VL v. Carteret (S. Plainfield) 8 Nov (1985)

- Letter from Barcan+ Judge re: opp. to ~~[illegible]~~'s Harris' motion

4 pgs

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November 8, 1985

PLEASE REPLY TO:

Honorable Eugene D. Serpentelli
Ocean County Court House
CN 2191
Toms River, New Jersey 08754

Re: Urban League vs. Mayor and
Council of Carteret, et als. -
South Plainfield Case

Dear Judge Serpentelli:

This firm represents Harris Structural Steel Co., Inc. which has moved to intervene in the captioned litigation; the motion is scheduled for hearing on November 12, 1985 simultaneously with the compliance hearing on the South Plainfield Zoning Ordinance. I wish to respond to the papers received yesterday from Eric Neisser on behalf of the Urban League in opposition to Harris' motion. Before responding to some of points made in the Urban League's papers, I wish to state clearly Harris' position that the primary thrust of its motion is to commit to the construction of lower income housing as long as it can subsidize such housing by nonresidential uses. Therefore, it is hoped that Harris' petition in this case will have appeal to the Court and to the Urban League, although we assume that South Plainfield intends to appeal the final judgment in this case and so would not consent to any amendment to the Judgment on Harris' behalf which the Court might find acceptable. However, because the public interest will be served by implementing Harris' position, we respectfully suggest that a preargument conference be held in chambers so that the various options for voluntary development by Harris might be explored informally.

As to the merits of the Urban League's position, Harris does not contend that the site is not suitable for residential development because of proximity to industrial uses or otherwise. We point, instead, to the environmental constraints to site development and acknowledge frankly that differing figures of developable acreage are given in the various memoranda submitted by Harris' expert and attached to Harris' moving papers. But Paragraph 13 of my Affidavit notes that the precise amount of developable acreage cannot be fixed without a formal field investigation of soil and vegetation types followed by a survey. This is conceded by Allen Mallach in Paragraph 10 of his Affidavit where he states that the precise amount of buildable land "can only emerge from a formal and systematic environmental and engineering study". It is apparent that no such study was done before the entry of Judgment as the very first paragraph of the May 22, 1984 Judgment states only that the review of the sites selected dealt only with the "reasonableness" of development on those sites. The extent to which those sites are fully developable will have to await more formal study in connection with the site plan review process. At this point, we know only that the entire site is not developable because of wetlands and other environmental constraints and also because of the development standards imposed by the new South Plainfield Zoning Ordinance.

Harris is willing to build as lower income housing 20 percent of the gross density which is achievable on the buildable portion of the site following a systematic environmental and engineering study in light of applicable environmental regulations and the new Zoning Ordinance, whatever that number turns out to be. We ask for the option to develop the balance of the buildable land with nonresidential uses, such as offices and light industrial facilities. We believe that it is unfair to hold Harris to a gross density of 12 units per acre including nonbuildable land, especially if the Harris site is the only site with serious environmental constraints. The Urban League's logic would force the gross density onto a smidgen of the entire site if that were the only buildable area; that is not only bad planning but would deprive Harris of any chance to build a nonresidential subsidizer. In that regard, we note that the Urban League apparently does not object to subsidizing lower income units with nonresidential uses.

We say again that no real public hearings were ever held. The Urban League's brief notes the Borough's history of resisting implementation of the Judgment by delaying adoption of a new Zoning Ordinance. It is therefore unfair for the Urban League to suggest that Harris tried and failed to convince South Plainfield to accept its view and that had South Plainfield been so convinced it could have moved the Court for a reopening of the Judgment. South Plainfield was obviously unreceptive to Harris' willingness to build Mt. Laurel housing.

The discussion of the Court's right to impose a rezoning Ordinance also begs the question. We do not deny that the Court could with the advice of the Master rezone the Borough to enforce its Judgment. We say only that error was made in entering the Judgment itself by ordering a rezoning without public input.* Public input is solicited in cases which are not settled, for example, in Cranbury. While a municipality does not have to accept public comment given at public hearings, due process requires an opportunity to be heard. Harris has simply had no such opportunity in this case.

In summary, the precise amount of buildable land on the Harris tract has never been set by formal study or otherwise. Such documents as are now available demonstrate that a substantial amount of the site is unbuildable, although the parties presently dispute the precise amount of that acreage. Harris submits that it should be permitted to intervene and the Judgment as it affects the Harris site should be amended to permit Harris to build as lower income housing 20 percent of the density achievable on a site plan utilizing the buildable acreage as determined by formal study which would consider applicable environmental regulations and the requirements of the proposed new Zoning Ordinance. If the Court accepts the

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* I make an analogy to a variance application to which there are objectors and which is denied by the Board of Adjustment or Planning Board. On appeal by the applicant, could the Board settle the case by agreeing to the grant of variance or some modified building proposal? Clearly, such a settlement would be without the participation of the objectors, would represent nothing more than a "change of mind" by the Board, and would be improper.

Urban League's argument that the gross density should remain at 12 units per acre, then Harris would want the flexibility to build only the set aside component of such density. In either event, Harris asks that the Judgment be amended to permit the site to contain nonresidential uses to subsidize the lower income housing with phasing in accordance with the Judgment. This latter aspect is apparently not opposed by the Urban League and is a mechanism offered by Harris to achieve the Mount Laurel II housing which it is willing to build.

Respectfully yours,

STEPHEN E. BARCAN

Federal Express

cc: Eric Neisser, Esquire (Federal Express) ✓
Frank Santoro, Esquire (Federal Express)
South Plainfield Service List
Harris Structural Steel Co., Inc.
John Rahenkamp & Associates, Inc.