Warren 1984 (11/19)

Brief on Behalf of Board Adjustment (~~[illegible] copies~~)

Pgs. ~~52~~ 59

ML000367B

LAWRENCE V. STEINBAUM,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION SOMERSET COUNTY
Plaintiff,	:	
vs.	:	Docket No. L-59706-84 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

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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.

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

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).

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:

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.

"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 application 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 property 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

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/
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.