RULS-AD-1981-290

7/27/1981

Ltr. from A. Ferguson to Judge Gaynor Re: Bedminster ads-Dobbs

Plaintiff, Dobbs seeks protective Order

27 pgs.

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RULS - AD - 1981 - 290

July 27, 1981

Re: Bedminster ads. Dobbs
Docket No. L-12502-80

Honorable Robert E. Gaynor, J.S.C.
Somerset County Court House
Somerville, New Jersey 08876

Dear Judge Gaynor:

Please accept this letter in lieu of brief in response to the cross-motion by plaintiff to amend the Pretrial Order and for a Protective Order.

Plaintiff, Leonard Dobbs, seeks a protective order pursuant to R. 4:10-3 to prevent discovery of his contract to purchase land in Bedminster. The contract he wants to protect covers the property which is the subject of this suit. For the reasons set forth below, the Township of Bedminster asks the Court to deny plaintiff's motion for a protective order and to order plaintiff to comply immediately with the terms of the pretrial order by providing a copy of the contract to all parties.

A. The Contract Is Necessary to Decide This Cause of Action.

Plaintiff's assertion that the contract is relevant only to prove his standing is simply wrong. See Certification of Donald A. Klein, plaintiff's counsel, paragraph 5. The Complaint includes a count alleging that the current zoning of the property amounts to an unconstitutional taking without compensation. See Complaint, Fourth Count. The Pretrial Order lists "defacto confiscation" as one of the issues to be resolved in this lawsuit. The value of the property will be

critical proof in deciding the confiscation issue. The Court must review the value of the property as it is now zoned and its value under the option terms of the contract. Without this evidence the proofs will be merely speculative.

The terms of the contract may provide very relevant evidence. For example, the purchase price may vary, depending on the zone change, if any, that Dobbs is able to acquire through this litigation. If so, this evidence should be presented to the Court as proof of the value of the property under various uses. This evidence may also tend to contradict plaintiff's claims that the current zoning is unreasonable (Complaint, Fourth Count) and that it is "impossible" to use the property for residential purposes (Complaint, Fifth Count).

The terms and conditions of the contract may define both the owners' and Dobbs' concept of reasonable uses for the property. Although the owners and Dobbs would like the most profitable return on the land, the most profitable use is not the only reasonable use. If Dobbs has admitted this by agreeing to the contract, Bedminster is entitled to the benefit of that admission.

Bedminster Township should not have to play guessing games in defending its ordinance. Plaintiff has sought the aid of this Court to challenge the zoning ordinance. He cannot prejudice defendant by hiding the key piece of evidence that Bedminster will need to defend against plaintiff's constitutional attack.

B. Plaintiff Has Not Satisfied His Standing Requirement.

Plaintiff correctly observes that the contract is necessary to demonstrate his standing to bring this suit. See Jersey Shore Medical Center v. Estate of Baum, 84 N.J. 137, 144 (1980) (a plaintiff must have a "sufficient stake in the outcome of the case" in order to bring suit in New Jersey Courts).

The affidavit of Ralph K. Smith, Jr., attorney for some of the landowners, does not satisfy plaintiff's burden to demonstrate his standing. The affidavit purports to describe the terms of the contract. As such, the affidavit would be inadmissible. N.J. Evidence R. 70 provides that "as tending to prove the content of a writing, no evidence other than the original writing itself is admissible..." except for specific exceptions. None of the exceptions applies to plaintiff. Only the original contract will demonstrate plaintiff's standing.

C. The Contract Is Discoverable Under The Rules of Court.

The standard for discovery has been set forth by the Appellate Division in Franklin v. Milner, 150 N.J. 456, 465-466 (App. Div. 1977):

> Our discovery procedures should be liberally construed to compel the production of all relevant, unprivileged information and information that may lead to the discovery of relevant evidence. R. 4:10-2(a).

The relevance of the contract appears undisputed on its face. Plaintiff obviously recognized its relevance because he pleads the contract in the very first paragraph of his Complaint.

Moreover, R. 4:18-2 provides that

> When any document or paper is referred to in a pleading but is neither annexed thereto nor recited verbatim therein, a copy thereof shall be served on the adverse party within 5 days after service of his written demand therefor. (emphasis added).

The language of the rule is mandatory, not permissive, and it does not suggest that the trial court has any discretion to vary the terms of the rule.

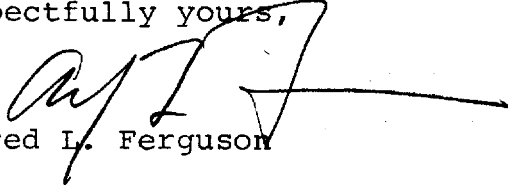
Under R. 4:18-2, the mere recitation of a document in the pleadings requires that they be submitted to other parties for inspection on demand. Lakewood Trust Co. v. Fidelity and Deposit Co., 81 N.J. Super 329, 337 (Law Div. 1963). The relevance of pleaded documents appears to be conclusively presumed by the rule.

Plaintiff asserts no privilege or public policy reasons to overcome the presumption favoring disclosure. He only says that the contract has been "treated as confidential" by the parties. Indeed, most people prefer that their business dealings remain private. But when they entered this agreement, the parties to the contract knew that the current zoning of the property did not permit the development of a regional shopping center. They also knew that litigation in a public forum or some other form of public review would be necessary to change the zoning. Under the circumstances plaintiff's assertion that the contract has been "treated as confidential" is supercilious and without merit.

Plaintiff also alleges that the attempt to obtain disclosure of the contract is "harassment" by defendants. More likely, the parties want to conceal the enormous profits they will reap from this land speculation. But the courtroom is no place for secrets and plaintiff's embarrassment of riches does not outweight Bedminster's basic right to discovery.

Plaintiff is not the final arbiter of what is discoverable in this case. He has chosen litigation to remedy the wrong he perceives. The contract of sale, like every other piece of evidence, must be submitted to the adversarial process to determine whether it is relevant evidence or whether it may lead to relevant evidence. Plaintiff offers no persuasive reason to prevent discovery. His motion for a protective order should be denied.

Respectfully yours,



Alfred L. Ferguson

ALF:bjg
cc: Joseph L. Basralian, Esq.
Henry Hill, Esq.
Herbert A. Vogel, Esq.

VOGEL AND CHAIT
A PROFESSIONAL CORPORATION
Attorneys at Law

FILED
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SOMERSET COUNTY
R OLSEN CLERK

HERBERT A. VOGEL
ARNOLD H. CHAIT
ENID A. SCOTT
ARON M. SCHWARTZ
THOMAS F. COLLINS, JR.

HAROLD GUREVITZ
OF COUNSEL

MAPLE AVENUE AT MILLER ROAD
MORRISTOWN, NEW JERSEY 07960
538-3800
AREA CODE 201

July 29, 1981

W. Lewis Bambrick
Clerk of the Superior Court
State House Annex
Trenton, New Jersey 08625

Re: Leonard Dobbs vs. Township of Bedminster
Docket No. L-12502-80

Dear Sir:

Enclosed please find the originals and two copies of Affidavits in opposition to the plaintiff's notice of cross-motion for an order amending the pretrial order and for a protective order. The plaintiff's cross-motion is scheduled in the above-entitled matter for July 31, 1981. Please file the original affidavits and return a copy to me in the enclosed, self-addressed, stamped envelope.

By copy of this letter, copies of the affidavits are being served upon all counsel and are also being forwarded to the Somerset County Clerk.

Very truly yours,

VOGEL and CHAIT
A Professional Corporation

THOMAS F. COLLINS, JR.

TFC/aeo
Encs.
cc: Somerset County Clerk ✓
McCarter & English, Esqs.
Winne, Banta & Rizzi, Esqs.
Brenner, Wallach & Hill, Esqs.

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SOMERSET COUNTY
L. R. OLSON CLERK

7/31 pg. 9

S-7364

Aff. of counsel for Δ intervenors in opposition to π's motion for protective order

7/30/81

VOGEL AND CHAIT
A PROFESSIONAL CORPORATION
MAPLE AVENUE AT MILLER ROAD
MORRISTOWN, NEW JERSEY 07960
(201) 538-3800
ATTORNEYS FOR Defendant - Intervenors

Plaintiff LEONARD DOBBS,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION:SOMERSET COUNTY
vs.	*Docket No.* L-12502-80
Defendant TOWNSHIP OF BEDMINSTER	*CIVIL ACTION*
ROBERT R. HENDERSON, DIANE M. HENDERSON, HENRY E. ENGELBRECHT, Defendant - Intervenors.	AFFIDAVIT

HERBERT A. VOGEL, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am an Attorney at Law of the State of New Jersey and a member of the firm of Vogel and Chait, attorneys for the defendant-intervenors in this matter.

2. On April 3, 1981, at the pretrial conference in this matter, the Honorable Michael R. Imbriani entered a Pretrial Order

requiring the plaintiff to produce a copy of the contract to purchase mentioned in the plaintiff's complaint by April 17, 1981.

3. Prior to being advised about a potential settlement of this law suit between plaintiff and defendant, Bedminster, I had not been involved in any discussions or negotiations of voluntary dismissal of the plaintiff's complaint. I was not invited to participate in any such negotiations or discussions until after the attorney for the plaintiff and the attorney for the Township of Bedminster had already discussed a tentative understanding as to the possibility of withdrawal or dismissal of the complaint. I was not informed of this tentative understanding until on or about June 23, 1981. I advised the attorney for Bedminster and the attorney for the plaintiff of my opposition to the proposal and immediately sent a letter to Mr. Basralian on June 23, 1981 objecting to a dismissal without prejudice and setting forth five specific conditions under which I suggested that my clients would agree to consent to a Stipulation of Dismissal. Our clients were very upset when they heard about the tentative understanding reached between the other parties without their knowledge, participation or consent.

4. As attorney for the defendant-intervenors and as the trial attorney in this case, I never approved any agreement to defer that portion of the Pretrial Order which required production of the contract by April 17, 1981. In a phone conversation with Mr. Basralian sometime last month, I informed him that we were

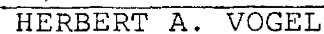
again demanding that his client produce a copy of the contract to purchase in accordance with the Pretrial Order of April 3, 1981. Mr. Basralian indicated that he thought that Mr. Collins, an associate with my firm, had consented to a postponement of the Pretrial Order as it related to the contract to purchase until after settlement discussions had terminated. I immediately informed Mr. Basralian that Mr. Collins had not informed me of any such agreement and that I did not think that Mr. Collins would have agreed to such a deferral without my approval. I further informed Mr. Basralian that I was the partner in the law firm who was in charge of the case and that any formal waiving of the Court's Pretrial Order would have to be approved by me as trial attorney. Since Mr. Collins was not available during the time of my conversation with Mr. Basralian, I immediately informed Mr. Basralian that even if Mr. Collins had agreed to a deferral of the requirement in the Pretrial Order, that I was immediately withdrawing any such consent or agreement. I informed him that we wanted a copy of the contract to purchase immediately and I said that I would send a messenger to his office to pick up a copy of the contract. Mr. Basralian informed me that he did not have a copy of the contract in his possession but that his client had the contract. He generally indicated an adamant refusal to turn over to me any copy of the alleged contract in question.

5. The entire contract is absolutely relevant to the issues in the case and it is directly relevant to the standing issue. Based upon its relevance to the standing issue alone, the contract

should be produced and it is unnecessary to provide other reasons indicating the relevancy of the document. Nevertheless, the contract is also directly relevant to the case since it was pleaded in the complaint of the plaintiff and it was incorporated in that complaint. In addition, it is also relevant to the other issues involving confiscation and unreasonableness of the current zoning. Clearly, the defendant, the Township of Bedminster, and the defendant-intervenors are entitled to know what the owners of the property have consented to and they are also entitled to know what is the nature and extent of the consent given by the owners to the plaintiff. The consent stated in the contract will be relevant to the current proceedings in that the consent may be limited to a specific portion of the property or to particular types of applications or proceedings such as site plan, variance, or other rezoning requests.

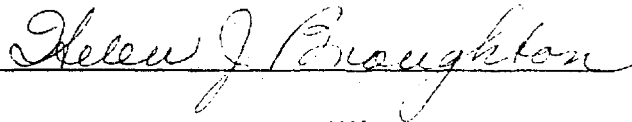
6. We have discussed the matter of the contract to purchase with our clients. All of our clients are insistent upon knowing the terms of the contract. They have instructed us not to waive the provision of the Pretrial Order requiring production of the contract to purchase. Our clients are property owners who will be most directly affected by the plaintiffs' attempts to have the property rezoned for a regional shopping center since their properties directly adjoin the property which is the subject of this suit. They clearly have a right to the information contained

in the contract of sale, particularly the information regarding the duration of the contract, the extent and nature of the owner's consent and the amount or amounts of consideration which will be paid to the owners, since all of this information will be relevant to the issues of standing, confiscation, and reasonableness of the current zoning ordinance.



HERBERT A. VOGEL

Sworn to and subscribed to before me this 30th day of July, 1981.



HELEN J. BROUGHTON
A Notary Public of New Jersey
My Commission Expires Sept. 29, 1985

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SOMERSET COUNTY
P. R. OLC CLERK

7/31 pg 9

S-7364

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VOGEL AND CHAIT
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MAPLE AVENUE AT MILLER ROAD
MORRISTOWN, NEW JERSEY 07960
(201) 538-3800
ATTORNEYS FOR Defendant - Intervenors

Plaintiff LEONARD DOBBS,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION:SOMERSET COUNTY
vs.	*Docket No.* L-12502-80
Defendant TOWNSHIP OF BEDMINSTER ROBERT R. HENDERSON, DIANE M. HENDERSON, HENRY E. ENGELBRECHT, Defendant -Intervenors.	*CIVIL ACTION* AFFIDAVIT IN OPPOSITION TO THE NOTICE OF CROSSMOTION OF PLAINTIFF

THOMAS F. COLLINS, JR., of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am an Attorney at Law of the State of New Jersey and an associate of the firm of Vogel and Chait, attorneys for the defendant - intervenors in this matter.

2. On April 3, 1981, a pretrial conference was held in connection with this matter and the Pretrial Order entered by the

Honorable Michael R. Imbriani. The Pretrial Order entered by the Honorable Michael R. Imbriani ordered the plaintiff to:

> "supply defendant and intervenors with a copy of his contract to purchase the land in question by April 17, 1981."

It was clear at the pretrial conference that the defendant was to provide the contract by April 17, 1981, two weeks from the date of the pretrial order, unless he moved in Superior Court for a protective order. No such motion was filed by Mr. Basralian before April 17, 1981 and no such motion was filed until July 23, 1981.

3. On or about the time of the pretrial, the attorneys for the defendants-intervenors were not involved in any discussions of a possible resolution of the within matter. Thus, it is incorrect to state, as Mr. Klein does in his certification of July 23, 1981, that the parties began such discussion on or about the time of the pre-trial.

4. Donald Klein, of Winne, Banta & Rizzi, called me on April 21, 1981 and told me that the attorneys for the plaintiff and the defendants had been discussing the possibility of a dismissal of the case without prejudice. I was surprised that any such discussions had been occurring since we had not been informed of such discussions. Mr. Klein indicated that Mr. Basralian was on vacation. In our telephone conversation, I suggested that

as attorneys for the defendant-intervenors, we should be advised of any such discussions. Mr. Klein did not ask my consent to defer the filing of any protective order pending settlement discussions or discussions of the plaintiff's desire for a dismissal without prejudice. I did not consent to any proposal to defer or stay the order of Judge Imbriani until the outcome of settlement discussions. Indeed, I wrote to Mr. Klein on April 22, 1981 (see Exhibit A) and I thanked him for informing me that attorneys for the plaintiff and defendant had been discussing the possibility of dismissal without prejudice. I indicated that our clients might be willing to consent to such a dismissal as long as various conditions were agreed upon. I requested that he contact us to set up a time for such a meeting to discuss the conditions of any voluntary dismissal. Neither Mr. Klein nor Mr. Basralian answered my letter of April 22, 1981 and we were never invited to any meeting to discuss a dismissal without prejudice or the conditions under which we would agree to such a dismissal. In my letter of April 22, 1981, I did not refer to any discussion of consent to a deferment of the pre-trial order and neither Mr. Klein nor Mr. Basralian contacted me with regard to my letter of April 22, 1981.

5. On May 6, 1981, I filed and served the Answer of the defendant- intervenors. (See Exhibit B-1 and B-2). The Answer specifically demanded the production of a copy of the contract

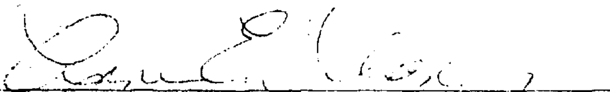
to purchase referred to in Paragraph 1 of the First Count of the plaintiff's complaint. (See Exhibit B-2 at 5). The contract was not produced within five days of service of the Answer as required by Rule 4:18-2. Neither Mr. Basralian nor Mr. Klein contacted me with regard to this demand for production of the document which had been incorporated by reference into the plaintiff's complaint.

6. On May 19, 1981, the attorney for the Township of Bedminster, Alfred L. Ferguson, wrote to Mr. Basralian and requested the plaintiff provide the contract as required by the Pretrial Order. (See Exhibit C).

7. Contrary to the position of Mr. Klein and the plaintiff, the contract is relevant to more than just the issue of standing. The contract and its contents may also be relevant to the confiscation issue and the issue of the unreasonableness of the zoning. Both of these issues are raised in the plaintiff's complaint. For example, the contract may specify a price for the final contract of sale. This price will clearly be relevant to the confiscation issue since the difference between the value of the land under commercial retail zoning vis a' vis residential zoning is one of the key elements of the confiscation issue. In addition, the contract may specify alternative sale prices for the property if the plaintiff is unable to obtain a rezoning

or is unable to obtain the density of commercial use which he is seeking. The contract may indicate that Mr. Dobbs intends to purchase and utilize the property for a residential use, if he is unsuccessful in his rezoning attempt. Such a provision in the contract would clearly be an admission of the plaintiff that the zoning is not unreasonable and that the property is not being confiscated by the current residential zoning. The term of the option agreement and the date of expiration may also be relevant to the standing issue as well as the issue of reasonableness of the zoning. If the contract has expired or is about to expire, that information will be relevant to the case. The terms of the contract may also be relevant to the confiscation issue if the contract provides for sale of the property to alternative purchasers who intend to use the property, or portions of the property, for residential purposespermitted under the zoning ordinance. For the above reasons, the contract and its terms are clearly relevant to the issues raised in the plaintiff's complaint and we are therefore requesting that it be produced. Furthermore, the plaintiff in the moving papers has not indicated any reasons based on privilege or confidentiality which support his position that the contract should not be produced.

Sworn to and subscribed before
me this 24th day of July, 1981



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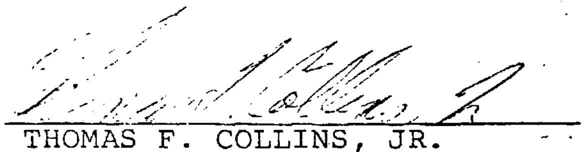
My Comm[illegible] Sept. 5, 1985



THOMAS F. COLLINS, JR.

COPY

VOGEL AND CHAIT
A PROFESSIONAL CORPORATION
Attorneys at Law

HERBERT A. VOGEL
ARNOLD H. CHAIT
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HAROLD GUREVITZ
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538-3800
AREA CODE 201

April 22, 1981

Donald A. Klein, Esq.
Winne, Banta, Rizzi & Harrington
25 E. Salem Street
Hackensack, New Jersey 07601

Re: Leonard Dobbs vs. Township of Bedminster
Docket No. L-12502-80
S-7354 P.W.
Our File No. 12332

Dear Mr. Klein:

I am writing in response to your telephone call of April 21, 1981. Thank you for informing us that the attorneys for Mr. Dobbs and the Township have been discussing the possibility of dismissal without prejudice. I have discussed the matter with Mr. Vogel and there is some possibility that our clients would be willing to agree to such a dismissal as long as various conditions could be agreed upon. Therefore, please contact us to set up a time for a meeting with you or Mr. Basralian, and Mr. Ferguson, at which time we can discuss the conditions of such a dismissal.

Thank you for your attention to this matter.

Very truly yours,

VOGEL and CHAIT
A Professional Corporation

THOMAS F. COLLINS, JR.

TFC/aeo

EXHIBIT A

VOGEL AND CHAIT
A PROFESSIONAL CORPORATION
Attorneys at Law

HERBERT A. VOGEL
ARNOLD H. CHAIT
ENID A. SCOTT
ARON M. SCHWARTZ
THOMAS F. COLLINS, JR.

HAROLD GUREVITZ
OF COUNSEL

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538-3800
AREA CODE 201

May 6, 1981

W. Lewis Bambrick
Clerk, Superior Court
State House Annex
Trenton, New Jersey 08625

RE: Dobbs vs. Township of Bedminster, Robert R. Henderson,
Diane M. Henderson and Henry E. Engelbrecht
Docket No. L-125-2-80
Our File No. 12332

Dear Sir:

Enclosed please find the original and two copies of the Answer of the Defendant-Interveners in the above matter. On April 27, 1981, Judge Imbriani signed an order granting these parties leave to intervene. Please file the original and a copy and mark the additional copy as "filed" and return it in the enclosed self addressed postage prepaid envelope.

By copy of this letter I am hereby serving this answer upon the attorney for the plaintiff in this matter.

Thank you for your assistance.

Very truly yours,

VOGEL AND CHAIT
A Professional Corporation

THOMAS F. COLLINS, JR.

TFC:ngc
encls.
cc: Joseph L. Basralian, Esq.
Alfred L. Ferguson, Esq.
Guliet Hirsch, Esq.

EXHIBIT B

COPY

VOGEL AND CHAIT
A Professional Corporation
Maple Avenue at Miller Road
Morristown, New Jersey 07960
(201) 538-3800
Attorneys for Intervener-Defendants

LEONARD DOBBS, Plaintiff, vs. TOWNSHIP OF BEDMINSTER, a Municipal Corporation, Defendant, ROBERT R. HENDERSON, DIANE M. HENDERSON and HENRY E. ENGELBRECHT, Defendant-Interveners	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-SOMERSET COUNTY DOCKET NO. L-12502-80 CIVIL ACTION ANSWER

Defendant-Interveners, ROBERT R. HENDERSON, DIANE M. HENDERSON and HENRY E. ENGELBRECHT, each residing on Matthews Drive, Bedminster, New Jersey answering the Complaint, say:

FIRST COUNT

1. Defendant-Interveners adopt the answers of the defendant as to Paragraphs 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13,

EXHIBIT B-1

14, 15 and 16 of the First Count of the Complaint.

2. The allegations of Paragraph 8 are denied. Prior to the institution of this legal action, the plaintiff never made any request to either the governing body, the planning board or the zoning board of adjustment of the Township of Bedminster for a rezoning or a use variance. Furthermore, the defendant-interveners were not given any notice of any meetings of the plaintiff with officials of the Township prior to the filing of this action. The defendant-interveners deny the allegation that the plaintiff has exhausted, or indeed even attempted to invoke, the administrative procedures and remedies available to him with respect to the zoning ordinance of Bedminster.

3. The defendant-interveners deny the allegations of Paragraph 10. The defendant-interveners add that since the plaintiff has not made any attempt to even utilize his administrative remedies, it is impossible to conclude that resort to administrative remedies would be futile. The plaintiff is merely seeking to circumvent the normal administrative processes and to avoid any public hearings on his proposal for rezoning and thereby avoid and impede the rights of the defendant-interveners.

SECOND COUNT

1. Defendant-Interveners repeat their answers to the First Count.

2. Defendant-Interveners adopt the answers of the defendant as to Paragraphs 2 through 11 of the Second Count.

THIRD COUNT

1. Defendant-Interveners repeat their answers to the First and Second Counts.

2. Defendant-Interveners adopt the answer of the defendant as to Paragraph 2 of the Third Count.

3. Defendant-Interveners deny the allegations of Paragraph 3, and further add that the current zoning of the tract of land which the plaintiff is seeking to have rezoned is totally inappropriate for a regional shopping center and the current R-3% is reasonable in all respects.

FOURTH COUNT

1. Defendant-Interveners repeat their answers to the First, Second and Third Counts.

2. Defendant-Interveners admit that the land in question is zoned for residential purposes and point out that the adjoining lots owned by the defendant-interveners are located in the same residential zone and are currently being utilized for residential purposes as provided in the zoning ordinance of the Township of Bedminster.

3. Defendant-Interveners adopt the answer of the defendant to Paragraph 3 of the Fourth Count but add that the tract of land in question is also in the immediate vicinity of, in fact it is adjacent to, the residential uses of the defendant-interveners.

4. The allegations of Paragraph 4 are denied.

5. The allegations of Paragraph 5 are denied.

FIFTH COUNT

1. Defendant-Interveners repeat their answers to the First, Second, Third and Fourth Counts.

2. The allegations of Paragraph 2 are denied. Residential development in the tract of land which is the subject of this action is economically practical and reasonable, especially considering the fact that lots located directly adjacent to the tract in question are currently being used for residential purposes. The fact that a portion of the tract is near Route 206 does not render the tract unusable for residential purposes.

3. The allegations of Paragraph 3 are denied. The defendant-interveners add that the soil conditions on the tract of land in question are identical to the conditions on their property and on-site septic systems are certainly economically practical in the area. This is clear in view of the fact that defendant-interveners currently use on-site septic systems.

4. The allegations of Paragraph 4 are denied.

5. The allegations of Paragraph 5 are denied.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

The plaintiff has failed to exhaust the administrative remedies available to him as required under R. 4:69-4 and is barred from bringing the within action.

SECOND SEPARATE DEFENSE

The complaint was not filed within 45 days of

the adoption of the Revised Land Development Ordinance, and this action is therefore barred.

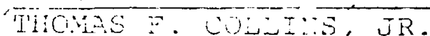
THIRD SEPARATE DEFENSE

The plaintiff's request for relief in the form of a Court order rezoning the tract of land in question to retail commercial is barred since such an order would constitute state action which would deprive the defendant-interveners of their liberty and property interests without due process.

DEMAND FOR DOCUMENT REFERRED TO IN PLEADING

Defendant-Interveners demand, pursuant to R. 4:18-2, a copy of the contract to purchase referred to in Paragraph 1 of the First Count of the Complaint, within five days after service of this Answer upon plaintiff.

VOGEL AND CHAIT
Attorneys for Defendant-Interveners



By ______________________
THOMAS F. COLLINS, JR.

I hereby certify that a copy of the within answer was served and filed within the time prescribed by the Rules of the Court.

By ______________________
THOMAS F. COLLINS, JR.

Dated: May 6, 1981

COPY

McCARTER & ENGLISH
ATTORNEYS AT LAW
550 BROAD STREET
NEWARK, NEW JERSEY
07102

May 19, 1981

Re: <u>Bedminster ads. Dobbs</u>

Joseph L. Basralian, Esq.
Winne, Banta, Rizzi & Harrington
25 East Salem Street
Hackensack, New Jersey 07602

Dear Mr. Basralian:

The terms of the Pretrial Order signed by Judge Imbriani on April 3, 1981 require, in part, that:

> Plaintiff shall supply defendant and intervenors with a copy of his contract to purchase the land in question by April 17, 1981.

Plaintiff was to provide the contract by April 17 unless he moved in Superior Court for a protective order. No such motion has been filed.

Very truly yours,

Alfred L. Ferguson

ALF:bjg
cc: Herbert A. Vogel, Esq.

EXHIBIT C

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PHILIP SCALO
EDWARD R. KOCH
VIRGINIA ANNE GLYNN

ltr from π's counsel to trial judge in response to Δ's opposition to motion for protective order.

7/30/81

July 30

RECEIVED
JUL 30 1981
SOMERSET COUNTY
ASSIGNMENT CLERK

Honorable Robert E. Gaynor
Somerset County Court House
Somerville, New Jersey 08876

Re: Dobbs v. Bedminster
L-12502-80

Dear Judge Gaynor:

This letter is submitted in response to the July 27, 1981 memorandum filed by defendant Township of Bedminster in opposition to plaintiff's Motion for a Protective Order.

Defendant municipality argues that R. 4:18-2 requires production of the Option Agreement because it is "referred to" in plaintiff's Complaint. However, this is a mischaracterization of plaintiff's Complaint. The Option Agreement is not at all "referred to" in plaintiff's Complaint. On the contrary, the only documents referred to in plaintiff's Complaint are the Zoning Ordinance and Master Plan of defendant municipality, challenged in the litigation, and the Order entered in Allan Deane Corporation, et al. v. Township of Bedminster, et al. mandating a rezoning of defendant municipality. These documents are referred to because they are relevant to the substantive issues in this case. Defendant municipality invokes R. 4:18-2 because of the characterization of plaintiff Dobbs in paragraph 1 of the First Count of plaintiff's Complaint as the "contract purchaser" of the property referred to in such paragraph. This is not a reference to a document (which might be covered by R. 4:18-2) but rather a reference to plaintiff's status, which reference is necessary only to demonstrate plaintiff's standing to bring this action. This case is quite distinguishable from Lakewood Trust Co. v. Fidelity and Deposit Co., 81 N.J. Super. 329 (L. Div. 1963), the R. 4:18-2 case relied upon by defendant municipality, where "specific reference" was made to certain documents in plaintiff's complaint.

mr cal 7/30 P9

Defendant municipality's argument that the Option Agreement is relevant to prove something beyond standing similarly rests on a mischaracterization of plaintiff's Complaint. The Fourth Count of plaintiff's Complaint, referred to by defendant municipality, reads in pertinent part as follows:

> "5. For the reasons set forth hereinabove, said zoning ordinance, as applied to plaintiff's property, constitutes an improper and unlawful exercise of the police power delegated to the defendant township, depriving plaintiff of his property without just compensation or due process of law, and the said zoning ordinance is unconstitutional, null and void."

In the Fourth Count of his Complaint, plaintiff is arguing that the Ordinance is unconstitutional because it has the effect of depriving plaintiff of his property without just compensation or due process of law. This argument is addressed to the constitutionality of the Ordinance and not to a claim for damages for an unlawful taking, as defendant municipality suggests. In fact, plaintiff does not seek such relief:

> "WHEREFORE, plaintiff demands judgment against defendant:
>
> A) Declaring the zoning ordinance adopted by defendant invalid;
>
> B) Compelling a rezoning of the tract of land for which plaintiff is a contract purchaser to a regional retail and commercial development district;
>
> C) Awarding the plaintiff his costs of suit and attorneys' fees herein;
>
> D) Granting the plaintiff such further relief as the Court deems just and proper."

Thus defendant municipality's argument that valuation of the property is a critical issue is misleading.

Defendant municipality's argument that the Option Agreement may provide relevant information because it may contain "admissions" misses the point; in any case, such argument can be met without present production of the Option Agreement. The issue in this case

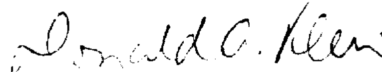
is whether the Zoning Ordinance and Master Plan of defendant municipality is unconstitutional as applied to the property in question a determination to be made by the Court on the basis of objective evidence and a determination as to which the "admissions" suggested by defendant municipality would have little relevance. In any case, the Option Agreement is not conditioned on alternative zoning as suggested by defendant municipality; rather the the Option Agreement only makes reference to the commercial zoning which plaintiff is endeavoring to establish through this litigation. Plaintiff is prepared, at the appropriate time, to submit the Option Agreement to the Court for its in camera inspection so that the Court may be satisfied that this is the case and that there are no "admissions" contained in the document.

Defendant municipality's argument that the Affidavit of Ralph K. Smith, Jr. does not demonstrate plaintiff's standing is spurious. The Affidavit is the affidavit of counsel for the owners of the property wherein the affiant states that plaintiff has a presently valid and outstanding option to purchase the property in question. This Affidavit is uncontested by defendants. It must be recognized that the issue in this case is the validity of the Zoning Ordinance and the Master Plan of defendant municipality. Defendants' efforts to switch the focus of this litigation to an analysis of the terms of plaintiff's Option Agreement is ingenious but misleading. Given the Affidavit of Mr. Smith, which demonstrates plaintiff's standing, the specific terms of the Option Agreement are not relevant and are, in any case, cumulative. Contrary to Defendant municipality's suggestion, plaintiff has not endeavored to prove the terms of the Option Agreement (and therefore the best evidence rule is inapplicable). Rather plaintiff has simply attempted, through the Affidavit of Mr. Smith, to demonstrate his standing to bring this action.

Defendants' arguments must also be put in context. On July 17, 1981, Your Honor entered an Order in this case staying all proceedings (with the exception of the present motions) pending a decision by the Appellate Division on various appeals relating to intervention. As a consequence, all outstanding discovery, including very considerable discovery addressed to the central issues in this case - the validity of the Zoning Ordinance and Master Plan of defendant municipality - has been held in abeyance. There is no reason not to have defendants' request for the production of the Option Agreement covered by the same stay. Plaintiff and the owners of the property have a legitimate concern in maintaining the confidentiality of the terms of their Option Agreement, an interest which is perhaps heightened in this case which has, unfortunately, been too greatly tried in the press. Having demonstrated through the Affidavit of Mr. Smith plaintiff's standing to bring this action and having offered to produce the Option Agreement, if desired, in camera, at the appropriate time, to satisfy the Court that no

"admissions" are contained in the Option Agreement, nothing more should be required at this point. Plaintiff submits that the terms of the Option Agreement are not relevant to the issues in this case. However, if, after in camera inspection after the stay has been dissolved, the Court should determine that any aspect of the Option Agreement has any relevance to the issues in this case then plaintiff would asks that any such disclosure be subject to a Protective Order limiting use of such portion of the Option Agreement to this particular litigation and prohibiting publication of same to anyone other than the parties to this action. Since the stay entered by Your Honor on July 17, 1981 was entered because of the desire to have the intervention questions resolved before proceedings in this case continue, it is all the more important that disclosure of any portion of the Option Agreement not be made presently to anyone who may not be a party to this action after the Appellate Division has ruled.

Respectfully yours,



Donald A. Klein

DAK:vjs

cc: McCarter & English, Esqs.
Vogel and Chait, Esqs.