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Cranbury

8-1-84

Letter brief re: priority of builder's remedy (for P Zirinsky by Herbert)

pgs. 12

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August 1, 1984

Honorable Eugene D. Serpentelli, J.S.C.
Ocean County Courthouse
118 Washington Street
Toms River, New Jersey 08753

Re: Lawrence Zirinsky, et al v. Cranbury Township
Docket No. L-09308-83 P.W.
Priority of Builders' Remedies

Dear Judge Serpentelli:

Please accept this letter in lieu of a formal brief concerning the issue of priorities of remedies for developer-plaintiffs in the current Mount Laurel II litigation against Cranbury Township. It has been, and continues to be, the position of Mr. Zirinsky that the issue of priority among builders is a question which should properly be addressed in the compliance phase of a Mount Laurel II case. Accordingly, while the Urban League and three of the other plaintiff-developers (Garfield, Cranbury Land and Toll Brothers) have submitted briefs on this issue, we chose to do so only after the court had issued its decision on the first phase of this litigation, dealing with fair share and the threshold question as to whether the proposed development would offend sound planning and environmental considerations.

On July 27, 1984, the court issued a letter opinion on this first phase of the litigation, based upon seventeen days of trial, from April 16th until May 30th. In that decision, the court determined that the fair share of low and moderate income housing for Cranbury Township would be 816 units and that there would be no modification of the May, 1980 State Development Guide

Plan (SDGP). The court also found that the land use ordinance of Cranbury Township was invalid under Mount Laurel II guidelines and ordered it to revise that ordinance within 90 days. The court concluded by appointing Carla Lerman and Philip B. Caton as masters to assist Cranbury in that revision process. At page 4 the court stated that a right to a builder's remedy in Cranbury would be reserved pending this revision process and that, "Mr. Caton should also make recommendations, from a planning standpoint, as to the relative suitability of each site", as part of the court's resolution of the priority issue.

Before its July 27th decision, the court determined three questions which have a direct bearing on the issue of builder's remedies. First, on May 29th, the trial court found that Cranbury did not meet its heavy obligation of showing that tne plaintiffs should be barred from obtaining a builder's remedy on the grounds that the development of their sites would be contrary to environmental or other substantial planning concerns, 92 N.J. 279, 280. On the following day, the trial court denied the motion of Cranbury to withhold a builder's remedy to the Plaintiffs Zirinsky and Toll Brothers, because the former had not sought to construct housing prior to the institution of suit and the latter had allegedly threatened suit prior to filing its complaint on January 30, 1984. Finally, on June 24, 1984, the court considered the application of the plaintiffs Joseph and Robert Morris (hereinafter "Morris") to amend their complaint so as to seek a builder's remedy under Mount Laurel II. The court allowed the amendment but held that all of the other plaintiffs would be entitled to a remedial preference because Morris had never sought relief under Mount Laurel II prior to the time of this late application.

In view of these rulings, as well as the considerable evidence adduced at trial, including stipulations concerning the history of the plaintiffs and their land holdings, the court is now in a far better position to assess the issue of builder's priorities, then it was when the initial briefs on this matter were filed with the court in May and June.

THE BUILDERS-DEVELOPERS

1. Garfield and Company - This plaintiff is the owner of 219 acres consisting of two lots (Block 5, Lot 9 and Block 7, Lot 10) dissected by Half Acre Road, east of Route 130. This land is presently in agricultural use and is zoned PD-HD (Planned Development-High Density), allowing for a gross density of up to

five units per acre depending on the purchase of Transfer Development Credits (TDC), amounting to one additional unit for every two acres purchased in the A-100 zone, and a mandatory set aside for low and moderate income housing. Prior to instituting suit on September 7, 1983, a representative of Garfield appeared before the Township Council urging that the new Zoning Ordinance allow for high density development on its tract and indicated that it is prepared to construct Mount Laurel II housing.

2. Lawrence Zirinsky - This plaintiff is the optionee on seventeen separate tracts, comprising 1,771 acres, all located west of Main Street, within the Village of Cranbury. Of these optioned lands, 360 acres are located directly west of the Village, north of Cedar Brook and within the SDGP Growth Area (Block 25, Los 8, 19 and 31 and Block 23, Lots 12, 13 and 70). The remaining 1,411 acres extend to the Plainsboro border. Approximately 200 of this western acreage (within the 258 acres optioned from Max Zaitz, fronting on Old Trenton Road, Block 21, Lot 6), is in the Growth Area, while the remainder is in the Limited Growth Area.

In the Spring of 1983, Mr. Zirinsky and his representatives urged the Township Council and Planning Board to discuss potential plans for development on these lands. After one informal meeting with the Mayor and Township Planner, he was advised that the Planning Board would not consider such plans because the 1983 Zoning Ordinance was then up for review by the Township Council. After the Township Council adopted the new ordinance in July, 1983, all but 49 acres of the 1,771 acres now held by Mr. Zirinsky was placed in the A-100 Zone, allowing for a minimum lot size of 6 acres. That 49-acre tract (Block 25, Lot 8), was placed in the R-LI (Residence-Light Impact) zone, permitting a density of 1 unit per acre. It is located between Dey Road on the north and Cranbury Brook on the south, in close proximity to the Village of Cranbury.

Only after its overtures had been rebuffed, and after Garfield and Cranbury Land Company had filed suits, did this plaintiff file its own complaint, and an Order of Consolidation was issued by the court on December 20, 1983.

3. Cranbury Land Company - This plaintiff owns two parcels in the southwest corner of Cranbury Township, north of Old Trenton Road, comprising 137 acres (Block 22, Lot 8 and Block 21, Lot 8). These lands are presently zoned as A-100. The eastern parcel is in the Growth Area of the SDGP, while the

western tract lies within the Limited Growth Area. Apparently this plaintiff did seek approvals for the construction of high density zoning, including low income zoning, in the early 1970's. However, as with the other plaintiff-developers, it did not participate in the pre-Mount Laurel II trial and appellate phases. It did not make any applications for housing within the last several years, prior to filing suit on November 10, 1983.

4. Toll Brothers - This plaintiff is the owner of 104 acres in the western part of the Township, separated from the Village of Cranbury by a property optioned to Zirinsky, North of the Plainsboro-Cranbury Road (Block 25, Lot 40). All but a small segment of eastern perimeter of this tract lies within the Limited Growth Area. In December, 1983, while the other plaintiffs were in litigation, the attorney for Toll Brothers wrote to Cranbury urging it adopt zoning ordinance amendments to accommodate their site for the construction of low and moderate income housing, or else litigation would be instituted. When the Township did not comply, suit was filed on January 30, 1984. On February 10, 1984, the trial court granted Toll's motion for consolidation, but precluded it from participating in the first phase of the litigation, dealing with fair share.

5. Joseph and Robert Morris - These plaintiffs have optioned 101 acres located between the Hightstown Road and Route 130 just south of Cranbury Village (Block 18, Lots 23 and 36). These lands were placed in the PD-MD zone (Planned Development-Medium Density) which allows multi-density zoning as a condition of use, up to 3 units per acre, but only after using TDCs from the A-100 zone.

Morris filed suit on August 2, 1983, contending that the TDC provisions of the ordinance were ultra vires. At no time prior to May 31, 1984, or after the completion of the first phase of the litigation, did Morris seek a builder's remedy under Mount Laurel II. On July 22, 1984, allowed Morris to intervene in the builder's remedy phase of the case, but only after priority was given to the other plaintiffs.

ARGUMENT

POINT I

THE COURT SHOULD CLASSIFY THE THREE PLAINTIFF-DEVELOPERS WHO PARTICIPATED IN THE FAIR SHARE PHASE OF THE LITIGATION, IN A PREFERENTIAL CLASS FOR A BUILDER'S REMEDY, AND PLACE THE REMAINING TWO PLAINTIFF-DEVELOPERS WHO DID NOT SO PARTICIPATE IN A CONTINGENT CLASS.

Obviously, the whole issue of builder's priorities has emerged in Cranbury Township since it is not possible to grant a builder's remedy to all of the developers, within the 816 low and moderate units allocated by the trial court. By way of illustration, assuming a gross density of 8 units per acre, with a 20 percent set aside as recommended by the Supreme Court for low and moderate income housing, see, 92 N.J. 279, fn 37, Garfield and Cranbury Land Company alone would generate approximately 570 low and moderate income units. Obviously, the Plaintiff Zirinsky does not seek a builder's remedy from the court on all of its 1,771 optioned acres, but believes that the court and/or master should have alternatives for building sites, based upon planning and environmental suitability. Nevertheless, even if builder's relief were to be given to the other two plaintiffs for their entire sites, only 241 low and moderate income units would be allocable to this plaintiff. Therefore, as a practical matter, it is clear that these three plaintiffs can more than satisfy the fair share of low and moderate income housing now established by the court in its decision of July 27, 1984.

As noted, the court has already held that Morris is in a secondary priority position to the other plaintiffs, so the remaining preliminary issue is whether Toll Brothers should be accorded the same status as the other three plaintiff-developers.

In Oakwood at Madison v. Madison Township, 72 N.J. 481, 550, 551 (1977), as well as in Mount Laurel II, at 92 N.J. 278-281, the Court held that a builder's remedy would only be available to plaintiffs who had "borne the stress and expense of this public interest litigation", 72 N.J. at 550. Clearly, this would mean that Garfield, Cranbury Land Company and Zirinsky are entitled to a priority classification over Toll Brothers. On February 10th, the motion of Toll Brothers to intervene was allowed but only on the condition that they would not be

permitted to participate in the initial phases of the trial. Accordingly, the remaining three plaintiff-developers actively participated in pre-trial discovery and attended to various pre-trial and ancilliary motions and incurred substantial expert fees for their own experts, who submitted reports and participated in the development of the "concensus formula", now adopted by the court. In addition, Toll participated in only 2 of the 17 days of trial, when a motion was brought to preclude that plaintiff from obtaining a builder's remedy.

If the "incentive" underlying the rationale for granting builders' remedies is to mean anything, plaintiff-developers who actively participate in litigation should be protected from competing with other developers who seek to gain a windfall by filing a complaint or entering the case after all or most of this litigation effort has been completed. Accordingly, while we believe that Toll should not be deprived of the right to seek a builder's remedy, it should be placed in a secondary, contingent classification, along with Morris, behind the three other developers, as a matter of law. If any of the first three plaintiffs fail to demonstrate the commitment and the capability to construct at least a 20 percent set aside, then Toll would be allowed to assume that plaintiff's priority position ahead of Morris.

There is an additional reason why this position should be taken by the court. The principal criterion which this court should adopt to determine priorities is the suitability of the plaintiffs' sites, so as to realistically produce the 816 low and moderate income units allocated to Cranbury Township. That mission would be delayed substantially if the master and the court were required to examine an additional site or sites, with the type of scrutiny which good planning and engineering requires, over and above the sites of the remaining plaintiffs. Further delay in litigation, which dates back almost a decade would be incurred, along with unnecessary expense.

POINT II

THE SOLE CRITERIA FOR DETERMINING PRIORITY AMONG THE PLAINTIFF-DEVELOPERS IN THE FIRST CLASSIFICATION SHOULD BE THE PLANNING SUITABILITY OF THE SITES

Understandably, in their briefs, both Garfield and Cranbury Land have asked the court to assign priority on the

basis of the sequence of filing of complaints. This is so because Garfield filed in September and Cranbury Land filed on November 10, 1983, while Zirinsky filed on December 20, 1983.* Apparently, these plaintiffs contend that they should receive priority over Zirinsky solely because they won the "race to the courthouse", with no consideration whatsoever as to the suitability of the sites owned or optioned by the plaintiff-developers.

In addition, since Garfield already has the highest density and use permitted in the present ordinance, it argues that priority should be given to a plaintiff based upon the "preference of the municipality". We join with Carl Bisgaier, the attorney for Cranbury Land Company, in his brief of July 26th, in urging the court that it not give any credence whatsoever to this argument. As Mr. Bisgaier noted at Page 2 of that brief, "Mount Laurel II must contain half a dozen specific disclaimers as to the relevancy of (the preference factor) to the award of a builder's remedy". Mr. Bisgaier did not exaggerate!

At Pages 305 and 306, the Court discussed at great length the "presumption of validity" attached to governmental enactments and concluded that, once a zoning ordinance is found not to comply with the constitutional obligitions of Mount Laurel II, then that presumption must fall. As the Court observed at Page 306, "it is not fair to require a poor man to prove you were wrong the second time you slam the door in his face."

At Pages 350 and 351, the Court expressly found the pre-1983 Cranbury Zoning Ordinance unconstitutional and remanded the matter back to the trial court in order to determine region, fair share and allocation of low and moderate income housing and "thereafter revision of the land use ordinances and adoption of affirmative measures to afford the realistic opportunity for the requisite low income housing." The Court encouraged Cranbury to amend its ordinance so as to be in compliance. Of course, the record now shows that Cranbury did nothing to comply with the mandate of the Supreme Court, despite the passage of over a year

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* To the extent that it is relevant it should be pointed out that Zirinsky's attorneys attended the first status conferences on the Cranbury case, while the complaint was being prepared, as early as November 18, 1983.

and a half. Instead it adopted a new ordinance which it now concedes is non-complying with the Mount Laurel II mandate. It would be particularly ironic if this court were to give any presumptiveness to the zoning judgments, emanating from an ordinance which has now been held to be unconstitutional, in different forms, not once but twice! Indeed, if any validity were to be given to the zoning preferences of Cranbury, it would be slamming the door in the face of those denied adequate housing, not twice, but three times!

Further, at Page 290, the Court emphasized that once the presumption of validity has been breached (as in the case of Cranbury), then the court should move to issue appropriate remedies to assure that the low income housing, so central to the Mount Laurel II doctrine, in the form of builder's remedies.

Cranbury Land also disagrees with the position of Garfield that priority should be given to the landowner whose site is within the Growth Area, as set forth by the SDGP. Once again the different points of view are understandable considering the fact that the Garfield site is entirely within the Growth Area while the SDGP line separating Growth and Limited Growth Areas traverses the site of Cranbury Land.

As Mr. Bisgaier points out in his reply brief, the decision in Orgo Farms and Greenhouses v. Colts Neck Tp., 192 N.J. Super 599 (L. Div., 1983) makes it clear that a plaintiff-developer would not be deprived of a builder's remedy simply because its site is located in a Limited Growth Area. By the same logic, priorities cannot be established largely on which side of the SDGP line, a particular site is located.

It is beyond cavil, that the SDGP is not site specific and, indeed, there are ideal building sites, closely related to service infrastructure, within Limited Growth Areas; while there are other sites which should not be developed on environmental or conservation grounds and/or which are remote from infrastructure, but yet are within the Growth Area. The irrelevancy of SDGP Limited Growth and Growth Area designations vis a vis site suitability is vividly demonstrated in Cranbury. All of the area east of the Village has been designated as a Growth Area, while approximately two-thirds of the area west of the Village is designated as Limited Growth. Yet a greater percentage of the area east of the Village is devoted to agriculture, in comparison to the areas in the west (see Exh. DC-14, page II-14).

In addition, the northwest perimeter of Cranbury Township is surrounded by the Lin-Pro Development now under active construction, where approximately 6500 units of high density development will be constructed right up to the very border of Cranbury Township. On the southwest perimeter of Cranbury Township, in East Windsor, there are other high density developments, such as Windsor Mill.

At Page 240, the court recognized that there would be the SDGP was not sacrosanct and alterations would be allowed because of such developments. In fact, in the Clinton case, the Court noted that the construction of a major employment center next to a proposed building site would intensify the need to construct affordable housing for those who would be employed at such a facility. 92 N.J. 327, fn. 66. When it is realized that the western part of Cranbury is virtually incapsulated by high density housing, commercial and office/research development emanating from Route 1 through Plainsboro and East Windsor, it is clear that the SDGP designations have little relationship to the appropriateness of a builder's remedy.

It is the position of the plaintiff Zirinsky that the SDGP designations should be used primarily as a tool for calculating fair share. However, even though approximately two-thirds of Zirinsky's landholdings are in the Limited Growth Area (approximately 1,211 of his 1,771 acres), it is urged that the SDGP should nonetheless be one factor, although a very minor one, in comparative assessment of building sites among competing builders.

We also join with Mr. Bisgaier in urging a rejection of Garfield's suggestion that priority should be given to a plaintiff who is a long-time landowner, rather than a "speculator". If sufficient low and moderate income housing is constructed on a site which comports with sound environmental and planning factors, what possible relevancy could this factor have to granting a builder's remedy? The tremendous capital investment needed to carry out that mandate would never be forthcoming if developers were limited to the chosen who had not been excluded in the past. Indeed, if New Jersey were to depend only upon "long-time landowners" for the construction of desperately needed housing, then the sweeping mandate of Mount Laurel II would be but a mirage.

The Urban League and Toll brothers have urged this court to consider site suitability, along with the capacity to actually

construct the low and moderate income housing, as the primary factor in determining priority among plaintiff-developers who would otherwise be in the same position. We agree. Throughout the Mount Laurel II decision, the Court emphasized continuously the point that a builder's remedy should not be granted at the price of sound planning and environmental considerations. It was on this very basis that the Court remanded the Round Valley case back to the trial court. 92 N.J. 332. As the Court observed:

> Subject to the clear obligation to preserve open space and prime agricultural land, a builder in New Jersey who finds it economically feasible to provide decent housing for lower income groups will no longer find it governmentally impossible. Builders may not be able to build just where they want--our parks, farms and conservation areas are not a land bank for housing speculators. but if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. And if the area will accommodate factories, it must also find space for workers. The specific location of such housing will of course continue to depend on sound municipal land use planning. (92 N.J. 211, emphasis supplied).
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> The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread. It does not require rural municipalities to encourage large scale housing developments. It does not require wasteful extension of roads and needless construction of sewer and water facilities for the out-migration of people from the cities and the suburbs. There is nothing in our Constitution that says that we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently. (92 N.J. 230, emphasis supplied).
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> * * *

> We emphasize here that our concern for protection of the environment is a strong one and that we intend nothing in this opinion to result in environmentally harmful consequences. See Mount Laurel I, 67 N.J. at 186-87. We are, however, convinced that meeting housing needs is not necessarily incompatible with protecting the environment... (92 N.J. 331, fn. 68, emphasis supplied).

Indeed, the Court cautioned that the availability of roads and a service infrastructure must be considered where mandatory set asides are provided:

> Where set-asides are used, courts, municipalities, and developers should attempt to assure that lower income units are integrated into larger developments in a manner that both provides adequate access and services for the lower income residents and at the same time protects as much as possible the value and integrity of the project as a whole... (92 N.J. 268, fn. 32).

If site suitability is not to be considered then what role would the master play, other than reviewing a new ordinance to assure that it complies with the Court's mandates? The use of a master to consider the suitability of a plaintiff's site and proposed development was expressly endorsed by the Court in the Clinton case. 92 N.J. 332. A master is uniquely suited to play such a role and Cranbury presents an ideal opportunity for the use of such an expert. That master should consider a number of factors, most of which have been enumerated in the brief of Toll Brothers. They include the impact on streams, soil conditions, the availability of water and sewer lines and capacity, the availability of roads, accessibility to public transportation, community facilities and shopping, the traffic impact, site plan design, buffering, and a number of other planning considerations.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the Court adopt a two tier approach in determining priorities among plaintiff-developers. First, all such plaintiffs who have successfully participated in the fair share

and pre-compliance stages of Mount Laurel II litigation should be placed in a preferential category, with other developers placed in a contingent classification. The contingent plaintiffs would qualify for a builders remedy only if the preferred plaintiffs are not able to produce the low income housing for which they have committed themselves. Second, the Court would then assign priorities to the builders in the first classification on the basis of site suitability, to the extent that builder's remedies and phasing would absorb the requisite fair share.

Respectfully submitted,

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cc: All Counsel of Record