

UL v. tauj#: Old Bridge

July 22, 1937

- Supplemental letter lines
- township attorney's letter joining Norman's position

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July 22, 1987

Honorable Eugene Serpentelli, J.S.C.
Superior Court
Ocean County Court House
CN 2191
Toms River, NJ 08754

RE: Olympia & York Old Bridge Development Corp.
et al. vs. Old Bridge, et al.

Dear Judge Serpentelli:

Please accept this supplemental letter brief on behalf of the Planning Board of the Township of Old Bridge. The Planning Board filed a Motion pursuant to Rule 4:50-1, with a supporting Brief and Affidavit of Carl Hintz on December 30, 1986. The return date for the Motion of January 16, 1987 was continued by the Court pending delineation of wetlands by Olympia & York and Woodhaven Village and certification thereof by the U.S. Army Corps of Engineers (hereinafter Corps).

As of the date of this letter brief, it is the understanding of the Planning Board of Old Bridge Township (hereinafter Planning Board) that the Corps has certified the Olympia & York application and has designated 1,459 acres of wetlands within the O&Y tract. So far, the Corps has not certified the wetlands delineation on the Woodhaven tract but it is the understanding of the Planning Board based upon representations of Woodhaven Village and the Corps that certification will be granted after a third on-site inspection is completed. For purposes, of deciding the Planning Board Motion, the Planning Board stipulates that approximately 490 acres are wetlands on the Woodhaven parcel.

Additionally, the Planning Board submits in support of its Motion the Affidavit of Joan George, the Chairperson of the Old Bridge Planning Board; the Report of Carl Hintz, entitled Environmental Limitations And Their Impact on Olympia & York and Woodhaven Villages dated May 1987; and, lastly the report prepared by Sullivan Associates, entitled Planning Report For The Olympia & York Planned Development dated May 26, 1987. Both reports are referred to in the Affidavit of Joan George and are



Letter - Judge Serpentelli, J.S.C.

attached hereto as Exhibits A-1 and A-2.

SUPPLEMENTAL FACTUAL BACKGROUND

Andrew Sullivan (hereinafter Sullivan) states in his planning report submitted on behalf of O&Y to the Planning Board analyzing the wetland delineation and its planning impact upon the O&Y parcel at page three that:

"Of a total of approximately 2,600 acres, the final wetlands mapping, as submitted to the Corps, identifies approximately 1,459 acres of wetlands. Any development requiring fill on these lands would be subject to an Army Corps of Engineers 404 permit. The remaining lands, totaling approximately 1,141 acres, are not subject to regulation by the Corps. About 581 (39%) of these uplands are located in large continuous tracts of land, ranging from 25 to 132 acres in size. Another 200 acres of these lands are located in tracts ranging from 10 to 19 acres in size. Most of these upland parcels are adjacent to existing roads and are accessible."

Sullivan's analysis of the amount of developable land contained in this paragraph is consistent with the analysis of Carl Hintz in his report to the Planning Board. More specifically, the Sullivan report refers to 581 acres of larger size tracts and 200 acres of smaller size tracts equaling, in total, 781 acres. Subtracting 781 acres from 1,141 acres of uplands (2,600 acres less 1,459 acres of wetlands) an amount remains of 360 acres of scattered uplands consisting in size of one through ten acres. These small parcels are not adjacent to existing roads and are not accessible. Moreover, they are not buildable and are not recognized or counted even in the Sullivan report as developable land.

The Hintz report, at page twenty-seven, table one, under the designation "developable", concludes that approximately 784 acres are developable on the O&Y tract. In short, both consultants basically agree that approximately 784 acres are developable out of the 1,141 acres of uplands on the O&Y tract. This represents about 30% of all land on the O&Y tract that is developable. This also constitutes a loss of approximately 57% of developable land since the original "submission by O&Y indicated that approximately 2,304 acres were developable.

A similar analysis of the Woodhaven parcel has been made by Carl Hintz but no report comparable to the Sullivan report has been submitted by Woodhaven as yet. An important missing factor which must be determined after Corps certification is the exact location of wetlands vis-a-vis uplands and the impact on accessibility to road access and upland parcel size for development purposes, particularly at a gross density of four units to the acre.

Letter - Judge Serpentelli, J.S.C.

BASIC PREMISE

The Planning Board believed that approximately 4,000 acres included in the Court settlement were buildable and the proposed development of O&Y and Woodhaven Village could be achieved in a manner substantially like that proposed by the developers subject, of course, to market contingencies regarding financing but not subject to the impossibility of performance due to the physical limitations of the land. The elimination of at least 1,949 acres of wetlands coupled with the loss of at least another 300 acres of scattered, unusable uplands destroys any of the planning or financial advantages which the Planning Board bargained for on behalf of the residents of Old Bridge Township at the time of the settlement. This analysis does not take into account the loss of acreage in the Woodhaven tract.

After full review of the record including correspondence between the various parties and the Corps, the Planning Board does not believe that fraud was involved on the part of any party. Clearly, a change in Federal law regarding the definition and status of "wetlands" devastated any opportunity on the part of Old Bridge Township to realize any benefits from the development proposed by O&Y or Woodhaven. ✓

LOST BENEFITS

The Planning Board bargained for benefits that would accrue to all of the citizens of Old Bridge Township and agreed to the settlement for that reason. The benefits included:

1. A strong tax base and employment source within the O&Y development through extensive office commercial and industrial development along Routes 9 and 18. More than seven and one half million square feet of office and industrial floor space was provided for in the Court settlement. All lands on which this base was to be developed are no longer buildable because all of it is designated as wetlands by the Corps.] I¹¹ |
2. Adequate areas for active recreation including an 18-hole golf course and sites for schools, firehouses and first-aid buildings are lost. Even golf courses are not permitted in wetlands nor are the other public facilities.
3. It was believed that 1,625 units of Mt. Laurel II housing, the lion's share of the Old Bridge Township responsibility, would be satisfied within the O&Y and Woodhaven development tracts. This was based on a buildout of approximately 18,000 dwelling units conditioned upon a ten (10%) percent mandatory set aside. This is no longer possible. The ten (10%) percent set aside was seen as a significant benefit in that the Township would be able to incorporate the Mt. Laurel housing in a reasonable manner phased in relation to jobs, tax base, and sound planning.

Letter - Judge Serpentelli, J.S.C.

4. The Planning Board expected a new town to take place with a transportation system internally sound and intergrated with the remainder of Old Bridge Township. The Planning Board expected sound urban design including a variety of densities and housing types sited in ways which would result in most efficient use of land and most efficient use of municipal services and facilities. This is no longer possible.

THE URBAN LEAGUE

The contention of the Urban League has been from the beginning that the Township of Old Bridge is responsible for its fair share of low and moderate income housing under the Mt. Laurel doctrine. The Urban League has never waived from this position. However, since the Settlement Order was entered by this Court, the Council on Affordable Housing (COAH), pursuant to the Fair Housing Act determined that Old Bridge Township's fair share was 862 units of low and moderate income housing. Additionally, COAH credited Old Bridge Township with 450 units leaving an outstanding obligation of approximately 412 units of low and moderate income housing. The Planning Board will immediately develop a fair housing plan and adopt a housing element of the Master Plan to provide for its full constitutional responsibility as indicated by COAH.

BUILDERS; Olympia & York and Woodhaven

Clearly, the two builders and particularly Olympia & York are impacted dramatically by the advent of wetlands legislation and wetlands delin-
eation. However, as the Supreme Court in The Hills Development Co. v. Township of Bernards, 103 N.J. 1 (1986) recognized there are very dangerous and unpredictable scenarios which may arise due to legislative changes and court decisions which impact developers negatively.

LEGAL ARGUMENTS

(1) Rule 4:50-1

^) The Planning Board relies on the arguments set forth in Points I, II
vW 4 and III of its brief filed December 30, 1986. Additionally, the Plan-
Y f\ning Board seeks to stress that at the time of the settlement the Plan-
 \ A ning Board knew that approximately 336 acres were undevelopable on the
 | >_x O&Y site and that 158 acres were undevelopable on the Woodhaven site
 | \i/x due to streams and wetlands. The Planning Board was advised that the
 j t ^ 1 Corps had issued a nationwide permit for development for the O&Y site
 3 r / in 1979. It was not until after the public hearing started that the
 wetlands issue manifested itself. This issue concerning change of
 law regarding treatment of wetlands was material and certainly would
 have changed the terms of the court settlement. These facts constitute
 grounds ^{to} set aside the settlement pursuant to Rule 40:50-1. See,

Letter - Judge Serpentelli, J.S.C.

Bauer v. Griffin, 104 N.J. Super 530, 544 (Law div. 1969) and Aiello v. Myzie, 88 N.J. Super 187, 196 (App. Div. 1965). As to change of law justifying relief, see Ford v. Weisman, 188 N.J. Super 614, 619 (App. Div. 1983).

(2) REOPENER CLAUSE III-A.3

The Reopener Clause set forth in the settlement agreement provides:

Any party to this agreement, upon good cause shown, may apply to the Court for modification of this agreement based on a modification of law by a court of competent jurisdiction, a subsequently enacted state statute, a subsequently adopted administrative regulation of a state agency acting under statutory authority, or based on no reasonable possibility of performance." (See paragraph III-A.3)

The Planning Board moves to reopen the agreement due to a "subsequently adopted administrative regulation of a state agency acting under statutory authority" and also based upon no reasonable possibility of performance.

The Council on Affordable Housing established pursuant to the Fair Housing Act has promulgated rules and regulations which, among other things, establish a fair share responsibility for each municipality in New Jersey. In the case of Old Bridge Township, the Council on Affordable Housing has established a fair share requirement of 412 low and moderate income housing units. The regulation was adopted subsequent to the agreement entered into by the parties herein. The administrative regulation sets forth a specific fair share responsibility which is based upon state and regional planning considerations. The Reopener Clause was bargained for expressly for permitting adjustments either upward or downward in the fair share number subsequent to the agreement by the Council on Affordable Housing.

Additionally, based upon the wetlands dilemma it is clear that the benefits of the settlement to be derived by Old Bridge Township for the benefit of its citizens can no longer be realized. In effect, there is no reasonable possibility of performance which would insure those benefits and the agreement must be modified to reflect the wetlands dilemma. The Planning Board is presently reviewing its Master Plan with its Planning Consultant, Carl Hintz, for the purpose of revising the Master Plan and zoning regulations of the Township of Old Bridge in light of requirements and guidelines adopted by the Council on Affordable Housing and new state regulations pertaining to the delineation and regulation of development on wetlands. The Planning Board seeks modification of the agreement in a manner which is consistent with the plans and studies concerning the Master Plan revision presented

Letter - Judge Serpentelli, J.S.C.

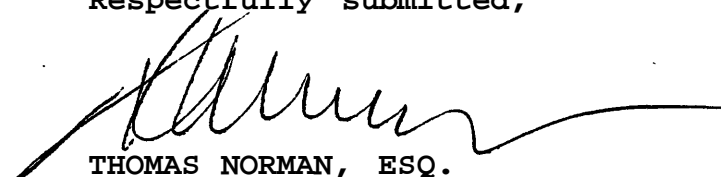
to the Planning Board by its consultant and seeks Court approval to submit these plans in conjunction with this request for modification of the agreement.

CONCLUSION

There is no question that the Doctrine of Finality is extremely important as all controversies must come to an end at some point in time. In this case a settlement was entered after twelve months of negotiations among the parties and, in the ordinary course, the controversy should terminate with the settlement. However, the discovery of significant areas of wetlands, albeit due to a change of regulation, makes it impossible for Olympia & York and Woodhaven to perform in any substantial way with the terms of the settlement. This wetlands dilemma unfortunately affects in a very negative way sound planning and development in a substantial portion of Old Bridge Township. The development standards contained in the settlement can not be followed blindly for the sake of "finality" if the end result will devastate sound planning in a large portion of Old Bridge Township. Nor should the terms of the settlement be followed if the end result will have a substantially detrimental impact on the environment. The Planning Board and Township are concerned with the public welfare of Old Bridge Township rather than private interests.

For these reasons, the Planning Board demands that the Judgment and Order of Repose be set aside and that this matter be transferred to COAH for review in accordance with the rules and regulations adopted pursuant to the Fair Housing Act. Alternatively, the Planning Board demands that the agreement be modified to reflect the subsequently adopted administrative regulations of COAH establishing the Constitutional obligation of 412 units of low and moderate income housing for Old Bridge Township and also to reflect the wetlands dilemma leading to the impossibility of performance with regard to Olympia & York and Woodhaven Village.

Respectfully submitted,



THOMAS NORMAN, ESQ.
For Old Bridge Township Planning Board

TN:gk

CC: Service List

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JEROME J. CONVBRY
TOWNSHIP ATTORNEY

MIDDLESEX COUNTY, N.J.

TOWNSHIP OF OLD BRIDGE

June 22, 1987

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Courthouse
CN-2191
Toms River, NJ 08754

Re: Woodhaven Village, Inc. and
O & Y v. Old Bridge Township, et al

Dear Judge Serpentelli:

Please be advised that, as the Township Attorney for the Township of Old Bridge, I join with Thomas Norman, Esq. and Ronald L. Shimanowitz, Esq. in the position that a Court Master is not needed, nor is a Master's Report required to resolve the Motion of the Planning Board in the Township of Old Bridge to set aside the settlement.

Thank you for your attention to this matter.

Respectfully,

Jerome J. Convery,
Township Attorney

JJC/jd
cc: Service List