RULS-AD-1986-70

2/20/86

Bernards Notice of Cross motion for Order Vacating Order of 12/12/85 & Opposition to Motion to Reverse Planning Board

Pgs. 61

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OF COUNSEL
FRANK J. VALGENTI, JR.

February 20, 1986

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

Re: The Hills Development Company v. The Township of Bernards, et al
Docket No. L-030039-84 P.W.
(Mount Laurel II)

Dear Judge Serpentelli:

In connection with a motion returnable February 28, 1986, at 1:30 p.m., before Your Honor, we enclose the following papers on behalf of defendants:

1. Copy of Notice of Cross-Motion;

2. Copies of Certifications of Harvey S. Moskowitz, Peter A. Messina, Harry M. Dunham, John Hoare, and Howard P. Shaw;

3. Original and one copy of Brief;

4. Original and two copies of proposed Order;

5. Transcript of November 22, 1985 motion hearing.

By copy of this letter, we are filing the original Notice of Motion and Certifications with the Clerk of the Superior Court, and we are serving copies of All papers except the transcript upon counsel for Hills (the transcript was previously served upon Hills'

attorneys in connection with Supreme Court proceedings in this action).

Very truly yours,

Howard P. Shaw

HPS:no
Encl.
cc: Clerk, Superior Court
Henry A. Hill, Esq. (by Hand)
Arthur H. Garvin, III, Esq.

FARRELL, CURTIS, CARLIN & DAVIDSON
43 Maple Avenue
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN COUNTIES

(MOUNT LAUREL II)

THE HILLS DEVELOPMENT COMPANY,	:	
Plaintiff,	:	
vs.	:	Docket No. L-030039-84 P.W.
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.	:	NOTICE OF CROSS-MOTION

TO: Henry A. Hill, Esq.
Brener, Wallack & Hill
Attorneys for Plaintiff

PLEASE TAKE NOTICE that on February 28, 1986, at 1:30 p.m. or as soon thereafter as counsel can be heard, the undersigned attorneys for defendants will cross-move before the Honorable Eugene D. Serpentelli at the Ocean County Court House for an Order vacating the Court's Order dated December 12, 1985, in this matter.

In support of this cross-motion, we will rely upon the accompanying brief and certifications, as well as briefs submitted in opposition to plaintiff's previous motion to enjoin enactment of an ordinance.

A proposed form of Order also accompanies this Notice.

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

By Howard P. Shaw
Howard P. Shaw

KERBY, COOPER, SCHAUL, & GARVIN
Attorneys for Defendant, Planning Board of Bernards Township

By Arthur H. Garvin III
Arthur H. Garvin, III

Dated: February 19, 1986

PROOF OF SERVICE

I certify that on February 20, 1986, I caused this Notice of Motion and the accompanying Certifications, Brief and Order to be served and filed by hand as follows:

Clerk of the Superior Court:
Original Notice of Motion
Original Certifications

Clerk of Ocean County:
Copies of above
Original Brief
Original and two copies of Order

Henry A. Hill, Esq.:
Copies of All papers.

James E. Davidson, Esq.

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

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET/OCEAN COUNTIES

(MOUNT LAUREL II)

THE HILLS DEVELOPMENT COMPANY,	:	
Plaintiff,	:	
vs.	:	Docket No. L-030039-84 P.W.
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.	:	CERTIFICATION OF HOWARD P. SHAW OPPOSING MOTION TO REVERSE PLANNING BOARD

I, Howard P. Shaw, certify as follows:

1. When enacted, Bernards Township Ordinance #746 contained a technical error in its reference to this court's Order of December 12, 1985. That error concerned the date when said Order authorized the Township to apply to the court to modify the terms of said Order. Attached to this Certification as Exhibit A is a copy of Ordinance #756, adopted by the Township Committee in order to correct that technical error in Ordinance #746. The attached copy was furnished by the Township Clerk.

2. Attached to this Certification as Exhibit B is a copy of the proposed form of Order as submitted by counsel for Hills following the November 22, 1985 motion hearing before this court.

3. Attached to this Certification as Exhibit C is a copy of my letter of December 6, 1985, to the Honorable Eugene D. Serpentelli, objecting to plaintiff's proposed Order because it omitted the word "pending". This letter was drafted and mailed before I received Thomas Carroll's letter of December 6, 1985, and not "Thereafter" (plaintiff's brief, page 6).

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

Howard P. Shaw

Howard P. Shaw

Dated: February 19, 1986

Bernards Twp.

ORDINANCE 756

AN ORDINANCE OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF BERNARDS AMENDING ORDINANCE 746 WHICH PROVIDES FOR THE CONCEPTUAL APPROVAL OF DEVELOPMENT PLANS FOR RESIDENTIAL CLUSTER DEVELOPMENT AND PLANNED DEVELOPMENT.

WHEREAS, Section 707(E) of the Land Development Ordinances of the Township of Bernards is contrary to the statutory approval procedures for preliminary and final subdivision and site plan approvals and

WHEREAS, Ordinance 746, which amended Section 707(E), was duly read and passed on final reading and adopted at a meeting of the Township Committee of the Township of Bernards on December 26, 1985; and

WHEREAS, it is necessary to amend Ordinance 746 to more accurately reflect the time frame within which the order of the Superior Court of New Jersey, Law Division, as more specifically set forth in Ordinance 746, shall remain in effect;

NOW, THEREFORE BE IT ORDAINED that a portion of Section 707(ED)(b) of the Land Development Ordinances of the Township of Bernards, as set forth in Ordinance 746, is hereby deleted and repealed and is replaced with the following:

"(b) a period of 95 days from December 3, 1985 (which is March 8, 1986). . . ."

This ordinance shall take effect immediately upon final passage and publication in accordance with law.

Passed on first reading January 14, 1986

PUBLIC NOTICE

Notice is hereby given that the above ordinance was duly read and passed on final reading and adopted at a meeting of the Township Committee of the Township of Bernards in the County of Somerset, held on the 28th day of January, one thousand nine hundred and 86.

Bernards Township Committee
Sandra J. Harris
Mayor

Dated: January 29, 1986
Attest:
James T. Hart
Township Clerk

2/6/T1

EXHIBIT A

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

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

This matter having been opened to the Court by Brener, Wallack and Hill, attorneys for Plaintiff, The Hills Development Company, Henry A. Hill, Esq. appearing, in the presence of Farrell, Curtis, Carlin & Davidson, attorneys for Defendants, Howard P. Shaw, Esq. appearing, and the Court having reviewed the Plaintiff's motion on short notice and the moving and responding briefs, affidavits and exhibits submitted with respect thereto and having considered the arguments of

counsel, it is on this _____ day of _____, 1985 ORDERED that Plaintiff's application to modify the stay issued in this matter is granted insofar as the Defendant Township Committee may proceed to adopt an ordinance modifying Section 707 (E) of the Bernards Township Land Development Ordinance provided that such an ordinance expressly provides that any modification of Section 707 (E) shall be inapplicable to a Conceptual Approval Application submitted by Plaintiff pursuant to Section 707 of said Land Development Ordinance.

IT IS FURTHER ORDERED that the relief ordered herein shall remain in effect until such time as the New Jersey Supreme Court resolves the Defendant Township's appeal which appeal has been certified to the Supreme Court provided, however, that the Defendant Township may apply to this Court to modify the terms of this Order on or about the 90th day of the time frame for application approval set forth in Section 707(D)(1) of the Bernards Township Land Development Ordinance.

_____
Eugene D. Serpentelli, A.J.S.C.

December 6, 1985

Hon. Eugene D. Serpentelli, A.J.S.C.
Ocean County Court House
Toms River, New Jersey 08753

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

Dear Judge Serpentelli:

After mailing my letter of objection, dated December 5, 1985, I realized that there is one other objectionable aspect of plaintiff's proposed Order.

The proposed Order would require the ordinance to provide that it "shall be inapplicable to a Conceptual Approval Application submitted by Plaintiff pursuant to Section 707 of said Land Development Ordinance." Your Honor's ruling was that the amendment should be inapplicable to "the pending" conceptual approval application of plaintiff, and we submit that the words "the pending" should be substituted for the word "a".

The significance of this change is that either (a) following its review of the pending application, it is possible that the Planning Board might find the application to be unacceptable, and might therefore reject it, or (b) Hills might, for any number of reasons, withdraw the pending application and/or submit a different one. If either circumstance occurs, any subsequent application by Hills would not be "the pending" application, and should not be protected by the instant Order.

I note that my raising the possibility of a rejection by the Planning Board does not indicate that any such determination has

EXHIBIT C

been made. On the contrary, I have not discussed the application with any member of the Planning Board and I have no knowledge of which members, if any, have even reviewed the application. I mention it only to point out that the mere fact that Mr. Hill's client has submitted an application does not automatically require that such application be approved. I am sure that this application will receive no different treatment from any other application by any applicant.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON

By: Howard P. Shaw

HPS:nmp

cc: Thomas F. Carroll, Esq.
Arthur H. Garvin, III, Esq.

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.	:	

BRIEF OF DEFENDANTS IN OPPOSITION TO MOTION TO REVERSE PLANNING BOARD, AND IN SUPPORT OF CROSS-MOTION TO VACATE ORDER OF DECEMBER 12, 1985

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of Bernards

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Township of Bernards, Township
Committee of the Township of
Bernards, and Sewerage
Authority of the Township of
Bernards

On the Brief:

HOWARD P. SHAW, ESQ.
JAMES E. DAVIDSON, ESQ.
ARTHUR H. GARVIN, III, ESQ.

PRELIMINARY STATEMENT

This Preliminary Statement is based upon affidavits submitted upon the present motions and previous motions in this matter, and upon other matter appearing in the record of this case.

On its present motion, Hills asks this court to reverse and remand the action of the Planning Board in rejecting an application for approval of a conceptual plan under Bernards Township Land Development Ordinance (BTLDO) Section 707.

The conceptual application in question was filed with the Planning Board October 17, 1985. This was nearly eleven months after Bernards Township enacted Ordinance #704, which almost tripled Hills' density and imposed a Mount Laurel set-aside. It was also after the Fair Housing Act was passed, after Hills perceived that the Act might result in a lower fair share number for Bernards and therefore lower set-aside and density bonus for Hills, and after Bernards filed a motion to transfer to the Affordable Housing Council.

Hills' conceptual approval application was deemed to be complete on December 3, 1985. At a meeting of the Planning Board's Technical Coordinating Committee (TCC) on December 17, 1985, the TCC and representatives of Hills discussed the conceptual plan, and concurred that the plan failed to satisfy the BTLDO and failed to satisfy sound planning principles, and that the deficiencies in the plan necessitated substantial

changes to the plan. (Certification of Harry M. Dunham, 3; TP* 17-6 to 17; TP 18-4 to 8; TP 18-19 to 24; TP 24-21 to 24; TP 35-16 to 25; TP 37-3 to 4.) The Chairman of the Planning Board was of the opinion that the necessary changes were so substantial that they would entail the preparation of a new conceptual plan. (Dunham Certification, ¶4.)

Planning Board members were asked to review the conceptual plan in anticipation of a meeting on January 7, 1986. (Dunham Certification, ¶¶5-6; Certification of John Hoare, ¶3.)

Although neither Municipal Land Use Law (MLUL; N.J.S.A. 40:55D-1 et seq.) section 10.1, nor BTLDO §707, requires any hearing upon a conceptual plan or provides for the taking of any testimony, counsel for the Planning Board did notify counsel for Hills, at least four days before the January 7 meeting (Certification of Guliet D. Hirsh, ¶6) that the Hills' conceptual plan was on the Planning Board's January 7 agenda.

Prior to the meeting, the Township's Planner and Engineer had furnished written memoranda to the Planning Board listing defects in Hills' conceptual plan (Certifications of Harvey Moskowitz and Peter Messina; TP 3-1 to 4; TP 12-12 to 14.) At the meeting, Mr. Moskowitz and Mr. Messina orally recapped at length their evaluations of the conceptual plan.

Opportunity was afforded for those members who so desired to express their personal comments on the plan. Those who

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* "TP" denotes the unofficial Planning Board transcript, attached to Plaintiff's Brief as Exhibit E.

wished to do so, did. (TP 15-2 to 8; TP 15-11 to 16; TP 27-6 to 15; TP 39-9 to 22.) The members who spoke endorsed the reasons for rejection of the conceptual plan which the Planner and Engineer had noted. The members described the plan as "far miss[ing] the mark" (TP 27-12) and as "an abomination" (TP 15-6 to 7).* The Board voted unanimously, with one abstention, to reject Hills' conceptual plan (TP 39-15 to TP 40-16.)

Hills' conceptual plan violated the BTLDO in several respects, and exhibited very poor planning in other respects. (Moskowitz and Messina Certifications.) By letter dated February 4, 1986, the Planning Board, through its Chairman, stated in writing to Hills the reasons for its denial of Hills' conceptual plan. (Dunham Certification, ¶7 and attachment.)

Other pertinent facts will be addressed in context in the body of this brief.

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* Hills' allegation that "No deliberations...occurred in public" (brief, pg. 14) obviously is factually wrong. Consequently, defendants have not seen a necessity to respond to Hills' legal arguments on that point.

POINT I

THE ORDER OF DECEMBER 12, 1985, IS MOOT AND SHOULD BE VACATED

At the November 22, 1985, motion, the court stated from the bench its interim order, including that:

> "The municipality may perceive [sic-proceed] to adopt a form of ordinance which will eliminate the vesting provision so long as it is not applicable to Hills' development's pending application ... ." (TM 54-20 to 24)*

When Hills submitted its proposed form of Order (Shaw Certification, Exhibit B), it simply provided that such ordinance must not apply "to a Conceptual Approval Application submitted by Plaintiff pursuant to Section 707 of said Land Development Ordinance."

In one of their letters objecting to the form of that Order (Shaw Certification, Exhibit C), defendants' counsel noted the discrepancy between the court's oral order and the language proposed by Hills. Counsel observed that if the pending application were either rejected by the Planning Board or withdrawn by Hills,

> "any subsequent application by Hills would not be 'the pending' application, and should not be protected by the instant order."

Counsel proposed that the court replace the phrase "a Conceptual Approval Application" with the phrase "the pending Conceptual

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* "TM" denotes Transcript of the November 22, 1985 Motion, attached to this Brief.

Approval Application."

When the court entered its Order, dated December 12, 1985 (Exhibit C to Plaintiff's Brief), it did delete the indefinite article "a" and substituted the specific description,

> "the Conceptual Approval Application submitted by Plaintiff pursuant to Section 707 of said Land Development Ordinance on October 17, 1985, and deemed complete on December 3, 1985."

From the court's oral Order, from the court's written Order, and from the sequence of correspondence in between, it is apparent that the interim injunctive relief afforded by the court was designed to protect only the specific application for conceptual approval which was pending before the Planning Board at the time that proposed Ordinance 746 was introduced. Only that specific concept plan, which Hills claimed to have prepared in reliance upon the unamended Section 707 of the BTLDO, was to be insulated (while the court studied the issues) from the alleged effects of the proposed amendment to Section 707.

That pending concept plan has now been rejected by the Planning Board. At the meeting where that rejection was voted, plaintiff's counsel repeatedly admitted that plaintiff intended to change the pending application (TP 17-6 to 17; TP 18-4 to 8; TP 18-19 to 24; TP 24-21 to 24) and plaintiff's principal, Mr. Kerwin, made the same admission (TP 35-16 to 25; TP 37-3 to 4). Plaintiff's counsel indicated willingness to withdraw the pending application if (contrary to the language and intent of the December 12 Order) a subsequent application for conceptual

approval would be exempt from the amendment of Section 707, and if Hills were assured of getting vested rights if such subsequent conceptual application were approved (TM 32-14 to 22).

Thus, precisely the contingencies anticipated in defense counsel's letter of December 6 have occurred. The Planning Board has rejected the pending application, and Hills has as much as admitted that it intended to submit, and to have the Planning Board review, a different application from the one pending before the Board. The December 12 Order was designed to protect only the pending application, and that application is now defunct. There is no longer any reason for the ordinance books of Bernards Township to be burdened with a proviso referring to the December 12 Order, and therefore that Order should be vacated.

POINT II

HILLS' MOTION DOES NOT BELONG BEFORE THIS COURT

With its present motion, Hills has taken the extraordinary step of bypassing pleadings, bypassing discovery, and asking the court to decide on motion what is really a separate prerogative writ action challenging an action of the Planning Board.

Moreover, that quasi-action alleges that the Planning Board failed to follow allegedly required procedures in reviewing an alleged application for development, and is not a Mount Laurel-type action, yet it is brought before one of the specially-constituted Mount Laurel courts instead of in Somerset County, where the defendant municipality is located, as required by R.4:3-2(a).

Being a Mount Laurel plaintiff does not entitle Hills to trample upon the rules of procedure or to ignore mandatory venue requirements in non-Mount Laurel actions.*

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* Hills' disregard for legal propriety is exemplified further by a letter dated February 3, 1986, from counsel for Hills to this court, in connection with the still pending motion concerning Ordinance #746. By that letter, counsel for Hills submitted material to the court which amounts to allegedly expert opinion as to the desirability of vesting based upon a conceptual plan, yet the material is not supported by any affidavit, either as to its authenticity or as to the qualifications of its alleged authors. Cf. R.1:6-6, R.1:4-4. Moreover, it is admitted by counsel for Hills to be nothing more than a working draft which has not even been reviewed by the agency which will supposedly promulgate it, and it is "not for

(Footnote continued on next page)

Hills should be required to follow the law. Its present motion should be denied, and if it wishes to pursue this action, it should be required to file a formal Complaint, venued in the Law Division, Somerset County.

(Footnote continued)

quotation." Even at that, it is random pages, taken out of context. In addition to being wholly improper, it is wholly irrelevant, because the right of Bernards Township to repeal an ultra vires (or even a valid) ordinance is wholly independent of whether some third person thinks the thrust of the repealed ordinance was an "enlightened" idea (whatever "enlightened" might mean).

POINT III

THE CONDUCT OF THE PLANNING BOARD DID NOT VIOLATE ANY PROVISION OF THE MUNICIPAL LAND USE LAW

Plaintiff's arguments that the Planning Board violated the MLUL are based upon misreadings of the MLUL and the BTLDO, and should be rejected. We will address the arguments sequentially:

(A)(1) Alleged "right" to revise plans.

MLUL sections 46(b) and 48(b) do not, as Hills contends, say anything about the planning board's authority to "demand a new application". Instead, they say that if an "application for development" (see next subheading, below) has been the subject of a hearing, and if thereafter substantial amendment is required, then an amended "application for development" must be submitted and proceeded upon as in the case of the original "application for development". These sections thus impose a requirement upon the applicant, not a restriction upon the Planning Board.

The fact that these sections require the applicant to proceed "as in the case of the original application for development" strongly suggests that a substantially amended application is treated as a new original application, not as a continuation of the pending, unacceptable application. Statutory time periods would begin to run anew, starting from zero, and presumably, therefore, the filing date--to the extent that has any relevance--would be the new filing date, not the

filing date of the unacceptable application.

Hills cites no authority at all for its bold assertion (supplementary letter brief, pg. 8) that "indisputably" the Planning Board could have, and should have, permitted Hills to revise a conceptual plan that the Board and its advisors found grossly unacceptable.

(A)(2) Alleged "right" to a hearing.

The sections just discussed, MLUL §46(b) and §48(b), deal with "applications for development". Plaintiff correctly notes that MLUL §10(a) requires a hearing on each "application for development". But, plaintiff misses the point that an application for approval of a conceptual plan is optional, BTLDO §707.A., that it is therefore not an application "required by ordinance" for approval of a development, and it is therefore outside the MLUL's definition of "application for development". N.J.S.A. 40:55D-3.

In contrast, N.J.S.A. 40:55D-10.1, which does govern conceptual plans, calls only for "informal review", does not call for any hearing, and does not require that any testimony be taken.

Also, §10.1 specifies that review of a conceptual plan is not binding upon either the developer or the Planning Board. Since the proceeding has no binding effect, its outcome, whether acceptance or denial, can work no legal wrong, and there is no need to have any evidentiary record (nor is there any reason for a court to entertain objections to the outcome).

(A)(3) Alleged right to review by the Planning Board itself.

Hills relies upon N.J.S.A. 40:55D-25(a)(2), which says that the Planning Board shall exercise its power in regard to "Subdivision control and site plan review pursuant to article 6." However, §10.1, which governs conceptual plans, is part of MLUL Article 1, not Article 6. It is sui generis, separate and distinct from site plan review.

(We note that §10.1 provides for informal review. It does not require, or even imply, that such review must be of an informal plan. Consequently, in analyzing the nature of BTLDO §707, the level of detail which that section requires for a conceptual application has no probative value in the analysis. As regards the review itself, BTLDO §707 is consistent with MLUL §10.1, and with the fact that a conceptual application is not an application for development, in that §707 does not require any notice or any hearing, and while the decision of the Planning Board is required to be stated in writing, BTLDO §707.D.3, §707 does not require any formal "resolution" of the planning board's action. By contrast, compare the requirements for notice, hearing, and a formal resolution which apply to applications for development, i.e., applications for preliminary and final approval, as specified in, e.g., N.J.S.A. 40:55D-10[a]; N.J.S.A. 40:55D-10 [g][1], [2]; N.J.S.A. 40:55D-12; BTLDO §708.H.1 [copy attached]).

While the MLUL thus does not require any particular level of review of a concept plan, other than "informal", Hills'

argument is in any event based upon pure speculation as to whether Planning Board members did or did not review the plans. Such speculation has no legal standing, and is rebutted by the Certifications of Harry Dunham and John Hoare, which show that Planning Board members were notified to review Hills' plans, and also by the fact that the Board members had copies of the conceptual plan sitting in front of them at the meeting (see reference at TP 18-5 to 6, to "the plans you see there").

B. Alleged denial of due process.

The Planning Board meeting in question was on the night of Tuesday, January 7. The Affidavit of plaintiff's attorney, Guliet Hirsh, admits that telephone notice of the meeting was given on Friday, January 3.* Thus, plaintiff had notice of the meeting nearly three business days and two weekend days in advance.

However, the issue of notice is a diversion. Neither MLUL §10.1 nor BTLDO §707 gives Hills any right to a hearing upon a conceptual plan. They say only that the Planning Board will review--i.e., will look at--the conceptual plan. Hills had no right to present testimony, and therefore no need to arrange for attendance by its consultants.

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* It is not defendants' responsibility to see that telephone messages are delivered promptly from one part of plaintiff's counsel's office to another. The allegation that Ms. Hirsh did not personally receive the message until January 5 is irrelevant.

C. Alleged non-compliance with Bernards' ordinance.

Hills' complaint appears to be that the Planning Board did not adequately discuss the application. The transcript shows that the Board's consultants had submitted memoranda to the Board detailing the many faults with the plan, and that at the meeting the consultants summarized a number of major points of objection. Those Board members who did speak said that they were in agreement with the conclusions stated by the consultants (TP 15-2 to 8; TP 15-11 to 16; TP 27-6 to 15). The affirmative votes of the other members signaled their concurrence, and there was no need for each and every member to otherwise verbalize his position.

The Certification of Harry M. Dunham shows that by letter of February 4, 1986, the Planning Board did send Hills a written letter setting forth the objections which prompted the Board to reject Hills' conceptual application.

POINT IV

THE PLANNING BOARD PROPERLY EXERCISED ITS DISCRETION

The application which was rejected by the Planning Board was only for approval of a conceptual plan. However, even under the law governing applications for more formal approvals, the Planning Board's action would have been entirely proper.

Plaintiff's property which is the subject of the rejected conceptual application is zoned for R-8 or 20,000 square feet standard single family detached residential development under the Bernards Township Land Development Ordinance. (BTLDO §403). Within the R-8 zone is the provision for alternative development under "PRD-4 Planned Village Developments" (BTLDO §403.H.5.) pursuant to N.J.S.A. 40:55D-65c. The applicant's conceptual plan proposed development of its said property under the planned unit development scheme.

An elucidation of the planned unit development concept was provided in Rudderow v. Mt. Laurel Tp. Comm., 121 N.J. Super. 409, 412-413 (App. Div. 1972).

> In summary, P.U.D. is a recognition by the Legislature that the 'Euclidean' (traditional) zoning approach, adopted in New Jersey about 50 years ago, had outlived its usefulness, and that new and more creative flexible approaches had to be adopted to overcome 'Euclidean' zoning inequities and deficiencies, and enable municipalities to provide for housing and other public needs for the present and reasonably foreseeable future. P.U.D. is the antithesis of the exclusive districting principle which is the mainstay of 'Euclidean' zoning. The latter approach divided a community

> into districts, and explicitly mandated segregated uses. P.U.D., on the other hand, is an instrument of land use control which augments and supplements existing master plans and zoning ordinances, and permits a mixture of land uses on the same tract (i.e. residential, commercial and industrial). It also enables municipalities to negotiate with developers concerning proposed uses, bulk, density and set back zoning provisions, which may be contrary to existing ordinances if the planned project is determined to be in the public and individual homeowner's interest. It also recognizes the importance of encouraging and making it financially worthwhile for developers and investors to undertake P.U.D. projects by permitting a more intensified utilization of vacant land which is scarce and skyrocketing in price.
>
> The Legislature directed, 'This act shall be construed most favorably to municipalities, its intention being to give all municipalities the fullest and most complete powers possible concerning the subject matter hereof. ***' N.J.S.A. 40:55-67."

Local boards who are thoroughly familiar with their communities' characteristics and interests and whose actions are presumed to be valid, have primary responsibility and discretion to maintain the integrity of the municipal zoning scheme. Ward v. Scott, 16 N.J. 16, 23 (1954); Weiner v. Zoning Bd. of Adjust. of Glassboro, 144 N.J. Super. 509, 520 (App. Div. 1976).

The discretion accorded municipal planning boards is by necessity greater when dealing with a planned development application. In Zanin v. Iacono, 198 N.J. Super. 490, 501 (Law Div. 1984) the court stated as follows:

> "[A] municipal planning board, confronted with an application for planned development must have more flexibility and power than a board dealing with a routine application for site plan approval. I am satisfied that to hold otherwise would interfere with, rather than further, the intent of our Legislature in providing for planned development."

The plaintiff's conceptual plan contained violations of the standards set forth in the Bernards Township Land Development Ordinance. See Certification of Peter A. Messina dated February 18, 1986. In addition to direct violations of the Ordinance, the conceptual plan represented what the Planning Board felt to be just plain bad planning. The Planning Board exercised reasonable and appropriate discretion in denying the plaintiff's application for conceptual approval based upon that review. Such action by the municipal planning board should not be disturbed.

POINT V

THE UNDERLYING ISSUES, RAISED BY HILLS' PREVIOUS MOTION, REQUIRE DENIAL OF HILLS' PRESENT MOTION

Defendants submit that the present motions can be decided in favor of defendants and against Hills upon the substantive and/or procedural grounds stated above, without ever reaching the amendment and alleged estoppel issues raised at the previous motion made by Hills. If the issues raised above are not dispositive in favor of Bernards, then it is submitted that these motions cannot and should not otherwise be decided without first deciding those previously-raised issues.

Hills' present motion seeks to revive an application for approval of a conceptual plan which was rejected by the Planning Board. The motion asks that the rejection be reversed; that the conceptual application be sent back to the Planning Board for re-review; and that Hills be permitted to "revise its plans" (Brief, pg. 9) yet still have them deemed to be the same plan and the same original application. As we have noted above, both Hills' counsel and Hills' principal acknowledged at the Planning Board meeting that the conceptual plan which Hills will want the Board to vote upon will be changed and therefore different from the conceptual plan which Hills submitted on October 17, 1985.

Hills' present motion is the latest round in Hills' game of "Beat the Clock." As we have noted in previous briefs, Hills filed no applications at all for nearly 11 months after

Ordinance #704 took effect. That ordinance nearly tripled Hills' density and imposed a Mount Laurel set-aside. Then, after the Fair Housing Act was enacted, after learning that Bernards intended to proceed under the Act, after being faced with the prospect that Bernards might have a lower fair share number under the Act than under the Consensus methodology and might therefore amend Ordinance #704 to accordingly reduce Hills' set-aside and density bonus, and after Bernards filed its motion to transfer to the Council on Affordable Housing, Hills first filed an application for conceptual approval. The concept plan which was the basis of that application stated, on its face, that it was tentative and subject to change at the time of application for preliminary approval.

Nonetheless, with this conceptual plan that Hills knew, or at least anticipated, would not accurately portray the development that would eventually be submitted for preliminary approval, Hills hoped to lock in an alleged entitlement to build 2,750 dwelling units, and hoped thereby to avoid any contrary amendment of Ordinance #704. To accomplish that strategic coup, Hills allegedly relied upon an ultra vires section of the BTLDO which purported to vest an applicant with certain development rights upon approval of a conceptual plan.

Meanwhile, Bernards moved toward amending the BTLDO by deleting that purported "vesting" provision, essentially a housekeeping amendment since the provision, being ultra vires,

cannot be valid anyway. Hills then moved before this court for an injunction against the amendment, apparently upon the theory that by merely filing its conceptual application, Hills became vested with certain rights that precluded such amendment. The court entered an interim order for injunctive relief, but has not decided the motion.

Now, having had its conceptual plan, which one Board member described as "an abomination" (TP 15-2 to 8), rejected by the Planning Board, Hills' present tactic in effect seeks to recapture the October 17 filing date of the rejected application, and seeks to freeze Bernards' zoning ordinances as of that filing date, regardless of how bad was the conceptual plan Hills filed on that date, and regardless of how many changes Hills makes to those plans before it decides that it is ready to permit the Planning Board to vote.

Quite obviously, the significance of Hills' struggle to lock in that filing date depends upon Hills' underlying contention that despite the clear contrary direction of N.J.S.A. 40:55D-10.1, binding vested development rights can be conferred by virtue of approval of merely a conceptual plan. Moreover, even if Hills is correct on that point, its struggle to lock in the filing date lacks relevance unless the court further finds that despite the acknowledged power of a municipality to amend its land use ordinances(Morris v. Postma, 41 N.J. 354, 362 [1964]; Burcam Corp. v. Planning Bd. Tp. of Medford, 168 N.J.

Super. 508 [App. Div. 1979]; and see plaintiff's supplementary letter brief, pg. 20), Bernards is precluded from amending its ordinance in a manner which affects Hills Development Company. If, as defendants submit, approval of a conceptual plan is not binding and/or the Township does have the right to amend its ordinance, then the present dispute over Hills' conceptual application is moot.

In defendants' letter memorandum and Supplemental Brief, opposing Hills' motion to enjoin Ordinance #746, we have stated defendants' position that a developer cannot obtain vested rights from a conceptual approval; that Bernards was without legal authority to enact a provision purporting to confer vested rights based upon conceptual approval; that Bernards has the legal power and right to amend its land use ordinance and repeal such provision, whether or not the provision being repealed is ultra vires; that such amendment applies even to pending applications; and that because the provision in question was in fact ultra vires, there can be no legal basis for an estoppel. We have explained, as well, that the facts as alleged by Hills do not satisfy any of the legal criteria for a claim of vested rights. We have stated defendant's position that a court lacks the power to enjoin legislation. We have also noted, and the court has agreed (TM 13-5 to 9), that Hills cannot, in any event, prevail upon an estoppel claim before there is discovery and a fact hearing.

Defendants' arguments in support of those positions are stated at length in the previous briefs and need not be repeated here. We do offer the following additional points, regarding some of the matters contained in plaintiff's supplementary letter brief and supporting papers:

-- Plaintiff's extensive policy arguments, as to why vesting of rights based upon a conceptual plan would be a good idea, are totally irrelevant to the legal issues of whether the Municipal Land Use Law authorizes such vesting, and whether in any event a municipality has the power and right to repeal an ordinance which purports to confer such vesting. Similarly irrelevant is the allegation that ordinances in certain other municipalities purport to confer such vesting (Affidavit of Guliet Hirsh, ¶8).*

-- Procedures under BTLDO §703 cannot constitute the informal review authorized by MLUL §10.1 (plaintiff's supplementary letter brief, pgs. 13-14), because §10.1 speaks of the "planning board" granting informal review "of a concept plan", while BTLDO §703 speaks of review by the "Technical Coordinating Committee", "even prior to the development of conceptual plans." Also, repealed BTLDO §707(E)(1) cannot be merely an outer limitation upon the Planning Board's discretion

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* Plaintiff makes this allegation without attaching copies of any of the alleged ordinances. This appears to be a violation of the best Evidence Rule, Ev.R. 70, and it is improper to include inadmissible evidence in an affidavit. R.1:6-6.

to grant extended vesting (plaintiff's supplementary letter brief, pgs. 17-18), because §707(E)(1) purported to mandate that conceptual approval "shall" confer development rights "for a period of ten (10) years"--there is no discretionary language at all. Plaintiff's contentions would require a butchering of the language of the ordinance.

-- Defendants agree that repealed §707(E), the vesting clause, could be severed (plaintiff's supplementary letter brief, pg. 18). However, there would be no justification for judicially amending that section to substitute a three-year vesting period for a ten-year period because (a) the MLUL does not authorize any vesting based upon conceptual approval; (b) the legislative intent expressed in the BTLDO is clearly that conceptual approval be an optional precursor to preliminary approval, not a substitute for it; and (c) it is improper for a court to substitute its own judgment for that of the legislative body when declaring a law invalid, cf. Automatic Merch. Coun. of New Jersey v. Edison Tp., 204 N.J. Super. 395, 405 (App. Div. 1985) (court may not substitute lower fee for invalidated higher fee specified in ordinance).

-- The case of Crema v. New Jersey Dept. of Environmental Protection, 94 N.J. 286 (1983) (cited at plaintiff's supplementary letter brief, pg. 12 footnote), is not analogous authority for the present case. The Coastal Area Facility Review Act ("CAFRA"), N.J.S.A. 13:19-1 to -21, does not parallel

the MLUL, but rather is "supplemental" to the MLUL, N.J.A.C. 7:7-4.1(a), and therefore need not duplicate the procedures or safeguards of the MLUL. Whereas the MLUL specifies the mandatory and permissible content of land use regulations (e.g., §§ 38, 39), CAFRA gives the DEP a completely free hand to adopt rules and regulations (N.J.S.A. 13:19-17). There is no procedure under CAFRA similar to the two-step preliminary and final approval process under the MLUL, and no provision in CAFRA analogous to the three-year and two-year vesting for preliminary and final approval under the MLUL (§§ 49, 52). Thus, if there is any similarity between CAFRA and the MLUL, it is insufficient to permit any analogy here to the DEP's implied power to adopt regulations for binding conceptual approvals.

-- Although Hills argues that it will suffer great financial losses if it cannot get vested rights from conceptual approval, Hills' own expert belies that claim. The Affidavit of Kenneth Mizerny shows that the cost to Hills of preparing a conceptual plan is a "relatively modest" $82.69 per unit (¶¶ 14-16). Defendants submit that such an amount is not only modest, but miniscule, and would justify the court in finding as a matter of law that such a small cost per unit is an insufficient detriment to support an estoppel claim against a municipality in these circumstances. Moreover, in comparing the "modest" cost of a conceptual application with the allegedly higher cost of a preliminary approval application, Mr. Mizerny

and Hills ignore the fact that the BTLDO expressly requires an application for preliminary approval even if conceptual approval is granted (BTLDO §§707.A., 707.C.1., 707.c.2.1, 707.D.2.g., 707.D.3.a. and b., 707.E.1., 707.E.2.; and see also §707, first paragraph [copy attached to this brief].), so that the cost of a preliminary application is not avoidable.

Defendants submit that the present record permits the court to reject, as a matter of law, plaintiff's contention that it can possibly get vested development rights based upon conceptual approval. Since no vested rights can emerge from a conceptual approval application, there is no legal harm to plaintiff even assuming, hypothetically, that the Planning Board acted improperly in denying Hills' conceptual approval application. Consequently, Hills' earlier motion should be denied, its present motion should be dismissed as moot, and the December 12 order should be vacated.

If the court cannot rule against Hills as a matter of law, then it is submitted that the court cannot grant either the earlier motion or the present one without first allowing discovery and a trial upon the estoppel issues raised by Hills.

CONCLUSION

For the reasons stated above, it is submitted that plaintiff's motion to reverse the action of the Planning Board should be denied, plaintiff's earlier motion to enjoin enactment of Ordinance #746 should be denied, and the court's Order of December 12, 1985, should be vacated.

Respectfully submitted,

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

By Howard P. Shaw
Howard P. Shaw

KERBY, COOPER, SCHAUL, & GARVIN
Attorneys for Defendant, Planning Board of the Township of Bernards

By Arthur H. Garvin III
Arthur H. Garvin, III

Dated: February 19, 1986

construction may occur, but only within the sequence indicated on the staging plan and only after all plans and specifications have been submitted to and approved by the Township Engineer in accordance with the provisions of this Ordinance and only when all guarantees have been posted in accordance with the requirements of this Ordinance.

F. Modifications to an Approved Conceptual Plan.

1. The applicant may, at any time, submit a revised conceptual plan as in the first instance for review and action by the Board. Based upon the revisions requested, the Board may waive some or all of the supporting documentation at the request of the applicant. If the revised conceptual plan is not approved by the Board, the original conceptual plan shall remain in effect. If the revised conceptual plan is approved by the Board, such approval shall not extend the period for which the conceptual approval was originally granted as set forth in 707D hereinabove.

2. The Board may request that the applicant consider the submission of a revised conceptual plan. The applicant shall be under no obligation to accept the suggested revisions. If the applicant agrees to the revisions, and submits the revised conceptual plan, there shall be no additional fee for review of the conceptual plan and the Board may extend the time period for which the conceptual plan approval is in effect.

708. SUBMISSION OF PRELIMINARY PLATS AND PRELIMINARY PLANS

A preliminary submission is required of all subdivisions classified as major subdivisions and of all development proposals requiring site plan review.

A. Procedure for Submitting Preliminary Plats and Preliminary Plans.

1. Submit to the Administrative Officer after the 15th day of the calendar month preceding the first regularly scheduled monthly meeting of the Board but not later than the 1st day of the month in which said meeting is to be held, (14) copies of the preliminary Development Plan in accordance with Section 708C. through F. below; 4 copies of any protective covenants or deed restrictions applying to the lands to be subdivided or developed; 3 copies of the completed application form; and the fee in accordance with Section 901 of this Ordinance. The Administrative Officer shall first process the application through the Technical Coordinating Committee and certify the application as complete or notify the applicant in writing of any deficiencies within forty-five days of the submission. If the application has been found to be complete, the Administrative Officer shall forward it to the appropriate Board secretary who shall issue an application number. Once an application has been assigned a number, such number shall appear on all papers, maps, plats and other documents submitted for processing in conjunction with the application. If the application has been found to be incomplete, it shall be returned to the applicant who may submit an appropriately revised application as in the first instance.

H. Findings on the Application for Preliminary Approval.

1. Resolution of Memorialization. The memorialization of the granting or denial of preliminary approval by written resolution shall include not only conclusions but also findings of fact related to the specific proposal, and shall set forth the reasons for the grant, with or without conditions, or for the denial. Said resolution of memorialization shall set forth with particularity in what respects the plan would or would not be in the public interest, including but not limited to findings of fact and conclusions on the following:] § 708.H.1.

a. Specific findings - The Board shall make the following findings:

1) In what respects the plan is or is not consistent with the Township Master Plan.

2) To what degree the plan respects the natural features of the site. The Board shall take note of:

a) The degree to which severely restricted lands have been encroached upon.

b) The degree to which stands of trees have been respected. Particular emphasis will be directed toward the preservation and integration into the plan of prime or unique tree stands and specimen trees.

c) The degree to which unique or sensitive natural features have been integrated into the common open space system to minimize adverse impact.

3) Whether storm water runoff has been controlled on the site to meet the Township standard that no additional peak runoff shall be discharged during a 100 year storm of 24 hour duration.

4) Whether the sewage effluent generated by the development can be disposed of in a manner that will not exceed the capacities of public systems or, if an on-site or interim facility is to be utilized, whether the sewage effluent generated will degrade any flowing stream or underground water resource.

5) To what degree potable water demands generated by the development can be met from existing public or private systems. If a new on-site system is proposed, whether or not it will meet the demands of the development.

6) To what degree the internal circulation system is able to handle the traffic generated by the development. To what degree the existing external circulation system is

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ATTORNEYS FOR
Defendant, Bernards Township Planning Board

Plaintiff THE HILLS DEVELOPMENT COMPANY *vs.* *Defendants*, 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	SUPERIOR COURT OF NJ LAW DIVISION SOMERSET COUNTY/OCEAN COUNTY (Mt. Laurel II) *Docket No.* L-030039-84 P.W. *CIVIL ACTION* CERTIFICATION OF HARRY M. DUNHAM

HARRY M. DUNHAM, of full age, hereby certifies as follows:

1. I am the Chairman of the Planning Board of Bernards Township and was also the Chairman in 1985.

2. I attended the Technical Coordinating Committee meeting on the morning of December 17, 1985, where amongst other applicants, representatives of The Hills Development Company were present.

3. During the course of the December 17, 1985 Technical Coordinating Committee meeting with The Hills representatives, it became clear to me that even The Hills representatives agreed that The Hills' conceptual plan required substantial changes to correct existing deficencies both in terms of compliance with the Bernards Township Land Development Ordinance and sound planning principles.

4. I further concluded that The Hills' conceptual plan in its form on December 17, 1985 was unsatisfactory and that a completely new conceptual plan would have to be produced by the applicant.

5. Subsequent to the Technical Coordinating Committee meeting on the morning of December 17, 1985, I determined that the Planning Board, as a whole, should review the then present Hills conceptual plan over the holiday period and that the Planning Board should take what action it deemed appropriate on the conceptual plan at its first meeting in 1986 which was scheduled to be January 7, 1986.

6. At the regular meeting of the Planning Board of the night of December 17, 1985, I did so request the Board members to review The Hills' conceptual plan and to be prepared to discuss it and take what action each member felt appropriate at our January 7, 1986 meeting.

7. Attached hereto is a copy of my letter dated February 4, 1986 as Chairman of the Planning Board to The Hills Development Company advising them of the Planning Board's action with respect to their application for conceptual approval.

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

Harry M. Dunham

HARRY M. DUNHAM

Dated: February 18, 1986

February 4, 1986

The Hills Development Company
P. O. Box 500
Pluckemin, New Jersey 07978

Re: Hills Conceputal Application
Filed October 16, 1985
Deemed Complete December 3, 1985

Gentlemen:

The conceptual plan submitted by you was reviewed by the Planning Board. The Board found serious deficiencies with the plan. Accordingly, the Board was not satisfied with the plan and denied same at its meeting on January 7, 1986. Please consider this your advise in writing as to the Board's denial.

The Planning Board was of the opinion that your emphasis on single-family detached housing on small lots resulted in a significant overcrowding of the site. This deficiency resulted in poor block layout, inadequate access ,major site disturbance and excessive grades. A shift to a higher percentage of multi-family and townhouses would result in a much more efficient use of the property with considerably more open spaces. Specific deficiencies are noted below.

a. The design layout proposed by you resulted in a very high number of cul-de-sacs with some being of excessive and unacceptable lengths.

b. The development pattern showed a significant number of lots backing up to Schley Mountain Road, a four lane collector roadway. The access to the foregoing lots would, however, be from a local road on the other side of the lot. Lots having roads on two sides require considerably more depth and are often affected by a lack of privacy and noise. Also, some lots have roads on three sides, clearly substandard in terms of providing a standard residential environment.

c. In general, the development required enormous road lengths to provide access to the lots, with concurrent problems of land disturbance and excessive grades.

d. In at least two neighborhood areas within the development, there is inadequate access, with approximately 250 single-family lots with a single means of ingress and egress from the principal collector roadway.

e. Some of the lots proposed appear to be unusable. At the scale of the General Development Plan, it was difficult to ascertain which lots could actually be built upon.

f. Many lots appear to be affected by environmental limitations.

g. The recreational plan was not specific enough for a judgment as to its appropriateness in tems of both the types and quantity of facilities.

h. The access to the recreational and commercial areas was inadequate. Your proposal did not provide for pedestrian traffic to recreational and commercial areas, and the plan did not provide any parking for the major recreational area.

i. In many instances, single-family house lots backed up to recreational areas to the detriment of the lots because of noise and nuisances.

j. The concept plan did not provide for a school site.

k. The buffer areas which you propose were inadequate, particularly in the areas adjacent to existing single-family homes on Douglas, Layton and Old Coach roads as well as lands to the east and south of the project.

l. The plan did not consider the fact that the area on the corner of Layton Road and Mt. Prospect Road is an open field which should be preserved as open space or devoted to recreational use only.

m. The proposed plan did not provide for interconnections between open space areas.

n. Roadway curves were inadequate, and the roadway layout generally did not adequately interrelate with your development design in Bedminster Township.

The scale of the multi-family areas as propsoed on the General Development Plan was too small for adequate reveiw, and consequently, any deficiencies are not included as part of this review.

While the concept plan as submitted by you and as addressed in this communicaiton has been disapproved, such disapproval shall in no way prohibit you from submitting a new conceptual plan addressing the deficiencies set forth above or from proceeding with the submission of a preliminary development plan.

Very truly yours,

Harry Dunham
Planning Board Chairman

HD:nf

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ATTORNEYS FOR

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Plaintiff

THE HILLS DEVELOPMENT COMPANY

vs.

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SUPERIOR COURT OF NJ
LAW DIVISION
SOMERSET COUNTY/OCEAN COUNTY
(Mt. Laurel II)
Docket No. L-030039-84
P.W.

CIVIL ACTION

CERTIFICATION OF JOHN HOARE

JOHN HOARE, of full age, hereby certifies as follows:

1. I am the present Vice Chairman of the Planning Board in Bernards Township and was also in 1985.

2. Due to the absence from the state of the Chairman of the Planning Board through at least the period of our first Board meeting in 1986, which was to be January 7, 1986, I was to chair that first Board meeting.

3. I took it upon myself to personally telephone the following Board members to remind them that each should be prepared to discuss The Hills Development Co. application for conceptual approval at the regular scheduled Planning Board meeting of January 7, 1986: Mr. Thomas Daggett, Mr. Donald Seebohm, Mr. George Apgar, Mr. Mason Sisk and Mr. Marvin Lindsey.

4. In addition, I did call and speak with both Mr. Charles Lind and Mr. Edward Farrell, although my belief is that I did not discuss The Hills' conceptual plan agenda item with Mr. Lind because he advised me that he would not be at the meeting, or with Mr. Farrell. I did not call Mr. Harry Dunham because I knew that he would not be at the meeting and I was unable to reach both Mrs. Sandra Harris and Mr. Jerome Kienlen.

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

John D Hoare
JOHN HOARE

Dated: February 18, 1986

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Defendant, Bernards Township Planning Board

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

CIVIL ACTION

CERTIFICATION OF
PETER A. MESSINA

PETER A. MESSINA, of full age, hereby certifies as follows:

1. I am the municipal Township Engineer for Bernards Township and was also in 1985.

2. I reviewed the application and plans of The Hills Development Company for conceptual site plan approval and on December 12, 1985 set forth my comments with regard to

same in a Memorandum to the Planning Board. A copy of that Memorandum is attached hereto.

3. The following areas which are addressed also in my December 12, 1985 Memorandum to the Planning Board are in violation of the Bernards Township Land Development Ordinance.

a. There are a number of lots located in areas that have been determined to be environmentally restrictive in violation of B.T.L.D.O. Section 502.A.1.& 2.

b. Certain cul-de-sacs shown on the conceptual plan are in excess of the requirements set forth in B.T.L.D.O. Section 607.A.3. and as relaxed by Section 1112 D.4.a.

c. Open spaces shown on the conceptual plan are not connected in violation of B.T.L.D.O. Section 617.B.3.

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

PETER A. MESSINA

Dated: February 18, 1986

MEMO

To: Planning Board

From: Peter A. Messina
Township Engineer

Date: December 12, 1985

Subject: Hills Development Conceptual Review

The following is a list of comments and recommentations concerning the plans submitted for conceptual review:

1) P. 2a - A number of lots (20+) are located in areas that have been determined (by Hills) to be environmentally restrictive.

2) P.3a - The buffer areas should be larger, 300'+, in areas adjacent to existing single family homes on Douglas Road, Layton Road, Old Stagecoach Road and lands east and south.

3) P.3a - More attention should be focused on the fact that the area on the corner of Layton Road and Mt. Prospect Road is an open field. Consideration of a different land use, such as open space or ball fields should be investigated.

4) P.3a - I agree with all of the planning comments in Harvey Moskowitz's memo dated November 21, 1985. The following should be emphasized:

   a) Long cul-de-sacs should be eliminated.
   b) Access points should be increased.
   c) Access roads should line up across Allen Road extension and other collector roads.
   d) Poor road layout with the Bedminster property.
   e) Road connections thru cul-de-sacs needed to lands to the east.

5) P.3b - Open space areas need to be connected.

6) P.4 - Roadway curves should be smoother at several locations. (Roads are not labeled or stationed, so it is difficult to specify exact locations.)

7) P.6 - Show location of proposed 0.5 M.G. water tank in the R-3 zone.
   a) Show size (height and width).

8) P.6 - Explain the use of double water lines in street,
   a) Are wells proposed - If so, where and how are they to be housed or screened.

9) Are sattelite dish antennas or tower antennas proposed - If so, location not shown.

10) It was my impression that a school and park site was to be dedicated to the Township. Location not shown.

PAM/gh

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

CIVIL ACTION

CERTIFICATION OF HARVEY S. MOSKOWITZ

HARVEY S. MOSKOWITZ, of full age, hereby certifies as follows:

1. I am the Planning Consultant to Bernards Township and was also in 1985.

2. After reviewing the application and plans submitted by The Hills Development Company for conceptual approval on November 21, 1985, I prepared and distributed

a Memorandum to the Planning Board which contained my comments with regard to same.

3. A copy of my Memorandum of November 21, 1985 is attached hereto.

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

HARVEY S. MOSKOWITZ

Dated: February 18, 1986

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

TO: Bernards Township Planning Board

RE: Review of Concept Plan; Hills Development Company, dated 10/15/85

DATE: November 21, 1985

We had received, on or about October 15, 1985, a copy of the concept plan for the Hills development, Bernards Township. The concept plan was prepared on 10 sheets, in addition to a cover sheet. The sheets covered the following elements:

Sheet #1.	Title Sheet
Sheet #2.	Project Constraints Map, Vegetation and Special Features Map
Sheet #2A.	Project Constraints Map
Sheet #2B.	Land Classification Map
Sheet #3.	Conceptual Development/Land Use Plan
Sheet #3A.	Conceptual Development/Illustrative Plan
Sheet #3B.	Open Space Plan
Sheet #4.	Conceptual Circulation Plan
Sheet #5.	Utility Plan: Gas, Electric, Telephone & CATV
Sheet #6.	Utility Plan: Water
Sheet #7.	Utility Plan: Sewer
Sheet #8.	Conceptual Drainage Plan/Land Coverage and Drainage Plan
Sheet #9.	Staging Plan/Development Schedule Plan

The comments in this memorandum represent the Planning Consultant's views except as noted. The Township Engineer will review those items under his jurisdiction and submit a separate report. The comments contained in this report were illustrated on a set of development plan sheets and returned to the applicant for correction. Some of the following comments are general in nature, such as poor lot layout, but the specific deficiencies noted on the plan itself.

General Comments

1. The plan calls for a total of 2,750 dwelling units in the Raritan Basin and 273 in the Passaic Basin. The plan shows, although we have no way of checking, a total of 550 lower income units in the Raritan Basin. The actual acreage in the Raritan Basin zoned R-8/PRD-4 is 510 acres. The land use data for both the Raritan Basin and Passaic Basin are shown on the attached sheet. The plan itself calls for 50,000 square feet of commercial space on approximately six (6) acres of land.

2. We basically disagree with the emphasis on single-family detached housing on small lots. Hills proposes 1,411 single-family homes, of which 157 will be on lots of approximately 12,000 square feet, and 1,254 will be on lots of 5,000-6,000 square feet. The 157 larger lots will occupy about 70 acres for a net density of just over two (2) per acre. The smaller ones (1,254) will occupy 253.6 acres. The land use statistics look like this:

253.6	acres:	small lot, single-family:	1,254 units
70.0	"	large lot, single-family:	157 units
59.2	"	open space	
28.2	"	streets	
411.0	acres		1,411 units

This leaves approximately 100 acres for the additional 1,339 housing units. The result is a significant overcrowding of the site because of the great emphasis and large numbers of single-family homes on small lot.

A shift to a higher percentage of multi-family and townhouses would result in a much more efficient use of the property with considerably more open space. Ken Mizerny, Hills planner, on the other hand, indicated that their marketing study shows a significant demand for relatively high priced single-family homes ($200,000+) with a lot of amenities and with a closer integration with the outdoor space. It is not their intention to develop single-family detached homes but rather develop zero lot line and patio-type homes with two and three bedrooms.

Specific Criticism of Design

1. Some of the other specific criticisms which we pointed out to the applicant were the very high number of cul-de-sacs and the extreme length of some of the cul-de-sacs. We suggested that there were a number of areas where the cul-de-sacs could be continued through and loop streets created, which give all the advantages of cul-de-sacs without any of the inefficiencies and disadvantages.

2. Both Peter Messina and I had a lot of difficulty with the development pattern which shows a significant number of lots which will back up to Schley Mountain Road, a proposed four-lane collector. In other words, all of these lots will back up to Schley Mountain Road but with access from a local road on the other side of their lot. They will have roads on two sides. The

applicant indicates that these lots will be deeper, with berming, fencing or landscaping to effectively shield them from Schley Mountain Road. The lots really require considerably more depth to make the reverse frontage effective. In our opinion, a better approach would be to orient the blocks perpendicular to Schley Mountain Road. The applicant counters with the fact that this will create severe grades on some of the roads.

Again, the problem is caused by the very high percentage of single-family lots in the development. It is inefficient and requires an enormous number of roads, with concurrent problems of land disturbance, consideration of topography, etc.

3. Peter Messina also has problems with the road layout in many of the single-family areas. The great emphasis on cul-de-sacs makes providing service to these areas inefficient, although we generally like cul-de-sacs because of privacy, safety, etc.

4. At least two of the development areas appear to have inadequate access. In one, for example, there are approximately 250 single-family lots with a single means of ingress and egress.

5 Some of the lots appear to be unusable. At the scale of the General Development Plan, it is difficult to ascertain which lots can actually be built upon.

6. The multi-family areas are too small to adequately review. The applicant indicates that they will enlarge those to

give us an opportunity for comments. Many of the circulation systems are sketchy and can only be judged illustrative.

7. We question the recreation plan. The applicant will get us the number of units in Bedminster which will also use the recreation areas. There may be a need for some additional formal recreation facilities. The applicant shows 14 tennis courts, for example, and there may be a need for several more. We also questioned what is meant by "playfields." The applicant indicates it is only large, cleared areas. Depending on the probable occupants of the single-family housing, some more formal playfields, playgrounds and tot lots may be needed.

8. We suggested connections between the Bernards and the Bedminster development areas. There appears to be some opportunity for some logical connections.

9. The pedestrian pathway system was discussed. It is our opinion that the high density single-family area calls for sidewalks on both sides, although in streets with cul-de-sacs one side may be adequate.

10. We also pointed out the access to the recreation and commercial areas was inadequate. Cut-throughs will be needed in order to encourage pedestrian traffic. We also questioned the parking for the recreation areas.

11. The backing up of lots to recreation areas is not a good idea -- these will tend to be noisy, etc.

Summary

In summary, the concept plan is severely constrained and overcrowded, in our opinion, because of the large number (51 percent) of single-family homes. A 5.5 unit per acre density, in another type of housing unit, would result in a much more open layout with considerably more open space and less linear feet of road since many more units can be served by a single road in multi-family than with single-family. The result is an overcrowded site and one which, in our opinion, represents overuse of the land. It also results in an excessive number of cul-de-sacs, poor block layout, and many lots with roads on two sides. In fact, in many cases, corner lots have road frontage on three sides.

What the applicant proposes, and has indicated to us, is a type of design which is much more prevalent in the southwest and west coast; high density development packed very tightly with small, single-family lots. It is a type of development which has not been introduced in the east and possibly for good reasons. It may be better suited from a climatological point of view toward the southwest and west coast, more amenable site conditions, and a lack of available land. In my opinion, it represents poor planning.

LAND USE DATA

RARITAN BASIN-R-8/PRD-4

Parcel	Acres	Density Category	Density Range	Units Illustrated	
				Number	Type
a	19.4	LD	2-5	45	SFD 12,000 sf
b	41.9	LD	2-5	112	SFD 12,000 sf
c	53.2	LMD	4-10	254	SFD 6,000 sf
d	45.3	LMD	4-10	206	SFD 6,000 sf
e	5.6	-	-	-	REC. AREA
f	14.8	MHD	15-26	228	TH/CONDO
g	5.8	-	-	50,000 sf	COMMERCIAL
h	54.8	LMD	4-10	261	SFD 5,000 sf
i	11.1	HD	20-30	286	LOW INCOME
j	13.7	LMD	4-10	85	TOWNHOUSE
k	5.4	-	-	-	REC. AREA
l	22.1	MD	8-15	183	TOWNHOUSE
m	11.9	MHD	15-26	208	TH/CONDO
n	9.8	HD	20-30	264	LOW INCOME
o	34.9	LMD	4-10	188	SFD 5,000 sf
p	10.5	LMD	4-10	85	TOWNHOUSE
q	11.7	LMD	4-10	61	SFD 5,000 sf
r	53.7	LMD	4-10	284	SFD 5,000 sf
s	2.6	-	-	-	REC. AREA
t	25.3	-	-	-	REC. AREA
OS 1	4.0	-	-	-	OPEN SPACE
OS 2	12.1	-	-	-	OPEN SPACE
OS 3	3.5	-	-	-	OPEN SPACE
OS 4	11.7	-	-	-	OPEN SPACE
Roads	25.2				ROADS
TOTAL	510			2,750	

PASSAIC BASIN-R-3/PRD-3

Parcel	Acres	Density Category	Density Range	Units Illustrated	
				Number	Type
u	352.7	RD	1	273	SFD - 1 AC
OS	143.6	-	-	-	OPEN-SPACE
Reserved	42.2	-	-	-	RESERVED
Roads	25.5	-	-	-	ROADS
TOTAL	564.0	-	-	273	-

TOTAL SITE ACREAGE IN BERNARDS TOWNSHIP - 1074 AC