U.L. v. Carteret 1 Nov. 1983

Plainsboro

Letter re: zone + site plan ordinances

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November 1, 1983

Joseph Stonaker, Esq.
Edward R. Hannaman, Esq.
Stonaker & Stonaker
41 Leigh Avenue
Princeton, New Jersey 08540

Re: Urban League of Greater New Brunswick v. Carteret, et al., Docket No. C 4122-73

Dear Mr. Stonaker and Mr. Hannaman:

Thank you for submitting Plainsboro Township's current zoning and site plan ordinances, including the current Township zoning map. We have reviewed these documents in an effort to determine the degree to which the Township has achieved compliance with the decision of the New Jersey Supreme Court in Mount Laurel II.

The only portions of the current ordinances that provide in any way for high density housing are those which establish the PCD and PMUD planned development zones. It is plaintiffs' position, however, that these provisions do not satisfy the Township's constitutional obligation to provide a "realistic" opportunity for the construction of its fair share of low and moderate income housing, and that substantial revision of the ordinance will be necessary to bring the Township into compliance with Mount Laurel II.

These conclusions are based on four principal factors. First, by the 1979 amendment to Article XI of the Zoning Code, which distinguishes between "existing or pending" development applications, § 101-124, and "new" applications, § 101-125, the Township has sharply limited the possibility that low and moderate income housing can be produced in the PCD zone. By favoring existing or pending projects, none of which are known to include low or moderate income housing, over new applications, which could serve such goals, Plainsboro's ordinances have actually become more exclusionary, rather than less so. Second, given the lack of federal housing subsidies and the present high cost of mortgage financing, it is clear that a significant amount of lower income housing cannot be constructed in the Township unless the Township adds a mandatory set-aside provision to its ordinances. Third, the ordinances

continue to contain a number of unnecessary cost-generating requirements and restrictions that serve as a disincentive to the construction of low-cost housing, even if such development were otherwise feasible under the ordinances. Finally, the ordinances fail to provide for a number of affirmative steps that the Township itself can take to facilitate achievement of the fair share objective. We discuss each of these concerns in turn.

The PCD and PMUD Zones. We note at the outset that the higher-density residential provisions of the PMUD zone cannot be given serious consideration in evaluating the Township's compliance with Mount Laurel. The zone appears to be already largely developed, and even if it were not, § 101-138 requires a use ratio of one acre residential to nine acres non-residential. No meaningful contribution to fair share goals could possibly be made under such a requirement. Mount Laurel housing goals might be furthered, however, if each new non-residential development were required to provide or fund an appropriate number of low and moderate income housing units on some site within the Township, to reflect the housing needs generated by the new development itself.

It is plaintiff's position that the PCD zone, which appears to contain a significant amount of developable land, has been regulated in a regressive and completely unacceptable manner by the Township. Sections 101-124, dealing with existing or pending applications is quite generous. Permitted uses include multiple-dwelling units, there is no gross density limitation, net density is set at 11 units per acre, and the net density calculation treats common open space as residential land. In addition, the requirements for common open space are stated only in general terms.

By contrast, § 101-125 limits new developments in the PCD zone in a number of significant ways. Multiple-dwelling units are no longer permitted (§§ (B)(1)), a gross density limitation of 2½ units per acre is imposed (§ (D)(1)), common open space is excluded from the net density calculation (§ (D)(2)), the net densities themselves have been reduced (§ (D)(2)(b) and (c)), and excessive open space and recreation space requirements have been explicitly required (§ (I)(1) & (2)). It is plaintiffs' position that § 101-125 must be repealed in its entirety, as part of the general revisions of the zoning code discussed below.

Mandatory set-asides. The Plainsboro ordinance as it now stands contains no provision, not even a voluntary one, that might be construed as attempting to encourage the production

of low and moderate income housing. It is plaintiffs' position that the revised ordinance must now go beyond voluntary incentives and include a mandatory set-aside provision for low and moderate income housing. As the Supreme Court noted in Mount Laurel II, density bonuses and other voluntary incentives "leave a developer free to build only upper income housing and thus may prove to be insufficient to achieve compliance with the constitutional mandate." East Brunswick, for instance, has had a voluntary density bonus plan in its ordinance since 1976 that has to date produced only 168 units of moderate income housing.

The following measures, or other ordinances and provisions which will accomplish the same objectives, must be included in the mandatory set-aside and related ordinances:

1. The Township must adopt an ordinance which requires that a certain percentage of units in each high-density residential development be set aside for occupancy by low and moderate income households. This percentage must be large enough to enable the Township to meet its fair share obligation, but not so large as to make development infeasible. The Supreme Court in Mount Laurel II suggested that a 20% set-aside, divided proportionally between low and moderate income units based on need, would be appropriate. In return for this set-aside, developers should be allowed to develop at sufficiently high densities to permit the use of efficient construction techniques and economies of scale. We have determined that a minimum gross range of 8 to 16 units per acre, depending on housing type, will be necessary to meet these conditions. As we have noted above, the gross density of 2½ units per acre contained in § 101-125(D)(1) is completely inadequate.

2. The Township's zoning ordinance may not contain any provision under which residential developments at comparable densities may be constructed without a mandatory low and moderate income set-aside. Such alternatives obviously would undermine achievement of the Township's fair share goals.

3. The ordinance must require that lower income units be phased in along with the balance of the project. This will ensure that developers do not render the mandatory requirement ineffective by building conventional units first and then reneging on the obligation to develop lower income units.

4. The mandatory requirement must apply to a sufficient amount of vacant, developable land to enable the Township to meet its fair share obligation. Based on a formula which

considers factors such as total employment, amount of vacant, developable land, and net employment growth, our preliminary calculations show that Plainsboro Township's fair share of the regional need for lower income housing through 1990 is approximately 425 low income and 229 moderate income units.

The Township's fair share plan may be accomplished either by allowing high density residential developments with a mandatory set-aside as a conditional use in any non-environmentally sensitive zone or by zoning specific tracts for this type of development. Assuming that a 20% set-aside for low and moderate income housing is used, the amount of land zoned for high density residential development must be sufficiently ample to accommodate five times the fair share requirement since only 20% of the units will be earmarked for low and moderate income housing. In addition, as the Supreme Court noted in Mount Laurel II, it may be necessary to "overzone" for high density development since not all property zoned for a particular use results in development of that use and a failure to set aside enough land may cause an increase in land costs and thus an increase in the overall cost of development.

5. Provisions must be enacted to insure that units set aside for low and moderate income households will in fact be occupied by such households and that future sales or rentals will also be to low and moderate income families. In this regard, the Township might require the developer to use restrictive covenants for sales, formulate appropriate rent control provisions for rentals, and establish or contract with an independent agency to regulate future transfers.

To determine what housing costs are affordable to low and moderate income families, we suggest adopting prevailing governmental and trade guidelines which provide that housing costs should not exceed 28% of family income for sales and 30% of family income for rentals. Housing costs are defined as principal, interest, taxes, insurance, and association fees for purchases, and rent and utilities for rentals. Moreover, it must be demonstrated that the units are actually affordable, not only to persons at the top of each income range, but also to a reasonable cross-section within each category. Use of simplistic formulae to determine affordable costs, such as multiplying family income by 2.5 to yield sales prices, are clearly inappropriate for these purposes.

Elimination of cost-generating features. The ordinances should provide procedures that are both streamlined and free of any cost-producing requirements and restrictions that are

not necessary to protect health and safety. Although we are continuing to review the ordinances to determine whether they comply both with Mount Laurel II and with the technical requirements of the Municipal Land Use Law, N.J.S.A. 49:55D-1 et seq., our initial review indicates that it contains a number of provisions that are inconsistent with the above objectives. The provisions include the following:

50 acre minimum NG.

1. The 50 acre minimum for planned developments in the PCD zone (§ 101-125(C)) should be removed unless it can be shown that this requirement will not interfere with the development of potential sites suitable for multi-family projects. Indeed, the Municipal Land Use Law requires only a five-acre minimum. N.J.S.A. 40:55D-6. Similarly, the 500 acre minimum in the PMUD zone (§ 101-136) is clearly excessive.

2. Sections 85-59(A),(B),(D), & (E) and §§ 85-51(A) & (B) contain architectural and design standards which are dictated by considerations of aesthetics rather than health or safety. These requirements limit a developer's flexibility in achieving cost-effective construction methods and should be eliminated altogether insofar as developments including low and moderate income housing are involved.

3. The subdivision ordinance seems to permit the Township to impose heavier burdens on planned developments with respect to sewage and solid waste disposal than are imposed on other residents of the Township. Sections 85-59(I) & (L). These provisions should be revised to make it clear that no such differential in the provision of public services is intended.

4. The buffering requirements in §§ 85-20(E) & (F) appear to be excessive and should be reduced or eliminated.

5. The requirement that 15% of the gross area of a planned development be devoted to "useable recreation facilities" (§ 101-125(I)(1)) is clearly excessive. In addition, the detailed standards for recreation facilities (§ 85-62), including the apparent requirement that there be tennis courts, that each tennis court be provided with four parking spaces, and that swimming pools be provided at the rate of three square feet per resident over the age of three, are excessive.

6. The subdivision ordinance requires that at numerous steps in the approval process, the developer pay all reasonable costs for the Township's professional review of the application, and the nominal fee schedule on a per/unit basis is merely an escrow deposit against this ultimate charge. See. e.g., §§ 85-8(F), 10(B), 15(A), 34(D), 35(B) (maximum of $5,000), and

39(A)(2). This mechanism does not establish the certainty in fee schedules that is contemplated by the Municipal Land Use Law (see N.J.S.A. 40:55D-8(b)), and allows too much flexibility to the Township to generate unnecessary costs in connection with specific developments that it does not favor. A specific and uniform fee schedule should be adopted.

7. Conversion of single-family homes to two-family use can provide an important supplement to production of new housing. While §§ 101-25 and 35 permit such conversions in the R-200 and R-85 zones, the requirement that any converted structure in the R-200 zone have a 35,250 square foot lot per unit is excessive and unnecessary. Conversions should also be subject to appropriate occupancy controls as discussed above if they are to be considered toward meeting Mount Laurel goals.

Affirmative municipal action. Because of current economic conditions and reductions in federal housing subsidies, a mandatory set-aside ordinance alone may not be sufficient to enable a municipality to meet its fair share obligation, especially its distinct obligation to address low income housing need. Therefore, Plainsboro Township will also have to show, by resolution or ordinance, that it will offer the inducements necessary to meet this obligation fully. These inducements could include making municipally-owned land available for sale or long-term lease for use in development of low and moderate income housing; offering tax abatements to developers for the construction of lower income units; assuming financial responsibility for the construction of roads, sewers, and other infrastructure requirements; and committing a significant portion of the Township's Community Development Block Grant funds to aiding development of such housing through acquisition, write-downs, site improvements, or the provision of subsidies to prospective lower income homebuyers. The Township must also apply for such state and federal subsidies as may be available and encourage and assist developers to participate in available governmental programs.

Mobile homes. Zoning for mobile homes should also be included as an affirmative device in Plainsboro's ordinance. The ordinance may provide that such zoning will take effect only if the Township is otherwise unable to meet its fair share obligation.

Finally, plaintiffs note that their views on settlement could be significantly influenced by the disposition of any applications for residential development that are pending before the Township or may come before the Township during these proceedings. Approval of any such applications with a

provision for low and moderate income housing applied to a sufficiently large tract of land will reduce the Township's remaining fair share obligation and thus facilitate settlement of this matter.

This letter is submitted for settlement purposes only and does not purport to describe the positions plaintiffs will take should Plainsboro's Mount Laurel obligation have to be litigated. We are hopeful, of course, that further litigation will not be necessary. In this regard, plaintiffs remain open to discuss with you and your clients any reasonable alternatives to what we have suggested which you believe are likely to result in the construction of low and moderate income housing.

We look forward to your reply.

Sincerely yours,

Frank Askin
Counsel for Plaintiffs

cc/Hon. Eugene Serpentelli, J.S.C.
Carla Lerman
Bruce Gelber, Esq.
Jeffrey Fogel, Esq.