

CA - Cranbury

~~11/20/84~~

letter memorandum stating
UL's objectives at this stage

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CA 002249D

SCHOOL OF LAW - NEWARK - CONSTITUTIONAL LITIGATION CLINIC
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15 WASHINGTON STREET - NEWARK - NEW JERSEY 07102 - 201/648-5687

November 20, 1984

Mr. Philip Caton
Clarke & Caton
342 West State Street
Trenton, New Jersey

Dear Mr. Caton:

The Urban League plaintiffs have already achieved their principal objective in this case by establishing unambiguously the numerical fair share obligation of Cranbury Township and the other municipal defendants. At this stage in the proceedings, our further objectives are twofold: to insure that Cranbury's fair share actually gets built as quickly as feasible, and to begin articulation of more detailed rules for the award of the builder's remedy that will preserve the incentives that the Supreme Court intended this device to have. To these ends, as we have argued in the past, we believe that there is a strong case for entitlement to the builder's remedy on the part of those builders who have participated fully in the trial of this matter.

At the same time, however, the Urban League plaintiffs have consistently argued that the builder's remedy technique need not be applied in a manner that is destructive of legitimate municipal concerns, planning or otherwise. I am writing, therefore, to state a general framework for analysis of those limited circumstances under which the builder's remedy can be altered or denied completely. While the Supreme Court clearly intended the builder's remedy to be applied liberally, it is also clear that the entitlement is not without limitations, expressed in the phrase "environmental or other substantial planning concerns." (92 N.J. at 279-280) This phrase, however, was not contemplated to be limited to narrow or site-specific concerns such as unsuitable soils, steep slopes, or neighborhood traffic conjection. This is stressed in language early in the opinion:

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 infeasible. Builders may not be able to build just where they want -- our parks, farms and conservation areas are not a landbank for housing speculators . . . (92 N.J. at 211)

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Indeed, the issue of sound land use planning that runs as a consistent thread through the decision is that of minimizing urban sprawl. The emphasis on protecting sensitive areas, especially the state's farmlands, is central to the Court's strong reliance on the State Development Guide Plan. Although not specifically mentioned by the Court, we do not dispute that Cranbury's special interest in preservation of its historic district is in the same generic category.

It logically follows that a municipality could successfully argued that a builder's remedy should be denied with regard to a site which, although developable from a technical standpoint, is so located that its development would seriously threaten the type of goals mentioned by the court or fairly inferable from the court's opinion. But the standard to be met by such an argument is a very strict one -- significantly more stringent, for instance, than that which would support conventional master plan approval or even to be used to evaluate a Mount Laurel ordinance in the absence of a builder's remedy claim.

Builder's remedy litigation results only from a municipal decision not to comply voluntarily with the requirements of Mount Laurel. Once builder remedy status as to a particular site has been achieved, a municipality has lost its opportunity to presumptively determine the use of the litigated land and the successful plaintiff becomes presumptively entitled to build on his site at his required density. This incentive to the builder and threat to the municipality is the core of the builder's remedy principle. Unless the municipality can articulate and concretely defend sound planning reasons for proceeding differently, the builder's remedy must be allowed. Necessarily, the burden -- and a heavy one it is -- must be on the municipality to show that the proposed development would be inconsistent with essential planning concerns.

Reasoning from the logic of the Mount Laurel II opinion, we feel that the burden can be carried only if the municipality can show a strong probability that:

1. The municipal objective has a reasonable probability of success, i.e., there are no extrinsic circumstances or compelling circumstances which strongly suggest that efforts to achieve the objective are doomed in any event;
2. The effect of the proposed development on that objective

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is potentially significant;

3. Mitigation measures which would eliminate the significant impacts of the proposed development are not realistically available; and

4. The other land use planning and zoning activities of the municipality with regard to the area in question are fully consistent with the articulated objective that is said to require defeat of the builder's remedy.

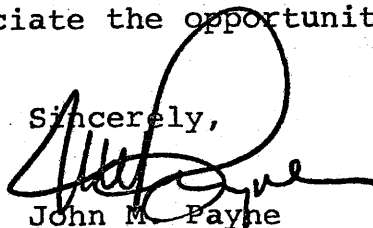
This is not meant to be a statement of a definitive test, but a suggestion of the nature of the inquiry that appropriately should be made in response to such an argument by a Mount Laurel defendant.

To date in these proceedings before you as master, we have seen no evidence presented of sufficient strength or specificity to defeat the entitlement of any of the builder-plaintiffs in Cranbury. While we believe that the remedial process would have been better served had Cranbury focussed more clearly on the builder remedy sites at any earlier date, we have not thought it necessary or appropriate that a formal record on these suitability issues be made until the township had freely considered its options. In any event, as we have explained, the burden is on the township to make such a showing, not on the plaintiffs. It is our intention, however, to evaluate Cranbury's proposed compliance ordinance (any any alternative ordinances, should it chose to present them) within the framework just set out when the remedial issues are heard by the Court.

In the absence of any compelling municipal showing to the contrary, moreover, it is our present conclusion that all of the asserted impacts on the historic district can be kept to an acceptable level by careful site planning and other appropriate municipal responses, and that even if farmland preservation in the western half of Cranbury is viable (a premise that we think has yet to be proven), farmland preservation objectives could be achieved without totally denying the builder's remedy either to Mr. Zirinsky or to Cranbury Land Company.

The Urban League plaintiffs appreciate the opportunity to express these views.

Sincerely,



John M. Payne

JMP/id
Copy: All Cranbury counsel
Cranbury Township (30 copies)