

BFI v. Cranbury  
MM

# 9-Dec-83

- Brief in Support of Motion For Partial Summary  
~~and~~ Judgment

- Affidavit of Lawrence B. Litwin, Esq.

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BROWNING - FERRIS INDUSTRIES  
OF SOUTH JERSEY, INC., A Corporation  
of the State of New Jersey,  
RICHCRETE CONCRETE CO., A Corporation  
of the State of New Jersey  
and MID-STATE FILIGREE SYSTEMS, INC.,  
a Corporation of the State of  
New Jersey

Plaintiffs

VS.

CRANBURY TOWNSHIP PLANNING BOARD  
AND THE TOWNSHIP COMMITTEE OF  
THE TOWNSHIP OF CRANBURY,  
Defendants

STATE OF NEW JERSEY  
MIDDLESEX COUNTY  
LAW DIVISION  
M-LULU^&UA cuuNix

Docket No. , L AC-OA>r 8 3  
O 58046.8

URBAN LEAGUE OF GREATER NEW  
BRUNSWICK,  
Plaintiff

SUPERIOR COURT OF  
NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

VS.

CARTERET, ETC., et al  
Defendant

Docket No. C 4122-r73

BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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JOSEPH MORRIS AND  
ROBERT MORRIS,  
Plaintiff

SUPERIOR COURT OF NEW JERSEY<sup>17</sup>  
LAW DIVISION  
MIDDLESEX COUNTY

vs#

Docket No. L 054117-83

TOWNSHIP OF CRANBURY IN THE  
COUNTY OF MIDDLESEX, a  
municipal corporation of the  
State of New Jersey,  
Defendant

1  
GARFIELD & COMPANY, a New  
Jersey Partnership,  
Plaintiff

SUPERIOR COURT OF NEW JERSEY<sup>17</sup>  
LAW DIVISION-  
MIDDLESEX COUNTY

vs#

Docket No. L 055956-83

MAYOR AND THE TOWNSHIP COMMITTEE  
OF THE TOWNSHIP OF CRANBURY,  
a municipal corporation, and  
the members thereof; PLANNING  
BOARD OF THE TOWNSHIP OF  
CRANBURY, and the members  
thereof,  
Defendant

CRANBURY DEVELOPMENT CORP,  
Plaintiff

SUPERIOR COURT OF NEW JERSEY<sup>17</sup>  
LAW DIVISION  
MIDDLESEX COUNTY

»  
vs#

Docket No. L 59643-83

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CRANBURY TOWNSHIP PLANNING  
BOARD and TOWNSHIP COMMITTEE  
OF THE TOWNSHIP OF CRANBURY,  
Defendant

## PROCEDURAL HISTORY

This is a brief in support of a motion for partial summary judgment on Count IV of the Complaint of plaintiffs, Browning-Ferris Industries of South Jersey, Inc., a corporation of the State of New Jersey (hereinafter "BFI"), Richcrete Concrete Co. a corporation of the State of New Jersey (hereinafter "Richcrete") and Mid-State Filigree Systems, a corporation of the State of New Jersey (hereinafter "Mid-State"). Plaintiffs filed the Complaint on September 14, 1983 against the Cranbury Township Planning Board (hereinafter "Planning Board") and the Township Committee of the Township of Cranbury (hereinafter "Township Committee"). The summons and complaint were served upon said defendants on September 27, 1983. On October 17, 1983, the Township Committee filed an answer; on November 7, 1983, the Planning Board filed an answer.

The Township Committee filed a Motion to Consolidate the within action together with other actions challenging the Cranbury Zoning Ordinance adopted July 25, 1983 and *Urban League of Greater New Brunswick v. Carteret, et al.* On November 18, 1983 the actions were consolidated.

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## STATEMENT OF FACTS

The plaintiffs' lands and premises are located in the remote southeast Corner of the Township of Cranbury, near the New Jersey Turnpike.

Richcrete is the owner of land and premises known as Lot 13, Block 16 as shown on the tax map of the Township of Cranbury, Middlesex County. Said lands and premises are located on Hightstown Cranbury Station Road; said lands and premises contain 3.4 acres. Richcrete has used those land and premises since February, 1965 for the construction and operation of a transmit mix concrete plant pursuant to a use permit. See Affidavit of Lawrence B. Litwin, paragraph 2-3 .

Mid-State is the owner of lands and premises known as Lot 5, Block 16 as shown on the tax map of the Township of Cranbury, Middlesex County. Said lands and premises are located on Hightstown Cranbury Station Road; said lands and premises contain 16.18 acres. Mid-State and its predecessors have used those lands and premises since 1972 for the manufacturing of cement forms as a permitted use. See Affidavit of L.B. Litwin paragraph 4-5.

BFI is the owner of lands and premises known as Lot 6, Block 16 as shown on the tax map of the Township of Cranbury, Middlesex County. Said lands and premises are located on Heightstown Cranbury Station Road; said lands and premises contain 4.7 acres. BFI has used those land and premises since approximately July 1, 1976 for the parking, storage and repair of trucks pursuant to a site plan approval and related use variance. See Affidavit of L.B. Litwin paragraphs 6-7. BFI is located next to Richcrete. Richcrete is separated from Mid-State by one lot. BFI is separated from Mid-State by two lots (Richcrete

and one other lot). Prior to July 25, 1983 plaintiffs' lands and premises were zoned industrial.

The lands and premises behind the plaintiffs' lands and premises are owned by Johns Mansville, Inc. and known as Lot 4, Block 16 on the tax map of the Township of Cranbury. These land and premises are 5.38 acres and are used presently for agricultural purposes. The land is vacant. Prior to July 25, 1983 the Johns Manville land and premises was zoned industrial. See Affidavit of L.B. Litwin paragraphs 1-7.

Cranbury Development Corporation (hereinafter "Cranbury Development") (a plaintiff in a companion case) is the owner of Lot 10, Block 10 and Lot 1, Block 12 as shown on the tax map of the Township of Cranbury. Said lands and premises are located on Brick Yard Road across from Mid-State. Said lands and premises contain 395 acres and are vacant. Prior to July 25, 1983 the Cranbury Development land and premises were zoned industrial. See Affidavit of L. B. Litwin paragraph•••\$i Exhibit A.

IBM Biomedical (hereinafter "IBM") is the owner of Lot 4, Block 16 as shown on the Tax Map of the Township of Cranbury. Said land and premises are located on Brick Yard Road and Cranbury Station Road, across the street from plaintiffs. Said lands and premises contain 16.738 acres and is used for engineering, assembling and testing biomedical products. Prior to July, 1983 the IBM land was zoned industrial. See Affidavit of L. B. kiiiiiii paragraph 8, Exhibit A.

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Prior to the Township Committee's adoption of the new Zoning Ordinance on July 25, 1983, the Planning Board conducted Master Plan hearings. On July 8, 1982 the Planning Board held a public hearing on the Master Plan. Plaintiffs did not appear at said hearing. Prior thereto, the Planning Board published a notice of that Master Plan hearing which provided:

"Please take notice that the Planning Board of the Township of Cranbury will hold a Public Hearing on Thursday, July 8, 1982 at 8:00 p.m. at the Cranbury Elementary School. To be considered are revisions to the Master Plan and discussion adoption of a Farmland Preservation Program. Copies of the proposed document will be available to review ten days prior to the meeting at the Cranbury Township Office and the Cranbury Public Library."

Subsequent thereto, on July 29, 1982 the Planning Board held a second public hearing on the Master Plan. Plaintiffs did not appear at said hearing. Prior thereto, the Planning Board published a notice of the Master Plan hearing which provided:

"Please take notice that the Planning Board of the Township of Cranbury will hold a Public Hearing on Thursday, July 29, 1982 at the Cranbury Elementary School. To be considered are revisions to the Master Plan and discussion of adoption of a Farmland Preservation Program. Copies of the proposed documents are available for review at the Cranbury Township Office and the Cranbury Public Library."

On August 3, 1982 the Planning Board held a third public hearing on the Master Plan. Plaintiffs did not appear at said hearing. Prior thereto the

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Planning Board published a notice of the Master Plan hearing which provided:

"Please take notice that the continuation of the public hearing to consider an amended element of the Land Use Plan of the Township of Cranbury and, specifically, a Farmland Preservation Plan has been rescheduled August 3, 1982 at the Cranbury Elementary School at 8:00 p.m. At that time the Planning Board will also consider possible revisions to the plan specifically in the high density planned development, middle density village, industrial districts and for properties on Dey Road, south of Station Road and north of the proposed Old Trenton Road, Master Planned road in the agricultural district. The Board will consider any written material provided it is submitted before the public hearing. Maps and reports are available for review at the Cranbury Township office between the hours of 9-12 a.m. and 1-4 p.m. Copies of the reports may be purchased at the Cranbury Township Office for a fee of \$10.00." See Affidavit of L.B. Litwin paragraph 9 .

On September 5, 1982 the Planning Board adopted the Cranbury Township Land Use Plan (hereinafter "Land Use Plan"). Pursuant to the Land Use Plan, the Planning Board determined that the plaintiff's lands and premises and IBM lands and premises be located in the light impact industrial zone and the Johns Manville lands and premises and the Cranbury Development lands and premises were to be located in the low density residential use zone - 3 acre residential. Prior thereto, plaintiffs' lands and premises, the IBM lands and premises, the Johns Manville lands and premises and the Cranbury Development lands and premises were in the industrial zone. <sup>See</sup> Affidavit of L.B. Litwin Exhibit H, p.2-3.

Subsequent to the adoption of the Land Use Plan, the Planning Board commenced the preparation of a Zoning Ordinance which it would recommend to



the Township Committee. At the initial stages thereof, plaintiffs appeared before the Planning Board. On December 17, 1982 plaintiffs requested that the Master Plan be amended and the Zoning Ordinance under consideration be revised. The Planning Board advised plaintiffs that they should have presented their position at the Master Plan hearings. At the suggestion of the Planning Board, plaintiffs commenced the preparation of a planning report with respect to plaintiffs' request for an amendment to the Master Plan and revision to the Zoning Ordinance. See Affidavit of L. B. Litwin paragraphs 13-14.

On March 9, 1983 plaintiffs submitted a report to the Planning Board outlining the reasons for the requested amendment to the Master Plan and revision to the Zoning Ordinance. On March 21, 1983 plaintiffs requested a response from the Planning Board. The Planning Board did not respond. See Affidavit of L.B. Litwin paragraphs 15-16.

On April 21, 1983 plaintiffs again appeared before the Planning Board and requested to be advised as to the status of their request. The Planning Board advised that plaintiffs should have presented their position at the Master Plan hearings. On May 5, 1983 the Planning Board recommended a Zoning Ordinance to the Township Committee. The proposed Zoning Ordinance was a mirror image of the Master Plan as to plaintiffs' lands and premises and the adjoining lands and premises. The new Zoning Ordinance placed: (1) plaintiffs' land and premises and the IMB lands and premises in the light impact industrial zone; and

(2) the Johns Manville land and premises and the Cranbury Development land and premises in light impact residential zone.

On May 23, 1983 the Township Committee had the first reading of the new Zoning Ordinance recommended by the Planning Board. Plaintiffs appeared in opposition thereto. Plaintiffs were again advised that they should have presented their position to the Planning Board during the Master Plan hearings. See Affidavit of L.B. Litwin paragraphs 12-19.

On July 25, 1983 the Township Committee had the second reading of the new Zoning Ordinance\* Plaintiffs again appeared in opposition. Plaintiffs were again advised that they should have presented their position to the Planning Board during the Master Plan hearings. See affidavit of L.B. Litwin para. 20.

On July 25, 1983 the Township Committee adopted the Zoning Ordinance recommended by the Planning Board. Pursuant to the new Zoning Ordinance, plaintiffs' lands and premises and IBM lands and premises which are heavy industrial uses, were zoned industrial light impact, and the Johns Manville lands and premises and the Cranbury Development lands and premises adjacent to plaintiffs lands and premises (previously zoned industrial) were zoned light impact residential, 3 acre. See Affidavit of L.B. Litwin, Exhibit H p.2-3.

The new Zoning Ordinance is fatally defective because the new Zoning Ordinance must be preceded by a duly adopted Master Plan. The Master Plan was not duly adopted. Therefore, the Zoning Ordinance was not duly adopted.

POINT I

SINCE THE PLANNING BOARD'S NOTICE OF THE MASTER PLAN HEARINGS DID NOT COMPLY WITH N.J.S.A. 40:55D-62 NOR WITH THE NOTIONS OF DUE PROCESS, THE MASTER PLAN AND ZONING ORDINANCE WERE NOT ADOPTED IN ACCORDANCE WITH LAW.

A

The Notice Did Not Comply With N.J.S.A. 40:55D-62.

The Municipal Land Use Act requires that the land use plan element of a master plan must be duly adopted by a planning board as a condition precedent to a governing body adopting or amending a zoning ordinance. NJSA 40:55D-62 entitled "Power to Zone" provides:

"a. The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element of a master plan and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element of the master plan or designed to effectuate such plan element; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body with the reasons of the governing body for so acting recorded in its minutes when adopting such a zoning ordinance; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection 77b of this act. (emphasis added)

Thus, if the Master Plan is not adopted in accordance with law, the Zoning Ordinance will not be adopted in accordance with law. See Pop Realty Corp.

v. Springfield Twp. Bd. of Adjustment, 176 NJ Super 441 (Law Div. 1980)

Prior to holding Master Plan hearings, the Planning Board must give notice by publication in a newspaper of general circulation at least 10 days prior to such a hearing. N.J.S.A. 40:55D-13.<sup>1</sup> The Notice shall state the date, time and place of the hearing and the nature of the matters to be considered. N.J.S.A. 40:55D-11<sup>2</sup>.

<sup>1</sup>The Planning Board shall give:

(1) Public notice of a hearing on adoption, revision or amendment of the plan; such notice shall be given by publication in the official newspaper of the municipality, if there be one, or in a newspaper of general circulation of the municipality at least 10 days prior to the date of the hearing.

(2) Notice by personal service or certified mail to the clerk of an adjoining municipality of all hearings on adoption, revision or amendment of a master plan involving property situated within 200 feet of such adjoining municipality at least 10 days prior to the date of any such hearing;

(3) Notice by personal service or certified mail to the county planning board of (a) all hearings on the adoption, revision or amendment of the municipal master plan at least 10 days prior to the date of the hearing; such notice shall include a copy of any such proposed master plan, or any revision or amendment thereto; and (b) the adoption, revision or amendment of the master plan not more than 30 days after the date of such adoption, revision or amendment; such notice shall include a copy of the master plan or revision or amendment thereto.

<sup>2</sup> Notices pursuant to N.J.S.A. 40:55D-13 shall state the date, time and place of the hearing, the nature of the matters to be considered and, in the case of notices pursuant to subsection 7.1 of this act, an identification of the property proposed for development by street address, if any, or by reference to lot and block numbers as shown on the current tax duplicate in the municipal tax assessor's office, and the location and times at which any maps and documents for which approval is sought are available pursuant to subsection 6b.

me Planning board's Notices of the Master Plan hearings provide:

a. As to the July 8, 1982 hearings:

"Please take notice that the Planning Board of the Township of Cranbury will hold a Public Hearing on Thursday, July 8, 1982 at 8:00 p.m. at the Cranbury Elementary School. To be considered are revisions to the Master Plan and discussion adoption of a Farmland Preservation Program. Copies of the proposed document will be available to review ten days prior to the meeting at the Cranbury Township Office and the Cranbury Public Library."

b. As to the July 29, 1982 hearing:

"Please take notice that the Planning Board of the Township of Cranbury will hold a Public Hearing on Thursday, July 29, 1982 at the Cranbury Elementary School. To be considered are revisions to the Master Plan and discussion of adoption of a Farmland Preservation Program. Copies of the proposed documents are available for review at the Cranbury Township Office and the Cranbury Public Library."

c. As to the August 3, 1982 hearing:

"Please take notice that the continuation of the public hearing to consider an amended element of the Land Use Plan of the Township of Cranbury and, specifically, a Farmland Preservation Plan has been rescheduled August 3, 1982 at the Cranbury Elementary School at 8:00 p.m. At that time the Planning Board will also consider possible revisions to the plan specifically in the high density planned development, middle density village, industrial districts and for properties on Dey Road, south of Station Road and north of the proposed Old Trenton Road, Master Planned road in the agricultural district. The Board will consider any written material provided it is submitted before the public hearing. Maps and reports are available for review at the Cranbury Township office between the hours of 9-12 a.m. and 1-4 p.m. Copies of the reports may be purchased at the Cranbury Township Office for a fee of \$10.00."

**SCERBO, KOBIN, LITWIN & WOLFF**

COUNSELLORS AT LAW

10 PARK PLACE

MORRISTOWN, N. J. 07960

The notice of the Master Plan hearing did not adequately specify the nature of the hearings. The notice did not provide that, pursuant to NJSA 40:55D-62, after the adoption of a land use element of the Master Plan, a new zoning ordinance could be adopted which would be consistent therewith or a new ordinance could be adopted which was inconsistent with the land use element, provided there was a majority vote of the three member Township Committee. The public notice did not adequately inform the public of the significance of the adoption of the Master Plan, especially where, as in this case, the Planning Board and the Township Committee subsequently advised the plaintiffs that plaintiffs' input should have been provided at the Master Plan hearings. In other words if the Township Committee and the Planning Board only wanted input, with respect to the zoning ordinance at the Master Plan Hearings, the notice should have so specified<sup>3</sup>. See affidavit of L.B. Litwin ^paragraphs 13-20.

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<sup>3</sup> Under the prior statute the adoption of the Master Plan had no legal significance; thus notice thereof was of no import. Pop Realty, supra, 176 NJ Super at 447, citing Cochran v. Summit Planning Bd., 87 NJ Super 526, 535-36 (Law Div. 1965).

B  
The Notice Did Not Comply With Notion of  
Due Process

The Planning Board's notices of the Master Plan hearings failed to adequately inform the public as to the nature of the Master Plan hearing.<sup>4</sup> Said notices violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Any procedure which deprives an individual of a property interest must conform to the dictates of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Matthews v. Eldridge, 424 U.S. 319 (1976); Bell v. Burson, 402 U.S. 535 (1971). Interests in real estate are protected by the Due Process Clause of the United States Constitution and the New Jersey Constitution. Township of Montville v. Block 69, Lot 10, 74 NJ 1 (1976). Zoning effects interests in real property. If zoning is confiscatory condemnation results and the property owner is entitled to compensation. See Sheer v. Evesham Twp, 184 NJ Super 11 (Law Div. 1982); Morris County Land v. Parsippany, 40 NJ 539 (1963). The property owner is entitled to actual notice of a condemnation if his address is known. Walker v. City of Hutchinson 352 U.S. 112 (1956). If the property owner is to be able to determine if a new zoning

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<sup>4</sup> Similar NJSA 40:49-2.1 does not require that an entire zoning ordinance, which had been duly adopted, be published. However there must be a brief summary of the main objectives and provisions of the ordinance. See Wolf v. Shrewsbury, 182 NJ Super 289 (App. Div. 1981). So too the notice of the Master Plan hearings should inform as to the significance of the master plan hearings.

ordinance is confiscatory he should be entitled to actual notice of a potential zoning change to his property. In this case a property owner whose property was scheduled for rezoning via the Master Plan should have received actual notice of the proposed changes since the Township Committee wanted all input at the Master Plan hearing. In Township of Montville v. Block 69, Lot 10, 74 NJ 1, 7 (1976) the court stated:

"The Fourteenth Amendment to the Federal Constitution provides: 'No state shall deprive any person of life, liberty or property, without due process of law.' This is consistent with Article I, par. 1 of our state Constitution, which also protects a person's right to acquire, possess and protect property."

The words of the Due Process Clause require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust Co, 339 U.S. 306 (1950); see also Matthews v. Eldridge 424 U.S. 319 (1976). The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. Mullane, supra at 314.

It is well settled that personal service of written notice within the jurisdiction is the classic form of notice and is adequate in any type of proceeding. Mullane, supra at 313. Personal service, of course, has not in all cases been regarded as an indispensable form of service. Service by mail or service by publication or posting have been found to be adequate in many circumstances. In Mullane supra the United States Supreme Court has stated, that the Due Process Clause does prescribe a constitutional minimum for the



notice requirement:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections... When notice is a person's due, process which is a mere gesture is not due process." Mullane supra at 314-315. (emphasis supplied.)

Even if notice by publication suffices, in the instant case the notice of a Master Plan hearing was a mere gesture. The notice did not inform the public as to the statutory implications of the adoption of a Master Plan set forth in NJSA 40:55D-62; nor did the notice specify that all input or the Zoning Ordinance should come at the Master Plan hearing. The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of a proceeding that affect their interests. Greene v. Lindsey, 102 S.Ct. 1874 (1982). In Greene, at page 1879, the Court stated:

"In arriving at the constitutional assessment we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State or provide notice in a particular class of cases, its effect must be judged in the light of its practical application of the affairs of men as they are ordinarily conducted.

Ordinary business men and property owners could not understand the significance of the adoption of a Master Plan based upon the Planning Board's

notice. If the Planning Board's notice had set forth the legal consequences of adoption of a Master Plan pursuant to N.J.S.A. 40:55D-62, and been served upon property owners whose property was scheduled to be rezoned pursuant to the Master Plan ordinary businessman could have understood the consequences of the adoption of the Master Plan.

Since the notice of the Master Plan hearings is fatally defective, the Master Plan in Cranbury was not duly adopted. Since the Master Plan was not duly adopted, the zoning ordinance was not duly adopted and must be stricken. The notice of the Master Plan hearing was not calculated to advise interested property owners that their property could be rezoned as a result of the adoption of the Master Plan.

II

SUMMARY JUDGMENT WAS APPROPRIATELY GRANTED  
BY THE TRIAL COURT BECAUSE THERE EXISTS NO GENUINE  
ISSUE OF MATERIAL FACT.

Where there exists no genuine issue of material fact, and the moving party is entitled to the relief requested as a matter of law, summary judgment is appropriate. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954), the Supreme Court said:

"The standards of decision governing the grant or denial of a summary judgment emphasize that a party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one."

"Thus it is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact, 6 Moore's Federal Practice, par. 56.15 (3). The phrasing of our rule R.R. 4:58-3, slightly different from Federal Rule 56(c), underscores this in the requirement that the absence of undisputed material facts must appear "palpably". All inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated, Templeton v. Borough of Glen Rock, 11 N.J. Super. 14 (App. Div. 1950). And it is not to be concluded that palpably no genuine issue as to any material fact exists solely because the evidence opposing the

claim fact strikes the judge as, being incredible..."

"However, if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, 5 Vanderbilt L. Rev. 607, 613 (1952), "fanciful, frivolous, gauzy or merely suspicious", 6 Moore, Federal Practice, par. 56.13(3), he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. Taub v. Taub, 9 N.J. Super. 219 (App. Div. 1950); Lauchert v. American S.S. Co., 65 F. Supp. 703, 707 (D.C.W.D.N.Y. 1946)..."

Where the pleadings, affidavits and interrogatories show that there is no genuine issue of any material fact summary judgment is appropriate. There are no material facts in dispute in this case.

CONCLUSION

For all the foregoing reasons, plaintiff respectfully requests its Motion for Partial Summary Judgment be granted.

Scerbo, K0M71, Litwin & Wolff  
Attorneys ;toj: Plaintiff, BFI, eu  
al

BY: 

LAWRENCEH3. LITWIN, ESQ.

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Morristown, NJ 07960  
Attorney for Plaintiffs- Browning Ferris, et al  
(201) 538-4220

BROWNING-FERRIS INDUSTRIES OF  
SOUTH JERSEY, INC., A corporation  
of the State of New Jersey, RICHCRETE  
CONCRETE CO., A Corporation of the  
State of New Jersey and MID-STATE  
FILIGREE SYSTEMS, INC., A Corporation  
of the State of New Jersey,

Plaintiffs

VS.

CRANBURY TOWNSHIP PLANNING BOARD  
AND THE TOWNSHIP COMMITTEE OF THE  
TOWNSHIP OF CRANBURY,  
Defendants

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

Docket No. L 058046—83

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URBAN LEAGUE OF GREATER NEW  
BRUNSWICK,  
Plaintiff

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

vs.

CARTERET, ETC., et al  
Defendant

Docket No. C 4122-73

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AFFIDAVIT OF LAWRENCE B. LITWIN, JESQV

V

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SCERBO, KOBIN, LITWIN & WOLFF  
COUNSELLORS AT LAW  
10 PARK PLACE  
MORRISTOWN, N. J. 07960

JOSEPH MORRIS AND  
ROBERT MORRIS,  
Plaintiff

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

vs.

Docket No. L 054117-83

TOWNSHIP OF CRANBURY IN THE  
COUNTY OF MIDDLESEX, a  
municipal corporation of the State  
of New Jersey,  
Defendant

GARFIELD & COMPANY, a New  
Jersey Partnership,  
Plaintiff

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

vs.

Docket No. L 055956-83

MAYOR AND THE TOWNSHIP  
COMMITTEE OF THE TOWNSHIP  
OF CRANBURY, a municipal  
corporation, and the memo ers  
thereof; PLANNING BOARD OF THE  
TOWNSHIP OF CRANBURY, and  
the members thereof.  
Defendant

CRANBURY DEVELOPMENT COPR.  
Plaintiff

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MIDDLESEX COUNTY

vs.

Docket No. L 59643-83

CRANBURY TOWNSHIP PLANNING  
BOARD and TOWNSHIP COMMITTEE  
OF THE TOWNSHIP OF CRANBURY,  
Defendant

Lawrence \*B. Litwin, of full age being duly sworn according to law upon his oath deposes and says:

1. I am an attorney at law of the State of New Jersey and a member of the firm of Scerbo, Kobin, Litwin and Wolff. Scerbo, Kobin, Litwin and Wolff, are the attorneys for the plaintiffs Browning Ferris Industries of South Jersey, Inc., (hereinafter BFI), Mid-State Filigree a corporation of the State of New Jersey (hereinafter Mid-State) and Richcrete Concrete Co., a Corporation of the State of New Jersey (hereinafter Richcrete).

2. Richcrete Concrete Co.,<sup>5</sup> is the owner of land and premises known as Lot 13, Block 16 as shown on the tax map of the Township of Cranbury, Middlesex County. Said lands are located on Hightstown Cranbury Station road. Said lands and premises contain 3.4 acres. See Exhibit A. Richcrete Concrete Co., has used those premises since 1965 for the construction and operation a transit mix concrete plant pursuant to a use permit. See Exhibit B.

3. Richcrete, is located next to BFI a co-plaintiff. In addition, Richcrete is 2 doors away from Mid-State. Richcrete's land is adjoined in the rear by the land and premises of John Mansville.

4. Mid-State is the owner of land and premises known as Lot 5, Block 16 as shown on the tax map of the Township of Cranbury, Middlesex County. Said lands are located on Hightstown Cranbury Station road. Said lands and premises contain 16.18 acres. See Exhibit A. Mid-State and its predecessor have used those lands since 1972 for manufacturing cement forms.

5. Mid-State is located 2 doors away from Richcrete a co-plaintiff. In



addition, Mid-State is 3 doors away from BFI. Mid-State is adjoined in the rear by the land and premises of John Mansville.

6. BFL is the owner of land and premises known as Lot 6, Block 16 as shown on the tax map of the Township of Cranbury, Middlesex County. Said lands are located on Hightstown Cranbury Station road. Said lands and premises contain 4.7 acres. See Exhibit A. BFI has used those premises since July 1976 for the parking, storage and repairs of trucks pursuant to a site plan approval and related use variance. See Exhibit C.

7. BFI is located next to Richcrete a co-plaintiff. In addition, BFI is 2 doors away from Mid-State. BFI's land is adjoined in the rear by the land and premises of John Mansville.

8. Plaintiffs' properties are shown on the map attached hereto as Exhibit A.

9. By letter dated August 31, 1983 (Exhibit D) the Secretary of the defendant Cranbury Township Planning Board (hereinafter Planning Board) forwarded copies of all notices of Master Plan hearings held by the Planning Board. The notices indicate that the Planning Board held Master Plan hearings on July 8, 1982, July 29, 1982 and August 3, 1982.

10. The Planning Board adopted the Master Plan on September 5, 1982.

11. Subsequent thereto, for the first time, Richcrete by letter dated October 14, 1982 (Exhibit E) advised the Planning Board of its concern with respect to the Master Plan.

12. The public notices of the Master Plan hearings did not inform plaintiffs of the legal significance of the adoption of the Master Plan as set

forth in N.J.S.A. 40:55D-62.

13. On December 17, 1982 I appeared before the Planning Board on behalf of the plaintiffs and advised that plaintiffs were concerned about a new Zoning Ordinance, then under consideration. Plaintiffs requested that they be permitted to have input with respect to the new Zoning Ordinance, which was prepared based upon the Master Plan. Plaintiffs' concern were expressed in a letter dated December 16, 1982 (Exhibit F) as follows: Plaintiff wanted (a) their property to be zoned asaconforming use; and (b) property immediately adjacent thereto to be continued to be zoned industrial, not residential.

14. At the December 17, 1982 Planning Board meeting the Planning Board encouraged plaintiffs to have a planning report prepared to outline the basis for a potential change in the Master Plan as well as a change in the proposed Zoning Ordinance. (See letter dated December 28, 1982; Exhibit G).

15. As a result, on March 9, 1983 plaintiffs submitted a planning report of Paul Szymanski , AICP, PP; the report evaluated plaintiffs proposed changes to the Zoning Ordinance and the Master Plan. A copy of the report is annexed hereto as Exhibit H.

16. On March 21, 1983 I requested the Planning Board's further consideration of Pontiffs' request. (Exhibit I).

17. I appeared before the Planning Board on April 21, 1983. I advised the Planning Board that plaintiffs were still awaiting a response to the Szymanski report. At that hearing, plaintiffs were advised that the time for input on the Zoning Ordinance and an amendment to the Master Plan was at the public

hearings for the Master Plan, which was approximately 14 months prior. (See transcript of April 21, 1983 proceedings page 7-7; Exhibit J).

18. By letter dated June 2, 1983, the Secretary of Planning Board, in response to my letter of May 6, 1983 advised that on May 5, 1983 the Planning Board had recommended the proposed new Zoning Ordinance to the Township Committee of the Township of Cranbury (hereinafter Township Committee). (See Exhibit K).

19. The first reading of the proposed Zoning Ordinance by The Township Committee was held on May 23, 1983; the proposed Zoning Ordinance was a mirror image of the Master Plan. Plaintiffs objections to the new Zoning Ordinance and requested revisions thereto, were noted at the May 23, 1983 hearing. (See letter dated May 23, 1983, Exhibit L). Again, plaintiffs were advised why they had not been present when the Master Plan was being promulgated. (See transcript of proceedings of May 23, 1983 Exhibit M page 4 line 20.)

20. Plaintiffs also appeared at the second reading of the Zoning Ordinance held on July 25, 1983. (See transcript of proceedings of July 25, 1983, Exhibit N page 38 et seq. ) Again plaintiffs requested changes. Again plaintiffs were advised that their input should have been provided at the Planning Board level, when the Master Plan hearings were held. (See Exhibit N. See page 57 line 13.)

Sworn to and subscribed  
to before me this day  
of July, 1983.



CLAUSE E. VANSOES?  
A Notary Public in and for the State of New Jersey  
My Commission expires on July 2, 1984

Scerbo, Kobin, Litwin and Wolff  
Attorneys for Plaintiff



BY: LAWRENCE M. LITWIN, ESQ.