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Brief in Opposition to Defendant's Motion for Partial Summary Judgment on the Grounds of Res Judicata and Collateral Estoppel

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. L-25645-75 P.W.

THE ALLAN-DEANE CORPORATION, :

Plaintiff, :

Civil Action

v. :

THE TOWNSHIP OF BERNARDS IN THE COUNTY OF SOMERSET, et al., :

Defendants. :

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE GROUNDS OF RES JUDICATA AND COLLATERAL ESTOPPEL

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PRELIMINARY STATEMENT

While admitting the utter absence of any supporting decisional authority in the zoning field, the defendant Township of Bernards now moves before this Court for an order barring proofs on Counts I and II of the plaintiff's complaint, as amended, on alleged grounds of res judicata and collateral estoppel. In essence, the Township urges that the final judgment in a prior proceeding entitled Lorenc, et al. v. Township of Bernards (Docket L-6237-74PW), as affirmed on appeal (Docket A-2718-77), in which this plaintiff was neither a party nor in any way involved, directly or indirectly, serves to foreclose this plaintiff (and presumably any other plaintiff) from prosecuting a constitutional attack on the municipal zoning ordinance. Indeed, the Township goes yet further to argue that this nonparty is bound, not only by the issues actually determined in that prior action, but also as to any other issue that might have properly been raised therein but was not.

While seemingly recognizing that this astounding result would not be applicable to an ordinary civil proceeding of succeeding actions between different and

unrelated parties, the Township ironically urges that, because the constitutional issues involved are of paramount public importance, therefore they cannot be litigated anew by any other person.

However, as is demonstrated hereinafter, neither logic nor law support this artificial result.

STATEMENT OF FACTS

In support of its motion, the Township recounts, at great length, the pleading history of the Lorenc case, presumably in order to demonstrate that all relevant Mount Laurel issues were raised and concluded by the decision in that case. The implication is, therefore, that the constitutional concerns were explored on the basis of comprehensive proofs and exhaustive legal argument, so as to render any subsequent proceeding as mere needless repetition. Nothing can be further from the fact.

A. The Lorenc Proofs Were Fundamentally Deficient on Material Facts

The Township traces, in great detail, the comparative motion and pleading histories of the Lorenc and Allan-Deane cases, concluding, in effect, that the end product pleadings were strikingly similar.* Relati-

* The apparent fact that the Lorenc plaintiffs, frustrated by the bombardment of procedural challenges to the initial complaints, ultimately borrowed heavily, in the Second Amended Complaint, from the already filed Allan-Deane complaint, is taken by the Township, without more, as being proof that the issues actually addressed in the Lorenc case must be substantially identical to those to be dealt with in the Allan-Deane case -- a curious argument indeed!

vely little attention is given to the proofs actually offered at trial, and, indeed, the Township's exposition of the trial testimony deals almost exclusively with the proofs offered by way of defense.

In fact, in the Lorenc trial, of the 29 witnesses offered, only seven were produced by the plaintiff on the direct case. Of these seven, four were township representatives or agents, testifying essentially with respect to the history of the zoning and planning process in Bernards. The three other witnesses were two real estate brokers and an engineer. Thus, in this "major" constitutional case, the plaintiffs offered no independent planner, no fair share analysis, no regional socio-economic or demographic evidence, and no extensive environmental proofs with regard to the Township generally. There then ensued a long parade of defense witnesses, addressing fair share modeling, planning issues, ecological concerns, sewering studies and the like. It was only on rebuttal that the plaintiffs opened the door, however slightly, to a critical examination of the ordinance and to some fair share commentary.

Accordingly, it is apparent that, to the

extent the trial court ruled adversely to the Lorenc plaintiffs on exclusionary zoning issues, it was premised more on a failure of proof rather than on a complete and balanced record of relevant evidence. In sharp contrast, the instant case contemplates a complete exposition of significant evidence not in any way addressed to Lorenc.

B. The Thrust of the Lorenc Trial was Limited to Specific Zoning Districts and Only Peripherally to the Entire Zoning Scheme

A review of the Lorenc transcript reveals that the plain, almost exclusive focus of the plaintiff's proofs therein was the PRN Zone (Ordinance #347), with some peripheral attention to the BRC Zone (Ordinance #385).* The proofs were sparse at best (perhaps non-existent) with respect to the constitutional integrity of the overall zoning scheme. In short, it was the development feasibility of the provisions governing the

* Any doubt in this regard is resolved by reference to the Pretrial Order (Da-E) and the Supplement Pretrial Order (Da-P), which supersede all prior pleadings. Therein, the plaintiffs' factual and legal contentions plainly address only the PRN Ordinance (#347) and, to some extent, the BRC Ordinance (#385).

PRN zone, wherein the plaintiffs owned land, that was the main issue in Lorenc. The Lorenc plaintiffs simply did not attempt an overall and comprehensive analysis of the Bernards zoning scheme.

In Allan-Deane, the overriding evidential issues, omitted in Lorenc (i.e., such as planning analysis, fair share and regional evaluations) will be presented, making it far more inclusive, both factually and legally, than the Lorenc proceeding.

In any event, it should be noted that even Bernards concedes that the issue of appropriate remedy is different in the two cases, although the distinction is lightly dismissed as being merely one of each plaintiff wanting to build on his own land. Such a crucial difference, however, cannot be so easily ignored if one recalls the judicially recognized urgent need for least-cost housing and the obvious corollary that, if this need is to be satisfied, there must be developers willing and able to erect the dwellings.

C. Both the Law and the Facts have Changed Significantly since the Lorenc Trial

The Township baldly states that "[t]here have

been no changes in the facts or legal doctrines" (p.54) which would materially alter the original Lorenc holding. This simply is not so.

The Lorenc trial took place in 1976 on the basis, as noted above, of rather scanty proofs by the plaintiffs with respect to the critical determinants of fair share and the constitutional obligations. The Madison Township case, which extended Mount Laurel and first introduced the "least cost" concept, had not even been rendered by the close of the proofs. While subsequent legal argument was had with respect to Madison, no additional proofs were offered with regard to the high court's refined focus of the municipal obligation.

Moreover, the relevant facts have changed since those adduced in Lorenc. For instance, fair share, even as proffered by the Township, is premised on shifting demographic characteristics and employment opportunities. As employment has mushroomed in and around Bernards in the years since the base date of the original proofs, it is evident that the municipal fair share obligation will similarly vary, under any formula-

tion.* To argue, as Bernards does, that the findings of the Lorenc trial court with respect to its fair share approach, on the basis of limited evidence offered some years ago, is somehow "conclusive", is to ignore the fundamentally flexible and changing nature of the fair share concept -- it is not a fixed and certain number, but rather a proportionate obligation that will vary with the changing development characteristics of the community and its environs. In short, the constitutional integrity of a municipal zoning ordinance is not frozen in time, but rather is dependent, under modern principles of law, upon a host of complex factual circumstances that evolve over time. Thus, whatever can be said of the adequacy of the plaintiff's constitutional proofs in Lorenc, it is apparent that both the relevant legal touchstones and the factual context have changed since the trial in 1976.

* * *

* As a further example of the evidential change, the Statewide Housing Allocation Plan, promulgated by the Department of Community Affairs, was not published until 1978. That plan provides an allocation for Bernards Township in excess of 1400 units or some three times the number contemplated by the Township in its fair share formula as presented to the Lorenc court.

In sum, it should be apparent, from a purely factual standpoint, that:

(1) The Lorenc case does not represent a comprehensive and complete exploration of the relevant factual and legal issues necesary for a conclusive determination of such publically significant constitutional issues;

(2) The Lorenc proofs were limited in scope and focus; and

(3) The relevant factual backdrop and the legal setting have significantly altered since the Lorenc trial in 1976.

ARGUMENT

I. THE DEFENDANT TOWNSHIP OF BERNARDS SHOULD BE ESTOPPED FROM ASSERTING THIS DEFENSE BY REASON OF ITS FAILURE TO TIMELY PLEAD THIS DEFENSE, TO THE PREJUDICE OF THE PLAINTIFF, AND BY REASON OF ITS FAILURE TO JOIN THIS PLAINTIFF IN THE PRIOR ACTION.

A. The Failure to Timely Plead Res Judicata or Collateral Estoppel as an Affirmative Defense

R.4:5-4 requires that certain affirmative defenses, including estoppel and res judicata, be expressly pleaded. The intendment of the Rule is to avoid surprise to the adversary, see Bacon v. American Insurance Co., 131 N.J. Super. 450 (Law Div. 1974), aff'd o.b. 138 N.J. Super. 550 (App. Div. 1976), and the failure to comply with the Rule is deemed a waiver of such defense, see Colegrove v. Behrle, 63 N.J. Super. 356 (App. Div. 1960) (issue first raised on appeal).

Herein, the judgment in Lorenc was rendered in January of 1978. An appeal was taken by the Township, with a cross-appeal by the plaintiffs, but, as the Township correctly describes in its brief, the appeal involved only issues of the particulars of the relief

granted and in no way concerned the determinations with which the Township now seeks to bind Allan-Deane.

However, the Township did not promptly seek to amend its long list of separate defenses to raise this new bar to the Allan-Deane case. Indeed, it was not until the pretrial, some 12 months after the Lorenc decision, that the defendant first raised the spectre of this defense, and no motion was made thereon until 14 months after entry of the Lorenc judgment.

This unilateral delay is plainly prejudicial to Allan-Deane. In effect, the Township now seeks to hold this plaintiff to a judgment in a case in which this plaintiff did not participate; the Township waited, in raising this defense, until a point in time at which Allan-Deane could not effectively participate in the prior action even at the appellate level. Thus, according to the Township's approach, Allan-Deane can appear in neither proceeding and yet is to be bound by a trial in which it was not a party and did not participate.

On these facts, it is respectfully submitted, the Township should be estopped from asserting this defense, first raised a year after it accrued, when the

result of the delay worked to the clear prejudice of its adversary.

B. The Failure to Join Allan-Deane in the Prior Proceeding

The Township, in support of its motion, complains that being forced to defend the Allan-Deane suit would result in a duplication of effort, a waste of public funds, the potential of inconsistent verdicts and an unnecessary multiplicity (i.e., 2) of litigation. The short answer to these concerns is that they are wholly and unilaterally created by the Township itself!

The instant action was filed in March of 1976. The Lorenc action did not begin trial until June of that year. Yet the Township, which now bewails the duplication of effort, took no steps to join the cases into a single proceeding. Thus, if the Township is correct in its assertion that Allan-Deane had an "interest" in the Lorenc proceedings, it could have moved to join Allan-Deane as a party thereto. R.4:28-1(a). Alternatively, it could have moved for consolidation of the pending actions on the theory now asserted- that they involve common questions of law and fact. R.4:38-1(a).

Having failed to take either of these procedural steps, however, the Township of Bernards can hardly now be heard to complain about being confronted with multiple proceedings. In this connection, it is important to recall that the actual issue to be determined on these motions is not whether a general judgment sustaining an ordinance should bind unknown, later claimants. Rather the issue is whether a defendant, which unilaterally elects to keep parallel proceedings involving distinct parties totally separate, can later be permitted to assert that the first tried action ought to be binding on the second. See, for instance, O'Hara v. Pittston Co., 186 Va. 325, 42 S.E.2d 269, 174 A.L.R. 945 (1947).

In short, the Township had it wholly within its own power to seek to ameliorate the concerns it now raises, but apparently elected to do nothing. In this setting, it is respectfully submitted, it should not now be heard to argue a self-created hardship.

II. AN ACTION FOR DECLARATORY JUDGMENT RELIEF WITH RESPECT TO A MUNICIPAL ORDINANCE IS NOT BINDING UPON NONPARTIES BY STATUTORY LAW.

An action seeking to adjudicate the lawfulness or constitutionality of a municipal ordinance is fundamentally one of declaratory judgment relief, pursuant to N.J.S.A. 2A:16-50 et seq. See Washington Township v. Gould, 39 N.J. 527 (1963); Odabash v. Mayor and Council, Borough of Dumont, 65 N.J. 115 (1974). Specifically, N.J.S.A. 2A:16-53 provides that:

> "A person...whose rights, status or other relations are affected by a ... municipal ordinance ... may have determined any question of construction or validity arising under the ... ordinance ... and obtain a declaration of rights, status or other legal relations thereunder."

However, said statute later expressly provides that:

> "No declaratory judgment shall prejudice the rights of persons not parties to the proceeding." N.J.S.A. 2A:16-57.

Accordingly, it is readily apparent that the

declaratory judgment determinations rendered in Lorenc cannot, as a matter of statutory law, be held as dispositive as against the nonparty Allan-Deane.

III. NEITHER THE DOCTRINES OF RES JUDICATA NOR OF COLLATERAL ESTOPPEL CAN SERVE TO BAR LITIGATION OF A CONTROVERSY BY A PERSON NOT A PARTY TO, NOR IN PRIVITY WITH A PARTY TO, A PRIOR ACTION.

The doctrines of res judicata and collateral estoppel prohibit the relitigation of a controversy, between the same parties or their privies. In short:

> "...the question to be decided is whether a party has had his day in court on an issue, rather than whether he has had his day in court on that issue against a particular litigant." McAndrew v. Mularchuk, 38 N.J. 156, 161 (1962).

But the doctrines can be applied only as against a party or his privies to a prior proceeding:

> "The criteria for determining who may assert a plea of collateral estoppel differ fundamentally from the criteria for determining against whom such a plea may be asserted. The doctrine cannot be raised against a litigant unless the latter was a party to the earlier litigation or in privity with a party thereto. However, one raising the plea of collateral estoppel need not have been a party, or in privity with a party, to the earlier proceeding." Ettin v. Ava Truck Leasing, Inc., 100 N.J. Super.

515, 527 (App. Div. 1968), aff'd in part, rev'd in part 53 N.J. 463 (1969). (emphasis added).

See also, State v. Redinger, 64 N.J. 41, 46 (1973).*

Plainly, the plaintiff herein, Allan-Deane, was not a party to the prior Lorenc litigation and cannot be said to have been in "privity" with those plaintiffs. Indeed, the Township has not even argued any privity relationship between the respective plaintiffs.**

* The Township's briefs contain a number of case quotations, purporting to summarize the doctrine of collateral estoppel. These quotations create the impression that the principal judicial inquiry, with regard to application of the doctrine, is simply whether any issue has been conclusively determined. However, it appears that, without explanation or justification, the Township has carefully excised from those quotations the additional requirement that the prior determination have been between the same or related parties. Because of the seriousness of these repeated omissions, the plaintiff has included, at Appendix "A" hereof, the full text of those quotations. A review of those holdings, with the complete language, demonstrates the stark difference in result when applied herein.

** "Privity is simply mutual or successive relationship to the same rights of property. Privity within the view of the rule of res judicata ordinarily means identity of interest, through succession to the same rights of property involved in the prior litigation." Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704, 706 (E. & A. 1948). The Allan-Deane plaintiffs have no legal interests in the Lorenc lands and none are alleged by the Township.

Nothing is clearer and more certain, in New Jersey and elsewhere throughout the nation, than that the doctrine of collateral estoppel cannot be applied as against a nonparty, or nonprivity to a party, to a prior litigation. See Ettin v. Ava Truck Leasing, Inc., above at 527; Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 732, 19 L.Ed. 2d 936 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered."); Cox v. Miles, 420 F.2d 279 (3 Cir. 1969) (applying New Jersey law); see also Public Service Electric and Gas Co. v. Waldroup, 38 N.J. Super, 419, 425 (App. Div. 1955); 46 Am. Jur. 2d, "Judgments", 518.

Perhaps the most analagous situation to the case herein arose in E.B. Elliot Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5 Cir. 1970), cert. den. 400 U.S. 805, 91 S.Ct. 12, 27 L.Ed.2d 35 (1970). Therein, a plaintiff advertising company brought suit to challenge a local ordinance prohibiting billboard advertising in certain areas as being unconstitutional. The Florida state courts determined that the enactment was constitutional. Thereafter, a class action involving similarly situated advertising companies was commenced in the

federal district court, challenging the ordinance on the same constitutional grounds, and the defendants raised the defense of res judicata. The court reviewed the application of the doctrine by which a prior judgment operates as a bar to subsequent actions on the same issues between the same parties and their privies, concluding:

> "However, it is equally elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. [citations omitted]
>
> "[The subsequent plaintiffs] were in no way involved in the previous actions brought by Donnelly and Elliot to challenge Ordinance No. 63-26, either as named parties or as members of a class being represented, and therefore are not bound by the previous adjudications. Nor are any unnamed members of the class represented in this action (with possible minor exception) which includes all persons who are in the outdoor advertising business or who own or lease outdoor advertising facilities in Dade County, Florida, bound by the prior state actions." 425 F.2d at 1148.

The situation is no different herein.

Moreover, despite its long digression into the

history of the application of the rule of collateral estoppel,* the defendant Township has cited no case where the doctrine of collateral estoppel was held applicable as against a person who was neither a party nor in privity with a party to a prior proceeding.

In State v. Gonzalez, 75 N.J. 181 (1977), two defendants in a single vehicle were stopped by the police for speeding, and a resultant search of the automobile revealed marijuana. The first defendant successfully moved to suppress the evidence on the

* The Township's lengthy recounting of the gradual erosion of the earlier mutuality requirement and of the modern distinctions between "offensive" and "defensive" collateral estoppel is, simply stated, completely irrelevant to any issue herein. Indeed, the historical developments may be summarized in a few sentences. Originally, collateral estoppel could not be asserted by a nonparty to the prior proceeding as against a prior party, because of general notions of fairness requiring that the prior judgment to be asserted should have been binding on both parties to the subsequent proceeding. This notion of mutuality has been abandoned in virtually all states, including New Jersey. However, there is no hint or suggestion in any of these cases that collateral estoppel can henceforth be raised as against a prior nonparty. In short, the cases cited relative to the abandonment of the mutuality requirement deal only with who may assert the claim of collateral estoppel, not against whom it may be asserted. (For an example of a New Jersey case recognizing this distinction over ten years ago, see Ettin v. Ava Truck Leasing, Inc., above at 527.)

grounds of lack of probable cause for the search; he prevailed. The second defendant similarly moved, but lost. The Supreme Court held that the first determination bound the prosecution and collateral estopped it from relitigating the issue with the second defendant. In short, the State had had its day in court and lost, and could not seek a readjudication of the selfsame transaction with the second defendant. Thus, collateral estoppel was applied as against the common party, which had full opportunity to litigate the controversy.

In New Jersey Manufacturers Insurance Company v. Brower, 161 N.J. Super. 293 (App. Div. 1978), the plaintiff insurer had issued a homeowners policy covering Brower. Brower had shot Geschke with a shotgun. In the first action, a criminal proceeding, Brower was convicted of assault with intent to kill -- plainly an intentional act. Geschke was the key witness therein. In the second action, the carrier brought a declaratory judgment action against Brower and all persons claiming under the policy as a result of the incident, arguing that the policy did not cover Brower's intentional torts. In that second action, the court held that Geschke was collaterally estopped from litigating the

issue of intent, because Geschke was in privity with Brower. That is to say, Geschke's rights against the insurance carrier were solely derivative of Brower's contractual rights with that carrier. The victim Geschke had no great rights against the carrier than did Brower under the terms of the insurance contract. Thus, a determination against Brower, with respect to intent, plainly binds the victim Geschke on any derivative claim. The basis of the holding, then, was direct privity among the parties.

In Brunetti v. Borough of New Milford, 68 N.J. 576 (1975), one of the famous trilogy of rent control cases, there was no concluded issue whatsoever with respect to collateral estoppel.* There, to the extent relevant herein, the court succinctly stated the issue before it:

* The Township seriously mischaracterizes the language relied upon as a "holding" with respect to collateral estoppel. Plainly, there was no such holding at all, and the language referred to, which is ambiguous at best, is mere obiter dictum, entitled to due consideration but in no way binding or precedental. Jamouneau v. Division of Tax Appeals, 2 N.J. 325, 332 (1949); see also Key Agency v. Continental Cas Co., 55 N.J. Super. 58, 62 (Ch. Div. 1959), aff'd 31 N.J. 98 (1959); Bierne v. Gangemi, 74 N.J. Super. 557, 572 (App. Div. 1962).

"As noted above, the trial court rejected plaintiffs' challenge to the original ordinance as untimely filed under R.4:69-6. In so holding, the court refused to extend the time limit 'in the interest of justice' as permitted by paragraph (c) of the rule because the original ordinance had been upheld previously in Costa v. Borough of New Milford, plaintiffs had known about this prior action and could have intervened therein and, consequently, plaintiffs should not be allowed to relitigate the constitutionality of this ordinance at the taxpayers' expense. We disagree." 68 N.J. at 585.

After reviewing the liberal standards the courts should apply in entertaining questions of constitutional and public importance, the court concluded that the trial court should have relaxed the time requirements of the rules, and permitted the challenge to go forward, adding:

"The argument that plaintiffs should be precluded from challenging the original ordinance because they could have joined in the earlier suit is unsound. Res judicata does not bar strangers to a prior action from filing an action of their own, precisely because every plaintiff is entitled to his day in court." 68 N.J. at 587.

It is true that the high court added the

further language:

> "The danger of multiple suits by landlords is not particularly great because collateral estoppel prevents relitigation of any issue actually determined in the original suit. In the instant case, the trial judge conceded that at least some of the issues raised by the plaintiffs were not tried in the earlier suit. Therefore, plaintiffs were entitled to submit their proofs.
>
> "Thus, subject to the limitation discussed in Part II of this opinion [relating to exhaustion of administrative remedies], the trial judge should have admitted proofs and rendered a judgment with regard to plaintiffs' challenges to the constitutional validity of the Borough ordinance both as originally enacted and as amended." 68 N.J. at 587-588.

The precise meaning of the reference to collateral estoppel is murky at best. That is to say, it is unclear what parties the court meant would be bound by a prior judgment and under what circumstances. Plainly, it did not mean that the prior unsuccessful challenge to the ordinance (Costa) bound the present, different plaintiffs, because the court thereafter went on to determine all of the constitutional issues without further reference to the prior Costa action. Presumably, then, the court intended that the resultant

Supreme Court determination would bind the parties thereto in futuro and that, in any event, subsequent litigations would bind the common municipal party. In sum, whatever the true meaning of the cited language, the Supreme Court neither held nor applied the doctrine of collateral estoppel as against any prior nonparty.

Thus, it is clear that the Township herein has been unable to unearth any decisional law applying the doctrine of collateral estoppel as against a person who was not a party to, nor in privity with a party to, a prior proceeding.* However, stripped to its essentials, the Township's argument herein is that, without any supporting authority therefor, this Court should bind the Allan-Deane plaintiff to a judgment and determination to which it was never, directly or indirectly, a

* In similar misdirection, the Township spends many pages discussing provisions and commentary of Restatement, Judgments 2d, §§68.1 and 88 (Tent. Draft), with respect to the factors to be considered by a court when applying the doctrines of res judicata and collateral estoppel. However, mere reference to the cited text reveals that these sections refer only to the circumstances under which a court will or will not preclude a successive action between the same parties! None of the referred-to discussion relates to applying such doctrines as against prior nonparties.

party.* Such a result is at odds with both decisional authority and all traditional notions of due process of law.

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* The absurdity of the requested result is demonstrated by a simple example. In a multiple car accident, several negligence suits are commenced against driver A. In the first suit, the defendant driver is found to have been nonnegligent. In the succeeding suits, driver A moves for summary judgment, arguing that he has already been vindicated in a prior action, prosecuted with respect to the same event by a person with similar interests. That is to say, as the Township describes the principle it seeks to invoke, the prior action involved a similarity of interests and claims, a vigorously fought litigation, and a similarity of judicial forum -- notwithstanding the actual difference of nominal parties. In exactly this context, the Third Circuit has ruled, applying New Jersey law, that the subsequent plaintiff cannot be bound to a prior judgment, exonerating the common defendant, where the former was not a party to the prior action. Cox v. Miles, above. No different result can obtain herein on any recognized principles of res judicata or collateral estoppel.

IV. THE EQUITABLE DOCTRINE OF VIRTUAL REPRESENTATION, BOTH AT COMMON LAW AND AS ARTICULATED UNDER THE CLASS ACTION RULES, IS OF SPECIFIC AND LIMITED APPLICATION AND CANNOT HERE SERVE TO BAR THE ALLAN-DEANE PLAINTIFF FROM CHALLENGING THE CONSTITUTIONALITY OF THE BERNARDS ZONING ORDINANCE.

The defendant Township argues next that the equitable doctrine of virtual representation serves to bar relitigation of the matters tried in the Lorenc action. This common law principle, applied historically only in the area of estates and trusts, unincorporated associations and true class actions, is simply irrelevant, both factually and legally, to the matters presently before this Court.

A. Class Actions Under the Rules

Except in the estates area, the principles of virtual representation are largely subsumed in the modern provisions for the maintenance of class actions. R.4:32. Thereunder, a class representative, under certain prescribed conditions may maintain an action, both on his own behalf and on behalf of all similarly situated persons. The results of a true class action are, with

certain exceptions, binding on all members of the described class.

However, there have evolved a series of procedural safeguards, in order to protect the interests of the class. These include judicial determinations as to the identity of the class, the representative nature of the nominal plaintiff's claims and the ability of the class representative to serve the interests of all. See R.4:32-1. Absent these findings, no class action may be maintained.

Moreover, the class members must be noticed as to the existence of the action, be given the opportunity to participate, and may elect exclusion so as not to be bound by the result. R.4:32-2(b).

It is without doubt that no such procedures were followed in Lorenc. Lorenc was not denominated, maintained or prosecuted as a class action. The class, which Bernards suggests would include Allan-Deane, was given no opportunity to participate or opt out. Notwithstanding the complete absence of any of these due process guarantees, the Township urges that the court recognize a new legal animal -- the "retrospective

class action" -- whereby "class" members who have no legal notice of the proceeding, who have had no opportunity to participate therein, who have not been afforded the right to be excluded therefrom and who have not even been accorded a prior judicial determination that their interests are, in fact, being so represented, should nonetheless be forever bound by the outcome of that litigation. As was said in O'Hara v. Pittston Co., above, in the face of a similar argument:

> "We have been cited to no authority nor have we been able to find any to support the contention that a suit, commenced and conducted as an action in personam against certain named parties, can be converted into a class suit after the entry of judgment therein." 174 A.L.R. at 956.

B. Virtual Representation Under the Rules

Under the modern rules of practice, virtual representation is expressly available only in the estates area, in connection with the representation, in court proceedings, of future interests of unknown or uncertain claimants and unborn heirs. See R.4:26-3. Thereunder, these future interests may be represented by a predecessor in interest or the court may appoint a party

to represent such interests. R.4:26-3(a) and (c).

Under this principle, the courts recognize that the relationship between the presumptive takers and the class of successive potential takers is direct and substantially identical, so that the interests of the later claimants can be adequately and fairly represented by the denominated parties. See, for instance, In re Estate of Lange, 75 N.J. 464, 484-485 (1978).

These sections of the rules, although cited by the defendant Township, plainly have no relevance to the subject zoning litigation.

C. Virtual Representation at Common Law

As noted above, the common law doctrine of virtual representation was limited to the fields of estates and trusts (now covered by R.4:26-3), of true class and derivative actions (now covered by R.4:32), and of unincorporated associations. The only area historically covered by this rubric and not now the subject of express rule procedures, is unincorporated associations.

In the past, a litigative problem occasionally

arose with respect to such associations. An unincorporated association was not recognized as an independent juridical entity, separate and apart from its individual members, capable of suing or being sued in its own name, although this is no longer the case. See Crescent Park Tenants Ass'n v. Realty Eq. Corporation of N.Y., 58 N.J. 98 (1971).

In order to avoid multiple litigations involving the members of such associations, the courts have invoked the equitable doctrine of virtual representation in two ways: (1) where individual members of such associations have brought an action, purportedly on their own behalf and on behalf of the balance of the membership, the result is held to be binding both on the organization itself and on other members of the organization who later attempt to relitigate the same issues, see Harker v. McKissock, 12 N.J. 310 (1953) and Collins v. International Alliance, etc. Operators, 136 N.J.Eq. 395 (E. & A. 1945); and (2) where a person has unsuccessfully sued an unincorporated association and later tries to sue an individual member thereof on the same cause of action, that defendant individual member, who is deemed to be "in privity" with the organization, may assert the

collateral estoppel bar as against the prior unsuccessful claimant. See Bango v. Ward, 12 N.J. 415 (1953). The doctrine has not been applied, however, outside the realm of such unincorporated associations. And no such association is involved in either Lorenc or Allan-Deane.

Even in the area of its limited scope, however, there are restrictions on the application of the doctrine. First, before the doctrine can have any application, the putative representative must clearly be a member of the affected class. See New Jersey Banker's Ass'n v. Van Riper, 1 N.J. 193 (1948).* Second, the prior action, to serve as a bar to later proceedings, must always have been maintained and prosecuted as a collective action. See, 74 Am. Jur. 2d, "Judgments", 540; see also O'Hara v. Pittston Co., above at 955 ("It is well settled that a representative or class suit must have been instituted or conducted as such."). And, where divergent interests are apparent among the group, later claimants cannot be

* The defendant Township never identifies the "class" it claims is bound by the Lorenc decision -- i.e., all property owners in Bernards, or all persons intending to develop least cost housing there, or all persons excluded by the zoning ordinance, or the world at large?

bound under the doctrine. See Board of Directors, Ajax, etc. v. First National Bank of Princeton, 33 N.J. 456, 463 (1960). None of these requirements are satisfied herein.

Since the Township never identifies the bound class, it cannot be determined whether or not the Lorenc plaintiffs are members thereof. Additionally, the Lorenc action in no way of record purported to be a class or representative action. Finally, the Township readily concedes that the Lorenc and Allen-Deane plaintiffs are at conflict over the relevant remedy and relief. Under these circumstances, it is inconceivable that the Township can be heard to argue that the Lorenc plaintiffs purported to represent the interests of Allan-Deane and other members of the undescribed "class", so that the limited doctrine of virtual representation could bar the present proceeding. Again, as with its collateral estoppel argument, the Township merely urges that this result should occur, without a single supporting authority therefor.

V. THE LIMITED ESTOPPEL PROVISIONS, RELATIVE TO TAXPAYERS SUITS, HAVE NO APPLICATION TO THE SUBJECT SUIT.

The Township finally asserts that a very limited and rarely asserted principle of law, relating to "taxpayer actions", should bar prosecution of the Allan-Deane case. The lone decisional authority for the proposition is In re Petition of Gardiner, 67 N.J. Super. 435 (App. Div. 1961).*

However, in the Gardiner case itself, the court explained the limited, and sui generis, nature of taxpayer actions:

> "A taxpayer attacking governmental action in which he has no peculiar personal or special interest is taken to be suing as a representative of all taxpayers as a class. The general rule is that in the

* The further assertion that the New Jersey Supreme Court, in Brunetti v. Borough of New Milford, above, "found that a landowner challenging a municipal ordinance will be barred by the doctrine of virtual representation" is both a shocking misstatement and an utter inaccuracy. In that case, there is no reference whatsoever to the doctrine of virtual representation! Moreover, as noted above, the reference in that case to the doctrine of collateral estoppel is neither a "holding" nor a "finding".

> absence of fraud or collusion a judgment for or against a governmental body in such an action is binding and conclusive on all residents, citizens and taxpayers with respect to matters adjudicated which are of general and public interest." 67 N.J. Super. at 448 (emphasis added).

While conceding both that exclusionary zoning suits are not "strictly" taxpayers actions and that neither the Lorenc nor Allan-Deane cases have been prosecuted as taxpayer actions, the Township nonetheless asserts that the principles described above should be applied herein.

The short, and clear, answer is that neither Lorenc nor Allan-Deane are, in fact, mere taxpayer actions. In both instances, the plaintiffs, as property owners in the municipality seek, inter alia, specific corporate relief so as to provide a realistic remedy to the past exclusionary practices of Bernards. It is plain that a declaration of zoning invalidity, in whole or in part, can directly affect the property interests of the respective plaintiffs; indeed, this is exactly what has occurred in Lorenc, where the court is presently determining the appropriate increases in density

within the PRN zones. To argue, as Bernards apparently does, that the interests of these plaintiffs are no different from that of some mere citizen in Bernards or elsewhere in New Jersey is remarkable, to say the least. Plainly, both from a standing and determinative perspective, the interests of these plaintiffs is more direct, pecuniary and personal than that of the citizenry at large. Cf. Al Walker, Inc. v. Stanhope, 23 N.J. 657 (1957).

Moreover, as the Township herein concedes, the taxpayer action concept has no application where the first prosecuting plaintiff seeks to pursue his personal rights, rather than just those of the general public, or where the succeeding plaintiffs seek different results. See Edelstein v. Asbury Park, 51 N.J. Super. 368, 387 (App. Div. 1958). Elsewhere in its brief, the Township admits that both the respective plaintiffs seek principally to advance their personal and property rights and that they seek differing results. It would seem, therefore, that, even from the Township's vantage point, the taxpayer action rule is facially irrelevant.

In sum, it is readily apparent that the

interests of Allan-Deane, and for that matter of the Lorenc plaintiffs, rise higher than that of merely the citizenry at large. As such, neither case can be viewed as a "taxpayer action", so as to bar the other. Moreover, the public policy principles underlying the application of the doctrine must be weighed as against the clear public purpose served by the continued prosecution, by private parties, of exclusionary zoning actions--described by the Madison court as "socially desirable" litigations. 72 N.J. at 550.

* * *

In sum, it is respectfully submitted that vague notions of collateral estoppel and virtual representation as urged herein by the defendant Township, are fundamentally inapplicable, unsupported by substantial authority, and simply represent another in a series of manuevers to avoid a just determination on the merits. In the absence of some precedental rule to sustain movant's position -- and none is forthcoming--the motion must be denied in its entirety.

CONCLUSION

For the reasons expressed herein, it is respectfully submitted that the motion of the defendant Township of Bernards for partial summary judgment with respect to Counts I and II of the plaintiff's complaint, as amended, should be denied.

Respectfully submitted,

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DATED: March 16, 1979

APPENDIX "A"

(Omitted language underscored)

From p. 47 of defendant's brief:

> "The doctrine of res judicata provides that:
>
> 'In any action on a case previously litigated by the same parties or their privies, a general judgment in the prior action is considered a finding against the party affected....'"

Miraglia v. Miraglia, 106 N.J. Super. 266, 271 (App. Div. 1969), citing Kelley v. Curtiss, 16 N.J. 265 (1954).

* * *

From p. 50 of defendant's brief:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or facts once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

New Jersey Highway Authority v. Renner, 18 N.J. 485, 494 (1955), citing Southern Pacific R. Co. v. United States, 168 U.S. 1, 48 (1887).

* * *

From p. 54 of defendant's brief:

> "The parties and their privies are concluded not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Hudson Transit Co. v. Antonucci, 137 N.J.L. at 707.