APPENDIX IV

MATTER OF FRANKLIN INDUSTRIES

Decided September 25, 1972

WHEREAS, application has been made by Franklin Industries, a partnership, with respect to premises known and designated as Block 51 Lot 12 on the Tax Map of the Borough of Franklin for a variance to permit construction of a building to be used for the operation of a retail nursery and landscaping business in the R-10 Residential District contrary to the provisions of the zoning ordinance of the Borough of Franklin, and

WHEREAS, hearings were held before this Board on May 17, 1972, and July 19, 1972 before Mr. Beverly Post, Mr. Stephen Wronka and Mrs. Louis Alexander, (Mr. Maurice Kopens disqualified himself and took no part in the hearing or determination of this matter), and

WHEREAS, Mr. Dana Farber was present at the hearing held on May 17, 1972 and has read the transcript of the continued hearing held on July 19, 1972, and

WHEREAS, George W. Nemeth was not present at the hearing on May 17, 1972 but had read the transcript of the testimony taken at said hearing and was present at the continued hearing on July 19, 1972, and

WHEREAS, petitioner has filed an affidavit showing compliance with all the statutory requirements as to the giving of notice as well as all requirements of the zoning ordinance of this Borough,

NOW THEREFORE BE IT RESOLVED by the Zoning Board of Adjustment of the Borough of Franklin as follows:

This is a new application seeking a use variance to permit the use of premises designated as Block 51 Lot 12 on the Tax Map of the Borough of Franklin containing 1.19 acres for commercial purposes, viz. for the operation of a retail nursery and landscaping business. A similar application was made by the same petitioner and the request for variance was denied by this Board on March 15, 1972, **Matter of Franklin Industries** 2 F.B.A.R.46. During the hearings on the second application, a stenographic record was taken and a transcript furnished to the Board covering some 147 pages. On the basis of the testimony and exhibit, we find the facts to be as follows:

The proposed building plans are the same as presented in connection with the previous application, and the site plan is substantially the same except that the proposed building has been moved closer to the southerly boundary line of the property so that the building would be 102 feet from Walsh Road. There is a reduction in the size of the lath house, and also a proposal for a screen planting on the northerly line of the property abutting Walsh Road. Otherwise, the site plan is essentially the same plan as submitted in connection with the previous application.

In his opening statement, the attorney for petitioner assigned seven special reasons why the variance ought to be granted, indicating that the evidence to be presented would support these contentions (Cf. Tr. p. 5, May 17).

I

Reasons 1, 2, 5 and 7 advanced by petitioner were: the commercial character of the neighborhood, the peculiar suitability of the premises in question for commercial uses, that the premises may not reasonably be used for the purpose for which it is zoned, and that these factors result in unnecessary hardship to the applicant.

There was testimony in connection with the prior application as to the nature of the neighborhood and the commercial uses which exist. During this hearing, a map marked P-2 in evidence was submitted which shows the uses along Route #23. The property in question is in the R-10 zone, and reference to said map shows that in the R-10 zone in question there are but three commercial uses along Route #23, namely a dry cleaning establishment, a modular home sales office and a gasoline service station. All the other lots in the R-10 zone in question abutting Route #23 are either vacant or used for dwelling purposes. The testimony of Mr. Masker (Tr. p. 27, May 17), was that there are twelve residences within the R-10 zone abutting Route #23. It might be pointed out that the modular home sales office may eventually be used for residential purposes but there is insufficient evidence before this Board to make any determination with respect thereto. Furthermore, the “farm house” and the property adjoining petitioner’s, while evidently vacant, is obviously residential in character.

Reference to the map indicates that there are residential properties on both sides of the premises in question, while the Franklin Public School lies to the rear. We also find that there are numerous

commercial uses on the easterly side of Route #23, but that this side of Route #23 is zoned C-2 Commercial. There, nevertheless, appear to be at least eight dwellings on that side of the road in the C-2 District.

There have been two conversions of dwellings to commercial use in the general area along Route #23, one in 1963 and one in 1966, prior to the adoption of our zoning ordinance. Neither of these conversions involved the property of Mr. Peter Ora who converted a dwelling to commercial use in 1963 (Tr. p. 61, May 17). Another building in the C-2 zone was converted to a Stewart's Root Beer stand (this property having been the subject of a variance proceeding before this Board in the recent past).

Petitioner sought to show that because of the "commercial character of the neighborhood" the premises could not reasonably be used for the purposes for which it is zoned, and thus undue hardship would result to the petitioner unless a variance were granted.

The fact is, however, that petitioner purchased the property knowing that it was zoned R-10, but "feeling certain that they would get a variance" (Tr. Pp. 5-6, July 19). Moreover, from the time of the purchase of the land in 1969 to the date of the first hearing in this matter on May 17, 1972, there had been no attempt to sell this property for any use permitted in the R-10 zone (Cf. tr. p. 33, May 17).

After the date of the first hearing, petitioner inserted an advertisement in the New Jersey Herald, a daily newspaper published and circulating in Sussex County, which is published daily Monday through Friday. The advertisement, which appeared in each issue from June 16th through July 12th, 1972, stated as follows:

> "RT.23 FRANKLIN, N.J. -1.2 ACRES
> R-10 Zone. Can be subdivided for
> four lots. FRANKLIN INDUSTRIES,
> 147 Main Street, Franklin 827-7290."

An affidavit of publication was marked in evidence as P-5. Six replies were received from this advertisement including one from a real estate agency through which another inquiry as to the property was made. The property was offered at a price of $24,000.00, but no sale resulted from any of the inquiries. Publication of said advertisement ceased a week prior to the date of the continued hearing in this matter on July 19th.

A Mr. William Fritz and a Mr. Chalen Kithcart, Jr., both of whom are builders, testified that in their opinion the property in question was not desirable for residential use. There was no evidence or testimony to the effect that the premises were not suitable for any of the other uses permitted in the R-10 District.

Petitioner's reasoning has been that since there are commercial uses in the general area (not necessarily in the R-10 district), the premises in question are better suited for commercial use, that the land cannot be used for permitted purposes and that, therefore, undue hardship results sufficient to authorize the recommendation of a variance. We cannot agree. It is notable that zoning was not adopted in Franklin until January of 1968. In any community where zoning came so late, there is bound to be a multiplicity of nonconforming uses. Nevertheless, it is significant that in the R-10 district there are only three nonconforming business uses existing within the zone abutting Route #23. Many of the businesses referred to in the testimony exist in commercial districts located either on the same side or on the opposite side of Route #23, where, of course, they are permitted. Petitioners have implied that the drawing of the zone lines in the manner in which they were was the result of poor planning. This is not for us to say. A variance may not be based upon a conclusion that there is no factual justification for a zoning regulation as an act of legislation. Bern v. Fair Lawn, 65 N.J. Super. 435 (App. Div. 1961). Moreover, the proximity of commercial buildings, standing alone, would be an insufficient "special reason" to permit a variance for commercial building in a residential zone. Cf. Ward v. Scott, 11 N.J. 117, 128 (1952).

The core question here is whether the property may, viewed in the setting of its environment, reasonably be adapted to a permitted use. Rexon v. Haddonfield, 10 N.J. 1 (1952).

We reiterate the finding made in connection with the previous application of this petitioner for essentially the same relief, that the evidence simply does not warrant a finding by this board that the land cannot in fact be used for any of the purposes or uses permitted in the R-10 District. Petitioner purchased the land in 1969 and never made any effort whatever to sell the land for any permitted use until after the filing of the petition in this case. Indeed, the testimony indicates that petitioner throughout this period had in mind the seeking of a variance to permit the use of the property for

commercial uses which would be more profitable. We do not view the belated attempt to sell this property through a newspaper advertisement during the pendency of this proceeding as a bona fide effort or indication of its salability or lack thereof for permitted uses. There was no evidence to support a finding that the land is likely to go undeveloped as a result of a denial of variance, and while petitioner has indicated that the proposed use would "be better for the municipality" than if used for duplex apartments (which could be permitted as a special use in the R-10 District), there was no indication whatever that the land could not in fact be used for the construction of duplex residences. Moreover, the fact that the proposed use might be more attractive in appearance than some residences and might pose fewer drainage problems and the like cannot justify the favorable recommendation of a variance for a business use in a residence zone. Cf. Munoz Realty Corp. v. Verona, 93 N.J. Super. 232 (App. Div. 1966), aff'd 48 N.J. 360; Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967).

Since petitioner's right to relief evidently must be based upon a finding of exceptional and undue hardship, (since no other special reasons are apparent) it is desirable to examine the meaning of that term. Thirty years ago, Justice Heher, classically dealt with the meaning of the term "unnecessary hardship" in Brandon v. Montclair, 124 N.J.L. 135 aff'd 125 N.J.L. 367. In 124 N.J.L. at page 149, Justice Heher stated:

> "The term 'unnecessary hardship' does not lend itself to precise definition automatically resolving every case. The test would seem to be whether the use restriction, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property. Is the environment such that the lot is not reasonably adapted to a conforming use? It is not per se a sufficient reason for a variation that the nonconforming use is more profitable to the landowner.... The converse of this would emasculate the principle of zoning, for invidious distinctions are inadmissible.... It is to be observed that the statute permits the exercise of the zoning power for the *conservation* not for the *enhancement* of the 'value of property' ."

In short, the "hardship" test laid down in Brandon requires a showing that the land or structure cannot be used for any permitted purpose in the district and that denial of a variance would be tantamount to a "taking" in order to justify the grant of a use variance under subsection (d).

Professor Cunninghan, in his treatise *Discretionary Powers of the Zoning Board of Adjustment and the Municipal Governing Body under N.J.S.A. 40:55-39,* Institute for Continuing Legal Education, Rutgers University, (1968), traces the application of the Brandon "hardship" test in the cases decided since Brandon where hardship has been the basis for the granting or denial of use variances. At page 3043, he concludes as follows:

> "It will normally be very difficult to sustain use in "variances based on hardship" alone, because of the very strict standard applied to these cases - essentially a constitutional "taking" test as laid down in Brandon. Moreover, if the "taking" is due to unreasonableness of the zoning ordinance as it applied to land other than the land in question, as well as that land, the "uniqueness" requirement is not satisfied, and the courts will generally hold that a variance is the wrong remedy; the land owner must attack the validity of the zoning regulation directly."

It is readily apparent that the "hardship" complained of by petitioner in no way relates to the unique circumstances of the land itself, and petitioner's alleged mistaken belief that they could easily obtain a variance and use the premises for commercial purposes cannot be considered a showing of "special reasons," including undue hardship. Cf. Dolan v. DeCapua, 16 N.J. 599.

II

Reasons 3, 4 and 6 advanced by petitioner in support of a favorable recommendation for a variance in this case are that the purpose applied for will serve the most appropriate use of the land and conserve the value of the property, that sanitary and storm water conditions will be better served by the allowance of this particular use and that there is a comparative economic advantage of the use applied for.

The facts do not support the contentions, nor do the contentions support petitioner's claim to relief.

The gist of the contentions is that the "highest and best use" of the premises is commercial. But this is not equivalent to a finding that it is not usable for the purposes permitted. Schoelpple v. Woodbridge Township, 60 N.J. Super. 146, 155 (App. Div. 1960). The evidence offered to show that sanitary and storm water conditions would not be as adversely affected by the proposed use as by certain permitted uses may be pertinent in showing that the granting of the variance would not be

detrimental to the public good, but variances may not be awarded indiscriminately merely because they do not offend the negative criteria of the statute. Moreover, there was no showing at all that the alleged drainage problem which might result from the development of the property for residential uses could not be overcome through appropriate and available engineering methods.

On the basis of the evidence adduced at the hearing, we find that the petitioner has failed to show sufficient special reasons within the meaning of the statute to justify the favorable recommendation of the grant of variance for the proposed use.

III

Petitioner further argued, on various occasions, that the "area" in which the subject premises is located is one of "mixed uses" and that the current zoning of the area contravenes the statutory injunction of R.S. 40:55-32 that zoning regulations shall be made with reasonable consideration, *inter alia*, of the character of the district and its particular suitability for particular uses. We are aware of the statutory provisions. We are aware that the reasonableness of a zoning ordinance must be tested in the setting of the physical characteristics of the area in which it is sought to be enforced, and also that natural contours and topographical features, and even geological strata of the land with reference to water and sewage problems, are factors to be considered in creating zoning classifications. Cf. Zampieri v. River Vale, 29 N.J. 599 (1959); Bogert v. Washington Twp., 25 N.J. 57 (1957).

But complaints as to deficiencies in the drawing of zone boundaries, or inclusion or exclusion of uses from the zone scheme for an area, are not within the purview or jurisdiction of this Board. Complaints as to such alleged deficiencies must be made either to the Planning Board and Governing Body for legislative redress or to the Superior Court for judicial redress. Our jurisdiction extends only to the granting of favorable recommendation of variances from the general zoning scheme as to specific pieces of property upon a showing of one or more of the statutory prerequisites for a variance. We have, however, no power to vary the zoning scheme itself, and since, as we have found, there has been no showing of "special reasons" why the requested variance ought to be granted, it must be denied.

IV

While we have chosen to deal with this matter on the merits we are also of the opinion that this petition is subject to dismissal on the basis of the application of the doctrine of res judicata, which doctrine is applicable in proceedings before a Board of Adjustment. Cf. Home Builders Association v. Paramus, 7 N.J. 335, 342 (1951); Russell v. Tenafly, 31 N.J. 58, 65 (1959); Tzeses v. South Orange, 22 N.J. Super. 45, 54-55; Mingle v. Orange, 6 N.J. Misc. 595, 597; St. Cassian's Catholic Church v. Allen, 77 N.J. Super. 99, 108 (1962).

The doctrine has been summarized in 50 C.J.S. 16, Judgments, 598, as follows:

> "A final valid judgment on the merits by a court of competent jurisdiction bars any future suit between same parties or their privies on the same cause of action; identity of the thing sued for, of the causes of action, of the parties to the action, and of the quality or capacity in which the parties sue or are sued is essential to the application of the doctrine."

Thus, even though the parties were the same, where in the first instance a variance to permit construction of three houses was requested, and the second application sought a variance to permit construction of only two houses, the second application was held not barred. Tzeses v. South Orange, supra.

As stated in Russell v. Tenafly, supra:

> "The question for the Board of Adjustment, on a second application for a variance concerning the same property, is whether there has occurred a sufficient change in the application itself, or in the conditions surrounding the property to warrant entertainment of the application."

Cf. also Mazza v. Board of Adjustment, Linden, 83 N.J. Super. 494.

In Pieretti v. Bloomfield, 35 N.J. 382, it was held by the Supreme Court that the doctrine of res judicata was applicable where, fourteen years after a property owner's application for a variance to erect a new industrial building in a residential zone had been denied, the owners applied for a variance as to the same property to construct a larger building.

In the case before us, there was no showing of any different circumstances or any change in the condition of the surrounding area between the time of the denial of the first application and the filing of the petition in the second case. While there were some minor changes effected in the site plan, they are immaterial in view of our finding in the first case that no special reasons had been advanced

to use the premises for the operation of a retail nursery and landscaping business. Moreover, we found as a fact in our decision in March 1972, that the intrusion of this type of commercial use would be detrimental to the owners of surrounding residential properties. We did not find that the mere location of the proposed building, lack of screening or other factors of this nature would make the use detrimental, but rather we found that the use itself would be detrimental, and that no variance could be recommended since no special reasons had been shown.

Notwithstanding the introduction of a great deal of new testimony and material during the course of the hearings held on the second application made by this petitioner, the fact is that nothing has changed. In so saying, we reiterate our finding that the attempt to show the unsalability of this property for permitted uses through the insertion of a newspaper advertisement during a portion of the time that this matter was pending before us and the failure to sell the property for any permitted use at a price which was not shown by any testimony to have been reasonable, did not constitute a bona fide effort to sell, and is not indicative of either the salability or unsalability of the land for a permitted use.

V

We find no reason to disturb the conclusion reached in the prior proceeding before us that the relief here requested could not be granted without substantial detriment to the owners of adjoining residential properties who are entitled to the protection afforded by the zoning ordinance.

For all of the reasons set forth above it is therefore

RESOLVED, by the Zoning Board of Adjustment of the Borough of Franklin that the petition of Franklin Industries for a variance to permit the use of the premises designated as Block 51 Lot 12 on the Borough Tax Map for operation of a retail nursery and landscaping business be and it is hereby denied.

[**NOTE:** Applicant has been referred to as “petitioner” in the above resolution, a not unusual practice prior to passage of the MLUL. The proper term would now be “applicant” rather than “petitioner.”]

WILLIAM T. MASKER, et al,
t/a FRANKLIN INDUSTRIES :
Plaintiffs;
:

FINDINGS OF THE COURT

V.
BOARD OF ADJUSTMENT OF
BOROUGH OF FRANKLIN,
Defendant.
BY:
HONORABLE ROBERT MUIR, JR., J.S.C.

THE COURT: As a preliminary footnote to this opinion, this is a matter that was pretried and argued orally before Judge Byrne prior to his resignation from the bench. After reviewing the file, through my law secretary, both counsel agreed to waive reargument to facilitate the disposition of the case. The matter is an appeal from a board of adjustment. So, it was on the record and I will dispose of it accordingly.

Now, this matter was heard on cross-motions for summary judgment. On the plaintiff's case it would be a partial summary judgment motion because there is contained in the complaint, an attack on an ordinance, a zoning ordinance that is in force in Franklin Township; but, essentially, this is dealing with an appeal from the denial of N.J.S.A. 40:55-39 (d) type variance application by the defendant, Borough of Franklin Board of Adjustment.

Now, the plaintiffs sought a recommendation to the governing body of the Borough of Franklin for permission to construct and conduct a retail nursery and landscaping business in the R-10 Residentail Zone. The structure proposed in conjunction with the business was to contain an office and sales area on the first floor and an apartment on the second floor. The R-10 Residential Zone permits single and two-family residential home occupations and certain non-residential uses as special exceptions.

All other uses, including the plaintiff's proposed use are proscribed.

The application was considered by the Board at a hearing on May 17 and then again on July 19 for some supplemental testimony. The proposal was essentially similar to the one previously submitted and denied by the board on March 15, 1972, no appeal having been taken from that denial.

The changes in the most recent application dealt with larger setbacks, a reduction in the size of a hot house and a new screening plan.

The plaintiff asserts that he established special reasons before the Board of Adjustment, relying on the opinion of Judge Conford in Bern v. Borough of Fair Lawn, 65 N.J. Super. 435, where Judge Conford stated that the purposes of zoning as set forth in N.J.S.A. 40:55-32, particularly the general welfare, may constitute the special reasons for N.J.S.A. 40:55-39 (d) type variance, provided the negative criteria of that statute are satisfied.

It is argued that special reasons established related to:

(1) the character of the district, and
(2) the land's peculiar suitability for particular purposes, and
(3) conservation of the value of the property, and
(4) encouragement of the most appropriate use of land.

The critical issues raised by the appeal are:

(1) whether this appeal is barred on the principle of res judicata, and
(2) if not, whether the plaintiff established proof before the Board of Adjustment of special reasons in satisfaction of the negative criteria required by statute.

It is the opinion of this Court that the decision of the Board of Adjustment be sustained in all respects and this appeal be denied for the reasons hereinafter stated.

The test for deciding whether a prior decision by the Board of Adjustment has the res judicata effect is set forth in Russell v. Tenafly Board of Adjustment, 31 N.J. 58 (1959) at 65 and I quote:

"Res judicata is applicable to actions heard by a Zoning Board of Adjustment. That the same owner and the same property are involved in the second application for a variance is not

alone sufficient to act as a bar. The objector must also show that the second application is substantially similar to the first, both as to the application itself and the circumstances of the property involved."

The test is whether there has occurred a sufficient change in the application itself, or in the conditions surrounding the property to warrant entertainment of the application. The board found, in effect, that nothing had changed with respect to the surrounding area and noted the changes in the application as being superficial. It is the board's determination in the first instance whether res judicata applies and this Court will not overturn that determination since it is not shown as being unreasonable, or arbitrary, or capricious. Russell v. Tenafly Board of Adjustment at 67.

What plaintiff did here was to make certain changes, minor in nature, to overcome some objections expressed at the prior hearing. These are not "sufficient changes" to obviate the res judicata effect.

Argument might be presented that the Board waived its right to assert res judicata since it considered the application in a non-adversarial type of proceeding, as this one was. The Board proceeded, in my opinion, in a proper way. It considered the matter and denied it both on the merits and, procedurally, this precluded the necessity of a remand in the event the Court is not satisfied with the res judicata ruling.

However, since the Board considered the special reasons, I will, also.

Review of Board of Adjustment decisions by the Courts are subject to the premise that the Board is reposed with a wide latitude in the exercise of its delegated discretion and there can be no judicial charges of invalidity in the absence of clear abuse of that discretion. Kramer v. Board of Adjustment Sea Girt, 45 N.J. 269 and 297 (1965). Within this frame the Court will analyze plaintiff's arguments.

The subject property is in the R-10 zone. In that zone are located three commercial uses, nonconforming. The remaining parcels of land, substantial in number, are all conforming in character. Plaintiff alleges "the character of the district" refers to the neighborhood of the surrounding area and not just the R-10 zone, and seeks to encompass in the character of the district all of the areas zoned commercially on either side of Route 23.

I cannot agree with this argument. All references in the zoning statute to the word district, indicate one specified district, not an area. Boundary lines between different type use zones or districts are created by legislative action and subject to the discretion of the legislative body. That a parcel of land and all adjoining parcels of land in one district are not appropriately zoned is not the basis for a variance. Bern v. Fair Lawn, 65 N.J. Super. 435. Presence of commercial uses in other districts is not a special reason. The plaintiff argues that the proposed use is the highest and best use for the land and thereby encouraging the most appropriate land use in conserving the value of that specific piece of property.

Now, clearly, these are purposes of zoning of property, but not in the Court's opinion special reasons when viewed in the overall variance framework.

A more profitable use of the land to plaintiff than the permitted use is not an appropriate basis for a variance. Schoepple v. Woodbridge Township, 60 N.J. Super. 146-155 (1960).

Plaintiffs in their proposed variance say it is the highest and best use and it will conserve the value of this specific piece of property. This, however, is merely indicative of the owner's personal economic enhancement and nothing more. That the owner gains more possible use from his land and considers the proposed variance as the highest and best use is not the basis for granting a variance. Admittedly, N.J.S.A. 40:55-32 sets forth the purposes of zoning enunciated and Judge Conford indicated these might be special reasons, but the Court in this case considers these arguments to be specious in light of the proof that was established before the Board of Adjustment. There is no showing plaintiff's property is uniquely affected in relation to other parcels in the zone, or that it is peculiarly suited for this use and not for the permitted uses.

Plaintiff's argument here is really with the zoning. There was an offering of proof on surface water drainage and water supply problems, but it fell far short of any degree of satisfactory proof on promotion of the general welfare. See Kohl v. Council of Fair Lawn, 50 N.J. 268 (1967).

The plaintiff had the burden of proving special reasons and satisfying the negative criteria of the statute. The proofs did not substantiate the existence of either. Judgment should be accordingly. I will ask that it be submitted within 10 days.