

AMG

2-2-81

CL re: brief, enclosed

- w/ brief in opposition to Is motion to
Strike Certain defgs

pgs. 11

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Warren

April 2, 1981

Somerset County Superior Court Clerk
Administration Bldg.
Somerville, N.J. 08876RE: AMG Realty Company vs. Township of Warren
Docket No. L-23227-80
Our file W-32

Dear Sir:

Enclosed herewith is the original and copy of brief in opposition to the motion of plaintiff in the above matter to strike certain separate defenses, said motion being returnable on Friday, April 10, 1981. Please provide a copy of the within brief to the Judge hearing this matter.

Very truly yours,


John E. Coley, Jr.JEC:kl
encls.ccs: Hon. Michael Imbriani
Joseph E. Murray, Esq.

FILED

5-15-98

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SOMERSET COUNTY
L. R. OLSON, CLERK

Entered ✓

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : SOMERSET COUNTY
DOCKET NO. ~~L-23227-80~~

L-23277-80

AMG REALTY COMPANY, A Partnership)
organized under the laws of the State)
of New Jersey,)

Plaintiff,)

vs.)

Civil Action

THE TOWNSHIP OF WARREN, A Municipal)
Corporation of the State of New)
Jersey,)

Defendant.)

BRIEF OF DEFENDANT AGAINST PLAINTIFF'S MOTION
TO DISMISS FIRST, SECOND AND SIXTH SEPARATE DEFENSES

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On the Brief:

John E. Coley, Jr., Esq.

STATEMENT OF FACTS

The facts which are relevant in the pending motion by plaintiff in his prerogative writ action presently pending before the Court challenging the zoning ordinance of Warren Township, Somerset County, New Jersey, as being exclusionary under the principles of Mt. Laurel are as follows:

Plaintiff has never made an application for land development before the Warren Township Planning Board or the Warren Township Zoning Board of Adjustment. Plaintiff has never sought a variance for its property before the Warren Township Board of Adjustment. Plaintiff has not made application before the Warren Township Committee (governing body) relative to rezoning the 90 acres of vacant land which it owns in the Township of Warren and which is currently designated on the Warren Township tax assessment maps as Lots 22 and 25 in Block 137. Instead of following any of the above administrative procedures, the plaintiff has chosen to go directly to the Superior Court of New Jersey, Law Division, Somerset County by filing a complaint in lieu of prerogative writ.

In the fourth paragraph of plaintiff's complaint, it is alleged as follows:

"The lands of the plaintiff are capable of being developed for residential use and plaintiff proposes to utilize said lands for the construction and sale of approximately 450 townhouse units, which land use is contrary to the applicable zoning laws of the defendant (Warren Township)".

The present zoning law of Warren Township was passed by the Township Committee on January 25, 1979.

Plaintiff's complaint contains no allegation that the townhouses that plaintiff desires to construct would offer the home-buying public the

opportunity of "least cost" or "new housing for low and moderate income households". In fact, it is defendant's belief that the townhouses proposed by plaintiff will offer neither of the above opportunities.

ARGUMENT OF LAW

POINT I

THE EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED BEFORE
PLAINTIFF CAN SEEK RELIEF FROM THE SUPERIOR COURT OF NEW JERSEY.

It is a fundamental theory of law in New Jersey that if relief from a municipality's zoning ordinance is sought primarily as to the particular property of the plaintiff that prior to seeking judicial relief due application to the Zoning Board of Adjustment should be undertaken. Fischer vs. Township of Bedminster, 11 N.J. 194 (1952). It is obvious from the complaint filed by the plaintiff in the instant matter that the primary purpose of the litigation before the Court is for relief to allow the construction of townhouses on Lots 22 and 25 in Block 137 as the same are set forth on the current tax assessment maps for the Township of Warren. This is obvious based upon the allegation of ownership of the said property in the first paragraph of plaintiff's complaint and also from a reading of the fourth paragraph of plaintiff's complaint wherein the plaintiff proposes to utilize the aforesaid property for the construction of approximately 450 townhouse units. It is the defendant's position that the attack made by plaintiff in its present complaint alleging the invalidity of the existing Warren Township zoning ordinance is merely a subterfuge. The real purpose of the present litigation is to grant relief from the existing zoning ordinance of the Township of Warren to allow the construction of the proposed townhouses by plaintiff on the specific property owned by the plaintiff in the Township of Warren. It is obvious from the type of entity which the plaintiff appears to be in the present action--a realty company with the obvious purpose of making a profit on land development, that the plaintiff is not seeking the

betterment of the house-buying public in the area of Warren Township. In the major cases which have recently brought against municipalities in the State of New Jersey alleging invalid exclusionary zoning contrary to the provisions of Article 1, Paragraph 1 of the Constitution of the State of New Jersey, the plaintiff has generally been an entity with the general purpose of the betterment of large segments of the New Jersey populace. Examples of common-type plaintiffs being "Urban League of New Brunswick" and "South Burlington County" and "NAACP". These plaintiffs appeared in cases entitled "Urban League of New Brunswick vs. Carteret, 170 Super. 461 (App. Div. 1979) and South Burlington County NAACP vs. Township of Mount Laurel, 67 N.J. 151 (1975)". The present plaintiff does not qualify as an entity for the betterment of the New Jersey house-buying public.

The plaintiff cites in his brief AMG Associates vs. Township of Springfield, 65 N.J. 101 in support of its position that it does not have to exhaust its administrative remedies in this matter. That case is not dispositive of the instant matter. The portion relied upon by the plaintiff is taken from a footnote on page 110 which is the continuation of the footnote on page 109. The portion of the footnote on page 109 states:

Ordinarily, where an owner claims a zoning ordinance use provision is invalid as applied to one relatively small piece of land by reason of substantial hardship, such as here, unusability for any permitted purpose, relief should first be sought by way of variance under NJSA 40:55-39(d), for in such situations the local administrative agencies can generally adequately deal with the problem.

Warren Township is basically a rural township covering an area of 19.3 square miles. The 90 acres owned by the plaintiff is a "relatively small piece of land". Thus, based upon the main case cited by the plaintiff, it would appear that the plaintiff must follow its administrative remedies in this

matter before seeking relief in the Superior Court of New Jersey.

POINT II

PLAINTIFF'S ACTION IS BARRED BY THE TIME LIMITATIONS OF
RULE 4:69-6(a).

The Warren Township zoning ordinance 79-3 was adopted on January 25, 1979. It is the belief of the defendant that the plaintiff owned the property in question in excess of 45 days before the filing of its complaint with the Clerk of the Superior Court of New Jersey on December 31, 1980.

Rule 4:69-6(a) provides:

No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to review, hearing or relief claimed . . .

The plaintiff was aware or should have been aware at the time of its purchase of Lots 22 and 25 in Block 137 on the currently official Warren Township tax assessment maps that the property was zoned rural residential for development as 1-1/2 acre tracts.

Based upon the argument set forth in Point I of the within brief, it is the defendant's position that plaintiff does not represent the "interests of justice" in that it is not seeking the betterment of the house-buying public nor is it seeking to construct housing of "least cost" or "new housing for low and moderate income households". There are no substantial constitutional questions raised by the defendant in the within matter.

Enlargement of the 45 day period set forth in the Court rule cited above for commencing suits in lieu of prerogative writs is permitted only in exceptional cases and where the most persuasive circumstances exist. See Riddlestorffer vs. Rahway, 82 N.J. Super. 36 (Law Div. 1963) at page 42, Testa vs. Town of Bloomfield, 71 Super. 66 (Law Div. 1961) and other cases of the same holding

It is the defendant's position that plaintiff would not qualify for enlargement of the 45 day period to file the within prerogative writ action. It is obvious that the said action was not filed within 45 days of January 25, 1979, when ordinance 79-3 was adopted, and it is the defendant's belief that the same was not filed within 45 days of plaintiff's purchase of the property in question, if that date would be applicable.

POINT III

THE WARREN TOWNSHIP PLANNING BOARD IS AN INDESPENSABLE PARTY TO THE PRESENT ACTION.

The Warren Township Planning Board prepared and submitted to the Warren Township Committee a Master Plan which was prepared prior to the preparation, introduction and passage of the present zoning law on January 25, 1979. That Master Plan provided the basis for the said zoning law.

NJSA 40:55(d)-26(a) requires the Township Committee to consider the Master Plan prepared by the Planning Board before the passage of a zoning ordinance. The Planning Board was intricately involved in the preparation of the present zoning law, and it is based upon this fact that the defendant maintains that the Planning Board is an indispensable party to the present action.

CONCLUSION

For the reasons set forth herein, it is submitted that the First, Second and Sixth Separate Defenses of the Township of Warren should be allowed to remain as designated in the said Township's answer.

Dated: April 2, 1981

KUNZMAN, COLEY, YOSPIN & BERNSTEIN, P.A.
Attorneys for Defendant

BY: 

John E. Coley, Jr.