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1/6/86

Transcript of Proceedings

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SUPREME COURT OF NEW JERSEY

TRENTON, NEW JERSEY

Docket No. A-122-85

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HILLS DEVELOPMENT COMPANY,

Plaintiff-Respondent,

-vs-

TOWNSHIP OF BERNARDS,

Defendant-Appellant.

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TRANSCRIPT OF PROCEEDINGS

January 6, 1986

January 7, 1986

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VOLUME I

January 6, 1986

IN ATTENDANCE:

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

APPEARANCES:

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

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

1 JANUARY 6, 1986

2 \* \* \*

3 MR. DAVIDSON: May it please the Court, my name  
4 is James E. Davidson, I'm with the Law Firm of Farrell,  
5 Curtis, Carlin and Davidson in Morristown, New Jersey.  
6 We represent the Township of Bernards.

7 I have a brief opening statement which is really  
8 in two parts. Initially, as you know, we take the posit-  
9 ion that the transfer provision of the New Fair Housing  
10 Act should be interpreted to permit transfer in all but  
11 a limited amount of cases. The Fair Housing Act was,  
12 was enacted after, after much consideration in the, in  
13 the Legislature, after much relative coercion from this  
14 Court and pressure from the public. The Fair Housing  
15 Act sets forth a new procedure for dealing with and sat-  
16 isfying the Constitutional obligations relating to  
17 Mount Laurel. In doing so it, it enacted a, a new admin-  
18 istrative scheme and used new mechanisms to deal with  
19 the same issue that you dealt with in Mount Laurel II  
20 with your affirmative remedies.

21 Before you in Bernards and in the other cases, at  
22 least those that were heard before Judge Serpentelli,  
23 are a large number of cases located in the same area  
24 in the State, the central part of the State - Middlesex  
25 County, Somerset County, up into Morris County. If

1 my recollection is correct, more than ten cases of trans-  
2 fer motions were heard by Judge Serpentelli, only one  
3 was granted.

4 If the Act is to work it must be implemented. In  
5 reviewing the transfer motions it is our feeling that  
6 the, the decision should take into serious consideration  
7 the policy behind the Act and the new administrative  
8 procedures behind the Act. If a substantial amount of  
9 cases are decided under the old law and the Act is not  
10 used it will be substantially undermined, at least in  
11 that area of which I'm speaking.

12 The second thing I'd like to mention relates to  
13 the Bernards Township case itself. In November 1984  
14 Bernards Township enacted a modification to it's Zoning  
15 Ordinance to provide a realistic opportunity for low  
16 or moderate income housing. That's Ordinance 704. That  
17 Ordinance has not been challenged by any pleading in  
18 this litigation. That Ordinance provides a substantial  
19 number of low or moderate income housing in two areas  
20 in the town. Since that time, more than 15 months ago,  
21 housing has -- low or moderate income housing has received  
22 approvals and is now under construction.

23 The Plaintiff has stipulated -- represented before  
24 Judge Serpentelli that the Plaintiff had no objection  
25 to Ordinance 704. The Plaintiff has stated init's

1 papers before this Court that it believes Ordinance 704  
2 complies with Mount Laurel. Bernards Township believes  
3 Ordinance 704 complies with Mount Laurel. There is no  
4 reason that this case should be in any Court. There  
5 is no dispute that this case should proceed to the Council  
6 to be heard by the Council just as any other matter  
7 would be heard. We do not belong in Court.

8 CHIEF JUSTICE WILENTZ: Is it clear that the lower  
9 income units allowed by 704 are all going to be built?

10 MR. DAVIDSON: I believe so. Yes, sir.

11 CHIEF JUSTICE WILENTZ: Is there any intent or any  
12 indication that Bernards is going to modify, repeal or  
13 amend 704?

14 MR. DAVIDSON: They may.

15 THE COURT: In other words you're not representing  
16 to us that 704, which apparently is believed to satisfy  
17 the Mount Laurel obligation, is going to remain on the  
18 books.

19 MR. DAVIDSON: That's correct, I'm not going to  
20 represent that.

21 CHIEF JUSTICE WILENTZ: How many units are provided  
22 for of low or of moderate income housing?

23 MR. DAVIDSON: In Ordinance 704?

24 CHIEF JUSTICE WILENTZ: Yeah.

25 MR. DAVIDSON: It's between 8 and 900, your Honor.

1 CHIEF JUSTICE WILENTZ: And the builder's name again?

2 MR. DAVIDSON: Hills Development Company.

3 CHIEF JUSTICE WILENTZ: And that builder, if I'm  
4 not mistaken --

5 MR. DAVIDSON: Let me, let me amend that answer.  
6 There are a number of builders. Hills Development Com-  
7 pany is the Plaintiff in this case.

8 CHIEF JUSTICE WILENTZ: Right.

9 MR. DAVIDSON: Hobnanian is now constructing  
10 housing in Bernards Township. There is a piece of property  
11 next door called the Kirby property, I don't know the  
12 development. They have received approval for constructing  
13 low or moderate income housing.

14 CHIEF JUSTICE WILENTZ: So, so that if the likeli-  
15 hood of construction of the Mount Laurel share, fair  
16 share is a relevant factor in the transfer decision,  
17 this Court cannot assume that that Ordinance is going  
18 to lead to such construction, since you're unwilling  
19 to, and I accept that, represent that that Ordinance  
20 is going to in fact stay on the books and provide in  
21 fact the lower income housing that it would if it stayed  
22 on the books.

23 MR. DAVIDSON: Well the lower income housing is  
24 being, is being constructed now. I see no reason to  
25 assume that the, the Ordinance is going to be removed

1 and, therefore, deprive the lower income housing.

2 CHIEF JUSTICE WILENTZ: But, but apparently --

3 MR. DAVIDSON: It's possible but it's possible  
4 in any event.

5 CHIEF JUSTICE WILENTZ: It's -- but I didn't gather  
6 that that was the possibility that you, that lead you  
7 to not be willing to represent that it would stay on  
8 the books.

9 MR. DAVIDSON: No. Let me, let me, let me state  
10 our, state our position here. We believe that, that  
11 as the legislative body in our municipality we can enact  
12 whatever ordinances are necessary under our zoning power.  
13 Those include ordinances that are necessary to provide  
14 our realistic opportunity for low or moderate income  
15 housing, whatever that may be. Okay? We put an ordinance  
16 on the books basically, basically on the consensus method-  
17 ology which has been used by the Trial Courts. Okay.  
18 Subsequent to the consensus methodology the Fair Housing  
19 Act was enacted. The Fair Housing Act extends to us  
20 and all municipalities difference mechanisms, different  
21 methodology, so on and so forth, relating to Mount Laurel  
22 housing. Bernards Township may want to take advantage  
23 of some of the mechanisms. That may result in a lower  
24 fair share, a higher fair share, it may result in diff-  
25 erent methods of doing it --

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CHIEF JUSTICE WILENTZ: Do you know whether Bernards has made up its mind that it is going to submit, assuming there is a transfer, that it is going to submit to the council on affordable housing a Zoning Ordinance other than 704?

MR. DAVIDSON: No, they have not made up their minds on that.

CHIEF JUSTICE WILENTZ: They have not made up their minds. What is your view as to the meaning of manifest injustice?

MR. DAVIDSON: Manifest injustice means a high -- to the, to the offended party a high level of harm which is irrevocable.

CHIEF JUSTICE WILENTZ: Do you believe that it should be interpreted to include that harm to lower income people consisting of a delay, if there is such a delay, in the satisfaction of the Mount Laurel obligation?

MR. DAVIDSON: Not in the delay contemplated by the Statute. I think when they drafted the statute they recognized, as everybody recognized, that there is some delay in putting the proceedings into effect. I think the salutary part on the other side of that is we get a comprehensive statewide regulation of low or moderate income housing and that in order to do that some delay is necessary.



1 CHIEF JUSTICE WILENTZ: Right. So that the delay  
2 that would be caused by the transfer itself, assuming  
3 it would cause a transfer, is not a delay sufficient  
4 to amount to a manifest injustice, --

5 MR. DAVIDSON: That's correct, your Honor, that's  
6 our position.

7 CHIEF JUSTICE WILENTZ: -- suggesting that if there  
8 was some other kind of delay because of some peculiarity  
9 of the case, I suppose, that that might be considered.

10 MR. DAVIDSON: I think that's correct.

11 CHIEF JUSTICE WILENTZ: So that what you're saying  
12 is that you think consideration of the impact on lower  
13 income people is a permissible factor to consider in  
14 deciding manifest injustice.

15 MR. DAVIDSON: Not necessarily. The delay doesn't  
16 necessarily run to lower income people. You know, you're  
17 getting, getting me into the position of who's, who's  
18 a party to the litigation under the Statute.

19 CHIEF JUSTICE WILENTZ: Exactly. That's precisely  
20 what I'm asking.

21 MR. DAVIDSON: Yes. Yes. And it seems clear to  
22 me under that, under the Statute that the legislature  
23 intended in the language of the statute itself that "party  
24 to the litigation" itself means just that, party to the  
25 litigation.

1 CHIEF JUSTICE WILENTZ: When your position is man-  
2 ifest injustice does not include any consideration of  
3 the impact of a transfer on lower income people.

4 MR. DAVIDSON: Well again --

5 CHIEF JUSTICE WILENTZ: Because they are not a party.

6 MR. DAVIDSON: They are not a party -- unless they  
7 are a party. If they are a party clearly it does. If  
8 it does not and the delay we're talking about relates  
9 to the delay in the statute, I, I think that the lower  
10 income people are protected by the Statute.

11 CHIEF JUSTICE WILENTZ: What kind of damage to a  
12 party would justify a finding of manifest injustice?

13 MR. DAVIDSON: Damage to a party? One example I  
14 could think of would, would be a situation where a party,  
15 and by party now I'm talking a developer party as opposed  
16 to low income persons as a party, had received some type  
17 of approval, for instance an approval to construct part  
18 of his development of which a large percentage of it  
19 was low or moderate income housing and would not get  
20 the offsetting units. That would seem to me to be a  
21 substantial --

22 CHIEF JUSTICE WILENTZ: Say that again. I'm not  
23 sure I follow you.

24 MR. DAVIDSON: He's received and perhaps even con-  
25 structed part of his development and, and has done

1 it in series rather than all at once, so he's constructed  
2 part of the development which part consists of perhaps  
3 a substantial amount of low or moderate income housing.

4 CHIEF JUSTICE WILENTZ: So the implication, the  
5 implication you're making is that were such a case to  
6 be transferred, perhaps those approvals would be affected.

7 MR. DAVIDSON: That's correct.

8 CHIEF JUSTICE WILENTZ: In other words that's --  
9 but for that implication, that would not be manifest  
10 injustice.

11 MR. DAVIDSON: That's correct.

12 CHIEF JUSTICE WILENTZ: So you're saying that if  
13 in any case there is a transfer that would prevent a  
14 builder from completing a project already started, espec-  
15 ially one where presumably the least profitable units  
16 have been constructed and the most profitable have not,  
17 that would be manifest injustice.

18 MR. DAVIDSON: Yes, that's correct, your Honor.

19 CHIEF JUSTICE WILENTZ: So implicit in that is that  
20 generally, if you're viewing a builder as a party, it's  
21 some kind of devastating economic loss.

22 MR. DAVIDSON: Correct.

23 CHIEF JUSTICE WILENTZ: Any, any other? Is there  
24 any kind of manifest injustice that would justify a denial  
25 of a transfer in regard to a public interest plaintiff?

1 Urban League, Morris, Morris County Housing Council?

2 MR. DAVIDSON: I, I, I guess I feel that, that,  
3 that if it could be shown that the housing will not result  
4 that the public interest group, while it is a public  
5 interest group but it is a plaintiff and as a plaintiff  
6 it's representing the public interest, that housing would  
7 not result, then that's manifest injustice.

8 THE COURT: Well when you say "the housing would  
9 not result," the --

10 MR. DAVIDSON: Low and moderate income.

11 CHIEF JUSTICE WILENTZ: You mean any, or that the  
12 fair share will never be --

13 MR. DAVIDSON: Fair share will never be recognized.  
14 That's correct.

15 CHIEF JUSTICE WILENTZ: Well how could anyone ever  
16 show that? I mean -- you're not saying that the hous-  
17 ing, in terms of a builder's remedy that was about to  
18 be implemented, you're not referring to that kind of  
19 a situation.

20 MR. DAVIDSON: No, sir, I'm not.

21 CHIEF JUSTICE WILENTZ: You're saying if someone  
22 could make a showing that the transfer to the council  
23 will ultimately result in not satisfying fair share,  
24 then --

25 MR. DAVIDSON: Yeah, I --

1 CHIEF JUSTICE WILENTZ: -- then that would be. But  
2 how could that be done?

3 MR. DAVIDSON: The example that, that seems to be  
4 given which -- would be if the infrastructure was to  
5 be -- there was only a little bit of infrastructure left,  
6 it was to be used up and the Court, for some reason  
7 and I don't know that this would exist, would be unable  
8 to protect that infrastructure, --

9 CHIEF JUSTICE WILENTZ: In other words --

10 MR. DAVIDSON: -- that type of situation.

11 THE COURT: -- not a absolute showing that never  
12 ever is it going to be built but a showing that, let's  
13 say, the most suitable, most likely tract is going to  
14 get, have a factory put on it or something else.

15 MR. DAVIDSON: Yes, and we have -- our case isn't  
16 one but there are some cases that have built up commun-  
17 ities where, where infrastructure and land is, is very  
18 scarce. That's not true in my case.

19 CHIEF JUSTICE WILENTZ: There's, there's no automat-  
20 ic cut-off date on Ordinance 704, is there? There's  
21 no sunset provision or anything.

22 MR. DAVIDSON: No. There was but it was removed,  
23 your Honor.

24 CHIEF JUSTICE WILENTZ: What had that provision  
25 said again?

1 MR. DAVIDSON: I believe it said that this Ordinance  
2 shall not be effective subsequent to a certain date unless  
3 the same has been approved by the Court and the six year  
4 repose granted.

5 CHIEF JUSTICE WILENTZ: Oh, I see.

6 MR. DAVIDSON: But I'm not sure.

7 CHIEF JUSTICE WILENTZ: In other words it had the  
8 usual cut-off that a compliance ordinance, substitute  
9 compliance hearing has.

10 MR. DAVIDSON: That's my recollection. I'm not --

11 CHIEF JUSTICE WILENTZ: That's been --

12 MR. DAVIDSON: I did not review that --

13 CHIEF JUSTICE WILENTZ: That's been excised from  
14 the Ordinance.

15 MR. DAVIDSON: That's correct, your Honor.

16 THE COURT: Mr. Davidson, is there any inconsistency  
17 between Ordinance 704 and the new Ordinance 746?

18 MR. DAVIDSON: Ordinance 746, your Honor, has nothing  
19 to do with Ordinance 704. Ordinance 704 -- let me --  
20 I'll have to back off a little bit. The general Ordin-  
21 ance of the municipality has in it a provision, normal  
22 provisions for preliminary and final and so on. It also  
23 has in it a provision relating to prior approvals - I  
24 can't think of the word now - conceptual approvals. In  
25 that provision it says that it gives the developer

1 certain protections upon getting a conceptual approval.  
2 Ordinance 746 addresses those protections. It applies,  
3 it applies to anybody and everybody and, and removes  
4 those protections that you would get from a conceptual  
5 pursuant to the Ordinance. The change is for several  
6 reasons - we don't think the Statute authorizes it, period.  
7 It gives the person more protection than he would get  
8 under a preliminary, yet it, yet the submission is nothing  
9 like a preliminary. It's just not in the Statute. Nor  
10 is it very wise. All the, all the application gets is  
11 a cursory glance by what we call the technical coordin-  
12 ating committee and, and the, and the Planning Board.  
13 There's no public hearings provided. The submissions  
14 that are made are general in nature as opposed to detailed  
15 in nature such as you would give in a preliminary approval.

16 THE COURT: So that the reason --

17 MR. DAVIDSON: That's what 746 is involved with.

18 THE COURT: -- the reason that the plaintiff, the  
19 Hill's Organization objected to Ordinance 746 then was  
20 not because the effect on the number of units that they  
21 could develop was different than Ordinance 704, but  
22 rather that it took away rights provided to that organ-  
23 ization under 704.

24 MR. DAVIDSON: I believe that's correct, your Honor.

25 THE COURT: Now when, when Bernards adopted the

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Ordinance 704 in November, 1984, wasn't that adoption accompanied by a concession that the prior Ordinance was invalid?

MR. DAVIDSON: No, sir, your Honor, it was not. I'll give you a little background on that if I may.

Prior to that we had had -- there had been cross motions for Summary Judgment. At the cross -- both, both of which were denied. We took the position at that time that the Ordinance we had in effect did meet the requirements of Mount Laurel, that the parties - and the parties being Hill's and another area in the Town which we call the PRN zone had received substantial increases in density to provide under prior cases - Mount Laurel won cases and Oakwood and Madison cases - to provide us with housing for all economic groups and with specific references to the cases, to Mount Laurel and Oakwood. We took the position that -- and these cases were settled. We took the position that part and parcel of that settlement is that these plaintiffs should construct that housing that our Ordinance was good. And so what occurred was we went ahead and in October sent down an Order to Judge Serpentelli requesting a stay, jointly by counsel - not necessarily by the Township.

THE COURT: A stay or a grant of immunity from further suit?

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1 MR. DAVIDSON: No, we requested a stay originally.  
2 Okay? Judge Serpentelli wrote back and said he will  
3 not do that unless -- or he didn't say he will not do  
4 it, he said he's not likely to do it unless we agreed  
5 that our prior ordinance was not good. This was in Oct-  
6 ober. We did not want to do that and we did not do that.  
7 Instead what we did was we enacted another ordinance,  
8 Ordinance 704 which, the term we used, was to better  
9 to comply with our Mount Laurel obligations. It makes  
10 it clearer, it makes the mandatory set-aside clearer,  
11 it doesn't have us arguing on what's implicit and what's  
12 explicit, et cetera. It changes the numbers but not,  
13 it doesn't change the numbers tremendously.

14 Then in December I addressed the same issue with  
15 Judge Serpentelli, setting forth why it was that we thought  
16 he should grant us the stay, and if you want to call  
17 it -- it prevented -- it provided and at his request  
18 it provided that no other builder remedies would be granted  
19 Okay, that's what it, that's what it provided.

20 THE COURT: Counsel, what do you conceive the status  
21 of Ordinance 704 would be if it were determined that  
22 the case ought to be transferred to the council? Can  
23 that be entirely superceded or supplanted by whatever  
24 action the council takes?

25 MR. DAVIDSON: Could 704 -- could the Council,

1 the affordable Housing Council, supercede 704 and say  
2 it was no good for instance? I'm not sure I understand,  
3 your Honor.

4 THE COURT: Yes. Could it disregard it as a pos-  
5 ition taken by the Township with respect to its present  
6 condition concerning its Mount Laurel obligation? Is  
7 that type of effort to be totally superceded by the pro-  
8 ceedings before the Council? If the case were to be  
9 transferred?

10 MR. DAVIDSON: I, I think my answer is yes but I'm  
11 not sure I understand the question again. It, it --  
12 I'm not sure I understand how it comes up.

13 THE COURT: I take it in response to one of the  
14 questions asked of you by the Chief Justice was that  
15 Bernards Township, for example, would feel legally free  
16 to supplant Ordinance No. 704. Did I under --

17 MR. DAVIDSON: That's correct. That's correct.

18 THE COURT: Do you, therefore, take the position  
19 that that would be wholly within the discretion of the  
20 township if the case were transferred to the Council  
21 on Affordable Housing?

22 MR. DAVIDSON: Well yes, it would be -- that would  
23 be wholly within our discretion but, but it must be done  
24 in accordance with law. If, if you're suggesting that  
25 we'll, we'll revoke it and, and have no Mount Laurel

1 Ordinance - sure, I think we have the power to do that,  
2 right.

3 THE COURT: You would simply have to put together  
4 another package that you think would satisfy whatever  
5 the criteria and guidelines are set up by the Council  
6 on affordable housing.

7 MR. DAVIDSON: That is correct.

8 THE COURT: And to that extent my original question  
9 is: It is at least theoretically possible, therefore,  
10 that the Council itself could disregard or supplant what-  
11 ever Mount Laurel values are implicit in Ordinance 704.

12 MR. DAVIDSON: That's correct. They could tell  
13 us that, that under their standards your fair share is  
14 twice what we put in in our --

15 THE COURT: Do you think there is any merit to the  
16 position taken by some of the adversary parties in this  
17 collective litigation that a transfer can be subjected  
18 or should be subjected to reasonable conditions so that  
19 the Mount Laurel gains that have been realized by some  
20 of the litigants wouldn't be totally dissipated or lost  
21 in the event cases were transferred?

22 MR. DAVIDSON: I think it, that any conditions that  
23 accompany a transfer should not invade the province of  
24 the Agency. I think the Agency's standards are going  
25 to be different. I, I would expect, however, that the

1 total fair share and the total housing to be constructed  
2 would be the same but I don't think this Court should  
3 impose on -- that type of condition on the agency.

4 On the other hand, if it's a condition which is  
5 really -- I'mnot sure "condition" is the right word,  
6 but if it's the type of action which will protect some-  
7 thing from occurring such as the loss of sewers or such  
8 as something to -- in order to see that housing will  
9 not be lost, I think that would be proper.

10 THE COURT: For instance you think it would be proper  
11 -- let's assume you have a municipality where it's clear  
12 that there's only one tract that can possibly satisfy  
13 the Mount Laurel obligation, you think it might be proper  
14 for a Court, in ordering transfer, to order it conditioned  
15 on the non-development of that tract?

16 MR. DAVIDSON: That, that's what I mean, your Honor,  
17 yes.

18 THE COURT: In your definition of manifest injustice  
19 what role, if any, would you ascribe to a finding that  
20 a municipality had acted in bad faith if indeed such  
21 a finding were made?

22 MR. DAVIDSON: I guess I have to say none, but a  
23 qualified none. Good faith-bad faith doesn't seem to  
24 me to go to manifest injustice, and I don't think it  
25 really solves anything, and I think deciding good faith

1           --- we haven't -- we're having a tough enough time decid-  
2           ing what manifest injustice means as opposed to deciding  
3           what good faith - bad faith means. I'm afraid that good  
4           faith-bad faith in many places is taken as, as, as re-  
5           sisting as best you can within the legal means you have.  
6           It -- if that's what it means I don't think it should  
7           be considered at all. On the other hand, I think that  
8           if it means that you're totally intractable and then  
9           no matter what happens we won't build housing, then I  
10          think I'm not at all sure the case should be transferred  
11          in any event, but not really for manifest injustice reas-  
12          ons but just because it doesn't make any sense to trans-  
13          fer it.

14                 THE COURT: In the case, in your cases or in any  
15                 of the cases we have before us do you know whether or  
16                 not the trial court made any finding of bad faith with  
17                 respect to any of the municipalities? I know they didn't  
18                 in our case and I'm fairly confident that they did not  
19                 in any of Judge Serpentelli's cases. I'm not family  
20                 with the ones before --

21                 THE COURT: Was the issue presented to the trial  
22                 Court?

23                 MR. DAVIDSON: Not to my knowledge. Not in our  
24                 case, it wasn't, no.

25                 THE COURT: Does your manifest injustice standard

1 involve a balancing of anything or is it simply looking  
2 at each party and determining whether there's any  
3 party which will suffer this manifest injustice?

4 MR. DAVIDSON: Well I, I think -- the standard as  
5 applied by the Court I think does not. In defining what  
6 it means I think it does though, and, you know, and I  
7 balance it with what I think is the very salutary effect  
8 of getting these cases into the Administrative Agency,  
9 the executive branch of the Government. That's on the  
10 one side. On the other side, and this is -- again I'm  
11 talking about forming the rule that decides when you  
12 transfer cases generally. On the other side you have  
13 to balance what I think is, is a far less public oriented  
14 desire. See, I'm not concerned that the housing won't  
15 get built because I think it will get built. I think  
16 it will get built under the Statute. So when we're taking  
17 a provincial look at a, at a, at a developer-plaintiff  
18 who, who has expended time and litigation, I don't think  
19 that mounts up at all compared to the general policy  
20 of getting these cases where I think they belong.

21 THE COURT: But it's not clear to me whether you're  
22 saying you do any balancing or you don't do any balancing.

23 MR. DAVIDSON: Not on a case by case method.

24 THE COURT: On a case by case --

25 MR. DAVIDSON: I do not.

1 THE COURT: -- you do not do any.

2 MR. DAVIDSON: I do not.

3 THE COURT: All right. The situation that you gave  
4 as an example of potential manifest injustice, you've  
5 indicated that as a matter of fact Hill's is now in the  
6 process of building?

7 MR. DAVIDSON: No, sir. No, sir. Hill's hasn't  
8 built anything.

9 THE COURT: Who -- there's another developer?  
10 There's another developer building?

11 MR. DAVIDSON: That's correct.

12 THE COURT: In Bernards.

13 MR. DAVIDSON: That's correct. I believe it's two  
14 developers.

15 THE COURT: Mr. Davidson, Hill's contends that they  
16 expanded sewer capacity to meet this settlement that  
17 they contend they have and built an access road to serve  
18 this in an adjoining municipality. How do you respond  
19 to those points?

20 MR. DAVIDSON: I don't believe they are accurate,  
21 your Honor.

22 THE COURT: Does that mean there's a --

23 MR. DAVIDSON: Hills has a sewer development plan  
24 in Bedminster.

25 THE COURT: The adjoining --

1 MR. DAVIDSON: The adjoining municipality.

2 THE COURT: Yes.

3 MR. DAVIDSON: Bedminster has a large development  
4 in it. We have -- in, in Bernards Township Hills owns  
5 approximately one thousand acres. Hills -- and let me  
6 back off a second.

7 They assume that they'll get no use of that at all  
8 in making that argument, no use of the Bernards Township  
9 land at all. Prior to, prior to this case having been  
10 brought they were going to get more than a thousand units  
11 in Bernards Township. In addition, the Bernards Township  
12 land is on top of a hill. The rest, the other part of  
13 their development is down below, the Bedminster part.  
14 The sewerage plant is down below. Also on top of the  
15 hill is a substantial amount of land in Bedminster that's  
16 going to use the sewer plant. In addition it's my under-  
17 standing, and I'm not fully involved in this, there is  
18 an enormous, a very substantial litigation before Judge  
19 Serpentelli deciding on how that sewer capacity should  
20 be used. There's a lot of people that are going to use  
21 that sewer capacity and some of those people want to  
22 use it to put in low or moderate income housing.

23 Secondly, the road. The road has to come up a hill  
24 in any event. They've got to get to the top of the hill.  
25 They've got approximately a thousand units in Bedminster



1 to do it. They, they, they can build that road -- if  
2 they don't build that road they can't develop the top  
3 of the property anyway, without regard to low or moderate  
4 income housing. I think everything that it mentioned  
5 they've had on the books for years, well prior to Mount  
6 Laurel II, that they had planned to do - the water cap-  
7 acity which I understand they raised originally and then  
8 got turned down by one of the towns, so that they did --  
9 they indicated they had to increase their water capacity.  
10 Well they don't even have that. The road, the sewer  
11 capacity - I can't remember the other items that they  
12 raised, but I, I don't think that, that any of them go  
13 to this situation.

14 Lastly, it assumes that they won't get to develop  
15 the, the Bernards Township property. They were granted  
16 a franchise to sewer the Bernards Township property some  
17 four or five years ago. They have a thousand units in  
18 that portion of the property which have to be sewered.  
19 It's, it's -- it's just a red herring. It's just --  
20 it's not the problem that they, that they say it is.

21 **THE COURT:** All of the material you just mentioned  
22 is factually in the record before us.

23 **MR. DAVIDSON:** Yes, I -- well -- those are my argu-  
24 ments as to what's going to effect. What's factually  
25 in the record is, is -- well I don't --

1 THE COURT: Well what's factually in the record  
2 are affidavits alleging that they expended certain sums  
3 of money to construct the road and to expand the capac-  
4 ity of the sewer plant that you are rebutting in this  
5 way.

6 MR. DAVIDSON: Well we denied it in the record too.

7 THE COURT: Yeah.

8 THE COURT: Mr. Davidson, in fact the sense of their  
9 argument is that there was a settlement negotiated back  
10 in the Fall of 1984 which prompted the enactment of Or-  
11 dinance 704 and the submission by Bernards to Judge Ser-  
12 pentelli of a request for immunity from further suit  
13 which was granted for 90 days initially and then extended,  
14 and apparently in reliance on those negotiations the  
15 litigation had come to a halt for a little more than  
16 12 months in anticipation of a settlement agreement being  
17 adopted by the Council, and as I read the briefs and  
18 affidavits submitted by Hills, their contention is that  
19 in reliance on that negotiated settlement which appears  
20 to be at least supported in part by some of the actions  
21 that Bernards took, they expended significant amounts  
22 of money, including a very large application fee, only  
23 to have the settlement rejected at the 11th hour. Could  
24 you tell us what your position is as to that?

25 MR. DAVIDSON: Yeah, I think you have the timing

1 wrong, your Honor. The settlement negotiations took  
2 place after we adopted the Ordinance, not before we adopted  
3 the Ordinance. The settlement negotiations took place  
4 in the Spring up into the Summer of this year. The case  
5 was never settled, and this is all in the affidavit,  
6 and frankly I don't really think it goes to what we're  
7 talking about. In any event, the settlement -- it was  
8 clear all along when we were talking about the case that  
9 a lot of these items that were being brought up were  
10 items that were going to have to be settled by the Town-  
11 ship and none of them involved Mount Laurel housing. -  
12 I won't say none, almost none of them involved Mount  
13 Laurel housing. They involved other things that we were  
14 talking about. We passed the Mount Laurel Ordinance  
15 in November of '84, they could have built in December  
16 of '84. They didn't need us to settle anything. They  
17 say right now that the Ordinance is good. I mean they  
18 are not any different than any other developer that  
19 comes along and, and you have an Ordinance in front of  
20 them and they plan to do something and the Ordinance  
21 gets changed. All they've done, according to them, is  
22 some planning and these different items that they say  
23 they've done which they say they've done which we con-  
24 test whether they've done relying on that Ordinance.  
25 And they take the position that they are relying not

1 on the settlement but on the settlement negotiation.  
2 Now that's very uncommon in my experience. Somebody  
3 is going to spend millions of dollars because we're neg-  
4 otiating with a town?

5 THE COURT: What significance attaches to the letter  
6 that counsel for Bernards wrote to the Trial Court in  
7 June of 1985 saying that, "the parties have arrived at  
8 an agreement to settle and conclude the above matter"?

9 MR. DAVIDSON: Well two, two significant -- one,  
10 it's overly optimistic. We did not settle the case.  
11 There were issues that they wanted and issues that we  
12 wanted and they did not -- we did not agree on them.  
13 The second thing happened is that while all this was  
14 going on the Fair Housing Act was passed.

15 THE COURT: But that -- I suspect that that was  
16 the material act that changed because the letter was  
17 in June, the Act was passed in July, and in August there's  
18 the refusal by the township committee to sign the --  
19 to complete the settlement. It seems to speak for itself  
20 that all that happened was the enactment of the statute.

21 MR. DAVIDSON: Well no, your Honor, but the settlement  
22 wasn't agreed on even at our level. It wasn't -- the  
23 Township -- we didn't have a proposed settlement and  
24 take it to them and say, "no, we're not going to sign  
25 it." It never got that far.

1 THE COURT: Well then that obliges me to ask the  
2 further question - why did you advise the Court that  
3 the matter had been settled?

4 MR. DAVIDSON: Because I thought it had been. I  
5 thought it was going to be.

6 THE COURT: The disputes between the town and the  
7 building were so minimal that you were confident enough  
8 to advise the Court that the matter had been settled.

9 MR. DAVIDSON: Yes, I guess I could say that.

10 THE COURT: Mr. Davidson, --

11 MR. DAVIDSON: However, the disputes did not turn  
12 out to be so minimal.

13 THE COURT: -- as I understand it, your position  
14 with respect to Hills, the money that they expended, you're  
15 not saying they didn't expend the money, you're just  
16 saying they didn't expend it on reliance of Ordinance  
17 704.

18 MR. DAVIDSON: Oh, let me back off that a little  
19 bit. I'll, I'll say they didn't expend the money too.  
20 They started the work on this road in October. Okay?  
21 The transfer motion was heard in early October. They  
22 hadn't built the water tower yet that they are talking  
23 about, the sewer plant has been there and if they are  
24 going to expand the sewer plant they're going to expand  
25 it for a lot of people. There's plenty of people

1 use that sewer plant.

2 THE COURT: So that you're contesting basically  
3 what they are saying in their affidavit.

4 MR. DAVIDSON: Yes, and I also am saying it's not  
5 relevant. If they have some type of protection because  
6 of monies they have expended, there's a line of cases  
7 that treats that issue. It has nothing to do with trans-  
8 fer motions. If we went to the transfer - let me go  
9 hypothetical - went to the council, the case was trans-  
10 ferred to the council, we modified our ordinance and  
11 put all our Mount Laurel housing in some other part of  
12 town --

13 THE COURT: I understand that but that's what confuses  
14 me as to whether you are saying -- that's another point.  
15 I want to know whether you think, first, their allegations  
16 that they spent the money is correct, then the second  
17 point is well whether they spent it or not may be not  
18 relevant to this issue.

19 MR. DAVIDSON: Okay. I, I, I honestly don't know  
20 what money they've spent. My, my experience in it is  
21 that it's all Johnny come lately expenses.

22 THE COURT: But it could have been expended for  
23 some of the Mount Laurel or under the Ordinance 704 and  
24 it might not necessarily only have been expended for  
25 other, for the other problems of a developer, so to

1 speak, in Bedminster, et cetera.

2 MR. DAVIDSON: I don't, I don't believe that's acc-  
3 urate. I don't believe that, that it would not have  
4 been expanded other than for --

5 THE COURT: What is your position as to the ultimate  
6 decision by this Court? In other words you have indic-  
7 ated your definition of manifest injustice and your con-  
8 clusion that it does not apply in Bernards Township case.  
9 Would it be fair for the Court, if it adopts the stan-  
10 dard that you argue for, to order a referral or a trans-  
11 fer to the Council, or would it be fairer to remand the  
12 matter to the Trial Court, setting forth the standard  
13 so that the issue of the manifest injustice could be  
14 tried pursuant to that statute?

15 MR. DAVIDSON: Well I think it's, it's -- in my,  
16 in my case I think that, that the, the -- it would be  
17 the better decision if the Court found my standard  
18 and ordered the case transferred. I just don't see any  
19 factual situation that, that could exist in my case which  
20 would result in the Court granting --

21 THE COURT: You think the facts in your case are  
22 sufficiently spelled out, you don't think testimony is  
23 required or anything like that.

24 MR. DAVIDSON: I do not, your Honor, no.

25 CHIEF JUSTICE WILENTZ: Does the Court have any  
further questions of Mr. Davidson?

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Is there any further point you want to make, Mr. Davidson?

MR. DAVIDSON: No, your Honor. Thank you.

CHIEF JUSTICE WILENTZ: Thank you.

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SUPREME COURT OF NEW JERSEY

TRENTON, NEW JERSEY

Docket No. A-122-85

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HILLS DEVELOPMENT COMPANY, :

Plaintiff-Respondent, :

-vs- :

TOWNSHIP OF BERNARDS, :

Defendant-Appellant. :

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TRANSCRIPT OF PROCEEDINGS

VOLUME II

January 6, 1986

IN ATTENDANCE:

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

APPEARANCES:

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

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

1 JANUARY 7, 1986

2 \* \* \*

3 CHIEF JUSTICE WILENTZ: Mr. Hill?

4 MR. HILL: Good morning. May it please the Court,  
5 my name is Henry Hill, I represent the Hills Develop-  
6 ment Company, the developer-plaintiff in the Bernards  
7 case.

8 The principle factual differences between the Bernards  
9 case and the other cases before you are, one, in Bernards  
10 we have an enacted ordinance currently in place, passed  
11 by the governing body during the pendency of litigation  
12 which, according to the Court appointed master, brings  
13 the town into compliance with Mount Laurel II; two, we  
14 have substantial reliance by the developer on that Ordin-  
15 ance and the Mount Laurel process, including, according  
16 to the developer's affidavit, over \$500,000 in planning  
17 and pre-start activities, about \$800,000 in road work  
18 which would not have been required without the existing  
19 Bernards zoning, and a bank loan of six and a half mill-  
20 ion dollars secured by the Bernards property as appraised  
21 under the existing zoning or Ordinance 704. The affid-  
22 avit further talks about sewer expansion and water infra-  
23 structure activity already -- and contracts already let  
24 to begin the construction process in Bernards.

25 Three, we have a pattern of representations made

1 both to the Plaintiff and to the trial Court that a settle  
2 ment had been reached. The Trial Court was prepared,  
3 based on its recollection of those representations which  
4 were made not only in this case but in a related action  
5 involving a developer called Spring Ridge, to either  
6 approve the settlement or, in the event Bernards chose  
7 to repeal 704 prior to the compliance hearing which this  
8 Court prevented through its stay, to order the master  
9 to come up with a new Ordinance and I quote Judge Ser-  
10 pentelli, "which would be 704 with some modifications,"  
11 and I refer the Court to the supplemental appendix of  
12 respondent 13A which is that portion of the transcript  
13 of the October hearing in which those remarks were made.

14 in other words we have a town which wants to go  
15 before the Affordable Housing Council only so it can  
16 repeal its compliance ordinance and prevent imminent  
17 Mount Laurel development from taking place.

18 CHIEF JUSTICE WILENTZ: Would you review the represent-  
19 ations please? Will you review the representations please,  
20 counsel?

21 MR. HILL: The --

22 CHIEF JUSTICE WILENTZ: You said there were sub-  
23 stantial representations involving the settlement.

24 MR. HILL: There were substantial representations.  
25 This Court has already questioned Mr. Davidson about

1 a letter to the Court. There were, there were repeated  
2 requests for stays and requests that an order, orders  
3 be entered to prevent other persons from suing Bernards  
4 Township under the Mount Laurel doctrine during the pen-  
5 dency of this litigation. In addition there was a case -  
6 Bernards, shortly after Mount Laurel II came down, real-  
7 ized that the zoning which they had provided after Mount  
8 Laurel I came down which were basically density increases  
9 for certain developers with no mandatory set asides and  
10 no requirements of low and moderate income housing would  
11 not credit them under Mount Laurel II, attempting to  
12 place mandatory set asides on, on certain developments  
13 without granting density bonuses, and one of those devel-  
14 opments already had an approval and came before Judge  
15 Serpentelli. The case is Spring Ridge Associates versus  
16 Bernards, and I, I guess Mr. Herbert of Stern, Herbert  
17 and Weinroth represented the developer in that case,  
18 and requested, the developer requested that the mandatory  
19 set asides not be required, that they had certain vested  
20 rights by reason of that their approval, that they were  
21 in the development process and they couldn't suddenly  
22 build low and moderate where, where they had more expensive  
23 housing planned for, and Judge Serpentelli basically -  
24 and he refers to it in the transcript of this case and  
25 in his opinion - basically said in view of, of Bernards'

1 representations that they have settled the case, that  
2 they are going to comply with Mount Laurel, that they  
3 are, their concurrence in allowing me to appoint a master  
4 -- "in other words in view of their good faith I'm going  
5 to reduce their fair share by 141 units," which was the  
6 number of units, and so when we came before the Judge  
7 with our settlement there was already this, this credit  
8 for -- in place. But representations were made in that  
9 action which the Judge refers to and he, he felt very  
10 strongly that, that - and I'm characterizing him. I,  
11 I think that you should review the transcript - that,  
12 that, that the Court was misled by Bernards Township  
13 when they decided to back out of the settlement, and --  
14 in other, in other words we have a town which wants to  
15 go before the Affordable Housing Council only so it can  
16 repeal it's compliant ordinance and prevent imminent  
17 Mount Laurel development from taking place. In addition,  
18 and this is true in a number of cases, we would have  
19 a final judgment today had this Court not stayed the  
20 compliance hearing. Hills has represented to the Trial  
21 Court that it was prepared to guarantee, barring cata-  
22 strophic developments, that it would build all 550 lower  
23 income units required of it under Ordinance 704 by 1990  
24 were it allowed to develop under the ordinance.

25 Applying the existing law, the Trial Court's

1 rationale in deciding against transfer of this case focused  
2 primarily on an analysis of which action would most exped-  
3 ite the production of lower income housing. THE Court  
4 also appeared to have been influenced by representations  
5 made by Bernards to the Court in return for stays and  
6 protection against other litigants, and I refer the Court  
7 to, to the transcript of Judge Serpentelli's decision.  
8 Hills argues, in addition to the standards relied on  
9 by Judge Serpentelli, that their reliance on both the  
10 ordinance and the overt actions of Bernards and on the  
11 substantive and procedural rules articulated in Mount  
12 Laurel II, reliance on existing law is a factor to be  
13 considered in construing the meaning of manifest injustice  
14 in the retroactive application of statute cases, and  
15 I refer the Court particularly to Gibbons versus Gibbons.  
16 Since there are competing factual allegations in this  
17 case - I, I noted that Mr. Davidson's recollection of  
18 the facts differs from mine and I suppose to some extent  
19 that is inevitable when this Court takes up interlocutory  
20 appeals where many of the allegations haven't been tried  
21 in full - we would suggest that the Court remand this  
22 case for factual determinations if this Court accepts  
23 as a matter of law reliance and estoppel arguments as  
24 relevant in making determinations with respect to manifest  
25 injustice, and we --

1 CHIEF JUSTICE WILENTZ: What kind of particular  
2 issues would you want factual testimony taken on? The  
3 extent of your expenditures and how they are related  
4 and caused by reliance on 704?

5 MR. HILL: That's, that's correct, your Honor, and  
6 reliance also on the existing law. We were in the process  
7 a Mount Laurel process. We had certain expectancies  
8 based on this Court's --

9 CHIEF JUSTICE WILENTZ: Well do they, do they all  
10 translate into money? In other words that's what I meant  
11 to suggest. Reliance on the existing law, including  
12 both the Mount Laurel II and the Ordinance 704.

13 MR. HILL: Well they, they translate into -- they --  
14 because my client is a business everything it does can,  
15 can be --

16 CHIEF JUSTICE WILENTZ: I don't mean to, I don't  
17 mean to minimize it, I'm just asking a question.

18 MR. HILL: -- can be quantified in terms of money,  
19 yes. Yes, I would, I would suggest that, that under  
20 the, the case law analyzing manifest injustice as it  
21 applies to retroactive statutes --

22 THE COURT: With respect to that standard, how firm  
23 is the argument that reliance on established law justified  
24 the Court in concluding that that reliance should be  
25 considered being tantamount to having vested rights?

1 MR. HILL: Well --

2 THE COURT: The law that is relied upon is basic-  
3 ally the law that this Court suggested be employed follow-  
4 ing Mount Laurel II. Is that correct?

5 MR. HILL: That's correct, yes.

6 THE COURT: But nevertheless, even within that decis-  
7 ion there is clear recognition by the Court that the  
8 legal standards that the Court prescribed could very  
9 well be modified or supplanted by legislation, so that  
10 any reliance by parties on the Mount Laurel II doctrine  
11 would necessarily be, it could be argued, contingent  
12 upon what action the legislature might take.

13 MR. HILL: Your, your Honor, I think that the meaning  
14 of the term "manifest injustice" is, is, is obviously  
15 an equitable standard of some kind, and we don't need  
16 to say that Hills had acquired vested rights in order  
17 to conclude that, that it would be inequitable to trans-  
18 fer them in view of their reasonable reliance and estab-  
19 lished procedures and policies and pre-existing law which --

20 THE COURT: Well you could argue that the reliance  
21 is reasonable. Could it not also be argued that what,  
22 what is involving here is something of a high stakes  
23 legal gamble? That a developer seeking to secure the  
24 profitability of a development sees fit to bring a  
25 Mount Laurel suit or include a Mount Laurel element



1 to it's zoning claim against the municipality, well under-  
2 standing that the ground rules under which it was proceedi  
3 could be changed by legislation. Isn't that in a sense  
4 a high stakes legal gamble as much as it is reasonable  
5 reliance?

6 MR. HILL: I think we're getting into the same argu-  
7 ment that we got into with Mr. Bizgaier. I think yes,  
8 any business decision is a -- to spend money on a course  
9 of action which may be predictable by reading the case  
10 law is a high stakes legal gamble. On the other hand,  
11 this Court invited and has made the constitutional doct-  
12 rine first enunciated in Mount Laurel I work for the  
13 first time by, by driving -- by marrying the profit motive  
14 with the, with the private attorney General notion that,  
15 that, that developers should bring these cases, and Hills,  
16 just as many other developers, responded to this Court's  
17 invitation to vindicate a constitutional right and to  
18 a certain extent my credibility as a member of the Bar  
19 depends on, as well as the credibility of 40,000 other  
20 lawyers that are licensed in this State --

21 THE COURT: To the extent the suggestion is made  
22 that the reliance is not to be considered as reasonable  
23 reliance, at least in terms of the doctrine of retroact-  
24 ivity which imports the notion that no one would expect  
25 the law that was relied upon to be changed, and when

1 the change came the change was abrupt, it was wholly  
2 unexpected and it, and it wiped out any expectations  
3 that were otherwise developed on the established law,  
4 which is arguably very different from what has occurred  
5 in the context of the Mount Laurel doctrine and the  
6 Mount Laurel law where everyone, I think, reasonably  
7 anticipated the law would remain somewhat in a state  
8 of flux until ultimately settled, so that one could argue  
9 that the reliance might have been understandable but  
10 not necessarily reasonable from the standpoint of the  
11 retroactivity doctrine. This doesn't mean that the extent  
12 of economic harm is something that shouldn't be considered,

13 MR. HILL: Well --

14 THE COURT: -- so that wholly apart from the reason-  
15 ableness of the reliance, aren't you really remitted  
16 to the extent to which your client has seriously and  
17 perhaps irreparably gone out of pocket and shouldn't  
18 that be the primary consideration in terms of the manifest  
19 injustice doctrine?

20 MR. HILL: Well I think that reliance is twofold:  
21 one, there was reliance on an existing ordinance enacted  
22 by the municipality after public debate rezoning 500  
23 acres of Hills land to 5 1/2 units per acre, and coming  
24 before the Court and saying, "look, we've done this,  
25 we want to comply with Mount Laurel, we're requiring  
them to do mandatory set-asides," that was one aspect

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

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

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

1 the Township, I think the Township made it clear enough  
2 that, that if they can transfer they will repeal this  
3 ordinance and, and go before the Affordable Housing Council  
4 without a compliance plan, and what we're seeking is,  
5 on one hand, either that the Trial Court be affirmed  
6 or, on the other hand that, that, that any transfer be  
7 made subject to the condition that the Ordinance which  
8 they enacted and which represents their only compliance  
9 plan remain in effect.

10 I'd like to just talk about that Ordinance a minute  
11 because I think it's important that the Court understand  
12 the, the degree that, that the compliance plan of Bernards  
13 is, is dependent on Hills' action.

14 THE COURT: Mr. Hill, could I just interrupt for  
15 one second? Could you clarify one thing for me that  
16 I have difficulty understanding? The Ordinance was adopted  
17 somewhere around October or November of 1984, as I under-  
18 stand and that was about the time that Judge Serpentelli  
19 first entered an order staying litigation. I assume  
20 that the expenditures, particularly that large applic-  
21 ation fee of 300 some odd thousand dollars, was incurred  
22 after the --

23 MR. HILL: \$74,000 I believe..

24 THE COURT: \$74,000 was the fee and \$300,000 was  
25 the --

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MR. HILL: \$250,000 was the cost and consultant's fees and preparing the application.

THE COURT: All right. What I don't understand is why didn't, why didn't you wait until the settlement agreement was signed before incurring that kind of expense

MR. HILL: Well on, on one hand there's -- on one hand Bernards is arguing that we didn't do enough, we sat on our rights for a year after they passed the Ordinance, why should we be here today arguing, we should have done more earlier, and then on the other hand they are arguing that we foolishly relied and did too much and, and shouldn't -- in fact Bernards asked us not to apply piece mail until the Ordinance, or the compliance package was fine tuned. What the Court should understand was there were three parties to the settlement. There was a Court appointed master. The Court appointed master attended most of the meetings between Bernards officials and Hills, he went independently before the Bernards Township committee to explain provisions of the settlement, he reported to the Court. I don't know all the settlement discussions had to be acceptable by him, to him because it was clear that Judge Serpentelli was taking the view that a Mount Laurel settlement was a public interest settlement that was, couldn't simply be, be achieved by two parties, a developpr and a town.

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As the Court has remarked in Mount Laurel II, such settle-  
ments might easily leave out the lower income benefic-  
iaries and, and --

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

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

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

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

1 ment on top for only \$800,000, so that, you know, two  
2 extra lanes went in in view of the 2750 units provided  
3 for that would be coming down to the 287 intersection.

4 I think it's important also that the Court under-  
5 stand the magnitude of the numbers. The master's fair  
6 share report indicates that Bernards fair share is  
7 1509 units. Incidentally, Bernards has calculated it  
8 independently at 1525 units which indicates how fine  
9 tuned the AMG methodology really is.

10 The Ordinance, Ordinance 704 provides for, according  
11 to the master's report, 839 new units. The master --  
12 of which 369 are low and 470 are moderate. The compliance  
13 plan gives Bernards credits - they are called in the  
14 Mount Laurel trade soft units - of 670 units. Basically  
15 they get, they got 20 percent bonus for settling voluntar-  
16 ily in good faith which 20 -- which is about 300 units.  
17 They got an additional 141 units because of the problem  
18 with Spring Ridge. They also got another additional  
19 140 units because, in the master's words, "Bernards had  
20 tried to comply with the Mount Laurel I," in Oakwood  
21 at Madison and basically had rezoned certain areas for  
22 higher density without further action, and so the --  
23 out of the total fair share of 1509 units only 839 are  
24 really new units that would exist. Out of that Hills  
25 is providing 550. That's 66 percent of the total low

1 and moderate units for Bernards, it's 75 percent of the,  
2 of the low income units in fact because some of the other  
3 developments were only building moderate. That's signif-  
4 icant because it costs significantly more for a developer  
5 to subsidize a low income unit than a moderate income  
6 unit. What I'm, what I'm trying to point out is that  
7 what's at stake here is, is not just Hills Development  
8 Company but 66 percent of the compliance plan of Bernards,  
9 or more if you value the low income units as, as, as  
10 worth more.

11 We -- Hills -- again Hills argues that it should --  
12 that the Trial Court's decision should be affirmed or,  
13 in the alternative, that the case should be transferred  
14 with a condition that Bernards not repeal it's existing  
15 ordinance which represents a considered action by the  
16 governing body. Then before Ordinance 704 was passed  
17 there were public hearings in Bernards and, in many alter-  
18 natives were discussed and, and on balance if Bernards  
19 was going to have to comply with Mount Laurel II it chose  
20 to comply along the Bedminster border where the traffic  
21 went into Bedminster and where the zoning right across  
22 the line was 8 units per acre and Hills accepts the 5  
23 1/2 unjts per acre and is, is knowledgeable in the process  
24 of building Mount Laurel low and moderate income housing  
25 and, and would like to go ahead with a development



1 and we feel that the application for a transfer is --

2 THE COURT: Is the property subject to 704, almost  
3 all of it owned by Hills? In other words is 704 applic-  
4 able to Hills property solely?

5 MR. HILL: No. Ordinance 704 concerns, also involves  
6 four or five other properties which make up in balance  
7 the, the other third of the fair share. There, there's  
8 an analysis of that in the master's report which is in  
9 the appendix.

10 THE COURT: Do you have any opinion as to the effect-  
11 iveness of the various financial devices that are provided  
12 for in this act?

13 MR. HILL: I, I was thinking about that. Hills  
14 was the recipient of a 9 million dollar set aside in  
15 Bedminster which is exactly -- when the public advocate  
16 was discussing the pool of 125 million that would be  
17 eligible for subsidizing low and moderate from the MFA.  
18 That 9 million built and was sufficient to provide for  
19 260 lower income units at Hill, so --

20 THE COURT: That's a 9 million dollar what? Is  
21 that a --

22 MR. HILL: Well it was set aside as available by  
23 the MFA as available for low and moderate income home  
24 buyers at Hills in Bedminster. It --

25 THE COURT: But available in what way?

1 MR. HILL: Available for purch -- for them to use  
2 to purchase homes.

3 THE COURT: Pardon me?

4 MR. HILL: For them to use to purchase homes. The,  
5 the --

6 THE COURT: In other words loan money to buyers  
7 or is it grant money to buyers?

8 MR. HILL: It, it was loan, it was loan money to  
9 buyers. The, the interest rate was about 3 points below  
10 the prevailing interest rate which meant that the carry-  
11 ing costs was 20 to 25 percent less than they would other-  
12 wise have had to have been, given the cost of money.  
13 The 9 million-dollars - it provided 95 percent mortgages,  
14 i.e., someone, -- the down payments were very minimal  
15 and, and it's hard for lower income people to come up  
16 with any down payment but to buy a home today with a  
17 down payment in the neighborhood of \$1,000 or \$1,500  
18 was a remarkable event and what that indicates to me  
19 is that a pool of 125 million dollars is, would subsidize  
20 about 3000 units as opposed to 300 units mentioned by  
21 the public advocate. Again these -- that's assuming  
22 that these units were used in conjunction with the man-  
23 datory set aside where the builder had already brought  
24 down that was delivering units, as Hills did, below its  
25 cost to the lower income persons.

1 THE COURT: In other words it needs the mandatory  
2 set aside as well as the low interest loan money.

3 MR. HILL: Yes, if, if --

4 THE COURT: The low interest loan money without  
5 mandatory set aside, in other words without the financial  
6 advantage of being able to produce for market value units  
7 for every -- lower income units will do what?

8 MR. HILL: Well the Hills units would have sold  
9 for approximately twice as many dollars had they not  
10 been required to bring them down to comply with Mount  
11 Laurel II, i.e., a \$30,000 unit would have sold for about  
12 \$60,000 in the market place which, which would indicate  
13 to me that without the mandatory set aside the effect  
14 of \$125,000,000 would be about half as much as it would  
15 otherwise be.

16 In terms of the State fair share as a whole, most  
17 of the projections -- the pool that's, that's being divided  
18 in the Warren AMG methodology is about 230 to 250,000  
19 lower income units needed by the year 1990. It, it appears  
20 that \$125,000 -- if, if -- \$125,000,000, if used in con-  
21 junction with a mandatory set aside, would, would sub-  
22 sidize about 1 1/2 percent of that pool of units needed  
23 statewide.

24 THE COURT: Mr. Hill, you've demonstrated a high  
25 degree of expertise in describing how a major developer

1 goes forward with a project like this. The impression  
2 that comes through, at least to this member of the Court,  
3 is that there is, to a certain extent, a very high level  
4 poker game going on between the municipality and the  
5 builder with one party playing cards very close to it's  
6 vest, another party, in your words, playing it's hands  
7 to build in vested rights with the idea of going back  
8 on remand to develop a record on the issue of reliance,  
9 and you presented in the context as if it's almost an  
10 all or nothing game - either you get the units from the  
11 Court or you don't get them at all. My question is this:  
12 if you had to play your hand before the Council what  
13 would, what would you urge the Council to do to preserve  
14 the kinds of housing allocation that's been described  
15 in the master's report? Would you urge the Council that  
16 there's a builder's remedy? Would you-- just what do  
17 you think the Council could do for you?

18 MR. HILL: Well if, if you want to describe it as  
19 a game, before the Court's with Mount Laurel II, there  
20 ~~has been~~, there have been a number of settlements. It's  
21 ~~been possible~~ to achieve production of housing because  
22 this Court had said certain things and, and, and the  
23 municipality was aware that there were certain consequences.  
24 My problem with, with the Council scenario is that there  
25 are no consequences. To talk about mediation and

1 review -- mediation of, of housing disputes --

2 THE COURT: Let's put that to the side. What do  
3 you think -- the Mount Laurel II doctrine had teeth in  
4 it and that's why I suspect you succeeded as you have  
5 in other municipalities and why you progressed as far  
6 as you have in this one. What do you think the Council  
7 does the Council have no teeth at all?

8 MR. HILL: I don't think the Council has any teeth  
9 at all. I think the perception is that -- the municipal  
10 perception was that we have to get Mount Laurel out of  
11 the Courts because they, they are intent on pursuing  
12 the constitutional goal and you can't talk to the Courts,  
13 and I think that they tried to set up an agency which  
14 is, you know, politically responsive to its constituency  
15 and, you know, I fear that, that, that the, the very  
16 numbers that we're talking about, that, that there will  
17 be great dilution of constitutional rights. You know,  
18 if there is a need today or by the year 1990 for 250,000  
19 units statewide and if the Council determines, for in-  
20 stance, that that's much too big a number, we think  
21 50,000 units statewide is better, you are, you're choosing  
22 to shelter one in five of, of, of the low and moderate  
23 income population that, that the experts say will need  
24 that housing. It seems to me it's not any different  
25 than a Court deciding that we'll let half of some minority

1 group vote because there will be chaos if we let them  
2 all vote.

3 THE COURT: Other than that kind of possibility  
4 which, I take it, you would not expect us to assume in  
5 deciding this matter, namely that there will be some  
6 intentional diminution of need in order to diminish the  
7 impact of the constitutional obligation - or would you  
8 suggest that we assume that?

9 MR. HILL: Well I -- you know, I --

10 THE COURT: You're just responding to the question,  
11 I take it.

12 MR. HILL: I know --

13 (LAUGHTER)

14 MR. HILL: You know, I know what was attempted to  
15 be created and I assume that it's creators were success-  
16 ful, and it quacks like a duck and it walks like a duck  
17 but we really can't call it a duck until it --

18 THE COURT: Well I don't think it quacked or walked  
19 yet, but --

20 (LAUGHTER)

21 THE COURT: You say the Council has no teeth. If  
22 you mean that in the sense that you just described, namely  
23 that what's going to happen in your view is in determin-  
24 ing the total need it will be greatly diminished, then  
25 I understand what you're saying. If you mean it to

1 say that in going through the process there are no teeth,  
2 I assume the teeth exist in the form of a potential remand  
3 to the Court and continuation of a Mount Laurel type  
4 of litigation.

5 MR. HILL: Yes, in the long run we can come back  
6 to the Courts but in the long run of course we're all  
7 dead, and --

8 THE COURT: Well it's not quite that long if you  
9 take care of yourself. In other words the -- if the,  
10 if the Council decides sincerely that it wants to provide  
11 this opportunity, and I suggest to you that the Court  
12 at least is required to make that assumption, it presum-  
13 ably will not give substantive certification unless there's  
14 a realistic opportunity in a municipality's proposal  
15 for the fair share of lower income housing needed in  
16 the region. It may very well, as some have suggested,  
17 have to include a mandatory set aside in that. It may,  
18 perhaps at, as some suggested, include a builder's remedy,  
19 in other words a set aside for a particular developer.  
20 If the municipality doesn't buy that, and presumably  
21 you would know that within two years - that's your survival  
22 requirement - I assume that is not completely toothless.

23 MR. HILL: Well it's very difficult. I, I -- Hills  
24 Development Company, as an example, is building housing  
25 at the rate of 1000 units per year today. It took them

1 four or five years to just get the staff and be able  
2 to do that. They have a terrific housing market --

3 THE COURT: What you're saying is that two years  
4 may end the project as far as you are concerned.

5 MR. HILL: Yes. Four years ago I was at meetings  
6 with, with government talking about the fact that the  
7 housing business in New Jersey was in the doldrums, what  
8 could we do --

9 THE COURT: So it would only have teeth if there  
10 is some actual developer around who is going to carry  
11 the torch, assuming the administrative attempt fails.

12 MR. HILL: Well it, it takes a great deal of money,  
13 it takes a track record to get the money, it takes --  
14 a, a housing development is, is very much like a train -  
15 once it gets going it works very very well, but you can't  
16 decide tomorrow to build housing somewhere. The sewer  
17 plant is built for this housing to come on line. There  
18 was a lot of reliance. It -- you know, Mount Laurel  
19 is working very very well in the Somerset hills because  
20 the housing and the mandatory set aside program is working  
21 very very well because the housing market is so strong  
22 and many -- I believe Hills produced the first 260 Mount  
23 Laurel II units in the State.

24 CHIEF JUSTICE WILENTZ: Justice Pollock, did we  
25 get that card game straightened out?



1 THE COURT: Yes, go ahead.

2 MR. HILL: Anyway I, I -- it's very hard for me  
3 to tell my client that he should lay off 300 people and  
4 wait two years because, because it takes him months and  
5 years to, to build an organization capable of, of con-  
6 structing housing, and that's the problem with this bus-  
7 iness.

8 CHIEF JUSTICE WILENTZ: Does the Court have any  
9 further questions of Mr. Hill?

10 Thank you.

11 \* \* \*

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13  
14 CERTIFICATION

15 I, ALBERT ADLER, a Transcriber approved by the Adminis-  
16 trative Office of the Courts of New Jersey do hereby certify  
17 that the foregoing Transcript of Proceedings in the matter  
18 of Hills Development Company versus Township of Bernards heard  
19 in the Supreme Court of New Jersey on January 6 and 7, 1986  
20 and recorded on Tape 1/6/86 AM-A index 0053 to 1175 and 1/7/86  
21 ~~AM-A~~ index 0769 to 2109 is true and accurate to the best of  
22 my knowledge and ability.

23 Dated: 4/3/86

  
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24  
25 RM