

AMG

Timber

6-29-83

letter re's

- w/ memo in opposition to motion to dismiss
- w/ cert.

PSS. 17

Pi # 3250

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June 29, 1983

Lawrence R. Olson, Clerk  
 Somerset County Administration Building  
 P.O. Box 3000  
 Somerville, New Jersey 08876

Re: Timber Properties vs. Twp. of Warren, et als.  
 Docket No. L-67820-80

Dear Mr. Olson:

Enclosed for filing in the above matter please find an original and one copy of a Memorandum in Opposition to Motion for Dismissal or Consolidation, together with an original and one copy of a Certification in Opposition to Motion for Dismissal or Consolidation.

By copy of this letter, I am forwarding a copy of these pleadings to the Honorable Eugene D. Serpentelli, the judge assigned to this matter.

Also by copy of this letter, I am forwarding copies of the within pleadings to my adversaries.

Very truly yours,

**RECEIVED**

Raymond R. Trombadore

JUL 1 1983

smr

JUDGE SERPENTELLI'S CHAMBERS

Enclosures

cc: ✓ Honorable Eugene D. Serpentelli w/enclosures  
 John E. Coley, Jr., Esq. w/enclosures  
 J. Albert Mastro, Esq. w/enclosures  
 Eugene W. Jacobs, Esq. w/enclosures

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Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: SOMERSET COUNTY  
DOCKET NO. L-67820-80 P.W.

TIMBER PROPERTIES, a corpora- :  
tion of the State of New Jersey, :  
Plaintiff, :

-vs.-

Civil Action

THE TOWNSHIP OF WARREN, a muni- :  
cipal corporation of the State :  
of New Jersey, THE PLANNING :  
BOARD OF THE TOWNSHIP OF WARREN, :  
and THE WARREN TOWNSHIP SEWERAGE :  
AUTHORITY, :

Defendants. :

MEMORANDUM IN OPPOSITION  
TO MOTION FOR DISMISSAL  
OR CONSOLIDATION

STATEMENT OF FACTS

The plaintiff is the contract purchaser of a parcel of vacant land located in Warren Township, Somerset County, New Jersey, consisting of approximately 68 acres. The property is located in a residential zone and, until December of 1982, was zoned for single-family, detached housing on lots having a minimum lot area of 60,000 square feet. Development of the rear portion of the plaintiff's property would have been permitted for detached, single-family houses on half-acre lots.

One of the conditions of the plaintiff's contract was that the plaintiff would obtain rezoning of the property to permit the development of approximately 250 townhouses on the property. Numerous requests for variances had previously been denied by the Warren Township Board of Adjustment. Several requests for townhouse variances were then pending before the Warren Township Board of Adjustment. Under the Zoning Ordinance then in effect, no residential housing was permitted in Warren Township except single-family, detached houses on large lots. The defendant Township had rezoned substantial portions of land in the area of the plaintiff's land for intensive office use. Chubb and Sons, Inc., a major insurance company, had obtained approvals for the construction of a headquarters office facility involving several hundred thousand square feet of offices opposite the plaintiff's land. A new sewer plant was about to be constructed in the vicinity of the plaintiff's land and intended to service the plaintiff's land. Under all of these circumstances, in September of 1980 the plaintiff requested the Warren Township Committee to rezone its property for multi-family use. The Township Committee referred the request to the Warren Township Planning Board, and the plaintiff met with the Planning Board on several occasions in the latter part of 1980 and in the early part of 1981. The plaintiff presented detailed testimony and exhibits in support of its request for a rezoning of the area in which its property was located. Said evidence clearly established the feasibility of the

development of plaintiff's lands for townhouses at the density proposed. Notwithstanding that evidence, which was uncontradicted, the Planning Board arbitrarily and unreasonably refused to recommend to the Township Committee the rezoning of the plaintiff's lands. In addition, the plaintiff had asked the Warren Township Sewerage Authority to provide adequate sewage treatment for the sewage which would be generated by the development of the plaintiff's lands. The Sewerage Authority arbitrarily limited the capacity of treatment available to the plaintiff to the gallonage which would be generated by the development of the plaintiff's lands under the then-present zoning. In effect, the Sewerage Authority arbitrarily and capriciously refused to allocate gallonage in order to limit the growth which would be permitted on the plaintiff's property. This refusal of the Sewerage Authority was based upon an agreement which had been reached between the Sewerage Authority and the defendant Township of Warren to limit allocation to the then-existing limitations of the Zoning Ordinance.

In July of 1981, the plaintiff brought suit against the Township of Warren, alleging in some eight separate counts (1) that the Zoning Ordinance of the Township of Warren was exclusionary and, therefore, unconstitutional and illegal; (2) that the Zoning Ordinance of Warren Township violated the requirement of the Municipal Land Use Act and that the development of individual municipalities should not conflict with the development

and general welfare of neighboring municipalities in the county and the state as a whole; (3) that the Zoning Ordinance of Warren Township failed to satisfy the stated purposes of the Municipal Land Use Act in that it did not utilize creative development techniques, did not serve to preserve open space and natural resources and to prevent urban sprawl, and did not encourage planned unit development incorporating the best features of design and lay-out of residential, commercial, industrial and recreational development; (4) that the minimum lot areas required by the Zoning Ordinance of Warren Township were unrelated to a reasonable exercise of the police power; (5) that the limitations of the Zoning Ordinance of Warren Township were not the product of a comprehensive zone plan which gave reasonable consideration to the character of each district and its peculiar suitability for particular uses; (6) that the limitations imposed upon the lands of the plaintiff constituted an inverse condemnation of the plaintiff's property; (7) that the refusal of the Warren Township Committee to rezone the properties pursuant to the request of the plaintiff was arbitrary, capricious and unreasonable; and (8) that the refusal of the Sewerage Authority to provide adequate capacity for the treatment of sewage from the plaintiff's lands was arbitrary, capricious, unreasonable, and the product of an illegal conspiracy between the Township Committee and the Sewerage Authority, which conspiracy was designed to limit growth in the Township.

While the plaintiff's suit was pending, the trial court in Somerset County found the Zoning Ordinance of Warren Township to be exclusionary and unconstitutional. The trial court's opinion was based upon the principles enunciated in Mt. Laurel I. Based upon that opinion, plaintiff moved for a judgment and the defendant Township moved for dismissal on the grounds that this plaintiff's suit had become academic since Warren Township had been ordered to rezone its residential properties. The trial court found that the first two counts of this plaintiff's complaint were academic because of the rezoning ordered and placed the remaining counts of the complaint on the inactive list, pending the rezoning of the residential portions of Warren Township. Thereafter, the Township introduced an amended Zoning Ordinance on December 2, 1982. Said Ordinance provided that the Ordinance would become effective upon approval by the trial court for Somerset County. The Ordinance adopted by the Township of Warren did not rezone the lands of AMG Realty Company, but did rezone the lands of the plaintiff Timber Properties. Nevertheless, because the trial court had retained jurisdiction in the matter and because the Ordinance itself provided that it would not take effect until approved by the court, the plaintiff Timber Properties was unable to proceed in the development of its property, pending a determination of the lawfulness of the rezoning which was enacted by Warren Township. Timber Properties, therefore,

moved to restore its case to the active list and also sought summary relief. Summary relief was denied, but the complaint of Timber Properties was restored to the active list. The defendant Warren Township now seeks to dismiss the plaintiff's complaint.



ARGUMENT

POINT I: THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE  
REMEDIES DOES NOT APPLY TO THIS CASE.

The first argument brought by the defendant Township is that the plaintiff's complaint should be dismissed because the plaintiff has not exhausted its administrative remedies. Specifically, the Township argues that it was incumbent upon the plaintiff to seek a variance for the development of its property prior to attacking the constitutionality and legality of the Warren Township Zoning Ordinance. The Township does not seek a dismissal of the Eighth Count of the complaint under this theory because the Eighth Count of the complaint is a count which is brought against the defendant Sewerage Authority, as to which there is clearly no administrative remedy.

R. 4:69-5 provides that actions in lieu of prerogative writ shall not be permitted except where administrative remedies have first been exhausted, unless the interest of justice requires otherwise. The exhaustion of administrative remedies is neither a jurisdictional nor an absolute requirement and may be dispensed with where the interest of justice requires. See Matawan Borough v. Monmouth County Tax Board, 51 N.J. 291 (1968). Also see the annotation to R. 4:69-5. Plaintiff in this case had sought relief from the Township Committee by its direct request to the Township Committee to rezone lands in the Township. Following extensive hearings before the Planning Board, the Township Committee failed

to take any action. It would be a futile act on the part of the plaintiff to go once again to a board appointed by the Township Committee to seek a variance from the provisions of the Ordinance then existing. Ultimately, the granting of that form of use variance would have been subject to review by the Township Committee, which had refused that relief in the first instance.

More significantly, the issues raised by the suit brought by the plaintiff against Warren Township were not issues calling for administrative determination. The various counts of the complaint assert constitutional infirmities in the Zoning Ordinance of the Township of Warren. This was not a case in which the plaintiff sought to appeal the denial of a specific permit for a small and isolated parcel of land. The issues were of general application to the Township and could not be resolved by a determination of the Board of Adjustment. The futility of such a requirement is made readily apparent by reference to the attempt on the part of Warren Township to divest its own Board of Adjustment from jurisdiction to act in such matters. The brief filed on behalf of the Township in the suit of AMG Realty Co., et als. v. The Township of Warren by the public advocate for the Township of Warren, Mr. Terrence O'Connor, argued essentially that the Board of Adjustment should not be permitted to act on such applications since the applications involved essentially legislative considerations. Clearly, the Township of Warren should not be permitted to enjoy

inconsistent positions in this regard. It is respectfully submitted that the doctrine of exhaustion of administrative remedies has no application to this case.

POINT II: PLAINTIFF SHOULD NOT BE REQUIRED  
TO CONSOLIDATE ITS CLAIMS WITH THOSE OF  
AMG REALTY CO., ET ALS. v. THE TOWNSHIP OF WARREN.

The defendant Township argues secondly that the plaintiff's suit in this matter should be consolidated with litigation presently pending against the Township in the matter of AMG Realty Co., et als., vs. The Township of Warren, Superior Court, Law Division, Docket No. L-23277-80. It is respectfully submitted that such a consolidation should not be ordered against this plaintiff until this plaintiff has been furnished with copies of the pleadings in that litigation and a determination has been made as to the issues to be resolved in that litigation. Defendant's brief fails to address any of the issues generated by the decision of the New Jersey Supreme Court in Mt. Laurel II, and it is clear that a further amendment of the complaint will be required in these matters, whether consolidated or not. It is the understanding of this plaintiff that the present litigation between AMG Realty Company and the Township of Warren is litigation in which AMG Realty attacks the Zoning Ordinance amendment enacted by the Township of Warren in December of 1982. This plaintiff has not been furnished with the pleadings in that case, and it is respectfully submitted that that a consolidation to an existing suit cannot be ordered without the benefit of affording the

parties copies of the pleadings involved in the respective suits. It is therefore respectfully submitted that if a consolidation is to be ordered, that consolidation should be conditioned first on the furnishing of such pleadings and, secondly, on the right of this plaintiff to amend its complaint to assert such further demands for relief which might be appropriate in a consolidated action. By way of example, it would be incumbent upon this plaintiff to assert that the Zoning Ordinance of Warren Township, as amended, does not meet the dictates of Mt. Laurel II in that it does not provide for the construction of low-cost or least-cost housing. The Ordinance, even as amended as to the plaintiff's lands, is deficient in that it does not permit for adequate subsidies for the creation of low-cost housing. Furthermore, the plaintiff is required to amend its complaint in order to assert that the failure of the Township of Warren to provide adequate sewer capacity to the plaintiff's land likewise interferes with the ability of the plaintiff to provide either low-cost or least-cost housing. For all of these reasons, it is respectfully submitted that a consolidation should not be ordered and that this plaintiff should be given an opportunity to amend its complaint.

POINT III: THIS PLAINTIFF DOES HAVE STANDING  
TO MAINTAIN THE PRESENT LITIGATION.

The last argument made by the defendant Township is that this plaintiff does not have standing to maintain this litigation. The Township has appended to its pleadings a copy of the

contract between this plaintiff and the record owners of the property. The Township then points to a specific provision of that contract and relies upon a reported conversation with the attorney for one of the sellers for the proposition that the plaintiff's contract rights have expired. No certification is submitted in support of this contention. Furthermore, the contention is one which is predicated upon a unilateral assertion by the attorney for one of the two sellers, contained in a hearsay statement in the brief submitted by the defendant Township. The certification submitted together with this Memorandum clearly indicates that plaintiff Timber Properties continues to assert its rights as a contract purchaser of the property. There is clear and definitive language in the contract of sale indicating that the plaintiff's contract rights will survive until the completion of litigation and beyond that litigation for a period of time sufficient to permit the closing of the contract. It is respectfully submitted that it would be highly improper for this court to undertake the resolution of a collateral issue which is not before the court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the defendant's motion to dismiss or consolidate be denied.

RAYMOND R. & ANN W. TROMBADORE  
A Professional Corporation  
Attorneys for Plaintiff

By: /s/ Raymond R. Trombadore  
RAYMOND R. TROMBADORE  
A Member of the Firm

DATED: June 29, 1983

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Somerville, New Jersey 08876  
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Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: SOMERSET COUNTY  
DOCKET NO. L-67820-80 P.W.

TIMBER PROPERTIES, a corpora- :  
tion of the State of New Jersey, :  
Plaintiff, :

-vs.-

Civil Action

THE TOWNSHIP OF WARREN, a muni- :  
cipal corporation of the State :  
of New Jersey, THE PLANNING :  
BOARD OF THE TOWNSHIP OF WARREN, :  
and THE WARREN TOWNSHIP SEWERAGE :  
AUTHORITY, :

Defendants. :

CERTIFICATION IN OPPOSITION  
TO MOTION FOR DISMISSAL  
OR CONSOLIDATION

DAVID WEINBERG, of full age, hereby certifies:

1. I am an attorney at law of the State of New Jersey and am Vice President of Timber Properties, Inc., a New Jersey corporation and the plaintiff herein.

2. I was intricately involved with the negotiations, drafting and execution of a Contract of Sale between Henry W. Evans and Waldo F. Reis and Timber Properties, Inc., which was ultimately signed on July 10, 1980.

3. The contract dated July 10, 1980, was the culmination of a series of contract proposals, drafts and discussions between myself, Henry Evans and his attorney, William Peek.

4. From the inception of the contract negotiations, it had clearly been established on numerous occasions by myself and by Mitchell T. Berlant, President of Timber Properties, Inc., that the price that the purchaser was paying for the premises greatly exceeded the present-day market value of the property. It was clearly explained to the sellers throughout the negotiations, and they thoroughly understood, the concept that the purchase price would only be worth that amount after Timber Properties had spent moneys, efforts and its experience in achieving the contemplated rezoning. On at least two separate occasions, Mr. Berlant explained in detail the costs, efforts and time which would be required to rezone this property and that it was a firm company policy that no deposit or a minimal deposit would be places in escrow since Timber Properties' good faith was its performance and, more practically, the moneys for any deposit would be better spent on payment of architectural, engineering, traffic and planning fees, as well as on scale models and attorney's fees.

5. With reference to Paragraph 5(k) on Page 9 of the contract, the provision "Notwithstanding any other provision of this contract, if title has not closed by January 2, 1983 Seller shall have the option to terminate this contract on ten days written notice to the Purchaser" was inserted in the contract by Mr. Peek



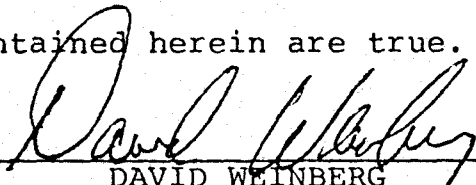
with the understanding that it applied to all circumstances except for the preceding paragraph which states, ". . . Notwithstanding anything contained herein to the contrary, the Purchaser shall have the option to appeal any adverse decision with the appropriate court or courts. Seller hereby agrees to extend the time for performance by the Purchaser until such time as the appeal process has been exhausted or abandoned by Purchaser. Purchaser shall diligently and expeditiously (sic.) prosecute any appeal in accordance with the Rules of Court." It was clearly understood and it was the intent of the drafters of this agreement that as long as Timber Properties was diligently processing the application through the courts, the sellers would agree to extend the time for performance. The paragraph pertaining to the January 2, 1983, option to terminate was inserted and refers to a case where litigation is not pending and where it was felt by the sellers that the purchaser was not diligently proceeding with the approval process and, thus, would have the option to terminate. It was anticipated that it would take years to obtain approvals on this property and the purchase price was designed to be increased every year by the amount of \$160,000. The contract specifically stated in Paragraph 2(d) that ". . . after the expiration of 12 months from the date hereof . . . (Purchaser) shall increase the Purchase Price by the amount of ONE HUNDRED SIXTY THOUSAND (\$160,000.00) after the expiration of each 12 months thereafter." To further minimize the sellers' exposure for

taking the property off the market, the purchaser had agreed not only to pay substantial increases in the purchase price, but to pay all real estate taxes after the first year of the contract. The concept and rationale was clear that as long as the purchaser would diligently and actively pursue its approvals through the courts, the sellers would stand behind their agreement and, upon a successful rezoning, stand ready to convey the property at a price far exceeding the original fair market value at the time the contract was entered into and which would possess a greater value once approvals were obtained, but only as a result of the moneys, efforts and diligence of Timber Properties.

6. Timber Properties continues to assert its rights as a contract purchaser of the property in question.

7. The unilateral assertions of the sellers or of their attorneys do not have the effect of terminating the contract. It is improper for the Township of Warren to assert on the basis of a conversation with an attorney for the sellers that Timber Properties does not have standing in this litigation.

8. I am aware of the penalties for a false certification, and I certify that the statements contained herein are true.

  
\_\_\_\_\_  
DAVID WEINBERG

DATED: June 29, 1983