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2/28/86

Correspondence on Adjournment

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OF COUNSEL
FRANK J. VALGENTI, JR.

February 28, 1986

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

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

Dear Judge Serpentelli:

We are submitting this letter in response to Mr. Hill's letter of February 24, 1986. Since that letter does not appear to be a formal application for any particular relief or ruling, we submit this informal response rather than a full brief on the issues.

We believe that plaintiff has missed the point of the Supreme Court's opinion, namely, that the Supreme Court has removed the three special Mt. Laurel courts from the process of regulating Mt. Laurel compliance, except for the limited purpose of considering conditions solely to protect scarce development resources. (The court may not impose "any conditions this Court deems appropriate", as plaintiff's letter asserts). Therefore, the contention by plaintiff that the issues in Mr. Hill's letter "raise colorable 'Mount Laurel' claims and said issues should therefore be heard by this Court" contains a non sequitur. "Mount Laurel" issues will be considered by the Council, and no longer can be entertained by this Court.

If Mr. Hill is wrong in contending that the issues he mentions raise "Mount Laurel" claims, then such non-Mount Laurel claims

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should be addressed in the proper court, following the proper procedures, all according to the Rules of Court. The Supreme Court's supplementary Order in this appeal directs this court to determine the appropriate form for such application, in the event that plaintiff makes such application. We submit that the appropriate form would be an action venued in Somerset County as required by R.4:3-2. Judge Pressler's annotation to R.4:3-3 states that "A motion for a change of venue on the ground that venue was not laid in accordance with R.4:3-2 should be routinely granted..." Pressler, Current N.J. Court Rules, Comment R.4:3-3.

Further, we believe it is not only desirable, but necessary, that any such pursuit by Hills should begin with the filing and serving of a Complaint which spells out the facts on which plaintiff's claims are based and the relief to which it deems itself entitled. R.4:5-2. Hills repeatedly speaks of enforcing "the settlement agreement", but defendants do not even know what it is that Hills alleges was agreed upon!

We cannot fight with shadows. We have a right to know the specific allegations, and we have a right to take full discovery into those allegations, into the sources from which plaintiff derives its alleged information, and into the means by which plaintiff obtains such alleged information, in order to test its veracity. Formal pleadings and discovery under the Rules are required.

As regards the imposition of conditions upon transfer, the Supreme Court has not ordered each Mt. Laurel judge to initiate hearings regarding conditions. Instead, the Court left it to plaintiffs to initiate such proceedings by motion. Implicit in that approach is the idea that such motion should specifically allege which development resources, if any, are so scarce that further development "is likely to have a substantial adverse impact on the ability of the municipality to provide lower income housing in the future." Slip opinion, at 87. We do not believe that the Supreme Court contemplated the approach which plaintiff seems to

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favor, of simply holding an open-ended judicial investigation into "whether there exists any limitations" upon development resources in the Township. A motion for conditions, like any other, should be supported by affidavits. R.1:6-6. Depending upon the allegations, discovery and evidentiary hearings on such conditions might be warranted. First, however, plaintiff must make and support specific allegations that specific conditions are needed for the limited purpose authorized by the Supreme Court, if plaintiff can do so in good faith.

Finally, we respectfully request that our cross-motion to vacate Your Honor's order of December 12, 1985, be heard at the earliest possible time, and not be delayed to accommodate Hills' timetable for filing motions.

Upon the resolution of the appeal by the Supreme Court, this court's December 12 Order, the exemption in Ordinance #746, and the Supreme Court's stay Order of November 14 all expired by their own terms. Moreover, the Supreme Court's Opinion indicates that the status quo is not to be preserved, and the Opinion expressly sanctions changes of position by municipalities because of the changed assumptions which now govern the whole Mount Laurel field.

The December 12 Order infringes upon municipal autonomy, and at the November 22 hearing Your Honor acknowledged as much by stating that "The only thing that would preclude them from adopting the ordinance at this time is the Supreme Court [stay] order." (TM 44-18 to 20) With all due respect, it is offensive to the Township to have its ordinance fettered with the language of the court-ordered exemption, and the Township would like that language deleted as soon as possible. To make the record of this case clear, and to avoid offending the court, we prefer to have the December 12 Order vacated before recommending to the Township that it amend the ordinance by deleting the exemption.

In addition, we are concerned that the longer the exemption language remains in place, the more likely it is that this

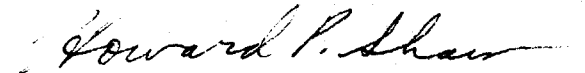
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plaintiff will try to use its prolonged existence as the basis for yet another alleged estoppel.

Since there is no reason to have the December 12 Order remain open, defendants respectfully request a prompt hearing upon their application to have it vacated.

Respectfully yours,

FARRELL, CURTIS, CARLIN & DAVIDSON



By: Howard P. Shaw

HPS:nmp

cc: Arthur H. Garvin, III, Esq.
Henry A. Hill, Esq.

RECEIVED

FEB 27 1986

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+ CERTIFIED CIVIL TRIAL ATTORNEY

February 24, 1986

FILE NO. 3000-04-02

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

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

Dear Judge Serpentelli:

This will confirm my conversation with Your Honor's law secretary of this date wherein it was indicated that the motion and cross-motion in the above-captioned matter, originally scheduled to be heard on February 28, 1986, had been adjourned by the Court.

As Your Honor is aware, the Supreme Court has, in the opinion of The Hills Development Company v. Tp. of Bernards; A-122-85 (and related cases), transferred this matter to the Council on Affordable Housing subject to any conditions this Court deems appropriate and subject also to The Hills Development Company's leave to file an application in this Court as outlined in the Supreme Court's Order of February 20, 1986. Said Order was issued in response to a motion filed by Hills in the Supreme Court wherein Hills sought leave to supplement the record and to file a supplemental brief. The order, a copy of which is enclosed herewith, denied said motion "without prejudice to the filing by plaintiff, regardless of any outstanding stay orders, of an application to the trial court, in a form that that court deems appropriate, asserting plaintiff's alleged development rights arising out of any alleged settlement, estoppel, or otherwise ..." The Hills intends to file such a motion in this Court raising such issues and one purpose of this letter is to inquire as to how the Court wishes to handle such an application and the factual issues which will be raised thereby.

The issues which Hills intends to raise on an application in this Court include the following:

1. Whether the parties' settlement agreement is enforceable

notwithstanding the fact that the settlement documents were not executed by the parties;

2. Whether the defendants have undertaken actions which justify a conclusion that the Township should be equitably estopped from repealing the zoning which is applicable to the Hills tract;
3. Whether the defendant Planning Board's recent denial of Hills' ordinance Section 707 "conceptual approval" development application was unlawful and whether municipal approval of said application vests Hills with development rights;
4. Whether a repeal of Hills' zoning would be inconsistent with the Township's Master Plan and/or otherwise arbitrary and capricious; and
5. Whether there exists in Bernards Township any limitations on necessary infrastructure, e.g. sewage treatment capacity, which justify the imposition of restraints as a condition of transfer.

Naturally, the above issues would require factual resolution by this Court and certain facts of utmost relevance have not yet been brought to the Court's attention. For example, with respect to the issue of whether a settlement agreement was indeed reached and whether the municipal attorneys were in fact authorized to negotiate on behalf of the municipality, Hills will allege that the Court-appointed Master, George Raymond, was present at closed municipal meetings at which municipal officials agreed by a formal vote to each and every item which was negotiated and agreed upon by the parties. This allegation, among others, will presumably be denied by the defendants. An issue therefore arises as to the manner in which the Court would prefer to resolve such issues. Some alternatives are as follows:

1. Full factual hearings with "live" testimony concerning all issues; or
2. Affidavits and other documentation concerning the pertinent facts could be submitted with factual hearings thereafter confined to any disputed facts; or
3. The facts could be developed entirely by way of affidavits and other documentation.

Since the Township has indicated that it would wish to conduct discovery with respect to Hills' allegations, it would seem to Hills that the second alternative discussed above would be most fair and expeditious in that the necessity for discovery would be minimized.

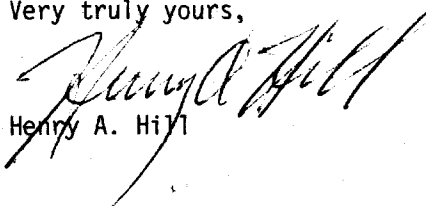
In essence, Hills seeks the opportunity to demonstrate, as per the Supreme Court opinion and Order, that it has acquired rights which will enable it to construct a development containing 550 units of low and moderate income housing and that, pending Council review of the Township's full obligation, Hills should be permitted to continue with its development activities in the interim. In Hills' view, the above issues raise colorable "Mount Laurel" claims and said issues should therefore be heard by this Court, the court assigned by the

Supreme Court to hear Mount Laurel matters. In the alternative, however, Hills would request that this Court grant leave for Hills to institute a separate complaint in the appropriate Somerset County court for the purpose of raising such issues which this court might determine should neither be transferred (presumably because they are not within the jurisdiction of the Affordable Housing Council) nor decided by this court which has taken jurisdiction of all issues due to the Mount Laurel issue. Hills' allegations with respect to certain arbitrary and capricious actions by Bernards might be handled in this matter should Your Honor choose not to hear them since they are independent cause of actions not within the jurisdiction of the Council.

Due to the unusual procedural issues raised by this matter, Hills respectfully submits that it would be prudent for the Court to hold a conference in this matter.

Thank you for your kind attention in this matter.

Very truly yours,



Henry A. Hill

HAH:klp

enclosure

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

THE HILLS DEVELOPMENT COMPANY,

Plaintiff-Movant,

v.

O R D E R

THE TOWNSHIP OF BERNARDS in the
COUNTY OF SOMERSET, etc., et al.,

Defendants-Respondents.

This matter having been duly presented to the Court, and
good cause appearing;

It is ORDERED that the motions for leave to supplement
the record (M-549) and to file a supplemental brief (M-550) are
denied, without prejudice to the filing by plaintiff, regardless
of any outstanding stay Orders, of an application to the trial
court, in a form that that court deems appropriate, asserting
plaintiff's alleged development rights arising out of any
alleged settlement, estoppel, or otherwise; provided, however,
that such application shall not affect this Court's Order trans-
ferring the matter to the Council on Affordable Housing and pro-
vided further that this Order granting leave to file such
application shall not preclude the assertion by defendants that
this Court's Order of transfer forecloses such claims by plain-
tiff.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice,
at Trenton, this 20th day of February, 1986.

A TRUE COPY
Stephen Wilentz
CLERK

Stephen Wilentz
Clerk