RULS-AD-1986-180
5/6/86

Reply Brief & Supplemental Appendix of Plaintiffs Hills

pgs 41

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May 6, 1986

FILE NO. 3000-0042

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JUDGE SERPENTELLI'S CHAMBERS

RULS - AD - 1986 - 180

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

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

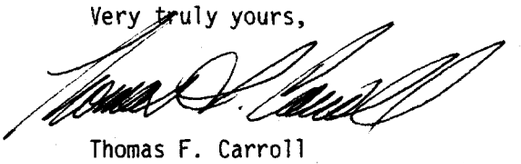
Dear Judge Serpentelli:

This office is in receipt of a brief, appendix and affidavits submitted by defendants in opposition to plaintiff's Motion on Remand from the Supreme Court. In reply to said opposition, enclosed please find a Reply Brief and Supplemental Appendix and the Certification of George M. Raymond. Plaintiff requests the Court's indulgence concerning the timeliness of the enclosed submission but notes that defendants' opposition to plaintiff's motion, served March 24, 1986, was not received by plaintiff until Thursday, May 1, 1986. The Certification of George M. Raymond is submitted in response to defendants' objection concerning the fact that Mr. Raymond's recollection of the Township Committee's June 6, 1985 meeting had not been put in affidavit form.

Finally, plaintiff wishes to advise the Court that it has filed a Complaint in Lieu of Prerogative Writs with the Law Division, Somerset County in which plaintiff alleges various theories, including the arbitrary, capricious and unreasonable nature of defendants' downzoning of Hills' Raritan Basin and Passaic Basin properties. Said Complaint does not raise any theories presently before this Court. Please note that, due to time limitations imposed by R. 4:69-6, it was necessary to file said Complaint prior to the argument on the pending motion in order to preserve plaintiff's objections to Township Ordinance 760, an ordinance which effectively downzones the Passaic Basin portion of plaintiff's property.

Thank you for your kind attention in this matter.

Very truly yours,



Thomas F. Carroll

TFC:klp

CC: James E. Davidson, Esq. - Hand Delivery
Arthur H. Garvin, III, Esq. - Hand Delivery

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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF, THE HILLS DEVELOPMENT COMPANY ON REMAND FROM THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

Table of Exhibits

POINT I

HILLS' PENDING MOTION WAS EXPRESSLY SANCTIONED BY THE SUPREME COURT AND IS NOT FORECLOSED BY THE SUPREME COURT'S OPINION IN THIS MATTER

Defendants, Township of Bernards, et al., argue in this forum that the Supreme Court's opinion in The Hills Development Company v. Tp. of Bernards, et al., ____ N.J. ___ (1986) forecloses this Court's consideration of the motion expressly sanctioned by the Supreme Court's Order of February 20, 1986 (Hills' Exhibit N). Typical of Defendants' gymnastics the Township argued directly to the contrary when the very issues addressed herein were brought before the Supreme Court In response to a motion filed by Plaintiff, The Hills Development Company ("Hills") with the Supreme Court Defendants expressed the following position:

> THE ISSUES RAISED BY HILLS HAVE NOTHING TO DO WITH TRANSFER OF THIS CASE TO THE COUNCIL ON AFFORDABLE HOUSING.
>
> * * *
>
> [E]ven assuming, hypothetically, that Hills does have vested rights regarding its zoning, and that Bernards is estopped from ever reducing the number of units that Hills may construct still that has no bearing upon the issue before this Court that is, the choice as to whether the Council or the courts should determine if Bernards satisfies its Mount Laurel obligation.
>
> Assume hypothetically, that Bernards is transferred to the Council and there presents a housing element which satisfies its Mount Laurel obligation without allotting a single Mount Laurel unit to Hills. Although defendants believe that Hills' estoppel arguments are factually and legally groundless, defendants know of nothing that would prevent Hills from filing suit to try to prove, if it can, that it has a vested right to build 2,750 units on its property, irrespective of Bernards' housing element. Defendants believe that as a matter of law and fact, Hills would lose such a case, but the transfer of this Mount Laurel action to the Council would not impair Hills' right to pursue such a claim in court, just as any landowner would have the right to sue to challenge an allegedly improper rezoning, completely independent of any Mount Laurel considerations.
>
> * * *

> As Judge Serpentelli acknowledged at the hearing upon Hills' motion, Hills' claim of reliance and estoppel, being based upon facts uniquely within Hills' knowledge, could not be adjudicated without discovery *** and presumably an evidentiary trial thereafter. The Supreme Court certainly is not the proper forum for such a proceeding.
>
> Hills has filed its Law Division motion for an injunction based upon estoppel. The Law Division judge has not yet adjudicated that motion. The estoppel argument is, in any event, irrelevant to the issue of whether Bernards' Mount Laurel compliance should be evaluated by the Council on Affordable Housing or by a court. The estoppel issue should be left with the Law Division, where it belongs, and therefore plaintiff's motion should be denied.

Defendants' Supreme Court brief in opposition to Plaintiff's Motion for Leave to Supplement Record and File Supplementary Brief at 4-7, 9. (Exhibit A, annexed hereto.) (emphasis added).

Having convinced the Supreme Court that transfer should be granted, Defendants once again spin full circle and argue that transfer forecloses this Court's consideration of the very issues Defendants previously argued should be heard by this Court. In short, Defendants have written Hills' brief on this issue and argued before the Supreme Court the precise position taken by Hills Defendants, as with all litigants should be estopped from taking diametrically different positions in litigation See e.g. Koppel v. Olaf Realty Corp., 56 N.J. Super. 109, 1^1 (Ch. Div. 1959) aff'd 62 N.J. Super 103 (App. Div. 1963) (a party will not be permitted to play fast and loose with the courts, nor to assume a position in one court entirely different or inconsistent with that taken in another court with reference to the same subject matter)

Hills has little to add to Defendants' Supreme Court position. The Supreme Court has directed that the Council on Affordable Houusing will now determine the full extent of Bernards' fair share obligation. The Supreme Court has not vaporized hundreds of years of our common law. In fact the Supreme Court has expressly permitted Hills to raise the issues addressed herein. The Supreme Court's

February 20, 1986 Order did grant to Defendants the right to urge that the Order of transfer forecloses Hills' common law claims related to development rights. However, the issues to be addressed on the return date of this motion were fully briefed before the Supreme Court. Had the Supreme Court been of the view that Hills' common law remedies were negated by the Order of transfer, it could have so ruled. It did not. If the Order of transfer is to foreclose Hills' common law remedies, it must be for reasons peculiar to this litigation not because the Supreme Court said what it did in its opinion concerning what Bernards has acknowledged to be issues "irrelevant" to the questions now before this Court

The inconsistency of Defendants' position aside, the language of the Supreme Court opinion relied upon by Bernards does not support the position it now urges. Bernards first looks to pages 8^ and 83 of the opinion where the Court advises that "stipulations" entered in litigation are not binding upon the Council on Affordable Housing (the "Council"). The Court was obviously speaking of stipulations as to non-compliance, fair share obligation, etc. The Court's comments were not directed to whether settlement of litigation should be enforced. To the contrary the Court went to great lengths to commend the settlements reached in many lawsuits. (slip op. at 90-92). The settlement of the instant litigation is equally commendable and should likewise be honored.

Bernards also points to the portion of the opinion (slip op. at 73) wherein the Court rejects the notion that the "bad faith" of a municipal official should operate to defeat transfer. While Hills submits that Bernards' behavior gives new meaning to the term, the issue of transfer is not before this Court and the Council will now evaluate the Township's fair share obligation. Again the language relied upon by Bernards has no bearing on Hills' common law rights.

Similarly inapposite is the Court's language to the effect that the Mount Laurel II entreaty for developer litigation does not "create the impage of an estoppel"

with respect to the issue of transfer. (slip op. at 76). The argument discredited by the Supreme Court has no bearing on the issue of whether Bernards should be equitably estopped from downzoning Hills due to Hills' expenditures and other reliance upon the zoning and municipal representations. The Supreme Court found no substance to the argument that any of the twelve municipalities before it should be estopped from transfer; the Court did not address the issue of whether the doctrine of equitable estoppel based upon substantial reliance is now eradicated.

Hills believes that the Supreme Court, in its Order of February 20, 1986, intended this Court to inquire as to whether a finding of Hills' development rights would substantially impair the purposes and intent of the Fair Housing Act as applied to this defendant municipality. The answer to this inquiry is clearly in the negative. Bernards has never taken the position that the zoning of Hills' property as set forth in Ordinance 704 was contrary to the sound planning sought by the Act. To the contrary, the Township has expressly found that the zoning of Hills' Raritan Basin property at a gross density of 5.5 dwelling units per acre is in accord with the Township's Master Plan and sewer districting policies. (Exhibit B, annexed hereto).

The sole reason offered by Defendants for the downzoning is that of preventing construction of more lower income housing than the Council will find to be the Township's obligation Hills is willing to construct the number of lower income units required by the applicable pre-existing ordinance, i.e the 550 units required by Ordinance 704. However, if Bernards' sole concern is that of ensuring that it does not "over-satisfy" its Mount Laurel obligation, Hills will, if Bernards desires, refrain from constructing the number of lower income units Bernards feels would be in excess of its obligation. If this were to be the end result, there would be absolutely no reason under the Act or otherwise to find that the Order of transfer forecloses Hills' common law rights. Indeed when before the Supreme Court, Defendants argued this very position and, Hills submits, correctly so.

POINT II

HILLS DOES NOT SEEK EQUITABLE RELIEF WITH UNCLEAN HANDS.

In what Hills believes is truly a display of audacity, Defendants allege that Hills has come before this Court with "unclean hands" and should be denied equitable relief. As explained below, Defendants truly grasp at straws in an attempt to support an inference that Hills' "conduct" has not been "fair, just and equitable " While Bernards' alleged instances of Hills' "inequitable conduct" are patently fallacious, Hills feels constrained to respond.

First, Bernards refers to Hills' pre-Mount Laurel II plans to conduct "expensive" housing on its property. As Bernards well knows, the "least cost" principles which were then in effect and the judgment entered in 1980 expressly permitted the housing then proposed by Hills. There is certainly nothing inequitable about following the law.

Second, Bernards refers to its blatant attempt to violate the 1980 judgment and castigates Hills for its "threat" to file a Mount Laurel II lawsuit in the absence of a voluntary rezoning. Having lost a motion to dismiss based on this theory in July of 1984 and thereafter approaching Hills to settle the litigation, Bernards once again dredges up this history and alleges that it displays Hills' inequitable conduct. Again the "conduct" of which Bernards now complains was expressly sanctioned in Mount Laurel II and Bernards' July 1984 failure to succeed on a motion to dismiss for "lack of standing" does not support a finding of "unclean hands" in May 1986.

Third, Bernards points to a March 18, 1^86 meeting of the Defendant Planning Board at which recommendation of the original version of the downzoning ordinance, Ordinance 764, was considered Hills advised the Planning Board that "interim" Ordinance 764 was expressly proscribed by an amendment to N.J.S.A 40:55D-90 and the Planning Board attorney advised that the Board was aware of the

amendment. (March 18, 1986 Transcript, supplied by Defendants at "-8, 11). Hills also advised that the proposed ordinance was unlawful for other reasons as well. (3/18/86 T3-10). Nevertheless, Bernards apparently takes offense to Hills' stating that municipal bodies may not be immune from liability if they intentionally act unlawfully (3/18/86 T12). Apparently, Bernards believes that its Planning Board should be able to take intentionally unlawful actions without fear of complaint. Hills does not believe that it is "inequitable" to attempt to convince a municipal body not to intentionally violate the law

In the same breath, Bernards alleges that Hills did not appear at the March 18 1986 Planning Board meeting in order to attempt to persuade the Board not to recommend adoption of Ordinance 764 but was present only to "set-up" Bernards and "make a record." Bernards' presumptions concerning Hills' scienter are not only remarkable but contrary to the record A review of the Planning Board hearing transcript displays numerous instances of Hills' imploring the Board not to recommend passage of the ordinance. Of course, in light of the fact that the Board Chairman advised Hills that he did not "believe the members will pay much attention to what the witnesses have to say" ("/18/86 T15), it is not surprising that Bernards considers Hills' appeal to the Board to be a "dog and pony show" delivered for the sole purpose of making a record. However Bernards is wrong.

Bernards also complains of Hills' alleged attempts to "obtain valuable concessions that have no relationship to Mount Laurel". (Db26). Of the many items negotiated by the parties, Bernards now castigates Hills for attempting to secure means to provide sewage treatment capability for its Passaic Basin property * At

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* Bernards has recently adopted an ordinance, Ordinance 760, which amends the ordinance cluster provision so as to effectively downzone the Passaic Basin property below the 273 units permitted by a March 18, 1980 Judgment of the Superior Court. (See Judgment, Defendants' Exhibit B at ¶1 and pertinent portion of Ordinance 760, Exhibit C, annexed hereto)

the outset of the settlement process, Bernards was aware that Hills considered Bernards' assistance in resolving the Passaic Basin sewer problem as being integral to Hills' agreement to refrain from seeking a density increase on the property (Hills' Exhibit P; September 18 1985 Affidavit of John H. Kerwin at 4). As indicated in Defendants' Exhibit P, the Township's sewer districting policies leave the land (545 acres) virtually undevelopable. It does not require extensive legal research to recognize this as a taking. Bernards was also aware that Hills considered its ability to develop the Passaic Basin property at its as-of-right density as being integral to the economic viability of the overall inclusionary development. (Ibid).

Bernards now labels this item (which Bernards negotiated for months) as a "non-Mount Laurel concession" which renders Hills' hands unclean. Bernards also alleges that Hills made "mistatements" to the Department of Environmental Protection ("DEP") when it advised the Commissioner that the Passaic Basin sewer issue was integral to the parties' settlement negotiations. As indicated above, the statements made to the DEP were entirely accurate. Moreover, if Bernards detected any inaccuracies in Hills' January, 1985 letter to the DEP it was copied with the letter (Defendants' Exhibit P) and participated in discussions with the DEP and thus, it may not now point to Hills for any inaccuracies it now allegedly perceives. In sum, Hills was under the belief that Bernards does not favor situations where land may not be developed and thus, taken. Hills believed that Bernards did not wish to engage in yet another round of litigation and, thus attempted to resolve the sewer issue. In retrospect, Hills may have been wrong

Similarly without basis is Bernards' statement concerning Hills' request for additional commercial space. As Bernards well knows, Hills requested the additional square footage to serve the increased size of the inclusionary development resulting from Ordinance 704. (Hills' Exhibit V; Memorandum at 1). When Bernards appeared to resist the request in January 1985, Hills did not press the issue.

(Defendants' Exhibit S at 1). Thus, the requested commercial space was neither a "non-Mount Laurel concession" nor was it an issue of any real significance

Defendants follow up the gymnastics displayed in their Point I argument with the allegation that Hills has engaged in "twisting and misrepresentation." (Db27). Hills is compelled to rebut these groundless allegations. First Bernards asserts that Hills has alleged that Defendants initiated the Township's requests for a stay and builder's remedy immunity when, in fact Hills initiated the process Hills does not believe that it has ever alleged that Bernards was the originator of the notions of a stay and immunity. Apparently Bernards does not recall who originated the notion although it feels that the originator was either Hills or this Court Nevertheless, to the extent it is relevant the record discloses that the immunity order was drafted by Township counsel on his stationery, the Township submitted lengthy correspondence pleading for the entry of the Order (Defendants' Exhibit N), Township counsel advised that another developer was then preparing to sue the municipality (Defendants' Exhibit D), the Township made numerous requests to extend the relief contained in the Order and, to be sure the Township has warmly received its benefits.

Bernards also takes issue with Hills' allegation concerning the fact that "minor" alterations were made to settlement documents whereas Bernards now asserts that the changes were "substantive." To be sure, the parties' characterization of the changes are different. Bernards is quite presumptuous however when it unequivocally asserts that its characterization is correct.

Bernards also castigates Hills for alleging that the Township Committee voted to approve all terms of the parties' settlement whereas the Master's subsequent correspondence indicates that there may have been some issues which the Committee did not vote to approve on that date. (Defendants' Exhibit U). Defendants could have, and still could, enlighten the Court as to exactly what the Committee voted to approve on June 6, 1985 and on other dates. For obvious reasons, Defendants have

not chosen to do so. However, the Township is off the mark when it criticizes Hills for its allegedly incomplete penetration of the Township's veil of secrecy

Finally, Bernards alleges that Hills has spoken inaccurately for Bernards when Hills states that the Township has not taken the position that Hills' development as per Ordinance 704 would not be in accord with sound planning. The glaringly apparent facts demonstrate this to be entirely accurate. The Township Planner himself has stated that the zoning provided by Ordinance 704 is in accord with the Township's Master Plan and sewer districting policies. (Exhibit B annexed hereto) Bernards does not now contest this finding although it does offer one reason for a downzoning: a lower fair share obligation. Despite Bernards' apparent disagreement Hills submits that such a reason does not give lawful support to the downzoning.

In sum, there is absolutely no basis to any of Bernards' allegations of inequitable conduct by Hills. In light of the Township's outrageous behavior as amply demonstrated by the record, it is not surprising that Bernards should mount a desperate attempt to alter the equitable equation However, Hills respectfully submits that Bernards' attempt fails miserably and the allegation that Hills comes to this Court with "unclean hands" is absolutely groundless.

POINT III

HILLS' REQUEST FOR AN ADJUDICATION OF DEVELOPMENT RIGHTS IS AMPLY SUPPORTED BY THE RECORD.

Defendants submit to this Court that the voluminous record supplied to this Court does not support a finding that Hills is entitled to the relief it requests. As discussed below, Defendants' position is without basis.

With respect to Hills' request that this Court enforce the parties' settlement agreement, Bernards first asserts that Bernards' negotiators were not authorized to bind the Township to a settlement agreement. Hills has never alleged to the contrary. Hills does presume that the Township's negotiators were not engaging in fraud and, as negotiations progressed, the negotiators sought their client's agreement on the fruits of the negotiation. Defendants seem to now imply that the Township negotiators were engaged in unauthorized discussions which produced some seven months of wheel spinning Hills alleges that the Township negotiators sought approval of negotiated issues as negotiations progressed; Hills does not allege that the Township negotiators could "bind" the Township to the agreement that was reached.

Hills has also alleged that the Township Committee voted to approve the parties' settlement agreement at a Committee meeting held on June 6, 1986. The Court-appointed Master has indicated that this is essentially the case although he does not recall the Committee discussing certain details of the parties' settlement. With the exception of the issue of off-tract improvements, the Master's correspondence does not mention which additional items, if any, were not discussed. The issue of off-tract improvements was resolved very early in the negotiation process, it being agreed that Hills would contribute the sum of $3,240,000.00. (See e.g Defendants' Exhibit S at 5). Assuming that the Master is correct and that the Committee did not vote on June 6 to approve this aspect of the settlement it does

not follow that the Committee did not approve this item although it clearly does follow that a vote to approve the item did not occur on that date. Again, Bernards could enlighten the Court if it advised as to what occurred at the June 6 meeting and whether there were any other Committee meetings at which the Committee voted to approve any items which were allegedly not approved at the June 6 meeting. Unfortunately, Bernards has not seen fit to advise the Court that the June ^ vote of approval occurred at all. Nevertheless, the fact was discovered and Hills requests the opportunity to further discover precisely what was voted approved on June 6 and, assuming the entire settlement was not voted approved on that date, whether the Committee voted to approve the balance of the settlement on another date or dates *

Moreover, Bernards totally fails to address Hills' contention concerning the partial settlement of this litigation achieved in November 1984 when the Township adopted Ordinance 704. Without question the Township voted to approve the partial settlement outlined in Ordinance 704. It is also beyond question that the essential parameters outlined in the ordinance, including the gross density and set-aside, were acceptable to the parties. As Bernards has repeatedly stressed, Hills was lawfully entitled to commence development following the adoption of Ordinance 704. As Hills has noted, had Bernards indicated that it was not sincere with respect to its intention to finalize the settlement, Hills would have done just that. (Affidavit of John H Kerwin submitted in support of this motion).

Next Bernards argues that the settlement it freely entered into is unlawful, invalid and unenforceable. Bernards seems to assert that the settlement

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* Bernards also argues that Hills has not alleged that the Planning Board and Sewerage Authority voted to approve the settlement. Hills knows of no legal requirement that any body other than the governing body need vote to approve a settlement. Nevertheless, assuming that the approval of those two bodies is a legal requirement Hills alleges their approval and seeks discovery on the issue.

resulted in "contract zoning" and an "impermissible restriction upon future exercise of municipal legislative power". Citing Midtown Properties, Inc. v Madison Tp., 68 N.J. Super. 197, 206 (Law Div. 1961) aff'd o.b. 78 N.J. Super. 471 (App. Div. 1963), the agreement is criticized for its "viciousness." In essence, the Township argues that it was not lawfully entitled to settle this zoning litigation, a most curious proposition.

The Midtown Properties case involved an attempt to enforce a "contract" which purported to settle zoning litigation and which was not approved by way of municipal resolution. 68 N.J. Super. at ^04-^05. The contract, in fact, had indicated that resolutions authorizing the settlement were passed. Id at 206. The court concluded:

> A public body may only act by resolution or ordinance; it contracts on behalf of the public and even its representatives have no power to bind it to an illegal and void contract. Id. at 208

Since the municipality in Midtown Properties had passed neither an ordinance nor a resolution, the agreement was held to be ultra vires and invalid. Id. at 208-209.

In Suski v. Mayor & Com'rs of Beach Haven, 132 N.J. Super. 158 (App. Div. 1975), at issue was an agreement to permit construction in direct contravention of a zoning ordinance. Id. at 163. The agreement was held invalid since it was an "attempt to do by agreement what can only be done by following the appropriate statutory procedure " Id. at 164. In other words the ordinance should have been amended

To the same effect is North Jersey Dist. Water Supply v. Newark, 103 N.J. Super. 542, 546-547 (Ch Div. 1968) aff'd 52 N.J. 134 (1968) (a binding settlement agreement with a municipality must be approved by ordinance or resolution)

In the instant case the Township has adopted both an ordinance and a

resolution. Clearly, Ordinance 704, an ordinance which was passed to settle the essential parameters of this lawsuit was duly adopted by Bernards.* Moreover, Hills alleges that the Township Committee indeed resolved to settle this litigation in toto in June of 1985.** Thus, the cases relied upon by Bernards have no bearing on the validity of the settlement reached in this litigation. In sum, Bernards' ill-timed attack upon the validity and enforceability of the settlement agreement it entered into is without basis and Hills respectfully requests that the agreement be enforced.

With respect to Hills' request that ernards be equitably estopped from downzoning Hills, Hills has already addressed the issue of whether "official municipal action" or a judgment is a necessary prerequisite to an equitable estoppel claim Hills again submits that there has indeed been official municipal action (by both the Townships of Bernards and Bedminster). In addition, Hills respectfully submits that the immunity order premised upon the rezoning of Hills should be viewed no differently than a judgment expressly ordering a use. Finally, due to Bernards' representations to our appellate courts when seeking a stay of the November 18, 1985 compliance hearing which had been scheduled in this matter (e.g requesting "judicial notice" of repeal of the Ordinance 704 "sunset provision" and advising that a

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* The Township appears to argue that the Ordinance 704 "sunset provision" (a provision repealed while the transfer issue was before the Supreme Court) indicates that the ordinance was not intended to be binding. In the same brief, Bernards argues that Hills could have commenced construction immediately following the adoption of the ordinance but did not because it was "greedy" and wished "more concessions." The Township's constantly shifting position renders reply to its argument somewhat difficult Suffice to say that the "sunset provision" was not a condition to the effectiveness of the ordinance; it merely provided that the ordinance would expire unless extended, if a judgment of compliance were not acquired within one year. Had Hills received approvals prior to that time, the provision would have been moot.

** It should be noted that a "resolution" is no more than an act "resolved on upon a motion by some member." Keyport Sewerage Authority v. Granata, 52 N.J. Super 76, 83 (Law Div 1958). See also Woodhull v. Manahan, 85 N.J. Super. 157, 164 (App. Div. 1964).

stay would in no way affect Hills' rights) (Hills' Exhibits O and P), Bernards should not now be heard to assert that there is any critical significance to the final judgment which would have been issued in the absence of a stay.

Lastly, Defendants argue that Hills has fatally failed to allege all of the dates upon which it undertook its extraordinary expenditures in reliance upon Ordinance 704. Once again, Bernards seeks the best of both worlds. Despite express requests by this Court and the Supreme Court (Transcript of Supreme Court proceedings at 4-7) as to its intentions upon transfer, Bernards advised that it did not know whether it would downzone Hills. Two weeks after the Order of transfer, an ordinance downzoning Hills was introduced and thereafter raced through the process of adoption. On October 17, 1985, Hills filed a Section 707 "conceptual" approval application and paid the $74,360.00 application fee which was accepted by Bernards. Although the application was prepared over a period of months, Hills has conceded that the application was filed when it was filed due to Hills' suspicions concerning Bernards' intentions. (Defendants' Exhibit Z, p.2.1'). Nevertheless, Bernards' acceptance of the application and the fee, along with its pledge to process the application "as with any other", indicated that, good faith presumed, Bernards might not downzone Hills.

For reasons known only to Bernards, it did not disclose an intention to downzone Hills until it introduced Ordinance 764 on March 6, 1986. To be sure, Hills did suspect that Bernards would attempt to downzone Hills. However Hills takes issue with Bernards' apparent position concerning any magical date prior to March 6, 1986 beyond which any act of reliance was not justified. Hills respectfully submits that mere suspicion concerning a zoning amendment does not warrant a conclusion that one must sit idly by for an indeterminate period of time. To the contrary, Hills submits that a landlowner is entitled to attempt to develop pursuant to effective

zoning ordinances unless a municipality announces an intention to repeal the zoning. This did not occur until March 6, 1986.

Nevertheless, Hills has submitted numerous affidavits which outline the various items of reliance alleged by Hills and the time frame over which expenditures were made. (See e.g. Affidavits of John H. Kerwin at ¶ 17, 20, 21 and Joseph Thompson, P.E., at ¶ 6 through 9 submitted in support of this motion).

As Bernards was well aware Hills' property located in the Bernards Raritan Basin was being developed and planned in conjunction with Hills' immediately adjacent Bedminster Highlands property. Thus, even as to work which continues in progress today, Hills was compelled to proceed with the designed infrastructural improvements lest Bernards' ambivalence concerning its intentions sabotage Hills' Bedminster inclusionary development as well as the Bernards development. Hills has produced affidavits which demonstrate that it has either expended or committed to expend vast sums of money in reliance on the zoning which Bernards now seeks to remove. In fact, the record indicates that Hills has expended over $1,000,000.00. Hills has also alleged items of reliance based upon Hills' forebearance reliance damages which Bernards does not contest. Bernards is free to assert that it does not agree with the record. However, Bernards' mere denials of Hills' allegations do not establish Bernards' position.*

In sum, Bernards is in error when it asserts that the record adduced in this matter thus far does not support an award of relief for Hills as requested on this motion. To the contrary, Hills respectfully submits infra that the record supports a finding that Hills is entitled to relief as a matter of law.

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* ~~Nevertheless, should this Court determine that the issue of~~ whether a sufficient ~~quantum of justifiable reliance has~~ been demonstrated must ~~be shown on motion,~~ Hills ~~will supply a detailed account~~ of all ~~expenditures and all dates~~ relevant thereto.

POINT IV

HILLS IS ENTITLED TO THE REQUESTED RELIEF AS A MATTER OF LAW.

Hills respectfully submits that it has established entitlement to the relief sought as a matter of law and that there is no need for the discovery and trial suggested by Bernards.

With respect to the settlement agreement reached by the parties it is eminently clear and not denied that Ordinance 70' provided for a partial settlement of this litigation. As Hills has submitted to this Court, the law directs that such partial settlements should be enforced. See e.g. Main Line Theatres, Inc. v Paramount Film Distrib. Prop., 298 F. 2d 801, 804 (3d Cir. 1962).

Similarly, Hills' allegations concerning the Township Committee vote to approve the settlement as set forth in the May 31 1^85 settlement agreement (Hills' Exhibit H) has not been denied. Bernards has asserted that Hills has not yet established that the Committee voted to approve all of the terms of the settlement. Nevertheless this information is in the hands of the Defendants and despite opportunity to do so, Hills' allegation in this regard has not been denied and should be deemed admitted.*

Finally with respect to Hills' request for equitable estoppel Bernards has limited its response to mere denials of Hills' allegations. Bernards posits that the facts are largely within the knowledge and records of Hills. However, as to Hills' infrastructural improvements same are not only fully visible but the approvals for

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* Bernards has also argued that "substantive" issues in dispute arose subsequent to June 6 1985 and that some were never resolved. Even assuming that Bernards is correct, the agreement reached prior to that time is nevertheless valid. See e g Comerata v. Chaumont, Inc., 52 N.J. Super. 299, 305 (App Div. 1958) (agreement enforceable notwithstanding the fact that an anticipated written agreement will contain additional terms as are later agreed upon).

the improvements are a matter of public record. Moreover, Bernards does not even deny the items of reliance established by virtue of Hills' forebearance. (See e.g. Affidavit of Kerwin submitted in support of this motion at ¶ 18, 19). Under these circumstances, Bernards should not be permitted to rest upon no more than mere denials and the Township should be estopped as a matter of law.

CONCLUSION

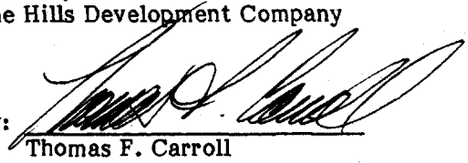
Hills respectfully submits that Bernards has failed to demonstrate that the Order of transfer should foreclose Hills' common law claims. The Supreme Court opinion itself does not purport to negate the common law and an adjudication of Hills' development rights will not be at all inconsistent with the purposes and intent of the Fair Housing Act. Hills further submits that Bernards' attempt to impute "unclean hands" upon Hills is also without any basis whatsoever. Finally, Hills respectfully requests that this Court hold that:

(1) the parties' settlement as reflected in the May 1, 1985 agreement be enforced; or

(2) the parties' partial settlement as reflected in Ordinance 704 be enforced; and

(3) Bernards be equitably estopped from applying a repeal of Ordinance 704 to Hills.

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

By: 
Thomas F. Carroll

May 6, 1986

Exhibit A

SUPREME COURT OF NEW JERSEY

DOCKET NO. 24,780

THE HILLS DEVELOPMENT COMPANY,	:	
Plaintiff/Respondent,	:	
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,	:	CIVIL ACTION
Defendants/Appellants.	:	

BRIEF AND APPENDIX OF DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT RECORD AND FILE SUPPLEMENTARY BRIEF.

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On the Brief:

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ARTHUR H. GARVIN, III, ESQ.
HOWARD P. SHAW, ESQ.

ARGUMENT

POINT I

THE ISSUES RAISED BY HILLS HAVE NOTHING TO DO WITH TRANSFER OF THIS CASE TO THE COUNCIL ON AFFORDABLE HOUSING.

Regardless of the glosses which Hills seeks to place upon the issue, the issue addressed in its motion papers is simply one of alleged estoppel. Hills asserts that Bernards is estopped to ever amend its zoning ordinance and, apparently, that Bernards' Planning Board is estopped to reject Hills' conceptual approval application regardless of its inadequacies.

In an apparent effort to paint Bernards as "the bad guys", Hills has submitted motion papers replete with purported factual material, much of it entirely outside the record of the case, designed to demonstrate that Hills has a vested right to prevent Bernards from ever reducing the density allotted to Hills' property by the present Land Development Ordinance. In so doing, Hills studiously, painstakingly, avoids using the correct description of the application which it submitted and which is governed by BTLDO Section 707 -- an application for approval of a conceptual plan (see previous admission of this fact by Hills at Pb 11, footnote 9). By instead using the generic (and inaccurate*) term "development application", Hills apparently

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* The Municipal Land Use Law defines "application for development" as an application which is "required" by

hopes to avoid the obvious bar of N.J.S.A. 40:55D-10.1, which says that approval of a conceptual plan is not binding (and therefore can create no vested rights).

But even assuming, hypothetically, that Hills does have vested rights regarding its zoning, and that Bernards is estopped from ever reducing the number of units that Hills may construct, still that has no bearing upon the issue before this Court, that is, the choice as to whether the Council or the courts should determine if Bernards satisfies its Mount Laurel obligation.

Assume, hypothetically, that Bernards is transferred to the Council, and there presents a housing element which satisfies its Mount Laurel obligation without allotting a single Mount Laurel unit to Hills. Although defendants believe that Hills' estoppel arguments are factually and legally groundless, defendants know of nothing that would prevent Hills from filing suit to try to prove, if it can, that it has a vested right to build 2,750 units on its property, irrespective of Bernards' housing element. Defendants believe that as a matter of law and

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ordinance. N.J.S.A. 40:55D-3. Bernards' Land Development Ordinance specifies that a conceptual application is optional, consequently it is not a "required" application. BTLDO §707.A. (Dma 3). (We presume that an ordinance, being law, does not constitute a supplementation of the record. In the event that it is deemed to be factual material rather than law, we note that ordinances are properly the subject of judicial notice without request by a party. Ev. R. 9[2][a].)

fact, Hills would lose such a case, but the transfer of this Mount Laurel action to the Council would not impair Hills' right to pursue such a claim in court, just as any landowner would have the right to sue to challenge an allegedly improper rezoning, completely independent of any Mount Laurel considerations.

The foregoing assumptions are, in any event, completely speculative and without basis in fact. Moreover, transfer to the Council will not necessarily cause the ordinance to be amended so as to reduce Hills' density at all, nor will retention of the Mount Laurel issue in court necessarily protect Hills from such an ordinance amendment (see Db 39 to Db 41).

As Judge Serpentelli acknowledged at the hearing upon Hills' motion, Hills' claim of reliance and estoppel, being based upon facts uniquely within Hills' knowledge, could not be adjudicated without discovery (T 13-5 to 9*) and presumably an evidentiary trial thereafter. The Supreme Court certainly is not the proper forum for such a proceeding.

Hills has filed its Law Division motion for an injunction based upon estoppel. The Law Division judge has not yet adjudicated that motion. The estoppel argument is, in any event, irrelevant to the issue of whether Bernards' Mount Laurel

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* Transcript of the November 22, 1985 motion hearing, previously submitted. A copy of the referenced page is attached to this Brief. (Dma 4).

compliance should be evaluated by the Council on Affordable Housing or by a court. The estoppel issue should be left with the Law Division, where it belongs, and therefore plaintiff's motion should be denied.

measures by Bernards satisfy Bernards' Mount Laurel obligation. Thus, such allegation is unlikely to affect the outcome of the present appeal, and supplementation of the record is inappropriate. In re Marvin Gastman, supra, at 114.

In addition, review of a conceptual plan is not binding, N.J.S.A. 40:55D-10.1, and the Municipal Land Use Law does not require any hearing upon a conceptual plan, so that there is no legal basis for Hills to challenge the rejection of a conceptual plan.

If Hills is permitted to supplement the record, defendants would be compelled to move, after seeing such supplementation, for leave to submit responsive supplementation of the record, which would undoubtedly raise sharp factual disputes, including a dispute over the merits -- or extreme lack of merit -- of the conceptual plan submitted by Hills. The Supreme Court is not the appropriate forum in which such factual disputes should be adjudicated, particularly when they are irrelevant to the issue before the Court.

Exhibit B

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

HARVEY S. MOSKOWITZ P.P., P.A.
Community Planning & Development Consultant

TO: Township of Bernards Planning Board and Township Committee

RE: Review of Alternate Sites for Low and Moderate Income Housing

DATE: November 5, 1984

At the public hearing on Ordinance No. 704, a number of residents requested that other sites be considered for at least part of the Township's low and moderate income housing responsibility. It was the residents' opinion that if the Town owned or were to acquire alternate sites for lower income housing, it would allow the Township to reduce the density bonus proposed to be granted by Hills Development under Ordinance No. 704 (1,200 new market units for 550 low and moderate income units).

Based on suggestions by the residents, as well as discussion among the Township's technical staff, a number of alternate sites were reviewed and are discussed in this memorandum.

In summary, of all the sites reviewed, only the Sherbrook tract and the Conkling Street parcel are possible higher density housing sites. The 150-acre Sherbrook site is sewered, on a major road, in the growth area, and large enough to make a meaningful impact on the Township's low and moderate income obligation. Unless the Township acquired all or part of the land, a density bonus would have to be granted to get low and moderate income housing. The Conkling site is already owned by the Township. While access is only fair, it could be developed at some future date with lower income units if necessary.

Other Considerations

In considering alternate housing strategies to comply with Mt. Laurel, a number of other points should be considered, as follows:

1. Extension of sewers into the low growth areas of the Township has significant ramifications in terms of the Master Plan's Land Use Plan. Expanding the sewer district (with permission of the State and Federal agencies) into the low growth area for the purpose of providing higher density housing might encourage additional growth in these designated low growth areas. To be sure, while a distinction could be made between municipally-owned low and moderate income housing as a reason for extending the district line, the fact that the area has been declared appropriate for high intensity use by the Township is

one that other property owners would not overlook in contesting the Township's extremely low density zoning in these areas.

2. The proposed zoning strategy in which Hills Development is granted a density bonus of 1,200 units in order to secure 550 low and moderate income units does not do violence to the Master Plan or sewer district area. Hills Development will be utilizing their Bedminster plant capacity and thus not place any burden upon the Township's 2.5 million gallon capacity plant.

3. The imposition of a low and moderate income requirement on the existing PRN developers does not alter the dwelling unit count or sewer demands. In fact, given the somewhat smaller units that are being built for the lower income component, slightly less sewer demand would probably result.

4. Use of the Sherbrook site for higher density housing is not recommended given the close proximity of the PRN development. The use of the Conkling Street tract may be necessary if the Township's position with respect to 900 low income units doesn't stand up in court. In other words, if the Court insists that the Township provide some of its 1,272 low and moderate obligation, part of it could go on the Conkling Street property.

5. Finally, if Hills Development chooses to contest any proposed Mt. Laurel II strategy, their case will have to be litigated. In that event, the probable scenario is that the Township's full 1,272 low and moderate income obligation will be accepted by the Court with Hills seeking a builder's remedy for

all or a significant part of that number. It is conceivable that the total number of units to be constructed by Hills would be over 6,000, including higher density development in the Passaic Basin, a heretofore limited growth area of the Township.

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

EDR12C

Ord. #760

AN ORDINANCE OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS AMENDING VARIOUS SECTIONS OF THE LAND DEVELOPMENT ORDINANCE OF THE TOWNSHIP OF BERNARDS REGARDING ZONING AND LAND USE MANAGEMENT.

BE IT ORDAINED, that the following amendments and modifications be made to the Land Development Ordinance of the Township of Bernards.

1. Article 202.37.A is hereby added and shall read as follows:

37.A Child Care Center - A private establishment enrolling four or more children up to 5 years of age and where tuition fees or other forms of compensation for the care of the children is charged and which is licensed or approved to operate by the State as a child care center.

2. Article 202.86 is hereby amended and shall read as follows:
(Definitions)

86. Floor Area - The area of all floors computed by using the dimensions of the outside walls of each floor of a building. Only those areas having five feet or more of clear head room with completed floors, ceilings and partitions may be considered in computing the second floor area of a 1-1/2 story house and at least one-half of the included second floor area shall have a minimum ceiling height of 7'6". Cellars (but not basements), porches, balconies, patios, terraces, breezeways, enclosed pedestrian walkways, carports, verandas and garages are excluded, as is enclosed parking for a nonresidential use except that enclosed porches and patios which are heated and used year-round shall be counted in computing the floor area.

3. Article 202.93 is hereby amended and shall read as follows:
(Definitions)

93. Grade - A reference plane representing the average of finished ground level adjoining the building at all exterior walls. When the finished ground level slopes away from the exterior walls, the reference plane shall be established by the lowest points within the area between the building and a point 6 feet from the building.

4. Article 202.98 is hereby amended and shall read as follows:
(Definitions)

98. Height of Structure - The vertical distance from grade to the top of the highest roof beams of a flat roof, or highest gable or slope of a hip roof.

rewording

10. Article 403F.1.a. is hereby amended and shall read as follows:

a. In the R-1 zone, the tract shall be greater than 7 acres but less than 10 acres, excluding the area of the staff.

11. Article 403F.1.b. is hereby amended and shall read as follows: (Flag Lot Development)

b. In the R-2 and R-3 zones, the tract shall be greater than 4 acres but less than 6 acres, excluding the area of the staff. added

12. Article 403G.8. is hereby amended and shall read as follows: (Residential Cluster Development)

8. The number of lots proposed under cluster residential or PRD-3 developments shall not exceed the number of lots which could be developed under the standard non-clustered provisions of this ordinance. The number of lots that would have resulted in an application for a standard development shall be determined by submission of a sketch plat using the provisions of this ordinance applying to non-clustered development.

added

current ordinance allows developer to reach max. allowable density through benefit of cluster design - this amendment erases that benefit

13. Article 404.B. is hereby amended and shall read as follows: (Non-conforming Uses & Structures)

B. Structures. Any structure which meets the use requirements of this Article and is non-conforming because of any of the following: height, FAR, coverage, and/or yard regulations, may be enlarged providing the height, FAR, coverage and/or yard regulations are not further violated by the enlargement and no other provisions of this Article or Article 500 are violated. Any addition to a non-conforming structure shall comply with the current setback requirements. added

14. Article 405.C.2. is hereby amended and shall read as follows:

2. Home offices. The provisions of this Section are intended to apply to the owner-occupied office of a physician, surgeon, dentist, attorney at law, architect, artist, real estate broker, scientist, mathematician, engineer, planner or person of like profession which office is located within the residence of the person who practices such profession.

conditional Uses

15. Article 405.C.6.f. is hereby deleted in its entirety. This provision limits the size of gross leasable floor area in commercial development of the PRD-4 zone

16. Article 405.C.6.j. is hereby deleted in its entirety. limits the amount of gross leasable floor area in any single building in the PRD-4 zone, commercial development

17. Article 405.C.6.k. is hereby deleted in its entirety. a phasing schedule which ties the % of C.O's given to the commercial development to the # of C.O.'s issued for residential units within the tract.

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Attorneys for Plaintiff

THE HILLS DEVELOPMENT COMPANY, Plaintiff v. 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 GEORGE M. RAYMOND

I, George M. Raymond, A.I.C.P., A.I.A., hereby certify as follows:

1. In December of 1984, I was appointed Master in the matter of The Hills Development Company v. Tp. of Bernards. Commencing in January of 1985, I attended a number of meetings involving the representatives of the parties to this litigation at which settlement discussions took place. To the best of my

recollection, I have set forth below a recitation of what transpired at a meeting I attended on June 6, 1985.

2. On June 6, 1985, and at my request, I attended a meeting of the Township Committee of the Township of Bernards. I recall that this meeting was attended by all the members of the Township Committee of the Township of Bernards as well as James E. Davidson, Esq. and Mr. H. Steven Wood, the Township Administrator. I do not recall any other persons being present.

3. My purpose in requesting such a meeting was to help firm up the Township's compliance package. 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.

4. 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 of the meeting the Mayor polled the Township Committee and, if my recollection serves, received approval for the package from all but one member. I left the Township Committee meeting fully convinced that a solution had been officially arrived at which, I hoped, would be satisfactory to the Court.

5. My impression that the compliance package had been favorably,

though informally, voted on by the Township Committee as acceptable seems to have been shared by Mr. Davidson. In his letter dated June 12, 1985 to Judge Serpentelli, Mr. Davidson indicates a collective belief that "we have reached an understanding which is satisfactory to Mr. Raymond and the municipality." Since I have not known Mr. Davidson to use the royal "we" when referring to himself, I assume that the "we" in the preceding quote referred to all parties involved in arriving at a settlement, including the Township.

6. Mr. Davidson's letter of transmittal to me of the same date also contained the enclosed draft of a proposed judgment which, while incomplete in some respects, did detail the compliance package components which accorded with the numbers which I thought had been agreed on June 6, 1985.

7. I wish to emphasize that, at that juncture, I was particularly anxious to bring about basic municipal compliance with Mount Laurel II. I was aware of other issues which I believed to be unresolved (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 and I am unaware as to whether the parties actually agreed to resolve such issues. 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 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:

George M. Raymond