Mt. Laurel

(Atleast 1983)

Memo against challenging Mt. Laurel's adoption of DCA fair Share Number

11 pgs

CA000223D

MOUNT LAUREL ISSUES

This memorandum will summarize the issues upon which we will ultimately have to take a position with the master in the Mt. Laurel case. In some instances, I am merely raising questions; in others, I am making recommendations.

I. THE CONDITIONAL USE

Geoff Weiner is preparing a report on what features an inclusionary zoning and subdivision ordinance should contain to reduce costs for a low and moderate income developer. In many respects that is the easiest part of our task. A draft should be available within the next week or so.

I suggested to Geoff that the inclusionary provisions should be drafted as an overlay zone superimposed onto the existing zoning ordinance so that any developer in the municipality willing to provide lower income housing can take advantage of it. Mt. Laurel has a history of such overlay zones. Fifteen years ago, the Township adopted a planned unit development overlay, permitting planned unit developments to be proposed in any district in the Township. This approach was declared valid by the Appellate Division in Rudderow v. Tp. of Mt. Laurel, 121 N.J.Super. 409 (App. Div. 1972). Likewise, the Township's 1983 zoning ordinance requires all developers in the Township without exception to provide 20% low and moderate income housing. In view of this I feel that we are in a good position to propose all of the Township as appropriate for the inclusionary overlay. If the Township believes that particular areas are inappropriate for inclusion within the overlay, they should have that burden to demonstrate why the area is inappropriate, e.g., because of environmental problems.

Several issues, however, remain unresolved. First, what are the developer's rights under such an inclusionary ordinance? Is the developer entitled to build as a matter of right under the inclusionary option or does the developer obtain only the right to seek approval, just as he would seek tentative approval under a planned unit development? Mt. Laurel would strongly challenge a proposal authorizing a developer to build at very high densities as of right, regardless of utilities, transportation system or environmental problems with the land. One option is to make this high density development a conditional use which must be approved by the Planning Board unless the Planning Board can demonstrate unsuitability; where the Board proposed to find unsuitability or that the land cannot support the maximum permitted density, the master shall review the application and make comments.

II. THE LOW AND MODERATE INCOME HOUSING REQUIREMENT

The next issue concerns the inclusionary requirements that are to be imposed upon a developer choosing this option. Must he build 10% low and 10% moderate income housing in all cases? If so, how are we going to define low and moderate income housing and in how much detail?* Is there to

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* The Mt. Laurel 1983 ordinance provides:

> 1. Units which shall be offered for sale shall be sold at a maximum price of eighty percent (80%) of the median income of the region for moderate income families and fifty percent (50%) of the median income of the region for low income families, each figure to be multiplied by 2.5.
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> 2. Rental units shall have a maximum annual rent of eighty percent (80%) of the median income of the region for moderate income families and fifty percent (50%) of the median income of the region for low income families, such figure to be multiplied by 30%.

be an escape valve whereby a developer who wants to build an inclusionary development could, on hardship grounds, seek to build, say, 15% moderate income and 5% low income or to build housing affordable to persons at, for example, 60% of median rather than 50%? Assuming that there is to be a "hardship" modification mechanism, who decides whether relief is to be granted - the master or the planning board? What are the standards for such relief, assuming a developer is willing to open his book in an attempt to show that he needs it? Finally, is a small developer, one building 20, 50, or even 99 units, who is interested in the Mt. Laurel inclusionary option going to be held to the same low and moderate income requirements as Hovnanian or Alan-Deane?

The section on low and moderate income housing requirements may be the most crucial one of our report. We could easily draft it as a straight-forward take-it-or-leave-it density bonus option. The worst thing that could happen to us, however, is to have Mt. Laurel adopt a model inclusionary ordinance which developer would completely ignore, choosing rather to build at two to the acre, or perhaps, instead, in the next town which has no inclusionary provisions.

Regardless of how rigid we make the low and moderate income requirements, the ordinance must give the developer maximum flexibility in building the units. He must be free to use manufactured housing or condominiums and to build on-site* or off-site so long as the units are built at the same time as the rest of the development. Furthermore, we should specifically state that the off-site lower income housing may built as be a joint venture

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* Without the many restrictions of the Mt. Laurel ordinance including the requirement that low income units must be the exact look-alikes of all other units.

or may be constructed by a separate developer. Phil Caton told me that Hovnanian is interested in the possibility of entering into arrangements with other developers who would pay him to build the lower-income housing off-site so that those developers can build their conventional developments. We should strongly encourage this.

A related issue is whether we are going to compel a developer to provide a mix of rental and sales units for the lower income units or allow him to make that choice himself. For many small developers, rental housing is not even a possibility because they lack the ability to finance, syndicate and manage it. If rental housing is provided, we should specify the earliest time period in which a condominium conversion will be permitted and upon what terms.

III. HOUSING CONTRIBUTIONS

Another suggestion which has been made to increase the likelihood that a developer will take an advantage of the inclusionary provision is to impose a "housing tax" on new developments which do not contain a percentage of lower income housing. The proceeds from this "housing tax" would be used to reduce the amount of internal subsidization required of an inclusionary developer.

There are no statutes or no cases on point. State law specifically permits a municipality to force a developer to bear his pro-rata share of off-site improvements, N.J.S.A. 40:55D-42 but is silent on the subject of a housing tax. We would defend this ordinance as we did in Egg Harbor Associates by stressing the Mt. Laurel constitutional doctrine and the presumption of validity that attaches to a municipal ordinance.

THE SELECTION PROCESS AND RESALES

What party administers the resale program and the selection process? Concerning resales, there are at least six possibilities: the developer, the municipality, a state agency, a housing authority, a non-profit corporation of some sort, or a self-enforcing program. Three of these options can be eliminated almost immediately. First, the developer is eliminated because both F.N.M.A. and F.H.L.M.C. preclude the developer from administering the resales; agencies will not consider the loan if the developer administers it. Second, D.C.A. administration might be feasible in another context; the present administration would have no interest in such a program. Third, self-enforcement seems impossible. Even if the deed specified how much a unit could sell for in the event of resale, in the absence of any policing, the provision could either be ignored or defeated by under the table payments.

It would be difficult to rely on the municipality which opposes Mt. Laurel to supervise the resale agreements. The only advantage is that both F.N.M.A. and F.H.L.M.C. expect a governmental agency to do this supervision. If the municipality were both permitted to charge for the cost of administering the resale program and informed that faiulre to do this would subject it to a further Mt. Laurel liability, the Township might reluctantly become the administrator. How well they would do the job in another question.

Another possibility worth exploring is to find out whether a county housing authority would be willing to undertake this responsibility.

The final alternative is to have some other board, organization or corporation make the decision. The first hurdle to this approach is the F.N.M.A. regulations which require that the resale controls must be "administered by an authorized governmental unit that has established

Developers who would challenge this provision would argue that an inclusionary developer at least obtains something in exchange for lower income housing - the density bonus. This tax will be passed on without any offset to the purchasers of new housing, many of whom are barely able to afford a home themselves. The tax is further unfair, they will argue, because it is imposed neither upon purchasers of resale home nor existing residents but solely upon purchasers of new homes. If the Mt. Laurel doctrine requires municipal subsidization, then it should come from the municipal treasury with monies raised through general taxes, not through a new home tax.

Alternatively, Henry Hill has been suggesting a transfer development system used in Orange County where developers can buy affordable housing transfer development credits from a bank or a developer who has built more than his share of lower income housing, instead of actually constructing the units themselves.

Both proposals raise complex legal, political and policy issues which may simply be too complicated for inclusion in this proceeding. For example, if a developer who builds at two to the acre must pay a housing tax, shouldn't he receive a density bonus from the municipality as compensation for the tax? The spirit of the Mt. Laurel decision would suggest so. The mandatory tax with density bonus might be the route most developers would choose to take, resulting in a large amount of housing at four to the acre built without any lower income housing. The best alternative for now may be to allow developers to choose between low densities (1 or 2 to the acre) without lower income housing or very high densities with a lower income component, and to allow maximum cooperation between developers in providing this on-site or off-site. This is, in essence, permitting the private market to work out among themselves the equivalent of transfer development credits.

-- we must establish a time limit on the controls which may not exceed 30 years.

-- they must be ended in the event of foreclosure; however, we must draft them so that the homeowner does not receive a windfall through foreclosure. It is possible that this could occur if there has been tremendous appreciation.

We also need to decide whether resale controls are necessary for mobile homes; the Mt. Laurel decision suggests that they need not be.

We also need to decide who should determine which lower income persons get to occupy the units - the developer or the resale agency - and establish criteria for determining priority. We can expect two totally different reactions from developers. Some will be adamant that in their development, they make the decisions on occupancy. Others, such as Alan Deane, wish to be absolved from the responsibility of making these choices. There is a likelihood that whoever makes the choice will tend to prefer the most upwardly mobile applicant who is closest to the income eligibility ceiling.

In the case of rental housing, we need to determine who will determine rent increases in the future, how rent increases will be structured to protect lower income persons, and our policy on rents to be charged to lower income persons whose income has raised them above moderate income levels.

PREVIOUSLY APPROVED DEVELOPMENTS

The New Jersey statutes contain no authorization to compel a developer with tentative or final approval to modify his plans to include a percentage of lower income housing. The law does permit a municipality to offer such a developer a substantial incentive to modify his plans, and to impose all

procedures for screening and processing applicants." F.H.L.M.C. requires an authority or agent of a governmental unit.

In Bedminster, we have discussed a tri-partite agency, consisting of a Township representative, a developer representative and a public interest representative. Were such a board created by ordinance, it would presumably be acceptable to the two Federal agencies. We need to discuss the precise composition of such a board. It will be very difficult to constitute an effective board in municipality after municipality. There have been very preliminary discussions about some non-profit corporation that could be created to perform this role throughout the State in some sort of consultant role to local governments.

We will have to suggest how a board should operate. In California, the board has ninety days to either purchase the home itself according to a pre-established formula or find a qualified lower income purchaser. If it does neither, the controls are lifted and the unit is never again price restricted.

In the context of Bedminster, we have also been discussing giving the Board ninety days to find a purchaser or to purchase the unit itself. In the event that neither of these occurs, we have discussed two options which the Board could utilize in a particular case. First, the owner could be permitted to sell the unit to any interested party regardless of his income at the authorized price; the unit would, however, remain price controlled. Alternatively, the owner could be permitted to sell the unit at any price and be relieved of any future price controls; however, in that case 80% of anything which the seller received in excess of the Board's resale formula would be turned over to the Board to help it subsidize other lower income persons.

Our resale provisions must be consistent with F.N.M.A. policies:

inclusionary requirements upon him if, because of his delay in buliding, he forfeits the protection of his preliminary or final approval status.

The Planned Unit Development Act, N.J.S.A. 40:55-54, et seq., the statute under which the Mt. Laurel P.U.D.'s were approved, repealed by the Municipal Land Use Law of 1975, stated that "(p)ending completion within five years of a planned unit development or of that part thereof that has been finally approved, the municipality could not modify or impair the plan." Nor could the municipality compel changes in a plan that had received tentative approval, provided that this final plan was in "substantial compliance" with the tentatively approved plan. "Substantial compliance" meant inter alia a density change of 5% or less. N.J.S.A. 40:55-63. If there was substantial compliance, the municipality could reject any of the developers proposed minor changes, but in that event the developer could abandon the proposed changes and be entitled to final approval of the plan that had been tentatively approved. If there was not substantial compliance, the Township was free to accept or reject the revised plan; if it was rejected, the developer could still revert back to his tentatively approved plan and obtain approval of that.

When final approval is granted pursuant to a developer under the Municipal Land Use Act, there can be no change in the zoning requirements for two years after final approval; and the planning board may grant in addition up to three one year extensions of this protection. In the case of a planned or cluster development, of fifty acres or more the planning board may grant the protection from zoning changes for any period in excess of two years which it deems reasonable under the circumstances. N.J.S.A. 40:55D-52.

A developer who has received preliminary approval is protected from zoned changes for a minimum of one year with the possibility of two additional years, at the discretion of the Board. In developments of fifty acres or more, the Board can extend this protection for as many years as it determines to be appropriate. N.J.S.A. 40:55D-49.

The statute strongly discourages changes in a plan which has received preliminary approval. N.J.S.A. states that in the case of a planned or cluster development, the Board "may permit minimal deviations from the conditions of preliminary approval necessitated by changes of conditions beyond the control of the developer without the developer being required to submit another application for development for preliminary approval." N.J.S.A. 40:55D-50. Presumably, any other change would force a developer to seek preliminary approval anew.

Based on this review, I conclude that a developer with preliminary or final approval may not be foreced to include a percentage of lower income housing. Should he lose the protection of preliminary or final approval because of his failure to proceed promptly, the municipality can impose this obligation upon him. In any event, the municipality can offer the developer incentives in exchange for the developer voluntarily assuming this obligation.

FAIR SHARE

Mt. Laurel has proposed the D.C.A. fair share number as its fair share number until 1990. I strongly recommend that we accept this. First, the number is so high that there is virtually no likelihood that it will be achieved. In reality, there is nothing we gain by obtaining a higher number. Second, there is a real possibility that if we enter this fray, we could wind

up with a lower number. Phil Caton, as master in Mahwah, has recommended a fair share number that is much lower than the D.C.A. fair share number for Mahwah. Furthermore, Alan Mallach has recently done a fair share report in South Jersey for a private developer which gives Mt. Laurel a fair share number approximately 20% less than the D.C.A. number. Under these circumstances, I see nothing to be gained and something that could be lost by challenging Mt. Laurel's adoption of the D.C.A. fair share number.