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Defendant Berrards' Supplemental Brief Regarding Motion to Modify Stay

Pgs. 49

FARRELL, CURTIS, CARLIN & DAVIDSON
ATTORNEYS AT LAW
43 MAPLE AVENUE
P.O. BOX 145
MORRISTOWN, N.J. 07960
(201) 267-8130

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

EDWARD J. FARRELL
CLINTON J. CURTIS
JOHN J. CARLIN, JR.
JAMES E. DAVIDSON
DONALD J. MAIZYS
LOUIS P. RAGO
LISA J. POLLAK
HOWARD P. SHAW

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

OF COUNSEL
FRANK J. VALGENTI, JR.

January 2, 1986

The Honorable Eugene D. Serpentelli
Judge of the Superior Court
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:

On behalf of the defendants in the above-entitled matter, I enclose herewith the following for filing:

(1) Original and one copy of Supplemental Brief; and

(2) Two copies of Certification of Peter Messina Regarding Concept Plan, the original of which has been mailed by regular mail to the Superior Court in Trenton.

By copy of this letter I am serving upon counsel copies of the aforementioned documents.

Very truly yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: Howard P. Shaw

HPS/sjm
Encl.
HAND DELIVERED
cc: Henry A. Hill, Jr., Esq.
Arthur H. Garvin, III, Esq.
Superior Court Clerk

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET/OCEAN COUNTIES
DOCKET NO. L-030039-84 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,	:	CIVIL ACTION
Defendants.	:	

SUPPLEMENTAL BRIEF OF DEFENDANTS IN OPPOSITION TO MOTION TO ENJOIN ENACTMENT OF PROPOSED ORDINANCE #746

FARRELL, CURTIS, CARLIN
& DAVIDSON
43 Maple Avenue
P.O. Box 145
Morristown, New Jersey 07960
Attorneys for Defendants

On the Brief:

HOWARD P. SHAW, ESQ.
JAMES E. DAVIDSON, ESQ.

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PRELIMINARY STATEMENT

On the present motion, plaintiff, Hills Development Company ("Hills"), seeks to enjoin the Township Committee of Bernards Township from exercising its rightful legislative power to amend the Bernards Township Land Development Ordinance ("BTLDO").

Specifically, Hills asks that the Township be prohibited from repealing that portion of its ordinance governing review ad approval of conceptual plans which purports to give an applicant the right to develop in accordance with an approved conceptual plan at any time within ten years after approval of the conceptual plan. BTLDO §707(E)(1).* At oral argument, Hills more or less acknowledged that its real motivation is not to preserve the so-called "vesting" provision per se, but rather to use the vesting provision as a means to prevent the Township from possibly amending Ordinance #704, which amended the BTLDO by (among other things) giving Hills a density bonus of 1,750 dwelling units (above and beyond the 1,000 units allowed pursuant to the 1980 Judgment in Hills/Allen-Deane's 1976 Mt.

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* Since the emergent return date of November 22, 1985, the Township has enacted the repealer ordinance, after amending it to comply with an interim Order dated December 12, 1985, which specified that the repealer ordinance must expressly state that it is not applicable to the pending application by Hills for conceptual approval. Presumably the issue now before the court is whether that interim injunction upon the Township's legislative power should be vacated, made permanent, or continued pending discovery and an evidentiary hearing.

Laurel action), and requiring a set-aside of 550 lower income units.

The possible amendment of Ordinance #704 is not, however, before this court, because there is not even a proposed draft of any such amendment before the Township Committee or Planning Board for consideration. What is before the court is a repealer of a provision which would -- when and if Hills' conceptual application is approved -- purport to give Hills certain vested rights based upon such conceptual approval. At issue is whether Hills presently has any vested rights which would preclude the Township from applying that repealer with respect to Hills' property and Hills' conceptual application.

The Township's position, as stated repeatedly in previous submissions and oral argument, is that Hills has no vested rights, Hills cannot get any vested rights by virtue of a conceptual approval, and the Township does not have and never did have any authority to enact an ordinance provision which purports to confer any vested rights based upon a conceptual approval. Consequently, the now-repealed §707(E)(1) never had any force or effect and its repeal is more of a "housekeeping" matter than a substantive change in the law; but if the Court decides to the contrary, the absence of any vested rights in Hills leaves the Township Committee free to have the now-enacted repealer ordinance, Ordinance #746, apply to Hills just as it does to every other landowner and developer in Bernards Township.

Defendants rely upon their previous letter memorandum, dated November 21, 1985, as well as upon the arguments in this Brief.

POINT I

HILLS' CIRCUMSTANCES DO NOT SATISFY ANY OF THE CRITERIA FOR A CLAIM OF VESTED RIGHTS.

In Timber Properties, Inc. v. Township of Chester, Docket No. L-39452-83 P.W. (Decided March 2, 1984) (slip opinion, LEXIS copy attached; approved for publication September 11, 1985), Judge Skillman had before him, in a Mount Laurel case, issues almost precisely in point with those now before the court.

In that case the plaintiff developer had actually received approval of a conceptual plan for a proposed development including low and moderate income housing, Id. at LEXIS pages 2, 12. By contrast, the present plaintiff has not proceeded even that far, having merely submitted an application for conceptual approval.

In Timber Properties, the defendant Township, having granted conceptual approval and "for nearly a year and a half" having "strongly encouraged the proposed development," Id., at LEXIS page 3,* amended its zoning ordinance shortly after the decision in Mt. Laurel II, in a manner which compelled denial of Timber's site plan application. Id. The present plaintiff alleges, in effect, that it has been encouraged to file a conceptual approval application based upon Ordinance #704, and

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* The facts recited here are as alleged in the Complaint of Timber Properties, because the case was decided on a motion for dismissal and/or summary judgment.

that Bernards Township is allegedly seeking to amend Section 707 of its Land Development Ordinance so as to allegedly enable it to then amend Ordinance #704 in a way which would compel denial of a site plan application corresponding to Hills' present conceptual application.

Timber alleged in its Complaint that the ordinance amendment deprived Timber of "vested rights" in its proposed development. Id. The present plaintiff's motion papers appear to allege that the amendment of §707 would deprive Hills' of vested rights in its proposed development. (One can only wonder how Hills can claim to have any vested rights when it has not yet received any approvals, even of a conceptual plan.*)

In a detailed, analytical opinion, Judge Skillman held that Timber did not, and could not, obtain any "vested rights" by virtue of either a conceptual approval or the encouragement of municipal officials, or from a combination of the two. The court noted that vested rights for a developer come from preliminary approval pursuant to N.J.S.A. 40:55D-49(a), or from the doctrine of equitable estoppel. Id. at LEXIS page 5. The court determined, however, that:

> "There are only two circumstances in which the courts of this State have concluded that a

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* As noted in previous papers in this Court and elsewhere, Hills has received approximately 64 preliminary and/or final approvals for large-lot, single-family homes in a part of its property not affected by any Mt. Laurel set-aside.

> municipality may be barred under principles of equitable estoppel from applying an amended zoning ordinance to a landowner. One circumstance is where a building permit or similar municipal authorization has been issued and there has been substantial reliance upon that authorization. See, e.g., Gruber v. Raritan Tp., 39 N.J. 1 (1962); Tremarco Corp. v. Garzio, supra [32 N.J. 448 (1960)]. The second is where a trial court has entered judgment ordering municipal approval for a particular land use and there are special equities which militate against application of a subsequently adopted ordinance to bar that use. See, e.g., Kruvant v. Cedar Grove, supra; Urban Farms, Inc. v. Franklin Lakes, 179 N.J. Super. 203, 217-223 (App. Div. 1981), certif. den., 87 N.J. 428 (1981)." Id. at LEXIS page 6.

In Timber Properties no building permit or similar municipal authorization had issued, and no judgment had been entered ordering the land use which Timber wanted to develop. In the present case no building permit or similar authorization has issued, and no judgment has been entered ordering the particular land use that Hills wishes to develop, as represented by Hills' conceptual plan.* More pertinent to the present motion, however -- because the ordinance presently before the court amends only the conceptual approval ordinance, §707(E), and does not amend the zoning of plaintiff's land under Ordinance #704 -- no judgment has been entered which orders the Township to give ten years' (or any) vested protection to a conceptual plan.

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* There has been no allegation by Hills that Bernards intends to re-zone in a manner which would violate the 1980 Judgment in Allen-Deane Corp. v. Bernards Township, which ordered a rezoning of plaintiff's lands.

Even in cases where a building permit has issued or a judgment has been entered, Judge Skillman found, "the New Jersey courts have barred municipalities from invoking newly adopted zoning ordinances to prevent proposed uses of property only in very compelling circumstances," Id., LEXIS page 6. Where "extraordinary" circumstances have not been demonstrated,

> "the New Jersey courts have reaffirmed the continuing authority of a municipality to subject all property within its jurisdiction to a zoning amendment even though individual property owners may have incurred substantial expenses in reliance upon the prior zoning ordinance." Id. at LEXIS page 7.

"In any event," Judge Skillman wrote,

> "there is no decision which states that vested rights can be acquired without either official municipal action or the [pre-amendment] judgment of a court." Id. at LEXIS page 8.

Except for the name of the plaintiff and defendant, the words of Judge Skillman's conclusion very nearly describe, and apply to, the present circumstances of Hills:

> "Timber's 'vested rights' claim does not rest upon the judgment of a court or official municipal action. Rather, it is based solely on the alleged fact that prior zoning ordinance permitted their proposed project and that the planning board and various municipal officials encouraged Timber to undertake the preliminary steps required for approval of the project. However, no matter how vigorous the encouragement or how extensive Timber's activities in pursuing the project in reliance upon that encouragement, the above discussion demonstrates that defendant municipality remained free to change its view of the zoning appropriate to the district where Timber's property is located.
>
> One final reason for rejecting Timber's 'vested rights' claim should be mentioned. The Municipal Land

> Use Law, enacted in 1975, N.J.S.A. 40:55D-1 et seq., deals in a more comprehensive fashion than its predecessor, the Municipal Planning Act, N.J.S.A. 40:55-1.1 et seq., with the circumstances under which a developer may acquire 'vested rights[']' as a result of a particular type of municipal approval. The new statute deals more specifically with the effect of preliminary site plan or subdivision approval, compare N.J.S.A. 40:55D-49 with N.J.S.A. 40:55-1.18, and it sets forth for the first time the effects of site plan and final subdivision approval, N.J.S.A. 40:55D-47, N.J.S.A. 40:55D-52. Also, by a 1979 amendment, L. 1979, c. 216, N.J.S.A. 40:55D-10.1, it authorizes conceptual approval of a development plan, but specifies that the planning board 'shall not be bound' by any such approval. This more comprehensive treatment in the Municipal Land Use Law of the consequences of various forms of municipal approval reduces the scope of judicial discretion to articulate these consequences in the face of legislative silence. See YM-YWHA of Bergen Cty. v. Washington Tp., [192] N.J. Super. [340], [348-349?] (App. Div. 1983 (slip opinion at 13-14).
>
> Within the framework of the Municipal Land Use Law, the official response of Chester to Timber's application did not go beyond conceptual approval, which the Legislature has expressly said shall not be binding. Since Timber's application never reached the state of preliminary site plan or subdivision approval, the prerequisite for a conclusion that Timber acquired a 'vested right' in its project is absent and summary judgment in favor of defendants will be granted on this claim." Id. at LEXIS pages 10-12 (footnote omitted) (emphasis added)

As previously noted, the "offical response" of Bernards Township to Hills' application has not even reached the point of conceptual approval.

Hills does not come within those provisions of the Municipal Land Use Law ("MLUL") which grant vested rights for preliminary and final approvals. Hills does not come within

either of the categories for common law vesting of development rights. Particularly in light of the "reduce[d] scope of judicial discretion" under the MLUL, it is submitted that plaintiff's motion for an injunction should be denied as a matter of law, with prejudice, and the interim restraints in the Order of December 12 should be vacated.

POINT II

EVEN UNDER PRESENT LAW, REPEALED SECTION 707 (E)(1) IS ULTRA VIRES.

Hilton Acres v. Klein, 35 N.J. 570, 578 (1961), held that a municipality lacked statutory authority to grant to a developer vested rights beyond the vested rights expressly conferred by the Municipal Planning Act, N.J.S.A. 40:55-1.18. Such a purported extension beyond the statutory protection period was, therefore, ultra vires. Debold v. Township of Monroe, 110 N.J. Super. 287, 290 (Ch. Div. 1970), aff'd o.b., 114 N.J. Super. 502 (App. Div. 1971), certif. denied, 59 N.J. 296 (1971).

At oral argument on November 22, 1985, the court observed that sections of the 1975 Municipal Land Use Law, particularly N.J.S.A. 40:55D-10.1, 40:55D-39(d), and 40:55D-49, appeared designed to instill greater flexibility into zoning administration. The court asked counsel to address, in supplemental briefs, the question of whether such flexibility carried with it sufficient authority to render repealed BTLDO §707(E)(1) -- which purported to grant ten years' protection based upon conceptual approval -- a valid enactment, and not ultra vires.

Defendants submit that the answer is no -- such authority is not conferred by the MLUL, and §707(E)(1) was an ultra vires enactment. (Bernards Township has the right and power to amend its Land Development Ordinance by repealing §707 [E][1] whether

or not it is ultra vires. Morris v. Postma, 41 N.J. 354, 362 [1964]. The fact that it is ultra vires is yet another reason why Hills is legally barred from successfully making an estoppel argument. Gruber v. Mayor, etc., Raritan Tp., 39 N.J. 1, 15 [1962]; Debold v. Township of Monroe, supra, at 295.)

In the Timber Properties case, supra, Judge Skillman held that the MLUL deals in a more comprehensive manner than past statutes "with the circumstances under which a developer may acquire 'vested rights[']' as a result of a particular type of municipal approval." Id., at LEXIS page 11. As part of that comprehensive arrangement, he held, "the Legislature has expressly said" that conceptual approval "shall not be binding." Id. at LEXIS page 12. Repealed §707(E)(1) contravened that express legislative directive, and therefore was utterly beyond the Township's jurisdiction to enact zoning and land use ordinances. See Dresner v. Carrara, 69 N.J. 237, 241 (1976).

Analysis of the development of the MLUL as currently amended further demonstrates the absence of authority to enact repealed §707(E)(1).

Even prior to the 1975 enactment of the MLUL, the Legislature had, in 1967, enacted a statute which allowed for the granting, in some cases, of protection for longer than the three years then conferred upon "tentative" approvals by N.J.S.A. 40:55-1.18, now repealed. In L. 1967, c.61, §1 et

seq., the "Municipal Planned Unit Development Act (1967)", N.J.S.A. 40:55-54 et seq. (now repealed) (the "PUD Act"), the Legislature specified that if a development plan for a planned unit development is granted "tentative" (the equivalent of the present "preliminary") approval, the "municipal authority" which grants the approval

> "shall set forth in the written resolution the time within which an application for final approval of the plan shall be filed or, in the case of a plan which provides for development over a period of years, the periods of time within which applications for final approval of each part thereof shall be filed." N.J.S.A. 40:55-61(c) (now repealed).

Moreover, under that Act, a plan which has received tentative approval

> "shall not be modified, revoked or otherwise imparied by action of the municipality pending an application or applications for final approval, without the consent of the landowner, provided an application for final approval is filed or, in the case of development over a period of years, provided applications are filed, within the periods of time specified in the resolution granting tentative approval." N.J.S.A. 40:55-62, now repealed.

Powers under the PUD Act could be exercised by any municipality which enacted an appropriate ordinance. Such ordinance was required, among other things, to "[d]esignate the municipal authority which shall exercise the powers of the municipal authority, as herein defined." N.J.S.A. 40:55-56 (c), now repealed. Under that 1967 Act, the municipality could designate either the governing body or the planning board, N.J.S.A. 40:55-65(c), now repealed, as the municipal authority

with power to, among other things, confer vested rights of longer duration than three years.

By contrast, when the PUD Act (along with the Municipal Planning Act, N.J.S.A. 40:55-1.1 et seq.) was repealed by L. 1975, c.291, §80, the successor Municipal Land Use Law, L. 1975, C.291, §1, et seq. (N.J.S.A. 40:55D-1, et seq.), gave to the planning board and the board of adjustment the power to review and approve or deny applications for development. N.J.S.A. 40:55D-25; N.J.S.A. 40:55D-76(b). It gave solely to those bodies the power to grant, in their discretion, vested rights for a period of longer than three years. N.J.S.A. 40:55D-49(d), N.J.S.A. 40:55D-76(b). It also expressly provided that such powers, having been expressly conferred upon those two bodies, "shall not be exercised by any other body, except as otherwise provided in this Act." N.J.S.A. 40:55D-20.

Thus, the governing body was removed from the review and approval process (although to a limited extent it remains in the appeal process, N.J.S.A. 40:55D-17), and so the governing body may no longer exercise discretion either to confer vested rights for longer than three years, or to confer any vested rights at all.

Neither may the governing body automatically confer vested rights for ten years upon an entire class of applications, because there is no statutory grant of authority permitting it to do so. "A municipality has no inherent power to adopt zoning

or other land use ordinances; it may act only by virtue of a statutory grant of authority from the Legislature." Dresner v. Carrara, supra, at 241.

Any suggestion that repealed §707(E)(1) of the BTLDO was an attempt to take advantage of the flexibility created by N.J.S.A. 40:55D-49(d) ignores the plain fact that §49(d) confers that flexibility solely upon the planning board and, through §76(b), upon the board of adjustment. See also N.J.S.A. 40:55D-20 (express powers of planning board or board of adjustment may not be exercised by any other body). The governing body was utterly lacking in statutory authority to enact a provision which purports to give a blanket 10-year vesting of rights to a developer.

In fact, the MLUL does not give the governing body the power to provide for any vesting of rights in a developer. Vesting occurs directly by virtue of the statute, upon a grant of preliminary approval, N.J.S.A. 40:55D-49, or final approval, N.J.S.A. 40:55D-52. Those are the only types of "approvals" contemplated or authorized for development applications, and therefore the only tpes of approvals which carry with them any vested rights.*

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* In fact, since a conceptual application is optional, BTLDO §707 A., and not "required by ordinance," it is not even an "application for development." N.J.S.A. 40:55D-3, "Application for development."

Because of those two statutory sections, there is no need for an ordinance to separately provide for such vesting. There is no requirement that an ordinance contain any vesting provision, N.J.S.A. 40:55D-38, and no statutory clause specifying that any vesting provision may be a discretionary part of an ordinance, see N.J.S.A. 40:55D-39, N.J.S.A. 40:55D-40, N.J.S.A. 40:55D-41.

Even the authority of the planning board to extend the three-year statutory vesting period for preliminary approval is a power granted directly by statute, N.J.S.A. 40:55D-49(d), without need for an ordinance provision.

Moreover, the grant of discretionary power to the planning board to confer extended vesting, N.J.S.A. 40:55-49(d), supports the position that the governing body lacks any power to confer such vesting, despite the provisions of N.J.S.A. 40:55D-39(d). The planning board's discretionary power would frequently, perhaps most frequently, be exercised in regard to planned developments. Yet (i) construing section 39(d) to allow blanket extensions of vesting for planned developments would directly conflict with the expressly granted discretion of the planning board, and (ii) although section 49(d) refers to the three years which the MLUL establishes as the vesting period, it does not contain any suggestion that a municipal ordinance may create a different "standard" vesting period.

While land use statutes subsequent to Hilton Acres have added increased flexibility to the process of zoning administration, they have not conferred power upon a municipal governing body to grant vested rights for longer than the statutory three years, or to grant any vested rights for a conceptual approval.

POINT III

THE TOWNSHIP HAS A RIGHT TO AMEND ITS ORDINANCE IN A MANNER WHICH AFFECTS PENDING APPLICATIONS.

Our courts have held, expressly, that it is permissble for a municipality to amend its land use ordinances in regard to the application process itself, while an application is pending, and to have the amendment apply to the pending application. In Burcam Corp. v. Planning Bd. Tp. of Medford, 168 N.J. Super. 508 (App. Div. 1979), plaintiff-developer had filed an application for site plan approval. Two weeks later, while that application was pending, the municipality enacted an interim site plan review ordinance. Another two months later, while the application still was pending but after a public hearing had been held on the application, the municipality first filed its site plan ordinance with the county planning board, as required by N.J.S.A. 40:55D-16 in order to have the ordinance take effect. Id. at 511.

Plaintiff argued that it was entitled to approval of its application because the site plan ordinance was not in effect when it initially filed its application. The Appellate Division agreed that the ordinance did not take effect until it was filed with the county planning board. Id. at 511-512. "Nevertheless," the court continued:

> "plaintiff[']s argument that it is entitled to approval of its application because no ordinance was

> in effect on the date of the initial filing of the application is without merit. In the area of land use, a municipality may change its regulating ordinances after an application has been filed and even after a building permit has been issued and, as long as the applicant has not substantially relied upon the issuance of the building permit, it is subject to the amended ordinance. This is even so where the municipality amends its ordinance in direct response to the application." Id. at 512.

Of course, no building permit has yet been issued to the present plaintiff, Hills, with respect to its conceptual plan.

In the present case, as in Burcam, the municipality is amending its land use regulations in a manner which directly involves the application process itself and the effects of that process. In Burcam, the municipality created review and approval requirements which did not exist at the time the site plan application was initially filed. In the present case, Ordinance #746 at most has similar effect, because the repealed §707(E)(1) by its terms would have indicated that a developer receiving a conceptual approval could thereby have avoided at least certain aspects of review and approval in the preliminary application process, whereas the repealing ordinance expressly states that conceptual approval has no binding effect.*

Bernards Township has the same right as the municipality in Burcam to amend its zoning approval ordinance and have the

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* Defendants reiterate that Ordinance #746 in fact makes no change at all in the application process, because the provision it repeals has no legal validity or effect.

amendment apply to pending applications, including the pending conceptual application of plaintiff, Hills.

POINT IV

PLAINTIFF WILL SUFFER NO LEGALLY COGNIZABLE HARM IF ORDINANCE #746 TAKES FULL EFFECT.

The Court has asked the parties to brief the issue of what harm would be suffered by Hills if it were affected by the repeal of former BTLDO §707(E)(1), effectuated by Ordinance #746.

Defendants submit that Hills will suffer no legally cognizable harm at all. For the reasons stated in the preceding points, Hills has no vested rights at present, and would acquire no vested rights from a conceptual approval, whether or not former §707(E)(1) is repealed. As an ultra vires enactment, former §707(E)(1) was a nullity, which cannot confer any rights. Debold v. Township of Monroe, supra.

Moreover, under factual circumstances closely analogous to those alleged here, and in a Mt. Laurel case, Judge Skillman held, in Timber Properties, supra, that:

> "[A] property owner interested in a large construction project must ordinarily take his chances on numerous types of incidental preliminary expenses generally incurred even before a permit is issued. Clearly as to these, the situation of the owner may be damnum absque injuria in relation to a bona fide subsequently adopted restrictive regulation. Any other rule would severely burden municipal authorities properly concerned with legitimate zoning protection for the public at large as against the operations of land developers who naturally may be more concerned with immediate profits than with the general public welfare subserved by salutary zoning." Id. at LEXIS pages 4-5 (quoting from Sautto v. Edenboro Apartments, Inc., 69

N.J. Super. 420, 434 (App. Div. 1961)*.

Hills is not entitled to special privileges. It is subject to the same risks as any other developer, including the risk that zoning regulations might be amended.

This returns us, again, to the point that the present motion addresses an amendment of the conceptual approval ordinance, and not any change in the zoning of Hills' property. The present amendment, by itself, does no harm to Hills, even if repealed §707(E)(1) were assumed to be a valid enactment. While it is possible that such zoning might be changed in the future, there is no way to know at present whether it actually will be changed, or if so in what way or to what extent it might change. At this point, projected harm to Hills is speculative.

As noted in our letter memorandum of November 21, 1985, to the extent that plaintiff claims that it is harmed because of

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* It should be noted that the public interest, as declared by the Supreme Court, is not in providing for production of a maximum amount of lower income housing, or in producing an amount which a developer-plaintiff claims it wants to produce, but rather is in having each municipality provide a realistic opportunity for production of its fair shar of lower income housing -- nothing more is requried. So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 259-260 (1983) ("Mt. Laurel II"). The Court expressly noted that determination of regional need is a matter for expert testimony, and that there may be various "formulas" for determining "fair share." Id. at 256. If Bernards does eventually rezone in accordance with an acceptable fair share formula -- i.e. under the Fair Housing Act -- which may differ from the "Consensus" formula applied by this court in other cases, there is nothing contrary to the public interst in that, even if such formula yields a lower "fair share" than the consensus method.

expenses purportedly in reliance upon Mt. Laurel II and Ordinance 704, (a) such alleged reliance has no legal significance, and (b) if it does have legal significance, it invokes factual matter which is solely within plaintiff's control and therefore would have to be the subject of discovery and an evidentiary hearing. As noted in the next point, however, even if that contingency occurs the interim order of the court should be vacated.

POINT V

CONTINUING THE PRESENT INJUNCTION MIGHT NOT PRESERVE THE STATUS QUO, AND COULD ITSELF BRING ABOUT A CHANGE IN THE STATUS QUO.

At oral argument on November 22, the court acknowledged that it is improper for a court to enjoin enactment of an ordinance. "[T]he law is well settled that the town could adopt whatever ordinance it wants to adopt and then you litigate that." Transcript, 45-4 to 6.* However, based upon the Supreme Court's Order staying proceedings in this litigation, Transcript, 44-18 through 45-6, and to preserve the status quo, Transcript, 29-5 through 31-6, the court did enjoin the Township's legislative power on an interim basis, to the extent of prohibiting amendment of §707(E)(1) as regards the pending conceptual application by Hills.

Assume hypothetically that Hills is correct in arguing that §707(E)(1) is a valid enactment. In that case, continuation of the present restraints might affirmatively change the status quo, rather than preserve it. This is because BTLDO §707(D)(1) provides that failure by the Planning Board to act upon a conceptual application within 95 days after it is certified as complete shall constitute approval. So long as the December 12 Order remains in effect, repealed §707(E)(1) is not repealed as

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* Copies of all cited Transcript pages are attached.

regards Hills' present application, and approval of that application would purportedly vest Hills with development rights in accordance with the conceptual plan. Assuming that the conceptual plan is found to be worthy of approval (and that is not necessarily the case), then whether the planning board votes approval or allows the 95-day period to expire without voting, Hills -- which currently does not have any vested rights to develop in accordance with its conceptual plan -- would purportedly acquire such vested rights, because of the interim Order designed to preserve the status quo.

Furthermore, while Hills seeks injunctive relief from this court by portraying itself as an innocent victim, Hills' conceptual plan itself shows that Hills is manipulating the circumstances in order to wring maximum pecuniary advantage out of the law. First, despite the alleged lengthy detrimental reliance by Hills, its conceptual application was not even filed until mid-October, 1985, after the Township had filed its motion to transfer to the Affordable Housing Council, and eleven months after Ordinance 704 took effect. Having received a motion for transfer to the Council, Hills seems to be scrambling to try to preserve the large density bonus resulting from Ordinance 704, before the Ordinance can be amended (if at all) in accordance with the Fair Housing Act and the Council's regulations. This is a "race of diligence", Tremarco Corp. v. Garzio, 32 N.J. 448,

455 (1960), which the developer loses, Socony-Vacuum Oil Co. v. Mt. Holly Twp., 135 N.J. Law 112 (Sup. Ct. 1947).

Second, on sheet 3a of Hills' conceptual plan (copy of pertinent portion attached), Hills states:

> "This plan is for illustrative purposes only. Number of units illustrated within each development parcel may vary according to the designated density range of the parcel as indicated on the Land Use Plan and the adjacent chart. The site plans and submissions for each section may change when submitted for preliminary and final approval."

This demonstrates that Hills knows that it must apply for and obtain preliminary and final approval, even after getting conceptual approval; that while Hills wants to take the benefit of the purported "vesting" under repealed §707(E)(1), it does not want to be bound by the conceptual review process; and that Hills' conceptual application is intended solely to try to lock in the right to build 2,750 units based upon a purported conceptual site plan which Hills knows, in advance, does not reflect what the development will truly look like when it is actually developed.

Hills should not be permitted to invoke this court's injunctive power any further, for the protection of this insincere conceptual application. The interim order should be vacated.

CONCLUSION

Hills does not have, and cannot obtain, any vested rights under the alleged present factual circumstances of this case. That conclusion is supported by a recent holding of a Mt. Laurel II court, and by analysis of the zoning enabling statute and its historical background.

In addition, Hills will suffer no cognizable harm from a vacating of the court's interim Order, whereas a continuation of that Order could potentially cause harm to the defendants by resulting in unintended protection for an insincere conceptual plan.

For the foregoing reasons, it is respectfully submitted, on behalf of all defendants, that plaintiff's motion should be denied with prejudice, and the interim Order of December 12, 1985, should be vacated.

Respectfully submitted,

FARRELL, CURTIS, CARLIN & DAVIDSON
Attorneys for Defendants/Appellants,
Township of Bernards, Township
Committee of the Township of
Bernards and the Sewerage Authority
of the Township of Bernards

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

Dated: January 2, 1986

is thinking, and that is certainly an advantage to the applicant instead of coming in cold and having his application rejected on a preliminary level.

THE COURT: It does kind of stick in my claw that the principal argument before the Appellate Division is that the Township wants to maintain status quo. Regardless of what you call it, this isn't maintaining status quo. Maybe you perceive it as being a minor change in the status quo, but it's a change.

MR. SHAW: Well, Your Honor, I think Your Honor is construing the status quo far more broadly as was addressed in the Appellate Division application.

THE COURT: Because we don't know how the Appellate Division understood it, either.

MR. SHAW: We don't. But the issue before the Appellate Division was whether the Township should go through a compliance hearing, and the issues we raised and the concerns we raised were that a ruling could come out of the compliance hearing before Your Honor that would bind Bernards Township with

respect to such matters as a fair share number, and as the method of complying with the Mount Laurel ordinance there could be binding on the Township and allow development contrary to what we contend is authorized by the Fair Housing Act. Those issues have nothing to do with the vesting provision, so-called vesting provision, of a conceptual approval. As far as I know, that issue was not before the Appellate Division and the status quo that was referred to did not refer to that. I think it's --

THE COURT: Well, the Appellate Division won't know that. As I read your papers before the Appellate Division, and I haven't seen the papers before the Supreme Court, I would assume there's a similar argument made to the Supreme Court that you want to maintain the status quo.

Is that correct or incorrect?

MR. SHAW: Oh, yes.

THE COURT: And I think a judge reading that would say, look, the town is representing they're not going to do anything to hurt these people and they're going to continue to process.

Now, you say, well, we're not hurting them. That question's up for grabs, but it would sure appear to me that the Court would assume you weren't going to change anything until come January, or whenever, or presumably pretty soon the Supreme Court acts.

MR. SHAW: Let me pose a hypothetical.

Let's suppose that the ordinance stays in place as it is and on its face provides for 10 years vesting. And to presumably preserve the status quo, we're enjoined from taking out what we contended was to be the ultra vires provision. And Hills presumably proceeds with its conceptual application, and at some point presumably gets conceptual approval.

What happens at that point when they now have conceptual approval under an ordinance which purports to confer vested rights which we believe is ultra vires? I don't think that that result is a fair result to the Township, while at the same time the result that Hills is asking for is to stop us from amending that.

THE COURT: Why don't we permit you to

amended and why 10.1 came in even after that.

Let me ask you. Would you have any objection that this ordinance be adopted with a proviso that it be inapplicable as to Hills development pending further order of the Court? I mean, they got other people they're concerned about, I guess.

MR. HILL: Your Honor, no. If I can understand what the standard of proof is, that we have the right to rely on it further --

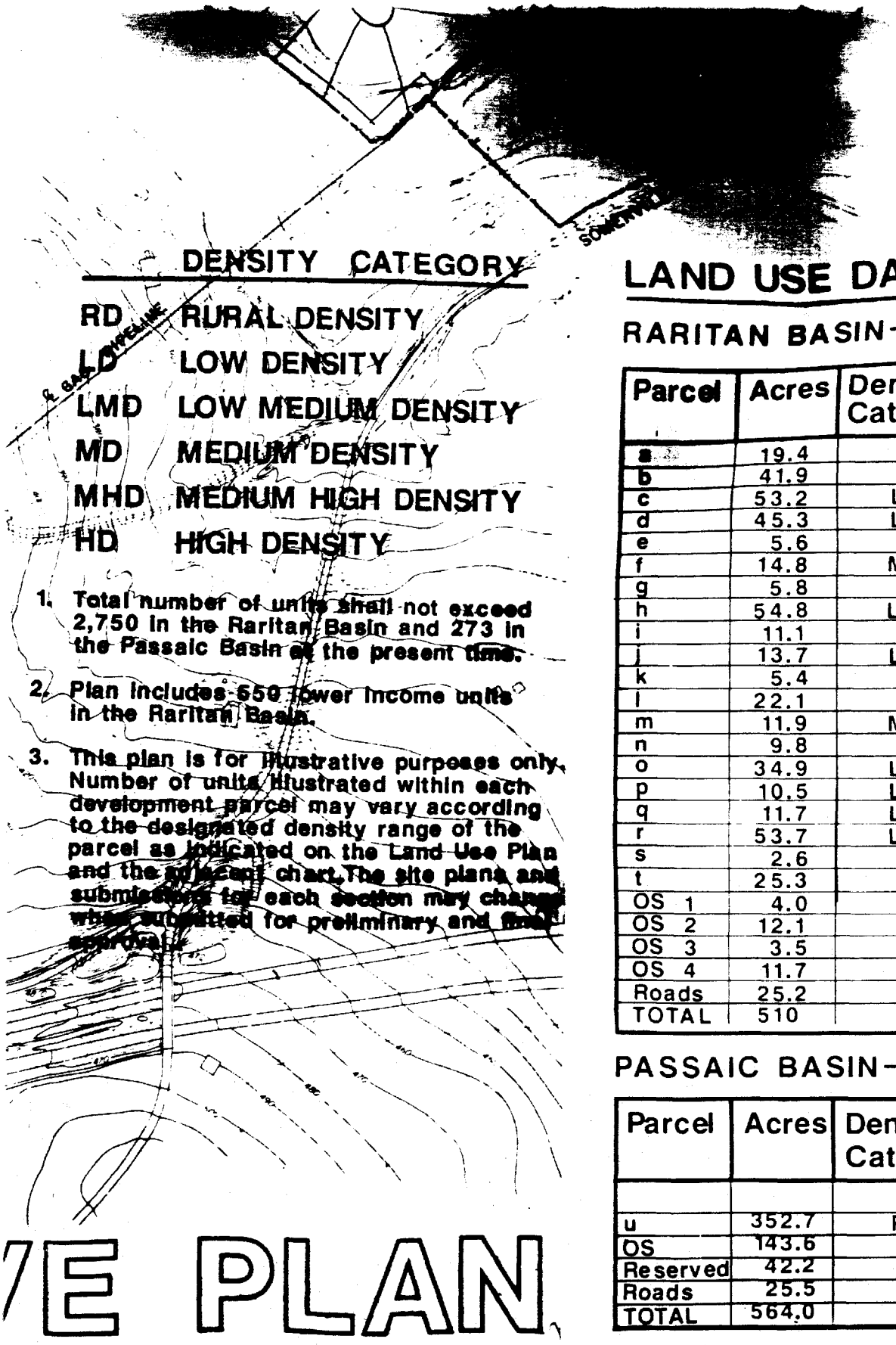
THE COURT: No, I'm not ruling on that yet, but I'm saying I can see at this moment that I'm going to need additional briefing, and at the same time the Township may have a legitimate interest in not getting anybody else relying on this, and to that extent they should have a right to adopt the ordinance.

The only thing that would preclude them from adopting the ordinance at this time is the Supreme Court order. This Supreme Court order says, in effect, if I understand it properly, that if changed circumstances are proven or, if there's an effort to frustrate Mount Laurel development, at this point I can't tell either of those with any

certainty, then this Court first, and then the Supreme Court on review, shall have the right to modify the stay. But for that provision the law is well settled that the town could adopt whatever ordinance it wants to adopt and then you litigate that.

And what I'm suggesting is that, as long as you were protected by a proviso that the ordinance will contain language, that it shall not be applicable to the Fills' pending application until such time as the pending motion before this Court, you wouldn't have any objection?

MR. HILL: I wouldn't have any objection, Your Honor. And on a red herring issue as to whether 10 years, this is their ordinance and not ours, should be automatic, we have no objection to their amendment to provide it three years or such further time as may be appropriate, given the magnitude of the development, which is just using the language of the Municipal Land Use Law. We're not set on getting 10 years. We just want to -- we're set on their focusing and deciding rather than playing games with us in the conceptual



DENSITY CATEGORY

RD	RURAL DENSITY
LD	LOW DENSITY
LMD	LOW MEDIUM DENSITY
MD	MEDIUM DENSITY
MHD	MEDIUM HIGH DENSITY
HD	HIGH DENSITY

1. Total number of units shall not exceed 2,750 in the Raritan Basin and 273 in the Passaic Basin at the present time.
2. Plan includes 550 lower income units in the Raritan Basin.
3. This plan is for illustrative purposes only. Number of units illustrated within each development parcel may vary according to the designated density range of the parcel as indicated on the Land Use Plan and the adjacent chart. The site plans and submissions for each section may change when submitted for preliminary and final approval.

7E PLAN

LAND USE DATA

RARITAN BASIN-R-8/PRD-4

Parcel	Acres	Density Category	Density Range
a	19.4	LD	2-5
b	41.9	LD	2-5
c	53.2	LMD	4-10
d	45.3	LMD	4-10
e	5.6	-	-
f	14.8	MHD	15-26
g	5.8	-	-
h	54.8	LMD	4-10
i	11.1	HD	20-30
j	13.7	LMD	4-10
k	5.4	-	-
l	22.1	MD	8-15
m	11.9	MHD	15-26
n	9.8	HD	20-30
o	34.9	LMD	4-10
p	10.5	LMD	4-10
q	11.7	LMD	4-10
r	53.7	LMD	4-10
s	2.6	-	-
t	25.3	-	-
OS 1	4.0	-	-
OS 2	12.1	-	-
OS 3	3.5	-	-
OS 4	11.7	-	-
Roads	25.2		
TOTAL	510		

PASSAIC BASIN-R-3/PRD-3

Parcel	Acres	Density Category	Density Range
u	352.7	RD	1
OS	143.6	-	-
Reserved	42.2	-	-
Roads	25.5	-	-
TOTAL	564.0	-	-

TOTAL SITE ACREAGE IN BERNARDS TOWNSHIP

(1)

LEVEL 1 - 7 OF 22 CASES

TIMBER PROPERTIES, INC., LANDMARK FARMS, INC., JOHN R. HARDIN, JR. and STEPHANIE P. HARDIN, Plaintiffs, vs. TOWNSHIP OF CHESTER, THE MAYOR AND COUNCIL OF THE TOWNSHIP OF CHESTER, THE PLANNING BOARD OF THE TOWNSHIP OF CHESTER, MAYOR FRANK ADESSA, FRANK J. GOMEZ, EDWARD R. RUSSO, YALE H. FERGUSON and JAMES D. SMITH, ROBERT COLE, EARL BRIDGETT, PEYTON ROCHELLE, FRANK GOMEZ, FRANK D'ALONZO, LEONARD TAYLOR and KENNETH CARO, Defendants

L-39452-83 P.W.

Superior Court of New Jersey, Law Division

Slip Opinion

March 2, 1984; Approved for Publication September 11, 1985

Herbert A. Vogel and Thomas F. Collins, Jr., for plaintiffs (Vogel & Chait, attorneys).

Alfred L. Ferguson for defendant Township of Chester and individual defendants Adessa, et al. (McCarter & English, attorneys; Gary T. Hall on the

(2)

brief).

James R. Hillas, Jr. for defendant Township of Chester Planning Board.

SKILLMAN

SKILLMAN, J.S.C.

This is a Mount Laurel case. See Southern Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158 (1983) ("Mount Laurel II"). It follows the usual pattern. The principal plaintiff is Timber Properties, Inc. (referred to hereafter as "Timber"), a builder which proposes to construct a development that will include some housing for low and moderate income persons. Defendants are the municipality in which the proposed development would be constructed, Chester Township, as well as its governing body, its planning board and the members of those municipal agencies. The complaint contends that the municipal zoning ordinance is unconstitutional because it fails to provide a realistic opportunity for the construction of low and moderate income housing.

In addition to the usual factual allegations on which Mount Laurel claims are based, the complaint alleges that Timber filed applications for conceptual review and for preliminary site plan approval with the Planning Board and that

its plans complied with the existing zoning ordinance. The complaint further alleges that for nearly a year and a half the Planning Board as well as other municipal officials strongly encouraged the proposed development. However, the proposed project was aborted, shortly after the decision in Mount Laurel II, when the governing body adopted amendments to the Chester zoning ordinance which compelled the denial of Timber's site plan application. This amendment to the zoning ordinance and the circumstances of its adoption provide the basis for a variety of non-Mount Laurel claims which are set forth in separate counts of the complaint. Plaintiffs contend that defendants' actions deprived Timber of "vested rights" in their proposed development, violated Timber's federal civil rights for which a claim lies under the federal Civil Rights Act, 42 U.S.C. §1983, interfered with contractual relationships for which a claim may be pursued under the New Jersey Tort Claims Act N.J.S.A. 59:1-1 et seq., and violated the New Jersey Antitrust Act, N.J.S.A. 56:9-1 et seq.

Defendants filed a motion which sought in part dismissal and/or summary judgment on these non-Mount Laurel counts. n1 It is concluded for the reasons set forth in this opinion that these parts of the motion should be granted in their entirety.

n1 The motion also sought dismissal of various other counts on the grounds they had not been filed in a timely manner. These parts of the motion have

been ruled upon previously by oral opinions.

I - Vested Rights

A municipality possesses continuing authority to amend its zoning ordinance and ordinarily a zoning change applies to property for which there is a pending application for approval of a particular use. Donadio v. Cunningham, 58 N.J. 309, 322-323 (1971); Morris v. Postma, 41 N.J. 354, 362 (1964); Tremarco Corp. v. Garzio, 32 N.J. 448 (1960). The reason for this rule is that any zoning amendment presumably serves "to preserve the desirable characteristics of the community through zoning" Tremarco v. Garzio, supra at 456, and the exemption of a property owner from a zoning amendment simply because an application had been filed under a prior ordinance would undermine the objectives sought to be achieved by the new ordinance. Kruvant v. Cedar Grove, 82 N.J. 435 (1980); Donadio v. Cunningham, supra. As the court observed in Sautto v. Edenboro Apartments, Inc., 69 N.J. Super. 420 (App. Div. 1961):

> [A] property owner interested in a large construction project must ordinarily take his chances on numerous types of incidential preliminary expenses generally incurred even before a permit is issued. Clearly as to these, the situation of the owner may be damnum absque injuria in relation to a bona fide subsequently adopted

> restrictive regulation. Any other rule would severely burden municipal authorities properly concerned with legitimate zoning protection for the public at large as against the operations of land developers who naturally may be more concerned with immediate profits than with the general public welfare subserved by salutary zoning. [Id. at 434.]

However, there are circumstances under which a landowner may acquire "vested rights" under an existing zoning ordinance and hence be exempt from the effect of a zoning change. One source of "vested rights" is a section of the Municipal Land Use Law which provides that the general terms and conditions on which a preliminary subdivision or site plan approval has been granted shall not be changed except by an ordinance addressed to public safety or health concerns. N.J.S.A. 40:55D-49(a); see Field v. Franklin Tp. 190 N.J. Super. 326 (App. Div. 1983). A second source of "vested rights" is the judicially developed doctrine of equitable estoppel. See Virginia Construction Corp. v. Fairman, 39 N.J. 61, 70 (1962).

The branch of the "vested rights" doctrine which rests upon the Municipal Land Use Law is not relied upon by Timber since it did not acquire either subdivision or site plan approval. Rather, Timber must rely upon the judicially developed doctrine of equitable estoppel.

There are only two circumstances in which the courts of this State have concluded that a municipality may be barred under principles of equitable estoppel from applying an amended zoning ordinance to a landowner. One circumstance is where a building permit or similar municipal authorization has been issued and there has been substantial reliance upon that authorization. See, e.g., Gruber v. Raritan Tp., 39 N.J. 1 (1962); Tremarco Corp. v. Garzio, supra. The second is where a trial court has entered judgment ordering municipal approval for a particular land use and there are special equities which militate against application of a subsequently adopted ordinance to bar that use. See, e.g., Kruvant v. Cedar Grove, supra; Urban Farms, Inc. v. Franklin Lakes, 179 N.J. Super. 203, 217-223 (App. Div. 1981), certif. den., 87 N.J. 428 (1981).

Even in these two categories of cases, the New Jersey courts have barred municipalities from invoking newly adopted zoning ordinances to prevent proposed uses of property only in very compelling circumstances. Thus, in Gruber v. Raritan Tp., supra, informal and formal approvals were obtained for a residential development, a performance bond was filed, model homes were constructed, and curbing, sidewalks utility poles, road grading and graveling were completed, before the municipality adopted a zoning ordinance which prohibited residences in the zone where the developer's property was located. The court held that "on elemental considerations of justice" the developer should be permitted to complete at least part of its project. Id. at 19. In

Tremarco Corp. v. Garzio, supra, the building inspector issued a valid building permit for the construction of a public garage and gasoline filling station and in reliance on that permit plaintiff purchased the property in question, expended money for a survey and architectural work, entered into a contract to construct the facility and had gasoline storage tanks delivered to the premises for installation, before the zoning ordinance was amended. In these circumstances, the court concluded that "the equities strongly predominate in favor of plaintiff." Id. at 458. In Kruvant v. Cedar Grove, supra, a developer twice successfully challenged the validity of zoning ordinances which prevented construction of a garden apartment complex on his property. When the municipality attempted a third rezoning of the developer's property during the pendency of litigation challenging the validity of the second rezoning and in violation of a court order establishing a deadline for any rezoning, the court concluded that "the equities warrant and judicial integrity justifies" ignoring the most recent zoning amendment in determining the propriety of the developer's project. Id. at 445.

In cases where such extraordinary circumstances have not been demonstrated, the New Jersey courts have reaffirmed the continuing authority of a municipality to subject all property within its jurisdiction to a zoning amendment even though individual property owners may have incurred substantial expenses in reliance upon the prior zoning ordinance. Thus, in Donadio v. Cunningham,

supra, Justice Hall observed:

> The paramount public interest dictates that no equity should arise in an owner's favor and that he should have no right of reliance until the municipality has, by issuing a valid permit, officially approved the project at the first level of authority. [58 N.J. at 322.]

Consistent with this restrictive view of the "vested rights" doctrine, our courts have rejected claims to exemption from later changes in zoning ordinances based upon a site plan approval, Hill Homeowners Ass'n v. Passaic, 156 N.J. Super. 505 (App. Div. 1978); a use variance, Dimitrov v. Carlson, 138 N.J. Super. 52 (App. Div. 1975), certif. den. 70 N.J. 275 (1976); and a final subdivision approval, Sandler v. Springfield Tp. Bd. of Adjustment, 113 N.J. Super. 333 (App. Div. 1971).

While these decisions seem to leave open the possibility that municipal action short of the issuance of a building permit could encourage reliance and confer vested rights, they indicate that such a finding could be made only in an exceptional situation. In any event, there is no decision which states that vested rights can be acquired without either official municipal action or the judgment of a court.

In arguing that the "vested rights" doctrine should be applied more broadly, Timber relies primarily upon the following dictum in Urban Farms, Inc. v. Franklin Lakes, supra:

> We do not regard the issuance of a building permit as a sine qua non to the applicability of the substantial reliance doctrine. See Kruvant v. Cedar Grove, 85 N.J. 435 (1980). Rather, we are of the view that its applicability requires a weighing of such factors as the nature, extent and degree of the public interest to be served by the ordinance amendment on the one hand and, on the other hand, the nature, extent and degree of the developer's reliance on the state of the ordinance under which he has proceeded, the extent to which his undertaking has been at any point approved or encouraged by official municipal action, and the extent to which, under the circumstances and as objectively determined, he should have been aware that the municipality would be likely to change the ordinance prior to actual commencement of construction. [Id. at 221.]

This passage, taken out of context, might support the conclusion that a landowner could secure a "vested right" in an existing zoning ordinance without either the judgment of a court or official municipal action authorizing a

particular use of land. However, the question addressed by this part of the Urban Farms opinion is whether there are circumstances in which a zoning amendment adopted in response to the judgment of a trial court may be denied retroactive effect. The court answered this question affirmatively, and the passage relied upon by Timber outlines the criteria for determining when those circumstances exist. The fact that the court was addressing itself solely to this narrow issue --- and not undertaking to broaden the scope of the "vested rights" doctrine in other contexts --- is indicated by the final sentence of the passage, which says:

> These are the factors constituting the developer's special equities, and if they outweigh the public interest concerns, they should also operate to bar post judgment retroactivity of a zoning ordinance amendment. [Id. at 221-222; emphasis added].

Timber's "vested rights" claim does not rest upon the judgment of a court or official municipal action. Rather, it is based solely on the alleged fact that prior zoning ordinance permitted their proposed project and that the planning board and various municipal officials encouraged Timber to undertake the preliminary steps required for approval of the project. However, no matter how vigorous the encouragement or how extensive Timber's activities in pursuing the project in reliance upon that encouragement, the above discussion demonstrates

that defendant municipality remained free to change its view of the zoning appropriate to the district where Timber's property is located.

One final reason for rejecting Timber's "vested rights" claim should be mentioned. The Municipal Land Use Law, enacted in 1975, N.J.S.A. 40:55D-1 et seq., deals in a more comprehensive fashion than its predecessor, the Municipal Planning Act, N.J.S.A. 40:55-1.1 et seq., with the circumstances under which a developer may acquire "vested rights: as a result of a particular type of municipal approval. The new statute deals more specifically with the effect of preliminary site plan or subdivision approval, compare N.J.S.A. 40:55D-49 with N.J.S.A. 40:55-1.18, and it sets forth for the first time the effects of site plan and final subdivision approval, N.J.S.A. 40:55D-47, N.J.S.A. 40:55D-52. Also, by a 1979 amendment, L. 1979, c. 216, N.J.S.A. 40:55D-10.1, it authorizes conceptual approval of a development plan, but specifies that the planning board "shall not be bound" by any such approval. This more comprehensive treatment in the Municipal Land Use Law of the consequences of various forms of municipal approval reduces the scope of judicial discretion to articulate these consequences in the face of legislative silence. See YM-YWHA of Bergen Cty. v. Washington Tp., N.J. Super. , (App.Div. 1983) (slip opinion at 13-14).

Within the framework of the Municipal Land Use Law, the official response of Chester to Timber's application did not go beyond conceptual approval, which the Legislature has expressly said shall not be binding. Since Timber's application never reached the state of preliminary site plan or subdivision approval, the prerequisite for a conclusion that Timber acquired a "vested right" in its project is absent and summary judgment in favor of defendants will be granted on this claim. n2

n2 The circumstances of the zoning change still :say be relevant on the claim that the current zoning of Timber's property is arbitrary and capricious. See Guaclides v. Englewood Cliffs, 11 N.J. Super. 405, 415-416 (App. Div. 1951).

II - Federal Civil Rights Act (42 U.S.C. §1983)

The adoption or amendment of a zoning ordinance constitutes action "under color of state law," which may provide the basis of a claim for money damages under 42 U.S.C. §1983 if a violation of federal constitutional rights can be shown. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979). However, certain defendants enjoy qualified or absolute immunity from liability for damages under §1983. See Owen v. City of Independence, 445 U.S. 622, 637-638, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). One form of absolute immunity is for official action taken in a

legislative capacity. Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951).

In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra, the Court held that legislative immunity is enjoyed not only by state legislators but also members of a regional planning agency. Quoting from Tenney v. Brandhove, supra, the Court said that the rationale for absolute legislative immunity is that the proper discharge of legislative duties would be inhibited if legislators "could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives," and it concluded that "[t]his reasoning is equally applicable to federal, state and regional legislators." 440 U.S. at 405.

Although the Court refrained from extending this holding to members of local governing bodies, Id. at 404, n. 26, every United j States Circuit Court of Appeals which has addressed this issue since Lake Country Estates has concluded that the reasoning of the opinion extends to municipal legislators. Aitchison v. Raffiani, 708 F. 2d 96 (3rd Cir. 1983); Reed v. Village of Shorewood, 704 F. 2d 943, 952-953 (7th Cir. 1983); Kuzinich v. Santa Clara Cty. 689 F. 2d 1345 (9th Cir. 1982); Hernandez v. City of Lafayette, 643 F. 2d 1188 (5th Cir. 1981), cert. den. 455 U.S. 907 (1982); Bruce Riddle, 631 F. 2d 272 (4th Cir. 1980);

Gorman Towers, Inc. v. Boloslavsky, 626 F. 2d 607 (8th Cir. 1980). See also T & M Homes, Inc. v. Mansfield Tp., 162 N.J. Super. 497 (Law Div. 1978), which reached the same conclusion prior to Lake Country Estates. In Gorman Towers the court said:

> We perceive no material distinction between the need for insulated legislative decision making at the state or regional level and a corresponding need at the municipal level. 626 F. 2d at 612.]

The court also pointed out, quoting from Ligon v. Maryland, 448 F. Supp. 935, 947 (D. Md. 1977), that the need for absolute legislative immunity is especially strong in the area of local land use control:

> [I]n the area of land use, where decisions may have an immediate quantifiable impact on both the value and development of property, local legislators should be free to act solely for the public good without the specter of personal liability with the passage of each zoning ordinance. [626 F. 2d at 612.]

Following this unbroken line of authority since Lake Country Estates, this court concludes that municipal officials enjoy absolute immunity from suit for

money damages pursuant to §1983 when acting in a legislative capacity. n3

n3 It is only individual municipal officials who enjoy this immunity, not a municipality. Owen v. City of Independence, supra. Therefore, it is conceded that at this stage of the litigation the claim for money damages under § 1983 against Chester remains viable.

This absolute immunity entitles the members of the Chester Township governing body and planning board to summary judgment on the §1983 claims which seek to impose individual monetary liability. Apart from conclusionary legal labels, the only acts of these defendants alleged in the complaint are that the members of the planning board recommended, and the members of the municipal council voted for an amendment to the zoning ordinance which abolished the "Apartment/Townhouse" zone of the municipality. The legislative character of either recommending or voting for a change in the permitted uses in a zoning district is well established. Fralin & Waldron, Inc. v. Henrico Cty., 474 F. Supp. 1315 (E.D. Va. 1979); Bruce v. Riddle, supra; see also Girard v. Alverez, 144 N.J. Super. 259 (App. Div. 1976). Although it is alleged that the defendants in abolishing the "Apartment/Townhouse" zone, were improperly motivated by a desire to block Timber's development plans, one of the essential purposes of affording absolute legislative immunity is to prevent judicial inquiry into legislative motives. Lake Country Estates, Inc. v. Tahoe Regional Planning

Agency, supra; Tenney v. Brandhove, supra; Aitchison v. Raffiani, supra.

Moreover, there is no allegation that Timber's proposed project remained viable once the Apartment/Townhouse zone was abolished. Hence, there is no basis for a claim that any acts of the municipal officials independent of the adoption of the zoning change adversely impacted upon Timber. See Hernandez v. City of Lafayette, supra, 643 F. 2d at 1194, n. 12.

Therefore, the individual defendants are entitled to summary judgment on the §1983 claims for money damages. n4

n4 Timber conceded in its answer to the motion that punitive damages may not be sought against a municipality in an action under §1983. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). Consequently, the part of the complaint seeking such relief also will be dismissed.

III - Tort Claims Act

The New Jersey Tort Claims Act extends immunity to public employees for legislative and judicial activities. N.J.S.A. 59:3-2(b) provides that:

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> A public employee is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature.

N.J.S.A. 59:2-3(b) affords the same immunity to public entities. In Girard v. Alverez, supra, 144 N.J. Super. at 262, the Appellate Division held that the process of effecting a change in zoning is legislative in nature and therefore falls within the immunity conferred upon public employees by N.J.S.A. 59:3-2(b). Public entities would be entitled to the same immunity under N.J.S.A. 59:2-3(b) since the operative language of the two sections is the same.

The complaint alleges that defendants interfered with contractual relations between plaintiff Timber, as contract purchaser of the subject property, and plaintiffs John and Stephanie Hardin, as contract sellers, by "wrongfully, knowingly, intentionally, maliciously and without reasonable justification or excuse" improperly voting to abolish the "Apartment/Townhouse" zone. As previously discussed in connection with the §1983 claim, this action was purely legislative in character and therefore falls within N.J.S.A. 59:2-3(b) and N.J.S.A. 59:3-2(b).

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Nevertheless, plaintiffs argue that the individual defendants remain amenable to suit pursuant to N.J.S.A. 59:3-14(a), which provides that:

> Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or wilful misconduct.

Although there are no allegations which could support a conclusion that any of the municipal officials acted outside the scope of their employment or committed a crime or actual fraud, there are allegations which could support a conclusion that they were guilty of "actual malice" or "wilful misconduct." Viewed most favorably to plaintiffs, the allegations of the complaint and of the affidavits relied upon in opposition to this motion might support an inference that the municipal officials amended the zoning ordinance with knowledge that it was invalid for the sole purpose of impeding Timber's development project and thereby interfered with the contractual relations between plaintiffs, as contract sellers and purchasers. Such a finding could support a conclusion that the individual defendants were guilty of "actual malice," cf. Bock v. Plainfield CourierNews, 45 N.J. Super. 302, 312-313 (App. Div. 1957), or "wilful misconduct," cf. Tabor v. O'Grady, 61 N.J. Super. 446, 454 (App. Div. 1960). Therefore, it is necessary to determine whether, despite the broad immunity

afforded by N.J.S.A. 59:3-2(b) for legislative actions, a tort action may be pursued against a municipal legislator pursuant to N.J.S.A. 59:3-14(a) for "actual malice" or "wilful misconduct" in the adoption of an ordinance.

N.J.S.A. 59:3-14(a) is not phrased in terms of imposing any liability upon a public employee. It simply says that "[n]othing in this act shall exonerate a public employee from liability" for, among other things, "actual malice" or "willful misconduct." [Emphasis supplied]. Therefore, the source of any liability of a public employee must be found outside of N.J.S.A. 59:3-14(a).

The Tort Claims Act does not contain detailed provisions dealing with intentional torts such as interference with contractual relations. Rather, as suggested by the legislative declaration "that public entities shall only be liable for their negligence within the limitations of [the Tort Claims Act]", N.J.S.A. 59:1-2, the detailed provisions of the Act deal solely with the liability of public entities and public employees for negligence. However, with respect to intentional torts, the Act basically retains whatever liabilities and immunities a public employee would have had at common law N.J.S.A. 59:3-1(a) states that "[e]xcept as otherwise provided by this act, a public employee is liable for injury caused by his act or omission to the same extent as a private person." This liability is qualified by N.J.S.A. 59:3-1(b), which states that "[t]he liability of a public employee established by this act is subject to

any immunity of a public employee provided by law." Moreover, N.J.S.A. 59:1-3 defines "law" to include "decisional law applicable within this State." Therefore, to determine whether a municipal official may be subject to tort liability for adopting an ordinance, it is appropriate to consider decisional law before enactment of the Tort Claims Act. Cf. Burke v. Deiner, 190 N.J. Super. 382, 391 (App. Div. 1983) (holding that municipal officials could be subject to suit under N.J.S.A. 59:3-14 for "wilful misconduct" in connection with "administrative action of a legislative or judicial nature" when they would have enjoyed immunity prior to enactment of the Tort Claims Act for the type of activity involved only upon a showing of "good faith" conduct); see also Report of the Attorney General's Task Force on Sovereign Immunity, at 211 (1972) (containing the legislative recommendations on which the Tort Claims Act was based, which points out that the open-ended language of N.J.S.A. 59:2-2, a section substantially similar to N.J.S.A. 59:3-1, "permits the courts to continue to recognize common law immunities to the extent they are consistent with the provisions of this act,").

The research of the court has disclosed only two New Jersey decisions prior to enactment of the Tort Claims Act in which the immunity from monetary liability of individual legislators was directly implicated. Cole v. Richards, 108 N.J.L. 356 (E. & A. 1932); Van Riper v. Tumulty, 26 N.J. Misc. 37, 56 A. 2d 611 (Sup. Ct. 1948). Both decisions hold that a state legislator enjoys

absolute immunity from suit under the "speech or debate" clause of the New Jersey Constitution (N.J. Const. (1844), Art. IV, §IV, par. 8; see also N.J. Const. (1947), Art. IV, §IV, par. 9) for statements made in the Legislature. Other pre-Tort Claims Act decisions involved solely the liability of a public entity for the enactment of legislation. See, e.g., Visidor v. Cliffside Park, 48 N.J. 214 (1966), cert. den. 386 U.S. 972 (1967); Veling v. Ramsey, 94 N.J. Super. 459 (App. Div. 1967), and hence did not provide the occasion for consideration by our courts of whether public officials could be subject to "civil liability for acts done within the sphere of legislative activity." Tenney v. Brandhove, supra, 341 U.S. at 376.

Notwithstanding the absence of more definitive decisional authority in New Jersey, the existence of absolute immunity for state legislators at common law was generally accepted. See Tenney v. Brandhove, supra. The prevailing view was that this absolute immunity extended to municipal legislators. 2 F. Harper and F. James, The Law of Torts §29.10 at 1639 (1956); W. Prosser, The Law of Torts §132 at 988 (4th ed. 1971). But see Bruce v. Riddle, supra, 631 F. 2d at 276. The only New Jersey case which considered the issue stated flatly that "the well-established rule at common law was one of absolute immunity for all legislators, regardless of level." T & M Homes, Inc. v. Mansfield Tp., supra, 162 N.J. Super. at 511. This view basically mirrors the conclusion of the lower federal courts, adopted in part II of this opinion, that local legislators

enjoy absolute immunity from suits for money damages pursuant to §1983.

Although the issue is not free from doubt, this court is satisfied that the New Jersey courts would follow the common law rule, as stated in T & M Homes, Inc., and hold that municipal legislators enjoyed absolute immunity from individual monetary liability prior to enactment of the Tort Claims Act. Pursuant to N.J.S.A. 59:3-1(b), this immunity was preserved under the Tort Claims Act. Since the only action of the individual defendants which could have had an adverse impact upon plaintiffs is the legislative act of abolishing the "Apartment/Townhouse" zone, summary judgment will be granted on the malicious interference with contractual relations claim.

IV - New Jersey Antitrust Act

N.J.S.A. 56:9-3 broadly states that "[e]very ... combination ... or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." However, this provision is qualified by N.J.S.A 56:9-5, which exempts certain organizations and activities from scrutiny under the New Jersey Antitrust Act. These exemptions include N.J.S.A. 56:9-5(c), which states in pertinent part that:

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> [The Antitrust Act] shall not apply to any activity directed, authorized or permitted by any law of this State that is in conflict or inconsistent with the provisions of this act....

The Supreme Court of New Jersey has twice held that N.J.S.A. 56:9-5(c) precludes an attack pursuant to the New Jersey Antitrust Act upon a regulation adopted by a state administrative agency pursuant to its enabling legislation. Bally Mfg. Corp. v. New Jersey Casino Control Comm'n, 85 N.J. 325, 335 (1981), app. dism. 454 U.S. 804 (1981); New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 564 (1978).

There is no meaningful distinction in the application of exemption from antitrust liability provided by N.J.S.A. 56:9-5(c) between a zoning ordinance and a state administrative regulation. The Municipal Land Use Law confers express authority upon a governing body to adopt a zoning ordinance (N.J.S.A. 40:55D-62(a) in the same manner as various enabling legislation delegates authority to state administrative agencies to adopt regulations. Therefore, the adoption of zoning ordinances by municipal governing bodies and of regulations by state administrative agencies are both activities "authorized or permitted by ... law of this State" and hence both fall within the exemption from antitrust liability provided by N.J.S.A. 56:9-5(c).

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In arguing that N.J.S.A. 56:9-5(c) is not controlling plaintiffs point out that they have alleged in other counts of their complaint that the zoning amendment abolishing the "Apartment/ Townhouse" zone is arbitrary and capricious, inconsistent with the Municipal Land Use Law and in violation of the New Jersey Constitution as construed in Mount Laurel II. Plaintiffs argue that if they prevail on one or more of these grounds of attack, then the Chester zoning ordinance would not be "authorized or permitted" by any law of this State, within the intent of N.J.S.A. 56:9-5(c).

However, any duly adopted municipal ordinance or state administrative regulation is subject to attack on the grounds that it is arbitrary and capricious, inconsistent with the applicable enabling legislation or unconstitutional. See, e.g., Dome Realty, Inc. v. Paterson, 83 N.J. 212 (1980); New Jersey Guild of Hearing Aid Dispensers v. Long, supra. If such an attack succeeds, this does not mean that the act of adopting the ordinance or regulation was not "authorized or permitted by any law of this State" and that the public entity responsible for the ordinance or regulation as well as its individual members are subject to monetary liability under the Antitrust Act. There is a well recognized distinction between an act of a governmental agency which is beyond its jurisdiction and an act which is within the jurisdiction of the agency but is found to be invalid. Summer Cottagers' Ass'n of Cape May v. Cape May, 19 N.J. 493, 504 (1955). This distinction is pertinent in the

interpretation of N.J.S.A. 56:9-5(c). The "activity" of adopting a zoning ordinance is clearly within the jurisdiction of a planning board and a governing body and hence "authorized or permitted" by law. The mere fact that an ordinance or administrative regulation is subject to being set aside by a court does not mean that a public official has exceeded his authority in its adoption.

In addition, it should be noted that most land use ordinances and other economic regulations have arguable anti-competitive consequences. Therefore, if Timber's reading of N.J.S.A. 56:9-5(c) were correct, an exposure to antitrust liability, including treble damages, see N.J.S.A. 56:9-12, would arise any time such an ordinance or regulation were adopted. The chilling effect that exposure would have upon the adoption of desirable regulations is a further reason to read N.J.S.A. 56:9-5(c) as barring any liability of a municipality or its officials under the Antitrust Act arising out of the adoption of a zoning ordinance.

A partial summary judgment in conformity with this opinion will be entered in favor of the defendants.