Memorandum of Law in Opposition to South Brunswick's Motion to Transfer and in Support of the Civic League's Cross-motion to enforce the Consent Order

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX/OCEAN COUNTY

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| URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants. | Civil No. C 4122-73 (Mount Laurel) |

# MEMORANDUM OF LAW IN OPPOSITION TO SOUTH BRUNSWICK'S MOTION TO TRANSFER AND IN SUPPORT OF THE CIVIC LEAGUE'S CROSS-MOTION TO ENFORCE THE CONSENT ORDER

## INTRODUCTION

This Memorandum is submitted in opposition to the Motion of South Brunswick to transfer this matter to the Affordable Housing Council ("the Council") and in support of the Civic League's cross motion for an Order compelling South Brunswick to comply with the terms of the duly executed Consent Order dated February 5, 1986, or, in the alternative, setting this matter down for trial as soon as practicable. Since defendant has improperly sought to shift the burden of proof to plaintiff by failing to set forth any grounds whatsoever in support of its demand, in complete contravention of the applicable court rules, there is no possible basis for granting its application.[1]

Moreover, as this Court is aware, after months of arduous negotiation South Brunswick finally signed a Consent Order on February 5, 1986. Defendant now insists that it be relieved of its obligations under that Consent, noting obliquely that it relies upon "the Fair Housing Act and the Hills Development decision". There is nothing in the Act or the Hills decision or otherwise before this

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1 Defendant's failure to set forth any grounds for the extraordinary relief demanded, contrary to R. 1:6-2(a), in itself mandates the denial of defendant's motion. Defendant attempts to obtain an unfair advantage by placing the burden on plaintiff to show why defendant should not be granted the relief sought. It is respectfully submitted that this inversion of usual motion practice, considered in conjunction with defendant's failure to file any supporting affidavits, memorandum or proposed form of Order, renders the instant application so defective as to preclude relief.

Court justifying the unilateral rescission of this Consent and it is respectfully submitted that it should be enforced.

In the alternative, the Civic League respectfully requests that this matter be set down for trial at the earliest practicable date. The Fair Housing Act expressly provides that a plaintiff shall not be required to exhaust administrative remedies where, as here, the defendant has failed to file its resolution of participation within four months of the effective date of the Act and has failed to file its fair share plan and housing element prior to plaintiff's filing of its complaint. Under such circumstances, the plaintiff is entitled to a trial on its Complaint pursuant to Section 16(b) of the Act.

## I. SOUTH BRUNSWICK WAIVED ITS RIGHT TO SEEK TRANSFER OF THIS LITIGATION BY FAILING TO FILE ITS RESOLUTION OF PARTICIPATION, AND ITS FAIR SHARE PLAN AND HOUSING ELEMENT, IN A TIMELY FASHION

The Fair Housing Act clearly provides that some exclusionary zoning litigation will be tried in the Superior Court, while some will be handled initially by the Council on Affordable Housing. The Act provides definite procedures and time limits to determine where each case will be heard. The procedures were established to provide townships in litigation with the opportunity to avail themselves of the new administrative process and the time limits were imposed to prevent needless delay and upheaval by township reconsideration after further developments. In short, as with most procedural rights in our legal system, adequate time was provided for invocation, after which the right would be waived.

The purpose of the statute is evident. It affords every municipality already in litigation with the same option to avail itself of the new administrative process as a municipality not yet in litigation. On the other hand, it intends to prevent needless delay of court proceedings if the municipality does not wish to avail itself of the opportunity. A town may well choose not to transfer because, as in the instant case, the settlement may be more favorable in view of the lowered fair share number, the favorable split of low and moderate units, and the extensive phasing conditions. Whatever the reasons, the statute makes clear that the municipality has four months to decide. Thereafter it risks continued or new litigation. In short, the Legislature did not write in a specific four-month period for filing, ending November 2, 1985, so that there would be another 9-month gestation period ending August 1, 1986 during which a township could reconsider, file a housing element with the Council and seek transfer. South Brunswick knowingly, intelligently and unequivocally waived its right to seek transfer under Section 16 of the Act, and cannot now be heard to seek further delay, after two years of negotiations by which it avoided prior entry of a final judgment.

Section 9(a) of the Act provides:

> Within four months after the effective date of this act, each municipality which so elects shall, by a duly adopted resolution of participation, notify the council of its intent to submit to the council its fair share housing plan. * * *

The effective date of the Act was July 2, 1985, allowing a municipality until November 2, 1985 to file its resolution of participation. South Brunswick does not even claim that it filed its resolution on a timely basis. It is significant that the Hills Court expressly held that the transfer motions which it decided were to be "regarded as [a] petition[s] for substantive certification" under the Act. (Slip op. at 50). The Court there noted that those motions, unlike the instant motion, were filed "shortly" after the Act's effective date of July 2, 1985, well within the 4 months permitted by the Act.

Municipalities which do not choose to file under Section 9(a) may file under Section 9(b) of the Act, which provides:

> *b.* A municipality which does not notify the council of its participation within four months may do so at any time thereafter. In any exclusionary zoning litigation instituted against such a municipality, however, there shall be no exhaustion of administrative remedy requirements pursuant to section 16 of this act unless the municipality also files its fair share plan and housing element with the council prior to the institution of the litigation. (Emphasis added.)

There is no requirement in Section 16(b) to exhaust the review and mediation process of the Council before being entitled to a trial for a party, like the Civic League, which has filed its complaint prior to a municipality's filing of its fair share plan and housing element. These provisions provide the incentive for municipalities to voluntarily proceed before the Council, as South Brunswick could have, within the time frame set forth in the Act.

The Act explicitly provides that where, as here, a municipality fails to avail itself of the Council process in a timely fashion, "[T]here shall be no exhaustion of administrative remedy requirements pursuant to section 16 . . .".

The statutory scheme is quite clear. Only those municipalities filing a resolution of participation within the period set forth in section 9(a) are entitled to require their adversaries to "exhaust the review and mediation process of the council before being entitled to a trial on his complaint." Those filing after November 2, 1985 in effect wager that they will file their fair share plan and housing element prior to the institution of any litigation. The Hills Court concisely described the process:

> If the municipality fails to adopt a resolution of participation within four months of the effective date of the Act, and then later fails to file its fair share plan and housing element with the Council prior to the institution of Mount Laurel litigation, it may lose the benefit of substantive certification. § 9b. It will be subject to litigation and the remedies provided by Mount Laurel II, the replacement of which by the administrative procedures of the Council was one of the primary purposes of the Act. § 3 (emphasis added). Id. at 46.

If South Brunswick is permitted to transfer this matter to the Council, it would encourage other municipalities, which did not file a resolution of participation prior to November 2, 1985 to refrain from proceeding before the Council until they, too, are actually sued. Granting South Brunswick's demand here would seriously undermine the statutory scheme. This is exactly the scenario which the Act seeks to prevent.

Indeed, the plaintiffs here could have filed a voluntary dismissal of this action against South Brunswick on November 3rd and simultaneously filed a new Mount Laurel complaint. Clearly exhaustion before the Council would then have been barred. Plaintiffs should not now be treated worse because they relied on a perfectly clear statutory limitation and proceeded with the instant 12-year-old action.

It is respectfully submitted that the Civic League should not be compelled to exhaust administrative remedies to which the Township is not properly entitled. South Brunswick's motion to transfer should accordingly be denied and South Brunswick should be held to the terms of its Consent or, in the alternative, this matter should be set down for trial before this Court as soon as practicable.

## II. SOUTH BRUNSWICK SHOULD BE REQUIRED TO COMPLY WITH THE PROVISIONS OF THE DULY EXECUTED CONSENT DATED FEBRUARY 5, 1986

It is well settled in New Jersey that an agreement to settle a lawsuit is a contract, which may be enforced like any other, whether or not it is formally entered on the record. In Pascarella v. Bruck, 190 N.J. Super. 111 (App. Div. 1983), the Court upheld the validity of such a settlement even though, unlike the instant settlement, it was orally made. Citing the Third Circuit's decision in Green v. John H. Lewis & Co., 436 F.2d 389 (3d Cir. 1971) for the proposition

that an "agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of the Court and even in the absence of a writing", the Pascarella Court ruled:

> We adopt these principles as consistent with the announced public policy of the jurisdiction favoring settlement of litigation. Settlements of this nature are entered into daily in our courthouse corridors and conference rooms, the court only aware, until informed of the fact of settlement, that counsel and the parties are working toward that desirable end. Adoption of a principle that such agreements are subject to attack because they were not placed upon the record places in unnecessary jeopardy the very concept of settlement and the process by which settlement of litigation is ordinarily achieved. * * *
>
> An agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of "fraud or other compelling circumstances," should honor and enforce as it does other contracts. Indeed, "settlement of litigation ranks high in our public policy." (citations omitted). Id. at 124.

There has been no demonstration of "fraud or other compelling circumstances" here. Indeed, in view of the lengthy negotiations preceding this Agreement, it should be given greater deference than Pascarella agreements reached on the courthouse steps. As set forth in the Affidavit of Eric Neisser, Esq. submitted herewith, it reflects extensive negotiations over a period of more than two years. In addition, the resultant agreement was expressly approved by Carla Lerman, the Court-appointed Master.

South Brunswick has no more right to renege on its agreements than a natural person. Contracts between municipalities stand on the same footing as contracts of natural persons, and are governed by the same considerations in determining their validity and effect.

Beverly Sewerage Authority v. Delanco Sewerage Authority, 65 N.J. Super. 86 (Law Div. 1961). Nor, where a municipality has incurred an obligation which it has the power to incur, should it be permitted to escape that obligation. Palisades Properties, Inc. v. Brunetti, 44 N.J. 117 (1965). In Monroe Co. v. Asbury Park, 40 N.J. 457 (1963) the Supreme Court held that specific performance in connection with a lease would not be withheld where the municipality failed to sustain its burden of proof as to the illegality of such lease. Here, too, it is respectfully submitted that the municipality has not -- and cannot -- sustain its burden of proof as to the Agreement which it seeks to avoid.In view of the inadequacy of a remedy at law,the Civic League should be entitled to specific performance here.

South Brunswick states only that it relies upon the Fair Housing Act and the Hills decision. That neither bars enforcement of the Consent Order here is made clear by the Supreme Court's order in the Bernards case on the same day it issued the Hills decision. There the plaintiff developer contended that the parties had reached a complete oral agreement to settle the litigation in June of 1985, that should be enforced against the township even though the Township had refused to execute the later drafted documents embodying the agreement. Plaintiffs' Letter Memorandum in Support of Motion for Leave to Supplement Record and File Supplemental Brief, at 6, Hills Development Co. v. Township of Bernards, No. A-

122, #24,780. A copy of the letter memorandum and the Court's Order of February 20, 1986 in response to the motion are attached for the Court's convenience as Exhibit A to this Memorandum. The Supreme Court made clear that its Opinion that day transferring the Bernards case did not decide or preclude plaintiff's claims based upon the alleged settlement or estoppel. It is to be recalled that Bernards had not signed the settlement and had filed its transfer motion in a timely fashion at the time it decided not to sign. In contrast, South Brunswick, knowing of its right to seek transfer, decided to conclude negotiations and sign a formal, final, and complete settlement and file it with this Court for enforcement, rather than to seek transfer. This Court need only rely on ordinary contract law, not even the special doctrine of equitable estoppel, to enforce this settlement.

The Hills decision, moreover, does not change the law regarding settlement of litigation set forth in Pascarella nor does it alter the principle articulated in Palisades Properties that municipalities, like natural persons, are bound by their contracts. South Brunswick's reliance upon the Hills decision is accordingly misplaced. All of the municipalities in the Hills case filed their motions to transfer well before the November 2, 1985 deadline. The Hills Court explicitly held that those motions were to be considered petitions for substantive certification for purposes of the timetable set forth in the Fair Housing Act. By not filing its

motion prior to November 2, 1985, South Brunswick waived any rights it might have had to appear before the Council. Like the Civic League, it committed itself to negotiating a settlement and, if the parties were unable to agree, to a trial. The Civic League, in reasonable reliance upon this commitment, refrained from proceeding to trial. As set forth in Mr. Neisser's affidavit, the Civic League afforded the municipality every possible opportunity to voluntarily satisfy the mutually agreed upon fair share. It is a matter of record that this Court refrained from signing the duly executed Consent as a further accommodation to South Brunswick.

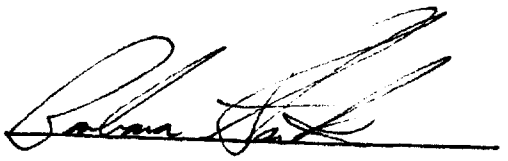
The Civic League agreed to postpone the trial in this matter only because of South Brunswick's professed good faith. It is impossible to ascertain how many interested developers and actual units have been lost during this period. If the negotiations had failed, at the very least the Civic League would be entitled to a trial on the merits. But the negotiations did <u>not</u> fail. On the contrary, the Consent represents a detailed, workable and fair compromise. It is respectfully submitted that South Brunswick as well as the Civic League will benefit by being held to its terms.

## CONCLUSION

These motions require this Court to decide simply whether the government, too, is bound by the law. Must only plaintiffs, or also the government, obey statutory time restrictions delimiting rights? Must only plaintiffs, or also the government, comply with its own voluntary agreements to settle? Plaintiffs respectfully submit that because there is no system of law if the government is above the law, the Township's motion to transfer must be denied and the plaintiffs' motion to enforce the settlement must be granted.

Dated: May 7, 1986

Respectfully submitted,



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SUPREME COURT OF NEW JERSEY
M-549 September Term 1985
M-550

THE HILLS DEVELOPMENT COMPANY,

Plaintiff-Movant,

v.

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

Defendants-Respondents.

O R D E R

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 of out any alleged settlement, estoppel, or otherwise; provided, however, that such application shall not affect this Court's Order transferring the matter to the Council on Affordable Housing and provided 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 plaintiff.

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

A TRUE COPY
Stephen W. Townsend
CLERK

Clerk

EXHIBIT A

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January 22, 1986

FILE NO.

The Honorable The Chief Justice and
Associate Justices of the Supreme Court
New Jersey Supreme Court
Hughes Justice Complex CN-970
Trenton, New Jersey 08625

Re: The Hills Development Company v. Township of Bernards, et al.;
Docket No. L-030039-84 P.W., No. A-122, #24,780.

To The Honorable The Chief Justice and Associate Justices of the Supreme Court:

On behalf of plaintiff/movant-The Hills Development Company ("Hills"), please accept this letter memorandum in lieu of a formal brief in support of the within motion for leave to supplement the record and file a supplementary brief. This matter is an exclusionary zoning lawsuit filed pursuant to Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) ("Mount Laurel II"). This matter is presently before this Court by virtue of an interlocutory appeal filed by defendant, Township of Bernards ("Bernards"), wherein Bernards seeks reversal of the trial court's denial of transfer to the Council on Affordable Housing. Trial court proceedings are stayed.

## FACTS/PROCEDURAL HISTORY

The procedural history and facts of this case have been set forth in detail by Hills in its briefs already submitted to this Court in connection with Bernards' appeal of the trial court's denial of transfer. The relevant facts on this motion are as follows.

On October 17, 1985, Hills submitted to Bernards a development application pursuant to Section 707 of Bernards' land use ordinance. The cost of preparing the application was estimated at $250,000. A $74,360 application fee was paid to Bernards. (Pa196 to Pa198).[1] The application was deemed complete by the Township on December 3, 1985. Representatives of Hills and Bernards' "Technical Coordinating Committee" ("TCC") met for the purpose of discussing Hills' development application.[2] During these discussions, representatives of Bernards made various suggestions with respect to desired revisions to the plans submitted by Hills.

On the evening of January 7, 1986 (the second day of oral argument in this matter), defendant Bernards Township Planning Board summarily and arbitrarily denied said development application. The circumstances under which approval was denied include the following:

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1 "Pa" refers to original Appendix submitted by Plaintiff, Hills. Appendix documents referenced herein are also set forth in the Appendix in Support of Motion submitted herewith.

2 The TCC is a development application review group established by ordinance and comprised of various Township officials. It meets informally and has powers limited to that of making recommendations to the Planning Board. It lacks power to take any action on applications other than to advise the Board.

(1) Hills received slightly more than one business day's notice of the Planning Board's intention to take action on the application. Hills was thus unable to have its expert witnesses attend or otherwise prepare for the meeting in any meaningful way;

(2) At a TCC meeting held on December 17, 1985, it was agreed that another TCC meeting concerning the application would be held on January 21, 1986 with an informal Planning Board meeting to follow on January 27, 1986. Nevertheless, without rational explanation, the application was summarily denied on January 7, 1986;

(3) Hills' offers to revise its plans to the best of its ability went unheeded;

(4) Hills offered to withdraw its application and submit a second application if Bernards would stipulate that approval of the second application would vest Hills with development rights as would approval of the original application (see discussion infra). The Planning Board declined Hills' offer;

(5) The Planning Board retired to closed session immediately prior to voting to deny the application;

(6) Hills was not permitted to present witnesses, have a public hearing or otherwise formally make a record supporting its application;

(7) A number of new Planning Board members were sworn in on that very evening. It is highly unlikely that the new members so much as glanced at the application.

Despite the fact that the application fully complied with Bernards' ordinances, Hills fully intended to do its utmost to satisfy any Township concerns with respect to the plans. Hills so advised Bernards. In fact, Hills' ability to respond to questions or concerns was confined to meetings with the TCC. Hills was totally denied an opportunity to present its plans before the Planning Board. No public hearings have been held.

The reasons underlying Bernards' summary, arbitrary and unlawful denial of Hills' development application are obvious. Shortly after Hills filed its Section 707 development application, the Bernards Township Committee introduced an ordinance which would amend Section 707 of the Township's land use ordinances. Section 707 expressly provided that approvals of development applications submitted pursuant to that section confer development rights upon the applicant. The amending ordinance, Ordinance 746, deleted the Section 707 language which vested development rights upon the applicant and, in its stead, substituted language which expressly provided that approvals of Section 707 development applications confer no development rights upon the applicant. Township counsel conceded that the reasons underlying the amendment of Section 707 included that of preventing Hills from vesting its development rights.[3]

Trial court proceedings in this matter have been stayed. However, this Court entered an order which provided that Hills was entitled to move

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[3] Despite having processed and approved numerous applications submitted pursuant to Section 707, shortly after Hills filed such an application, Bernards moved to amend the section and argued that it was ultra vires.

before the courts for relief if Bernards attempted to take any municipal action which would have the effect of frustrating compliance with the Mount Laurel mandate. (Pa48). Hills thereafter moved before the trial court to enjoin Bernards' adoption of Ordinance 746. The trial court did not so enjoin Bernards but it specified that any such ordinance must explicitly state that it would not apply to Hills' development application pending this Court's resolution of the appeal before it. The trial court's order limited the relief to Hills' pending application. Bernards indeed adopted such an amending ordinance on December 26, 1985. However, as indicated above, less than two weeks later Bernards arbitrarily denied Hills' development application for the obvious purpose of divesting Hills of the development rights which would have otherwise accrued pursuant to approval of its application. Hills has obtained a stenographic transcript of the January 7 Planning Board meeting. Hills desires to supplement the record in this matter with that transcript and any other documentation necessary to support the allegations contained herein.

Facts relevant to Hills' request to file a supplementary brief are as follows. The fundamentals of a settlement of the above-captioned litigation were agreed upon in September of 1984. At that time, representatives of Bernards approached Hills and offered to settle this litigation. (Pa139). Bernards offered to rezone a portion of Hills' property in a manner which would allow Hills to construct an inclusionary development which would provide 550 units of lower income housing. To that end, Bernards adopted Ordinance 704 on November 12, 1984 which ordinance provided zoning which would permit construction of the inclusionary development described above. (Pa161).

Thereafter, the parties and the court-appointed Master met on numerous occasions for the purpose of resolving certain relatively minor issues. These issues were, in fact, resolved and, on June 12, 1985, counsel for Bernards wrote to the trial court and advised the court that "the parties in the above mentioned matter have arrived at an agreement to settle and conclude the above matter." (Pa175). The parties thereafter concluded the process of drafting a proposed order of judgment and stipulation of settlement/memorandum of agreement. Although the drafting of said documents was resolved to the satisfaction of the parties, Bernards declined to execute any documents outlining the agreement as negotiated. (Pa143 to Pa146).

Hills desires herein leave to file a supplementary brief on the issue of whether the agreement may be enforced notwithstanding the fact that the settlement documents were not executed. In the alternative, Hills respectfully requests that the stay entered in this matter be modified so that Hills may file the appropriate motion in the trial court.

## ARGUMENT

### POINT I

### HILLS RESPECTFULLY REQUESTS THAT THIS COURT PERMIT HILLS TO SUPPLEMENT THE RECORD IN THIS MATTER SO AS TO REFLECT ACTIONS UNDERTAKEN BY BERNARDS SUBSEQUENT TO THE SUBMISSION OF BRIEFS ON BERNARDS' APPEAL.

Bernards' recent actions are quite illuminating. Bernards has steadfastly declined to advise this Court as to the course of action it would take if this Court were to reverse the trial court's decision denying transfer to the Council on Affordable Housing. Unfortunately, Hills suspects that, upon entry of

an order by this Court transferring this matter to the Council, Bernards would expeditiously move to attempt to repeal the zoning which permits Hills to construct its inclusionary development. Bernards' passage of the aforementioned Ordinance 746 surely supports Hills' suspicions. The arbitrary denial of Hills' development application on January 7, 1986 further fuels Hills' suspicions.

Hills will be moving before the trial court in an effort to have said denial declared unlawful so that the application may be processed in accordance with the Municipal Land Use Law.[4] However, Hills respectfully submits that the arbitrary denial of Hills' development application further demonstrates the bad faith of Bernards and its intentions upon a transfer of this matter. Bernards has stated to this Court and the courts below that it would process Hills' development application just as it would any other development application, i.e. in accordance with law. In Hills' view, it has not done so.

Bernards has deleted the "sunset provision" which had been contained in Ordinance 704 so that the ordinance did not expire in November of 1985. Presumably, Bernards did so in order to convince this Court of its honorable intentions. Yet, Bernards is taking extraordinary steps in an effort to divest Hills of the development rights which would otherwise accrue upon an approval of its development application. Hills believes that Bernards' recent arbitrary denial is relevant to the issue of transfer and it therefore respectfully requests

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[4] Since the trial court has already adjudicated Hills' motion to enjoin the adoption of Ordinance 746, Hills presumes that this Court's Order of November 14, 1985 (Pa48) also authorizes such a trial court application.

that this Court permit Hills to supplement the record to reflect the activities which have taken place subsequent to the filing of briefs in connection with the Township's appeal on the issue of transfer.

## POINT II

### HILLS RESPECTFULLY REQUESTS LEAVE TO FILE A SUPPLEMENTARY BRIEF ON THE ISSUE OF WHETHER THE SETTLEMENT REACHED BY THE PARTIES MAY BE ENFORCED.

As described above and as represented by Township counsel to the trial court in June of 1985, an agreement to settle this matter had indeed been reached.[5] However, the Township Committee refused to execute settlement documents outlining the negotiated settlement and, in fact, attempted to repudiate the settlement. Hills has become aware of a line of case law which is applicable to the facts of this matter but which has not yet been briefed. That line of case law holds that an agreement to settle a lawsuit which is voluntarily entered into may be binding upon the parties, whether or not made in the presence of the court and whether or not reduced to a writing.[6] Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983) certif. denied 94 N.J. 600 (1984);

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[5] Hills alleges that the Township Committee met with the court-appointed Master in closed session prior to announcing the settlement, voted by roll call on each and every issue contained in the settlement and agreed by majority vote to authorize their attorney to proceed with the settlement. This action, taken in the presence of the court-appointed Master, could be demonstrated on remand.

[6] Counsel for Hills and Bernards indeed prepared settlement documents which were revised as a result of the parties' negotiations. However, the documents were not executed.

Davidson v. Davidson, 194 N.J. Super. 547 (Ch. Div. 1984); Green v. John H. Lewis and Co., 436 F.2d. 389 (3d Cir. 1971). Unless a requirement exists for an agreement to be in writing, parties may bind themselves by written or oral understanding, or by any combination of both. Silverstein v. Dohoney, 32 N.J. Super. 357 (App.Div. 1954). See also Davidson, supra, 194 N.J. Super. at 552-554.

Hills respectfully requests that this Court grant to Hills the opportunity to brief the issues raised by the aforementioned line of case law. The issue of whether the agreement reached in this matter may be enforced is relatively straightforward and would not require extensive briefing by the parties. Despite representations made to the trial court, Bernards would presumably deny that an agreement to settle this matter had ever been reached. Therefore, a factual hearing on the issue would appear to be necessary. Hills has already requested that this Court either affirm the trial court's denial of transfer or remand this matter in light of Hills' claims of inequitable conduct by Bernards including the issue of whether Bernards should be equitably estopped from transferring this matter or repealing Hills' zoning. If such an opportunity for a hearing on remand were granted, the issue of whether an enforceable agreement was indeed reached could also be addressed at such a hearing.[7]

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[7] But for the stay issued in this matter (Pa47 to Pa48), Hills would be able to file a trial court motion to enforce the parties' agreement. Presumably, the merits of such a motion would be independent of the issue of whether the trial court improperly denied transfer. However, guidance from this Court with respect to the issue raised herein will assist in clarifying the nature of any hearing upon remand which this Court may decide to order.

Finally, it should be noted that the identical issue raised herein may be raised in other pending exclusionary zoning lawsuits. For example, in Urban League of New Brunswick v. Carteret (So. Plainfield), A-129; #24,788, a similar issue appears to be raised. In fact, Hills believes that a number of pending Mount Laurel lawsuits may raise the issue of whether the parties' apparent agreement to settle may be enforced notwithstanding the municipal attempt to repudiate the agreement and transfer the matter to the Council on Affordable Housing. Therefore, resolution of the issue of whether the aforementioned line of case law may be applied to enforce a settlement once reached in exclusionary zoning litigation may assist in expeditious disposition of a number of pending exclusionary zoning lawsuits in which agreements to settle have apparently been reached. Therefore, Hills respectfully requests that this Court permit Hills to file a supplementary brief on the issue of whether an agreement to settle Mount Laurel litigation may be enforced by the courts notwithstanding the fact that settlement documents have not been executed.

## CONCLUSION

For the aforementioned reasons, Hills respectfully requests that this Court: (1) grant Hills leave to supplement the record to reflect the actions taken by Bernards subsequent to the filing of briefs with this Court in connection with the Township's motion to transfer; (2) grant Hills leave to file a supplementary brief on the issue of whether the agreement to settle reached by the parties in this matter may be enforced by the courts; and (3) remand this matter to the trial court for a full evidentiary hearing on the issue of whether an enforceable settlement was reached in addition to the issue of whether Hills' reliance on Bernards' compliance ordinance and representations should estop Bernards from a transfer or a repeal of Hills' zoning. In the alternative, Hills requests that the stay issued in this matter be modified so that Hills may raise in the trial court the issue of whether the parties' agreement may be enforced.

Respectfully submitted,

BRENER, WALLACK & HILL,
Attorney for plaintiff/movant-
The Hills Development Company

BY _____
Henry A. Hill

January 22, 1986

By: _____
Thomas F. Carroll