RULS-AD-1986-170
4/30/86

Brief on defendants Opposing Plaintiffs "Motion on Remand"

Pgs 108

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April 30, 1986

Honorable Eugene D. Serpentelli, A.J.S.C.
Ocean County Court House
Toms, River, New Jersey 08754

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

Dear Judge Serpentelli:

Enclosed for filing are the following papers, in response to plaintiff's "Notice of Motion on Remand from the Supreme Court":

1. Original and copy of Brief of Defendants Opposing Plaintiff's "Motion on Remand";

2. Copy of Certification of James E. Davidson, dated April 30, 1986;

3. Copy of Appendix of Defendants Opposing Plaintiff's "Motion on Remand" (which is incorporated by reference into Mr. Davidson's Certification);

4. Copy of Certification of Harvey Moskowitz;

5. Copy of Transcript of the oral arguments of Mr. Davidson and Mr. Hill before the Supreme Court in Hills v. Bernards, January 6 and 7, 1986;

6. Copy of Transcript of proceedings before the Planning Board, March 18, 1986, on referral of proposed Ordinance #764.

Per Your Honor's instructions, as reflected in Mr. Carroll's letter of April 17, 1986, and clarified in my conversation with your law clerk, Tricia Burke, on April 22, 1986, the enclosed papers address only Points I and II of Hills' most recent Brief.

We understand that all other issues which have been asserted in various motions to Your Honor are not to be briefed now or argued on the May 8 return date. These issues include the following:

-- Bernards Township's right to amend its ordinance in regard to conceptual approval applications;

-- formal vacating of the court's temporary Order of December 12, 1985;

-- legality of the Planning Board's rejection of Hills' conceptual plan; and

-- Bernards' right to amend Ordinance #704, apart from estoppel-related issues.

All defendants respectfully submit that the above issues (except for vacating of the December 12 Order), as well as the issues which we are now briefing, are outside this court's jurisdiction by virtue of the Supreme Court's decision in Hills v. Bernards. However, in the event that the court does eventually hear those other issues, defendants assume that they will be given an opportunity to submit briefs and affidavits addressing them, and to have oral argument on them, at that time, and defendants respectfully request sufficient advance notice to permit them to do so.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: Howard P. Shaw
Howard P. Shaw

HPS/sjm
BY HAND

cc: Henry A. Hill, Jr., Esq. (By Hand)
(w/all encls.)

Arthur H. Garvin, III, Esq.
(w/encls. except transcripts)

Clerk of the Superior Court
(w/original Certifications and
Appendix, for filing)

TABLE OF AUTHORITIES

Cases Cited — Page

Other

PRELIMINARY STATEMENT

On the present motion, plaintiff seeks enforcement of an alleged settlement, and seeks to estop defendant Township from amending the zoning of plaintiff's property.

It is the intent of defendants, in this Brief, to show that the Supreme Court has foreclosed plaintiff from obtaining the requested relief, to show that the law otherwise does not support Hills' claims, and to show that in any event Hills has not made a sufficient factual showing to entitle it to any relief.

Beyond that, however, it is defendants' intent to show, largely through plaintiff's own words, that there was no settlement of this case; that the reason that settlement was delayed and ultimately prevented was the pure and simple greed of plaintiffs in demanding non-Mount Laurel concessions; and that contrary to plaintiff's vicious attack upon the integrity of defendants, it is in fact plaintiff which has acted in bad faith, conducted itself as a bully, and misrepresented the facts of this case in order to sway the sympathies of the court.

At the direction of the court, at this time defendants do not address plaintiff's motions relating to its conceptual approval application, amendment of the ordinance governing such applications, or the alleged invalidity of Ordinance #764A as an

allegedly interim ordinance, nor defendants' motion to vacate the Order of December 12, 1985. Defendants submit that those other motions by plaintiff, like the motions now being briefed, have been foreclosed by the Supreme Court, but defendants respectfully request a full opportunity to respond to those motions if they do eventually come on for hearing.

COUNTERSTATEMENT OF FACTS

Some of the background facts stated below have been presented by affidavit and brief in earlier proceedings in this case. It is not our intent to rehash the entire history of plaintiff's property and its zoning disputes with Bernards Township, nor to respond to every single allegation in plaintiff's papers. Rather, our intent is to summarize those facts which have particular significance to the present motions.[1]

In 1975, plaintiff[2] was the owner of a large tract of land in Bernards Township. It was zoned for a density of one

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[1] Plaintiff's motion papers and brief appear to use the numbers 746 and 764 interchangeably in referring to the ordinance which amended Bernards' Mount Laurel II ordinance. In fact, the amending ordinance was #764A (Exhibit AA, accompanying this brief), and it will be so designated in this Brief. Ordinance #746 amended the conceptual approval ordinance, and is at issue on other motions which are not presently being briefed.

[2] "Plaintiff" is used to designate both Hills Development Co. and its predecessor in interest, the Allan-Deane Corporation.

dwelling unit per three acres, or a total of approximately 167 units on the 501 acres in the Raritan Basin region.

In that year, plaintiff sued Bernards Township in the Superior Court,[3] based upon Mount Laurel I,[4] alleging that the zoning of the Township was exclusionary. The Second Amended Complaint alleged that plaintiff proposed to provide low and moderate income housing on its property. (First Count, ¶ 28. See Exhibit A, accompanying this brief.)

As a result of the Final Judgment in that case (Exhibit B), in 1980 plaintiff's Raritan Basin property was rezoned to increase the permitted number of dwelling units from 167 to 1,002. Plaintiff's property in the Passaic Basin was rezoned to increase the permitted number from 182 to 273 units.

Plaintiff did not build on its property, but did submit a Project Report (Exhibit C) showing its intent to use its Mount Laurel I density bonus in the Raritan Basin to build housing ranging from $155,000 to $215,000 in price. Its property in the Passaic Basin would be used for houses priced at $255,000. All prices are in 1980 dollars.

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[3] Allan-Deane Corporation v. Township of Bernards, Docket No. L-25645-75 P.W.

[4] So. Burlington Cty. N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975)

Following Mount Laurel II[5], the Planning Board's Technical Coordinating Committee suggested to plaintiff that it would have to build some Mount Laurel housing on its property, but plaintiff's counsel objected to that suggestion. (See minutes of February 14, 1984, attached as Exhibit D.)

Apparently realizing a tactical opportunity, plaintiff then reversed its position dramatically, and in a letter dated April 10, 1984 (Exhibit E) threatened to sue the Township under Mount Laurel II unless, within 27 days from the date of the letter, it adopted 22 pages of zoning ordinance amendments and 5 pages of master plan amendments, including massive new density bonuses for plaintiff and a Mount Laurel set-aside. The letter demanded densities of 9 units per acre (instead of 2) in the Raritan, and 5.5 (instead of 0.5) in the Passaic, but threatened to sue for 10 units per acre throughout the property if the Township did not knuckle under. (Exhibit E, page 3, last paragraph.)

The day following plaintiff's deadline, May 8, 1984, plaintiff filed the present suit, again alleging (as plaintiff had falsely done in Allen-Deane) that it proposed to provide low and moderate income housing on its property.

In July, 1984, the court denied cross-motions for summary judgment. Defendants' motion was based upon plaintiff's alleged

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[5] So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983).

bad faith in using Mount Laurel II as a threat to intimidate the Township, contrary to Mount Laurel II, 92 N.J. at 280.

While denying defendants' motion, the court noted that Bernards had "gotten as close . . . as anybody has yet" to proving such abuse of Mount Laurel II, but suggested that plaintiff had been "too cute" in phrasing its letter to enable the court to make that finding. (Transcript, Exhibit F)

Plaintiff -- not defendants -- initiated attempts to obtain an order preventing other developers from intervening. Mr. Davidson, counsel for defendant Township, recalls having to ask why defendants should have any interest in such an Order, since the Township would only have to satisfy its fair share once, regardless of how many plaintiffs filed suit. He was counseled, by Mr. Hill and/or the court, that getting such an order would avoid the situation which occurred in Franklin Township, where the presence of multiple plaintiffs made settlement impossible to negotiate. (Davidson Certification dated April 30, 1986, ¶¶ 2, 3.)

Thus, on September 12, 1984, plaintiff's counsel sent a letter (Exhibit G), enclosing a proposed form of order which he had drafted, and telling Mr. Davidson what the order would accomplish "if consented to by you" (emphasis added). Plaintiff's counsel then suggested an approach for selling the judge on granting the order, and expressing confidence that he

would sign it "if you put it on that basis". Mr. Davidson submitted the order on September 18, 1984, with a letter telling the court that "[w]e have been asked" to submit the Order "on behalf of all counsel." (Exhibit H)

The court rejected both that order and a re-drafted one. In the latter instance, the court wrote that its "normal approach" has been to grant immunity from builder's remedy suits if the township will stipulate the present invalidity of its ordinance and its fair share number. (Exhibit I) Mr. Davidson passed that letter along to plaintiff's counsel, but did not express willingness to go along with the court's normal procedure. Instead, he expressed the belief that passage of a proposed new Mount Laurel ordinance would enable the parties to "work around" the court's problem. (Exhibit J)

That ordinance, Ordinance #704, had been introduced on first reading on October 2, 1984. (Plaintiff's Exhibit C, 3rd page). On November 5, 1984, shortly before a scheduled final vote on the ordinance, plaintiff's counsel wrote to defendant's counsel to comment on Ordinance #704. (Exhibit K) He did not say that the parties were agreeing to settle based upon Ordinance #704 and would make other agreements later (plaintiff's brief, p. 17); he did not say that the densities in Ordinance #704 were agreeable to Hills (plaintiff's brief, p. 2;

Kerwin Affidavit, ¶ 7 [6]); and he did not say that Ordinance #704 addressed or resolved all of the essential issues (plaintiff's brief, p. 3). Rather, he said that:

- the ordinance is "a good start toward an Ordinance" which would enable Hills to settle the litigation (Exhibit K, second paragraph, emphasis added);

- Hills wanted three times the amount of commercial space allowed by the ordinance (Id., pg. 1, last paragraph);

- sewering of the Passaic Basin (where Hills planned to sell homes for over $250,000) is a "significant problem" (Id., pg. 4, second paragraph); and

- Hills wants to have "a complete settlement of all issues in the case" (Id., pg. 4, last paragraph).

The letter and attachment also included five pages of additional objections to various provisions of the Ordinance. In addition, the attachment to the letter seeks to renege upon a requirement of the 1980 Judgment, that Hills provide a school site or park. (Exhibit K, last page, paragraph f.)

A previous affidavit in this case by plaintiff's attorney, Thomas Hall, acknowledges that the November 5 letter outlined "difficulties" which the Hills Development Company had with Bernards' proposed ordinance, and that Hills' position was that

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[6] Plaintiff's brief says that plaintiff agreed to the densities of Ordinance #704 on September 25, 1984. Mr. Kerwin's affidavit says his management agreed to that density on September 25, 1985. We do not know if this is a typographical error, but we do note that the first time plaintiff ever said that it would accept Ordinance #704 as a resoution of this case, with no changes or other conditions, was at the October 4, 1985 transfer motion arguments. (Exhibit L)

"it would be appropriate to settle all issues at once." (Exhibit CC, ¶ 13)

When enacted, Ordinance #704 on its face showed that it was not intended to be permanently binding upn the Township, for it contained a self-destruct clause which would render the ordinance void if a judgment of repose were not obtained within one year. (Plaintiff's Exhibit C, last paragraph before appendix.)

On November 23, 1984, following passage of Ordinance #704, Mr. Davidson wrote to the court with a status report, and to renew the joint request for a stay. (Exhibit M) He stated that "[t]here is, of course, not a clear agreement as to Bernards Township's fair share number (p. 2, first paragraph), and that there are outstanding issues "which must be negotiated before the current litigation can be finally settled" (p. 3, continued paragraph). He renewed the parties' request for a stay and non-intervention order, but did not admit a fair share number, and did not admit that the prior ordinance was non-complying.

In response (Exhibit N), the only change which the court required in the proposed order was the addition of the designation of a court appointed expert. The revised order was submitted by counsel for plaintiff, who advised (Exhibit O) that negotiations were still going on, which "would be considerably complicated" if the imminent intervention of another developer plaintiff were not headed off.

On January 14, 1985, counsel for plaintiffs sent the court appointed expert a list (plaintiff's Exhibit V) of "those issues which are of greatest importance to Hills." These "significant issues" included increasing the number of allowable units beyond what Ordinance #704 allowed, and otherwise consisted chiefly of demands which, in fact, were unrelated to Mount Laurel, including:

- tripling Hills' allowed commercial space (item 2);
- sewering of Hills' low density, high priced units in the Passaic Basin (item 3[a]);
- guaranteed first position on any planning board agenda involving Hills, even if other Mount Laurel builders also are on the agenda (item 4[b][ii]); and
- resolution of a tax issue relating solely to the high-priced Passaic Basin development (item 6).[7]

On January 30, 1985, counsel for plaintiff wrote to the state Department of Environmental Protection (Exhibit P), regarding sewer service for plaintiff's high-priced homes planned for the Passaic Basin. Unable to get approval for a communal septic system, Hills wanted defendant, Bernards Township Sewerage Authority ("BTSA"), either to sewer those expensive lots, or to allow Hills' captive sewer utility, EDC, to sewer those lots. Hills represented to DEP that a resolution

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7 The Certification of Louis Rago, dated October 1, 1985 and filed previously, shows that the tax issue was legally groundless, and eventually was dismissed by unilateral decision of Hills.

of the sewer issue for these $250,000-plus homes was "essential to the settlement of [this] Mt. Laurel case". (Exhibit P, pg. 3, second paragraph.)

Homes priced at over $250,000 are not Mount Laurel housing. Ordinance 704 did not do anything to the zoning of Hills' Passaic Basin property. Yet Hills represented to the DEP in that letter that sewers for these upper-income homes "will be part of a comprehensive Mount Laurel II compliance program for Bernards Township." (Id., pg. 3, last full paragraph.)[8]

Settlement discussions between negotiators for both sides continued. On April 1, 1985, plaintiff's counsel sent a letter (Exhibit Q) transmitting a draft Stipulation of Settlement, and stating his belief that "this case is now ripe for settlement" (emphasis added) -- i.e., that there had not, to that point, been any settlement agreement.

Throughout the discussions, defendants' representatives made it clear that they did not have authority to bind the Township and that the Township could only be bound upon the passage of a resolution accepting any proposed settlement. (Davidson Certification dated October 1, 1985, ¶ 6. [9])

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[8] Off-site sewage treatment for homes in the Passaic Basin violates one of the express conditions of the Final Judgment in the Allen-Deane case, in exchange for which plaintiff received its original density bonus. (Exhibit B, attachment, ¶ 2.3, ¶ 3.2)

[9] Submitted in connection with the transfer motion and related motions.

Plaintiff's president, Mr. Kerwin, admits that he knew that the Township's negotiators lacked binding authority, and that he objected to that situation "throughout the course of negotiations." (Kerwin Affidavit, ¶ 13.) There is nothing in the moving papers which even suggests that defendants' negotiators ever received such authority, or ever told plaintiff that they had received such authority.

Other than the implicit and unsupported assertion that defendants' negotiators did not have binding authority, the only attempt by plaintiff to show alleged binding action by defendants is the representation made by plaintiff's counsel -- both to this court (plaintiff's brief, pg. 5) and to the Supreme Court (Exhibit R) -- that plaintiff:

> "intends to prove that the Defendant Township Committee met (in the presence of the court-apointed 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." (Plaintiff's brief, pg. 5.)

When filing the present motion, plaintiff told the court that it "may wish to submit an affidavit from the Master, George Raymond," to prove that point. (Exhibit S) No such affidavit has been submitted.

Plaintiff's counsel wrote to Mr. Raymond (Exhibit T), in essence asking for a letter which would prove that point in lieu of an affidavit. Mr. Raymond responded (Exhibit U), with copies to counsel and the court. Mr. Raymond's letter showed the representation by plaintiff to be untrue and unsupportable. Mr.

Raymond stated:

> "I was aware of other unresolved issues between the parties (such as off-tract improvements, etc.) and had participated in meetings intended to solve them. None of these were discussed at the June 6 meeting."

Plaintiff solicited this letter, but has not made it part of its submission on this motion.[10]

Around the time of Mr. Davidson's letter to the court, over-optimistically referring to a settlement, on June 14, 1985 Mr. Davidson wrote to plaintiff's counsel (Exhibit V) transmitting a draft proposed agreement. He expressly told plaintiff's counsel that:

- it was a draft;
- it had not been reviewed by the Township Committee, or by Planning Board attorney Arthur Garvin;
- he (Davidson) had concern about provisions relating to sewerage and the concept plan; and
- Hills' and the Master's proposals regarding fee waiver, fast tracking, and other technical matters were too inflexible.

As drafts continued to be exchanged, reviewed and revised, Mr. Davidson again wrote to plaintiff's counsel on July 3, 1985 (Exhibit W), transmitting a revised draft. Again, he stated that it "has not been reviewed by all of my principals." He also made plaintiff aware that the just-enacted Fair Housing Act might have undetermined effects upon the ongoing discussions.

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[10] Also lacking in plaintiff's papers is any evidence that the Planning Board or the Sewerage Authority, also defendants, ever took any action upon an alleged settlement agreement.

On July 25, 1985, plaintiff's counsel returned a draft on which he had marked numerous proposed revisions, including (in his words) "substantial re-writes of paragraphs." (Exhibit X; plaintiff's exhibit J) Though he characterized them as clarifications, comparison of the original (plaintiff's exhibit I) and the mark-up shows numerous substantive points of disagreement. Some, but not all, of the changes that he made were:

(a) Deletion of language in which the plaintiff would provide deeds, assignments, acknowledgements, etc. in order to restrict the development of the property as provided in the memorandum.

(b) A re-writing of the provisions relating to open space requirements surrounding plaintiff's property including the deletion of large buffer areas requested by the municipality.

(c) A re-writing of the provisions relating to a school site which severely changed the obligations of Hills with regard thereto and set up an unrealistic time frame which could result in the loss of the school site and/or the loss of the ability to sewer the school site prior to a time when the Township would expect a school to be built. They also modified a provision which would have provided that the school site (if not used for a school) would become permanent open space. The Hills version, in contrast, had the school site reverting to Hills.

(d) Hills also modified the proposed agreement so as to provide that the Bernards Township Sewerage Authority would agree to act as agent for Hills with regard to Hills sewer expansion.

(e) A suggestion for obtaining security relating to the use of temporary holding tanks was deleted.

(f) A provision relating to off-tract contributions of $3,240,000 was severely modified. The

> alternative suggestions by Hills required the documentation of various roads and allocations of the contribution, etc. There was also a provision relating to payment of the contribution.

All in all, on a draft agreement of just over thirteen pages Hills proposed the deletion of 3 1/2 pages and insertions of 2 additional pages.

In addition, the document under discussion provided in paragraph 14 for an "attached" conceptual plan which, by virtue of terms of that paragraph, would in effect have been deemed approved. In fact, no such plan was attached to the drafts being circulated; the only relevant "plan" shown to municipal representatives up to that time was a "sketch concept plan" (Kerwin Affidavit, ¶ 20[e]) which had been shown only to the Technical Coordinating Committee (TCC) in March, 1985, and which the TCC had found to be totally unacceptable (present Moskowitz Certification, ¶ 5); and no other conceptual plan was presented to municipal representatives until October, 1985 (see letter brief of plaintiffs, dated January 30, 1986, on motion to reverse denial of conceptual approval).

A week later, on August 2, 1985, plaintiff's counsel wrote to the Township's attorneys again (Exhibit Y), with still more "suggested changes".

Plaintiff's contentions as to the nature of discussions at an August 7 meeting are directly controverted by Mr. Davidson's Certification of October 1, 1985 (at pages 9-12, ¶¶ 8-13).

However, even Mr. Hall's present Affidavit (at ¶ 41) contends that it was only on August 7 that Mr. Davidson said he was presenting documents to the Township Committee, and (at ¶ 42) that by August 12 he had been notified that the draft Memorandum of Agreement was not acceptable to the Committee.

After that breakdown of negotiations, and after August 26 when Hills learned that Bernards would seek transfer to Council on Affordable Housing, "In September, 1985, a complete Environmental Impact Assessment (EIA) was prepared by [plaintiff's consultant] for the Hills Development Company in connection with a conceptual development application for Hills' property located in Bernards Township, New Jersey." (Ferrara Affidavit, ¶ 4). Through two motions and three submissions by Hills alleging various aspects of reliance upon Ordinance #704 and a supposed settlement, Mr. Ferrara's Affidavit is the first and only paper which states a date when specific alleged acts of reliance occurred, and it shows that Mr. Ferrara did not prepare Hills' EIA until after Hills knew there was a possibility that the matter might be transferred to a forum, and might be governed by a law, which Hills perceived as less favorable to its interests.

Plaintiff's counsel, appearing before the Supreme Court in the appeal of the transfer motion in this case, in essence admitted that the estoppel claim is a sham, and that the supposed reliance was nothing more than a hurried effort to

manufacture a claim against the Township:

> "THE COURT: Mr. Hill, despite the inconsistencies of the municipality's position, the question Justice Stein asked was: why didn't you wait before incurring those particular expenditures?
>
> "Mr. HILL: Well at some point in time we, we, we detected, because we read the papers and, and my client has a large development adjacent, that there were, there were problems and we, we, we tried to vest our rights. Frankly, you know, as soon as it, it -- it took months to prepare this application, but as soon as it was detectable that, that, that sometime in August when Bernards wasn't getting back to us we, we rushed ahead to try and vest the rights we had."

Transcript of Proceedings [Oral Arguments of Mr. Davidson and Mr. Hill], New Jersey Supreme Court, January 6 and 7, 1986, pg. 2.14, l. 4-16 (copy of page furnished in Exhibit Z; copy of Transcript is being filed with Judge Serpentelli with this brief).

In the course of argument, plaintiff's counsel also belied the present claim that Ordinance #704 was, by itself, intended to be permanent and binding. He told the Court:

> "[W]e don't claim that we have vested rights in the sense that we could build if they repealed the ordinance."

Id., pg. 2.11, l. 9-10 (Exhibit Z).

On February 20, 1986, the Supreme Court ruled in Hills v. Bernards [11] that this matter should be transferred to the

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[11] Hills Development Co. v. Township of Bernards, ____ N.J. ____ (1986) (Docket No. A-122-85, decided February 20, 1986). All page references are to the slip opinion.

Council. In its Opinion the Court declared, for the first time, that stipulations, determinations, and other actions taken with reference to assumptions adopted by Mount Laurel courts (implicitly, the universally adopted "consensus" methodology) "may not be in accord with the policies and regulations of the Council," and therefore shall not be binding upon municipalities whose cases are transferred. Slip op. at 82-83.[12]

With the consensus methodology, upon which Ordinance #704 was based, having been effectively written out of the law, Bernards Township moved to amend Ordinance #704, so as to reflect the fact that its methodological underpinnings had been removed.

Rather than simply repeal Ordinance #704 outright, thereby reverting to pre-Mount Laurel II zoning, Bernards adopted Ordinance #764A (Exhibit AA), which (a) grants Hills 1,500 units in its Raritan Basin property (compared with 1,002 before Mount Laurel II), (b) continues to have Hills as the only developer in Bernards who receives a Mount Laurel II density bonus, and (c) requires Hills to build only 225 Mount Laurel units (compared with 550 before the amendment).

Thus, as a result of Mount Laurel litigation and legislation, Hills' Raritan density has increased ninefold,

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[12] Other aspects of the Supreme Court opinion will be addressed below.

thereby increasing the allowable number of units from 167 before Mount Laurel I to 1500 now. The requirement of 225 Mount Laurel units represents only a 15% set-aside. (Even discounting the units plaintiff started with, the set-aside amounts to only 17% of the total density bonuses plaintiff has received because of Mount Laurel.)

It seems fitting that while Ordinance #764A was pending, Hills conducted itself as it began this case, and as it has done throughout -- with a threat and a set-up. Appearing before the Planning Board when it was considering Ordinance #764 [13] pursuant to N.J.S.A. 40:55D-26(a) (see transcript excerpts attached as Exhibit BB), plaintiff's counsel imposed lengthy statements, testimony, and colloquy upon the deliberations despite the absence in the law of any requirement for holding a hearing, he threatened the Planning Board members with personal liability if they recommended passage of the ordinance (pg. 9, l. 2-14; pg. 12, l. 6-17), and he stated outright that the only reason for his dog and pony show before the Board was to "make a record" (pg. 20, l. 16 to p. 21, l. 10). (A copy of the full transcript is being filed with Judge Serpentelli with this brief.)

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[13] Ordinance #764A is identical to Ordinance #764 except in the important respect that it deletes language, and a sunset provision, which would have rendered Ordinance #764 an interim ordinance.

ARGUMENT

I. THE PRESENT MOTIONS ARE FORECLOSED BY THE SUPREME COURT'S OPINION

In deciding that this case should be transferred to the Council on Affordable Housing, Hills v. Bernards, supra, the Supreme Court issued an Order (plaintiff's Exhibit N) denying plaintiff's motions to supplement the record and to file a supplemental brief,

> "without prejudice to the filing by plaintiff • • • of 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 . . .."

But, the Court added provisos,

> "that such application shall not affect this Court's Order transferring the matter to the Council on Affordable Housing and provided further that this Order granting leave to file such application shall not preclude the assertion by defendants that this Court's Order of transfer forecloses such claims by plaintiff."

Defendants do assert that the present motions are foreclosed by Hills v. Bernards.

We note, at the outset, that the preceding Order does not say that Hills has a right to pursue this application. It says only that if Hills files such application, the fact that the Supreme Court denied its motions to supplement the record and file additional briefs shall not prejudice this court's treatment of the application. Further, defendants are expressly permitted to argue that the Supreme Court's decision precludes

these motions. In short, the Supreme Court had decided the broad policy issues governing the twelve transfer cases before it, and preferred not to get involved with the particular issues involved here, leaving to this court to determine whether there is a cognizable issue in light of Hills v. Bernards, and if so how to adjudicate it.

The Court's opinion expressly stated that the trial courts shall retain jurisdiction for the "limited purpose" of hearing motions for the imposition of certain types of conditions on transfer. Slip op. at 88. Those conditions relate to peservation of scarce development resources, not to the protection of any builder. Id. The present motion is not a motion for such conditions, and therefore defendants submit that this court no longer has jurisdiction to hear the motion.

Assuming, however, that jurisdiction does exist to hear this motion, the Supreme Court decision requires denial of the motion.

Plaintiff asserts two alternative points: that an alleged stipulation of settlement should be enforced against defendants, or that defendants should be estopped to change Hills' zoning because of alleged bad faith. However, hard as plaintiff tries to ignore it, the fact is that no judgment ever was entered in this case. Therefore, the alleged settlement agreement (which defendants deny ever existed) was, at most, a stipulation between the parties. Hills v. Bernards held that in matters

transferred to the Council, such pre-judgment stipulations are not to be binding:

> "Where no final judgment has been entered, we believe the Council is not bound by any orders entered in the matter, all of them being provisional and subject to change, nor is it bound by any stipulations, including a municipality's stipulation that its zoning ordinances do not comply with the Mount Laurel obligation. The administrative remedies, and the administrative approach to that subject, may be significantly different from the court's. Fair share rulings by the court, provisional builder's remedies, site suitability determinations -- all of these may not be in accord with the policies and regulations of the Council. Similarly, stipulations in Mount Laurel matters were undoubtedly based on the assumption that the issues would be determined by the court in accordance with Mount Laurel II. They presumably represented the litigant's belief that what was being stipulated would be adjudicated in any event. It is not only, in a sense, unfair to the litigant to be bound by these interim adjudications and stipulations, it would also be inconsistent with the purposes of the Act, for these determinations and stipulations may be inconsistent with the comprehensive plan of development of the state and the method of effectuating it."

Slip. op. at 82-83.

To saddle defendants with an alleged settlement stipulation, one of whose main components is an ordinance based upon a now-discarded fair share methodology, would be inimical to the purposes of the Act, and therefore would contravene the Supreme Court's holding.

Similarly, alleged bad faith by defendants (a charge which defendants also vehemently deny) cannot be used as a basis for permanently binding defendants to a superseded methodology and resultant ordinance. Hills v. Bernards holds:

> "The Legislature determined that the goals of the Act were so important that it should, in effect, be given retroactive force by the transferring of preexisting litigation to the Council. The importance of these legislative objectives forecloses a result that would deprive a municipality and its citizens of the Act's benefits because of the asserted bad faith of a municipal official."

Slip op. at 73.

If Bernards is held to be bound to the alleged settlement, or bound irrevocably to the original version of Ordinance #704, then this court will have presented the Council with a fait accompli, depriving Bernards Township and its citizens of the benefits of developing a compliance package based upon regulations to be issued under the Act. That result would dramatically "affect [the Supreme] Court's Order transferring the matter to the Council on Affordable Housing." (Supreme Court Order of February 20, 1986, plaintiff's Exhibit N.) Such result thus would contravene both the decision in Hills v. Bernards, and the specific Order under which plaintiff filed the present motion.

The Supreme Court made clear in Hills v. Bernards that builders are a "class of litigant that knows the uncertainty of litigation," and that they must accept the possibility of legislative and decisional change "that can turn a case upside down" as a risk of doing business, especially in the context of Mount Laurel II. Slip op. at 76. The Court expressly held that a builder may not obtain an estoppel which would undermine the

municipality's rights under the Act on the basis that the builder actively pursued Mount Laurel II litigation. "[I]f that suggestion is intended to create the image of an estoppel, there is no substance to it." Slip op. at 76.

The above passages show, as well, that Hills v. Bernards established the paramount position of the public interest in achieving unimpeded implementation of the Fair Housing Act, and in ensuring that municipalities be given the maximum opportunity to make use of the Act and its benefits. That public interest was held to outweigh the private interests of builders, and must prevail in any balancing test such as under Urban Farms, Inc. v. Franklin Lakes, 179 N.J. Super. 203 (App. Div. 1981), certif. denied, 87 N.J. 428 (1981).

For the above reasons, defendants submit that plaintiff's motion should be denied.

II. PLAINTIFF IS BARRED BY UNCLEAN HANDS

The present motion seeks two forms of equitable relief: specific enforcement of an alleged agreement to settle the case, and an injunction against enforcement of a zoning ordinance amendment.

It is a basic tenet of equity that equitable relief will be denied to one who comes before the court with unclean hands -- i.e., one who himself has acted inequitably.

> "This means, among other things, that the party asking the aid of the court must stand in conscientious relation to his adversary; his conduct in the matter must have been fair, just and equitable, not sharp or aiming at unfair advantage."

Stehr v. Sawyer, 40 N.J. 352, 357 (1963).

The Counter-Statement of Facts, above, shows that Hills has conducted itself throughout this matter in a manner undeserving of equitable relief.

After receiving a sizable density bonus under Mount Laurel I, plaintiff submitted a project report showing that its housing would sell for no less than $155,000. When told that it would probably be subject to some lower income set-aside, Hills objected. Then, turning around, Hills threatened Bernards with a suit for over 10,000 units (10 per acre times over 1,000 acres) if it were not rezoned for at least 5,800 units. Although this court did not find the latter threat to be sufficient to sustain a motion to dismiss the Mount Laurel

complaint for lack of standing, the court took time to state its "personal offense" at such conduct by plaintiff and to decry it as being "in the worst spirit of Mount Laurel". (Exhibit F, transcript page 50, 1. 3-7.)

Having begun this case with threats, Hills has now resorted to threats again, most recently threatening planning board members with personal liability if they passed favorably upon proposed legislation. That not only is offensive, it is offensive without having any basis in the law, because members of governmental bodies have absolute immunity from liability for their conduct in a legislative capacity. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed. 2d 401 (1979) (holding members of a regional planning agency absolutely immune, but declining to rule as to local officials because not at issue in the case); Timber Properties, Inc. v. Chester Tp., 205 N.J. Super. 273, 282-285 (Law Div. 1984).

Plaintiff also has used legalistic tactics to try to "set up" Bernards Township by manufacturing claims against the Township. Plaintiff's counsel admitted to the Supreme Court that plaintiff hurried up to try to get vesting only when it learned that Bernards wanted to transfer to the Council. He also admitted to the Planning Board that his purpose in being there was to try to "make a record".

Plaintiff has used this Mount Laurel litigation as a tool to try to obtain valuable concessions that have no relationship to Mount Laurel, such as sewers for its $250,000-plus houses and a tripling of its allowable commercial development. Their irrelevance to Mount Laurel is demonstrated by the fact that when Hills ultimately faced the possibility of a transfer to the Council and all that that entails, Hills decided that it did not need those other concessions after all, and stated to this court (for the first time) that it was willing to accept Ordinance #704, without change, and without more. (Exhibit L) Yet as late as August, 1985 sewer-related issues were one of the bones of contention which the attorneys were still negotiating and as to which proposals were still being made and revised, thereby delaying a settlement. (See Exhibit Y.)

Hills represented to the DEP that sewers for the Passaic Basin were "essential" to a settlement of this case (Exhibit P), only to turn around now and tell this court that sewers were not essential after all, and that the only essential part of the alleged settlement was Ordinance #704, and that the parties had agreed that Ordinance #704 embodied their settlement although they might reach later agreements on other minor issues, so would the court please enforce Ordinance #704 in its original form, even if it will not give Hills the other allegedly agreed upon items.

Even that is a misrepresentation, however, because plaintiff's own correspondence shows that plaintiff had "difficulties" with Ordinance #704 (Exhibit CC), that Ordinance #704 was not perceived by plaintiff as anything more than a "start toward an Ordinance" that would be an acceptable basis for settlement (Exhibit K), and that Hills wanted to settle all issues in the case at once (Exhibit CC, Exhibit K).

Plaintiff's twisting and misrepresentation does not stop there. It also includes the following:

- alleging that defendants initiated the requests for stays and non-intervention orders, when correspondence shows that plaintiff was the initiator;

- alleging that modifications which plaintiff made on drafts of a proposed settlement document were "minor wording changes" (Hall Affidavit, ¶ 40), when in fact they were substantive changes which, in one instance, amounted to more than five pages on a 13 page document (plaintiff's Exhibits I and J);

- representing to this court and the Supreme Court that plaintiff could prove, through the court-appointed expert, George Raymond, that the Township Committee "voted by roll call on each and every issue contained in the settlement" (Exhibit R; Exhibit S; plaintiff's present brief, pg. 5), when Mr. Raymond's letter (Exhibit U) shows that plaintiff is wrong, and also that plaintiff lacked any factual basis for making that misrepresentation.

Plaintiff even is so arrogant as to take it upon itself to speak for Bernards Township, and in so doing to misrepresent Bernards' positions. On page 25 of its present Brief, plaintiff states,

"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."

Of course Bernards asserts that the pre-amendment zoning under Ordinance #704 was flawed and contrary to sound planning, for one thing, because the planning consideration which gave rise to that zoning -- the consensus method -- has been effectively thrown out by the Supreme Court.

On page 35, plaintiff then says:

"Bernards does not contend that the development which would result from Ordinance 704 would result in any detriment to the public interest."

Of course defendants assert such detriment, if for no other reason than that the consensus method yielded a much higher "fair share" for Bernards than other methodologies likely to be adopted by the Council, so that pre-amendment Ordinance #704 would have given Hills a far greater density bonus (based upon a higher fair share) than is needed or warranted.

In Stehr v. Sawyer, supra, the Supreme Court denied any specific performance to a real estate contract purchaser, where the purchaser pressed an issue which ought not to have been relevant (a title defect of which purchaser was aware when it signed the contract), refused to settle the matter without a substantial concession on that issue, pursued litigation to compel such concession, and then, when it saw that it could not

obtain such relief, belatedly asked the court to enforce the contract without the concession. The court found plaintiff's conduct inequitable, and denied relief.

The doctrine of unclean hands also has been invoked to deny relief where plaintiffs submitted untrue and misleading motion papers in the action, Landau v. Rosenbaum, 15 N.J. Super. 524 (Ch. Div. 1951).

In summary, plaintiff misused Mount Laurel I to get a density bonus; plaintiff used threats to try to capitalize on Mount Laurel II and has continued to use threats as a tactic; plaintiff has insisted upon negotiating non-Mount Laurel issues which delayed settlement until eventually settlement discussions were supplanted by the impact of the Act; and plaintiff has engaged in repeated and material misrepresentations to DEP, this court, and the Supreme Court, in apparent willingness to say whatever has to be said in order to get the particular forum to grant the particular relief being sought on a given occasion. In that stature, plaintiff has no right to ask this court for equitable relief, and its motion should be denied.

III. PLAINTIFF'S PROOFS, EVEN TAKEN AT FACE VALUE, CANNOT SUSTAIN THE MOTION.

Plaintiff's motion alleges that there was a negotiated agreement between the parties, and/or that plaintiffs acquired development rights by estoppel. The record lacks proof of at least one critical fact essential to sustain each of those respective allegations.

To prove a binding agreement, plaintiff must show that someone who had authority to bind the defendants made such agreement on behalf of defendants. Several Certifications previously filed by defendants[14] show that plaintiff was told, repeatedly, that the attorneys and others who negotiated for the Township did not have authority to make a binding agreement, and that it was uncertain whether a majority of Township Committee members would vote for a settlement. They also show that plaintiff's representatives acknowledged this lack of authority. Plaintiff has never submitted any Certification denying those facts, and Mr. Kerwin's present Affidavit implicitly admits them, by stating (¶ 13) that he objected "throughout the course of negotiations" to negotiating with persons who lacked authority. He does not allege that

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[14] See Certification of James E. Davidson, dated October 1, 1985, ¶ 6; Certification of Arthur H. Garvin, III, dated October 1, 1985, ¶ 3, ¶ 5; Affidavit of H. Steven Wood, dated October 1, 1985, ¶ 3.

defendants acceded to his objections, that defendants' negotiators ever said that they had been given binding authority, or even that he stopped negotiating because of the lack of authority. He only says that he "objected".

Thus, plaintiffs have submitted no proof that defendants' negotiators could make a binding agreement, and (as shown above) no proof that the Township Committee ever voted to make such agreement. Plaintiffs have not even alleged, let alone proved, that the other defendants -- the Planning Board and Sewerage Authority -- ever voted upon any proposed settlement agreement.

The absence of any one essential element of a claim defeats the claim. See Lekich v. IBM Corp., 469 F.Supp. 485 (E.D. Pa. 1979) (defamation case; summary judgment granted to defendant). Without proof of authority or a vote, plaintiff's motion to enforce an alleged settlement must fail.

Moreover, to the extent that plaintiff seeks to enforce any alleged settlement terms which would contradict or waive the terms of Township ordinances, such alleged agreement is unenforceable, because it would amount to impermissible zoning by agreement. Suski, Jr. v. Mayor & Com'rs. of Beach Haven, 132 N.J. Super. 158, 164 (App. Div. 1975). To the extent plaintiff alleges an agreement never to amend Ordinance #704, such alleged agreement is unenforceable as an impermissible agreement to restrict future exercises of the Township's zoning powers. See Midtown Properties, Inc. v. Madison Tp., 68 N.J. Super. 197, 207

(Law Div. 1961), aff'd o.b., 78 N.J. Super. 471 (App. Div. 1963). Nor can the enactment of Ordinance #704 itself be construed as precluding future amendment or repeal of Ordinance #704, first because by its original terms Ordinance #704 was self-repealing, and second because a municipality may not, even by ordinance, place restrictions upon future exercise of municipal legislative power. McCrink v. West Orange, 85 N.J. Super. 86, 91 (App. Div. 1964) (striking down proposed initiative ordinance regarding municipal salaries).

In any event, plaintiff's counsel conceded, before the Supreme Court, that "we don't claim that we have vested rights in the sense that we could build if they repealed the ordinance." (Exhibit Z, Transcript page 2.11, l. 9-10.)

The Midtown Properties case, supra, is particularly telling. The plaintiff in Midtown Properties alleged virtually all of the same circumstances as are now alleged by Hills, but also was able to show a signed settlement agreement and the entry of a judgment, which Hills cannot show. Still, the court invalidated the settlement, citing the "viciousness" of such an agreement. 68 N.J. Super. at 206.

The two cases relied upon by plaintiff which involve public entities as parties show that plaintiff's position is untenable. Edelstein v. Asbury Park, 51 N.J. Super. 368, 388-389 (App. Div. 1958), held that

> "while a municipal corporation may, under proper circumstances, enter into a consent judgment the same as a private litigant, such a judgment has no conclusive effect if the municipal action was illegal or improper in any respect."

Even at that, the agreement to enter such judgment must be authorized by proper "authorizing action." The alleged agreement to grant Hills zoning-related concessions, exemptions, and automatic approvals, and to preclude future amendment of Bernards' zoning ordinance lacked any authorizing action and in any event would have been improper, and therefore invalid.

In North Jersey Dist. Water Sup. v. Newark, 103 N.J. Super. 542, 546-547 (Ch. Div. 1968), aff'd, 52 N.J. 134 (1968), then-Judge Mountain held that an alleged settlement agreement involving a municipality cannot be given binding force where the municipality has not adopted an appropriate resolution or ordinance,[15] even where there has been a lengthy period of settlement efforts.

The same absence of official or officially authorized action precludes plaintiff from proving an estoppel. Point I of the Supplemental Brief of Defendants in Opposition to Motion to Enjoin Enactment of Proposed Ordinance 746, filed in this action and dated January 2, 1986, describes and quotes at length from

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[15] As noted elsewhere in this brief, even such ordinance could not preclude future ordinance amendments, and in any event Ordinance #704 was not agreed upon by the parties as a settlement, and by its own terms was intended to be self-repealing if a settlement and judgment did not occur.

Timber Properties, supra, on the issue of alleged vesting of rights related to development, by way of estoppel. In an extensive review of the law, Judge Skillman determined that

> "there is no decision which states that vested rights can be acquired without either official municipal action or the judgment [prior to amending of a zoning ordinance] of a court."

205 N.J. Super. at 280. Neither of those two factors is present here, and so Hills cannot claim a vested right by estoppel to develop pursuant to the original Ordinance #704.

In addition, for all of plaintiff's conclusory allegations of reliance, the only specific date in plaintiff's papers shows that plaintiff's Environmental Impact Assessment was not prepared until September, 1985, after notification of defendants' intent to transfer, and (defendants submit) too late as a matter of law to support any claim of justifiable reliance.

It has been held that a party opposing summary judgment must produce sufficient proof upon the motion to defeat the motion, and may not hold back its proofs until trial. Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962), certif. denied, 37 N.J. 229 (1962). In the present procedural context, it is submitted that the same principle should apply to plaintiff. Having failed on this application to produce facts necessary to sustain its claim, plaintiff should have its motion denied with prejudice, and this case should be dismissed so it can proceed to the Council.

IV. IF PLAINTIFF'S MOTION IS NOT DENIED, IT SHOULD NOT BE GRANTED, EITHER.

The preceding points have shown that plaintiff's motion should fail, both as a matter of law and because of an absence of necessary factual proof. If the court disagrees, nonetheless it would be improper to grant the requested relief, i.e. enforcement of an alleged settlement agreement or ordering of an estoppel, because defendants are entitled to discovery and a trial if necessary to defeat plaintiff's application.

By asking for ultimate relief, plaintiff has in effect structured this application as a motion for summary judgment, seeking relief based upon affidavits. Summary judgment is not proper when there exist genuine issues of material fact. R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

Defendants submit that plaintiff's own words and conduct show beyond issue that there was not any settlement agreement, binding or otherwise, between the parties. Outright denial of the motion is therefore appropriate. But at worst, the documents and certifications submitted by defendants, presently and in the past (including especially the Davidson Certification of October 1, 1985) create genuine issues of fact as to what if anything was agreed between counsel, and whether defense counsel had authority to bind defendants to anything. If the court

cannot rule against plaintiff on the motion, then these issues must go to trial.

In that event, discovery also would be required into such basic matters as what plaintiffs contend was agreed upon and when, and what was said or done which constituted such agreement. That probing is needed because plaintiff's papers allege at least two different and inconsistent agreements, and perhaps more.

As to the estoppel and reliance claim, this court has already acknowledged the need for discovery on such issues if plaintiff is not otherwise foreclosed from such relief. (See Transcript of November 22, 1985 Motion, pg. 13, l. 5-9 [Exhibit DD].) One basis of the right to discovery is the fact that information pertinent to the reliance claim, such as what plaintiff allegedly did, when it was done, and the extent to which it was truly done in reliance upon anything, is largely within the knowledge and records of the plaintiff. Bilotti v. Accurate Forming Corp., 39 N.J. 184, 206 (1963); Templeton v. Bor. of Glen Rock, 11 N.J. Super. 1, 4-5 (App. Div. 1950). As noted, the few bits of information that plaintiff has let slip tend to show that there was not true reliance, but rather a hurried attempt to create the appearance of reliance.

Thus, while this court can properly deny plaintiff's motion and dismiss this action, it cannot properly grant plaintiff's motion and the requested relief because defendants would be entitled to discovery and a trial.

CONCLUSION

Defendants submit that the relief sought by plaintiff was foreclosed by the Supreme Court; that if it was not, plaintiff has nonetheless conducted itself so egregiously as to be denied any equitable relief; that plaintiff has not and cannot, in any event, show factual or legal justification for the requested relief; and that before such relief could be granted defendants would be entitled to discovery and an evidentiary trial.

It is respectfully submitted that plaintiff's motion should be denied, that because plaintiff is foreclosed from relief this court's Order of December 12, 1985, should be formally vacated, and that this action should be dismissed so that the matter can proceed before the Council.

Respectfully submitted,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: Howard P. Shaw
HOWARD P. SHAW, ESQ.

KIRBY, COOPER, SCHAUL & GARVIN

By: Arthur H. Garvin III
ARTHUR H. GARVIN, III, ESQ.

Dated: April 30, 1986

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

THE HILLS DEVELOPMENT COMPANY, 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 CERTIFICATION OF JAMES E. DAVIDSON

I, JAMES E. DAVIDSON, certify as follows:

1. The idea to obtain an Order staying this action and precluding intervention by additional plaintiff-developers did not originate with defendants. The idea came from either plaintiff's attorney, Henry Hill, or the court.

2. I recall that when the idea was suggested to me, I did not grasp why Bernards Township should care whether or not the case was stayed and intervention was precluded. My feeling was that whatever Bernards Township's fair share was, it would only have to be satisfied once regardless of how many plaintiffs were involved.

3. I recall being told, by Mr. Hill and/or the court, that

based upon their knowledge of a Mount Laurel case involving Franklin Township (with which I was not familiar at the time) exclusion of other potential plaintiffs would make it much easier to pursue settlement negotiations.

4. Accompanying the present Certification and Brief, defendants are filing a separate appendix of documents, which I incorporate in this Certification by reference. The table of contents for the Appendix shows by what affidavit or certification a number of those documents were previously placed in the record. As to the following exhibits, which might not have been placed in the record previously, I certify that the Appendix includes true copies of each of them.

Exhibit	Description
E	April 10, 1984, letter from Henry Hill to Bernards Township Planning Board
F	Excerpts from Transcript of July 20, 1984, summary judgment motions
G	September 12, 1984, letter from Henry Hill to me
J	October 25, 1984, letter from me to Henry Hill
M	November 23, 1984, letter from me to Judge Serpentelli
N	November 28, 1984, letter from Judge Serpentelli to me

O	December 18, 1984, letter from Henry Hill to Judge Serpentelli
P	January 30, 1985, letter from Thomas Hall to DEP Commissioner Hughey
R	Excerpts from Hills' Letter Brief to the Supreme Court, dated January 22, 1986, in support of Hills' Motion for Leave to Supplement the Record
S	March 24, 1986, letter from Thomas Carroll to Judge Serpentelli
T	March 21, 1986, letter from Henry Hill to George Raymond, soliciting a testimonial letter from Mr. Raymond
U	March 25, 1986, letter from George Raymond to Henry Hill, furnished in response to Mr. Hill's solicitation
V	June 14, 1985, letter from me to Thomas Hall
W	July 3, 1985, letter from me to Thomas Hall
X	July 25, 1985 letter from Thomas Hall to me
Y	August 2, 1985 letter from Thomas Hall to me
Z	Excerpt of transcript of Supreme Court oral arguments, January 6 and 7, 1986
AA	Bernards Township Ordinance #764A (which was adopted on final

reading without any further changes)

BB	Excerpts from transcript of Planning Board proceedings of March 18, 1986, which was furnished to defense counsel by a reporter brought by Hills
DD	Excerpts from transcript of November 22, 1985 motion to enjoin proposed Ordinance #746.

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: April 30, 1986

JAMES E. DAVIDSON

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
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(201) 267-8130
Attorneys for Defendants, Township of Bernards, et als.

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 CERTIFICATION OF HARVEY S. MOSKOWITZ

I, HARVEY S. MOSKOWITZ, certify as follows:

1. I am a licensed professional planner of the State of New Jersey. I serve as planning consultant for Bernards Township. I have served in this capacity since early 1984.

2. During 1984, I made extensive planning studies in regard to Bernards Township's response to Mount Laurel II, and prepared reports containing recommendations for such response. I was actively involved in the conception and drafting of Ordinance #704.

3. At the time that Ordinance #704 was proposed and enacted, there were no planning considerations, other than the

need to provide a density bonus in connection with Mount Laurel housing, which dictated that the then-current zoning of Hills Development Company's property in the R-8 zone was inappropriate or should be changed to an increased density. It was solely because of Mount Laurel II and a Mount Laurel analysis based upon the "consensus" methodology that I recommended an increase in Hills' density in that zone to approximately the levels which were reflected in Ordinance #704, as originally enacted.

4. With the consensus methodology having been cast aside by virtue of the Fair Housing Act and the Supreme Court's decision in Hills Development Company v. Bernards Township, all indications are that Bernards Township's fair share number will be substantially lower under the regulations to be issued by the Council on Affordable Housing than under the consensus method. Since far fewer Mount Laurel units will be needed, far fewer market-priced density bonus units will be needed. Consequently, a correction of the artificially inflated density of Hills' property under Ordinance #704 was appropriate. Ordinance #764A amended Ordinance #704 to make a reasonable correction of that density in light of the best available information.

5. In or about March, 1985, representatives of Hills met with the Bernards Township Planning Board's Technical Coordinating Committee (TCC), to show the TCC a sketch concept

plan for development of Hills' property, and to solicit comments from the TCC. I was present as a member of the TCC. The members of the TCC, including myself, found that the concept plan was unacceptable and showed very poor planning in many respects. We told that to Hills' representatives, told them specific points of dissatisfaction, and I prepared a written memorandum which I gave to them. Hills' representatives indicated that they were in general agreement with our criticisms, and agreed that the concept plan would have to be re-done.

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: April 30, 1986

HARVEY S. MOSKOWITZ

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HOWARD P. SHAW

CYNTHIA H. REINHARD
MARTIN G. CRONIN
JEANNE A. McMANUS

OF COUNSEL
FRANK J. VALGENTI, JR.

April 30, 1986

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

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

Dear Judge Serpentelli:

Due to a temporary illness, Harvey Moskowitz was unable to come to our office in sufficient time to enable him to sign his Certification before our messenger had to leave for Toms River today.

Consequently, we are unable to enclose the Certification referred to in my enclosed transmittal letter, and, as I discussed with Ms. Burke, we will have it delivered to your office under separate cover tomorrow.

I respectfully request the Court's indulgence in this matter, and apologize for any inconvenience it may cause.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

Howard P. Shaw

By: Howard P. Shaw

HPS:nmp

cc: Arthur H. Garvin, III, Esq.
Henry A. Hill, Esq.
Clerk of the Superior Court

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OF COUNSEL
FRANK J. VALGENTI, JR.

April 30, 1986

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

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

Dear Judge Serpentelli:

Enclosed is the Certification of Harvey Moskowitz, which we were unable to file on April 30.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

Howard P. Shaw

By: Howard P. Shaw

HPS:nmp
Enclosure

FEDERAL EXPRESS

cc: Arthur H. Garvin, III, Esq.
Henry A. Hill, Esq. (Federal Express)
Clerk of the Superior Court

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43 Maple Avenue
Morristown, New Jersey 07960
(201) 267-8130
Attorneys for Defendants, The Township of Bernards, et al.

THE HILLS DEVELOPMENT COMPANY,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION
Plaintiff,	:	SOMERSET/OCEAN COUNTY (Mt. Laurel II)
-v-	:	
THE TOWNSHIP OF BERNARDS, et al.,	:	DOCKET NO. L-030039-84 P.W.
Defendants.	:	Civil Action

APPENDIX OF DEFENDANTS OPPOSING PLAINTIFF'S "MOTION ON REMAND"

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Board of the Township of Bernards

TABLE OF CONTENTS

EXHIBIT	DOCUMENT	PREVIOUSLY IN THE RECORD BY:
L	Transcript of Transfer Motion, Morning Session, October 4, 1985 (Excerpts)	
M	November 23, 1984 letter from Davidson to Judge Serpentelli	
N	November 28, 1984 letter from Judge Serpentelli to Davidson	
O	December 18, 1984 letter from Hill to Judge Serpentelli	
P	January 30, 1985 letter from Hall to Commissioner Hughey	
Q	April 1, 1985 letter from Hall to Davidson	Hall Affidavit 9/16/85
R	Excerpts of Hills' Letter Brief to Supreme Court on Motion to Supplement the Record Dated January 22, 1986	
S	March 24, 1986 letter from Carroll to Judge Serpentelli	
T	March 21, 1986 letter from Hill to Raymond	
U	March 25, 1986 letter from Raymond to Hill	
V	June 14, 1985 letter from Davidson to Hall	

EXHIBIT	DOCUMENT	PREVIOUSLY IN THE RECORD BY:
W	July 3, 1985 letter from Davidson to Hall	
X	July 25, 1985 letter from Hall to Davidson	
Y	August 2, 1985 letter from Hall to Davidson	
Z	Supreme Court Transcript, January 6 and 7, 1986 (Excerpts)	
AA	Ordinance #764A	
BB	Planning Board Transcript March 18, 1986 (Excerpt)	
CC	Affidavit of Thomas J. Hall in Opposition to Motion to Transfer, dated September 16, 1985 (Excerpts)	Itself
DD	Transcript of November 22, 1985 Motion (Excerpts)	

Exhibit A

Exhibit U

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI

OCEAN COUNTY COURT HOUSE
C.N. 2191
TOMS RIVER, N.J. 08754

November 28, 1984

James E. Davidson, Esq.
Farrell, Curtis, Carlin and Davidson
43 Maple Avenue
P. O. Box 145
Morristown, N. J. 07960

Re: Hills Development Co. v. Bernards Twp.

Dear Mr. Davidson:

This will acknowledge your letter of November 23, 1984.

The proposed ordinance must be reviewed by the Court appointed expert. Therefore, the order should be amended to provide for that appointment. The function of the expert will be to review the ordinance and to report as to its compliance. Furthermore, to the extent that the expert can assist in resolving the outstanding issues, he may also be utilized for that purpose. The order should provide for the appointment of George M. Raymond, 555 White Plains Road, Tarrytown, New York, 10591-5179.

I believe that Mr. Raymond is uniquely qualified in light of his involvement in Bedminister and in light of the relationship of Bernards' developments to the sewerage issues in Bedminister. If there is any objection to the selection of Mr. Raymond, kindly advise immediately.

Very truly yours,

Eugene D. Serpentelli, J.S.C.

EDS:RDH
cc: Henry A. Hill, Esq.
cc: Arthur H. Garvin, III, Esq.
cc: George M. Raymond, A.I. P. P.

EOR130

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

Exhibit O

BRENER, WALLACK & HILL

ATTORNEYS AT LAW

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December 18, 1984

FILE NO.

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

RE: The Hills Development Co. v. Bernards Township

Dear Judge Serpentelli:

In accordance with my telephone conversation with your Law Clerk, please find enclosed a copy of an Order prepared by James Davidson and consented to by myself and Arthur Garvin, attorney for the Planning Board. As I stated to your Law Clerk, James Davidson, who prepared the Order, has apparently neglected to sign it and I am notifying him by copy of this letter that he should get a signed copy to you at his earliest convenience.

Mr. Davidson has indicated to me in a telephone conversation that it is important that this Order be signed as soon as possible, if it is acceptable to Your Honor, as a land owner has informed the Township he has directed his attorneys to institute Mount Laurel litigation and they will be filing such litigation on Thursday, December 20. My client, The Hills Development Company, and Bernards Township are on the verge of a settlement which provides for a substantial number of low and moderate income units both on our site and on other properties, and our current negotiations would be considerably complicated were there another party in this litigation.

Very truly yours,

BRENER, WALLACK & HILL

Henry A. Hill

HAH:klp

enclosure

CC: James Davidson, Esq.

EDR12P

[redacted]

Exhibit P

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

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January 30, 1985

FILE NO.

Mr. Robert E. Hughey
Commissioner
Department of Environmental Protection
John Finch Plaza
802 Labor & Industry Building
Trenton, NJ 08625

Re: Sewer Service for property owned by The Hills Development Company located in the Passaic Basin section of Bernards Township to service a proposed single family home development.

Dear Commissioner Hughey:

The purpose of this letter is to outline efforts made by the Hills Development Company to provide sewer service to a portion of its property in Bernards Township in New Jersey; to outline shifts in NJDEP sewer policy and to illustrate how those policies shifts have affected this particular project; and to request the Department to provide clear guidance to ourselves and the Township so that we may proceed to an acceptable resolution of a serious problem.

1. History of the project.

The Hills Development Company ("Hills") or its predecessor in interest, has owned property in Passaic Basin since 1969. In 1979, it formulated a proposal to build approximately 275 single family homes in the area. In conformance with then DEP policy, it formulated an application to sewer this project with an on-site treatment system, which would have discharged effluent into the Dead River. An application was made to NJDEP in September, 1979.

At that point, Hills' predecessor in interest was informed that Departmental policy did not favor package treatment plans, and were advised

that such plans were not likely to receive approval by the Department. The applicant was informed that DEP preferred Community Septic Systems (CSS).

Hills and Bernards Township agreed that CSS would be more compatible with Bernards Township growth policies, and Hills applied for an on-site CSS in 1982. DEP reviewed the project and indicated all technical issues regarding design and engineering were resolvable and that conceptually the project could be approved.

In July 1982, The Hills Development Company received a letter from S.T. Giallella, Chief of DEP's Bureau of Municipal Waste Management, advising the Company that the area (Sections 1A and 1B of The Hills Development Company's Bernards Township, Passaic Basin single family lot program) should be serviced by the Bernards Township Sewerage Authority and that the Community Septic System was therefore inconsistent with the appropriate 201 and 208 Plans (See Exhibit A attached). The application was resubmitted in October 1982, and again rejected by DEP in February 1983 as being inconsistent with the 201 Plan. (See attached letter Exhibit B.)

Subsequent to this, Bernards Township submitted information expressing their opinion that The Hills Development site, although in their franchise area, was not within their sewer service area. This material was reviewed by the USEPA who in May 1983, advised DEP and the other parties that effluent from the Hills site was not figured into the Harrison Brook plant and therefore The Hills should not necessarily connect into the Bernards Township Sewerage Authority. (See Exhibit C). In June 1983 DEP, concerned with this USEPA decision, advised The Hills to resubmit its application for a Community Septic System. (See Exhibit D). After considerable time and expense, the application was prepared once again and resubmitted to DEP in November 1984. (A copy of this application, already in your possession will be supplied upon request). In December 1984, DEP responded once again that the CSS was inconsistent with 208 planning, stating that "...this area (The Hills) is to be sewered by the Bernards Township Sewerage Authority, not by a Community Septic Water Treatment Facility". (Attachment E).

2. Effect of NJDEP Policy Shifts.

Since 1979, Hills has been attempting to develop its property in an environmentally responsible manner. Both Hills and Bernards Township feel at a loss as to how to proceed with this project. Based on early NJDEP policy, Hills formulated a plan for a package treatment system. When informed this was unacceptable, Hills spent substantial additional monies in the design of a Community Septic System. When the Department told Hills that once again there was a policy shift, Hills has informally requested the BTSA to connect its project with Bernards Township system but has been informally told that such a connection is not acceptable.

Thus far, the project is no closer towards development than it was in 1979, and Hills has spent several hundreds of thousand dollars in attempting to resolve this issue in an environmentally responsible manner. This is in addition to the many thousands of dollars in site work undertaken in reliance on the Department's earlier policies and the subdivision approvals granted by the Townsip.

3. Proposed solution.

Hills Development Company would accept DEP's determination that the Bernards Township Sewerage Authority (BTSA) would offer the most technically feasible and environmentally and economically responsible means of providing sewer service to its site. Further, since resolution of this issue is essential to the settlement of a Mt. Laurel case, a connection of the project with the BTSA would result in positive socio-economic impact to the area.

Because of its growth management policies and the capacity figures supplied by its experts, BTSA has been unwilling, thus far, to agree to treat effluent generated by the project. Part of the rationale of such an unwillingness was Bernard's understanding that CSS was an appropriate way to proceed. If the Department will unequivocally indicate that it will not approve a CSS system for that area, and will, instead, accept only connection to a existing Public Utility System, then we would proceed with negotiations with Bernards Township as the preferred means of providing service to this area.

In the alternative, the Environmental Disposal Corporation, a franchised public utility currently in existence, would be willing to provide sewer service to this site. EDC operates an 850,000 gallons per day advanced waste water treatment system discharging to the Raritan River, and any connection to this project would require modification to the existing "201" and "208" Plans and would also require the Department's acceptance of a modest inter-basin transfer of water.

Hills and Bernards Township are moving, in an accelerated fashion, to resolve issues which were raised by Mount Laurel litigation. One of the items essential to the solution of the problem is the provision of an adequate, environmentally responsible waste water treatment system for the 273 homes in the Passaic Basin which, along with a larger number of units to be built in the Raritan Basin and serviced by EDC, will be part of a comprehensive Mount Laurel II compliance program for Bernards Township. Neither Hills nor Bernards Township wish to delay resolution of this issue, and both Bernards and Hills seek clear direction from the Department as to which alternative would be acceptable.

We would appreciate the opportunity to meet you, the Director of the Division of Water Resources and the appropriate members of the Department so that this matter can be resolved in a timely fashion. Please

advise us when a convenient time for such a meeting can be arranged. Representatives of the Bernards Township Sewerage Authority as well as representatives of The Hills have indicated they would be willing to participate in such a meeting.

Thank you for your attention to this matter.

Sincerely,

Thomas J. Hall

TJH/4/sp

cc: John Gaston
George Horzepa
Arnold Schiffman
Bernards Township Sewerage Authority
George Raymond, AICP
James Davidson, Esq.
John Kerwin
Ray Ferrara, Ph.D.
Harvey S. Moskowitz, P.P.

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

EDR12Q

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△ CERTIFIED CIVIL TRIAL ATTORNEY

FILE NO.

April 1, 1985

James E. Davidson, Esquire
Farrell, Curtis, Carlin, & Davidson
43 Maple Avenue
Morristown, New Jersey 07960

Dear Jim:

I am glad we had the chance to discuss the pending Stipulation of Settlement at the Mount Laurel conference on Saturday.

I am enclosing the following items:

1. A redrafted Stipulation of Settlement, which reflects a conversation I had with George Raymond today. George is going to review the material he has and will set forth his understanding of your fair share of lower income housing. The Stipulation now includes language making it clear that the Township would receive a Judgment of Repose as a consequence of this Settlement. I have also added some language which protects The Hills Development Company in the event that legislation, now pending, ultimately manages to get signed into law. We both realize that George Raymond has not yet rendered a final decision on fair share and compliance, and the final draft of the Settlement Order will reflect his decisions.

2. I am also including the Memorandum of Understanding which I drafted on receipt of material from Orth-Rodgers;

3. Ken Mizerny's draft of Appendix "E", which includes the changes which Ken believes necessary to be made in the exsisting Ordinance with respect to building coverage, site design, and application procedures. This material is being reviewed by Harvey Moskowitz now.

4. I am also including a draft of Appendix "F", which reflects the time period set forth in the Mahwah decision.

I believe this case is now ripe for settlement, and would propose that we schedule a meeting among the parties to be held no later than April 10. This will give us the opportunity to work through the document, on a line by line basis if necessary, so that we can get this case (and the Farmland Assesment case, which is currently scheduled for trial on April 17) out of the way in a timely fashion.

I look forward to hearing from you in the near future.

Sincerely,

Thomas J. Hall

TJH/ehl
Enclosures

cc: John Kerwin
Art Garvin
George Raymond

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

EDR12R

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^ CERTIFIED CIVIL TRIAL ATTORNEY

January 22, 1986

FILE NO.

The Honorable The Chief Justice and
Associate Justices of the Supreme Court
New Jersey Supreme Court
Hughes Justice Complex CN-970
Trenton, New Jersey 08625

Re: The Hills Development Company v. Township of Bernards, et al.;
Docket No. L-030039-84 P.W., No. A-122, #24,780.

To The Honorable The Chief Justice and Associate Justices of the Supreme Court:

On behalf of plaintiff/movant-The Hills Development Company ("Hills"), please accept this letter memorandum in lieu of a formal brief in support of the within motion for leave to supplement the record and file a supplementary brief. This matter is an exclusionary zoning lawsuit filed pursuant to Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"). This matter is presently before this Court by virtue of an interlocutory appeal filed by defendant, Township of Bernards ("Bernards"), wherein Bernards seeks reversal of the trial court's denial of transfer to the Council on Affordable Housing. Trial court proceedings are stayed.

that this Court permit Hills to supplement the record to reflect the activities which have taken place subsequent to the filing of briefs in connection with the Township's appeal on the issue of transfer.

POINT II

HILLS RESPECTFULLY REQUESTS LEAVE TO FILE A SUPPLEMENTARY BRIEF ON THE ISSUE OF WHETHER THE SETTLEMENT REACHED BY THE PARTIES MAY BE ENFORCED.

As described above and as represented by Township counsel to the trial court in June of 1985, an agreement to settle this matter had indeed been reached.[5] However, the Township Committee refused to execute settlement documents outlining the negotiated settlement and, in fact, attempted to repudiate the settlement. Hills has become aware of a line of case law which is applicable to the facts of this matter but which has not yet been briefed. That line of case law holds that an agreement to settle a lawsuit which is voluntarily entered into may be binding upon the parties, whether or not made in the presence of the court and whether or not reduced to a writing.[6] Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983) certif. denied 94 N.J. 600 (1984);

---

[5] Hills alleges that the Township Committee met with the court-appointed Master in closed session prior to announcing the settlement, voted by roll call on each and every issue contained in the settlement and agreed by majority vote to authorize their attorney to proceed with the settlement. This action, taken in the presence of the court-appointed Master, could be demonstrated on remand.

[6] Counsel for Hills and Bernards indeed prepared settlement documents which were revised as a result of the parties' negotiations. However, the documents were not executed.

Exhibit S

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JOSEPH A. VALES
DANIEL J. SCAVONE
MINDEY G. POSER+
DANIEL J. SHERIDAN
MATTHEW M. LUBART+
L. STEPHEN PASTOR**
GUY P. LANDER+
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FARRELL, CURTIS, CARLIN & DAVIDSON

March 24, 1986

FILE NO. 3000-0042

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)

Exhibit T

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* CERTIFIED CIVIL TRIAL ATTORNEY

March 21, 1986

FILE NO. 3000-0042

Mr. George Raymond
Raymond, Parish, Pine & Weiner
555 White Plains Road
Tarrytown, NY 10591

RE: The Hills Development Company v. Tp. of Bernards

Dear George:

As I advised you on the telephone, Hills Development Company is bringing a motion before Judge Serpentelli to enforce a settlement which they believe was reached in the Bernards case. In connection with that motion, it would be helpful to the court, we believe, to know what occurred at a meeting which you attended with the Township Committee of Bernards Township and Planning Board officials on June 6, 1985 in your role as Court-appointed Master. Specifically, we would like to know the following:

1. Who attended the meeting?

2. What was the purpose of the meeting and did you at that meeting have occasion to explain to the Township Committee any or all of the terms of the settlement; or in the alternative, the terms which your felt at that time were still under discussion between the parties?

3. To the best of your recollection, what were the terms of the settlement which were still in dispute at that time or which you explained?

4. Did the public officials present indicate in any manner what their position was with respect to those terms?

5. How did they indicate their assent or dissent with the issues presented?

6. What was your impression with respect to any consensus reached at that meeting and the status of the issues at the end of the meeting?

I am enclosing for your information, a copy of a letter sent to the court by James Davidson, the attorney for Bernards Township, on June 12, 1985 in which he states to the court that a settlement has been reached between The Hills Development Company and Bernards Township. To put my questions in context, we would like to document to the court, to the best of our ability, that Mr. Davidson's statement to the effect that a settlement was reached sometime prior to June 12, 1985 is accurate and would like any assistance you may give as to which, if any, remaining issues were resolved at the meeting of June 6, 1985.

If you could state your recollection in a letter addressed to both myself and James Davidson, we may be able to avoid a formal affidavit with respect to that meeting on June 6, 1985, and agree to the presentation of this letter to the court.

Very truly yours,

Henry A. Hill

HAH:klp

enclosures

CC: James E. Davison, Esq. (w/o enclosure)
Honorable Eugene D. Serpentelli (w/o enclosure)

Exhibit U

EDR1JU

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

RPPW

555 White Plains Road, Tarrytown, New York 10591 (914)631-9003 (212)365-2666

EDWARD J. RYBCZYK

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ROBERT GENESLAW, A.I.C.P.
RICHARD A. HARRALL
GERALD C. LENAT, A.I.C.P., A.I.A.
EDITH LANDAU LITT, A.I.C.P.
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JOHN J. SACCARDI
JOHN L. SARNA, P.E.
DAVID B. SCHIFF, A.I.C.P.
STUART I. TURNER, A.I.C.P.

PATRICIA KELLY
NOEL SHAW JR., R.A., A.I.A.
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DIANE C. TOOLAN

GEORGE M. RAYMOND, A.I.C.P., A.I.A.
NATHANIEL J. PARISH, P.E., A.I.C.P.
SAMUEL W. PINE, A.I.C.P.
MICHAEL WEINER, A.I.C.P.

March 25, 1986

Henry A. Hill, Esq.
Brener, Wallack & Hill
2-4 Chambers Street
Princeton, New Jersey 08540

Re: Hills Development Co. v.
Township of Bernards

Dear Henry:

In response to your letter dated March 21, 1986, please be advised as follows:

On June 6th, 1985, at my request, I attended a meeting of the Township Committee of Bernards Township. The meeting was attended by, I believe, all the members of the Committee as well as James E. Davidson, Esq. and Mr. H. Steven Wood, the Township Administrator. If there were any others, I have no recollection.

My purpose in requesting such a meeting was to help firm up the Township's compliance package. As you know, the Township had already enacted an essentially complying ordinance (Ordinance #704) on November 12, 1984. My principal concern, therefore, was with the Town's acceptance of the need to accommodate a number of low- and moderate-income units sufficient to satisfy its fair share.

At the June 6 meeting I presented to the Township Committee the compliance package which I ultimately recommended for approval to the Court in my report dated June 12, 1985. There was considerable discussion of my proposal, but at the end the Mayor polled the Committee and, if my recollection serves, received approval from all but one member. I left the meeting fully convinced that a solution had been officially arrived at which, I hoped, would be satisfactory to the Court.

My impression that the compliance package which had been favorably, though informally, voted on by the Township Committee was acceptable seems to have been shared by Mr. Davidson. In his letter dated June 12, 1985 to Judge Serpentelli (which is

enclosed), Mr. Davidson indicates a collective belief that "we have reached an understanding which is satisfactory to Mr. Raymond and the municipality" (emphasis supplied). Since I have not known Mr. Davidson to use the royal "we" when referring to himself, I assumed that the "we" in the preceding quote referred to all parties involved in arriving at a settlement, including the Township.

Mr. Davidson's letter of transmittal to me of the same date also contained the enclosed draft of a proposed judgement which, while incomplete in some respects, did detail the compliance package components which accorded with the numbers that I thought had been agreed on June 6.

I wish to emphasize that, at that juncture, I was particularly anxious to bring about basic municipal compliance with Mt. Laurel II. I was aware of other unresolved issues between the parties (such as off-tract improvements, etc.) and had participated in meetings intended to solve them. None of these were discussed at the June 6 meeting. I can state emphatically that the then existing zoning of the Raritan Basin portion of the Hills property was not represented to me as being in dispute.

I hope that the above will help bring about a meeting of the minds between Hills Development Company and the Township.

Sincerely yours,

George M. Raymond, AICP, AIA
Chairman

GMR:kfv

Encs.

cc: James E. Davidson, Esq.
Hon. Eugene D. Serpentelli, J.S.C.

EDR12V

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

Exhibit V

COPY

June 14, 1985

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

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

Dear Tom:

Enclosed please find a proposed Judgment in the above matter. Attached to the Judgment is a proposed Memorandum of Agreement between the parties to be entered into in furtherance of the settlement. Please be advised that this is a draft and it has not been reviewed by my clients nor Art Garvin. I am especially concerned with some of the provisions relating to the sewage facilities and the concept plan.

The Judgment also contemplates the attachment of zoning amendments. These are the same amendments which were arrived at by Ken Mizerny, Harvey Moskowitz and Pete Messina. It is intended that they are to be supplemented by the change relating to Planning Board fee waiver for low and moderate units and the so called "fast-tracking". In that regard, it is our feeling that your proposal (and that set forth in George Raymond's report) is too inflexible to work for a large development such as yours in a municipality such as ours. We feel, however, that there is an accommodation that can be made which should be satisfactory to both parties.

Please review the documents and contact me at your convenience. I will be out of the office next week and during

that period of time you may want to contact Art Garvin with any changes or suggestions you may have with regard to this draft.

Very truly yours,

James E. Davidson

JED/sjm
Encl.
cc: Arthur H. Garvin III, Esq.
Mr. George Raymond
Mr. Harvey Moskowitz
Mr. H. Steven Wood
Mr. Peter Messina

July 3, 1985

COPY

Thomas J. Hall, Esq.
BRENER, WALLACK & HILL
2-4 Chambers Street
Princeton, New Jersey 08540

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

Dear Tom:

Enclosed please find a revised proposed Order of Judgment and Memorandum of Agreement in the above matter. I have made most of the changes that we discussed on the phone. In addition, I made some changes requested by Steve Wood. These latter changes, for the most part, relate to the construction of sewerage facilities. The proposed Order and Memorandum has not been reviewed by all of my principals.

We have not reviewed the new statute with our clients and do not know the effect, if any, this may have on our discussions.

Very truly yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By:
James E. Davidson

JED/sjm
Encl.
cc: Arthur H. Garvin III, Esq.
Mr. George Raymond
Mr. Harvey Moskowitz
Mr. H. Steven Wood
Mr. Peter Messina

BRENER, WALLACK & HILL

ATTORNEYS AT LAW

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HARRY BRENER
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* MEMBER OF N.J. & D.C. BAR
** MEMBER OF N.J. & PA. BAR
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+ + MEMBER OF N.J. & GA. BAR
^ CERTIFIED CIVIL TRIAL ATTORNEY

FILE NO.

July 25, 1985

Mr. James Davidson
Farrell, Curtis, Carlin & Davidson
43 Maple Road
Morristown, NJ 07960

Dear Jim:

As promised, enclosed is my red line mark-up of your draft memorandum of agreement. With my secretary's assistance, I have attempted to write neatly and to confine my comments to those about which we are most concerned. In some cases, I've provided substantial re-writes of paragraphs, solely for the purposes of making sure that our concepts are clearly stated and reflect agreements which I believe we have achieved.

Within both the Order and the memorandum of Agreement, you reference the 68 additional lower income units. As you know, we would not ~~approve~~ oppose any attempt by Bernards Township to try to get through the hearing without this concession - that is, to dispute the Master's recomendation in this area - and to see if Judge Serpentelli would agree with the Township's position. I am advised that as a result of the passage of the new "Mount Laurel" legislation, Judge Serpentelli has been even more favorably disposed to accomodate municipal perspectives. Perhaps it would be wiser to delete any reference to the 68 units, and then, if it is necessary to re-insert the language after the hearing, to put the language in as you have it in this draft.

Please get back to me if you have any problems with anything I have drafted; and rest assured that Hills is most anxious to conclude this matter as speedily as possible.

Sincerely,

Thomas J. Hall

TJH;krb
encl.

Exhibit Y

control of EDC; provided, however, if the Board has began the process of constructing such school, the capacity will be reserved for the Board until 1998, or until the date of the completion of the school, whichever comes first. At such time as the Board requests service, the Board shall enter into an agreement with EDC in accordance with the terms and conditions of EDC's then current tariff."

NOTE--This paragraph now incorporates changes in the dates which resulted from your conversation with Henry--the other language changes the obligation from Hills to EDC)

EDC would also like a new section added in on page 14, as a new section 20. I have been assured by the EDC people that these conditions are generally inserted in the contracts so as to prevent EDC from being in default as a result of actions totally beyond its control, as, for example, orders which are imposed upon it by the BPU.

In reviewing the document I sent you, I have noticed that I made a couple of errors which I would like to correct.

.On page 6, my Item C, rather than making this an automatic reversion, I think we would both be better off if Hills had the option, upon notice to the then current land owner, to reclaim the property, so that the text would now read:

"c. The property shall be reserved for use as a public educational facility, and ownership and use of the property shall contain a reversion clause, such that, upon notice by Hills to the then current land owner, such property may, at Hills' option, revert to Hills or its assigns if the facility is ever used for any other purpose other than public education."

Also, on page 11, in paragraph 12, , it should read that
"The Hills will provide up to $3,240,000.00 Dollars. My hand written copy included the insertion of the words "up to", but I am not sure that the copy that ultimately made it out the door included these changes.

Finally, Henry tells me that you want the language regarding accountability which I wrote in at page 11 deleted. He tells me that you are willing to put in language to the effect that if you receive contributions from other developers for the same road, you'd be willing to reduce Hills' share of costs attributed to them, and you'll put in language to that effect.

Please give me a call if you have got any problems with any of these changes or anything else we have written. Otherwise, I will expect that on Wednesday we will come up with a final draft document which we can sign.

Best wishes,

Thomas J. Hall

TJH/lm

20: Additional Considerations:

a. Governmental Action: It is understood by and between the parties hereto that this Agreement or any schedule or exhibit attached hereto is subject to amendment, modification or alteration by any governmental body, including without limitation, the Board of Public Utility Commissioners, or by court order or by EDC in order to comply with any governmental direction and that any such modification or alteration shall in no event shall alter this Agreement as a binding obligation of the parties.

b. Waiver. It is understood by and between the parties hereto that any party to this Agreement may waive any obligation required of any other party to this Agreement which benefits the waiving party provided however that any such waiver shall not limit the right of such waiving party to require future performance of any such obligation.

c. Non-recourse. It is understood by and between the parties hereto that this Agreement shall be non-recourse to the joint venture general partners of The Hills Development Company and in the event of any default by The Hills Development Company under this Agreement, the liability of The Hills Development Company shall be limited to the assets of The Hills Development Company and no deficiency and other personal actions shall be instituted against the joint venture general partners of The Hills Development Company.

Exhibit Z

[redacted]

SUPREME COURT OF NEW JERSEY

TRENTON, NEW JERSEY

Docket No. A-122-85

HILLS DEVELOPMENT COMPANY,

Plaintiff-Respondent,

-vs-

TOWNSHIP OF BERNARDS,

Defendant-Appellant.

TRANSCRIPT OF PROCEEDINGS

January 6, 1986
January 7, 1986

VOLUME I

January 6, 1986

IN ATTENDANCE:

CHIEF JUSTICE ROBERT N. WILENTZ
ASSOCIATE JUSTICE ROBERT L. CLIFFORD
ASSOCIATE JUSTICE ALAN B. HANDLER
ASSOCIATE JUSTICE STEWART G. POLLOCK
ASSOCIATE JUSTICE DANIEL J. O'HERN
ASSOCIATE JUSTICE MARIE L. GARIBALDI
ASSOCIATE JUSTICE GARY S. STEIN

APPEARANCES:

JAMES E. DAVIDSON, ESQ., for Defendant-Appellant

HENRY A. HILL, ESQ., for Plaintiff-Respondent

Tape Reporters P.O. BOX 823 EAST ORANGE, N.J. 07019 (201) 674-8600

of the reliance, and there was also reliance on, on, on the Mount Laurel process. Hills, you know, is more sophisticated than most developers, having been in Mount Laurel litigation since 1971 in their prior guise as the Allendine (sic) Corporation, so that -- but I think it's a twofold reliance and, and all I'm suggesting is that, is that manifest injustice is a, is an equitable doctrine of some kind and that reliance goes to equity and we don't claim that we have vested rights in the sense that we could build if they repealed the ordinance. We only claim that we have taken steps in reliance on a course of action and on a body of law dating, you know, since the ordinance was, was enacted and that, that if the Court is willing to consider this standard that, that perhaps the best way to handle it would be to remand to the trial court because only they can determine what facts are true. Itmakes no sense for me and Mr. Davidson to, to argue about facts.

THE COURT: In that hearing would you be, are you agreeing or saying that if it is shown, for example, that your design plans and so forth can be useful in any future development of the property, that that would not establish the Gibbons type of deleterious injury?

MR. HILL: Well I, I don't -- the design plans are to certain standards in an existing ordinance which

As the Court has remarked in Mount Laurel II, such settlements might easily leave out the lower income beneficiaries and, and --

THE COURT: Mr. Hill, despite the inconsistencies of the municipality's position, the question Justice Stein asked was: why didn't you wait before incurring those particular expenditures?

MR. HILL: Well at some point in time we, we, we detected, becausewe read the papers and, and my client has a large development adjacent, that there were, there were problems and we, we, we tried to vest our rights. Frankly, you know, as soon as it, it -- it took months to prepare this application, but as soon as it was detectable that, that, that sometime in August when Bernards wasn't getting back to us we, we rushed ahead to try and vest the rights we had.

THE COURT: Right. Were some of those expenditures for the benefit of your -- or could they be used for the benefit of your developing in the neighboring municipality? Or is that the kind of thing you would like to have tried before the Judge on remand?

MR. HILL: The, the affidavit indicates that a certain road was built at a cost of $1,600,000 and that the traffic engineers could have built that road to get to the top of the hill to serve the Bedminster develop-

EDH12A

Exhibit AA

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

Bernards Twp.

ORDINANCE #704A

AN ORDINANCE OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS AMENDING THE LOW AND MODERATE INCOME HOUSING PROVISIONS AND THE ZONING MAP OF THE LAND USE ORDINANCE OF THE TOWNSHIP OF BERNARDS

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

WHEREAS, Ordinance #704 of the Township of Bernards amended the Land Development Ordinance of the Township of Bernards by, among other things, adding to said Ordinance a new Article 1100; and

WHEREAS, Ordinance #704 was enacted in order to further ensure the actual construction and availability of a fair share of low and moderate income housing in Township of Bernards, and

WHEREAS, Ordinance #704 was enacted pursuant to interpretations of Mount Laurel II (So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983)] prior to the adoption of the Fair Housing Act (L. 1985, c.222); and

WHEREAS, jurisdiction over Bernards' Township's compliance with its "fair share" obligation has been transferred to the Affordable housing Council; and

WHEREAS, the Affordable Housing Council is in the process of considering the adoption of regulations and criteria to govern the construction and availability of low and moderate income housing throughout the State and such regulations will include, among other things, the determination of regions, the determination of prospective need, the determination of methods of calculating fair share of low and moderate income housing in municipalities throughout the State and other significant issues and criteria; and

WHEREAS, the Fair Housing Act requires that such regulations and criteria be adopted prior to August 1, 1986; and

WHEREAS, the Fair Housing Act requires participating municipalities to adopt a housing element to their master plans within five (5) months of the adoption of the aforesaid regulations and criteria; and

WHEREAS, the aforesaid regulatory criteria relating to the housing element, calculations of fair share, regulations, and other matters are unknown at this time, and

WHEREAS, Ordinance #704 was adopted pursuant to criteria and based upon assumptions no longer in effect and not in accordance with the Fair Housing Act; and

WHEREAS, it is found to be in the best interests of the Township of Bernards to amend its Land Development Ordinance so as to reflect this change in circumstances and so as to assure that development during this interim period prior to adoption of regulations and criteria of the Affordable Housing Council and the housing element of the Master Plan of the Township of Bernards, when adopted.

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

(1) Section 1104, "Minimum Tract Size and Gross Density", is deleted in its entirety and replaced with the following:

Section 1104. Minimum Tract Size and Gross Density

1. Minimum Tract Size. The minimum tract size for other than single or two-family development in either zone shall be thirty (30) acres.

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

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

R-8, PRD-4, 3.0 dwelling units/acre up to a maximum of 1500 dwelling units in the zone

(2) Section 1110, "Lower Income Housing Requirements". Paragraph A, is deleted in its entirety and replaced with the following:

1110 Lower Income Housing Requirements

A. Number of Lower Income Dwelling Units Required

1. All developments on contiguous parcels of land totalling thirty (30) acres or more as of March 6, 1986 in the R-5 zone shall be developed in accordance with the PRD requirements and shall be required to provide twenty (20) percent of all dwelling units to be affordable for lower income households except as provided below

a. A minimum of 15 percent moderate income housing only shall be required in developments which have received conceptual approval prior to July 1, 1984 and which have not received preliminary or final approval.

b. A minimum of 12 percent moderate income housing only shall be required in developments where the maximum sales price of any housing unit will not exceed $100,000 per unit (in 1983 dollars).

2. All developments on contiguous parcels of land totalling thirty (30) acres or more as of March 6, 1986 in the R-8 zone shall be developed in accordance with the PRD requirements and shall be required to provide fifteen (15) percent of all dwelling units to be affordable for lower income households.

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

(3) Section 1110, "Lower Income Housing Requirements" subparagraph 1 of Paragraph F is deleted in its entirety and replaced with the following.

F. Phasing of Lower Income Housing

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

Percentage of building permits for market housing	Percentage of certificates of occupancy for lower income units
up to 24%	0
25 to 49%	25%
50 to 74%	100%
75%	—

(4) This Ordinance shall take effect immediately upon final passage and publication in accordance with law.

The foregoing amended ordinance, having been re-introduced and passed on first reading by the Township Committee of the Township of Bernards in the County of Somerset on March 25, 1986 and then ordered to be published according to law, will be further considered for final passage and adoption and a public hearing held at a meeting of said Township Committee to be held at the Municipal Building, Collyer Lane, Basking Ridge, N.J. in said Township on April 8, 1986 at 8:00 p.m., when and where, or at such time and place to which said meeting may be adjourned, all persons interested will be given an opportunity to be heard concerning said ordinance.

By order of the Township Committee
James T. Hart
Township Clerk
4/3/T1

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

Exhibit B R

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LISA J. POLLAK
HOWARD P. SHAW

CYNTHIA H. REINHARD
MARTIN G. CROWN
JEANNE A. MONAHUS

FRANK J. VALGENTI, JR.

April 30, 1986

Honorable Eugene D. Serpentelli, A.J.S.C.
Ocean County Court House
Toms, River, New Jersey 08754

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

Dear Judge Serpentelli:

Enclosed for filing are the following papers, in response to plaintiff's "Notice of Motion on Remand from the Supreme Court":

1. Original and copy of Brief of Defendants Opposing Plaintiff's "Motion on Remand";

2. Copy of Certification of James E. Davidson, dated April 30, 1986;

3. Copy of Appendix of Defendants Opposing Plaintiff's "Motion on Remand" (which is incorporated by reference into Mr. Davidson's Certification);

4. Copy of Certification of Harvey Moskowitz;

5. Copy of Transcript of the oral arguments of Mr. Davidson and Mr. Hill before the Supreme Court in Hills v. Bernards, January 6 and 7, 1986;

6. Copy of Transcript of proceedings before the Planning Board, March 18, 1986, on referral of proposed Ordinance #764.

Per Your Honor's instructions, as reflected in Mr. Carroll's letter of April 17, 1986, and clarified in my conversation with your law clerk, Tricia Burke, on April 22, 1986, the enclosed papers address only Points I and II of Hills' most recent Brief.

missing A-m of Appendix

PLANNING BOARD
TOWNSHIP OF BERNARDS
NEW JERSEY

IN THE MATTER OF: ORDINANCE NO. 764 : TRANSCRIPT OF
TOWNSHIP COMMITTEE REFERRAL. : PROCEEDINGS

Taken on: Tuesday, March 18, 1986

At: Municipal Building
Township of Bernards
New Jersey

BEFORE: HARRY DUNHAM, Chairman

MEMBERS OF THE PLANNING BOARD:

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

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

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

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

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

HARVEY S. MOSKOWITZ, Planning Board Consultant

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

alone is patently illegal.

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

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

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

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

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

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

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

MR. HILL: Yes.

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

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

THE CHAIRMAN: This is not a court.

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

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

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

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

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

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

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

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

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

MR. FERRARA: Yes, I did.

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

MR. FERRARA: Yes, I did.

MR. HILL: What was your conclusion?

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

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 OPPOSITION TO MOTION TO TRANSFER AND IN SUPPORT OF CROSS-MOTION FOR JUDGMENT OF COMPLIANCE

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 have been asked to attend various meetings, to participate in discussions, to monitor statements of parties and their representatives, and to prepare reports and memoranda.

13. By letter dated November 5, 1984, I provided a four page memorandum to Bernards Township outlining difficulties which The Hills Development Company had with Bernards' proposed ordinance. (See Exhibit M). 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 B).

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 (Exhibit N), 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 O).

19. That list formed the basis of the discussions which took place on January 16. At that meeting, it became clear that Hills and Bernards would be willing to settle this case, if agreement could be reached on all outstanding issues.

20. 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 P).

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

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.

Transcript of

Proceedings

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

B E F O R E:

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

(Appearances, Page 2)

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

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

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

THE COURT: I agree.

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

Thirdly, if as we suggest the ordinance is ultra vires, I think the Gruber case, and I think it's the Bold case, make it clear if we didn't have the power to enact the ordinance they can't get an estoppel based on that. We didn't. Frankly, we don't think that there's veracity to their reliance claim, and we think discovery, if it comes to that, we don't think it should, frankly we think there cannot be, as a matter of law, be estoppel based on this ultra vires provision. If it does come to that, we