Warren 1984 (2/22)

Original and copy of Brief on behalf of Warren Twp
Attch: 2 copies of cover letter to Judge

pgs. 7

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February 22, 1984

Honorable Robert E. Gaynor
Somerset County Court House
Somerville, New Jersey 08876

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

Dear Judge Gaynor:

Enclosed herewith please find original and one copy of Brief on behalf of the Warren Township Board of Adjustment with reference to the above-entitled action. As noted in my recent letter to Your Honor, we will be submitting a Supplemental Brief shortly relating to the separate issue involving the Board Attorney.

It is my understanding that the Court must also still receive the various exhibits which were marked into evidence during the Board of Adjustment proceedings, together with the Warren Township Zoning Ordinance; and I will make arrangements to have all of these items delivered to Your Honor.

Respectfully yours,

Barry M. Hoffman

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

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April 30, 1984

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

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

Dear Judge Leahy:

For the hearing in this prerogative writ action, the defendant, Board of Adjustment of the Township of Warren, will rely essentially on the two briefs previously submitted by it (the initial brief and the supplemental memorandum relating to the Board attorney issue). The purpose of the present letter is merely to comment on the plaintiff's "Reply Memorandum" dated April 11, 1984.

First of all, some (brief) mention ought to be made of the sentence in plaintiff's initial paragraph wherein he asserts that the substance of defendant's briefs "do not refute the allegations contained in the Complaint and in the plaintiff's Brief." Lest our silence possibly be construed as acquiescence in plaintiff's statement, we hasten to offer a resounding denial to this assertion by the plaintiff. In all seriousness, we must question whether the plaintiff has even read the defendant's briefs because, for one who had, the only sensible conclusion which could be drawn is that the defendant does indeed "refute" the plaintiff's allegations -- and that it does so vigorously (see, for example, the headnotes or "Point" titles in defendant's two briefs). Defendant submits that this sentence in plaintiff's latest memorandum is illustrative of the myopia with which the plaintiff views just about everything pertaining to this variance application and the hearings held thereon.

On the first page of plaintiff's April 11th letter, he alleges that the defendant "does not refute" his contention that the land cannot be reasonably utilized for its zoned purpose of one family dwellings (see paragraphs 2 and 3 on page 1). However, Conclusion 1(c) of the Board's Resolution specifically states that "the applicant has not clearly shown that the property cannot be reasonably used for its zoned purpose," and the balance of that paragraph sets forth specific reasons in support of this conclusion. It is impossible to understand how the plaintiff can assert (as he does in paragraph 3

on page 1) that 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" when an entire portion of defendant's initial brief (Point V) is devoted exclusively to factual and legal evaluation of this very issue. Thus, the contention now made by plaintiff that a sewage treatment plant would not be "economically feasible" for one family dwellings is not only a misleading oversimplification of the facts as testified to by the experts in this matter, but it also disregards the established decisional law to the effect that profitability and financial feasibility is not a special reason for a use variance (see page 34 of defendant's initial brief).

The plaintiff's references (at pages 1 and 4 of his letter) to some adjacent different uses as a supposed basis to sustain a variance disregards the admonition of our Supreme Court in the Cerdel case, as quoted at pp.35-36 of defendant's brief. Contrary to plaintiff's assertion on page 1, the 25 numbered paragraphs on the first 12 pages of the Board's Resolution are not "merely a summary of the evidence below." While that is certainly a primary function of the bulk of the Resolution, a fair reading of the document will reflect that the 25 paragraphs also contain certain evaluation and commentary on the facts as well as weighing of the testimony and credentials of the expert witnesses. The "ultimate conclusions" of the Board appearing on pages 13 and 14 of the Resolution do, it is submitted, set forth reasonable judgments and conclusions with respect to the detailed record produced before it. As such, these agency determinations should now be affirmed by this reviewing Court (see Points I and II and page 36 of defendant's brief).

As a new argument in support of his request to allow multi-family housing on his tract, the plaintiff (at pages 2 and 3 of the April 11th letter) now cites the recent recommendation of the Warren Township Planning Board, made in late 1983, that the interior portion of plaintiff's property be rezoned to industrial usage. Contrary to the statement on page 2, the "township itself" has not recognized the appropriateness of such recommendation by the Planning Board and, as of this writing, no Ordinance has been adopted, or even introduced, to implement this suggested rezoning. If any inferences were to be logically drawn as to this possible zone change, defendant submits that same would be that industrial usage of the property would be

the most appropriate -- not that some alternative form of residential development would be desirable. However, it is foolish for anyone -- plaintiff, defendant or even this Court -- to speculate as to the factors which led the Planning Board to recommend a possible rezoning of the land. None of these recent developments are part of the record of the Board of Adjustment proceedings currently under review in this action; and they should not even be considered in evaluating the propriety of the defendant Board's Resolution. The only reason for even bringing the suggested rezoning to the Court's attention was a purely procedural one -- to request a short extension of time. As Judge Gaynor noted in his December 16, 1983 letter granting the defendant's requested extension for filing of a brief:

> "The proposed re-zoning of plaintiff's property will have some effect upon the case and, accordingly, it is appropriate that proceedings be held in abeyance for a reasonable time to see if the proposed re-zoning is adopted. The 60-day extension will not unreasonably delay the proceedings in this case."

Defendant submits that it would be both error and folly to give substantive evaluation to the possible subsequent rezoning of the property in this appeal relating to the Board of Adjustment's determination on the variance.

On page 13 of his original brief, the plaintiff contended that the Public Advocate's planner "admitted" that the scaling down of the townhouse project to 184 units "obviated almost all of his site plan concerns" (Emphasis supplied). At pp. 13-14 of defendant's brief, this allegation was shown to be "a total misstatement of the facts". However, the plaintiff does not choose to place very much heed in the facts in his presentation of this case. In total disregard of the defendant's refutation of his prior allegation, the plaintiff now (at page 2 of his April 11th letter) repeats the same contention regarding the Public Advocate's planner -- this time without even bothering to use the qualifying adverb "almost".

The assertion near the bottom of page 2 of plaintiff's latest letter as to the alleged lack of qualification of the Public Advocate's planner was thoroughly discussed by the Board at pp.8-10 of its initial brief, and same will not be repeated here. Plaintiff apparently subscribes to the view that if one states a proposition or half-truth often enough, it will somehow become fact. Contrary to the suggestion at the top of page 3 of plaintiff's letter, the expert most relied upon by the Board was the Township Planner, John T. Chadwick (see page 43 of defendant's brief).

Defendant takes issue with plaintiff's statement (at page 3 of his letter) to the effect that the satisfaction of a municipal or regional need for multi-family dwellings automatically and invariably constitutes a "special reason" under the zoning statute. From a factual standpoint, the Township Planning Consultant readily conceded that there is presently a need for least-cost housing not only in Warren Township but throughout the country (see paragraph 23 of Resolution). Should this acknowledged widespread need operate to always constitute a satisfaction of the statutory affirmative criteria? See Point III of defendant's brief. Contrary to plaintiff's assertion, the Supreme Court did not so hold in the Fobe Associates case. Instead, it expressly grounded its decision on the applicant's failure to satisfy the negative criteria of the statute. 74 N.J. at pp.537-538. Indeed, a few pages earlier in its opinion, the Fobe Court discussed at length why the use of variances to achieve multi-family housing is a rather poor planning tool (see quotation at pp.24-25 of defendant's brief). As noted at page 47 of the Board's brief, our highest Court in the Mt. Laurel II case itself has cautioned that "Mount Laurel is not to be used as a substitute for a variance." 92 N.J. at p.326; see also 92 N.J. at pp. 280-281. The DeSimone and Weymouth cases cited at page 3 of plaintiff's letter memorandum are not apposite to the instant matter. The first of these decisions dealt with public or semi-public housing accommodations intended to replace substandard housing and the second dealt with mobile home units for senior citizens in a trailer park. Neither set of facts applies to plaintiff's application -- one to construct high priced townhouses. The plaintiff now alleges that he was "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" (see p.4 of plaintiff's original brief). He asserts that he "invited comments" from the Board in this regard. This subject was discussed by the Board at pp.5-8 of its initial brief. In addition thereto, it would be pertinent in this regard to refer to our highest Court's decision in Cobble Close Farm v. Bd. of Adj. of Middletown, 10 N.J. 442,454 (1952). There, as in the case sub judice, the plaintiff sought to have the Board of Adjustment suggest alternative uses for its lands and the Board refused to do so. The Court sustained the Board's action, commenting:

> "Plaintiff sought to have the local board suggest what other uses than accessory uses would be approved by it. The board refused to deal with anything except the actual state of facts presented by plaintiff's proposal. This was quite proper. It is not the duty of the board, nor of the court, to search out and list the uses which the board could approve by way of variance from the permitted uses. See Johnston v. Board of Adjustment, Westfield, 118 N.J.L. 298(Sup.Ct. 1937)." (Emphasis supplied)

The reluctance of our Courts to deal with hypothetical questions was explained by the Appellate Division in Hildebrandt v. Bailey, 65 N.J. Super. 274, 285 (App. Div. 1961):

> "In short, as the court said in American Federation of Labor v. Reilly, supra, at 155 P.2d 151-152 'We cannot here decide any other of the various questions raised, however desirable it might be to have them settled, unless we are now willing to answer questions 'which have not yet arisen and which may never arise,' and reply to mere 'speculative inquiries.' We cannot thus permit the courts to be converted into legal aid bureaus.' "

Quite early in the variance proceedings, the Board attorney, in focusing on the issue now being discussed, stated:

> "And I think the applicant once again has to make up its mind as to what direction it wants to take and what arguments it wants to present." (Tr. 10/23/80, p.110, lines 12-15)

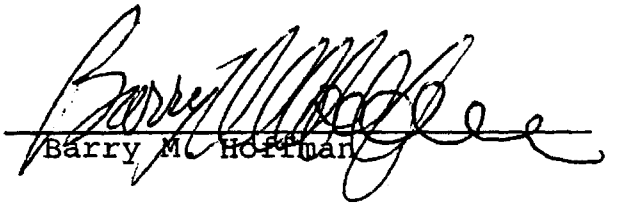
At pages 4 and 5 of his latest letter, the plaintiff persists in attempting to introduce facts dehors the record of the Board of Adjustment proceedings. Thus, he refers to supposed efforts to rezone his lands both before and after the Board of Adjustment hearings held on the use variance and he alludes to political campaign platforms during the pendency of various (unspecified) variance applications. It is settled law that matters outside the record of the Board proceedings may not be considered by the Appellate Court. Kempner v. Edison Twp., 54 N.J. Super. 408,417 (App. Div. 1959). Moreover, the political statements -- even if proven -- would be of questionable relevance to this variance application (see Kramer v. Bd. of Adj., Sea Girt, 45 N.J. 268,278-282 (1965); and, by the terms of this Court's own Pretrial Order, the plaintiff's challenge to the Zoning Ordinance was severed and is not a part of the present (Board of Adjustment) phase of the litigation. The only issue now under consideration is whether the site qualified for a use variance under the affirmative and negative criteria of the statute -- not whether it should have been rezoned.

The issue concerning the Board attorney was thoroughly dealt with in defendant's supplemental brief, and extensive commentary on the remarks appearing at pp.4-5 of plaintiff's letter is unnecessary. Except for his now supplying a single reference to the transcripts of the proceedings (as to which, see below), plaintiff prefers to

utilize the "shotgun method" of attack on the Board attorney. He persists in utilizing words such as "improper" behavior, "excessive" questioning and questions "designed to elicit possible harmful information" without citing instances where these supposedly grievous improprieties took place and without even attempting to respond to the carefully documented analysis of the Board attorney's conduct which appears in defendant's supplemental brief. The plaintiff states (at page 5) that the Board attorney "admitted" that "he came prepared with a list of questions to be asked of the witnesses" -- as if preparation by an attorney for a hearing were somehow improper or a matter to be criticized. The one instance in which plaintiff now furnishes a transcript reference in supposed support of his allegations against the Board attorney -- that being to the November 12, 1981 proceedings at page 125, et seq. -- does not even stand up to careful scrutiny. A review of the actual transcript reveals that plaintiff's counsel sought to "limit" a certain line of questioning by the Board attorney (p.125, lines 7-13); that the Board Chairman immediately overruled plaintiff's objection (p.125, lines 14-15); that when the plaintiff's attorney again objected, the Board attorney noted that counsel for plaintiff was attempting to lead his witness by reciting what the witness had previously answered (p.127, lines 8-25); that the Chairman observed that the Board attorney was not badgering the witness (p.128, lines 15-17); and that, interestingly, the planning expert for the applicant, who was then testifying, commented: "Well, I think Mr. Hoffman has a point" (p.129, lines 8-9). Thus, it will be seen that the sole citation now supplied by plaintiff in support of his sweeping allegations against the Board attorney does not even stand up to careful review.

Respectfully submitted,

BERNSTEIN, HOFFMAN & CLARK, P.A.

By: 
Barry M. Hoffman

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