CA- Cranberry 1/21/85

Brief on behalf of TMS Intervenors
in support of motion to intervene

p 16

CA0026051B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISON
MIDDLESEX COUNTY
DOCKET NO. 055956-83
(MOUNT LAUREL)

GARFIELD & COMPANY, a New Jersey Partnership, Plaintiff, vs. MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a municipal corporation, and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof, Defendants, vs. S. RICHARD SILBERT, NORMAN ADOLF AND JANET F. SILBERSTEIN, Plaintiffs-Intervenors.	Civil Action

BRIEF ON BEHALF OF PLAINTIFFS-INTERVENORS IN SUPPORT OF MOTION TO INTERVENE

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
900 Route 9, P. O. Box 10
Woodbridge, New Jersey 07095
(201) 636-8000
Attorneys for Plaintiffs- Intervenors

STEPHEN E. BARCAN, ESQ.
Of Counsel

STUART R. TENZER
On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES:

TABLE OF AUTHORITIES (Continued)

STATEMENT OF FACTS

As the Court is familiar with the proceedings to date, we will set forth only those facts which are directly relevant to this motion to intervene,* and some of those facts will be set forth in the body of the brief. Reference is also made to the Affidavit of Stephen E. Barcan, Esq., filed in this motion and to the exhibits thereto which are part of the record below.

Pursuant to this Court's order of July 27, 1984, Cranbury Township was given ninety days from that date in which to revise its Zoning Ordinance so as to meet the mandate of Mt. Laurel II and implement the Township's "fair share" obligation of 816 lower income units. Thereafter, the Township's Planning Board and Township Committee, with the aid of Mr. Philip Caton, the Court-appointed Special Master, and Mr. George Raymond, the Township's planning consultant, produced an extensive proposal for Mt. Laurel compliance.** This proposal, now under review by this Court, relies predominantly upon high density construction on three contiguous sites, including the land of plaintiffs-intervenors Silbert (hereinafter "the Silbert Tract"). Inclusion of the Silbert Tract in the Proposal followed Silbert's extensive

---

* All references contained herein refer to page numbers, tables or figures found within the compliance proposal presently under review by this court.

** The Proposal is entitled "Mount Laurel II Compliance Program for Cranbury Township, New Jersey" (hereafter "Proposal").

participation in the hearings below and commitment to development with twenty percent Mt. Laurel II units (see, generally, Barcan Affidavit and attachments thereto).

The Silbert tract consists of 49.482 acres (designated on the Cranbury Township Tax Maps as Block 7, Lot 13) and is roughly one-third of the area referred to as Site 3 in the Proposal. The Silbert tract is shown specifically as Site 3F on Figure 12 (page 77) of the Proposal. The Proposal concludes that Sites 1, 2 and 3 are "the best sites for Mt. Laurel II residential development" (Proposal, page 6) and therefore sets forth a priority rezoning of all three sites, as well as a draft zoning text for a revised planned development-high density zone to apply to the three contiguous sites.*

The Proposal sets forth two alternatives for "staging" or "phasing" rezoning and development. Plan "A" calls for a phasing period of 24 years while Plan "B" outlines an 18-year period. Under both of plans, however, the Silbert tract would be the final area to be rezoned and would maintain its current two acre zoning until 1996 under Plan B or until 2002 under Plan A. (See Tables 7 and 8 at pages 91A and 91B).**

---

* In addition, Site 5 will be rezoned as a planned development-medium density zone to accommodate the senior citizen units called for by the Proposal.

** This brief will not, of course, address the validity of the staging process per se -- that will be dealt with in the hearings on the Compliance Proposal.

ARGUMENT

PLAINTIFFS-INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT ..

R. 4:33-1 provides in full:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, where an applicant satisfies these criteria, intervention as of right must be granted by the Court. Vicendese v. J-Fad, Inc., 160 N.J. Super. 373, 379 (Ch. Div. 1978).* Here plaintiffs-intervenors have satisfied the criteria and therefore are entitled to intervene.

A. Plaintiffs-Intervenors Have An Interest in the Property or Transaction at Issue Herein.

Site 3 is crucial to the implementation of the Proposal inasmuch as it would be impossible for the Township to meet its "fair share" obligation of 816 lower and moderate income housing

---

* The text of R. 4:33-1 was taken verbatim from Federal Rule of Civil Procedure 24(e) as amended in 1966. There are relatively few New Jersey cases on this rule and therefore it is both necessary and beneficial to refer to the cases interpreting the Federal Rule as well as case law from other jurisdictions. See Vicendese, supra and Township of Hanover v. Town of Morristown, 118 N.J. Super. 136, 140 (Ch. Div. 1972) aff'd 121 N.J. Super. 536 (App. Div. 1972).

units if Site 3 were not rezoned for high density development.* The plaintiffs-intervenors thus have a direct and substantial interest in the Court's review of the Proposal and in any proceedings that may follow.

Moreover, plaintiffs-intervenors have an interest in these proceedings because the Silbert tract is immediately adjacent to Site 1, owned by plaintiff Garfield. This site will unquestionably be the largest development with proposed construction of 2,000 total units on 218 acres, yielding a gross density of roughly 9.2 units per acre. (See Table 6 at page 76C). Such extensive high density development will have an adverse effect on development of the adjacent Silbert tract if, for whatever reason, it is held to its current zoning of .5 dwelling units per acre. Such an interest of an adjoining property owner has proved sufficient to mandate intervention in zoning cases. See, e.g., Sarah Lawrence College v. City Council of Yonkers, 48 App. Div. 2d 897, 369 N.Y.S.2d 776 (1975), Bredberg v. Wheaton, 24 Ill.2d 612, 182 N.E.2d 742 (1962), Wolpe v. Poretsky, 144 F.2d 505 (C.A.D.C. 1944), cert. den. 323 U.S. 777 (1944).

---

* Table 6 (page 76C) of the Proposal reveals that high density development of Sites 1 and 2 alone would result in a total of only 674 lower and moderate income units, a deficit of 17.4% (or 142 units) below the fair share number.

B. The Disposition of This Matter Will Impede and Impair Plaintiffs-Intervenors' Ability to Protect Their Interest.

It is quite evident that this Court's review of the Proposal and any subsequent proceedings and remedies will, as a practical matter, result in a final determination of plaintiffs-intervenors' interest in this action. This is Silbert's only chance to challenge its status under Cranbury's phasing plan and attack the Proposal's cost-generating features. Once this Court approves Cranbury's rezoning and awards whatever affirmative remedies it deems appropriate, plaintiffs-intervenors will not have an opportunity to object to any aspect of the Proposal. Therefore, intervention at this time is necessary to protect the plaintiffs-intervenors' interests.

C. Plaintiffs-Intervenors' Interests Are Not Being Adequately Represented By Any Existing Party.

It cannot really be maintained that the interests of the plaintiffs-intervenors are or will be adequately represented by any of the existing parties to this action. The burden of establishing inadequate representation rests with plaintiffs-intervenors but "should be treated as minimal;. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); See also Com. of Va. v. Westinghouse Elec. Corp., 542 F.2d 214 (4th Cir. 1976). Plaintiffs-intervenors are merely required to show that the representation afforded their interests by the existing parties

"may be" inadequate. Spirt v. Teachers Ins. and Annuity Ass'n., 93 F.R.D. 627, 643 (S.D.N.Y. 1982); United States Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978).

The Third Circuit Court of Appeals has recently stated:

> The applicant (for intervention as of right) may demonstrate that its interests, though similar to those of an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interests proper attention. Hoots v. Com. of Pa., 672 F.2d 1133, 1135 (3d Cir. 1982).

See also National Farm Lines v. I.C.C., 564 F.2d 381 (10th Cir. 1977). If the legal arguments that the plaintiffs-intervenors seek to raise would not be expected to be addressed by the existing parties, the representation will be deemed inadequate. Blake v. Pallan, 554 F.2d 947, 955 (9th Cir. 1977).

In this action, only one plaintiff, Garfield, owns property in any of the sites that the Proposal seeks to rezone for high or medium density development.* (The Garfield tract is Site 1 (see Figure 13 at page 80A)). While Garfield and plaintiffs-intervenors both seek high density rezoning for their respective parcels, their interests in this matter are significantly different.

As noted earlier, the Garfield tract represents the

---

* It should also be noted here that the other plaintiffs' sites (Site 6-9 as shown on Figure 1 at page 3A) are outside of the "Growth Area" as set forth in the 1981 State Development Guide Plan. (See Figure 4 at page 32A).

most extensive single area of potential high density development. Therefore, Garfield may not be as concerned as is Silbert with some of the Proposal's cost-generating features which may uniquely affect smaller tracts and smaller developers.* As set forth in §150-30 of the proposed ordinance, such standards include mandatory open space requirements, maximum coverage of impervious surfaces, bike paths and a minimum required mix of structure types. (See Proposal at pages 113-17). By their nature, these standards have a profoundly different impact on smaller tracts which yield far fewer market rate units. Therefore, plaintiffs-intervenors' opportunities for economically sound high density development of their property may well be adversely affected if the opportunity to challenge the Proposal is left to the plaintiff Garfield.

Another issue of great importance to plaintiffs-intervenors is the "phasing" aspect of the Proposal; the Silbert tract is the last site to be rezoned under both the 18- and 24-year phasing plans. (See Tables 7 and 8 at pages 91A and 91B). The Silbert tract will be forced to maintain its current two acre zoning through the year 2002 (under Plan A) while high density development has occurred on immediately adjacent prop-

---

* The Garfield tract is over 4 times the size of the Silbert tract. Moreover, Mr. Garfield plans to construct roughly 6 times the number of market rate homes (1600 units as compared to 288 units on the Silbert tract). (See Table 6 at page 76C).

erties. Garfield may not adequately set forth Silbert's concerns with phasing because, under either of the two plans, Site 1 will be rezoned no later than 1996. More significantly, however, the proposal states that if Site 1 (Garfield) were to be granted a builder's remedy by this court, the phasing for Site 3 would have to be revised. (Proposal, page 89).

Plaintiffs-intervenors are not unmindful of this Court's very recent decision in J.W. Field Company, Inc. et al. v. Township of Franklin (Docket No. L-6583-84 PW January 3, 1985) regarding the award of builders' remedies. Garfield would appear to satisfy the criteria set forth in that opinion. If Garfield is awarded a builder's remedy, the phasing of Site 3 would be revised, presumably by extending the time for rezoning, and the only existing plaintiff who had been subject to phasing (Garfield) would no longer have any need to challenge it. As before, the interests of plaintiffs-intervenors in this issue are poorly represented by the existing parties in this action.

D. Plaintiffs-Intervenors' Motion To Intervene Herein Is Timely.

In ascertaining whether a motion to intervene is timely, it is necessary to consider all the circumstances of the case. Legal Aid Society of Alameda County v. Dunlop, 618 F.2d 48 (9th Cir. 1980). The question of timeliness cannot be considered in vacuo. Whether a motion is timely does not depend

only upon the amount of time that may have elapsed since the institution of the original suit. Clarke v. Brown, 101 N.J. Super. 404, 410 (Law Div. 1968). Furthermore, if intervention as of right is sought, a more liberal standard of timeliness applies than if permissive intervention is requested. Minersville Coal Company, Inc. v. Anthracite Export Association, 58 F.R.D. 612 (M.D. Pa. 1972).

In an exhaustive survey of the timeliness requirement under Fed. R. Civ. P. 24, the Fifth Circuit Court of Appeals in Stallworth v. Monsanto Company, 558 F.2d 257 (5th Cir. 1977) identified the following four factors that must be considered: (1) the length of time during which the intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as result of the intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the intervenor may suffer if his petition for intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

An examination of these factors as they apply to the instant case compels the conclusion that plaintiffs-intervenors' motion is timely.

1. Length of Time of Plaintiffs-Intervenors' Knowledge.

Plaintiffs-intervenors obtained a concrete and substantial interest in this matter only after Cranbury Township submitted its final compliance Proposal to this Court. Only then did it become clear what role plaintiffs-intervenors' property would play in the final Proposal. Prior to the submission of that Proposal, plaintiffs-intervenors had participated extensively in the numerous meetings with the Planning Board, Mr. Caton and Mr. Raymond that led to the text of the Proposal (Barcan Affidavit). Once the Proposal was put before this Court, however, plaintiffs-intervenors' interest in this matter rose to a level mandating intervention. Plaintiffs-intervenors' motion, filed shortly after submission of the final Proposal, must, therefore, be considered timely.

Arguably, the motion to intervene could have been filed immediately after this court entered its interlocutory order setting aside Cranbury's Zoning Ordinance. However, plaintiffs-intervenors knew that a motion to intervene made by another developer had been denied while preserving the developer's right to participate in the local rezoning process on remand.* Subsequently, this Court rejected plaintiff Zarinsky's informal

---

* We refer here to Robert and Joseph Morris' intervention motion in the case of Morris v. Township of Cranbury (Docket No. L-54117-83 PW). Morris is the owner of the 101.05 acre tract identified as Site 5 in the Proposal.

request to bar Cranbury from allowing any non-plaintiffs to participate in that local process. Based on this background, it appeared to plaintiffs-intervenors that a motion to intervene would have been futile if made before the conclusion of the local hearings and the submission to this Court of the final compliance Proposal.

2. Prejudice to Existing Parties.

In evaluating the prejudice to the existing parties, the scope of inquiry is limited:

> The prejudice to the original parties to the litigation that is relevent to the question of timliness is only that prejudice which would result from the would be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action. (Emphasis added) Stallworth at 265. See also Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir. 1970), cert. den. 400 U.S. 878 (1970).

As noted above, plaintiffs-intervenors' motion was filed promptly after obtaining a direct and substantial interest in this action. It is difficult to conceive how the failure to intervene any earlier could result in any prejudice whatsoever to the existing parties. Plaintiffs-intervenors, it must be noted, do not seek to challenge this Court's "fair share" determination in any manner or relitigate any of the issues previously raised before or determined by this Court. Intervention at this time is sought merely to protect the plaintiffs-intervenors' interest in

the implementation of a compliance Proposal which includes their property.

3. Prejudice to Plaintiffs-Intervenors if Motion is Denied.

Plaintiffs-intervenors' property interest will be greatly prejudiced if intervention is not permitted. As set forth earlier, Garfield is the only plaintiff whose property is included for rezoning in the compliance Proposal and Garfield's interests are significantly different from that of Silbert. If intervention is denied, the legitimate interests of plaintiffs-intervenors in such important issues as phasing and applicability of proposed development standards to smaller tracts within Sites 1-3 will very likely not be presented to this Court. Because development of Site 3 is necessary to meet the "fair share" obligation of 816 units, both the plaintiffs-intervenors and Mt. Laurel II policies will be prejudiced if intervention is denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that plaintiffs-intervenors' motion to intervene be granted.

Respectfully submitted,

WILENTZ, GOLDMAN & SPITZER
Attorneys for Plaintiffs-Intervenors

By: _____
STEPHEN E. BARCAN, ESQ.

DATED: January 21, 1985