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Brief and appendix in support of Plaintiff's Motion For Partial Summary Judgment

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Superior Court of New Jersey

Law Division

Middlesex County

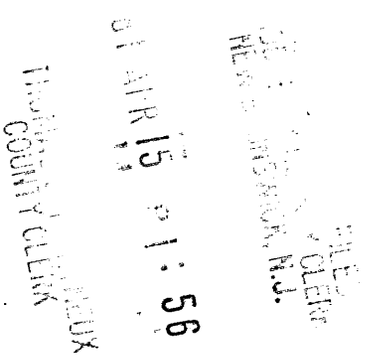
Docket No. L-32516-80

Civil Action

O & Y OLD BRIDGE DEVELOPMENT CORP.,
Plaintiff,

-vs-

THE TOWNSHIP OF OLD BRIDGE, et als.,
Defendants.



BRIEF AND APPENDIX IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CASES AND CITATIONS

PROCEDURAL HISTORY

February 18, 1981	Plaintiff's complaint in lieu of prerogative writ was filed with the Law Division of Superior Court, Middlesex County.
February 19, 1981	Plaintiff's complaint in lieu of prerogative writ was served on all Defendants.
March 3, 1981	Defendant Old Bridge Township Municipal Utilities Authority served an answer to the complaint and a counterclaim thereto.
March 5, 1981	Plaintiff consented to an extension of time for Defendant Old Bridge Township Sewerage Authority.
March 10, 1981	Defendants Township of Old Bridge and Township Council of the Township of Old Bridge served an answer to Plaintiff's complaint and a counterclaim thereto.
March 11, 1981	Defendant Old Bridge Township Planning Board served an answer to Plaintiff's complaint and a counterclaim thereto.

March 18, 1981	Plaintiff served an answer to the counterclaim of Defendant Old Bridge Township Municipal Utilities Authority.
March 26, 1981	Plaintiff served an answer to the counterclaims of Defendants' Planning Board of the Township of Old Bridge, Township of Old Bridge and Township Council of the Township of Old Bridge.
April 1, 1981	Defendant Old Bridge Township Sewerage Authority served an answer to Plaintiff's complaint and a counterclaim thereto.
April 7, 1981	Plaintiff served its answer to the counterclaim of Defendant Old Bridge Township Sewerage Authority.

STATEMENT OF FACTS

The within action involves a comprehensive challenge to Old Bridge Township's 1978 Land Development Ordinance and the fee schedules of the Township Municipal Utilities Authority and the Sewerage Authority. It also challenges general policy decisions made by some or all of the Defendants in planning for future water supply and sewer facilities to serve development allegedly permitted pursuant to the Land Development Ordinance. No previous legal action has even been instituted by O & Y Old Bridge Development Corp. or Olympia & York, the parent corporation, against Old Bridge Township or any of the other Defendants.

After service and filing of the complaint various daily newspapers published articles concerning said complaint, apparently because they considered it newsworthy. All of these articles discuss the content of the complaint generally, and either state that Plaintiff's attorney and/or the Vice President of Land Development for Olympia & York declined comment on the matter or discussed the allegations generally. (See Appendix pages 1a to 9a).

In the answers to the complaint filed heretofore, Defendants allege the following causes of action in their counter-claims:

1. The Township of Old Bridge and Township Council of the Township of Old Bridge allege libel, misuse and abuse of process, failure to exhaust administrative remedies against Plaintiff and demand a jury trial on their counterclaims.
2. The Planning Board of the Township of Old Bridge and the Old Bridge Township Sewerage Authority allege malicious abuse of process against Plaintiff.
3. The Old Bridge Township Municipal Utilities Authority alleges the failure to exhaust administrative remedies, as a counterclaim, against Plaintiff.

Plaintiff in the within Motion is seeking Summary Judgment against all Defendants on the causes of action stated in their Counterclaims.

POINT I

SUMMARY JUDGMENT SHOULD BE GRANTED ON THE TOWNSHIP COUNCIL'S LIBEL CLAIM BECAUSE IT FAILS TO STATE A CAUSE OF ACTION REGARDING STATEMENTS IN THE COMPLAINT

The First Count of the Township Council's Counterclaim alleges that each member of the Township Council enjoys a good reputation in the community and that Plaintiff falsely and maliciously caused legal proceedings to be filed containing false and libelous statements which injured the good reputation of said Council members. At paragraph 5 of the First Count, this Defendant alleges that the words and phrases which defamed the Council members "included" six general statements which are listed therein. These statements summarize various Counts of the complaint.

This libel Counterclaim should be dismissed because statements contained in Plaintiff's complaint are absolutely privileged and afford no basis for an action in libel. Genito v. Rabinowitz, 93 N.J. Super 225 (App. Div., 1966); Thourot v. Hartnett, 56 N.J. Super 306 (App. Div., 1959); Kotlikoff v. Tp. of Pennsauken, 131 N.J.Super 590 (Law. Div., 1974); Restatement, Torts, Section 587. In the case of Genito v. Rabinowitz, the Appellate Division affirmed the trial court's dismissal of a libel claim based upon statements in a filed complaint. The court explicitly held that allegations in a filed complaint

were absolutely privileged and could not afford a basis for an action in libel. In the case of Kotlikoff v. Township of Pennsauken, the court dismissed defendant's libel counterclaim and held that plaintiff had a complete defense to libel since the statements in his complaint which imputed criminal actions to defendant were absolutely privileged. Kotlikoff, supra at 597.

The doctrine of absolute immunity with respect to statements made in the course of judicial proceedings is one which is firmly established in New Jersey law. Meehan v. Hudson Dispatch, (App. Div., A-1560-79, decided 12/12/80); Devlin v. Greiner, 147 N.J. Super 446 (Law Div., 1977); LaPorta v. Leonard, 88 N.J.L. 663 (E.&A. 1916); Rogers v. Thompson, 89 N.J.L. 639 (E.&.A. 1916); Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552 (1955); Fenning v. S. G. Holding Corp., 47 N.J. Super 110 (App. Div., 1957); Middlesex Concrete, etc. v. Carteret Industrial Association, 68 N.J. Super 85 (App. Div., 1961). Absolute immunity serves the strong public policy which favors free expression in the judicial system. The privilege recognizes:

> "The supervening public policy that persons in such circumstances be permitted to speak and write freely without restraint or fear of an ensuing defamation action, this sense of freedom being indispensable to the due administration of justice." Fenning, supra at 117.

An absolute privilege is a total immunity granted on the basis of the speaker's position or status. Such immunity cannot be defeated by a showing that the speaker had actual malice, i.e., that he knew his statements were false or made these statements with reckless disregard for the truth. The speaker's motivation, no matter how improper, is entirely irrelevant once the communication is found to be entitled to absolute protection. Thus, the judicial inquiry ends with the finding of absolute privilege. Rainier's Dairies, supra at 558; Rogers v. Thompson, supra at 640.

Summary judgment should therefore be granted for Plaintiff since the absolutely privileged statements in Plaintiff's complaint cannot afford a basis for an action in libel and there remains no genuine issue of material fact. Judson v. Peoples Bank & Trust co. of Westfield, 17 N.J. 67 (1954).

POINT II

STATEMENTS WHICH CONCERN DEFENDANT'S GOVERNMENTAL OPERATIONS CANNOT FORM THE BASIS FOR A LIBEL ACTION BY THE TOWNSHIP COUNCIL

Plaintiff in its complaint in the within action challenges various actions by the Township Council acting pursuant to or under color of authority delegated by law[1]. These statements may not form the basis for an action in libel since impersonal attacks on governmental operations, as a matter of Constitutional law, may not constitute a libel of the officials responsible for those governmental operations. New York Times v. Sullivan, 376 U.S. 254 (1964); Wainman v. Bowler, 576 P.2d 268 (Mont. 1978).

In the landmark First Amendment case of New York Times v. Sullivan, the U.S. Supreme Court considered a newspaper advertisement concerning Montgomery, Alabama police action against civil rights demonstrators. The Court held that since the advertisement did not refer to police supervisors either by name or position, and merely constituted an impersonal attack on government operations as a whole, that the allegedly libelous statements were insufficient to support a finding that they referred to or were "of and concerning" the government official himself. It also held that an action for libel by a government

[1] Individual members of the Township council are not named or referred to in any manner.

agency is constitutionally impermissible. The Court reasoned as follows:

> "For good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of juris prudence. The present proposition would side-step this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a state may thus create the cause of action that would otherwise by denied for a publication which, as respondent himself said of the advertisement, 'reflects not only on me but on the other commissioners and the community'. Raising as it does the possibility that a good faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts srikes at the very center of the Constitutionally protected area of free expression. We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsibile for those operations." (Emphasis ours)

Thus, since both Plaintiff's complaint and statements made to the news media concern the general governmental operations of the the Township Council, said Council and the individual members thereof are constitutionally barred from basing an action for libel on these impersonal statements. Plaintiff therefore respectfully requests this Court to dismiss the First Count of the Township Council's Counterclaim as Constitutionally insufficient to support a finding of libel.

POINT III

SUMMARY JUDGMENT SHOULD BE GRANTED ON THE LIBEL COUNT OF THE TOWNSHIP COUNCIL'S COUNTERCLAIM REGARDING STATEMENTS MADE TO THE NEWS MEDIA

A. Summary Judgment Should Be Granted Because Of Defendant's Failure To Specifically Plead Libelous Statements

The Township of Old Bridge and the Township Council allege in paragraph 4 of the First Count of the Counterclaim:

> "that Plaintiff by itself, and through its servants, agents and employees made false and libelous (sic.) statements wilfully and maliciously and recklessly, to various representatives of the news media knowing said statements would be published and with the intent to have said statements published..."

Plaintiff is at a loss to reply to those general allegations, since all of the news articles we have seen state explicitly that Plaintiff specifically declined comment, and the only extra-judicial remarks published to date have been those of the various Township officials, including those of the Township attorney, attacking Olympia & York for having instituted this litigation. The pleadings of the Township Council do not identity either the slanderous remarks Plaintiff is alleged to have made, the name of its agent or employee who

talked to the news media, the representatives of the news media to whom statements were made, the name of the newspaper, the date of publication or the exact language published.[1] Because of this failure to allege the specific words claimed to be defamatory, the First Count of the Counterclaim of the Township Council is subject to dismissal at this time. Holmes v. Weber, 62 N.J.L. 55 (1898); Stickles v. Manes, 36 N.J.Super 95 (App. Div., 1955). Alternatively, Plaintiff requests this Court to order Defendant Township Council to amend its Counterclaim to specify the specific words spoken to the news media and other details of its claim.

B. Summmary Judgment Should Be Granted Because Statements Allegedly Made To The News Media Are Either Not Actionable Or Absolutely Privileged

A review of all articles published concerning the within lawsuit indicates that both Plaintiff's attorney and the Vice President of Land Development for O & Y Old Bridge Development Corp. have specifically declined comment on the lawsuit (see Appendix pages 1a-8a), with the exception of a February 20th, 1981 article in the News Tribune which summarizes statements of Plaintiffs counsel (see Appendix page 9a).

The News Tribune article of February 20th, 1981 entitled "Suit Asks Zone Law Stricken" generally summarizes various

[1] We assume that this paragraph in the Counterclaim was asserted without factual foundation, contrary to the rules relating to pleadings in slander actions in case Olympia & York later deviated from its policy against commenting on litigation in process.

statements of Plaintiff's filed complaint and also contains seven specific quotes from Plaintiffs counsel, Henry Hill. Of these seven quoted statements, two are not defamatory and therefor not actionable, three are statements of opinion which are absolutely priviledged under the First Amendment, and two are true and therefore absolutely privileged.

1. Statements Which Are Not Defamatory Are Not Actionable

In the News Tribune article of February 20th, 1981, Plaintiff's counsel was quoted as saying the following:

> "After two years, Olympia & York hasn't even been able to get an application in,"
>
> "The proposed development, which would contain between 15,348 and 20,464 units of mixed housing, would also include commercial developments such as a supermarket,"

Whether or not a publication is capable of having a defamatory meaning is initially for the court to decide as a matter of law. Mosler v. Whelan, 28 N.J. 397 (1958); Neigel v. Seaboard Finance Co., 68 N.J. Super 542 (App. Div. 1961). If the court decides that language complained of is not capable of defamatory meaning it must dismiss the complaint upon appropriate motion. Pierce v. Capital Cities Corporations, Inc., 576 F.2d 495 (3d Cir.), Cert. denied, 439 U.S. 861 (1978); Albert Miller & Co. v. Corte, 107 F.2d 432 (5th Cir. 1939),

Cert. denied, 309 U.S. 688 (1940); Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), Cert. denied, 100 S.Ct. 62 (1979); Restatement 2d of Torts, Section 614 (1977).

Expressions or statements, in order to be defamatory, must be capable of injuring reputation. Communication which is merely unflattering, annoying, irking, embarrassing, or that hurts a persons feelings, without more, is not actionable. Pierce v. Capital Cities Communications, Inc.,576 F.2d. 495, (3d Cir.), Cert. denied, 439 U.S. 861 (1978). The Restatement 2d of Torts, for example, defines a defamatory communication as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement 2d of Torts, Section 559 (1977).

Clearly Plaintiff's counsel's statement that Olympia & York has not been able to get in an application in two years would have no effect on the reputation of the Township Council. With regard to the statement that the proposed development would include a specific number of housing units and commercial development, this also cannot be construed to injure the Township Council's reputation in any way. Thus, this court should find that the above referenced statements are not defamatory as a matter of law and should grant summary judgment to Plaintiff as to those statements.

2. Statements Made To The News Media Which Constitute Opinions Are Absolutely Privileged

In the February 20th, 1981 article in the News Tribune, Plaintiff's counsel is quoted as making the following statements of opinion:

> "He said the Township and its ordinance require the company 'to provide architectural designs of proposed homes before the Township will determine whether we can actually build the homes. We are not allowed to know what we can plan to build until we design the plans."
>
> "Hill said that the Sewerage Authority and Utilities Authority prohibit the developer from using municipal services, but also prohibit the company from drilling for water or building utility lines."
>
> "Old Bridge is ignoring the second most famous land use decision in the state, Oakwood at Madison, which came out of its own town."

The above quoted three statements are no more than restatements of allegations in the filed complaint to the effect that:

1. Plaintiff will be unable to design its project before a final decision is made on the gross density permitted therein;
2. The Sewerage Authority and Utilities Authority have total control of the infra-structure necessay for multi-family development; and
3. The Township as a whole has ignored the decision

of the New Jersey Supreme Court in the Oakwood at Madison decision.

These opinions go no further than the allegations contained in the filed complaint, and even if they did, they are absolutely privileged under the First amendment as construed by the U.S. Supreme Court in Gertz v. Robert Welch, Inc.:

> "Under the First Amendment there is no such thing as a false idea. However malicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

As a matter of constitution law these opinions are not actionable. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Orr v. Argus-Press Company, 586 F.2d 1108 (6th Cir. 1978), Cert. denied, 440 U.S. 960 (1979); Cianci v. News Times Publishing Company, 486 F.Supp. 368 (S.D.N.Y. 1979); Ollman v. Evans, 479 F.Supp 292 (D.D.C. 1979); Church of Scientology v. Siegelman, 475 F.Supp. 950 (S.D.N.Y. 1979).

Since the above quoted three statements constitute absolutely privileged opinion under the First Amendment to the U.S. Constitution, we submit that said statements may not be the basis of this counterclaim for libel.

3. Truthful Statements Made By Plaintiff's Counsel Are Not Actionable

The following two quotes from Plaintiff's counsel refer to and characterize allegations of the filed complaint

in the within action:

> "Henry Hill, attorney for Olympia & York, said that the sixty-three page suit was a strong indictment of not only the Township's Zoning Ordinance but of the way in which business is conducted in Old Bridge."
>
> "The 1978 Ordinance restricts the development of small lot single family homes,...we are charging that Old Bridge had no intention of permitting this kind of development."

A review of the filed complaint in this matter indicates as to the first quoted statement above, that the suit challenges not only the Zoning Ordinance but the way in which Old Bridge Township has failed to provide necessary sewer and water infra-structure, in order words, the way in which the Township conducts business. (See Appendix pages 10a-15a containing the Eleventh Count of the complaint.)

With reference to the second statement quoted above, the twenty-first paragraph of the First Count of the complaint specifically alleges (as stated by Plaintiff's counsel) that the Township has failed to comply with the New Jersey Supreme Court mandate that it allocate substantial areas for single family dwellings on very small lots (See appendix pages 16a-17a containing the 21st paragraph to the First Count).

Since both of the above-quoted statements are truthful representations of the content of Plaintiff's complaint, as a matter of Constitutional law these statements may not form the basis for an action in libel. Both the First Amendment

to the U.S. Constitution and the New Jersey State Constitution require that the defense of truth be an absolute bar to a libel action. Garrison v. Louisiana. 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328 (1974); Hartley v. Newark Morning Ledger Company. 134 N.J.L. 217 (E&A 1946); Neigel v. Seaboard Finance Company, 68 N.J.Super 542 (App.Div., 1961); Rogozinski v. Airstream by Angell, 152 N.J.Super 133 (Law Div., 1977) modified on other grounds, 164 N.J.Super 465 (App.Div., 1979).

POINT IV

SUMMARY JUDGMENT SHOULD BE GRANTED ON DEFENDANTS' MALICIOUS PROSECUTION/ABUSE OF PROCESS COUNTERCLAIMS BECAUSE THEY FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Second Count of the Counterclaim of the Township Council of the Township of Old Bridge alleges various improper motives on the part of Plaintiff for instituting this litigation, including the desire to turn Old Bridge into a company town.

The Counterclaim of the Planning Board of the Township of Old Bridge alleges that the joining of the Planning Board as a Defendant constituted a "vindictive act" (despite the admitted statutorily required role of the Planning Board in preparation of the Land Development Ordinance) and that the filing of the Complaint constitutes malicious abuse of process. The Counterclaim of the Old Bridge Township Sewerage Authority alleges the improper naming of said Defendant for an ulterior motive. For the following reasons, these Counterclaims fail to state a cause of action upon which relief may be granted or are premature and thus subject to immediate dismissal.

A. Malicious Prosecution

To the extent these Counterclaims state a cause of action sounding in the tort of malicious prosecution, they

fail to allege numerous elements of this tort. Successful recovery on malicious prosecution requires Defendant to establish that:

1. A previous suit was brought against it without probable cause;
2. Plaintiff in the preceding action was actuated by malice.
3. The preceding action has been terminated favorably to Defendant.
4. Defendant-Counterclaimants suffered a special grievance as a result thereof.

Mayflower Industries v. Thor Corp., 15 N.J. Super 139 (Ch. Div. 1951), aff'd, 9 N.J. 605 (1952); Fielder Agency v. Eldan Construction Corp., 152 N.J. Super 344 (Law Div. 1977), Earl V. Winne, 14 N.J. 119 (1953); Voytko v. Ramada Inn of Atlantic City, 445 F. Sup. 315 (1978).

If the Counterclaims of these Defendants are viewed as claims for malicious prosecution, summary judgment should be granted for Plaintiff because of the failure to allege any facts which support any of the elements of this tort. Specifically, Defendants are unable to show:

1. Any previous litigation between Plaintiff and Defendants, because in fact there has been none;
2. Malice in a preceding action;
3. A favorable decision in a preceding action; and
4. Special grievance.

Because this is the first legal action between these parties any claim for malicious prosecution is premature and requires dismissal of this Count of the Counterclaim. Earl v. Winne, 14 N.J. 119 (1953).

B. Abuse of Process

The Counterclaims of both Defendants may be viewed as alleging an abuse of process. The jist of this tort is the misuse or perversion of process justified in itself for a purpose other than that which is was designed to accomplish, and the essential elements are:

1. An ulterior motive; and
2. Some further act after the issuance of process representing the perversion of the legimitate use of process.

Bad motives or malicious intent leading to the institution of a civil action are insufficient to support a cause of action for malicious abuse of process and there is no liability where the party has done nothing more than carry out the process to its authorized conclusion, even if done with bad intentions. Gambocz v. Apel, et al, 102 N.J. Super 123 (App. Div., 1968); Prosser, Law of Torts, Section 115 (3rd Ed., 1964); Penwag Property Co. v. Landau, 148 N.J.Super 493 (Ap. Div., 1977); Mayflower Industries v. Thor Corp., 15 N.J. Super 139 (Ch.

Div., 1951), aff'd 9 N.J. 605 (1952); Fielder Agency v. Eldan Construction Corp., 152 N.J. Super 344 (Law Div., 1977); Voytko v. Ramada Inn of Atlantic City, 445 F.Supp. 315 (D.N.J., 1978).

The required element of an act subsequent to the issuance of process usually takes the form of some kind of extortion by means of: attachment, execution, garnishment or sequestration proceedings or arrest of the person or criminal prosecution, or even infrequently the use of a subpoena for the collection of a debt. Although the ulterior motive may be inferred from the coercive act, the improper act may not be inferred from the motive itself. Prosser, Torts, Section 115, page 669.

The Counterclaims of the Township Council, the Planning Board and Sewerage Authority fail to allege the commission of an improper act after the issuance of process, and in fact there has been none. All that Plaintiff has done to date with respect to the use of process has been to file a complaint with the Superior Court and arrange to have that complaint served upon the Defendants through the Middlesex County Sheriff's Office. Those acts, irrespective of the Plaintiff's motives or the legal and factual basis for this action, cannot constitute, as a matter of law, an abuse of process.

Since Defendants' Counterclaims fail to state a cause of action for malicious prosecution or abuse of process, this Court should grant summary judgment for Plaintiff on these claims.

POINT V

SUMMARY JUDGMENT SHOULD BE GRANTED ON THE THIRD COUNT OF THE COUNTERCLAIM OF THE TOWNSHIP COUNCIL AND THE ENTIRE COUNTERCLAIM OF THE MUNICIPAL UTILITIES AUTHORITY BECAUSE THEY FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Third Count of the Counterclaim of the Township Council and the Counterclaim of the Municipal Utilities Authority allege that the purpose of the within suit is to harass said Defendants since no applications have been made to any agencies of Old Bridge Township and that the suit therefore is premature, arbitrary, unreasonable, and vexatious with an intent to intimidate said Defendants. Arguably, this Count fails to state a cause of action under any legal theory of New Jersey law. However, when viewed in the light most favorably to Defendants as required on Plaintiff's Summary Judgment Motion, this Count may state a defense that Plaintiff's suit is premature because of failure to exhaust all available administrative remedies.

Rule 4:7-1 of the Rules Governing the Courts of the State of New Jersey permit Defendants to state as a counterclaim, any claim against the Plaintiff whether or not arising out of the transaction or occurrence which is the subject matter of the opposing parties' claim. The exhaustion of the administrative remedies requirement is a rule of practice designed

to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts[1]. Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975). These Counterclaims therefore merely state a defense and not a claim against Plaintiff, and this Court is permitted by R. 4:5-4 to treat them as if they had been properly designated as defenses rather than Counterclaims, if the interest of justice requires.

Plaintiff respectfully requests this Court to grant Summary Judgment against the Township Council and the Municipal Utilities Authority on this portion of their Counterclaim and if the Court deems appropriate, permit both Defendants to amend their complaints to set forth the separate defense of failure to exhaust administrative remedies.

[1] N.J.S.A. 40:55D-17(a) provides: "Nothing in this act (the Municipal Land Use Law) shall be construed to restrict the right of any party to obtain a review by any court of competent jurisdiction according to law." The novel argument has been made, and is presently under consideration by our courts, that this language in effect nullifies Rule 4:7-1 with respect to the availability of an exhaustion defense in land use cases. Regardless of the outcome of that challenge to the exhaustion doctrine it is clear that the exhaustion doctrine itself does not apply where the issue to be decided is solely a matter of law or where, as is true in this case, application of the exhaustion doctrine would be an idle gesture since it would force the applicant or Plaintiff to go back to the administrative body (the Planning Board, Sewer Authority, Govering Body and Utilities Authority) and ask them to declare illegal their own actions (i.e., their Land Development Ordinance, Master Plan and sewer and water regulations). See Matawan v. Monmouth Cty Tax Board, 51 N.J. 291 (1968) at page 297 and cases cited therein.

POINT VI

SUMMARY JUDGMENT SHOULD BE GRANTED DISMISSING ALL COUNTS OF DEFENDANTS' COUNTERCLAIMS

New Jersey Court Rule 4:46-2 provides that an order for summary judgment shall be rendered forthwith if the pleadings and other papers on file show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to summary judgment as a matter of law. When both the papers supporting and in opposition to the motion demonstrate the absence of a factual dispute as to all elements of the cause of action, summary judgment should be granted. Frank Rizzo, Inc. v. Atlas, 27 N.J. 400 (1958).

The within Brief demonstrates that summary judgment should be granted for the following reasons:

1. As a matter of law, Defendants may not maintain a libel action based upon statements in Plaintiff's filed complaint;
2. The Defendants have no facts to support their allegation that Plaintiff made false and libelous statements to the news media;
3. As a matter of law, Defendants malicious prosecution action against Plaintiff is premature since there has been no preceding litigation terminated in Defendants' favor;

4. As a matter of law, Defendants may not maintain their action for abuse of process against Plaintiff since there has been no improper act after the issuance of process;

5. As a matter of law the exhaustion of administrative remedies doctrine may only be asserted as a defense and not as a counterclaim upon which the Court may award damages.

In considering the within motion this Court should closely scrutinize all papers supporting the motion and resolve all doubts in favor of the conventional trial. However, Defendants may not successfully resist this Motion by relying either upon conclusionary allegations or denials in their answers to the complaint. Robbins v. Jersey City, 23 N.J. 229 91957); James Talcott, Inc. v. Schulman, 82 N.J. Super 438 (App. Div., 1964).

Defendants also may not escape summary judgment by claiming that the critical facts to support their counterclaims are peculiarly within Plaintiff's knowledge and will be revealed through subsequent discovery because:

1. With reference to the libel claim involving statements in Plaintiff's complaint, said statements are privileged as a matter of law and raise no issues of fact;

2. With reference to the libel claim involving statements allegedly made to reporters which were published, Defendants may not claim that information in published newspaper reports is peculiarly within Plaintiff's knowledge.
3. With respect to the malicious prosecution claim, knowledge of the fact that there has been no preceding litigation between Plaintiff and Defendants should be imputed to Defendants;
4. With respect to the abuse of process claim, there is no allegation of any improper act after the filing and service of the complaint, and service of the complaint cannot as a matter of law, constitute an abuse of process;
5. With respect to the exhaustion of administrative remedies claim, as a matter of law, it constitutes no more than a defense and does not constitute a counterclaim upon which damages may be awarded.

CONCLUSION

For the aforementioned reasons, Plaintiff respectfully requests Partial Summary Judgment against the Township of Old Bridge, the Township Council of the Township of Old Bridge, the Planning Board of the Township of Old Bridge, the Old Bridge Township Municipal Utilities Authority and the Old Bridge Township Sewerage Authority on their respective Counterclaims.

BRENER, WALLACK & HILL
Attorneys for Plaintiff

By: _____
Guliet D. Hirsch

Dated: 6/25/91

APPENDIX

Home News 2/19/81

Firm seeks land changes

By JEFFREY BRODY
Home News staff writer

OLD BRIDGE — A Canadian development firm that owns about 25 percent of the vacant developable land in the township has filed a suit in state Superior Court charging that the land development ordinance is unconstitutional and should be declared invalid.

The firm, Olympia and York Ltd., said in a complaint filed yesterday in Trenton that the Township Council, Planning Board, Sewerage Authority and Municipal Utilities Authority have acted to keep out large developments.

The complaint said the governing bodies "have conspired to violate the specific directions of the New Jersey Supreme Court in the Oakwood at Madison decision" and the 1976 Urban League case, which is on appeal before the state Supreme Court.

The court in the historic 1977 Oakwood decision invalidated a municipal land development ordinance and said the community has an obligation to provide least-cost housing.

Olympia and York, which owns about 2,558 acres between Route 18 and Texas Road, demands in the complaint that the court appoint an independent planner to revise the land development measure and the regulations of the sewerage and utilities (water) authorities.

The municipality has yet to receive the complaint, but Township Attorney Louis Alfonso said he feels the township has been doing its share to meet regional planning needs.

E. Fletcher Davis, the township planner, said he spent several months working with representatives of the state Department of Community Affairs to make sure the land development ordinance complied with the Oakwood at Madison decision and the Urban League case.

"I have been a professional planner in New Jersey since 1975 and I have over 25 years of planning experience and I will put this ordinance up against any other ordinance in the state," Davis said. "I am very happy to defend it."

Lloyd Brown, vice president of land development for Olympia and York, yesterday said company policy prevents him from discussing any matter under litigation. According to a recent article in The Wall Street Journal, the firm has assets estimated at $5 billion and is the largest developer in North America.

The firm filed suit following the Township Council's decision last December to deny its request that the land use law be amended. The firm, in many meetings with the council and planning board, had sought an amendment that would allow developers of tracts of more than 600 acres to present a general development plan before seeking prelimary and final subdivision approval.

The general development plan, which would be an overview of the proposed project, would allow developers to build projects in stages over a 10- to 20-year period with guarantees that the outlines of their developments — roads, open space, residential, commercial and industrial zones — would exist beyond the life of one Planning Board.

Olympia and York, which owns more than 10 percent of the total land area of the township, plans to build a "new town," housing at least 18,000 people, over the next 15 years on its tract. The development would have commercial and industrial sections as well as schools, parks and a police precinct.

In addition to charging that the township has failed to comply with the Oakwood decision and the Urban League case, the firm, in its 65-page complaint, charges that land use and development laws discriminate against large developers; are vague and indiscriminate; not consistent with the master plan; and violate the state constitution and the state Municipal Land Use Law.

The complaint also charges that the Sewerage Authority and the MUA have unreasonable rules and regulations. The complaint said the MUA has failed to provide for the town's future water needs and the township needs to apply to the State Water Policy and Supply Council for additional diversion rights to support development projected in the Master Plan.

The firm said the township has not complied with the Oakwood decision and the Urban League case (Urban League of Greater New Brunswick vs. Mayor & Council of Carteret) because the land development ordinance discriminates against low- and moderate-income housing.

Central Jersey
THE NEWS TRIBUNE

Old Bridge sued by developer over construction ban on tract

By WAYNE F. YOURSTONE
and KATHLEEN CASEY
News Tribune staff writers

OLD BRIDGE — The township's zoning ordinance is being challenged by the Canadian-based developer Olympia York Ltd., a company that owns some 2,500 acres in the vicinity of Routes 9 and 18.

Township Attorney Louis J. Alfonso said the developer, as expected, filed the suit in Trenton, adding that the case will be heard in the Chancery Division of Superior Court, New Brunswick.

Details on the suit were scarce yesterday. While Alfonso said he has not read the 75-page complaint yet, he added he understands the township, and its Planning Board, Zoning Board of Adjustment, and Sewerage Authority, are all named by the developer.

He explained the suit charges the township's zoning law is unconstitutional and that it does not meet the requirements of providing for adequate housing.

"We feel we have met all housing requirements," Alfonso said, adding he will fully study the charges before formally responding.

An attorney for Olympia & York declined comment on the company's legal action, because, he said, Old Bridge township officials had not yet been served with the legal papers. Alfonso said the township will receive the formal suit in about a week.

Olympia York has been seeking several changes to the township's zoning laws to permit the development of a planned development here. The Township Council was to make those amendments last summer, but tabled the action, leading to Olympia York challenging the ordinance.

Middlesex County Planning Board officials — for whom the giant tract has been a blank circle on land-use maps for years — say development could have an impact on the natural process by which water seeps back into aquifers.

For that reason, they say, the board would require elaborate studies and carefully-tailored drainage plans from the developer before any type of development is approved.

When plans for a development are approved locally, they must also be approved by the county board if the project will affect a county road or drainage in a large area.

Two county roads — Route 527, or Old Bridge-Englishtown Road, and Route 520, or Texas Road — run through the Olympia & York property.

On a map, the property looks like a big ball stuck in a corner formed by Route 18 and the Monmouth County border.

The property is also between areas where the Old Bridge Sands and Englishtown Sands aquifers surface and may cover a very small part of the Englishtown sands.

The aquifers are water-bearing sand strata which are for the most part underground and supply drinking water.

But along the Monmouth County border, at the edge of the Olympia & York site, the Englishtown Sands aquifer surfaces in an irregular pattern called its "outcrop area."

It is at such outcrop areas that rain water seeps back into the aquifer, replenishing the underground water supply.

"We do not know the extent to which runoff from the Olympia & York site helps recharge the Englishtown Sands aquifer," said Douglas V. Opalski, acting county planning director.

But, he said, drainage on so large a site is significant anyway.

William J. Kruze, project manager for the Lower Raritan/Middlesex County Water Resources Management Program, said the county's water quality management plan requires that care be taken by developers that rainfall which would normally seep into the ground not be drained into a storm sewer system and dumped ultimately into the ocean.

He said major developers are required to produce engineering studies which show which areas on their property are more permeable to rainwater and which are less permeable.

With that information at hand, he said, the developers can arrange buildings, parking lots and other structures in ways which least block the natural seepage of rainwater into the underground water supplies.

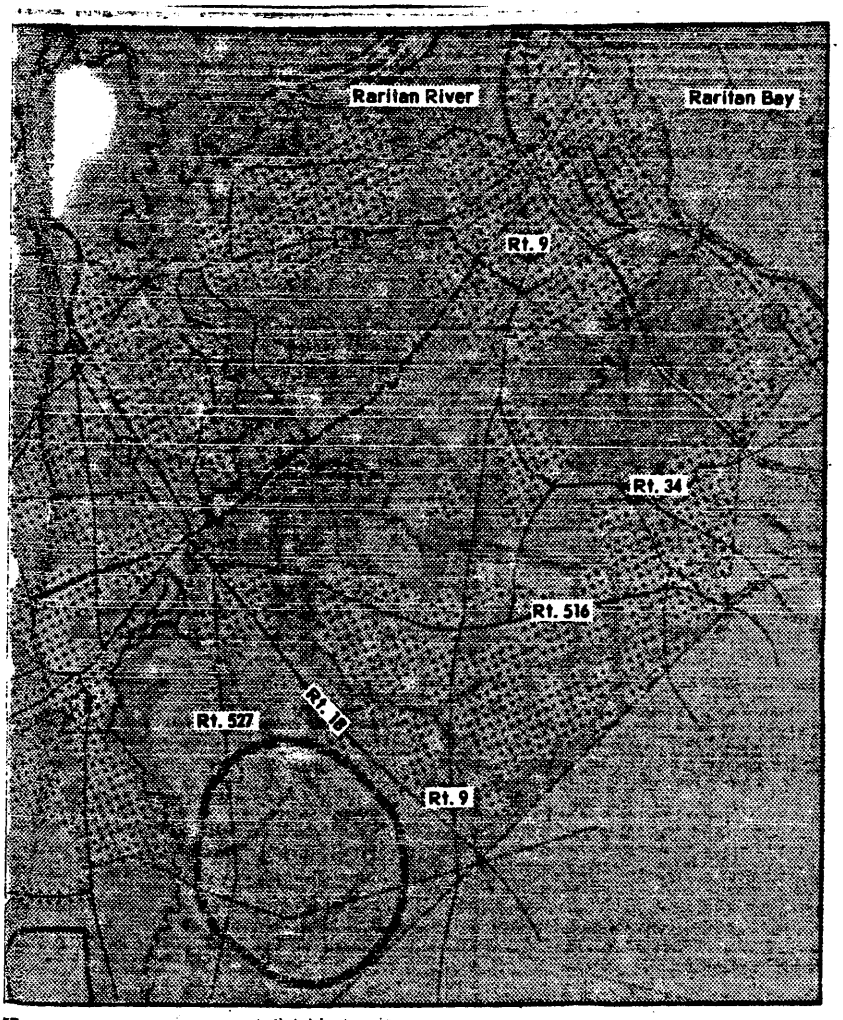
Other measures can also be taken to assure that as much water as possible is returned to the groundwater supply.

Kruze cited as an example perforated plastic barrels buried near down-spouts, into which rainwater from rooftops is drained. After a downpour, water collects in the barrels, then gradually seeps into the earth.

Such barrels, also referred to as dry wells, will be installed at the Winding Wood apartment complex, under construction near the Old Bridge Sands aquifer outcrop in Old Bridge.

The dry wells are the result of an agreement between Hillside Estates, Inc., the developer and the board after various planning agencies argued that the garden apartment complex would cause much rainwater to drain away from the aquifer outcrop and be lost to the potable water supply.

In November 1974, Olympia and York proposed the construction of 5,000 housing units, schools, stores, office buildings and industrial facilities on the site, but the project never materialized.



Focus of suit

Middlesex County map

Area circled in lower part of map shows the approximately 2,500-acre tract owned by the Canadian-based developer Olympia York Ltd. in the vicinity of Routes 9 and 18 in Old Bridge. The firm is challenging the township's zoning code, claiming it prohibits construction on the site. Middlesex County planners say such construction could adversely affect nearby aquifers.

Developer challenges 'obstructive' zoning

(Star Ledger 2/21/81)

By JIM O'NEILL

A major housing developer yesterday filed suit seeking to have Old Bridge township's land-use ordinance invalidated, claiming the law prevents construction of low- and moderate-income housing.

The suit, filed in New Brunswick by Olympia and York Ltd, a Toronto-based development firm that owns 2,558 acres of vacant Old Bridge land, claims the township's 1978 zoning laws were created under a conspiracy to prevent further development.

The development firm, which owns 10 per cent of the land in the township, plans to construct 15,348 to 20,464 units of mixed housing, some of which would be set aside for low- and moderate-income units, according to Henry Hill, a Princeton attorney representing the firm.

* * *

But Hill said the exact number of low-cost housing had not been determined.

The firm asks in its suit to be permitted to develop six to eight units an acre to save on construction costs. Township law permits two units an acre, according to the suit.

It also asks that the court appoint a master planner to create a land-use ordinance that would provide for low- and moderate-income housing.

The 65-page suit also details allegations that the township ordinance violates two court orders that required the township to provide for low-cost housing.

The suit cited the landmark 1977 Oakwood at Madison case in which the state Supreme Court set guidelines for housing development in the township and held that officials must provide for housing at the lowest possible cost.

* * *

The decision, which invalidated a 1973 zoning ordinance, was reached after a six-year battle in which the Oakwood at Madison housing developers sought to construct 1,700 units of mixed housing in the township.

The second case cited by Hill involved a 1976 Superior Court decision that found that Old Bridge had failed to provide its fair share of low- and moderate-income housing. The court set specific areas where 1,600 low-cost homes should be constructed.

The suit claimed the township failed to act on the recommendations of both courts and instead developed a zoning ordinance that continues to prevent housing construction.

Old Bridge to sue development firm

By JEFFREY BRODY
Home News staff writer

OLD BRIDGE — The township plans to file a $10 million libel suit against Olympia and York Ltd., the Canadian firm that is presently challenging the municipal land development ordinance.

Township Attorney Louis J. Alfonso announced last night that the municipality will file counterclaims against the Olympia and York suit, and in addition file the libel suit.

He said Olympia and York libeled township officials by charging in a complaint filed in state Superior Court that the Township Council, Planning Board, Municipal Utilities Authority and Sewerage Authority "conspired to deprive the firm of its right to develop in Old Bridge."

In the complaint, filed two weeks ago, Olympia and York said the local agencies acted to keep out large developments. The firm, which owns about 25 percent of the township's vacant developable land, also charged that the municipal land development ordinance is unconstitutional and should be declared invalid.

Lloyd Brown, vice president of land development for Olympia and York, last night said company policy prevents him from discussing any matter under litigation.

Alfonso called the Olympia and York charges "atrocious and unfounded." He said the township is under attack and "the issue is whether Old Bridge is going to be turned into a company town."

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NEWS TRIBUNE

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Old Bridge set to file $10 million counter-suit

By WAYNE F. YOURSTONE
News Tribune staff writer

OLD BRIDGE — A $10 million counter-suit is to be filed by the township against developer Olympia & York Ltd., according to Township Attorney Louis J. Alfonso.

The Canadian-based developer has filed a suit against the municipality charging the township zoning law is unconstitutional. Olympia & York owns 2,558 acres in the township, about 10 percent of the entire municipality.

Alfonso charged last night that township officials have been "libeled" and their character defamed by the suit. He said the developer's comments "have defaced the public officials in Old Bridge."

In the 63-page suit filed in Superior Court last month, the developer asked the township's zoning ordinance be declared invalid because it prevents the development of low and moderate income housing. The suit names the Township Council, Planning Board, Sewerage Authority and Municipal Utilities Authority as defendants.

Alfonso called the charges in the suit as "atrocious and unfounded." He added the developer "alleges the officials unlawfully conspired to deprive them of their rights to develop here."

According to Alfonso, the township will seek a jury trial. He said the entire matter probably will not be heard in court for at least a year.

The attorney warned that when the entire matter is settled, the developer "will be sorry" it challenged the township. Alfonso maintained that Old Bridge is under attack by the developer, adding the township will not be turned into a "company town."

Alfonso noted that Olympia & York wanted an ordinance "to lock in their development for 10 years and they didn't get their way."

The developer owns the land between Route 18 and Texas Road. The company also asked that the court appoint a planner to revise the township's land development ordinance and that the firm be permitted to develop between six and eight units of housing per acre.

The current zoning ordinance permits only two units per acre, according to the suit.

Councilman R. Lane Miller complained that the council "acts in good conscience and then a developer tries to intimidate us. We won't be slandered."

According to Councilwoman Sonja Fin[illegible] be a township run by the [illegible] to include [illegible] at the development of [illegible] lots.

She said she does not like developers filling the entire tract with a structure, thus eliminating any property for the owner.

Alfonso said that request for a maximum square-footage of building on any particular tract can be included.

Additional information on the counter-suit will be announced at a press conference tentatively set for Thursday evening.

Town boards file countersuits

OLD BRIDGE — The Township Council, Municipal Utilities Authority, and township Planning Board have each filed a countersuit against the large Canadian development firm Olympia & York Ltd. for alleged misuse and abuse of process and legal proceedings. The council and planning board have also sued for $10 million each for liable and defamation of character.

Their actions follow a suit filed against the council, planning board, MUA, and Sewerage Authority for allegedly unlawfully conspiring to violate the 1977 Oakwood at Madison decision to keep the firm from constructing 9,000 units on the 2,558 acres it owns between Route 18 and Texas Road.

The firm had supported an amendment to the land development ordinance which would have allowed a general development plan for owners of more than 600 acres in the township. The general plan would have been binding on both the township and the developer for 10 years. The amendment was tabled by the council in December.

Township Attorney Louis Alfonso said at a press conference Friday that he will not bill the taxpayers for legal fees in the liable suit.

"I feel that the council has acted properly and it is not proper for me to bill for legal fees. The council acted in the public interest by tabling the land use amendment," Alfonso said.

MUA attorney William Flynn filed the authority's countersuit last week. It said the purpose of the original suit filed by Olympia & York was to harass the members of the authority. It charges that the suit was premature, arbitrary, unreasonable, and an attempt to intimidate the members.

The MUA suit, like part of the township's suit, charges misuse and abuse of process and legal proceedings.

Flynn is retained by the authority on a full service contract. He is paid a fixed yearly salary.

"Olympia & York has not filed an application for water connections and never sought information about water availability. I'll be asking the executive director and authority members whether they also want to sue for slander or liable," Flynn said.

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According to Alfonso, the planning board is also filing a counterclaim for $10 million in compensatory and punitive damages for liable and defamation of character.

The Sewerage Authority, according to Alfonso, has not yet decided what to do about Olympia & York's suit and the conspiracy allegations it contains.

Alfonso's counterclaim says the firm made statements in its suit which "intended to bring into public disgrace the good name, fame and credit of said defendents amongst their neighbors in their community."

The countersuit also charges that the firm brought a lawsuit against the council because of its refusal to make changes in the land development ordinance which would have permitted a builder to receive approvals for 10-year periods.

The countersuit says the council made a decision to protect the public from haphazard zoning and planning actions and to make sure that all developments are built to proper standards with the public welfare in mind. Therefore, the council refused to "enact ordinances which would tend to encourage sloppy and substandard building and development," the suit says.

"The Township Council refuses to be turned into a company town and be run by representatives of plaintiff and other builders and developers, rather than the people and citizens of Old Bridge," the countersuit says.

"We must sue for a large amount of money because in this case the plaintiff has a lot of money. If punitive damages are assessed, the court would award an amount that the company will feel in its pocketbook," Alfonso said.

Olympia & York has assets totalling approximately $5 billion and is the largest land developer in North America.

Only Councilman George Bush questioned the council's need to sue for liable. He said he would only join the suit if it would not cost the taxpayers anything.

"I am very upset about the original suit filed by Olympia & York, but as far as the charge of unlawful conspiracy, liable is difficult to prove," Bush said.

However, Mayor Russell Azzarello said he feels an obligation to the taxpayers to defend the reputation of the council.

"We want to set a precedent to stop other builders from thinking they can use the courts to pressure us," Azzarello said.

Councilman Edward O'Connell agreed with Azzarello, saying, "The people elected us as their representatives to run the township. They put their trust in us and I truly feel that we are acting on behalf of the township residents in filing the countersuit for liable."

Councilwoman Sonja Fineberg said she will introduce an amendment to the land use ordinance which will set up a maximum size home that can be built on a lot. It will, she said, ensure that the township gets least cost housing.

Township Planner E. Fletcher Davis called the suit filed by Olympia & York "shallow and superficial.

"The Oakwood at Madison case and the Urban League case were taken very seriously. It took three years to devise the current land-development ordinance and the township went through one year of public hearings on the ordinance. The firm should have given its plans to the community first, then appealed if it did not like our decisions," Davis said.

[redacted] said it is very unusual for a township council to countersue a developer [redacted] There could be a legal question concerning the right of the council as a governing body to sue for liable if the court [redacted] unanimously named in the original suit, the attorneys said.

Alfonso said the council members were not mentioned individually in the Olympia & York suit and he does not know whether any money awarded as a result of the suit would go into the township treasury.

The attorney said during discussions before the press conference Friday the council members present determined any money won as a result of the suit would go to the township. However, Councilmen Richard L. Miller, Terrence Blackwell and George Stone were not present, and Alfonso said he does not know their feelings on the subject.

Miller said he is under the impression that if as a council member was libeled, any money resulting from a suit would go to him.

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Officials claim Alfonso did nothing improper

OLD BRIDGE — Township officials said a published account in an area newspaper implying Township Attorney Louis Alfonso used his position to buy municipal land and delayed payment for three years is incomplete and blown out of proportion.

"There are between 12 and 20 other people who bid on municipal land and didn't pay for it," explained Councilwoman Sonia Fineberg, who was mayor at the time of the 1977 land sale. "And it has nothing to do with whether they're a township attorney or not."

Mrs. Fineberg said that several land buyers found their deeds weren't clear following title searches. "You'd have to be a damn fool to pay for a piece of property when you're not sure if you own it," she said.

Township Manager John Morse said the article led an average reader to believe Alfonso arranged dates for the land sale. "He had nothing to do with setting up the date. That was set by an ad hoc committee — which included the township planner and tax assessor," Morse added.

Morse and Mrs. Fineberg both said that Alfonso not only kept township officials abreast of the title search problems but also informed the full council of research being done by a reporter. "He had nothing to hide but the reporter made him feel like he did," Morse said.

Mrs. Fineberg said she thought the allegations might be politically motivated, though she didn't elaborate. Alfonso, who couldn't be reached for comment, served as Democratic municipal chairman in the early '70s.

Earlier this month, Alfonso offered his legal services free of charge to township officials in their $50,000 countersuit against Olympia & York, a local developer, who Alfonso said libeled the township and its representatives.

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NEWS TRIBUNE

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Suit asks zone law stricken

By TOM ROSENTHAL
State House correspondent

TRENTON — A Canadian development firm which owns 25 percent of the vacant developable land in Old Bridge charged the township in a Superior Court suit with violating the state constitution and conspiring to block the construction of approximately 15,000 units of housing.

Olympia and York Ltd., asked in a suit filed here Tuesday that the township's zoning ordinance be declared invalid because it prevents the development of low- and moderate-income housing.

The company, which owns 2,558 acres between Route 18 and Texas Road — or 10 percent of the entire township — also asked that the court appoint a planner to revise the township's land development ordinances and that the firm be permitted to develop between six and eight units of housing per acre.

The township's zoning ordinance permits only two units per acre, according to the suit.

Henry Hill, attorney for Olympia and York, said that the 63-page suit was a strong indictment of not only the township's zoning ordinance but of the way in which business is conducted in Old Bridge.

In the suit, the firm accuses the township's Sewerage Authority of extorting $5,000 from the firm by requesting the money before supplying necessary planning information.

After the fee was paid, the suit alleges, the Sewerage Authority "still failed to provide the requested information."

The suit alleges that Old Bridge, after its zoning ordinance was struck down in 1977 in the landmark Oakwood at Madison decision, drew up a new ordinance in 1978 which failed to comply with the court's Oakwood order.

The court ruled in 1977 that Old Bridge had an obligation to provide housing at the lowest cost possible.

"The 1978 ordinance restricts the development of small-lot single family homes," Hill said. "We are charging that Old Bridge had no intention of permitting this kind of development."

He said the township and its ordinance requires the company "to provide architectural designs of proposed homes before the township will determine whether we can actually build the homes. We're not allowed to know what we can plan to build until we design the plans."

Hill also said that the Sewerage Authority and Utilities Authority prohibits a developer from using municipal services, but also prohibits the company from drilling for water or building utility lines.

The suit also charges that the ordinance creates an application process that would require the company to spend millions of dollars in order to discover whether it can build on its own property.

The company "has spent the last two years attempting to understand Old Bridge Township's complex maze of land use regulations, has hired a small army of planning, engineering, architectural, traffic, environmental and legal consultants to assist it in the task, and has held numerous meetings with the council, the planning board, the sewerage authority, the utilities authority, the township engineer, township planner and other public officials," the suit charges.

"After two years, Olympia & York hasn't even been able to get an application in," Hill said.

The suit also charges that the ordinance is vague and sets no standards for developers to follow in drawing up plans or an application.

The proposed development, which would contain between 15,348 and 20,464 units of mixed housing, would also include commercial developments such as a supermarket, Hill said.

"Old Bridge is ignoring the second most famous land-use decision in the state, Oakwood at Madison, which came out of its own town," Hill said.

Old Bridge officials have declined comment on the suit until they have been served with the court papers.

ELEVENTH COUNT

1. DEVELOPMENT CORP. repeats the allegations contained in the First through the Tenth Counts as if fully set forth herein.

2. DEVELOPMENT CORP.'S approximate 2,558 acres located in OLD BRIDGE TOWNSHIP is all undeveloped and constitutes 10% of the total land area of OLD BRIDGE TOWNSHIP and approximately 27% of the vacant and developable land within OLD BRIDGE TOWNSHIP.

3. DEVELOPMENT CORP.'s land holdings zoned for residential uses under the 1978 LAND DEVELOPMENT ORDINANCE constitute approximately 25% of the total vacant and developable land zoned for residential purposes in OLD BRIDGE TOWNSHIP.

4. That portion of DEVELOPMENT CORP.'S land holding zoned for non-residential uses under the 1978 LAND DEVELOPMENT ORDINANCE constitutes approximately 32% of the total vacant and developable land zoned for non-residential purposes in OLD BRIDGE TOWNSHIP.

5. Although DEVELOPMENT CORP.'S property is arbitrarily cut up into 9 different zoning districts, is substantially overzoned for non-residential uses and underzoned for residential uses under the 1978 LAND DEVELOPMENT ORDINANCE, it is ideally suited as a whole for the development at reasonable

densities, without adverse environmental impact, of a major planned development in which reasonably priced housing, multi-family housing and low and moderate income housing might be constructed.

6. The development of DEVELOPMENT CORP.'S entire property as a planned development at an overall gross density of between six and eight dwelling units per gross acre, including low and moderate income housing, would substantially relieve the housing shortage in the OLD BRIDGE TOWNSHIP housing region and would enable persons who can not presently afford to buy or rent housing in OLD BRIDGE TOWNSHIP to live there.

7. Because of the size of DEVELOPMENT CORP.'S land holdings and the economies of scale, housing could be constructed on DEVELOPMENT CORP.'S property in an environmentally responsible manner and at price ranges affordable to all categories of people who might desire to live there, including those of low and moderate income, if OLD BRIDGE TOWNSHIP, by its land use regulations, made such development reasonably possible.

8. DEVELOPMENT CORP. is prepared to work with OLD BRIDGE TOWNSHIP'S housing authority or some other sponsoring agency to assure that a substantial portion of the multi-family homes constructed on the property would be eligible for rent

subsidies in order to help OLD BRIDGE TOWNSHIP provide fully for its fair share of the regional housing need at all income levels.

9. DEVELOPMENT CORP. has spent the last two years attempting to understand OLD BRIDGE TOWNSHIP'S complex maze of land use regulations, has hired a small army of planning, engineering, architectural, traffic, environmental and legal consultants to assist it in the task and has held numerous meetings with the COUNCIL, the PLANNING BOARD, the SEWERAGE AUTHORITY, the UTILITIES AUTHORITY, the Township Engineer, Township Planner and other public officials.

10. As a result of the analysis conducted by its consultants, DEVELOPMENT CORP. learned that the 1978 LAND DEVELOPMENT ORDINANCE is unreasonable, illegal, unconstitutional, violates specific court orders and mandates an application process so cost generating that it would require DEVELOPMENT CORP. to spend several million dollars in order to discover whether that portion of it's property zoned for Planned Development would have to be engineered and planned for one unit per gross acre or four units per gross acre.

11. The provisions of the 1978 LAND DEVELOPMENT ORDINANCE regulating application procedures and the determination of discretionary density bonuses, standing alone, make it impos-

sible for a developer to know the nature and extent of the permitted uses and effectively preclude large scale development.

12. The 1978 LAND DEVELOPMENT ORDINANCE, because it ignores the Municipal Land Use Law, contains subjective and improper standards, is circuitous in its processes, iswithout proper organization, contains conflicting and inconsistent language, virtually mandates arbitrary and capricious action by the PLANNING BOARD.

13. DEVELOPMENT CORP. repeatedly requested the COUNCIL to amend the 1978 LAND DEVELOPMENT ORDINANCE to make, at the very least, the application process intelligible so that DEVELOPMENT CORP. could ascertain the nature and extent of the permitted uses on its property and thus begin to seriously plan for the development of that property.

14. The COUNCIL refused to amend the 1978 LAND DEVELOPMENT ORDINANCE to eliminate one of the major problems in the application process.

15. The COUNCIL, the PLANNING BOARD, the SEWERAGE AUTHORITY and the UTILITIES AUTHORITY have through their refusal to abide by Court Orders, including orders from New Jersey's highest Court, demonstrated themselves to be either unable or unwilling to promote the general welfare through the exercise

of the land use powers delegated to them pursuant to the New Jersey Constitution.

WHEREFORE, DEVELOPMENT CORP. demands the following:

a. That the 1978 LAND DEVELOPMENT ORDINANCE be invalidated in its entirety.

b. That this Court suspend all powers of the COUNCIL, the PLANNING BOARD, the SEWERAGE AUTHORITY and the UTILITIES AUTHORITY to regulate Land Use within OLD BRIDGE TOWNSHIP.

c. That this Court appoint a Master or Receiver pursuant to N.J. Court Rule 4:59-2(a) at the cost of OLD BRIDGE TOWNSHIP to revise the LAND DEVELOPMENT ORDINANCES of OLD BRIDGE TOWNSHIP to bring them into compliance with Oakwood at Madison, Urban League, and the Municipal Land Use Law, and to revise the regulations of the SEWERAGE AUTHORITY and UTILITIES AUTHORITY.

d. That the COUNCIL be ordered, under penalty of contempt citations, to enact the new LAND DEVELOPMENT ORDINANCE once it is completed.

e. That DEVELOPMENT CORP. be granted specific corporate relief in the form of permits to develop on their property a planned development at between six and eight units per gross acre, including provisions for a reasonable number of subsidized units for low and moderate income persons and families, under the supervision of the Court appointed Master or Reciever who shall be directed to assure compliance with reasonable building code, site-plan, water, sewerage and other requirements and considerations of health and safety.

f. Granting DEVELOPMENT CORP. such further relief as the Court deems just and proper.

Brener, Wallack & Hill
Attorneys for Plaintiff

By: Henry A. Hill
Henry A. Hill

Dated: February 18, 1981

21. For at least the following reasons, the 1978 LAND DEVELOPMENT ORDINANCE fails to comply with the New Jersey Supreme Court mandate that OLD BRIDGE TOWNSHIP allocate substantial areas for single family dwellings on very small lots:

a. Although single family homes on very small lots are permitted in the AF zone, the TH zone and the TCD zone, the remaining vacant and developable acreage in these zones is unlikely to be developed for single family housing at high densities given the lack of sewer and water service and the alternate multi-family uses permitted in these zones; at any rate, the meager 4% of total TOWNSHIP vacant and developable land zoned in this manner cannot be considered "substantial areas" as mandated by the New Jersey Supreme Court;

b. Although single family homes on very small lots are permitted in the R-7 zone, of the 2,162 acres zoned R-7, only 32 acres or 1% of the R-7 zone are presently vacant and developable; these 32 acres constitute no more than .3% of the TOWNSHIP's vacant and developable land and cannot be considered

as "substantial areas" allocated for single family dwellings on very small lots;

c. Single family homes on very small lots are not permitted in the Planned Development Zone.

22. The 1978 LAND DEVELOPMENT ORDINANCE fails to comply with the New Jersey Supreme Court mandate that the size of the R-P, the R-80 and R-40 zones (with minimum lot sizes of greater than one acre) be reduced substantially to provide for housing on very small lots and moderate size lots because the percentage of vacant developable acreage in the TOWNSHIP which is zoned for one acre minimum lot sizes or greater has in fact been increased from 58% under the 1973 ORDINANCE to 88% under the 1978 ORDINANCE;

23. For at least the following reasons, the 1978 LAND DEVELOPMENT ORDINANCE fails to comply with the New Jersey Supreme Court mandate in the Oakwood at Madison case that the OLD BRIDGE TOWNSHIP P.U.D. regulations be modified to eliminate undue costs generating requirements:

a. The combination of low gross density permitted by right in Planned Developments (1 unit per acre) and the high cost of bringing necessary infrastructure to a Planned Development site