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- LETTER TO LEAHY + BRIEF IN REPLY TO PLAINTIFF

PGS-10

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January 23, 1974

Re. Cieswick, The Allan-Deane Corporation
and Association of Bedminster Citizens
v. Township of Bedminster, et al.
Docket Nos. L-28061-71 P.W. S-9153
L-28837-72 P.W. S-9955
L-27700-72 P.W. S-9929

Hon. B. Thomas Leahy
County Court Judge
Court House
Somerville, New Jersey 08876

Dear Judge Leahy:

We enclose herewith defendants' brief in reply to brief of plaintiff, The Allan-Deane Corporation.

By copy of this letter we are also serving copies on our adversaries.

Respectfully yours,

McCarter & English

McCarter & English

NCE:hk
Enc.

cc: William W. Lanigan, Esq.
Peter A. Buchsbaum, Esq.
Miss Lois D. Thompson

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - SOMERSET COUNTY
DOCKET NOS. L-28061-71 P.W.
L-28837-72 P.W.
L-27700-72 P.W.

LYNN CIESWICK, et al. :

Plaintiffs :

THE ALLAN-DEANE CORPORATION, etc. :

Plaintiff :

ASSOCIATION OF BEDMINSTER CITIZENS, etc., :

Plaintiffs :

-vs- :

TOWNSHIP OF BEDMINSTER, et al. :

Defendants :

Civil Action

DEFENDANTS' BRIEF IN REPLY TO BRIEF OF PLAINTIFF, THE ALLAN-DEANE CORPORATION

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The brief filed on behalf of plaintiff, The Allan-Deane Corporation, raises a single point, which is that the Bedminster zoning ordinance of April 16, 1973 is arbitrary and capricious with respect to Allan-Deane's property because of the prescribed density of permitted dwellings per acre on plaintiff's land.

Defendants have already filed in the first Allan-Deane suit a brief in reply to the plaintiff's brief therein. Defendants would also expect to rely in defense of the present Allan-Deane action on the brief which defendants have filed in response to the brief of the plaintiffs Cieswick, et al.

The within brief will attempt to deal solely with the issues raised in Allan-Deane's new brief.

ARGUMENT

ZONING PROVISIONS ARE NOT INVALID BECAUSE THEY DO NOT PERMIT THE MOST PROFITABLE USE OF THE PROPERTY

Plaintiff, Allan-Deane, contends that it has been denied the use of its property by arbitrary zoning restrictions, so that the ordinance is therefore invalid.

When Allan-Deane bought its 467 acre property in Bedminster, it concededly knew that it was then zoned for single-family houses on 1-acre lots on 77 acres, and on 5-acre lots on the balance. Making appropriate allowance for roads, this would have permitted approximately 143 houses to be constructed. The present ordinance would permit Allan-Deane to build 500 or 600 dwelling units of various types on its property, plus a small shopping area. For Allan-Deane to contend that defendants have deprived it of any reasonable use of its land is patently ridiculous.

Allan-Deane's position is, in essence, that the zoning restrictions do not permit as great a profit to be realized from the development of its land as Allan-Deane would wish. This position is legally untenable.

A zoning ordinance is not valid merely because the restrictions do not permit the most profitable use of the property. In the leading zoning case, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the validity of the ordinance was upheld even though its effect was to reduce the value of plaintiff's property from

about $680,000 to about $170,000. Cf. Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

Accordingly, it is firmly established in New Jersey and elsewhere that zoning regulations are not invalid merely because they do not permit a more profitable use of the property. Guaclides v. Englewood Cliffs, 11 N.J.Super. 405, 414 (App. Div. 1951); Cobble Close Farm v. Bd. of Adj. Middletown, 10 N.J. 442, 452 (1952); Fischer v. Bedminster, 11 N.J. 194, 206 (1953); Rockaway Estates v. Rockaway Township, 38 N.J.Super. 468, 478 (App. Div. 1956); Clary v. Borough of Eatontown, 41 N.J.Super. 47, 65 (App. Div. 1956); S. & L. Associates, Inc. v. Washington Township, 61 N.J.Super. 312, 323 (App. Div. 1960); aff'd on this point and reversed on others, 35 N.J. 224 (1961); Bern v. Fair Lawn, 65 N.J.Super. 435, 450 (App. Div. 1961); Koslow v. Municipal Council, Wayne, 52 N.J. 441, 452 (1968); Ring v. Mayor, etc. Rutherford, 110 N.J.Super. 441, 445 (App. Div. 1970); cert. den. 57 N.J. 125 (1970); cert. den. 401 U.S. 911; Capital Properties, Inc. v. Zoning Commission, 229 F.Supp. 255, 257 (D.C., D.C. 1964); Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516, 519 (S.Jud. Ct. 1942); Building Commissioner of Medford v. C. & H. Co., 319 Mass. 273, 65 N.E. 2d 537, 541 (S.Jud. Ct. 1946); Senior v. Zoning Commission, 146 Conn. 531, 153 A.2d 415, 417 (S.Ct. Err. 1959); app. dism. 363 U.S. 143 (1960); DeForest & Hotchkiss Co. v. Planning and Zoning Comm., 152 Conn. 262, 205 A.2d 774, 780 (S.Ct. Err. 1964);

Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (C. of A. 1971). In Beirn v. Morris, supra, Justice Heher, speaking for the Supreme Court held at 14 N.J. 534:

> "The landowners acquired the property fully cognizant of the use restrictions, avowedly to make a more profitable use of the lands than conformance to the use regulation would permit, if that could be accomplished -- such as would serve their own private business interests at the time; and the profit motive is not an adequate ground for a variance."

In Rockaway Estates v. Rockaway Township, supra, Judge Francis, speaking for the Appellate Division, stated at 38 N.J.Super. 478:

> "The core of plaintiff's opposition is really that the lot size requirement prevents the most profitable use of his land. But the welfare of the community for all time cannot be subordinated to the profit motive of an individual landowner."

In Clary v. Borough of Eatontown, supra, Judge Conford said for the Appellate Division at 41 N.J. Super. 65:

> "It is not sufficient for the plaintiff to show that it would be more profitable for him to use his property in a manner prohibited by the ordinance; he must show an abuse of discretion resulting in an unreasonable exercise of the zoning power."

In Consolidated Rock Products Co. v. City of Los Angeles, 20 Cal. Rptr. 638, 370 P.2d 348 (S.Ct. 1962); app. dism. 371 U.S. 36 (1962), the court upheld the validity of a zoning ordinance notwithstanding the following facts (20 Cal. Rptr. 640):

> "Plaintiffs property -- 348 acres -- is zoned for agricultural and residential use; and rock, sand and gravel operations are prohibited thereon. * * *

> "The trial court found that the subject property has great value if used for rock, sand and gravel excavation but 'no appreciable economic value' for any other purpose, and in view of the 'continuing flood hazard and the nature of the soil,' any suggestion that the property has economic value for any other use, including those uses for which it was zoned, 'is preposterous.'"

In Goodman v. Zoning Board of Review of City of Cranston, 105 R.I. 680, 254 A.2d 743 (S.Ct. 1969), the court reversed the granting of a variance. Plaintiff owned a tract of 7 acres which was used in the nursery business, a non-conforming use. He had an option to sell the property for a price of between $500,000 and $600,000 to a purchaser who desired to construct and operate an automobile dealership, which was not a permitted use in the district.

In Turnpike Realty Company v. Town of Dedham (____ Mass. ____), 284 N.E. 891 (S. Jud. Ct. 1972), cert. den. 409 U.S. 1108, the court upheld the validity of a zoning ordinance amendment which was found to have brought about a substantial diminution in value of plaintiff's property. It was evidenced that the effect of the amendment was to reduce the value from $431,000 to $53,000.

Not only is Allan-Deane's position contrary to established and controlling authority, but it is also contrary to public policy.

Suburban sprawl, which almost everyone deplores, has come about largely because the desires of landowners and developers

have generated more pressure than the governmental planning and regulatory mechanisms. The rational use of land is more pressing in New Jersey than in any other state because New Jersey is now the most densely populated state in the Union, and its present population is obviously going to continue to grow. The rational use of land is impossible if the desire of a private party for maximum financial gain is allowed to prevail over reasonable planning and land use regulation.

The Citizens Advisory Committee on Environmental Quality, created by the federal government, established a Task Force of Land Use and Urban Growth which, in the spring of 1973 issued a report entitled "The Use of Land: A Citizens Policy Guide to Urban Growth" (Thomas Y. Crowell Company, New York). The Task Force issued a summary of its complete report, from which the following statements are taken:

> 27. To protect critical environmental and cultural areas, tough restrictions will have to be placed on the use of privately owned land. These restrictions will be little more than delaying actions if the courts do not uphold them as reasonable measures to protect the public interest, in short, as restrictions that landowners may fairly be required to bear without payment by the

government. The interpretation of the "takings issue"* is therefore a crucial matter for future land-use planning and regulatory programs.

28. Many judicial precedents (including some from the U.S. Supreme Court) that date from a time when attitudes toward land, natural processes, and planning were different from those of today. Many judicial precedents are anachronistic now that land is coming to be regarded as a basic natural resource to be protected and conserved and urban development is seen as process needing careful public guidance and control. * * *

34. It is time that the U.S. Supreme Court re-examine its earlier precedents that seem to require a balancing of public benefit against land value loss in every case and declare that when the protection of natural, cultural or aesthetic resources or the assurance of orderly development are involved, a mere loss in land value will never be justification for invalidating the regulation of land use.

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*The so-called "takings clause' in the Fifth Amendment to the U.S. Constitution: "...nor shall private property be taken for public use, without just compensation."

CONCLUSION

The grounds upon which The Allan-Deane Corporation relies for its attack on the Bedminster zoning ordinance are utterly devoid of merit, and its action should therefore be dismissed by the court.

Respectfully submitted,

EDWARD D. BOWLBY and
McCARTER & ENGLISH
Attorneys for Defendants

By Nicholas Conover English
Nicholas Conover English
A Member of the Firm