Warren 1983 (11/1)

Plaintiff's Trial Brief

Pgs. 58

MLCCC0361B

copy

S-IC 111

ML000361B

Entered ✓ Indexed

LAWRENCE V. STEINBAUM, Plaintiff, vs. BOARD OF ADJUSTMENT OF THE TOWNSHIP OF WARREN AND THE TOWNSHIP OF WARREN, a municipal corporation of the State of New Jersey, Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, SOMERSET COUNTY Docket No. L-59706-81 Civil Action

FILED
NOV 1 2 57 PM '83
SOMERSET COUNTY
L.R. OLSON, CLERK

PLAINTIFF'S TRIAL BRIEF

GLUCKSMAN & WEITZMAN
60 Maple Avenue
Morristown, New Jersey 07960
(201) 267-2900
Attorneys for Plaintiff

PHILIP R. GLUCKSMAN, ESQ.
On the Brief

STATEMENT OF FACTS

The plaintiff, Lawrence V. Steinbaum, is the owner of 30.9 acres on Mt. Horeb Road, Warren Township. The subject parcel is presently used as a recreational facility for the Somerset Hill School located across the street from the subject site. In 1979, the plaintiff contacted the Warren Township Planning Board in an effort to have the property rezoned to permit multi-family dwellings. (Tr. 10/6/80, p. 45) The Warren Township zoning ordinance at that time and during all hearings before the Board of Adjustment did not permit multi-family dwellings in any part of the municipality. The plaintiff appeared approximately five times before the Planning Board with experts but the Planning Board voted not to recommend a rezoning.

The plaintiff then applied to the Warren Township Board of Adjustment for a use variance to permit multi-family dwellings on the subject zone. The following witnesses were presented at the hearings below.

The first witness, Barrett Ginsberg, stated that he has been an architect for 16 years and is licensed in New Jersey and several other states. He has testified as an expert many times before various Boards of Adjustment and Planning Boards in the State of New Jersey. He averages two appearances before such Boards per week. He has also won numerous awards in the State of New Jersey and other groups during the course of his career. (Tr. 10/6/81, p. 54-57)

Mr. Ginsberg testified that the subject parcel is 30.9 acres in area and approximately one mile from the center of Warren Township, where the business center and other community facilities are located. The size of the parcel is irregular in shape. It is a "flag type" lot with very narrow frontage on Mt. Horeb Road and much greater width going towards the back of the site. (Tr. 10/16/81; p. 66)

The land is presently used as a recreational facility for Somerset Hills School located across from the site on Mt. Horeb Road. It contains a pond, some ball fields, a swimming pool and some open fields.

The subject parcel is presently zoned rural residential. A good portion of the parcel had just recently been rezoned from industrial to rural residential.

The subject parcel is, in fact, bounded on several sides by industrial uses. Immediately adjacent to this subject parcel is the Burroughs parking lot and headquarters, and further to the east is a newer industrial building now occupied by Chubb and Company. The property is, in fact, bounded on two sides by non-residential use and industrial use. (Tr. 10/6/81, p. 67)

Further, the land along Mt. Horeb Road is a mixture of commercial properties, including a junkyard, a food preparation place, a school, a transmitter and a camp. The residential properties immediately adjacent to the property are very small in nature and contain dilapidated chicken coops which immediately adjoin the subject site. (Tr. 10/6/81, p. 67)

Photos were submitted into evidence indicating the extreme proximity of the Burroughs parking lot, the Chubb building and the dilapidated chicken coops to the subject sites. Mr. Ginsberg indicated that percolation tests were performed by an engineering firm which indicated that the land does not percolate for a septic system. Therefore, one family houses could not be built on the subject site which would utilize a septic system. Since there are no township sewers to the lot, a septic system is the only alternative. (Tr. 10/6/81, p. 78-83)

It was Mr. Ginsberg's opinion that a one family home of approximately 2,500 to 3,000 square feet would not be a marketable item on the subject parcels. Initially, as indicated above, it would be impossible to install a septic system, thus a sewerage treatment would have to be constructed. It would be totally uneconomical to construct a sewerage system for an eighteen house or less subdivision. Additionally, the subject parcel is immediately adjacent to industrial, warehouse and other non-residential uses. Further, there are dilapidated chicken coops, a junkyard and other small houses neighboring the subject lot. A combination of these factors would totally discourage prospective buyers from purchasing a single family home on the site, the cost of which would be in excess of $200,000. (Tr. 10/6/81, p. 79-83)

Mr. Ginsberg testified that the subject parcel would be uniquely suited for the proposed use. The unique configuration of the lot with the pre-existing open fields and pond would make this parcel ideally suited for townhouse use. (Tr. 10/6/81, p. 84)

Mr. Ginsberg originally testified that the plans called for 300 units, the lower cost of which would be approximately $80,000. He indicated that the cost of the units would depend ultimately on the township's notion of what it would like to see in these units. However, the plaintiff throughout these proceedings continually represented and stressed to the Board that it was totally amenable to any type of housing which the Board would like to see on the subject parcel, including least-cost housing, senior citizen housing or subsidized housing. The plaintiff continually indicated to the Board of Adjustment that it was totally flexible in its approach and invited comments from the Board in this regard. All the plaintiff was requesting was some form of multi-family dwelling use on the parcel in question.

David Cahill, an architect, also testified on behalf of the plaintiff. He indicated that he is an architect and planner and member of an architectural firm with offices in Far Hills, New Jersey, New York City and Florida. (Tr. 10/15/81, p. 72) Approximately 50% of his practice over the past ten years has involved multi-family dwellings. His firm has designed over 10,000 units and some 30 projects in New Jersey, New York, Georgia, Texas and Florida. (Tr. 10/15/81, p. 72) His firm currently has projects pending in Union Township, Clinton Township, Bernards Township, Parsippany and Watchung.

Mr. Cahill brought forth a plan which reduces the number of requested units from 300 to 184 units. This density comes out to 5.95 units per acre which, in his experience, was a "very acceptable density in this part of New Jersey for multi-family

units." (Tr. 10/15/81, p. 78)

Mr. Richard Schindelar, a professional engineer, testified that he has performed a substantial amount of work in Warren Township. He stated that his office conducted percolation tests of the subject site and these tests indicated that the soils on the subject parcel would not permit installation of individual disposal systems. (Tr. 11/13/80, p. 14)

He remarked that without sewers the normal method of waste disposal for a single family home would be an individual septic system. Mr. Schindelar flatly ruled out this possibility as being operable in the instant case. He stated that a sewerage treatment plan would be totally unfeasible and uneconomical regarding one family homes but would be quite feasible for proposed townhouses. (Tr. 11/13/80, p. 15) He further testified that there would be no engineering constraints for the granting of a variance for multi-family dwelling units on the subject parcel. He also stated that the granting of the variance would not have an adverse effect on this site or the adjoining areas. In fact, he said it would be an improvement to the existing manufacturing and warehouse uses and chicken coops that presently exist in the area. (Tr. 11/13/80, p. 16-17)

On further redirect examination, Mr. Schindelar testified that because the proposed density was reduced from 300 townhouses to 184, there would be even less engineering concerns involved with this project. Lastly, he observed that he had occasion to examine the subject parcel on a day when the rainfall set a record for that day and he found no evidence whatsoever of

any type of flooding. He testified he had first-hand evidence that there was no concern in this regard.

Mr. Carl Lindbloom testified as a Planning Expert on behalf of the plaintiff. Mr. Lindbloom informed the Board that he had extensive experience in this field. He has served as consultant to many municipalities and boards and had drafted master plans for these municipalities. (Tr. 1/19/81, p. 16)

Mr. Lindbloom was the planner on behalf of the plaintiff in the case of Allen-Deane Corporation v. Bedminster Township.

Mr. Lindbloom reviewed the different criteria which are usually present when townhouses are permitted in certain areas. He noted that the subject parcel is less than a mile from the Warrenville area which is described in the Township Master Plan as the Town Center. This makes the proposed facility very close to the town's two shopping centers. (Tr. 1/19/81, p. 26-27)

The site is also very close to public schools. (Tr. 1/19/81, p. 28) He also stressed that the subject parcel is in a transitional zone in that it is bounded on the north and east by the General Industrial Zone (G.I.-2 zone). He emphasized that the parcel was bounded on two sides by industrial use. The Burroughs Corporation is presently the township's largest employer. He also remarked that the existence of these facilities with its attendant parking would adversely impact the owner of a one family dwelling. (Tr. 1/19/81, p. 28-29)

He further noted that there were many non-residential uses along Mt. Horeb Road, including a day camp, a television

transmission tower, a private school, an auto wrecker, a gas station and a caterer. He felt that the non-residential uses adjacent to the subject site would not make it particularly suitable for new one family dwellings. (Tr. 1/19/81, p. 29-30)

He noted that the parcel in question is in a minimal limitations category as defined by the master plan, which means that it is not predominantly steep slopes, high water table or flood prone. (Tr. 1/19/81, p. 30)

Mr. Lindbloom examined the uses permitted under the township ordinances and found that 87% of the acreage in the town is devoted to rural-residential. The township did not permit any type of multi-family dwelling. (Tr. 1/19/81, p. 35)

Mr. Lindbloom stated that Warren Township was located within a region with a large and growing employment base. He stated that under current case laws mandated by New Jersey Supreme Court, Warren Township had its duty to provide its fair share of all types of housing to meet general housing needs in the area. Presently, the zoning in Warren Township provides housing only for those employees in the highest income brackets.

Mr. Lindbloom then went on to conclude that the Township of Warren meets all the criteria mandated by the New Jersey Supreme Court in the landmark Mt. Laurel decision. He delineated what those six criteria were and found that Warren Township met every single one of those criteria. (Tr. 1/19/81, p. 51-54) Additionally, there would be future job growth with large office developments currently being planned by AT&T and Chubb and Son.

These developments alone will account for 5000 jobs, almost triple the township's current employment. (Tr. 1/19/81, p. 55) Because of the above and since Warren is welcoming and permitting this industry, it has a corresponding duty under New Jersey law to provide its fair share of housing to the people who will be working in the community. It has a duty to provide housing other than one family houses as the present zoning ordinance now permits.

Mr. Lindbloom stated that the granting of the variance meets all the criteria of the statute. Special reasons exist for the granting of the use variance in that the proposed multi-family units will help meet the existing needs of varied housing and will provide a portion of the township's housing obligation in accordance with Mt. Laurel mandate. This, in turn, would promote the general welfare. He stated that the subject parcel is well located in that it is in close proximity to shopping, schools and community facilities and job opportunities. The proposed use will provide a good transitional use between the adjacent industrial uses and the lower density residential uses. In addition, there are no serious environmental constraints in development of the site as proposed.

Lastly, the site is particularly well suited for the proposed use. The configuration of the lot is such that it would be quite appropriate for multi-family development. Additionally, there is a pond that exists on the site which would be enlarged and esthetically integrated within the proposed development. (Tr. 1/19/81, p. 56) Further, the granting of this proposal would not cause any detriment to the public good.

Mr. David Mendelson, a Traffic Consultant, testified with regard to a traffic engineering study concerning the subject application. Mr. Mendelson summarized his study by stating that with a minor modification regarding improvement in the intersection, there would be no problems of traffic concern with the proposed application. (Tr. 2/6/81, p. 17-18) The traffic expert employed by Mr. O'Connor, the Public Advocate, was in complete agreement with conclusions reached by Mr. Mendelson. Thus, the Public Advocate's expert also concluded that there would be no particular traffic problems in the proposed application.

The last witness presented by the applicant was Clifford Earl, a real estate appraiser. Mr. Earl is past president of the Somerset County Board of Realtors and past vice-president of New Jersey Association of Realtor Boards. He has also testified as an expert in real estate appraisal work before other planning boards and in the State Courts of New Jersey. (Tr. 5/4/81, p. 6-7)

Mr. Earl conducted a study regarding the use variance pending before the Board. He noted that the residential nature of the subject property was greatly impacted by the G.I.-2 zone (industrial zone) bordering the subject property on both sides. He further noted that there were mixed uses along Mt. Horeb Road, including a service station, restaurant, junkyard and a school across the street. (Tr. 5/4/81, p. 8-9) He observed that the property was "extremely odd-shaped." Thirty percent of the acreage would be lost because of the unnatural shape of the property and because of the shape of cul-de-sacs that would be installed. (Tr. 5/4/81, p. 10)

It was his opinion that a one family home on these lots would sell for approximately $225,000. It was his further opinion that a one family home would never sell for such a price on these lots. He noted that one would not be willing to spend sums in excess of $200,000 on homes which were immediately adjacent to industrial zones, dilapidated chicken coops, smaller homes and a host and variety of other adjacent non-residential uses. (Tr. 5/4/81, p. 13-15)

Mr. Earl summarized by stating that any developer who would construct one family homes on these lots would be building "monuments to himself." (Tr. 5/4/81, p. 16) On the other hand, Mr. Earl stated unequivocally that in his expert opinion the highest and best use for this property would be townhouses. (Tr. 5/4/81, p. 16)

Mr. James Higgins was called as a planner on behalf of the Bublic Advocate. Mr. Higgins, in his report, suggested that the townhouses may not be a proper use for the parcel in question.

However, a close examination and analysis of Mr. Higgins' report and testimony clearly reveals that his arguments are tenuous. Initially, Mr. Higgins only has a degree as a landscape architect. (Tr. 6/1/81, p. 17) On cross-examination, Mr. Higgins indicated that he had virtually no experience with townhouses. He never supervised or principally designed a townhouse. He does recall participating in the design of a townhouse in East Brunswick, but doesn't even recall the name of the development. The plan was eventually withdrawn. He has never been involved in any active

townhouse application which ever reached the initial proceeding before a municipal body. He has also had nothing ever to do with the implementation of a townhouse project or overseeing the operation of such a project. (Tr. 6/1/81, p. 17-20) He has never even testified, as an expert, either before a Court of Law or any municipal Board of Adjustment or Planning Board regarding any townhouse project.

In spite of the complete lack of experience concerning the townhouses, Mr. Higgins reached certain conclusions regarding the instant application. Mr. Higgins was against the proposed use because it was not located close to mass transit. However, he quickly agreed on cross-examination that no parcel in Warren Township would be acceptable under his standards because none were located next to mass transit.

Additionally, the parcel was not located next to a major road. Mr. Higgins conceded that very few parcels in Warren Township would be located next to a major road. He had some traffic concerns with regard to the project but he quickly admitted that he was not a traffic expert and he would defer to the opinions of the traffic experts of the Public Advocate and the applicant, who both felt that there would be no particular traffic problems associated with the subject project. (Tr. 6/22/81, p. 36-38)

He did concede that there were shopping centers approximately one mile away from the subject parcel. He also admitted that this would be very close for persons who had a car at their disposal. (Tr. 6/22/81, p. 46)

Mr. Higgins conceded that he was not familiar with

proposal in the area of a medium-range density. (Tr. 10/15/81, p. 29) Mr. Chadwick conceded that the homes surrounding the subject site are smaller and older and that there are chicken coops in a state of bad disrepair adjacent to the site. (Tr. 10/15/81, p. 21)

Mr. Chadwick admits that there is poor percolation on the subject parcel but never goes on to take a position disputing the contentions of the plaintiff's experts that the land could not be utilized for the zoned purpose. Lastly, Mr. Chadwick principally objects to the subject site because of the alleged water course protection area which could inhibit construction. However, Mr. Chadwick conceded that this is principally an engineering consideration which could be overcome at site plan proceedings. (Tr. 10/15/81, p. 49-50)

At the conclusion of the hearings on March 29, 1982, the Board of Adjustment voted 4 to 1 to deny the use variance. This Appeal now follows.

POINT I

THE BOARD OF ADJUSTMENT ERRED IN DENYING THE USE VARIANCE REQUESTED.

N.J.S.A. 40:55D-70(d) states that the Board of Adjustment shall have the power to:

> "In particular cases and for special reasons grant a variance to allow departure from regulations pursuant to Article 8 of this Act, including, but not limited to allowing a structure or use in a district restricted against such structure or use..."

The case law interpreting the phrase "special reasons" indicates that although there is no clear definition of "special reasons," there are essentially three general categories of special reasons. These three general categories include the following: 1) the proposed use will inherently serve the public good and general welfare; (2) the property in question is peculiarly suited or uniquely suitable for the proposed use; or (3) the property cannot reasonably be utilized for the purposes permitted under the zoning ordinance. See Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 269, 286-287; Yahnel v. Board of Adjustment of Jamesburg, N.J. Super. 509 (App. Div. 1963), cert. den'd. 41 N.J. 116 (1963); Black v. Montclair, 40 N.J. 1 (1963); DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428 (1970); Fobe Associates v. Mayor and Council of the Borough of Demarest, 74 N.J. 519 (1977); Scheff v. Township of Maple Shade, 149 N.J. Super 448 (App. Div. 1977) cert. den'd. 75 NJ 13 (1977). The case law regarding these special reasons also demonstrates that any one of these three general categories of special reasons is sufficient to meet the requirements of NJSA 40:55D-70(d). See Rolph v. Borough of

Emerson, 141 NJ Super! 341, at 352-353 (Law Div. 1976); Yahnel v. Board of Adjustment of Jamesburg, supra at 518.

Special reasons has been defined by our Supreme Court as a "flexible concept; broadly speaking, it may be defined by the purposes of zoning set forth in NJSA 40:55-32 which specifically include promotion of health, morals, or the general welfare." DeSimone v. Greater Englewood Housing Corporation, 56 NJ 428 (1970). In essence, a Board of Adjustment can grant a use variance if it is deemed that the use will in some way promote the general welfare as it is broadly defined in the zoning statute. Consider the following varied instances where use variances granted by the Board of Adjustment were upheld because they promoted the general welfare. Andrews v. Board of Adjustment of the Township of Ocean, 30 N.J. 245 (1959) which permitted a parochial school to be constructed in residential zone; Burton v. Montclair, 40 N.J. 1, a private school in a residential zone; Yahnel v. Board of Adjustment of Jamesburg, 79 N.J. Super. 509 (App. Div. 1963), cert. den'd. 41 N.J. 116 (1963) which permitted a telephone equipment building in a residential zone; Grundlehner v. Dangler, 29 N.J. 256 (1956) variance granted for the alteration of a funeral home in residential zone; Kramer v. Sea Girt, 45 N.J. 268, variance permitted for construction of hotel in residential zone; Kunzler v. Hoffman, 48 N.J. 277 (1966) which permitted a private hospital for the emotionally disturbed in a residential zone; Bonsall v. Mendham Township, 116 N.J. Super. 337 (App. Div. 1971) which affirmed the variance created to a Seeing Eye clinic to permit the construction of the building on the premises.

In the following two cases the courts reversed the decision of a Board of Adjustment denying the use variances. 3L Corporation v. Board of Adjustment City of Newark, 118 N.J. Super. 453 (L. Div. 1972) whereby variance was mandated to permit creation of a private day care center in a residential zone and Wickatunk Village, Inc. v. Township of Marlboro, 118 N.J. Super. 445 (Ch. Div. 1972) which directed variances to permit construction of a sewerage treatment plant in a residential zone.

More recently, New Jersey courts have specifically held that the need for varied housing especially in the low and moderate income area, does constitute special reasons to authorize a variance for private housing as well as public. In Brunetti v. Madison Township, 130 N.J. Super. 164 (L. Div. 1974), the court reversed the Township Council's denial of a variance for multi-family housing. The courts specifically directed the governing body to grant the plaintiff's application for a variance and in doing so, specifically stated that "a need for low and moderate income housing constitutes a special reason for justifying a zoning variance whether served by semi-public housing as in De Simone or by private housing as proposed by the plaintiff. The mayor and council were unreasonable in not so concluding." 130 N.J. at 168 (italics supplied).

The landmark case with regard to the need for multi-family dwellings and how that need satisfies the general welfare is the case of South Burlington County N.A.A.A.C. v. N.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975). The Supreme Court in the aboye case greatly emphasized that there is a dire need

for multi-family housing in the state, especially in the low and moderate income areas. The court stated that "it is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." The Supreme Court went on to particularly note that "the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing communities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the good of the municipality. It has to follow that broadly speaking presumptive obligation arises for each such municipality affirmatively to plan and provide by its land use regulation a reasonable opportunity for an appropriate variety and place of housing including, of course, low and moderate cost housing, to meet the needs and desires and resources of all categories of people who may desire to live within its boundaries." 67 N.J. at 179 (italics supplied) Indeed, it cannot be imagined a stronger statement from our Supreme Court that at the present time one of the greatest ways of satisfying the general welfare is for a developing community to provide the varied type of housing for regional needs beyond its boundaries. As stated above, the municipalities must shed their "parochial attitudes" and look beyond the municipal boundaries to satisfy those needs.

The court further went on to state that "when it is shown that a developing municipality in its land regulations has

not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, there is an obvious showing of the violation of due process and that the municipality has the heavy burden to establish that there is rational reason for excluding this varied type of housing. 67 N.J. at 181.

The court emphasized continually that there is an acute need for multi-family housing. The court noted that "single family dwellings are the most expensive type of quarters and great numbers of families cannot afford them. Certainly, they are not pecuniarily feasible for low and moderate income families. Most young people and many elderly and retired persons" cannot afford the single family dwelling. 67 N.J. at 182.

What is very interesting to note when comparing the Mount Laurel case to the case at bar is that Mount Laurel's zoning ordinance does allow some form of julti-family dwellings. Warren Township is much worse when compared to the Supreme Court's criteria because its zoning ordinance does not in any way, shape or form provide for any type of multi-family housing.

In its conclusion, the Supreme Court did not restrict its decision solely to low cost housing. It stated that a developing municipality had the burden of providing varied housing, of which multi-family was one type and low cost housing another type.

What is particularly applicable to the case at bar is the comments of Supreme Court regarding zoning certain areas for industry and commerce without providing adequate housing. The Court stated that certainly when a municipality zones for industry and commerce for local tax benefit purposes, it has, without question, a corresponding obligation to provide adequate housing within the means of the employees involved in such use. "In other words, such municipalities must zone primarily for the living welfare of people not for the benefit of the local tax rate." 67 N.J. at 187-188.

The reasoning behind the Mount Laurel decision was carried forward by the Supreme Court in the case of Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977). The Supreme Court of New Jersey again reaffirmed the Mount Laurel decision that "requires that a municipality must allow for an appropriate variety and choice of housing." 72 N.J. at 516. The Court examined the Township of Madison and found that there was a substantial amount of land yet to be developed. Most of the zoning ordinance was devoted to single family residential. The Court found that the failure of the town to provide for its fair share of varied housing rendered that town to be in violation of its mandate. It further went on to comment at length that a municipality must provide its fair share of the regional needs for housing rather than just the needs of a municipality.

It is quite interesting to note in this regard that in doing so, the Supreme Court of New Jersey referred to an article written by an expert in the field. See Lindbloom, "Defining Fair

Share of Regional Need," 98 N.J.L.J. 633-644 (July 24, 1975). This article was written by Carl Lindbloom who is the very expert used by the plaintiff. In the Madison case, the Supreme Court again emphasizes "we impose upon each developing community the obligation to plan and provide by its land use regulation a reasonable opportunity for an appropriate variety and choice of housing." 72 N.J. at 559.

In South Burlington County NAACP v. Mt. Laurel Twp., N.J. 158 (1983), (hereinafter "Mt. Laurel II"), the N.J. Supreme Court reiterated and vigorously reaffirmed the principles established in Mt. Laurel I. The Court went at great lengths to assert that a community in a growth area has a duty to provide a varied type of housing, some of which should be low or moderate income or, in some circumstances, least cost housing. In the Appendix to the above decision, Warren Township was listed as a "growth area" and therefore, as such, clearly fell within the dictates and remedies provided in the above case.

The Court in this case went out of its way to note that most municipalities clearly sought to circumvent the holdings in Mt. Laurel I by dragging their feet or making it difficult for a developer to construct multi-family dwellings in a municipality. In order to rectify the above situation, the Supreme Court in Mt. Laurel II provided for drastic builder's remedies which would compel the municipalities to provide the requisite multi-family housing so sorely needed. The Supreme Court in citing the numerous instances of municipal zoning ordinances either prohibiting completely or discouraging multi-family housing, stated that "zoning

ordinances that either encourage this process or rectify its results are not promoting our general welfare, they are destroying it." 92 N.J. at 211. The Court also pointed out that each municipality had to provide for its fair share of the region's low and moderate income housing. 92 N.J. at 208-209.

Since the institution of the within action the Warren Township zoning ordinance has declared invalid. In the case of AMG Realty and Skytop Land Corp. v. Twp. of Warren, Docket No. L-23277-80, the Court invalidated the zoning ordinance of Warren Township for failing to provide multi-family dwellings. Warren Township has not included the plaintiff's property in any plans for zoning which would permit multi-family dwellings.

It is respectfully submitted that because of the above, the plaintiff has clearly demonstrated that the granting of this variance would certainly promote the general welfare. As stated above, the Supreme Court of New Jersey has listed Warren Township as being in a growth area. The granting of this variance would tend to promote the general welfare in that it would provide a sorely needed type of housing in the municipality and region where no such type of housing presently exists. The courts in all the cases stated above that this reason alone would constitute special reason for the granting of a variance.

Everyone agrees that there is an acute need for this type of housing in the United States. The plaintiff's planner stressed the reasons why there is a need for this type of housing in the Warren Township area. While the Public Advocate's planner did not conduct a study, his reaction was to confirm that there

is a need for this type of housing in the area, although he did confirm that in general there is a need for least-cost housing.

The Supreme Court decisions in Mt. Laurel I and II and Madison at Oakwood are matters of public record and are the law of the state. Any fair analysis of those cases compels one to the conclusion that Warren Township certainly meets the criteria set forth in those cases. Accordingly, it has an affirmative duty to provide its fair share of regional housing needs.

In addition, it has been confirmed by all parties that there is an expected growth of employment in Warren Township. Because of same, the township owes a duty to provide housing that is affordable for those persons being brought into the area because of that employment. A failure to provide multi-family dwellings would result in a major segment of the population being precluded from acquiring housing. This would apply to young married couples, the elderly, and, especially, persons who are purchasing homes for the first time. The granting of this variance would provide a much needed type of housing in Warren Township for the above segment of the population. It is patently obvious that this, in turn, would promote the general welfare.

Nor can it be said that the granting of the variance for multi-family dwellings would violate the "negative criteria" of the statute. The case law interpreting the negative criteria indicates that the variance should be granted if the benefits of the variance outweigh the detrimental impacts, if any. See Kramer v. Board of Adjustment of Sea Girt, 45 N.J. at 293. The

negative impact or detrimental impact must be clearly substantial and must substantially outweigh the benefits of the variance. As the Kramer court stated:

> "The key word is 'substantially'... if on adequate proof, the board without arbitrariness concludes that the harms, if any, are not substantial and implicitly determines that the benefits preponderate the variance stands."
> Kramer v. Board of Adjustment of Sea Girt, 45 N.J. at 293.

The clear balancing requirement of the case law relating to the negative criteria illustrates the importance of consideration of the responsibilities of the municipality within the context of Mt. Laurel II with respect to the determination of whether the negative criteria of a use variance proposing multi-family use have been met. DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428 (1970). See also Fobe Associates v. Mayor and Council of Demarest, 74 N.J. 519 (1977).

There are additional "special reasons" for granting a use variance in this case separate from the general welfare issue. It is well established in New Jersey case law that a separate and independent grounds or "special reason" for a use variance exists if the subject property cannot be reasonably used for the zoned purpose. See Bern v. Fairlawn, 65 N.J. Super. 435, 446-448 (App. Div. 1961). As the Bern court pointed out..."While an undue hardship may constitute a special reason for a (d) variance, the degree and extent of hardship for a (c) is greater than that provided for a (d) variance." Id. at 446-447 and see Grimley v.

land cannot reasonably be utilized for single family dwellings and that the granting of this variance would not impair the public good but would instead definitely promote the general welfare by permitting a use which is greatly needed in this area. In view of the above cases and for the above reasons, it is respectfully submitted that the Board clearly erred in denying the requested variance and that said decision should be reversed and the variance granted.

POINT II

THE ATTORNEY FOR THE WARREN TOWNSHIP BOARD OF ADJUSTMENT ENGAGED IN IMPROPER BEHAVIOR WHICH DEPRIVED THE PLAINTIFF OF A FAIR HEARING.

It is a basic principle of law that the Board of Adjustment in passing upon variance applications act in a quasi-judicial capacity. Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268 (1965). "While the hearing before the Board is not a formal trial, it partakes of the character of a quasi-judicial proceeding which must be governed by a spirit of impartiality...." Hill Homeowners v. Passaic Zoning Board of Adjustment, 129 N.J. Super. 168, 179 (L. Div. 1974).

It is respectfully submitted that a complete and detailed review of the record below clearly indicates that the questioning by the Board of Adjustment attorney was excessive, protracted and often needless. In addition, the content and amount of questioning clearly indicate that the Board attorney was not completely objective in his questioning.

If we examine the testimony of the first witness for the plaintiff, Barry Ginsberg, we notice that the Board members asked a total of 18 questions. However, the Board attorney asked an astonishing 116 questions of Mr. Ginsberg. This represents a 600% increase over the number of questions asked by the Board.

When the Board attorney cross-examined Mr. Schindelar, the plaintiff's engineer, he asked in excess of 184 questions. However, when he questioned Mr. Kolody, the Public Advocate's engineer, he asked a total of only 32 questions, over half of which dealt with a new problem concerning hearsay information and

not one of major substance.

Unfortunately, the notes for the transcript of Mr. Lindbloom's cross-examination were destroyed and we cannot determine the exact number of questions asked by the Board attorney. However, on Mr. Lindbloom's recross-examination, when he was merely questioned about the new reduced site plan, the Board attorney still managed to ask Mr. Lindbloom a total of 80 questions. However, he asked Mr. Higgins, the Public Advocate's planner, a total of only 49 questions on his original testimony.

When the Board attorney began his cross-examination of the first witness, he made a statement which revealed quite a bit about the nature of his questioning and its purpose. He stated that for the first time in six years that he has been attorney to the Board of Adjustment, he felt "a little awkward in the fact that I have prepared my questions and done what I considered to be my job as an attorney may make me somewhat suspect but nonetheless I'll proceed as I deem to be fit." (Tr. 10/23/80, p. 78, l. 14-21). Thus, his initial statement at the very outset of his cross-examination turned out to be quite prophetic as can be seen by the protracted examination of all the plaintiff's witnesses.

Moreover, a review of the transcript of that cross-examination clearly reveals that the Board attorney asked questions of the plaintiff's witnesses that were designed to elicit damaging answers bur asked much more mild and innocuous questions of the Public Advocate and township witnesses which were designed to support their case. I think the transcript also makes it readily apparent that the Public Advocate was not neutral from

the outset but asked questions and produced witnesses who were adverse to the plaintiff. Thus, the plaintiff found himself encountering two adversary attorneys who were, by definition, supposed to have been neutral.

For instance, the Mt. Laurel issue was clearly an issue raised in the various proceedings. Mr. Lindbloom was cross-examined by the Board and its attorney concerning Mt. Laurel.

When the plaintiff cross-examined Mr. Higgins, the Public Advocate's planner, it was discovered that Mr. Higgins had not even read the Mt. Laurel decision. However, when plaintiff questioned Mr. Higgins more closely concerning Mt. Laurel, the Board attorney himself raised an objection to the questioning, citing that questions concerning Mt. Laurel were not really relevant. It is quite enlightening to see that the Public Advocate himself did not raise the objection concerning his own witness but the Board attorney did it on his own volition.

In the transcript of June 22, 1981, at page 20, the Board attorney notes that he is raising objections to Mt. Laurel questions on his own in the absence of an objection by the Public Advocate because he feels that the Mt. Laurel decision was not relevant. However, it appeared that no objection was raised when Mr. Lindbloom, the plaintiff's planner, was questioned about Mt. Laurel. Nor did he ever raise an objection when Mr. Lindbloom raised it as part of the plaintiff's affirmative case. It was quite obvious from the record that the Board attorney was trying to save Mr. Higgins from any further embarrassing questions concerning Mt. Laurel and his candid admission that he had never read

the case. This was done by the Board attorney in the complete silence and absence of any objection from the Public Advocate. The objection was also made in face of the fact that Mt. Laurel was certainly a relevant factor to the requested use variance. It is quite obvious that a review of the record will reveal that the tenor of the Board attorney's questions was not neutral in thought or purpose. As stated above, his questioning of plaintiff's witnesses was needlessly lengthy, with the purpose of trying to find fault in the testimony. However, such was not the case with the township witnesses and those of the Public Advocate where the questions were far less in number, muted and supportive in nature.

It is respectfully submitted that the above clearly shows that the Board of Adjustment attorney clearly overstepped his bounds by the numerous and prolific questions asked of the plaintiff's witnesses. Questions asked by the Board attorney were far greater than those asked by the seven Board members together. He also far exceeded the number of questions asked by the Public Advocate. In fact, the Board attorney, by engaging in this behavior, literally became tantamount to a Board member during the course of the proceedings and thereby usurped their function. Additionally, any objective reader of these transcripts is compelled to the conclusion that the Board attorney was asking questions of the various witnesses which would have been designed to affirm, on appeal, any Board decision denying the requested use variance. The questions asked of the plaintiff's expert witnesses were clearly designed to be counterproductive and damaging. The

questions asked of the Public Advocate's witnesses were far less numerous and tended to reinforce the Public Advocate's and township's witnesses.

As stated above, the Board of Adjustment exercises a quasi-judicial function and, logically, so does the Board attorney. Our cases have clearly held that even a judge in his or her full judicial capacity should exercise restraint in cross-examining witnesses. In Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J. Super. 522 (App. Div. 1960), the Court recognized judicial restraint in examining a witness even in the absence of a jury. The Court stated that if a judge "participates to an unreasonable degree in the conduct of a trial, even to the point of assuming the role of an advocate, what he does may be just as prejudicial to a defendant's rights as if the case were tried to a jury." 62 N.J. Super. at 549. In Ridgewood v. Sreel Investment Corp., 28 N.J. 121, 132, the Court stated that if there is excessive questioning by a judge, it may reach "a point at which the judge may cross that fine line that separates advocacy from impartiality. When that occurs there may be substantial prejudice to the rights of one of the litigants." 28 N.J. at 132.

In Polulich v. J.G. Schmidt Tool Die and Stamping Co. 46 N.J. Super. 135, 144, (County Court, 1957,) the Court stated, "The power to take an active part in the trial of a case must be exercised by the judge with the greatest restraint...."

Thus, it can be seen by the above that the Board attorney's excessive and unobjective questioning was clearly improper.

CONCLUSION

In view of the foregoing cases and for the above reasons it is respectfully submitted that the decision of the Board of Adjustment be reversed and that the requested variance be granted.

Respectfully submitted,

PHILIP R. GLUCKSMAN
Attorney for Plaintiff

feasible to construct and sell homes on these lots. He is in no position to dispute Mr. Earl's previous statements regarding costs of constructing one family dwellings on this site and whether such dwellings would be readily marketable. (Tr. 7/20/81, p. 37)

Mr. Kolody was again called to testify after the applicant resubmitted plans which called for a reduction of townhouse units from 300 to 184. Mr. Kolody stated both in his additional report and his testimony that the reduction in these units "tends to minimize adverse effects to the surrounding environment and to the existing water course." Thus, in essence, from an engineering standpoint, he no longer had any major concerns about the proposed townhouse project as reduced and amended. (Tr. 2/4/82, p. 9)

Mr. Kolody also stated the effect that some of the small portion of the area is in a water course protection area and does not prohibit the subject application for townhouses to be constructed in that area. The application would merely have to come before the appropriate township boards and it would be more a consideration of a site plan. (Tr. 2/4/82, p. 7)

Mr. Chadwick, the Township Planner, conceded that there was a need for least-cost housing in Warren Township as well as throughout the United States. He was not prepared to define least-cost in terms of the particulars of Warren Township.

Mr. Chadwick never conducted a study as to whether there was a need for multi-family housing in Warren Township, nor did he ever conduct an analysis as to whether this parcel may be the best suited for multi-family dwellings. (Tr. 10/15/81, p. 5) He stated that reduction of proposed units from 300 to 184 put the

proposal in the area of a medium-range density. (Tr. 10/15/81, p. 29) Mr. Chadwick conceded that the homes surrounding the subject site are smaller and older and that there are chicken coops in a state of bad disrepair adjacent to the site. (Tr. 10/15/81, p. 21)

Mr. Chadwick admits that there is poor percolation on the subject parcel but never goes on to take a position disputing the contentions of the plaintiff's experts that the land could not be utilized for the zoned purpose. Lastly, Mr. Chadwick principally objects to the subject site because of the alleged water course protection area which could inhibit construction. However, Mr. Chadwick conceded that this is principally an engineering consideration which could be overcome at site plan proceedings. (Tr. 10/15/81, p. 49-50)

At the conclusion of the hearings on March 29, 1982, the Board of Adjustment voted 4 to 1 to deny the use variance. This Appeal now follows.

POINT I

THE BOARD OF ADJUSTMENT ERRED IN DENYING THE USE VARIANCE REQUESTED.

N.J.S.A. 40:55D-70(d) states that the Board of Adjustment shall have the power to:

> "In particular cases and for special reasons grant a variance to allow departure from regulations pursuant to Article 8 of this Act, including, but not limited to allowing a structure or use in a district restricted against such structure or use..."

The case law interpreting the phrase "special reasons" indicates that although there is no clear definition of "special reasons," there are essentially three general categories of special reasons. These three general categories include the following: 1) the proposed use will inherently serve the public good and general welfare; (2) the property in question is peculiarly suited or uniquely suitable for the proposed use; or (3) the property cannot reasonably be utilized for the purposes permitted under the zoning ordinance. See Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 269, 286-287; Yahnel v. Board of Adjustment of Jamesburg, N.J. Super. 509 (App. Div. 1963), cert. den'd. 41 N.J. 116 (1963); Black v. Montclair, 40 N.J. 1 (1963); DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428 (1970); Fobe Associates v. Mayor and Council of the Borough of Demarest, 74 N.J. 519 (1977); Scheff v. Township of Maple Shade, 149 N.J. Super 448 (App. Div. 1977) cert. den'd. 75 NJ 13 (1977). The case law regarding these special reasons also demonstrates that any one of these three general categories of special reasons is sufficient to meet the requirements of NJSA 40:55D-70(d). See Rolph v. Borough of

Emerson, 141 NJ Super. 341, at 352-353 (Law Div. 1976); Yahnel v. Board of Adjustment of Jamesburg, supra at 518.

Special reasons has been defined by our Supreme Court as a "flexible concept; broadly speaking, it may be defined by the purposes of zoning set forth in NJSA 40:55-32 which specifically include promotion of health, morals, or the general welfare." DeSimone v. Greater Englewood Housing Corporation, 56 NJ 428 (1970). In essence, a Board of Adjustment can grant a use variance if it is deemed that the use will in some way promote the general welfare as it is broadly defined in the zoning statute. Consider the following varied instances where use variances granted by the Board of Adjustment were upheld because they promoted the general welfare. Andrews v. Board of Adjustment of the Township of Ocean, 30 N.J. 245 (1959) which permitted a parochial school to be constructed in residential zone; Burton v. Montclair, 40 N.J. 1, a private school in a residential zone; Yahnel v. Board of Adjustment of Jamesburg, 79 N.J. Super. 509 (App. Div. 1963), cert. den'd. 41 N.J. 116 (1963) which permitted a telephone equipment building in a residential zone; Grundlehner v. Dangler, 29 N.J. 256 (1956) variance granted for the alteration of a funeral home in residential zone; Kramer v. Sea Girt, 45 N.J. 268, variance permitted for construction of hotel in residential zone; Kunzler v. Hoffman, 48 N.J. 277 (1966) which permitted a private hospital for the emotionally disturbed in a residential zone; Bonsall v. Mendham Township, 116 N.J. Super. 337 (App. Div. 1971) which affirmed the variance created to a Seeing Eye clinic to permit the construction of the building on the premises.

In the following two cases the courts reversed the decision of a Board of Adjustment denying the use variances. 3L Corporation v. Board of Adjustment City of Newark, 118 N.J. Super. 453 (L. Div. 1972) whereby variance was mandated to permit creation of a private day care center in a residential zone and Wickatunk Village, Inc. v. Township of Marlboro, 118 N.J. Super. 445 (Ch. Div. 1972) which directed variances to permit construction of a sewerage treatment plant in a residential zone.

More recently, New Jersey courts have specifically held that the need for varied housing especially in the low and moderate income area, does constitute special reasons to authorize a variance for private housing as well as public. In Brunetti v. Madison Township, 130 N.J. Super. 164 (L. Div. 1974), the court reversed the Township Council's denial of a variance for multi-family housing. The courts specifically directed the governing body to grant the plaintiff's application for a variance and in doing so, specifically stated that "a need for low and moderate income housing constitutes a special reason for justifying a zoning variance whether served by semi-public housing as in De Simone or by private housing as proposed by the plaintiff. The mayor and council were unreasonable in not so concluding." 130 N.J. at 168 (italics supplied).

The landmark case with regard to the need for multi-family dwellings and how that need satisfies the general welfare is the case of South Burlington County N.A.A.A.C. v. N.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975). The Supreme Court in the above case greatly emphasized that there is a dire need

for multi-family housing in the state, especially in the low and moderate income areas. The court stated that "it is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation." The Supreme Court went on to particularly note that "the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing communities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the good of the municipality. It has to follow that broadly speaking presumptive obligation arises for each such municipality affirmatively to plan and provide by its land use regulation a reasonable opportunity for an appropriate variety and place of housing including, of course, low and moderate cost housing, to meet the needs and desires and resources of all categories of people who may desire to live within its boundaries." 67 N.J. at 179 (italics supplied) Indeed, it cannot be imagined a stronger statement from our Supreme Court that at the present time one of the greatest ways of satisfying the general welfare is for a developing community to provide the varied type of housing for regional needs beyond its boundaries. As stated above, the municipalities must shed their "parochial attitudes" and look beyond the municipal boundaries to satisfy those needs.

The court further went on to state that "when it is shown that a developing municipality in its land regulations has

not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, there is an obvious showing of the violation of due process and that the municipality has the heavy burden to establish that there is rational reason for excluding this varied type of housing. 67 N.J. at 181.

The court emphasized continually that there is an acute need for multi-family housing. The court noted that "single family dwellings are the most expensive type of quarters and great numbers of families cannot afford them. Certainly, they are not pecuniarily feasible for low and moderate income families. Most young people and many elderly and retired persons" cannot afford the single family dwelling. 67 N.J. at 182.

What is very interesting to note when comparing the Mount Laurel case to the case at bar is that Mount Laurel's zoning ordinance does allow some form of julti-family dwellings. Warren Township is much worse when compared to the Supreme Court's criteria because its zoning ordinance does not in any way, shape or form provide for any type of multi-family housing.

In its conclusion, the Supreme Court did not restrict its decision solely to low cost housing. It stated that a developing municipality had the burden of providing varied housing, of which multi-family was one type and low cost housing another type.

What is particularly applicable to the case at bar is the comments of Supreme Court regarding zoning certain areas for industry and commerce without providing adequate housing. The Court stated that certainly when a municipality zones for industry and commerce for local tax benefit purposes, it has, without question, a corresponding obligation to provide adequate housing within the means of the employees involved in such use. "In other words, such municipalities must zone primarily for the living welfare of people not for the benefit of the local tax rate." 67 N.J. at 187-188.

The reasoning behind the Mount Laurel decision was carried forward by the Supreme Court in the case of Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977). The Supreme Court of New Jersey again reaffirmed the Mount Laurel decision that "requires that a municipality must allow for an appropriate variety and choice of housing." 72 N.J. at 516. The Court examined the Township of Madison and found that there was a substantial amount of land yet to be developed. Most of the zoning ordinance was devoted to single family residential. The Court found that the failure of the town to provide for its fair share of varied housing rendered that town to be in violation of its mandate. It further went on to comment at length that a municipality must provide its fair share of the regional needs for housing rather than just the needs of a municipality.

It is quite interesting to note in this regard that in doing so, the Supreme Court of New Jersey referred to an article written by an expert in the field. See Lindbloom, "Defining Fair

Share of Regional Need," 98 N.J.L.J. 633-644 (July 24, 1975). This article was written by Carl Lindbloom who is the very expert used by the plaintiff. In the Madison case, the Supreme Court again emphasizes "we impose upon each developing community the obligation to plan and provide by its land use regulation a reasonable opportunity for an appropriate variety and choice of housing." 72 N.J. at 559.

In South Burlington County NAACP v. Mt. Laurel Twp., N.J. 158 (1983), (hereinafter "Mt. Laurel II"), the N.J. Supreme Court reiterated and vigorously reaffirmed the principles established in Mt. Laurel I. The Court went at great lengths to assert that a community in a growth area has a duty to provide a varied type of housing, some of which should be low or moderate income or, in some circumstances, least cost housing. In the Appendix to the above decision, Warren Township was listed as a "growth area" and therefore, as such, clearly fell within the dictates and remedies provided in the above case.

The Court in this case went out of its way to note that most municipalities clearly sought to circumvent the holdings in Mt. Laurel I by dragging their feet or making it difficult for a developer to construct multi-family dwellings in a municipality. In order to rectify the above situation, the Supreme Court in Mt. Laurel II provided for drastic builder's remedies which would compel the municipalities to provide the requisite multi-family housing so sorely needed. The Supreme Court in citing the numerous instances of municipal zoning ordinances either prohibiting completely or discouraging multi-family housing, stated that "zoning

ordinances that either encourage this process or rectify its results are not promoting our general welfare, they are destroying it." 92 N.J. at 211. The Court also pointed out that each municipality had to provide for its fair share of the region's low and moderate income housing. 92 N.J. at 208-209.

Since the institution of the within action the Warren Township zoning ordinance has declared invalid. In the case of AMG Realty and Skytop Land Corp. v. Twp. of Warren, Docket No. L-23277-80, the Court invalidated the zoning ordinance of Warren Township for failing to provide multi-family dwellings. Warren Township has not included the plaintiff's property in any plans for zoning which would permit multi-family dwellings.

It is respectfully submitted that because of the above, the plaintiff has clearly demonstrated that the granting of this variance would certainly promote the general welfare. As stated above, the Supreme Court of New Jersey has listed Warren Township as being in a growth area. The granting of this variance would tend to promote the general welfare in that it would provide a sorely needed type of housing in the municipality and region where no such type of housing presently exists. The courts in all the cases stated above that this reason alone would constitute special reason for the granting of a variance.

Everyone agrees that there is an acute need for this type of housing in the United States. The plaintiff's planner stressed the reasons why there is a need for this type of housing in the Warren Township area. While the Public Advocate's planner did not conduct a study, his reaction was to confirm that there

is a need for this type of housing in the area, although he did confirm that in general there is a need for least-cost housing.

The Supreme Court decisions in Mt. Laurel I and II and Madison at Oakwood are matters of public record and are the law of the state. Any fair analysis of those cases compels one to the conclusion that Warren Township certainly meets the criteria set forth in those cases. Accordingly, it has an affirmative duty to provide its fair share of regional housing needs.

In addition, it has been confirmed by all parties that there is an expected growth of employment in Warren Township. Because of same, the township owes a duty to provide housing that is affordable for those persons being brought into the area because of that employment. A failure to provide multi-family dwellings would result in a major segment of the population being precluded from acquiring housing. This would apply to young married couples, the elderly, and especially, persons who are purchasing homes for the first time. The granting of this variance would provide a much needed type of housing in Warren Township for the above segment of the population. It is patently obvious that this, in turn, would promote the general welfare.

Nor can it be said that the granting of the variance for multi-family dwellings would violate the "negative criteria" of the statute. The case law interpreting the negative criteria indicates that the variance should be granted if the benefits of the variance outweigh the detrimental impacts, if any. See Kramer v. Board of Adjustment of Sea Girt, 45 N.J. at 293. The

negative impact or detrimental impact must be clearly substantial and must substantially outweigh the benefits of the variance. As the Kramer court stated:

> "The key word is 'substantially'... if on adequate proof, the board without arbitrariness concludes that the harms, if any, are not substantial and implicitly determines that the benefits preponderate the variance stands."
> Kramer v. Board of Adjustment of Sea Girt, 45 N.J. at 293.

The clear balancing requirement of the case law relating to the negative criteria illustrates the importance of consideration of the responsibilities of the municipality within the context of Mt. Laurel II with respect to the determination of whether the negative criteria of a use variance proposing multi-family use have been met. DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428 (1970). See also Fobe Associates v. Mayor and Council of Demarest, 74 N.J. 519 (1977).

There are additional "special reasons" for granting a use variance in this case separate from the general welfare issue. It is well established in New Jersey case law that a separate and independent grounds or "special reason" for a use variance exists if the subject property cannot be reasonably used for the zoned purpose. See Bern v. Fairlawn, 65 N.J. Super. 435, 446-448 (App. Div. 1961). As the Bern court pointed out..."While an undue hardship may constitute a special reason for a (d) variance, the degree and extent of hardship for a (c) is greater than that provided for a (d) variance." Id. at 446-447 and see Grimley v.

negative impact or detrimental impact must be clearly substantial and must substantially outweigh the benefits of the variance. As the Kramer court stated:

> "The key word is 'substantially'... if on adequate proof, the board without arbitrariness concludes that the harms, if any, are not substantial and implicitly determines that the benefits preponderate the variance stands."
> Kramer v. Board of Adjustment of Sea Girt, 45 N.J. at 293.

The clear balancing requirement of the case law relating to the negative criteria illustrates the importance of consideration of the responsibilities of the municipality within the context of Mt. Laurel II with respect to the determination of whether the negative criteria of a use variance proposing multi-family use have been met. DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428 (1970). See also Fobe Associates v. Mayor and Council of Demarest, 74 N.J. 519 (1977).

There are additional "special reasons" for granting a use variance in this case separate from the general welfare issue. It is well established in New Jersey case law that a separate and independent grounds or "special reason" for a use variance exists if the subject property cannot be reasonably used for the zoned purpose. See Bern v. Fairlawn, 65 N.J. Super. 435, 446-448 (App. Div. 1961). As the Bern court pointed out..."While an undue hardship may constitute a special reason for a (d) variance, the degree and extent of hardship for a (c) is greater than that provided for a (d) variance." Id. at 446-447 and see Grimley v.

Ridgewood, 45 N.J. Super. 574, 581 (App. Div. 1957) cert. den'd. 25 N.J. 102 (1957). The case law also indicates that where, due to the restrictions of the ordinance and conditions of the property of the surrounding area, the property cannot reasonably be used in an economical manner for its zoned purposes, a use variance is appropriate as long as the negative criteria are established. See Yahnel v. Board of Adjustment of Jamesburg, 79 N.J. Super., supra, at 517-518, and Scheff v. Township of Maple Shade, 149 Super. 448, 458 (App. Div. 1977). It is also established in New Jersey case law that a zoning ordinance may effectively result in an inverse condemnation of the property justifying either variance relief, a rezoning of the property or damages for inverse condemnation. See Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597 (1980) and also, Sheer v. Evesham Township, 184 N.J. Super. (1982).

It is respectfully submitted that the applicant has supplied more than sufficient evidence to establish that he is entitled to a use variance because the property cannot reasonably be used for single family residences. Again, without repeating the testimony at length, it suffices to say that the land in question is bordered on two sides by non-industrial use. Burroughs Company, the present largest industrial employer in the township, is immediately adjacent to the subject parcel. Cars from that facility are parked almost on top of the property line.

Next to that facility is a Chubb warehouse complex, with

its attendant commercial activity. Indeed, part of the plaintiff's property had been previously zoned industrial and was recently rezoned to residential at the time that the plaintiff sought to have a zoning change to permit multi-family dwellings. In addition to the above, there are dilapidated chicken coops immediately adjacent to the land in question and many non-residential uses along Mt. Horeb Road. The houses existing on Mt. Horeb Road presently near the site are not in the caliber of new 2,500 to 3,000 square foot homes which would sell for approximately $225,000.

Further, it is beyond dispute that there is a very poor percolation in this area and that individual septic systems could not be utilized. This, by itself, precludes the subject properties from ever being utilized as one family dwellings. In addition, a package treatment plant would not in any way be economically feasible for one family homes.

For these reasons, it can be readily seen that the land cannot be utilized for the purposes for which it is zoned; i.e., one family homes. Even if there were proper percolation and individual septic systems could be installed, would anyone honestly believe that a person would be willing to spend $225,000 to purchase a house which would be immediately adjacent to industrial uses, a variety of non-residential uses and dilapidated chicken coops?

On the other hand, the site is uniquely suitable for the proposed use. The parcel is a flag-type lot which contains

a pond and recreational fields. The architects went to great pains to incorporate the existing facilities in their design for the townhouses. It represents an ideal use in a transitional zone next to industrial uses.

It is well settled law in this state that a use variance can be granted if the proposed use is uniquely suitable to subject property. See Rolphe v. Borough of Emerson, 141 N.J. Super. 341 at 352-353. As outlined in Rolphe, if the property is uniquely suitable for the proposed use and the property will generally serve the purposes of the Municipal Land Use Law, then the variance should be granted. See also Ward v. Scott, 16 N.J. 16 (1954).

The Board resolution consists of 15 pages but only two of those pages are devoted to reasons in support of its decision denying the use variance. An analysis of those few reasons clearly indicates that they are not supported by the weight of credible evidence. Initially, the Board chose to completely ignore Mr. Lindbloom's testimony and instead concentrated and relied upon the testimony of Mr. Higgins, the Public Advocate's planner. It is respectfully submitted that the record on its face clearly shows that Mr. Lindbloom was eminently more qualified to testify on the issue at bar. Initially, Mr. Higgins merely obtained a degree as a landscape architect and never obtained a degree as a planner. He has never been involved in any project concerning townhouses and never had even qualified as an expert in the courts of New Jersey. This is to be contrasted with Mr. Lindbloom's copious experience as stated aforesaid.

Once the proposed project was reduced from 300 units to 184 units, Mr. Higgins readily conceded that this reduction satisfied most of his objections to the use variance. He was then merely left with the concern that there was no mass transit to the subject site; that it was a mile away from a shopping center and that Mt. Horeb Road had no sidewalks. However, he further admitted on cross-examination that there was no mass transit to any site in Warren Township and therefore no prospective multi-family dwelling site would satisfy this criterion. He also conceded that the proposed site, being less than a mile away from the center of Warren Township and shopping, would not pose any burden at all to those who have cars. Lastly, he admitted that there were many sites in Warren Township without sidewalks and that there had, in fact, been many multi-family units constructed in similar municipalities such as Warren Township which would not meet the above criteria concerning mass transit and sidewalks.

It is further submitted that the plaintiff's engineer had likewise more experience in the construction of on-site sewerage treatment plants than that of the Public Advocate. Mr. Kolody testified that he had never designed or supervised or had any connection with the construction of a sewerage treatment plant such as the one proposed in the application. He conceded that if Mr. Schindelar, the plaintiff's engineer, had been involved in the design and construction of 30 to 40 such type plants, then Mr. Schindelar would have more experience in this field. Mr. Kolody also conceded that he has no idea when sewer lines would reach the subject site, if ever. Lastly, Mr. Kolody conceded

that the reduction in the new plans of units from 384 "tends to minimize adverse effects to the surrounding environment and to the existing water course." The plans as amended no longer concerned him regarding the water course protection area. This would not prohibit the construction of townhouses on the subject area but would merely be a site plan consideration.

The Board relied on Mr. Kolody's rough hand drawn sketch that 16-18 single family homes could be developed on this site. Mr. Kolody admitted that this was a hand drawn sketch, not even drawn to scale; that this sketch involved filling in the entire existing lake. He also admitted that he had no idea what one family houses would sell for in this area and what the cost of homes that he proposed would be, or whether they would ever be practically marketable. This shows that this sketch is, at best, a rough one which is completely unsupported by any cost study or any engineering analysis. However, the Board chose to rely on this unsupported, rough sketch and chose to ignore the testimony of Mr. Schindelar and Mr. Earl. Lastly, the Board relies on the fact that no conceptual approval for the sewerage plant was obtained from the DEP or the Municipal Sewerage Authority. However, it was conceded at the hearings below that this was not necessary at this particular juncture and that said approval can easily be made a condition of the variance.

Thus, it can be readily seen from the paucity of reasons in alleged support of the denial that those reasons are clearly not supported by the weight of the credible evidence. The Board chose to completely ignore the uncontradicted evidence that the

land cannot reasonably be utilized for single family dwellings and that the granting of this variance would not impair the public good but would instead definitely promote the general welfare by permitting a use which is greatly needed in this area. In view of the above cases and for the above reasons, it is respectfully submitted that the Board clearly erred in denying the requested variance and that said decision should be reversed and the variance granted.

POINT II

THE ATTORNEY FOR THE WARREN TOWNSHIP BOARD OF ADJUSTMENT ENGAGED IN IMPROPER BEHAVIOR WHICH DEPRIVED THE PLAINTIFF OF A FAIR HEARING.

It is a basic principle of law that the Board of Adjustment in passing upon variance applications act in a quasi-judicial capacity. Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268 (1965). "While the hearing before the Board is not a formal trial, it partakes of the character of a quasi-judicial proceeding which must be governed by a spirit of impartiality...." Hill Homeowners v. Passaic Zoning Board of Adjustment, 129 N.J. Super. 168, 179 (L. Div. 1974).

It is respectfully submitted that a complete and detailed review of the record below clearly indicates that the questioning by the Board of Adjustment attorney was excessive, protracted and often needless. In addition, the content and amount of questioning clearly indicate that the Board attorney was not completely objective in his questioning.

If we examine the testimony of the first witness for the plaintiff, Barry Ginsberg, we notice that the Board members asked a total of 18 questions. However, the Board attorney asked an astonishing 116 questions of Mr. Ginsberg. This represents a 600% increase over the number of questions asked by the Board.

When the Board attorney cross-examined Mr. Schindelar, the plaintiff's engineer, he asked in excess of 184 questions. However, when he questioned Mr. Kolody, the Public Advocate's engineer, he asked a total of only 32 questions, over half of which dealt with a new problem concerning hearsay information and

not one of major substance.

Unfortunately, the notes for the transcript of Mr. Lindbloom's cross-examination were destroyed and we cannot determine the exact number of questions asked by the Board attorney. However, on Mr. Lindbloom's recross-examination, when he was merely questioned about the new reduced site plan, the Board attorney still managed to ask Mr. Lindbloom a total of 80 questions. However, he asked Mr. Higgins, the Public Advocate's planner, a total of only 49 questions on his original testimony.

When the Board attorney began his cross-examination of the first witness, he made a statement which revealed quite a bit about the nature of his questioning and its purpose. He stated that for the first time in six years that he has been attorney to the Board of Adjustment, he felt "a little awkward in the fact that I have prepared my questions and done what I considered to be my job as an attorney may make me somewhat suspect but nonetheless I'll proceed as I deem to be fit." (Tr. 10/23/80, p. 78, l. 14-21). Thus, his initial statement at the very outset of his cross-examination turned out to be quite prophetic as can be seen by the protracted examination of all the plaintiff's witnesses.

Moreover, a review of the transcript of that cross-examination clearly reveals that the Board attorney asked questions of the plaintiff's witnesses that were designed to elicit damaging answers bur asked much more mild and innocuous questions of the Public Advocate and township witnesses which were designed to support their case. I think the transcript also makes it readily apparent that the Public Advocate was not neutral from

the outset but asked questions and produced witnesses who were adverse to the plaintiff. Thus, the plaintiff found himself encountering two adversary attorneys who were, by definition, supposed to have been neutral.

For instance, the Mt. Laurel issue was clearly an issue raised in the various proceedings. Mr. Lindbloom was cross-examined by the Board and its attorney concerning Mt. Laurel.

When the plaintiff cross-examined Mr. Higgins, the Public Advocate's planner, it was discovered that Mr. Higgins had not even read the Mt. Laurel decision. However, when plaintiff questioned Mr. Higgins more closely concerning Mt. Laurel, the Board attorney himself raised an objection to the questioning, citing that questions concerning Mt. Laurel were not really relevant. It is quite enlightening to see that the Public Advocate himself did not raise the objection concerning his own witness but the Board attorney did it on his own volition.

In the transcript of June 22, 1981, at page 20, the Board attorney notes that he is raising objections to Mt. Laurel questions on his own in the absence of an objection by the Public Advocate because he feels that the Mt. Laurel decision was not relevant. However, it appeared that no objection was raised when Mr. Lindbloom, the plaintiff's planner, was questioned about Mt. Laurel. Nor did he ever raise an objection when Mr. Lindbloom raised it as part of the plaintiff's affirmative case. It was quite obvious from the record that the Board attorney was trying to save Mr. Higgins from any further embarrassing questions concerning Mt. Laurel and his candid admission that he had never read

the case. This was done by the Board attorney in the complete silence and absence of any objection from the Public Advocate. The objection was also made in face of the fact that Mt. Laurel was certainly a relevant factor to the requested use variance. It is quite obvious that a review of the record will reveal that the tenor of the Board attorney's questions was not neutral in thought or purpose. As stated above, his questioning of plaintiff's witnesses was needlessly lengthy, with the purpose of trying to find fault in the testimony. However, such was not the case with the township witnesses and those of the Public Advocate where the questions were far less in number, muted and supportive in nature.

It is respectfully submitted that the above clearly shows that the Board of Adjustment attorney clearly overstepped his bounds by the numerous and prolific questions asked of the plaintiff's witnesses. Questions asked by the Board attorney were far greater than those asked by the seven Board members together. He also far exceeded the number of questions asked by the Public Advocate. In fact, the Board attorney, by engaging in this behavior, literally became tantamount to a Board member during the course of the proceedings and thereby usurped their function. Additionally, any objective reader of these transcripts is compelled to the conclusion that the Board attorney was asking questions of the various witnesses which would have been designed to affirm, on appeal, any Board decision denying the requested use variance. The questions asked of the plaintiff's expert witnesses were clearly designed to be counterproductive and damaging. The

questions asked of the Public Advocate's witnesses were far less numerous and tended to reinforce the Public Advocate's and township's witnesses.

As stated above, the Board of Adjustment exercises a quasi-judicial function and, logically, so does the Board attorney. Our cases have clearly held that even a judge in his or her full judicial capacity should exercise restraint in cross-examining witnesses. In Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J. Super. 522 (App. Div. 1960), the Court recognized judicial restraint in examining a witness even in the absence of a jury. The Court stated that if a judge "participates to an unreasonable degree in the conduct of a trial, even to the point of assuming the role of an advocate, what he does may be just as prejudicial to a defendant's rights as if the case were tried to a jury." 62 N.J. Super. at 549. In Ridgewood v. Sreel Investment Corp., 28 N.J. 121, 132, the Court stated that if there is excessive questioning by a judge, it may reach "a point at which the judge may cross that fine line that separates advocacy from impartiality. When that occurs there may be substantial prejudice to the rights of one of the litigants." 28 N.J. at 132.

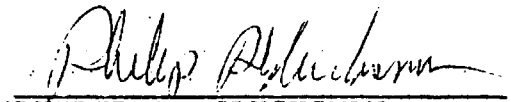
In Polulich v. J.G. Schmidt Tool Die and Stamping Co. 46 N.J. Super. 135, 144, (County Court, 1957,) the Court stated, "The power to take an active part in the trial of a case must be exercised by the judge with the greatest restraint...."

Thus, it can be seen by the above that the Board attorney's excessive and unobjective questioning was clearly improper.

CONCLUSION

In view of the foregoing cases and for the above reasons it is respectfully submitted that the decision of the Board of Adjustment be reversed and that the requested variance be granted.

Respectfully submitted,



PHILIP R. GLUCKSMAN
Attorney for Plaintiff

variance for multi-family housing largely in the negative criteria of the statute. See 74 N.J. at pp.537-539. Other cases entailing multi-family housing applications in which the Appellate Division -- in denying developers' proposals -- relied basically on the negative criteria, include Nigito v. Borough of Closter and Weiner v. Zoning Board of Adjustment of Glassboro, both of which were discussed in Point III above. In Weiner, the Court accepted "the beneficent public welfare purpose of encouraging housing for senior citizens and the propriety of such a use as a permissible ground for a special reason variance" but then admonished that "it does not necessarily follow that such a use variance must be granted regardless of the character of the district involved and the departure from the bulk and density requirements of that district." 144 N.J. Super at p.515 (Emphasis by the Court). In Nigito, the Appellate Division reversed the Trial Court and thereby sustained the municipality's denial of a special use variance for construction of garden apartments (for families of moderate income. Because of some discordant uses in the immediate area, the Trial Judge had concluded that the proposed apartment complex would not be out of keeping with the character of the area and that the subject parcel was particularly suited for apartment use. 142 N.J. Super at

pp.6-7. The Appellate Division in reversing, stated that:

> "No apparent consideration was given [by the Trial Court] to the borough's conclusion that the requested variance failed to comply with the negative criteria set forth in N.J.S.A. 40:55-39(d), necessary prerequisites to a variance pursuant to that provision." 142 N.J. Super. at p.7.

The Court went on to hold that the municipality could reasonably base its denial of the requested variance upon a violation of the negative criteria. At p.8.

Without getting into any detailed analysis of same, suffice it to say that each of the Board's conclusions in the instant case as to the negative criteria are well supported by both the evidence and the prior factual findings in the Resolution. This is true with regard to excessive density and lack of adequate buffering in the front portion of the tract. (No.2(a)); incompatibility of usage (No. 2(b)); adverse impact upon the existing roadway (No.2(c)); conceptual feasibility for the proposed on-site sewerage treatment plant (No.2(d)); and impairment generally to the Zone Plan and creation of an undesirable planning precedent (No.2(e)).

One topic treated by these conclusions -- basic feasibility of the proposed sewerage system -- does warrant some discussion, however. On this particular point, the plaintiff and defendant are in both factual and legal disagreement. In Conclusion 2(d) of the Resolution, the Board noted, among other things, that:

"No conceptual approval for the sewerage plant was sought or obtained from either the New Jersey Department of Environmental Protection or the Warren Township Sewerage Authority."

At page 30 of his brief, the plaintiff states:

"Lastly, the Board relies on the fact that no conceptual approval for the sewerage plant was obtained from the DEP or the Municipal Sewerage Authority. However, it was conceded at the hearings below that this was not necessary at this particular juncture and that said approval can easily be made a condition of the variance."

No citation is furnished as to where during the proceedings the Board allegedly "conceded" that preliminary or conceptual feasibility of the proposed sewerage system was only a "detail" that could be discussed or worked out during a later stage of processing of the application. The applicant's engineer acknowledged that neither he nor anyone on behalf of the plaintiff had touched base with the Township Sewerage Authority to inquire as to the conceptual feasibility of what was proposed (Tr. 1/4/82, p.38, lines 10-16). In his report, the Township Planning Consultant saw fit to note that:

"The applicant gave no evidence of application to NJDEP for approval of the system's concept and therefore no certainty of sewer treatment facilities can be concluded." (B-4 Ev., Paragraph 7, page 2).

By virtue of the fact that it deemed it appropriate in Conclusion 2(d) to cite the lack of any attempt to secure conceptual approval, the Board obviously -- and contrary to plaintiff's assertion that the Board felt it unnecessary to be

treated at this juncture -- thought the matter to be of importance. The Board's concern for a showing of such conceptual approval at an early stage of the proceedings, finds legal support in the recent decision of Field v. Franklin Township, 190 N.J. Super. 326 (App. Div. 1983). In Field, the Court noted that:

> "Certain elements -- for example, drainage, sewage disposal and water supply -- may have such a pervasive impact on the public health and welfare in the community that they must be resolved at least as to feasibility of specific proposals or solutions before preliminary approval is granted." 190 N.J. Super. at pp.332-333.

POINT VII

WEIGHING THE CREDIBILITY OF THE VARIOUS WITNESSES WAS FOR THE BOARD.

At pages 28 and 30 of his brief, plaintiff alleges that in its Resolution the Board "chose to completely ignore "the testimony of his experts, Messrs. Lindbloom, Schindelar and Earl. The allegation is patently absurd. A reading of the Board's rather comprehensive Resolution discloses that -- instead of "ignoring" the testimony of any of the experts -- the Board obviously took pains to carefully recite and review all of the pertinent testimony. If plaintiff's real complaint is that the Board of Adjustment found certain of the testimony of witnesses other than the applicant's to be more convincing, that is no ground for legal objection. It is well settled that:

> "The board of adjustment exercises a quasi-judicial function. Schmidt v. Board of Adjustment of Newark, 9 N.J. 405, 420 (1952). In so functioning, as with other administrative agencies, it has the choice of accepting or rejecting the testimony of witnesses. Where reasonably made, such choice is conclusive on appeal." Reinauer Realty Corp. v. Nucera, 59 N. J. Super. 189,201 (App. Div. 1960), certif. den. 32 N.J. 347 (1960).

"Even the testimony of expert witnesses may be weighed, and found wanting, by the board of appeals." Rathkopf, The Law of Zoning and Planning, Third Edition, 43-4.

Without responding, point by point, to each of plaintiff's challenges to the qualifications of James W. Higgins, the Public Advocate's planning expert, the Board would merely note that some of the statements regarding this witness' qualifications appearing near the bottom of page 28 of plaintiff's brief are simply wrong. And, in any event, the acceptance of the experts' qualifications, and the weighing of their testimony, was a function peculiarly that of the Board. See Paragraph 16 of the Board's Resolution. Moreover, even though no mention is made of Mr. Chadwick at pp.28-30 of plaintiff's brief, it is undoubtedly the case that the Township Planner -- rather than Mr. Higgins or anyone else -- was given the greatest weight by the Board from amongst the several experts who testified (Mr. Chadwick's opinions are quoted at length in the Resolution and he is specifically relied upon and cited in the Board's conclusion). Notably, the applicant and all interested parties readily stipulated to Mr. Chadwick's expertise as a planner (Tr. 8/31/81, p.8, lines 13-22).

After deliberation, the Board of Adjustment found that the plaintiff had not established either special reasons or the negative criteria prerequisite to a use variance. The credibility of the various witnesses was weighed and

findings and conclusions were made in accordance with the statute and decisional law. See Kramer v. Board of Adjustment, Sea Girt, supra, 45 N.J. at p.288. The record fully supports the Board's decision.

POINT VIII

PLAINTIFF MISUSES AND MISAPPLIES THE MT. LAUREL DOCTRINE IN THIS CHALLENGE TO A BOARD OF ADJUSTMENT'S DENIAL OF A VARIANCE.

In his letter to the Court dated October 27, 1983, plaintiff's counsel claims that, "pursuant to the Pretrial Order, this Brief only concerns the issues reached against the Board of Adjustment." The Pretrial Order entered by this Court on October 29, 1982 specifically severed from any present consideration in this action, the issue of "validity and application of Zoning Ordinance" as it relates to plaintiff's lands. Therefore, based upon the terms of the Pretrial Order and plaintiff's attorney's own letter, no consideration should be given in the plaintiff's brief to the broad issue of the validity of Warren Township's Zoning Ordinance. A reading of the brief submitted by plaintiff discloses, however, that there has been manifest non-compliance with the terms of the Pretrial Order.

After a few introductory pages of legal argument (starting on page 16), the plaintiff then proceeds to devote a substantial portion of his brief (from the last paragraph on page 18 through the next-to-last paragraph on page 24) to an analysis of the Mt. Laurel I and Mt. Laurel II decisions, the follow-up

case of Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977), and the AMG Realty case involving a constitutional challenge to Warren's Zoning Ordinance. In the cited sections of his brief, extensive discussion is given to housing needs, employment growth, "fair share", "growth area" and related types of peculiarly Mt. Laurel considerations. Overall, nearly 40% of the first (and main) point of legal argument in plaintiff's brief is devoted to Mt. Laurel type presentation.

Not only did this Court's Order of severance (the Pretrial Order) state that any consideration to be given to the AMG case would be only as part of the later phase of the litigation and in conjunction with an Amended Complaint to be filed. An additional subsequent "case management directive" for this action was forthcoming from the Hon. Eugene D. Serpentelli, specially-appointed Mt. Laurel Judge for this portion of New Jersey. Defendant would refer the Court to the annexed copy of letter dated July 12, 1983 from Judge Serpentelli to counsel. It will be noted that the Court expressed "the assumption that the Board of Adjustment proceedings were not grounded in a Mount Laurel claim." Judge Serpentelli further states that "I assume, therefore, that your briefs will not be addressed to any Mount Laurel claims." He indicates that if any Mt.

Laurel claims do evolve out of the Board of Adjustment proceedings, then the file should probably be returned to him for determination. Consequently, the defendant respectfully submits that the cited portions of plaintiff's brief -- being in violation of both the Pretrial Order and Judge Serpentelli's instructions (as well as being contrary to the representations as to the brief's contents by plaintiff's own counsel) -- should be stricken by this Court.

In any event, the plaintiff's reliance on Mt. Laurel is misplaced. Our Chief Justice in Mt. Laurel II said that: "Mount Laurel is not to be used as a substitute for a variance." 92 N.J. at p.326. The criterion which a Board of Adjustment must consider when deciding a use variance case for special reasons has not been changed by Mt. Laurel II:

> "Finally, we emphasize that our decision to expand builder's remedies should not be viewed as a license for unnecessary litigation when builders are unable, for good reason, to secure variances for their particular parcels (as Judge Muir suggested was true in the Chester Township case). Trial courts should guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mount Laurel doctrine." (Emphasis supplied) 92 N.J. at pp.280-281.

"If the ordinance is so outmoded and ill-fitting, its alteration must be by amendment or revision. It may not be done by variance." Schoelpple v. Woodbridge Twp., 60 N.J. Super. 146,

152 (App. Div. 1960). Mt. Laurel type issues are constitutional ones which local administrative bodies, such as a Board of Adjustment, have no authority to decide. 92 N.J. at p.342, footnote 73.

CONCLUSION

For all of the reasons set forth above, the defendant, Board of Adjustment of the Township of Warren, respectfully requests that the relief requested by plaintiff, Lawrence V. Steinbaum, be denied and that the Board's Resolution be affirmed by the Court.

Respectfully submitted,

BERNSTEIN, HOFFMAN & CLARK, P.A.

By: _____
Barry M. Hoffman
A Member of the Firm

SCHEDULE OF SUPPORTING DOCUMENTATION FOR FINDINGS OF FACT IN BOARD OF ADJUSTMENT RESOLUTION

(Lawrence V. Steinbaum, Case No. 80-8)

NOTE: Sentence numbering refers to numbers added to annexed copy of Resolution.

All citations are to the transcripts of the proceedings unless indicated otherwise below.

Paragraph 1

Sentence 1 - Oct. 6, 1980, p.66.
Sent. 2 - Oct. 6, 1980, p.66; report of Michael J. Kolody, P.E. & L.S. (PA-3 Ev.), p.1.
Sent. 3 - Oct. 6, 1980, p.66.
Sent. 4 - Oct. 6, 1980, p.66; March 18, 1982, pp. 9-10, 13.
Sent. 5 - Oct. 23, 1980, p.82; March 18, 1982, p.9.
Sent. 6 - Oct. 6, 1980, p.67; Oct. 23, 1980, p. 85,89; August 31, 1981, p.16; March 18, 1982, p.10; report of John T. Chadwick (B-5 Ev.), p.2.
Sent. 7 - Warren Township Zoning Ordinance and Zoning Map.
Sent. 8 - Oct. 6, 1980, p.67.

Paragraph 2

Sent. 1 - Oct. 6, 1980, p.66
Sent. 2 - Oct. 6, 1980, p.67; Warren Township Zoning Map.
Sent. 3 - Oct. 6, 1980, p.67; Oct. 15, 1981, p.21; report of Carl Lindbloom (A-10 Ev.), p.2.
Sent. 4 - Oct. 6, 1980, p.67.
Sent. 5 - Oct. 6, 1980, p.67; report of Carl Lindbloom (A-10 Ev.), p.2.
Sent. 6 - Report of John T. Chadwick (B-4 Ev.), p.2.
Sent. 7 - Oct. 6, 1980, p.67.
Sent. 8 - Oct. 6, 1980, p.67.

Paragraph 3

Sent. 1 - Oct. 6, 1980, p.61.
Sent. 2 - Oct. 6, 1980, p. 76.
Sent. 3 - Oct. 15, 1981, pp. 75-78.
Sent. 4 - Oct. 15, 1981, p. 81.
Sent. 5 - Oct. 15, 1981, p.77 (except 184 ÷ 7 = 26.29)

Paragraph 4

Sent. 1 - Warren Township Zoning Ordinance and Zoning Officer Denial Letter.
Sent. 2 - Hearing Notice.
Sent. 5 - Oct. 6, 1980, pp. 44-45.

Paragraph 5

Sent. 1 - Oct. 6, 1980, p.61.
Sent. 2 - Oct. 6, 1980, pp 66-73.
Sent. 4 - Oct. 6, 1980, p.65.
Sent. 5 - Oct. 15, 1981, pp.81-82.
Sent. 6 - Oct. 15, 1981, pp.81-82.
Sent. 7 - Oct. 15, 1981, pp.81-82.
Sent. 8 - Oct. 6, 1980, p.76.
Sent. 9 - Oct. 23, 1980, p.44.
Sent. 10 - Oct. 6, 1980, p.85.
Sent. 11 - Oct. 6, 1980, p.85; Oct. 23, 1980, p.104.
Sent. 12 - Oct. 6, 1980, pp. 81-82.
Sent. 13 - Oct. 6, 1980, p.80.
Sent. 14 - Oct. 6, 1980, p.84.
Sent. 15 - Oct. 6, 1980, p.84.
Sent. 16 - Oct. 6, 1980, p.67; Oct. 23, 1980, p.88.
Sent. 17 - Oct. 23, 1980, p.85,89. Second half of sentence is on pp.86-87.

Paragraph 6

Sent. 1 - Oct. 15, 1981, p.71.
Sent. 2 - Oct. 15, 1981, pp.76-77.
Sent. 3 - Oct. 15, 1981, p.77.
Sent. 4 - Oct. 15, 1981, pp.78-79.
Sent. 5 - Oct. 15, 1981, p.77,83.
Sent. 6 - Oct. 15, 1981, pp.85-86.
Sent. 7 - Oct. 15, 1981, p.98.
Sent. 8 - Oct. 15, 1981, p.98,105.
Sent. 9 - Oct. 15, 1981, p.82,84.
Sent. 10 - Oct. 15, 1981, pp.86-87.

Paragraph 7

Sent. 1 - Nov. 13, 1980, p.9.
Sent. 2 - Nov. 13, 1980, p.22; Jan. 4, 1982, p.7.
Sent. 3 - Dec. 1, 1980, p.55.
Sent. 4 - Jan. 4, 1982, p.23.
Sent. 5 - Nov. 13, 1980, p.37.
Sent. 6 - Dec. 1, 1980, pp.60-61; Jan. 4, 1982, p.44.
Sent. 7 - Jan. 4, 1982, p.45
Sent. 8 - Dec. 1, 1980, p.80

Paragraph 8

Sent. 1 - Jan. 4, 1982, p.9.
Sent. 2 - Nov. 13, 1980, p.13.
Sent. 3 - Nov. 13, 1980, pp.15-16.
Sent. 4 - Nov. 13, 1980,pp.15-16,26.
Sent. 5 - Jan. 4, 1982, p.14.
Sent. 6 - Jan. 4, 1982, pp.17-18.
Sent. 7 - Nov. 13, 1980, pp. 19-20,26.
Sent. 8 - Jan. 4, 1982, p.24.
Sent. 9 - Dec. 1, 1980, p.38; Jan. 4, 1982, p.38.
Sent. 10 - Nov. 13, 1980, pp.76-79.

Paragraph 9

Sent. 1 - Jan. 19, 1981, p.22.
Sent. 2 - Jan. 19, 1981, p.23.
Sent. 3 - Jan. 19, 1981, p.31,37,51-52.
Sent. 4 - Jan. 19, 1981, p.28.
Sent. 5 - Jan. 19, 1981, p.28.
Sent. 6 - Jan. 19, 1981, p.26.
Sent. 7 - Jan. 19, 1981, p.24,27-28.
Sent. 8 - Jan. 19, 1981, pp.29-30.
Sent. 9 - Jan. 19, 1981, p.56.
Sent. 10 - Jan. 19, 1981, p.30
Sent. 11 - Feb. 5, 1981 Minutes (no transcript available),p.22.

Paragraph 10

Sent. 1 - Jan. 19, 1981, pp.34-35
Sent. 2 - Jan. 19, 1981, p.35
Sent. 3 - Jan. 19, 1981, p.36.
Sent. 4 - Jan. 19, 1981, p.36; report (A-10 Ev.), p.6.
Sent. 5 - Jan. 19, 1981, p.36.
Sent. 6 - Nov. 12, 1981, pp.42-43.

Paragraph 10 (continued)

Sent. 7 - Jan. 19, 1981, pp.37-38, 41-42.
Sent. 8 - Jan. 19, 1981, p.114, 42; Feb. 5, 1981 Minutes, pp. 11-12,21; report (A-10 Ev.), p.8.
Sent. 9 - Feb. 5, 1981 Minutes, p.12; June 1, 1981, p.44; June 22, 1981, pp.77-79; report of James W. Higgins (PA-2 Ev.),p.2; report of John T. Chadwick (B-4 Ev.), pp.4-5.

Paragraph 11

Sent. 1 - Jan. 19, 1981, pp.44-50.
Sent. 2 - Jan. 19, 1981, pp.51-52.
Sent. 4 - Jan. 19, 1981, pp.87-90.
Sent. 5 - Jan. 19, 1981, pp.87-90.
Sent. 6 - Nov. 12, 1981, p.130.

Paragraph 12

Sent. 1 - Jan. 19, 1981, pp.55-56.
Sent. 2 - Jan. 19, 1981, p.57; Feb. 5, 1981 Minutes, p.24.
Sent. 3 - Nov. 12, 1981, p.111.
Sent. 4 - Nov. 12, 1981, p.119.
Sent. 5 - Nov. 12, 1981, p.113.
Sent. 6 - Nov. 12, 1981, p.121.

Paragraph 13

Sent. 1 - April 6, 1981, p.4.
Sent. 2 - April 6, 1981, pp.6-7.
Sent. 3 - April 6, 1981, p.7,19.
Sent. 4 - April 6, 1981, p.40,51-52.
Sent. 5 - April 6, 1981, pp.7-8.
Sent. 6 - April 6, 1981, p.12,17.
Sent. 7 - April 6, 1981, p.12.
Sent. 8 - April 6, 1981, p.13.
Sent. 9 - April 6, 1981, p.14.
Sent. 11 - April 6, 1981, p.65.
Sent. 12 - April 6, 1981, pp.65-66.

Paragraph 14

Sent. 1 - May 4, 1981, p.6.
Sent. 2 - May 4, 1981, p.8, 14
Sent. 3 - May 4, 1981, p.10.
Sent. 4 - May 4, 1981, pp.55-56.

Paragraph 14 (continued)

Sent. 5 - May 4, 1981, pp.12-13.
Sent. 6 - May 4, 1981, pp.20-21,15.
Sent. 7 - May 4, 1981, p.15.
Sent. 8 - May 4, 1981, p.15.
Sent. 9 - May 4, 1981, p.26.
Sent. 10 - May 4, 1981, p.16, 23-24,26-27.

Paragraph 15

Sent. 1 - May 4, 1981, pp.28-29.
Sent. 2 - May 4, 1981, p.46.
Sent. 3 - May 4, 1981, p.77
Sent. 4 - May 4, 1981, pp.80-83.
Sent. 5 - May 4, 1981, pp.84-85.
Sent. 6 - May 4, 1981, pp.99-100.

Paragraph 16

Sent. 1 - June 1, 1981, p.2.
Sent. 2 - June 1, 1981, p.11.
Sent. 3 - June 1, 1981, p.27,11.
Sent. 4 - June 1, 1981, p.12.
Sent. 5 - June 1, 1981, pp.12-13.
Sent. 6 - June 1, 1981, p.35; Nov. 12, 1981, p.44.

Paragraph 17

Sent. 1 - June 1, 1981, pp.36-37, 39-40, 44.
(a)-(i) - criteria re: suitability of any site - June 1, 1981, p.46.
Sent. 2 - June 1, 1981, pp.46-61; Feb. 4, 1982, pp.42-43.
Sent. 3 - June 1, 1981, p.46; June 22, 1981, p.13; Feb. 4, 1982, p.42.
Sent. 4 - Feb. 4, 1982, p.42, pp.69-70.
Sent. 5 - Feb. 4, 1982, pp.41-42.
Sent. 6 - June 1, 1981, pp.53-59; Feb. 4, 1982, pp.42-43.

Paragraph 18

Sent. 1 - June 1, 1981, p.44, 48.
Sent. 2 - June 1, 1981, p.48.
Sent. 3 - June 1, 1981, p.48; Feb. 4, 1982, p.38.

Paragraph 18 (Continued)

Sent. 4 - Feb. 4, 1982, p.38.
Sent. 5 - June 1, 1981,pp.55-56; Feb. 4, 1982, pp.40-41
Sent. 6 - Feb. 4, 1982, p.39.
Sent. 7 - June 1, 1981,pp.55-56.

Paragraph 19

Sent. 1 - Feb. 4, 1982, p.74.
Sent. 2 - Feb. 4, 1982, p.75.
Sent. 3 - Feb. 4, 1982, pp.41-42.
Sent. 4 - Feb. 4, 1982, p.41,61.
Sent. 5 - June 1, 1981, p.60; Feb. 4, 1982, p.76.
Sent. 6 - Feb. 4, 1982, pp.41-42,76.
Sent. 7 - June 1, 1981, p.61; June 22, 1981,p.5.
Sent. 8 - June 1, 1981, p.61; June 22, 1981, p.5.
Sent. 9 - June 1, 1981, p.44; June 22, 1981, pp.77-79; report (PA-2 Ev.),p.2.
Sent. 10 - June 1, 1981, p.41.
Sent. 11 - June 1, 1981, p.41,60; Feb. 4, 1982, p.41; report (PA-2Ev.),p.6.

Paragraph 20

Sent. 1 - June 22, 1981, p.96.
Sent. 2 - Reports marked PA-3 Ev. and PA-4 Ev.
Sent. 3 - June 22, 1981,p.116; July 20, 1981, pp.52-53; report (PA-3 Ev.),p.3.
Sent. 4 - Feb. 4, 1982, p.8; report (PA-4 Ev.),p.2.
Sent. 5 - June 22, 1981, pp.109-110; Feb. 4, 1982,p.5.
Sent. 6 - Feb. 4, 1982, p.5.
Sent. 7 & 8 - June 22, 1981, p.110; July 20, 1981, p.115; report (PA-3 Ev.),p.2.
Sent. 9 - July 20, 1981, pp.115-118.
Sent. 10 - July 20, 1981, p.118.
Sent. 11 - Feb. 4, 1982, pp.13-14.
Sent. 12 - Feb. 4, 1982, p.14.
Sent. 13 - Feb. 4, 1982, p.19; report (PA-4 Ev.),pp.1-2.
Sent. 14 - Feb. 4, 1982, pp.22-24; report (PA-4 Ev.),pp.1-2.
Sent. 15 - July 20, 1981, pp.96-99.

Paragraph 21

Sent. 1 - Aug. 31, 1981, p.9,12; March 18, 1982,p.5.
Sent. 2 - Aug. 31, 1981, p.9.
Sent. 3 - Aug. 31, 1981, p.8.
Sent. 4 - Aug. 31, 1981, pp.11-13.
Sent. 5 - Aug. 31, 1981, p.13.
Sent. 6 - Aug. 31, 1981, p.16.
Sent. 7 - Aug. 31, 1981, pp.28-31.
Sent. 8 - Aug. 31, 1981, p.31.
Sent. 9 - Aug. 31, 1981, p.31.
Sent. 10 - Aug. 31, 1981, p.18.
Sent. 11 - Aug. 31, 1981, pp 18-19.
Sent. 12 - Aug. 31, 1981, p.19.
Sent. 13 - Aug. 31, 1981, p.19.
Sent. 14 - Aug. 31, 1981, pp 19-20 (quote is from Minutes, p.184)
Sent. 15 - Oct. 15, 1981, p.21.
Sent. 16 - Oct. 15, 1981, pp.21-22.
Sent. 17 - Oct. 15, 1981, p.23.

Paragraph 22

Sent. 1 - Aug. 31, 1981, p.49.
Sent. 2 - Aug. 31, 1981, p.49.
Sent. 3 - Aug. 31, 1981, p.49.
Sent. 4 - Aug. 31, 1981, p.49 (quote is from Minutes, p.188).
Sent. 5 - Oct. 15, 1981, p.14.
Sent. 6 - Aug. 31, 1981, pp.41-42.
Sent. 7 - Aug. 31, 1981, pp.65-66.
Sent. 8 - Oct. 15, 1981, p.9,33.

Paragraph 23

Sent. 1 - Aug. 31, 1981, p.48.
Sent. 2 - Oct. 15, 1981, p.38.
Sent. 3 - Oct. 15, 1981, pp.35-36.
Sent. 4 - March 18, 1982, p.29.
Sent. 5 - Aug. 31, 1981, p.41.
Sent. 6 - Aug. 31, 1981, p.43 (quote is from Minutes, p.187).

Paragraph 24

Sent. 1 - March 18, 1982, pp.9-10,12,15.
Sent. 2 - March 18, 1982, pp.8-9.
Sent. 3 - March 18, 1982, p.15.
Sent. 4 - March 18, 1982, p.47.
Sent. 5 - March 18, 1982, p.11,77-78.
Sent. 6 - March 18, 1982, pp.26-28.
Sent. 7 - March 18, 1982, pp.27-28.

Paragraph 25

Sent. 1 - March 29, 1982, pp.4,8,45,61-66.