AMG

4-3-85

letter re: Timber lost other law suit & deemed "no standy"

-w/Opinion of Evans & Reis v. Timber Prop.

pgs. 24

AM0002170

Fwd
Very interesting
pls read

RAYMOND R. & ANN W. TROMBADORE
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW
33 EAST HIGH STREET
SOMERVILLE, NEW JERSEY 08876

TELEPHONE
(201) 722-7555

RAYMOND R. TROMBADORE

ANN WILKIN TROMBADORE
OF COUNSEL

MARILYN RHYNE HERR

April 3, 1985

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, NJ 08754

Re: AMG/Skytop and Timber vs. Warren Township
Mount Laurel Litigation

Dear Judge Serpentelli:

The remedy granted to the plaintiff, Timber Properties, was conditioned on the successful outcome of litigation pending between Timber and the owners of the property. On March 18, 1985, Judge William D'Annunzio issued an opinion finding that the contract between Timber and the owners was terminated in January of 1983. Timber has moved for a new trial and for a stay of any judgment to be entered in the matter. If the motion for new trial is denied, Timber will appeal the decision of Judge D'Annunzio. I will inform the court on the outcome of the application for a stay. Until some determination has been made, we will continue to participate as a party in this matter unless otherwise ordered by the court.

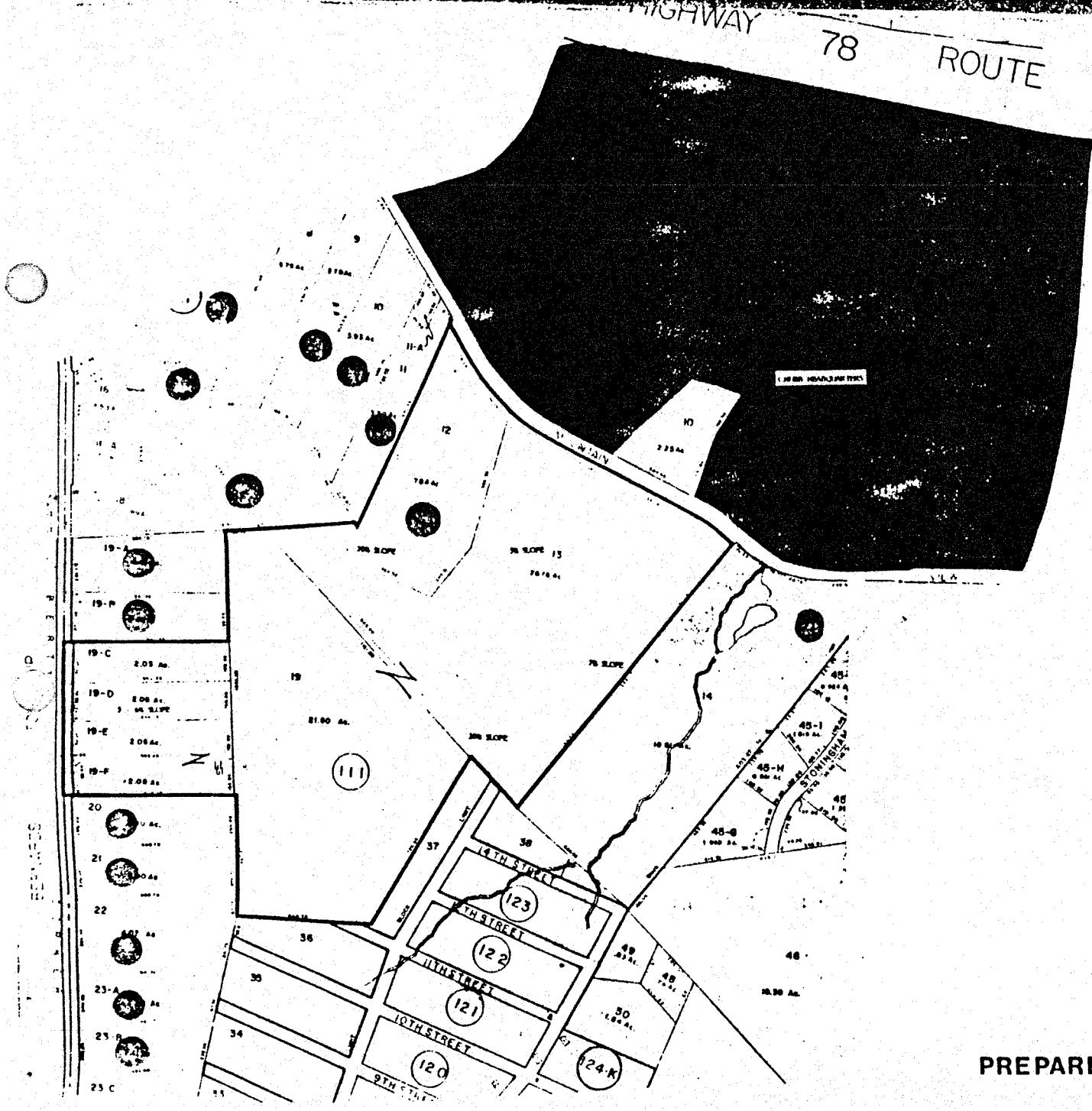
Respectfully yours,

Raymond R. Trombadore

Raymond R. Trombadore

RRT/mmp

cc: Mr. Mitchell Berlant
J. Albert Mastro, Esq.
John E. Coley, Jr., Esq.
Joseph E. Murray, Esq.
Eugene W. Jacobs, Esq.



PROPOSED RE-ZONING
TRACT G

Proposed Zoning Change
From: RR **To:** R-20(TH)

EXISTING LAND USE

Residential

Office

TRACT G

Property Ownership List

Block	Lot	Owner
111		

PREPARED BY: Richard Thomas Coppola
and Associates · May 1983

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION - SOMERSET COUNTY

DOCKET NO. C-4728-83

HENRY W. EVANS and ESTATE OF WALDO F. REIS, Plaintiffs,	:	
v.	:	OPINION
TIMBER PROPERTIES, INC., a New Jersey Corporation, Defendant.	:	

Decided March 18, 1985

Paul R. Williams, Jr., for plaintiffs (Williams & Schirmer, attorneys).

Raymond R. Trombadore, for defendant (Raymond R. & Ann W. Trombadore, attorneys).

D'ANNUNZIO, J.S.C.

Plaintiffs own approximately 64 acres in Warren Township, Somerset County. By a written agreement dated July 10, 1980, plaintiffs agreed to sell that property to defendant, Timber. Plaintiffs contend that in January 1983 they terminated the contract pursuant to its terms and seek a declaration to that effect from this court as well as other relief. Timber denies that the contract was validly terminated and in its counterclaim seeks specific performance of the agreement.

Plaintiffs also contend that in July 1981 defendant breached a contractual provision which required defendant to pay certain sewer charges. Plaintiffs further contend that the sewer charge breach also effectively terminated the contract.

The base purchase price is $1.6 million. In paragraph 2(d) the parties agreed that the purchase price would be increased by $160,000.00 as of July 11, 1981 and by an additional $160,000.00 after the expiration of each 12 month period thereafter. The contract contains contingencies in sub-paragraphs of paragraph five. The major controversy in this case involves the period of time within which the contingencies had to be satisfied as described in paragraph 5(k).

When the contract was executed the property was zoned for single family detached residences. Part of the land was zoned for 1-1/2 acre lots and another part for 1/2 acre lots. It appears that approximately 45 single family residences could be built on the property as zoned in 1980. Paragraph 5(a) made the contract contingent on a variance or zoning change which would enable Timber to obtain final site plan approval for the construction of a minimum of 300 townhouse or condominium type dwellings. Paragraph 5(k) which is set forth in full at page ten of this opinion established the time frame for satisfaction of the contingencies.

Attached to and made a part of this opinion is an appendix which details the chronology of defendant's efforts to effect re-zoning.

Also in controversy are paragraphs 2(a), paragraph 12 and a rider to paragraph 12. They are set out in full:

> (a) In lieu of a down payment, the Purchaser agrees that it will be responsible for payment to Warren Township Sewerage Authority of the

sewer charges in addition to purchase price.

12. Purchaser, in lieu of a down payment has agreed to make all necessary and required payments for the sewerage treatment plant servicing the subject premises. In the event approvals are not granted, the service charges and related fees shall be a lien against the property and Seller shall execute a note and mortgage to the Purchaser securing said indebtedness.

Rider to Paragraph 12. Said mortgage shall be for a term of 18 months from the date of the termination of this Agreement, and shall be due sooner on sale of the property, interest only payable quarterly, the rate of interest to be determined by the prime interest rate fixed b· Citi Bank, New York, New York, at the time of execution of said mortgage.

THE SEWER PAYMENT CONTROVERSY

The provisions dealing with payment of a sewer charge arose out of the fact that prior to the contract with defendant, plaintiffs had reserved capacity in a proposed sewage treatment plant to be constructed by the township's sewerage authority. The reservation of this capacity is evidenced by agreement dated September 18, 1979. It obligated plaintiffs to pay 1.94% of the cost of the sewer project. At the time the reserve capacity agreement was executed and at the time the contract with the defendant was executed the parties were uncertain as to when payment to the sewerage authority would have to be made and were also uncertain as to the amount of that payment.

By letter dated May 21, 1981 the sewerage authority demanded payment pursuant to the reserve capacity contract in the amount of $138,173.68. Payment was demanded by noon on Tuesday, July 10, 1981. Failure to make the required payment would result in forefeiture of the reserved capacity. By letter dated June 2, 1981 plaintiffs' attorney

William Peek, wrote to defendant's attorney advising him of the need to make the sewer payment before July 10, 1981. For some reason unconnected with the parties to this litigation the payment date was extended by the sewerage authority to July 20, 1981.

Plaintiffs' demand that defendant pay the sewer charge engendered a controversy. During a series of contacts between June 2, 1981 the date of Mr. Peek's demand letter, and the payment deadline of July 20, Mitchell Berlant, defendant's president, expressed reluctance to pay the sewer charge. His position was communicated not only to Mr. Peek but also to John Reis, the co-executor of the estate of Waldo Reis, one of the plaintiffs in this case. Berlant speculated that the sewer charge might be illegal. He also expressed reluctance to expend a substantial sum of money pursuing a contract with a potential termination date of January 1983. Berlant informed Reis that this would not give him enough time to pursue a zoning change because litigation against the township probably would be required to effect a zoning change. Berlant wanted the time for performance of the contract extended in exchange for his payment of the sewer charge. It is not surprising that these discussions were taking place in July 1981 because that is when defendant commenced suit against Warren Tp. to force re-zoning, having realized that the township would not re-zone voluntarily. See appendix. The parties finally focused on a proposal that plaintiffs would extend the time for satisfaction of the contingencies for a total of eight quarters to January 1985. Defendant would pay for those extensions at the rate of $20,000.00 per quarter. In the event title closed pursuant to the contract the amounts paid for the extensions would be credited against the purchase price. In exchange for these extensions

Berlant agreed to protect the sewerage capacity by one of several possible methods: procuring an extension for payment from the sewerage authority; suing the authority while paying the amount due into court; or paying the amount due on or before July 20. "As a result of those conversations and meetings, the last one occuring on July 17, 1981, Mr. Peek drew a supplement to the agreement in longhand on Saturday, July 18. Eventually this proposed supplement was typed although it is not clear whether it was typed by Peek's office or by the office of Mr. Weinberg, defendant's counsel. In any event, the court is satisfied that P-5 represents the proposed supplement designed to resolve the controversy over the sewer payment. It was never executed.

On Monday, July 20, defendant's attorney, Mr. Weinberg, asked Mr. Peek if he had the note and mortgage ready. The court finds that this is the first reference by defendant to any requirement that plaintiffs execute a note and mortgage to secure repayment of the sewer moneys in the event title did not close. Defendant was taking the position that the note and mortgage had to be executed by plaintiffs at the time defendant paid the sewer moneys and that plaintiffs' obligation to pay interest commenced at the time defendant paid the sewer moneys. Defendant continued to insist that interest accrued immediately and that the note and mortgage were to be executed immediately. Plaintiffs refused to accede to defendant's request and in response defendant refused to pay the sewer charges. Plaintiffs eventually borrowed the funds and paid the sewer charges.

Plaintiffs allege that defendant's failure to pay the sewer

charge constituted a material breach of the contract entitling plaintiffs to a judgment of this court that the contract was terminated. The contract very clearly states in paragraph 2(a) that purchasers would be responsible for the sewer charges and that the sewer charges would be in addition to the purchase price if title closed. Paragraph 12 repeated purchasers obligation "to make all necessary and required payments for the sewerage treatment plant ... ." The obligation on defendant to pay the sewer charge was absolute and unconditional. Only if the contingencies were not met and title did not close was defendant entitled to the return of the money it had paid. That entitlement is clearly stated in paragraph 12 which provides "in the event approvals are not granted, the service charges and related fees shall be a lien against the property and seller shall execute a note and mortgage to the purchaser securing said indebtedness."

Defendants position that the note and mortgage were to be executed when defendant paid the sewer charge is inconsistent with paragraph 2(a) which provides in effect that defendant is to pay the sewer charge in addition to the purchase price if title closes.

Plaintiffs however were willing to give defendant a note and mortgage in 1981 provided interest did not begin to run unless and until the contract was terminated without a closing. Defendant rejected that compromise and insisted that interest accrue immediately. Since the sewer charge was in the nature of a down payment it would be anomalous to expect the sellers to finance the purchasers down payment by paying the interest on it. The anomaly is compounded by the fact that the payment would be in addition to the purchase price when title closed. Sellers therefore would be paying interest on a portion of the price to be paid

to them by the defendant. The language is clear and unambiguous. The rider added by Mr. Weinberg which provides that the mortgage "shall be for a term of 18 months from the date of the termination of this agreement" supports the court's interpretation.

Accordingly, defendant breached the contract in July 1981. As a result, plaintiffs are entitled to interest on the amount paid by them or on their behalf to the sewerage authority from the date of payment.

Plaintiffs take the position that defendant's failure to pay the sewer charges constituted a material breach of the contract thereby terminating the contract. Indeed, plaintiffs, by letter of their attorney, Mr. Peek, dated July 21, 1981 expressed that position to the defendant. Plaintifs seek a judgment of this court that as a result of that breach the contract was terminated and is no longer in force. Although the court is of the opinion that defendant committed a material breach of the contract by its failure to make the required sewer payment, it is also this court's opinion that plaintiffs, by their subsequent conduct, waived their right to a termination of their responsibilities under the contract. Frank Stamato & Co. v. Borough of Lodi, 4 N.J. 14 (1950). Despite their lawyer's letter of July 21 terminating the contract, plaintiffs acquiesced in the continued exercise of rights under the contract by the defendant. Reference to the appendix reveals that between July 1981 and January 1983 defendant was engaged in continuing efforts to effect re-zoning. Those efforts took the form of prosecution of a suit and, subsequent to Judge Meredith's May 1982 decision, appearances before the planning board. The direct and circumstantial evidence satisfies the court that plaintiffs were aware of these efforts and acquiesced. The court is

satisfied that Mr. Evans, a former township official, had his ear to the ground and knew of and continued to support Timber's efforts. Although periodically plaintiffs took the position with defendant that the contract had been terminated plaintiffs did nothing to effect that point of view. At no time before January 1983 did plaintiffs commence suit for a judgment of termination. At no time did plaintiffs inform Warren Township that defendant had no further rights to the property and therefore no standing to continue its efforts to effect a zone change. This suit was commenced by plaintiffs in November 1983 more than two years after the defendant's sewer charge breach. Furthermore, it was not until the summer of 1983 that plaintiffs attempted to interdict defendants zoning litigation on the grounds that defendant lacked standing. These circumstances also support a finding that plaintiffs are estopped by their acquiescence from relying upon the sewer breach as a ground for termination. See, Taner v. Atlantic Cas. Ins. Co. of Newark, 37 N.J. Super. 9 (App. Div. 1955).

Although failure to pay the sewer charge does not result in termination of the contract, the circumstances surrounding that controversy are instructive to the court. Those circumstances demonstrate a willingness on the part of defendant to resort to expediency and machination as well as distortior of plain contract language. During the cross examination of plaintiff's witnesses, Peek, Reis and Evans, defense counsel referred to Exhibit D-2. That exhibit is a form of mortgage note, unexecuted, dated July 20, 1981. It was drawn by Mr. Weinberg in the principal amount of the required sewer charge. By its terms it was payable 18 months from the termination of the contract in question and provided

that interest would begin to run upon termination of that contract. That form of mortgage note was in compliance with the contract. Defense counsel questioned plaintiffs' witnesses about D-2 implying by the form of the questions that they had previously seen and had been presented D-2 by Mr. Weinberg on or about the 20th of July. Each witness denied having seen that instrument. Of course, if such an instrument had been presented to plaintiffs or their counsel on or about July 20, 1981 such a tender would go far towards undercutting plaintiffs' allegation that defendant had breached the contract by its refusal to pay the sewer charge unless plaintiffs began to pay interest on it.

Mr. Weinberg testified that he had D-2 in his file when he arrived at Peek's office on July 20. Weinberg did not testify that he in fact presented D-2 to plaintiffs. To the contrary, he testified that he did not believe he handed it to plaintiffs' attorney. That testimony contradicts a hand written ink scrawl at the top of D-2 which states in part "delivered to Peek refused." It is quite clear from the testimony of Peek, Reis, Evans and Weinberg that D-2 was never delivered to plaintiffs or their attorney and indeed was never tendered. The machination becomes more complex because in his file Mr. Weinberg also had D-2 b, a note and mortgage requiring the immediate payment of interest on the sewer charge. The court finds that Weinberg pressed plaintiffs for execution of a note and mortgage requiring immediate accrual of and quarterly payment of interest as a condition of the sewer payment by defendant knowing that the condition was a breach of the agreement. In his testimony, Weinberg cynically described D-2, the no

interest note and mortgage, as his "back-up" position. According to Weinberg, Timber would have paid the sewer charge if plaintiffs had signed D-2. Of course, D-2 was never presented to plaintiffs. A subsequent exchange of correspondence, J-5-J-9 confirms that Timber's position was and remained that interest would accrue immediately. In addition, although expressing a willingness or an intention to pay the sewer charge, and although he testified that he saw a check drawn by Berlant to cover the sewer charge, Weinberg did not have the check with him when he appeared at Peek's office on July 20. Although Mr. Weinberg was the point man for the defendant in these machinations, the court infers that defendant's president, Mr. Berlant, was aware of and played a part in these tactics.

THE TERMINATION DATE CONTROVERSY

This controversy requires interpretation of section 5(k) of the contract. That section consists of two full paragraphs totaling twenty lines. It provides:

(k) The Purchaser shall have 18 months from the date of this agreement, to obtain all necessary approvals without payment of any kind due to the Seller. In the event that the Purchaser is actively and diligently pursuing its application for a zoning change or variance, or any other municipal permission or through the courts, for the building permit at the expiration of the 18 month period, the Purchaser shall be granted a six month extension period in order to pursue his application before such authority and through the courts should such application to the courts become necessary. 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 expediously prosecute any appeal in accordance with Rules of the Court.

Notwithstanding any other provision in 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.

(The court has added line numbers for ease of reference.)

Pursuant to the last paragraph of subsection 5(k), lines 17-20; (referred to as the termination paragraph) the plaintiffs attempted to terminate the contract by letter dated January 4, 1983. (J-19 in evidence). It informed defendant that "the seller does hereby exercise the option to terminate the contract as of January 17, 1983, and by this notice does advise you that any outstanding interest in said contract will expire January 17, 1983."

Defendant did not acquiesce in this attempted termination. Defendant takes the position that so long as it is in the courts pursuing satisfaction of the re-zoning, subdivision and site plan approval contingencies, it has an indefinite amount of time to fulfill those contingencies, and until litigation has fully run its course the contract cannot be terminated.

Plaintiff's position is that although litigation was contemplated and is specifically mentioned in the first paragraph of subsection 5(k) the termination paragraph established an outside termination date giving the seller the right to abrogate.

A reading of subsection (k) reveals some ambiguity. Lines 9-16 are consistent with defendant's interpretation. Lines 17-20 are consistent with plaintiff's interpretation. It is the court's obligation to resolve the ambiguity and determine the intent of contracting parties as expressed in the contract from all the surrounding circumstances.

The contract went through several drafts and extensive negotiations before it was executed in its final form as represented by J-1 in evidence. The court finds that P-1 is the original draft and that P-1 was drawn by defendant's counsel, Mr. Weinberg. Section 5(1) on page nine of P-1 is the section which described the time for

satisfaction of the contingencies. In J-1 that section is 5(k). P-1 did not contain the termination clause, lines 17-20, which J-1 contains. In fact, that termination paragraph was not added until the final draft of the contract. P-1 gave the purchaser a six month extension period to pursue his application "before such authority and through the courts should such application to the courts become necessary." It further provided that if the contingencies remained unsatisfied after the first extension that the purchaser would have a second six month extension period. There followed the language that is also in J-1 about the seller extending time for performance necessary to litigate the issues.

P-1 established the price at $1,000,000.00 with no provision for price escalation during the time necessary to satisfy the contingencies. It also provided for a token $1,000.00 down payment. Section 5(b) provided that if development costs, as defined therein, exceeded a certain amount the purchaser would have the right to terminate the agreement. Section 5(d) made closing contingent upon the issuance of building permits. Of course, title was to be good and marketable.

In what appears to be an initial analysis of the proposed contract, plaintiffs lawyer, Mr. Peek, prepared a memorandum dated April 23, 1980. It is D-6 in evidence. In that memorandum, he expressed concern about the time necessary to process an application before municipal boards. He recommended as an alternative to the proposed contract an unconditional sale with closing to take place within four months. He also expressed concern about leaving questions of marketability of title open until satisfaction of contingencies and also expressed his disapproval of a building permit contingency. Although it is not expressed in his memorandum

Peek, according to Weinberg, became concerned about the possibility of endless litigation tying up the property.

Peek's efforts on behalf of the plaintiffs eventually resulted in contract revisions which limited the seller's options. Peek required the purchaser to submit a title binder and search on the property within two months from the date of the contract and to notify the sellers of any title objections it may have existing at that time. The purpose of the provision is to face and resolve any title problems shortly after execution of the contract rather than waiting until the contingencies have been resolved. That language is now in section 5(j) of J-1.

In addition, the paragraph giving the purchaser the right to terminate the contract if development costs exceeded a certain amount was eliminated.

The building permit contingency was also eliminated and section 5(o) requires closing within 60 days after final site plan approval and evidence that all utilities are available.

Negotiations also resulted in an increase of the purchase price to 1.6 million dollars. The increased purchase price is in P-3 which appears to be the third draft of the contract. As previously indicated, purchasers were required to make the sewer charge payment in lieu of a down payment.

Early in the negotiations and while the purchase price remained at $1,000,000.00, sellers demanded and received a contract clause in section 2(d) for a 10% increase in the purchase price after the expiration of 12 months from the date of the contract. Purchaser also agreed to pay an additional 10% of the purchase price for each 12 month

period thereafter. That language is introduced into the drafts beginning with P-2 in evidence. That clause is also found in P-3 and exists in the contract actually signed by the parties, J-1, although in different language. In section 2(d) of J-1 the agreed upon increase is not stated in a percentage but in the absolute amount of $160,000.00 after the expiration of 12 months and $160,000.00 after the expiration of each additional 12 month period without closing. In light of one of the arguments of the defendant which will be considered later, it is sifnificant that the 10% annual price increase was introduced into the drafts at an early stage.

Regarding the time for performance as set forth in section 5(k) drafts P-1, P-2 and P-3 contain language giving the purchaser 18 months plus two six month extensions. Draft D-7 contains the same two six month extensions as draft D-8 however, D-8 which was Mr. Weinberg's working copy has a red line through the language granting the second six month extension. In D-9 language granting the second six month extension is eliminated. But D-9, which was a late draft, does not contain the termination paragraph, lines 17-20, which is in the final executed contract.

Defendant argues that the time for satisfaction of the contingencies was open-ended as long as defendant was in court attempting to force the municipality to re-zone in such manner that would satisfy the contract contingencies. In support of his argument, defendant very specifically argues that the additional $160,000.00 per year to be added to the contract price after 12 months from the date of the contract was consideration for the indefinite time period during which defendant could pursue zoning litigation. The court totally rejects that argument.

As previously indicated, language requiring an annual price escalation was introduced into the contract in draft P-2, one of the early drafts in this negotiation. It was introduced into the contract long before the addition of the termination paragraph, lines 17-20. It is clear from Peek's memo, D-6, that a price escalation clause was an inflation hedge.

During the trial, defendant through its witnesses, Weinberg and Berlant, testified that if Timber was not in court but was before the municipal authorities on July 10, 1982, two years after the execution of the contract, that is, 18 months plus an additional six month extension, then plaintiff had the right to terminate. That is, defendant's position. Stated another way, time available subsequent to July 10, 1982 for contingency satisfaction could relate only to court action. If that is the case the termination paragraph with its January 2, 1983 date could only be applicable to court action thereby modifying the apparently open-ended litigation language in lines 9-16.

It is very clear that sellers negotiated for and won the elimination of the second six month extension period. The eliminated six month extension, as well as the first extension, was granted to allow the purchasers to "pursue her application before such authority and through the courts ... ". It is unlikely that a second specific extension period for court action would be eliminated if the intent of the parties was to grant an indefinite amount of time to pursue judicial intervention.

The court recognizes that the plaintiff sellers are fully committed by this contract. Because the contract contains such major contingencies the purchasers are not fully bound. The contract has the characteristics of a unilateral agreement. In Stamato v. Agamie, 24 N.J. 309 (1957) a case involving a contract for the sale of land which was

contingent on re-zoning, the court stated:

> It would be unreasonable to find that the party who alone is fully committed agreed to be bound interminably, and hence in these circumstances the agreed time limitations are more meaningful than in situations in which the obligations are bilaterally firm." (at 316)

The phrase "bound interminably" from the Stamato opinion is perceptive and prophetic. Peek was concerned about endless litigation. And that is what has occurred. The fifth anniversary of the contract is approaching and, despite years of litigation, plaintiff's lands are not yet re-zoned. They are in the process of re-zoning pursuant to a Mt. Laurel decision of Judge Serpentelli in the consolidated cases of AMG Realty Co. v. Tp. of Wayne, L-23277-80 P.W. and Timber Properties v. Tp. of Warren, L-67820-80 P.W., rendered July 16, 1984. Defendant's attorney concedes that the prospects for years of additional litigation are real because of the potential of an appeal by the Township and litigation to compel the Warren Township Sewerage Authority to provide adequate capacity. Furthermore, the site plan-subdivision process has yet to be commenced.

Considering the circumstances at the time of the negotiation of the contract (including the ages of Waldo Reis, 76, and Evans, 68) the negotiations, the evolution of the drafts, sellers' attorneys concerns about and efforts to close "open ends" and the clear language within the termination paragraph, the court is satisfied that the parties intended that the sellers have the right to terminate the contract if title had not closed by January 2, 1983. The sellers exercised that right.

Berlant's expressions of concern during the sewer payment dispute in 1981 about not having enough time to litigate the township's zoning and his attempts to re-negotiate time for performance (see page of this opinion) is further support for the court's conclusions because it establishes his awareness of sellers' right to terminate in January 1983. Cf. Purich v. Weininger, 72 N.J. Super. 344 (App. Div. 1962).

The court's conclusion also harmonizes the termination paragraph and lines 9-16 of section 5(k). The earlier lines, 9-16, give defendant the right to continue its pursuit of litigation beyond the initial 18 month period and one six month extension. The termination paragraph gave the sellers the right to draw the line and terminate the contract six months later.

The court does not suggest that exercise of the right of termination by sellers would be valid regardless of the state of the contingencies. There is an implied covenant of good faith and fair dealing in every contract which was well expressed in Association Group Life, Inc. v. Catholic War Vets, 61 N.J. 150 (1972):

> In every contract there is an implied covenant that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.' 5 Willison on Contracts §670, 159-160 (3rd ed. 1961) (at 153)

See Anderdonk v. Presbyterian Homes of N.J., 85 N.J. 171 (1981).

Did sellers violate the covenant of fair dealing when they terminated the contract? Stated another way, was sellers exercise of the option reasonable at the time? The answer depends upon the status of the contract in January 1983, especially the contingencies.

After defendant's request for re-zoning was rejected by the township, defendant sued the township in July 1981 alleging a cause of action based upon Mt. Laurel I. A similar suit had been started previously by AMG Associates. (See appendix.). The AMG suit was tried in May, 1982 resulting in a decision by Judge Meredith invalidating Warren's zoning ordinance and ordering the township to re-zone. Timber's zoning counts were dismissed as moot.

Responding to Judge Meredith's order, the planning board and the township held meetings in the fall of 1982 culminating in a new ordinance adopted in December 1982. J-26 in evidence. This ordinance re-zoned plaintiffs' property in a manner which would fulfill the re-zoning contingency. That being the case, a powerful argument could be made that termination of the contract in January 1983 was unreasonable because the defendant was at the threshold of success. But the argument would be specious. The new ordinance was specifically made subject to Judge Meredith's approval. It was highly unlikely that he would approve it because the new ordinance defiantly did not re-zone the lands of AMG, the successful litigant.

Clearly, in January 1983, the defendant was not on the threshold of success. It was on the threshold of more litigation and that is what happened. (See appendix.). Judge Meredith did not approve the ordinance and additional litigation ensued which continues two years later as this decision is being rendered.

Under the circumstances existing in January 1983, plaintiffs' decision to terminate was a reasonable exercise of the power granted by the termination paragraph and did not violate the implied covenant of good faith and fair dealing.

The contract is void and shall be discharged of record.

Because of its breach of the obligation to pay the sewer charge, defendant is obligated to compensate plaintiffs for the interest paid on the moneys borrowed by plaintiffs to pay the sewer charge. The exhibit, P-16, is not clear as to the amount of interest paid by plaintiffs. For example, the amount borrowed is reported as $150,000.00 (see P-8a and 8b). But the sewer charge was less than that. If the parties cannot agree on the amount of interest, the court shall be notified and a hearing held.

Defendant is also responsible for taxes from July 10, 1981 to January 17, 1983, the date of termination. Those taxes total $11,170.65.

APPENDIX

CHRONOLOGY OF EFFORTS TO RE-ZONE AND ZONING LITIGATION

DATES	
July 10, 1980	Date of Contract
December 15, 1980	Application to Township Committee for Re-zoning
January 9, 1981	Township Committee refers matter to Planning Board
January 14, 1981	Timber requests a hearing before the Planning Board
March 9 and 13, 1981	Timber makes its presentation to the Planning Board
June 2, 1981	Planning Board announces that it will make no recommendation on Timber's request for re-zoning
June 10, 1981	Timber repeats its request to the Township for re-zoning
June 15, 1981	A letter from the Planning Board to the Committee indicating that a decision to re-zone would be premature and presumptuous
July 23, 198	Timber files a complaint against Warren Township charging exclusionary zoning and requesting a builders remedy under Mt. Laurel I. In addition there is a separate count against the Warren Township Sewerage Authority.
November 6, 1981	Pre-trial conference
May 12, 1982	Timber receives a notice fixing a trial date of June 21, 1982
May 19, 1982	Trial in AMG v. Warren Township begins
May 23, 1982	Judge Meredith renderes a decision in the AMG case and declares Warren Township's ordinance invalid.
May 24, 1982	Timber files a motion for summary judgment against Warren Township. Warren Township files a motion to dismiss Timber's suit as moot.

DATES

July 7, 1982	Judge Meredith denies Timber's summary judgment-- motion but dismisses those counts of the Timber complaint seeking re-zoning as he considers those counts to be moot. The remaining counts are placed on the inactive list.
September 29, 1982	The Planning Board holds public meetings regarding re-zoning pursuant to Judge Meredith's order.
October 1982/ November 1982	Additional Planning Board meetings
November 4, 1982	Introduction of a new zoning ordinance
December 2, 1982	Adoption of that new ordinance subject to Judge Meredith's approval
February 1983	AMG commences a new suit attacking the new ordinance and also relying upon Mt. Laurel II which had been decided in January 1983
April 1983	Judge Meredith reinstates Timber's complaints against Warren Township The case is referred to Judge Serpintelli as a Mt. Laurel judge.
May 25, 1983	The township moves to dismiss Timber's complaint or to consolidate it with the AMG suit
July 29, 1983	Motion to dismiss is denied. Motion to consolidate granted. Township reserves the right to move to dismiss Timber's suit because of Timber's lack of standing. Timber was allowed to amend its complaint and the amended complaint is filed on July 29, 1983. Thereafter the township moves to dismiss for lack of standing and plaintiff's attorney Mr. Peek files an affidavit in support of that motion. The plaintiffs took the position that Timber had no further rights under the contract.
October 25, 1983	The motion on the grounds of lack of standing is denied
November 8, 1983	Motion by Reese and Evans to intervene
December 8, 1983	Motion to intervene is denied
January 3, 1984	Trial [illegible]

DATES

January 6, 1984	The settlement is announced. Thereafter the settlement is rejected by the township committee
March 19, 1984	AMG v. Warren Township and Timber Properties v. Warren Township is tried.
July 16, 1984	Judge Serpintelli decides the case
August 1984	Judge Serpintelli enters judgment and Warren is ordered to re-zone within 90 days.
October 19, 1984	Expiration of the 90 day period
October 21, 1984	The 90 day period is extended until November 30, 1984
Mid-January 1985	The township submitted its proposed compliance ordinance to Judge Serpintelli and AMG and Timber took exception to the ordinance and have asked for a hearing. The hearing is to be held after receipt of the standing master's report.