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Brief in opposition to plaintiff's motion
for Partial Summary Judgment

Pg. 13

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Attorney for Defendant, The Planning Board of the Township of
Old Bridge

O & Y OLD BRIDGE DEVELOPMENT : SUPERIOR COURT OF NEW JERSEY
CORP. : LAW DIVISION
: MIDDLESEX COUNTY

Plaintiff,

vs.

THE TOWNSHIP OF OLD BRIDGE,
et als.,

Defendants

:

: DOCKET NO. L-32516-80

:

CIVIL ACTION

:

:

:

:

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

STATEMENT OF FACTS

Plaintiff filed a Complaint in Lieu of Prerogative Writ against the defendant, Old Bridge Township Planning Board, among others, on February 18, 1981. The complaint challenges the validity of the Old Bridge Township Land Development Ordinance in the first five counts of the complaint as being unconstitutional, vague, inconsistent with enabling legislation and therefore, ultra vires. Plaintiff also alleges an illegal conspiracy involving the Old Bridge Township Council, Planning Board, Sewerage Authority and Utility Authority in the tenth count.

Plaintiff has never submitted an application for development for least cost housing developments or for any development to the Planning Board of Old Bridge Township. However, plaintiff has, in the past 18 months, submitted requests for zoning ordinance amendments to the Planning Board. These requests have been limited solely to zoning and subdivision changes which would allow the plaintiff to vest its rights in preliminary subdivision approval for a period of not less than 20 years. (See Exhibit B). Plaintiff did not seek changes in any other provisions that it challenges in the first five counts in its complaint. Plaintiff filed this action after the Township Council failed to take action on the proposed twenty year freeze provision.

The complaint was served on the defendants on February 19, 1981, at 2:30 P.M. (See Exhibit "A" attached hereto) On the very same day, newspaper articles appeared in the Home News (Plaintiff's Appendix, 1a) and in the News Tribune (Plaintiff's Appendix, 2a). On February 21, 1981, an article appeared in the

Star Ledger describing the challenge of the plaintiff (Plaintiff's Appendix 4a).

An article also appeared in the News Tribune on February 20, 1981 (Plaintiff's Appendix 9a) indicating that the the suit "was a strong indictment of not only the Township Zoning Ordinance but of the way in which business is conducted in Old Bridge". The article also states that "Old Bridge officials have declined to comment on the suit until they have been served with the Court papers".

ARGUMENT

POINT I

I. SUMMARY JUDGMENT MOTION OF
PLAINTIFF SHOULD NOT BE
GRANTED ON THE COUNTERCLAIM
OF THE PLANNING BOARD FOR
MALICIOUS ABUSE OF LEGAL
PROCESS

The Planning Board alleges that plaintiff joined the Planning Board as a vindictive act in malicious disregard of the facts involved in the matter and as a malicious abuse of process because Old Bridge Township would not amend its land development ordinance to extend to the plaintiff a period of protection of twenty years pursuant to N.J.S.A. 40:55D-49d.

As plaintiff correctly states, the essence of the tort of abuse of process is not in commencing an action or causing process to issue with or without justification, but misuse or misapplying process justified in itself for an end other than that which it was designed to accomplish. Plaintiff is attempting to pressure Old Bridge Township to amend its regulations by filing the suit. The essential elements of abuse of process are first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding. If there is present a form of extortion or coercion, during the course of negotiation or pending trial after the issuance of the process itself — the complaint — such coercion may constitute abuse of process. (Prosser Torts, Section 100, page 669)

Plaintiff argues that no act has occurred subsequent to the issuance of process which justifies the counterclaim. It is the Planning Board's contention that a deliberate effort on the part of the plaintiff to publicize the action immediately upon filing of the suit constitutes the act and is consistent with the pressure tactics of plaintiff in its attempt to force Old Bridge to change its zoning to grant a twenty year period of protection for the plaintiff.

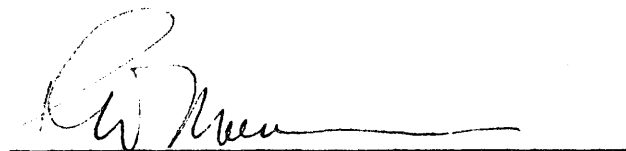
It appears that immediately upon filing of the complaint in Trenton with the Clerk of the Superior Court, plaintiff also filed the complaint with at least two newspapers with significant circulation in Old Bridge Township. The Summons and Complaint were received by the Clerk of Old Bridge Township at 2:30 P.M. on February 19, 1981. The newspaper articles appeared on the 19th even before the Township was aware of the suit. Such action obviously indicates a clear attempt to coerce the various governmental bodies of Old Bridge Township for the purpose of forcing a zoning amendment which the plaintiff desires and the Township rejects.

ARGUMENT

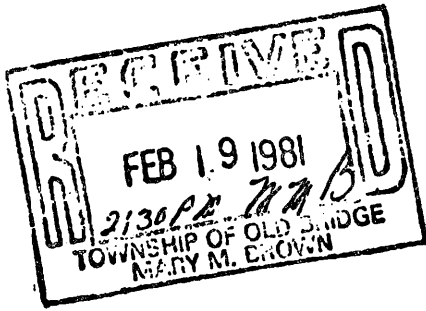
POINT II

II. THE MOTION FOR SUMMARY JUDGMENT DISMISSING THE COUNTER CLAIM OF THE PLANNING BOARD CHARGING ABUSE OF PROCESS SHOULD BE STAYED UNTIL COMPLETION OF DISCOVERY BY THE PLANNING BOARD.

This plaintiff, in opposing the motion, is not able to file supporting affidavits with respect to the origin of newspaper articles appearing on the same day as the filing of the complaint and alleges that critical facts, with respect to the origin of the newspaper accounts, are within the moving parties knowledge. The plaintiff's motion should not be granted until the Planning Board has had a reasonable opportunity to conduct discovery with respect to newspaper articles. Rule 4:46-5(a), Bilotti v. Accurate Forming Corp., 39 N.J. 184, 206 (1963)



Thomas Norman, Attorney for
Defendant, Planning Board of
Old Bridge Township



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JOSEPH ... NIZZO
NEW ... N.J.

for defendant

Attorney(s): BRENER, WALLACK & HILL
Office Address & Tel. No.: 15 Chambers Street, Princeton, N.J. 08540 (609) 924-0808
Attorney(s) for Plaintiff(s) O & Y OLD BRIDGE DEVELOPMENT CORP.

Plaintiff(s)
O & Y OLD BRIDGE DEVELOPMENT CORP., a Delaware Corporation.

SUPERIOR COURT
OF NEW JERSEY

LAW DIVISION

MIDDLESEX COUNTY

vs.

Docket No. L- 32516-80

Defendant(s)
THE TOWNSHIP OF OLD BRIDGE in the COUNTY OF MIDDLESEX, a municipal corporation of the State of New Jersey, THE TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, the PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, the OLD BRIDGE TOWNSHIP SEWERAGE AUTHORITY and the OLD BRIDGE TOWNSHIP MUNICIPAL UTILITIES AUTHORITY.

CIVIL ACTION
Summons

Att'y
OFF ATTY
A

The State of New Jersey, to the Above Named Defendant(s):

TOWNSHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE

YOU ARE HEREBY SUMMONED in a Civil Action in the Superior Court of New Jersey, instituted by the above named plaintiff(s), and required to serve upon the attorney(s) for the plaintiff(s), whose name and office address appears above, an answer to the annexed complaint within 20 days after the service of the summons and complaint upon you, exclusive of the day of service. If you fail to answer, judgment by default may be rendered against you for the relief demanded in the complaint. You shall promptly file your answer and proof of service thereof in duplicate with the Clerk of the Superior Court, P. O. Box 1900, Trenton, New Jersey 08625, in accordance with the rules of civil practice and procedure.

If you are unable to obtain an attorney you may communicate with the New Jersey State Bar Association by calling toll free 800-792-8315. You may also contact the Lawyer Referral Service of the County in which you reside, by calling 201-828-0053. If you cannot afford an attorney, you may communicate with the Legal Services office of the County in which you reside, by calling

Dated: February 18 19 81

W. Lewis Bambrick
W. Lewis Bambrick

Clerk of the Superior Court

Name of defendant to be served: Township Council of the Township of Old Bridge
Address for service: c/o Township Clerk
One Old Bridge Plaza
Old Bridge, New Jersey 08857

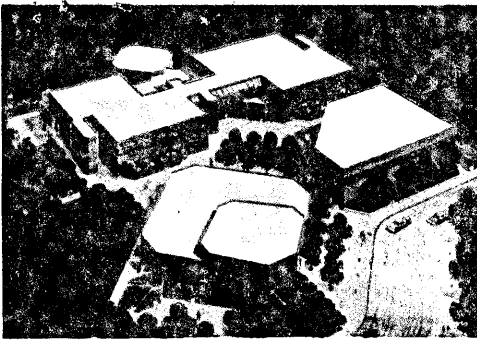


EXHIBIT "B"

Township of Old Bridge

MIDDLESEX COUNTY, N.J.

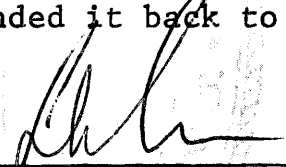
ONE OLD BRIDGE PLAZA • OLD BRIDGE, N.J. 08857

DEPARTMENT OF PLANNING & DEVELOPMENT
(201) 721-5600

TO: Tom Norman, Esq.
FROM: E. Fletcher Davis, Township Planner
DATE: December 5, 1980
RE: General Development Plan - Olympia York

I am enclosing herewith a copy of the revised "Olympia York" General Development Plan amendment. Changes have been made in Item 20-8.812 (ii), 20-8.813 (a) where Bonus #5 was moved back up front; 20-8.813 (f) where the Public Open Space dedication can have the same 12 months as right of ways; and 20-8.814 (g) and (h) which provides for a biennial review.

Please call me with your comments. I think I might try to shoot this back up to the Council on December 15th inasmuch as it was the Council that formerly remanded it back to you and I.


E. Fletcher Davis
Township Planner

EFD:ml
Enc.

6. Amend Section 20-8.8 Planned Development, by deleting Section 20-8.81 Planned Development Pre Application Meeting in its entirety and in its place insert the following

20-8.8 PLANNED DEVELOPMENTS

20-8.81 PLANNED DEVELOPMENT PRE-APPLICATION MEETING

Any applicant wishing to seek approval of a Planned Development may request a Pre-Application meeting with the Planning Board as the first step in the Planned Development approval process. The purpose of this procedure is to expedite processing of the applications for preliminary and final approval by insuring that the applicant fully comprehends the requirements of this Section, that the applicant will be in compliance with it, and that the applicant and the Planning Board are in substantial agreement as to the overall concept of the proposed Planned Development.

20-8.811 SUBMISSION PROCEDURES FOR A GENERAL DEVELOPMENT PLAN

- (a) An applicant for approval of Class V Planned Development may elect, to file a General Development Plan encompassing all of the applicant's land constituting the proposed Planned Development. If such a filing is elected, the applicant shall first obtain approval of the General Development Plan as provided herein (in lieu of "Planned Development Preliminary Approval" pursuant to Section 20-8.82) and shall thereafter from time to time proceed to obtain Preliminary Major Subdivision Approval pursuant to Section 20-8.2 for each of the several subdivisions comprising the total Planned Development and Final Major Subdivision Approval pursuant to Section 20-8.3 for each such subdivision (in lieu of "Planned Development Final Approval" pursuant to Section 20-8.83).
- (b) An application for approval for a General Development Plan shall be deemed an application for development for the purposes of requiring a public hearing pursuant to Section 20-2.14.
- (c) Fifteen (15) copies of the General Development Plan and four (4) complete applications shall be submitted to the Administrative Officer at least 30 days prior to a regular meeting of the Planning Board. If the application is found to be incomplete the applicant shall be notified by the Administrative Officer within 45 days of submission of the application or the application shall be deemed to be properly submitted.
- (d) Two (2) copies of the General Development Plan shall be filed by the applicant, for informational purposes only, with both the County Planning Board and the State of New Jersey Department of Community Affairs, Division of State and Regional Planning.

- (e) The Planning Board shall, within 95 days or within such further time as may be consented to by the applicant, by written resolution, either grant approval of the General Development Plan as submitted, or with changes and/or conditions, or deny approval.

20-8.812

CONTENTS OF GENERAL DEVELOPMENT PLAN

The General Development Plan shall:

- (a) Contain such information as may be necessary for the Planning Board to reach the Required Statutory Determination set forth in Section 20-8.825 pursuant to N.J.S.A. 40:55D-45.
- (b) Comply with the requirements of Section 20-11 and set forth in written form and with maps and drawings, as applicable.

(i) The total number of proposed dwelling units, as a matter of right and the manner in which the applicant intends to satisfy the provisions of Section 20-11.25.

(ii) A Land Use Plan for the proposed Planned Development indicating the general location and amount of land to be utilized for open space and to serve as buffers or to integrate the proposed Planned Development with adjacent properties and land uses, lands to be set aside for schools and other community facilities and lands to be used for residential and non-residential uses, according to the following schedule:

Residential:

Type I - Areas restricted for single family detached dwellings, patio homes and cluster homes only.

Type II- Areas for all types of housing, including multi-family.

Non Residential:

Type I - Areas for retail commercial.

Type II- Areas for all types of offices, hotel-motels and light industry.

(iii) An Open Space plan setting forth public and private open space and indicating recreational and community facilities, developed and undeveloped open space, for proposed Planned Development.

- (iv) Traffic and Circulation plans for the proposed Development indicating proposed major vehicular and pedestrian circulation systems, and proposed improvements, if any, to existing vehicular and pedestrian circulation systems.
 - (v) In the case of a Planned Development which proposes construction over a period of years, provisions insuring the protection of the interests of the public and the residents, occupants and owners of the proposed Planned Development in the total completion of the Planned Development; and
 - (vi) A staging plan, which describes the nature and type of supporting community facilities, including recreation roads, public safety and health education as related to the number of dwelling units proposed for construction at each stage. Such staging shall be designed so as not to create excessive demand on any municipal facility or service available to serve the areas proposed for development, as contemplated by Section 20-11.4.
- (c) Provide the information required by Section 20-9.1 (Environmental Impact Report)

20-8.813

APPROVAL OF GENERAL DEVELOPMENT PLAN

- (a) The grant of approval shall include findings of fact and conclusions of law pertaining to 20-8.812 and shall include findings of fact and conclusions pertaining to the bonuses set forth in Section 20-11.252, identified as, but limited to: Bonus #1, Siting; Bonus #2, Traffic Impact, Bonus #5, Distinctiveness and Excellence and Bonus #6, Public Open Space.
- The Planning Board shall not consider Bonus #3, Design Features on Tract; Bonus #4, Landscaping as part of the resolution of approval of the General Development Plan.
- (b) If the Planning Board grants approval of a General Development Plan, all of the representations and commitments of the applicant, including all maps or plans, together with all conditions imposed by the Planning Board and its resolution of approval shall be deemed to constitute the General Development Plan for the proposed Planned Development which General Development Plan shall be mutually binding upon the applicant and the Planning Board for 10 years (Section 20-8.814 paragraph (g), subject to such minor refinement or adjustment as may be appropriate in connection with the subsequent approvals of each of the several subdivisions comprising the Planned Development except that nothing hereir shall be construed to prevent modification by Ordinance of such terms and conditions of the General Development Plan as relate to public health and safety.

- (c) As a condition of approval, the Planning Board shall require that the pertinent commitments and conditions of the General Development Plan be set out in a formal agreement in form reasonably acceptable to the Planning Board.
- (d) As a condition of approval, the Planning Board shall require that the applicant copy and bind in book form the materials constituting the General Development Plan and provide the Administrative Officer with 20 copies thereof.
- (e) As a condition of approval the Planning Board shall require the applicant to dedicate the right-of-way for all major and minor arterials as set forth in the Traffic and Circulation Plans (See 20-8.812. b, iv.). Dedication of the right-of-ways shall be made by the applicant within 12 months of the date of approval of the General Development Plan. The Planning Board may revoke the approval of the General Development Plan if the dedication of the right-of-way is not completed within 12 months.
- (f) As a condition of approval, the Planning Board shall require the applicant to dedicate 25% of the Public Open Space as set forth in the Open Space Recreation and Community Facilities Plans, (See 20-8.812(b) (iii)), in fee simple absolute, within 12 months of the date of approval of the General Development Plan. The Planning Board may revoke the approval of the General Development Plan if the dedication of the open space is not completed within 12 months

20-8.814 EFFECT OF APPROVAL OF GENERAL DEVELOPMENT PLAN

- (a) Residential Density: The permitted density of one development unit per acre, as a matter of right, shall be fixed and binding upon the applicant. Density bonuses as set forth in Section 20-11.252, with specific reference to Bonus #1, Siting, Bonus #2, Traffic Impact, Bonus #5, Distinctiveness and Excellence and Bonus #6, Public Open Space, shall be binding if so determined by the Planning Board pursuant to Section 20-8.812(a). Density Bonuses #3 and #4 shall not be fixed until such time as preliminary approval of a specific section or stage is applied for.
- (b) Land Use Plan: The Type I and Type II residential land use designations and the Type I and Type II non residential land use designations shall be binding on the applicant. Precise locations and specifications of the various housing types (i.e. single family, patio homes, cluster homes, townhouses, garden apartments, etc.) shall be determined at the time of the applicable subdivision or site development plan approvals.
- (c) Open Space, Recreation and Community Facilities Plans: The amount and general location of lands remaining to be dedicated to the Township of Old Bridge as shown on the approved General Development Plan (i) to be utilized for public open space and to integrate the proposed Planned Development with adjacent properties and land uses, (ii) to be utilized for major recreational facilities such as playing fields, playgrounds, lakes,

etc., (iii) to be dedicated to public uses such as schools, fire or first aid stations, etc., shall be fixed and shall be binding on the applicant subject to final location on applicable subdivision or site development plans as the Planned development is developed.

- (d) Traffic and Circulation Plans: The location of all major and minor arterials as defined by Section 20-7.221 for vehicular traffic and all major pedestrian circulation routes, shall be binding on the applicant. All other vehicular or pedestrian circulation systems shall be determined at the time of subdivision approval.
- (e) Any conditions concerning the manner in which the development may be constructed so that the number of dwelling units and non-residential uses do not create excessive demands on municipal facilities or services shall be binding on the applicant.
- (f) Final approval of the subdivision or site development plan of any of the lands which are the subject of a General Development Plan shall be deemed prima facie evidence that the subdivision or site development plan, as approved, complies with the General Development Plan and any agreements relating thereto.
- (g) Approval of a General Development Plan shall vest in the applicant the right to develop the lands which are subject to General Development Plan in accordance with the General Development Plan, subject to the biennial review procedure set forth in Section 20-8.814(h). The applicant shall retain such rights for a period of ten (10) years. Prior to the expiration of nine (9) years from the date of approval of the General Development Plan the applicant shall apply to the Planning Board for a review of the applicant's compliance with the terms and conditions of the General Development Plan. Unless prior to the tenth anniversary of approval of the General Development Plan the Planning Board finds that there has been a substantial deviation from the terms and conditions of the General Development Plan, the applicant's rights to develop as provided herein shall be renewed for an additional ten (10) year period.
- (h) The Planning Board shall reserve the right to review the General Development Plan every two years from the date of approval in order to determine the appropriateness of the Plan, as it relates to the public health, safety and general welfare and in particular the design standards governing its construction. The Planning Board shall have 95 days from the beginning of each two year review period to make minor refinements and adjustments, as may be appropriate on the subsequent unbuilt sections of the General Development Plan, which modifications shall be binding upon the applicant. Such modifications shall be made by resolution, at a public meeting of the Planning Board. Failure to act upon the General Development Plan within the 95 day period shall constitute reapproval for an additional period of two years.