

RULS - AD - 1980 - 30

24 Jan 1980

Letter from Ferguson to Leahy w/ authority  
as to specific corporate relief & other  
problems w/ remedy process

Pgs 10

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January 24, 1980

RULS - AD - 1980 - 30

Re: Bedminster ads Allan-Deane

The Honorable Thomas B. Leahy  
Superior Court of New Jersey  
Court House Annex  
Somerville, New Jersey 08876

My dear Judge Leahy:

At the conference before the Court on January 16, the Court indicated it would like to receive authority, particularly from other jurisdictions, as to specific corporate relief and other problems with the remedy process. This letter will refer the Court to some authority which may be helpful.

The Pennsylvania Experience

Pennsylvania has a long history of coping with the dangers and pitfalls of specific corporate relief. The Pennsylvania experience supports the position of the Township here: that building permits should be given only based upon an assessment of all planning factors, and not blindly in the number requested by he who "wins" a lawsuit.

Pennsylvania law provides a unique "curative amendment" procedure which is central to a challenge to the validity of a zoning ordinance. The Municipalities Planning Code, 53 P.S. §11004, as amended in 1972, permits a landowner to submit his challenge to the local governing body together with a curative amendment. If, after hearings, the governing body determines that the ordinance is defective, it may amend the ordinance either by accepting the landowner's proposal or by adopting its own curative amendment.

January 24, 1980

If the governing body rejects the landowner's challenge and request for a curative amendment, the landowner may appeal to the court of common pleas. If the court finds the ordinance invalid, specific relief is statutorily required.

The judicial role in the Pennsylvania procedure was not universally applauded by the courts. In Ellick v. Board of Supervisors of Worcester Township, 333 A.2d 239 (Pa. Commonwealth 1975), a frequently cited case, Judge Kramer provided a thorough explanation of the procedures and expressed a critical view of his responsibilities:

In effect, the Legislature has directed those courts to act as administrative bodies (as super zoning boards of adjustment) which the appellate courts in this Commonwealth have stated many times is not a proper judicial function. We believe that social and economic problems of society presented in zoning cases should properly be resolved by the legislative and executive branches of government rather than by the courts.

Id. at 246.

Against this legislative background, the Pennsylvania cases do not present a persuasive argument for judicial relief here. Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), struck down the Nether Providence Township zoning ordinance for failure to provide for apartments. Decided before the 1972 amendments were enacted, the Supreme Court did not grant specific relief in its opinion. Indeed, the court acknowledged the inappropriateness of specific relief in a footnote where it stated that the township "could show that apartments are not appropriate on the site where appellant wishes to build...." Id. at 339 n.6.

A building permit was, however, issued in a subsequent proceeding. Although the subsequent Girsh proceeding is not reported, Chief Justice Jones explained in his dissenting opinion in Casey v. Zoning Hearing Board of Warwick Township, 328 A.2d 464, 470-471 (S. Ct. 1974), that when the court decided to grant specific relief to the landowner in Girsh, "the issue was whether a township could in 'bad faith' zone around the challenging landowner."

Although the 1972 amendments did not apply to the application for a zoning permit in Casey, supra, legislation authorizing judicial relief had been enacted by the time the case was on appeal. The key issue was whether a curative amendment, adopted while the case was on appeal, could be considered

January 24, 1980

"pending" so that the court could focus on the ordinance in its amended form. Concluding that the amendment was not pending, the court then determined that the ordinance was unconstitutional and citing Girsh, granted specific relief.

After six years of experience with the "curative amendment" procedure, the Pennsylvania legislature made important changes to the Judicial Relief section. Effective October 5, 1978, strict standards were established for determining whether a zoning ordinance is invalid. The section was also amended to provide specific guidelines for the court in issuing its order. Significantly, the criteria focus upon the suitability of the site for the intended use and the usual planning criteria, 53 P.S. 11011 (2) now provides:

In issuing its order the court shall consider the following: (i) the locational suitability of the site for the uses proposed including the general location of the site with regard to major roads, sewer facilities, water supplies, schools and other public service facilities or the comprehensive plan and zoning ordinance of the municipality and the county if they exist; (ii) the impact of the proposal on regional housing needs, the transportation network, and the other public services and facilities; (iii) the suitability of the site for the intention of use proposed by the site's soils, slopes, woodlands, wetlands, flood plains, natural resources and natural features, the degree to which these are protected or destroyed, the tolerance of the resources to development and any adverse environmental impacts; and (v) the impact of the proposal on the preservation of agriculture and other land uses which are essential to public health and welfare.

These factors are precisely those which Bedminster Township contends must be used in deciding how many units Allan-Deane should be permitted to build and where. The remedy proceeding is the proper forum.

When the specific physical facts and problems of the Corridor are viewed from this planning perspective, the proper procedure for the remedy proceeding becomes clear.

January 24, 1980

The Problem with the Corridor Area

The corridor in the eastern portion of Bedminster Township is probably among the most complex pieces of land to plan and zone in the State of New Jersey. Consider the following factors:

The corridor contains the second Watchung Mountain, which itself is a significant geological factor separating the highlands, dipping down from Morris County, from the piedmont area of New Jersey. Geologically it is complex, leading to many different soil types and geological formations. High water tables, low depth to bed rock, and other limiting geological and soil factors are present throughout the area.

The corridor is bisected by two interstate highways, with limited access. The Court has already acknowledged the fact that these interstate highways are formidable barriers, indeed in many ways more formidable than a natural barrier such as a river. In addition, a major north-south highway, Route 202-206, bisects the corridor. Any major development, such as that proposed by Allan-Deane and that which will be necessitated by increased development in the corridor, will present major traffic and access problems.

In connection with the traffic problems on Route 202-206, the Department of Transportation, while recognizing that traffic problems do exist, has recently informed the Township that the proposed Pluckemin Bypass (which is on the Township's master plan) will receive a low priority in terms of funding and construction by the DOT. Therefore, it is likely that the traffic problems will have to be solved by some other mechanism. This will of necessity involve a thorough and detailed review of traffic access and traffic flow considerations in Allan-Deane development, which is proposed to be built right down to Route 202-206, as well as throughout the rest of the corridor.

The corridor contains the North Branch of the Raritan River, a major surface water resource for New Jersey, and any proposed construction and development must be carefully sited and carefully designed to avoid non-point pollution. The slope of the land is continuous downward to the Raritan River from the bottom of the steep slope on the second Watchung Mountain. The Allan-Deane development will cover all land except slopes of 15% or greater, and erosion problems will be major, both during construction and after construction.

January 24, 1980

There is a significant sewer capacity problem. The proposal of Allan-Deane to build a .85 MGD plant does not solve it. The problem is this: the Allan-Deane plant will serve its development in Bernards and Bedminster and a very limited amount of existing development in Pluckemin. There is not sufficient capacity in the Allan-Deane plant (and indeed there is probably not sufficient capacity in the Raritan River to receive more discharge effluent) to construct a sewer to service the entire corridor as it will be rezoned in the remedy proceeding. Allan-Deane, as the applicant with a leg up on all future applicants because of its participation in this litigation and in this remedy process, is trying to appropriate to itself all existing sewer capacity for the corridor. If the sewer capacity is appropriated by Allan-Deane, then the zoning for the rest of the corridor may be largely illusory. The remedy proceeding must consider this problem and recommend an equitable solution. It is extraordinarily difficult, and attention must be given to it.

Mr. Roach, the Somerset County planner, has voiced grave reservations about the magnitude of the Allan-Deane development in Bedminster (1,849 units times 3.0 persons per dwelling unit equals 5,547 people) which would approximately triple the existing population of the Township. The remedy proceeding must address the capacity of the Township to absorb large increases of population, and the time frame in which this absorption must be accomplished. It is obvious that staging must occur. Development does not occur in a vacuum, and infrastructure development must go along with it. Not just sewer and pipes, but police, schools, social institutions, etc. For instance, there must be school capacity to accept the children from the Allan-Deane development. It may exist off the Allan-Deane site; we do not know now. Some provision for a school facility on the Allan-Deane land may have to be made. In addition, there is no infrastructure to support intense use on the plateau area, except for one sewer pipe going down to the proposed Bedminster sewer plant. Allan-Deane proposes 630 units for the plateau. What facilities will the occupants of those units have?

\* \* \*

In short, there is a great deal of planning and difficult problem solving which must occur before a viable development can be built on the Allan-Deane site. Allan-Deane is attempting to avoid this problem solving by asking for specific corporate relief and shortcutting the approval process it would normally have to go through. It should not be allowed to do so.

January 24, 1980

Bedminster Township Has Never Reviewed or Commented  
On the Allan-Deane Conceptual Plan

Allan-Deane has never presented its conceptual plan (marked in evidence as P-40) to the Township Planning Board for review. All that Bedminster Township has seen is a booklet describing the development in glowing terms and giving nothing more than bare-bones concepts. The conceptual plan was first prepared and introduced during the compliance hearing itself. While it is true that the Township Committee, and certain members of the Planning Board, have been shown the plan in the context of the litigation, the Planning Board has never reviewed it. The Township's consultants have never discussed the conceptual plan with the Planning Board in the context of a review process. Even John Rahenkamp concedes, indeed he glorifies, the importance of the review and negotiation process between the Township and an applicant. Allan-Deane's strategy is very clear and very clever: short circuit the regular Township approval process whenever possible. Throughout this entire litigation, lasting now over eight years, Allan-Deane has resorted to the court system as an approval mechanism. This Court should not allow itself to be so used.

Allan-Deane's principal planning witness was John Rahenkamp. He testified, time and time again, that "negotiation is the essence" of the planned development planning process. Allan-Deane does not want to participate in this negotiation process. It wants specific corporate relief for anything it wants to build. The method by which they seek their building permits, specific corporate relief without review by the Township, is contrary to the testimony of their own planning witnesses.

Indeed, we believe the conceptual plan is being revised now into a site plan which no one has seen.

The Allan-Deane Proposal Should be Reviewed  
Only After the Rezoning of the Rest of the  
Corridor is Completed

Based upon the Court's opinion, it is apparent that the remedy process will result in a substantial replanning and rezoning of the corridor for more multi-family development. This of necessity may include the R-3 land owned by Ellsworth, and the remaining R-3, R-6 and R-8 in the area bounded by Route 287 and the eastern boundary of the Township. The problems of traffic access, development of infrastructure, how the various developments should be laid out, new roads and streets, etc. should be addressed as a whole, and not piecemeal.

January 24, 1980

A person who considers the traffic problems of the Allan-Deane development must not wear blinders; there will be multi-family housing right next to the Allan-Deane development on the Ellsworth land; surely it makes practical common sense, as well as good planning sense, to address these problems all at the same time. This can be done if, and only if, the rest of the corridor is rezoned first. Therefore, the proper sequence of the remedy process should be:

(1) The rezoning of the rest of the corridor, including consideration of major planning problems such as traffic, access, interrelationship with the Interstates 202-206, sewer, water, etc., of all land in the corridor;

(2) Then review the Allan-Deane proposal to make sure it is harmonious with and supports the major planning decisions made for the whole corridor.

#### Participation by the Somerset County Planning Board

There is one entity which can be of major help to the Court and the parties in the rezoning and replanning process: the Somerset County Planning Board and its Planning Director William Roach and his staff. The Court relied heavily on the Somerset County Master Plan in both of its opinions. Mr. Roach and the staff are familiar with the problems of the corridor and of the Somerset Hills area. We urge the Court to utilize the Somerset County Planning Board and its staff as much as possible during the remedy proceedings and process.

#### Suggested Sequence of the Remedy Proceedings

For the reasons stated above, we believe the proper sequence of events should be as follows:

(1) The Court should ask the Somerset County Planning Board, through Mr. Roach and his staff, to propose an appropriate rezoning and replanning of the corridor area, within guidelines to be laid down by the Court in conformity with its two trial court opinions. Mr. Roach should be asked to report back with a recommendation to the Court within 30



January 24, 1980

days (or such time as may be feasible for his staff). All parties can then comment within 20 days. The Court can then accept the recommendation, change it, or it can order testimony on whatever issues the Court may want to have clarified. We are not suggesting a new trial with extensive testimony. The Court itself would determine and limit the scope of any testimony after reviewing Mr. Roach's report and the comments of the parties. The Court would be in a position to severely limit what testimony it wanted to hear, and it would have to hear only that which it felt necessary to make a decision as to whether to adopt Mr. Roach's report, reject it, or adopt it in part with modifications.

The zoning for the corridor will then be established. It will then be appropriate to consider the review of the proposed Allan-Deane plan. Once the zoning is established, the parties will be in a better position to see how the Allan-Deane plan fits in with the plans for the entire corridor. The procedure will continue as follows:

(2) Allan-Deane will submit a proposed site plan to the Township for review under the Municipal Land Use Law provisions. We would encourage the Allan-Deane consultants to explain to the Township officials and consultants what it wants to do and how it wants to do it. We emphasize again that the Township has never had the benefit of any such explanation from the Allan-Deane consultants. It has always been in the litigation context. We submit that the Court must grant the Township this opportunity, which is provided by statute and which it has never had an opportunity to exercise.

(3) If there are areas of disagreement between the Township and Allan-Deane, the Court can then decide whether to resolve them on a short one-day hearing, or to refer them to a planner or master (or perhaps the staff of the Somerset County Planning Board). We predict that there will be very few areas of disagreement. Allan-Deane's protestations of bad faith and inability to work with the Township are themselves made in extreme bad faith; they have never tried to work with the Township at all. Once the log jam of what the zoning should be has been broken, which is what this Court's opinion of December 13, 1979 did, there is no reason why Allan-Deane and the Township, given the barest minimum of civility and good common sense, cannot resolve the site plan problems. Allan-Deane and the Township have never tried. They must be made to try.

January 24, 1980

(4) Assuming that there are some problems, the Court can resolve them as appropriate, either by appointing a separate planner to be paid for by the Township and Allan-Deane as appropriate, or if the problems are not great, by resolving them in a very short proceeding of not more than one or two days duration.

\* \* \*

We submit that the procedure set forth above does the least violence to the statutory scheme of municipal action and approval of development; is consistent with this Court's two trial court opinions; utilizes the inhouse expertise of the Somerset County Planning Board staff, which knows the County problems better than any other planner or master could ever know them; and is the most economical and efficient way of resolving the remaining problems.

#### Unresolved Issues

The last line of Part IV of this Court's opinion stated that the remedy proceeding should provide a means for resolving the issues not decided by the opinion. These concern the many relatively minor criticisms which the Allan-Deane experts had of various provisions of Bedminster's land use regulations.

We believe that ultimately this Court must decide those issues, since they all involve the legal issue of validity under either the statutes or the constitution of New Jersey. It would be a duplication of effort and a waste of time and expense to bring a third party, who must become acquainted with these issues, when this Court must ultimately pass upon them.

In addition, we believe that many of these unresolved issues became of relatively minor significance once the Court rendered its December 13 opinion invalidating the zoning ordinance. We believe that in the process we propose, many of the issues will either disappear or be agreed upon between the parties.

January 24, 1980

We propose that Allan-Deane prepare a short form specification of the issues left unresolved and which it wants presented for decision. A short statement giving the reasons for the claimed invalidity should be given for each provision. This specification should be served upon the Township, along with a proposed revision of the ordinance provision challenged. If the Township does not agree to the provision, and if the matter is unable to be resolved through the efforts of counsel (who throughout this litigation have displayed an uncommon ability to work together in a professional manner in the best interests of their clients), then the Township can briefly state its objections in writing to the Court, and the Court can make a decision.

This will not be burdensome for the Court. There need be no new testimony; there is ample testimony in the record. There need be no new briefing; much legal argument has already been written, and it can be incorporated by reference, or copies attached.

This procedure will avoid the unduly complicated and expensive mechanism of a special master or planner. Indeed, it is hard to see how a planner could resolve these issues, since he is not a lawyer. A special master who is a lawyer would have to become familiar with the transcript, argument, and very complex nature of the ordinances, with which the Court is already familiar. If the Court needs any technical help in resolving these issues, it can use the Somerset County planning staff as a resource.

\* \* \*

For the reasons set forth above, we urge the Court to order that the replanning and rezoning of the corridor occur first, with the help of the Somerset County Planning Board, that the Court allow the Township of Bedminster to exercise its statutory obligations and responsibility of reviewing the Allan-Deane application, and that the parties through counsel present to this Court, in a sharply defined and limited fashion, all issues left unresolved by this Court's earlier opinion.

Respectfully yours,

  
Alfred L. Ferguson

ALF/pep

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