

CA - Cranbury

5/17/84

~~cover letter~~ cover letter

trial brief on prioritization

and of builder's remedies submitted
by Toll Bros, Inc.

P 13

CA002236B

BRENER, WALLACK & HILL

ATTORNEYS AT LAW

2-4 CHAMBERS STREET
PRINCETON, NEW JERSEY 08540

(609) 924-0808

CABLE "PRINLAW" PRINCETON
TELECOPIER: (609) 924-6239
TELEX: 937652

HARRY BRENER
HENRY A. HILL
MICHAEL D. MASANOFF**
ALAN M. WALLACK*
GULIET D. HIRSCH
GERARD H. HANSON
J. CHARLES SHEAK**
EDWARD D. PENN+
NATHAN M. EDELSTEIN+
THOMAS L. HOFSTETTER**
ROBERT W. BACSO, JR.+
EDWARD M. BERNSTEIN^
MARILYN S. SILVIA
THOMAS J. HALL
SUZANNE M. LAROBARDIER
ROCKY L. PETERSON
VICKI JAN ISLER
MICHAEL J. FEEHAN

* MEMBER OF N.J. & D.C. BAR
** MEMBER OF N.J. & PA. BAR
+ MEMBER OF N.J. & N.Y. BAR
^ MEMBER OF N.J. & FLA. BAR

FILE NO. 2528-04-02

May 17, 1984

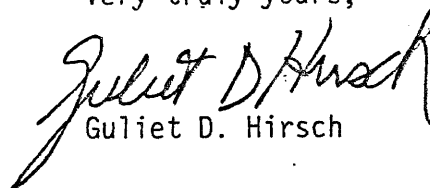
The Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, NJ 08753

RE: Urban Legue case

Dear Judge Serpentelli:

Enclosed please find a copy of Trial Brief on Prioritization of Builder's Remedies Submitted by Toll Brothers, Inc.

Very truly yours,


Guliet D. Hirsch

GDH:klp

enclosure

CC: All Parties on Attached list

Joseph Benedict, Esq.
Benedict & Altman
247 Livingston Avenue
New Brunswick, New Jersey 08901

Bertram Busch, Esq.
Busch & Busch
99 Bayard Avenue
New Brunswick, NJ 08903

Carl S. Bisgaier
Bisgaier & Pancotto
510 Park Blvd.
Cherry Hill, NJ 08034

Patrick Diegman, Jr., Esq.
1308 Durham Avenue
South Plainfield, NJ 07080

Thomas Farino, Jr. Esq.
Applegarth and Halfacre Road
Cranbury, NJ 08512

Bruce Gelber, Esq.
Janet Labella, Esq.
Nat'l Comm Against Dis. in Housing
1425 H Street NW, Suite 410
Washington, DC 20005

Bruce S. Gibber, Esq.
Nat'l Conf. Against
Dis. & Housing, Inc.
1425 H. Street NW
Washington, DC 20005

Michael J. Herbert, Esq.
Stern, Herbert & Weinroth
P. O. Box 1298
Trenton, NJ 08607

Leslie Lefkowitz, Esq.
1500 Finnegaus Lane
P. O. Box 3049
North Brunswick, NJ 08902
atty for defendant Towns.of
North Brunsk.

Lawrence B. Litwin, Esq.
Scerbo, Kobin, Litwin & Wolff
Park Square Bldg.
Morristown, NJ 07960

William C. Moran, Jr., Esq.
Huff, Moran & Bolint
Cranbury-South River Road
Cranbury, NJ 08512

Eric Neisser, Esq.
Rutgers Law School
15 Washington Street
Newark, NJ 07102

Michael Noto, Esq.
151 Route #516
P. O. Box 607
Old Bridge, NJ 08857
atty for def tp of Old Bridge

Phillip Paley, Esq.
Kirstein, Friedman & Cherin
17 Academy Street
Newark, NJ 07102
atty for tp of Piscataway

Richard Schatzman, Esq.
McCarthy & Schatzman
6 Charlton, Box 2329
Princeton, NJ 08540

Joseph Stonaker, Esq.
Stonaker & Stonaker
41 Leigh Street
Princeton, NJ 08540

Arnold K. Mytelka
Clapp & Eisenberg
80 Park Plaza
Newark, NJ 07102

Fred Kessler
Clapp & Eisenberg
80 Park Plaza
Newark, NJ 07102

URBAN LEAGUE OF GREATER NEW BRUNSWICK,
et al.

Plaintiffs,

vs.

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

Defendants,

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

CIVIL ACTION

DOCKET NO: C-4122-73

GARFIELD & COMPANY,

Plaintiff,

vs.

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,

LAW DIVISION
MIDDLESEX COUNTY

DOCKET NO: L-055956-83 P.W.

TRIAL BRIEF ON PRIORITIZATION OF BUILDER'S REMEDIES

SUBMITTED BY TOLL BROTHERS, INC.

BRENER, WALLACK & HILL
Attorneys for the Plaintiff
Toll Brothers, Inc.
2-4 Chambers Street
Princeton, NJ 08540
(609) 924-0808

On the Brief:

GULIET D. HIRSCH

LAWRENCE ZIRINSKY

Plaintiff,

vs.

DOCKET NO: L-079308-83 P.W.

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

Defendants,

JOSEPH MORRIS and ROBERT MORRIS,

Plaintiffs,

vs.

DOCKET NO: L-054117-83

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

Defendant,

CRANBURY DEVELOPMENT CORPORATION, A Corpora-
tion of the State of New Jersey

Plaintiff,

vs.

DOCKET NO: L-59643-83

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 FILIGREE
SYSTEMS, INC., a Corporation of the State of
New Jersey,

Plaintiffs,

vs.

DOCKET NO: L-058046-83 P.W.

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

Defendants,

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

Plaintiff,

vs.

DOCKET NO: L-070841-83

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

Defendant,

TOLL BROTHERS, INC., A Pennsylvania Corporation,

Plaintiff

vs.

DOCKET NO: L-005652-84

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,

DRAFT

ARGUMENT

FACTORS FOR PRIORITIZING THE AWARD OF BUILDER'S REMEDIES ARE SUGGESTED BY THE MOUNT LAUREL II DECISION AND STATE DEVELOPMENT GUIDE PLAN

The issue which will face this Court in the event that Cranbury Township's zoning plan is found not to comply with Mount Laurel II is the relative rights of the developer-plaintiffs¹ to the award of a full or partial builder's remedy. In the event that Cranbury Township's fair share obligation to 1990 is not as great as the sum of the lower income housing commitment of the developers requesting builder's remedies, the Court will have to develop a system for prioritizing rights. It is the position of Toll Brothers, Inc. that this system must be based upon the language and spirit of the Mount Laurel II decision and the principles and guidelines of the State Development Guide Plan.

Attached as Exhibit A to this brief is an outline of a four step process to prioritize rights to builder's remedies. In summary:

- A. The first step requires the Court to consider whether each developer can satisfy four conditions required by Mount Laurel II and thereby establish a prima facie right to the remedy. Any developer who fails to prove satisfaction of these criteria would be weeded out in this first step;
- B. The second step allows the municipality to meet the prima facie showing by producing evidence on each development with respect to its effect on the environment and consistency with reasonable planning concerns. After the developers offer rebuttal, some may be weeded out if this Court concludes, perhaps with the aid of its master, that the proposed project would cause substantial environmental degradation;
- C. Developers who survive to the third step would then undergo careful scrutiny with regard to the availability of infrastructure to their sites. The proposed point system rewards projects with immediately available sewer capacity and water supply, sufficient road access and public transportation facilities. Projects which would require the extension of infrastructure through limited growth areas are penalized. To survive step three, a minimum score must be achieved and the project must not score "zero" on more than one factor; and

¹ hereinafter referred to as "developers" in this brief

- D. In the event that too many developers survive these three steps, step four allows the Court to require rezoning to effectuate the municipality's fair share to the year 1996.

A. Establishment of Prima Facie Right to Builder's Remedy (Step One)

1. Proposal of Substantial Amount of Lower Income Housing

Each developer should specify how he intends to provide a substantial amount of lower income housing as required by the Mount Laurel II decision. 92 N.J. 158, 279. At this point, each developer should set forth the following:

- a. total number of units proposed on his property;
- b. the gross and net densities;
- c. the total number of low income units proposed;
- d. the proposed sales or rental prices by unit size;
- e. the method by which resale price controls will be created and administered;
- f. proposed affirmative marketing provisions; and
- g. construction timetable, including target dates for lower income housing phases.

In the event that any developer proposes a project which fails to meet all of the following criteria, he should be dropped from the rating process at this first step:

1. The project involves less than 20% lower income housing;
2. The developer refuses to market the units at affordable prices or subject to appropriate resale price controls;
or
3. The developer cannot provide assurance to the Court that the project will be constructed and virtually all lower income units will be constructed and offered for sale by 1990.

2. Claim of Good Faith

Each developer should then specify the facts upon which he bases his claim of "acting in good faith and attempting to obtain relief from the municipality without litigation." See Mount Laurel II, 92 N.J. 218². This requirement applies more strongly with respect to the first or second developer who brings suit and requires them to show that the municipality was put on notice of its noncompliance with Mount Laurel II as well as the basic elements of the development plan proposed. After the first developer has been rebuffed in such an attempt, the Court should recognize the futility of further attempts by other developers and not require them to seek to obtain relief without litigation.

3. Conflict or Compliance with Reasonable Planning Concerns

If the developer's property is in a growth area, a presumption should arise that development at densities consistent with the provision of lower income housing will not conflict with reasonable planning concerns. Where only a portion of the developer's property is within a growth area, this presumption should also arise, since as the New Jersey Supreme Court noted in Mount Laurel II, the State Development Guide Plan does not purport to draw lines so finely as to delineate specific parcels of land.

In the event that a developer's property is totally outside of a growth area, he should have to demonstrate that the State Development Guide Plan designation is arbitrary and capricious or that his

² The "good faith" requirement is listed in the "Summary of Rulings" Section of this decision. The Court does not explain this requirement and fails to list it as a prerequisite to the grant of a builder's remedy in its more detailed discussion at pp. 279-280 of the decision. The requirement therefore may be dicta.

proposed development would comport with sound planning and have no negative environmental impact. Relevant to this demonstration is the consideration of whether the proposed development will exert growth pressure on other properties in limited growth, conservation or agricultural areas as designated on the State Development Guide Plan. See Mount Laurel II, 92 N.J. 329.

B. Municipal Defense of Substantial Planning Concerns or Environmental Degredation (Step Two)

In order to demonstrate that a builder's remedy should not be granted for a specific project, a showing of environmental or other substantial planning concerns which make the project clearly contrary to sound land use planning is required. 92 N.J. 280. In the Caputo v. Chester case, the Court recognized the environmentally sensitive nature of much of Chester Township's lands. The Court suggested that the limited growth designation was supported by the Township's lack of infrastructure, its topography, water resources and agricultural suitability. 92 N.J. 311. Although one portion of the Township was considered developable, the balance consisted of rugged terrain, steep slopes and a stream valley. Additionally, the head waters of streams which feed the Raritan River, an important potable water source, are located in Chester Township and there are substantial aquifers throughout the Township. The Court found that the Caputo tract was "strategically located" and that its development would contribute to the pollution of surface water and underground water supply and would cause erosion of steep slopes and further stream pollution during and after construction.

In Round Valley, Inc. v. Clinton, a Court required further

inquiry by the trial court was required into the environmental factors affecting the Beaverbrook tract. The specific feature noted there was the topography, which the Court suggested would make construction more difficult and more costly. 92 N.J. 30.

The factors considered by the Court in the Caputo and Round Valley cases do not exhaust the factors which, when analyzed by a court-appointed master, might justify a conclusion that the proposed development would result in substantial environmental degradation. This conclusion should not be reached until the developers have had an opportunity to rebut the evidence put forth by the municipality.

C. Consideration of Infrastructure (Step Three)

At this point in the process, the remaining developers' property should be judged for suitability for multifamily development in accordance with accepted planning criteria.

The infrastructure factors, which include the availability of public sewers, public water, sufficient road access and public transportation, are derived from the State Development Guide Plan criteria for delineating growth areas as set forth at page 47 of the revised draft (May 1980). Penalties are provided for developments which require extension of infrastructure through other than growth areas in order to avoid the "site specific pressure of locating a large development in such a fashion in a growth area as to make it highly likely that growth will occur where it is intended not to, mainly, in the "limited growth" area." 92 N.J. 329.

D. Final Criteria, (Step Four).

If too many developers survive the rating system to this point, the Court should reward developers in the order in which they rank under the eligibility criteria of step three. Those developers who remain after the municipal fair share is met should be awarded rezoning contingent upon proof that the 1996 fair share would not be exceeded and that the proposed development would be constructed after 1990. The court may require an appropriate phase-in of this housing.
92 N.J. 218-9.

EXHIBIT A

OUTLINE
ELIGIBILITY FOR BUILDER'S REMEDY IN
MULTIPLE-PLAINTIFF CONTEXT

Step 1:

Builder-Plaintiff must establish prima facie right to remedy by showing:

- a. He proposes "subst. amt." of lower income housing;
- b. He has acted in good faith and attempted to obtain relief without litigation (this is not a significant factor after at least one developer has "attempted to obtain relief" and failed);
- c. Some portion of his property is in a growth area or if not in a growth area, the proposed project does not conflict with substantial env. or planning concerns, including: sewer, water, drainage and road improvements in a limited growth, agricultural or conservation area.

Step 2:

Municipality then may meet showing of builder-plaintiff by showing that proposed project would cause "subst-environmental degradation". Builders-Plaintiffs should offer rebuttal at this stage.

Step 3:

Consideration of Infrastructure

In order to survive this step, the builder-plaintiff must score at least 10 points and must not score more than one "0" point in the process.

<u>A. Public Sewers Availability</u>	<u>Points</u>
1. Available sewage treatment capacity and sufficient line close to property boundary -	4
2. Extension of line required	2
3. Requires extension of line, treatment plant or pump station in limited growth area	0
<u>B. Public Water Availability</u>	
1. sufficient line close to property boundary	4
2. Extension of line required	2

3. Extension of line thru limited growth are required

0

C. Road Access

1. Sufficient road access w/out "costly" improvements (per unit)

4

2. More substantial road improvements necessary -

2

3. Road improvements in limited growth area necessary

0

D. Public Transportation

1. Park & Ride lot, commuter bus stop or train station within 1/3 mile;

4

2. Same as (1) within 1 mile;

2

3. Neither 1 or 2

0

Step 4:

If too many developers-plaintiff survive this process, several alternative are possible:

1. Reward builder's in order in which they rank under eligibility criteria;

2. Closed bid among developers for right to builder's remedy based on highest offer to do lower income housing; and/or

3. Reward builder's in order in which they filed suit.