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6/18/1979

- LETTER TO JUDGE GAYNOR (4)
- AFFIDAVIT OF HENRI HILL (9)

PGS - 13

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June 15, 1979

REC'D AT CHAMBER

JUN 18 1979

Robert E. Gaynor

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The Honorable Robert E. Gaynor
Court House Annex
Somerville, New Jersey 08876

Re: The Allan-Deane Corporation vs.
The Township of Bernards
Docket No. L-25645-P.W.

Dear Judge Gaynor:

We enclose an original and two copies of our Affidavit in opposition to Bernards Townships' Notice of Motion to further extend the time for discovery in this case. Allan-Deane opposes this Motion on the following grounds:

- 1) For a period of almost two years Bernards Township conducted extensive almost full-time discovery in this case. No effort was made by them to conduct additional discovery after 1977 until it became apparent that the trial of this matter was imminent.
- 2) Bernards has already deposed Carl Lindbloom, James Murar and Alan Mallach and received notice as early as June 15, 1976, that both Dr. George Sternlieb and Apgar Associates were potential witnesses, but chose not to depose them.
- 3) The time during which discovery can be conducted has been extended by this Court four times and expired over a year and a half ago. No attempt was made to extend it until a trial date was set.
- 4) The mere fact that Plaintiff chooses to make minor changes with respect to which matters will be covered by which witnesses does not give Defendants new rights to discovery.
- 5) Bernards Township has itself disclosed to Allan-Deane that they have hired an entirely new roster

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of expert witnesses, none of whom were even mentioned by the Township during extensive discovery. The fact that Bernards should allege surprise after they have completely changed all of the expert witnesses which Allan-Deane deposed shows simply that their main objective is to delay and avoid this trial.

- 6) Any extension of discovery may endanger the September 10, 1979 trial date. Despite the fact that it is Allan-Deane and not Bernards which has been placed at a disadvantage by new witnesses, Allan-Deane is prepared to go to trial on September 10, 1979, without further discovery.

Bernards Township takes the position, on the one hand, that they cannot prepare a Trial Brief because of certain uncompleted zoning ordinance amendments they have agreed to adopt as part of a settlement entered into between the Township and a private litigant.* While they argue, on the other hand, that the Township should be permitted further discovery on the grounds that Allan-Deane intends to analyze these new amendments to the Zoning Ordinance once they have been enacted and Allan-Deane has made minor changes with regard to which issues will be covered by which expert witness and added George Sternlieb to their list of expert witnesses. As the enclosed Affidavit indicates, it is, in fact, Bernards and not Allan-Deane which has completely changed its roster of expert witnesses. Allan-Deane was notified in March and April of 1979 for the first time of eight new expert witnesses who had been hired by the Township.

Allan-Deane has already been subject to more extensive, more expensive and more time-consuming discovery than perhaps any other private litigant in a zoning case in New Jersey. Although Johns-Manville is not a party to this litigation, Bernards sought to depose that Company's President, that Company's Vice President in charge of legal services and all Corporate Officers who could have any conceivable connection with the Allan-Deane Corporation. Bernards requested and went through caseloads of documents in the possession of the Allan-Deane Corporation, Johns-Manville

* Judge Diana, in his letter of May 31, 1979, suggests that neither party complied with the Pretrial Order requirement concerning the filing of Briefs. This is incorrect. On April 30, 1979, Allan-Deane filed with the County Clerk an original and one copy of an eighty page Trial Brief as required by the Pretrial Order.

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Properties Corporation and Johns-Manville concerning this property. They devoted thousands of hours in the years 1976 and 1977 to this extensive discovery. Since March 2, 1978, Bernards has sought no additional discovery.*

As the Affidavit enclosed with this letter indicates, Defendant has already deposed Carl Lindbloom once on July 28, 1976; James Murar, the President of Allan-Deane, twice on May 25, 1976 and August 4, 1977 and Alan Mallach twice on July 27, 1976 and October 5, 1977. Defendants were informed as early as June 15, 1976 in answer to a written Interrogatory requesting Plaintiff to set forth the names and addresses of each and every person who had knowledge of the facts relevant to this action that George Sternlieb, Director of the Center for Urban Policy Research at Rutgers University, was considered by Plaintiff to be a possible witness. At the same time, Defendants were also notified that Apgar Associates was consulted with respect to its land use plan and proposals for its land in Bernards Township and Defendants have been furnished with all of Apgar Associates' reports. Despite the fact that Defendants received notice through Interrogatories that both Dr. Sternlieb and Apgar Associates were potential witnesses, they did not seek to depose either of them until the trial date was set some three years later.

In their letter of May 29, 1979, Defendants indicate that it is necessary to depose Alan Mallach a third time because Plaintiff intends to use him, rather than Carl Lindbloom, as their fair share witness. As McCarter & English knows, Carl Lindbloom's fair share methodology is premised on the Mount Laurel thesis that if there is zoning for employment in a municipality, there is a concomitant responsibility for housing. His methodology does not work for a town, like Bernards, which deliberately manipulates downward their fair share by unduly restricting new employment generating uses. We have determined to use the Mallach methodology because it is not subject to artificial manipulation and is a better measure of the municipality's true housing needs. Bernards' attorneys are thoroughly familiar with Mr. Mallach's methodology, as they recently cross-examined him for several days in the Bedminster litigation, and they have his full reports.

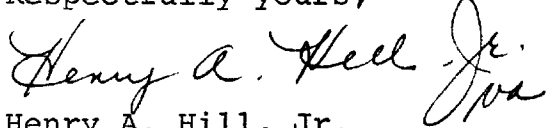
* In fact over one-half of the discovery conducted by Bernards was directed toward the Officers of Allan-Deane and Johns-Manville and the inspection of Company records in an apparent attempt to ascertain whether the Company was "profit motivated". Since clearly a public corporation, such as Johns-Manville, must be profit motivated this discovery was more actually designed to inconvenience the Officers of the parent Company in the hopes that they would direct the discontinuance of this litigation.

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George Sternlieb, the Director of the Center for Urban Policy Research at Rutgers, has been referred to throughout the discovery by Plaintiff as a major source regarding the impact of land use controls on housing price and on anticipated rates of growth in New Jersey. He will rebut the testimony of Edwin Mills, the Princeton economist, to the effect that Bernards Township is on the fringe of the New York metropolitan area and that Somerset County is not an area of anticipated job growth. Dr. Sternlieb is well known to Defendants for his research on the effects of exclusionary zoning on housing costs and suburban growth patterns in New Jersey.

Finally, we oppose this Motion because we need all the time between now and September 10, 1979, to prepare for trial. We are willing, in consideration of the early trial date (three and one-half years after we filed this action) to forego additional discovery ourselves, even though Bernards has seen fit within the last few months to replace all of the expert witnesses which they originally hired to defend this action.

Respectfully yours,


Henry A. Hill, Jr.

HAH/vwa
Enclosures

cc: Alfred L. Ferguson, Esq. (w/encl.)
Dean A. Gaver, Esq. (w/encl.)
James E. Davidson, Esq. (w/encl.)
John F. Richardson, Esq. (w/encl.)

2. Time for Discovery. Our records indicate that the time during which discovery could be conducted has been extended by Order of this Court at the request of counsel on four separate occasions. The time for discovery expired, under the last of these Extension Orders on December 1, 1977. Despite the fact that the time for discovery has expired, Allan-Deane allowed Bernards to depose Officers of Johns-Manville as late as March, 1978.

3. In its Motion defendant, Bernards Township, seeks to reopen this case for additional discovery on the grounds that they are in the process of making so many zoning changes that the discovery conducted up to this point is irrelevant. They further complain that Allan-Deane intends to analyze their zoning changes, once they are enacted, and that they should be entitled to additional time for depositions before a trial to review our analysis. They take the position that the municipality, so long as it has the power to keep changing its ordinances, should have the power to delay this trial by requesting time for additional discovery. Before ruling on this Motion, the Court should be aware of the extent of the discovery conducted by defendant to date.

4. Discovery Conducted by Defendant to Date. Defendant, Bernards Township, has conducted already more discovery in this case than has probably been conducted previously in any zoning case tried in the State of New Jersey. Defendants have had use of every means of discovery provided under the Rules Governing New Jersey Courts.

a. Depositions. Our records indicate that defendant, Bernards Township, has taken the following depositions of expert witnesses and Officers of Allan-Deane, Johns-Manville Properties Corporation and Johns-Manville since the inception of this action:

1. Deposition of John Kerwin, Vice President of Allan-Deane, May 24, 1976,
2. Deposition of James Murar, President of Allan-Deane, May 25, 1976,
3. Deposition of Alan Mallach, expert witness, July 27, 1976,
4. Deposition of Carl Lindbloom, expert witness, July 28, 1976,
5. Deposition of John Rahenkamp, expert witness, August 3, 1976,
6. Deposition of Gordon Fluke, expert witness, August 3, 1976,
7. Deposition of Richard Reading, expert witness, February 24, 1977,
8. Second Deposition of James Murar, President of Allan-Deane, August 4, 1977,
9. Second Deposition of Alan Mallach, expert witness, October 5, 1977,
10. Deposition of Dale Wheeler, Vice President of Johns-manville, October 24, 1977,
11. Deposition of John McKinney, formerly President and now Chairman of the Board

and Chief Executive Officer of Johns-
manville,

12. Deposition of Richard Ginman, expert witness, November 28, 1977,
13. Deposition of Earl Parker, Vice President, Secretary and Chief Legal Officer of Johns-Manville, March 2, 1978.

Our records indicate that defendants have not noticed additional depositions or sought additional depositions since March 2, 1978, until the filing of the present Motion despite the fact that they have been notified months previously of the roster of witnesses proposed by plaintiff.

b. Interrogatories. Defendants have promulgated two separate sets of interrogatories on plaintiff which total 160 pages of written questions. These interrogatories contain a total of 173 numbered questions in all and, in many cases consist of as many as 10 subquestions to be separately answered. These interrogatories have been answered and the sufficiency of the answers thereto has been the subject of at least two separate Motions before this Court. Allan-Deane notified Bernards in response to interrogatories as early as June, 1976, that Apgar Associates was doing Allan-Deane's civil engineering work, and that George Sternlieb, the Director of the Center for Urban Policy Research at Rutgers, had knowledge of facts relevant to this action and were potential witnesses. Despite the fact that Bernards received notice through answers to interrogatories that Dr. Sternlieb and Apgar Associates were potential witnesses no attempt was made to depose them until

a trial date was set three years later.

c. Requests for Admissions. Defendant has promulgated two separate requests for admissions pursuant to Rule 22 of the Rules Governing New Jersey Courts on plaintiff. These requests for admissions have been answered by the plaintiff and have been the subject of at least one Motion to determine the sufficiency of the answers. This Motion has been disposed by this Court.

d. Requests for Production of Documents. On April 5, 1976, defendants served on Allan-Deane a request for the production of virtually every document in the possession of Allan-Deane, Johns-Manville Properties Corporation and Johns-Manville concerning the Bernards property. Pursuant to this request, 8 or 10 cases of documents were shipped from Johns-Manville's corporate headquarters in Denver and Johns-Manville Properties Corporation's headquarters in California to New Jersey where they were examined and inspected for several days by counsel for defendant. As a result of this inspection by defendant, defendant requested that several thousand pages of documents be xeroxed and turned over to defendant counsel. All documents requested were xeroxed and turned over.

e. Additional Discovery. In addition to the formal discovery conducted under the Rules, counsel for Allan-Deane has regularly forwarded to counsel for Bernards Township, copies of additional expert reports as they are received.

5. Expert witnesses hired by Defendants since the time during which Discovery could be undertaken expired. Defendant, the Township of Bernares, complains that Alan Mallach, whom they have deposed on two separate occasions, indicates in his most recent expert report that the scope of his testimony is being expanded slightly to include his formulaic fair share testimony. They also complain that George Sternlieb, who was described in answers to Interrogatories as a person who might be a potential witness, has now definitely been retained as an expert witness and that they should have an opportunity to depose him.

Since March, 1979, Bernards has advised Allan-Deane of eight additional expert witnesses whom they intend to call, none of whom were listed in answers to Interrogatories promulgated by Allan-Deane and none of whom were deposed by Allan-Deane since Allan-Deane, up to now, had no knowledge that they had been retained. These witnesses are the following:

a. Peter L. Abeles, a planner, who was hired to replace Bernards' former planner, Charles Agle. Allan-Deane has received no reports from Mr. Abeles and therefore, has no knowledge with regard to the subject of his proposed testimony. Allan-Deane was notified on March 19, 1979, that Mr. Abeles had been retained to be an expert witness in this case. Prior to March, 1979, Allan-Deane had been informed that Charles Agle was Bernards' planner and, relying on that information, twice deposed Mr. Agle.

b. Marshall Frost, a professional engineer and licensed planner. Allan-Deane was first advised on March 19, 1979, that Mr. Frost would be a witness for Bernards. Allan-Deane has received no expert reports or other information indicating what he will testify about.

c. Edwin Mills, an economist teaching at Princeton University. Allan-Deane was first advised on March 19, 1979, that Bernards intended to call Mr. Mills. Allan-Deane has received no reports covering Mr. Mills' proposed testimony in this case but has been informed that his testimony will be similar to that in the Bedminster action before Judge Leahy.

d. Steven Carroll a planner residing in North Branch, New Jersey. Allan-Deane has received no report from Mr. Carroll and therefore has no idea with respect to what he will testify about and has been unable to depose him since we were notified of his existence on March 19, 1979, after the time during which discovery could be conducted had expired.

e. On March 30, 1979, Allan-Deane was first notified that Peter J. Jones, Jr. of Arthur Young and Company, may testify as to Allan-Deane's historical and projected costs. Allan-Deane was not notified that Mr. Jones might testify until after the time during which discovery could be conducted had expired and therefore has not had an opportunity to depose Mr. Jones.

f. On March 30, 1979, Allan-Deane was also notified that a Barry Krauser of Krauser and Welsh, Real Estate Ap-

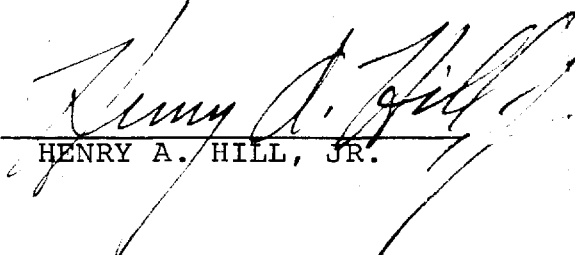
praisers, might testify. We have received no reports or other indication with regard to Mr. Krauser's proposed testimony.

g. On March 30, 1979, the attorneys for Bernards first advised us that John DeFillippi, a sanitary engineer and environmental engineer, might testify for Bernards Township with regards to sanitary sewage problems. We have received no expert reports from Mr. DeFillippi, had no opportunity to depose him, and therefore have no further information with regard to his proposed testimony.


h. On April 6, 1979, we were advised for the first time by McCarter & English that Maurice Wrangle, a landscape architect, should be added to the list of expert witnesses for Bernards. We received no reports or indication as to what Mr. Wrangle would testify to.

The purpose of this recital is to advise the Court that Bernards Township is in no position to allege surprise and a delay of the trial because Plaintiffs are "significantly changing the case from that which was presented in discovery". Bernards Township has known, as early as 1976 that George Sternlieb might be a witness and has had ample opportunity to depose him. They have deposed Mr. Mallach and Mr. Lindbloom. Bernards Township, on the other hand, has hired at least eight new expert witnesses since the time during which discovery might be conducted has expired who were never mentioned in Interrogatories.

It is clear that it is Allan-Deane, and not Bernards, which will be confronted at the trial with an entirely new roster of expert witnesses which they have had no opportunity to depose.


HENRY A. HILL, JR.

Sworn to and subscribed
before me this *15th* day
of June, 1979.



VALESKA W. ANDREN
A Notary Public of New Jersey
My Commission Expires Dec. 8, 1979