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Motion on Remand from the Supreme Court

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March 24, 1986

FILE NO. 3000-0C

RULS - AD - 1986 - 130

RECEIVED
MAR 2 1986
JUDGE SERPENTELLI'S CHAMBERS

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

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

Dear Judge Serpentelli:

On behalf of The Hills Development Company, I enclose a notice of motion, brief, affidavits and appendix. This motion is filed pursuant to the authority granted by the Supreme Court in its Order of February 20, 1986. The notice of motion calls for a return date to be set by this Court.

Also enclosed is a reduced set of conceptual plans drafted by consultants for The Hills Development Company in connection with its conceptual approval application. Those plans are submitted for the primary purpose of illustrating the integration of The Hills' Bernards and Bedminster Township properties and the road network designed and partially constructed in connection therewith. As Defendants are already in possession of these plans, the reduced version of the plans enclosed herewith is not supplied to them.

As the Court is aware, Hills asserts that the Defendant Township Committee voted, in the presence of the Court-appointed Master, to approve the settlement agreement reached by the parties. Therefore, Hills may wish to submit an affidavit from the Master, George Raymond, if such an arrangement is acceptable to the Court. The parties are presently awaiting correspondence from Mr. Raymond with respect to this issue.

Hills also intends to supply the Court with an affidavit from Raymond Ferrara, Ph.D. in connection with environmental considerations. While it was

not possible to have such an affidavit drafted in time to enclose herewith, Hills requests permission to file same no later than Friday, March 28, 1986.

Thank you for your kind attention in this matter.

Respectfully submitted,

Thomas F. Carroll

TFC:klp

cc: James E. Davidson, Esq. (Federal Express)
Arthur H. Garvin, III, Esq. (Federal Express)

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

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

TO: James E. Davidson, Esq.
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Arthur H. Garvin, III, Esq.
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9 DeForest Avenue
Summit, NJ 07901

PLEASE TAKE NOTICE that the undersigned attorneys for Plaintiff in the above-captioned matter will move before the Honorable Eugene D. Serpentelli of the Superior Court of New Jersey, Law Division, Somerset/Ocean County, at the Ocean

County Court House, Toms River, New Jersey on a date to be set by the Court for an Order;

1. Enforcing the parties' settlement agreement;
2. Declaring that Defendants are equitably estopped from applying Ordinance 746 to Plaintiff;
3. Declaring Ordinance 746 to be in violation of N.J.S.A. 40:55D-90 and, thus, an invalid ordinance amendment;
4. Declaring Ordinance 746 to be arbitrary, capricious, unreasonable and otherwise unlawful;
5. Directing that Defendant Planning Board's arbitrary denial of Plaintiff's conceptual approval application be reversed and the application be approved. In the alternative, Plaintiff moves for an Order directing that the Planning Board consider the development application in accordance with law.

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

Oral argument is requested.

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

By: _____
Thomas F. Carroll

Dated: March 24, 1986

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

BRIEF OF PLAINTIFF, THE HILLS DEVELOPMENT COMPANY
ON REMAND FROM THE SUPREME COURT OF NEW JERSEY

BRENER, WALLACK & HILL
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Attorneys for Plaintiff

On the Brief:

Henry A. Hill, Esquire
Thomas F. Carroll, Esquire

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STATEMENT OF FACTS

The facts of this matter have been comprehensively addressed in numerous, recent submissions to this Court. Therefore, Plaintiff, The Hills Development Company ("Hills"), will attempt to confine its recitation of the facts of this matter to those directly pertaining to the remand directed by the Supreme Court.

Hills filed an exclusionary zoning complaint against the Defendant Township of Bernards ("Bernards") on May 8, 1984.* Thereafter, the process of discovery commenced and a motion and cross-motion for summary judgment were heard by this Court in June of 1984. If Bernards truly doubted the constitutional invalidity of its then-extant ordinance prior to the return date of said motions, such doubt was surely removed during the course of oral argument. (Exhibit A). Shortly thereafter (August, 1984), representatives of Bernards contacted representatives of Hills and offered to settle this litigation. (Affidavit of John H. Kerwin, submitted herewith).

The Hills complaint had sought a rezoning of both the Passaic Basin and Raritan Basin portions of the Hills tract. The rezoning sought in the complaint would have resulted in a 7,500 unit development of which 20% of the units would be affordable to low and moderate income households. The rezoning offered by Bernards in its efforts to settle this matter was limited to the Raritan Basin portion of Hills' property and the gross density offered on that portion of the tract, 5.5 dwelling units per acre, was a density slightly higher than 50% of that sought in the Hills complaint. Nevertheless, in the spirit of compromise and settlement in which the offer was

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* Hills' predecessor in title, the Allan-Deane Corporation, originally brought exclusionary zoning litigation against the Township of Bernards on March 11, 1976. Said litigation is not directly relevant to this motion.

made, representatives of Hills contacted Hills' management and advised it of the Bernards offer. Following its consideration and evaluation of the Bernards settlement proposal, the management of Hills decided that it would accept the offer and the acceptance was conveyed to Bernards on September 25, 1984 at which time Bernards was advised that Hills would be willing to settle the litigation at the density and set-aside proposed by Bernards. (Affidavit of Kerwin). Following the parties' agreement as to the terms offered by Bernards, the parties agreed to stay this litigation.

Correspondence between this Court and Bernards indicated to the Township that no immunity would be forthcoming in the absence of adoption of a compliance ordinance. (Exhibit B). Thereafter (on November 12, 1984), the Township Committee of the Township of Bernards duly adopted Ordinance 704, (Exhibit C), an ordinance which rezoned the Hills property in accordance with the terms offered by Bernards and accepted by Hills. On November 23, 1984, Township counsel wrote to this Court, advised it of the passage of Ordinance 704 and requested that an amended immunity order enclosed therewith be entered. (Exhibit D). On December 19, 1984, this Court entered the "immunity order" which noted the adoption of the ordinance providing for over 1,000 units of lower income housing, stayed this litigation, immunized Bernards from builder's remedies during the "opportunity to complete the settlement" (90 days) and appointed a Master to "assist the Court and the parties in resolving any outstanding issues where requested." Finally, the immunity order provided for an extension thereof "if further time is needed to work out this settlement." (Exhibit E). Ordinance 704, adopted on November 12, 1984, will be repealed on March 25, 1986 should the Defendant Township Committee vote in favor of said repeal.*

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* As discussed infra, the repeal is to be accomplished by way of an amendment to the ordinance, "interim" Ordinance 764. (Exhibit F).

The affordable housing ordinance which resulted from Bernards' settlement proposal, Ordinance 704, set forth the essential parameters of the parties' agreement to settle. Pursuant to Ordinance 704, the Raritan Basin portion of Hills' tract was rezoned so as to permit an inclusionary development containing 550 units of lower income housing. The ordinance also specified permissible use regulations, minimum tract size dimensions, minimum tract setbacks, distance between buildings provisions, off-street parking requirements, minimum dwelling unit floor area provisions, provisions governing conditions upon resale, phasing requirements, fee waivers for all inclusionary developments (except Hills), open space requirements, and engineering and construction design provisions. (See Exhibit C).

While Ordinance 704 accurately depicted the parties' agreement to settle upon the essential issues raised in the litigation, the ordinance was not drafted with the input of Hills and certain relatively minor differences remained outstanding. Some of these differences related to deficiencies in the ordinance itself while others were only indirectly related to this litigation. [Thus, it was agreed that the parties would negotiate those remaining issues to agreement.] Indeed, representatives of the parties and the Court-appointed Master met on numerous occasions and resolved the outstanding issues. Items which were negotiated and the resolution thereof is described below:

a. (1) Amendment of a number of ambiguous, unnecessary and cost-generative standards remained in the Township's land use ordinances notwithstanding the passage of Ordinance 704; and (2) modification of certain design standards which would enable construction of a more attractive and more feasible development which would contain housing product types similar to those in Hills' inclusionary development on adjacent land in the Township of Bedminster.

In addition, Ordinance 704 provided for fee waivers for lower income units in some inclusionary developments but not for Hills. Hills sought ordinance provisions which would allow for fee waivers for Hills' lower income housing units as well.

Resolution: Technical ordinance issues were quickly resolved. The Township's planner, Harvey Moskowitz, Hills' planner, Kenneth Mizerny, and the Township Engineer met and ironed out ordinance

language which was agreed upon early in the negotiations. Affidavit of Kenneth J. Mizerny. (see also Exhibit G; May 21, 1985 memorandum of Harvey Moskowitz outlining ordinance changes).

Bernards also agreed to waive fees for Hills' lower income units. (See Exhibit H, ¶ 14).

b. Addition of land use application provisions which would allow for cost-reducing accelerated time frames for planning board review of applications for inclusionary developments (i.e., a "fast-track" provision).

Resolution: Bernards apparently agreed to a "fast-track" procedure recommended by the Court-appointed Master and as reflected in the Stipulation of Settlement. (Affidavit of Kerwin) (Exhibit H, ¶ 1.3)

c. Bernards' off-tract improvements ordinance, ultimately found to be illegal in separate litigation, was considered by Hills to be excessive and a financial proposal to fund off-tract improvements directly attributable to Hills was negotiated.

Resolution: The parties' agreed that Hills would contribute $3,240,000 for off-tract improvements. (Exhibit H, ¶ 10) (Exhibit I, ¶ 12).

d. As indicated above, the zoning of the Hills property located in the Passaic Basin was not changed by virtue of Ordinance 704. In order to avoid future litigation over the issue, it was agreed that the parties would seek alternative ways of sewering the Passaic Basin property for development at its as-of-right density (one dwelling unit per two acres).

Resolution: The parties agreed that the Environmental Disposal Corporation would provide sewerage treatment capacity for the tract. (Exhibit H, ¶ 6; Exhibit I, ¶ 8).

During the course of the negotiations the immunity order was extended twice by this Court. Upon granting the second extension, this Court noted that Bernards had been given 90 days to submit a compliance package, that some five months had since elapsed and that a one month extension would be granted "with the express understanding that no further extension will be granted." (Exhibit K). The parties' negotiations were indeed successful and, as of June 5, 1985, all remaining outstanding issues were resolved to the satisfaction of the parties. (Affidavits of Thomas J. Hall, John H. Kerwin). This agreement is reflected in the May 31, 1985 Stipulation of Settlement which resulted from the parties' agreement. (Exhibit H).

Hills intends to prove that the Defendant Township Committee met (in the presence of the court-appointed Master) and voted by roll call to approve each and every item resolved in the settlement and reflected in the May 31, 1985 Stipulation of Settlement. Indeed, on June 12, 1985, counsel for Bernards wrote to this Court, requested a third extension of immunity and advised the Court:

> The parties in the above-mentioned matter have arrived at an agreement to settle and conclude the above matter. Additionally, the Township has been working with George Raymond on all aspects of the Township's compliance package and we believe we have reached an understanding which is satisfactory to Mr. Raymond and the municipality. I am in the process of drafting a proposed order and judgment which will be satisfactory to the parties and the Court. The drafting of the proposed judgment has proved difficult. It is my understanding that this process, including the drafting of the judgment, has delayed the filing of George Raymond's report, although Mr. Raymond has indicated to me that he expects to have his report filed by the end of this week.
>
> I respectfully request that the Court schedule a hearing date to review the proposed settlement and compliance package in order to dispose of the action and bring the matter to a conclusion. I would expect to submit all reports and documentation necessary for the Court's review well in advance of the hearing date. I would also respectfully request that the Order dated April 29, 1985 which was supplemented by the Court's Order dated May 13, 1985 be extended until such hearing date and until the matter is finally disposed of by the Court. Both my adversary and Mr. Raymond have indicated to me that they concur with this request. (Exhibit L). (emphasis added).

As indicated in the above-referenced correspondence of counsel for Bernards, all issues were resolved as of June 12, 1985. The above-referenced correspondence also referred to the drafting of the proposed judgment. The original Stipulation of Settlement was drafted by counsel for Hills. As negotiations progressed, the Stipulation of Settlement was revised. Ultimately all issues were resolved and the resulting agreement was reflected in the May 31, 1985 Stipulation of Settlement. At the parties' June 5, 1985 meeting at which it was agreed that all issues were resolved as per the May 31, 1985 Stipulation of Settlement, counsel for Bernards indicated that he wished to redraft the settlement documents to be

presented to the Township Committee. Counsel for Hills indicated that Hills was not concerned with who drafted the final documents so long as the issues were resolved. (Affidavit of Hall).

As per the parties' agreement, the Stipulation of Settlement drafted by Hills was recast by Township counsel and entitled "Memorandum of Agreement". (Exhibit I). A proposed form of Order of Judgment (Exhibit M) was also drafted by Township counsel. Since the parties' agreement was now in different language, drafting issues arose. The Memorandum of Agreement and proposed form of Order of Judgment were transmitted to Hills on or about July 3, 1985. Counsel for Hills thereafter reviewed the documents, suggested some minor drafting changes, and transmitted a "red-lined" version of the documents to Township counsel. (Exhibit J). (Affidavit of Thomas J. Hall, Esq.).

The parties' representatives met once again on August 7, 1985 and reviewed the "red-lined" version of the Memorandum of Agreement. At this meeting, exceedingly minor wording changes were made to the settlement documents and it was agreed that all drafting issues were once again resolved and the documents could be finalized and presented to the Township Committee for signature. However, on August 12, 1985, counsel for Hills received a telephone call from counsel for Bernards wherein it was indicated that the Township Committee refused to sign the settlement documents concerning the agreement as negotiated. Bernards' counsel further advised that the Committee intended to explore its options pursuant to the Fair Housing Act. Bernards' counsel indicated he was instructed to seek a lower number of units to be built by Hills. Implicit in the conversation was the notion that, should Hills refuse to accept a "new offer", Bernards would file a motion seeking transfer to the Council on Affordable Housing as per Section 16 of the Fair Housing Act. On September 13, 1985, Hills was served with Defendant-Bernards Township's motion to transfer to the Council on Affordable Housing.

By way of order dated October 16, 1985, this Court denied Bernards' motion to transfer this matter to the Council on Affordable Housing. Thereafter, this Court scheduled a compliance hearing in this matter for November 18, 1985. This Court denied a Township motion to stay said compliance hearing. However, upon Bernards' motion in the Appellate Division, said compliance hearing was stayed and Bernards' leave to appeal this Court's denial of transfer was granted. Thereafter, the Supreme Court directly certified Bernards' appeal concerning the issue of transfer and, on February 20, 1986, the Supreme Court issued an opinion directing that this matter be transferred to the Council on Affordable Housing. Notwithstanding the order of transfer, however, the Supreme Court issued an order which remanded this matter and provided in part that Hills may file:

> an application to the trial court, in a form that that court deems appropriate, asserting Plaintiff's alleged development rights arising out of any alleged settlement, estoppel, or otherwise . . . . (Exhibit N).

As the issue of transfer wound its way through the courts, Bernards steadfastly declined to advise the courts as to whether it would repeal Hills' zoning if transfer were granted. This is so despite the fact that its consultant prepared a fair share report in October, 1985 which report purported to analyze the Township's fair share obligation pursuant to the Fair Housing Act. Nevertheless, on March 6, 1986, two weeks after the Supreme Court's decision to transfer, the Township introduced an ordinance to decrease the permissible density on Hills' property by almost 50% (from 5.5 du/ac. to 3.0 du/ac).* The prior zoning of the tract had been 2.0 du/ac. with no set-aside obligation. Thus, the downzoning ordinance, Ordinance 746, (Exhibit F) would permit construction of 500 units over that originally permitted as-of-right with

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* Ordinance 704 provides that Hills is obligated to make 20% of the total development affordable to lower income households. The proposed amendment reduces the set-aside obligation to 15%.

225 of those additional units, or 50%, to be affordable to lower income households. Of equal concern, Bernards has enacted Ordinance 746 as an "interim ordinance" which will expire in one year unless repealed or modified prior thereto. (Exhibit F, ¶4). This interim ordinance is in direct contravention of N.J.S.A. 40:55D-90 as recently amended. (See Point III, infra). Nevertheless, to be brutally frank, Hills fears that the decision to propose an "interim" ordinance indicates that this may not be the last downzoning on the Bernards drawing board.

As set forth below, Hills respectfully submits that, for various reasons, it has acquired the development rights to which the Supreme Court order referred and that it should be permitted to proceed with the development permitted by the ordinance which resulted from the parties' agreement to settle this matter notwithstanding the fact that transfer to the Council on Affordable Housing has been ordered. While the Council is surely now directed to ascertain the full extent of the Township's constitutional obligation to provide its fair share of lower income housing, transfer to the Council does not negate our common law nor does it excuse the deceptive, outrageous and egregious conduct which Bernards seems to assert is sanctioned by the Fair Housing Act and the order of transfer.

SUMMARY OF ARGUMENT

Agreements to settle lawsuits are enforceable notwithstanding the fact that such agreements are not reduced to writings which have been executed by the parties. As set forth in the affidavits and exhibits submitted in support of the instant application, Hills alleges that an agreement to settle each and every issue raised in this lawsuit was reached by the parties. Indeed, in June of 1985, counsel for the Township itself unequivocally advised this Court that an agreement to settle and conclude this matter had been reached. Hills further alleges herein that the Township Committee of the Township of Bernards voted to approve the agreement which had been negotiated by the parties' representatives. Hills respectfully requests herein that said agreement be enforced.

Assuming arguendo that the parties' June, 1985 settlement agreement is not enforceable, it is indisputable that the parties unequivocally agreed to settle the essential parameters of this litigation which agreement is reflected in Ordinance 704. Relevant case law governing contracts, including law specifically governing agreements to settle lawsuits, holds that parties may reach a binding agreement to settle the essentials of a lawsuit without reaching agreement on all detailed issues which the parties intend to subsequently negotiate, reach agreement upon and reduce to a writing. At the least, therefore, Hills respectfully requests herein that this Court enforce the parties' settlement as reflected in Township Ordinance 704.

Whether or not it is held that the agreement to settle this lawsuit should be enforced, Bernards should be equitably estopped from applying a repeal or amendment of Ordinance 704 to Hills. In response to a constitutional obligation, Bernards adopted Ordinance 704 in November, 1984, an ordinance adopted for the purpose of settling this litigation. Between August, 1984 and August, 1985, Bernards

consistently advised both this Court and Hills that it had no desire to litigate this matter but, rather, that it wished to settle the litigation as per the parameters set forth in Ordinance 704. Throughout the course of the parties' negotiations, Bernards never indicated that it wished to alter its course in response to any legislation. In this regard, it is worth noting that the Fair Housing Act was introduced in June, 1984, some five months before Ordinance 704 was adopted in furtherance of settlement of this lawsuit. In response to the adoption of Ordinance 704 and the Township's representations, Hills undertook a series of extremely costly pre-development activities and these activities were either encouraged by, or acquiesced in, by Bernards. Hills also refrained from filing development applications due to Bernards' expressions concerning its desire to settle with Hills as to all issues. Additionally, in an act of forebearance, Hills took Bernards at its word and agreed to cease prosecution of this lawsuit as of the time Bernards originally advised that it wished to settle this litigation.

In short, as a result of its representations, Bernards received truly extraordinary relief and Hills incurred enormous financial obligations as well as other significant and irreversible detriment. Nevertheless, despite the foregoing, Bernards takes the position that it is entitled to simply repeal the zoning applicable to Hills' property and leave Hills saddled with useless infrastructure and the enormous debt which would result if Bernards were now permitted to diametrically alter its position. Under the circumstances, Hills respectfully submits herein that principles of equitable estoppel compel a conclusion that Bernards may not now contest the development rights which accrue to Hills by virtue of the adoption of Ordinance 704, Hills' forebearance and the expenditures undertaken by Hills in reliance upon that ordinance and the good faith of the Township's representations.

Further, as mentioned above and discussed at Point III, Ordinance 746 is an "interim ordinance" which is clearly in violation of N.J.S.A. 40:55D-90 as recently amended. The amendment must therefore be invalidated.

In Point IV, infra, Hills addresses the issue of the arbitrary, capricious and unreasonable nature of the proposed downzoning of Hills' property. The Defendants have thoroughly analyzed the Raritan basin portion of Hills' property and have found that the tract can support a density of 5.5 du/ac in a manner entirely consistent with generally accepted planning and environmental concerns. The proposed downzoning is not premised upon a belief that the Defendants' prior determination was in any way flawed. Rather, Bernards is attempting to downzone Hills simply because it wants "less units." Zoning for the purpose of stifling residential development is not a lawful exercise of the zoning power. Therefore, the downzoning of Hills' property is arbitrary, capricious and unreasonable.

Lastly, addressed herein are the Township's truly elaborate machinations with respect to Section 707 of the Bernards land use ordinance and the Defendant Planning Board's clearly arbitrary denial of the "conceptual" development application Hills submitted pursuant to that section of the ordinance. Hills submits herein that, despite the Township's ill-timed assertion to the contrary, Section 707E of the Ordinance is not ultra vires and, for various reasons, the Township should not be permitted to amend Section 707E as that section applies to Hills. Due to a plethora of ordinance amendments Bernards has adopted concerning Section 707, it is not now entirely clear whether or not the original Section 707E is legally effective as to Hills. If not, Hills requests that the Township be ordered to re-adopt Section 707E as same originally read when Hills submitted its Section 707 development application. Hills also requests herein that the Defendant Planning Board's obviously arbitrary, unreasonable, capricious and otherwise unlawful denial of Hills' Section 707 application be reversed and that the application be either ordered approved or remanded to the Planning Board for further consideration in accordance with law.

ARGUMENT

POINT I

THE PARTIES' AGREEMENT TO SETTLE THIS LITIGATION IS VALID, BINDING AND SHOULD BE ENFORCED BY THE COURT.

As discussed at length in the Statement of Facts, supra, the parties to this lawsuit reached an agreement to settle the basic parameters of the litigation in September, 1984. The Bernards offer and Hills' acceptance of that offer are reflected in Ordinance 704, adopted November 12, 1984. The parameters of settlement outlined in Ordinance 704 were subsequently supplemented by virtue of the June, 1985 agreement which resulted following numerous meetings between the parties. Hills respectfully requests herein that this Court enforce the parties' settlement agreement.

"Embedded in our jurisprudence is the principle that the settlement of litigation ranks high in our public policy." Honeywell v. Bubb, 130 N.J. Super. 130, 135 (App. Div. 1974). See also Jannarone v. W. T. Co., 65 N.J. Super. 472, 476 (App. Div. 1961). "The policy of the courts of the State of New Jersey is to encourage settlements." Davidson v. Davidson, 194 N.J. Super. 547, 550 (Ch. Div. 1984). "An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of 'fraud or other compelling circumstances,' should honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. 118, 124-125 (App. Div. 1983) certif. denied 94 N.J. 600 (1983). See also, Davidson, supra, 194 N.J. Super. at 554. The wisdom and validity of settlement agreements are not to be viewed in hindsight. As stated in Pascarella, supra, "if later reflection were the test of the validity of such an agreement, few contracts of settlement would stand." Id., 190 N.J. Super. at 126. It is, of course,

well established that "municipal contracts stand on the same footing as contracts between natural persons...". North Jersey Dist. Water Sup. v. Newark, 103 N.J. Super. 542, 550 (Ch. Div. 1968). Further, it is a "fundamental principal that a municipal corporation may, generally speaking, deal with its contracts and adjust and settle claims against it in the same manner as a natural person, provided it acts lawfully and in good faith..." Edelstein v. Asbury Park, 51 N.J. Super. 368, 389-390 (App. Div. 1958).

a. The Parties' June, 1985 Agreement to Settle and Conclude this Matter Should be Enforced Notwithstanding the Fact that the Settlement Documents Drafted by the Parties Were Not Executed.

The essential facts concerning the parties' June, 1985 settlement, as detailed above, are quite straightforward. The drafting of the Stipulation of Settlement commenced in March, 1985 and was completed as of May 31, 1985. The parties agreed that all issues were resolved and that the May 31, 1985 Stipulation of Settlement accurately reflected the parties' agreement. As a result of the May 31 Stipulation, the parties' June 5 meeting and the Township Committee vote, this matter was, as the Court was advised (Exhibit L), settled.

Again, due to Township counsel's desire to redraft the settlement documents, drafting issues thereafter arose. Nevertheless, even as to the documents drafted by Township counsel, agreement as to all drafting issues was reached. However, the Township Committee refused to execute the Memorandum of Agreement and, in lieu of execution, indicated that Defendants wished to repudiate the agreement to settle. Nevertheless, the settlement agreement may be enforced notwithstanding the lack of an executed document.

In Pascarella, supra, 190 N.J. Super. 118, at issue was an oral agreement of settlement of a litigation. The trial court was advised of the settlement. However, the agreement was not placed on the record. The parties agreed that a written settlement agreement would be drafted. Prior to execution of the agreement, one party attempted to repudiate the agreement. The trial court refused to enforce the settlement.

The Appellate Division reversed the trial court and ordered the matter remanded for entry of an order enforcing the settlement. Id., 190 N.J. Super. at 127. The Appellate Division held:

> This was a settlement agreement made between competent adults. There is no legal requirement that there be court approval in such a case, DeCaro v. DeCaro, 13 N.J. 36, 43 (1953), and the practice of spreading the terms of the agreement upon the record, although a familiar practice, is not a procedure requisite to enforcement. That the agreement to settle was orally made is of no consequence, and the failure to do no more than, as here, inform the court of settlement and have the clerk mark the case settled has no effect on the validity of a compromise disposition. In Green v. John H. Lewis & Co., 436 F.2d 389, 390 (3 Cir. 1971), it was held that an "agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the court and even in the absence of a writing." Accord Good v. Pennsylvania R.R., 384 F.2d 989, 990 (3 Cir. 1967); Main Line Theatres, Inc. v. Paramount Film Distrib. Corp., 298 F.2d 801, 802-803 (3 Cir. 1962), cert. den. 370 U.S. 939, 82 S. Ct. 1586, 8 L.Ed.2d 808 (1962). We adopt these principles as consistent with the announced public policy of the jurisdiction favoring settlement of litigation. Settlements of this nature are entered into daily in our courthouse corridors and conference rooms, the court only aware, until informed of the fact of settlement, that counsel and the parties are working toward that desirable end. Adoption of a principle that such agreements are subject to attack because they were not placed upon the record places in unnecessary jeopardy the very concept of settlement and the process by which settlement of litigation is ordinarily achieved.

Pascarella, supra, 190 N.J. Super. at 124 (emphasis added).

The Court continued:

> That the agreement was to be memorialized in writing makes it no less a contract where, as here, the parties concluded an

> agreement by which they intended to be bound. Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369, 374 (App. Div. 1975); Comerata v. Chaumount, Inc., 52 N.J. Super. 299, 305 (App. Div. 1958). The latter case clearly holds that "parties may orally, by informal memorandum, or by both agree upon all the essential terms of a contract and effectively bind themselves thereon, if that is their intention, even though they contemplate the execution later of a formal document to memorialize their undertaking." Ibid.

Id. at 126.

Similarly, in Davidson, supra, 194 N.J. Super. 547, an oral property settlement agreement was judicially enforced. Following negotiations, the parties in Davidson reached a settlement agreement and it was envisioned that a consent order would be drafted and submitted to the trial court. Some five days after the proposed consent order was drafted and mailed to him, defendant's attorney telephoned plaintiff's attorney and indicated that defendant wished to repudiate the settlement. The proposed consent order was therefore not entered and plaintiff brought an order to show cause to specifically enforce the oral settlement.

Relying principally upon Pascarella, the Davidson court held that the agreement to settle the lawsuit was indeed enforceable despite the fact that the agreement was oral, not formalized "on the record" and there had been no court approval. Davidson, supra, 194 N.J. Super. at 552-553. The court concluded: "This court finds that the property settlement and support agreement is a binding contract." Id. at 554.

The above rule of law is consistent with case law governing contracts in general. See e.g. Comerata v. Chaumont, Inc., 52 N.J. Super. 299, 305 (App. Div. 1958) ("parties may orally, by informal memorandum, or by both agree upon all the essential terms of a contract and effectively bind themselves thereon, if that is their intention, even though they contemplate the execution later of a formal document to memorialize their undertaking.")

In sum, Hills respectfully submits that case law pertaining to oral settlement of litigation directs that the parties' June, 1985 settlement be enforced. The parties to this matter indeed reached an oral agreement to settle this entire controversy and the fact that the Defendants have attempted to repudiate the agreement is of no consequence. It is likewise clear that the parties intended to be bound by the agreement reached in June, 1984. Indeed, counsel for Bernards indicated that an agreement had been reached, that it was satisfactory to the municipality, and that the municipality wished to submit the agreement to this Court for review. The fact that any subsequent events may have induced Bernards to attempt to repudiate the agreement is of no consequence. Hills further submits that the record adduced thus far permits this Court to so find as a matter of law. However, if Defendants now deny that an agreement to settle was reached, or if a discrepancy arises concerning the terms of the settlement, it would appear that a factual hearing must be held.

b. Assuming Arguendo that the Parties' June, 1985 Settlement Agreement May Not be Enforced, the Agreement to Settle Which is Reflected in Ordinance 704 Should be Enforced.

The record adduced in this matter demonstrates that the essential terms of the parties' settlement agreement were agreed upon as early as September of 1984. Those terms, including permissible gross density and mandatory set-aside provisions, are reflected in Ordinance 704 (adopted November 12, 1984). Again, as stated in [redacted] supra:

> [T]he fact that parties who are in agreement upon all necessary terms may contemplate that a formal agreement yet to be prepared will contain such additional terms as are later agreed upon will not affect the subsistence of the contract as to those terms already unqualifiedly agreed to and intended to be binding. 1 Corbin on Contracts (1950), § 30, p. 83.

Id, 52 N.J. Super. at 305.

Indeed, the necessary terms of the parties' agreement were agreed upon in September, 1984 and reflected in Ordinance 704. Therefore, the fact that the parties contemplated preparation of a formal agreement containing additional terms does not affect the validity of the agreement previously reached i.e., adoption of Ordinance 704. See also Main Line Theatres, Inc. v. Paramount Film Distrib. Corp., 298 F. 2d 801, 804 T3d Cir. 1962); Mayer v. Development Corp. of America, 541 F.Supp. 828, 854-855 (D.N.J. 1981) aff'd 688 F.2d 822 (3d Cir. 1982).

As Bernards has repeatedly stressed to the courts hearing this matter, Hills was legally entitled to apply for approvals and construct a development permitted by Ordinance 704. Likewise, Hills intended to be bound by the essentials contained in Ordinance 704 although, as discussed above, the agreement to settle as per Ordinance 704 also entailed an agreement to later modify the agreement. Thus, Bernards clearly intended to be bound by Ordinance 704. In addition to the foregoing, it must also be stressed that Hills proceeded to substantially perform under the agreement and Bernards accepted the benefits of the agreement, i.e. immunity from builder's remedy lawsuits and a stay of this litigation. As noted in Comerata:

> The undertaking of performance, concurred in by the other party, is generally taken as strongly probative of an intention on the part of parties who have orally agreed to terms of a contract to be bound thereby notwithstanding the later execution of a formal contract is contemplated.
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> * * *
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> We consider the parties intended to be bound to the extent of the items they agreed upon notwithstanding it was contemplated that additional, less essential matters might be incorporated in the formal agreement later to be signed.

Id. at 306. (citations omitted).

Application of the foregoing principles to the instant case leads to the same result reached by the Comerata court. Based upon Ordinance 704, Hills has undertaken to perform a series of extremely extensive pre-development activities. Moreover, Bernards has gained the benefits resulting from the agreement and, in fact, said benefits were extended three times.

In sum, the parties clearly reached agreement on the essential terms outlined in Ordinance 704 and the agreement is binding notwithstanding that the parties contemplated the drafting of a formal agreement which might contain additional, less essential terms. Thus, in the event that this Court declines to enforce the parties' June, 1985 settlement agreement, Hills respectfully requests that this Court specifically enforce the agreement outlined in Ordinance 704 and hold that Hills has acquired development rights by virtue of said agreement.

POINT II

DEFENDANTS SHOULD BE EQUITABLY ESTOPPED FROM APPLYING A ZONING AMENDMENT TO HILLS.

The instant case presents a unique factual setting for the Court's consideration with respect to the issue of equitable estoppel.* The essential facts include the following:

(1) Bernards was, and is, under a constitutional obligation to adopt an ordinance providing for its fair share of lower income housing;

(2) Hills sued Bernards in an effort to compel the Township to adopt a constitutional ordinance;

(3) Bernards approached Hills and offered to settle the litigation at a density far below that demanded in Hills' complaint;

(4) In the spirit of compromise and in reliance upon the candor of Bernards' representations concerning its desire to settle the litigation, Hills accepted Bernards' offer and ceased prosecution of its lawsuit. As a result of its adoption of Ordinance 704, Bernards received immunity from builder's remedy lawsuits;

(5) Thereafter, based on the passage of an ordinance Bernards was constitutionally obligated to adopt, and based further on Bernards' continuous representations to Hills and to the Court concerning its desire to settle this litigation, Hills: (a) expended hundreds of thousands of dollars in planning and pre-development expenses in an effort to construct its development; (b) refrained from filing a preliminary development application which would have indisputably vested Hills with rights; and (c) agreed to cease prosecution of this lawsuit;

(6) Bernards now intends to repeal the aforementioned zoning.

Bernards has gathered all the benefits it sought. It now takes the position that notions of equity serve as no barrier to its attempt to saddle Hills with enormous financial obligations incurred in reliance on Bernards' statements and the adoption of

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* The doctrine of equitable estoppel is also sometimes referred to in the caselaw as the doctrine of "substantial reliance." For the sake of consistency and clarity, Hills uses the term "equitable estoppel" throughout this discussion. To be distinguished at the outset are the vested rights which are provided by the Municipal Land Use Law upon approval of a preliminary development application. N.J.S.A 40:55D-49. Of course, the issue of substantial reliance is irrelevant in such a case.

an Ordinance passed in furtherance of a settlement. Bernards also apparently believes that Hills' forebearance in reliance upon its representations is of no consequence. If analogous facts concerning the behavior of two private individuals were presented to a court, Hills submits that the offending party would most certainly be equitably estopped from carrying out its intentions. The only fairly debatable issue is whether Bernards' status as a municipality places the matter in a different perspective and endows the Township with the prerogative to engage in clearly inequitable conduct. Hills respectfully submits that no municipality, including Bernards, is granted carte blanche to run roughshod over the rights of property owners no matter how outrageous and inequitable the conduct.

"[T]here is a strong recent trend towards the application of equitable principles of estoppel against public bodies where the interests of justice, morality and common fairness clearly dictate that course." Gruber v. Mayor and Tp. Com. of Raritan Tp., 39 N.J. 1, 13 (1962). "Municipalities, like individuals, are bound by principles of fair dealing." Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 131 (1965). "In simple language, estoppel will be applied against a municipality in the interest of equity and essential justice. Morality and common fairness clearly dictate that course." Hill v. Bd. of Adjust. of Eatontown, 122 N.J. Super. 156, 164-165 (App. Div. 1972).

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

a. **Items of Hills' reliance on the adoption of Ordinance 704 and Bernards' representations concerning its desire to settle this litigation.**

Set forth below is an outline of the activities and acts of forebearance taken by Hills in reliance upon Ordinance 704 and Bernards' representations to Hills and to this Court concerning its desire to settle this litigation:

1) In forebearance, Hills refrained from filing a preliminary development application, as was its right. Had Bernards expressed any intention to consider repeal of Ordinance 704, Hills would have filed such an application and undeniably vested its rights (Affidavit of Kerwin);

2) Again in forebearance, Hills agreed to cease prosecution of its lawsuit and, due to the transfer of this matter, Hills can no longer recommence prosecution (Affidavit of Kerwin);

3) The reconstruction of Schley Mountain Road. This road is being totally reconstructed and expanded to four lanes. The road was designed to accommodate the traffic from The Hills' inclusionary development in the Bedminster highlands and the 2,750 units in the adjacent Bernards Raritan Basin which units would result pursuant to development under Ordinance 704. A four lane design of this road would have been unnecessary in order to provide adequate service for a 1,500 unit Bernards development. Hills was compelled to execute contracts for the construction of this road in the Summer of 1985, at a cost of $1,600,000, and Hills is now committed to the road's construction notwithstanding Bernards' attempt to eschew settlement and repeal Hills' zoning. Some $675,000.00 of this expense will have been a needless expenditure if Hills' zoning is repealed (Affidavit of Kerwin and Joseph Thompson, P.E.);

4) Hills has expended, or committed to the expenditure of hundreds of thousands of dollars for planning and material commitments for the Environmental Disposal Corporation sewerage treatment plant; moreover, the EDC plant is financed through a $6,380,000 bond issue, secured by the Bernards property as now zoned pursuant to Ordinance 704 (Affidavit of Kerwin);

5) Hills has sized and installed sewer and water mains to accomodate the development permitted by Ordinance 704. These mains are oversized for a 1,500 unit Bernards development. Some $30,000.00 of the funds used for main design and construction will have been funds wasted if Hills' zoning is repealed (Id.);

6) Due to Bernards' expressed intentions concerning settlement and professed hostility toward "piecemeal" preliminary development applications covering portions of

Hills' tract. no such applications were filed. In an evolutionary process which began in March, 1985, Hills met with Bernards officials and discussed conceptual plans. Ultimately, pursuant to Section 707 of the Township's ordinances, Hills prepared and submitted a "Conceptual Approval" development application, which seeks approval for the entire planned development, and which has been arbitrarily denied by the Planning Board. This development application was prepared at a cost of approximately $250,000.00. In addition, a $74,360.00 development application fee has been paid to Bernards. Since the proposed rezoning is vastly different than Ordinance 704, much of the $250,000 in preparation expenses and the application fee will be a total loss if Ordinance 704 is repealed (Id.);

8) Hills withdrew a tax court action concerning assessment of the Bernards tract since the parties' agreement rendered the action moot (Affidavits of Kerwin, Hall);

9) Hills has some 185 full-time employees on its payroll, partially pursuant to Ordinance 704, many of which will be laid-off if the originally proposed Bernards development is not permitted to proceed. Naturally, Hills also retains a number of subcontractors and their employees who will also be affected. (Affidavit of Kerwin).

In sum, Hills has gone to extraordinary length and expense in its attempts to construct the inclusionary development permitted by Ordinance 704. Hills' best estimate of the funds which would be needlessly spent if Ordinance 704 were repealed runs to well over $1,000,000.00. In forebearance, Hills has also altered its position to its detriment in reliance upon Bernards' representations. Hills had no reason to believe that Bernards would attempt to repudiate the parties' settlement and repeal Hills' zoning. Over the course of a year, Hills worked with the Township carefully, diligently, and truly believed, up until August 12, 1985, cooperatively. Hills respectfully submits that its detrimental reliance is unprecedented in its diversity and magnitude.

b. **The Law of Equitable Estoppel as Applied to Municipal Attempts to Repeal Zoning.**

The principles of equitable estoppel have often been applied in connection with challenges to municipal attempts to rezone property. The law in this area has recently been discussed in the matter of Timber Properties, Inc. v. Chester Tp., 205 N.J. Super. 273 (Law Div. 1984). To be sure, courts are generally reluctant to equitably estop municipalities from applying a rezoning to a particular landowner. As stated in Timber Properties: "The reason for this rule is that any zoning amendment presumably serves 'to preserve the desirable characteristics of the community through zoning...' " Id. at 277 (citations omitted). However, while municipalities are given wide latitude in determining how to zone or rezone, that latitude is not without limit. A rezoning must find support in sound planning considerations and may not be arbitrary, capricious unreasonable or otherwise unlawful. As set forth below, Bernards' decision to rezone is without any legitimate basis and the policy underlying traditional reluctance to equitably estop application of a rezoning does not apply herein.*

(i) **The Bernards attempt to downzone Hills is an abuse of the police power and the traditional reluctance to equitably estop application of zoning amendments is not justified herein.**

In 1984, the Defendant Planning Board examined a portion of Hills' tract and determined that the property was suitable for the density outlined in Ordinance 704. As stated in Ordinance 746 (Exhibit F) the proposed downzoning of Hills is not premised upon the need to satisfy legitimate planning concerns. One and only one reason is offered: the Township feels that transfer entitles it to a much lower fair share. Thus, it downzones Hills' property. Meanwhile, the zoning applicable to the

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* This assumes that proposed "interim" Ordinance 746 is lawful in the first instance, a dubious assumption. See Point III, infra.

property of numerous other landowners (who have not participated in this lawsuit) has been, and is, left untouched. No lawfully recognized reason supports the downzoning of Hills' property. The decision is clearly based on whimsy and caprice, i.e., the Township simply wants "less units."*

In discussing various reported opinions concerning the issue and courts' traditional deference to retroactive application of ordinance amendments, the Appellate Division has noted that it was prudent "to permit a municipality to give initial legislative consideration to serious and substantial land-use planning concerns theretofore unaddressed by its ordinance." Urban Farms, Inc. v. Franklin Lakes, 179 N.J. Super. 203, 220 (App. Div. 1981) certif. denied 87 N.J. 428 (1981) (emphasis added). The Urban Farms court continued:

> When these [legitimate] concerns are involved, the public interest clearly justifies protection by way of the municipal opportunity to amend its ordinance after and in response to an adverse judgment. But we do not regard either of these public-interest rationales to be implicated or relevant in the situation now before us. Here we are dealing with an inherently beneficial use serving the general welfare, to which the municipality had already given its deliberate legislative attention and had decided to permit as a conditional use predicated upon a showing of its reasonable necessity for the convenience of the community. It thereby encouraged a prospective developer to undertake the considerable commitment in time and expense involved in pursuing that use. There is nothing in this record to suggest that the public interest would be more advantaged by now eliminating that use than it would be by continuing to permit it.

Id., 179 N.J. Super. at 220-221. (emphasis added). **

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* The arbitrary, capricious and unreasonable nature of the proposed downzoning of Hills is discussed at length at Point IV, infra.

** While the Urban Farms case involved a different use than that at issue, the policy is no less applicable herein.

Similar considerations present themselves in the instant case. The preamble to Bernards' downzoning ordinance, Ordinance 764, indicates that the sole reason for the downzoning is that of the perceived lower fair share as per the Fair Housing Act and the need "to reflect this change in circumstances." (Exhibit F). Bernards does not assert, nor can it in good faith do so, that the Planning Board's prior determination as to an appropriate density for the tract was somehow flawed and that development of Hills' property at 5.5 du/ac. would be contrary to any legitimate planning or environmental concerns. As in Urban Farms, presented here is the absence of the customary public-interest underpinnings of retroactive application.

Hills respectfully submits that, since the traditional reason underlying deference to zoning decisions is not present, the traditional reluctance to equitably estop municipalities should be tempered. Rather, Hills requests that this Court balance the equities and any lawful, legitimate municipal concerns so that the interests of all concerned are properly considered.*

(ii) Application of the doctrine of equitable estoppel is not limited to circumstances in which a building permit has been issued, there is similar municipal authorization or a final judgment has been entered.

It has been suggested that a municipality may not be equitably estopped from applying a rezoning unless a final judgment has been entered, a building permit secured or other "similar municipal authorization."** A suggestion to that effect may be found in the Law Division opinion in Timber Properties, 205 N.J. Super. at 278. However, Hills is aware of no reported opinion which has held that equitable estoppel may never be applied in the absence of a final judgment, building permit or "similar municipal authorization."

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* The balance utilized in Urban Farms, and the application thereof, is discussed infra.

** "Similar municipal authorization" is discussed infra.

In the abstract, it is undeniably somewhat arbitrary to advance a rule of law which holds that there may never be a legitimate claim of equitable estoppel in the absence of a final judgment, building permit or similar authorization. Under the unique set of facts presented in this matter, the arbitrariness of such a rule is made eminently clear. This arbitrariness has been recognized by the Appellate Division:

> We see no reason why the additional fact that a permit had been issued prior to the purchase, and that the purchase was in reliance thereon, should make any difference. There may be situations in which the issuance of a permit is of some importance but the case at bar is not one of them.
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> We are aware that there is dictum which appears to give a permit special values or virtues. Cf. Sun Oil Co. v. City of Clifton, 16 N.J. Super. 265 (App. Div. 1951). To say, in a case such as the one at bar, that the property owner who spent thousands before a permit was issued is worse off than the one who spent hundreds after the issuance of a permit, appears to us to be purely arbitrary, and without basis in reason. Frequently much must be done by a purchaser of property, who intends to build for a permitted use, before he is ready to apply for a building permit. In addition to purchasing the property he may need not only land surveys and architectural and engineering layouts, but economic studies and traffic checks. He may need to arrange financing, procure tenants, or make other business arrangements. He may need to assure himself of materials, machinery or labor, or the extension of gas, electric, water or sewer lines. He may have to procure cost figures, and alternate designs and estimates. He may need to arrange with the municipality for the vacation of streets, or even for the amendment of the zoning ordinance. All of this, and much more, he may need to do before he is ready to prepare the plans which, ordinarily, must accompany the application for a permit. Why should the position of the property owner be any better the moment a permit is issued (at a relatively trifling cost) than it was the moment before?
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> * * *
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> We conclude that whether an owner has made such investments and expenditures in reliance upon the use being permitted that he has an irrevocable right to continue is a question of fact in each case. If a permit has been issued it is merely a fact to be considered with all of the other facts, and it may be especially pertinent on the issue of reliance.

Tremarco Corp. v. Garcia, 55 N.J. Super. 320, 326-328 (App. Div. 1959) rev'd 32 N.J. 448 (1960) (citations omitted) (emphasis added).

In Tremarco, the plaintiff had in fact been issued a building permit and the central issue was whether the plaintiff had demonstrated sufficient reliance. Of course, the arbitrariness of any "building permit rule" is no less apparent in the instance in which a building permit has not been issued.

The Appellate Division in Tremarco refused to find that the plaintiff therein had acquired rights which would prevent the defendant municipality from amending its zoning. In reversing, the Supreme Court spoke in terms most instructive in connection with the instant case:

> There is no easy formula to resolve issues of this kind. The ultimate objective is fairness to both the public and the individual property owner. We think there is no profit in attempting to fix some precise concept of the nature and quantum of reliance which will suffice. Rather a balance must be struck between the interests of the permittee and the right and duty of the municipality through planning and the implementation of that scheme through zoning "to make, ordain and establish all manner of wholesome and of reasonable laws, not repugnant to the Constitution, as may be deemed to be 'for the good and welfare of the commonwealth, and all the subjects of the same.' " Roselle v. Wright, 21 N.J. 400, 408-409 (1956). This right is one of which the permittee is deemed to be aware. Cf. Fischer, supra, and Lionshead Lake, Inc., supra.
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> * * *
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> There was no change whatsoever in the characteristics of the area since the adoption of the 1950 zoning plan. The surrounding lands are still substantially undeveloped. There is no suggestion that the governing body suddenly found itself confronted with an ordinance which had become outmoded because of ensuing events. The amendment was provoked by a petition from some of the residents who sought to eliminate gasoline stations out of the zone.
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> In these circumstances, we are satisfied that the equities strongly predominate in favor of plaintiff. Its right to proceed under the regularly issued permit should therefore be upheld.

Id., 32 N.J. at 457-458.

See also Urban Farms, supra, where the court held:

> We do not regard the issuance of a building permit as a sine qua non to the applicability of the substantial reliance

> doctrine.*** Rather, we are of the view that its applicability requires a weighing of [various] factors. 179 N.J. Super. at 221.

Finally, although Judge Skillman, in his Timber Properties opinion, suggested (but did not hold) that the doctrine of equitable estoppel may not be applied in the absence of a building permit, similar municipal authorization or a judgment, he did acknowledge:

> Consistent with this restrictive view of the "vested rights" doctrine, our courts have rejected claims to exemption from later changes in zoning ordinances based upon a site plan approval. Hill Homeowners Ass'n v. Passaic, 156 N.J. Super. 505 (App. Div. 1978); a use variance, Dimitrov v. Carlson, 138 N.J. Super. 52 (App. Div. 1975), certif. den. 70 N.J. 275 (1976); and a final subdivision approval, Sandler v. Springfield Tp. Bd. of Adjustment, 113 N.J. Super. 333 (App. Div. 1971). While these decisions seem to leave open the possibility that municipal action short of the issuance of a building permit could encourage reliance and confer vested rights, they indicate that such a finding could be made only in an exceptional situation. In any event, there is no decision which states that vested rights can be acquired without either official municipal action or the judgment of a court.

Id., 205 N.J. Super. at 279-280 (emphasis added).

Indeed, Hills respectfully submits that the facts of this case indeed present "an exceptional situation."

If there were any "rule" of law requiring a final judgment, building permit or similar municipal authorization as a prerequisite to a claim of equitable estoppel, the policy underlying such a rule would have a rational, albeit tenuous, underpinning. That is, as a general principle, it may be said that a developer is not ordinarily justified in undertaking any substantial developmental activities in the absence of a permit or judgment. However, under the circumstances of this case, it is respectfully submitted that no developer could ever set forth circumstances which more strongly compel the conclusion that reliance on the state of the ordinance was justified. Further, Hills respectfully submits that its reliance to its detriment is far more profound than that exhibited by the plaintiff in Tremarco or, for that matter, any

other reported opinion. Equity looks to substance over form. Since equitable estoppel is, indeed founded in equity, it is not surprising that our courts have not held that, regardless of the equities, one may never assert estoppel in the absence of a permit, similar municipal authorization or judgment. Indeed, when equitable notions are involved, courts never say never or, at least, rarely ever.

(iii) Assuming arguendo that application of equitable estoppel is ordinarily confined to situations in which there has been a permit issued, similar municipal authorization or a judgment entered, Bernards should nevertheless be equitably estopped.

As stated above and as set forth in Timber Properties, supra, there are two traditional circumstances in which municipalities have been equitably estopped from rezoning a tract of land.

The first of of these "is where a building permit or similar municipal authorization has been issued and there has been substantial reliance upon that authorization." Id., 205 N.J. Super at 278. Hills has not been issued a building permit by Bernards Township. It is useful to recall why Hills is not in possession of approvals or a building permit. As Bernards has repeatedly stressed, Hills was legally entitled to submit a formal development application for the tract immediately following the adoption of Ordinance 704. Hills did not do so. Hills not being masochistic, the reason for this is obvious. Bernards steadfastly advised that it wished to settle with Hills; not litigate. Despite the fact that the Fair Housing Act was introduced in June, 1984, Bernards never indicated that it wished to consider any options which the legislation would provide prior to July, 1985. (Affidavit of Kerwin). Bernards' position was constant, absolute and unequivocal: it simply wished to settle all issues as between the Township and Hills. **Hills took Bernards at its word and agreed to forego its right to file preliminary applications pending resolution of all issues.** If Bernards had not so induced Hills, Hills would have immediately filed preliminary applications and, assuming that the Defendant Planning Board processed same in

accordance with law, Hills would now have approvals. Such approvals alone would have vested Hills' rights. N.J.S.A. 40:55D-49. If preliminary and final approvals had been sought simultaneously,* Hills would now almost assuredly possess a building permit. Moreover, as discussed at Point V, if Bernards had processed Hills' Section 707 application in accordance with law, Hills would indisputably possess development rights as per Section 707E of Bernards' ordinances.

At best, the Township's behavior was disingenuous and inequitable. At worst, it was deceptive and fraudulent. In either event Hills is now without the approvals and building permits it would have but for its forbearance in reliance on the candor of Bernards' representations. Under these circumstances Bernards should be estopped from asserting that a building permit has any legal significance with respect to the estoppel issue.

Moreover, there has clearly been the "similar municipal authorization" of which Timber Properties spoke. In fact, all of the developmental expenses undertaken by Hills were authorized and, in fact, encouraged by municipal officials in both Bedminster and Bernards Townships. As Bernards was well aware, the Bernards development was designed, and infrastructural improvements were installed, in conjunction with Hills' adjacent development in Bedminster Township. Of course, municipal approval for improvements undertaken in Bedminster have been obtained from that municipality. In addition, Hills has received final approvals for two subdivisions in the Bedminster Highlands adjacent to the Bernards property. (Affidavit of Kerwin). Thus this case presents a unique issue: permits and approvals have been obtained, and extensive improvements undertaken, but the official approvals have been in an adjacent municipality. Again, Bernards was aware of Hills' activities and said nothing to indicate that Hills was to be downzoned and, thus, should refrain from wasting vast sums of money.

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* As set forth in the Affidavit of Kenneth J. Mizerny in connection with Hills' motion concerning Section 707 of Bernards' ordinances (the "conceptual development application section), the requirements for Bernards preliminary and final approvals are substantially identical.

In addition, the joint planning of Hills' Bedminster and Bernards developments entailed routing of the access road to the Bedminster Highlands through the Bernards Township portion of the property. (See Conceptual Plans submitted herewith). Much of this road (the Allen Road Extension) is now under construction.

This matter presents another type of municipal authorization not heretofore addressed in the case law. That is, express municipal representations concerning a municipality's desire to settle constitutional zoning litigation coupled with both express and tacit encouragement of a developer's actions taken in furtherance thereof. Even should Bernards now deny that a settlement agreement had been reached in this litigation, Bernards clearly adopted an ordinance which formed the basis of the settlement, indicated its desire to settle and, in fact, advised that an agreement to settle had been reached. It is likewise indisputable that, even if an agreement had not been reached, Hills was misled by the representations of Bernards and, thus, Bernards should be equitably estopped from denying municipal authorization.

The second circumstance where estoppel has ordinarily been applied is that where a trial court has entered judgment ordering municipal approval of a use and there are special equities which militate against application of a rezoning. Timber Properties, supra, 205 N.J. Super. at 278. See also Urban Farms, supra, 179 N.J. Super. at 217-223.

No "judgment" has been entered in this matter. It is useful to recall why a final judgment has not been entered in this matter. As this Court will recall, a compliance hearing was scheduled in this matter on November 18, 1985. Bernards' request to this Court for a stay of said hearing (anticipated to be one day in duration) was denied. In successfully seeking a stay from the Appellate Division, Bernards advised that Court as follows:

> Neither the actual party to this litigation (Hills) nor the persons purportedly represented by that party (lower income families) will suffer prejudice by this [the stay] application...Plaintiff has before the Township an application for conceptual approval of its project. This application will continue before the Township Planning Board in accordance with law. (Exhibit O).

Upon Hills' motion before the Supreme Court to dissolve the stay, Bernards first:

> respectfully requested that the Court take judicial notice of the enactment by Bernards Township of an Ordinance repealing the "sunset" provisions of its "Mount Laurel" ordinance, Ordinance 704. (Exhibit P).

Bernards then noted that "Plaintiff will not suffer the irreparable injury required under R. 2:2-2(b)" and that "the stay will have no effect on the construction of housing for the poor nor will it affect plaintiff's development rights.*** The stay maintains the status quo without causing harm or damage to any person or party." (Exhibit P).

Of course, the Planning Board did not even approach lawful consideration of Hills' development application. (See Point V). However, it was upon such representations that a stay was granted. Even if Bernards had not made the above assertions, a stay may nevertheless have been issued. On the other hand, if Bernards had advised the courts that it intended to downzone Hills (if Bernards knew),* a stay may have been denied. In any event, in light of the circumstances under which a stay of the compliance hearing was issued, Hills respectfully submits that considerations of equity should prevent Bernards from taking the position that a judgment has any significance with respect to the issue of estoppel.

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* Thus far, Hills assumes that Bernards in fact did not know that it would downzone Hills while before the Appellate Division and Supreme Court. Hills does not concede this, however, and assuming its relevance, Hills requests an opportunity for discovery on the issue.

In addition, this Court did enter an immunity order on December 19, 1984 which order was entered due to the Township's adoption of Ordinance 704 and its professed intention to voluntarily comply. The result is no different than if a judgment of invalidity had been entered along with an order to rezone.* In arguing for reversal of this Court's denial of transfer, Bernards took the position that Hills would suffer no manifest injustice because, inter alia, Hills should have anticipated the legislation on the subject which was openly sought in Mount Laurel II. Bernards is held to the same knowledge. In fact, as of November, 1984, the Fair Housing Act had already been in the legislative process for some five months. Armed with this knowledge, Bernards faced a choice: (1) continue with the Hills litigation and leave itself exposed to additional builder's remedy suits; or (2) settle with Hills and acquire immunity from such suits. Bernards chose the latter course and it has gained the benefits resulting therefrom. Although Bernards had recognized the invalidity of its prior ordinance and enacted a constitutional ordinance, the legal consequence should be no different than where an ordinance is adjudged unconstitutional and an order to rezone is entered. Thus, as in Urban Farms, supra, Bernards should be equitably estopped since Bernards was effectively ordered to zone for a use, the zoning was adopted and applying a repeal to Hills "would undermine existing special equities without accomplishing any offsetting service to the public interest in the zoning sense." Id., 179 N.J. Super. at 217.

It must also be recalled that Hills' June, 1984 summary judgment motion was denied solely due to factual assertions the good faith of which was highly

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* This Court apparently recognized this "one bite at the apple" notion when it advised Bernards that, if Ordinance 704 were to expire or be repealed, the Master would be directed to redraft same and a judgment of compliance would be entered thereon. (Exhibit Q). See also Exhibit K) wherein this Court advised that the immunity order entered in this matter granted Bernards 90 days to submit a compliance package. Identical directives ordinarily follow issuance of summary judgment of constitutional invalidity.

questionable. (Exhibit A). Regardless, a factual hearing on the noncompliance of Bernards' original ordinance would have been a relatively straightforward and expeditious undertaking. Had Bernards not indicated its intention to settle, acquire immunity and stay this matter, it is quite possible that this matter would have been concluded in the ordinary course. Thus, Hills' forebearance, induced by Bernards, has prejudiced its opportunity to prevail in a lawsuit which, but for Bernards' position, could now have been concluded in Hills' favor. Under these circumstances, Bernards should not now be heard to assert that a judgment compelling a use is a necessary element to a claim of equitable estoppel.

(iv) Application of the Urban Farms balancing test

With respect to "special equities," the Urban Farms court noted:

> It is not only the absence of the customary public-interest underpinnings of retroactive application which here concerns us but also what we have already alluded to as the developer's special equities. We have long adhered to the principle in this State that substantial economic reliance by a developer on a building permit issued to him prior to a zoning ordinance amendment will defeat its retroactivity.
>
> We do not regard the issuance of a building permit as a sine qua non to the applicability of the substantial reliance doctrine. See Kruvant v. Cedar Grove, 82 N.J. 435 (1980). Rather, we are of the view that its applicability requires a weighing of such factors as the nature, extent and degree of the public interest to be served by the ordinance amendment on the one hand and, on the other hand, the nature, extent and degree of the developer's reliance on the state of the ordinance under which he has proceeded, the extent to which his undertaking has been at any point approved or encouraged by official municipal action, and the extent to which, under the circumstances and as objectively determined, he should have been aware that the municipality would be likely to change the ordinance prior to actual commencement of construction. These are the factors constituting the developer's special equities, and if they outweigh the public interest concerns, they should also operate to bar postjudgment retroactivity of a zoning ordinance amendment.

Id., 179 N.J. Super. at 221-222.

When the factors discussed in Urban Farms are weighed, it is respectfully submitted that the "special equities" far outweigh any legitimate public interest.

Again, Bernards does not contend that the development which would result from Ordinance 704 would result in any detriment to the public interest. As to the nature, extent and degree of Hills' reliance on Ordinance 704 and the circumstances under which it was adopted, the activities undertaken and sums expended in reliance have been far greater than that alleged in most cases in which estoppel has been applied. Throughout the settlement process, all of Hills' actions were either approved or encouraged by Bernards or, with Bernards' knowledge and acquiecence, approved by Bedminster.

Finally, as to the extent to which Hills could have been aware that Bernards would be likely to repeal Ordinance 704, this factor leans most strongly in favor of Hills. First, the ordinance was adopted for the purpose of settling a lawsuit. Bernards so advised Hills and this Court. Second, the ordinance, unlike most, was adopted in response to a constitutional obligation. Third, throughout the time period during which detrimental reliance occurred, Bernards persisted in advising that it did not wish to litigate but desired to conclude the settlement. In fact, a settlement had been reached and Bernards so advised this Court. Bernards certainly cannot assert that the Fair Housing Act was an unexpected piece of legislation which justifies its conduct. Again, the Fair Housing Act had been in the deliberative process for some five months when the Township proposed settlement and adopted the ordinance upon which Hills relied. As indicated above, from day one and throughout the process of negotiating the agreement, Bernards never indicated that it intended to abruptly alter its course due to any legislation which might be adopted. In sum, it is difficult to imagine a set of circumstances under which a developer would be more justified in relying on the state of a zoning ordinance.

The final comments of the Urban Farms court are also worthy of note.

> While we recognize that there are circumstances in which the municipality is appropriately permitted to effect a retroactive postjudgment amendment of its zoning ordinance in specific

> response to that judgment, nevertheless the potential anomaly of this technique is both apparent and troublesome, particularly where the purpose of the amendment is neither to fill a serious gap in the original ordinance nor to properly reenact a provision thereof adjudicated ineffective either for procedural or substantive reasons. It appears to us to be wholly antithetical to both the integrity and the legitimacy of the judicial process for a municipality to submit its land-use action to the scrutiny and review of the court, to participate in the litigation in apparent good faith, to thus impose upon the financial resources of the court, the developer and its own taxpayers, and then, when the decision is adverse to it, to be free to render the entire proceeding a charade and the judgment of the court a nullity by recourse to a legislative action which was available to it from the beginning. We are of the view that while a municipality should not be precluded from so doing where the public interest requires and where there are no countervailing equities, nevertheless it should, in these circumstances, bear the burden of proving that its legislative abrogation of the court's judgment does indeed genuinely serve the public interest.

Id. at 222-223. (emphasis added).

Similar notions present themselves herein. While no final judgment has been entered, Bernards has rezoned in response to a constitutional obligation and it has warmly received the benefits which resulted therefrom including builder's remedy immunity. Bernards' relief was granted due to its asserted intention to voluntary comply and settle with Hills. Bernards was sued by another developer, Spring Ridge Associates, when the Township attempted to retroactively apply a set-aside obligation on that developer. Based on Bernards' representations, this Court halted that litigation by offering the Township a 141 unit credit to be awarded for its position of voluntary compliance and settlement. Again, Bernards warmly accepted this relief. Bernards now effectively thumbs its nose at the Court and attempts to excuse its behavior by pointing to the passage of legislation which had been anticipated for well over one year. Hills respectfully submits that Bernards' status as a municipality does not entitle it to trod at will on the integrity and legitimacy of the judicial process.

In sum, Hills respectfully submits that elemental principles of justice, morality and fair dealing compel one equitable result: Bernards must be estopped from applying a downzoning to Hills' property. Bernards has derived extraordinary benefits as a result of its adoption of Ordinance 704. Conversely, if the downzoning were now applied to Hills, Hills would suffer extraordinary harm unprecedented in the case law. Most importantly, the downzoning finds no support in planning considerations which would serve the public interest. While the facts of this matter are most unusual, Hills submits that the law of equity has evolved so as to be applied to such facts. Equity will suffer no wrong without a remedy. Hills believes Bernards is clearly wrong. Hills therefore respectfully requests that Bernards be equitably estopped from applying a downzoning to Hills.

POINT III

PROPOSED ORDINANCE 764 IS AN INTERIM ORDINANCE WHICH IS CONTRARY TO THE MUNICIPAL LAND USE LAW AND THE AMENDMENT OF ORDINANCE 704 IS THEREFORE VOID.

Defendant Bernards proposes to adopt Ordinance 764 pursuant to N.J.S.A. 40:55D-90. (Exhibit F, Ordinance 764, ¶ 4). By way of legislation signed into law on January 21, 1986, N.J.S.A. 40:55D-90 has been amended and now reads as follows:

> Moratoriums; interim zoning.
>
> a. The prohibition of development in order to prepare a master plan and development regulations is prohibited.
>
> b. No moratoria on applications for development or interim zoning ordinances shall be permitted except in cases where the municipality demonstrates on the basis of a written opinion by an qualified health professional that a clear imminent danger to the health of the inhabitants of the municipality exists, and in no case shall the moratorium or interim ordinance exceed a six-month term.

L. 1986, c. 516 (emphasis added). (Copy of statutory amendment set forth at Exhibit R).

Defendant Bernards has not acted on the basis of a written opinion by a qualified health professional that a clear imminent danger to health exists. To the contrary, it proposes to amend Ordinance 704 simply because it apparently feels that the Fair Housing Act permits the Township to satisfy a lower fair share obligation. Thus, Ordinance 764 is clearly contrary to N.J.S.A. 40:55D-90 and, if adopted, the amendment must be invalidated.*

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* It should be noted that the ordinance would have been unauthorized and, thus, unlawful even prior to the amendment of N.J.S.A 40:55D-90. See N.J. Shore Builders Ass'n v. Dover Tp. Committee, 191 N.J. Super. 627, 631 (Law Div. 1983); Pop Realty Corp. v. Springfield Tp. Bd. of Adj., 176 N.J. Super. 441, 449 (Law Div. 1980) (N.J.S.A. 40:55D-90b ceased to be effective on May 31, 1979).

POINT IV

THE PROPOSED REPEAL OF THE ZONING OF THE HILLS PROPERTY WOULD NOT ADVANCE A LAWFUL OBJECTIVE, IS NOT SUPPORTED BY ANY LEGITIMATE PLANNING CONSIDERATIONS AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE.

As discussed supra, Ordinance 746 is an unlawful interim ordinance and it must, therefore, be invalidated. However, if the amendment were a "standard" ordinance, it would nevertheless be invalid.

Ordinance 746 decreases the gross density permitted on the Raritan Basin portion of the Hills property from 5.5 du/ac to 3.0 du/ac. This downzoning finds no support in legitimate planning concerns. To the contrary, the zoning permitting a density of 5.5 du/ac. (Ordinance 704) is more appropriate now than when Ordinance 704 was adopted in November, 1984. (Affidavit of Mizerny). The sole reason for the downzoning is that Bernards purportedly believes that the Fair Housing Act will allow for a significantly lower fair share obligation. Thus, Bernards attempts to arbitrarily downzone the property of the sole Mount Laurel litigant, Hills, simply because it wants "less units." This is not a lawfully recognized objective of the zoning power. The downzoning is arbitrary, capricious, unreasonable and invalid.

To be sure, zoning ordinances, as well as amendments of same, are presumed valid. However, there are constitutional constraints which must be observed. Zoning is an exercise of the police power and is subject to due process requirements. Arbitrary or unreasonable ordinances are invalid and the "purposes sought to be accomplished must justify the restrictions placed on one's land." Home Builders League of So. Jersey, Inc. v. Tp. of Berlin, 81 N.J. 127, 137-138 (1979). "The means used to attain the ends must be reasonably related to those ends." Id. at 138.

If a zoning provision has some relationship to one of the purposes designated in the MLUL, N.J.S.A. 40:55D-2, it will be upheld unless it also has effects contrary to the general welfare in which case closer scrutiny must be undertaken and "the court is required to decide whether a proper legislative goal is being achieved in a manner reasonably related to that goal." Id. at 139.

a. Ordinance 764 does not serve any legitimate statutory purpose.

On its face, Ordinance 746 does not meet this criterion. The Defendant Township has cast aside all conventional and legitimate planning considerations and downzoned Hills for one reason: it wishes to stifle growth. Such a purpose is not among the permissible purposes set forth at N.J.S.A. 40:55D-2. In fact, land use regulations "cannot be used to thwart growth." See e.g. Albano v. Mayor and Tp. Com. of Tp. of Wash., 194 N.J. Super. 265, 275 (App. Div. 1984). Of course, the expressed reason for the downzoning is a belief that the Council on Affordable Housing will permit a lower fair share obligation. Regardless, the tract has been found suitable as zoned pursuant to Ordinance 704 and the goal of limiting growth is not a permissible objective.

b. Ordinance 764 is not in accordance with a comprehensive plan.

As per the mandate of N.J.S.A. 40:55D-62, a zoning amendment must be consistent with the land use element of the master plan. By way of a master plan amendment dated October 30, 1984, the Planning Board recommended a density of 5.5 du/ac on the land in question. Proposed Ordinance 764 would clearly be inconsistent with the master plan. Exceptions to this principle provide, first, that the full membership of the governing body may vote to approve an inconsistent ordinance if the reasons are stated. However, since no legitimate reasons may be offered, the amendment cannot be valid. Second, N.J.S.A. 40:55D-62 provides that interim

ordinances need not be consistent with the master plan. However, as an interim ordinance, Ordinance 704 is clearly unlawful as per N.J.S.A. 40:55D-90. Thus, the amendment is invalid.

c. The proposed downzoning is arbitrary, capricious, unreasonable and invidiously discriminatory.

In Albano, supra, 194 N.J. Super. 265, at issue was a significant downzoning of permissible residential density. The downzoning was challenged as being overly restrictive and discriminatory. The defendant municipality asserted that the downzoning was necessary to prevent degredation of a lake which was fed from five streams flowing through the subject property. It was held that evidence concerning the streams and soil conditions on the tract justified the municipality in selectively downzoning the subject tract. The environmental considerations involved, said the court, justified a conclusion that the restrictions were "reasonably necessary for public protection of a vital interest." Id. at 275.

No such considerations are present herein. No legitimate planning concerns support the rezoning. As set forth in the affidavit of Mizerny, the Hills tract is more suitable for its Ordinance 704 density now than when originally zoned. The tract is adjacent to, and essentially part of, the planned residential development of Hills being constructed in Bedminster. The Bedminster development is being constructed at an overall gross density of 10 du/ac. The section immediately adjacent to Bernards is being built at a gross density of 8 du/ac. There is no question that, from a planning point of view, a density of 5.5 du/ac would provide a far smoother transition, and be more compatible, than would a density of 3.0 du/ac. In fact, the downzoning is directly contrary to a purpose of the MLUL, i.e. to "ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities..." N.J.S.A. 40:55D-2d. This statutory purpose is even more applicable when, as in the instant case a municipal boundary separates what is in effect one planned development. (Affidavit

of Mizerny). Much of the necessary infrastructure to serve the Bernards development is already substantially constructed. In short, the downzoning is absolutely unsupported by any legitimate planning concern.

With respect to the invidiously discriminatory nature of the downzoning, it must be stressed that Bernards proposes to downzone only one tract of land: that of Hills. Other tracts of land, zoned for a density of 6.5 du/ac, remain as zoned. Hills submits that there is no question that the Hills property is far superior than the Township's other "high density" tracts in terms of its suitability for its zoned density. (Affidavit of Mizerny). Less than three percent of the Hills tract is undeveloped land. As noted, the Hills tract is directly adjacent to, and integrated with, a high density planned development. The infrastructre is largely in place. Nevertheless, Bernards proposes to slash the density of the Hills property to less than half that permitted other similarly situated landowners. With the exception of the possible objective of "punishing" Hills for filing its Mount Laurel lawsuit, it is impossible to discern any rational reason for this disparate treatment of Hills. cf. Albano, supra, 194 N.J. Super. at 274. The proposed amendment is therefore invalid.

d. The formal protest filed by Hills heightens the merits of a conclusion of invalidity.

Hills has filed a formal protest pursuant to N.J.S.A. 40:55D-63. (Affidavit of Kerwin). "Protest statutes ... are designed to protect the interest of property owners in the stability and continuity of zoning regulations." Levin v. Township of Parsippany - Troy Hills, 164 N.J. Super. 409, 411 (App. Div. 1978). "There is no doubt ... as to the importance assigned by the Legislature to the values thereby embraced." Id. at 412. The protest statute requires a 2/3 affirmative vote in order to adopt a protest statute. "That the municipality should exercise extra diligence when it is making important changes in the property rights of citizens who object is obvious ..." Farmer v. Meeker, 63 N.J. Super. 56, 64-65 (Law Div. 1960) (emphasis added).

Far from exercising "extra diligence," Bernards has moved at breakneck speed in an effort to downzone Hills. Some two weeks after issuance of the Supreme Court's order of transfer, the downzoning ordinance was introduced. Hills truly doubts whether any deliberation concerning proper planning was undertaken, much less extra diligence. In light of the protest of this drastic change in Hills' property rights and Bernards' lack of deliberation, a conclusion of invalidity of the amendment is all the more compelling.

In sum, the downzoning proposed by Bernards is a textbook example of an unlawful zoning amendment. With respect to the physical characteristics of Hills' land, nothing has changed except Bernards' apparent belief that it is now entitled to thwart growth. Such an objective does not support a zoning amendment and Hills respectfully requests that same be held invalid.

POINT V

THE DEFENDANT PLANNING BOARD'S DENIAL OF HILLS' CONCEPTUAL DEVELOPMENT APPLICATION WAS ARBITRARY AND CAPRICIOUS AND SAID DENIAL SHOULD BE REVERSED.

The issues raised by Bernards' repeated amendments of Section 707 of its ordinance (approvals of conceptual development applications) have been extensively briefed and Hills will not repeat its arguments here. In apparent recognition of the tenuousness of its legal position with respect to the Section 707 issues, the Defendant Planning Board attempted to short-circuit this Court's adjudication of Hills' rights by way of an indisputably arbitrary denial of the application.

Factually, Hills takes the following position:

1) From the moment Hills filed its Section 707 application, Bernards had no intention of processing same in accordance with law and, in fact, Bernards' intention from the date of the filing was to either amend Section 707E or deny the application regardless of its merits;

2) Notwithstanding the above undisclosed intention, Defendants advised the courts hearing this litigation that the application would be processed in accordance with law and, in furtherance of fostering this intention, meetings with the Township's professionals were arranged and other actions taken in advancement of a process which appears in retrospect to have been a charade;

3) The sole reason for the attempted amendment of Section 707E was that of preventing Hills from vesting development rights to which it would have been entitled had the application been processed and approved in accordance with law;

4) Upon learning of Hills' successful attempt to enjoin application of a Section 707E amendment to the then-pending development application filed by Hills, Defendants decided to simply deny the application notwithstanding its merits and notwithstanding Hills' ability and desire to amend the plans in any manner deemed appropriate by the Planning Board;

5) On January 7, 1986, the Defendant Planning Board did in fact deny Hills' application under the most grossly arbitrary and otherwise unconstitutional circumstances including the following:

   a) Hills was denied any meaningful notice and opportunity to be heard;

   b) With the exception of one Planning Board member, the Planning Board (some members of which had been sworn in on that evening) did not even look at the application (this allegation has not been denied in Bernards' responses to Hills' submissions despite the Township's opportunity to do so);

   c) The discussion of the merits of Hills' application (if any) and the decision to deny same were made in closed session immediately prior to the "vote" of denial;

   d) Hills' offers to amend the application as the Board desired or, submit a new application if it was stipulated that the divesting language would not apply, were ignored;

   e) Despite a concealed intention to downzone Hills, Hills was advised that the denial of the application did not prevent Hills' submission of a new application (which would not vest Hills with rights).

Hills respectfully submits that the following legal conclusions should be drawn from the parties' previous submissions to this Court and the facts as alleged by Hills:

1) Section 707E of the Bernards land use ordinance is not ultra vires and its amendment was based on the entirely unlawful and unauthorized objective of divesting Hills of the development rights to which it would have otherwise been entitled. The amendment is therefore invalid;

2) Even if Section 707E is ultra vires, it is only so in the secondary sense and Bernards should be equitably estopped from applying an amendment of the Section to Hills;

3) The outrageously arbitrary and otherwise unconstitutional denial of Hills' development application warrants that said application be deemed approved. In the alternative, the application should be remanded to Defendant Planning Board where the application should be processed and considered in accordance with law.

In essence, Hills merely requests that Bernards not be permitted to prosper by its unlawful and unconstitutional conduct. The application was in total compliance with the Bernards land development ordinances. If the application had been processed in a lawful manner it would now be approved and, pursuant to the terms of Section 707E, Hills would be in undeniable possession of development rights. Of course, this is the very reason Bernards attempted to amend Section 707E and, failing that, summarily denied the application. Regardless, Bernards is simply not entitled to deny to Hills its lawful and constitutional right to have a development application processed in accordance with the Township's own ordinances.

Thus, Hills respectfully requests that the Defendant Planning Board be ordered to approve Hills' application as it would have done if it had acted in a lawful and constitutional manner. In the alternative, Hills requests that it be placed in the position it would have been in had the Planning Board acted according to law. That is, the Planning Board should be directed to actually review and consider Hills' application in accordance with all ordinances in effect at the time the application was pending.

CONCLUSION

Of all of the cases transfered by the Supreme Court to the Council on Affordable Housing, Hills believes that the Order entered by the Court in this matter is unique. Indeed, Hills believes that this matter raises legal and factual issues unlike any other transferred case. Hills respectfully submits that the Supreme Court's selective treatment of this case is justified. The Supreme Court could have decided the issues raised herein. For what Hills believes are sound reasons, it did not. Transfer to the Council will result in the Council determining the full extent of Bernards' fair share obligation. However, transfer to the Council does not eradicate our common law.

In what is perhaps too many words, Hills has attempted to demonstrate to this Court that it has been wronged. Of this, Hills believes there can be little question. Hills has also attempted to demonstrate that it is entitled to a remedy. Bernards has attempted to repudiate a settlement agreement. Bernards has led Hills down a path, and watched while Hills took that path to its detriment. Bernards now seeks to prosper by virtue of its inequitable behavior. If Hills' adversary were a private party, Hills respectfully submits that the just outcome of this matter would not give the Court a moment's pause. Concededly, municipalities are given deferential treatment. Municipalities are not, however, immune from laws or essential principles of equity. For these reasons, Hills respectfully requests the entry of an order:

(1) enforcing the parties' settlement of this matter;

(2) equitably estopping Defendants from applying a downzoning ordinance to Hills;

(3) declaring Ordinance 746 to be in violation of N.J.S.A. 40:55D-90;

(4) declaring Ordinance 746 to be arbitrary, capricious, unreasonable and otherwise unlawful;

(5) remanding Hills' conceptual approval application to Defendant Planning Board and ordering that said application be approved or, in the alternative, directing that said application be considered in accordance with the law extant at the time the application was arbitrarily denied.

Respectfully submitted,

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

By: Henry A. Hill /s/
Henry A. Hill

March 24, 1986

By: Thomas F. Carroll /s/
Thomas F. Carroll

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ATTORNEYS FOR Plaintiff

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

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

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

1. I am President of The Hills Development Company ("Hills"), a major builder and developer in Somerset County, a resident of Bedminster, New Jersey, and a member of the Somerset-Morris Homebuilders Association. I am responsible for the day-to-day operations of Hills, and I have been actively involved in the decisions of

Hills with respect to the development of the Hills' property located in Bernards and Bedminster Townships.

2. The Bernards Township portion of Hills' property comprises in excess of 1,047 acres, with 501 acres located in the Raritan Basin portion of Bernards Township and the remainder being located in the Passaic Basin portion of the Township.

3. Hills filed a lawsuit under Mount Laurel II against Bernards Township in May, 1984. At that time, the operative zoning of Hills' property in the Raritan Basin was two dwelling units per acre and, in the Passaic portion, one dwelling unit per two acres. No lower income housing was required in either zone under then-existing ordinances. In that lawsuit, we requested that our Raritan Basin lands be rezoned to allow 10 units per acre and that the Passaic Basin portion of our property be rezoned to a gross density of 6 units per acre which rezoning would have allowed us to develop over 7,500 units on the property. It was proposed that 20% of the units would be affordable to lower income households.

4. In August of 1984, representatives of Bernards contacted my attorneys and advised that the Township desired to settle this litigation. Bernards offered to modify its zoning to provide 5.5 dwelling units per acre for the portion of Hills' property which lay in the Raritan Basin with a mandatory 20% set-aside for lower income housing on that portion of the property. The proposal would not alter the zoning of the Passaic Basin portion of Hills' land. Thus, the proposal contemplated construction of a total of 2,750 units in the Raritan Basin plus the 273 units previously permitted in the Passaic Basin.

5. Upon learning of Bernards' settlement proposal I contacted the management of Hills and advised of the offer. Hills' management thereafter commenced consideration of the proposal.

6. On September 17, 1984 I attended my first meeting with representatives of Bernards at which settlement was discussed. Present at this

meeting were the Township's attorneys, its planner, Harvey Moskowitz, and Hills' attorneys. A variety of issues were discussed at this meeting.

7. Bernards did not consult with Hills about specific ordinance language prior to the introduction and passage of Ordinance 704. Following its review of the then-proposed Ordinance 704 (adopted November 12, 1984), Hills management reviewed the advisability of settling the lawsuit on the basis of the ordinance and, after due deliberation, it was decided that Bernards' offer should be accepted and that the essential parameters of the parties' settlement were contained in Ordinance 704. The management of The Hills Development Company concurred with our analysis, and authorized me on September 25, 1985 to settle with Bernards at the density allowed in Ordinance 704. This decision was thereafter conveyed to Bernards. Based upon the Township's settlement offer and the adoption of Ordinance 704, Hills agreed to a stay of this litigation and the entry of an order which would immunize Bernards from additional builder's remedy lawsuits. In deciding to accept Bernards' proposal, Hills considered the following:

(a) The previous zoning, which was two dwelling units per acre, would have permitted Hills to build 1,002 units completely free of any obligation to build lower income housing, and the proposed new zoning would have permitted Hills to build an additional 1,250 market units along with 550 lower income units.

(b) This was a higher ratio of low and moderate income units to market units than Mt. Laurel developers had previously found acceptable, but there were important considerations which led the management of Hills to favorably review the possibilities and accept the terms of the Bernards offer.

(c) During the development of the Bedminster portion of the Hills' project, the management of Hills had developed a large and efficient organization, capable of producing housing in volume, thereby enabling Hills to meet the demands

of the marketplace as quickly as possible. Prolonged litigation would cause major difficulties, both with Hills' Bedminster development as well as Hills' Bernards project and it was felt that it would place the effectiveness of the entire organization in jeopardy if Hills completed the build-out in Bedminster and could not proceed in Bernards. However, it was recognized that it was necessary to solve in the settlement the following additional issues which were not addressed by Ordinance 704.

8. When Ordinance 704 was initially adopted by Bernards Township, there had been an attempt made not to involve the Hills, inasmuch as Bernards was facing political pressure not to "give in to the developers". Therefore, the Ordinance was designed without our input, and, from our perspective, was deficient in the following ways:

(a) The ordinance was not free of ambiguous or unnecessary and cost-generative standards and the design standards had little relationship to the product types which Hills had been constructing in its inclusionary development on adjacent land in Bedminster Township;

(b) The ordinance did not reflect any of the cost-reducing accelerated time frames for Planning Board review of projects which "fast-track" provisions have been incorporated in many Mount Laurel II ordinances;

(c) There was no provision within the ordinance for fee waivers for Hills' lower income housing, a standard element in Mount Laurel II ordinances which also offers a substantial cost-saving to inclusionary developers. Fees were waived for all other inclusionary developments.

These issues were relatively easily resolved in the parties' early negotiations. Bernards agreed to certain ordinance changes (see Exhibits H and S), and to waive fees for Hills' lower income units. As to "fast-tracking," the Master had recent experience with a "fast-track" procedure in Mahwah, and suggested adoption of a schedule which was acceptable to Hills and apparently acceptable to the Township.

9. In addition, there were other important legal issues affecting Hills and Bernards which were negotiated (and ultimately resolved) so that construction of Hills' inclusionary development could begin promptly. These included:

(a) The Bernards "off-tract" improvements ordinance which our attorneys regarded as illegal (and which was ultimately declared illegal in litigation in which Hills was not involved). See New Jersey Builders Association v. The Mayor and Township of Bernards, decided February 25, 1985, Superior Court of New Jersey, Docket No. L-043391-83 P.W.

(b) Hills had hoped to begin a single-family lot program in the Passaic Basin portion of Bernards Township, for sections of which it had received municipal approval, but for which a solution to a sewer issue had to be found. We wished to explore alternative ways of sewering that proposed development with Bernards, and regarded that portion of the development as an integral part of the overall Bernards project and as an important source of revenue, capable of assisting to offset costs incurred in other areas;

(c) As a result of what Hills believed to be an assessor's error in 1982, the land within the lot program had been improperly assessed, and there was litigation pending against Bernards to correct the error.

It was the opinion of the parties that it would be desirable, in a settlement with Bernards, to dispose of all issues which were in dispute between the Township and Hills, and we devoted substantial time to resolving our differences with the Township in the meetings which took place. The above issues were all resolved as of early June, 1985. It was agreed that Hills would contribute $3.24 million, or approximately $1,000 per unit for off-tract improvements (Exhibits H and I). The tax litigation was dismissed as a result of the settlement and, finally, it was agreed that the Passaic Basin would be sewered by the Environmental Disposal Corporation. (Exhibits H and I). The settlement process itself is discussed below.

10. Hills, its attorneys and consultants met with the Township's attorneys and consultants several times during January, February and March 1985, and expended considerable effort, both in Hills' staff time and Hills' - paid consultant time, to meet with NJDEP, the Township, the Court-appointed Master and other parties to resolve all issues which were considered to be directly or indirectly related to the Mount Laurel II case.

11. In March, 1985, the issues had been sufficiently crystalized to enable preparation of a draft Stipulation of Settlement and this Stipulation was the focal point of discussions during March-May, 1985.

12. On behalf of Hills, I personally attended many of the meetings at which negotiations took place. I was authorized by Hills to settle the issues which remained following acceptance by the principals of Hills of the density and set-aside offered by Bernards. In my absence, Hills' attorneys were authorized to negotiate any remaining points of contention.

13. Throughout the course of negotiations I objected to any negotiations on any topics which the Township's representatives had not received authority to agree upon since I was aware that a negotiated "resolution" of issues was of little value without Township Committee approval.

14. By early June, 1985, all major issues of contention between the parties were resolved. Bernards Township's representatives in fact advised Hills at a June 5, 1985 meeting that all issues were resolved. It was agreed that a Stipulation of Settlement prepared by Hills' attorneys would be redrafted by Bernards' attorney, and drafting began on that document in June, 1985. My belief concerning the fact that an agreement to settle this matter had been reached was confirmed on June 12, 1985, when the Township in fact wrote to the court to advise that agreement had been reached and requested from the court a hearing date for that settlement to be approved.

15. Despite the fact that all issues had been resolved and the settlement finalized, in early August of 1985 my attorneys advised me that Bernards had refused to execute the settlement documents redrafted by the Bernards attorney, that the Township attorney had been instructed to prepare a "counter-offer" and that Bernards officials had threatened to seek transfer of this matter to the Affordable Housing Council in the event they could not reach agreement with Hills with respect to a substantial down-zoning of the Hills property.

16. On Thursday, March 6, 1986, I learned by reading the "Bernardsville News" of that date that Bernards was introducing an ordinance to downzone Hills property so as to eliminate zoning for 1,250 dwelling units.

17. In light of the adoption of Ordinance 704 and the Township's continuous statements to the Court and Hills indicating that the Township wished to settle (and, in fact, that this matter was settled), Hills undertook a series of costly actions and commitments in preparation for construction of the Bernards development.

18. In addition, as a result of my belief in the veracity of Bernards' representatives' statements concerning the Township's desire to settle I did not authorize the preparation of a preliminary application following the adoption of Ordinance 704. Had there been significant problems with Bernards' desire to settle as to all related issues I would have immediately directed preparation of a preliminary application for the entire tract. Throughout the settlement process and up until August, 1985, Bernards never indicated any intention to back out of the settlement process for any reason, including the legislation which had been pending for some time.

19. Similarly, if Bernards had not advised Hills that it wished to settle this matter, I would not have authorized Hills' attorneys to cease the litigation process.

20. Actions taken by Hills in reliance on the adoption of Ordinance 704 and the Township's representations include the following:

(a) Hills has made substantial financial commitments for the reconstruction of Schley Mountain Road, which has been designed to be a four lane, main collector road to serve the entire Raritan Basin development, including the Bedminster Highlands at eight (8) dwelling units per acre and the Bernards property at the 5.5 dwelling unit per acre density. The design work has already been done, the approvals have been obtained, the contracts have been awarded and construction has commenced. In order to expand the road, Hills was compelled to purchase three tracts of property in their entirety. It would not be necessary to totally reconstruct the road, at a cost of

approximately $1,600,000, in the absence of a 2,750 unit Bernards development. In the opinion of our traffic engineers, some $675,000.00 will have been needlessly spent if the road is to serve only Hills/Bedminster and a Bernards development at 3.0 du/ac.

(b) Hills has also designed and commenced construction of water and sewer mains to serve both the Hills/Bedminster highlands development and the Bernards development. As with the road construction, the mains were designed and sized to serve a 2,750 unit development in Bernards. If the zoning is now repealed, the mains will be grossly oversized and some $30,000 expended by Hills will be a noncompensable loss to Hills;

(c) The EDC plant is financed through a N.J.E.D.A. bond issue in the amount of approximately $6,380,000, secured by property in Bernards. Failure to go forward with the Bernards development at the approximate zoning provided for by Ordinance 704 would imperil the financing of the sewage plant and, hence, the investments of the numerous bondholders;

(d) Pursuant to Ordinance 704 and the parties' agreement, Hills has expended approximately $200,000 for traffic engineering, transportation and improvement studies on surrounding roads including Routes 202/206, Allen Road and Schley Mountain Road, architectural design, storm water engineering, wetlands engineering and mapping (including a series of meetings with the Army Corps of Engineers) and market research, all of which will have been expenditures in vain if Ordinance 704 is repealed as proposed;

(e) Part of the parties' agreement included the submission of a conceptual approval application for the development of the Bernards properties. In accordance with the provisions of Ordinance 704, Hills began work on the detailed concept planning. A sketch concept plan was submitted to Bernards in March, 1985 at which time the Township made various suggestions. The process culminated in a conceptual application which included a land use plan, a utilities plan, a circulation and traffic plan, and all other related documents, plans and studies, including an environmental impact statement and a community impact statement which are required by the Ordinance, and which will become essentially useless in the event Ordinance 704 is repealed. The planning and other technical studies performed in preparation for the application were done at a cost to Hills of approximately $250,000. An application fee in the amount of $74,360 was also paid to Bernards. Of course, essentially all of these expenses will be funds spent in vain if the zoning is repealed;

(f) As a result of our original understanding with Bernards, we withdrew our suit in tax court against the Township with regard to the assessment of the property in the lot program, and did not

file a protest against the 1985-86 assessment since, pursuant to our agreement.

(i) The statutory deadline to file an application under the Farmland Assessment Act and the general time for appeal of tax assessments have passed, all to the detriment of Hills;

(ii) There was no way that Hills could undertake meaningful construction on the lot program during the 1985 building season and, therefore, Hills has paid taxes at full development level on property which is undeveloped, a scenario has cost Hills many thousands of dollars which otherwise would not have been assessed;

(g) In anticipation of commencement of construction of its Bernards development, Hills has expanded its internal organization including the leasing of office space, expansion of its computer facilities and the development of a full-time, in-house construction staff. Hills presently has approximately 205 full time employees, the retention of which Hills may not be able to assure if Hills' zoning is repealed as proposed, all to the detriment of Hills, its employees and subcontractors;

In summary, Hills has expended a sum in excess of $1,000,000 on "planning and pre-start" in reliance upon Ordinance 704 and the Township's representations. If Ordinance 704 is repealed, most of this money will have been money expended in vain.

21. Finally, it should be stressed that Hills undertook infrastructural improvements in Bedminster Township which were designed and constructed in conjunction with the adjacent 2,750 unit development permitted by Ordinance 704 in Bernards. Bernards was well aware of these development activities and no representative of Bernards ever indicated that Hills should refrain from incurring these expenses. Naturally, Hills received all necessary municipal approvals for development activities undertaken in Bedminster Township including final approval for two subdivisions in the Bedminster Highlands.

22. Upon learning of the proposed adoption of Ordinance 764, I, on behalf of Hills, filed a formal protest pursuant to N.J.S.A. 40:55D-63. A copy of this protest is attached hereto as Exhibit A.

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

John H. Kerwin

Sworn to and subscribed before
me this 24th day of March, 1986

Kathie L Paulman
My Commission Expires 10-26-88

THE HILLS

FORMAL PROTEST AGAINST PROPOSED ADOPTION OF BERNARDS TOWNSHIP ORDINANCE 764.
(N.J.S.A. 40:55D-63)

It has come to my attention that the Township Committee of the Township of Bernards has introduced Ordinance #764, a proposed amendment to the Bernards Township Land Development Ordinance which amendment would drastically reduce permissible gross density in the R-8 zone.

On behalf of The Hills Development Company, owner of approximately 501 acres of land zoned R-8, I formally protest the proposed amendment of the zoning applicable to The Hills Development Company property. This formal protest is filed with the Township Clerk of the Township of Bernards pursuant to N.J.S.A. 40:55D-63.

John H. Kerwin, President
The Hills Development Company

March 12, 1986

The Hills Development Company (201) 658-4400
Street Address: One Hills Drive, Bedminster, New Jersey 07921 Mailing Address: P.O. Box 500, Pluckemin, New Jersey 07978

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

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

STATE OF PENNSYLVANIA)
) SS:
COUNTY OF PHILADELPHIA)

Joseph Thompson, of full age, having been duly sworn according to law upon his oath deposes and says:

1. I am a traffic engineer registered professionally by the states of New Jersey and Pennsylvania, among others, and I am a member of the firm of Orth-Rodgers & Associates, Inc., a traffic engineering and transportation planning firm located at 230 South Broad Street, Philadelphia, Pennsyvania.

2. The firm of Orth-Rodgers has been retained by The Hills Development Company for the purposes of analyzing the traffic impacts and access issues arising from The Hills' developments in Bedminster and Bernards Townships.

3. The results of Orth-Rodgers' thorough analysis of traffic impacts of Hills' Bernards development are contained in a Circulation and Traffic Report prepared by Orth Rodgers in January, 1985 and updated in September, 1985. This analysis was supplied to the Bernards Township Planning Board in connection with The Hills' conceptual approval application.

4. Based on various roadway improvements and traffic signal recommendations, many of which are fully designed and/or constructed, there will be no adverse impact on the involved communities. In fact, the improvements will significantly improve access in the area and traffic safety.

5. The Bernards development permitted by the currently effective zoning, 2,750 units, will engender no traffic impacts which justify any reduction in density. To the contrary, The Hills is undertaking significant improvements to the road network, most significantly, Schley Mountain Road and the Allen Road Extension. Therefore, traffic and access considerations compel a conclusion that, from a traffic/transportation point of view, the zoned density of 5.5 du/ac. is more appropriate today than when the zoning was adopted in November, 1984.

6. The Bedminster and Bernards properties owned by Hills have, in essence, been planned as a singular planned development. The tracts are adjacent and it was therefore deemed necessary to design and construct the access road in Bedminster, Schley Mountain Road, for the traffic that would be generated by both the Bernards and Bedminster portions of The Hills' development.

7. In planning for access to the developments through Schley Mountain Road, it was recognized that adequate service to the Bedminster Highlands and the 2,750 unit Bernards development would require a four-lane configuration for Schley

Mountain Road. Thus, the design entailed clearing and grading of a new two-lane roadway adjacent to the existing Schley Mountain Road. (See road drawing, Exhibit 1 submitted herewith). This new roadway is now largely constructed.

8. Analysis of the traffic demands which would be generated by the development with 1,500 units in Bernards has been performed. I have concluded that the traffic demand which would be generated by such a reduced development would not necessitate expansion of Schley Mountain Road to four lanes. If original planning would have entailed a 1,500 unit Bernards development, Schley Mountain Road would have been limited to a two lane road which would have been constructed over the existing roadbed. Naturally, the design and construction costs to upgrade the existing Schley Mountain Road would have been far less than the costs involved in clearing and regrading an additional two lane roadbed along with the upgrade of the existing Schley Mountain Road.

9. In sum, my analysis of the funds expended by Hills for the Schley Mountain Road improvements and associated facilities design and construction costs yields a conclusion that Hills has spent, or is committed to spending, at least $675,000.00 more than would be necessary to design and construct the access road for a 1,500 unit Bernards development.

Joseph Thompson P.E.

Sworn to and subscribed before me
this 24th day of March, 1986

Kathie L. Paulmier

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

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

STATE OF PENNSYLVANIA)
) SS:
COUNTY OF PHILADELPHIA)

Kenneth John Mizerny, of full age, having been duly sworn according to law upon his oath deposes and says:

1. I am a professional planner licensed by the State of New Jersey and a landscape architect, employed by the planning and design firm of Sullivan Arfaa, with principal offices at 2314 Market Street, Philadelphia, Pennsylvania, 19103.

2. I have been employed as a consultant to The Hills Development Company, with particular responsibilities for planning and coordination of The Hills Development Company's projects in Bedminster and Bernards Townships, New Jersey.

3. Hills Development Company (hereinafter "Hills"), has been actively involved in construction of a planned development in the Township of Bedminster on property adjacent to the Township of Bernards.

4. I have been actively involved in the planning for the Bedminster PUD, and have worked closely with Bedminster Township planning officials with respect to ordinance drafting, ordinance interpretation, and filing development applications in accordance with the ordinances.

5. As part of my responsibilities, I reviewed Bernards Township's Ordinance 704 in October, 1984. Based on previous analyses which I had performed for other municipalities, I examined the then-proposed ordinance for the purposes of: (a) examining whether the ordinance removed all of the cost generative standards in Bernards' land development ordinance; and (b) determining whether the ordinances would permit the use of housing products which had been successfully built by Hills in Bedminster Township. Inasmuch as an ordinance which failed to permit the use of proven products would cause expensive work to be done in architectural redesigns and engineering, and inasmuch as Bedminster's ordinance had worked well to provide opportunities to build an inclusionary development and since Bedminster was immediately adjacent to Bernards, such an ordinance comparison was deemed necessary.

6. While I found Ordinance 704 to be generally acceptable, I had objections concerning the setbacks, height limitations, the building separations, and similar bulk and yard requirements which would apply to inclusionary developments. It was my view that modification of these standards would enable a developer to be more flexible, and provide more efficient and less costly planning and development. This is of particular importance in an inclusionary development.

7. At a meeting held on January 16, 1985 and attended by representatives of the Bernards Township Committee and Planning Board, representatives of The Hills Development Company and the Special Planning Master, George Raymond, Bernards Township agreed to make certain changes in Ordinance 704, reflecting the concerns contained in a memorandum I had prepared. Those changes and the concerns discussed by Hills and the Township are summarized in a January 23, 1985 Memorandum, drafted by the Township's Planning Consultant, Dr. Harvey S. Moskowitz, P.P. (Exhibit S to Appendix).

8. Additional meetings were held with respect to ordinance amendments and these meetings were usually attended by the Township Planner, the Township Engineer and myself. Thereafter, ordinance changes were drafted by Dr. Moskowitz and were designed to be incorporated in a revised ordinance prepared by Dr. Moskowitz. These proposed changes are described in Exhibit G.

9. I have reviewed Bernards Township proposed Ordinance 764, an ordinance which would significantly reduce the gross density permitted on the Hills property, that is, from 5.5 du/ac to 3.0 du/ac.

10. One of the purposes of the Municipal Land Use Law is to ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and state as a whole. The Hills Development Company has property in Bernards Township bordering Bedminster Township. The Bedminster Township zoning adjacent to the site permits development ranging from ten dwelling units per acre to eight dwelling units per acre, with the eight dwelling unit per acre zoning immediately adjacent to the Hills project in Bernards Township. In essence, the Bedminster and Bernards tracts are to be developed as one planned development by a single entity. Therefore, in addition to the traditional concern for consonant planning along the Bedminster/Bernards border, the abrupt density change proposed by the Bernards zoning amendment would be especially inappropriate in that the sudden change would take place within one planned development.

11. It is my strong belief that the zoning provided for in Ordinance 704 is superior, in terms of sound planning and the Municipal Land Use Law, then is the zoning which would result from the proposed repeal of Ordinance 704. The transition between eight dwelling units per acre and three dwelling units per acre as provided for in the proposed amendment is too abrupt and is not in accord with general planning principles. Ordinance 704, which provides for 5.5 dwelling units per acre on the site adjacent to the Hills Bedminster development, provides a far superior transition from a planning perspective.

12. On October 30, 1984, the Bernards Township Planning Board adopted amendments to the land use element of the master plan which recommended that the Raritan Basin portion of the Hills property be zoned at a density of 5.5 dwelling units per acre. (Exhibit T).

13. If Ordinance 704 were to be repealed, the Raritan Basin portion of Hills' property would be zoned at three dwelling units per acre. Therefore, from a planning perspective, the resulting land use pattern would be clearly contrary to the land use element, a violation of soundly established planning principles and the Municipal Land Use Law.

14. Thus, it is my opinion as a professional planner that Ordinance 704, with the zoning providing the 5.5 dwelling units per acre adjacent to Bedminster, represents sound planning in all respects. The Planning Board and Township Committee have recognized as much in the Master Plan and Ordinance 704.

15. Upon learning of Bernards' introduction of an ordinance to downzone Hills, Hills requested that I analyze the downzoning for the purpose of determining whether the downzoning was in any way supported by legitimate planning considerations. In a report which is entitled "Planning Evaluation of Ordinance 764, Bernards Township, New Jersey," I have concluded that there are no such planning justifications for the downzoning.

16. The reasons underlying the conclusions in my report (which has been supplied to the Planning Board) include the following:

(a) Land Use Compatibility: As mentioned above, the Bedminster and Bernards portions of Hills' property have been planned in a unified and comprehensive manner. The municipal boundary line is indistinguishable in that it does not follow any natural land feature. The Bernards Master Plan itself (at p.122) recognizes the merits of a comprehensive planning approach which is facilitated by zoning compatibility. Avoidance of a disjointed development pattern on either side of the municipal boundary requires that there not be a drastic density differential as proposed by Ordinance 746;

(b) Environmental Suitability: A detailed Environmental Impact Assessment and Natural Features Report were supplied to Bernards in connection with Hills' conceptual development application. According to the criteria set forth in Bernards Township's Land Development Ordinance, the Hills Raritan Basin property is remarkably free of any significant environmental constraints. Steep slopes and wetlands are minimal and some 97% of the tract is unrestricted land and environmentally suitable for development. From an environmental standpoint, the Hills property can accomodate a density of 5.5 du/ac in a manner entirely consistent with any environmental concerns. There is simply no environmental rationale to support any downzoning;

(c) Accessibility and Roadway Improvements: The principle access to Bernards will be provided by the Allen Road Extension, a designated master plan improvement incorporated into the overall Circulation Plan element of the 1982 Bernards Master Plan. The Allen Road Extension will provide excellent access to Schley Mountain Road and, hence, I-287 and U.S. Route 202/206 and, to the east, Allen Road and Martinsdale Road which has a major interchange with I-78. In short, accessibility is excellent and no traffic or circulation considerations warrant the decrease in density proposed by Bernards. In fact, since Schley Mountain Road has been designed to serve the Bedminster Highlands and 2,750 units in Bernards and is now under construction, access at this time is far superior than when Ordinance 704 was adopted; and

(d) Sewer and Water service: Sewer service to the Bernards development will be provided by the Environmental Disposal Corporation (EDC). The EDC will have adequate treatment capacity to serve the Bernards development as zoned by Ordinance 704. In addition, design and construction of the interceptor sewer lines is underway and those lines have been sized to accomodate the flow

from a 5.5. du/ac Bernards development. Of two other interceptors to serve the area, one is out to bid and the other is in the engineering process. There is certainly adequate sewage treatment capability to serve the Bernards development as zoned.

Similarly, adequate water service is available. In fact, Hills has entered into an agreement with the Commonwealth Water Company. Extensive engineering studies have been completed. A major water main is already under construction.

17. In sum, a review of all considerations leads to the conclusion that any decrease of the 5.5 du/ac density applicable to the Hills' property would, from a planning point of view, be purely arbitrary. This conclusion is strengthened by a review of other tracts in Bernards which are clearly far less suitable than the Hills property and yet are zoned for a gross density of 6.5 du/ac. There is simply no rational reason to downzone the Hills property

I certify that the foregoing statements made by me are true. I understand that if any statement contained herein is wilfully false, I am subject to punishment.

Kenneth John Mizerny

Sworn to and subscribed before me
this 24TH day of March, 1986

Veronica V. Komansky

VERONICA V. KOMANSKY, NOTARY PUBLIC
PHILADELPHIA, PHILADELPHIA COUNTY
MY COMMISSION EXPIRES DEC. 28, 1987
Member, Pennsylvania Association of Notaries

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2-4 Chambers Street
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ATTORNEYS FOR Plaintiff

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

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

I, THOMAS JAY HALL, of full age, being duly sworn according to law, hereby depose and say:

1. I am an associate in the firm of Brener, Wallack and Hill, and have been assigned responsibilities in the above captioned case.

2. As part of those responsibilities, I was asked to attend various meetings, to participate in discussions, to monitor statements of parties and their representatives, and to prepare reports and memoranda.

Set forth below is a reconstruction of events, based on a review of correspondence, memoranda and diaried information, beginning with the filing of a Complaint by The Hills Development Company ("Hills") against Bernards Township on May 8, 1984 to August 26, 1985. It is similar to an affidavit filed with the court in opposition to Bernards' motion to transfer; but contains some additional information based on review of the above indicated information.

3. A public meeting was held with the Bernards Township Planning Board on May 10, 1984, which included a presentation by the Township's Planner, Dr. Harvey S. Moskowitz, who outlined a variety of options which the Planning Board and Bernards Township could take in dealing with its Mount Laurel obligation, which Dr. Moskowitz indicated was approximately 1,272 units. [Dr. Moskowitz' reports were previously filed with this Court as part of motions filed by the Plaintiff in June, 1984.]

4. The period between May 10 and July 20, 1984 was occupied with discovery and motions and cross-motions for protective orders and summary judgment.

5. A hearing was held before the Honorable Eugene D. Serpentelli on July 20, 1984, with respect to the aforementioned summary judgment and discovery motions. While the summary judgment motions were denied, the Township apparently recognized that its existing Land Development Ordinance needed revision.

6. During the late summer, 1984, Bernards Township representatives informed counsel for Hills that the Township would be interested in settling the conflict. They indicated that, based on their planner's interpretation of their fair share and other zoning considerations, Bernards Township would need five hundred fifty (550) lower income units, equally divided between low and moderate income, to be built by Hills. The Township intended to re-zone the Raritan Basin portion of the Hills tract for 5.5 dwelling units per acre, with a twenty (20%) set-aside.

7. At a meeting held September 17, 1984, representatives of the Hills and the Township discussed the concepts of the proposal, but there was no draft ordinance available for review. Hills expressed interest in pursuing settlement of the case as opposed to continuing litigation.

8. On September 18, 1984, a letter was sent from counsel for Bernards to the Court requesting the entry of an Order staying this litigation and immunizing Bernards from further builder's remedy suits.

9. There was discussion between the Township and Court with respect to a proposed Order staying the litigation and providing immunity. A revised Order was submitted to the Court on October 10, 1984; and was rejected by the Court by letter of October 16, 1984. (See Appendix, Exhibit B; all Exhibit references are to Exhibits contained within the Appendix submitted herewith).

10. On October 22, a public hearing was held in Bernards Township with the Bernards Township Committee and the Planning Board in attendance. The meeting focused around a discussion of the proposed Mount Laurel ordinance, which had been introduced on October 2 for first reading. At that hearing, the Township, and its special planning consultant, Dr. Moskowitz, reviewed the proposed ordinance and the planning rationale underlying it, including the proposed rezoning for the Hills. Dr. Moskowitz indicated that it was reasonable to rezone Hills due to the available infrastructure to serve the development. The meeting also included a discussion of the rationale for settling the case rather than continuing with litigation.

11. Also during October, Hills and its consultants began the process of examining the proposed ordinance with respect to any cost-generative and unnecessary standards.

12. On October 30, 1984, the Planning Board held a public meeting. Among the purposes of the meeting was adoption of amendments to the Bernards Township Master Plan in order to effectuate the Township's Mount Laurel II strategy

(Exhibit T) and the making of recommendations with respect to the proposed Mount Laurel ordinance.

13. By letter dated November 5, 1984, I provided a four page letter and an accompanying memorandum to Bernards Township outlining difficulties which The Hills Development Company had with Bernards' proposed ordinance. (Exhibit U). The letter also discussed several other areas of controversy between the Township and The Hills Development Company (including a sewer issue affecting property in the Passaic Basin and a pending matter in Tax Court) and suggested that it would be appropriate to settle all issues at once.

14. Bernards Township held a public hearing on November 5, 1984, and elicited considerable public comment on the proposed Ordinance.

15. On November 12, 1984, the Township Committee adopted Ordinance 704 as its response to Mount Laurel II. (Exhibit C).

16. An Order was submitted by the Township and entered by the Court on December 19, 1984. This Order granted a 90 day stay of litigation and immunity from other builder's remedy suits. The Order also appointed George Raymond as Master in this matter. (Exhibit E).

17. By letter dated January 3, 1985, counsel for Bernards Township provided George Raymond with a variety of material which Mr. Raymond had requested, including a copy of Ordinance 704.

18. A meeting with George Raymond and representatives of the Township and Hills was held on January 16, 1985. In advance of that meeting, I prepared a list of important issues which Hills wished to discuss. (Exhibit V). That list formed the basis of the discussions which took place on January 16.

19. That meeting crystallized the thinking of both Bernards and The Hills, and is described in a Memorandum prepared by Harvey Moskowitz, The Township's Planner, (Exhibit S).

20. At the urging of the Master and with the concurrence of the Township, on January 30, 1985, I sent a letter to N.J.D.E.P. Commissioner Hughey requesting a meeting to resolve the Passaic Basin sewer problem.

21. During the month of February, discussions took place between consultants for Bernards Township and the consultants for Hills for prospective ordinance revisions. Hills also analyzed the off-tract improvement costs.

22. A meeting took place with representatives of Hills, the Township and the DEP on March 11, 1985. During the meeting, the NJDEP indicated it could accept a sewering scheme for the Passaic Basin which included either service provided by the Environmental Disposal Corp. (EDC) or the Bernards Township Sewerage Authority. DEP indicated that the choice was completely in the hands of the Township.

23. In March, 1985, a first draft of a proposed Stipulation of Settlement was prepared by me and transmitted to all parties.

24. Hills submitted a concept plan, to the Bernards Township Planning Board Technical Coordinating Committee, in draft form for discussion, in March, 1985.

25. I met and discussed the matter with the Defendants' attorneys, James Davidson, Esq., and Arthur Garvin, Esq. on March 29, 1985 and followed the meeting with a letter dated April 1, 1985, which included materials requested by the parties. (Exhibit W).

26. Concurrently, I requested the Tax Court to defer a scheduled hearing on the farmland assessment issue. Thereafter, I requested several other postponements from the Tax Court, until it appeared that the Township and Hills had achieved agreement as to all issues.

27. A further exchange of correspondence between the parties occurred in April and a meeting of the parties was held on Wednesday, April 24, 1985.

28. At that point, it was agreed that there were still some relatively minor issues which needed to be resolved, although agreement was reached in principle on all major matters, including the extension of EDC's sewage collector lines to serve the Passaic Basin portion of the Hills' property.

29. A request was submitted by Bernards to the court to further extend the order granting immunity for additional builder's remedy suits until May 15, 1985. An Order granting this request was entered on April 29, 1985.

30. On May 8, 1985, the court-appointed Master wrote to the Court and requested an additional extension of immunity. This request was granted with the express understanding that no further extension would be granted.

31. On May 21, 1985, I wrote to John Kerwin, president of Hills, indicating that there was a meeting scheduled for May 24, 1985, and alerting him that Hills would need to make a policy decision with respect to the number of lower income housing units to be built (Exhibit X).

32. Further discussions among the parties occurred in May, including the meeting held on May 24, 1985. Prior to that meeting, I redrafted the proposed Stipulation of Settlement and the appendices and provided them to counsel for Bernards Township.

33. On May 31, 1985, I transmitted a draft of the Stipulation of Settlement which appeared to be the final version of the agreement. (Exhibit H). In that letter, I indicated that I thought that we would be in a position to resolve all remaining issues in order to get the agreement initialled. (Exhibit Y).

34. A review of the May 31 draft of the Stipulation of Settlement was conducted at a meeting with Bernards Township on Wednesday, June 5, 1985 at which time counsel for Bernards Township indicated that he was satisfied that all of the issues were resolved as between Hills and Bernards Township, but that he would prefer having the final Stipulation of Settlement prepared by him rather than by the

attorneys for the Plaintiff. We indicated that was not a problem and that, so long as the issues were resolved, we were not concerned with who drafted the Stipulation.

35. On June 12, 1985, counsel for Bernards wrote to the Court advising that agreement had been reached and requesting a compliance hearing date and an extension of immunity. (Exhibit L).

36. Also on June 12, 1985, George Raymond issued his report on the compliance package offered by the Township. While he generally supported the Township's efforts, he recommended certain changes in Ordinance 704 to comply with Hills' suggested design changes. The changes by the Master were substantially consistent with the amendments agreed upon through the parties' negotiations. Mr. Raymond also indicated that the Township's fair share of regional need would not be met unless some additional units were provided. He recommended that Hills supply 68 additional units of lower income housing, to be built during the period 1991-94 as a means of remedying the Township's shortfall. Hills and Bernards agreed that Hills would provide the additional 68 units if the Township did not wish to contest the Master's recommendation. It should be noted that the Master had expressed his views and recommendations throughout the course of the negotiations.

37. On June 24, I requested that the Tax Court dismiss the appeal brought by Hills against Bernards Township. The action was in fact dismissed.

38. As we had agreed, Mr. Davidson redrafted the Stipulation of Settlement, and recast it as a "Memorandum of Agreement" Largely because of some differences in drafting style, some omissions and modifications of language between the May 31 draft and Mr. Davidson's first draft, and some desire to clarify additional terms, there appeared to be some differences of opinion on relatively minor issues between Hills and Bernards.

39. Mr. Davidson redrafted the Memorandum (Exhibit I) and sent it out for review on July 3, 1985. The parties met again on July 18 to review the

Memorandum of Agreement and a proposed Order of Judgment prepared by Mr. Davidson (Exhibit M) at which time it appeared that the only point of contention was the issue of 68 additional lower income units proposed to be built in the Raritan Basin to conform with the recommendations of the court-appointed Master. Again, it was agreed that, should Bernards desire, Hills would construct these additional units.

40. There were other minor wording changes in dispute, but Hills provided additional language for Mr. Davidson's consideration, via a red-line markup (Exhibit J) of Mr. Davidson's original draft Memorandum of Agreement. We also reviewed the proposed Order of Judgment drafted by Mr. Davidson (Exhibit M), dismissing the litigation and declaring the Township to be in compliance with Mount Laurel II, and indicated that the proposed Order of Judgment was acceptable to us, but we would not object to minor wording changes in it.

41. The parties met again on August 7 at which time Mr. Davidson indicated that the Memordandum of Agreement and proposed Order of Judgment were acceptable and that he was presenting the documents to the Township Committee. We have not seen a re-drafted Memorandum of Agreement and proposed Order, inasmuch as the responsibility for preparing the documents was Mr. Davidson's, but had assumed that some redrafted document was prepared for Mr. Davidson's presentation to the Committee.

42. On August 12, 1985, I received a telephone call from Mr. Davidson indicating that the Township Committee had decided not to authorize him to execute the Memorandum of Agreement. He indicated the Township would make a counter-offer to Hills which he did not think Hills would find acceptable.

43. On August 26, 1985, we were informed that it was likely that Bernards would seek to transfer the case to the Affordable Housing Council.

Raymond A. Ferrara

Raymond A. Ferrara, Ph.d.

Sworn to and subscribed before
me this 27th day of March, 1986

Kathie L. Paulmier

My Commission Expires 10-26-88

Attorney(s): BRENER, WALLACK & HILL
Office Address & Tel. No.: 2-4 Chambers Street,
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Attorney(s) for PLAINTIFF

THE HILLS DEVELOPMENT COMPANY

Plaintiff(s)

vs.

THE TOWNSHIP OF BERNARDS, et al.

Defendant(s)

SUPERIOR COURT OF NEW JERSEY
SOMERSET/OCEAN *COUNTY*
LAW *DIVISION*

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

CIVIL ACTION

A copy of the within Notice of Motion has been filed with the Clerks of the Counties of Somerset and Ocean Somerville and Toms River, *New Jersey*

THOMAS F. CARROLL
Attorney(s) for PLAINTIFF

The original of the within Notice of Motion has been filed with the Clerk of the Superior Court in Trenton, New Jersey.

THOMAS F. CARROLL
Attorney(s) for PLAINTIFF

Service of the within

is hereby acknowledged this day of 19 .

Attorney(s) for

I hereby certify that a copy of the within Answer was served within the time prescribed by Rule 4:6.

Attorney(s) for

PROOF OF MAILING: On March 24 *19* 86 *, I, the undersigned,* ~~mailed to~~ Federal Expressed to James E. Davidson, Esq., Morristown, NJ 07960 and Arthur H. Garvin, III, Esq., Summit, NJ 07901
Attorney(s) for Defendants
at 43 Maple Avenue, Morristown, NJ and 9 DeForest Avenue, Summit, NJ 07901
by Federal Express ~~mail, return receipt requested;~~ the following:
Notice of Motion, Brief and Appendix and Affidavits.

R. 1:5-3 *The return receipt card is attached to the original hereof.*

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

Dated: March 24, *19* 86.

THOMAS F. CARROLL

BRENER, WALLACK & HILL

ATTORNEYS AT LAW

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** MEMBER OF CONN. BAR ONLY
△ CERTIFIED CIVIL TRIAL ATTORNEY

March 25, 1986

FILE NO. 3000-0042

Mr. John Mayson, Clerk
Superior Court of New Jersey
CN 971
Trenton, NJ 08625

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

Dear Mr. Mayson:

Enclosed herewith please find the following documents in regard to the above referenced matter:

( )	Complaint	( )	Request for Enter Default & Certification
( )	Complaint/Jury Demand	( )	Interrogatories
( )	Proof of Filing/Mailing	( )	Release
( )	Answer	( )	Notice to Take Oral Depositions
(x)	Notice of Motion	( )	Notice to Produce Documents
( )	Order	( )	Judgment
( )	Proposed Order	( )	Acknowledgement of Service
(x)	Affidavit(s) (Four)	( )	Certification
( )	Stipulation	( )	Check in the amount of $_____
( )	Other		

Would you kindly:

(x) File and return a filed copy to us in the envelope provided. (Notice of Motion)
( ) Sign and return to us in the envlope provided.
( ) Have signed by the appropriate judge and return to us in the envelope provided.
( ) Serve.
( ) Have answered and return to us within the time provided by the Rules.

Very truly yours,
BRENER, WALLACK & HILL

Thomas F. Carroll

TFC:klp
enclosures
CC: Clerks of Somerset/Ocean County (w/Notice of Motion)