CA - O+4 v. Twp Old Bridge 4/23/81

Brief in opposition to Δ Old Bridge Twp Sewerage Authority's motion for summary judgment

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
DOCKET NO. L-32516-80

O & Y OLD BRIDGE DEVELOPMENT CORP.,

Plaintiff,

vs.

THE TOWNSHIP OF OLD BRIDGE, et als.

Defendants.

Civil Action

BRIEF IN OPPOSITION TO DEFENDANT OLD BRIDGE TOWNSHIP SEWERAGE AUTHORITY'S MOTION FOR SUMMARY JUDGMENT

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(609) 924-0808

On the Brief:

Henry A. Hill
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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 Sewerage Authority. The suit also challenges policy decisions made by some or all defendants in planning (or failing to plan) for water supply and sewer facilities to serve future development. Plaintiff is a land owner with over 2500 acres in the southwest quadrant of the township.

Plaintiff's Complaint alleges that the Sewerage Authority, by virtue of its powers pursuant to N.J.S.A. 40:14A-1 et seq. and contracts and franchise agreement with Old Bridge Township, controls all sewerage construction within the Township. If Plaintiff is to develop its land it must comply with the Rules and Regulations of the Sewerage Authority which contain numerous fees which are illegally high, cost-generative, impede the construction of least-cost housing and constitute an illegal tax because they greatly exceed the cost of regulation. (See Sixth Count of Complaint, particularly Paragraphs 6, 7, 8, 9, 10, 11 and 12.)

It is also alleged that the Sewerage Authority illegally without authorization pursuant to statute or regulations, extorted Five Thousand ($5,000.00) Dollars from Plaintiff as the alleged cost of providing basic over-the-counter information needed in order to apply for sewerage services. Even after Plaintiff paid the Five Thousand ($5,000.00) Dollars illegally requested, the Sewerage Authority failed to provide the requested information which failure constituted an unreasonable interference with the application

process which Plaintiff is required to pursue in order to obtain sewer services for its development; this transaction and the Authority's refusal to allocate any sewer capacity to its development effectively prevented Plaintiff from taking any further steps to initiate the application process. (See Seventh Count of Complaint.)

The Tenth Count alleges that the Sewerage Authority conspired with the other named defendants to preserve exclusionary land use patterns and prevent the provision of least-cost and governmentally subsidized housing in accordance with the Supreme Court mandate in Oakwood-at-Madison v. Tp. of Madison, 72 N.J. 481 (1977).

Defendant Old Bridge Township Sewerage Authority by this motion for summary judgment seeks dismissal of the Sixth, Seventh and Tenth Counts of the Complaint for failure to exhaust administrative remedies (Sixth Count) and failure to state a claim upon which relief can be granted (Seventh Count and Tenth Count). The Authority has filed in support of its motion for summary judgement an affidavit of the Executive Director of the Old Bridge Township Sewerage Authority stating unequivocally the following:

1. Plaintiff has not within the past three years filed any application, made any payment to or corresponded in any way with the Sewerage Authority.
2. The Sewerage Authority has never formally at any Authority meeting entered into any contract with other municipal agencies or bodies to deprive anyone from developing any property within its district nor to violate any court mandates.

On the basis of this affidavit, defendant Old Bridge Township Sewerage Authority demands summary judgment.

Plaintiff, O & Y Old Bridge Development Corp., has in response to this motion filed two affidavits, including the affidavit of its Vice-President in Charge of Development which indicates that:

1. Plaintiff has had a number of meetings with the Sewerage Authority, exchanged correspondence and has repeatedly attempted, to no avail, to obtain the information which it needs in order to make an application to the Sewerage Authority.
2. That the Plaintiff has paid the Sewerage Authority Five Thousand ($5,000.00) Dollars, by check, which check bears the endorsement of the Sewerage Authority and which check was acknowledged by the Sewerage Authority.
3. That the Sewerage Authority has already notified Plaintiff that it lacks the sewerage capacity to serve Plaintiff's development and that any application for sewerage would be denied.

Plaintiff's second affidavit is from its consulting engineer, Peter Homack. This affidavit indicates that the Rules and Regulations of the Old Bridge Township Sewerage Authority would require Plaintiff to pay a minimum of $11,697,500.00 in fees to obtain sewer service for its proposed development, in addition to the actual construction of the sewerage collection system on the property estimated to cost between $5,000,000 and $5,750,000.

Mr. Homack also asserts that these fees are unreasonable, cost-generative and bear no relationship to the actual cost of regulation.

In summary Plaintiff has shown by affidavit that it can physically construct a sewerage collection system for $5,000,000 serving all the proposed development on its property and connected to the Middlesex County Utilities Authority through the Old Bridge Township Sewerage Authority collector system. The Old Bridge Township Sewerage Authority's existing regulations would require Plaintiff to pay a minimum of $11,697,500 in addition to the $5,000,000. construction costs by way of connection charges, inspection fees etc. These fees are unreasonable and bear no relationship to the actual cost of regulation, thereby constituting an illegal tax.

Plaintiff respectfully requests this Court to deny this motion for summary judgment since:

1. Exhaustion of administrative remedies is neither required nor appropriate;
2. Defendant has in fact received a $5,000. payment from Plaintiff; and
3. Plaintiff should have the opportunity to pursue discovery concerning its conspiracy claim before this Court considers summary judgment thereon.

POINT I

PLAINTIFF'S ACTION IS NOT BARRED BY THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE

The exhaustion of administrative remedies doctrine as embodied in Rule 4:69-5 requires a litigant to pursue any administrative review process which is "certainly available, clearly effective and completely adequate to right the wrong complained of"; Patrolmen's Benevolent Assoc. v. Montclair, 128 N.J. Super 59 (Ch. Div., 1974). Although administrative remedies should ordinarily be resorted to prior to institution of an action in Superior Court, this requirement is neither jurisdictional nor absolute. Brunetti v. Borough of New Milford, 68 N.J. 576 (1975); Roadway Express, Inc. v. Kingsley, 37 N.J. 136 (1962); East Brunswick Twp. Board of Education v. East Brunswick Twp. Council, 48 N.J. 94 (1964).

Rule 4:69-5 codifies a group of exceptions to the exhaustion rule which have developed in the case law under the rubrick of the "interest of justice". These exceptions include cases where:

1. The issues do not involve the exercise of administrative expertise or discretion and only a question of law is involved [Supermarkets Oil Co., Inc. v. Zollinger, 126 N.J. Super 505 (App. Div., 1974); Wilbert v. DeCamp, 72 N.J. Super 60 (App. Div., 1962); Nolan v. Fitzpatrick, 9 N.J. 477 (1952)];
2. Administrative review would be futile [see Patrolmen's

Benevolent Association, supra at 63; Baldwin Construction Co. v. Essex County Bd. of Taxation, 24 N.J. Super 252 (Law Div., 1952), aff'd 27 N.J. Super 240 (App. Div., 1953)];

3. Where irreparable harm will otherwise result from denial of immediate judicial relief [(Roadway Express, Inc. v. Kingsley, supra at 152)];

4. Where there is a need for a prompt decision in the public interest [Matawan Borough v. Monmouth Cty. Tax Bd., 51 N.J. 291 (1968)].

5. Where the relief requested is a declaration by the administrative agency that its own regulations or actions are invalid. [Matawan Borough v. Monmouth City Tax Board, 51 N.J. 291, 297 (1968))]

Defendant Old Bridge Township Sewerage Authority claims in the within motion that the following provision of its Rules and Regulations creates an administrative remedy which would permit it to waive or modify its fee schedule:

> "However, if an applicant can clearly demonstrate that, because of peculiar conditions pertaining to his application, the literal enforcement of one or more of these rules and regulations is impractical or will exact undue hardship, the Sewerage Authority may grant such exception or exceptions as may be reasonable and within the general purposes and intent of these rules and regulations."

It is Plaintiff's position that the Sewerage Authority is powerless to modify all of its fee schedules, and is throwing out the illusion of an administrative remedy to dissuade and delay Plaintiff from seeking a final resolution of the legality of the Authority's fee schedule.

A. Administrative Review Is Not Required Since Only A Question Of Law Is Involved

It has long been recognized that exhaustion of administrative remedies is not required where only a question of law is at issue, since to require a resort to administratrive remedies in that case would create only useless delay. Nolan v. Fitzpatrick, 9 N.J. 477, 487 (1952).

1. Application and Inspection Fees

According to the affidavit of Peter Homack, the Rules and Regulations of the Old Bridge Township Sewerage Authority would require Plaintiff to deposit a total of $647,500.00 in application and inspection fees for its proposed development. The general requirement for administrative fees charged by municipal agencies is that such fees must be designed only to defray the actual cost of regulation. Colonial Oaks West, Inc. v. Township of East Brunswick, 62 N.J. 560 (1972). More specific guidelines for the permissable limits of such fees were set forth in the case of Economy Enterprises, Inc. v. Township Committee of Manalapan Township, 104 N.J. Super 373 (App. Div. 1969). In that case the court evaluated an inspection fee deposit requirement contained in a muncipal subdivision ordinance which required the developer to deposit a fee in cash or certified check amounting to five (5%) percent of the estimated cost of the required improvements. The court held that this required deposit based upon the cost of improvements was void as against public policy because:

> "As practically interpreted by the municipality, the governing body divorces itself from any function in relation to the process of so called reimbursement except to the extent that it acts as a dry trustee of the monies

> paid into the special account by the developer and funnels such funds out directly to the engineer who did the inspection in relation to the particular development. ...the governing body has no economic incentive to curtail the charges since they do not come out of the municipal treasury. The developer may be loathe to take issue with the charges as he may have future problems with the engineer and may not wish to court the possibility of antagonizing him by objecting to the amount of his charge. Moreover, such an arrangement subjects the engineer to the temptation to overcharge an unfriendly developer or undercharge a friendly one."

The court required the municipal agency to develop a fee schedule which instituted a scheme of fees on a fixed or mathematically determinable basis, which while it may not in each case exactly reflect the municipal costs of administering the ordinance as to any particular developer, are fixed in such a manner that in the long run, the fee schedule recovers in the aggregate approximately the total cost of administration of the ordinance. Economy Enterprises, Inc. at 381.

It is Plaintiff's contention, that as a matter of law the application and inspection fees of the Old Bridge Township Sewerage Authority, are invalid because they are calculated as a percentage of improvement construction costs.

2. Connection Fees

Connection fees are charges authorized by N.J.S.A. 40:14A-8 in order to recompense a Sewerage Authority for the actual cost of making the physical connection of a property to the sewerage system (tapping the sewer main and installing a lateral from the main to the curb) and to provide

for a fair contribution by the connecting party to debt service charges. Plaintiff contends that Defendant's Rules and Regulations do not comply with the requirement of the Sewerage Authorities Law that "credit" be granted against the connection fee for any facilities installed by the developer instead of the Authority. This credit requirement would assure large developers (such as Plaintiff) that they would not have to both pay exhorbitant connection fees and install laterals throughout the development.

The correct interpretation of Defendant's Rules and Regulations is a question of law involving no need for the exercise of administrative expertise. This court should therefore retain jurisdiction as to the legality of the connection fee regulations of defendant Old Bridge Township Sewerage Authority.

B. Administrative Review By The Sewerage Authority Would Be Futile

1. The Previous Course of Dealing Between the Parties Makes Further Applications Futile

As indicated in the affidavit of Lloyd Brown, Plaintiff's Vice-President in Charge of Land Development, Plaintiff met numerous times with the Sewerage Authority from February 14, 1979 to June 25, 1980. During a meeting held on April 27, 1979, Neil Sullivan, (consulting engineer for the Authority), advised Plaintiff that no sewer capacity could be allocated to its proposed development because the Iresick Brook trunk sewer had sufficient capacity to serve no more than half of vacant land in the area. Numerous long discussions with Mr. Sullivan regarding the basis for this policy

decision to totally exclude plaintiff's lands from sewer service did not succeed in modifying the Authority's position.

At a later meeting held on June 26, 1979 between plaintiff and members and consultants of the Authority, plaintiff was advised of two additional independent reasons why sewer service would not be provided:

1. Provisions of a Bond Resolution prohibited allocation of capacity to Plaintiff's land; and
2. Structural deficiencies (a "bottleneck") in the Iresick Brook trunk sewer had to be resolved before its true capacity could be determined.

Legal and engineering review of the Bond Resolution by Plaintiff's Consultants did not substantiate the Authority's claim that it prohibited the allocation of capacity to Plaintiff. Plaintiff's consultants made at least six requests for information regarding the "bottleneck" in the Iresick Brook trunk sewer. These requests were ignored until finally the Authority's consultant claimed on October 26, 1979 that the requested information had already been provided at the meeting of June 26, 1979. Failure to provide this information concerning the present capacity of the one trunk sewer which extends to the boundary of Plaintiff's property effectively prohibited its engineering consultants from preparing an application for service.

Given the Sewerage Authority's unwavering position that it will not allocate any sewer capacity to Plaintiff's development, and its refusal to provide critical over-the-counter information needed by Plaintiff to plan an effective sewer system, it would be a futile waste of time and

money for plaintiff to submit any formal applications to the Authority, especially an application requesting fee schedule exceptions which the Authority has complete discretion to deny.

2. The Sewerage Authority Has No Jurisdiction To Modify Its Fee Schedule

In the Sixth Count of its complaint, Plaintiff challenges all application fees, the performance bond requirement, connection fees, inspection fees, and the intial service fees as being cost generative, illegal and unreasonable. With regard to the challenge to the Sewerage Authority's application fees, even the Sewerage Authority's attorney admits that Plaintiff must submit a preliminary application filing fee of $10.00 per unit in order to get a decision concerning the reasonableness of its fees (Defendant's Brief, page 4). In order to "invoke the jurisdiction" of the Sewerage Authority, Plaintiff therefore is required to deposit $130,000 ($10 x 13,000 dwelling units) for the privilege of requesting this agency to utilize its unlimited discretion and declare its own administrative regulations illegal and invalid.

As the affidavit of Peter Homack indicates, application and inspection fees for plaintiff's proposed development would total $647,500. Although municipal agencies have long been held to have the power to charge fees to cover regulatory costs, such fees must be designed only to defray the actual cost of regulation and must not exceed "the bounds of reason considered in connection with the service and the cost of the service granted". Colonial Oaks West, Inc. v. Township of East Brunswick, 62 N.J. 560 (1972).

To ask the Sewerage Authority to render a decision that its own application and inspection fees grossly exceed the actual cost of regulation and that Plaintiff should therefore be granted an exception, would be an idle gesture, and courts in similar circumstances have found that the doctrine of exhaustion of administrative remedies was not applicable. Matawan Borough v. Monmouth Cty. Tax Bd., 51 N.J. 291 (1968).

With regard to the $11,050,000.00 connection fees required by the Old Bridge Township Sewerage Authority to connect Plaintiff's development, we also maintain that the waiver or exception provision of the regulations provides, in fact, an illusory remedy. Quite simply, this Defendant exists persuant to the Sewerage Authorities Law (N.J.S.A. 40:14A-1 et seq) and is authorized by that statute to charge connection fees which are uniform within each class of users. A modification by the Authority of its connection fee schedule for a large development such as Plaintiff proposes would, on its face, be a violation of the uniformity requirement of the Sewerage Authority Law[1]. With respect to connection fees, it is therefore clear that the Authority is powerless to negotiate or grant exceptions to its connection fee schedule. Since only a question of law is therefore involved,

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[1] The futility of resort to such an amorphous "exception" remedy in this case is analogous to the situation in AMG Associates v. Tp. of Springfield, 65 N.J. 101 (1974). In that case the Court held that where a zoning ordinance provision affects a large tract of land, that the situation is beyond the intended scope of the administrative variance procedure and the owners may proceed directly to the law division.

Plaintiff is not required to attempt to exhaust this illusory administrative remedy. Nolan v. Fitzpatrick, 9 N.J. 477 (1952).

C. Exhaustion Of Administrative Remedies Should Not Be Required Because Of The Public Interest In A Prompt Decision

Where exhaustion of administrative remedies is not in the interest of justice a court may depart from the exhaustion doctrine. R. 4:69-5; Waldor v. Untermann, 10 N.J. Super 188 (App. Div. 1950); Nolan v. Fitzpatrick, 9 N.J. 477 (1952). This exception to the doctrine of exhaustion of administrative remedies recognizes the inconvenience, expense and injustice that must necessarily flow from arbitrary enforcement in each and every case, regardless of the circumstances and the interests of justice. Nolan v. Fitzpatrick, 9 N.J. Super. at 485.

In its interpretation of the interests of justice policy of the rule, our courts have found that where an expeditious determination of a legal question is directly in the public interest, that resort to administrative remedies should not be required. For example, in the case of Waldor v. Untermann the court allowed a taxpayer of the City of Newark to bring his challenge to a member of the Board of Education of the City of Newark in the Law Division without instituting proceedings before the Commissioner of Education because the court found that an early determination of the issue was in the public interest. Waldor v. Untermann, 10 N.J. Super 188 (App. Div. 1950).

In the within case, the legality of the Sewerage Authority's fees, is a matter of very significant public interest especially when viewed

in the context of the New Jersey Supreme Court order to this municipality to revise its development regulations to eliminate cost-generative provisions unduly adding to the cost of housing. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977). In the Oakwood at Madison decision, the Supreme Court examined the cost involved in bringing roads and utility lines to the planned unit development sites and found that these costs, if they did not totally prohibit development, added sufficiently to final costs so as to tend to have an exclusionary impact. The Court held that the added costs of providing necessary sewer and water utilities established a prima facie case of exclusion, thereby shifting the burden to the township to justify those provisions of its ordinance. 72 N.J. at 522, 523.

The various fees required by the Sewerage Authority may be sufficient to make development under the new zoning scheme more expensive than under the 1973 zoning scheme invalidated by the New Jersey Supreme Court in the Oakwood at Madison decision. It is Plaintiff's position that the public interest requires this court to retain jurisdiction and decide the question of cost-generative sewer utility fees once and for all so that developers in Old Bridge Township will not be discouraged from construction by exorbitant sewer fees.

POINT II

THE SEVENTH COUNT OF PLAINTIFF'S COMPLAINT SHOULD NOT BE DISMISSED ON SUMMARY JUDGMENT

As indicated in the affidavit of Lloyd Brown, Vice-President in Charge of Development for O & Y Old Bridge Development Corp., a $5,000.00 check was submitted by Olympia & York properties to the Old Bridge Township Sewerage Authority on April 2, 1979 (See Exhibit 1 attached to the Affidavit). By letter of April 4, 1979, the office manager for the Old Bridge Township Sewerage Authority acknowledged receipt of this $5,000.00 check. Plaintiff is at a loss to explain the reason why this check failed to show up in the thorough review of payments done by the Executive Director of the Old Bridge Township Sewerage Authority.

Plaintiff respectfully requests this court to deny summary judgment to the Old Bridge Township Sewerage Authority since a substantial issue of material fact exists on its claim that it never received the alleged $5,000.00 payment.

POINT III

SUMMARY JUDGMENT ON THE CONSPIRACY COUNT SHOULD BE DENIED

The Tenth Count of Plaintiff's Complaint alleges a conspiracy among the Township Council, the Planning Board, the Sewerage Authority and the Utilities Authority to unlawfully preserve the exclusionary land use pattern of the Township. This Count also alleges a conspiracy to enforce land use policies which are contrary to the general welfare, which violate the specific directions of the New Jersey Supreme Court in its Oakwood at Madison decision, and which prevent private developers from providing least cost housing and federally or state subsidized low and moderate income housing. In order to prove this conspiracy cause of action, there must be shown:

1. two or more participants;
2. an object to be accomplished;
3. a meeting of minds or agreement on the object or course of action;
4. one or more overt acts; and
5. damages

Hills Dredging Corp. v. Risley, 18 N.J. 501 (1955)

A. Defendant Has Engaged In Overt Acts Pursuant To The Conspiracy

A showing of an overt act by Defendant in furtherance of an unlawful agreement is a necessary element of civil conspiracy. Board of Education, Asbury Park v. Hoek, 166 N.J. Super 231, rev'd in part, 38 N.J.

213 (1961). Defendant Sewerage Authority alleges on this motion that Plaintiff can show no overt act on its part. As the annexed affidavit of Lloyd Brown shows, this is simply not true. The affidavit is replete with overt acts, including the following:

1. After numerous meetings between Plaintiff and the Sewerage Authority, Plaintiff was advised on April 27, 1979 that there was no available sewer capacity to serve its proposed development (See Paragraph 14 of the affidavit of Lloyd Brown);
2. At a meeting on June 26, 1979 Plaintiff was advised that certain conditions of the Authority's bond resolution prevented the Sewerage Authority from allocating any capacity to its proposed development (See Paragraph 15 of Lloyd Brown's affidavit);
3. On numerous occasions the Sewerage Authority's engineer refused to supply information concerning available capacity in a trunk sewer which could serve Plaintiff's development (See Paragraph 17 of Lloyd Brown's affidavit);
4. The Sewerage Authority has failed to respond to numerous attempts made by Plaintiff's engineers to arrange meetings with the Authority's engineer to discuss sewer capacity arrangements (See paragraph 18 of the affidavit of Lloyd Brown).

Any or all of these actions in combination, are sufficient to constitute the required element of an overt act in furtherance of a

conspiracy. Since a genuine issue of material fact therefore exists regarding the overt act, this Court should not grant summary judgment for Defendant Old Bridge Township Sewerage Authority dismissing Plaintiff's conspiracy claim. Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67 (1954); Frank Rizzo, Inc. v. Atlas, 27 N.J. 400 (1958); Blum v. Prudential Insurance Company of America, 125 N.J. Super 195 (Law Div. 1973).

B. Plaintiff Should Have The Opportunity To Discover The Details Of The Conspiratorial Agreement

Although agreement among conspirators is an essential element of conspiracy, illegal conspiracies are often formed without simultaneous action or agreement. Interstate Circuit v. U.S. Tex., 59 S. Ct. 467, 306 U.S. 208, 83 L. Ed. 610. No formal agreement between the parties to do the act charged is necessary; it is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the offense charged, although such agreement is not manifested by any formal words or written instrument. U.S. v. Paramount Pictures, N.Y., 68 S. Ct. 915, 334 U.S. 131, 92 L.Ed. 1260.

A conspiracy may be proven by either direct or circumstantial evidence. State v. Carbone, 10 N.J. 329 (1952); State v. Seaman, 114 N.J. Super 19 (App. Div. 1971), cert. den. 404 U.S. 1015, 30 L. Ed. 2d 662, 92 S. Ct. 674. Proof of a conspiracy is generally a matter of inference deduced from the acts of the parties, and when the total effect of the proofs indicate sufficiently the existence of a conspiracy, the case must go to the jury. State v. General Restoration Co., 42 N.J. 366 (1964).

1. A Genuine Issue of Material Fact Exists Concerning The Conspiratorial Agreement

Defendant may be claiming that Summary Judgment should be granted because Plaintiff has not stated specific facts concerning the illegal agreement among defendants. The assertion in the affidavit of the Executive Director that the Authority always acts at its regular meetings and that he has never been authorized at these meetings to enter into any contract to deprive anyone from developing their property or to violate any court orders does not prove that an illegal agreement did not exist. Due to an illegal conspiracy's essential need for secrecy, it is unlikely that the Sewerage Authority would have authorized the execution of an illegal agreement at one of its regular meetings in full view of the public. As to any informal meetings which may have been held between one or several members of the Sewerage Authority and any of the other defendants concerning an illegal agreement, this Court cannot be assured that the Executive Director of the Sewerage Authority would have been invited to participate and observe. For these reasons, the affidavit of the Executive Director fails to eliminate any issue of material fact regarding the existence of an illegal agreement between some or all Sewerage Authority members and any other defendant.

2. Plaintiff Should Have The Opportunity To Pursue Discovery

New Jersey Court Rule 4:46-5 requires a court to deny or stay a motion for summary judgment when it appears that the adverse party cannot present the facts which are essential to justify his opposition. In the case of Monmouth Lumber Co. v. Indemnity Insurance Co. of North America,

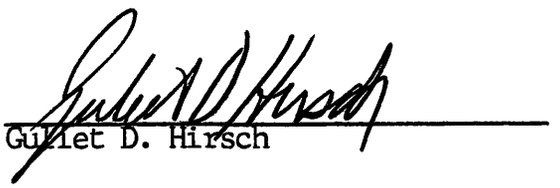
21 N.J. 439 (1956) the New Jersey Supreme Court held that on a Motion for Summary Judgment the court must be critical of the moving papers but not those in opposition and should deny summary judgment until discovery proceedings are had to enable the responding party to obtain the material necessary to justify its opposition; accord, Judson v. People's Bank & Trust Co. of Westfield, supra at 76; Bilotti v. Accurate Forming Corp., 39 N.J. 184 (1963).

Plaintiff in the within action, like virtually every other party against whom a conspiracy has been exercised, does not at this time have specific knowledge of the terms of any agreement between defendants, the names of individuals involved, the dates of their meetings, or substance of their conversations therein. Plaintiff served Interrogatories concerning conspiracy on March 24, 1981 and will pursue other discovery at an appropriate time in order to obtain as much direct evidence on the conspiracy as possible. But it is the essential nature of a conspiracy that more often than not, the only type of evidence available to prove the conspiracy is circumstantial evidence. Even if Plaintiff at the close of its case at trial would have no more than circumstantial evidence to show the existence of an agreement among defendants, it would be sufficient to justify a verdict in their favor. Board of Education, Asbury Park v. Hoek, 38 N.J. 213 (1962); Lewis Kamm, Inc. v. Flink, 113 N.J.L. 582 (E. & A. 1934); State v. Carbone 10 N.J. 329 (1952); State v. General Restoration Co., 42 N.J. 366 (1964).

Plaintiff therefore respectfully requests this Court to allow it to pursue the discovery process and attempt to obtain all information it needs to prove its case on the conspiracy count.

CONCLUSION

For the aforementioned reasons, Plaintiff respectfully requests dismissal of defendant Old Bridge Township Sewerage Authority's Motion for Summary Judgment.



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ATTORNEYS FOR Plaintiff

Plaintiff

O & Y OLD BRIDGE DEVELOPMENT CORP.

vs.

Defendant

THE TOWNSHIP OF OLD BRIDGE, et als.

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-32516-80

CIVIL ACTION
AFFIDAVIT

STATE OF NEW JERSEY)
) ss:
COUNTY OF MERCER)

LLOYD BROWN, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am the Vice President in charge of development for Plaintiff O & Y Old Bridge Development Corp. and make this Affidavit in opposition to the Old Bridge Township Sewerage Authorities' Motion for Summary Judgment.

2. I directed a review of company files which produced

cancelled check No. 06834, dated April 2, 1979 issued by Olympia & York Properties to the Old Bridge Township Sewerage Authority in the amount of $5,000.00. In a box in the top right-hand corner of said check is the following notation:

"Re: OANDY OLD BRIDGE DEVELOPMENT CORP."

(See Exhibit 1 for copy of said check)

3. By letter of April 4, 1979 Mrs. Eleanor Bushman, office manager of the Old Bridge Township Sewerage Authority acknowledged receipt of said check number 06834, said acknowledgement letter being addressed to Olympia and York Properties (see Exhibit 2 for copy of acknowledgement letter).

4. The Old Bridge Township Sewerage Authority acknowledgment letter of April 4, 1979 mistakenly designates the subject of the check to be "the Dandy Old Bridge Development Corporation"; this mistake apparently arises from the notation at the top of the check which lists the previous corporate name of Plaintiff O & Y Old Bridge Development Corp., to wit, the Oandy Old Bridge Development Corp.

5. Since the back of this check is stamped "for deposit only, Old Bridge Township Sewerage Authority, filing and inspection fee account" and appears to have been cleared through the Amboy-Madison National Bank I believe that a thorough review of the accounting records of the Old Bridge Township Sewerage Authority for the month of April, 1979, should show

a record of this payment.

6. The following paragraphs of this Affidavit contain a chronological summary (as derived from my records) of the events which led to the payment and receipt of this $5,000 check and the Old Bridge Township Sewerage Authority's refusal to agree to provide any sanitary sewer capacity for the proposed development on the lands of O & Y Old Bridge Development Corp.

7. After several unsuccessful attempts to arrange an appointment by telephone, by my letter of February 1, 1979 a request was made to Jack Phillips, executive director of the Old Bridge Township Sewerage Authority, for a meeting to discuss sewer facilities necessary for the development of the O & Y Old Bridge Development Corp. property. There was no response to this letter.

8. A lunch meeting was held on February 14, 1979 to discuss in general terms the manner in which arrangements could be made to provide the sewer facilities and water services required for the proposed development. My records show that the following people, in addition to myself, were at that meeting:

a. Arnold Lauer, Chairman of the Old Bridge Township Sewerage Authority;

b. Tom Wilson, Project and Systems Coordinator for the Old Bridge Township Sewerage Authority;

c. George Stone, Executive Director of the Municipal Utilities Authority;

d. John Allgair, Consulting Engineer to O & Y Old Bridge Development Corp.

9. On February 28, 1979, John Allgair and Peter Strong of Engineering, Surveying and Planning (engineering consultants to O & Y Old Bridge Development Corp.) appeared with me at an evening meeting of the Board of Directors of the Old Bridge Township Sewerage Authority in order to present our requirement for a commitment of sewerage capacity and to obtain the Board's consent to begin discussion of related engineering design. We were advised by the Board that it would be necessary to pay the Sewerage Authority's consulting engineer for any time which he spent discussing sewer proposals with us. We agreed to pay the Authority said costs on a per diem hourly rate basis at the same rate as their engineer billed them.

10. On March 21, 1979 John Allgair, Peter Strong and myself met with the Authority's Executive Director, Jack Phillips and its consulting engineer, Neil Sullivan, and discussed the terms of the payment agreement for work to be done by their consulting engineer. It was agreed that the per diem charges of the Sewerage Authority Engineer would not exceed $5,000 without first advising me and obtaining my approval.

11. I telephoned Neil Sullivan on March 30, 1979,

and he told me that he had been directed by the Board of the Old Bridge Township Sewerage Authority not to talk to us any further until we paid the $5,000.

12. At a meeting in the morning of April 4, 1979 between myself, John Allgair, Peter Strong and representatives of the Old Bridge Township Sewerage Authority including Arnold Lauer, Tom Wilson, Jack Phillips and Neil Sullivan, I produced the aforementioned $5,000 check and Jack Phillips told me to give it to one of the office staff.

13. Later, at a meeting with the Board of Directors of the Old Bridge Township Sewerage Authority in the evening of April 4, 1979, the Chairman advised the Board that we had deposited $5,000 to cover the cost of time spent by Neil Sullivan in consulting with us.

14. At a meeting on April 27, 1979 with Neil Sullivan attended by John Allgair, Peter Strong and myself we were advised by Mr. Sullivan that the Authority was taking the position that when all the undeveloped land in the Iresick Basin (the sewerage drainage basin in which much of the O & Y Old Bridge Development Corp. property is located) was considered, there would only be enough capacity to serve approximately one-half of the undeveloped lands, accordingly, there would be no remaining capacity available to serve the property of O & Y Old Bridge

Development Corp. Mr. Allgair and I questioned Mr. Sullivan at length about the policy reasons for reserving sewer capacity for lands which were not presently proposed for development while denying capacity to lands which were the subject of current development plans, but we did not receive a satisfactory response to our questions.

15. I met with Neil Sullivan on June 26, 1979 to again attempt to work out some basis upon which an agreement could be reached to sewer the O & Y Old Bridge Development Corp. property. Also present at this meeting were Tom Wilson, George Stone, Wendell Smith (counsel to O & Y Old Bridge Development Corp.) and John Allgair. At this meeting we were advised by Neil Sullivan that the conditions of the Bond Resolution pertaining to the Iresick Trunk Sewer prevented the Old Bridge Township Sewerage Authority from amending the designated boundaries of this sewer basin and accordingly, from allocating any capacity to our development. We were also advised that there were structural deficiencies (a bottleneck) in the Iresick Trunk Sewer that had to be resolved before the capacity of the lines could be determined. Mr. Sullivan promised to advise our engineering consultants of the specifics of the structural deficiencies in the Iresick Trunk Sewer.

16. At my request, Mr. Wendell A. Smith of the law

firm of Greenbaum, Greenbaum, Roe & Smith reviewed the Old Bridge Township Sewerage Authority Bond Resolution referred to by Neil Sullivan and found that there were no provisions which would restrict the Authority from amending the boundaries of the sewer basin or conditions to prevent allocating capacity to O & Y Old Bridge Development Corp. Further review of the Bond Resolution by our engineering consultants led to the same conclusion.

17. By letters of July 3, 1979, August 7, 1979, September 13, 1979 and October 11, 1979 our engineer John Allgair, requested Neil Sullivan to provide the information he had promised regarding the Iresick Trunk Sewer. By telephone conversation of October 26, 1979 with Peter Strong, Mr. Sullivan insisted that he had supplied the required information to us at the meeting of June 26, 1979. He was then asked to duplicate the information but to date no such information has been received.

18. On January 14, 1980, I engaged the firm of Killam and Associates, Consulting Civil Engineers as our new sewerage engineers on this project. This firm, instead of requesting information from the Authority, went into the field and obtained comprehensive factual data of the entire Iresick Trunk Sewer. During the period of data collection, the Authority gave its permission to install flow meters in the sewer and generally

appeared to have a cooperative attitude. Based on the field data, Killam engineered a preliminary trunk sewer plan, with alternates, to provide a primary sanitary sewer system for the area. On Monday, June 16, 1980, Peter Homack and Jim Coe of Killam Associates, with myself in attendance, appeared before the Board of the Sewerage Authority and made a presentation outlining our proposals and left drawings with Mr. Joe Romack (who replaced Mr. Sullivan) with the understanding that he would contact Killam Associates within a week or so. Mr. Romack did not contact Killam nor has Killam subsequently been successful in repeated attempts to arrange a meeting with Mr. Romack. This frustrating history leads me to believe the Township of Old Bridge Sewerage Authority has never had any intention of working toward a rational agreement between the Sewerage Authority and O & Y Old Bridge Development Corp. to provide primary sanitary sewer capacity to the area in general and to our lands in particular.

19. Given the above described course of dealings between O & Y Old Bridge Development Corp. and the Old Bridge Township Sewerage Authority, it is my opinion that any further negotiations or discussions with the Authority or its consultants would be an absolutely futile effort.

L. Brown

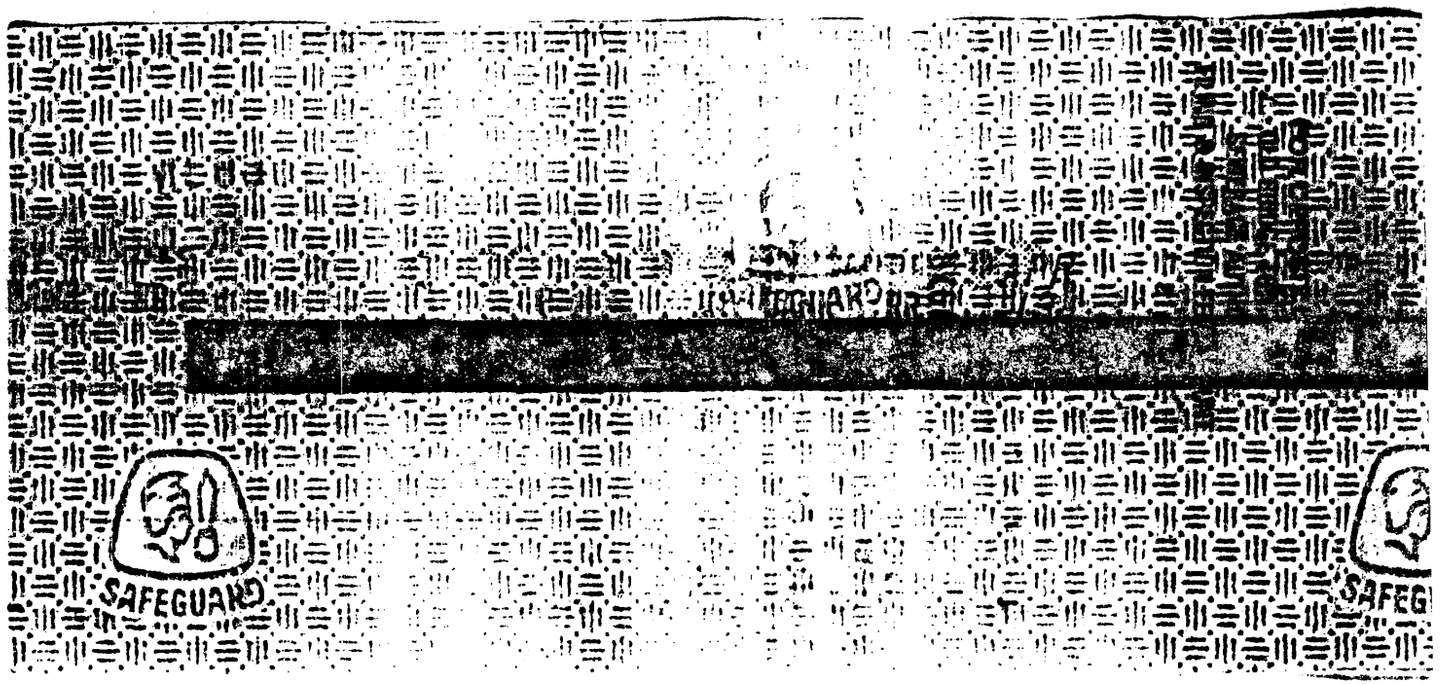
Lloyd Brown

Sworn to and Subscribed before
me this 16th day of
, 1981.

Valeska W Andren

VALESKA W. ANDREN
A Notary Public of New Jersey
My Commission Expires July 28, 1985

EXHIBIT 1


SAFEGUARD

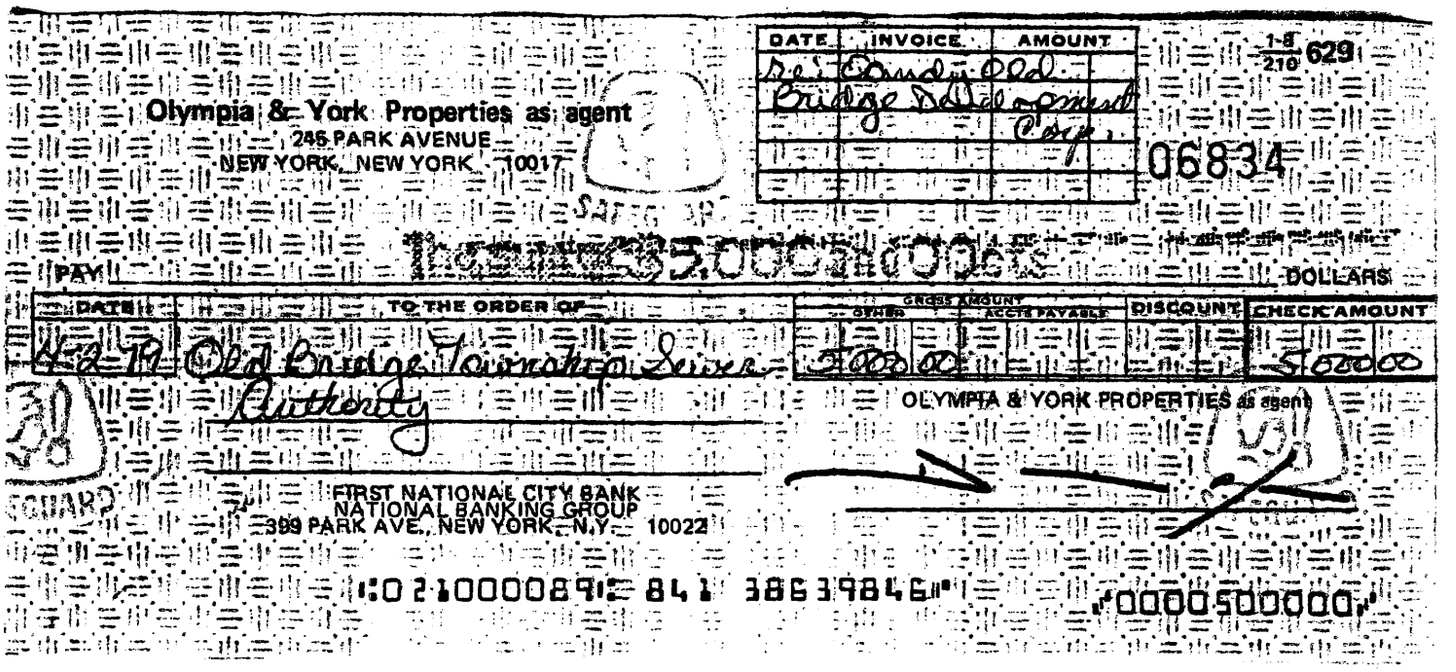

DATE
INVOICE
AMOUNT
Re: Bond Red.
Bridge Dev. Corp.
1-8
210
629
Olympia & York Properties as agent
245 PARK AVENUE
NEW YORK, NEW YORK 10017
06834
PAY
DOLLARS
DATE
TO THE ORDER OF
GROSS AMOUNT
OTHER
ACCTS PAYABLE
DISCOUNT
CHECK AMOUNT
4-2-79
Old Bridge Township Sewer Authority
5000 00
5000 00
OLYMPIA & YORK PROPERTIES as agent
FIRST NATIONAL CITY BANK
NATIONAL BANKING GROUP
399 PARK AVE., NEW YORK, N.Y. 10022
:021000089: 841 386398461
0000500000

EXHIBIT 2

566-2534

Old Bridge Township Sewerage Authority

P. O. Box 72
Laurence Harbor, N. J. 08879

April 4, 1979

Olympia & York Properties
245 Park Avenue
New York, New York 10017

RE: Dandy Old Bridge
Development Corporation

Gentlemen:

Please let this serve as a receipt of your check #06834, dated April 2, 1979 in the amount of $5,000.00 for above designation.

Thank you.

Very truly yours,

Eleanor Bushman

Eleanor Bushman, (Mrs.)
Office Manager

EB:Kb
File

BRENER, WALLACK & HILL
15 CHAMBERS STREET
PRINCETON, NEW JERSEY 08540
(609) 924-0808
ATTORNEYS FOR Plaintiff

Plaintiff

O & Y OLD BRIDGE DEVELOPMENT CORP.

vs.

Defendant

THE TOWNSHIP OF OLD BRIDGE, et als.

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L-32516-80

CIVIL ACTION
AFFIDAVIT

STATE OF NEW JERSEY)
) ss:
COUNTY OF)

PETER HOMACK, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a specialist in hydraulic and sanitary engineering and have been retained by Plaintiff to perform all engineering services necessary to provide sewer and water to Plaintiff's

proposed development in Old Bridge Township.

2. I am Chairman of the Board of Elson T. Killam Associates and am a licensed engineer in the State of New Jersey with 35 years of experience as a consulting engineer for numerous municipal water and sewer authorities as well as private developers throughout the State.

3. I have reviewed the Rules and Regulations governing applications for and construction of sewerage facilities in the Township of Old Bridge (dated March, 1979) and conclude that it would cost O & Y Old Bridge Development Corp. a minimum of $11,697,500 to comply with said Rules and Regulations concerning application fees, inspection fees and connection charges and a minimum of $5,000,000 to construct the necessary on-site sewer facilities for a total of $16,697,500 (See Exhibit 1).

4. The Rules and Regulations of the Old Bridge Township Sewerage Authority require the payment of a preliminary application filing fee of $10 per unit (our copy of the Rules says "per lot" (see Exhibit 2) although the Brief of the Sewerage Authority indicates that the fee is "per unit". This would amount to approximately $130,000 for plaintiff's development. Since the stated purpose of the preliminary application is only to allow the Authority to determine whether septic tanks or a comprehensive sewerage system is required, this fee grossly exceeds the actual costs of review.

5. After reviewing the Authority's existing facilities available to serve the O & Y Old Bridge Development Corp. site in conjunction with a test site plan for the property, I have done a preliminary take-off of the cost of the on-site sewer facilities required to serve the proposed development. I have arrived at a total cost for necessary on-site sewer facilities of $5,000,000 if constructed by the developer. If the Authority were to construct these facilities, the cost could be from 15% to 25% higher.

6. The Rules and Regulations of the Old Bridge Township Sewerage Authority require computation of construction-cost percentage-based-fees on the Authority's estimated cost to construct, rather than the probable actual cost for construction by the developer (see Exhibit 4).

7. The Rules and Regulations of the Old Bridge Township Sewerage Authority require the payment of a tentative application fee of 1% of construction costs (see Exhibit 4) which would cost O & Y Old Bridge Development Corp. $57,500.

8. The Rules and Regulations of the Old Bridge Township Sewerage Authority require the payment of a final application fee in the amount of 1.5% of the cost of construction (Exhibit 5) which would cost O & Y Old Bridge Development Corp. $85,250.

9. The Rules and Regulations of the Old Bridge Township Sewerage Authority require payment of inspection fees at the time of final approval in the amount of 6.5% of construction costs (see Exhibit 5) which would cost O & Y Development Corp. $373,750.

10. The Rules and Regulations of the Old Bridge Township Sewerage Authority which require the payment of tentative application fees, final application fees and inspection fees calculated as a percentage of total construction costs and computed on the basis of the Authority's costs to construct, are cost-generative and unreasonably discriminate against large developments in which economies of scale substantially lower the Authority's costs of regulation. It is my opinion that the percentage fee method of calculating fees is not appropriate and representative of the cost of providing engineering services. This is recognized by Federal Agencies who no longer permit the use of percentage fees as a basis for engineering compensation.

12. The Rules and Regulations of the Old Bridge Township Sewerage Authority should also require said Authority to return any portion of fees deposited which exceed the actual cost of administration and/or inspection.

13. The Rules and Regulations of the Old Bridge Township Sewerage Authority requires the payment of connection charges in accordance with the prevailing fee schedule; to the best of my knowledge the present fee schedule requires payment of $850 per unit as a connection charge, for a total of $11,050,000 to connect all the dwelling units proposed for the O & Y Old Bridge Development Corp. property.

14. The requirement of the Rules and Regulations of the Old Bridge Township Sewerage Authority that "credit" be granted to a developer where the Authority requires the installation of a larger size pipe than required by the development in order to meet the future requirements of a tributary area (see Exhibit 3) would not apply to grant credit against the connection charge for facilities required by the development and constructed at the total expense of the developer.

15. All of the above described fee requirements of the Old Bridge Township Sewerage Authority Rules and Regulations are excessive and unreasonable especially when applied to a large development, that total revision, rather than case-by-case exceptions for developers which prove hardship is required.

Peter Homack

Sworn to and Subscribed
before me this 21st day
of April, 1981

CAROLYN LE MAIRE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 26,1983

EXHIBIT 1

OLD BRIDGE TOWNSHIP SEWERAGE AUTHORITY
FEES REQUIRED FOR O & Y OLD BRIDGE
DEVELOPMENT CORP. PROPOSED DEVELOPMENT

Based Upon $5.75 Million On-Site Construction Costs[2]

A.	Application Fee		
	1. Preliminary Application Fee		
	13,000 units x $10.	=	$ 130,000.
	2. Tentative Application Fee		
	1% x $5,750,000.	=	57,500.
	3. Final Application Fee		
	1.5% x $5,750,000.	=	86,250.
B.	Inspection Fees		
	6.5% x $5,750,000.	=	373,750.
C.	Connection Charges		
	13,000 units x $850.	=	11,050,000.
		TOTAL	$11,697,500.

[2] $5.75 million construction costs assumes construction by the Sewerage Authority.

EXHIBIT 2

PRELIMINARY
APPLICATION NO._____ Filed_____

OLD BRIDGE TOWNSHIP SEWERAGE AUTHORITY

APPLICATION FOR REVIEW OF PRELIMINARY PLANS FOR SEWERAGE SYSTEM CONSTRUCTION IN THE TOWNSHIP OF OLD BRIDGE, COUNTY OF MIDDLESEX, STATE OF NEW JERSEY. (This application must be filed in duplicate, accompanied by filing fee of ten dollars ($10.00) per lot with the Executive Director of the Authority, 14 days in advance of the agenda meeting of the Authority.)

Application is hereby made for preliminary review of sewerage plans for the proposed subdivision for a ruling on whether individual or comprehensive sewerage system is required.

1. Applicant's Name:_____
   Address:_____Phone:_____

2. Name and address of present owner (If other than No. 1 above):
   Name:_____
   Address:_____Phone:_____

3. Interest of applicant if other than owner:_____
   _____

4. Date Classified as major subdivision by the Planning Board:_____
   _____

5. Location of subdivision:_____
   (neighborhood or section name)
   _____, _____, _____
   (street) (tax map block) (lot nos.)

6. Number of proposed lots to be sewered:_____

7. Area of entire tract:_____and portion being sewered:_____

8. Development plans:
   a. Sell lots only? (Yes or No)_____
   b. Construction of houses for sale? (Yes or No)_____
   c. Other:_____

9. Name and profession of person designing sewerage system:
   Name:_____ _____
   Profession
   Address:_____ _____
   Phone

10. Does applicant or owner agree to convey by deed to the Authority easements to all areas on preliminary plan showing sanitary sewer and all rights to sewer system?
    _____

EXHIBIT 3

Application for Tentative Approval

If sewers are required, the applicant must submit an application, in duplicate, for tentative approval on a form (Exhibit "B") furnished by the Secretary of the Authority, together with the supporting data described below.

If the size of any sewer main, as shown by the applicant's Engineer, is inadequate for the future requirements of the tributary area, as determined by the Authority, then the applicant shall install a larger size pipe, if required to do so by the Authority. The Authority agrees to pay the applicant the difference in the material cost of the pipe plus the cost of the additional excavation. Payment by the Authority shall be in the form of a credit to the applicant against the required connection fee.

The Authority will not charge the applicant the increased cost of the Authority's Engineer's review and inspection when the increased cost of construction results from an order by the Authority.

In the event, the applicant is permitted to tie into an existing sewer of adequate capacity, he shall pay the connection fee per unit as established by the Authority in its current rate schedule.

All sewers must be designed on a separate system plan, in which all water from roofs, cellars, streets and any other areas must be excluded. No by-passes which allow raw sewage to be discharged from sewers or which permit storm water to enter the sewers shall be installed.

EXHIBIT 4

To receive consideration, the application must be accompanied by the proper fee, in the form of a certified check, for review of the application. This fee shall be based on a charge of 1% of the applicant's Engineer's estimated construction cost as approved by the Authority. Construction cost shall include, as a minimum, the following items: pipe, manholes, house connections and cleanouts, pumping stations, force mains, treatment plants, appurtenances, and as-built drawings. Construction cost estimates shall reflect costs for the Authority's installation of the facilities.

The application shall be accompanied by six (6) copies of each of the following:

1. Engineer's Report.
2. General Map of the entire project.
3. Plans and profiles of all proposed sewers and pipelines.
4. Plans and specifications for sewage pumping stations and treatment plants.
5. Engineer's estimated cost of construction.

Applications for tentative approval must be submitted at least 2 weeks before a regularly scheduled agenda meeting of the Authority. Applications are to be signed by the Owner, or Owners, or by a proper official of the company, or, if signed by an authorized agent, shall be accompanied by a certified copy of the authorization.

After approval, one complete set of plans will be so stamped and returned to the applicant.

8. Performance Bond (amount and detail will be established during final review by the Authority).
9. All connection fees, as set forth in the Authority's current rate schedule.
10. Maps and descriptions of all lands and easements to be conveyed to Authority.
11. Completed copies of N.J.D.E.P. forms CP-1 and PWF-2.
12. Additional copies of any data furnished with the application for tentative approval, as requested by the Authority.

All drawings, design reports and specifications submitted by the applicant must bear the signature and raised seal of the applicant's engineer. Upon Authority approval or completion of all conditions of a conditional final approval, one complete set of plans and specifications will be so stamped and returned to the applicant and processing for M.C.S.A. and N.J.D.E.P. approval will begin.

Instruction for Submitting Applications for Final Approval

1. Fee for Review and Inspection

A certified check or cashier's check in the amount of 1-1/2% for review and 6.5% of the cost of construction for inspection.

8. Performance Bond (amount and detail will be established during final review by the Authority).
9. All connection fees, as set forth in the Authority's current rate schedule.
10. Maps and descriptions of all lands and easements to be conveyed to Authority.
11. Completed copies of N.J.D.E.P. forms CP-1 and PWF-2.
12. Additional copies of any data furnished with the application for tentative approval, as requested by the Authority.

All drawings, design reports and specifications submitted by the applicant must bear the signature and raised seal of the applicant's engineer. Upon Authority approval or completion of all conditions of a conditional final approval, one complete set of plans and specifications will be so stamped and returned to the applicant and processing for M.C.S.A. and N.J.D.E.P. approval will begin.

Instruction for Submitting Applications for Final Approval

1. Fee for Review and Inspection

   A certified check or cashier's check in the amount of 1-1/2% for review and 6.5% of the cost of construction for inspection.

2. Plans and Profiles of all Proposed Sewers and Pipelines

   Plans and profiles shall be as specified in paragraphs 3 and 4 under Instructions for Submitting Applications for Tentative Approval.