

RULS-AD-1986-110

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Transcript of Proceedings

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PLANNING BOARD
TOWNSHIP OF BERNARDS
NEW JERSEY

IN THE MATTER OF: ORDINANCE NO. 764 : TRANSCRIPT OF
TOWNSHIP COMMITTEE REFERRAL. : PROCEEDINGS
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Taken on: Tuesday, March 18, 1986

At: Municipal Building
Township of Bernards
New Jersey

BEFORE: HARRY DUNHAM, Chairman

MEMBERS OF THE PLANNING BOARD:

SANDRA J. HARRIS, Mayor
THOMAS DAGGET
EDWARD FARRELL
NANCY C. FERGUSON
CHARLES LIND

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

MESSRS. KERBY, COOPER, SCHAUL & GARVIN
BY: ARTHUR H. GARVIN, ESQ.
Attorneys for the Planning Board

MESSRS. BRENER, WALLACE & HILL
BY: HENRY A. HILL, JR., ESQ.
Attorneys for the Hills Development Company

A L S O P R E S E N T:

HARVEY S. MOSKOWITZ, Planning Board Consultant

MEL WEINER & ASSOCIATES
Certified Shorthand Reporters
1 Maryland Street
Cranford, New Jersey 07016
(201) 272-7336-7332

RULES - AD - 1986 - 110

1 **THE CHAIRMAN:** Item No. 7,
2 Ordinance No. 764. This is an ordinance
3 which changes our Mount Laurel ordinance.
4 It's been referred back to us from the
5 Township Committee for our final approval.

6 **Mr. Kerwin,** do you have something
7 to say?

8 **MR. HILL:** Please.

9 **MR. KERWIN:** Mr. Dunham, to
10 make our presentation, I can tell you
11 without fear of contradiction from our
12 esteemed counsel that it will not be
13 possible to accomplish this in five
14 minutes.

15 **THE CHAIRMAN:** I would like
16 to see Henry give us a statement.

17 **MR. KERWIN:** Mr. Dunham,
18 before I turn it over to Mr. Hill, the
19 first time we appeared before this Board
20 was fifteen years ago today. We have yet
21 to build our first house in Bernards
22 Township on that property, and if the only
23 consideration that this Board is going to
24 give us after fifteen years is a
25 five-minute presentation about some 1,275

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units, then let me assert our position.

We will be in litigation, a serious litigation, with this Board which will cover every avenue possibly available to us. If, after having said that, you are still willing to give us a total of five minutes after fifteen years, why that's your decision.

MR. DUNHAM: John, my problem is this. It's been referred back to us. It is not a public hearing. Legally, it is not a public hearing. We had a public hearing, I think, when we referred this to the Township Committee. The Township Committee is going to have a public hearing. I think that's the forum where you have to present your case.

However, out of the kindness of our hearts, we'll be happy to listen to Henry.

MR. HILL: Let me phrase our appeal this way. Hills Development Company has filed a formal protest against your proposed revision of the zoning ordinance pursuant to N.J.S.A 40:55D-63. This protest statute is designed in the

1 words of the Superior Court to protect the
2 interest of property owners in the
3 stability and continuity of zoning
4 regulations.

5 The Courts have said that a
6 municipality should, and I quote,
7 "Exercise extra diligence when a protest
8 has been filed and when it is making
9 important changes in the property rights
10 of citizens who object."

11 That's the language of the
12 Appellate Division Rules on 40:55D-63.

13 We request permission pursuant to
14 this protest to present our planner, our
15 environmental engineers, and our traffic
16 engineers to testify with respect to the
17 appropriateness of the present zoning and
18 the inappropriateness of the proposed
19 zoning changes.

20 The Hills Development Company takes
21 the legal position that an ordinance
22 change, such as this one, which
23 substantially diminishes the value of
24 their property without promoting public
25 health, safety, morals, or the general

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welfare, and which is not based on any substantial change in the area being downzoned is patently illegal.

We remind the Planning Board that any zoning change should be in accordance with a comprehensive plan and must fulfill a legitimate objective of zoning contained in the Land Use Law. The property, our experts will demonstrate, can be developed under the existing zoning without any adverse environmental impacts.

Our traffic engineer will testify this evening, if you allow him to, that it can be developed under the present zoning without adverse traffic impacts. Our planner, Ken Wizermy, will testify this evening, if you will allow him, that the proposed amendment conflicts with your Master Plan, is incompatible with the zoning immediately adjoining it in Bedminster Township, and with the density and uses as related to site suitability of other tracts where multi-family housing is permitted.

In addition, Hills Development

1 Company, as you well know, has constructed
2 roads, sewer, and water systems which have
3 been sized in reliance on the five and a
4 half units per acre zoning at substantial
5 expense. The result of this down-zoning
6 would be to leave most of this
7 infrastructure oversized at great
8 financial waste.

9 Our traffic engineer will testify
10 with respect to the oversizing of the
11 roads. We realize that the down-zoning
12 proposed here is being pursued because of
13 a public perception that the
14 municipality's fair share under the Mount
15 Laurel doctrine may be lower as a result
16 of recent judicial action and that the
17 township may be over-zoned for lower
18 income housing.

19 Hills takes the legal position that
20 this view, whether it be true or false,
21 does not justify a radical change in the
22 permitted densities on property which has
23 been found suitable by your own
24 comprehensive planning processes for a
25 higher density use.

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We request permission to present witnesses whom we believe will establish the reasonableness of the present zoning and the physical capacity of the land and the associated infrastructure for a development at five and one half units per acre.

Conversely, we will attempt to demonstrate to you why the proposed amendment is unreasonable, constitutes poor planning, and unnecessarily impacts on property values without any compensating promotion of legitimate police power objectives.

Finally, I would like to state that we note that Ordinance 764 is an interim ordinance adopted pursuant to N.J.S.A. 40:55D-90.

The Planning Board should be aware that N.J.S.A. 40:55D-90 was amended when Governor Kean signed into law on January 21, 1986 Senate Bill No. 2313. These amendments contained, among other things, the following language:

"No moratoria on applications for

1 development or interim zoning ordinances
2 shall be permitted except in cases where
3 the municipality demonstrates on the basis
4 of a written opinion by an appropriate
5 qualified health professional that a clear
6 imminent danger to the health of the
7 inhabitants of the municipality exists,
8 and in no case shall the moratorium or
9 interim ordinance exceed a six-month
10 term."

11 I am sure that your attorneys, when
12 they have had an opportunity to review the
13 new amendments to the Municipal Land Use
14 Law and Judge Serpentelli's opinion in the
15 case of New Jersey Shore Builders
16 Associates versus Township Committee 191
17 New Jersey Super 627 will advise you that
18 interim ordinances adopted after May 31,
19 1979 were not legal in New Jersey, and
20 that the Municipal Land Use Law has been
21 changed to reflect this case law.

22 I hope it will not be necessary to
23 waste my time and my client's money to
24 resolve, at least, that issue through
25 litigation. The ordinance on that basis

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alone is patently illegal.

Finally, I realize that you are in a rush to torpedo Hills Development Company's proposals and to deny applications presently pending before you by Hills Development Company. I just caution you that in your rush to accomplish this, and in your failure to go through the ordinary master planning process, that you are subjecting yourselves to a claim that you are not following due process of law and a charge that there may be some malice in the speed and the procedure by which you are acting.

Again, I renew my earnest requests that the planner, the traffic engineer, and the environmental engineers who are here this evening be allowed to testify in front of you as to why this zoning ordinance is inappropriate, constitutes bad planning, does not conform with the Master Plan, is inconsistent with zoning along the borders, along an extensive border with Bedminster Township, is not compatible with that zoning, and serves no

1 legitimate police power objective.

2 I think that having filed a
3 protest, and in view of the statement by
4 the Superior Court, Appellate Division,
5 that applicants who have filed a protest
6 must be applicants with power, who own
7 more than twenty percent of the land in
8 the zone being down-zoned, have a
9 particular right to due process, and that
10 the municipalities have a particular
11 obligation to exercise extra diligence in
12 acting on such an ordinance.

13 I have a record here, and I beseech
14 you for the record and for those who would
15 review it, that you give us an opportunity
16 to present a case against this ordinance.

17 THE CHAIRMAN: Mr. Garvin,
18 I'll ask you a question. Mr. Hill has
19 produced an awful lot of phraseology here.
20 Should we defer this to a later date and
21 let you take this under advisement?

22 MR. GARVIN: I don't see any
23 reason, Mr. Chairman.

24 THE CHAIRMAN: Will you
25 answer these question put forth as far as

1 the legality of sections?

2 MR. GARVIN: Mr. Chairman, I
3 really don't think any response is
4 necessary. I think the Board appreciates
5 Mr. Hill's statements, his comments, his
6 referral to stern statutes and cases.

7 Both myself and the township
8 attorneys are quite familiar with the Land
9 Use Law, as is Mr. Hill. We have our
10 differences about what certain statutes
11 and cases mean.

12 MR. HILL: Are you aware of
13 the recent amendments of Bill No. 2313
14 enacted into law on January 21st of this
15 year?

16 MR. GARVIN: We are.

17 MR. HILL: And are you aware
18 that that amendment prohibits interim
19 zoning except where the health expert -
20 - -

21 MR. GARVIN: Mr. Hill, you
22 and I both read the law. We're not going
23 to take the time to discuss what your
24 interpretation is and what mine is, or any
25 other lawyer's is. I don't think you are,

1 Mr. Chairman. I don't think you probably
2 are interested in doing that. I'm sure if
3 we are incorrect in the actions we're
4 about to take, you'll do what best you
5 feel you should do.

6 MR. HILL: Let me just say
7 that municipally-appointed bodies are
8 generally immune from personal liability
9 by virtue of the Tort Claims Act unless
10 they act maliciously, and it is my
11 contention that passing a patently illegal
12 law to delay a development is patently
13 malicious, and all I say is that you get a
14 legal opinion on the interim zoning so
15 that we can find out if this is a
16 deliberate device to delay this attorney's
17 application.

18 MR. GARVIN: Mr. Hill, you
19 made your point, and we've listened to
20 your statement. I don't think I nor any
21 member of this Planning Board is
22 interested in either thinly-veiled or
23 other wise remarks of that nature.

24 I would most kindly and
25 respectfully ask you not to use this as a

1 forum for those purposes. If you wish to
2 discuss those kinds of matters, you know
3 how to reach me, and I think it's totally
4 inappropriate for this Board to entertain
5 this kind of a dialogue with you.

6 MR. HILL: Well, I think
7 there is a fatal flaw, at least in the
8 interim. It's not even a question of what
9 constitutes good zoning. It's a question
10 of a statute that says that there shall be
11 no interim ordinance passed by any
12 municipality except in a dire health
13 emergency with the health expert having so
14 certified to the municipality.

15 If you are going to allege that
16 keeping Hills at five and a half units per
17 acre is going to cause a hepatitis
18 outbreak, or some such charge, we would
19 like to see that affidavit. We think that
20 someone is misguided, and we understand
21 the concern. We understand the purpose of
22 the interim ordinance to the Master Plan.

23 THE CHAIRMAN: Mr. Hill,
24 you've done this two or three times
25 already. If you look at the agenda, you

1 see we have listed 8:00 to 8:30 to discuss
2 this ordinance. If you can get your
3 testimony in and still have time at the
4 end for our work that we have to perform
5 before 8:30, that's fine with me.

6 MR. HILL: Well, I would like
7 to call Mr. Miserny.

8 MR. GARVIN: Mr. Chairman, if
9 I may, I don't know where we're going to
10 go with this. I, personally, can suggest,
11 from just Mr. Hill's remarks, that we're
12 going to be talking about apples and
13 oranges here. I think the legislation on
14 its face recites very clearly why the
15 Township Committee has proposed to pass
16 that ordinance into law. The Planning
17 Board has already some familiarity with
18 it.

19 Again, Mr. Chairman, it's up to
20 you, but I really don't think, under the
21 theory that I understand Mr. Hill to be
22 using in his protestations here tonight,
23 that we're going to be talking, if you
24 will, in the same wavelengths or the same
25 apples and oranges.

1 I think the act is very clear on
2 the surface as to what the intent,
3 purpose, and the changes are that the
4 Township Committee seeks to pass into law
5 and has asked this Board now to refer
6 back.

7 MR. HILL: Do I understand
8 that I am allowed to call witnesses, or am
9 I not allowed to call witnesses?

10 THE CHAIRMAN: Well, as I
11 said before, I don't believe this was a
12 forum for witnesses.

13 MR. HILL: Well, you are the
14 Chairman.

15 THE CHAIRMAN: I don't
16 believe the members will pay much
17 attention to what the witnesses have to
18 say.

19 MR. HILL: Well, that is very
20 candid of you to say, Mr. Chairman. That
21 is - - -

22 THE CHAIRMAN: Because I
23 believe your forum is in front of the
24 Township Committee right now. Now, if you
25 present your case to them, and they feel

1 strongly enough, they will refer it back
2 to us for our consideration.

3 MR. HILL: What I'm trying to
4 suggest is that there should be master
5 planning - - -

6 THE CHAIRMAN: There is. I
7 don't know whether or not you read it.

8 MR. HILL: Has there been a
9 Master Plan amendment?

10 THE CHAIRMAN: Not yet.

11 MR. HILL: When is the
12 hearing on the Master Plan amendment?

13 THE CHAIRMAN: When our
14 client finishes investigating it.

15 MR. HILL: Are you going to
16 allow us to be heard at that hearing?

17 MR. GARVIN: Mr. Hill,
18 certainly. Mr. Hill, I need not recite
19 for you what I am sure you know to be the
20 appropriate procedural mechanisms for
21 either the evolution of an ordinance into
22 law or the amendments to the Township's
23 Master Plan.

24 I think the Chairman has said
25 several times that we are not equipped,

1 given the work schedule that this Board is
2 facing right now, given the scheme of
3 events that that ordinance is at, to
4 conduct a public hearing on this. It's
5 not required, it's not provided for, and I
6 think it's fair to say that you are not
7 being foreclosed at all from presenting
8 what you wish to the appropriate body to
9 be taken into consideration.

10 This Planning Board is only one
11 body that is going to have input into the
12 enactment of this ordinance, as it must.
13 It's required by law. I appreciate that
14 we don't have to. We can let thirty-five
15 days lapse.

16 This Board does not usually do
17 that, however. The appropriate forum and
18 the mechanism that is provided for you is
19 not here, and we simply, I think the
20 Chairman is saying, choose not to do that.

21 We're happy to have let you have an
22 opportunity to make the statement that you
23 have made. I think it was an excellent
24 statement of your side's position,
25 frankly, and I think we understand it.

1 I think that if the Chairman let
2 your individuals speak, despite what he
3 may have said in the conversations with
4 you, this Board certainly would listen to
5 what your people had to say, but it's not
6 the appropriate forum for that procedure.

7 We are not going to vote this
8 ordinance into law. We are going to be
9 one body that happens to have the legal
10 requirement to have input.

11 MR. HILL: Well, I understand
12 that you haven't changed your Master Plan,
13 and your purpose here tonight is to
14 recommend a passage or not passage of an
15 ordinance which, obviously, doesn't comply
16 with your Master Plan.

17 I understand, further, that you are
18 to recommend passage or not passage to the
19 government body, pursuant to law, of a law
20 which patently violates the Land Use Law
21 to the interim, and I'm stating that we
22 would like to help you guide the governing
23 body.

24 You did adopt the Master Plan. The
25 Master Plan was, the last I heard, the

1 underpinning to the zoning ordinance, and
2 we think that most of the arguments that
3 we have to make against the substantive
4 zoning changes are Master Planning
5 matters, and we would like to appear
6 before the appropriate body, which has to
7 be the Planning Board, to explain, or else
8 we are being brought to the governing body
9 on the 25th, and they will say, "You
10 should have told the Planning Board this."

11 We don't hear planners. We don't
12 want people to explain why the zoning is
13 inappropriate. All I am saying is, there
14 is a process. If it's passed, it's going
15 to be before somebody, and I either want
16 to be able to put on the record, or I want
17 it on this record clearly, that you
18 refused to listen, and let that other
19 forum be the judge as to whether you
20 behaved arbitrarily and capriciously and
21 whether you treated us the way a protester
22 is entitled to be treated.

23 THE CHAIRMAN: Before you
24 started, I said that the Ordinance 764, I
25 want to put it on at 8 o'clock and have it

1 over at 8:30. You've used up fifteen
2 minutes. If you would like to spend ten
3 minutes and have your experts make a
4 statement, fine.

5 MR. HILL: Yes.

6 THE CHAIRMAN: By twenty-five
7 minutes after eight, I'm going to wrap the
8 gavel, and anybody that has any questions,
9 they can ask them. If they don't, I'm
10 going to cut it off.

11 MR. HILL: Ray Ferrara, can
12 you come up here? Do you want Mr. Ferrara
13 sworn? What is your wish?

14 THE CHAIRMAN: This is not a
15 court.

16 MR. HILL: Mr. Ferrara, did
17 you prepare an environmental impact
18 statement which included, among other
19 things, the development of the 500-acre
20 zone, five and a half units, in Bernards?

21 THE CHAIRMAN: Is this the
22 same environmental statement that was
23 before us before?

24 MR. HILL: We already sent
25 that. I'd appreciate it if I could make a

1 record because the people that are going
2 to read the record may not understand what
3 I'm saying.

4 You know, it's at certain times
5 that you are playing for the person that
6 reads the record and not to the Board.

7 MR. LIND: Is that the only
8 reason for the next ten minutes?

9 MR. HILL: I think I'm
10 entitled to make a record.

11 THE CHAIRMAN: I wish you
12 would put it in writing and give it to us,
13 and we'll be able to put it in the record.

14 MR. HILL: Mr. Ferrara, did
15 you prepare an E.I.S. on this property?

16 MR. FERRARA: Yes, I did.

17 MR. HILL: Did you come to a
18 conclusion as to whether it could be
19 developed for 2,750 units with or without
20 adverse effects?

21 MR. FERRARA: Yes, I did.

22 MR. HILL: What was your
23 conclusion?

24 MR. FERRARA: The conclusion
25 is that there is no unique environmental

1 impact to this particular development
2 proposal.

3 MR. HILL: Do you have a
4 summary of the E.I.S.?

5 MR. FERRARA: The E.I.S.
6 includes a summary. I also have prepared
7 a brief three-page summary of the
8 conclusions of that summary.

9 MR. HILL: I ask the Board to
10 allow the E.I.S. prepared by Ray Ferrara
11 as part of the concept plan application of
12 Hills Development for 2,750 units
13 illegally denied by this Board on January
14 7, 1985 without a public hearing and after
15 refusal by this Board to allow Hills to
16 present testimony.

17 I'd also like to present this
18 summary of the E.I.S. Mr. Garvin, will
19 you accept this summary?

20 MR. GARVIN: I don't know.
21 Mr. Chairman?

22 THE CHAIRMAN: We asked you
23 to put everything in writing. Is this the
24 same thing?

25 MR. HILL: This is the

1 summary of the E.I.S.

2 THE CHAIRMAN: Is that what
3 the doctor said?

4 MR. FERRARA: Yes. That's a
5 summary statement of the conclusions drawn
6 upon in this environmental study.

7 THE CHAIRMAN: Now that
8 you've stated it for the record, is there
9 any reason for giving us the writing? You
10 are just wasting time if he states it, and
11 then you give it to us in a writing.

12 MR. HILL: We're only wasting
13 time if we proceed with the assumption
14 that it is a foregone conclusion.

15 If what we're doing is arguing as
16 to why something is before the Board for
17 its consideration, why should we be
18 presenting reasons why it should be
19 denied, then we're hopefully serving this
20 Board by supplying the Board with that
21 information.

22 I don't understand what the
23 Chairman says when in a deliberative
24 process he says, "You are wasting time,"
25 when you are listening to reasons why this

1 particular ordinance amendment is not
2 appropriate.

3 THE CHAIRMAN: What you have
4 in your hands, is that the statement you
5 want to make or the one that the doctor
6 has given us?

7 MR. HILL: I'm simply trying
8 to amplify the doctor's statements. I'm
9 trying to do what you said you wanted,
10 which was eight minutes of testimony and
11 no more than eight minutes

12 THE CHAIRMAN: You are trying
13 to do both.

14 MR. HILL: Why don't you read
15 the statement?

16 THE CHAIRMAN: He's already
17 given the statement.

18 MR. KERWIN: Would you like
19 this submitted now, Mr. Chairman?

20 THE CHAIRMAN: I'd like to
21 see it in writing. This is what's in the
22 paper, and - - -

23 (Whereupon, the E.I.S. is
24 submitted to the Board.)

25 MR. HILL: Would the Planning

1 Board also review the E.I.S.? Mr.
2 Moskowitz, I gave you a document. What's
3 the title of the document, for the record,
4 and I'll give one to the Board?

5 MR. MOSKOWITZ:

6 "Environmental Impact for the Hills
7 Development Company, Bernards Township."

8 MR. HILL: And I'd like to
9 give the Court Reporter a copy of that to
10 attach to the record of this meeting so
11 that we can show what information we've
12 given to the Planning Board.

13 MR. MOSKOWITZ: Can I ask Dr.
14 Ferrara a question?

15 Dr. Ferrara, you indicated there
16 would be no significant environmental
17 impact based on a development of
18 five-point-five dwelling units per acre.

19 MR. FERRARA: That's correct.

20 MR. MOSKOWITZ: Could one
21 logically assume that if the site were
22 developed in three dwelling units per acre
23 that there would be less of an
24 environmental impact than five-point-five
25 dwelling units per acre?

1 MR. FERRARA: I have not
2 conducted that analysis, and I would not
3 logically assume that without conducting
4 such an analysis.

5 MR. NOSKOWITZ: You say the
6 air quality impact, as a result, is
7 primarily related to automobile emissions.

8 If there are less dwelling units,
9 one would assume that there would be less
10 vehicle trips. Could one logically say
11 there would be less detriment to the air
12 quality from a lower density than from a
13 higher density?

14 MR. FERRARA: I'm not the
15 person to answer that question because, if
16 you read in my statement, or in my E.I.A.,
17 you'll note that the environmental impact
18 due to automobile emissions have been
19 evaluated by a separate expert for the
20 Hills Development Company.

21 MR. NOSKOWITZ: All I'm
22 commenting on is that the statement went
23 in under your name so, consequently, I
24 would understand by that - -

25 MR. FERRARA: There is no

1 name there that I've done any analysis
2 regarding automobile emissions.

3 MR. MOSKOWITZ: Would you
4 make the statement that development at
5 three units per acre would have less, the
6 same, or more environmental impact than a
7 development of five-point-five units per
8 acre?

9 You are not in a position to say
10 that less than intensive development on a
11 given parcel of land will give less
12 environmental impact, the same, or more?

13 MR. FERRARA: I'm not ready
14 to make that statement. I have not done
15 that comparison.

16 MR. MOSKOWITZ: Thank you.

17 MR. HILL: I'd like to call
18 Ken Mizerney.

19 THE CHAIRMAN: Time is
20 running out.

21 MR. HILL: I hope when my
22 time is up, I hope you'll abruptly tell me
23 that I can't present any more testimony.

24 Mr. Mizerney, have you
25 conducted an analysis of the proposed

1 ordinance?

2 MR. MISERNY: Yes, I have.

3 MR. HILL: Can you tell the
4 Board briefly what your conclusion with
5 respect to the ordinance is?

6 MR. MISERNY: Basically, what
7 we did is, we looked at the ordinance from
8 the points of view of land use
9 compatability, accessibility, sewer and
10 water service, and environmental
11 suitability, and our findings are that we
12 can find no substantial reason why the
13 property should be down-zoned from
14 five-point-five to three-point-o units per
15 acre on the basis of those items which
16 I've just enumerated.

17 MR. HILL: Did you compare
18 the zoning with that of Bedminster?

19 MR. MISERNY: Yes, we did.

20 MR. HILL: What is the zoning
21 in Bedminster?

22 MR. MISERNY: Our finding is
23 that the down-zoning would create an
24 incompatible condition with the eight
25 units per acre which are in the adjacent

1 district in Bedminster Township.

2 MR. HILL: Does the Land Use
3 Law say anything about compatability with
4 neighboring zones?

5 MR. NISERNY: One of the
6 purposes of the Municipal Land Use Law is
7 that when a municipality is zoned, you
8 should take into account neighboring
9 municipalities and try to come up with a
10 zoning scheme which is compatible with
11 neighboring municipalities.

12 MR. HILL: What other
13 conclusions did you reach?

14 MR. NISERNY: Well, we've
15 prepared a report, and there's a summary
16 of conclusions and facts in the opening of
17 that report.

18 Basically, we've concluded that
19 there are no substantial environmental
20 restrictions which would warrant a
21 substantial reduction in density; that, in
22 fact, the area has excellent accessibility
23 to the surrounding road network and the
24 regional interstate highway system.

25 And, in fact, the accessibility

1 today, because of the current activity
2 that's been ongoing on the Hills, the
3 improvement of the Schley Mountain Road,
4 is better than it was when the property
5 was zoned PRO-4 in November of 1984.

6 So that, in fact, there is less
7 reason, as far as a traffic and
8 circulation accessibility viewpoint
9 exists, to down-zone the property today
10 than would be when the ordinance was
11 originally enacted permitting
12 five-point-five to the acre; that adequate
13 sewer and water capacity are available to
14 the property at five-point-five units per
15 acre, so that there's no substantial
16 reason to down-zone the property from a
17 utility standpoint.

18 It's my firm's feeling that to
19 down-zone the property on the basis of its
20 physical characteristics would be
21 arbitrary and capricious.

22 MR. HILL: Do you have a
23 report substantiating what you just said?

24 MR. WISERNY: Yes, I do.

25 MR. HILL: I put into the

1 record the Planning Evaluation of
2 Ordinance 764 Bernards Township, New
3 Jersey, prepared for Hills Development
4 Company, March 17, 1986, by Sullivan
5 Arfas.

6 I ask you to include a copy in the
7 record of that. Thank you, Mr. Miserny.

8 (Whereupon, a Planning Evaluation
9 is submitted to the Board.)

10 MR. MOSKOWITZ: May I ask a
11 question?

12 Mr. Miserny, have you done a plan
13 showing development of the site at three
14 dwelling units per acre?

15 MR. MISERNY: Have we done a
16 plan?

17 MR. MOSKOWITZ: In other
18 words, you came to a conclusion that, on
19 the face of it, a zone which shows three
20 dwelling units per acre and one adjacent
21 to eight units per acre is basically
22 incompatable. I think that - - -

23 MR. MISERNY: That's correct,
24 and I did not do a plan.

25 MR. MOSKOWITZ: Do you think

1 it would be possible to design a plan, for
2 example, which might provide a buffer
3 between 3-D per acre and 8-D per acre to
4 mitigate any basic incompatibility?

5 MR. NIZERNY: Well, I think
6 that defeats the whole purpose of the
7 planned unit of a plan unit development.

8 In fact, I would go to the 1982
9 Bernards Master Plan in which two relevant
10 items were stated. (Indicating.) One was
11 that this whole highlands area, and I am
12 referring to this map here, this whole
13 highlands area is really a physical
14 entity, and that includes both the R-8 in
15 Bedminster and the R-8, PRD-4 in Bernards
16 Township, and that they should be
17 developed in a unified fashion.

18 When I hear of a buffer to be used
19 to separate them, it sort of is like a
20 band aid approach to compatibility. I
21 don't think at all it's an appropriate
22 mechanism to substantiate that the two
23 zones could be made compatible.

24 MR. MOSKOWITZ: I have a
25 question then. Based on three dwelling

1 units per acre, would it not be possible
2 to develop the area adjacent to the eight
3 dwelling units per acre at a higher net
4 density to match off and be compatible
5 with the eight dwelling units in
6 Bedminster?

7 While the overall density gross is
8 3-D per acre, is it possible to develop
9 parcels immediately adjacent at a higher
10 net density to be compatible with the
11 Bedminster eight dwelling unit density?

12 MR. WIZERNY: I think it's
13 possible to develop a net density which is
14 higher, but I don't really think that's
15 the issue.

16 I think the issue is whether or not
17 the five and a half is, in fact,
18 compatible as opposed to the three and a
19 half. I think it is. I think the five
20 and a half is more compatible than the
21 three units per acre.

22 MR. NOSKOWITZ: May I ask
23 another question? On the map that you
24 were referring to that Mr. Hill referred
25 to before, there is a series of

1 single-family homes located in the
2 northerly portion immediately adjacent to
3 the eight dwelling units per acre in
4 Bedminster. What sized lots are those
5 larger single-family units immediately
6 adjacent thereto?

7 MR. NIZERNY: Those lots are
8 approximately 12,000 square feet. These
9 lots are in the range of 7,500.

10 MR. MOSKOWITZ: The 12,000
11 square feet is approximately what density?

12 MR. NIZERNY: It's about
13 three to the acre.

14 MR. MOSKOWITZ: Thank you.

15 THE CHAIRMAN: Mr. Hill, we
16 have to act on the ordinance.

17 MR. HILL: I have one more
18 witness.

19 THE CHAIRMAN: But the time
20 is up now. If he has a written statement,
21 please submit that.

22 MR. HILL: He doesn't have a
23 written statement. He would like to state
24 for the record that Hills has built and
25 designed roads considerably in excess of

1 the width capacity, considerably in excess
2 of the proposed zoning, and in reliance
3 under the ordinance on the five and a half
4 units per acre, and he'd like to talk
5 about traffic.

6 Mr. Moskowitz is very interested
7 here, and he is your consultant on that,
8 so it will be Mr. Moskowitz's last chance
9 to learn about air quality.

10 Mr. Thompson, could I ask you
11 if you are in charge of the designing in
12 the north region?

13 MR. THOMPSON: That's right.

14 MR. HILL: Did you design
15 Schley Mountain Road?

16 MR. THOMPSON: Yes, we did.

17 MR. HILL: And did you design
18 it with the thought in mind that there
19 were 2,750 units in the Raritan Basin?

20 MR. THOMPSON: Yes.

21 MR. HILL: Under 928 units in
22 Bedminster here?

23 MR. THOMPSON: Yes, sir.

24 MR. HILL: Was it sized for
25 that purpose?

1 MR. THOMPSON: It certainly
2 was, yes.

3 MR. HILL: Had you known that
4 Bernards was misleading Hills, and they
5 didn't intend to keep, in effect, the
6 ordinance that allowed 2,750 units and
7 were going to down-zone the property to
8 1,500 units, would you have designed a
9 road like that for Schley Mountain?

10 MR. THOMPSON: No, we would
11 not.

12 MR. HILL: What would you
13 have designed instead?

14 MR. THOMPSON: We took a look
15 at their reduction in the figures, and we
16 believe that, for example, in Schley
17 Mountain Road, with four lanes proposed,
18 it could have been reduced to two and
19 could have functioned with two lanes.

20 MR. HILL: Would there have
21 been grades separating in each direction?

22 MR. THOMPSON: They wouldn't
23 have been bifurcated, and they wouldn't
24 have been on the same alignment that they
25 are now.

1 MR. HILL: Can you estimate
2 how much money Hills has wasted in road
3 construction and contracts to date if the
4 development they are only going to have is
5 for 1,500 units in the Raritan Basin?

6 MR. THOMPSON: Just with
7 respect to the roadway?

8 MR. HILL: Just with respect
9 to the roadway.

10 MR. THOMPSON: Just with
11 respect to the roadway work, I believe
12 it's a bill of about \$675,000.00.

13 MR. HILL: So it's your
14 testimony that the roads are \$675,000.00
15 over-designed and over-built today for the
16 capacity that Bernards is proposing today.

17 Is that right?

18 MR. THOMPSON: That's
19 correct, yes.

20 MR. HILL: Did you do the air
21 quality study, too?

22 MR. THOMPSON: Yes, we did.

23 MR. HILL: Did you come to
24 the conclusion that, with the 2,750 units,
25 the air quality impact would be

1 insubstantial?

2 MR. THOMPSON: That's right.

3 MR. HILL: Is it your
4 testimony that the roads can handle the
5 traffic to be generated by 2,750 units?

6 MR. THOMPSON: Yes. We made
7 certain recommendations for improvements,
8 and as long as those recommendations were
9 followed.

10 MR. HILL: They include some
11 of the recommendations that you've already
12 gone into with Schley Mountain Road.

13 THE CHAIRMAN: Henry, I think
14 you made all the points. We have some
15 work to do.

16 MR. HILL: I thank you.
17 Again, if we had further notice, we would
18 have had experts to testify, such as Alan
19 Mallach, on what we consider to be a very
20 high mandatory set aside, a court order.
21 The prior court order gave us a thousand
22 units without any mandatory set aside.

23 THE CHAIRMAN: At this
24 point - - -

25 MR. HILL: We're looking at

1 fifty percent set aside and very low
2 density.

3 THE CHAIRMAN: - - - I would
4 like to hear reasons for or against
5 approving this and sending it back to the
6 Township Committee.

7 Would anyone like to venture?

8 MR. LIND: Harry, before we
9 comment specifically on that, I would just
10 like to assure Mr. Hill for the record,
11 since the record is still going, that
12 we've listened to your comments and to the
13 comments of his witnesses with great care
14 tonight, and I think we evaluated both the
15 content and the intent of all of your
16 comments.

17 We've also observed Hills
18 Development in the town, and I think the
19 members of this Board are far better
20 informed than your comments imply.

21 THE CHAIRMAN: I think we are
22 a little more sensitive to the people.

23 MR. HILL: I would like to
24 continue the record until you finish this
25 item. Have you recommended this?

1 THE CHAIRMAN: I'm asking for
2 a motion to approve this or send it back
3 to the Township Committee for final
4 approval.

5 MR. LIND: Are there any
6 comments on it?

7 THE CHAIRMAN: Do you have
8 anything, Mr. Moskowitz?

9 MR. MOSKOWITS: I think, Mr.
10 Chairman, just very briefly, the ordinance
11 before the Board tonight for which would
12 be referred to by the Township Committee
13 is Ordinance No. 764.

14 It carefully spells out - - the
15 preamble to Ordinance 764 carefully spells
16 out the reasons why the Township Committee
17 is considering the amendment to the
18 ordinance, and basically the original
19 Ordinance 704 was adopted pursuant to the
20 criteria that we had known and assumptions
21 prior to the affordable - - the Fair
22 Housing Act and the establishment of the
23 Affordable Housing Council.

24 The Township moved to expeditiously
25 implement the Mount Laurel obligation

1 through the reasoning by changing the
2 ordinance, by establishing a minimum
3 number of lower and moderate income units,
4 and by granting density bonuses to assure
5 the construction of those numbers of
6 units.

7 In the interim, the State of New
8 Jersey, through its legislation, has
9 adopted the Fair Housing Act which, in
10 fact, turns over many of the assumptions,
11 reverses, or changes many of the
12 assumptions upon which the previous
13 Ordinance 704 was based.

14 We have reviewed that act and have,
15 again, made certain assumptions with
16 respect to the Township's fair share
17 obligation. I might add that we had
18 available to us, among others, the records
19 by Alan Mallach, which was substantially
20 in conformation, or his conclusions were
21 substantially in conformation, with my
22 conclusions in terms of the Township's
23 fair share numbers.

24 The Fair Housing - - the Affordable
25 Housing Council will, in fact, prepare

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affordable housing figures for each municipality. They expect to have theirs mandated by law and to have that available by August.

It's my understanding that they hope to beat that deadline, not by very much, but by August of this year we should know what Bernards Township's fair share number would be, and then we would have an opportunity, since our case has been transferred to the Affordable Housing Council, to indicate where credits should be taken and what mitigating circumstances may exist in the community which might effect our ability to achieve that fair share number, whatever that number might be.

I think it's prudent on the part of the municipality to take steps to assure that we don't increase development, intensity development, and over-build our lower-moderate income housing.

I think the Mount Laurel case talked about a municipality not having to build more than its fair share. And what

1 we're talking about is a state-mandated
2 group, the Affordable Housing Council
3 coming down with guidelines, indeed,
4 coming down with specific numbers, and I
5 think it is most prudent for the community
6 to assure that they are meeting those
7 guidelines and which will be reported to
8 it, and that's the basic reason why the
9 proposed amendment is being considered by
10 the Township Committee.

11 It makes good planning sense. It's
12 logical. It does not, in fact, delay the
13 construction of lower-moderate income
14 housing. They are being constructed now
15 as part of developments which are in the
16 zone.

17 THE CHAIRMAN: And plan.

18 MR. NOSKOWITZ: Correct. It
19 does not deny the applicant to use his
20 property. It is not a moratorium
21 building. It's three units per acre for
22 1,500 units.

23 I think he can move ahead with the
24 planning as set forth in the ordinance.
25 For that reason, our recommendation to the

1 Planning Board is that they recommend
2 favorably to the Township Committee the
3 adoption of Ordinance 764.

4 THE CHAIRMAN: And you are
5 working on a revision of the Master Plan.
6 At that time, Mr. Hill, you will have the
7 opportunity to take as much time as you
8 wish to.

9 MR. NOSKOWITZ: The Municipal
10 Land Use Law talks about consistency
11 between the land use plan and the zoning
12 plan. It does not say that the land use
13 plan and the zoning plan can't differ. In
14 fact, it can differ.

15 If it does differ, the vote on the
16 Township Committee has to be significantly
17 higher than a normal majority. It has to
18 be accompanied by a written statement as
19 to why it differs.

20 I think there are good reasons why
21 at this point it differs, and there is
22 nothing, at least from a planning
23 perspective, wrong with that difference.
24 I think that has to be made clear.

25 THE CHAIRMAN: I'm just

1 telling Mr. Hill that he will have the
2 chance not only on the 25th of March at
3 the Township Committee public hearing on
4 the ordinance, but also at the Master Plan
5 hearing.

6 MR. HILL: When will that be?

7 THE CHAIRMAN: I don't know
8 yet.

9 MR. HILL: Is that going to
10 be before the passage of the ordinance?

11 THE CHAIRMAN: It will
12 probably be after the 25th with the work
13 we have in front of us.

14 MR. HILL: I thank you.

15 THE CHAIRMAN: Are there any
16 more comments? I would still entertain a
17 motion to do with 764 as we wish.

18 MR. KISLEN: It certainly
19 seems to me to make sense for a township
20 to adopt ordinances that are consistent
21 with what appears to be the prevailing
22 law. And in a perception of the
23 prevailing law, I guess our old ordinance
24 presumably did that.

25 This is a new ordinance that's made

1 in light of changed conditions, and again
2 it appears appropriate, and I suggest that
3 I move that we do adopt it.

4 THE CHAIRMAN: It's been
5 moved.

6 MR. LIND: I second that.

7 THE CHAIRMAN: Are there any
8 other adverse comments or any comments at
9 all?

10 (No response.)

11 THE CHAIRMAN: Roll call.

12 THE SECRETARY: Mr. Farrell?

13 MR. FARRELL: Yes

14 THE SECRETARY: Mr. Kienlen?

15 MR. KIENLEN: Yes

16 THE SECRETARY: Mr. Dagget?

17 MR. DAGGET: Yes.

18 THE SECRETARY: Mr. Lind?

19 MR. LIND: Yes

20 THE SECRETARY: Mrs. Harris?

21 MS. HARRIS: Yes.

22 THE SECRETARY: Mr. Dunham?

23 MR. DUNHAM: Yes.

24 (Whereupon, this portion of the
25 proceedings are concluded.)

C E R T I F I C A T E

I, SEVA FLICSTEIN, a Certified Shorthand Reporter and Notary Public of the State Of New Jersey, certify that the foregoing is a true and accurate transcript of my stenographic notes in the above-entitled matter at the time and place aforesaid.


SEVA FLICSTEIN, C.S.R.