UL v. Certoet, South Plainfield 5 Sept (1984)

Letter asserting no fundamental objections to Affordable Housing Ordinance drafted, lists technical corrections

+ objections to some proposed amendments

5 pgs

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September 5, 1984

Mr. Robert E. Rosa
Robert E. Rosa Associates
510 Amboy Avenue
Woodbridge, New Jersey 07095

Re: Urban League vs. Carteret, No. C 4122-73

Dear Mr. Rosa:

I am in receipt of your letter of August 22 to Barbara Ciccone and the attached drafts of the proposed Zoning Ordinance amendments and Affordable Housing Ordinance. After extensive review of the materials and consultation with Alan Mallach, plaintiffs' expert, I write to inform you that we have no fundamental objections to the Affordable Housing Ordinance as drafted, although there are some technical corrections, noted below. In contrast, we have, as I told you previously in our extended telephone conversation on July 26 and in my letter of August 15, a number of fundamental objections to the proposed zoning ordinance amendments, as well as some drafting and technical corrections. We believe that the zoning ordinance amendments, as presently drafted, would be in violation of the Judgment as to South Plainfield entered by Judge Serpentelli on May 22, 1984 and, thus, if the Planning Board and Council sought to enact them in their present form, plaintiffs would have to bring the matter before the Judge for appropriate action.

There are three basic problems with the zoning ordinance amendments. First, you have added since the last draft wholly unacceptable definitions of condominium apartments and townhouses to require that all units, including those intended for lower income households, on all but two sites, be for sale, rather than for rent. We recognize that many developers prefer to build sales properties. Nevertheless, we believe that any attempt to exclude any possibility of rental developments arbitrarily limits the realistic opportunity for construction of low and moderate income housing required by Mount Laurel II and this Judgment. Your prior draft quite properly defined garden apartments and townhouses by the type of structure, rather than the method of ownership, and we must insist that the Borough revert to that approach.

Second, as I have previously explained, we believe that your attempt to require on most of the sites a mixture of apartment and townhouses in a fixed 50-50 ratio and at differing densities is an arbitrary and inappropriate restriction that would deter development of the major sites covered by the Judgment. Quite simply, your proposal, by imposing arbitrary restrictions on the developer's options for usage of the acreage, when viewed in the context of detailed and, in respects noted below, excessive development standards and landscaping requirements, makes design and implementation of a development more complicated, hence more costly and less attractive. In our

Exhibit G-2

expert's opinion, the fixed ratios and differing densities will deter construction of the lower income units that the Judgment is designed to effect. Nevertheless, we recognize the Borough's (or at least your) underlying concern that not all units be garden apartments on the larger sites. In recognition of, although not necessarily agreement with, that concern, we would not object to a proposal that, on any site in PRD-1 involving a total of 200 or more units, the ordinance require a mixture of townhouses and apartments, with no more than 75 percent of the units in one development being of one type, if the only density specification is the overall gross density of 12 per acre required by the Judgment. We think this would meet some of the Borough's concerns, without needlessly restricting the developers' flexibility. We do not believe, however, that any such requirement for mixture of types of structures is realistic or feasible on the Pomponio Avenue site, involving a density of 15 per acre, which is covered by your PRD-2 zone. For that zone, the ordinance should simply establish a density of 15 per acre without specification of any limit on the types of developments.

The third major problem with your zoning ordinance draft is that it seeks to establish excessive, cost-enhancing development standards not tied to safety, health or other substantial public interests. Indeed, Mr. Mallach seriously doubts whether a developer could physically build 12 or 15 units to the acre, as theoretically permitted in PRD-1 and 2 zones, given the other requirements. In this connection I refer you again to Judge Smith's August 1 opinion in the Mahwah case, of which I have previously sent you a copy, which sets forth development standards very similar to those we propose.

First, we think it is essential to permit the developer to build at least half of the units in the development in structures of up to 3 stories of 40 foot height. This would hardly be inconsistent with the general concept of garden apartment development and in any case we note that the MF-1 and SC-1 zones already provide for 6- and 5-story buildings. This change would, of course, require modification of the standard in 711.2(c)(1)(f)(1) and comparable provisions to permit 24 households or units in a 3-story structure and 16 in a 2-story structure. In this regard, I note Judge Smith's finding that a 3-story, 24-unit structure is the most efficient to build. With regard to maximum lot coverage, we believe that 25% is necessary to make these developments feasible.

As for the specific setbacks, which I have previously gone over with you orally, I repeat them below for your convenience and Mr. Diegnan's information.

Apartments (presently in 711.2(c)(1) )
Townhouses (presently in 711.2(d)(1) ) (We do not expect townhouses to be more than two stories - alternative setbacks are for higher apartmer

Minimum front setback -- 20 feet from 2 story structures
35 feet from 3 story structures

Minimum setback from interior private roads carrying traffic through development -- 20 feet
from parking lots or parking areas -- 10 feet

Minimum setback from side and rear of tract property line --
25 feet from 2 story structure
35 feet from 3 story structure

Minimum open space between two buildings -- 50 feet if facing windows
20 feet if no facing windows

For the SC-1 zone development, the apartment standards would apply, although there could, again be some variation in the front and side setbacks for the taller structures that are permitted there. Finally, we reject, as I told you before, the idea that the setbacks for the MF-1 zone should be tied to the pending proposal for Elderlodge. The Judgment directs rezoning of the property which is the subject of that application; it does not in any way suggest that the rezoning must be tied to a private party's particular proposal and certainly could not be so construed if it would deter development of low and moderate income units. We propose that the front, side and rear setbacks, presently in 713.2 (b) (1), be 30 feet each, rather than 60-30-40 as in your draft, and, again, that the maximum lot coverage be 25%.

In addition to the height, setback and maximum coverage standards, we have problems with some of your design specifications. The second half of 711.2(c)(1)(f)(1) and the provisions of 711.2(d)(1)(f)(3) and (4) concerning facades and the like, while perhaps most to your professional liking, are arbitrary, cost-enhancing restrictions on development not related to health or safety, as required by Mount Laurel II. Similarly, as previously discussed, we fundamentally disagree with your design limitations on townhouses -- in (d)(1)(f)(1), (2), (10), and (11). We think the ordinance should permit 3 to 12 (rather than 4 to 8) attached units, should have no total length limit, should permit a width of no less than 16 (rather than 20) feet and should permit individual lots of 1250, rather than 2000, square feet. Finally, we note that your specifications for apartments in 711.2(c)(1)(f)(4) do not permit the construction of common laundry facilities, as compared to internal laundry areas. Again, it is important to retain flexibility in design and implementation, unless the standards are vital to preserve significant health and safety needs.

Similarly, we have some difficulties with some of your buffer and landscape specifications, which again may reflect your personal or professional design preferences but do not reflect fundamental housing needs. Under 711.4(b)(1), you require only a 5-foot landscaped buffer along all property lines. When you get to multi-family dwellings bordering on single-family homes, however, in 711.4(b)(9), you suddenly increase to 25 feet, and then in 711.5(d) also require a solid 6 foot high architectural fence, subject to waiver if the buffer area is properly landscaped. We think the combination is excessive and could, as I had explained to you previously, readily be solved by permitting the developer an option. Specifically, we think the requirements would not be objectionable if the ordinance clearly provided that the developer had a choice of either a 5-foot landscaped buffer with a solid fence or a 25 foot buffer between the boundary line and any structure, which could include the backyards of townhouses. Your proposal would not only provide for excessive and, in our view, totally unnecessary screening of

the multi-family developments, but would make development almost impossible given the setback requirements. That is, with a setback requirement even of only 25 feet, as we have proposed, the developer already would lose significant space around the property perimeter. If you do not allow him or her to use some of that 25 feet for parking areas, other passageways, play areas, or backyards, you make it almost impossible to put together on the space provided the units the Judgment requires be allowed. Similarly, the requirement in 711.4(c) for a minimum of 20 percent landscaped area is acceptable only if it includes all buffers as well as all required recreation areas. Finally, your landscaping proposal includes too many subjective judgments, threatening the possibility of holding up an entirely compliant development for reasons of personal taste or official animosity towards accomplishment of the Judgment's goals. For example, 711.4(a)(4) on labelling, and (b)(4) on monotony are excessive, and (a)(2), (b)(4), and (b)(6) provide far too much leeway for individual municipal decisionmaking. Your draft's (b)(5) shows that it is possible to be specific and thus remove the risk that discretion in landscaping decisions could be misused.

Two further minor points before moving on to the general provisions. Your proposed requirement of a trash compactor in each townhouse, in 711.2(d)(1)(f)(9), appears unnecessary, and your reference in 714.2(b)(1)(f)(2) to a basement area in the senior citizens apartment is inconsistent with your removal of basement requirements in (f)(3) immediately following and in all other provisions of the ordinance.

With reference to the general regulations set forth in Article V, I note that 516.1(c), which correctly states the 20% set-aside for PRD-1, 2 and MF-1 fails to note, as required by Judgment Paragraph 3(F), that in SC-1, 50% of the units must be low income and 50% moderate. With regard to the bedroom mix, accurately stated in 516.1(e), you need to add a provision for phasing in of construction permits or certificates of occupancy, as you did in 516.1(d) before it, to insure construction of the differing unit sizes, as required by Judgment Paragraph 3(L). In 516.1(f), concerning age restrictions, you have omitted any definition of the permissible age restriction. As you know from our prior draft, plaintiffs have consistently opposed any age restriction of 59 or less, so that we can be sure that senior citizen housing is in fact used for seniors. Finally, as a technical matter, I note that you should refer to the Judgment in all places as the "Judgment As To South Plainfield," to avoid confusion with other judgments in the same case.

AFFORDABLE HOUSING ORDINANCE

As noted previously, we have no serious problems with this draft. Substantively, I note only one omission -- the failure to specify a quorum for meetings of the agency. Also in 1002(g) I assume you meant that alternates may participate in "all discussions and other proceedings" rather than the present wording. Also I assume the last sentence of that provision should read: "If only one alternate may vote, Alternate No. 1 shall vote."

With regard to Table III, Alan noted that the draft you have still uses an average of 3 and 4 and of 4 and 5 person households for the 2 and 3 bedroom categories, although the consensus approach had pegged the 2 bedroom units to the 3-person household and the 3 bedroom units to the 5-person household. Tables I and II already incorporate that approach with regard to sales units; the consensus approach was to apply that as well to rentals. For your convenience, we have enclosed a copy with the corrected figures. Please note this means that notes 1 and 2 should be deleted and the others renumbered accordingly.

Finally, there were a few incorrect internal references and typographical errors. In 330(g) it should read "PMSA." The heading of ARTICLE VI should be "MAXIMUM SALES PRICES AND RENTAL CHARGES." The references in 601(a) and 602(a) should be to "section 500" not "this section" or "subsection 601(d) above." In 801 the reference should be to "section 701" not "this section." I also note the misspelling of "until" in 601(c) and of "Paterson" in 900.

OTHER MATTERS

Finally, there are still a few other matters to be drafted. The Borough must draft and adopt a resolution, pursuant to Paragraph 6 of the Judgment, committing the Borough to apply for all available government funds for rehabilitation and for subsidization of construction or rental, and encouraging (or, if you prefer, requiring) developers also to apply where appropriate. In addition, concurrently with adopting the zoning amendments with reference to SC-1, the Borough must adopt a resolution to comply with Paragraph 4 of the Judgment that commits it to contribute the land and financial support for the SC-1 development. I note also that the first report under Paragraph 9 is due by September 30. Finally, lest you think I am rushing you on the major revisions, I note that under Paragraph 11 of the Judgment, the time began to run 5 days after May 30, when Carla Lerman reported to the Court concerning South Plainfield, and thus the 120 days for revision of the ordinances does not run out until October 4, not October 1 as I had previously stated.

Please address your response to these objections and all future drafts of ordinances and resolutions to Barbara Williams, here at the Constitutional Litigation Clinic, and to Bruce Gelber, at the National Committee Against Discrimination in Housing, the primary counsel for plaintiffs in the revision stage, and to Alan Mallach, our expert, although I would appreciate receiving a copy as well. We look forward to South Plainfield's timely and complete compliance with the Judgment.

Sincerely yours,

Eric Neisser

Eric Neissser
Associate Professor of Law

cc/Patrick Diegnan, Esq.
Barbara Williams, Esq.
Bruce Gelber, Esq.
Mr. Alan Mallach
Mr. Roy Epps