

~~CA~~ CA Old Bridge 19-Jun-1981

O & Y v. O.B.

Transcript of Motion: ~~2~~

~~1000~~ ~~1000~~ D the Sewerage Authority's
Motion for Summary Judgment and
D Municipal Utility Authority's motion
to strike certain Interrogatories
p22 = 99

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Use as org

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

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O+Y OLD BRIDGE DEVELOPMENT CORP., :
Plaintiff, : STENOGRAPHIC TRANSCRIPT
-VS- : OF
TOWNSHIP OF OLD BRIDGE, TOWNSHIP : Middlesex County Court
COUNCIL, PLANNING BOARD, SEWERAGE : House
AUTHORITY and MUNICIPAL UTILITIES : New Brunswick, New Jersey
AUTHORITY, :
Defendants. :
----- :

BEFORE:
HONORABLE J. NORRIS HARDING, J.S.C.

A P P E A R A N C E S:

MESSRS. BRENER, WALLACK & HILL
BY: HENRY A. HILL, ESQ. & GULIET D. HIRSCH, ESQ.
Attorneys for the Plaintiff.

LOUIS J. ALFONSO, ESQ.
Attorney for Defendants, Township of Old Bridge &
Township Council.

THOMAS NORMAN, ESQ.
Attorney for Defendant, Planning Board.

MESSRS. YACKER, GRANATA & CLEARY
BY: LOUIS E. GRANATA, ESQ.
Attorneys for Defendant, Sewerage Authority.

MESSRS. ANTONIO & FLYNN
BY: WILLIAM E. FLYNN, ESQ.
Attorneys for Defendant, Municipal Utilities Authority.

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1 THE COURT: Okay. I seem to find
2 the following motions that I have.

3 MR. ALFONSO: I wanted to, Judge,
4 on behalf of all counsel to congratulate
5 you on being permanently assigned to this
6 case. We will look forward to spending much
7 time with you.

8 THE COURT: I am not sure if express
9 of condolence would be more appropriate
10 than congratulations, but I thank you for
11 your well-wishes anyway, and as somebody
12 said, "Will you love me in Decemeber as you
13 love me in May?"

14 I find the following motions are in
15 one form or another outstanding. There is
16 the Defendant's, Sewerage Authority motion
17 for summary judgment which I deferrred from
18 the last time. There is the Defendant's
19 Municipal Utilities Authority motion
20 to strike certain Interrogatories. There is
21 the Plaintiff's motion for partial summary
22 judgment, Plaintiff's motion to dismiss
23 counterclaim.

24 There is the Defendant Township and
25 Council motion for partial summary judgment

1 or alternatively permitting the filing of
2 an amended counterclaim or third party
3 complaint which is joined in by other
4 defendants; another motion to dismiss all
5 damages claims of Plaintiff for failure to
6 comply with the Tort Claim Act.

7 There is the Defendant's Sewerage
8 Authority's motion to vacate an ex parte
9 order of dismissal, to extend time for
10 discovery. There is the Defendant Township's
11 motion to require the Plaintiff to post
12 security for costs and Defendant Township's
13 motion to allow 70 days extension in answering
14 Interrogatories. Those latter two I don't
15 have I believe.

16 Are there any other motions that
17 anybody can think of that may be you even
18 forgot about? Does anybody have any particular
19 preference or order of addressing these
20 motions? It seems to me I ought to save the
21 motion to strike the Interrogatories until
22 last because that's probably going to involve
23 only two of the counsel.

24 MR. GRANATA: As a preliminary matter
25 I believe as far as the Sewerage Authority's

1 application is concerned that the Court
2 should first entertain the application to
3 vacate the ex parte order striking defenses
4 and entering default.

5 MR. HILL: One other thing. Your
6 Honor, our records show that two of those
7 motions that are noticed for July 2, the
8 one for security by costs by the Council
9 and the one to extend Interrogatories. We
10 have no objection to the latter motion
11 being heard today, but the one involving
12 security for costs involves a legal question
13 which we are just completing research on.

14 THE COURT: Okay.

15 MR. HILL: We are not prepared.

16 THE COURT: Okay.

17 MR. ALFONSO: If I am going to come
18 back I just assume come back on both if I
19 am going to come on one.

20 THE COURT: I don't think you are
21 going home now anyway and perhaps the one
22 to extend the Answers to Interrogatories
23 would make more sense to dispose of that one
24 way or another at this point rather than
25 wait two weeks and have the same problem,

1 because what it only does is extend the
2 time for everybody.

3 In any event I have an application
4 to vacate the ex parte order of dismissal
5 and extend time for discovery made on behalf
6 of Defendant Sewerage Authority. I have
7 received no opposition to that. Is there
8 any?

9 MR. HILL: We were short noticed on
10 that. We only got notice on the 17th.
11 Yes, we object to that. We have looked
12 over the affidavit. The affidavit states
13 that we never told them that we would enforce
14 the rule. It doesn't say anywhere that we
15 misled them.

16 Of course, unless we hear from
17 counsel --

18 THE COURT: Well, suggesting that
19 you misled them --

20 MR. HILL: Well, unless we hear from
21 counsel with regard to their intentions,
22 counsel called us and asked for an extension,
23 and unless we hear from them and if they
24 assume that we will not enforce the rules
25 the assumption was mistaken.

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It is our position that the only way under the rules to reinstate a claim that's been dismissed is to answer the Interrogatories first within 30 days, and then if they are answered within 30 days we have no objection to the reinstatement. In fact that is their right.

THE COURT: Except that all time periods as far as I know with limited exceptions can be extended by the Court. I don't think anybody is going to say that 30 days is perhaps reasonable.

MR. HILL: We think that those Interrogatories have been in their possession for 100 days. It is not our --

THE COURT: How long will the Sewerage Authority need?

MR. GRANATA: Your Honor, the Sewerage Authority will need at least 70 days. These Interrogatories set forth in the affidavit are quite extensive. They involve extensive record searchings and tying up of quite a bit of time for the experts for the Sewerage Authority. Document gathering and the experts for the Sewerage Authority are not on

1 exclusive retainer with the Sewerage
2 Authority.

3 There are also depositions that
4 are scheduled of those experts depending on
5 the outcome, of course, of today's motion
6 for July 6 and 7 and depending on that it
7 is difficult to say, Judge, but the mere
8 size of these Interrogatories would indi-
9 cate no less than 70 days for the Defendant
10 to adequately answer those Interrogatories.

11 THE COURT: Do you have any serious
12 objection to that?

13 MR. HILL: Yes, we object to it
14 strenuously. That takes us way over the
15 period of discovery. It extends the time
16 that this matter can come to trial. All
17 discovery should be completed within 150
18 days, and we object because we can't seriously
19 get into the case until those Interrogatories
20 are answered, and we think they can be
21 answered in 10 days if they are diligently
22 pursued, and we think it is shocking that
23 this Defendant has sat on those Interrogatories
24 since March and now says they haven't done
25 any work on them and asks for more time than

1 the rules would allow them in the first
2 instance.

3 We think 70 days is way over the
4 time. We think they can easily be answered
5 in 30 days, and we do object.

6 MR. GRANATA: Most respectfully,
7 your Honor, the motion that is pending for
8 dismissal was timely filed with the answer
9 to the Complaint, and had the motion been
10 disposed of I would have been well within
11 time to answer the Interrogatories.

12 THE COURT: Can you do it in 60
13 days?

14 MR. GRANATA: I will do my best,
15 your Honor.

16 THE COURT: Because that will bring
17 you to roughly mid August. Nothing is
18 going to happen in the month of August in
19 any event, so whether I say 30 days or 70
20 days for that matter it really is not
21 going to affect a trial date because we are
22 not going to have a trial date until
23 September at the earliest.

24 MR. GRANATA: If I cannot complete
25 them within 60 days I will come back to the

1 Court.

2 MR. HILL: Your Honor, we can't
3 intelligently pursue depositions until we
4 get answers to the Interrogatories. The
5 Interrogatories were propounded almost
6 simultaneously with the servicing of the
7 Complaint.

8 THE COURT: That's why I tried to
9 set it in the middle of August so it will
10 at least give you gentlemen and ladies some
11 time toward the latter part of August or
12 early part of September to pursue depositions
13 if you wish.

14 MR. HILL: We don't have an expert
15 witness list. I think at the very least
16 counsel should be required within ten days
17 of today to furnish us with a list of people
18 that they propose to use as expert witnesses.

19 MR. GRANATA: Most respectfully,
20 your Honor, Mr. Hill speaks out of both
21 sides of his mouth. He has served me with
22 deposition notices, and while we were
23 negotiating dates for the depositions makes
24 no mention of requiring Answers to
25 Interrogatories or made them in any way

1 necessary for him to conduct the deposition.
2 If I had known this when I was speaking
3 openly with Mr. Hill I would have certainly
4 done my best to cooperate with Mr. Hill,
5 and depositions are scheduled between us
6 for my experts on July 6 and 7.

7 MR. HILL: I don't know who his
8 experts are.

9 MR. GRANATA: He is taking the
10 depositions of several people who he knows
11 are my experts.

12 MR. HILL: We have sewer engineers
13 because we don't know who his expert
14 witnesses are, and we'd like to progress
15 and try to finish discovery, the depositions
16 over the summer, and we can't begin to
17 do that until we know who the expert witnesses
18 are.

19 THE COURT: Well, Mr. Granata has
20 said a couple of times that he has told
21 you already. Did you say it in a specific
22 letter?

23 MR. GRANATA: Yes, attached to my
24 affidavit it makes reference to it.

25 MR. HILL: You are saying Cupper

1 Associates are your only experts? Those are
2 your only expert witnesses in this case?
3 Is that what you are representing to the
4 Court?

5 MR. GRANATA: That is what I am
6 telling the Court at this point.

7 MR. HILL: Well, if we have that
8 representation that's fine.

9 MR. GRANATA: That's not in any way
10 to limit it, your Honor. That's all I have
11 right now.

12 MR. HILL: Your Honor, the quicker
13 defense counsel focuses on the defense and
14 lets us know who they are hiring --

15 THE COURT: He's already given you
16 at least two names and a group. I think
17 that we can proceed from there. Obviously
18 counsel is bound by the requirement, and I
19 assume the question has been asked for the
20 names and addresses of experts. I have
21 seen at least those entities or gentlemen
22 will be furnished, and I think counsel
23 is all well aware of the requirement to
24 amend their answer if they intend to utilize
25 them at the time of trial.

1 X All right. I will restore your
2 answer and extend for 60 days from today
3 the time in which to answer the Interrogatories.

4 MR. GRANATA: Your Honor, I request
5 also a waiver in the requirement of the
6 costs.

7 THE COURT: I will waive the costs.

8 MR. GRANATA: Thank you.

9 THE COURT: What next shall we
10 address?

11 MR. GRANATA: The Sewerage Authority's
12 motion which has been pending and carried
13 from the Court I think is the oldest if
14 the Court wants to take them as far as age
15 is concerned.

16 THE COURT: Okay.

17 MR. GRANATA: Your Honor, this is
18 my motion to dismiss the Complaint for
19 failing basically to exhaust the administrative
20 remedies. There's an extensive affidavit
21 and several briefs that have been submitted.
22 Olympia and York or O & Y Old Bridge
23 Development Corporation has in their
24 Complaint set forth allegations that the
25 rules, regulations and procedure that the

1 Sewerage Authority has adopted are in their
2 estimation arbitrary, capricious, unreasonable
3 and not well suited to their purposes.

4 There is no application that has
5 ever been filed by this Plaintiff before
6 the Sewerage Authority to process any
7 applications for approval, for review, for
8 consideration, for anything. The Plaintiff
9 has by-stepped the administrative body that
10 has been created by --

11 THE COURT: But the problem or
12 challenge they are mounting is would that
13 be at all helped by submitting to the
14 Sewerage Authority their application.

15 MR. GRANATA: Most certainly, your
16 Honor.

17 THE COURT: Let me finish.

18 If their point is that the rules
19 and regulations themselves are either unduly
20 cumbersome or harsh or whatever.

21 MR. GRANATA: No, your Honor, because
22 the Sewerage Authority rules and regulations
23 as I have submitted to the Court provide
24 that any applicant who comes in can request
25 of the Court the authority to waive any or

1 all of the rules and regulations.

2 THE COURT: Well, that in and of
3 itself I guess creates a challenge by the
4 plaintiff in affect saying that you can't
5 do that. You just can't have a waiver rule
6 without any particular guidelines as to
7 how it is to be exercised.

8 MR. GRANATA: The guidelines are
9 set forth in the rules and regulations
10 specifically, whatever the applicant --
11 there is no application. All that this
12 Authority has ever seen is the Complaint
13 and a map showing Old Bridge Township. That's
14 the essence of their application that is
15 before the Court at this time.

16 What they are asking this Court to
17 do is suspend the powers of a legislative
18 creative body to administer --

19 THE COURT: Let's lay aside the
20 application to suspend the powers for a
21 moment for the argument.

22 Isn't the rest of what they are
23 saying namely that your fee schedule and
24 the rules and regulations themselves are
25 arbitrary, unreasonable and capricious

1 for one reason or another, and isn't that
2 a question of law? It is not a question
3 of saying we were unfairly treated, but that
4 the rules and regulations pertaining and
5 the fee schedules themselves are defective
6 as a matter of law; and isn't that one of
7 the exceptions whereby you do not have to
8 exhaust your administrative remedies in
9 order to bring it before Court?

10 MR. GRANATA: That would be the
11 case, your Honor, if that was the thrust
12 of the Complaint. The thrust of the
13 Complaint is that a \$10 filing fee --

14 THE COURT: That has to do with the
15 fee schedule.

16 MR. GRANATA: That's basically
17 what they are saying, that the fee schedule
18 is onerous because they have 13,000
19 applications.

20 THE COURT: You wouldn't want to
21 say they would want to pay the \$10 for each
22 of the 13,000 and then go through a
23 proceeding before your board before they
24 can finally come to a Court and say the
25 rules and regulations and the fee schedule

1 are onerous.

2 MR. GRANATA: Yes, your Honor,
3 especially when they are saying the Oakwood
4 at Madison Case has directed the Sewerage
5 Authority to do something concerning the
6 use of the ground and the Old Bridge
7 Sewerage Authority was never a party
8 Defendant, party Plaintiff or in any way
9 controlled by the Oakwood at Madison matter.
10 That was against the Old Bridge Township
11 Council Planning Board. The Sewerage
12 Authority and the Municipal Utilities
13 Authority as far as I know was never part
14 of that litigation.

15 The Plaintiff's theory is Oakwood
16 at Madison has said Old Bridge, you will
17 do this. Olympia and York or O & Y
18 Development Corporation comes in and says
19 the Town did not do that. They have adopted
20 rules and regulations that violate the
21 mandate of the Supreme Court, that the
22 Sewerage Authority violated the mandate of
23 the Court by adopting those rules and
24 regulations. That's why they are unreasonable,
25 arbitrary and capricious, that the fee

1 schedule is not in accordance with the
2 Oakwood at Madison matter, and we are not
3 part of that, never have been part of that.

4 Our rules and regulations have
5 been since the creation of the Authority
6 not challenged or reviewed by any Oakwood
7 at Madison Court decision. They have just
8 come in in a grand sweep, filed an
9 application for every single board and
10 everybody in Old Bridge by paying \$65 to
11 the clerk of the Superior Court instead of
12 going to each body and saying here is our
13 plans, please review them. We come in with
14 a massive project. You the planner, you
15 the engineer, you the road department, you
16 the park system, you the Sewerage Authority,
17 you the Municipal Utility Authority, let's
18 sit down and work it out.

19 They didn't even bother. They
20 just circumvented them and came to this
21 Court and alleged that the rules and regulations
22 of the Sewerage Authority are arbitrary,
23 capricious and unreasonable.

24 If that was the law of the State
25 of New Jersey, your Honor, there would be no

1 use to have an administrative tribunal.
2 Any Plaintiff can allege their rules and
3 regulations are arbitrary, capricious and
4 unreasonable and bypass the administrative
5 body that has been created especially to
6 hear and determine these matters.

7 THE COURT: Let me say two things.
8 Number one, I am not sure that it is material
9 to my decision, but I think the Plaintiff
10 would disagree with you in contending that
11 they did not attempt to sit down and work it
12 out with the Authority.

13 I think part of their allegation
14 as I understand it -- I don't know whether
15 it is true or not -- but it is their contention
16 they did sit down at one time or another
17 and try to work out problems and were told
18 that they weren't going to work out in
19 effect. That's their contention.

20 MR. GRANATA: That's their contention,
21 and the only document that supported that,
22 your Honor, --

23 THE COURT: Number two is that,
24 as I perceive the overall thrust of the
25 Plaintiff, it is not merely to get around

1 the bodies except in the limited area that
2 they seek a suspension of authority which
3 I may have some trouble with, but what they
4 are ultimately seeking is that there be
5 coordination between the various boards
6 in Old Bridge in reasonably -- I am now
7 doing what are allegations -- I am not saying
8 this is what ultimately my decision would
9 be or I am sympathetic with the position --
10 but it is my position what they are attempting
11 to do is to coordinate the various boards
12 in some reasonable fashion to consider their
13 application. I don't perceive that their
14 complaint was not to be ultimately presented
15 to the various boards.

16 MR. GRANATA: If that be the case,
17 your Honor --

18 THE COURT: In other words, they
19 don't want me to take the place of all the
20 boards.

21 MR. GRANATA: If that be the case,
22 your Honor, there's a mechanism by which
23 they can do that, just as there is a
24 mechanism by which they could appear before
25 this Court. They have gone through the

1 expense of preparing a Complaint, bringing
2 it to Trenton and paying a \$75 filing fee
3 in order to gain jurisdiction here. They
4 have not done the same thing that is set
5 up in the Municipality to go to the boards
6 and invoke the jurisdiction of those boards.

7 Boards just don't respond nor
8 does the Court respond to somebody who
9 walks in the door and says, "Look, I'd
10 like to resolve this for me. I'd like you to
11 sit down and figure out how we are going
12 to work this thing out before I come in and
13 file my application or complaint, so let's
14 sit down."

15 Now if the Court refuses to do
16 that does that then give the plaintiff the
17 right to go to the United States District
18 Court and say that the Courts of the State
19 of New Jersey acted in an arbitrary,
20 capricious and unreasonable way by establishing
21 rules of Court and challenging the rules of
22 Court?

23 THE COURT: I would think not al
24 easily because the vehicle to force a Board
25 to do something or challenge the constitution-

1 ality at least in the first instance here,
2 I am not sure that same jurisdiction is
3 open in the Federal District Court.

4 MR. GRANATA: They are not challenging
5 the constitutionality of these boards, not
6 the Sewerage Authority.

7 THE COURT: They are challenging
8 the reasonableness of the due process being
9 offered by the boards through the rules and
10 regulations; aren't they?

11 MR. GRANATA: Because they allege
12 that the fees are costs generative. They
13 have not -- if the concept as the Court
14 understands is to get these boards and this
15 town together then there is a vehicle to do
16 that, not the Courts. There is a vehicle
17 set up specifically by the mandate of the
18 legislature, the ordinances, rules, regulations
19 of these legislatively created bodies. There
20 is a vehicle for that.

21 If they feel that the fees are
22 unreasonable they have a way of taking care
23 of that. They could file their filing fees
24 under protest. They can file their appli-
25 cation under protest and preserve those

1 rights; but they cannot, I would submit
2 to the Court, just ignore a legislatively
3 created entity and say we don't think your
4 fees are right and then come over to this
5 Court and say that they are wrong.

6 We have to have an opportunity to
7 at least respond to an application, to
8 at least look at it.

9 THE COURT: The nature of the
10 application that would be made before you
11 or would your board take up then the issue
12 of whether or not their fees, the fees
13 are valid or the rules and regulations are
14 valid? That is not something that the
15 boards would entertain.

16 MR. GRANATA: They certainly can.
17 I am not speaking for any other board.
18 I am speaking for the Sewerage Authority
19 that I represent.

20 The statute that creates the Sewerage
21 Authority allows them to set rules at rates,
22 fees and charges. It is discretionary
23 with the Board. The Board has established
24 rules and regulations and fee schedules
25 that they amend from time to time, and they

1 have a vehicle by which any agreed party
2 can come before them, challenge it, go through
3 the process, preserve that right and --

4 THE COURT: Why would they have to
5 preserve it? My question to you was would
6 the board entertain the application itself?

7 MR. GRANATA: It certainly would.

8 THE COURT: If the applicant were
9 to come in and go before the board and
10 say, "Now I have paid some money and the
11 first I want to challenge before I present
12 my application is how much I paid. The
13 second thing I want to challenge is the
14 validity of your rules."

15 You think the board at that is
16 going to have a hearing on their own rules?

17 MR. GRANATA: Your Honor, that is
18 something that the Board may entertain, and
19 I would submit to the Court that the Board
20 has that right because they were given that
21 mandate by the legislature. They have
22 adopted a vehicle in their rules and
23 regulations to handle that, and unless they
24 are given an opportunity to respond there is
25 no way of determining that.

1 I can't say what the Board would
2 say, but I can represent to the Court --

3 THE COURT: Well, they have a way of
4 responding through you before me.

5 MR. GRANATA: And I am going to
6 do that. In the seventh count of the
7 Complaint there is an allegation that O & Y
8 Old Bridge Development Corporation paid to
9 the Sewerage Authority \$5,000. The person
10 who paid or the entity that paid \$5,000
11 to the Sewerage Authority is a corporate
12 entity established separate and apart from
13 this plaintiff as recorded in the Secretary
14 of State's corporate files.

15 Olympia and York Properties paid
16 to the Old Bridge Township Sewerage Authority
17 under an agreement \$5,000 for the Sewerage
18 Authority's engineers and professionals to
19 sit down with the engineers and professionals
20 from Olympia and York Properties to review
21 the matter, to set up a vehicle by which
22 they can conduct studies, by which they
23 can process an application and present it
24 to the Board.

25 That was done in February. In

1 February the engineer for the Sewerage
2 Authority was ready to report to the
3 Sewerage Authority of those meetings and
4 the outcome of those meetings, when this
5 complaint was filed. So the Board has
6 already done that. Not with this particular
7 corporate entity, because this corporate
8 entity has never come to the Sewerage Authority.
9 The Olympia and York Properties had come,
10 paid \$5,000 and our engineers were directed
11 to sit down with their engineers and work
12 out some figures.

13 Our engineer has completed the study,
14 had charged the Sewerage Authority \$3,000
15 for a study known as the Erisa Brook Study
16 (phonetic) just for Olympia and York
17 Properties.

18 THE COURT: Has the results of the
19 study been furnished to Olympia and York
20 Properties?

21 MR. GRANATA: O & Y Development
22 Corporation filed litigation. We have not
23 heard from Olympia and York Properties
24 any more.

25 The next application or the next

1 correspondence we get after this complaint
2 is a letter from Killiam Associates (phonetic)
3 who is now the engineer for O & Y Old
4 Bridge Development Corporation with a letter,
5 and I believe I attached it to my moving
6 papers in one paragraph saying, "Can you
7 service our property," and they enclose
8 a map that shows the southern end of Old
9 Bridge.

10 Now in order for the Sewerage
11 Authority first of all under its mandate
12 with the legislature and secondly under its
13 rules and regulations, they have to
14 study and respond. They just can't look at
15 it and say, "Sure, come on in. Run sewers
16 where you are going to run them." There has
17 to be a study.

18 They have to have the director
19 engineer respond in some way. He responds
20 to applications. They did not prepare
21 applications for an applicant. They
22 don't do their studies. They don't lay their
23 lines.

24 We, the Authority, merely got a
25 big map. We don't know how many gallons of

1 sewerage they propose. They don't tell us
2 any of those technical matters that we could
3 respond to, whereas Olympia and York
4 Properties agreed with the Sewerage Authority
5 to pay the Sewerage Authority engineers up
6 to \$5,000 to do this massive study which
7 they did and it's ready. It's prepared. It's
8 for presentation to the Sewerage Authority
9 by its engineers.

10 Olympia and York Properties never
11 came back. The litigation was filed.
12 So the Sewerage Authority is not just sitting
13 out in the left field not doing anything.
14 They are ready. They are willing. They are
15 able. They want to get this thing going.
16 They want to have something with which to
17 grasp, but they cannot grasp something that
18 is not an application, nothing to respond to.

19 MR. HILL: Your Honor, there are a
20 lot of factual allegations which aren't
21 in the Record that have been made.

22 The one that is bothering me particularly
23 is the allegation that we paid and met with
24 them in 1979. Our affidavits show we repeatedly
25 requested this study for two years. It just

1 so happens two years later when we file suit
2 never having heard from them and having
3 been told by them in a meeting that they
4 won't service us as our affidavits say,
5 that they just coincidentally finished a
6 study that was waiting, that they were
7 waiting to give us.

8 I don't want to make factual allega-
9 tions because my client isn't here, but we
10 have the files showing stacks of correspondence
11 requesting the Authority between 1979 and
12 time suit was initiated if they'd give us
13 the study or give us our money back or tell
14 us what they were doing and there were just
15 no replies.

16 I think what is important on this
17 motion for the Court to focus on --

18 THE COURT: I think one of the things --
19 let me interrupt you -- one of the things
20 the Sewerage Authority is saying is that you
21 didn't use the right letterhead in writing
22 for your response.

23 MR. HILL: Maybe that's an honest
24 misunderstanding. As you can see there is
25 a cancelled check attached to an affidavit.

1 It does say re: O & Y Development Corporation.
2 Maybe Lloyd Brown dealing with them talked
3 with Olympia and York and when they got
4 a check where their money is kept in an
5 account under Olympia and York Properties
6 which is the banker for this subsidiary,
7 there may have been in fact a bona fide
8 confusion as to who paid what; but I think
9 that the tax records of the Town will
10 show that the only corporate entity that
11 owns any property in Old Bridge is O & Y
12 Old Bridge Development Corporation, that
13 that property owner owns 2500 acres and
14 yes, Lloyd Brown with supporting, with
15 cards that say Olympia and York which is
16 what the O & Y stands for has been talking
17 and trying to apply and meeting with engineers
18 for a period of years, and that they might
19 have honestly thought that the property
20 owner was Olympia and York; but I think the
21 facts show that regardless of the confusion
22 there were a number of meetings. There is
23 an affidavit on file which says that at
24 the final meeting O & Y was told we cannot
25 service your property.

1 Our allegation here is that they
2 have a franchise. They have a monopoly
3 to service all the sewerage in the Municipality.

4 The briefs and the Court records
5 would show that the only other applicant
6 who is of any size who sued Oakwood at
7 Madison had to sue the Water Authority and
8 then has still to put a spade in the ground.

9 Our theory is, and we'd like a
10 chance to prove to the Court, that the
11 Township Council has set up these independent
12 entities given the monopolies and franchises
13 which gives them the only right to sell
14 water in the Town or to service sewer in the
15 Town and through these independent authorities
16 controls development in Old Bridge, and that
17 this is -- that there is a scheme of non-
18 compliance, and it is that scheme the we'd
19 like the Court to address. We think and
20 our brief shows and our Supreme Court has
21 said that when the relief requested is a
22 declaration by the administrative agency that
23 its own regulations or actions are invalid
24 and then there is no need to exhaust
25 administrative remedies, that there is no

1 need to exhaust administrative remedies
2 where the issues are issues of law and not
3 issues of particularly in the realm of
4 administrative expertise.

5 The affidavits on file in connection
6 with this motion show prima facie that if
7 we were to develop our land for 13,000 units
8 that it would cost us, physically cost us
9 five million dollars to build a sewage system
10 to service that property connected to the
11 Sewerage Authority, but that their fees,
12 their connection fees and their application
13 fees would total eleven million so that under
14 their system of regulations it would
15 cost us eleven million in fees and five
16 million in construction or \$16,000,000 to
17 physically construct a sewage system in this
18 property.

19 We think we have the right to
20 argue before this Court that \$11,000,000 is
21 too much to regulate a \$5,000,000 construction
22 job. It goes beyond the scope of this
23 motion, but there is case law on this
24 subject in New Jersey. We believe that
25 when these facts are properly before you

1 that the Court will have jurisdiction to
2 rule on them, and we think that we should
3 have a chance to argue those issues in the
4 main case to try and show this Court that
5 the Sewerage Authority is acting in concert
6 with other agencies to stop development
7 by making it too expensive to build in
8 Old Bridge Township, and that the statistics
9 on building starts will support this
10 allegation.

11 Old Bridge Township with 20 percent
12 of the vacant land in Middlesex County --

13 THE COURT: I think you are getting
14 beyond the scope of the argument.

15 MR. HILL: Thank you.

16 MR. GRANATA: Your Honor, the
17 confusion is exactly why the matter should
18 be returned to the administrative body set-
19 up to get rid of this confusion, get down
20 to the bare bones and decide whether
21 Olympia and York Properties is the same
22 entity as O & Y; whether there was an
23 application filed; whether there was anything
24 at all going on. That's what the administra-
25 tive agency is set up for.

1 This Plaintiff wants you, your
2 Honor, to sit down and review the sewer
3 site plan to determine pipe lengths that
4 conform with the EPA --

5 THE COURT: I am not sure I have
6 intentions presently at least of doing that.
7 As I gather it now the only thing the plaintiff
8 wants me to do is to look at the rules and
9 regulations as well as the fee schedule and
10 determine whether or not they are reasonable
11 and arbitrary and capricious.

12 MR. GRANATA: If the Court were to
13 say unreasonable and arbitrary they'd still
14 have to come back to the Sewerage Authority
15 I assume; and when he speaks about an
16 onerous burden there are preliminary
17 applications. We are talking about \$130,000
18 to submit their preliminary sewer plan.
19 Just very quick calculations 13,000 units
20 they propose. If they sold those 13,000
21 units at \$50,000 which is \$30,000 below the
22 national average for an average home, we
23 are talking about \$6,500,000,000 that
24 Olympia and York is grossing out of a
25 project in Old Bridge, and \$130,000 or

1 \$11,000,000 in application fees is a mere
2 drop in the bucket to such a monstrous
3 application.

4 Concerning the allegation of Oakwood
5 at Madison yet putting a spade in the
6 ground --

7 THE COURT: I still don't think that
8 you necessarily balance the fees on
9 basis that you just suggested.

10 MR. GRANATA: No, your Honor. That's
11 what I am trying to lead to at the Oakwood
12 at Madison matter.

13 The Oakwood at Madison application
14 was approved at the last meeting. Mr. Hill
15 was there when the Sewerage Authority
16 processed and finally approved the Oakwood
17 at Madison application because Oakwood of
18 Madison was involved in litigation, not with
19 the Sewerage Authority. Nowhere along the
20 lines of the Sewerage Authority involved.

21 Oakwood of Madison terminated.
22 There was settlement negotiations with the
23 Municipal Authority. They came up with a
24 certain number of units. Oakwood at
25 Madison processed their application through

1 the boards. After they go through the
2 boards they finally come to the Utility
3 Authority. Their application came in one
4 year ago to the Sewerage Authority and it
5 was approved at the last meeting. Oakwood
6 at Madison has not had to pay all their
7 connection fees because of an agreement of
8 the Sewerage Authority because of the size of
9 their project and the concern with the
10 Authority. There is a prime example.

11 What Mr. Hill is pointing to as
12 why he should be here, Oakwood at Madison
13 is beginning to put a spade in the ground,
14 because they went through the Sewerage
15 Authority, they submitted their application,
16 they paid their filing fees and they sat
17 down and went over it with their engineers,
18 and the Sewerage Authority waived certain
19 parts of their rules and regulations to the
20 satisfaction of the Sewerage Authority and
21 to the satisfaction of Oakwood at Madison;
22 so when we are talking about these fees
23 that's what the rules say. Come to the
24 Sewerage Authority. Tell us what you want to
25 do. Tell us what your problems are. We will

1 listen. We will decide. If you are not
2 satisfied you have preserved your right.

3 Should I stand before the Court and
4 say, "Your Honor, I throw in the rules and
5 regulations of the Sewerage Authority"?

6 THE COURT: Of course not.

7 MR. GRANATA: Then what? Oakwood --
8 O & Y --

9 THE COURT: Of course you are not
10 going to say that. You are going to say
11 they are valid.

12 MR. GRANATA: Supposing I just
13 throw them in. All right. \$10 an application
14 is arbitrary, capricious and unreasonable.
15 Pay us one dollar. Come in. Let's look at
16 the application. After we look at the
17 application then we can decide whether one
18 dollar is reasonable or unreasonable.

19 How long did it take your engineer
20 to prepare the application? How long did it
21 take your engineer to prepare the plans?
22 A year, two years? Well, our engineer has
23 to look them over. That's what the \$10
24 is for, for our engineer to look over your
25 plans. If it took your engineer a year

1 shouldn't it take ours at least a couple
2 of months, and that's the basis of it,
3 your Honor.

4 We are wasting the Court's time
5 here. The Sewerage Authority is set up to
6 handle this, set up to review it, set up
7 to sit down and negotiate and work out some-
8 thing that is beneficial to the Town and
9 beneficial to the applicant; but O & Y
10 Development Corporation just ignores that
11 and expects the Court to take over this
12 administrative burden; and I don't believe
13 the Court has that much time to waste on
14 this kind of an application, your Honor.

15 MR. FLYNN: Your Honor, before you
16 close out on this one, I by letter to you
17 and copy to the Brener firm indicated I
18 would join in the application of the
19 Sewer Authority because I think the Water
20 Authority is basically in the same position
21 not having had any applications, probably
22 even less by way of negotiations or preliminary
23 work; and I would join in the written
24 arguments of Mr. Granata and in his oral
25 argument today on that same issue.

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MR. GRANATA: Just one further thing, your Honor. The Court can remand this back to the Sewerage Authority and still retain jurisdiction over it and still control it and still get rid of all these side issues, these confusions, these little "who are you; I am me," and this nonsense that the Court has to delve through before it gets to the main issue.

THE COURT: I would say that I think we will get along much better if we try and make it as least difficult to litigate the main issues as we can rather than play by gamesmanship, and I am not accusing anybody of doing that.

I think the problems are difficult enough without trying to also seek to the tactical advantage rather than take the more cooperative road in the approach to all the problems.

Let me ask you a question, Mr. Hill. Other than the fee schedule what other rules and regulations are you challenging? I am really unclear as to the rules and regulations that you are challenging.

1 MR. HILL: The Sewerage Authority
2 and the Water Authority are different
3 entities, and we are challenging different
4 things. We allege in the complaint with
5 respect to the Water Authority that --

6 THE COURT: Let's stay with the
7 Sewage Authority right now.

8 MR. HILL: Okay. Basically we are
9 alleging that we have been through their
10 accountings filed with the State, and we
11 are alleging that the connection fee, the
12 whole way they calculate fees --

13 THE COURT: Other than monetary
14 calculation which I for want of a better
15 term call fee schedule, is there anything
16 else in the rules and regulations that you
17 wish to challenge as being arbitrary and
18 capricious?

19 MR. HILL: We would challenge the
20 time periods -- I can't -- other than
21 their regulatory scheme and the fact that we
22 allege that they are serving a Township
23 purpose of frustrating development rather
24 than serving developers, no, there is
25 nothing that we would challenge.

1 THE COURT: What you are saying is
2 you are fearful they are going to foot drag,
3 but you are not really challenging the
4 rules and regulations themselves.

5 MR. HILL: We are saying we have
6 already talked to them. We have paid them
7 the \$5,000. They told us they couldn't
8 serve us part of the sewage. We tried to
9 get our engineers to show them how we could
10 do it. They were not cooperative.

11 We believe they do not intend to
12 facilitate the development of that portion
13 of the Municipality other than for purposes
14 of being the Sewerage Authority. I don't
15 know how otherwise to express it to you.
16 We believe in the conspiracy scheme. We
17 believe that the Municipality intends to
18 preclude in this area from development and
19 the three or four years that Olympia and
20 York has spent trying to work with the
21 Municipality has resulted in this
22 conclusion.

23 So yes, we think that the regulatory
24 scheme and the discretionary powers as to
25 where and how and which areas they will

1 sewer -- you see, in this area a developer
2 would need to cooperate with the Sewerage
3 Authority and assist the Sewage Authority
4 in enlarging certain pipes and increasing
5 the capacity of certain pumping stations.
6 It's an engineering problem, and in Oakwood
7 at Madison the Supreme Court ordered the
8 Town to extend the sewer system.

9 One of the orders in the case, and
10 it was directed to the Municipality and
11 maybe Mr. Granata is technically right, is
12 that the Sewer Authority not being a party
13 to Oakwood at Madison didn't have to comply
14 with Oakwood at Madison because they have
15 not been complying; but I am saying the
16 Township Committee appoints the Sewerage
17 Authority. They approved it. They created,
18 and they could dissolve it and --

19 THE COURT: I really don't think,
20 though, that you are answering the question,
21 and you are making the other attorneys
22 feel uncomfortable or their objections
23 being slightly gored.

24 My question solely is as far as the
25 rules and regulations are concerned is there

1 any other specific rules and regulations
2 other than the fee schedule or computation
3 of fees that you feel should be knocked
4 out as being arbitrary and unreasonable?

5 MR. HILL: No. At this point the
6 fee schedule and those rules which require
7 them to cooperate with the developer we
8 find inadequate.

9 THE COURT: How about with respect
10 to Municipal Authority, the Water Department?

11 MR. HILL: We have another problem
12 with the Water Authority. We have a problem
13 with the Water Authority in that we allege
14 that they have a duty to apply for
15 deviation permits. Old Bridge Township
16 gets water by drilling into the ground,
17 and they need to get permits from the DEP
18 to pump out a certain amount of water.

19 THE COURT: Is there anything wrong
20 with the rules and regulations? Aren't you
21 talking about the implementation that you
22 are really arguing about?

23 MR. HILL: No. We claim there is
24 nothing wrong with the rules and regulations
25 other than the fee schedule. We do claim,

1 however, that they have an affirmative
2 duty to expand their water capacity and that
3 they are not fulfilling that duty.

4 THE COURT: But that again is
5 not encompassed within the rules and regulations,
6 the expansion of the water ability; is it,
7 the water provision ability?

8 MR. HILL: No. The fact that they
9 cannot physically supply the water that we
10 need.

11 THE COURT: That is not going to
12 be governed within the rules and regulations
13 themselves though.

14 MR. HILL: We have had some preliminary
15 discussions with the Water Authority. We
16 have told them that we would be satisfied
17 if they would release us from their franchise
18 and let us supply our own water, let us
19 dig our own wells and supply water to our
20 community or go to the DEP and apply for
21 more deviation permits so they can supply
22 the water. We don't care; or three, let us
23 let another franchise in the next town over
24 come in and supply water to us.

25 There is plenty of water, but they

1 don't have the right to get it because they
2 have never applied for the right, and their
3 failure to act, their failure to apply for
4 more water permits is what has limited
5 development in parts of Old Bridge; and
6 we'd like the Court to focus on whether
7 or not they have an affirmative duty as long
8 as they have a monopoly.

9 THE COURT: I understand that.
10 That's not within the scope of the rules
11 and regulations.

12 MR. HILL: That's correct. The
13 rules and regulations don't set out an
14 affirmative duty for them. I guess I am
15 at a loss because I am wondering as you ask
16 the question should rules and regulations
17 set out affirmative duty, and if they should
18 and they don't then we think they are wrong
19 in that respect; but I don't know the
20 answer to that question.

21 MR. ALFONSO: I just don't want the
22 Record not to reflect my disagreement in
23 his statement that the Township Council
24 controls the authority and can dissolve them.
25 That's not the case at all in this case.

1 MR. NORMAN: Your Honor, may I
2 answer one of counsel's questions briefly?

3 THE COURT: Can we try -- again we
4 are going to be really here a long time
5 if everybody feels obligated to jump up
6 and respond to something that is really
7 not germane to what I am trying to find out.
8 I mean I know that you all feel you have
9 an obligation and you are protecting your
10 own clients, but --

11 MR. NORMAN: Your Honor, I just
12 want to point out one simple thing, that
13 exhaustion of administrative remedies goes
14 to the argument that they ought to apply
15 to the State for your well permits. He
16 makes the application and none of the Boards
17 in the Town really have an obligation to
18 apply to the State for anything.

19 ~~XX~~ THE COURT: With respect to the
20 applications of the Sewage Authority and
21 Municipal Utility's motion for summary
22 judgment they are denied insofar as it is
23 argued that the Plaintiff must exhaust
24 its administrative remedies first before
25 obtaining a judicial review or a look-see

1 at the fee schedules themselves.

2 It seems to me that that is a
3 question of law. I don't perceive the
4 Plaintiff's complaint to be that he wants
5 this Court to serve as any of these boards
6 or reviewing authorities. It seems rather
7 what the plaintiff wants to do is to get
8 on with his whole development and will
9 submit to reasonable requirements of boards;
10 but he feels one of the unreasonable require-
11 ments is the fee schedules themselves; and
12 it seems to me that whether or not those
13 fees are lawful and appropriate it becomes
14 a matter of law in the case of Matawan vs.
15 Monmouth County Tax Board, 51 N.J. 291, A1962
16 decision of our New Jersey Supreme Court,
17 is not necessary when we are dealing with
18 questions of law to challenge in effect
19 some part of the scheme that you have to
20 actually present an application in order
21 to be able to challenge.

22 With respect to the complaint as
23 it may challenge the other rules and
24 regulations of the Sewerage Authority and
25 the Municipal Utilities Authority except for

1 how, whatever provision it may be having
2 to do with if there is such a provision
3 applying for additional water rights, the
4 application for summary judgment is granted.
5 In other words, there's no offer made that
6 they are challenging any other provisions
7 except the fee schedules for both utilities,
8 and to whatever extent it may apply the
9 requirement if there is such a requirement
10 that the Municipal Utilities Authority
11 allow either themselves go in and get
12 additional water rights or exempt the
13 plaintiff from providing its own water either
14 directly or indirectly through another
15 community.

16 With respect to the application for
17 summary judgment having to do with the
18 payment or nonpayment of \$5,000 and the
19 return of that amount of money it seems to
20 me that that is a fact question as to whether
21 or not it was paid, who paid it and whether
22 it was an interlocking relationship, and
23 they are fact questions presented so I
24 must deny summary judgment on that account.
25 Okay.

1 MR. GRANATA: Your Honor, the order
2 would read that the issue in the complaint
3 concerning the Sewerage Authority is only
4 the reasonableness of the rate schedule?

5 THE COURT: Yes. You are going
6 to submit an order for both yourself and
7 Mr. Flynn's client.

8 MR. GRANATA: We will cooperate
9 in preparing the order.

10 MR. HILL: Let me understand. Are
11 you saying that --

12 THE COURT: You may challenge without
13 exhausting the administrative remedies,
14 the reasonableness of the fee schedule and
15 to whatever extent the rules and regulations
16 of the Municipal Utilities Authority has to
17 do with how they get water rights. That you
18 can challenge. The rest you can't challenge.
19 You have told me in fact there is no
20 challenge.

21 MR. HILL: All right. So the fee
22 schedule plus the deviation permits we may
23 challenge.

24 THE COURT: Without exhausting
25 administrative remedies.

1 MR. HILL: Without exhausting
2 the administrative remedies and the rest
3 we can't challenge. I understand.

4 THE COURT: All right.

5 MR. HILL: A minor confusion.
6 Apparently both Mr. Flynn and I sent orders
7 on the last motion and your Honor signed
8 both, and they are slightly differently
9 worded.

10 THE COURT: On what?

11 MR. HILL: That was the motion to
12 extend the time to answer the Interrogatories.
13 Maybe we can get a better procedure for
14 making sure we don't have duplicates.

15 THE COURT: I asked Mr. Granata
16 in this instance to prepare a joint order
17 with Mr. Flynn.

18 Let's go to the plaintiff's two
19 motions.

20 MR. HILL: Miss Hirsch will argue
21 the plaintiff's motions.

22 THE COURT: Now as I understand it
23 the plaintiff has two motions. One is
24 for partial summary judgment respecting a
25 claim for a libel. The second is plaintiff's

1 motion to dismiss the counterclaim or counter-
2 claims insofar as they still set forth a
3 cause of action for which damages may be
4 realized for failure to exhaust administrative
5 remedies.

6 It seems to me that I decided this
7 once already; am I correct?

8 MR. GRANATA: Yes, your Honor.

9 THE COURT: Is there any opposition
10 to making the motion or my decision as I
11 decided previously since I think it's
12 addressed to the amended answers, that I
13 shouldn't have the same result that I rendered
14 at that time should not be equally applicable
15 to the amended answer?

16 MR. GRANATA: I filed no amended
17 answer on behalf of the Sewerage Authority
18 so I presume that the Court's order,
19 plaintiff's motion to dismiss defendant
20 Township Sewage Authority's counterclaim
21 sounding abusive process is denied without
22 prejudice would be a continuation of that
23 order?

24 THE COURT: Is that the thrust of
25 what your motion was, to make it current?

1 MS. HIRSCH: Excuse me, your
2 Honor. I think the problem was I was
3 looking at the order that I submitted which
4 was signed which only dismissed the
5 malicious prosecution claims.

6 I'm sorry. There's some confusion
7 in my mind. I know that you did rule on
8 the libel claim.

9 THE COURT: Can I suggest to you
10 why don't you withdraw this motion until
11 you don't have the confusion because I am
12 confused too, and if you are going to tell
13 me that you are not sure what you are
14 addressing why don't you withdraw the
15 motion without prejudice and refile it
16 if you find the confusion still exists.

17 MS. HIRSCH: Your Honor, I noticed
18 a motion for partial summary judgment
19 referencing several points in the brief
20 that we had previously submitted. Those
21 briefs refer to the libel claim which
22 arises out of statements which agents of
23 plaintiff may have made to the newspapers.

24 My understanding was that was denied
25 at the time without prejudice to renew

1 after a permanent judge was appointed to
2 handle the case.

3 THE COURT: Well, that had to do
4 with the libel claims. I rather think that
5 may be treated with some of the other motions
6 that deal with the libel claims brought by the
7 defendant Township.

8 Let me put that libel motion aside
9 for the moment today.

10 The other motion was to dismiss the
11 counterclaim. It seemed the purpose of that
12 motion was to make current on all present
13 counterclaims the concept that you can't
14 seek damages against your client for failure
15 to exhaust administrative remedies.

16 MS. HIRSCH: Yes, your Honor. That
17 was against the Municipal Utilities Authority
18 who filed an amended counterclaim stating
19 five new separate defenses and also repeating
20 the counterclaim which sounds in abusive --
21 excuse me -- failure to exhaust administrative
22 remedies.

23 MR. FLYNN: That's where she's got
24 her mistake because what she thinks it
25 sounds in it doesn't sound in. That's her

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problem.

MS. HIRSCH: Ultimately we move to dismiss it for failure to reinstate it.

THE COURT: You haven't told me why. You just make a broad statement in about a sentence. It's the last paragraph of your motion or your brief.

MS. HIRSCH: I understand that. I am unable to tell if that is not an allegation of failure to exhaust administrative remedy what the claim sounds in.

THE COURT: No. You say it ought to be dismissed because of failure to state a cause of action; doesn't it?

MS. HIRSCH: Yes.

THE COURT: But you haven't told me why. You just made that as an allegation as part of your motion. I don't see really how I can treat it at this time.

MS. HIRSCH: I can't figure out what cause of action it states. It alleges that we are a foreign corporation, that we have a purpose to harass these particular defendants, especially the MUA, that we have never filed any applications for service or

1 approval and as a direct result of that
2 they will incur damages.

3 THE COURT: Okay. Now I think I
4 am going to deny -- have you finished your
5 argument on this motion to dismiss the
6 counterclaim on the two grounds?

7 MS. HIRSCH: Your Honor, this is the
8 identical counterclaim we argued before.

9 MR. FLYNN: Exactly. They made the
10 same argument before. Your Honor ruled that
11 if exhaustion of remedies was the only
12 basis of my counterclaim then I had none,
13 and that was the order; but it's basically
14 a malicious abuse of process and I talk
15 about the nature of the suit being arbitrary
16 and unreasonable. That's what it sounds
17 like, not exhaustion of remedy.

18 MS. HIRSCH: In that case it's
19 missing a critical element of that tort.

20 ~~A~~ ~~X~~ THE COURT: With respect to the
21 plaintiff's motion to dismiss the counter-
22 claim against the Municipal Utilities Authority
23 it will be granted insofar as that counter-
24 claim may sound in seeking damages for
25 failure to exhaust an administrative remedy.

1 I believe that this is consistent with my
2 ruling the last time. It is denied as it
3 is generally set forth to dismiss because it
4 doesn't spell out a cause of action.

5 It is denied without prejudice
6 to being renewed when you tell me more
7 specifically what you mean and let Mr.
8 Flynn have a chance to respond to what you
9 mean; but you just say it in a sentence and
10 it doesn't spell it out. You have not told
11 me in what way you feel it is defective,
12 and I think in fairness to Mr. Flynn he
13 ought to be given an opportunity to under-
14 stand your argument as well as --

15 MS. HIRSCH: Your Honor, this is an
16 argument we have posed before. It is an
17 argument that there are --

18 THE COURT: The only thing I am
19 telling you is I don't doubt your right to
20 make it, but I would like for you to spell
21 it out to me what it is precisely that you
22 are saying because I don't think it is fair
23 for me to just take a paragraph and say but
24 we made this three weeks ago. You will recall
25 your Honor said thus and such, and then for

1 Mr. Flynn to get up and say but we said
2 three weeks ago thus and such, and I have
3 no idea of what you are talking about.

4 If you told me that you want to
5 rely on something that you said at least
6 in preparation for your motion I could read
7 your paper and understand the rest of your
8 argument, but for me to evaluate the drawing
9 upon what you recall was said, what he
10 recalls was said, and I am sitting in the
11 middle trying to recall myself off the top
12 of my head, I don't think I can deal with
13 your motions that way.

14 MS. HIRSCH: I understand that. Our
15 difficulty was that the cause of action
16 was never spelled out. I can respond to it
17 now.

18 THE COURT: I don't want you to
19 respond off the top of my head or trying to
20 evaluate arguments. I deny it without
21 prejudice. I request if you want to make
22 it make it formally and spell it out so Mr.
23 Flynn can address himself and I can have a
24 chance to evaluate those arguments before
25 coming out to hear it. Even if you refer in

1 those moving papers to something that may
2 have occurred I can have a chance to look
3 that up; okay?

4 MS. HIRSCH: Yes, your Honor.

5 MR. FLYNN: Just for clarity is
6 she going to prepare the order on that?

7 THE COURT: Why don't you prepare
8 this one?

9 MR. FLYNN: She has been granted
10 in part.

11 THE COURT: Mr. Flynn, please, you
12 won. Please prepare the order.

13 MR. FLYNN: All right, your Honor.

14 THE COURT: All right. Now the
15 order on plaintiff's motion for partial
16 summary judgment had to do with the claim
17 for libel. I think that that really should
18 be taken in conjunction with the defendant
19 Township's motion for partially summary
20 judgment or some of the alternatives released
21 as that deals with libel; but I think you,
22 Mr. Hill, apprised me you really don't
23 want to respond to that today; am I correct?

24 MR. HILL: Well, I can respond to
25 the motion for leave to amend their counter-

1 claim to bring in the individual parties.
2 We are ready to respond to that. What I
3 was not ready to respond to was --

4 THE COURT: There's two other parts.
5 One has to do with the conspiracy count and
6 the other has to do with failure to comply
7 with the Torts Claim Act.

8 MR. HILL: We were served on June 16
9 with a conspiracy count. I just have not,
10 you know --

11 THE COURT: Can we deal with the
12 libel question then?

13 MR. HILL: We can deal with the
14 libel question, but we are not prepared
15 to deal with the conspiracy count insofar
16 as there is a new conspiracy count motion.
17 We just simply haven't done the work on
18 that.

19 THE COURT: Okay.

20 MR. HILL: Why doesn't Miss Hirsch
21 deal with our affirmative motion and then I
22 will deal with our response to their motion
23 for leave to amend to bring in the individual
24 plaintiffs.

25 THE COURT: Okay.

1 MS. HIRSCH: Your Honor, the statements
2 at issue are statements that allegedly were
3 made to newspapers sometime around the time
4 the complaint was filed in this matter.
5 All of those statements are at pages 12, 14
6 and 16 of my earlier summary judgment brief,
7 but I can read them into the Record if that's
8 the easiest way to deal with that.

9 THE COURT: Go ahead.

10 MS. HIRSCH: "After two years,
11 Olympia and York hasn't even been able to
12 get an application in." That's the first
13 quote.

14 The second quote is, "The proposed
15 development, which would contain between
16 15,348 and 20,464 units of mixed housing,
17 would also include commercial developments
18 such as a supermarket." That's the second
19 quote.

20 The third is, "He said the Township
21 and its ordinance require the company to
22 provide architectural designs of proposed
23 homes before the Township will determine
24 whether we can actually build the homes.
25 We are not allowed to know what we can plan

1 to build until we design the plans." That's
2 the third.

3 The fourth is, "Hill said that the
4 Sewerage Authority and Utilities Authority
5 prohibit the developer from using Municipal
6 Services, but also prohibit the company
7 from drilling for water or building utility
8 lines."

9 The fifth quote is, "Old Bridge is
10 ignoring the second most famous land use
11 decision in the State, Oakwood at Madison,
12 which came out of its own Town."

13 The sixth quote is, "Henry Hill,
14 attorney for Olympia and York, said that the
15 63 page suit was a strong indictment of
16 not only the Twonship's zoning ordinance
17 but of the way in which business is conducted
18 in Old Bridge."

19 The seventh quote is, "The 1978
20 Ordinance restricts the development of small
21 lot single family homes. We are charging
22 that Old Bridge had no intention of permitting
23 this kind of development."

24 Your Honor, you can notice from all
25 of those quotes that the Township Council,

1 either the council itself or its individual
2 members are not mentioned by name or even
3 implicated in any way. There is discussion
4 of the Town in general.

5 Under New York Times Company vs.
6 Sullivan, the landmark Supreme Court Case
7 and additionally a recent law division
8 decision by Judge Gibson of Atlantic County
9 rendered February 26, 1981, this kind of
10 an impersonal attack on Government operations
11 may not constitute libel of the officials
12 or the Government agency as a matter of
13 first amendment law.

14 In the Weymouth Township Board of
15 Education Case decided by Judge Gibson
16 the plaintiff was the Board of Education.
17 The defendants were taxpayers who alleged that
18 the Board of Education had misused, lost or
19 possibly embezzled School Board funds.
20 The Law Division held in that case discussing
21 other case law, doing a thorough review of
22 the case law throughout the country and
23 found that the article at issue, these
24 statements even if they were defamatory
25 could not be the basis for an action in libel.

1 In the New York Times case the
2 Court found that an individual member of the
3 governing body also did not have a right to
4 sue for libel. Defendant Sullivan in that
5 case as an elected commissioner of local
6 government who is also the Police Commissioner,
7 he claimed --

8 THE COURT: Didn't the New York Times
9 Company say they didn't have a right to sue
10 for libel in those factual circumstances?
11 Didn't say didn't have a right at all; didn't
12 it? Didn't it cough out an area where an
13 individual could sue for libel?

14 MS. HIRSCH: Only when the statements
15 which are allegedly defamatory are of and
16 concerning the plaintiff as a matter of
17 law. That is not a question of fact.
18 That's a question for your Honor's decision
19 and the statements of the type I just
20 cited from the Weymouth Township case
21 which made explicit reference to the Board
22 of Education, the plaintiff in that case,
23 the Court found that as a matter of fact
24 that could not be the basis for libel for
25 the Board of Education.

1 In the New York Times case the issue
2 is whether Sullivan, the Police Commissioner
3 had an action in libel. The Court found
4 not only did the Commissioner as a body
5 not have an action of libel, but he did not have
6 an action in libel because the statements
7 did not refer even implicitly to Sullivan
8 or to his actions or in any way refer to his
9 actions. That's a basic requirement of libel
10 that the statement be of and concerning the
11 plaintiff; and the Supreme Court found in
12 that case that there were not and these
13 cases are direct analogies to the types of
14 statements which the Township Council
15 complains of.

16 THE COURT: Are you saying to me that
17 there would be a cause of action in certain
18 instances if they were personalized to a
19 particular member and made with malice?

20 MS. HIRSCH: Yes, your Honor.

21 THE COURT: Whether it is generally
22 addressed to a Board's conduct, that that
23 doesn't give rise to the Board itself to
24 seek a claim for libel?

25 MS. HIRSCH: That is correct. The

1 statements have to explicitly reference the
2 individual, not necessarily by name, but
3 sufficiently enough so that a reader may
4 identify the person being libelled.

5 THE COURT: Who has claims for libel
6 besides the Township, anybody?

7 (No response.)

8 THE COURT: Okay, just the Township.
9 Okay, Mr. Alfonso?

10 MR. ALFONSO: You have two separate
11 defendants here. You have a governing
12 body and then you have the members individually
13 that make up the governing body.

14 THE COURT: So they are not named.

15 MR. ALFONSO: No, they are not,
16 but I am saying as far as the cases are
17 concerned they are drawing a distinction,
18 and I would agree that as far as a governing
19 body itself it would appear based on that
20 recent case which they submitted a governing
21 body itself could not maintain an action for
22 libel.

23 THE COURT: Do you agree then that I
24 should grant them summary judgment under
25 your counterclaim alleging libel?

1 MR. ALFONSO: Yes, I do.

2 / * THE COURT: Okay. For the Record,
3 application for plaintiff on summary judgment
4 concerning the libel counterclaim filed by
5 the Township as an entity against the
6 plaintiff is granted. You will submit to
7 me an order on that.

8 MR. HILL: Yes.

9 MR. ALFONSO: One point of clarifica-
10 tion, and I think by their not objecting
11 we know where we stand. They brought an
12 action against the Township Council without
13 their now objecting, I assume they bring it
14 against the Township Council as a governing
15 body and not against the individuals.

16 MR. HILL: That is correct.

17 THE COURT: The suit is made against
18 the Township as an entity and the Council
19 as a body but not as against any individuals.

20 MR. HILL: Yes. We have no claim
21 for damages. We are seeking to reference
22 the cause of action. It's in the nature
23 of a declaratory judgment that we are seeking
24 here and nobody is being sued individually.
25 The government as the government is being

1 sued in prerogative writ in order to get
2 a declaration of rights and get certain
3 ordinances declared invalid.

4 MR. ALFONSO: The next point then
5 for me to address myself to I would think
6 would be my affirmative motion to amend
7 that count one and instead of listing
8 it as coming from the Township Council
9 have it be the individual members of the
10 Township.

11 THE COURT: Don't you really have
12 to file some of the individual members who
13 are not a party? Can you really file a
14 counterclaim or third party complaint? Don't
15 you really have to file a separate suit?

16 MR. ALFONSO: That may very well
17 be to file a separate suit and have it
18 consolidated with this action. We can
19 certainly proceed that way.

20 THE COURT: It seems to me that a
21 counterclaim or third party complaint where
22 the people who you want to bring in the
23 suit are not a party. I just can't add them
24 in at this time. The best I can do is
25 after it is filed is to consolidate if that

1 were the appropriate thing.

2 MR. ALFONSO: Fine. I was just
3 trying to save some Court appearances if
4 I could. We will then proceed on that.

5 THE COURT: Do you wish to respond?
6 I think he's conceded.

7 MR. HILL: There is an issue and the
8 issue I submit, and I am not going to
9 argue it now, but I think the issue is
10 whether if you were to bring such a suit
11 whether that suit either should be consoli-
12 dated or whether -- another way to do it
13 would be to file a motion for intervention
14 by these new parties, and I was prepared to
15 argue that such a motion should be denied.

16 *GA* THE COURT: But I don't have a
17 motion for intervention before me, and I
18 don't have a motion for consolidation before
19 me. This is the whole thing. I simply
20 have his motion to permit amendment of the
21 counterclaim or to file a third party complaint.

22 I think counsel conceded procedurally
23 I can't do it, so the defendant's application,
24 defendant's Township application to amend
25 the counterclaim or file third party complaint

1 so as to set forth causes of action for
2 individuals itself is denied. It is, of
3 course, denied without prejudice to those
4 individuals starting their own suit or
5 seeking their own remedy in some other way
6 and leave it for a future day whether such
7 claims should be consolidated.

8 Who is going to submit the order?

9 MR. HILL: We will submit the order.

10 Your Honor, on the two other motions
11 by counsel we would like to suggest that
12 the motion for extension of time be argued
13 now and we are willing to submit the issue
14 of whether we should file security if the
15 Court would give us five days to file a letter
16 with the Court just quoting some law on
17 that. We are willing to stipulate that the
18 Court should determine that motion. The
19 security involved is \$100 I believe under the
20 statute, if Mr. Alfonso is right. We don't
21 believe he's right, but we'd like to make
22 a brief argument on that point and submit a
23 letter opinion and have your Honor decide
24 it thereafter if that is agreeable to Mr.
25 Alfonso.

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MR. ALFONSO: That would be agree-
able to me, Judge, on the proviso that I
get an opportunity to respond also by letter
brief. I have given no basis.

THE COURT: Ten days each.

MR. HILL: Fine, your Honor.

THE COURT: So on defendant's
Township motion to post security for costs
alleging the plaintiff is a foreign
corporation and should be required to post
the bond for \$100 I will allow you each a
period of ten days to file a brief in
response. Again may I say though that I
really think you have enough trouble meeting
the issues without getting into --
we are talking about a building project
here, without worrying about security of
\$100.

MR. ALFONSO: I absolutely agree.
That was brought as a result of their
taking action against Mr. Granata. If they
intend to do it we do too.

THE COURT: I think I have enough
difficulty getting along and coming to
some agreement or at least sensibly liti-

1 gating the gut issues without trying to
2 either act punitively or -- and I am not
3 accusing anybody of doing it here, or
4 gamesmanship, and I am not necessarily
5 making that accusation here either; but
6 I just wish that we would not have to have
7 all counsel technically have the right to
8 make such motions, not have to fight the
9 dispute in those terms. Okay.

10 Now on the defendant Township's
11 motion for 70 days to answer Interrogatories
12 I have already granted the Authority 60
13 days. Is there any objection if I give
14 them 60 days? What difference does it make?

15 MR. HILL: Having granted the
16 Authority 60 days I don't want to waste the
17 Court's time.

18 THE COURT: Does 60 days cause a
19 problem to you versus 70 days?

20 MR. ALFONSO: No, sir.

21 THE COURT: Defendant Township's
22 motion to extend the time for answering
23 Interrogatories is granted for 60 more days.

24 MR. HILL: Let me try and relieve
25 an inequity. One counsel, the Planning Board

1 attorney, called me and asked for an
 2 extension of time, and we agreed to an
 3 extension of time and he had until August
 4 3. Now it doesn't seem very fair to him
 5 because his Interrogatories may be the longest.
 6 His Interrogatories --

7 THE COURT: Theoretically he
 8 started sooner. I will have to deal with
 9 the problems as they come up, but it seems
 10 if 60 days is fair for one 60 days is fair
 11 for the other as of today.

12 Okay. Let's take a five minute
 13 recess.

14 (Whereupon a recess was taken.)

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 18 THE COURT: Mr. Flynn, have you
 19 read the letter from Plaintiff's counsel?
 20 He makes certain suggestions as to what
 21 would be appropriate answers.

22 MR. FLYNN: I think that some of
 23 them, yes, some of my objections will be
 24 solved by my referring to our records.

25 THE COURT: Accepting the suggestion.

1 which ones then do we still have at issue?

2 MR. FLYNN: Well, the whole host
3 of ones concerning relationships between
4 parties, actually for two reasons now.
5 I think your Honor has ruled that the only
6 thing left with the Water Authority is the
7 rate schedule and the divergence so since
8 the conspiracy is out all the others would
9 be irrelevant.

10 THE COURT: I am not sure that
11 ends the conspiracy parts.

12 MR. HILL: Your Honor, we didn't
13 understand that motion to be directed to
14 the conspiracy count.

15 THE COURT: I didn't understand it
16 to have been so ruled either. All right.

17 We are going to have to go through
18 them one by one.

19 Number 18 asks for photographs,
20 movies, drawings, sketches, charts, maps,
21 et cetera. Is it satisfactory rather than
22 annex full copies to make reference; is that
23 the thrust of the plaintiff's position
24 with respect to that?

25 MS. HIRSCH: We can specify more

1 directly.

2 THE COURT: If they tell you what
3 they are relying upon.

4 MS. HIRSCH: We would be satisfied
5 with inspecting, yes.

6 * THE COURT: 18 will be answered by
7 specifying the items rather than annexing.
8 25 is the next one. What is your opposition
9 to that?

10 MR. FLYNN: Your Honor, he wants
11 such detail and such data that is not available
12 in any one place.

13 THE COURT: It says list or generally
14 described.

15 MR. FLYNN: Reservoirs is easy,
16 but then he gets down to certain things
17 as sewers and water distribution systems,
18 water ways, sources of water, supply, wells.
19 He wants a whole history of the Water
20 Authority in one question.

21 That question alone would take
22 probably a staff months to prepare such a
23 list. It's taken us 20 years to get in this
24 position to have all these things and to do
25 it in a short period of time is an almost

1 impossible and voluminous job.

2 MS. HIRSCH: Your Honor, we need to
3 know all -- we need to have designated for
4 us all facilities that have been acquired
5 or otherwise purchased by the Authority
6 in order to figure out whether their connection
7 fees are reasonable because their connection
8 fees according to the Sewage Authority
9 statute must be somewhat based upon existing
10 bond payment requirements, that kind of
11 thing. That is the reason for this.

12 Most of these are very major
13 facilities, reservoirs, basins, dams,
14 canals. I mean many of them may not apply
15 in this case, and that's all that needs be
16 said.

17 MR. FLYNN: If we limit it to major
18 facilities then it might be a more reasonable
19 question.

20 * THE COURT: Okay. 25 will be answered
21 by requiring the Authority to list the major
22 facilities.

23 The next one is 26.

24 MR. FLYNN: 26 is a similar type
25 question.

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THE COURT: I think, though they are all major facilities they are talking about there. I think they are all major; aren't they? List all major facilities.

The next one in dispute is 27. Seems to be disposed of in the same way; isn't it?

MR. FLYNN: 27, list all major facilities.

MS. HIRSCH: Your Honor, just for clarification when we say major facilities we mean major water supply, water treatment and distribution. Those are three distinctive types of facilities. You are saying list major facilities of each type?

THE COURT: Yes.

MS. HIRSCH: Okay.

THE COURT: So again repeat the categories so Mr. Flynn is clear.

MS. HIRSCH: Water supply is the first.

MR. FLYNN: I think the three questions deal with the three categories you just said. 25 is facilities. 26 is supply.

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MS. HIRSCH: No, there is a distinct--

MR. FLYNN: And 27 seems to be --

MS. HIRSCH: Excuse me. 25 refers
to facilities.

THE COURT: What are the three major
categories?

MS. HIRSCH: Water treatment,
water supply and water distribution.

THE COURT: Okay. Supply, treatment
and distribution in those numbers.

MR. FLYNN: 28.

THE COURT: Those three categories
would apply to the questions 25, 26 and 27.
Now we are on 28.

MR. FLYNN: In my certification
I indicate the reason why we shouldn't have
to answer this one. These are all -- I
would like to refer to the records and give
them the records with respect to various
charges that the Authority has had and the
amendments thereto.

THE COURT: Is that satisfactory
if he tells you where the records are?

MS. HIRSCH: Yes, if he supplies us
with the records.

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MR. FLYNN: Not supply them.

We will tell you where the records are.

MS. HIRSCH: And we will have the right to inspect them?

MR. FLYNN: Yes.

THE COURT: 28 will be answered by a designation of the records.

MR. FLYNN: And permit inspection.

THE COURT: And permit inspection and copied if the plaintiff so wishes.

MR. FLYNN: 29 is a similar type of a question, and I assume the same type answer.

THE COURT: Similar disposition.

MR. FLYNN: 30 I would like to supply our annual audit reports which have the operating expenses, and then they can from their experts extrapolate the information they need..

THE COURT: Let me ask you this. Talking from the time of creation how many years are we talking about roughly if you know?

MR. FLYNN: I am not positive. I think it's about 15 or 20 years. I am not

1 positive though.

2 THE COURT: You will give the
3 audit reports for 15 or 20 years then?

4 MR. FLYNN: That's the best I can
5 do.

6 THE COURT: Will that be satisfactory?

7 MS. HIRSCH: As long as it is up
8 to date, yes.

9 * THE COURT: Okay. 30 will be answered
10 by supplying the audit reports.

11 MR. FLYNN: Then we go to 31.
12 I think answering referring to the records
13 would be similar because it's a similar
14 type question as 28 and 29, and permit
15 inspection and if they want to copy, go
16 ahead and copy.

17 MS. HIRSCH: I don't agree with
18 that. The question asks for the method
19 by which the fee schedules were determined.
20 That method may be during the course of
21 public hearings. There was discussion over
22 variations in each rate schedule. There
23 may have been reports from their consultant
24 just filing a certain rate schedule. We
25 want to know how they came to the conclusion

1 that the rates services would pay all
2 expenses, and if their answer is there has --

3 THE COURT: How many times have the
4 rates changed; do you know?

5 MR. FLYNN: I would say at least
6 about four times to my memory, and the
7 problem with all of the back rates is the
8 personnel has changed. There are people
9 no longer in Town. There's a different
10 engineer. I could do it with respect to
11 the most recent one, and I should think
12 that would be the one in question. That's
13 the one they are challenging.

14 THE COURT: Does it really make
15 any difference what the rationale was in
16 older rate schedules?

17 MS. HIRSCH: We'd just like to
18 go back to prior to the Oakwood at Madison
19 decision. We can put a time limit on it
20 I'd say of 1975.

21 MR. FLYNN: As I say, other than the
22 most recent one the rest would be a fishing
23 expedition.

24 THE COURT: When was the most recent
25 one?

1 MR. FLYNN: In '79 or '80.

2 THE COURT: When was the one before
3 that?

4 MR. FLYNN: I don't know. I wasn't
5 there then. The personnel has changed
6 considerably since then, but that's the
7 one they are challenging.

8 THE COURT: I will require only the
9 most recent one. In answering 30 you will
10 answer information concerning only the
11 most recent rate schedule.

12 MR. FLYNN: Then we go to 62 I
13 guess is the next one, and this is information
14 that we don't have. We don't keep records
15 like that by year.

16 THE COURT: Then you could answer it
17 that way; couldn't you?

18 MR. FLYNN: Well, I didn't think
19 they'd be satisfied with such an answer.

20 THE COURT: Well, if it is a statement
21 we don't have such information --

22 MR. FLYNN: All right, fine.

23 MS. HIRSCH: Your Honor, I think that
24 the rule concerning the alternative of
25 inspecting documents where information

1 can be obtained from business records of an
2 agency --

3 THE COURT: I understand him to say
4 they don't have those records.

5 MR. FLYNN: Not in the form they
6 want. Somebody could probably -- it would
7 take quite a job to try to do it. I don't
8 even know if it can be done, but they are
9 welcome to look at the records.

10 THE COURT: Then 62 should be
11 answered by designating the records with
12 right to copy and inspect.

13 MR. FLYNN: 63 I think I will go
14 along with their suggestion that making
15 records available will be satisfactory to
16 answer 63.

17 THE COURT: 63 will be answered by
18 making the records available.

19 MR. FLYNN: 64, I think the same
20 answer.

21 THE COURT: 64 will be answered by
22 making the records available for inspection.

23 MR. FLYNN: And 65, same thing.

24 THE COURT: 65 will be answered by
25 making the records available for inspection.

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MR. FLYNN: 71 is the next one.

MS. HIRSCH: Your Honor, I believe the confusion with that one was an improper reference to a preceding Interrogatory. That's what the problem is. It should refer to 70, set forth as to -- but not listed in answer to number 70 it should say. Number 70 are permits held by private water companies which were acquired by the Authority.

MR. FLYNN: So we will answer that -- make that change.

THE COURT: Question 71 will be amended so as to have the internal reference to question 70 rather than 69 as amended. Question 71 will be answered.

MR. FLYNN: Next is question 76, and I just think that would be unreasonable to require us to in effect do a water feasibility study all over Old Bridge Township by each zone of what each zone is allowed to have. That's just not the function of Interrogatories I don't think.

MS. HIRSCH: Your Honor, we would be satisfied with an answer that they do not know the answer to this or they have not

1 studied the question.

2 MR. FLYNN: All right. I will
3 accept that.

4 * THE COURT: All right. 76 will be
5 answered by either the supplying of the
6 information if --

7 MR. FLYNN: We will give them what
8 we have and what we don't have --

9 * THE COURT: If the Utilities
10 Authority has it. If they don't have it
11 they should say so, but I will not require
12 the Authority to make such a study.

13 MR. FLYNN: All right. Now we
14 get to a really omnibus question such as
15 93 and on. I mean 93 says if any member,
16 agent, employee or consultant of the Authority
17 is personally acquainted with any member,
18 agent, employee or consultant of the Planning
19 Board. That question is ridiculous.
20 That means that some 40 people who are
21 associated with the Water Authority have to
22 be quizzed to see if they know anybody on
23 the Planning Board, and then if they do all
24 kinds of personal relationships. That question
25 is ridiculous, overly broad and certainly

would not be the kind of thing that we do, because how can I ask an employee of the Water Authority to answer such a question? He is not being sued.

THE COURT: How many people are on your Authority?

MR. FLYNN: Well, they are not limited to just the Board. There's five on the Board. There's another 30 or 40 employees. There's professional staff. You know, this question just goes on and on and on.

Even as to the Board I don't think the question is proper.

MS. HIRSCH: We would be satisfied with the Board, limiting this question to the Board itself, its executive director and its engineering consultant.

MR. FLYNN: I submit that that's also improper. The Board is not being sued individually. The engineer is not being sued. They want to take depositions of people, let them take them.

THE COURT: 93 will be answered by requiring the Authority to survey its

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1 Board, its consultant and its executive
2 director and making inquiry of those persons
3 to have them list who they know on the
4 Old Bridge Planning Board and they can tell
5 us who they know.

6 Thereafter I think it is up to
7 depositions to determine the extent of that
8 friendship or acquaintanceship.

9 MR. FLYNN: Then the next two questions
10 are similar.

11 * THE COURT: They apply to different
12 agencies. 93 has to do with knowledge of
13 members of the Planning Board and 94 has to
14 do with knowledge of the members of the
15 Old Bridge Township Council. 95 has to do
16 with knowledge of members of the Old Bridge
17 Sewerage Authority. They will be similarly
18 answered as 93 with the appropriate changes
19 to the variations of the rule.

20 MR. FLYNN: Then we go to 107.

21 THE COURT: What's 96, 97 and 98?

22 MR. FLYNN: Did I skip those?

23 THE COURT: No. 107 makes reference
24 to 96, 97 and 98.

25 MS. HIRSCH: Your Honor, they refer

1 to conversations concerning the idea of
2 providing a theoretically large area for
3 multi-family housing under the 1978 Land
4 Development Ordinance while preventing
5 housing development pursuant to the ordinance
6 by failing to plan and provide water necessary
7 to serve development. That's 96.

8 MR. FLYNN: I don't see how this
9 question even relates to the Water Authority.
10 That looks like it should be addressed to
11 the Planning Board. Perhaps it was --

12 THE COURT: It is not in here in
13 error?

14 MR. FLYNN: 96 says who conceived
15 the idea. That's not a question that the
16 Water Authority has any knowledge of. That
17 should be addressed to the Planning Board
18 or the council.

19 MS. HIRSCH: Well, our theory is
20 that there's a conspiracy to theoretically
21 permit high density or medium density develop-
22 ment and then preclude such development by
23 failing to provide water and sewer necessary.

24 MR. FLYNN: The answer to 96 is
25 right now is going to be no knowledge, we

1 don't know.

2 MS. HIRSCH: That's the answer. We
3 are asking for an answer.

4 THE COURT: If 96 is no knowledge
5 then 107 can be answered similarly; can't
6 it?

7 MS. HIRSCH: Not applicable.

8 MR. FLYNN: It says who conceived
9 the idea. How could anybody in their lifetime
10 dream of who conceived an idea. The question
11 isn't even properly worded. Conceiving of
12 an idea is not something that anybody could
13 know.

14 THE COURT: Are we talking about
15 107?

16 MR. FLYNN: Now I am talking about
17 96 which is one of the related questions.
18 Who conceded that the world was round?
19 Maybe it was somebody who never told anybody
20 about it.

21 MS. HIRSCH: It is basic conspiracy
22 language.

23 MR. FLYNN: If they ask who articulated
24 the concept that might be a little more
25 appropriate, but conceiving an idea is just

1 an amorphous concept.

2 THE COURT: Well, you are not
3 objecting to 97.

4 MR. FLYNN: No, but as I say, the
5 question is so foolish I can't even answer
6 it. I am just going to say no knowledge.
7 107 says did you. Who does it mean by the
8 you? Who is the you?

9 THE COURT: I will limit question
10 107, the you in 107 to mean the members of
11 your Board, the executive director and the
12 consulting engineer, and direct you to answer
13 even if the answer is no knowledge.

14 MR. FLYNN: And then 108 I suppose
15 would follow?

16 THE COURT: If your answer to 107
17 is no knowledge 108 is applicable only if
18 the answer is yes, so it becomes moot I
19 suppose.

20 MR. FLYNN: 109 I think we have
21 the same defect. Was any group meeting
22 ever called or held concerning the activity
23 described in Interrogatories.

24 THE COURT: I will direct that you
25 answer that.

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MR. FLYNN: What is a group meeting?
That is my question to that. What is a
group meeting?

THE COURT: All right. My understanding would be members of your Board or consulting engineer or executive director with persons on similar plateaus with the other boards or council fathers.

MR. FLYNN: In other words like an official type of meeting?

MS. HIRSCH: No, that is not what we have in mind.

MR. FLYNN: We don't know what they have in mind, nor did the Judge.

THE COURT: I don't limit it to an official type of meeting. It could be an informal meeting in somebody's house.

MR. FLYNN: Nevertheless it would be the official bodies?

THE COURT: If we are talking about members of official bodies then I suppose official is appropriate, but I am not talking necessarily about official group meetings. I am talking about if officials met whether formally or informally.

1 MS. HIRSCH: And that would also
2 include, your Honor, a meeting with insufficient
3 members to constitute a quorum or an interest
4 in that kind of a meeting also?

5 MR. FLYNN: That's why we get back
6 to what is a group.

7 THE COURT: I have defined the
8 groups to mean members of your Board, your
9 executive director or consulting engineer.
10 Have any of those persons ever met with
11 people on parallel planes from any of your
12 co-defendant entities either formally or
13 informally.

14 MR. FLYNN: But by members do you
15 mean three, four, five, one? I mean --

16 THE COURT: Well, I mean more than
17 one.

18 MR. FLYNN: In other words, if two
19 members happened to have lunch with two
20 members of some other Board that would be
21 considered a meeting?

22 THE COURT: To discuss the activities
23 mentioned in 96, 97 and 98.

24 MR. FLYNN: Suppose they met just
25 for lunch and just happened to be talking

1 about it and one person remembered and another
2 did not.

3 THE COURT: That may be the problem
4 of future depositions, but I think counsel
5 is entitled to know the recollection of your
6 Board members with respect to that. Did they
7 ever meet, discuss the activities mentioned
8 in 96, 97 or 98 formally or informally.

9 MR. FLYNN: All right. Now we get to
10 113 ad infinitum and these questions all deal
11 with a similar type of answer.

12 THE COURT: I am sorry. Where did
13 we jump to?

14 MR. FLYNN: 113 and I guess it is
15 through to the end. This is similar to the
16 one you said to just give names and if they
17 want to take depositions we can do that,
18 but even that --

19 THE COURT: Does 113 through the
20 end ask for substances of conversations?

21 MR. FLYNN: Yes.

22 THE COURT: I won't require it.
23 That's something that you will have to
24 address after he's disclosed that there were
25 such conversations. You will have to pursue

1 that through depositions.

2 MS. HIRSCH: These are 113 through
3 130 to the extent they ask for that?

4 THE COURT: I think that's what they
5 are asking for, the substance of the conversa-
6 tion, the date.

7 MR. FLYNN: All right. That
8 covers it, your Honor. I will submit
9 an order on that.

10 THE COURT: Okay.

11 MR. FLYNN: I am going to leave now
12 because I am not involved any more.

13 THE COURT: Okay, fine.

14 (Whereupon Mr. Flynn left the
15 Courtroom.)

16 THE COURT: The last motion I
17 think -- no, we have two more. I am sorry.

18 The next to last motion has to do
19 with the defendant Township's motion to
20 dismiss all damage claims for failure to
21 comply with Torts Claim Act. Have I under-
22 stood correctly that there are no damage
23 claims being made?

24 MR. HILL: There are no damage
25 claims.

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MR. ALFONSO: And I think that we can do away with that motion very easily. I will just put it in the form of an order.

THE COURT: Okay. Your application to dismiss damage claims for failure to comply with Tort Claim Act is granted.

MR. ALFONSO: The last one had to do with the conspiracy, and I understand Mr. Hill wanted more time on that, so is your Honor going to carry that until July 2 or some other time?

THE COURT: Well, I will carry it to July 2. I think I really only need you two gentlemen for that; don't I?

MR. NORMAN: I am also going to make a motion on behalf of the Planning Board.

THE COURT: If you are going to make one make it immediately so whoever is going to address themselves to this conspiracy concept, let's have them in on time prior to July 2 so we can do it on July 2.

Now unfortunately we are going to have to do it in the morning.

MR. GRANATA: The Sewerage Authority's

1 motion that was ruled upon concluded a
2 dismissal of the conspiracy count and --

3 THE COURT: I am sorry.

4 MR. GRANATA: The Sewerage Authority's
5 motion for summary judgment that the Court
6 previously ruled on concluded a request for
7 summary judgment on the conspiracy count
8 against the Sewage Authority. I noted --
9 I asked if the only issues remaining between
10 the Sewage Authority and O & Y constituted
11 the reasonableness of the Sewage Authority
12 and the \$5,000 rate schedule and I presume
13 the Court had ruled the conspiracy out?

14 THE COURT: I did not mean to.

15 I did not mean to do that.

16 MR. GRANATA: Then may I argue that
17 or do you want me to argue that also on the
18 2nd with the other conspiracy matter?

19 THE COURT: I think it would make
20 more sense to argue on the 2nd.

21 Okay. Can I just say to counsel
22 though with respect to this, I have two
23 problems. Number one, count 10 is the
24 conspiracy count; am I correct?

25 MR. GRANATA: That's correct.

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1 THE COURT: I just raise the question
2 at this time rhetorically. Is there any
3 case law that has application to a prerogative
4 writ action with prerogative writ type
5 remedies that deal with conspiracy or are
6 we really now talking about a misnomer rather
7 than get involved in the conspiracy law. Does
8 the plaintiff really mean conspiracy literally
9 because I don't understand the plea of the
10 plaintiffs to be seeking any criminal
11 sanctions for damages.

12 Is what the plaintiff is really
13 talking about kind of the Board's acting
14 jointly and improperly with kind of a
15 concept that several of the preceding
16 counts make allegations of improprieties
17 against the Boards and count 10 merely says
18 that they acted jointly in their improprieties?
19 Isn't that in essence what we are talking
20 about?

21 MR. HILL: Yes, that's what in
22 essence we are talking about. What we have
23 been bothered by is that the issue of whether
24 the different boards and bodies are separate
25 lines of defense against developments or

1 whether they are acting jointly, and we
2 did not mean by conspiracy to allege
3 something criminal or something seeking
4 damages.

5 We simply want the Court to focus
6 on the fact that there's more than one body,
7 more than the bodies addressed by the
8 Supreme Court in Oakwood at Madison which --

9 THE COURT: You are talking merely
10 about the concept of conduct jointly and
11 severally among the defendants rather than
12 a conspiracy.

13 MR. HILL: That's right, and it is
14 to get to the issue of whether the
15 Sewer Authority has an obligation and the
16 Water Authority for instance to promote the
17 development of housing at reasonable cost
18 or whether they can generate up the cost
19 and it is a constitutional issue.

20 THE COURT: No, I think your allegations
21 are to the converse of that. Your allegations
22 are that they acted together or acted in
23 concert to prevent or thwart.

24 MR. HILL: That's correct.

25 THE COURT: Whether that is --

1 is saying the same thing as to whether they
2 have an affirmative obligation or not may
3 be a different question.

4 MR. HILL: We raise the issue in
5 one of our briefs. While at Mount Laurel
6 the Supreme Court said in a footnote we
7 don't care whether it is deliberate and they
8 were talking about zoning ordinances that in-
9 creased costs had precluded low and moderate
10 income housing. We don't care if it is
11 purposeful or by accident. We want to get
12 rid of it. However, in Oakwood at Madison
13 the Court seemed to say that when considering
14 specific corporate relief the good faith
15 of the parties became relevant and we'd like
16 the Court to focus on the necessity for
17 specific corporate relief in this case because
18 of those allegations and the motives of all
19 those bodies acting together.

20 THE COURT: All right. I just
21 raised the question so when we do return on
22 the 2nd and you give whatever you are going
23 to give me let's not get lost in a lot of
24 conspiracy or criminal conspiracy. That's
25 really not what we are talking about.

1 We are talking about more or less
2 acting in concert and the survivability of
3 such an account.

4 Okay. We will stand in recess.

5 Thank you all very much for coming.

6 MR. HILL: Thank you, your Honor.

7 MR. NORMAN: Thank you, your Honor.

8 MR. ALFONSO: Thank you, your Honor.

9 MR. GRANATA: Thank you, Judge.

10 (Whereupon the matter was adjourned.)
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C E R T I F I C A T E

I, STACEY P. STOLP,
a Shorthand Reporter of the State of New Jersey,
do hereby state that the foregoing is a true
and accurate transcript of my stenographic notes
of the within proceedings, to the best of my ability.

Stacey P. Stolp