

RULS-AD-1985-430

12/12/85

Order granting motion

Pgs 17

**BRENER, WALLACK & HILL**  
2-4 Chambers Street  
Princeton, New Jersey 08540  
(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 :	ORDER
PLANNING BOARD OF THE TOWNSHIP :	
OF BERNARDS and the SEWERAGE :	
AUTHORITY OF THE TOWNSHIP :	
OF BERNARDS :	
Defendants :	

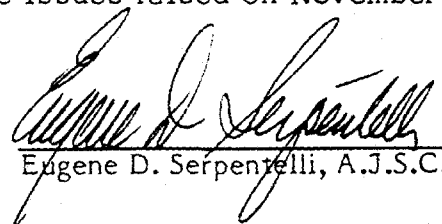
This matter having been opened to the Court by Brener, Wallack and Hill, attorneys for Plaintiff, The Hills Development Company, Henry A. Hill, Esq. appearing, in the presence of Farrell, Curtis, Carlin & Davidson, attorneys for Defendants, Howard P. Shaw, Esq. appearing, and the Court having reviewed the Plaintiff's motion on short notice and the moving and responding briefs, affidavits and exhibits submitted with respect thereto and having considered the arguments of

AD-12-85  
01072

counsel, it is on this 12 day of December, 1985 ORDERED that Plaintiff's application to modify the stay issued in this matter is granted insofar as the Defendant Township Committee may proceed to adopt an ordinance modifying Section 707 (E) of the Bernards Township Land Development Ordinance provided that such an ordinance expressly provides that any modification of Section 707 (E) shall be inapplicable to ~~the~~ <sup>the</sup> Conceptual Approval Application submitted by Plaintiff pursuant to Section 707 of said Land Development Ordinance, on October 17, 1985 and deemed complete on December 3, 1985,

IT IS FURTHER ORDERED that the relief ordered herein shall remain in effect until such time as the New Jersey Supreme Court resolves the Defendant or until this Court resolves the issues raised at the motion on Nov. 22, 1985 Township's appeal which appeal has been certified to the Supreme Court, provided, however, that the Defendant Township may apply to this Court to modify the terms of this Order on or about the 90th day of the time frame for application approval set forth in Section 707(D)(1) of the Bernards Township Land Development Ordinance.

Supplemental briefs regarding the issues raised on November 22, 1985 are to be submitted by January 2, 1986,

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

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Δ CERTIFIED CIVIL TRIAL ATTORNEY

FILE NO.

December 6, 1985

The Honorable Eugene D. Serpentelli  
Judge, Superior Court of New Jersey  
Ocean County Court House  
CN-2191  
Toms River, New Jersey 08753

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

Dear Judge Serpentelli:

This is in reference to The Hills Development Company's recent motion to modify the stay entered in this matter (i.e. the motion to enjoin Bernards Township from deleting the "vesting" language contained in Bernards Ordinance Section 707).

As Your Honor may recall, the defendant Township Committee was restrained from amending §707 of the Township's Land Use Ordinance unless such an amending ordinance specified that the amendment was not applicable to The Hills Development Company. Your Honor also advised that the defendant Township may move to modify Your Honor's restraint at such time as the §707 95-day approval period nears its completion.

Initially, there seems to be some confusion as to when the 95-day approval period begins to run. Pursuant to §707(D) of the Township's ordinances (copy attached), the Planning Board must take action on conceptual plans within 95 days after the certification by the administrative officer of the submission of a complete application. Hills' pending development application was officially deemed complete on December 3, 1985 (see correspondence attached). Therefore, in Hills' view, the 95-day approval process commenced running on December 3rd, not November 12th as alluded to by counsel for defendants in his correspondence to the Court of November 27, 1985. I do not believe that we have ever suggested to the contrary.

The Township has indeed introduced a revised ordinance which indicates that the deletion of the vesting provision is inapplicable to Hills (copy of revised Ordinance #746 attached). The ordinance is scheduled for adoption on December 10, 1985. Unfortunately, the revised ordinance is objectionable. As indicated, the ordinance does contain a provision which specifies that the deletion of the vesting language is inapplicable to Hills' development application. However, the ordinance further specifies that the provision "shall be deemed to have never been of any force or effect...without need for further legislation" if (1) Your Honor's November 22nd Order is revised, vacated or modified; or (2) the Supreme Court issues its opinion concerning the Township's appeal of this Court's denial of transfer.

Thus, should Your Honor's November 22 Order be so much as "modified" by this or any other court, or, should the Supreme Court issue its opinion on transfer prior to either approval of Hills' application or March 8, 1986, the development application will be worthless. This is the very harm Hills sought to avoid when it applied to this Court for relief.

On November 22, Your Honor sought to preserve the status quo. However, the "proviso to the proviso" in Bernards ordinance would immediately alter the status quo upon the occurrence of either of the above two events. Hills believes that Your Honor sought to preserve the status quo pending resolution of the issue of whether Bernards should be permanently enjoined from deleting the vesting language vis-a-vis Hills. If Your Honor has not resolved this issue at such time as Your Honor's order is "modified" or the Supreme Court issues its opinion, Bernards will have successfully divested Hills of the development rights Hills would otherwise acquire pursuant to ordinance Section 707.

Therefore, Hills requests that this Court either: (1) resolve the ultimate issue of whether Bernards can apply the divesting language to Hills prior to the issuance of the Supreme Court opinion; or (2) direct that the divesting language shall not apply to Hills, regardless of any extraneous event, until such time as a court of law decides whether Bernards may apply the deletion of vesting language to Hills. As Your Honor may recall, supplementary briefs concerning the Section 707 issue are due by January 2, 1986.

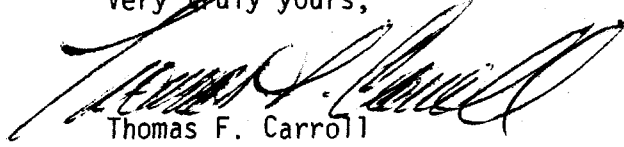
Finally, counsel for defendants requests that Your Honor reconsider the ruling allowing the Township to apply to remove the restraint on or about the 90th day of the approval period set forth in §707(D) of the Township's ordinances since the Planning Board could not otherwise approve the application without prejudicing its rights. In the event that the defendant Planning Board wishes to approve Hills' pending development application, Hills would certainly have no objection to the Township's ability to apply to modify Your Honor's restraint at any time prior to the 90th day of the approval process. Since Hills' pending development application has just recently been certified to be complete, the Township's concern in this regard seems to be quite premature. Nevertheless, it seems that the Township's concern could be alleviated if the proposed form of order were amended to provide that, in the event that the defendant Planning Board represents that it desires to approve Hills' pending development application, the Township may apply to this Court to modify the restraint entered by Your Honor on November 22, 1985.

If the Court wishes to hold a telephone conference with respect to this matter, kindly so advise and I will arrange for same.

*Handwritten notes:*  
Hills  
12/10/85  
Bernards  
11/22/85

Thank you for your kind attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas F. Carroll", written in a cursive style.

Thomas F. Carroll

TFH/sr

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

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.



# TOWNSHIP OF BERNARDS

COLLYER LANE  
P. O. BOX 437  
BASKING RIDGE, NEW JERSEY 07920  
201-766-2510

December 4, 1985

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

Re: Hills Development  
Conceptual Application

Dear Mr. Hall:

Please be advised that on Tuesday, December 3, 1985, the Technical Coordinating Committee deemed the above referenced application complete.

Very truly yours,

A handwritten signature in cursive script that reads "H. Steven Wood".

H. Steven Wood  
Administrative Officer  
Planning Board

HSW/PAM/gh  
cc: Mr. John Kerwin  
The Hills Development  
Box 500  
Pluckemin, New Jersey 07978



# Bernards Twp.

## AMENDED 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 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 repeated and is replaced with the following:

"E. Conceptual approval shall not confer any development rights upon the applicant; PROVIDED, HOWEVER, that on November 22, 1985, a Judge of the Superior Court of New Jersey, Law Division, entered an order which directs that this clause, and the repealer effected by Township of Bernards Ordinance #748, shall not be applicable to a certain application for conceptual approval submitted by Hills Development Company and pending as of November 22, 1985, said order to remain in effect until such time as either (a) the Supreme Court of New Jersey has rendered its opinion in the pending appeal in the case of Hills Development Company v. Township of Bernards, et al., Docket No. A-122, or (b) a period of 95 days from November 12, 1985, is about to expire in which event, if the Supreme Court has not yet spoken, the Township of Bernards shall have leave on or after the 90th day of such period to apply to the Superior Court of New Jersey, Law Division for further review of such order; and PROVIDED FURTHER that the foregoing proviso shall be of no force or effect and shall be deemed to have never been of any force or effect, immediately upon the occurrence of any one or more of the following events, without need for further legislation: (i) reversal, vacating, or modification of said order by any court of competent jurisdiction; or (ii) issuance by the Supreme Court of its opinion in said pending appeal."

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

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 November 26, 1985 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, Colliyer Lane, Basking Ridge, N.J. in said Township on December 10, 1985 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  
12/5/85

P.F. \$34.10

OBT

FARRELL, CURTIS, CARLIN & DAVIDSON

ATTORNEYS AT LAW

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

*Memo  
12/6/85*

December 6, 1985

Hon. Eugene D. Serpentelli, A.J.S.C.  
Ocean County Court House  
Toms River, New Jersey 08753

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

Dear Judge Serpentelli:

After mailing my letter of objection, dated December 5, 1985, I realized that there is one other objectionable aspect of plaintiff's proposed Order.

The proposed Order would require the ordinance to provide that it "shall be inapplicable to a Conceptual Approval Application submitted by Plaintiff pursuant to Section 707 of said Land Development Ordinance." Your Honor's ruling was that the amendment should be inapplicable to "the pending" conceptual approval application of plaintiff, and we submit that the words "the pending" should be substituted for the word "a".

The significance of this change is that either (a) following its review of the pending application, it is possible that the Planning Board might find the application to be unacceptable, and might therefore reject it, or (b) Hills might, for any number of reasons, withdraw the pending application and/or submit a different one. If either circumstance occurs, any subsequent application by Hills would not be "the pending" application, and should not be protected by the instant Order.

I note that my raising the possibility of a rejection by the Planning Board does not indicate that any such determination has

Hon. Eugene D. Serpentelli, A.J.S.C.  
Page Two  
December 6, 1985

been made. On the contrary, I have not discussed the application with any member of the Planning Board and I have no knowledge of which members, if any, have even reviewed the application. I mention it only to point out that the mere fact that Mr. Hill's client has submitted an application does not automatically require that such application be approved. I am sure that this application will receive no different treatment from any other application by any applicant.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON



By: Howard P. Shaw

HPS:nmp

cc: Thomas F. Carroll, Esq.  
Arthur H. Garvin, III, Esq.

OBJ

FARRELL, CURTIS, CARLIN & DAVIDSON

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December 5, 1985

Hon. Eugene D. Serpentelli, A.J.S.C.  
Ocean County Court House  
Toms River, New Jersey 08753

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

Dear Judge Serpentelli:

This letter is submitted to set forth our objections to the proposed form of Order which was submitted by plaintiff's counsel by letter dated November 26, 1985, but which was not received by us until December 4, 1985. On December 4, I telephoned your chambers to make the court aware of the fact that I had just received the proposed Order. Your law clerk was in court at the time, and so I spoke with your secretary, who told me that the court had received the proposed Order on December 2, and would hold it for receipt of objections through December 9, 1985.

We object to three sepecific aspects of the proposed Order, as follows:

First, the Order recites that "plaintiff's application to modify the stay issued in this matter is granted". We believe that this statement is inaccurate. It was our understanding that Your Honor did not grant or deny the application at all, but rather reserved decision pending submission of supplementary briefs, and that the injunction that Your Honor ordered was in the nature of temporary relief pending disposition of the motion. If our undestanding is not correct, then we are at a loss to see why supplementary briefs would be required. We propose that plaintiff's proposed form of order be modified by deleting the words "plaintiff's application to modify the stay in this matter is granted insofar as".

Second, the proposed Order recites that the Township may

Hon. Eugene D. Serpentelli  
Page Two  
December 5, 1985

apply to the court to modify the terms of the order on or about the 90th day "of the time frame for application approval set forth in Section 707(D)(1)" of the ordinance. As noted in my letter to the court dated November 27, 1985, there may well be disagreement between the parties as to when that time frame begins to run, and therefore the proposed language is too indefinite to apprise the parties of their rights. We propose that the form of the proposed Order be changed to allow application to the court "on or about 90 days after November 12, 1985," since that was the date that Mr. Hill placed before the court in his oral argument upon this motion. However, we submit that it would be preferable to remove the 90 day provision entirely, and revise the court's ruling to permit the township to apply to the court to modify the terms of the order "at any time that factual or procedural developments warrant such application," as previously suggested in our letter to the court dated November 27, 1985.

Last, the proposed Order omits any reference to Your Honor's order that the parties submit supplementary briefs, and therefore has the potential to create the impression that the motion has, in fact, been formally and finally adjudicated. To avoid such possible misconstruing of Your Honor's ruling, we propose the addition of the following language to the form of the Order:

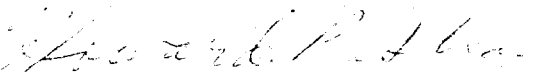
"IT IS FURTHER ORDERED that in order to assist this Court in making a determination upon the issues raised in the instant motion papers, counsel shall, on or before January 2, 1986, submit supplementary briefs, addressing the issues of (a) the validity of the 10-year vesting provision in the Bernards Township Land Development Ordinance, in light of provisions of the Municipal Land Use Law, and (b) what damage, if any, would result to the developer by virtue of the enactment of the proposed ordinance which would repeal said vesting provision and replace it with a provision which would provide that conceptual approval shall not confer any development rights upon the applicant."

Hon. Eugene D. Serpentelli  
Page Three  
December 5, 1985

While the above comments are our only objections to the form of the Order, we respectfully continue to note our objection to the substance of Your Honor's ruling of November 22, 1985.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON



By: Howard P. Shaw

HPS:nmp

cc: Thomas F. Carroll, Esq.  
Arthur H. Garvin, III. Esq.

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JUDGE SERPENTELLI'S CHAMBERS

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HOWARD P. SHAW  
CYNTHIA H. REINHARD  
MARTIN G. CRONIN

*Stj.*

November 27, 1985

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

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

Dear Judge Serpentelli:

Based upon a telephone conversation with Thomas Carroll, Esq., on November 26, I understand that Mr. Carroll's firm will be submitting, under the five-day rule, a proposed form of Order to memorialize Your Honor's ruling of November 22. We have not yet received that proposed Order, but we felt it was appropriate to bring certain matters to the court's attention.

Part of that ruling included the granting of leave to the Township to apply to the court to reconsider the ruling if the Supreme Court has not acted by the time "the 95-day period is about to expire". During oral argument Mr. Hill had made the allegedly factual assertion -- which is not in any affidavit or elsewhere in the record -- that Hills had been told at a November 12 meeting of the Technical Coordinating Committee that its application was complete. I understand Your Honor's ruling, quoted above, to refer to a period of 95 days from that November 12 date.

At the time of oral argument, obviously I had not had an opportunity to investigate the factual assertion which

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

Page Two

November 27, 1985

Mr. Hill made at that argument. However, our investigation since then has found no indication that Hills' application has been certified as complete, or that Hills was ever told that the application was complete. Consequently, we wish to make it clear to both the court and the plaintiff that the Township disputes any suggestion that Hills' conceptual application automatically will be deemed approved if not otherwise acted upon within 95 days of November 12.

In addition, we respectfully request that the court reconsider the above-described provision of its ruling, as being unworkable. As phrased in Your Honor's oral ruling, that provision could be construed as prohibiting the Township from seeking modification of the forthcoming Order at any time before 90 days from November 12. This effectively means that if the Planning Board becomes inclined to approve Hills' conceptual plan, it must necessarily allow it to be deemed approved by inaction, rather than voting on approval, because if it votes before the Township can seek or obtain a modification of your November 22 ruling, it risks having such approval be subject to the "vesting" provision which your ruling has temporarily frozen in place. We respectfully submit that the Order should grant leave to the defendants to seek a review of Your Honor's ruling whenever factual or procedural developments warrant such review. (We maintain, of course, that even while in place, the vesting provision is of no legal force or effect, but we wish to avoid the need to have to litigate that additional issue, if possible.)

After receipt and review of plaintiff's proposed form of Order, we will submit any specific objection which we may have to such form of Order.

Finally, we note that nothing herein should be construed as acquiescence in the court's ruling of November 22, with

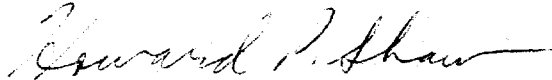


Hon. Eugene D. Serpentelli, J.S.C.  
Page Three  
November 27, 1985

which ruling we respectfully disagree.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON



By: Howard P. Shaw

HPS:nmp

cc: Thomas F. Carroll, Esq.  
Arthur H. Garvin, III, Esq.

Hed 4  
3 July 12-9

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\* MEMBER OF N.J. & D.C. BAR  
\*\* MEMBER OF N.J. & PA. BAR  
† MEMBER OF N.J. & N.Y. BAR  
†† MEMBER OF N.J. & GA. BAR  
Δ CERTIFIED CIVIL TRIAL ATTORNEY

FILE NO. 3000-04-02

November 26, 1985

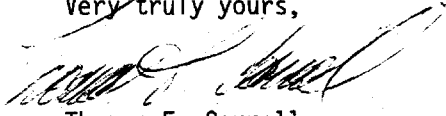
The Honorable Eugene D. Serpentelli  
Judge, Superior Court of New Jersey  
Ocean County Court House  
Toms River, NJ 08753

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

Dear Judge Serpentelli:

As per Your Honor's November 22, 1985 ruling with respect to Plaintiff's motion to modify the stay entered in the above-captioned matter, I enclose the original and two copies of a proposed form of Order. By copy of this letter, I am providing copies of said proposed form of Order to counsel for the Defendants in this matter.

Very truly yours,

  
Thomas F. Carroll

TFC:klp

Enclosure

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

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JUDGE SERPENTELLI'S CHAMBERS