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letter-brief in response to motion of Garfield + Co for an order granting its first priority in award of a builder's remedy in Cranbury Twp litigation

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March 11, 1985

GARFIELD
PRIORITY MOTION

The Honorable Eugene D. Serpentelli
Judge, Superior Court
Ocean County Courthouse
CN 2191
Toms River, New Jersey 08754

Re: Urban League of Greater New Brunswick v.
Borough of Carteret
No. C 4122-73 (Cranbury)

Dear Judge Serpentelli:

Please accept this letter-brief in response to the motion of Garfield and Company for an order granting it first priority in the award of a builder's remedy in the Cranbury Township litigation. Although the Urban League plaintiffs have supported Garfield's pending motion for entitlement to the builder's remedy itself, we believe that this extension of the motion to reach the issue of priorities raises questions of fact that cannot be resolved until the compliance trial. Accordingly, we oppose the motion at this time.

Mr. Warren's letter-brief in support of the motion argues that Garfield is entitled to first priority under this Court's ruling in J.W. Field Company, Inc. v. Franklin Township, Docket No. L-6583-84 PW (January 3, 1985), on two theories: first, that the aggregate number of units that all builder-remedy claimants plan to build exceeds the township's fair share, and second, that the aggregate units exceed any phasing of the township's fair share.

As to the first theory, it is by no means clear that the fair share obligation of Cranbury Township will be exceeded by those parties ultimately found entitled to the builder's remedy by the Court. The Urban League, for instance, has stated its opposition to the motion of Toll Brothers for a declaration of entitlement in its letter-brief dated March 7, 1985. Elimination of Toll Brothers' units would clearly bring the aggregate of the other three builder's remedy plaintiffs within the Township's fair share of 816 units. Moreover, until the master reports on site suitability and on acceptable densities, and until the Court rules on the overall compliance submission, it is uncertain what the numerical contribution of any of the four builders will be. Garfield's original motion for award of a builder's remedy implicitly recognizes this uncertainty because its proposed order leaves open the possibility that a change in density will be ordered as to its own site. Until these multiple issues are resolved at the compliance hearing, therefore, there is no basis on which to assume that the priorities problem addressed by the Franklin Township opinion exists in Cranbury Township.

Even more problematical is Garfield's second theory, that there is excess capacity in relationship to the phased fair share obligation. Although all of the parties to this litigation concede that some staging of Cranbury's growth will be necessary, Garfield understandably, and correctly, argues that it should not be left till last, as it is under Cranbury's plan. However, Mr. Warren's brief and proposed order also imply, incorrectly we think, that Garfield's "priority" under Franklin Township would entitle it to build all that it could to the exclusion of all other builders whose land is rezoned, even including other parties who are otherwise entitled to a builder's remedy, such as Cranbury Land Company and Lawrence Zirinsky.

Nothing in the Franklin Township opinion extends the first-filing advantage to this extreme, and we will strenuously urge that the Court not do so, when the issue is reached at the compliance hearing. This approach creates enormous disincentives for those builders who would have to risk the vagaries of the market a decade or more hence and it is, therefore, inconsistent with the basic principles of the builder's remedy as explained in Mount Laurel II.

We will argue instead that, to the maximum extent feasible, each party whose land is rezoned should be entitled to build a portion of that year's fair share each year. In order to know what is feasible, however, the Court must hear the testimony of the experts on such matters as realistic absorption rates, realistic economies of scale in annual construction, and realistic patterns of infrastructure development, particularly if all development is not concentrated in the same section of the township. Only if all entitled parties cannot be realistically accommodated will there be a need to confront priorities. Therefore, we believe that Garfield's attempt to invoke priority in staging is not only wrong as a matter of law but premature as a matter of fact.

Having been waiting since 1974 to see the start of fair share compliance in Cranbury Township, the Urban League plaintiffs have more cause than any other party to regret the frustrating complexity of the issues which still confront us, and we sympathize with Garfield and Company's desire to cut through the tangle and begin actual development. We see no alternative, however, to the careful fact work which remains, confident that the patterns of decision being worked out in this case will eventually help to simplify and expedite the resolution of fair share issues in the long line of cases yet to come.

Respectfully submitted,

John M. Payne
Co-Counsel for the
Urban League plaintiffs

cc/All Cranbury Counsel