

CA

Cranbury

Trial brief on behalf
of D (Twp Cranbury)

PSS-14

CA002214B

LAWRENCE ZIRINSKY,

Plaintiff,

v.

THE TOWNSHIP COMMITTEE OF THE
TOWNSHIP OF CRANBURY, A Municipal
Corporation and THE PLANNING BOARD
OF THE TOWNSHIP OF CRANBURY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX
COUNTY

Docket No. L 079309-83 P.W.

JOSEPH MORRIS and ROBERT MORRIS,

Plaintiffs,

v.

TOWNSHIP OF CRANBURY IN THE
COUNTY OF MIDDLESEX, A Municipal
Corporation of the State of New
Jersey,

Defendant.

Docket No. L 054117-83

TRIAL BRIEF ON BEHALF OF DEFENDANT,
TOWNSHIP OF CRANBURY

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WILLIAM C. MORAN, JR., ESQ.
On the Brief

GARFIELD & COMPANY,

Plaintiff

Docket No. L 055956-83 P.W.

v.

MAYOR and THE TOWNSHIP COMMITTEE OF
THE TOWNSHIP OF CRANBURY, A Municipal
Corporation and the Members thereof;
PLANNING BOARD OF THE TOWNSHIP OF
CRANBURY, and the members thereof.

Defendants

CRANBURY DEVELOPMENT CORPORATION, A
Corporation of the State of New
Jersey,

Plaintiff,

Docket No. L 59643-83

v.

CRANBURY TOWNSHIP PLANNING BOARD and
the TOWNSHIP COMMITTEE OF THE TOWNSHIP
OF CRANBURY,

Defendants.

BROWNING-FERRIS INDUSTRIES OF SOUTH
JERSEY, INC., A corporation of the
State of New Jersey, RICHCRETE CONCRETE
COMPANY, A Corporation of the State of
New Jersey, and MID-STATE FILLIGREE
SYSTEMS, INC., A Corporation of the
State of New Jersey.

Plaintiffs,

Docket No. L 058046-83 P.W.

v.

CRANBURY TOWNSHIP PLANNING BOARD and
THE TOWNSHIP COMMITTEE OF THE TOWNSHIP
OF CRANBURY,

Defendants

URBAN LEAGUE OF GREATER NEW BRUNSWICK,

Plaintiff,

CHANCERY DIVISION:
MIDDLESEX COUNTY

v.

THE MAYOR and COUNCIL OF THE BOROUGH
OF CARTERET, et al.,

Defendants

Docket No. C 4122-73

CRANBURY LAND COMPANY, a New Jersey
Limited Partnership,

Plaintiff,

v.

CRANBURY TOWNSHIP, A Municipal Corporation
of the State of New Jersey located in
Middlesex County, New Jersey,

Defendant.

Docket No. L 070841-83

TOLL BROTHERS, INC. a Pennsylvania
Corporation,

Plaintiff,

v.

THE TOWNSHIP OF CRANBURY IN THE COUNTY
OF MIDDLESEX, A Municipal Corporation
of the State of New Jersey, THE
TOWNSHIP COMMITTEE OF THE TOWNSHIP OF
CRANBURY and THE PLANNING BOARD OF THE
TOWNSHIP OF CRANBURY,

Defendants.

Docket No. L 005652-84

POINT I

THE OBLIGATION OF A MUNICIPALITY TO
PROVIDE A REALISTIC OPPORTUNITY FOR
ITS FAIR SHARE OF LOWER INCOME HOUSING
IS LIMITED BY THE DECISION OF THE
SUPREME COURT IN MOUNT LAUREL II.

The Mount Laurel doctrine requires that certain actions be taken to provide a realistic opportunity for the construction within a municipality of its fair share of lower income housing. In its Mount Laurel II decision, the Supreme Court delineated sequential measures which are required to guarantee compliance with the constitutional mandate implicit in Mount Laurel. First, municipalities are obligated to remove all municipally created barriers, such as zoning and subdivision restrictions and exactions not necessary to protect the public health and safety. So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158, 456 A. 2d 390 (1983) [hereinafter Mount Laurel II]. Second, "where the Mount Laurel obligation cannot be satisfied by removal of restrictive barriers, inclusionary devices such as density bonuses and mandatory set-asides keyed to the construction of lower income housing" are to be included in the land use regulations of the municipality. Mount Laurel II, 456 A. 2d @448.

Once a municipality has taken the first two steps (i.e. revised its land use regulations to remove restrictive barriers and affirmatively acted to provide a realistic opportunity for the construction of its fair share of lower income housing) the Mount Laurel doctrine requires it to do no more. Mount Laurel II, 456 A. 2d @442.

The language of the opinion is clear. "Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the Mount Laurel doctrine requires it to do no more". 456 A2d @ 442. As will be seen later in the brief a builder's remedy is not appropriate in this case. But even if it were there is nothing in Mount Laurel which indicates that a builder's remedy could require a municipality to provide more than its fair share. Implicit in the concept that a given allocation number constitutes a fair share is also the idea that anything more or less is unfair.

POINT II

A "BUILDER'S REMEDY" RECOMES AVAILABLE ONLY UPON A FINDING BY THE COURT THAT A MUNICIPALITY HAS FAILED TO MEET ITS MOUNT LAUREL OBLIGATIONS.

A site-specific "builder's remedy" has been styled by the Supreme Court to augment the traditional forms of judicial remedies available when a municipality has failed to comply with its Mount Laurel obligation.

If a trial court determines that a municipality has not met its Mount Laurel obligation, it shall order the municipality to revise its zoning ordinance within a set time period to comply with the Constitutional mandate; if the municipality fails adequately to revise its ordinance within that time, the court shall implement the remedies for noncompliance outlined below; and if plaintiff is a developer, the court shall determine whether a builder's remedy is appropriate. Mount Laurel II, 456 A. 2d at 452.

If, and only if, a municipality has not initially met its Mount Laurel obligation and then subsequently further fails to revise its zoning ordinance to comply with the constitutional mandate can the Court implement the available remedies fashioned for non-compliance; one of which is the so-called "builder's remedy". The unambiguous language of the Supreme Court in its Mount Laurel II decision necessitates that both of the above prerequisite events occur prior to the consideration by the Court of the available judicial remedies

for non-compliance, the most drastic of which involves action by the court which may properly be described as "quasi-legislative" in nature (i.e. a "builder's remedy").

Upon a finding of non-compliance, the trial court must initiate its inquiry into the characteristics of the various plaintiff-developers to determine whether any form of builder's remedy is appropriate. After completing its scrutiny of the plaintiff-developer; and assuming the court finds the developer is possessed of the requisite qualifications, the court must additionally engage in a thorough examination of the developer's proposed plan; as submitted to the municipality, to ascertain if the project is one suitable to assure compliance with the Mount Laurel doctrine. Should the developer or his proposed plan fail to satisfy the strict requirements of Mount Laurel, any right to a builder's remedy is lost.¹

1. When it comes to a builder's remedy, however, there is no substitute for low and moderate income housing. If the builder wants his remedy, he must prove to the satisfaction of the trial court that lower income housing, not just least cost housing, will actually result from it. Mount Laurel II, 456 A. 2d @ 479.

POINT III

TO BE AWARDED A BUILDER'S REMEDY, THE PLAINTIFF DEVELOPER MUST SATISFY THE COURT THAT IT HAS FULFILLED AT LEAST FIVE PRE-CONDITIONS TO OBTAINING SUCH RELIEF.

In order to insure that the plaintiff-developer not abuse the Mount Laurel doctrine, the Supreme Court imposed certain pre-conditions on the category of plaintiff-developers who would, in any event, qualify for the grant of a "builder's remedy" (i.e. site-specific relief). At a minimum, the plaintiff must demonstrate that:

- (1) it has acted in good faith;
- (2) it has attempted to obtain relief without litigation;
- (3) it has proposed a specific and detailed project for construction;
- (4) its proposed project includes an appropriate proportion of lower and moderate housing (i.e. it is insufficient if the project includes only "least cost" housing); and
- (5) its project is located and designed in accordance with sound zoning and planning concepts.

Mount Laurel II, 456, A. 2d 390, 420.

While the decision of the Supreme Court in Mount Laurel II unquestionably expanded the availability of a "builder's remedy", it did not relieve the trial court of its obligation to guard the public interest carefully to be sure plaintiff-

developers do not misappropriate the doctrine expoused in that decision. Mount Laurel II, 456 A. 2d @453. Simply put, any builder's remedy is subservient to the implementation of the Mount Laurel obligation and not vice-versa.

The articulated basis for the Supreme Court's expansion of the so-called "builder's remedy is predicated upon the principle that such a remedy should "be made more readily available to achieve compliance with Mount Laurel." Mount Laurel II, 456 A. 2d @452 (emphasis added).

If compliance with Mount Laurel is obtained through other means, the granting of a builder's remedy should continue to remain a judicial remedy which, "...will ordinarily be rare." Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481, 551-552; 371 A. 2d 1192 (1977).

POINT IV

TO BE CONSIDERED A "PLAINTIFF-DEVELOPER"
A PLAINTIFF MUST HAVE PROPOSED A PROJECT
FOR CONSTRUCTION WITH SUFFICIENT SPECIFICITY
TO AFFORD A REVIEW OF THE PLAN TO DETERMINE
IF IT IS IN ACCORDANCE WITH SOUND LAND USE
PLANNING CONCEPTS AND THE MOUNT LAUREL
DOCTRINE.

Not every plaintiff who may coincidentally be a developer is a "plaintiff-developer" for purposes of Mount Laurel litigation. To be considered a "plaintiff-developer" the plaintiff must be involved in the litigation after a municipality has rejected its proposed plan which was capable of being reviewed both in terms of (1) sound land use planning principles, and (2) its provision for lower income housing. Mount Laurel II, 456 A. 2d @420.

None of the plaintiffs in this case have ever proposed a specific project to Cranbury. Only one has even indicated the number of units it could build. No specific projects have been proposed to this court. Under Mount Laurel that is fatal to any request for a builder's remedy. That an application is a necessary prerequisite to a builder's remedy is highlighted by subsequent language which said, "Finally, we emphasize that our decision to expand builder's remedies should not be viewed as a license for unnecessary litigation when builders are unable for good reason, to secure variances for particular parcels..." There are no plaintiff-developers in this case. (See Mount Laurel II--the remand did not even

mention builder's remedies because there were no plaintiffs who were plaintiff-developers.)

POINT V.

A JUDICIAL "BUILDER'S REMEDY" GRANTED AS
A RESULT OF RECALCITRANT CONDUCT BY A
MUNICIPALITY IS A SITE-SPECIFIC REWARD TO
A SUCCESSFUL PLAINTIFF-DEVELOPER WHICH
MUST ACCORD WITH SOUND LAND USE PLANNING.

Builder's remedies will only be granted where the proposed project of the developer accords with sound land use planning. Mount Laurel II, 456 A. 2d @ 479.

Sound land use planning, as espoused in Mount Laurel II, necessarily includes planning based upon "regional" needs. Accordingly, each municipality has been directed to provide a realistic opportunity for construction of its fair share of lower income housing within the appropriate region, as defined by the Court. Once a municipality has contributed its fair share, it need do no more. Mount Laurel II, supra @442.

The Supreme Court's expansion of the availability of a "builder's remedy" cannot be interpreted as overriding the court's insistence that appropriate land use planning must consider the needs of a "region". A builder's remedy is not a vested right, rather it is nothing more than a judicial device designed to insure compliance with the Mount Laurel doctrine. If any "builder's remedy" fails to serve the Mount Laurel doctrine, there is no authority which justifies its imposition by the court.

Once the trial court has fixed the "fair share" obligation of a municipality an award of any builder's remedy in excess of that number would unfairly penalize the municipality, distort the "regional need", and serve to thwart the constitutional underpinnings of the Mount Laurel doctrine.

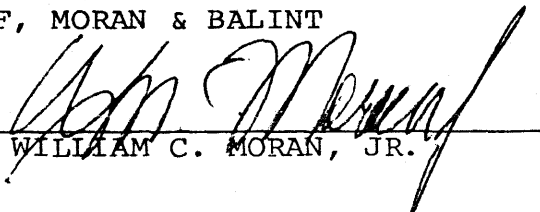
CONCLUSION

For all of the above reasons, it is respectfully requested that the Court deny with prejudice the request of the within plaintiffs for a builder's remedy and further declare by judgment that the effect of any cumulative builder's remedies awarded in a case may not exceed the municipality's "fair share" obligation, fixed by the court pursuant to the Mount Laurel doctrine.

Respectfully submitted,

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BY:


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