Warren 1984 (4/11)

Reply memorandum in opposition to trial brief
Attch: Supplemental Certification

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JUDGE LEAHY

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April 11, 1984

B. Thomas Leahy
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Re: Steinbaum v. Bd. of Adjustment
of Warren Twp.
Docket No. L-59706-81 P.W.

Judge Leahy:

This Reply Memorandum is being submitted in opposition to trial Brief just recently submitted by the defendant. A review the defendant's Brief reveals that most of its points are quite ef and cite general law on the subject. However, the substance that Brief does not refute the allegations contained in the mplaint and in the plaintiff's Brief.

The many cases cited by the defendant that a Board of djustment is presumed to be correct is general law but does not address the issues of this case. The defendant does not refute the plaintiff's contention that the land cannot be reasonably utilized for one family dwellings. A close examination of the Board's resolution discloses that it consists of 25 statements of fact which are merely a summary of the evidence below. The Board's conclusion consists of only a page and a quarter of a 14 page resolution. It merely echoes the findings of the Public Advocate's Planner but gives no reason why the Board chose to follow those conclusions rather than the ones given by plaintiff's Planner who is eminently more qualified.

Defendant has completely chosen to ignore the plaintiff's argument that the land cannot be reasonably utilized for the purposes for which it is zoned. As the facts below demonstrate, the subject parcel is bounded on several sides by industrial uses and there is a mixture of commercial properties in the immediate area, including a junkyard, a food preparation place, a school, a transmitter and a camp. Photographs were submitted into evidence indicating that the subject parcel was surrounded by two industrial parking lots and dilapidated chicken coops. It is further beyond dispute that there is no sewerage to the area and the land does not percolate well for a septic system. For this reason it would be necessary to employ a sewage treatment plant which would not be economically feasible for one family dwellings.

It was originally estimated that it would cost in excess of $200,000 to build a home on the subject site. It is important to note that these estimates were done several years ago and the inflationary cost of goods and services would raise that figure far in excess of the above amount. The realtor and planner indicated that these proposed homes would be totally incongruous in this area and would not be readily marketable. There is nothing in the defendant's Brief or the resolution which belies these assertions. Indeed, certain recent acts upon the part of the defendant and the township have developed which support the plaintiff's position.

When the defendant's Brief was due the defendant sought a Court Order requesting a two month postponement because of the fact that the Warren Township Planning Board had voted for a suggestion rezoning the plaintiff's property from single family residential to industrial. The defendant submitted an affidavit in support of this request which is attached hereto as Exhibit A.

The defendant was ultimately successful in obtaining a two month delay for the filing of its trial Brief. Thus, the defendant township itself recognizes that the subject property is not appropriate for single family residential use but more appropriate for industrial-type use. This act by defendant township confirms the continued assertion of the plaintiff.

As is stated in the plaintiff's trial Brief, the plaintiff's planner was eminently more qualified than that of the Public Advocate concerning the proposed project. The Public Advocate's planner merely had obtained a degree as a landscape architect and virtually had no experience with town houses. He never testified as an expert in Court or before any municipal agency regarding any town house applications. He also conceded that he had never read the Mt. Laurel decision.

However, the Public Advocate's planner did state that the reduction of the project from 300 to 184 units eliminated all of his site plan concerns regarding the subject property.

Testimony will disclose that plaintiff's planner was eminently more qualified and experienced than the Public Advocate's planner. This was likewise true concerning the engineering witness. Again, without reviewing all the assertions made in plaintiff's trial Brief, it suffices to say that defendant never gave cogent or

substantial reasons as to why it chose to ignore completely testimony of plaintiff's experts while adopting totally those of the Public Advocate and, to some extent, those of the municipal planner.

It is respectfully submitted that a total review of all the testimony clearly demonstrates that the land cannot be reasonably utilized for single family dwellings, which conclusion was recently confirmed by the Warren Township Planning Board when it proposed an ordinance changing the use of the subject property to industrial from single family residential.

There can be no question that where there is a need for multi-family dwellings in a municipality or region the satisfaction of that need would promote the general welfare and thus constitute a "special reason" under the zoning statute. The cases cited by defendant are quite inapplicable to the facts in the instant case.

The cases of Fobe Assoc. et als. v. The Mayor and Council and Board of Adjustment of the Borough of Demarest, 74 N.J. 519 (1977) and Nigito et als. v. Borough of Closter et al., 142 N.J. Super 1 (App. Div. 1976) concern municipalities that the Court determined to be either developed or almost fully developed. In the case of Weiner v. The Zoning Board of Adjustment of Glassboro, 144 N.J. Super. 506 (App. Div. 1976), the issue was one primarily of the density of the project and not so much that of the proposed use.

In the Fobe case, the Court recognized that private multi-family housing when needed could promote the general welfare and thus constitute a special reason for granting a use variance. The Court chose not to decide the affirmative criteria issue in the above case but merely decided the case on the negative criteria, 74 N.J. at 537-538. In the dissenting opinion Justice Sullivan cited ample precedent for the fact that housing needs would constitute special reasons for the granting of a variance.

In DeSimone v. Greater Englewood Housing Corp., No. 1, 56 N.J. 428 (1970), the Supreme Court held that multi-family housing does have an impact on the general welfare and would qualify as "special reasons" for the granting of a (d) variance. In Taxpayers Ass'n. of Weymouth Tp. v. Weymouth Tp., supra. 71 N.J. 249 at 266,

the Court stated that"not only do housing needs fall within the purview of the 'general welfare' but they have been recognized as 'basic' by this court."

In the instant case there is no question that Warren Township is a developing community as defined by the Mt. Laurel case and state guidelines. Moreover, when this case was presented below there were no provisions for multi-family dwellings in the Township of Warren. Lastly, as indicated above, the proposed parcel is not located in the middle of a solid residential area but rather is in a marginal area which was once zoned industrial and bordered on several sides by non-residential uses.

The plaintiff has attempted to have this property rezoned in 1979. Most recently, when Warren Township was ordered by the Superior Court, Law Division to rezone, plaintiff appeared before the township council and again requested that his property be rezoned. Thus, plaintiff has engaged in continued but fruitless efforts to have his property rezoned. The variance procedure was the only avenue open to him to seek relief from completely inappropriate zoning. As stated above, the Planning Board of Warren Township has confirmed that single family residential is not a proper use for this parcel by recommending this change from single family residential to industrial.

It is further respectfully submitted that the arguments advanced by defendant Board's attorney regarding his behavior during the course of proceedings are somewhat ludicrous. The defendant defends that Board's attorney's lengthy and one-sided questioning on the ground that since no member of the Board was an attorney, that type of questioning was necessary for a proper decision. It is respectfully submitted that many or most boards do not have members who are attorneys. Moreover, it is quite clear from the slightest perusal of the transcripts that the attorney's questioning had the opposite effect of greatly lengthening the proceedings instead of expediting same.

In his trial Brief plaintiff has recounted in detail the reasons why the Board attorney's behavior was improper. It suffices to say that any careful and close review of the transcripts patently shows that the Board's attorney's conduct was improper. It is beyond dispute that Board attorney's questions of plaintiff's

witnesses were excessive, especially when compared to the questioning of the other witnesses. The Board's attorney when he began his initial cross-examination of plaintiff's first witness gave us a clue to his intended behavior in this matter. He indicated that for the first time in the six years he had been attorney to the Board, he felt "a little awkward in the fact that I have prepared my questions and done what I considered to be my job as an attorney may make me somewhat suspect but nonetheless I will proceed as I deem fit." (Tr. 10/23/80 pg. 78:14-21). The Board attorney then saw fit to ask the applicant's first witness, Barrett Ginsberg, a total of 116 questions as opposed to only 18 questions asked by the Board members. Moreover, the Board attorney asked 184 questions of Mr. Schindelar, the plaintiff's engineer. However, he asked only 32 questions of the Public Advocate's engineer.

Moreover, any fair reading of the transcripts will show that the attorney's questions of the plaintiff's witnesses were designed to elicit possible harmful information and tended to be supportive in nature for those asked of the witnesses of the Public Advocate and township. The key word in this matter is "design." The Board attorney initially admitted that he came prepared with a list of questions to be asked of the witnesses. It is further abundantly clear that those questions were designed to support any decision of the Board denying a use variance. It was common knowledge prior to the application that there were no multi-family dwellings in Warren Township and that any such previous variance applications had been denied. Also, during the pendency of these variance applications, candidates for office were running on platforms of opposing town houses in Warren Township. Lastly, the Board attorney's repetitious and tedious questioning of the applicant's witnesses most often were quite draining. On occasion the Board attorney at a very late hour would indicate that he had only a few questions left of a particular witness and then would still continue to question the plaintiff's witnesses excessively even at that late time.(See, for example, Tr. 11/12/81 pg. 125 et seq.) A total review of the transcripts involved clearly shows that the Board attorney's behavior in this matter regarding questioning of witnesses was improper.

For all the reasons cited above, it is respectfully submitted that the use variance the plaintiff seeks in this matter be granted.

Respectfully submitted,

PHILIP R. GLUCKSMAN

PRG/jh
cc.: William Wintermute, Assignment Clerk
Barry Hoffman, Esq.
Lawrence V. Steinbaum

Exhibit A

BERNSTEIN, HOFFMAN & CLARK
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ATTORNEYS FOR Defendant, Board of Adjustment of the Towship of Warren.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

Plaintiff,

LAWRENCE V. STEINBAUM,

vs.

Defendant,

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF WARREN and THE TOWNSHIP OF WARREN, a Municipal Corporation of the State of New Jersey.

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

CIVIL ACTION

SUPPLEMENTAL CERTIFICATION OF BARRY M. HOFFMAN

I, BARRY M. HOFFMAN, do hereby certify that:

1. I have ascertained the following additional information pertinent to the Motion heretofore filed by this firm and returnable on December 16, 1983, in which the Board of Adjustment of the Township of Warren seeks an extension of sixty (60) days for filing and serving its answering brief.

2. In my previous Certification dated November 22, 1983, I stated that the Warren Township Planning Board had

expressed a favorable view toward a requested re-zoning of the bulk of the plaintiff's property so as to place same in a General Industrial Zone. On this date and yesterday, I spoke with Herbert Lewis, Chairman of the Warren Township Planning Board, and Agnes Wimmer, Secretary of the Planning Board, and ascertained that the following action of the Board did, in fact, take place at a meeting held on December 6, 1983. The Warren Township Planning Board, at such meeting, unanimously agreed to recommend to the Township Committee a re-zoning of the interior portion of Mr. Steinbaum's property for industrial usage beyond a depth of 800 feet back from Mt. Horeb Road. As noted in the Resolution of the Board of Adjustment (a copy of which is annexed to the Answer filed in this matter), the Steinbaum property is a "flag" lot, with the bulk of the tract being the interior lands -- the portion which has now been recommended for the zoning change.

3. I am advised by Mrs. Wimmer that a written memorandum will be prepared and submitted to the Township Committee within a few days which will serve to confirm this action now taken by the Planning Board to recommend the re-zoning of the plaintiff's lands. I have asked her to supply me with a copy of such memorandum and, if same is received prior to the return date of the present Motion, I will transmit same to the Court and counsel by letter.

4. For the reasons set forth herein, as well as those contained in my previous Certification dated November 22, 1983, I would submit that the Township is now undertaking a bona fide re-zoning of the Steinbaum property such as will serve to render the instant litigation moot; and I, therefore, respectfully submit that, under the circumstances, it would be appropriate that the time period for filing any answering brief in this matter be postponed.

5. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Barry M. Hoffman

Dated: December 8, 1983.