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- PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NO. 1-36896-70 P.W.

THE ALLAN-DEANE CORPORATION, :
a Delaware corporation :
qualified to do business in :
the State of New Jersey, :

Plaintiff, :

vs. :

THE TOWNSHIP OF BEDMINSTER, a :
municipal corporation of the :
State of New Jersey, and THE :
TOWNSHIP OF BEDMINSTER :
PLANNING BOARD, :

Defendants. :

Civil Action

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO
FILE A BRIEF AMICUS CURIAE

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William W. Lanigan
On Brief

Daniel F. O'Connell
On Brief

STATEMENT OF FACTS

The within action is a suit in lieu of prerogative writ against the Township of Bedminster and the Township of Bedminster Planning Board filed on August 23, 1971. The Plaintiff, The Allan-Deane Corporation, is the owner of some 465 acres of land upon which it proposed a development consisting of office and research facilities, including a lodge-meeting center in conjunction therewith, single family residences on less than five acre lots, town houses and a portion of a golf course. This plan was presented to the Bedminster Township Planning Board and Township Committee for their consideration, and a formal request for rezoning was made on May 24, 1971.

Upon the failure of the Defendants to respond in any way to this request, the Plaintiff filed suit. In its Amended Answer to the Complaint, the Defendants raised in the Sixth, Tenth and Twelfth defenses to all counts, the question of environmental and ecological conditions in connection with the zoning ordinances in general, and the Bedminster Zoning Ordinance in particular.

Since the filing of the Amended Answer, exhaustive discovery proceedings have taken place in preparation for trial. On May 11, 1972, this matter was Pre-Tried and the Court set June 21, 1972, as the trial date. All discovery will be completed by the second week in June.

On Wednesday, May 17, 1972, the Attorney General's office of the State of New Jersey, on behalf of Commissioner Richard J. Sullivan, Commissioner of Environmental Protection, State of New Jersey, filed a Notice of Motion for leave to file a Brief Amicus Curiae because of the environmental considerations which had been raised as a defense to the attack upon Bedminster's zoning ordinance.

As stated in the accompanying letter of the Attorney General, "[The Commissioner's] only purpose in seeking leave to file a Brief Amicus Curiae is to urge that environmental factors be considered in evaluating the Bedminster zoning ordinance."

Nothing in the motion papers indicate what direction this brief will take other than the statement that, "...the Commissioner would hope to assist the Court in evaluating Bedminster's claim that its ordinance is environmentally sound." This is the very antithesis of the next sentence which states,

"... it is not the Commissioners intent to take sides in this particular controversy." Nor can it be ascertained what sources would be utilized in preparing the brief. This is the first time to counsel's knowledge that the Commissioner of Environmental Protection has requested to intervene in a law suit involving the legality of a municipality's zoning ordinance.

ARGUMENT

IF, AS THE INTERVENOR STATES, "HIS ONLY PURPOSE IN SEEKING LEAVE TO FILE A BRIEF AMICUS CURIAE IS TO URGE THAT ENVIRONMENTAL FACTORS BE CONSIDERED IN EVALUATING THE BEDMINSTER ZONING ORDINANCE" THEN THE INTERVENTION IS UNNECESSARY AND MOOT SINCE DEFENDANTS HAVE RAISED SUCH FACTORS IN THEIR ANSWER, HAVE INDICATED AN INTENTION TO CALL EXPERTS IN THESE FIELDS AS PART OF THE PRESENTATION OF DEFENDANT'S CASE, AND PLAINTIFF CONSIDERS SUCH FACTORS TO BE A RELEVANT CONSIDERATION IN THE PRESENTATION OF ITS CASE.

This is not an attempt to get "ecology" before the Court, or a new and novel attempt to have the Court consider such factors in its determination as to the reasonableness of a zoning ordinance, for the matter of ecology and environmental factors is already before the Court in this litigation. If the purpose in intervening is to urge the Court that environmental factors be considered, then the Plaintiff will likewise agree that the Court should consider such factors in making its decision.

Frankly, it is incongruous to suggest that a Court would not consider such factors in the presentation of a case, of this type and magnitude, and counsel in the case are

sophisticated enough to realize, both in the presentation of the case and in the defense of the action, that there are relevant environmental factors. Yet, this is what the Motion suggests.

Therefore, if we are to believe that this is the Commissioner's "only purpose", and "that it is not the Commissioner's intent to take sides in this particular controversy", then there is really no necessity for the Commissioner to intervene. His purpose, or at least that which has been expressed in the letter dated May 16, 1972, has been completely fulfilled.

We think the Commissioner's purpose is otherwise. We think the Commissioner's purpose is as he stated it--to evaluate Bedminster's claim that its ordinances and environment are sound. As such, this is a new departure for the Commissioner of Environmental Protection and frankly, for the State of New Jersey. While it may be very advantageous for the Defendants in this particular action to have the assistance of the State of New Jersey, and to offer whatever additional ammunition it can supply, perhaps in an overall view, this is not sound. Especially when there has been an expressed intent by

the Township to raise the identical questions on its own behalf and in its own defense and especially when there has been an acknowledgement by the Plaintiff that such factors are certainly relevant in the consideration of the determination of the matter.

In the answers to the Plaintiff's interrogatories which were propounded to the Defendants, the Defendants list three individuals, Jack Mc Cormick of Devon, Pennsylvania, William Whipple, Jr., Water Resources Research Institute, Rutgers University, New Brunswick, New Jersey and Chester A. Ring, III of Elizabethtown Water Company who may testify on behalf of the Defendants. Elsewhere in the Defendants' answers to interrogatories are statements replete with environmental connotations and a complete development of the defenses which the Defendants had raised with respect to the environmental protection, the conservation of natural resources and the maintenance of sound ecological systems. These were raised in the Sixth Defense to the Plaintiff's Complaint.

As such, the Court is not in the position of having to be informed that it should consider these factors. Yet, this is the only function of an amicus curiae--the introduction

or raising of an issue that the parties might not otherwise address themselves to.

Black's Law Dictionary, Fourth Edition, defines amicus curiae as being literally, "A friend of the Court" and further states that an amicus curiae is defined as, "A bystander, (usually a counsellor) who interposes and volunteers information upon some matter of law in regard to which the Judge is doubtful or mistaken." In further definition it is stated that it, "Implies friendly intervention of counsel to remind Court of legal matter which has escaped its notice, and regarding which appears to be in danger of going wrong."

Of course, the additional definition which defines amicus curiae as, "Also a person who has no right to appear in a suit, but is allowed to introduce argument, authority, or evidence to protect his interests" would not be relevant since the Commissioner has indicated that he has no interest in the litigation other than to, "...urge that environmental factors be considered..."

Certainly the decision to permit an amicus curiae is solely within the discretion of the Court and is not a matter of

right, but by definition such Motion presupposes that the Judge is "doubtful or mistaken" or there is some "legal matter which has escaped its notice, and regarding which it appears to be in danger of going wrong." In the instant matter, this is an absurdity.

Yet, the Commissioner can do no more for the amicus curiae is not a party to the action and, therefore, must be totally impartial and not an advocate. Where the petitioner's attitude towards the litigation is patently partisan, he should not be allowed to appear amicus curiae. Casey v. Male 63 N.J. Super.255 (Essex County Ct., 1960).

The Casey case is a fine exposition by Judge Waugh of the right of an intervenor to appear as amicus curiae and is applicable to the instant cause. In that case, the Court concluded that the proposed intervenor's attitude would be patently partisan and any interest they may have in the subject matter would be adequately protected by the defense of the Defendant.

Certainly the adequacy of representation should be

considered by the Court. In the case at Bar, the Defendants have raised the issue of environmental considerations as a defense to the action, and it may be assumed that distinguished counsel for the Defendants will more than adequately present this defense to the Court. Apart from such defense, it is quite probable that this Court would consider environmental factors on its own. It is inconceivable to suggest that because counsel for the Defendants might not adequately present his defense that someone should be permitted to intervene and make that defense. Certainly the public interest is going to be adequately represented by counsel where the entire thrust of the defense of the action revolves around the very factors which are under discussion.

The difficulty with permitting an amicus curiae intervention a little over three weeks prior to a trial is certainly prejudicial to the rights of the Plaintiff. It is a little hollow by a letter dated May 16, 1972 to seek leave to file a Brief, because environmental considerations have been raised as a defense, when, in fact, those considerations have been raised in October of 1971, over seven months ago.

If the considerations were as important as the intervenor represents, it was certainly incumbent upon such intervention some time prior to three weeks before a trial. Of course, by submitting a Brief and putting whatever testimony and assertions it cares to in the Brief, this leaves absolutely no time for an adequate response by the Plaintiff. Likewise in a very contrived manner, it eliminates the opportunity to depose any of the officials, to examine any of the references and material cited and permits the intervenor, without reference to any standard, to make whatever claims it chooses in the name of "environmental protection." It is respectfully submitted that if the Commissioner of Environmental Protection has something to say in the defense of the Township of Bedminster Zoning Ordinance, then the Defendants can call him as a witness.

CONCLUSION

Based upon the fact that this intervention is obviously an afterthought, being commenced some three weeks before a trial and over seven months after the issue was first raised in the pleadings, in an action which has received considerable notoriety and publicity in the newspapers, the Motion could be considered untimely. Coupling this with the fact that there will be no adequate way for the Plaintiff to defend, within the next three weeks, against any assertions which may be made in the Brief, and without the opportunity to depose witnesses, examine testimony or even make diligent inquiry into the motivation behind this Motion, the Motion is certainly inopportune.

It is respectfully submitted that the parties are adequately represented by counsel, and the public interest is being adequately protected. The Defendants have two law firms defending them in this action and have raised the very considerations from the outset which the intervenor now purports to inform the Court about some seven months later.

This Court is mindful of the problem, is not

"doubtful or mistaken" and certainly the matter of environmental considerations have not "escaped the Court's notice." Based on the avowed purpose of the Commissioner in his letter of May 16, 1972 that, "his only purpose...is to urge that environmental factors be considered..." it is respectfully submitted that such a purpose has, in fact, been accomplished, and the intervention as amicus curiae is both unnecessary and unwarranted under the circumstances.

Respectfully submitted,

Law Offices of William W. Lanigan

By: William W. Lanigan
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