Old Bridge (1988)
Reply Letter Brief
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Yellow P.I. # 3108

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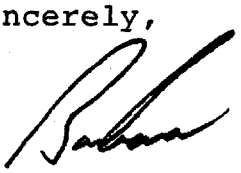
January 7, 1988

Mr. C. Roy Epps, President
Civic League of Greater New Brunswick
47-49 Throop Avenue
New Brunswick, NJ 08901

Dear Roy:

Enclosed please find Woodhaven's Reply Letter Brief. The reply to the Civic League Brief is at page 6.

Sincerely,



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January 4, 1988

Hon. Eugene D. Serpentelli, A.J.S.C.
Ocean County Court House
CN-2191
Toms River, New Jersey 08754

Re: Urban League, et al. vs. Carteret, et al.
Woodhaven Village, Inc. v. Old Bridge (L-036734-84 PW)

Dear Judge Serpentelli:

Woodhaven Village, Inc. is in receipt of letter brief of Thomas Norman on behalf of defendant Planning Board, dated December 11, 1987; letter brief of Jerome J. Convery on behalf of defendant Township of Old Bridge, dated December 14, 1987; and, letter brief of Barbara Stark on behalf of plaintiff Civic League, dated December 16, 1987 all of which were submitted in answer to the pending motion of Woodhaven Village, Inc. for reconsideration and rehearing. Please accept the following as Woodhaven's reply to the above answering briefs.

I. Reply to Brief of Defendant Planning Board

a) Defendant Planning Board argues that the Planning Board and Governing Body of Old Bridge Township would not have entered into the consent agreement with Woodhaven Village solely. There exists no evidence either for or against this proposition. The argument amounts to mere speculation about the past subjective intentions of defendants. If one assumes that defendants would not have entered the settlement with only Woodhaven, then one could equally assume that Woodhaven would not have entered the settlement if Woodhaven's right were contingent on O & Y's ability to build as planned (thereby supporting the argument that the settlements were independent). Such assumptions can be formulated to best serve the position being supported and therefore counterbalance one another leaving the parties in a "mexican standoff." The solution is to look to the settlement document. No provision is made in the Blue Book for defendant's settlement with Woodhaven to be contingent

upon defendants settlement with O & Y. Accordingly, the settlements must be viewed as independent.

b) Defendant argues that its inducement to settle was the benefit which defendants saw emanating from O & Y (i.e., golf course, office/commercial center, Trans Old Bridge Connector). This argument ignores the fact that Woodhaven, at the time of settlement, maintained an independent Mount Laurel complaint against defendants and that defendants received certain benefits as a result of its settlement with Woodhaven. For example, Township benefited by a reduced Fair Share number and repose from further Builder Remedy suits. Defendants further benefited from its settlement with Woodhaven since Woodhaven agreed to provide commercial development (whereas Mount Laurel lawsuits do not require plaintiffs to provide commercial development); and, Woodhaven received no density bonus above that permitted by the then existing ordinance. If all benefits and inducements to settle flowed solely from O & Y, and Woodhaven was not a source of benefits, then why did defendants settle with Woodhaven at all? The answer is that Woodhaven did offer defendant benefits and Woodhaven's pending lawsuit would not simply "go away". If defendants had not settled with Woodhaven, then Woodhaven would have pressed onward with its lawsuit. Defendants would then be exposed to the Court declaring an increased Fair Share and not requiring a commercial component from Woodhaven. Moreover, Woodhaven would have pressed for Density Bonuses, which it did not get. Clearly, the benefits which induced defendants to enter the settlement did not flow only from O & Y but also from Woodhaven.

c) The Planning Board claims that if only Woodhaven were involved at the time of settlement, then defendants would have requested a transfer to the Council on Affordable Housing (COAH) since defendants "had everything to gain and nothing to lose" by transferring. This claim is without merit because, at the time of settlement, nobody was confident about COAH's Fair Share numbers. In fact, COAH's Fair Share numbers were a "wildcard". (Yes, the Township's Fair Share number could have been lower, but it could also have been higher as occurred in Marlboro Township). Nobody knew the COAH Fair Share numbers for sure and a transfer to COAH prior to settlement meant exposure to defendants, particularly when the settlement decreased the Fair Share from approximately 2400 units (consensus methodology) to 1668 units. If defendants knew that the COAH Fair Share number would be lower than the settlement number, then defendants

could have settled with just O & Y. In light of the unknown COAH Fair Share number, defendants did not have "everything to gain and nothing to lose" by transferring to COAH.

d) The Planning Board argues that "the Township and Planning Board agreed to a settlement which assumed that both Woodhaven and O & Y could build jointly." This substantial assumption was a mistake on the part of defendants. Woodhaven did not make such an assumption (nor do we expect did O & Y). Such a unilateral mistake on the part of defendants is not grounds for setting aside the settlement.

e) It is shocking to read the Planning Board's statement that "the existence of Woodhaven directly adjacent to O & Y, basically as a tag along, simply permitted Woodhaven Village to receive the benefits of the settlement enjoyed by O & Y." Maybe the Planning Board views a project of hundreds of millions of dollars on 1455 acres with 5,820 units plus substantial commercial development as a "tag along" but this is not how Woodhaven conceived of itself. In fact, if there were no O & Y project (or even considering a scaled downed O & Y project) then Woodhaven would become one of, if not the largest planned developments in this state. Woodhaven is no "tag along." As stated above, defendants were to receive benefits from settling with Woodhaven or else defendants would not have settled. It is nonsenical to believe that defendants included Woodhaven as a tag along.

f) For the purposes of Woodhaven's Motion for Reconsideration and Rehearing Woodhaven has assumed that the plates were part of the settlement. However, the increase in wetlands acreage did not cause defendant's to lose any of the benefits promised by Woodhaven via Plate B and Plate B-1. This point is treated in full in Woodhaven's Brief in Support of Motion for Reconsideration and Rehearing.

g) The Planning Board has emphasized the arguments that the settlement contemplated the development of the O & Y tract and that the benefits of settlement emanated primarily from the O & Y tract thus claiming that the Woodhaven settlement was contingent upon defendants receiving the benefits from the O & Y tract. However, the settlement document does not state that Woodhaven's settlement is contingent upon O & Y's settlement. Even though defendants now claim that this contingency was of utmost importance, it was not important enough to expressly include in the

settlement document. Defendants could have requested (but did not request) such a contingency, and even if requested Woodhaven would not have agreed to it. Therefore, Woodhaven should not now be forced to lose all its rights by virtue of an alleged "implied contingency" for which defendants never bargained and to which Woodhaven would never have agreed.

h) Planning Board incorrectly argues that as a result of increased wetlands large areas originally planned for commercial use are eliminated. This is not true. Woodhaven's revised plate B and revised plate B-1 show the same number of commercial acres and in substantially the same location as originally proposed. The Planning Board asserts that isolated areas of uplands are undevelopable and accessible by bridges which would be extremely expensive for the Township to maintain. There are no proofs in support of or in opposition to this assertion. As fully argued in Woodhaven's brief in support of the within motion, and not repeated herein, Woodhaven's revised plate B and revised plate B-1 are substantially the same as original plate B and original plate B-1, respectively.

i) The Planning Board claims that the separation of the O & Y tract from the Woodhaven tract was never contemplated by defendants and that the O & Y and Woodhaven plans must be treated as one. If this issue was so important to defendants they could have made an express provision for same in the settlement document. Defendants could have requested a provision in the settlement which required that "the two plans must be treated as one for the purposes of this settlement." However, defendants did not even request such a protective provision. Conversely, the builder plaintiffs did obtain a provision in the settlement document which allows for the approval of one project without the other (Settlement Agreement V-B.3). This provision demonstrates that the O & Y and Woodhaven projects were to be treated independently.

j) There are no proofs in support of defendant's claim that both developments are integrated in terms of transportation, water, and sewer. Actually, as set forth in Woodhaven's Brief in Support of Motion, the Woodhaven site is a self sufficient project with the ability to independently provide its own sewer, water and transportation system. True, Woodhaven and O & Y planned to cooperate with one another where feasible but these major developers never placed their respective fates in the hands of the other developer.

II. Reply to Brief of Defendant, Township of Old Bridge.

Defendant, Township of Old Bridge states that the settlement with Woodhaven and the settlement with O & Y were one "package" and cites as an example that Woodhaven was permitted to provide a 5% commercial component as a result of the substantial commercial development expected from O & Y. First, Woodhaven was not permitted and/or obligated to any specific level of commercial development. The ten (10%) commercial development "requirement" about which the Township now argues, was contained in the Township's Zoning and Land Use Ordinances which were being attacked by plaintiffs (therefore, a ten (10%) per cent commercial component was not a minimum requirement at the time of settlement).

Second, the fact that Woodhaven was permitted to provide a 5% commercial component was not based entirely upon the benefits expected from O & Y. Woodhaven did not have a prime location for commercial development (such as the intersection of Routes 9 and 18) and the full 10% commercial development would have had a substantial impact on the local roads which bound the Woodhaven site. Therefore, a 10% commercial component was not appropriate from a planning sense for Woodhaven (independent of the O & Y commercial component). Actually, Woodhaven preferred to do more than five (5%) per cent commercial development since commercial development is more valuable than residential development (where the location and other development factors are favorable). Since the Woodhaven site is about one mile from any major road, it did not make planning sense to do more than five per cent commercial development. Woodhaven still prefers to do more than five per cent commercial, however, that would not make sense from a planning point of view. Accordingly, Woodhaven's commercial component was five (5%) per cent , not because of O & Y's commercial component but because a five (5%) per cent commercial component for Woodhaven made sense.

Third, the Township argues that "Lloyd Brown indicated he had no objection to Woodhaven Village only building five (5%) per cent commercial, since O & Y was to provide extensive commercial development." Lloyd Brown had "no objection" but Woodhaven did not argue for a five (5%) commercial component based upon what O & Y would or would not do. Woodhaven negotiated the five (5%) per cent commercial set aside based upon planning arguments that were particular to the Woodhaven site location and adjoining roads.

Fourth, allowing Woodhaven to provide a 5% commercial component is not all that unusual since nothing in the "Mount Laurel" case law requires a Mount Laurel plaintiff to include any commercial development. Also, Woodhaven agreed to develop without density bonuses.

Fifth, as this Court has already ruled, it is inappropriate

to consider the pre-settlement intentions of the parties which is precisely the basis for the Township's "Commercial development argument" (See, Transcript of Motion, September 14, 1987, T110-23 to T111-1). Why the parties agreed to a five (5%) commercial component for Woodhaven is of no moment. The fact is that the parties did so agree as is evidenced by the Settlement Document.

Sixth, there was never a guarantee that O & Y would actually build. There is always a risk that a developer, although willing to build as promised, cannot so build (as evidence by O & Y's experience herein). With that risk always in mind, defendants did not even request language in the Settlement Document which expressly required the Settlement Agreement to be an overall 'package' requiring development by both developers as one.

Although both defendant Planning Board and defendant Township argued that the settlement was an integrated interdependent package, it is surprising that neither defendant has addressed the substantial weight of case law cited by Woodhaven in support of its argument that the settlement was several and not joint.

III. Reply to Brief of Civic League

Civic League is fearful that a revised development proposed by Woodhaven may not include a Mount Laurel set aside or may result in a reduced Mount Laurel set aside. Woodhaven has never claimed that its Mount Laurel obligation should be reduced. Woodhaven remains prepared to build the entire 10% set aside on its project even if that set aside exceeds the Townships COAH Fair Share number. Woodhaven agrees that the Civic League should get the benefit of the bargain and, accordingly, is still and always has been willing to satisfy its Mount Laurel set aside.

IV. Conclusion

In light of the foregoing arguments and those set forth in Woodhaven's Brief in Support of Motion for Rehearing and Reconsideration, we request the Court to grant said Motion. Further, we respectfully request that this matter be set down for oral argument on a date sometime during January, 1988.

Thanking you for your consideration of the above, we remain

Respectfully yours,

HUTT, BERKOW & JANKOWSKI

BY: _____
STEWART M. HUTT

SMH:al

cc: All parties on Attached Service List
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Mr. Lloyd Brown

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