

CA - Cranbury

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letter-brief in opposition to Toll  
Bros motion that it can be declared  
eligible for entitlement to a  
builder's remedy in Cranbury Twp

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March 7, 1985

The Honorable Eugene D. Serpentelli  
Assignment Judge of the Superior Court  
Ocean County Courthouse  
CN 2191  
Toms River, New Jersey 08753

TOLL BROS.  
MOTION

Re: Urban League of Greater New Brunswick v.  
Borough of Carteret, Docket No. C-4122-73

Dear Judge Serpentelli:

Please accept this letter-brief in opposition to Toll Brothers' motion that it be declared eligible for entitlement to a builder's remedy in Cranbury Township.

Toll Brothers concedes that it is not entitled to claim a builder's remedy under the Court's recent decision in J.W. Field Company, Inc. v. Franklin Township, Docket No. L-6583-84 PW (L.Div., January 3, 1985). The partial consolidation of Toll Brothers' action with earlier Cranbury cases ordered by the Court on February 23, 1984, did not permit it to participate in the non-compliance trial, which was then scheduled to begin on March 19, 1984, and which was in substance conducted during May, 1984. The Urban League plaintiffs agree that Toll Brothers is barred under Franklin Township, but do not believe that Toll Brothers was unfairly surprised by that decision or that that decision altered Toll

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<sup>1</sup> On March 6, 1985, the Urban League plaintiffs received the moving papers of Morris Brothers seeking entitlement to the builder's remedy, as well as Garfield and Company's opposition to the Morris Brothers' motion. The Urban League agrees with Garfield that the Morris Brothers' motion is precluded by the Court's August 3, 1984 ruling on Morris' prior attempt to state a Mount Laurel claim. In addition, to the extent that Morris relies on Toll Brothers' motion, we oppose that motion for the reasons to be stated herein, and can perceive nothing in Morris Brothers' position that would give it a greater claim to entitlement at this late date.

Brothers' status as a builder's remedy claimant. On the contrary, we believe that the rule announced in Franklin Township was, as the Court there noted, clearly required by the explicit language of Mount Laurel II, see slip opinion at 1, 14, citing 92 N.J. at 279-80, and that Toll Brothers has never been entitled to builder's remedy status.

At the outset, it is well to note one potential confusion of terminology that arises when considering the "builder's remedy." In any successful Mount Laurel action (and disregarding for these purposes such non-building solutions as imposing rent and occupancy controls on existing developments) rezoning will eventually occur which will benefit those landowners and developers whose sites are favored, if they agree to provide lower income housing as part of their plans. These persons need not be parties to the litigation, but because they are not, they must convince the municipality, the master, and the Court, that their sites are suitable for development within the conventional bounds of local land use planning controls. These persons are not in any sense awarded a "builder's remedy" as that term operates in a Mount Laurel case.

Properly understood, the term "builder's remedy" applies only to those builder-litigants who successfully challenge a zoning ordinance as exclusionary and therefore are presumptively entitled to build a proposed Mount Laurel project unless the municipality carries a heavy burden of demonstrating that the builder's site violates environmental or other weighty planning norms. Builder's remedy plaintiffs are given the extraordinary power to disregard conventional land use planning controls to a significant degree, and because of the inevitable tendency of this power to disrupt optimum municipal planning, the Court should take care that builder's remedies are not awarded beyond the point necessary to effectuate Mount Laurel goals.

Whether or not Toll Brothers is entitled to claim a builder's remedy, it is entitled as a Cranbury landowner to offer its site for Mount Laurel purposes, just as other non-parties such as the owners of sites 2, 3 and 5 have done. What is at issue in Toll Brothers' motion is whether it has done enough to claim extraordinary exemption from the competitive process that these other landowners must engage in.<sup>2</sup>

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<sup>2</sup> We recognize, of course, that as a practical matter landowners with builder's remedy status may accomodate Cranbury's entire fair share, leaving all other possible

The unalterable fact, and the principal basis on which the Urban League plaintiffs oppose Toll Brothers' motion, is that Toll Brothers did not participate in the trial that led to the invalidation of Cranbury's zoning ordinance. This is so for two reasons.

First, Toll Brothers itself waived participation. Ms. Hirsch's letter of February 6, 1984 to the Court, seeking consolidation, states that "since we do not intend to participate in that portion of that trial which deals with the issues of region and regional fair share and have confidence that the parties presently before the Court . . . will fully litigate the issue of Cranbury Township's non-compliance with Mount Laurel II, my client therefore only needs to participate in the builder's remedy stage of the lawsuit."

Second, the Court, on February 23, 1984, found that consolidation for trial on March 19, 1984, was not feasible and denied Toll Brothers participation in that phase of the case. With the period of discovery then coming to a close and the pre-trial conference imminent, this decision was manifestly the correct one.

From its earliest participation in the case, then, Toll Brothers has been unable to satisfy the principal basis on which it could claim entitlement to the builder's remedy, its contribution to the finding of non-compliance.<sup>3</sup> We trust, moreover, that the Court will take note of the significant energies required of the Urban League and of the three builder-plaintiffs who were consolidated for trial, in testing

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builders without high-density development opportunities. This, however, is an inescapable cost of the Court's necessary balancing of builder and municipality interests in Mount Laurel cases.

<sup>3</sup> In Mount Laurel II the Supreme Court did allow a builder's remedy to Davis Enterprises against Mount Laurel Township, even though the burden of proving non-compliance had been borne by the public interest plaintiffs, on the ground that Davis had the ability to produce lower income housing quickly in a municipality that had been resisting all such development for over a decade. Although not too clearly articulated, the Court thus seems to have recognized a subordinate, "results" basis for awarding the builder's remedy. See 92 N.J. at 309, note 58. Toll Brothers' reliance on Davis' status is inapposite to Cranbury Township, where it is obvious that the fair share obligation of 816 units could be satisfied several times over by the developments already proposed to the master.

in adversarial proceedings the fair share methodology which was eventually approved by the Court in the AMG opinion.

As noted above, this threshold requirement of participation flows not from the recent Franklin Township opinion, but from Mount Laurel II itself, in terms clear enough to place Toll Brothers on notice that it would be unable to successfully claim the builder's remedy. Moreover, the Urban League has consistently stated its position in opposition to Toll Brothers on this point, and has urged the Court to resolve this, and other builder's remedy issues, at earlier points in the trial process.<sup>4</sup> Because of the range of novel issues presented by the builder's remedy technique, however, the Court thought it preferable to defer consideration of these builder's remedy questions until after completion of the master's hearings. Toll Brothers apparently understood this schedule since it withheld its motion until this time.

Toll Brothers makes several other points in its memorandum of law which deserve brief response. It cites Morris County Fair Housing Council v. Boonton Township, Docket No. L-54599-83 PW (L.Div., May 25, 1984) as an example of flexibility in allowing late intervenors to claim the builder's remedy. In that decision, however, Judge Skillman used essentially the same principle as later embodied by this Court in the Franklin Township decision to limit a builder's rights if it had not contributed substantially to the outcome (there, a settlement agreement) and if its participation as a builder-remedy party was not necessary to effectuate other Mount Laurel goals, as in the Davis situation, see note 1 supra. Morris County thus does not aid Toll Brothers' cause.

Similarly, Urban League of Essex County v. Township of

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4 The Urban League's Memorandum of Law to the Court of May 23, 1984, page 9, note 2, asserted flatly that the builder's remedy should be denied to any plaintiff not fully consolidated for trial. This position was reiterated at the status conference on Cranbury held on October 5, 1984. In its letter brief of May 29, 1984, and in subsequent oral argument, the Urban League supported Toll Brothers against Cranbury's assertion that the thirty-day demand letter that it employed in Cranbury was sufficient to invoke the "bad faith" exception to the builder's remedy recognized in Mount Laurel II. Counsel for the Urban League made clear at that time that its support was limited to the important, but narrow, question, then before the Court, and that it would oppose Toll Brothers when the Court permitted that issue to be reached.

Mahwah, No. L-17112-71 (L.Div., Aug.1, 1984), is inapposite. There, the trial judge permitted one developer, Beaver Creek, to intervene prior to the fair share hearing, and several additional developers to intervene afterwards. Once the fair share obligation had been determined, the Court required rezoning of the Beaver Creek site and of some, but not all, of the parcels whose owners had intervened after trial. In doing so, the Court clearly differentiated between Beaver Creek's entitlement to a builder's remedy because of its significant participation in the fair share trial, and the other intervenor's entitlement to a rezoning because their sites were suitable and would contribute to the overall fair share goal. See Slip Op'n at 96-97. If the Mahwah analysis were applied to the Cranbury facts, we submit, Toll Brothers would not be classed with Beaver Creek, which contributed to the resolution of the triable issues, but with the late intervenors who were entitled only to an opportunity to compete with others on the basis of comparative suitability.

Toll Brothers also argues that it has participated in the master's revision hearings this fall, thus setting up a further reliance claim. In this, however, its position is no different than that of the other landowners who hope to be advantaged by the rezoning, most of whom have not even a colorable claim to builder's remedy status. Toll Brothers confuses its expenditure of time and money in its legitimate self-interest with the broader contribution to the public interest that flows from the trial of the non-compliance issue and which alone is rewarded by the builder's remedy.

The Urban League plaintiffs set themselves at odds with a builder plaintiff reluctantly, because we share the Court's conviction that the harnessing of private enterprise to the cause of lower income housing is the essential genius of Mount Laurel II. At the same time, however, our separate position as non-profit representatives of the public interest requires us to recognize the balance of legitimate municipal concerns as well. It will be a slender victory if we shall have achieved lower income housing production at the expense of stable, well-planned communities in which lower income persons can live. Toll Brothers, for whatever reasons, found the timing inopportune and did not bear a laboring oar in the trial of this action. It therefore does not deserve the extraordinary reward that the builder's remedy allows to those who did participate, and in the particular circumstances of the Cranbury market, its status need not be upgraded to that of the builder's remedy plaintiff in order to assure that some housing was built, as was the case in Mount Laurel Township. If one or more of the builder's remedy claimants lose their entitlement, Toll Brothers should of course be

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allowed to compete for selection as the rezoned site, but in such competition it should prevail only if its site and its proposal accord best with ordinary principles of sound land use planning.

We urge that the motion be denied.

Respectfully submitted,

John M. Payne  
Co-counsel for Urban  
League Plaintiffs

JMP/id

cc: All Cranbury Counsel