AMG

6-25-84

Letter memo in lieu of brief

Pgs. 4
Pi # 3280

AM0001590

BRENER, WALLACK & HILL
ATTORNEYS AT LAW
2-4 CHAMBERS STREET
PRINCETON, NEW JERSEY 08540

(609) 924-0808

CABLE "PRINLAW" PRINCETON
TELECOPIER: (609) 924-6239
TELEX: 837652

HARRY BRENER
HENRY A. HILL
MICHAEL D. MASANOFF**
ALAN M. WALLACK*

GULIET D. HIRSCH
GERARD H. HANSON
J. CHARLES SHEAK**
EDWARD D. PENN+
NATHAN M. EDELSTEIN+
THOMAS L. HOFSTETTER**
ROBERT W. BACSO, JR.+
EDWARD M. BERNSTEIN△
MARILYN S. SILVIA
THOMAS J. HALL
SUZANNE M. LAROBARDIER
ROCKY L. PETERSON
VICKI JAN ISLER
MICHAEL J. FEEHAN

* MEMBER OF N.J. & D.C. BAR
** MEMBER OF N.J. & PA. BAR
+ MEMBER OF N.J. & N.Y. BAR
△ MEMBER OF N.J. & FLA. BAR

June 25, 1984

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

Re: Shainee Corp. v. Township of Waren et al.
Docket No. L-034351-84

Dear Judge Serpentelli:

Please accept this letter memorandum in lieu of a formal brief in support of Plaintiff's opposition to a motion for summary judgement filed by Defendant Warren County Sewerage Authority. This motion, noticed for June 29, 1984 was not received by Plaintiff until June 18, 1984. Although Plaintiff objects to this motion being heard on such short notice, in order to preserve its rights, should your Honor choose to entertain this motion on Friday June 29, 1984, Plaintiff submits the following Affidavit of John Kerwin, President of Shainee, Corp. and accompanying letter memorandum in opposition to the motion filed by Warren Township Sewerage Authority.

Factual Discussion

Plaintiff, Shainee Corporation is an optionee-contract purchaser of a tract of land in Warren Township consisting of more than fifty six (56) acres. It is the intention of Shainee Corporation to assist the Township of Warren in meeting its affirmative obligation to provide housing for low and moderate income families by constructing a housing development which would include homes for these people on this tract. However, in order to provide such housing, higher densities than those currently provided by Warren Township's exclusionary zoning ordinances are needed.

As the enclosed affidavit of John Kerwin shows, the Township openly and publicly declared its opposition to higher density developments and to voluntary rezoning of the Township to meet its constitutional mandate pursuant to Southern Burlington County NAACP v. Township of Mount Laurel 92 N.J. 158 (1983) ("Mount Laurel II").

It was quite evident that, given the publicly stated position of the Township's leaders and elected officials, that to apply for the variances and rezoning necessary to build the Shainee project, and the inevitable resulting appeals, would be futile, a waste of Shainee's resources which could be better used to provide housing for low and moderate income families, a waste of judicial resources, and contrary to public policy.

In its motion papers, Warren County Sewerage Authority seems to infer that Mount Laurel II imposes upon a party the obligation to take actions which are clearly futile. It is Plaintiff's position, as will be discussed more fully below, that no such obligation to undertake useless actions exists.

Substantive Discussion

It is well settled that Summary Judgment may only be granted where there are no genuine issues of material fact in dispute. Judson v. People's Savings Bank and Trust Co. of Westfield 17 N.J. 67 (1954). The purpose of summary judgement is to avoid fruitless litigation. Blum v. Prudential Insurance Co. 125 N.J. super 195 (L. Div 1973). Yet Defendant, in its motion for Summary Judgment, seeks to penalize Plaintiff because Plaintiff did not undertake to do a completely fruitless and useless act. Clearly this is not the intended purpose or use for Summary Judgement.

Contrary to Plaintiff's contention, there is no requirement in the law that a party must put themselves at risk, both in terms of time and expense, and do a completely useless act in order to have its day in court. Indeed, the law in this area is quite clear. A party is not required to do a completely futile act. N.J. Civil Service Ass'n v. State 88 N.J. 605 (1982), Garrow v. Elizabeth General Hospital and Dispensary 79 N.J. 549, 561 (1979).

As the enclosed affidavit of John Kerwin shows, it would be completely futile for Shainee to go to a Township which has publicly declared that it will not rezone to meet its Mount Laurel II obligation and request that it rezone. It is equally apparent that notifying a municipality that its zoning is exclusionary and subject to attack under the constitutional principles enunciated in both Mount Laurel I and Mount Laurel II when that municipality has been litigating these issues since 1980 without any attempt to rezone voluntarily would be of no use in encouraging the Township to take the steps necessary to bring the Township into compliance with the constitutional provisions of Mount Laurel II.

Based upon the knowledge that Warren Township declared publicly that no voluntary rezoning will take place, it is inconceivable that Mount Laurel II would require the futile act of applying for variances or asking a Township which has already gone on the record and stated it will not voluntarily rezone to do precisely what it has adamently refused to do. This is especially true when one notes that Shainee is not the only party to conclude that Warren Township's zoning is exlusionary, and yet the Township has consistantly refused to rezone.

It is well settled, even in situations where a formal mechanism for administrative review has been established, that requiring a party to utilize that mechanism before turning to the Courts is within the discretion of the Judge. New Jersey Civil Service Association, Supra, Garrow, Supra. The standard for determining whether exhaustion of administrative remedies is required was articulated in Garrow, Supra. The Garrow Court found that when administrative remedies would be futile, or irreperable harm would result; when jurisdiction of the agency is doubtful, or when overriding public interest calls for prompt judicial decision; that exhaustion will not be required. Id. at p. 561. All of the above factors are present in the instant case.

Similarly, the assertion of a constitutional claim would also be a factor to be considered in deciding whether exhaustion is to be required. Garrow, Supra. This factor is also present in the instant case. Thus, Plaintiff respectfully requests that Your Honor exercise the vast discretion given to a Mount Laurel II Judge and deny Defendant's motion.

Defendant's motion for summary judgment raises important public policy questions which should only be resolved by this court. The issue posed by Defendant's motion can best be framed as: "What type of notice, if any, is required to be given pursuant to Mount Laurel II, to a municipality which has publicly declared that it opposes the Mount Laurel II doctrine and intends to fight any and all attempts to rezone to meet this doctrine?" This is a purely legal question which can only be addressed by the Court, and not the Township of Warren. Just as exhaustion is not required where the issue is solely a legal one such as interpretation of a statute, See Matawan Borough v. Monmouth County Tax Board, 51 N.J. 291 (1968), so too should exhaustion not apply in the instant case. See also Super-Markets Oil Co., Inc. v. Zollinger 126 N.J. Super 505, 507 (App. Div. 1974), Tavreck v. City of Jersey City, 149 N.J. Super 503 at 509, (Law Div. 1977).

To require Shainee to go through the motions of filing an application for variances which have no chance of being granted or to notify a Township that has publicly stated that it will not voluntarily rezone that it needs to rezone would require Plaintiff to go through a costly, useless exercise. The useless delay which such a requirement would create in these unique circumstances cannot be in the public interest. A municipality should not be allowed to forestall the inevitable result of its refusal to comply with its Mount Laurel II obligation by creating a climate whereby interacting with the Township is a useless waste of time and money and yet, still necessary to bring a Mount Laurel II action.

The United States Supreme Court has long recognized as a general principle that, where the administrative remedy is inadequate, exhaustion is not required. NLRB v. Indiana Union of Marine Shipbuilding Workers of America AFL-CIO and its Local 22 391 U.S. 418, 88 S. Ct. 1717, 20 L. Ed. 2d 706 (1968). The concept of exhaustion of administrative remedies is premised on the assumption that such a remedy is "certainly available, clearly effective, and

completely adequate to right the wrongs complained of." Patrolman's Benevolent Assoc. v. Montclair, 128 N.J. Super 59 (Ch. Cio. 1974). In the instant case, where no such remedy exists, exhaustion should not be required.

Plaintiff, Shainee Corporation respectfully submits that, under the unique circumstances of this case, that they should not have to waste time and limited resources on an exercise in futility by notifying Warren Township that its zoning is exclusionary and by going through the expense of applying for variances which the Township has publicly stated will never be given. R. 4:69-5 does not require a different conclusion.

CONCLUSION

For the reasons stated above Plaintiff, Shainee Corporation respectfully requests that the Motion for Summary Judgment by Warren County Sewerage Authority be denied.

BRENER, WALLACK & HILL

By: Vicki Jan Isler
Vicki Jan Isler

Encl.

cc: Raymond Trombadore, Esq.
John Coley, Esq.
Joseph Murray, Esq.
J. Albert Mastro, Esq.
Eugene Jacobs, Esq.