

AMG

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Letter in opposition to Shahee  
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JUDGE SERPENTELLI'S CHAMBERS

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May 31, 1984

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

Re: Shainee Corporation v. Township of Warren, et als.

Dear Judge Serpentelli:

On behalf of our clients, AMG Realty Company and Skytop Land Corp., we submit this letter in opposition to the application of Shainee Corporation to consolidate its case with the matter of AMG Realty Company, et als. vs. the Township of Warren, Docket No. L-23277-80 P. W.

It appears that the sole purpose of the initiation of litigation by Shainee Corporation, and the consolidation thereof with the AMG case, is to participate in the "builder's remedy" aspects of the Mt. Laurel doctrine. The limited relief sought by Shainee Corporation is set forth in the proposed form of order submitted by Shainee together with the pleadings set forth in its complaint in lieu of prerogative writ. Initially, our clients oppose the application for consolidation in that it is clear from the face of the documents submitted to the Court that a builder's remedy could not, under any circumstances, be granted to Shainee Corporation. If such a form of relief could not, as a matter of law, be granted to Shainee Corporation, there is no common question of law or fact to which Rule 4:38-1 would apply.

It is submitted that the builder's remedy is, on its face, not available to the Shainee Corporation because the standards for obtaining the same as set forth in Mt. Laurel II (92 N.J. 158 (1983)) could not be met. These standards, as set forth in the decision, include the following:

(a) Proof that the applicant "has acted in good faith" and "attempted to obtain relief without litigation". 92 N.J. at 218. There is no reference in the pleadings of Shainee Corporation or in its brief that any attempt has been made by this

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"sophisticated" group of builders to seek Mt. Laurel housing through the regular channels within the municipal governmental agencies of Warren Township. There is no assertion by the Plaintiff as to when it acquired its status as a contract purchaser. Upon information and belief it is understood that this status was not acquired until approximately the latter half of May of 1984.

(b) The builder's remedy is available only to the builder-plaintiff who "vindicates the constitutional obligation in Mt. Laurel type litigation" (92 N.J. at 218) and is thereby a developer who "succeeds in Mt. Laurel litigation". 92 N.J. at 279. It is clear that Shainee Corporation is not an active builder-litigant who has undertaken this step since it is AMG and Skytop who were the successful litigants both in the first trial on the original Warren Township 1979 ordinance before Judge Meredith and, presumably, together with Timber Properties, Inc., will be successful litigants at least as to the constitutionality of the Warren ordinance in the present case. It is substantially presumptive on the part of Shainee Corporation to take the position that it is a successful litigant at this point. The mere fact that the builder offers to construct Mt. Laurel housing is in and of itself insufficient. It is obvious that Shainee Corporation seeks to ride upon the coattails of those litigants who have complied with the builder's remedy standards as set forth in Mt. Laurel II.

In the event that the Shainee Corporation does propose to construct Mt. Laurel housing and has sufficient lands upon which such housing could be constructed, it is clear that its remedy for such relief would be through the rezoning process that will be most likely ordered by the Court in the final decision to be rendered within the very near future. Shainee Corporation, together with other interested parties in Warren Township, may then petition the Planning Board of Warren Township and the governing body of that Township to include its lands within such rezoning processes as may be necessary to satisfy the pending judicial determination.

To permit the consolidation of the Shainee claim for builder's relief would also require the Court to reopen the trial of the matter with respect to the question of the builder's remedy as to AMG, Skytop and Timber Properties, Inc. Specifically, one of the defenses raised by the Township of Warren was that the consolidation of these three sites in a given geographic area of the community presented substantial environmental problems. The impact of the Shainee Corporation property, being an additional fifty-five acres, could well require the presentation of supplemental testimony from all parties. To reopen the trial at

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this point, even assuming Shainee had standing for builder's remedy, would not appear to be consistent with the purpose of Rule 4:38-1. As stated in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. Super 148 at 145-146, is to eliminate the multiplicity of litigation and to enable courts to arrange pending causes with the same facts and transactions so that the parties would not undergo inconvenience of double litigation. It is double litigation which is promoted by the present application in that the builder's remedy would have to be retried by all parties, not merely Shainee Corporation. Too much time, effort and expense has already been undertaken by AMG and Skytop Land Corp. to establish its rights and the consolidation of the Shainee claim at this time would be vexatious to the present plaintiffs' rights as litigants in this matter and not consistent with the object of the rule. In essence the proposed consolidation is not only too little in the way of substantive rights for the builder's remedy, but too late in the application for participation in this matter.

Respectfully submitted,

McDONOUGH, MURRAY & KORN  
A Professional Corporation

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