

CA - Old Bridge

222

Brief of Planning Board

pgs 14

notes: missing pages 8 + 13

CA 002302B

THOMAS NORMAN, ESQ.
 NORMAN & KINGSBURY
 Suite 2A
 Jackson Commons
 30 Jackson Road
 Medford, NJ 08055
Attorney for Defendant, Planning Board

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, v. THE MAYOR AND COUNCIL of the BOROUGH OF CARTERET, et al., Defendants, and O & Y OLD BRIDGE DEVELOPMENT CORPORATION, a Delaware Corporation, and WOODHAVEN VILLAGE, INC., a New Jersey Corporation, Plaintiffs, v. THE TOWNSHIP OF OLD BRIDGE in the COUNTY OF MIDDLESEX, a Municipal Corporation of the State of New Jersey, THE TOWN- SHIP COUNCIL OF THE TOWNSHIP OF OLD BRIDGE, THE MUNICIPAL UTILITIES AUTHORITY OF THE TOWNSHIP OF OLD BRIDGE and THE PLANNING BOARD OF THE TOWNSHIP OF OLD BRIDGE, <u>Defendants</u>	: SUPERIOR COURT OF NEW JERSEY : CHANCERY DIVISION : MIDDLESEX COUNTY/ : OCEAN COUNTY : <u>(Mount Laurel II)</u> : : DOCKET NO. C-4122-73 : : : : SUPERIOR COURT OF NEW JERSEY : LAW DIVISION : MIDDLESEX COUNTY/ : OCEAN COUNTY : <u>(Mount Laurel II)</u> : : DOCKET NO. L-009837-84 P.W. : and NO. L-036734-84 P.W. : : : <u>Civil Action</u> : : BRIEF OF PLANNING BOARD :
--	---

Planning
Board's
BRIEF

Missing
pages
8 + 13

LEGAL ARGUMENT

POINT I

- I. THE TOWNSHIP AND PLANNING BOARD OF OLD BRIDGE MUST BE RELIEVED FROM THE TERMS OF THE FINAL JUDGMENT OF JANUARY 24, 1986 BY VIRTUE OF MISTAKE IN ACCORDANCE WITH RULE 4:50-1 (a).

Subparagraph A of Rule 4:50-1 permits this Court to relieve Old Bridge Township from the terms of the final Judgment of January 24, 1986 by reason of mistake. O & Y maintained throughout the presettlement negotiations that it had fully explored all issues related to environmental protection and determined that approximately 14 acres of wetlands were located on the O and Y site. Woodhaven adopted the same position and maintained that 112 acres of wetlands were located on the Woodhaven site. However, the most recent submission of Woodhaven indicates that approximately 480 acres of wetlands are located on the site although this information has not been forwarded to the Army Corps of Engineers for verification. Additionally, the Old Bridge environmental consultant has raised serious questions concerning the accuracy of the wetlands delineation by Woodhaven. (See, Report of Dr. Norbert Psuty, dated May 13, 1986).

To this date O & Y has not submitted any data regarding wetlands delineation although correspondence of O & Y indicates that its environmental consultant, Amy Greene, completed her analysis and surveys were made delineating the various wetland areas. Based upon the public statements of O & Y it appears that more than 50 percent of its site is transversed by wetlands. This estimation is consistent with estimates prepared by the

PROCEDURAL AND FACTUAL HISTORY

On January 24, 1986, the Township and Planning Board of Old Bridge entered into a settlement with the Urban League of Greater New Brunswick (hereinafter Urban League), and Olympia and York (hereinafter O & Y) Old Bridge Development Corporation, and Woodhaven Village, Inc. (hereinafter Woodhaven), two large scale developers. The settlement agreement also formed the basis for the Order and Judgment of Repose for the Township of Old Bridge in fulfillment of the township's Mt. Laurel II obligation.

The settlement envisioned development of a new city on approximately 4,095 acres or approximately 6.25 square miles. The land-use plans were set forth on Plate A for O & Y and Plate B for Woodhaven. Approximately 16,380 residential dwelling units were proposed and six million square feet of office and light industrial space in addition to three large scale regional commercial centers. These plans also provided for an 18-hole golf course. The general thrust of the land use design involved an over-all development plan for both projects with specific employment centers, town center and a village connected by a circulation system resulting in a "cohesive community". See, "Project Report, Olympia and York Plan Development, February 3, 1986, hereinafter referred to as Exhibit A-1, and Project Plan Report, Woodhaven Village, February 28, 1986, hereinafter referred to as Exhibit A-2.

The settlement also established Old Bridge Township's Mt. Laurel II obligation at 1,668 units of low and moderate income housing and a 10 percent set-aside was agreed to based upon a gross housing density of four units per acre.

During settlement negotiations for approximately six months prior to the entry of the settlement, the township was assured by O & Y and Woodhaven that a small percentage of the land area was undevelopable due to wetlands and flood plain classification. Exact delineation of wetlands by the Army Corps of Engineers was a requirement which could be made a condition of Planning Board approval in conjunction with Planning Board hearings required by the settlement agreement.

At the first public hearing to consider the O & Y application on February 18, 1986, Gary Salzman was offered as an environmental consultant and testified that the proposed development plan submitted by O & Y as set forth in Plate A was practical and workable and would not have a negative impact on the environment. See, "Planning Board transcript, February 18, 1986, Pages 63-79" and report of Gary S. Salzman, identified as Exhibit A-3. However, the Township was informed by the Corps of Engineers that a potential problem might exist with regard to the amount of wetlands located on the O & Y and Woodhaven parcels. (Exhibit A-4). Olympia and York was notified of this concern by a letter dated March 12, 1986, (Exhibit A-5) as was Carla Lerman, the court-appointed Master.

On March 11, 1986, a public hearing was conducted by the Planning Board to consider the development plan of Woodhaven Village. An environmental consultant testified in considerable detail that the development plan would not pose serious environmental problems in light of the environmental analyses conducted by the expert and contained in a report entitled "Environmental Impact Assessment, Woodhaven Village, December, 1985." This re-

port concluded that wetlands covered approximately 203 acres, or 14 percent of the site. (See Exhibit A-6.1, Page 13, and testimony of Allen Dresdner contained in Planning Board transcript of March 11, 1986 at Pages 68-95.

Thereafter, on March 18, 1986, a second public hearing to consider the O & Y application was heard by the Planning Board. This hearing was devoted entirely to wetland's issues and involved the testimony of Amy Greene, an environmental consultant retained by O & Y and Andrew Sullivan, O & Y's Planning Consultant. The import of the testimony was that the site as depicted in Plate A could be developed, subject to minor adjustments for wetlands locations. At the conclusion of the public hearing, the Planning Board directed the Township Planner to retain an environmental consultant to review the wetland's issue with respect to the O & Y and the Woodhaven parcels. These efforts were communicated to this Court by letter dated March 19, 1986 (Exhibit A-6).

On April 21, 1986, the report of the Township's environmental consultants, prepared by Dr. Norbert Psuty and Dr. Charles Roman, were reviewed by the court-appointed Master, Carla Lerman and the attorney representing O & Y and the Planning Board attorney. As a consequence of this meeting, O & Y advised this Court by letter, dated April 22, 1986, that O & Y would seek an adjournment of the scheduled public hearing until such time as the wetlands delineation and evaluation could be completed.

(Exhibit A-7).

The report of the Township's environmental consultant, dated April 22, 1986 (Exhibit A-8) concludes with respect to O & Y that the wetlands boundary shown on the O & Y map is a faithful representation

of the national wetlands inventory map with one minor exception. However, the report also concludes there are additional wetlands on the site. With respect to the Woodhaven site, a separate report prepared by Dr. Norbert Psuty and Dr. Charles Roman, dated May 13, 1986, concludes that the wetland boundaries shown on the Woodhaven map modifies the existing national wetlands inventory map. It also concludes that there are additional wetlands on the site. (Exhibit A-9).

This Court was informed of the findings of the Planning Board consultants with regard to the O & Y application through correspondence of the Planning Board, dated April 23, 1986 (Exhibit A-10). The Court was similarly informed with respect to the Woodhaven application by Planning Board correspondence dated May 14, 1986. (Exhibit A-11).

On May 30, 1986, the Planning Board advised this Court that it would continue to work dilligently with O & Y and Woodhaven to attempt to resolve the wetlands issues, subject to the condition that the Township Planning Board was not waiving any rights it had to set aside the Order of this Court. (Exhibit A-12).

At this point in time Planning Board hearings were adjourned without a rescheduled date with the consent of all parties. On June 24, 1986, the Planning Board requested a case-management conference and the Township Counsel, by letter of June 25, 1986, joined in this request and also indicated that the Township of Old Bridge was considering formal motions to set aside the judgment. (Exhibit A-13).

By letter of September 17, 1986, O & Y indicated that Amy Greene had completed her delineation process and that engineers

were surveying and mapping the wetlands demarcation lines using the data developed through Amy Greene's field investigation. This correspondence also indicated that other consultants were working on ground water hydrology, water quality, flood storage and wild life. (Exhibit A-14). On October 30, 1986, the Township was notified by Olympia and York that the wetlands information would be forthcoming in a relatively short period of time. (Exhibit A-15).

On December 12, 1986, the Planning Board contacted the Corps of Engineers for an update with respect to the O & Y and Woodhaven applications (Exhibit A-16) and by letter dated December 18, 1986 the Corps of Engineers indicated that two inter-agency site inspections were made of the O & Y properties and that the corps was awaiting a final delineation report from O & Y's environmental consultant. Additionally, a letter indicated that no site-specific wetlands information has been submitted by Woodhaven to the Corps of Engineers. (Exhibit A-17).

O & Y apparently started to apply for appropriate wetland permits to the Corps sometime in late September, 1985 (Exhibit A-18) during settlement negotiations and prior to the filing of the Order and Judgment of January 24, 1986. By correspondence of November 12, 1985 (Exhibit A-19), O & Y submitted additional environmental data as well as a prior approval issued in August, 1979 (Exhibit A-20). However, by reply of December 10 1985 (Exhibit A-21) the Corps requested additional environmental information and by a second reply, dated January 27, 1986, the Corps restated its requirements regarding data for wetlands

delineation noting specifically that an individual permit pursuant to Section 404 of the Clean Water Act might be required.

(Exhibit A-22).

The Reports of the Township environmental consultants and the Planning consultant indicate that at least approximately 50 percent of the areas contained in the O & Y and Woodhaven sites are not developable due to environmental constraints. The non-residential, job-related land uses cannot be developed at all and the transportation system connecting both sites with the remainder of the town is impossible to achieve. Lastly, the new town concept utilizing community centers and villages is not achievable (See, affidavit of Carl Hintz).

Township environmental consultant and planning consultant. (See, affidavit of Carl Hintz, December 30, 1986 and report of Dr. Norbert Psuty, Exhibits A-8 and A-9.)

The consequences of the wetlands undercount are staggering, the most obvious consequence being the loss of approximately one half of the site for any development purpose. Wetlands are required to be left in their natural state by Corps regulations. However, the loss of 50 percent is understated when one considers the locational factors involved with regard to a comprehensive plan. Small islands of uplands are sprinkled throughout both sites creating a "swiss cheese" pattern which does not lend itself to intensive development. All of the non-residential lands involving job-generating land uses are apparently lost on the O & Y tract. The transportation plans for both sites are basically destroyed. Even the proposed 18-hole golf course cannot be developed because it is located entirely within wetlands.

All the incentives for Old Bridge to enter into the settlement agreement are destroyed as a consequence of the wetlands problem. The 10 percent set aside is lost; the expected number of low and moderate income units from Woodhaven and O & Y are substantially decreased, ratables and job-generating land uses are eliminated; and an exciting new town concept is converted into high density garden apartment development within an extremely environmentally fragile setting.

The Township and Planning Board agreed to the settlement including the fair-share number of 1,642 units because, at the time a huge portion of the obligation could be solved by Woodhaven and O & Y in a manner most acceptable to the municipality.

However, this is no longer true. It would be irresponsible on the part of Old Bridge to permit intensive, high-density residential development in one of the most fragile, environmentally sensitive areas in the township.

Old Bridge Township is not attempting to avoid its constitutional obligation to provide low and moderate income housing by this Motion. The Township has notified the Council on Affordable Housing that it will immediately submit a compliance plan in accordance with regulations promulgated by the Council on Affordable Housing.

In this context it should also be noted that the fair-share obligation of Old Bridge Township pursuant to the guidelines and regulations of the Council on Affordable Housing is 412 low and moderate income units. The settlement required the provision of approximately four times the number of units required by the Council. Given the difficult environmental issues involving the O & Y and Woodhaven parcels, as well as a substantial portion of the remaining undeveloped land in Old Bridge Township it would be incredibly unfair to impose a fair-share housing responsibility on Old Bridge Township that is more than four times the obligation as determined by the Council on Affordable Housing.

POINT II

- II. THE TOWNSHIP AND PLANNING BOARD OF OLD BRIDGE MUST BE RELIEVED FROM THE TERMS OF THE FINAL JUDGMENT OF JANUARY 24, 1986 BY VIRTUE OF NEWLY DISCOVERED EVIDENCE.

Throughout the negotiation period of approximately, four

months prior to the Settlement Agreement questions concerning environmental protection were raised by the Township and were answered by Woodhaven and O & Y in terms that suggested that environmental considerations were simply not a problem. It was agreed by all parties that an approval of development plans by the Planning Board could be made, subject to appropriate approvals by the Army Corps of Engineers, in the event such approvals were warranted. Of course, the underlying assumption on the part of the Old Bridge Township was that environmental factors, including the extent of wetlands, was not a serious problem which would jeopardize the integrity of the new town concept included in the O & Y and Woodhaven proposals. However, the subsequent discovery of extensive areas of wetlands after the entry of the Final Order must relieve Old Bridge from the terms of the Final Order.

While there is some indication that O & Y had knowledge that wetlands delineations might cause problems because of new standards adopted by the Corps of Engineers as reflected in the correspondence between the Corps and O & Y during October, November and December of 1986, it also appears that O & Y was relying upon a permit issued by the Corps in 1979. Therefore, at this time subsection c of Rule 4:50-1 is not invoked, although this defendant reserves the right to assert subsection c in the event evidence of misrepresentation or fraud surfaces.

POINT III

III. THE TOWNSHIP AND PLANNING BOARD OF OLD BRIDGE MUST BE RELIEVED FROM THE TERMS OF THE FINAL JUDGMENT OF JANUARY 24, 1986 PURSUANT TO SUBSECTION (f) BY REASON OF IMPOSSIBILITY OF PERFORMANCE.

Given the extensive area of wetlands and general environmental sensitivity of the Woodhaven and O & Y tracts intensive development on a large scale becomes untenable in terms of providing adequate environmental protection and in terms of basic health and safety. Additionally, all of the benefits negotiated for by Old Bridge Township, including the comprehensively planned new town with its own employment base, service base, and road network are lost as well as the 10 percent set-aside provision. Development, if permitted, will necessarily result in very high density, intensive development on uplands due to the vast amount of wetlands. Old Bridge Township never bargained for, nor should it be forced to accommodate such a result.

POINT IV

IV. THE SETTLEMENT AND JUDGMENT SHOULD BE SET ASIDE BASED UPON NO REASONABLE POSSIBILITY OF PERFORMANCE AS PROVIDED IN SECTION III-A.3 OF THE SETTLEMENT AGREEMENT.

For the reasons set forth in Points I, II and III this Court should set aside the Settlement Agreement and Order since it is no longer possible to perform in a manner which the Township of Old Bridge believed was possible. Clearly, the loss of more

significant employment base, nor does it have a high or even a moderately high average income per family, Old Bridge Township does have large undeveloped land areas which generate a large fair-share number. However, if this Court takes into consideration the environmental sensitivity of much of this undeveloped land, it becomes clear that Oldbridge Township should not be required to provide more than 412 units for low and moderate income housing.

This Court should note that Old Bridge Township is the only "Urban Aid" community to be challenged for exclusionary zoning practices.

POINT VI

VI. OLD BRIDGE TOWNSHIP'S FAIR-SHARE NUMBER SHOULD BE REDUCED TO 412 UNITS REQUIRED BY C.O.A.H REGULATIONS IN LIGHT OF III-A.3 OF THE SETTLEMENT AGREEMENT PROVIDING FOR MODIFICATION OF THE AGREEMENT BASED ON A SUBSEQUENTLY ADOPTED ADMINISTRATIVE REGULATION OF A STATE AGENCY ACTING UNDER STATUTORY AUTHORITY.

C.O.A.H. promulgated a guideline establishing a fair-share requirement of 412 low and moderate income units for Old Bridge Township. C.O.A.H. adopted this regulation in compliance with the requirements of the Fair Housing Act.

The language contained in the reopener clause is clear on its face. Therefore, the township is entitled to a reduced fair-share requirement in accordance with C.O.A.H. guidelines.

The Court should note that the language contained in the Old Bridge Township reopener clause permitting modification based upon subsequent adoption of regulations by an administrative agency is unique and similar language is not contained in other reopener clauses in other settlements. This language was intended to permit any party to modify the fair-share number either upwards or downwards, depending on the regulations of C.O.A.H. In fact, this interpretation is the only possible interpretation which one can reasonably arrive at, given the language in the Settlement Agreement. Any other interpretation would render this clause meaningless.

This interpretation is reinforced by the fact that all parties knew at the time of the settlement that C.O.A.H. intended to promulgate guidelines and a fair-share number for each municipality.

CONCLUSION

For the reasons herein set forth, the Planning Board demands that the Judgment and Order of Reopener be set aside and that this matter be transferred to C.O.A.H. for review in accordance with their duly adopted regulations and guidelines under the Fair Housing Act.

Respectfully submitted:


THOMAS NORMAN
FOR THE OLD BRIDGE PLANNING BOARD