

AMG

11-11-83

Letter in lieu of brief in opposition
to Evans & Reiss interventions

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November 11, 1983

Honorable Eugene D. Serpentelli
 Judge, Superior Court of New Jersey
 Ocean County Court House
 C. N. 2191
 Toms River, New Jersey 08753

Re: AMG Realty Company vs. Township of Warren

Dear Judge Serpentelli:

This letter is submitted in lieu of a brief in opposition to the application of Henry W. Evans and the Estate of Waldo F. Reiss to intervene as plaintiffs in this matter.

The proposed intervenors seek relief solely under Rule 4:33-1 "Intervention as of Right". The thrust of the application appears to be that Timber Properties is not adequately representing the interests of the proposed intervenors. It is submitted that the interests of Evans and Reiss, for intervention purposes, are in two areas:

A. Mt. Laurel Relief

It is basic in this case that the primary relief sought by AMG Realty and Skytop is a judicial determination that the current zoning regulations of Warren Township do not comply with the Mt. Laurel obligations. Timber Properties seeks the same relief.

The certification of the attorney for the proposed intervenors does not assert that the plaintiffs, AMG Realty and Skytop, will not adequately represent the proposed intervenors on that issue. He does assert that if AMG Realty and Skytop win on that issue the new zoning may not include their premises. That is not a Mt. Laurel issue when applied to the basic question as to the overall legality of the current zoning and if it were considered part of that issue, any and all Warren Township landowners or contract purchasers thereof could raise the same problem.

Honorable Eugene D. Serpentelli

November 11, 1983

Page 2

The factual and legal contentions asserted by the proposed intervenors, in lieu of the pleading required under Rule 4:33-3, does not make sense. The intervenors assert that the adoption of Ordinance 82-19, which changes their lands from 50,000 square-foot lots (actually 1 1/2 acre lots) to partial townhouse use, is an indication that the prior zoning of their lands was "arbitrary and capricious". This does not follow. No ordinance change, especially in zoning areas, constitutes express or implied admissions that what preceded the change was unlawful. There is nothing in the factual and legal contentions of the proposed intervenors that either adds to this case or makes it clear that the basic Mt. Laurel attack will not be adequately handled by other parties to this case.

Essentially, the Court must consider whether the present plaintiffs, AMG Realty and Skytop, adequately represent the interests of the proposed intervenors as to the general Mt. Laurel attack on the current zoning ordinance. We submit that this interest is more than adequately represented in that AMG Realty and Skytop have already obtained, through their own independent efforts, a prior judgment of Mt. Laurel invalidity as to the prior ordinance and during the entire course of that litigation the proposed intervenors did not deem it advisable to seek intervention in that case. AMG Realty and Skytop have not indicated, nor has it been asserted that they have evidenced, any less zeal, ability or preparedness to pursue the present action. AMG Realty and Skytop have the present ability, zeal and preparedness to adequately pursue and protect the interests of Evans and Reiss, if those interests are to overturn the current zoning ordinance of Warren Township as being in violation of Mt. Laurel obligations.

B. Builder's Relief

Do the intervenors seek builder's relief under Mt. Laurel? If they do, it is true that AMG Realty and Skytop will not and do not intend to represent their interests as to this issue. However, it is not Evans and Reiss who seek such relief. They are before this Court, not as builders, but as contract sellers of 64 acres of land at a sale price of \$1,200,000 to Timber Properties. The proposed intervenors are clearly not "plaintiff-developers" as contemplated by Mt. Laurel II, (See 92 N.J. 158 at 279 (1983).)

The proposed intervenors do claim that Timber Properties, because of certain purchase contract conditions, may not obtain sufficient relief to construct at least 300 units and it could thereby terminate the purchase agreement, if the agreement is presently enforceable. This condition is a matter of contract and

Honorable Eugene D. Serpentelli

November 11, 1983

Page 3

a risk which was consented to by Evans and Reiss when they agreed to sell their property to Timber Properties. If Evans and Reiss presently feel that Timber "cannot obtain 300 townhouses on the property" or that Timber can "make a settlement or take a position that would be adverse" (see page 5 of William's Certification), those issues are contract problems. If Timber breaches its contract obligations to use reasonable efforts to satisfy those conditions, Evans and Reiss have a remedy at law. In fact, if Evans and Reiss assume Timber's position as intervenors in this case, does this not possibly leave Timber Properties without adequate representation?

* { Evans and Reiss are not interested in Mt. Laurel relief. They are interested in either completing a sale of their lands to Timber or terminating the sales contract through separate litigation. The intrusion of these parties as plaintiffs in this case serves no useful purpose nor are their interests truly Mt. Laurel in substance.

C. Timeliness

In Allen-Deane Corp. v. Twp. of Bedminster, 121 N.J. Super 288 (App. Div. 1972), remanded, 63 N.J. 591 (1972), the proposed intervenors sought to intervene as plaintiffs in zoning action scheduled for trial approximately three weeks from the application. After denial of the application by the trial court and Appellate Division, the Supreme Court, on a petition for certification, granted the intervention. However, in Allen-Deane the cause of action of the existing plaintiff was to seek "remedial relief to permit the use of its property for specific purposes". 121 N.J. Super at 292. The intervenors sought relief against the ordinance as a whole as being exclusionary and therefore seeking total rezoning under Mt. Laurel principles. Clearly, the interests of the intervenors in Allen-Deane were not subject to adequate representation by a plaintiff who sought only limited rezoning as to its property. In the present case AMG and Skytop seek, as primary relief, the negation of the entire ordinance and this interest is consistent with that of the intervenors.

Thus, for authority that last minute intervention is permissible, Allen-Deane does not apply to this case. Diligence and promptness is required. Hanover Twp. v. Town of Morristown, 118, N.J. Super 136 (Ch. Div. 1972), affirmed 121 N.J. Super 536 (App. Div. 1972). Timber Properties is in this case through a consolidation of its prior suit against Warren Township filed on July 31, 1981, (Docket No. L-67820-80 P.W.). That suit

Honorable Eugene D. Seprantelli
November 11, 1983
Page 4

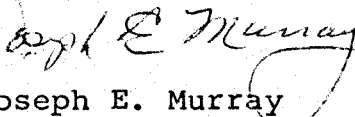
specifically sought Mt. Laurel relief and Timber claimed status therein as a contract purchaser from Evans and Reiss. No effort was made by either Evans or Reiss to intervene in that case which was pending for well over two years prior to its consolidation with this matter. This is not diligence.

CONCLUSION

The proposed intervenors have not demonstrated that the plaintiffs, AMG Realty and Skytop, cannot or will not adequately represent their interests on the basic Mt. Laurel challenge to Warren's zoning ordinance. Nor have they presented themselves as parties who could seek "builder's relief". They have an adequate forum to protect their interests in the Chancery action recently filed by them against Timber and any application to intervene in this case is untimely and unwarranted.

Respectfully yours,

McDONOUGH, MURRAY & KORN
A Professional Corporation


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