

AMG

5-6-85

Letter Memo in opposition to  
NOM to join Evans & Reiss as P.

PSS. 3  
P: # 3292

AM000226 D

## KUNZMAN, COLEY, YOSPIN &amp; BERNSTEIN

MAY 8 1985

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAWEDWIN D. KUNZMAN  
JOHN E. COLEY, JR.  
HARRY A. YOSPIN  
STEPHEN J. BERNSTEIN  
HAROLD J. LEVY\*  
JOHN V. BIVONA\*  
SIDNEY COHEN\*  
STEVEN A. KUNZMAN  
HAROLD DRUSE  
ANNE LORUSSO CASCONI  
MICHAEL J. MCCAFFREY  
RONALD J. THELEEN\*\*MICHAEL A. PATICCHIO  
OF COUNSEL\*NY BAR ONLY  
\*\*NJ & PA BARJUDGE SCOTT PELLETTI CHAIRMAN  
15 MOUNTAIN BOULEVARD  
WARREN, NEW JERSEY 07060

(201) 757-7800

ASSOCIATED WITH:

LEVY, BIVONA &amp; COHEN

PARTNERSHIP OF NEW YORK ATTORNEYS

10 EAST 40TH STREET  
NEW YORK, NEW YORK 10016  
(212) 889-2520

ADDITIONAL OFFICES:

LOS ANGELES, CA

(213) 553-4114

PHILADELPHIA, PA

(215) 735-2890

WASHINGTON, D.C.

(202) 466 6044

May 6, 1985

Honorable Eugene D. Serpentelli  
Ocean County Court House  
CN-2191  
Toms River, NJ 08754Re: AMG Realty Company, et als. vs. Township of Warren  
Docket Nos. L-23277-80 P.W. & L-67820-80 P.W.  
Our File No. W-129

Dear Judge Serpentelli:

Kindly accept this letter memorandum in opposition to the Notice of Motion scheduled for May 10, 1985, made by Paul R. Williams, Jr., on behalf of Henry Evans and the Estate of Waldo F. Reis the motion seeks to have the parties become a plaintiff with all the rights and responsibilities that have accrued to Timber Properties, Inc. in the within action or in the alternative to allow the movants to intervene in this action if Timber Properties is allowed to remain. In regard to the motion to dismiss Timber Properties, Inc. as a plaintiff, we, on behalf of The Township of Warren, do not oppose this aspect of the motion as has been stated previously by this office.

The primary concern in this matter is the attempt of the movants to become a party plaintiff with all the rights and responsibilities that accrue to Timber Properties, Inc. under the prior Orders and Interim Judgment of the Court, including the builder's remedy, if in fact it is applicable. The builder's remedy was initially discussed in Oakwood at Madison v. Township of Madison, 72 N.J. 481, 549 (1977). The Court, in Oakwood, created the "builder's remedy" because the "corporate plaintiff's have borne the stress and expense of this public interest litigation, albeit for private purposes ..." Id. Therefore, the Court deemed it necessary and appropriate, in rare circumstances, to mandate that the builder's parcel be rezoned to allow multi-family development. This "remedy" was proposed

Honorable Eugene D. Serpentelli  
Page Two  
May 6, 1985

as an "incentive for the institution of socially beneficial but costly litigation ..." Id. at 550-551. The Court in Mt. Laurel II expanded the "builder's remedy" by making it more readily available to the litigating parties. 92 N.J. at 279. The basic reasoning, however, remained the same: there must be a reward for the diligent effort to uphold the constitution -- even if that is not the main reason why the developer instituted the litigation. The point is that the builder's remedy was designed to tempt a builder to litigate the exclusionary zoning issues and to give them a firm reward for successful litigation. If there were no builder's remedy, builders may find themselves successfully defeating a municipality on a challenge to their zoning, yet find that his parcel was not rezoned in accordance with the Mt. Laurel doctrine. Realizing that public interest groups may not be able to withstand the cost of this litigation, the Supreme Court felt it necessary to offer this brass ring to the developer.

The movants herein, Henry W. Evans and the Estate of Waldo Reis, have not litigated the Mt. Laurel issues in this case. While they are owners of property for which a litigating party, Timber Properties, Inc.; was a contract purchaser, Timber Properties, Inc. expended the monies to pursue this litigation through two trials and over a period of many years. While Reis and Evans may have paid taxes, sewer charges and interest on loans taken out for purposes of paying the sewer charges, these are charges which would have had to have been paid anyway as a result of ownership of the property. This is not expenses put towards the cost of litigation, or in any sense placed towards the cost of vindicating constitutional rights of the general population of the State of New Jersey. There is no indication in Mt. Laurel I, Mt. Laurel II nor any of the cases related thereto, that the builder's remedy is tied with the land. As stated by the movant at pages 5 and 6 of his certification, where Mt. Laurel II is cited, there are two requirements in order to obtain a builder's remedy. First, a developer must succeed in Mt. Laurel litigation. Second, the developer must propose a project providing a substantial amount of lower income housing. In the present case, Reis and Evans claim to have satisfied the second aspect, in that they claim to have proposed a development which provides a substantial amount of lower income housing. They have not, however, pursued the Township in litigation and successfully obtained a judgment from the Court claiming that the Township's Zoning Ordinance is unconstitutional. If the movants are allowed to intervene as requested, it would mean that any property owner could present their plan to the Township and claim that they were entitled to builder's remedy. By the mere fact that Timber Properties was pursuing this litigation as an owner or contract purchaser of the same property which is the subject of the Reis and Evans claim, does not make the builder's remedy enure to the property. Indeed, the Court, in Mt. Laurel litigation, looks first to the litigant to determine whether a builder's remedy is appropriate. Once the builder's remedy is awarded the Court then looks

Honorable Eugene D. Serpentelli  
Page Three  
May 6, 1985

at the property and determines whether it is capable of sustaining the proposed development. In short, it is the litigating developer who is entitled to the benefit, not the property over which the developer claims proprietary rights. Therefore, it is respectfully submitted, that Reis and Evans have no place in the within litigation. They are not Timber Properties, they have not heretofore litigated this matter, and they were not one of the parties who obtained the judgment that the zoning ordinance of the Township of Warren was unconstitutional. As the Court may recall, this matter had been discussed on numerous occasions by the parties to the within matter, and it is my understanding that it was agreed that a builder's remedy is the right of the litigating developer and does not run with the land which, during the time of litigation, was the subject development proposals.

In respect to the movant's desire to intervene and to maintain its position along with Timber Properties in the within litigation, it is respectfully submitted that this is also improper. The issues of Mt. Laurel are regarding the constitutionality of municipal zoning ordinances. The primary issue is whether the zoning ordinance satisfactorily takes into account the "general welfare" as required under the constitution of the State of New Jersey. The issues have been thoroughly tried before this Court. The Court has made its determination. The issues before the Court at present regards the revision of the Warren Township Zoning Ordinance whether the new ordinance will comply with the constitutional directives of the Supreme Court of this State. The intervenors, have taken no action to date to uphold the constitution. Additional parties will be of no assistance in the compliance aspect of this matter and will only serve to confuse and make more difficult the job of the litigating parties, the Court, and the special master. Inasmuch as the movants have no right to a builder's remedy, there is no ground or reason for them to be present in this litigation as an intervenor.

In conclusion, it is respectfully submitted that the motion of the intervener, Henry Evans and the Estate of Waldo Reis, be denied.

Respectfully submitted,

KUNZMAN, COLEY, YOSPIN & BERNSTEIN

John E. Coley, Jr.

JEC:eg

cc: All counsel  
Township Committee/Township of Warren