Warren 1984 (4/3)

Supplemental Brief Concerning Board Attorney Issue (2 copies)
Attch: Lawrence Opinion + Cover letter to Judge

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SOMERSET COUNTY
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

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.

Docket No. L-59706-81 P.W.

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SUPPLEMENTAL BRIEF CONCERNING BOARD ATTORNEY ISSUE

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On the Brief

TABLE OF CONTENTS

## INTRODUCTORY STATEMENT

The initial brief submitted by the Board of Adjustment deals with the basic challenge by the plaintiff to the Board's Resolution denying the application of Lawrence V. Steinbaum to construct townhouse dwelling units on the property which was the subject of the Board hearings. This Supplemental Brief is limited to the allegations raised in the Second Count of the Complaint.

In the Second Count, the plaintiff contends that:

> "2. During the course of the hearings before the defendant, Board of Adjustment of the Township of Warren, as designated above, the attorney for the defendant, Warren Township Board of Adjustment, exceeded his proper role as attorney by usurping the function of the Board of Adjustment by continually and repeatedly asking numerous questions of the plaintiff's witnesses far beyond what was necessary to carry out the function of a Board attorney. Further, the questions were inherently biased in nature.
>
> 3. The nature and frequency of the questions described above indicates that the Board attorney was not conducting himself in a fair and impartial manner during these hearings.
>
> 4. Because of the improper and unreasonable behavior of the Board attorney as described above, the plaintiff was effectively deprived of his right to a fair, proper, and impartial hearing."

In its Answer, the Board denies all of the above-quoted allegations and, in addition, it states the following by way of affirmative defense:

> "With respect to the allegations of the Second Count, the Attorney for the Board of Adjustment did not exceed his proper role and acted at all times during the proceedings in a fair, impartial and unbiased manner."

The plaintiff's separate pretrial contentions allege, in pertinent part, that:

"During the course of these hearings the Board attorney usurped the function of the Board by asking an inordinate amount of questions which were primarily designed to elicit responses that would be unfavorable to the plaintiff's application."

The Board, however, maintains in its pretrial contentions that:

"... the Board emphatically denies any allegation that its Attorney exceeded his proper role during the hearings and maintains that a careful review of the record will disclose that the Board Attorney acted at all times in a fair, impartial and unbiased manner."

Consideration of these conflicting claims and contentions regarding the conduct of the Board Attorney necessarily requires a careful review of the transcripts of the Board proceedings. Before undertaking that analysis, however, some discussion would be appropriate as concerns the remedy or relief sought in this action by plaintiff on account of the alleged improper behavior of the Board attorney.

## ARGUMENT

### POINT I

EVEN IF WE ASSUME, ARGUENDO, THAT THE BOARD ATTORNEY DID "EXCEED HIS PROPER ROLE" DURING THE VARIANCE HEARINGS, THE PLAINTIFF WOULD, AT MOST, BE ENTITLED TO A REMAND AND NOT TO HIS REQUESTED REVERSAL OF THE BOARD DECISION.

As already stated in the defendant's Introductory Statement, the Board emphatically and absolutely denies that its attorney conducted himself in an improper manner during the hearings. For the reasons which will be documented later in this memorandum, the Board submits that the allegations of the Second Count of the Complaint are wholly baseless. However, before undertaking the review and analysis of the record which will substantiate the Board's position in this regard, it is worth noting that -- even if one were to assume for discussion purposes that the Board Attorney did somehow exceed his proper role during the proceedings -- the plaintiff would still not be entitled to the relief sought at the conclusion of his brief and at the end of the Second Count of the Complaint, i.e. reversal by this Court of the Board's denial of the requested variance and a direction that the variance be granted.

The Board of Adjustment's position is that -- especially under the circumstances of this particular case -- the alleged "excessiveness" or procedural impropriety of its attorney should in no way form a basis for "infecting", "tainting" or "reversing" the substantive determination or Resolution of the Board itself. The Board of Adjustment members decided by a 5 to 1 vote, after holding extensive hearings on the plaintiff's original application and his amended application, to deny the requested use variance. During the hearings, the applicant's attorney voiced numerous objections as to the conduct

of the Board attorney and, in particular, as to the length of the questioning of certain of the applicant's witnesses. See, e.g., Tr. 12/1/80, p.66, L.12 through p.68, L.10; Tr. 11/12/81, p.94, L.5 through p.101, L.20. Thus, applicant's counsel made it quite clear that:

> "I'm objecting for the record that Mr. Hoffman is taking the role of drilling a witness as an adversary." (Tr. 11/12/81, p.94, lines 5-7)

When applicant's counsel challenged the neutrality and "lack of objectivity" of the Board attorney, he elicited this response and dialogue between himself and the Board attorney:

> "MR. HOFFMAN: And I told counsel beforehand in these proceedings, and I will repeat it here on the record tonight, that I will continue to fulfill my role as Board of Adjustment attorney as I have always deemed it proper to be. If he doesn't like the way I'm carrying out my role, I readily invite him to go into the Superior Court tomorrow on an Order to Show Cause and challenge the way I'm conducting myself here and not to make statements and speeches here on the record.
>
> MR. GLUCKSMAN: That may very well be done if this is ever on an Appellate level.
>
> MR. HOFFMAN: I'm saying to do it tomorrow and stop making your speeches here to intimidate this Board and to attempt to intimidate me. You will not be successful in that effort, Mr. Glucksman." (Tr. 10/15/81, p.62, L.14 through p.63, L.6)

At another point during the repeated and slanted objections made by applicant's attorney during the hearings, he evoked this response from the Board attorney:

> "MR. HOFFMAN: I haven't tried to elicit any response. I was asking generally as to the entire site how he viewed the adequacy of buffering. You can have a continuing objection to my questions counsel. Frankly, I'm fed up with it and I told you earlier in the proceeding, and I wish you would have followed up, but apparently you didn't have the desire to do so, to immediately take the matter to court on an Order to Show Cause and get a judicial declaration as to the propriety of the Board attorney's role." (Tr. 2/4/82, p.78, lines 3-14)

From the above statements, it is clear that, during the hearings, the plaintiff was advised and actually urged to seek an immediate judicial interpretation on the "Board attorney issue" by means of an Order to Show Cause. The procedure whereby such prompt, interim Court determinations could be sought and obtained as concerns procedural aspects of Board of Adjustment hearings was specifically brought to the applicant's attention at the very outset of the proceedings (see reference to Twp. of Berkeley Heights v. Bd. of Adj. of Berkeley Heights, 144 N.J. Super. 291 (Law Div. 1976), in Tr. 10/6/80, p.39, L.2 through p.40, L.3). However, rather than seek such a judicial test of the matter in a separate forum, the applicant chose to disregard the suggestions repeatedly made to him that he seek a ruling on the issue. The plaintiff's counsel opted, instead, to engage in constant objections and "speech-making" in an effort to silence the Board, its attorney and the Municipal Public Advocate.

In short, the applicant was entirely willing -- notwithstanding the advice that he immediately seek a judicial resolution of the issue -- to sit back and wait until after conclusion of the case. Under the circumstances, the Board submits that it would be patently unfair for this Court to reverse entirely the substantive decision of the Board on the requested variance. This would constitute "overkill" in the extreme. When a proper record is not being made, or has not been made, during a Board of Adjustment proceeding, the appropriate course of action is for the reviewing Court to remand the matter back to the agency for a rehearing and redetermination. Dolan v. DeCapua, 16 N.J. 599, 610, 613 (1954); Carbone v. Weehawken Twp. Pl. Bd.,

175 N.J. Super. 584, 587 (Law Div. 1980). Presumably, any such remand which might now be directed by this Court would include specific judicial guidelines intended to curb any possible "excesses" during the new hearing by any of the attorneys involved -- the Board's, the applicant's, the Public Advocate, counsel for any objectors or interested parties, etc.

But, for present purposes, since the applicant was willing — in spite of repeated urgings that he judicially test the issue — to wait until this appeal in which to raise the specter of "Board attorney impropriety", he should not now be entitled to use this procedural argument as a "club" or weapon which will totally invalidate the Board's substantive determination on the variance. Having been content to wait before seeking judicial guidance on how a Board of Adjustment hearing should be conducted, the applicant should not be heard to complain if the matter is remanded for a rehearing.

## POINT II

## THE EXTENT OF QUESTIONING BY THE BOARD ATTORNEY WAS REASONABLE.

At page 32 of his brief, plaintiff asserts that "the questioning by the Board of Adjustment attorney was excessive, protracted and often needless." The Board maintains that a review of the record will prove otherwise:

A. Questioning proceeded quickly when the witness' answers were straightforward and complete.

As an example of this statement, it will be seen that David Mendelson, the applicant's traffic engineer, answered questions regarding traffic flow, volumes, street and site improvements and mass transit (Tr. 4/6/81, p.55, L.21 through p.71, L.5). Questions posed by the Board attorney were answered directly and completely by this expert, and the questioning proceeded briskly as to all of the topics relevant to traffic.

B. Questioning was more extensive when the testimony and prior answers furnished by witnesses was evasive and/or argumentative.

(1) When one of the applicant's architects, Barrett A. Ginsberg, testified regarding how and by whom the decision was made to propose 300 units, as well as with respect to related questions as to the design of the project, the Board attorney was required to ask additional questions in order to elicit satisfactory responses (see, e.g., Tr. 10/23/80, p. 90, 93, 97 and 98). Similarly, the witness' evasiveness or insistence on "broadbrushing" the topic

(Mr. Ginsberg's term) necessitated additional questioning as to costs to build the project (see Tr. 10/23/80, p.102, L.23 through p. 111, L.3).

(2) Richard H. Schindelar, the applicant's engineer, was asked a series of questions by the Board attorney in order to clarify statements he had made earlier in the proceedings concerning percolation difficulties of the soil (Tr. 12/1/80, p.18, L.24 through p.23, L.14).

(3) Clifford Earl was the applicant's real estate appraiser. Questioning of Mr. Earl by the Board attorney was necessary in order to clarify the witness' testimony, since he was, by his own admission, confused on several points (Tr. 5/4/81, p.64, L.23 through p.77, L.2). As an example of such confusion, see the following rather candid discussion between the Board Chairman, the Board Clerk and Mr. Earl:

> "MR. KOMETANI: Are you thinking out loud or testifying?
>
> MR. EARL: I think I'll stop talking. I don't know what I'm talking about. I wouldn't be able to come up with the right number anyhow.
>
> THE CLERK: You didn't say anything then?
>
> MR. EARL: I didn't say anything." (Tr. 5/4/81, p.65, Lines 6-12)

A review of the cited dialogue in the transcript (between pages 64 and 77) will reveal how frustrating things could be to a questioner. The Board attorney was attempting to ask a series of simple questions as to possible comparisons between two sites and was faced not only with the witness' admitted non-recollection or hazy recollection of matters but also with a veritable barrage of objections and intervention by the applicant's attorney. Such conduct attributable to the applicant's counsel undoubtedly served to protract the Board proceedings.

C. More extensive questioning was also necessary in order to elicit additional information from certain witnesses because of the importance to the application of the particular subject involved.

(1) Due to its importance to the proceedings — as well as the frequent inadequate nature of the witness' responses -- it was necessary to engage in fairly lengthy questioning of Mr. Schindelar regarding the ability of the soil to percolate, alternative methods of sanitary waste disposal and the proposed on-site sewerage treatment plant (see Tr. 12/1/80, p.19, 22, 26, 28, 32 and 35).

(2) For similar reasons, the applicant's engineer was also questioned extensively on matters pertaining to storm water runoff, the Watercourse Protection Area, etc. (Tr. 12/1/80, p.57, L.5 through p.59, L.2; p.68, L.16 through p.73, L.1). When the Board attorney attempted to question Mr. Schindelar as to his familiarity with a particular study dealing with drainage and storm water runoff in Warren Township, he was confronted not only with evasive and contradictory responses from the witness (see Tr. 12/1/80, p.63, lines 21-23), but also with a series of "machine-gun like" questions and objections from applicant's counsel, including a lecture on the supposed nature of questioning or cross-examining expert witnesses (Tr. 12/1/80, p.63, L.17 through p.68, L.13). Following this tirade by applicant's attorney, the Board attorney was eventually compelled to say "let me move on to another subject dealing with the drainage, Mr. Chairman, and by-pass the last one" (Tr. 12/1/80, p.68, lines 11-13). In view of the frequent protracted interruptions to the Board proceedings attributable to applicant's counsel, his present objection to the length of the hearings seems to constitute nothing more than a "cover-up" for his own adversarial conduct.

(3) Carl Lindbloom, the applicant's planner, was questioned -- and responded -- at some length with respect to the interrelationship between employment growth and housing need (Tr. 11/12/81, p.68, L.24 through p.75, L.22) and the need for multi-family housing in the Township (Tr. 11/12/81, p.85, L.16 through p.92, L.2).

D. The Board attorney was entitled to be liberal in the extent of his questioning, particularly in view of the circumstance that there were no attorney-members on the Board of Adjustment.

The applicant's counsel objected during the proceedings to the extent of questioning by the Board attorney (Tr. 11/12/81, p.97, lines 6-11), to the "vigor" of the questioning (Tr. 11/12/81, p.94, L.19) and to the alleged lack of neutrality, which a Board attorney should have (Tr. 11/12/81, p.97, lines 21-22). The applicant contended that diligent cross-examination of his witnesses is something "mainly [for] the board members" and the Board attorney's primary function is simply to render advice to his client (Tr. 11/12/81, p.97, L.23 through p.98, L.15). The Board attorney pointed out, in response (even though it is not stated with great clarity in the transcript), that none of the members of the Warren Township Board of Adjustment were attorneys and that:

> "...if counsel for the applicant would like me to simply sit back and counsel the Board when asked questions and not get actively involved in the questioning process, then I don't think I would be doing this Board a service since it doesn't have within its membership, as some other Boards in the State that I'm familiar with, to have legal counsel who can get involved in actively participating in the questioning process as attorneys are trained to do." (Tr. 11/12/81, p.99, L.22 through p.100, L.7)

In fact, no less distinguished a panel than the New Jersey Supreme Court Committee on the Unauthorized Practice of Law has had occasion to observe that:

> "Under the Municipal Land Use Act, N.J.S.A. 40:55-D-1 et seq., both boards of adjustment and planning boards exercise quasi-judicial functions. Hearings before said boards envision the presentation of testimony of engineers, architects, accountants, realtors, planning consultants and other witnesses. And thus, as we stated in Opinions 13, 16 and 19, legal knowledge and skill are required in presenting evidence, examination and cross-examination of witnesses, qualifying expert witnesses, objecting or resisting objections to the admission of evidence and construing pertinent statutes, ordinances and judicial decisions." (Emphasis supplied) Opinion No. 21 of Committee on Unauthorized Practice of Law, published in December 22, 1977 New Jersey Law Journal

The fact that the Board attorney had conducted himself in a similar manner in other applications of the same type -- and without objection by any of the interested parties -- is something alluded to by the Board Chairman (Tr. 11/12/81, p.98, lines 16-25). Thus, it was apparent that this particular (wholly non-attorney) Board of Adjustment had come to rely to a certain extent upon its counsel's ability to question witnesses, particularly those holding expert credentials. Defendant submits that, under the circumstances, questioning of this nature by its counsel was not at all improper. Plaintiff cites cases at p.36 of his brief to the effect that a Judge must exercise restraint in his conduct of a trial, and -- while defendant has no quarrel with these general precepts -- it is also pertinent to point out that our highest Court has held that a Judge has a right to participate in a trial and to ask questions of witnesses. State v. Riley, 28 N.J. 188, 200 (1958). In Riley, the Court commented:

> "We have long since receded from the arbitrary and artificial methods of the pure adversary system of litigation which regards the opposing lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed. See 3 Wigmore, Evidence (1940 ed.), § 784. The judge may, on his own initiative and within his sound discretion, interrogate witnesses for the purpose of eliciting facts material to the trial. [Citations omitted] In the reports of our own jurisdiction, we find many instances where trial judges were sustained in their right to ask questions of crucial importance to the resolution of the cause before them. [Citations omitted] Although it has been said that the instances are not too frequent in which a presiding judge will be justified in conducting an extensive examination, 98 C.J.S. Witnesses § 347, the matter is one which necessarily rests in discretion and depends upon the circumstances of the particular case " (Emphasis supplied)
> 28 N.J. at pp.200-201

Even though the applicant's counsel may somehow find it objectionable, defendant submits that the Board attorney should not be criticized for having diligently prepared his questions for the witnesses who would be testifying in the variance proceeding (Cf. Tr. 10/23/80, p.78, lines 12-21). There is apparently something in the respective "chemistries" of Mr. Glucksman and this writer which does not mesh. I do tend to be quite thorough, detailed and probing — in all work which I do. That may tend to make things more difficult for applicants who come before Boards which I represent, for objectors, for anyone. I can understand that. But, the important point for purposes of this appeal from a Board of Adjustment denial is that I do not believe such thoroughness to be legally objectionable. Defendant submits that the plaintiff may be looking for "scapegoats" on whom to blame the Board's denial, instead of facing up to the substantive deficiencies in his application. This attorney

does not intend on becoming such a target upon whom the plaintiff can vent his displeasure over the outcome of the variance proceeding.

## POINT III

### CONTRARY TO THE PLAINTIFF'S CONTENTION, THE BOARD ATTORNEY'S QUESTIONING WAS NOT DESIGNED TO ELICIT ANSWERS DAMAGING TO THE PLAINTIFF'S CASE.

The plaintiff contends on p.33 of his brief that "the Board attorney asked questions of the plaintiff's witnesses that were designed to elicit damaging answers but asked much more mild and innocuous questions of the Public Advocate and Township witnesses which were designed to support their case." Here, too, the Board maintains that a review of the transcripts will demonstrate the fallacy of plaintiff's argument:

A. To cite just a few instances of same, the Board attorney often asked questions of the applicant's experts which were favorable in nature to the applicant's case.

(1) The Board attorney brought up in his questioning of Daniel R. Cahill, the applicant's architect for his revised housing plan, the fact -- not elicited from the witness by applicant's own counsel -- that the new clustering arrangement for the townhouses would reduce energy utilization (Tr. 10/15/81, p.104, lines 5-11).

(2) Carl Lindbloom, the professional planning consultant for the applicant, was given the opportunity by the Board attorney to explain the circumstances under which a use variance might be granted for multi-family housing (Tr. 11/12/81, p.85, L.12 through p.88, L.12).

(3) Mr. Lindbloom was afforded the opportunity -- indeed, virtually led -- by the Board attorney to rebut some prior testimony and inferences from the Township Planner and to explain the significance of a

certain letter pertaining to the proposed Township Master Plan from William E. Roach, Jr., then the Somerset County Planning Director (Tr. 11/12/81, p.103, L.6 through p.104, L.1).

B. Even though applicant's counsel may perceive it otherwise, questions asked by the Board attorney of witnesses for the Township and the Public Advocate were entirely neutral in nature.

(1) During certain questioning by the Board attorney of John T. Chadwick, the Township Planning Consultant, as to the types of multi-family housing, if any, existing in adjacent municipalities to Warren Township, the applicant's attorney interposed an objection that "a Board of Adjustment attorney should be neutral" and should not be "suggesting an answer to that witness" (Tr. 10/15/81, p.62, lines 2-13). The Board attorney denied that he was "trying to suggest any answer" (Tr. 10/15/81, p.63, lines 13-14), and the Board Chairman asked: "How is he suggesting an answer?" (Tr. 10/15/81, p.63, lines 15-16). The Board attorney explained the basis for his line of questioning (Tr. 10/15/81, p.63, L.24 through p.64, L.9), and the Board Chairman commented to applicant's counsel that "I think you're speculating" (Tr. 10/15/81, p.64, L.14). Defendant invites this Court to review the entire discussion pertinent to this objection by plaintiff's attorney and to determine for itself whether applicant's counsel is not seeing proverbial "goblins under the bed" (Tr. 10/15/81, p.61, L.16 through p.66, L.9).

(2) Another example of the applicant's attorney "creating" or "imagining" some supposed lack of neutrality on the part of the Board attorney,

can be seen during some questioning of James W. Higgins, a planner for the Public Advocate (Tr. 2/4/82, p.75, L.19 through p.79, L.6). There, the Board attorney, in questioning Mr. Higgins as to the revised development plan, asked whether a buffering "problem which you perceived with respect to the earlier plan [has] been removed or ameliorated in this new proposal?" (Tr. 2/4/82, p.76, lines 5-7). After the witness had responded that "it's been ameliorated to a degree"(giving his explanation), plaintiff's counsel then — and only then — raised an objection to the Board attorney's question, asserting that this was "another example of the attorney seeking to extract an unfavorable response from a witness" (Tr. 2/4/82, p.76, L.24 through p.77, L.1). Both the Board attorney and the Public Advocate immediately stated that they had no idea what should give rise to such an objection (Tr. 2/4/82, p.77, lines 3-6), and the Board attorney said that:

> "I haven't tried to elicit any response. I was asking generally as to the entire site how he viewed the adequacy of buffering. You can have a continuing objection to my questions, counsel." (Tr. 2/4/82, p.78, lines 3-7)

C. In many instances, questions asked by the Board attorney of the Township's and Public Advocate's witnesses were, in fact, favorable to the applicant.

(1) The Board attorney, through questioning, was able to get the Township Planner to concede that a statement in his report assessing the employment projections made by the applicant's planner, Mr. Lindbloom, was actually a "conclusion" rather than a "factual finding" (even though the particular statement appears in the section of Mr. Chadwick's report entitled "Findings of Fact"). The effect of this concession by the Township Planner was,

undoubtedly, a certain discrediting of his report (Tr. 8/31/81, p.26,L.11 through p.27, L.5).

(2) Through his questioning, the Board attorney developed or pointed out serious inconsistencies and/or flaws in the testimony of Michael J. Kolody, the engineering expert for the Public Advocate. Thus, in questioning of Stanley Kaltnecker, the Township Engineer, the Board attorney attempted to illustrate the lack of feasibility of an alternate method of sewage treatment proposed by Mr. Kolody (Tr. 7/20/81, p.103, L.22 through p. 106, L.2). Similarly, in questioning Mr. Schindelar, the applicant's engineer, the Board attorney established that both Mr. Schindelar and the Township Planner agreed that Mr. Kolody's suggested alternative was not likely under present policies (Tr. 1/4/82, p.36, L.5 through p.37, L.3). In questioning Mr. Kolody himself, the Board attorney showed how the views of the Public Advocate's engineer differed significantly from those of the Township Engineer (Tr. 2/4/82, p.19, L.12 through p. 20, L.21). In response to applicant's counsel's objection that the Board attorney was not being "objective in his questioning" (Tr. 2/4/82, p.77, lines 9-10), the Board of Adjustment's counsel commented:

> "I think the record is also replete with instances where I question witnesses in a manner that an outside objective reviewing source might find that both questions and responses were favorable to the applicant's position, and one example that immediately comes to mind deals with the subject of sewage for the site and the consistency between the opinions of the various experts and the township engineer, but I don't think it is incumbent upon me to have to defend my role, so I won't proceed any further with it." (Tr. 2/4/82, p.78, L.20 through p.79, L.6)

## POINT IV

### THE BOARD ATTORNEY'S NEUTRALITY AND OBJECTIVITY CAN ALSO BE SEEN BY HIS ACTIONS AT VARIOUS TIMES DURING THE PROCEEDINGS WHEN HE WAS NOT QUESTIONING WITNESSES.

A. The Board attorney took efforts to make certain that, procedurally speaking, the variance proceedings got off on the "right track."

It is this defendant's understanding that the Court has been supplied with the transcript of the September 8, 1980 proceedings relative to the Steinbaum application. Due to certain "notice problems", the hearing in this matter got off to an abortive start that evening and, consequently, the September 8th transcript is not relevant or "part of the record" as concerns the actual variance application. However, defendant submits that certain of the discussion and statements by the Board attorney, as contained in the September 8, 1980 transcript, would be germane with respect to this Supplemental Brief.

Initially, the Board attorney made a point of checking into the source of the list of property owners who had been noticed as to the application, and -- upon ascertaining that the list had been obtained from the Township tax office by payment of a fee -- he then advised the Board that pursuant to N.J.S.A. 40:55D-12(c), "the accuracy of the list would be considered binding upon all interested parties" (Tr. 9/8/80, p.5, L.15 through p.6, L.4).

Thereafter -- at the instance of the Board attorney -- a lengthy discussion was held regarding the sufficiency of the form of the legal notices which had then been served (Tr. 9/8/80, p.6, L.4 through p.31, L.24). Toward

the end of this dialogue, the applicant's attorney remarked in response to a question by the Board attorney as to how the applicant would be proceeding:

> "MR. GLUCKSMAN: I'm going to put on notice all of the things that we've agreed upon. Thank you." (Tr. 9/8/80, p.30, lines 8-10)

During the course of discussing the notices, the Board attorney suggested that the Township Zoning Officer, who was present at the meeting, testify. Specifically, the Board's counsel noted that such input from the Zoning Officer would "perhaps...be beneficial from a procedural standpoint, so that we can avoid this kind of problem a second time,..." (Tr. 9/8/80, p.18, lines 4-10). As a result, a series of questions relating to the zoning violations entailed in the application were then put to the Zoning Officer (Tr. 9/8/80, p.18a, L.19 through p.29, L.23). It can be seen from the following quotation that the Board attorney, during this discussion, was desirous — from the standpoint of both the applicant and the Board — of preventing any jurisdictional problems concerning the notices:

> "MR. HOFFMAN: I would certainly think from the applicant's standpoint, I certainly can't advise you -- if I represented an applicant, I would want to make sure that jurisdiction without question were conferred upon with the Board to deal with any variances of a particular plan that might be present. And reservice of notices in my judgment would eliminate that from being an issue in the matter." (Tr. 9/8/80, p.16, lines 6-14).

Most assuredly, the applicant would have been severely disadvantaged in several respects had he gone through extensive hearings and <u>then</u> encountered a challenge to the sufficiency of the notices.

In a similar vein, the Board attorney during that initial procedural meeting suggested that the applicant furnish transcripts of the hearings to facilitate a vote on the application by as many Board members as possible (Tr. 9/8/80, p.31, L.25 through p.34, L.12). Here, too, the applicant's counsel thanked the Board attorney for his suggestion (Tr. 9/8/80, p.34, L.13).

B. The Board attorney strived to avoid any "procedural irregularities" or "taint" to the proceedings.

When the hearing did get underway at the following session (October 6, 1980), the applicant sought to have one of the Board members disqualify herself for the supposed reason that "she has already passed upon and judged this application" (Tr. 10/6/80, p.11, L.21 through p.12, L.14). The Board attorney rendered a legal opinion that there was "absolutely no reason" for the member in question "to disqualify herself from sitting in judgment of the present application before the Board of Adjustment" (Tr. 10/6/80, p. 35, lines 4-13). Notably, the Board attorney prefaced his opinion with these remarks:

> "MR. HOFFMAN: Based on everything that I have heard this evening, Mr. Chairman, let me say first of all that no one would be more concerned than I as counsel to the Board of Adjustment with any procedural irregularities, if there be such irregularities it might serve to, as Mr. Glucksman put it, taint the proceedings and make all of the efforts of the Board and everyone who is involved in hearing what appears to be a substantial application for naught. I wouldn't want the Board to go through an academic exercise here and I don't think anybody is seeking that." (Tr. 10/6/80, p.34, L.17 through p.35, L.4)

After rendering his legal opinion as to why he felt it would not be improper for the challenged Board member to sit on the application, the Board attorney then commented that if the applicant's counsel still believed that the presence of the particular member would somehow "taint" the proceedings:

> "... it would be my recommendation that what he seriously consider doing before we get very deeply into this matter is to bring a prompt court action in the nature of an order to show cause to deal with this limited procedural issue of testing the propriety of Mrs. Malpas sitting as a voting member of the Board of Adjustment for the application." (Tr. 10/6/80, p.39, lines 6-15)

C. The Board attorney made evidentiary rulings favorable to the applicant.

To cite some examples of rulings or comments by the Board attorney on evidentiary issues which were favorable to the applicant, defendant would note the following. After some discussion amongst the applicant's counsel, the Public Advocate and the Board attorney concerning whether a planning document should "be made a part of the application", the Board of Adjustment attorney stated that he thinks that the applicant should be entitled to have the item so made a part of the application (Tr. 10/23/80, p.12, L.8 through p.15, L.25). After the applicant's attorney had concluded his main questioning of Carl Lindbloom, the applicant's planner, the Board attorney reminded him to have the planner's report -- perhaps the most important of the applicant's exhibits -- marked into evidence (Tr. 1/19/81, p.57, lines 14-19). When the Public Advocate repeatedly asked Mr. Lindbloom the same question (about residential usage abutting industrial zones) and the Board Chairman directed the witness to answer the question, the Board attorney remarked that "[h]e's

answered it twice... so I guess that would suffice" (Tr. 1/19/81, p.93, lines 22-24).

D. The Board attorney stated that general ground rules should be established concerning presentation of expert witness testimony.

The Board attorney interrupted a minor argument between the Public Advocate and the applicant's counsel regarding testimony from an expert for the Advocate, with these comments:

> "MR. HOFFMAN: Gentlemen, to avoid this can we agree on some ground rules as far as any experts to be provided by anyone in this case? It will be some reasonable -- and I can't define that in quantitative terms -- advance notice prior to the expert appearing and testifying; that is to say, the area of expertise and the name of the proposed expert, and that would apply across the board as far as experts that the applicant will produce, experts that Mr. O'Connor will produce, possibly any experts that interested citizens may wish to offer and any that the Board may ultimately wish to produce in the case." (Tr. 1/19/81, p.78, L.24 through p.79, L.11)

## POINT V

## THE BOARD ATTORNEY ATTEMPTED TO EXPEDITE THE PROCEEDINGS WHEN THEY SLOWED DOWN.

As illustrations of the attempts made by the Board attorney to expedite the hearings, defendant offers the following examples:

Following a lengthy discussion between the Public Advocate and the applicant's counsel regarding the exchange of names of experts and their reports, the Board attorney stated:

> "MR. HOFFMAN: Gentlemen, why don't we have your respective witnesses confer over the phone?
>
> I say that tongue-in-cheek, but I think we're taking an awful lot of time..." (Tr. 1/19/81, p.85, lines 10-14)

When the applicant's attorney suggested holding a day session so as to expedite the hearings, the Board attorney immediately stated that, while he cannot speak for the Board, he certainly had no objection — even though, to the Board counsel's knowledge, "[i]ts never been done in the history of this Board..." (Tr. 1/19/81, p.126, L.18 through p.127, L.1).

When applicant's counsel was spending some time qualifying David Mendelson, his traffic expert, the Board attorney interrupted to state that he would like to "shorten" the dialogue, and this brief discussion ensued:

> " MR. HOFFMAN: If I could perhaps shorten this, in my experience and tenure as Board attorney for several Boards I've become quite familiar with Mr. Menselson's qualifications as a transportation and traffic consultant and the expertise which he and his firm have in that area and in traffic engineering.
>
> I take it, Counsellor, he's being offered as what's commonly referred to as a traffic engineering expert?
>
> MR. GLUCKSMAN: Yes. That's correct.

MR. HOFFMAN: I would have no difficulty with his qualifications in that regard.

MR. KOMETANI: Any member of the Board wish to ask Mr. Mendelson any questions?

MR. MENDELSON: Thank you, Mr. Hoffman, gentlemen.

MR. KOMETANI: I think the Board has accepted you as an expert in traffic." (Tr. 4/6/81, p.5, L.20 through p.6, L.13)

The Board attorney sought to avoid the delay that would be caused by requiring the applicant's architect, Barrett A. Ginsberg, to return in order to testify on a certain matter by suggesting that it might suffice if the expert simply submitted his figures and calculations in writing; and the applicant's counsel replied "I think that's a good idea" (Tr. 5/4/81, p.3, L.5 through p.4, L.14).

When additional testimony was required because of the applicant's revised plan, the Board attorney said that the Board should decide on the areas of expertise to be addressed and the specific witnesses to be produced so that "the case [would] be brought to as prompt a conclusion as possible" (Tr. 1/4/82, p.53, lines 4-12; p.55, lines 14-17).

## POINT VI

## PERTINENT DECISIONAL LAW FULLY SUPPORTS THE ACTIONS OF THE BOARD ATTORNEY DURING THE PROCEEDINGS.

At page 36 of his brief, plaintiff states that because the Board of Adjustment exercises a quasi-judicial function, then, logically, so does the Board attorney. The plaintiff cites several cases to show that a Judge must exercise restraint in cross-examining witnesses. Given the quasi-judicial role played by the Board attorney, he applies those cases to the present situation.

The decisions relied on by the plaintiff -- while indicating that a Judge must use self-restraint -- show that he may participate in a proceeding to the extent necessary to elicit the truth and to clarify information and testimony. One case mentioned by plaintiff is Band's Refuse Removal Inc. v. Fair Lawn Borough, 62 N.J. Super. 522 (App. Div. 1960), mod. on other grounds 64 N.J. Super. 1 (App. Div. 1960), certif. den. 33 N.J. 387 (1960). In Band's, Judge Goldmann noted that a Judge has the right "to interrogate a witness in order to qualify testimony or elicit additional information." 62 N.J. Super. at p.547.

The second case cited by plaintiff is Ridgewood v. Sreel Investment Corp., 28 N.J. 121 (1958). In Sreel, our highest Court stated that:

> "The trial judge may question a witness in order to clarify existing testimony or to elicit further information from him. [Citations omitted]. Indeed, this appears a desirable procedure where in his discretion he considers it necessary." 28 N.J. at p.132

The final case referred to by plaintiff is Polulich v. J.G. Schmidt Tool Die & Stamping Co., 46 N.J. Super. 135 (Cty. Ct. 1957). In Polulich, Judge Gaulkin noted that "it has always been the right of our trial judges to put additional questions to a witness [Citations omitted]; and that, too, in some cases, is a duty." 46 N.J. Super. at pp. 142-143. The Court quoted with approval from another decision, as follows (46 N.J. Super at p.144):

"But we do agree that

> 'he is not a dumb and mask-faced moderator over a contest between sensitive and apprehensive, or perhaps wily and ingenious, counsel. He is a vital and integral factor in the discovery and elucidation of the facts. * * * Therefore, on his own account, he is not obliged to rest content with the modicum of evidence which counsel may dole out, or to accept as final their showing of knowledge * * * and credibility * * * of witnesses. But beyond this it is the function of the judge to aid the jury in obtaining a comprehension of the facts equal to his own, in order that a just verdict may be reached. Therefore, whenever in his judgment the proceeding is not being conducted in a way to accomplish the purpose for which alone it is instituted, the full development of the truth, or whenever he can effect a better accomplishment of that purpose, he not only has the right, but it is his duty, to take part. Limitations upon this power appear from the statement of the purpose to be subserved, and are merely those which good sense and propriety suggest. The judge should not place himself in the attitude of helping or hurting either side, but, whenever it appears to him proper, he should fearlessly endeavor to develop the truth with all possible clearness and certainty, which ever side the truth may help or hurt.' State v. Keehn, 85 Kan. 765, 118 P.851 (Sup. Ct. 1911), quoted in 3 Wigmore, sec. 784."
> (Emphasis supplied)

To the same effect, see State v. Riley, 28 N.J. 188, quoted above in Point II of this brief; and see Vasily v. Cole, 173 N.J. Super. 152, 158 (App. Div. 1980). Annexed hereto is a copy of the Appellate Division's (unreported) opinion in the case of Murray v. Bd. of Adj. of Twp. of Lawrence, Docket No. A-489-66, Decided June 15, 1967. That was a matter in which the local Board had denied the plaintiff's application for a variance to construct certain multi-family housing. The plaintiff contended, inter alia, that since the Board was sitting in a quasi-judicial capacity, the calling of numerous expert witnesses by the Board attorney placed the Board "in an inconsistent advocacy position at the same time." The Appellate Division rejected this argument, noting that:

> "A board of adjustment hearing is not an essentially adversary proceeding. Its purpose is to elicit all the pertinent facts as a basis for the board's decision. Hence, the board's calling of these witnesses was in pursuit of that purpose and in fulfillment of our prior remand. It is immaterial that the board's attorney acted as the interrogator. Plaintiff's attorney was given every opportunity to examine the witnesses, whenever clarification or further elucidation was deemed necessary by him." (Emphasis supplied)

Given the above-quoted authority, defendant submits that the extent of participation by the Board attorney in the variance proceeding was reasonable and proper. The attorney questioned witnesses in order to clarify statements, to elicit additional information, to qualify testimony and to see that the hearings were conducted in a manner that would accomplish the purpose for which the proceeding was instituted. A review of the transcripts,

including those sections referred to hereinabove, will, it is submitted, disclose that the Board attorney in the case sub judice acted in a neutral role and at times served as a mediator. He attempted to discover both the positive and negative aspects of the proposal in order to assist the Board in making an informed decision. Contrary to plaintiff's contentions, the Board attorney's questioning of the applicant's witnesses was not designed to elicit damaging answers. Nor was his questioning of the Public Advocate and Township witnesses "mild and innocuous". He sometimes acted in a manner that was accommodating to the plaintiff and asked questions that were favorable to the plaintiff's position. The extent of the questioning was that which was considered necessary by the Board's counsel in his discretion. Contrary to the arguments advanced by plaintiff at page 32 of his brief, the precise number of questions asked of each witness is not material. A variance proceeding, after all, is not a "numbers game" in which a tally is to be taken of whether more questions were asked of one expert than another. The purpose of the proceeding, simply put, was to determine whether the site was suited for the proposed development under the standards and criteria established in the Municipal Land Use Law. The questioning by the Board attorney was necessary in order to clarify statements or to elicit additional information that was, in the language quoted in State v. Riley, supra, "of crucial importance to the resolution of the cause." Further, it should be noted that the Board attorney tried on numerous occasions to expedite the proceedings when they became needlessly lengthy. A review of the entire record will also disclose that plaintiff's attorney caused unnecessary delays and acted in an uncooperative manner on many occasions.

Our Supreme Court has recently reaffirmed that in a Board of Adjustment proceeding it is entirely appropriate for the Board to take an active role in calling witnesses of its own, and for the Board and its counsel to address pertinent inquiries during the proceedings. While emphasizing that the burden of proof always remains with the applicant, the Court noted it is quite proper for the Board to affirmatively "take some action which may be of assistance to it." Commons v. Westwood Zoning Bd. of Adj., 81 N.J. 597, 610-611 (1980).

## CONCLUSION

For the reasons set forth above, as well as those set forth in defendant's initial brief, 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

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-489-66

JAMES A. MURRAY,

Plaintiff-Appellant,

vs.

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF LAWRENCE IN THE COUNTY OF MERCER,

Defendant-Respondent.

---

Argued May 22, 1967 -- Decided JUN 15 1967

Before Judges Goldmann, Kilkenny and Collester.

On appeal from Superior Court, Law Division, Mercer County.

Mr. Ivan C. Bash argued the cause for appellant.

Mr. Paul G. Levy, argued the cause for respondent (Mr. Joseph L. Stonaker, of counsel).

PER CURIAM

Plaintiff owner of 11.85 acres of land in the Township of Lawrence appeals from a judgment of the Law Division upholding the action of the board of adjustment in denying plaintiff's application for a variance to construct a garden-type apartment project consisting of 154 multi-family dwelling units in 20 two-story buildings on his acreage.

The subject property is in a "B-Residential District," in which multi-family apartment buildings are not permitted and land use is limited to single-family dwellings, a church, a public school, a public park or playground, a municipal purpose building, a private school, an agricultural or horticultural use, a nursing home, a hospital, or a tourist home. Multi-family dwellings, including garden apartments, are permitted only in the "Business District" of the Township of Lawrence.

This matter is before us for the second time. In disposing of the first appeal we remanded the matter to the board of adjustment for a further hearing so that proofs could be presented (1) to establish the claim of the township committee that multi-family dwellings in this area would have an adverse impact upon already existing high densities of population and traffic, and (2) to cure the deficiency in the former record, limited almost entirely to testimony by plaintiff's expert witnesses as to the greater economic desirability of apartment houses as compared with one-family residences. Practically no consideration had been given to the utility of this land for other permitted uses in this zone.

As a result of further hearings following the remand, the board of adjustment found that:

1. The property in question may be used for permissible uses. It can be developed economically as well as physically for single-family dwellings. It may also be utilized for church purposes, or for school use, or for recreational purposes.

2. There would be a substantial impairment of the intent and purpose of the zone plan if the proposed use were allowed, since this area is basically residential in character. If the proposed apartments are permitted to be erected, they will change the character of the neighborhood by increasing its immediate population and will adversely affect property values in this low-density single-family suburban type area.

3. The proposed use would increase congestion by lowering the setback requirements, by the close proximity of the buildings, by having parking areas only half of what is required, and by the greater number of smaller apartments. All of this would be inharmonious with the present character of the neighborhood and substantially detrimental to the public welfare.

4. Special reasons, as required by N.J.S.A. 40:55-39(d) are not present, because the property is not uniquely circumstanced. Fill is needed for any development of this tract, but that is not enough to classify it as unique.

5. There is not present here such hardship as would require the Board to recommend a variance. The market value of the premises in question is approximately $4000 per acre for development for permitted uses, such as single-family houses. A higher land cost assumed by the Board when it originally recommended a variance for apartments was based upon use of the land for that purpose, but does not apply if a permissible use under the zoning ordinance is adopted.

Based upon all of these reasons, the board of adjustment denied pl tiff's applioation to erect 154 garden-apartment dwelling units in this limited residential zone.

I.

Plaintiff contends that the action of the board of adjust was improper, arbitrary, capricious and unreasonable in the light o our remand. He argues that the record clearly demonstrates that the premises in question had no other practical use than for multiple dwellings.

The scope of judicial review of the actions of municipal officials in granting or denying variances is limited. The law presumes that they are thoroughly familiar with their community's characteristics and interests, and that they will act fairly and with proper motives and for valid reasons.

> "Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere. A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable." Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 296 (1965).

We agree with the Law Division that the conclusions reached by the board of adjustment were proper and its findings were supported by substantial evidence. Accordingly, it cannot be said that the denial of the requested variance was arbitrary, capricious or unreasonable.

II.

Plaintiff's next point is that the board of adjustment acted improperly when it called as witnesses the former township tax assessor, the township engineer, the township health officer,

the acting police chief, the project planner for the Lawrence Townsh master plan study, and a local realtor and appraiser, all of whom te tified and gave their opinions in their respective areas of expertis on the issues to be decided by the board. Plaintiff argues that the board was sitting in a quasi-judicial capacity and having its attorn call these witnesses placed it in an inconsistent advocacy position at the same time.

The tax assessor testified that plaintiff's property in it existing state was valued at $49,000 for purposes of local taxation. The township engineer testified that the area was not swampy land, despite any such characterization on one of the exhibits. He stated that he was able to walk over the entire property, despite the fact that it was four feet lower than the level of an adjoining road. The board considered a report from the acting chief of police that t increase in traffic will not be a significant burden in terms of density on Princeton Pike or Route 206, the two major arteries in this area. The township health officer testified that there would b no detrimental effects from the new project since health problems would be properly taken care of.

The next witness called by the board's attorney was a Mr. Tighue, an appraisal expert in the field of residential real estate. He testified that the property had a fair market value of $92,300, if it were developed within the permitted uses. The purchase price of $150,000 was discounted because that price was contingent upon the obtaining of a variance for the garden apartments. It was his opinion, based upon the detailed reasons given, that the land could be developed profitably for single-family, church, school or recreational purposes, all of which are permitted in this residence "B" zone.

Finally, the planner employed by the township to prepare a new master plan testified that the highest and best use of the

property from a community viewpoint would be the presently permitted uses. He also stated that a garden-apartment project would be very bad for this property and would be harmful to the zone plan and property values in the immediate area.

In eliciting this information, the board of adjustment did not adopt the position of an advocate at a hearing in which it was sitting in a quasi-judicial capacity. Rather, it brought forth all the evidence to the end that an enlightened judgment could be made. We find no error--and certainly no prejudicial error--in the complete factual picture thus developed. The ultimate objective was fairness to both the public and the individual property owner. A board of adjustment hearing is not an essentially adversary proceeding. Its purpose is to elicit all the pertinent facts as a basis for the board's decision. Hence, the board's calling of these witnesses was in pursuit of that purpose and in fulfillment of our prior remand. It is immaterial that the board's attorney acted as the interrogator. Plaintiff's attorney was given every opportunity to examine the witnesses, whenever clarification or further elucidation was deemed necessary by him.

III.

Plaintiff's final claim is that the ordinance prohibiting multi-family dwellings in a residence "B" zone unconstitutionally deprives him of the use of his land without due process of law. We find no substantial merit in this contention, based as it is upon an assumption which was not established by the proofs, as noted above.

It is true that a municipality may not impose land use restrictions which are so unreasonable as to be confiscatory, arbitrary or oppressive. In zoning there must be a rational relation between the regulation and the service of the general welfare with-

in the range of the police power. An ordinance which so restricts th use to which land can be put as to prevent its being utilized for any reasonable purpose is constitutionally invalid. The reasonableness o a zoning regulation must be tested in the setting or physical characteristics of the area in which it is sought to be enforced. Glen Rock etc. v. Bd.of Adjust., etc., Glen Rock, 80 N.J.Super. 79, 88 (App.Div 1963). And see Collins v. Board of Adjustment of Margate City, 3 N.J. 200, 206 (1949); Katobimar Realty Co. v. Webster, 20 N.J. 114 (1955); Morris County Land, etc. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 557 (1963).

At the same time, the zoning power may be exercised to promote the general welfare within the permissive objectives of the Zoning Act. R.S. 40:55-32. Gruber v. Mayor and Tp.Com.of Raritan Tp 39 N.J. 1, 9 (1962). Among those objectives are: "to lessen congesti in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light ar air; prevent the overcrowding of land or buildings; avoid undue concentration of population." R.S. 40:55-32. Property need not be zone to permit every use to which it is adapted. "It is sufficient if the regulations permit some reasonable use of the property in the light of the statutory purposes." Morris County Land, etc., supra, 40 N.J. at p. 557. That constitutional test has been satisfied in the instant case.

The judgment of the Law Division is affirmed.

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201-322-2300

March 30, 1984

Honorable B. Thomas Leahy
Somerset County Court House
Somerville, New Jersey 08876

Re: Lawrence V. Steinbaum v. Board of Adjustment
of the Township of Warren, et al.
Docket No. L-59706-81 P.W. (S-10111)

Dear Judge Leahy:

It is my understanding from Mr. Wintermute's recent letter that Your Honor will now be hearing this matter. Accordingly, I enclose herewith original and one copy of Supplemental Brief Concerning Board Attorney Issue, on behalf of the defendant, Warren Township Board of Adjustment.

I will make arrangements to deliver the various exhibits which were marked during the Board of Adjustment hearings to Your Honor's Chambers next week.

Respectfully yours,

BARRY M. HOFFMAN

Barry M. Hoffman

BMH;avm
Enclosures
cc: Somerset County Clerk
Philip R. Glucksman, Esq.
John E. Coley, Jr., Esq.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

| | | |
|---|---|---|
| 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. | : | Docket No. L-59706-81 P.W. |

SUPPLEMENTAL BRIEF CONCERNING BOARD ATTORNEY ISSUE

BERNSTEIN, HOFFMAN & CLARK, P.A.
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(201) 322-2300
Attorneys for Defendant, Warren Township Board of Adjustment

BARRY M. HOFFMAN, ESQ.
On the Brief

## TABLE OF CONTENTS

## INTRODUCTORY STATEMENT

The initial brief submitted by the Board of Adjustment deals with the basic challenge by the plaintiff to the Board's Resolution denying the application of Lawrence V. Steinbaum to construct townhouse dwelling units on the property which was the subject of the Board hearings. This Supplemental Brief is limited to the allegations raised in the Second Count of the Complaint.

In the Second Count, the plaintiff contends that:

> "2. During the course of the hearings before the defendant, Board of Adjustment of the Township of Warren, as designated above, the attorney for the defendant, Warren Township Board of Adjustment, exceeded his proper role as attorney by usurping the function of the Board of Adjustment by continually and repeatedly making numerous questions of the plaintiff's witnesses far beyond what was necessary to carry out the function of a Board attorney. Further, the questions were inherently biased in nature.
>
> 3. The nature and frequency of the questions described above indicates that the Board attorney was not conducting himself in a fair and impartial manner during these hearings.
>
> 4. Because of the improper and unreasonable behavior of the Board attorney as described above, the plaintiff was effectively deprived of his right to a fair, proper, and impartial hearing."

In its Answer, the Board denies all of the above-quoted allegations and, in addition, it states the following by way of affirmative defense:

> "With respect to the allegations of the Second Count, the Attorney for the Board of Adjustment did not exceed his proper role and acted at all times during the proceedings in a fair, impartial and unbiased manner."

The plaintiff's separate pretrial contentions allege, in pertinent part, that:

"During the course of these hearings the Board attorney usurped the function of the Board by asking an inordinate amount of questions which were primarily designed to elicit responses that would be unfavorable to the plaintiff's application."

The Board, however, maintains in its pretrial contentions that:

"... the Board emphatically denies any allegation that its Attorney exceeded his proper role during the hearings and maintains that a careful review of the record will disclose that the Board Attorney acted at all times in a fair, impartial and unbiased manner."

Consideration of these conflicting claims and contentions regarding the conduct of the Board Attorney necessarily requires a careful review of the transcripts of the Board proceedings. Before undertaking that analysis, however, some discussion would be appropriate as concerns the remedy or relief sought in this action by plaintiff on account of the alleged improper behavior of the Board attorney.

## ARGUMENT

### POINT I

EVEN IF WE ASSUME, ARGUENDO, THAT THE BOARD ATTORNEY DID "EXCEED HIS PROPER ROLE" DURING THE VARIANCE HEARINGS, THE PLAINTIFF WOULD, AT MOST, BE ENTITLED TO A REMAND AND NOT TO HIS REQUESTED REVERSAL OF THE BOARD DECISION.

As already stated in the defendant's Introductory Statement, the Board emphatically and absolutely denies that its attorney conducted himself in an improper manner during the hearings. For the reasons which will be documented later in this memorandum, the Board submits that the allegations of the Second Count of the Complaint are wholly baseless. However, before undertaking the review and analysis of the record which will substantiate the Board's position in this regard, it is worth noting that — even if one were to assume for discussion purposes that the Board Attorney did somehow exceed his proper role during the proceedings -- the plaintiff would still not be entitled to the relief sought at the conclusion of his brief and at the end of the Second Count of the Complaint, i.e. reversal by this Court of the Board's denial of the requested variance and a direction that the variance be granted.

The Board of Adjustment's position is that — especially under the circumstances of this particular case -- the alleged "excessiveness" or procedural impropriety of its attorney should in no way form a basis for "infecting", "tainting" or "reversing" the substantive determination or Resolution of the Board itself. The Board of Adjustment members decided by a 5 to 1 vote, after holding extensive hearings on the plaintiff's original application and his amended application, to deny the requested use variance. During the hearings, the applicant's attorney voiced numerous objections as to the conduct

of the Board attorney and, in particular, as to the length of the questioning of certain of the applicant's witnesses. See, e.g., Tr. 12/1/80, p.66, L.12 through p.68, L.10; Tr. 11/12/81, p.94, L.5 through p.101, L.20. Thus, applicant's counsel made it quite clear that:

> "I'm objecting for the record that Mr. Hoffman is taking the role of drilling a witness as an adversary." (Tr. 11/12/81, p.94, lines 5-7)

When applicant's counsel challenged the neutrality and "lack of objectivity" of the Board attorney, he elicited this response and dialogue between himself and the Board attorney:

> "MR. HOFFMAN: And I told counsel beforehand in these proceedings, and I will repeat it here on the record tonight, that I will continue to fulfill my role as Board of Adjustment attorney as I have always deemed it proper to be. If he doesn't like the way I'm carrying out my role, I readily invite him to go into the Superior Court tomorrow on an Order to Show Cause and challenge the way I'm conducting myself here and not to make statements and speeches here on the record.
>
> MR. GLUCKSMAN: That may very well be done if this is ever on an Appellate level.
>
> MR. HOFFMAN: I'm saying to do it tomorrow and stop making your speeches here to intimidate this Board and to attempt to intimidate me. You will not be successful in that effort, Mr. Glucksman." (Tr. 10/15/81, p.62, L.14 through p.63, L.6)

At another point during the repeated and slanted objections made by applicant's attorney during the hearings, he evoked this response from the Board attorney:

> "MR. HOFFMAN: I haven't tried to elicit any response. I was asking generally as to the entire site how he viewed the adequacy of buffering. You can have a continuing objection to my questions counsel. Frankly, I'm fed up with it and I told you earlier in the proceeding, and I wish you would have followed up, but apparently you didn't have the desire to do so, to immediately take the matter to court on an Order to Show Cause and get a judicial declaration as to the propriety of the Board attorney's role." (Tr. 2/4/82, p.78, lines 3-14)

From the above statements, it is clear that, during the hearings, the plaintiff was advised and actually urged to seek an immediate judicial interpretation on the "Board attorney issue" by means of an Order to Show Cause. The procedure whereby such prompt, interim Court determinations could be sought and obtained as concerns procedural aspects of Board of Adjustment hearings was specifically brought to the applicant's attention at the very outset of the proceedings (see reference to Twp. of Berkeley Heights v. Bd. of Adj. of Berkeley Heights, 144 N.J. Super. 291 (Law Div. 1976), in Tr. 10/6/80, p.39, L.2 through p.40, L.3). However, rather than seek such a judicial test of the matter in a separate forum, the applicant chose to disregard the suggestions repeatedly made to him that he seek a ruling on the issue. The plaintiff's counsel opted, instead, to engage in constant objections and "speech-making" in an effort to silence the Board, its attorney and the Municipal Public Advocate.

In short, the applicant was entirely willing — notwithstanding the advice that he immediately seek a judicial resolution of the issue — to sit back and wait until after conclusion of the case. Under the circumstances, the Board submits that it would be patently unfair for this Court to reverse entirely the substantive decision of the Board on the requested variance. This would constitute "overkill" in the extreme. When a proper record is not being made, or has not been made, during a Board of Adjustment proceeding, the appropriate course of action is for the reviewing Court to remand the matter back to the agency for a rehearing and redetermination. Dolan v. DeCapua, 16 N.J. 599, 610, 613 (1954); Carbone v. Weehawken Twp. Pl. Bd.,

175 N.J. Super. 584, 587 (Law Div. 1980). Presumably, any such remand which might now be directed by this Court would include specific judicial guidelines intended to curb any possible "excesses" during the new hearing by any of the attorneys involved — the Board's, the applicant's, the Public Advocate, counsel for any objectors or interested parties, etc.

But, for present purposes, since the applicant was willing — in spite of repeated urgings that he judicially test the issue — to wait until this appeal in which to raise the specter of "Board attorney impropriety", he should not now be entitled to use this procedural argument as a "club" or weapon which will totally invalidate the Board's substantive determination on the variance. Having been content to wait before seeking judicial guidance on how a Board of Adjustment hearing should be conducted, the applicant should not be heard to complain if the matter is remanded for a rehearing.

## POINT II

## THE EXTENT OF QUESTIONING BY THE BOARD ATTORNEY WAS REASONABLE.

At page 32 of his brief, plaintiff asserts that "the questioning by the Board of Adjustment attorney was excessive, protracted and often needless." The Board maintains that a review of the record will prove otherwise:

A. Questioning proceeded quickly when the witness' answers were straightforward and complete.

As an example of this statement, it will be seen that David Mendelson, the applicant's traffic engineer, answered questions regarding **traffic flow, volumes, street and site improvements and mass transit (Tr.** 4/6/81, p.55, L.21 through p.71, L.5). Questions posed by the Board attorney were answered directly and completely by this expert, and the questioning proceeded briskly as to all of the topics relevant to traffic.

B. Questioning was more extensive when the testimony and prior answers furnished by witnesses was evasive and/or argumentative.

(1) When one of the applicant's architects, Barrett A. Ginsberg, testified regarding how and by whom the decision was made to propose 300 units, as well as with respect to related questions as to the design of the project, the Board attorney was required to ask additional questions in order to elicit satisfactory responses (see, e.g., Tr. 10/23/80, p. 90, 93, 97 and 98). Similarly, the witness' evasiveness or insistence on "broadbrushing" the topic

(Mr. Ginsberg's term) necessitated additional questioning as to costs to build the project (see Tr. 10/23/80, p.102, L.23 through p. 111, L.3).

(2) Richard H. Schindelar, the applicant's engineer, was asked a series of questions by the Board attorney in order to clarify statements he had made earlier in the proceedings concerning percolation difficulties of the soil (Tr. 12/1/80, p.18, L.24 through p.23, L.14).

(3) Clifford Earl was the applicant's real estate appraiser. Questioning of Mr. Earl by the Board attorney was necessary in order to clarify the witness' testimony, since he was, by his own admission, confused on several points (Tr. 5/4/81, p.64, L.23 through p.77, L.2). As an example of such confusion, see the following rather candid discussion between the Board Chairman, the Board Clerk and Mr. Earl:

> "MR. KOMETANI: Are you thinking out loud or testifying?
>
> MR. EARL: I think I'll stop talking. I don't know what I'm talking about. I wouldn't be able to come up with the right number anyhow.
>
> THE CLERK: You didn't say anything then?
>
> MR. EARL: I didn't say anything." (Tr. 5/4/81, p.65, Lines 6-12)

A review of the cited dialogue in the transcript (between pages 64 and 77) will reveal how frustrating things could be to a questioner. The Board attorney was attempting to ask a series of simple questions as to possible comparisons between two sites and was faced not only with the witness' admitted non-recollection or hazy recollection of matters but also with a veritable barrage of objections and intervention by the applicant's attorney. Such conduct attributable to the applicant's counsel undoubtedly served to protract the Board proceedings.

C. More extensive questioning was also necessary in order to elicit additional information from certain witnesses because of the importance to the application of the particular subject involved.

(1) Due to its importance to the proceedings — as well as the frequent inadequate nature of the witness' responses -- it was necessary to engage in fairly lengthy questioning of Mr. Schindelar regarding the ability of the soil to percolate, alternative methods of sanitary waste disposal and the proposed on-site sewerage treatment plant (see Tr. 12/1/80, p.19, 22, 26, 28, 32 and 35).

(2) For similar reasons, the applicant's engineer was also questioned extensively on matters pertaining to storm water runoff, the Watercourse Protection Area, etc. (Tr. 12/1/80, p.57, L.5 through p.59, L.2; p.68, L.16 through p.73, L.1). When the Board attorney attempted to question Mr. Schindelar as to his familiarity with a particular study dealing with drainage and storm water runoff in Warren Township, he was confronted not only with evasive and contradictory responses from the witness (see Tr. 12/1/80, p.63, lines 21-23), but also with a series of "machine-gun like" questions and objections from applicant's counsel, including a lecture on the supposed nature of questioning or cross-examining expert witnesses (Tr. 12/1/80, p.63, L.17 through p.68, L.13). Following this tirade by applicant's attorney, the Board attorney was eventually compelled to say "let me move on to another subject dealing with the drainage, Mr. Chairman, and by-pass the last one" (Tr. 12/1/80, p.68, lines 11-13). In view of the frequent protracted interruptions to the Board proceedings attributable to applicant's counsel, his present objection to the length of the hearings seems to constitute nothing more than a "cover-up" for his own adversarial conduct.

(3) Carl Lindbloom, the applicant's planner, was questioned -- and responded — at some length with respect to the interrelationship between employment growth and housing need (Tr. 11/12/81, p.68, L.24 through p.75, L.22) and the need for multi-family housing in the Township (Tr. 11/12/81, p.85, L.16 through p.92, L.2).

D. The Board attorney was entitled to be liberal in the extent of his questioning, particularly in view of the circumstance that there were no attorney-members on the Board of Adjustment.

The applicant's counsel objected during the proceedings to the extent of questioning by the Board attorney (Tr. 11/12/81, p.97, lines 6-11), to the "vigor" of the questioning (Tr. 11/12/81, p.94, L.19) and to the alleged lack of neutrality, which a Board attorney should have (Tr. 11/12/81, p.97, lines 21-22). The applicant contended that diligent cross-examination of his witnesses is something "mainly [for] the board members" and the Board attorney's primary function is simply to render advice to his client (Tr. 11/12/81, p.97, L.23 through p.98, L.15). The Board attorney pointed out, in response (even though it is not stated with great clarity in the transcript), that none of the members of the Warren Township Board of Adjustment were attorneys and that:

> "...if counsel for the applicant would like me to simply sit back and counsel the Board when asked questions and not get actively involved in the questioning process, then I don't think I would be doing this Board a service since it doesn't have within its membership, as some other Boards in the State that I'm familiar with, to have legal counsel who can get involved in actively participating in the questioning process as attorneys are trained to do." (Tr. 11/12/81, p.99, L.22 through p.100, L.7)

In fact, no less distinguished a panel than the New Jersey Supreme Court Committee on the Unauthorized Practice of Law has had occasion to observe that:

> "Under the Municipal Land Use Act, N.J.S.A. 40:55-D-1 et seq., both boards of adjustment and planning boards exercise quasi-judicial functions. Hearings before said boards envision the presentation of testimony of engineers, architects, accountants, realtors, planning consultants and other witnesses. And thus, as we stated in Opinions 13, 16 and 19, legal knowledge and skill are required in presenting evidence, examination and cross-examination of witnesses, qualifying expert witnesses, objecting or resisting objections to the admission of evidence and construing pertinent statutes, ordinances and judicial decisions." (Emphasis supplied) Opinion No. 21 of Committee on Unauthorized Practice of Law, published in December 22, 1977 New Jersey Law Journal

The fact that the Board attorney had conducted himself in a similar manner in other applications of the same type -- and without objection by any of the interested parties -- is something alluded to by the Board Chairman (Tr. 11/12/81, p.98, lines 16-25). Thus, it was apparent that this particular (wholly non-attorney) Board of Adjustment had come to rely to a certain extent upon its counsel's ability to question witnesses, particularly those holding expert credentials. Defendant submits that, under the circumstances, questioning of this nature by its counsel was not at all improper. Plaintiff cites cases at p.36 of his brief to the effect that a Judge must exercise restraint in his conduct of a trial, and -- while defendant has no quarrel with these general precepts -- it is also pertinent to point out that our highest Court has held that a Judge has a right to participate in a trial and to ask questions of witnesses. State v. Riley, 28 N.J. 188, 200 (1958). In Riley, the Court commented:

> "We have long since receded from the arbitrary and artificial methods of the pure adversary system of litigation which regards the opposing lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed. See 3 Wigmore, Evidence (1940 ed.), § 784. The judge may, on his own initiative and within his sound discretion, interrogate witnesses for the purpose of eliciting facts material to the trial. [Citations omitted] In the reports of our own jurisdiction, we find many instances where trial judges were sustained in their right to ask questions of crucial importance to the resolution of the cause before them. [Citations omitted] Although it has been said that the instances are not too frequent in which a presiding judge will be justified in conducting an extensive examination, 98 C.J.S. Witnesses § 347, the matter is one which necessarily rests in discretion and depends upon the circumstances of the particular case " (Emphasis supplied)
> 28 N.J. at pp.200-201

Even though the applicant's counsel may somehow find it objectionable, defendant submits that the Board attorney should not be criticized for having diligently prepared his questions for the witnesses who would be testifying in the variance proceeding (Cf. Tr. 10/23/80, p.78, lines 12-21). There is apparently something in the respective "chemistries" of Mr. Glucksman and this writer which does not mesh. I do tend to be quite thorough, detailed and probing — in all work which I do. That may tend to make things more difficult for applicants who come before Boards which I represent, for objectors, for anyone. I can understand that. But, the important point for purposes of this appeal from a Board of Adjustment denial is that I do not believe such thoroughness to be legally objectionable. Defendant submits that the plaintiff may be looking for "scapegoats" on whom to blame the Board's denial, instead of facing up to the substantive deficiencies in his application. This attorney

does not intend on becoming such a target upon whom the plaintiff can vent his displeasure over the outcome of the variance proceeding.

## POINT III

### CONTRARY TO THE PLAINTIFF'S CONTENTION, THE BOARD ATTORNEY'S QUESTIONING WAS NOT DESIGNED TO ELICIT ANSWERS DAMAGING TO THE PLAINTIFF'S CASE.

The plaintiff contends on p.33 of his brief that "the Board attorney asked questions of the plaintiff's witnesses that were designed to elicit damaging answers but asked much more mild and innocuous questions of the Public Advocate and Township witnesses which were designed to support their case." Here, too, the Board maintains that a review of the transcripts will demonstrate the fallacy of plaintiff's argument:

A. To cite just a few instances of same, the Board attorney often asked questions of the applicant's experts which were favorable in nature to the applicant's case.

(1) The Board attorney brought up in his questioning of Daniel R. Cahill, the applicant's architect for his revised housing plan, the fact -- not elicited from the witness by applicant's own counsel -- that the new clustering arrangement for the townhouses would reduce energy utilization (Tr. 10/15/81, p.104, lines 5-11).

(2) Carl Lindbloom, the professional planning consultant for the applicant, was given the opportunity by the Board attorney to explain the circumstances under which a use variance might be granted for multi-family housing (Tr. 11/12/81, p.85, L.12 through p.88, L.12).

(3) Mr. Lindbloom was afforded the opportunity -- indeed, virtually led -- by the Board attorney to rebut some prior testimony and inferences from the Township Planner and to explain the significance of a

certain letter pertaining to the proposed Township Master Plan from William E. Roach, Jr., then the Somerset County Planning Director (Tr. 11/12/81, p.103, L.8 through p.104, L.1).

B. Even though applicant's counsel may perceive it otherwise, questions asked by the Board attorney of witnesses for the Township and the Public Advocate were entirely neutral in nature.

(1) During certain questioning by the Board attorney of John T. Chadwick, the Township Planning Consultant, as to the types of multi-family housing, if any, existing in adjacent municipalities to Warren Township, the applicant's attorney interposed an objection that "a Board of Adjustment attorney should be neutral" and should not be "suggesting an answer to that witness" (Tr. 10/15/81, p.62, lines 2-13). The Board attorney denied that he was "trying to suggest any answer" (Tr. 10/15/81, p.63, lines 13-14), and the Board Chairman asked: "How is he suggesting an answer?" (Tr. 10/15/81, p.63, lines 15-16). The Board attorney explained the basis for his line of questioning (Tr. 10/15/81, p.63, L.24 through p.64, L.9), and the Board Chairman commented to applicant's counsel that "I think you're speculating" (Tr. 10/15/81, p.64, L.14). Defendant invites this Court to review the entire discussion pertinent to this objection by plaintiff's attorney and to determine for itself whether applicant's counsel is not seeing proverbial "goblins under the bed" (Tr. 10/15/81, p.61, L.16 through p.66, L.9).

(2) Another example of the applicant's attorney "creating" or "imagining" some supposed lack of neutrality on the part of the Board attorney,

can be seen during some questioning of James W. Higgins, a planner for the Public Advocate (Tr. 2/4/82, p.75, L.19 through p.79, L.6). There, the Board attorney, in questioning Mr. Higgins as to the revised development plan, asked whether a buffering "problem which you perceived with respect to the earlier plan [has] been removed or ameliorated in this new proposal?" (Tr. 2/4/82, p.76, lines 5-7). After the witness had responded that "it's been ameliorated to a degree" (giving his explanation), plaintiff's counsel then -- and only then -- raised an objection to the Board attorney's question, asserting that this was "another example of the attorney seeking to extract an unfavorable response from a witness" (Tr. 2/4/82, p.76, L.24 through p.77, L.1). Both the Board attorney and the Public Advocate immediately stated that they had no idea what should give rise to such an objection (Tr. 2/4/82, p.77, lines 3-6), and the Board attorney said that:

> "I haven't tried to elicit any response. - I was asking generally as to the entire site how he viewed the adequacy of buffering. You can have a continuing objection to my questions, counsel." (Tr. 2/4/82, p.78, lines 3-7)

C. In many instances, questions asked by the Board attorney of the Township's and Public Advocate's witnesses were, in fact, favorable to the applicant.

(1) The Board attorney, through questioning, was able to get the Township Planner to concede that a statement in his report assessing the employment projections made by the applicant's planner, Mr. Lindbloom, was actually a "conclusion" rather than a "factual finding" (even though the particular statement appears in the section of Mr. Chadwick's report entitled "Findings of Fact"). The effect of this concession by the Township Planner was,

undoubtedly, a certain discrediting of his report (Tr. 8/31/81, p.26,L.11 through p.27, L.5).

(2) Through his questioning, the Board attorney developed or pointed out serious inconsistencies and/or flaws in the testimony of Michael J. Kolody, the engineering expert for the Public Advocate. Thus, in questioning of Stanley Kaltnecker, the Township Engineer, the Board attorney attempted to illustrate the lack of feasibility of an alternate method of sewage treatment proposed by Mr. Kolody (Tr. 7/20/81, p.103, L.22 through p. 106, L.2). Similarly, in questioning Mr. Schindelar, the applicant's engineer, the Board attorney established that both Mr. Schindelar and the Township Planner agreed that Mr. Kolody's suggested alternative was not likely under present policies (Tr. 1/4/82, p.36, L.5 through p.37, L.3). In questioning Mr. Kolody himself, the Board attorney showed how the views of the Public Advocate's engineer differed significantly from those of the Township Engineer (Tr. 2/4/82, p.19, L.12 through p. 20, L.21). In response to applicant's counsel's objection that the Board attorney was not being "objective in his questioning" (Tr. 2/4/82, p.77, lines 9-10), the Board of Adjustment's counsel commented:

> "I think the record is also replete with instances where I question witnesses in a manner that an outside objective reviewing source might find that both questions and responses were favorable to the applicant's position, and one example that immediately comes to mind deals with the subject of sewage for the site and the consistency between the opinions of the various experts and the township engineer, but I don't think it is incumbent upon me to have to defend my role, so I won't proceed any further with it." (Tr. 2/4/82, p.78, L.20 through p.79, L.6)

## POINT IV

### THE BOARD ATTORNEY'S NEUTRALITY AND OBJECTIVITY CAN ALSO BE SEEN BY HIS ACTIONS AT VARIOUS TIMES DURING THE PROCEEDINGS WHEN HE WAS NOT QUESTIONING WITNESSES.

A. The Board attorney took efforts to make certain that, procedurally speaking, the variance proceedings got off on the "right track."

It is this defendant's understanding that the Court has been supplied with the transcript of the September 8, 1980 proceedings relative to the Steinbaum application. Due to certain "notice problems", the hearing in this matter got off to an abortive start that evening and, consequently, the September 8th transcript is not relevant or "part of the record" as concerns the actual variance application. However, defendant submits that certain of the discussion and statements by the Board attorney, as contained in the September 8, 1980 transcript, would be germane with respect to this Supplemental Brief.

Initially, the Board attorney made a point of checking into the source of the list of property owners who had been noticed as to the application, and — upon ascertaining that the list had been obtained from the Township tax office by payment of a fee — he then advised the Board that pursuant to N.J.S.A. 40:55D-12(c), "the accuracy of the list would be considered binding upon all interested parties" (Tr. 9/8/80, p.5, L.15 through p.6, L.4).

Thereafter -- at the instance of the Board attorney -- a lengthy discussion was held regarding the sufficiency of the form of the legal notices which had then been served (Tr. 9/8/80, p.6, L.4 through p.31, L.24). Toward

the end of this dialogue, the applicant's attorney remarked in response to a question by the Board attorney as to how the applicant would be proceeding:

> "MR. GLUCKSMAN: I'm going to put on notice all of the things that we've agreed upon. Thank you." (Tr. 9/8/80, p.30, lines 8-10)

During the course of discussing the notices, the Board attorney suggested that the Township Zoning Officer, who was present at the meeting, testify. Specifically, the Board's counsel noted that such input from the Zoning Officer would "perhaps...be beneficial from a procedural standpoint, so that we can avoid this kind of problem a second time,..." (Tr. 9/8/80, p.18, lines 4-10). As a result, a series of questions relating to the zoning violations entailed in the application were then put to the Zoning Officer (Tr. 9/8/80, p.18a, L.19 through p.29, L.23). It can be seen from the following quotation that the Board attorney, during this discussion, was desirous -- from the standpoint of both the applicant and the Board -- of preventing any jurisdictional problems concerning the notices:

> "MR. HOFFMAN: I would certainly think from the applicant's standpoint, I certainly can't advise you -- if I represented an applicant, I would want to make sure that jurisdiction without question were conferred upon with the Board to deal with any variances of a particular plan that might be present. And reservice of notices in my judgment would eliminate that from being an issue in the matter." (Tr. 9/8/80, p.16, lines 6-14).

Most assuredly, the applicant would have been severely disadvantaged in several respects had he gone through extensive hearings and <u>then</u> encountered a challenge to the sufficiency of the notices.

In a similar vein, the Board attorney during that initial procedural meeting suggested that the applicant furnish transcripts of the hearings to facilitate a vote on the application by as many Board members as possible (Tr. 9/8/80, p.31, L.25 through p.34, L.12). Here, too, the applicant's counsel thanked the Board attorney for his suggestion (Tr. 9/8/80, p.34, L.13).

B. The Board attorney strived to avoid any "procedural irregularities" or "taint" to the proceedings.

When the hearing did get underway at the following session (October 6, 1980), the applicant sought to have one of the Board members disqualify herself for the supposed reason that "she has already passed upon and judged this application" (Tr. 10/6/80, p.11, L.21 through p.12, L.14). The Board attorney rendered a legal opinion that there was "absolutely no reason" for the member in question "to disqualify herself from sitting in judgment of the present application before the Board of Adjustment" (Tr. 10/6/80, p. 35, lines 4-13). Notably, the Board attorney prefaced his opinion with these remarks:

> "MR. HOFFMAN: Based on everything that I have heard this evening, Mr. Chairman, let me say first of all that no one would be more concerned than I as counsel to the Board of Adjustment with any procedural irregularities, if there be such irregularities it might serve to, as Mr. Glucksman put it, taint the proceedings and make all of the efforts of the Board and everyone who is involved in hearing what appears to be a substantial application for naught. I wouldn't want the Board to go through an academic exercise here and I don't think anybody is seeking that." (Tr. 10/6/80, p.34, L.17 through p.35, L.4)

After rendering his legal opinion as to why he felt it would not be improper for the challenged Board member to sit on the application, the Board attorney then commented that if the applicant's counsel still believed that the presence of the particular member would somehow "taint" the proceedings:

> "... it would be my recommendation that what he seriously consider doing before we get very deeply into this matter is to bring a prompt court action in the nature of an order to show cause to deal with this limited procedural issue of testing the propriety of Mrs. Malpas sitting as a voting member of the Board of Adjustment for the application." (Tr. 10/6/80, p.39, lines 6-15)

C. The Board attorney made evidentiary rulings favorable to the applicant.

To cite some examples of rulings or comments by the Board attorney on evidentiary issues which were favorable to the applicant, defendant would note the following. After some discussion amongst the applicant's counsel, the Public Advocate and the Board attorney concerning whether a planning document should "be made a part of the application", the Board of Adjustment attorney stated that he thinks that the applicant should be entitled to have the item so made a part of the application (Tr. 10/23/80, p.12, L.8 through p.15, L.25). After the applicant's attorney had concluded his main questioning of Carl Lindbloom, the applicant's planner, the Board attorney reminded him to have the planner's report -- perhaps the most important of the applicant's exhibits -- marked into evidence (Tr. 1/19/81, p.57, lines 14-19). When the Public Advocate repeatedly asked Mr. Lindbloom the same question (about residential usage abutting industrial zones) and the Board Chairman directed the witness to answer the question, the Board attorney remarked that "[h]e's

answered it twice... so I guess that would suffice" (Tr. 1/19/81, p.93, lines 22-24).

D. The Board attorney stated that general ground rules should be established concerning presentation of expert witness testimony.

The Board attorney interrupted a minor argument between the Public Advocate and the applicant's counsel regarding testimony from an expert for the Advocate, with these comments:

> "MR. HOFFMAN: Gentlemen, to avoid this can we agree on some ground rules as far as any experts to be provided by anyone in this case? It will be some reasonable -- and I can't define that in quantitative terms -- advance notice prior to the expert appearing and testifying; that is to say, the area of expertise and the name of the proposed expert, and that would apply across the board as far as experts that the applicant will produce, experts that Mr. O'Connor will produce, possibly any experts that interested citizens may wish to offer and any that the Board may ultimately wish to produce in the case." (Tr. 1/19/81, p.78, L.24 through p.79, L.11)

## POINT V

### THE BOARD ATTORNEY ATTEMPTED TO EXPEDITE THE PROCEEDINGS WHEN THEY SLOWED DOWN.

As illustrations of the attempts made by the Board attorney to expedite the hearings, defendant offers the following examples:

Following a lengthy discussion between the Public Advocate and the applicant's counsel regarding the exchange of names of experts and their reports, the Board attorney stated:

> "MR. HOFFMAN: Gentlemen, why don't we have your respective witnesses confer over the phone?
>
> I say that tongue-in-cheek, but I think we're taking an awful lot of time..." (Tr. 1/19/81, p.85, lines 10-14)

When the applicant's attorney suggested holding a day session so as to expedite the hearings, the Board attorney immediately stated that, while he cannot speak for the Board, he certainly had no objection — even though, to the Board counsel's knowledge, "[i]ts never been done in the history of this Board..." (Tr. 1/19/81, p.126, L.18 through p.127, L.1).

When applicant's counsel was spending some time qualifying David Mendelson, his traffic expert, the Board attorney interrupted to state that he would like to "shorten" the dialogue, and this brief discussion ensued:

> " MR. HOFFMAN: If I could perhaps shorten this, in my experience and tenure as Board attorney for several Boards I've become quite familiar with Mr. Menselson's qualifications as a transportation and traffic consultant and the expertise which he and his firm have in that area and in traffic engineering.
>
> I take it, Counsellor, he's being offered as what's commonly referred to as a traffic engineering expert?
>
> MR. GLUCKSMAN: Yes. That's correct.

MR. HOFFMAN: I would have no difficulty with his qualifications in that regard.

MR. KOMETANI: Any member of the Board wish to ask Mr. Mendelson any questions?

MR. MENDELSON: Thank you, Mr. Hoffman, gentlemen.

MR. KOMETANI: I think the Board has accepted you as an expert in traffic." (Tr. 4/6/81, p.5, L.20 through p.6, L.13)

The Board attorney sought to avoid the delay that would be caused by requiring the applicant's architect, Barrett A. Ginsberg, to return in order to testify on a certain matter by suggesting that it might suffice if the expert simply submitted his figures and calculations in writing; and the applicant's counsel replied "I think that's a good idea" (Tr. 5/4/81, p.3, L.5 through p.4, L.14).

When additional testimony was required because of the applicant's revised plan, the Board attorney said that the Board should decide on the areas of expertise to be addressed and the specific witnesses to be produced so that "the case [would] be brought to as prompt a conclusion as possible" (Tr. 1/4/82, p.53, lines 4-12; p.55, lines 14-17).

## POINT VI

## PERTINENT DECISIONAL LAW FULLY SUPPORTS THE ACTIONS OF THE BOARD ATTORNEY DURING THE PROCEEDINGS.

At page 36 of his brief, plaintiff states that because the Board of Adjustment exercises a quasi-judicial function, then, logically, so does the Board attorney. The plaintiff cites several cases to show that a Judge must exercise restraint in cross-examining witnesses. Given the quasi-judicial role played by the Board attorney, he applies those cases to the present situation.

The decisions relied on by the plaintiff — while indicating that a Judge must use self-restraint -- show that he may participate in a proceeding to the extent necessary to elicit the truth and to clarify information and testimony. One case mentioned by plaintiff is Band's Refuse Removal Inc. v. Fair Lawn Borough, 62 N.J. Super. 522 (App. Div. 1960), mod. on other grounds 64 N.J. Super. 1 (App. Div. 1960), certif. den. 33 N.J. 387 (1960). In Band's, Judge Goldmann noted that a Judge has the right "to interrogate a witness in order to qualify testimony or elicit additional information." 62 N.J. Super. at p.547.

The second case cited by plaintiff is Ridgewood v. Sreel Investment Corp., 28 N.J. 121 (1958). In Sreel, our highest Court stated that:

> "The trial judge may question a witness in order to clarify existing testimony or to elicit further information from him. [Citations omitted]. Indeed, this appears a desirable procedure where in his discretion he considers it necessary." 28 N.J. at p.132

The final case referred to by plaintiff is Polulich v. J.G. Schmidt Tool Die & Stamping Co., 46 N.J. Super. 135 (Cty. Ct. 1957). In Polulich, Judge Gaulkin noted that "it has always been the right of our trial judges to put additional questions to a witness [Citations omitted]; and that, too, in some cases, is a duty." 46 N.J. Super. at pp. 142-143. The Court quoted with approval from another decision, as follows (46 N.J. Super at p.144):

> "But we do agree that
>
> > 'he is not a dumb and mask-faced moderator over a contest between sensitive and apprehensive, or perhaps wily and ingenious, counsel. He is a vital and integral factor in the discovery and elucidation of the facts. * * * Therefore, on his own account, he is not obliged to rest content with the modicum of evidence which counsel may dole out, or to accept as final their showing of knowledge * * * and credibility * * * of witnesses. But beyond this it is the function of the judge to aid the jury in obtaining a comprehension of the facts equal to his own, in order that a just verdict may be reached. Therefore, whenever in his judgment the proceeding is not being conducted in a way to accomplish the purpose for which alone it is instituted, the full development of the truth, or whenever he can effect a better accomplishment of that purpose, he not only has the right, but it is his duty, to take part. Limitations upon this power appear from the statement of the purpose to be subserved, and are merely those which good sense and propriety suggest. The judge should not place himself in the attitude of helping or hurting either side, but, whenever it appears to him proper, he should fearlessly endeavor to develop the truth with all possible clearness and certainty, which ever side the truth may help or hurt.' State v. Keehn, 85 Kan. 765, 118 P.851 (Sup. Ct. 1911), quoted in 3 Wigmore, sec. 784."
> (Emphasis supplied)

To the same effect, see State v. Riley, 28 N.J. 188, quoted above in Point II of this brief; and see Vasily v. Cole, 173 N.J. Super. 152, 158 (App. Div. 1980). Annexed hereto is a copy of the Appellate Division's (unreported) opinion in the case of Murray v. Bd. of Adj. of Twp. of Lawrence, Docket No. A-489-66, Decided June 15, 1967. That was a matter in which the local Board had denied the plaintiff's application for a variance to construct certain multi-family housing. The plaintiff contended, inter alia, that since the Board was sitting in a quasi-judicial capacity, the calling of numerous expert witnesses by the Board attorney placed the Board "in an inconsistent advocacy position at the same time." The Appellate Division rejected this argument, noting that:

> "A board of adjustment hearing is not an essentially adversary proceeding. Its purpose is to elicit all the pertinent facts as a basis for the board's decision. Hence, the board's calling of these witnesses was in pursuit of that purpose and in fulfillment of our prior remand. It is immaterial that the board's attorney acted as the interrogator. Plaintiff's attorney was given every opportunity to examine the witnesses, whenever clarification or further elucidation was deemed necessary by him." (Emphasis supplied)

Given the above-quoted authority, defendant submits that the extent of participation by the Board attorney in the variance proceeding was reasonable and proper. The attorney questioned witnesses in order to clarify statements, to elicit additional information, to qualify testimony and to see that the hearings were conducted in a manner that would accomplish the purpose for which the proceeding was instituted. A review of the transcripts,

including those sections referred to hereinabove, will, it is submitted, disclose that the Board attorney in the case sub judice acted in a neutral role and at times served as a mediator. He attempted to discover both the positive and negative aspects of the proposal in order to assist the Board in making an informed decision. Contrary to plaintiff's contentions, the Board attorney's questioning of the applicant's witnesses was not designed to elicit damaging answers. Nor was his questioning of the Public Advocate and Township witnesses "mild and innocuous". He sometimes acted in a manner that was accommodating to the plaintiff and asked questions that were favorable to the plaintiff's position. The extent of the questioning was that which was considered necessary by the Board's counsel in his discretion. Contrary to the arguments advanced by plaintiff at page 32 of his brief, the precise number of questions asked of each witness is not material. A variance proceeding, after all, is not a "numbers game" in which a tally is to be taken of whether more questions were asked of one expert than another. The purpose of the proceeding, simply put, was to determine whether the site was suited for the proposed development under the standards and criteria established in the Municipal Land Use Law. The questioning by the Board attorney was necessary in order to clarify statements or to elicit additional information that was, in the language quoted in State v. Riley, supra, "of crucial importance to the resolution of the cause." Further, it should be noted that the Board attorney tried on numerous occasions to expedite the proceedings when they became needlessly lengthy. A review of the entire record will also disclose that plaintiff's attorney caused unnecessary delays and acted in an uncooperative manner on many occasions.

Our Supreme Court has recently reaffirmed that in a Board of Adjustment proceeding it is entirely appropriate for the Board to take an active role in calling witnesses of its own, and for the Board and its counsel to address pertinent inquiries during the proceedings. While emphasizing that the burden of proof always remains with the applicant, the Court noted it is quite proper for the Board to affirmatively "take some action which may be of assistance to it." Commons v. Westwood Zoning Bd. of Adj., 81 N.J. 597, 610-611 (1980).

## CONCLUSION

For the reasons set forth above, as well as those set forth in defendant's initial brief, 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

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APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-489-66

JAMES A. MURRAY,

Plaintiff-Appellant,

vs.

BOARD OF ADJUSTMENT OF THE
TOWNSHIP OF LAWRENCE IN THE
COUNTY OF MERCER,

Defendant-Respondent.

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Argued May 22, 1967 -- Decided JUN 15 1967

Before Judges Goldmann, Kilkenny and Collester.

On appeal from Superior Court, Law Division,
Mercer County.

Mr. Ivan C. Bash argued the cause for appellant.

Mr. Paul G. Levy, argued the cause for respondent
(Mr. Joseph L. Stonaker, of counsel).

PER CURIAM

Plaintiff owner of 11.85 acres of land in the Township of Lawrence appeals from a judgment of the Law Division upholding the action of the board of adjustment in denying plaintiff's application for a variance to construct a garden-type apartment project consisting of 154 multi-family dwelling units in 20 two-story buildings on his acreage.

The subject property is in a "B-Residential District," in which multi-family apartment buildings are not permitted and land use is limited to single-family dwellings, a church, a public school, a public park or playground, a municipal purpose building, a private school, an agricultural or horticultural use, a nursing home, a hospital, or a tourist home. Multi-family dwellings, including garden apartments, are permitted only in the "Business District" of the Township of Lawrence.

This matter is before us for the second time. In disposing of the first appeal we remanded the matter to the board of adjustment for a further hearing so that proofs could be presented (1) to establish the claim of the township committee that multi-family dwellings in this area would have an adverse impact upon already existing high densities of population and traffic, and (2) to cure the deficiency in the former record, limited almost entirely to testimony by plaintiff's expert witnesses as to the greater economic desirability of apartment houses as compared with one-family residences. Practically no consideration had been given to the utility of this land for other permitted uses in this zone.

As a result of further hearings following the remand, the board of adjustment found that:

1. The property in question may be used for permissible uses. It can be developed economically as well as physically for single-family dwellings. It may also be utilized for church purposes, or for school use, or for recreational purposes.

2. There would be a substantial impairment of the intent and purpose of the zone plan if the proposed use were allowed, since this area is basically residential in character. If the proposed apartments are permitted to be erected, they will change the character of the neighborhood by increasing its immediate population and will adversely affect property values in this low-density single-family suburban type area.

3. The proposed use would increase congestion by lowering the setback requirements, by the close proximity of the buildings, by having parking areas only half of what is required, and by the greater number of smaller apartments. All of this would be inharmonious with the present character of the neighborhood and substantially detrimental to the public welfare.

4. Special reasons, as required by N.J.S.A. 40:55-39(d) are not present, because the property is not uniquely circumstanced. Fill is needed for any development of this tract, but that is not enough to classify it as unique.

5. There is not present here such hardship as would require the Board to recommend a variance. The market value of the premises in question is approximately $4000 per acre for development for permitted uses, such as single-family houses. A higher land cost assumed by the Board when it originally recommended a variance for apartments was based upon use of the land for that purpose, but does not apply if a permissible use under the zoning ordinance is adopted.

Based upon all of these reasons, the board of adjustment denied plaintiff's application to erect 154 garden-apartment dwelling units in this limited residential zone.

I.

Plaintiff contends that the action of the board of adjustme was improper, arbitrary, capricious and unreasonable in the light of our remand. He argues that the record clearly demonstrates that the premises in question had no other practical use than for multiple dwellings.

The scope of judicial review of the actions of municipal officials in granting or denying variances is limited. The law presumes that they are thoroughly familiar with their community's characteristics and interests, and that they will act fairly and with proper motives and for valid reasons.

> "Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere. A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable." Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 296 (1965).

We agree with the Law Division that the conclusions reached by the board of adjustment were proper and its findings were supported by substantial evidence. Accordingly, it cannot be said that the denial of the requested variance was arbitrary, capricious or unreasonable.

II.

Plaintiff's next point is that the board of adjustment acted improperly when it called as witnesses the former township tax assessor, the township engineer, the township health officer,

the acting police chief, the project planner for the Lawrence Township master plan study, and a local realtor and appraiser, all of whom testified and gave their opinions in their respective areas of expertise on the issues to be decided by the board. Plaintiff argues that the board was sitting in a quasi-judicial capacity and having its attorney call these witnesses placed it in an inconsistent advocacy position at the same time.

The tax assessor testified that plaintiff's property in its existing state was valued at $49,000 for purposes of local taxation. The township engineer testified that the area was not swampy land, despite any such characterization on one of the exhibits. He stated that he was able to walk over the entire property, despite the fact that it was four feet lower than the level of an adjoining road. The board considered a report from the acting chief of police that the increase in traffic will not be a significant burden in terms of density on Princeton Pike or Route 206, the two major arteries in this area. The township health officer testified that there would be no detrimental effects from the new project since health problems would be properly taken care of.

The next witness called by the board's attorney was a Mr. Tighue, an appraisal expert in the field of residential real estate. He testified that the property had a fair market value of $92,300, if it were developed within the permitted uses. The purchase price of $150,000 was discounted because that price was contingent upon the obtaining of a variance for the garden apartments. It was his opinion, based upon the detailed reasons given, that the land could be developed profitably for single-family, church, school or recreational purposes, all of which are permitted in this residence "B" zone.

Finally, the planner employed by the township to prepare a new master plan testified that the highest and best use of the

property from a community viewpoint would be the presently permitted uses. He also stated that a garden-apartment project would be very bad for this property and would be harmful to the zone plan and property values in the immediate area.

In eliciting this information, the board of adjustment did not adopt the position of an advocate at a hearing in which it was sitting in a quasi-judicial capacity. Rather, it brought forth all the evidence to the end that an enlightened judgment could be made. We find no error--and certainly no prejudicial error--in the complete factual picture thus developed. The ultimate objective was fairness to both the public and the individual property owner. A board of adjustment hearing is not an essentially adversary proceeding. Its purpose is to elicit all the pertinent facts as a basis for the board's decision. Hence, the board's calling of these witnesses was in pursuit of that purpose and in fulfillment of our prior remand. It is immaterial that the board's attorney acted as the interrogator. Plaintiff's attorney was given every opportunity to examine the witnesses, whenever clarification or further elucidation was deemed necessary by him.

III.

Plaintiff's final claim is that the ordinance prohibiting multi-family dwellings in a residence "B" zone unconstitutionally deprives him of the use of his land without due process of law. We find no substantial merit in this contention, based as it is upon an assumption which was not established by the proofs, as noted above.

It is true that a municipality may not impose land use restrictions which are so unreasonable as to be confiscatory, arbitrary or oppressive. In zoning there must be a rational relation between the regulation and the service of the general welfare with-

in the range of the police power. An ordinance which so restricts the use to which land can be put as to prevent its being utilized for any reasonable purpose is constitutionally invalid. The reasonableness of a zoning regulation must be tested in the setting or physical characteristics of the area in which it is sought to be enforced. Glen Rock, etc. v. Bd.of Adjust., etc., Glen Rock, 80 N.J.Super. 79, 88 (App.Div. 1963). And see Collins v. Board of Adjustment of Margate City, 3 N.J. 200, 206 (1949); Katobimar Realty Co. v. Webster, 20 N.J. 114 (1955); Morris County Land, etc. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 557 (1963).

At the same time, the zoning power may be exercised to promote the general welfare within the permissive objectives of the Zoning Act. R.S. 40:55-32. Gruber v. Mayor and Tp.Com.of Raritan Tp. 39 N.J. 1, 9 (1962). Among those objectives are: "to lessen congestion in the streets; secure safety from fire, panic and other dangers; promote health, morals or the general welfare; provide adequate light and air; prevent the overcrowding of land or buildings; avoid undue concentration of population." R.S. 40:55-32. Property need not be zoned to permit every use to which it is adapted. "It is sufficient if the regulations permit some reasonable use of the property in the light of the statutory purposes." Morris County Land, etc., supra, 40 N.J. at p. 557. That constitutional test has been satisfied in the instant case.

The judgment of the Law Division is affirmed.