Warren 1984

- Brief on Behalf of Board Adjustment
- Zoning Board Resolution
- letter from Judge to [redacted] Counsel
- 1967 Lawrence Twp Opinion

pgs 83

MLC000363B

LAWRENCE V. STEINBAUM,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY
Plaintiff,	:	
vs.	:	Docket No. L-59706-81 P.W.
BOARD OF ADJUSTMENT OF THE TOWNSHIP OF WARREN and THE TOWNSHIP OF WARREN, a Municipal Corporation of the State of New Jersey,	:	
Defendants.	:	

BRIEF ON BEHALF OF BOARD OF ADJUSTMENT

BERNSTEIN, HOFFMAN & CLARK, P.A.
336 Park Avenue
Scotch Plains, New Jersey 07076
(201) 322-2300
Attorneys for Defendant, Warren Township Board of Adjustment

BARRY M. HOFFMAN, ESQ.
On the Brief

TABLE OF CONTENTS

PRELIMINARY STATEMENT

This is an action seeking to reverse a denial issued by the Warren Township Zoning Board of Adjustment for a use variance application filed by the plaintiff in which he sought permission to construct certain multi-family housing. The plaintiff, Lawrence V. Steinbaum, owns a 30.94 acre tract of land in Warren Township located on the northerly side of Mt. Horeb Road. The tract is irregular in shape, a "flag lot", and contains an existing pond, some watercourses, swampy areas, open fields and wooded areas. It is presently zoned Rural-Residental (R-R) and Environmentally Critical Rural-Residential (ECR) and is currently utilized as a recreational facility for a private school located across from the site. The plaintiff applied to the Board of Adjustment to construct townhouses, a form of multi-family development, on the property, this being a non-permitted use in the Zones. The Board held extensive hearings on the plaintiff's application and denied same pursuant to a comprehensive Resolution adopted on May 20, 1982. A copy of the Board's Resolution is annexed to this memorandum.

Basically, the Board concluded that the applicant had failed to meet either the affirmative or negative criteria for grant of a variance under N.J.S.A. 40:55D-70(d).

Among other things, the Board found that the type of higher priced housing proposed would not inherently serve the general welfare; that the applicant had not shown the property to be peculiarly suited for multi-family development and, in fact, that it was especially unsuited for such usage; that the applicant had failed to clearly demonstrate that the property could not be developed for permitted detached single-family dwellings; that the land could continue to be utilized for a private school recreational facility; and that the proposed use would be out of character with the existing low density residential development in the area and would not serve as a good transitional use.

The Board of Adjustment maintains that it acted reasonably and properly in denying the plaintiff's application and that its Resolution should be affirmed by this Court. Additionally, the Board denies the allegation contained in the Second Count of the Complaint that its attorney exceeded his proper role during the hearings, and it 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 (this phase of the action will be treated in a supplemental brief to be filed on behalf of the Board). Under

the terms of the Pretrial Order entered in this matter -- and as noted in a letter to the Court of plaintiff's counsel dated October 27, 1983 -- the remaining issues raised in the Complaint (relating to the reasonableness of the application fees paid to the Township, the validity of the Zoning Ordinance and a claim of "inverse condemnation" of plaintiff's lands) will be dealt with in a later stage of the litigation.

STATEMENT OF FACTS

The Board of Adjustment has already adopted extensive factual findings with respect to the nature of plaintiff's property; the land uses existing thereon and in the area of the property; the Zoning regulations and Master Plan recommendations with respect to the property; the nature and extent of the usage proposed for the tract by the plaintiff; and the testimony and other evidence adduced at its hearings relating to the application. Those findings are all set forth at length in the duly adopted Resolution of the Board. This Court will, of course, carefully review the Board's Resolution as part of its consideration of the present appeal. Rather than to "abbreviate" the relevant facts or to furnish a "synopsis" of same, in duplicative fashion, the Board will incorporate herein by reference as the factual portion of its brief the detailed fact findings which it has already made, all as more particularly set forth in its Resolution adopted on May 20, 1982. (The annexed copy of the Resolution has had the sentences numbered in Paragraphs 1-25; and there is also annexed to this brief a detailed Table or Schedule of supporting references for all of the factual findings contained in the Board's Resolution, which Schedule contains sentence numbering corresponding to the marked copy of the Resolution).

Apart from the foregoing presentation of the pertinent facts, the Board of Adjustment would also wish to offer the following comments or corrections with respect to certain of the matters set forth in the Statement of Facts in the plaintiff's brief. First of all, in the top paragraph on page 4 of his brief, the plaintiff asserts that "throughout these proceedings [he] continually represented and stressed to the Board that it[sic] was totally amenable to any type of housing which the Board would like to see on the subject parcel, including least-cost housing, senior citizen housing, or subsidized housing." The plaintiff goes on to contend that he continually took an approach which was "totally flexible" and that he "invited comments from the Board in this regard. All the plaintiff was requesting was some form of multi-family dwelling use on the parcel in question." No citations to the transcripts are furnished as to where the plaintiff supposedly voiced this amenability to these varied potential types of development for his lands. The Board does not dispute, however, that discussions of this general nature took place during the lengthy proceedings. Thus -- at the risk of incurring the wrath of plaintiff that we may not be citing <u>all</u> of the instances or examples of such discussions -- we would refer the Court to the dialogue pertaining to a possible reduction

in density (Tr. 10/23/80, p.50, L.6 through p.56, L.11) and to the discourse pertaining to the nature and cost of the housing proposed for the tract (Tr. 10/23/80, p.109, L.11 through p.110, L.15). The Board's position, as stated therein, is that, as a quasi-judicial agency which is required to pass judgment upon the proposal which the applicant chooses to place before the agency, it would be highly improper for the Board to actively participate in helping to design or propose the basic development plans or scheme for the tract when that usage is one not permitted under the Zoning Ordinance. Thus, in considering the subject of the type and cost of the proposed townhouse units, the Board obviously accepted as credible the position of the Township Planner that houses selling for up to $120,000 or $125,000 -- and that at October 1980 prices -- would not qualify as "least-cost" housing (See Resolution, Paragraph 23, Conclusion 1(a); Tr. 10/6/80, p.85, lines 2-3; Tr. 10/23/80, p.104, lines 2-5). The applicant never saw fit to substantially amend his proposal insofar as the type of construction and sales prices for the proposed townhouses; and the Board acted upon the plan before it. The Board submits that it cannot, and should not, be called upon to change the very nature or concept of the applicant's proposal, which it must judge. It is pertinent to note that N.J.S.A. 40:55D-10.1

provides for informal conceptual reviews only by Planning Boards and not by Boards of Adjustment. It is this defendant's understanding that the Legislature intentionally omitted including Boards of Adjustment from the cited "informal review" section of the Municipal Land Use Law precisely because of the extreme awkwardness which could result from the type of "free-wheeling" discussion envisioned by that section. If the basic use is one not allowed, a Board of Adjustment should not be expected to render any "informal" indications of its acceptability in the absence of receiving an adequate showing of the "special reasons" and "negative criteria" of N.J.S.A. 40:55D-70(d). In any event, the statement in plaintiff's brief that it "invited comments" from the Board could not operate to trigger any such informal or conceptual discussion as contemplated by N.J.S.A. 40:55D-10.1 -- assuming, arguendo, that a Board of Adjustment can participate in that type of informal review. The statute is very clear that informal agency reviews are to occur prior to any formal application being submitted and only if no fees are paid to the municipality. In the instant case, the Board of Adjustment was already conducting hearings on a formal application of the plaintiff and one for which fees had been paid (indeed, as part of this action the plaintiff challenges the amount of the fees as

allegedly being excessive). For these reasons, the defendant contends that it would be unfair, impractical, improper and beyond the Board's statutory authority for the Board of Adjustment to be expected to affirmatively suggest or "plan" for overcoming fundamental deficiencies in the plaintiff's case. The Board can only "judge" an application; not "propose" it.

In a statement taken entirely out of context, on page 7 of his brief the plaintiff notes that Carl Lindbloom, his planner, indicated that the subject property is in a "minimal limitations category", including its supposed lack of a high water table or flood-prone characteristics. The Board submits that a fairer, more complete presentation of Mr. Lindlbloom's testimony on this point is that set forth at the end of Paragraph 9 of the Resolution. There was an acknowledgment which followed immediately by the wintess that percolation for the site is "very poor" according to the applicant's engineer (Tr. 1/19/81, p.30, lines 23-24), and Mr. Lindbloom was also unaware that all or any portion of the property was in a designated Watercourse Protection Area (Minutes 2/5/81, p.22).

A prime target of attack by applicant's counsel during the proceedings was James W. Higgins, a planning consultant presented by the Warren Township Public Advocate. At the bottom of page 10 and top of page 11 of his brief, the plaintiff contends that:

> "On cross-examination, Mr. Higgins indicated that he had virtually no experience with townhouses. He never supervised or principally designed a townhouse. He does recall participating in the design of a townhouse in East Brunswick but doesn't even recall the name of the development. The plan was eventually withdrawn. He has never been involved in any active townhouse application which ever reached the initial proceeding before a municipal body. He has also had nothing ever to do with the implementation of a townhouse project or overseeing the operation of such a project. (Tr. 6/1/81, p.17-20) He has never even testified, as an expert, either before a Court of Law or any municipal Board of Adjustment or Planning Board regarding any townhouse project. In spite of the complete lack of experience concerning the townhouses, Mr. Higgins reached certain conclusions regarding the instant application."

Defendant submits that the above commentary is by no means a fair or complete recital of the witness' planning credentials, either generally or specifically with respect to townhouse developments. The Board would refer the Court to several additional pages of the above-cited transcript (Tr.6/1/81, pp.11 through 35). Specifically with regard to townhouses, Mr. Higgins noted that he helped to design the East Brunswick application referred to above (p.19, lines 15-17). He also helped design a 200 unit townhouse complex in Edison (p.33, lines 12-19). From the municipal viewpoint, he reviewed townhouse applications for Ocean Township (p.18,21) and Delaware Township (p.34). The Delaware Township matter entailed litigation. The witness noted his involvement with writing of "numerous ordinances for

municipalities which allow multi-family housing" (p.34, lines 11-13). After polling all of the members, the Board of Adjustment unanimously accepted the witness' expertise as a planner (p.35, lines 15-25). See also Paragraph 16 of the Resolution.

On Page 11 of his brief, the plaintiff states that Mr. Higgins "had some traffic concerns with regard to the project but he quickly admitted that he was not a traffic expert and he would defer to the opinions of the traffic experts of the Public Advocate and the applicant, who both felt that there would be no particular traffic problems associated with the subject project." (Emphasis supplied). The actual dialogue between Messrs. Glucksman and Higgins relating to this matter is set forth below:

> "Q Also, in the location of a major road, you make some traffic decisions. You talk about a bottleneck resulting, talking about even if a right of way were given, certain factors might occur.
>
> You're not a traffic expert, are you?
>
> A No, I'm not.
>
> Q You don't hold yourself to be a traffic expert?
>
> A No.
>
> Q And you would give way, so to speak, defer to the opinions of traffic experts.
>
> Is that correct?
>
> A Not all the time.

Q What about your own traffic expert in this case, Mr. Christ?

A I do not know Mr. Christ.

Q In making a report have you spoken to the Advocate's expert?

A No

Q Have you made any attempt to coordinate with the traffic expert provided by the Public Advocate?

A No, I did not. I didn't think that would be appropriate.

Q You didn't think it would be appropriate to talk to him about traffic considerations?

A No, because our opinions may differ and I as a planner may have different views than he does.

Q Offhand would you defer to him as having a better view with regard to traffic conditions regarding this application.

A Not in all instances, no.

Q How about the instances laid out in paragraph D, location of major roads? You talk about bottlenecks occurring and widening of the roads. Would you feel he is more prepared and better able to and qualified to pass on the subjects?

A No. I don't think so. I don't think I am any more than he is, but I think we would be on a par. This is a planning consideration as well as it is a design consideration.

Q When you talk about bottlenecks resulting, isn't that more or less a traffic consideration?

A A bottleneck itself may be more of a --

Q With regard to that bottleneck resulting, do you feel Mr. Christ is better qualified to pass upon that than you are?

A If he did an engineering study with traffic counts, then I would think his information would be more accurate than mine.

Q Would it surprise you to find out Mr. Christ is in agreement with our traffic expert's findings and recommendations?

A No, it would not.

Q If you defer that Mr. Christ is better qualified with regard to the bottleneck situation, the traffic considerations, and he has, in fact, agreed with our traffic expert, does that in a way eliminate this particular problem?

A I don't think so because I still as a planner cannot support a complex like this on this small a road.

Q Just talking the traffic considerations of the bottleneck, would you defer Mr. Christ is better qualified to answer that?

A If he does traffic testimony -- as I said before, yes, if he did a traffic study." (Emphasis supplied). Tr. 6/22/81, p.36, L.5 through p.38, L.18.

It strains one's belief to attempt to fathom how one can possibly deduce from the foregoing cross-examination that Mr. Higgins "quickly admitted that he was not a traffic expert" and that he "would defer to the opinions" of others more qualified than himself. Defendant submits that this example is symptomatic of the rather contorted version of the "facts" which the plaintiff has furnished to the Court.

On Page 12, plaintiff states that "Mr. Higgins conceded that he didn't conduct a study as to whether there were sites more suitable for townhouses than the present one." A more balanced discussion of this point would have noted that while Mr. Higgins did say that he "strictly looked at the site" to determine its suitability for townhouses (which he found to be lacking) (Tr. 6/22/81, p.28, lines 12-13), the other two professional planning experts who testified, likewise refrained from presenting any such comparative study of the relative suitability of other potential sites. Mr. Lindbloom felt same to be unnecessary because he believed the applicant's lands to be suitable (Tr. 11/12/81, p.42, L.22 through p.43, L.15); and Mr. Chadwick, while noting that he was not in a position to select other, better suited sites for multi-family development, nevertheless did indicate that there are other properties in Warren Township having sewer and water utilities, located on major roads and not presenting any flooding or drainage considerations (Tr. 10/15/81, p.9, lines 17-23; p.32, L.25 through p.33, L.6).

To say -- as plaintiff does near the top of page 13 of his brief -- that "Mr. Higgins admitted that once the townhouse project was scaled down from 300 to 184 units, that this reduction, in turn, obviated almost all of his site plan

concerns regarding the subject property", is a total misstatement of the facts. In truth, in discussing the amended concept proposal of the applicant, Mr. Higgins clearly still expressed serious reservations about the entire front portion of the applicant's plan -- noting that the density was some eight (8) times greater than current zoning would allow and that a heavily traveled access road to the development would be just 25 feet away from single-family properties. This, the witness felt, would cause "an adverse relationship with the adjacent land uses at this point." (Tr. 2/4/82, p.41, L.3 through p.42, L.5; p.61, L.12 through p.62, L.4). A more appropriate capsulization of Mr. Higgins' views with regard to the amended plan can be found in the following quotation:

> "Q Do you have an opinion regarding the appropriateness of this site for the multi-family house use reflected on the amended site plan?
>
> A Yes. I still don't feel the site is particularly suited for the use.
>
> Q Why is that?
>
> A As I outlined in my original testimony, there were nine criteria that are used for site suitability. This still does not meet five, if not six of those criteria, and the site should meet more than a majority of those criteria. It does not have to meet all of the criteria, but it should meet the majority of it." (Tr. 2/4/82, p.42, lines 6-17).

Similarly taken out of context is the quotation near the top of page 14 of the brief of Michael J. Kolody, an engineer presented by the Public Advocate. The actual concluding paragraph of Mr. Kolody's December 15, 1981 report (PA-4Ev.) reads in its entirety:

> "As requested, I have reviewed the modified site plan proposed to determine what effect the plan would have on my original report dated June 16, 1981. As previously stated, the revised plan tends to minimize adverse effects to the surrounding environment and to the existing water course. The main concerns which still exist surround the proposed package treatment plant and its effect on the existing water course. The alternate proposed in my report on June 16, 1981, still appears to be a viable alternative in that the proposed reallocation of rights in the Middlebrook trunk sewer is minimal."

Defendant submits that the plaintiff's stated conclusion that "in essence, from an engineering standpoint, he [Mr. Kolody] no longer had any major concerns about the proposed townhouse project as reduced and amended." (Emphasis supplied), is entirely unwarranted. Clearly, in the engineer's own language, he still had certain "main concerns" pertaining to the proposed on-site sanitary sewerage treatment plant. See also Paragraph 20 of the Resolution.

Another "half-truth" appears in the plaintiff's statement on page 14 that John T. Chadwick, the Township Planner, "was not prepared to define least-cost [housing] in terms of

the particulars of Warren Township." It is true that Mr. Chadwick indicated that in his testimony (Tr. 10/15/81, p.38, lines 15-19); however, just prior thereto in his cross-examination he also emphatically expressed the opinion that a home in the $120,000 to $125,000 price range "does not fall within the bracket of least-cost housing." (Tr. 10/15/81, p.36, lines 8-15). Similarly, the rather unequivocal assertion by plaintiff on page 14 that Mr. Chadwick "never" conducted a study as to whether there is a need for multi-family housing in Warren Township, must be considered in light of the witness' testimony that such a study "is currently under way." (Tr. 10/15/81, p.4, L.24 through p.5, L.4; p.33, L.13). Finally, the alleged concession by Mr. Chadwick, as referred to on page 15 -- to the effect that the presence of the Watercourse Protection Area "is principally an engineering consideration which could be overcome at site plan proceedings" -- must be considered against the planner's actual testimony. He noted that the presence of the Watercourse Protection Area is a physical feature associated with the pond, stream and wet lands on the tract which limits and "inhibits development" (Tr. 10/15/81, p.49, L.19 through p.50, L.1). And when asked specifically by applicant's counsel whether the wet lands

limitations of the site cannot be treated as considerations to be dealt with "after the variance itself is granted", Mr. Chadwick's actual response was:

> "A Not if you have an intensive use application, and one of the features of the tract of land for which that application is made is a major water course through it." (Emphasis supplied). Tr. 10/15/81, p.50, lines 15-18.

That type of response is quite different from plaintiff's allegation that the witness "conceded that this...could be overcome at site plan proceedings."

While of no material legal significance, the defendant would simply wish to correct the statement made on page 15 of plaintiff's brief to the effect that the Board voted 4 to 1 to deny the requested use variance at the conclusion of the proceedings held on March 29, 1982. In fact, the vote was 5 to 1 on March 29, 1982 (Tr. 3/29/82, p.124). The vote on May 20, 1982 to adopt the Resolution of Memorialization was 5 to 0 -- that representing all of the members then eligible to vote on the Resolution pursuant to N.J.S.A. 40:55D-10(g).

ARGUMENT

POINT I

THE DECISION OF A BOARD OF ADJUSTMENT IS PRESUMED CORRECT, ESPECIALLY WHEN IT DENIES A VARIANCE.

It is an axiomatic principle of land use law that the decision of a Board of Adjustment "is presumptively correct, and the person assailing that action has the burden of proving otherwise." Bierce v. Gross, 47 N.J. Super. 148, 157 (App. Div. 1957); Ring v. Borough of Rutherford, 110 N. J. Super 441, 445 (App. Div. 1970), certif. den. 57 N.J. 125 (1970). The reviewing Court is not empowered to make a determination as to whether or not in its opinion a variance should have been granted by a Board of Adjustment. The Court is limited to reviewing the reasonableness of the determination. Miriam Homes, Inc. v. Board of Adjustment, Perth Amboy, 156 N.J. Super. 456, 458-459 (App. Div. 1976), aff'd per curiam 75 N.J. 508 (1978). It is in the spirit of our zoning laws to restrict, rather than to increase, nonconforming uses. Bove v. Board of Adjustment of Emerson Borough, 100 N.J. Super. 95, 101 (App. Div. 1968). "Variances to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning." Kohl v. Fair Lawn, 50 N.J. 268, 275 (1967).

The judicial philosophy of sympathy to local zoning decisions is:

> "even more cogently applicable to a case where we review a denial of a variance than where we review a grant, for generally speaking more is to be feared from a breakdown of a zoning plan by ill-advised grants of variances than by refusals thereof." Cummins v. Board of Adjustment of Borough of Leonia, 39 N.J. Super. 452, 460 (App. Div. 1956); Mahler v. Borough of Fair Lawn, 94 N. J. Super. 173, 186 (App. Div. 1967), aff'd per curiam 55 N.J. 1 (1969).

The plaintiff has a heavy burden in reversing the decision of a Board of Adjustment, especially when the Board denies an application. Kenwood Associates v. Board of Adjustment, Englewood, 141 N. J. Super. 1, 4 (App. Div. 1976).

There is a presumption of validity which attaches to the decision of a Board of Adjustment. That presumption is one which has not been altered by our Supreme Court in Southern Burlington County N.A.A.C.P. v. Mount Laurel Twp, 92 N.J. 158 (1983) ("Mt. Laurel II"), a case relied upon heavily by plaintiff in his brief. To the contrary, our highest Court in Mt. Laurel II remarked that "[p]resumptive validity of governmental action serves many important values." At p.305. It added that:

> "...the presumption goes deep, and indirectly includes the assumption of any conceivable state of facts, rationally conceivable on the record, that will support the validity of the action in question." At p.306.

Where a Board of Adjustment makes a reasonable decision, as in the present case, that decision should not be disturbed.

POINT II

THE DECISION OF A BOARD OF ADJUSTMENT MAY ONLY BE REVERSED IF IT IS FOUND TO BE ARBITRARY, CAPRICIOUS OR UNREASONABLE.

In an appeal involving a variance, the reviewing Court cannot substitute its judgment for that of the Board of Adjustment. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965). The Court in Cummins, supra, at p.460, stated:

> "On a judicial review this court does not substitute its independent judgment for that of a zoning board entrusted by the Legislature with the administrative function. [Citations omitted]. The question is never what we would have done in the circumstances, but whether the zoning board abused its authority or departed from law."

The decision of a Board of Adjustment may only be reversed where it is found to be arbitrary, capricious or unreasonable. Ring, supra, at p.445. In the absence of arbitrariness, the Board's decision must be upheld, regardless of the Court's independent judgment of the case. Demarest v. Borough of Hillsdale, 158 N.J. Super. 507, 511 (App. Div. 1978), certif. den. 78 N.J. 331 (1978). The basis for this rule was stated by the Supreme Court in Kramer, supra, at pp.296-297:

> "In these highly controversial and oftentimes debatable zoning cases the courts must recognize that local officials 'who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people are undoubtedly best equipped to pass initially on such applications for variance.' [Citation omitted]...

"Such public bodies, because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. 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. Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved."

In many cases, a Board could reasonably approve or deny a variance application. If the Board's decision is supported by the record, it cannot be disturbed on appeal.

"Our cases recognize that there is an area of special discretion reposed in the local agencies within which, in many situations, either the grant or denial of a (d) variance would be judicially sustained. The board of adjustment weighs the facts and the zoning considerations, pro and con, and will be sustained if its decision comports with the statutory criteria and is founded in adequate evidence." Mahler, supra, at pp.185-186.

The decision of a Board of Adjustment may only be reversed by "an affirmative showing that it was manifestly in abuse of [its] discretionary authority." Ward v. Scott, 16 N.J. 16, 23 (1954).

The holding in Nigito v. Borough of Closter, 142 N.J. Super. 1,9 (App. Div 1976), certif. den. 74 N. J. 265 (1977), is equally applicable to the case at bar:

"The borough's conclusion that special reasons have not been shown for the proposed garden apartment complex cannot be viewed as so arbitrary, capricious or unreasonable as to warrant what in substance amounts to a judicial grant of the variance in question."

POINT III

THE COURTS HAVE SHOWN AN AVERSION TO GRANTING VARIANCES FOR PRIVATE MULTI-FAMILY DEVELOPMENT.

The New Jersey Supreme Court upheld the denial of a use variance for the construction of apartments in Fobe Associates v. Demarest, 74 N.J. 519 (1977). The applicant in that matter had sought a variance for the construction in a single-family residential zone of a 120 unit garden apartment development in five separate colonial style buildings. The Board of Adjustment denied the request and the Trial Court, Appellate Division and Supreme Court all affirmed. The defendant municipality had no multi-family zoning. However, the Supreme Court cited Kramer, supra, at p. 290, to the effect that an outmoded zone plan should be corrected by an amendment to the zoning ordinance and not by a variance. 74 N.J. at p.532.

The Supreme Court gave cogent reasons why a use variance for multi-family development should be denied:

> "The breadth and amorphousness of our 'special reasons' d. variance under the Andrews doctrine has drawn authoritative criticism. See 5 Williams, American Land Planning Law (1975), § 149.18-149.19, pp.84-188; Cunningham, 'Control of Land Use in New Jersey by Means of Zoning', 14 Rutgers L. Rev. 37, 93-94 (1959).
>
> The New Jersey County and Municipal Government Study Commission has commented adversely on the use of the variance procedure for construction of multi-family

units in suburban areas. In a study of such variances from 1965-1972 the Ninth Report of the Municipal Commission noted that 'the use of variances in this way obviates the goal of preplanning the appropriate use[s] for each district. Furthermore, by its nature it makes it impossible the intelligent anticipation of development needed to plan for service provision and a balanced community.' Housing & Suburbs: Fiscal and Social Impact of Multi-family Development, Ninth Report 113 (1974).

The decision in Brunetti v. Mayor, Coun. Tp. of Madison, 130 N.J. Super. 164 (Law Div. 1974), upholding a variance for construction of garden apartments on the grounds that such housing constitutes a special reason within the scope of N.J.S.A. 40:55-39 d. has been criticized as 'subverting rational land use planning' so as to 'inevitably result in even greater misplanning in New Jersey suburbs.' Mallach, 'Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation', 6 Rutgers-Camden L.J. 653, 658, 676 (1975). Granting such variances 'largely on the basis of the absence of negative findings, would result in arbitrary changes in the use of land, precluding serious planning for services, facilities, traffic circulation and other community needs.' Id. at 659. To the same effect, Mytelka, 'The Mount Laurel Case: Where to Now?' 98 N.J.L.J. 513, 522 (1975). See also Mytelka and Mytelka, 'Exclusionary Zoning: A Consideration of Remedies', 7 Seton Hall L. Rev. 1, 11 (1975), rejecting the special use exception for low and moderate income housing as a remedy for exclusionary zoning because of its potential for abuse." Fobe Associates, supra, footnote 5, at pp. 535-536.

The denial of a variance to construct a 340 unit condominium project was upheld in Segal Construction Co. v. Zoning Board of Adjustment, Wenonah, 134 N.J. Super. 421 (App. Div. 1975), certif. den. 68 N.J. 496 (1975).

The denial of a use variance for the construction of 184 garden apartment units in a one family residential zone was before the Court in the Nigito case, supra. Adjacent to the

property in question were railroad tracks which were in use. The site was below the street grade and would require extensive fill. Parts of the property were low and swampy. Public water and sewers were available to the tract. The Appellate Division reversed the Trial Court which had directed the municipality to approve the application. In finding for the municipality, the Court stated: "The initial determination as to effect of the proposed apartment development upon the zoning plan of the borough was for the borough itself. Its conclusion, amply supported by evidence in the record, should not be disturbed simply because the court took another, albeit reasonable view of the matter. A variant use is permitted only in an exceptional case where the justification therefor is clear." 142 N.J. Super. at p.8.

A similar situation was presented in Weiner v. Zoning Board of Adjustment of Glassboro, 144 N.J. Super. 509 (App. Div. 1976), certif. den. 73 N.J. 55 (1977), where the Appellate Division reversed the determination of the Trial Court and reinstated the determination of the Board of Adjustment which denied a use variance. In that matter, the applciation was for senior citizen housing in a district which permitted one and two family dwellings on parcels containing at least 5,000 square feet per unit. The Court recognized the beneficial

purpose of senior citizen housing. However, the decision of the Board of Adjustment that the proposed density was excessive was not disturbed.

The pattern of having a municipality deny a variance for multi-family development, which decision was reversed by the Law Division and reinstated by the Appellate Division was followed in Castroll v. Township of Franklin, 161 N. J. Super. 190 (App. Div. 1978). The Appellate Division stated: "It is still the rule in New Jersey that a private commercial housing development does not inherently serve the public good and welfare." At p. 196. (Parenthetically, it might also be noted that the Castroll decision, at p.194, refers to the severe criticism furnished by commentators and the lack of subsequent judicial support given to the 1974 Law Division decision in Brunetti v. Madison Twp., an opinion relied on by the plaintiff at page 18 of his brief).

Contrary to plaintiff's contention (at page 23 of his brief) that the need for this type of housing will, itself, constitute special reasons for the grant of a variance, it is extremely difficult for an applicant to present a case before a Board of Adjustment which would justify the grant of a use variance for multi-family housing. In the landmark case of Southern Burlington County N.A.A.C.P. v. Township

of Mt. Laurel, 67 N.J. 151, 181-182, footnote 12, (1975) ("Mt. Laurel I"), the New Jersey Supreme Court stated:

> "It is well known the considerable numbers of privately built apartments have been constructed in recent years in municipalities throughout the state, not allowed by ordinance, by the use variance procedure, N.J.S.A. 40:55-39(d). While the special exception method, N.J.S.A. 40:55-39(b) is frequently appropriate for the handling of such uses, it would indeed be the rare case where proper 'special reasons' could be found to validly support a subsection (d) variance for such privately built housing." (Emphasis supplied).

Defendant submits that the plaintiff in the case at bar did not present such a "rare case." Based on the foregoing decisional law and the sales prices of the proposed townhouse units, the Board maintains that Conclusion 1(a) of its Resolution is well-founded. The Courts have been opposed to the grant of use variances for multi-family projects, especially when they are located in single-family residential zones. Since the denial of the variance application in the instant case is well documented by the record, the Board's decision should not be disturbed.

POINT IV

THE APPLICANT FAILED TO PROVE THAT HIS PROPOSAL WOULD PROMOTE THE GENERAL WELFARE BY VIRTUE OF PECULIAR SUITABILITY OF THE PROPERTY FOR MULTI-FAMILY HOUSING.

At page 16 and again at page 28 of his brief, the plaintiff contends that the property in question is peculiarly or uniquely suitable for the proposed use, thus entitling him to a use variance on those grounds. The Board of Adjustment, however, determined in Conclusion 1(b) of its Resolution that the applicant had not shown the property to be peculiarly suited for multi-family usage; and that, indeed, the site's particular unsuitability can reasonably be found to be the case.

The leading case on the issue is Kohl v. Fair Lawn, 50 N. J. 268, 279-280 (1967), wherein the Supreme Court stated:

> "The cases in this Court in which a significant factor has been the contribution of the proposed use to the 'general welfare' all have involved uses which inherently served the public good. [Citations omitted]. Of course, the processing and distribution of milk does serve the general welfare. However, this activity, unlike a school or hospital, does not in itself provide the basis for a finding of special reasons any more than does the manufacture and distribution of any other necessary commodity. In all the above cited cases the very nature of the use gave rise to special reasons for the grant of a variance, and in those cases we did not require a finding that the general welfare could be best served by locating the proposed use at the specific site in question. Where, however, the use is not of the type which we have held of itself provides special reasons,

such as a school or hospital, there must be a finding that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought. [Citations omitted]. This is so because nearly all lawful uses of property promote, in greater or lesser degree, the general welfare. Thus, if the general social benefits of any individual use -- without reference to its particular location -- were to be regarded as an adequate special reason, a special reason almost always would exist for a use variance. Mere satisfaction of the negative criteria of the statute would then be all that would be required to obtain a variance under subsection (d)." (Emphasis supplied).

See also Mahler v. Borough of Fair Lawn, 94 N. J. Super. 173, 184 (App. Div. 1967), aff'd per curiam 55 N.J. 1 (1969), wherein the Appellate Division observed that:

"It is obvious that almost all lawful uses of property in our society serve in greater or lesser degree the promotion of the general welfare. If the social benefits of any individual use were, on the basis of the general welfare concept, to be regarded as an adequate special reason for a (d) use variance, we would have, in effect, the untoward and clearly unintended consequence that variances could be awarded indiscriminately merely because they did not offend the negative criteria of the statute."

The Kohl test -- that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought -- was held to be applicable to multi-family projects in Fobe Associates, supra, at pp.534, 535, and Castroll, supra, at pp.196-197. Rejection of variance applications was upheld in both cases (discussed in Point III above). The present application is not for an eleemosynary use such as a school or hospital. The Board may have been faced with a different question if low income housing had been sought.

In the case sub judice, the plaintiff had the burden of proving that the proposed use was particularly suited to the subject property. He failed to meet this burden. Neither Mr. Lindbloom, the applicant's planner, nor Mr. Earl, his real estate appraiser, had done a comparative study as to the relative suitability for multi-family housing of the proeprty in question and other sites in the Township (see Resolution Paragraph 10, Sentence 6 and Paragraph 15, Sentence 4); and -- absent such proof -- the Board was justified in concluding that the plaintiff had failed to demonstrate the special or peculiar suitability of the subject property. Moreover, the evidence adduced at the hearing actually disclosed numerous reasons why the proposal under consideration was quite inappropriate for the site (see, e.g., Resolution Paragraph 17, Sentence 6; Paragraph 20, Sentences 8 and 12; Paragraph 21, Sentences 6-9; and Paragraph 24, Sentences 3-4). For these reasons, Conclusion 1(b) of the Board's Resolution was entirely warranted.

POINT V

THE APPLICANT FAILED TO SHOW THAT THE PROPERTY CANNOT REASONABLY BE USED FOR ONE OR MORE OF ITS ZONED PURPOSES.

The plaintiff also contends (at page 16 and pp.25-27 of his brief) that his lands cannot reasonably be used for detached single-family dwellings, that being one of the permitted purposes in the R-R and ECR Zones of Warren Township. In Conclusion 1(c) of its Resolution, the Board found that the plaintiff "had not clearly shown" this to be the case.

A careful review of the testimony of the various expert witnesses relative to possible single-family residential development of the tract discloses the following. Barrett A. Ginsberg, the applicant's architect, stated that, based upon a study done by his firm, 18 single-family homes could be placed on the site; and that under current zoning regulations they could be constructed on 52,000 square foot lots, freeing up some 9 acres for open area (Tr. 10/6/80, p.80, lines 16-24). Richard H. Schindelar, the applicant's engineer, furnished cost estimates for a sewer treatment plant for 18 homes (Tr. 11/13/80, p.15, lines 17-21). Carl Lindbloom, the professional planning consultant for the applicant, similarly indicated that, taking into account the pond area, about 18 dwellings could be built on 50,000 square foot lots with

approximately 9 acres left for open space (Tr. 1/19/81, p.36, lines 5-8; report (A-10 Ev.), p.6). James W. Higgins, the planning expert for the Township Public Advocate, opined that the property can be used for its zoned purpose by constructing 18 single-family homes thereon, with adequate buffers being provided between the new homes and the adjacent industrial areas (Tr. 6/1/81, p.61,lines 12-19; Tr. 6/22/81, p.5, lines 3-23), Michael J. Kolody, engineer for the Public Advicate, testified as to the possibility of obtaining sewerage rights for the tract for some 16 to 18 single-family homes (Tr. 2/4/82, p.19, lines 13-19). John T. Chadwick, the Township Planner, noted that while he had not done a study as to the number of single-family homes which could be placed on the subject parcel, the "natural constraints" of the site would be less of an inhibition to development for single-family housing than it would be for multi-family housing (Tr. 10/15/81, p.16,lines 2-16). Contrary to the testimony of other experts, including that of the applicant's architect and his planner, Clifford Earl, the real estate expert for the applicant, felt that a maximum of only 10 single-family lots could be developed on the tract due to its shape and the required roadways (Tr. 5/4/81, p.10, lines 1-24); but Mr. Earl acknowledged that his calculations were done without

utilizing the alternative lot design modification and variable lot size provisions contained in the Township Zoning Ordinance (Tr. 5/4/81, p.55, L.18 to p.56,L.2).

In Conclusion 1(c) of the Resolution, the Baord of Adjustment acknowledges, based upon the previous findings made by it, that "construction of single-family homes on the tract may be somewhat more expensive because of the environmental limitations of the site" and that "construction of higher density townhouses may be more economically feasible to the applicant." It is well settled, however, that a property owner is not entitled to a variance merely because a proposed use of his property will be more profitable to him than the permitted uses. Shell Oil Co. v. Zoning Board of Adjustment, Shrewsbury, 64 N.J. 334(1974), reversing on the dissenting opinion below in 127 N.J. Super. 60, 65 (App. Div. 1974); Wilson v. Mountainside, 42 N.J. 426, 451 (1964); Beirn v. Morris, 14 N.J. 529, 534 (1954). Indeed, in the recent (unreported) opinion of the Appellate Division in Tuschak, et al v. Township of Hillsborough, et al, Docket No. A-1032-82 T2, decided December 27, 1983, the Court stated (at p.15 of its opinion) that: "[e]vidence of financial unfeasibility of conforming uses would not provide a special reason for the grant of a variance."

At page 27 of his brief, plaintiff argues that the single-family houses presently existing along Mt. Horeb Road near the subject property are not in the caliber of those which his real estate expert, Mr. Earl, testified would have to be built on the site. However, this contention overlooks the testimony of Mr. Chadwick, who indicated that, from his experience in the area, large homes are historically seen in the Warren-Watchung area adjoining quarries, industrial uses and modest single-family dwellings, and that small or even dilapidated housing is not a deterrent to building larger, more expensive homes (see Resolution, Paragraph 21, Sentences 15-17). Similarly, the applicant's contention that the proximity of the industrial usage to the subject site serves as a deterrent disregards the testimony of Mr. Chadwick that the adjoining warehouse is only a "dead storage" facility rather than a location producing a continuous turnover of vehicles (Resolution, Paragraph 21, Sentences 10-14), as well as the acknowledgement of Mr. Earl that, during 4 or 5 visits to the property, he found the abutting industrial usage to be "almost noiseless" (Resolution, Paragraph 15, Sentence 3). In any event, our Supreme Court has stated that border areas of properties should not be easily subject to change through variance. In Cerdel Construction Co., Inc. v. East Hanover Twp., 86 N.J. 303, 306 (1981), the Court observed that:

> "It can always be said that the border area of a zone is affected by adjoining uses and that such an area is particularly adaptable to uses pursuant to a variance. However, the lines have to be drawn somewhere if a zone plan is to have any real purpose. The erosion of border areas through variances is destructive of sound zoning and cannot be allowed except where special circumstances beyond those ordinarily associated with zone borders are shown." (Emphasis supplied)

For the foregoing reasons, the Board submits that the conclusions reached by it in Paragraph 1(c) of the Resolution with respect to usability of the property for its zoned purpose of detached single-family dwellings, are reasonable and should not be disturbed. Additionally, it is worth noting -- as was stated in Conclusion 1(d) -- that a denial of the requested variance will not serve to zone the property into inutility (i.e. even assuming that single-family housing may not be feasible on the site). Throughout his presentation to the Board and in his brief, the plaintiff either overlooks or intentionally downplays the fact that the land can continue to be used, as at present, for private school recreational purposes. As Mr. Chadwick notes in Paragraph 5 of his report (B-4Ev.), at p.2:

> "The historic and current use of the land is for a recreational facility accessory to Somerset Hills located immediately south of the subject tract. Somerset Hills is a private school providing resident educational facilities for disturbed children."

That type of existing usage, incidentally, would appear to inherently serve the public good and welfare far more so than would a privately built multi-family housing complex.

POINT VI

THE APPLICANT FAILED TO SATISFY THE "NEGATIVE CRITERIA" PREREQUISITE TO THE GRANT OF A ZONING VARIANCE.

For the reasons set forth in Points III, IV and V of this memorandum, the defendant maintains that the plaintiff failed to establish the affirmative criteria of "special reasons", as required by N.J.S.A. 40:55D-70(d). Every application for a variance must also meet the "negative criteria" of the cited statute, i.e. there must be a showing that the requested variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The Board determined in its Resolution that the applicant had failed to meet the negative criteria for the several reasons enumerated in Conclusions 2(a) through (e). It was not the burden of the Board to find affirmatively that the Township Zone Plan could be substantially impaired by a grant of the proposed variance; it was, rather, the burden of the applicant to prove the converse. Weiner v. Zoning Board of Adjustment of Glassboro, supra, 144 N.J. Super at p.516.

The Supreme Court in Fobe Associates, supra, grounded its affirmance of a Board of Adjustment's denial of a use

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

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

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

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

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

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

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

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

At page 30 of his brief, the plaintiff states:

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

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

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

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

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

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

POINT VII

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

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

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

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

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

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

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

POINT VIII

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

BERNSTEIN, HOFFMAN & CLARK, P.A.

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

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

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

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

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

Paragraph 1

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

Paragraph 2

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

Paragraph 3

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

Paragraph 4

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

Paragraph 5

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

Paragraph 6

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

Paragraph 7

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

Paragraph 8

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

Paragraph 9

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

Paragraph 10

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

Paragraph 10 (continued)

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

Paragraph 11

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

Paragraph 12

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

Paragraph 13

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

Paragraph 14

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

Paragraph 14 (continued)

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

Paragraph 15

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

Paragraph 16

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

Paragraph 17

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

Paragraph 18

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

Paragraph 18 (Continued)

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

Paragraph 19

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

Paragraph 20

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

Paragraph 21

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

Paragraph 22

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

Paragraph 23

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

Paragraph 24

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

Paragraph 25

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

ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF WARREN

CASE NO. 80-8

RESOLUTION

WHEREAS, LAWRENCE V. STEINBAUM has applied to the Zoning Board of Adjustment of the Township of Warren for permission to construct multi-family attached townhouse dwelling units on property known as Block 313, Lots 21, 22, 23, 24 and 33B on the Tax Map of the Township, located at 201 Mt. Horeb Road, which premises are in a Rural-Residential (RR) Zone and Environmentally Critical Rural-Residential (ECR) Zone; and

WHEREAS, the Board has held public hearings on this application on October 6, 1980; October 23, 1980; November 13, 1980; December 1, 1980; January 19, 1981; February 5, 1981; April 6, 1981; May 4, 1981; June 1, 1981; June 22, 1981; July 20, 1981; August 31, 1981; October 15, 1981; November 12, 1981; January 4, 1982; February 4, 1982; March 18, 1982; and March 29, 1982; and

WHEREAS, the Board has received evidence at said hearings on behalf of the applicant, the Municipal Public Advocate, and from adjoining property owners and other interested parties, as well as produced certain of its own witnesses concerning the application; and

WHEREAS, the Board has carefully considered all of the extensive evidence presented to it, consisting of testimony and exhibits in the form of reports, letters, maps, charts, photographs, percolation test data and other documents; and

WHEREAS, the Board has also given careful consideration to the written memoranda and oral arguments advanced in favor of and against the application; and

WHEREAS, the Board members have also viewed the subject property and surrounding area; and

WHEREAS, the Board deliberated and took action on this application at its meeting of March 29, 1982, and this Resolution constitutes a Resolution of

Memorialization in accordance with N.J.S.A. 40:55D-10(g); and

WHEREAS, the Board has made the following factual findings and conclusions:

1. The subject property, which is located on the northerly side of Mt. Horeb Road, is a 30.94 acre tract of land owned by the applicant. It is irregular in shape and a "flag type" of lot, with some 284 feet of frontage along Mt. Horeb Road and a depth of approximately 1,800 feet. The width of the property is much wider in the interior of the site. For a depth of some 250 feet in off of Mt. Horeb Road, the property slopes downward rather steeply, with a topography in the area of 10 percent. The remainder of the tract is more level in topography. There is an existing pond which is fed and drained by some watercourses, as well as some wet or swampy areas, open fields and wooded areas. The property is presently zoned Rural-Residential (RR) and Environmentally Critical Rural-Residential (ECR), each of which zones permit single-family detached dwellings on 1.5 acre lots and other varied lot sizes, as well as farming of different types, houses of worship and certain other uses. The property is currently used as a recreational facility for the Somerset Hills School located across from the site on Mt. Horeb Road and it contains—in addition to the pond—an outdoor swimming pool, some ball fields, game facilities and several small buildings.

2. The tract is located approximately one mile from the Warrenville Center area of the Township, at a point which is some 2,100 feet west of the intersection of Mt. Horeb and Mt. Bethel Roads. The area surrounding the subject property includes some lands in RR and ECR Zones to the east, west and south, and lands in a GI-2 general industrial zone to the north and northeast. In the RR and ECR Zones are some single-family homes, vacant and wooded areas. There are some dilapidated chicken coops on lands to the west of the site. The industrially zoned land is developed with a manufacturing facility and parking of the Burroughs Corp. to the north and an office and warehouse of Chubb and Co. to the east. The industrial uses are separated from the site by natural tree growth. The area to the east of the property in closer proximity to the Mt. Bethel Road is zoned Neighborhood Business (NB) and is in mixed usage. Generally, heading eastward from the site along Mt. Horeb Road, there are a few non-residential uses, including a day camp and television transmission tower (neither of which are basically visible from the road), a private school and—nearer to the Mt. Bethel Road intersection—a catering office, small auto wrecking company, gasoline station and a public school.

3. The applicant initially sought permission to construct 300 townhouses on the tract in accordance with a conceptual plan prepared by Barrett A. Ginsberg, Architect-Planner, entitled "Proposed Multi-Family Housing, Mt. Horeb Road, Warren, New Jersey" dated July 17, 1980 and revised to September 18, 1980. Much of the applicant's presentation related to this particular plan, which provided a total of 70 one-bedroom, 200 two-bedroom and 30 three-bedroom units. Subsequently, while the hearings were still ongoing before the Board of Adjustment, the applicant significantly amended its proposal by submitting an entirely different conceptual plan for the site providing some 184 townhouse units in a different arrangement than had been shown on the earlier plan. The new plan, entitled "Proposed Multi-Family Complex, Warren Township, Somerset County, N.J." dated October 8, 1981 was prepared by Cahill-Prato-McAneny, Architects-Planners, and it provides for some 46 one-bedroom, 120 two-bedroom and 18 three-bedroom units. On the new plan, the townhouses are clustered around parking courts in some seven groups averaging approximately 26 units per cluster.

4. The application to construct multi-family townhouse units on the site is for a use not permitted in either the RR or ECR Zones, and the application

to the Board falls within the criteria of N.J.S.A.40:55D-70(d). Together with the basic use variance, the applicant sought relief for a number of other variances from the Township Zoning regulations. Several of these ancillary violations have been eliminated on the amended plan before the Board dated October 8, 1981. However, the application still appears to entail the following additional variances from provisions in the Warren Township Zoning Ordinance (as to which notice has been given):

(a) Section 16-5.15	-	Construction of more than one residential building on a lot.
(b) Section 16-5.18	-	Regulation of "Building Individuality".
(c) Section 16-7 (11)	-	Height of certain of the buildings (3 stories) exceeds the 2-1/2 story maximum allowed.
(d) Section 16-20.3(g)	-	Providing of two parking spaces for each residence (a ratio of only 1.85 spaces per unit being shown).

The application was presented to the Board as a "bifurcated" application under the provisions of N.J.S.A. 40:55D-76(b), which section permits a developer to elect to seek approval for the variances, with subsequent application for the necessary site plan approval and development permit approval under the Warren Township Flood Damage Prevention Ordinance if the variances are granted. (Parenthetically, it may be noted that, while the applicant followed the stated procedure, he also seemed to take the position that all issues other than approval of the basic concept of townhouse use could be deferred until the subsequent site plan stage and that the plan layout would not necessarily be fixed or established during the first phase of the application).

5. Barrett A. Ginsberg, who prepared the applicant's initial conceptual plan, testified as an expert in architecture. He described the site and surrounding area, presenting a series of photographs of the property and adjacent uses. A good deal of the witness' testimony pertained to a description of the earlier (300 unit) plan, which has now been superseded. Mr. Ginsberg also testified regarding a drawing prepared by his firm dated July 17, 1980 and revised to September 18, 1980 depicting typical elevations and floor plans for the proposed townhouses. This particular rendering is also applicable to the latest (184 unit) plan. In other words, although the basic site layout and number of units has changed significantly between the two plans, the general appearance of the housing units, their floor dimensions and height is still intended to be consistent with Mr. Ginsberg's rendering. This fact was confirmed by Daniel R. Cahill, the applicant's architect for the 184 unit plan. The unit sizes range from approximately 900 square feet for the smallest one-bedroom townhouse to approximately 1900 square feet for the largest three-bedroom townhouse. Mr. Ginsberg stated that the construction materials to be used would be wood frame, masonry and wood exterior walls, brick, stone, cedar siding; and he opined that these materials would blend in with the present residential character of the area. According to Mr. Ginsberg, all units would be sold, not leased. Sales prices projected by the witness as of October 1980 ranged between $80,000 and $120,000; but it should be noted that such opinion testimony was rendered in connection with presumable cost benefits to be derived from a much larger development. Mr. Ginsberg also cited figures from a study done by his firm to the effect that construction of a typical 2,500 square foot single-family house on the subject property--inclusive of costs for a sewerage treatment plant--would result in sales prices of approximately $195,000 per home. The witness noted that, under current Township Zoning regulations, some 18 single family homes could be built on the site. He was of the view that the tract is in

a transitional zone in the sense that the property has different types of uses on its borders and that, from an architectural standpoint, the parcel is suitable for multi-family dwellings. He noted that due to the narrow frontage of the property, there would be little visibility from the street. He also stated, however, that the site has been used for recreation purposes for many years by the Somerset Hills School. Although topographical maps showed portions of the property to be wet and swampy, the witness was unaware as to whether the site was located within a designated flood hazard area or Watercourse Protection Area.

6. Daniel R. Cahill, the applicant's architect for the new 184 unit plan, also testified. He described the larger setbacks (some 70 feet) to be provided by his firm's plan and noted the demarcation on the plan of the approximate Watercourse Protection line. He noted that some 50 percent of the site area is in a designated Watercourse Protection Area. The overall site density of the proposed development would come to 5.95 units per acre, with 70 percent of the tract in open space and 30 percent devoted to buildings and roadways. The witness indicated the location of a sewerage treatment plant on the easterly side of the property and a proposed swimming pool and some tennis courts on the westerly side. The existing pond on the site would be extended to a certain extent, as noted on the plan. The entranceway to the development would be a dualized roadway with one-way ingress and egress to the site. Internal roadways would be 24 feet wide and parking spaces would be of 10' x 20' dimension. Mr. Cahill noted that parking is provided on the site for 1.85 cars per unit, with some of the townhouses having garages and others not having them. He stated that, generally, his firm does recommend garages for all such housing units, however.

7. Richard H. Schindelar testified as an engineering expert for the applicant. Generally, he voiced the view both for the former and the amended plan that there are no engineering problems or restraints to development presented by the site that cannot be solved through normal engineering techniques. He described the drainage system as "conventional", with the water level in the pond maintained through a controlled outlet. The witness indicated that he had visited the site on January 4, 1982, a day of particularly heavy rainfall (1-1/2 to 2-1/2 inches); that he found the pond to be about one foot above its normal level; that there was some overland and sheet flow present; and that the whole tract, when developed, would be able to handle the amount of water to be produced under bad circumstances. Mr. Schindelar stated that the developer would have to obtain a stream encroachment permit from the New Jersey Department of Environmental Protection. While the witness had not yet done actual calculations on whether there would be an increase in the rate or velocity of runoff from the site after construction, he was confident that—through utilization of the storage capacity of the pond—there could be compliance with the drainage criteria of the Township. Mr. Schindelar had also not yet undertaken calculations as to the extent of ground disturbance or whether there would be a need for any extensive regrading. The witness also indicated that there is a sufficient public water supply available in Mt. Horeb Road to service the proposed units.

8. With regard to sanitary waste from the site, Mr. Schindelar testified that he did not believe capacity to be presently available in the municipal sewerage system. His office had conducted percolation tests of the property, the results of which showed that the land would not support individual septic disposal systems. His recommendation was for the construction of an on-site sewerage treatment plant, which he stated, however, would not be cost effective to build for 18 single family homes that might be constructed on the site due to both the initial capital expenditure and continuing operational charges. The cost of such a plant for 18 houses, as calculated by Mr. Schindelar and related by Mr. Ginsberg, would be approximately $100,000 ($5,500 per house) and $1,000 per year in operational

costs. According to Mr. Schindelar, the estimated cost of construction of a sewerage treatment plant for the 184 townhouses would be approximately $250,000 ($1,350 per unit) with annual maintenance being in the vicinity of $24,000 to $25,000. The witness indicated that the new treatment plant for the site would handle some 41,400 gallons per day of flow (184 units x 225 gallons per day per unit). He acknowledged that this particular facility would have to have a very high level of treatment (Advanced Waste Treatment). He felt that the level of flow to the facility could be regulated sufficiently through the lake and stream on the site. Notwithstsanding the high level of treatment which would be required, Mr. Schindelar stated that he had not yet contacted the Warren Township Sewerage Authority to ascertain even the preliminary or conceptual feasibility of such a proposed treatment facility for 184 townhouses. He noted—in discussing potential alternate methods of providing sanitary waste disposal for single-family homes—that there are some "very special types of designs" and that self-contained septic systems are being approved by the State; but that he had not considered such alternate methods, was not too familiar with the costs involved and/or did not believe they would be approved by the local Board of Health.

9. Carl Lindbloom, a professional planner, furnished a written report and also testified extensively for the applicant. Mr. Lindbloom's report deals with the suitability of the site for multi-family use and the criteria for the location of such type of housing. It also discusses Warren Township's Zoning and Master plan in relation to regional plans and recent court decisions. Mr. Lindbloom believed the site to be appropriate for the proposed usage because it is less than one mile from the Warrenville area, which is described in the Township Master Plan as the Town Center. This area of the Township contains two shopping centers as well as the municipal building, library and a county golf course. The Central School is situated to the east of the site. He noted that Mt. Horeb Road is designated as a collector street in the Township Master Plan and the site is less than one half mile along that street from the intersection with Mt. Bethel Road, a major arterial which is the Township's primary north-south traffic route. The witness reviewed the mixed character of uses in the vicinity of the subject property, stressing that two industrial properties abut the rear portions of the tract. He felt that the proposed use is well located for the traffic which it would generate and that it will provide a transitional use between the adjacent industrial development and the lower density residential uses. Mr. Lindbloom stated that, environmentally speaking, the site is in a "minimal limitations category" notwithstsanding the fact that the applicant's engineer had testified to the very poor percolation data which he had obtained. The planner was also not aware of the fact that a significant portion of the property is within a designated Watercourse Protection Area.

10. Mr. Lindbloom discussed the zoning districts of the Township, noting that RR and ECR Zones—of which the site is a part—make up some 87 percent of the zoned acreage in the Township. He then reviewed the other zoning designations and noted that none of them in Warren provide for multi-family dwellings. The witness also stated that the subject property is designated in the land use plan element of the Township Master Plan as an existing quasi-public use, reflecting its current use as a recreation area for a private school. He noted that it can accommodate about 18 homes under existing zoning, and with clustering these could be built on 50,000 square foot lots, leaving about nine acres of open space on the site. Due to the soil conditions and the abutting industrial uses, he was of the opinion that the property is better suited for the proposed multi-family usage than to development with single-family detached housing. Mr. Lindbloom had not made any comparative study, however, as to the suitability of other tracts in the Township for the proposed use, contending that same was unnecessary since he believed the site in question to be well suited. The planner reviewed the recommendations of the Somerset County Master Plan, New Jersey State Development Guide Plan and the Tri-State Regional Planning Commission, noting that to one extent or another they each call for some future residential development at higher

densities than allowed by Warren's Master Plan. However, he also acknowledged that Tri-State's recommendations are done on a broad-brush basis for most of Warren; that the State actually does not recommend specific residential densities but designates different sections of New Jersey only as growth, limited growth, agricultural or open space areas; and that Somerset County's Master Plan designation of "Community Development" use with medium density housing actually does not touch the subject tract. In fact, the Somerset County Master Plan actually designates the area of the proposed development as "Residential Neighborhood" at a density of only one dwelling unit per one or two acres (as was subsequently established during the hearings by a different planning expert).

11. Mr. Lindbloom cited various statistics to support his contention that Warren Township is located within a region with a large and growing employment base. He felt that the Township met the criteria for a "developing community" as established by the New Jersey Supreme Court in the case of Southern Burlington County NAACP v. Mt. Laurel Twp, and, as such, the municipality must provide for its share of the region's housing need. This Board seriously questions whether statistical analyses of housing need of the type presented by the planner can best be developed as part of the quasi-judicial proceedings held on a use variance application filed by a party seeking approval for development of a particular site or parcel. In any event, Mr. Lindbloom acknowledged that the proposed townhouse units would not help to fill the need for low or moderate income housing and that they would not increase the supply of rental housing (since the units are intended to be sold). His contention--made without the benefit of any detailed or comparative cost study--was that the units would qualify as "least cost" housing within the meaning of the subsequent Oakwood at Madison v. Twp. of Madison decision. He acknowledged, however, that there might very well be "more least cost" beyond what is proposed by this applicant.

12. All in all, Mr. Lindbloom concluded that "special reasons" had been shown for the requested use variance by its helping the Township meet a need for varied housing types on a site which he believed to be appropriate for the use. He also opined that relief could be granted without causing any detriment to the public good and without substantially impairing the intent and purpose of the Zoning Plan and Zoning Ordinance--notwithstanding his agreement that the proposal before the Board is, in fact, totally inconsistent with the present Township Master Plan. In commenting on the specific new 184 unit plan submitted to the Board of Adjustment, the planner felt that its traffic impact would be lessened from the previous 300 unit proposal and that the problem of setbacks and buffers would be lessened. While the density was now reduced to 5.95 units per acre, he acknowledged that if no townhouses were to be built in the Watercourse Protection Area--as testified to by Mr. Cahill the net density would thereby increase to approximately 11.9 units per acre. The planner also did not know whether the reduced density of the new plan would increase the projected sales prices of the units. Finally, he had not made any analysis of the adequacy of the parking shown on the new plan.

13. David Mendelson, a transportation consultant, testified for the applicant. He indicated that he had conducted a traffic engineering study, inclusive of road widths, speed limits and sight distances, had taken traffic counts and gathered accident data. Mr. Mendelson reviewed his findings, noting that Mt. Horeb Road in the vicinity of the subject property had a pavement width of only 18 to 19 feet and that it was operating at an advisory speed limit of 30 m.p.h. Notwithstanding the width of this collector street, he saw no need for any roadway widening in front of the property. The witness felt that the sight distances from the driveway were more than adequate to insure safe operation. The plan upon which Mr. Mendelson rendered his testimony was the previous (300 townhouse unit) plan and he did not believe that the increased traffic volume to be generated by such a development of the site would negatively impact the external road system of the Township. However, he did present a conceptual plan for improvement of the intersection of Mt. Horeb and Mt. Bethel Roads, which he recommended be implemented. Basically, the plan would increase the number of lanes to two east-bound lanes on Mt. Horeb as it

approaches the intersection, and it would add a second north-bound lane on Mt. Bethel for left-hand turns. The witness also furnished comments and recommendations relating to the roadway and parking arrangement of the site itself. There is no need to refer to same herein because the plan as to which he testified has been superseded. The applicant's transportation consultant—somewhat contrary to his expert planner saw no reasonable likelihood for public transit along Mt. Bethel Road in the near future. Specifically, Mr. Mendelson said that it will be "a very long time" before buses would be used on Mt. Bethel Road because there is simply not enough of a population density.

14. Clifford Earl, a real estate appraiser, also testified in an expert capacity for the applicant. He stated that the property could be considered to be in a transitional zone and that its location was, in his opinion, seriously affected by the GI-2 Zone to the north and east of the tract. Mr. Earl testified that he disagreed with the projections made by the applicant's architect and planner to the effect that 18 single-family homes could be constructed on the property; and he opined that, due to the shape of the tract and the required roads, a maximum of only 10 single-family lots could be developed. This calculation was done by the witness without utilizing the alternative lot design modification and variable lot size provisions contained in the Warren Township Zoning Ordinance. Projecting for the subject property what he believed the cost to be for constructing a 2,800 to 3,000 square foot eight-room, 2-1/2 bath modern colonial home with attached garage, Mr. Earl estimated an approximate sales price of $225,000 for such a dwelling. He was of the view that the proximity of the industrial zone would, however, adversely impact on the marketability and salability of single-family residences on the subject property and that that factor—along with the prohibitive cost for a sewer treatment system for only 10 lots—precluded the property from being used for its zoned purposes. In the witness' own words: a builder of single-family homes on the property "would be building monuments to himself." In Mr. Earl's view, a $225,000 price was too high for the location. He estimated the price range of single-family dwellings along Mt. Horeb Road to be between $125,000 and $150,000. In marked contrast to the detrimental effect which Mr. Earl believed the industrial zone would have upon single-family detached housing, the witness felt that people who reside in townhouses find such industrial areas to be "uniquely acceptable" and that the proposed development could serve to buffer the existing residences in the area from the GI-2 Zone.

15. On cross-examination, the applicant's appraiser conceded that there are existing residences in the Crown Drive area of the Township which abut the GI-2 Zone selling for between $225,000 and $250,000. Moreover, he also acknowledged that a builder could perhaps construct a single-family home on the subject property for as low a sales price as $165,000—a figure which, it may be noted, is not very much out-of-line with the $125,000 to $150,000 estimated price range of existing homes in the area. Mr. Earl further stated that in his experience in visiting the subject property on four or five occasions, with employees present on the abutting industrial sites, the amount of users or noise generated from those lots was "almost noiseless". He testified that he had not made a study of whether there are any other sites available in Warren Township which would be better suited for the proposed type of townhouse development and, in fact, did not know whether there are any other potential sites available within 1-1/2 miles of Route 78 or Route 22. The appraiser was not familiar with the types of amenities to be provided in the proposed units, noting simply that the materials could be changed if the municipality so wished. Finally, he was also unaware of the fact that a portion of the tract is in a Watercourse Protection Area.

16. The Warren Township Public Advocate participated in the proceedings held before the Board of Adjustment and presented two expert witnesses. The first of these experts was James W. Higgins, a professional planner. Preliminarily, it may be noted that the applicant challenged the qualifications of Mr. Higgins, who was licensed as a planner in New Jersey for some 2-1/2 years as of June 1981,

the time when he first testified in the present application. Mr. Higgins stated, however, that he had had some seven years of planning experience—six months with the Planning Department of Rutgers University and 6-1/2 years with a private firm of professional planners. The witness indicated that he had testified before numerous Planning Boards and Boards of Adjustment, as well as in the New Jersey Superior Court, as a planning expert; that he had helped to prepare zoning ordinances and master plans for several New Jersey municipalities; and that his experience included multi-family design and concept. The Board of Adjustment would note that it is satisfied as to the expert qualifications of Mr. Higgins and, in this regard, it might also be appropriate to mention that Mr. Lindbloom, the applicant's planner, testified that he agreed generally with the criteria for multi-family housing used by Mr. Higgins in his evaluation and report and differed only as to the specific conclusions to be drawn therefrom with regard to the subject site.

17. Mr. Higgins—after outlining the nature of the application and his findings with regard to the property, existing land use in the vicinity, zoning designation and Township and County Master Plan recommendations—presented a list of some nine criteria which professional planners use in evaluating the suitability of any given location for higher density housing:

(a) The availability of sanitary sewers, or a suitable State-approved system;

(b) The availability of a public water supply;

(c) Suitable storm drainage facilities or streams that can take the capacity of increased runoff;

(d) Location on a major road;

(e) Availability of mass transportation;

(f) Close proximity to major shopping facilities;

(g) Close proximity to public and semi-public facilities;

(h) Close proximity to employment;

(i) Compatible relationship to other land uses.

For both the applicant's initial 300 unit proposal and—subsequently—for his 184 unit plan, Mr. Higgins carefully evaluated the proposed townhouse projects in light of each of the listed criteria. His basic conclusion was the same in each instance—that the subject site does not meet most of the criteria and is not suitable for multi-family development. The witness stated that it was not his contention that a site must meet all of the outlined criteria to be suitable for multi-family housing but that it should satisfy most of them. With regard to the 184 unit plan, Mr. Higgins found—subject to one important qualification or exception noted below—that the revised density was an improvement over the applicant's initial proposal; but that the site still failed to meet five or six of the nine criteria. He expressed the view that there is not sufficient accessibility to shopping or to public and semi-public facilities; that the property is not located on a major road; that, while some employment is present nearby, the adjacent GI-2 Zone would provide a very limited type of employment opportunity; that mass transit is not available to the site; and that the proposal does not present a compatible relationship to adjacent land uses.

18. With regard to Mt. Horeb Road, Mr. Higgins was aware of the fact that the Township Master Plan designates the street as a collector road at a right-of-way width of 60 to 66 feet. However, he also noted that its existing right-of-way from Mt. Bethel Road up to the site is only some 40 feet, and 33

feet further to the west. He felt that it was highly unlikely that the street will be widened because of the topography, that to do so would be "environmentally unsound" and that there are, in fact, no plans to widen the road. Mr. Higgins cited the following statement appearing in the Warren Township Master Plan:

> "These standards cannot and should not be rigorously applied in all circumstances. In many cases, because of existing roadside development, topography or both rigorous application of County design standards would be unfeasible and environmentally unsound."

He also mentioned that there are no sidewalks or lighted streets along Mt. Horeb Road which residents of the townhouses could utilize in walking to the Neighborhood Business District to the east (noting that the NB Zone is not sufficient to service the subject property in any case). The witness stated that while the possibility exists that mass transit may become available in the future along Mt. Bethel Road, that street would be about one-half mile away and too far for walking—especially in light of the other cited problems with Mt. Horeb Road. For similar reasons, Mr. Higgins believed that shopping approximately one mile away in the Warrenville area would not be sufficiently convenient to residents of the proposed development.

19. In discussing the specifics of the new conceptual plan before the Board, Mr. Higgins voiced the opinion that the ratio of 1.85 on-site parking spaces per unit was not adequate for a location where there would necessarily have to be total reliance on the automobile. Moreover, he questioned the providing of garages for only 50 percent of the townhouses, noting that garages can frequently become storage areas. The Public Advocate's planning expert expressed serious reservations about the development proposal for the front, narrow portion of the site in the vicinity of Mt. Horeb Road. While agreeing that the overall density of the project had been improved from that contained in the earlier plan, he noted that some 48 housing units are still proposed for the front portion where only eight would be permitted under current zoning. In the witness' view, this created an "abrupt change" from low-density single-family usage to higher density multi-family development rather than a more desirable gradual transition. He also found the buffering distance within this section of the tract and the proximity of the site's entrance roadway to the property line, to be inadequate. In contrast, Mr. Higgins stated—in agreement with at least two of the applicant's own experts—that 18 single-family homes could be constructed on the property which would meet all of the minimum requirements of the Warren Township Zoning Ordinance. He believed that adequate buffers were certainly feasible between such an 18 lot subdivision and the adjacent uses, including the industrial ones to the rear. Mr. Higgins also testified to the fact that in the Somerset County Master Plan, the subject tract is actually designated as "Residential Neighborhood", which is single-family land use, with one dwelling unit for each one to two acres. He reviewed the existing residential development along Mt. Horeb Road between Mt. Bethel and King George Roads and noted that there are twenty-four single-family homes on lots of two acres or more, some six homes on lots between 1.5 and 2 acres, seven homes on sites between one-half and one acre and no single-family homes in the area on lots of less than one-half acre. He also stated that single-family houses on large lots exist directly adjacent to the site on both sides as well as across Mt. Horeb Road. The present pattern of residential development in the area is therefore generally consistent with what appears in the Somerset County Master Plan.

20. Michael J. Kolody, a licensed professional engineer and land surveyor, was the second witness to testify at the request of the Public Advocate. Mr. Kolody had reviewed both the applicant's original plan and the new one, and he rendered reports as to each of the proposals. The witness felt that the initial plan would involve substantial cut-and-fill operations "which would leave virtually no section of the tract untouched". In commenting upon the 184 unit plan, he stated that from an engineering standpoint it tends to minimize adverse effects to the

surrounding environment and to the existing watercourse.(5) Mr. Kolody's main concern which remained was the proposed on-site sanitary sewerage treatment plant.(6) He believed that its cost for some 184 units would be approximately $300,000—some $50,000 higher than had been estimated by the applicant's engineer, Mr. Schindelar-thereby adding to the ultimate sales prices of the units.(7) The witness also had a problem of potentially longer lasting concern.(8) Mr. Kolody noted that the present stream into which such a treatment plant would discharge is subject to extremely low flow conditions during the summer season and, while the New Jersey Department of Environmental Protection could conceivably issue a permit for discharge into a stream with such low flow, such a practice would be discouraged.(9) As a matter of fact, this statement of Mr. Kolody was confirmed by Stanley Kaltnecker, the Township Engineer, who also testified briefly during the proceedings at the request of the Board of Adjustment.(10) Mr. Kaltnecker indicated that he is familiar with the policy of the DEP on waste water discharge into small streams, and the DEP does try to discourage it and does not allow it at all in some cases.(11) In any event, Mr. Kolody stated that if such discharge were to be allowed by the DEP, it was likely that complicated tertiary treatment of the wastes would be required—in this respect concurring with the testimony of the applicant's own engineer as to the need for a very high level of treatment at this location.(12) Mr. Kolody stated that such type of treatment is prone to certain malfunctions, with a distinct possibility of resultant pollution of the stream.(13) In view of these potential problems with an on-site treatment facility, Mr. Kolody suggested—in lieu thereof—that it might be possible to obtain sewerage rights for 16 to 18 single-family homes on the tract in the Middlebrook Interceptor system, which is in a different drainage basin from the Passaic basin into which the property naturally flows.(14) While that method of sewering the property would not be likely for a substantial townhouse development, Mr. Kolody felt that through either a reallocation of capacity rights or special DEP permission, it could be obtained for a small number of single-family homes.(15) It might be noted, however, that Mr. Kaltnecker, in commenting upon the same point, stated that there could be a problem with the sizing of the sewer interceptor lines.

21.(1) John T. Chadwick, a professional planner and the Warren Township Planning Consultant since 1968, testified on some three different occasions during the proceedings at the request of the Board of Adjustment and he also furnished a report and supplemental report pertaining to the original and new plan of Mr. Steinbaum.(2) Mr. Chadwick noted that his planning background included the preparation of the current (1977) Warren Township Master Plan and the implementing development ordinances of the municipality.(3) The applicant and all interested parties stipulated to the witness' expertise.(4) Mr. Chadwick indicated that he had undertaken a study of the application, had reviewed the minutes, plans, documents and reports on file and had inspected the subject property.(5) He produced an aerial photograph of the lands in question and surrounding area.(6) According to Mr. Chadwick, the distinctive features of the site include a pool within its boundaries, pond, wet or swampy areas and stands of existing trees along all of the borders of the tract.(7) He explained the factors which led to rezoning of the subject property largely to ECR usage, noting that the applicant's tract adjoins environmentally critical lands.(8) The properties to the west and north are steeply sloped and there are flood plains and stream-ways to the south.(9) In fact, the flood plain designation extends approximately to the center of the site.(10) Mr. Chadwick commented on the influences of the surrounding industrial development on the site. (11) He noted that the subject property does abut an existing warehouse, office building and parking area but that none of the non-residential uses are intensive in nature. (12) The warehouse structure has no loading area near the applicant's property and is only a "dead storage" facility—as distinguished from a delivery or distribution center. (13) The industrial parking area is not that associated with a shopping center with a

continuous turnover of cars and is, instead, only employee parking with arrival and departure in the morning and evening. (14) While acknowledging that the non-residential uses would naturally have some influence on the subject site, the planner felt that:

> "This type of influence exists in any circumstance where a municipality draws a zone boundary line, with one use district on one side and another use district on the other. To describe the boundary line as it affects the northerly and easterly side of subject property, those development uses, in place, are on the lower end of the scale in terms of non-residential use and in terms of intensity, occupancy or activity."

(15) Mr. Chadwick also noted that there is no homogeneity to be found in the housing along Mt. Horeb Road, with both newer larger homes present and some smaller older ones immediately adjacent to the site. (16) However, he pointed out that the existence of smaller dwellings would not have any effect at all in the Watchung-Warren area of the County because large houses are seen adjoining quarries, industrial buildings and modest single-family homes. (17) The witness stated that his experience in Warren has been that the presence of small or even dilapidated housing is not a deterrent to the building of larger, more expensive dwellings.

22. (1) In further considering the effect which the abutting low density GI-2 Zone has on undeveloped land, Mr. Chadwick noted that there are some 200 plus vacant acres immediately adjoining that industrial area. (2) Moreover, most of such vacant land has little in the way of development constraints in that it is relatively flat, without streams and with utilities available in some instances. (3) The applicant's tract, in contrast, has "physical development limitations". (4) In Mr. Chadwick's professional opinion:

> "It [the subject property] is no different, in his judgment, than that 200 acres immediately adjoining or the next ring that becomes 400 acres, and to suggest a specific density for the subject parcel of land would set the basic planning or conclusion with the adjoining lands almost entirely that have the same development potential and right. In his judgment, that is planning by variance, and he does not subscribe to it."

(5) The witness further stated that it flies in the face of good planning to relegate greater concentrations of people to less desirable environmental locations. (6) For similar reasons, Mr. Chadwick felt that the existence of vacant lands adjoining an industrial district—either developed or undeveloped—coupled with the presence of poor percolation conditions in the soil, is a combination of factors commonly existing in Warren; and same is not unique to this site. (7) Moreover, the Township planner did not concur in the opinions voiced by the applicant's architect and planner that the subject land could be viewed as a transitional zone or use. (8) He stated that while he is not in a position to select other, better suited sites for multi-family usage, he was nevertheless aware of the fact that there are sites available in Warren having sewer and water utilities, located on major improved roadways and not presenting any flooding or drainage considerations.

23. (1) In dealing with the subject of the need for multi-family dwellings in the area, Mr. Chadwick indicated that a study by his firm is currently underway. (2) He readily acknowledged that there is a need today for least-cost housing not only in Warren Township but throughout the United States. (3) He noted, however, that in his judgment the proposed townhouse units, which were estimated early in the proceedings (and at an even higher density) to sell for up

to $120,000, would not fall within the category of "least-cost" housing. Generally, the professional planner did not find that the applicant's witnesses had demonstrated special reasons for constructing the proposed multi-family housing at this location. Rather, in Mr. Chadwick's opinion, the proposed development would be contrary to the Master Plan of Warren and would be injurious to the comprehensive zoning plan of the community, basically due to the considerable development limitations of the parcel relative to its streams and floodways and the absence of sanitary sewer services. In Mr. Chadwick's view:

> "The subject property is not readily developable, either from the standpoint of being high, dry and flat, or having all serving utilities at the site. The proposal to bring utilities to the site or to have construction of independent systems will contribute to the high cost of initial development and very high cost of operation, and will be reflected in the high cost of the structures, and therefore, is not related to the housing need question presented and referred to by the applicant's planning consultant and real estate expert. For all those reasons, in his professional opinion, the application does not present a specific benefit to the general public, does not address a specific housing need, does not relate to the limitations of the land itself, nor does the land possess unique physical and man-made features warranting the granting of a variance."

24. In testifying specifically with regard to the applicant's new (184 unit) plan, Mr. Chadwick stated that the revised concept plan was now "somewhat accountable" to development constraints, i.e. the flood plain and brook. However, he noted that it still proposes a density which is some 10 to 11 times greater than allowed under current zoning standards for the tract. Mr. Chadwick indicated that his calculations showed that for this 30.94 acre parcel, some 2.4 acres were in steep slope areas and 13.7 acres in the designated flood hazard area—thus placing over 50 percent of the tract in environmentally sensitive classifications. With these inherent development constraints—plus the factor of poor percolation—a developer would need to spend large sums to overcome same, such as by installing an on-site treatment plant and providing for substantial regrading as well as high roadway improvement costs. He also felt that the amount of parking provided on the new plan is inadequate and that a good deal of blacktop would be required for site development. Reiterating his previously expressed opinions, Mr. Chadwick stated that the subject property is not uniquely located; that it has severe development constraints due to environmental factors; and that the high site development costs would run counter to the concept of providing low or moderate income or least-cost housing. As a result, the Township Planner could discern no special benefit being derived from the proposed townhouse development of the site.

25. In addition to hearing from the several expert witnesses noted above, the Board of Adjustment also heard testimony or statements favorable or opposed to the application from a number of interested citizens.

WHEREAS, based upon the review of the evidence and upon the foregoing factual findings and conclusions, the Board of Adjustment has made the following ultimate conclusions regarding the application of Lawrence V. Steinbaum:

1. The applicant has failed to establish the affirmative criteria of "special reasons" required under N.J.S.A. 40:55D-70(d) in that:

(a) Although the applicant contended that his proposed plan would help to satisfy a need for multi-family housing in Warren Township, this Board does not believe that higher priced townhouses present a type of usage which inherently serves the general welfare and irrespective of the suitability of the particular site for which such housing is proposed. The applicant's own planning expert conceded that the units would not help to satisfy the need for low or moderate income housing and this Board does not believe that the applicant has sustained his burden of proving that the townhouses would even qualify as "least-cost" housing.

(b) The applicant has not shown the subject property to be peculiarly suited for the proposed multi-family usage. In fact, the converse (the site's unsuitability) can reasonably be concluded to be the case. It is not convenient for pedestrian access to shopping, municipal facilities or to possible future mass transit in the area. The property is not situated on an improved major roadway. The land has significant environmental constraints—not the least of which are the sewerage problems for the tract which were acknowledged by all of the experts who testified.

(c) The applicant has not clearly shown that the property cannot be reasonably used for its zoned purpose. While the construction of single-family homes on the tract may be somewhat more expensive because of the environmental limitations of the site, even the applicant's engineering expert acknowledged that there are alternate design systems available for handling of sanitary wastes. Construction of an on-site treatment plant could be undertaken--albeit that same would be on the somewhat expensive side. The Public Advocate's engineer felt, moreover, that the possibility existed for obtaining municipal sewerage rights for some 16 to 18 single-family homes. While the construction of higher density townhouses may be more economically feasible to the applicant, this Board does not believe that that is a basis for obtaining a zoning variance. By utilization of the variable lot size and design modification provisions in the Warren Township Zoning Ordinance, coupled with adequate buffering arrangements, the land should be able to be developed for single-family homes—or at least the applicant has failed to carry his burden of proving that this cannot be done.

(d) The land, in any event, can continue to be utilized for private school recreational purposes. This would be consistent with the quasi-public designation for the site appearing in the Warren Township Master Plan. A denial of the requested variance will not serve to zone the property into inutility.

2. The applicant has failed to meet the negative criteria of N.J.S.A. 40:55D-70(d) in that:

(a) Development of the front, narrow portion of the site with multi-family housing at a relatively high net density—and without sufficient buffering from the adjacent residentially zoned areas—will cause an abrupt change which is out of character with the existing pattern of low density residential land use in the arera.

(b) The proposed development—rather than to serve as a good transitional use—will, in the judgment of the Board, introduce an incompatible and discordant use into the area.

(c) The intensity of the proposed development will work

an adverse effect upon the adjacent low volume, narrow roadway, which is also lacking in sidewalks or lighting which could serve pedestrians from the proposed townhouses.

(d) The applicant has not satisfactorily demonstrated that his proposed method of handling sanitary sewerage from the 184 townhouses will not detrimentally affect the environment and, in particular, that it will not result in pollution of the low volume stream into which the sewerage facility would be discharging. No conceptual approval for the sewerage plant was sought or obtained from either the New Jersey Department of Environmental Protection or the Warren Township Sewerage Authority.

(e) The proposed usage will conflict with the Warren Township Master Plan and Zoning Ordinance. The applicant has not shown that relief can be granted without substantially impairing same. Moreover, since the subject tract is not at all unique insofar as its proximity to industrially zoned acreage, a grant of the requested use variance could serve as a precedent whereby further similar requests could be made, resulting in "planning by variance", as described by the Township Planning Consultant.

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Warren, on this 20th day of May, 1982, that the application of Lawrence V. Steinbaum, as aforesaid, be denied.

ROLL CALL VOTE:

Those in Favor: Mr. Kometani, Mr. Luna, Mrs. Noonan, Mrs. Vogel, Chairman Malpas

Those Opposed: None

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Warren, at its meeting on May 20, 1982 as copied from the minutes of said meeting.

DATED: May 20, 1982

/s/ Rosalie Ginda

ROSALIE GINDA, Clerk
ZONING BOARD OF ADJUSTMENT OF
THE TOWNSHIP OF WARREN, COUNTY
OF SOMERSET, STATE OF NEW JERSEY

Superior Court of New Jersey

CHAMBERS OF
JUDGE EUGENE D. SERPENTELLI

OCEAN COUNTY COURT HOUSE
C. N. 2191
TOMS RIVER, N. J. 08753

July 12, 1983

Philip R. Glucksman, Esq.
Glucksman and Weitzman, Esqs.
60 Maple Avenue
Morristown, N. J. 07960

John E. Coley, Esq.
Kunzman, Coley, Yospin and Bernstein, Esqs.
15 Mountain Blvd.
Warren, N. J. 07060

Barry M. Hoffman, Esq.
Bernstein, Hoffman and Clark, Esqs.
700 Park Avenue
Plainfield, N. J. 07060

Re: Steinbaum v. Board of Adjustment of Township of Warren et al
Somerset County Docket No. L-59706-81

Gentlemen:

After a review of the above referenced file and consultation with the Chief Justice, it has been decided that the above referenced matter shall be returned to Somerset County for trial with respect to the Board of Adjustment appeal.

In the event that the Court sustains the action of the Board of Adjustment and the plaintiff wishes to pursue the Mount Laurel claim either based upon the present complaint or an amendment to the complaint as authorized by a pretrial order, the file will be returned to me for further proceedings.

The return of the file to Somerset County is based upon the assumption that the Board of Adjustment proceedings were not grounded in a Mount Laurel claim and the trial Judge will not be called upon to make any determination which will impact on the Mount Laurel Doctrine. That assumption was confirmed in part as a result of my conversation with plaintiff's counsel. I assume, therefore, that your

John E. Coley, Esq.

Barry M. Hoffman, Esq.

Re: Steinbaum v. Board of Adjustment
L-59706-81

briefs will not be addressed to any Mount Laurel claims. I have advised Judge Diana that if a Mount Laurel claim should evolve out of the Board of Adjustment proceeding, I am to be advised since I believe that the Chief Justice will then request that the case be returned to me for determination.

I presume that you will be hearing from either the trial Judge or the Civil Assignment Clerk regarding further proceedings in Somerset County.

Very truly yours,

Eugene D. Serpentelli, J.S.C.

EDS:RDH
cc: William J. Wintermute,
Assignment Clerk

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 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 adjustment 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,

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.

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-

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 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 th 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