6 any vested rights upon the developer. And
7 presumably developers make use of them,
8 submit conceptualls to those towns for the
9 very reasons that I suggested; that it helps
10 the developer to know what the Township --

11 THE COURT: The only one that the
12 Court reviewed was West Windsor and that, con-
13 tains the same 10-year vested. It's different
14 in its procedure. You have a choice, pre-
15 liminary A or B and final. You can skip A or
16 B and go to a final. And A is really a
17 conceptual and they vest 10 years. I don't
18 know. I haven't taken a survey, but I know
19 that conceptualls are being used to vest rights,
20 properly or improperly.

21 MR. HILL: And I wrote the West Windsor
22 ordinance. I was the Planning Board attorney
23 when that was adopted.

24 THE COURT: That's what you call
25 bootstrapping.

1 MR. SHAW: The next point, Your Honor,
2 is regarding the point that you made earlier,
3 and that is that the Board is not enforcing
4 its own ordinance. That's not correct.
5 And in looking over the ordinance I recall
6 that there is a provision that deals with that
7 and it is the provision of Section D(3)(a)
8 which talks about what the Planning Board can
9 do. And that says in part that if they give
10 approval, such approval shall set forth those
11 aspects of the conceptual plan which have
12 been reviewed and approved. The items approved
13 will be determined by the extent of informa-
14 tion provided by the applicant. So there's
15 flexibility in the applicant to submit more
16 or less than what is required or what is
17 called for by the ordinance. Nothing's
18 required because it's optional and he can get
19 conceptual approval on portions of things.

20 THE COURT: I'm not so sure I agree
21 it's optional. It may be a question of how
22 much approval the applicant wants to get.
23 And clearly there's an inducement to get as
24 much information you can give so you get as
25 much approval as you can get. So there's an

1 inducement. Under this ordinance it's an
2 attractive device and beneficial to the
3 Township and the people. Good ordinance.
4 I don't have any quarrel with it.

5 MR. SHAW: One last point on the
6 suggestion of enacting or permitting us to
7 continue to consider the ordinance but
8 staying it as to Hills.

9 I'm not clear on what happens under
10 that if Hills gets its conceptual approval
11 and then comes in for preliminary approval.
12 How is the town supposed to treat that ,
13 preliminary application?

14 THE COURT: How would it be any dif-
15 ferent than any other? Whether there's a
16 10-year vesting or not, you treat it the same
17 way. Well, I mean, for the next year or two
18 or three, at least.

19 MR. SHAW: Well, would you say at that
20 point that the Planning Board is precluded
21 from the flexibility which we suggest 10.1
22 calls for?

23 THE COURT: No more than it would be
24 precluded -- it's not precluded now, is it?

25 MR. SHAW: If they get rights that

1 vest as a matter of law, it's precluded
2 because they can't -- vesting means that the
3 Planning Board cannot change it. I'm not
4 saying they will, but I'm saying 10.1 gives
5 them the flexibility. And if sound planning
6 concerns come up that require a change, what
7 position is the Planning Board in at that
8 point?

9 MR. HILL: We're required under the
10 ordinance to submit our preliminary consis-
11 tently with the conceptual approval that you've
12 approved. So I presume that you would not,
13 you know, unless this device of removing
14 vesting is just so you can play games with us,
15 you would not approve the changes and change
16 your mind dramatically about where you want
17 where and where you want the low and moderate
18 to appear, because it appears --

19 THE COURT: I think as a practical
20 matter Hills is not going to get its approval
21 before the Supreme Court speaks.

22 MR. HILL: I can speak on that.

23 On the day we were in the Appellate
24 Division, Tom Hall was before Bernards on the
25 first hearing on this application, and they

1 indicated then they were ruling it complete.
2 So if it was ruled complete on November 8th
3 under their ordinance, they have 95 days from
4 November 8th to determine -- to grant or deny
5 conceptual approval.

6 THE COURT: And the Supreme Court
7 speaks in January, they would have -- February
8 8.

9 MR. CARROLL: The 12th.

10 MR. HILL: November 12th. 95 days from
11 there is three months.

12 THE COURT: One other question, then
13 we're done.

14 Mr. Shaw, what do you think of Mr. Hill's
15 speculation as to the reason for the adoption
16 of this amendment? It sounds ominous that you
17 want to leave yourself flexible to perhaps
18 up-zone this property and thereby, in effect,
19 reduce Mount Laurel housing.

20 MR. SHAW: Your Honor, there is one
21 consideration, we now have the Fair Housing
22 Act in place. And the Fair Housing Act may
23 well change what has been perceived prior to
24 the Fair Housing Act as what may be Bernards'
25 obligation, but Bernards' obligation has not

1 yet been determined. It remains to be
2 determined either in a compliance hearing
before this Court or before the Council,
depending on how the Supreme Court rules.

8 I suppose there is the responsibility
that there may at some future date be a change
in Hills' zoning or there may not be. I don't
know.

9 THE COURT: You see, that is in my
10 mind exactly what the Supreme Court feared,
11 and frankly I am thankful that they had the
12 foresight to put that in the order because
13 that's just fundamentally unfair. But for
14 the stay this case would be over, and I mean
15 over. The suggestion that the fair share
16 number wasn't affected in this case in the
17 Appellate Division, I know it may be said that
18 it wasn't affected in light of the Fair
19 Housing Act, but I read that brief and there's
20 a suggestion that the fair share number wasn't
21 affected. It's fixed hard. It's fixed by an
22 agreement of the town. The builder's remedy
23 was affected.

24 MR. SHAW: No, sir.

25 THE COURT: And the ordinance was

1 affected.

2 MR. SHAW: No, sir.

3 THE COURT: And the only thing was
4 left was a three-hour hearing on compliance.

5 Now, the Supreme Court, in its wisdom,
6 saw fit to stay it, and obviously I'm bound
7 by that. But the Supreme Court was also very
8 concerned that, as a result of that stay, the
9 stay could be used to frustrate the production
10 of Mount Laurel housing and that, in effect,
11 the Court would be used as an instrument to
12 that effect.

13 And you candidly, and I think to your
14 credit, admitted that that potential exists.
15 And I have a great deal of difficulty in
16 balancing that against some hypothetical
17 injury to the municipality that may be incurred
18 and saying the balance that this Court shouldn't
19 stay what you're doing.

20 Now, my order's going to be that the
21 municipality may perceive to adopt a form of
22 ordinance which will eliminate the vesting
23 provision as long as it is not applicable to
24 Hills'development's pending application and
25 that my order will remain in effect until such

1 time as either the Supreme Court has rendered
2 its opinion or the 95-day period is about to
3 expire.

4 If at that time the Supreme Court has
5 not spoken, the Township will have leave on
6 the 90th day, or if that falls on a weekend,
7 on the 89th or 88th day, whatever, to make
8 application to this Court to further review
9 the stay.

10 In the interim I'm going to request
11 that counsel brief the issues as to the validity
12 of the provisions dealing -- the 10-year vesting
13 provision in light of the statutes that I've
14 cited, and also brief the question of what
15 damage would be done to the developer here by
16 virtue of the passage of the ordinance.

17 I don't think that that is clear from
18 the papers. And if for no other reason I would
19 entertain a temporary stay to have those issues
20 briefed. And they should be done within a
21 period of 30 days.

22 MR. HILL: Both of us are under order
23 to get briefs in by December 2nd and replies
24 in by the 11th. So, if your briefing
25 schedule can --

1 THE COURT: Thirty days is December
2 22nd.

3 MR. HILL: Okay.

4 THE COURT: You want to make it
5 January 2nd, that's all right with me, too.

6 MR. HILL: I think that would be
7 helpful. Fine. Thank you.

8 THE COURT: Yes. I don't want to
9 ruin your holidays.

10 MR. SHAW: Your Honor, I must add for
11 clarification I'm not sure I understand exactly
12 what you said about what we can do with the
13 ordinance. Are we permitted to proceed with
14 the ordinance as proposed and as published,
15 provided, however, that Your Honor is ruling
16 that it shall not apply to Hills, or is it
17 necessary that the ordinance itself be
18 amended?

19 THE COURT: The ordinance must be
20 amended, yes, for a whole host of reasons,
21 including that everybody in the public should
22 be on notice. The ordinance will have to be
23 amended exempting Hills.

24 MR. HILL: Are we the only pending
25 application? If we are, you can exempt

1 pending application.

2 THE COURT: You work out the wording.
3 If there's a dispute, contact me on that.

4 I might say, Mr. Shaw, notwithstanding
5 my order you did a very excellent job in oral
6 argument, because you almost convinced me to
7 change my mind.

8 MR. SHAW: Thank you, Your Honor.

9 MR. HILL: Thank you.

10 (End of session.)

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- CERTIFICATE -

I, ROSEMARY FRATANONIO, do hereby certify that the foregoing is a true and accurate transcription of the within proceedings, as taken by me stenographically on the date and place hereinbefore set forth.

Rosemary Fratanonio
 ROSEMARY FRATANONIO, C.S.R.
 Official Court Reporter

DATE: 17-11-85