~~MB~~ CA – Cranbury v. UL and Garfield and Co. Apr. 3, 1985

Brief of Plaintiff-Respondent Garfield and Company in opposition to Cranbury's petition for a Stay, along with supporting documents

Pgs. 8le

CA002551B

TOWNSHIP OF CRANBURY,

Petitioner,

vs.

URBAN LEAGUE OF GREATER NEW BRUNSWICK and GARFIELD AND COMPANY; CRANBURY LAND COMPANY; LAWRENCE ZIRINSKY; TOLL BROTHERS, INC.;

Respondents.

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 23-830

CIVIL ACTION

IN THE MATTER OF MOUNT LAUREL II
92 N.J. 158 (1983)

BRIEF OF PLAINTIFF-RESPONDENT GARFIELD AND COMPANY

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PROCEDURAL HISTORY

More than a decade ago the then existing Cranbury Township Zoning Ordinance was attacked by the Urban League of Greater New Brunswick as racially and economically exclusionary. Verified Petition For Stay and Other Relief (hereinafter "Petition") at ¶¶9, 10. After a lengthy trial, the Urban League's charges were sustained. Cranbury was ordered to rezone to accommodate 1,351 low and moderate income housing units. Petition at ¶11. That decision eventually found its way to this Court, and this Court's decision remanding it for further proceedings became known as Mount Laurel II. Petition at ¶13.

Sent to Judge Serpentelli by this Court, the Urban League case was consolidated with cases commenced by Garfield & Company as well as three other plaintiffs* challenging Cranbury's newly adopted zoning ordinance as violative of the principles set out by this Court in Mount Laurel II. Petition at ¶¶14, 15. Cranbury's new zoning ordinance had been adopted almost six months after this Court's Mount Laurel II decision. GPa 1 at ¶2, Exhibit A.

Prior to the trial of this action, Cranbury unsuccessfully moved for the recusal of Judge Serpentelli. GPa 4 at ¶10. A trial was then had before Judge Serpentelli on the issues of Cranbury's fair share of its region's low and moderate income housing needs, whether Cranbury's new zoning ordinance met its fair share obligation, and whether plaintiffs Zirinsky, Cranbury Land Company and Toll Brothers should be denied a builder's remedy on grounds that they did not proceed in good faith. Cranbury specifically did not challenge Garfield & Company's right to a builder's remedy on this ground. GPa 4 at ¶11, Exhibit L. Upon completion of the trial but before Judge Serpentelli had rendered a decision on fair share or compliance, Cranbury unsuccessfully moved for a new trial. GPa 4 at ¶13. Cranbury now seeks from this Court a stay of all further procedings in these cases.

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* Cranbury Land Company, Lawrence Zirinsky and Toll Brothers

STATEMENT OF FACTS

As Cranbury's brief and appendix show, in the decade since its zoning ordinance was first challenged as so racially and economically restrictive as to violate constitutional obligations, little, if anything, has been done to promote the development of low and moderate income housing in Cranbury. Rather, the municipality has authorized vast sums of money to delay or deny the development of such housing.

Almost six months after this Court's Mount Laurel II decision, Cranbury adopted the zoning ordinance presently at issue. GPa 1 at ¶2, Exhibit A. That ordinance designated Garfield & Company's land as a preferred location for low and moderate income housing. This property was zoned at a density of up to five units per acre. However, to construct housing at this density, Garfield & Company had to purchase something which the new zoning ordinance denominated as Transfer Development Credits. It took the purchase of 3.5 Transfer Development Credits and an agreement to construct 3/4 of a unit of low or moderate income housing per acre to reach the five unit per acre maximum density permitted. It was estimated that each of the Transfer Development Credits would cost between $8,000.00 and $10,000.00. GPa 2 at ¶¶4-5, Exhibits F,G.

On July 25, 1983 the Cranbury Township Committee held a hearing on this proposed zoning ordinance. At that hearing a representative of Garfield & Company made a presentation. He informed the Township Committee that Garfield & Company was willing and able to develop its property in Cranbury for Mount Laurel housing. However, he explained that such development would be impossible, inter alia, in light of the density provisions and the Transfer Development Credit purchase requirement contained in the proposed ordinance. Notwithstanding this presention, the Cranbury Township Committee adopted the proposed zoning ordinance without modifying the density provisions, Transfer

Development Credit purchase requirements or any of the other cost generating provisions. Garfield & Company then commenced suit within forty-five days as required by Rule 4:69-6. GPa 1 at ¶2, Exhibit A.

Subsequently, plaintiffs Zirinsky, Cranbury Land Company and Toll Brothers also challenged the zoning ordinance on the ground, inter alia, that it did not provide a reasonable opportunity for the construction in Cranbury of that municipality's fair share of the region's low and moderate income housing. During the course of pre-trial discovery, the plaintiffs learned from Cranbury's own planners that although the zoning ordinance mathematically provided for the construction of up to 375 low and moderate income units in Cranbury, there did not exist enough Transfer Development Credits to permit the construction of this number of low and moderate income units. Rather, there would be a shortfall of 700 market rate and subsidized units. Because the zoning ordinance contemplated that 15% of these units would be for low and moderate income families, only 270 low and moderate income units could be built under Cranbury's zoning ordinance; even assuming that the Transfer Development Credit scheme and other cost generating features were lawful. GPa 3 at ¶6, Exhibit H.

The ultimate conclusion of Cranbury's own planner was that Cranbury's ordinance was not in conformance with the principles set out in Mount Laurel II. GPa 3 at ¶7, Exhibit I. Rather, he submitted a report dated March 19, 1984 in which he expressed his general acceptance of most of the reasoning and conclusions set out in the report submitted to Judge Serpentelli by the Court appointed master, Carla L. Lerman. GPa 3 at ¶8, Exhibit J. Mr. Raymond, Cranbury's expert, recalculated Cranbury's fair share based upon his modification of the formula found in Ms. Lerman's report. He eliminated both the growth area and wealth factors from the fair share formula. However, Mr. Raymond still concluded that Cranbury's fair share was 599 units, 329 more units

than could be built under Cranbury's zoning ordinance with all of its cost generating features. GPa 3 at ¶9, Exhibit K. During pre-trial discovery Mr. Raymond, his associate Mr. March as well as Mayor Danser and Planning Board Chairman Don Swanagan all testified that Garfield & Company's land was an appropriate and desirable location for the construction of low and moderate income housing. GPa 2 at ¶3, Exhibits B, C and E.

Prior to the trial of this action, Cranbury moved for the recusal of Judge Serpentelli. This motion was fully briefed and argued. It was denied. GPa 4 at ¶10. After a full trial, Judge Serpentelli found that Cranbury had a fair share of 816 low and moderate income units. He appointed a master and gave Cranbury 90 days to develop a proposed compliance program. GPa 4 at ¶12, Exhibit M. After a series of meetings of the Planning Board and Township Committee, the municipality's planners came up with a draft compliance program which urged a staging over a period of years of Cranbury's fair share and designated the property owned by Garfield & Company as the preferred location for the first phase of low and moderate income residential construction in Cranbury. GPa 4 at ¶14, Exhibit N. However, the municipality secured an extension of time from Judge Serpentelli to submit its compliance program and revised its planner's recommendation. Cranbury's ultimate submission proposed that there be no Mount Laurel development of Garfield & Company's property until 1996, and that development take place over a period of twelve years. Yet, it recommended immediate development of two parcels of land continguous to the Garfield tract owned by persons who were not plaintiffs in the litigation and had not been involved in any way in challenging Cranbury's zoning ordinance. GPa 5 at ¶15. Thus, Cranbury's submission to Judge Serpentelli placed Garfield & Company, the first developer plaintiff to commence suit and the only developer plaintiff seeking to construct housing in an area which Cranbury had zoned for high density residential development, in a worse position than it would have been in

had it never challenged Cranbury's zoning ordinance.

After submission of Cranbury's proposed compliance program, Garfield & Company moved before Judge Serpentelli for an order entitling it to a builder's remedy on the ground that no issue of fact as to its entitlement existed. GPa 5 at ¶17, Exhibits O, P & Q. This motion was denied without prejudice by Judge Serpentelli pending a hearing on Cranbury's proposed compliance program. Cranbury did not seek on March 15, 1985, the return date of that motion, or at any other time, the stay for which it now petitions this Court; nor did Cranbury on March 15, 1985 inform Judge Serpentelli of its intention to seek this stay. GPa 5-6 at ¶¶18-19.

ARGUMENT

NO BASIS EXISTS EITHER TO CONSIDER OR GRANT CRANBURY'S PETITION FOR A STAY

The Township of Cranbury demands that this Court stay all pending Mount Laurel actions until the end of the present legislative session. It seeks this relief without ever having made such an application to the trial court. It submits in support of its application for this relief statements in the form of affidavits which were never submitted to the trial court and which, of course, are not subject to cross-examination. Finally, it submits in support of this application a statement of facts which tends to mislead by the facts which it omits to state.

Garfield & Company is presented to this Court as a plaintiff which filed a Mount Laurel complaint without ever contacting the municipality. In fact, it is undisputed that Garfield & Company actually made a presentation before the Cranbury Township Committee on the day the challenged zoning ordinance was adopted analyzing the ordinance and explaining that although it was willing to go forward as a Mount Laurel developer, the cost generating features of the ordinance precluded any such development. Cranbury totally ignored this presentation and adopted the ordinance. GPa 1-2 at ¶2, Exhibit A. This was the ordinance which its own expert later testified violated the principles set out by this Court in Mount Laurel II. GPa 3 at ¶7, Exhibit I.

The fair share number assigned to Cranbury by Judge Serpentelli is attacked as unreasonable. However, this number, 816, is only 60% of the fair share number assigned to Cranbury by Judge Furman back in 1976. Cranbury neglects to point out to this Court that its challenged zoning ordinance with all of its cost generating features, including the necessity of purchasing hundreds of Transfer Development Credits at a price of up to $10,000.00 a credit, would only generate 270 low and moderate income units. GPa 2-3 at ¶¶ 5 and 6, Exhibits F, G

and H. Cranbury also neglects to inform this Court that Cranbury's own expert testified that Cranbury's zoning ordinance did not comply with the guidelines set out in Mount Laurel II. GPa 3 at ¶7, Exhibit I. Finally, Cranbury neglects to inform this Court that its own expert calculated Cranbury's fair share at 599 low and moderate income units. GPa 3 at ¶9, Exhibit K.

Cranbury complains to this Court of the burden involved in constructing 816 low and moderate income units in the municipality. However, it neglects to inform this Court that it has proposed to Judge Serpentelli that these 816 units be phased in over a period of 23 years. GPa 5 at ¶16. Such a project only requires the construction of 36 low and moderate income units each year. Moreover, of course, Cranbury has not presented any testimony before Judge Serpentelli on five of the subsections into which its Statement of Facts is divided.

Growth
Water
Sewer
Schools
Traffic

Certainly neither Messrs. Burchell nor Costonis testified before Judge Serpentelli. Rather, Cranbury appears desirous of trying its case directly before this Court without making any record below.

Cranbury also complains that it is being forced to place low and moderate income housing in locations which it finds unsound and suggests that it would have settled this litigation for a fair share of 600 units if only it did not have to put the units in certain locations. It is, of course, worth noting that Cranbury suggests it would have been willing to settle for a fair share of 600 units even though it now argues it cannot possibly support such a number. It is also worth examining the municipality's treatment of Garfield & Company's site as a measure of Cranbury's good faith. Throughout this proceeding the

municipality has referred to Garfield & Company's property as its preferred site for low and moderate income housing. Its master plan and zoning ordinance, the testimony of its mayor and experts and the initial draft of its compliance program, all designated the Garfield & Company tract as the appropriate location for low and moderate income housing in Cranbury. GPa 2 at ¶¶3, 14, Exhibits B, C, D, E and N. Cranbury specifically refrained from challenging Garfield & Company's right to a builder's remedy at the trial of this action just because this piece of property was the preferred site for Mount Laurel development. GPa 4 at ¶11, Exhibit L. Notwithstanding these facts, Cranbury has not revised its zoning ordinance to accommodate Mount Laurel development on the Garfield & Company tract. In fact, the compliance program submitted by Cranbury to Judge Serpentelli would preclude any development of this tract until 1996. Development of this land would then take place over a twelve year period. GPa 5 at ¶15. Obviously, Cranbury is unwilling to accept low and moderate income development even on one of its preferred sites - at least by a developer which challenged its patently unlawful ordinance.

Another measure of Cranbury's good faith is the strides it has made since the 1974 inception of the Urban League case in providing for its fair share of its region's low and moderate income housing. The fact is that whether Cranbury's fair share is 1351 units as found by Judge Furman, 816 units as found by Judge Serpentelli, 599 units as found by Cranbury's own expert or even just 150 units, nothing of any significance has been accomplished over the past decade to reach any of these goals. Cranbury was unable to demonstrate to Judge Serpentelli that any significant amount of housing for low and moderate income citizens has been constructed in the municipality during the past 10 years. It can well be said of Cranbury as this Court said of Mount Laurel that

> [a]fter all this time, ten years after the trial court's initial order invalidating its zoning ordinance, ...

> [Cranbury] remains affected with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but ... [Cranbury's] determination to exclude the poor. [92 N.J. at 198].

The absence of any significant amount of low and moderate income residential construction in Cranbury during the past ten years strongly suggests a concomitant absence of good faith.

Cranbury also neglects to bring to this Court's attention the large number of settlements which have taken place in Mount Laurel litigations. The Urban League case alone started before Judge Serpentelli with seven defendant municipalities. Of these seven, only three remain in the case. Three of the other four municipalities have settled the Mount Laurel litigation pending against them and one has partially settled its litigation. This settlement record strongly suggests not only that the implementation of this Court's Mount Laurel II decision has been successful, but also that the burden of complying with the constitutional mandate found in Mount Laurel II is far less than Cranbury would have this Court believe.

It has now been more than eleven years since Cranbury's zoning practices were first challenged. Notwithstanding Cranbury's protestations of good faith, its has failed - even by its own planner's analysis - to fulfill its constitutional obligation during that period. It has, rather, used every possible tactic to delay. It has, for example, attempted to recuse the trial judge, attempted to secure a new trial before that trial judge even filed his decision and now seeks from this Court by methods of doubtful procedural validity a stay of this litigation.

Cranbury argues that it is properly before this Court because in Mount Laurel II this Court intended to retain jurisdiction over those consolidated cases. This Court can best gauge its own intentions, but certainly Mount Laurel

II contains no explicit statement of retention of jurisdiction by this Court. If anything, the detailed procedures set out by this Court in Mount Laurel II argue against any retention of jurisdiction. It can hardly be thought that it was this Court's intention to permit every or any plaintiff or defendant in the Mount Laurel II cases to bring to this Court on an ongoing basis grievances, real or imagined, or suggested procedural or substantive revisions to its decision. Such an intent would surely conflict with on of the fundamental bases of Mount Laurel II

> To the best of our ability, we shall not allow it to continue. This Court is more firmly committed to the original Mount Laurel doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work. The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, Mount Laurel will not result in housing but in paper, process, witnesses, trials and appeals. [92 N.J. at 198].

Cranbury's other argument that this Court may exercise its original jurisdiction over Cranbury's petition pursuant to its administrative authority is similarly lacking. Were this Court's authority to govern the administration of the New Jersey court system to provide an independent basis for jurisdiction the instant case, this Court can be said to have original jurisdiction over any matter in any court at any procedural stage. There is a significant difference between exercising original jurisdiction over an issue implicating the regulation of the Bar of this State and exercising original jurisdiction to intervene in a civil proceeding being contested in a trial court.

Finally, Cranbury argues that as a matter of equity this Court has the power to review its decision in Mount Laurel II. In support of this proposition Cranbury cites General Leather Products Company, Inc. v. Luggage and Trunk Makers Union, Local No. 49, 119 N.J. Eq. 432 (Ch.), appeal dismissed, 121 N.J. Eq. 101 (E. & A. 1936). That case, however, is totally inapposite to this

proposition. The issue before the court in that case was only whether changed circumstances should permit a supplemental pleading to be filed; a very different issue from the one presented by Cranbury's demand for a stay. Similarly, the equitable maxim that "equity suffers no right to be without a remedy" was never intended to create jurisdiction where jurisdiction does not otherwise exist. For example, would this maxim replace the requisites necessary to secure in personam jurisdiction. And, of course, there does exist a remedy in the instant case. Cranbury may try its case before Judge Serpentelli and, if it desires, appeal any order which may finally issue from the trial court.

Cranbury's sole legal argument in support of a stay is that a bill addressing low and moderate income housing needs has passed both houses of the Legislature. This argument ignores the fact that Governor Kean has expressed his intention to conditionally veto the bill. It ignores the fact that the bill raises serious constitutional issues. Most importantly, it ignores the fact that no irreparable harm to Cranbury will take place in the absence of a stay. Rather, the sole effect of a stay will be to delay the construction of low and moderate income housing in Cranbury, an event which has already been delayed for more than eleven years.

This Court reluctantly acted two years ago because no other institution was willing to do so. It had been eight years since Mount Laurel I, and exclusionary zoning ordinances abounded. More, far more, has been accomplished in the two years since Mount Laurel II than in the eight years between Mount Laurel I and Mount Laurel II. There have been numerous settlements and, more importantly, numerous ordinance revisions specifically designed to avoid litigation. In short order it may be predicted that no State legislation will be required.

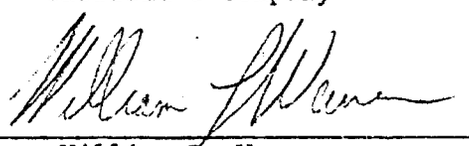
Dissatisfied with the success of Mount Laurel II. Cranbury and certain

other recalcitrant municipalities have lobbied hard to secure from the legislature the immunity they have been refused by this Court. The Legislature has produced a bill which would, at the very least, significantly delay the goal of statewide economic and racial integration. The bill has not even become law - may never become law; yet Cranbury is already before this Court seeking a stay of the challenge to its zoning ordinance, an ordinance which even its own experts admit does not meet the constitutional standards set out by this Court in Mount Laurel II, based upon the mere existence of this bill. Ever since 1974 Cranbury's goal has been delay. Further delay should not be tolerated.

CONCLUSION

For all the reasons set forth in this brief, this Court should not only deny Cranbury's Petition for a Stay but should also urge the trial court to expedite its review of Cranbury's proposed compliance program and its review of plaintiffs' applications for builder's remedies.

Respectfully submitted,
WARREN, GOLDBERG, BERMAN & LUBITZ
Attorneys for Plaintiff-Respondent
Garfield & Company

By: 

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Dated: April 3, 1985
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SUPREME COURT OF NEW JERSEY

DOCKET NO.: 23-830

TOWNSHIP OF CRANBURY,

Petitioner,

vs.

URBAN LEAGUE OF GREATER NEW BRUNSWICK AND GARFIELD AND COMPANY; CRANBURY LAND COMPANY; LAWRENCE ZIRINSKY; TOLL BROTHERS, INC.,

Respondents.

CIVIL ACTION

AFFIDAVIT OF WILLIAM L. WARREN

WILLIAM L. WARREN being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the Courts of this State and am counsel for Garfield & Company in the above captioned litigation. I make this Affidavit in opposition to the Petition of defendant Township of Cranbury for a stay of all proceedings in the above captioned action.

2. The zoning ordinance that is at issue in the above captioned action was adopted on July 25, 1984 after a public hearing at which a representative of Garfield & Company explained to the Cranbury Township Committee that although the zoning ordinance designated property owned by Garfield & Company as a preferred site for construction of low and moderate income housing, certain cost

generating features of the ordinance would preclude such housing on that site. Annexed as Exhibit A to this Affidavit is a Stipulation entered into between Garfield & Company, the Township of Cranbury and the Planning Board of the Township of Cranbury setting out the details of the presentation by Garfield & Company.

3. Cranbury's Master Plan designates the property owned by Garfield & Company as a preferred location for low and moderate income housing. The Zoning Ordinance placed this land in the PD-HD zone. At their depositions both Mayor Danser and Mr. Swanagan, Chairman of the Planning Board, confirmed that this land was a preferred location for low and moderate income housing. An excerpt from the March 12, 1984 deposition of Mayor Danser is annexed to this Affidavit as Exhibit B. An excerpt from the March 12, 1984 deposition of Mr. Swanagan is annexed to this Affidavit as Exhibit C. Moreover, both of Cranbury's planners, Thomas March and George Raymond, also testified that the land owned by Garfield & Company was a preferred and appropriate site for high density residential development. An excerpt from the March 26, 1984 deposition of Thomas March is annexed to this Affidavit as Exhibit D. An excerpt from the March 27, 1984 deposition of George Raymond is annexed to this Affidavit as Exhibit E.

4. The zoning ordinance which has been challenged in the above captioned action provides for a density on property owned by Garfield & Company of up to five residential units per acre. In order to reach this density Garfield & Company must purchase 3.5 Transfer Development Credits per acre and construct three quarters of a unit per acre of low or moderate income housing.

5. At their depositions Cranbury Mayor Alan Danser and Planning Board Chairman Don Swanagan testified that the cost of each Transfer Development Credit was estimated to be between $8,000.00 and $10,000.00. An excerpt from the March 12, 1984 deposition of Mayor Danser is annexed to this Affidavit as

Exhibit F. An excerpt for the March 12, 1984 deposition of Mr. Swanagan is annexed to this Affidavit as Exhibit G.

6. During the course of pre-trial discovery Cranbury's expert, George Raymond, admitted that sufficient Transfer Development Credits did not exist to permit the construction of the 375 low and moderate income units in Cranbury contemplated by the zoning ordinance, 15% of the approximately 2200 units which could be developed under the zoning ordinance. Rather, given the number of Transfer Development Credits available, only 275 low and moderate income units could be built pursuant to Cranbury's zoning ordinance; the shortfall of 700 Transfer Development Credits means a reduction of 105 low and moderate income units (15% x 700). An excerpt from the March 27, 1984 deposition of George Raymond discussing this aspect of the zoning ordinance is annexed to this Affidavit as Exhibit H.

7. George Raymond's ultimate conclusion was that Cranbury's zoning ordinance violated the principles set out by the Supreme Court in Mount Laurel II. An excerpt from the March 27. 1984 deposition of George Raymond is annexed to this Affidavit as Exhibit I.

8. George Raymond also testified that he generally accepted most, though not all, of the reasoning and conclusions set out in the consensus report submitted to Judge Serpentelli by the Court appointed master, Carla L. Lerman. An excerpt from Mr. Raymond's own revised March 19, 1984 report is annexed to this Affidavit is Exhibit J.

9. Mr. Raymond calculated Cranbury's fair share based upon his own modification of the formula found in Ms. Lerman's report. He eliminated both the growth area and wealth factor from the fair share formula and concluded that Cranbury's fair share would be 599 units. An excerpt from Mr. Raymond's revised March 19, 1984 report is annexed to this Affidavit as Exhibit K.

10. Prior to a trial on the issues of fair share and compliance Cranbury moved to recuse Judge Serpentelli as the trial judge. This motion was fully briefed and argued. It was denied by Judge Serpentelli.

11. A trial was then had on the issues of fair share, compliance and whether plaintiffs Zirinsky, Cranbury Land Company and Toll Brothers had filed their Complaints in good faith. Cranbury specifically did not challenge the good faith of Garfield & Company in filing its Complaint in this action, as it deemed Garfield & Company's site to be a preferred site for Mount Laurel development in Cranbury. A copy of Judge Serpentelli's decision on the issue of good faith is annexed to this Affidavit as Exhibit L.

12. Judge Serpentelli eventually concluded that Cranbury's f ir share of the region's low and moderate income housing was 816 units. He appointed a master and gave Cranbury 90 days to develop a proposed compliance program. A copy of Judge Serpentelli's Order is annexed to this Affidavit as Exhibit M.

13. Before Judge Serpentelli's opinion had even been issued, Cranbury had moved for a new trial. Judge Serpentelli denied this motion after extensive oral argument.

14. Cranbury then proceeded to draft a compliance program pursuant to Judge Serpentelli's Order. After a series of meetings of the Planning Board and Township Committee, the municipality's planner produced a draft compliance program which urged phasing of Cranbury's fair share and designated the property owned by Garfield & Company as the preferred location for the first phase of low and moderate income residential construction in Cranbury. A copy of Table 7 of the draft compliance program prepared by Cranbury's planners is annexed to this Affidavit as Exhibit N. The site 1 referred to in the excerpt is the site owned by Garfield & Company.

15. Notwithstanding the recommendation of Cranbury's planners found in this draft, Cranbury's ultimate compliance program submission to Judge Serpentelli proposed that there be no Mount Laurel development of Garfield & Company's property until 1996 and then that development take place over a period of twelve years. Indeed, it recommended that two other parcels of land contiguous to the Garfield tract be developed before the Garfield tract even though these continguous tracts were owned by persons who were not plaintiffs in the litigation and had not been involved in any way in challenging Cranbury's zoning ordinance or litigating the issues of Cranbury's fair share or compliance.

16. Cranbury's proposed compliance program also recommended that its fair share of 816 low and moderate income units be phased in over a period of 23 years.

17. After submission by Cranbury of its proposed compliance program, Garfield & Company moved before Judge Serpentelli for an order entitling it to a builder's remedy on the ground that no issue of fact as to its entitlement existed. Annexed to this Affidavit as Exhibit O is a letter memorandum dated January 23, 1985 submitted by Garfield & Company in support of its builder's remedy motion. Annexed to this Affidavit as Exhibit P is a letter memorandum dated February 7, 1985 submitted by Cranbury Township in opposition to Garfield & Company's builder's remedy motion. Annexed to this Affidavit as Exhibit Q is reply letter memorandum dated March 4, 1985 submitted by Garfield & Company in support of its builder's remedy motion.

18. Garfield & Company's builder's remedy motion was denied by Judge Serpentelli without prejudice pending a hearing on Cranbury's proposed compliance program. During the course of oral argument on Garfield & Company's motion on March 15, 1985, Judge Serpentelli strongly expressed his view that the

existence of a bill before the Governor which might affect Mount Laurel proceedings should not be considered in reaching any decision which he was required to reach with respect to any Mount Laurel case before him. Counsel for Cranbury expressed no disagreement whatsoever with this position taken by Judge Serpentelli. Nor did counsel for Cranbury seek a stay of any aspect of the above captioned litigation or indicate in any way Cranbury's desire for or intention to seek such a stay.

19. Without making any application to Judge Serpentelli, Cranbury now demands for a stay of all proceedings in the above captioned action.

William L. Warren

Sworn to and subscribed before
me this 3rd day of April, 1985.

Notary Public

SUSAN L. TAYLOR
A Notary Public of New Jersey
My Commission Expires Sept. 10, 1989

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

Docket No.: L-055956-83 P.W.

CIVIL ACTION

GARFIELD & COMPANY,

Plaintiff,

vs.

MAYOR and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation, and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof,

Defendants.

It is hereby stipulated and agreed by and among the above captioned parties that on July 25, 1983 a representative of Garfield & Company made a presentation to the Cranbury Township Committee at a public hearing on the proposed zoning ordinance, which was subsequently adopted and is challenged in this litigation. He informed the Township Committee that Garfield & Company was willing and able to develop its property in Cranbury for Mount Laurel housing as contemplated by the proposed zoning ordinance. However, such development would be impossible, inter alia, in light of the density provision and Transfer Development Credit purchase requirement contained in the proposed ordinance. Notwithstanding this

presentation by Garfield & Company, the Cranbury Township Committee adopted the proposed zoning ordinance without modifying the density provisions or the Transfer Development Credit purchase requirements affecting Garfield & Company's property or any other restrictions on development in the PD-HD zone. Garfield & Company then filed this action within 45 days of the adoption of the challenged zoning ordinance.

HUFF, MORAN & BALINT
Attorneys for Defendants The Mayor and Township Committee of the Township of Cranbury

BY: _____
William C. Moran

STONAKER & STONAKER
Attorneys for Defendant The Planning Board of the Township of Cranbury

BY: _____
Joseph L. Stonaker

WARREN, GOLDBERG, BERMAN & LUBITZ
Attorneys for Plaintiff, Garfield and Company

BY: _____
William L. Warren

Dated: June 1, 1984
Princeton, New Jersey

REDIRECT EXAMINATION BY MR. WARREN:

Q. Mayor Danser, at the time the Planning Board recommended the Zoning Ordinance to the Township Committee, did the Planning Board have a view as to what zone would be the most appropriate zone for the construction of low and modern income housing in Cranbury?

A. I would presume from the fact that the Planning Board made provisions for a density bonus in the PD-HD zone that they presumed that that would be the most appropriate zone.

Q. At the time the Township Committee adopted the Zoning Ordinance did the Township Committee have an opinion as to what the most appropriate zone would be for low and modern income housing in Cranbury?

A. I believe that the Township Committee felt the same way.

Q. The PD-HD zone?

A. Yes.

Q. Can you tell me whether since the Zoning Ordinance was recommended by the Planning Board and since the Zoning Ordinance was adopted by

the Township Committee, whether either the Township Committee or the Planning Board has changed its opinion as to what the most appropriate zone would be in Cranbury for low and modern income housing?

A. Not to my knowledge. I don't believe that they have.

Q. As far as you're concerned the Planning Board still believes that the PD-HD zone is the appropriate zone for the low and modern income housing in Cranbury; is that correct?

A. I believe so.

Q. And the same thing can be said with respect to the Township Committee; is that correct?

A. I believe so.

Q. Thus far with respect to the transfer development credits, and I will refer to them by initials, TDCs, so you will know what I mean --

A. That is fine.

Q. How many sketch plats have been submitted?

A. None.

Q. None at all?

A. No.

Q. How long has the Zoning Ordinance

we were concerned about the pressures of growth in the Township and the orderly growth in the Township and how the growth in the Township at that time was taking place.

Q. When the Planning Board adopted the Master Plan that currently exists, was there a unanimous view as to where low and moderate income housing in the Township ought to be located?

A. Yes, it would logically be where we would allow the higher density multi-type housing.

Q. Is there a particular zone in which the Planning Board expressed its opinion that low and moderate income housing ought to be constructed?

A. Yes, I would say in the planning unit development areas.

Q. PD-HD zone?

A. And, I presume the HD, high density.

Q. And is that still the belief of the Planning Board?

A. Yes.

Q. Now, at what point did the Planning Board begin to discuss the concept of transfer development credits?

A. It was discussed over perhaps the last 10 years. There was a prior planner that did a survey

developer of the higher density housing and the low- and moderate-income housing would have to take into consideration when he's trying to do his financial pro forma.

I could be wrong, if you want to give me a minute to go through here and see if there's a specific item in here that does increase the cost of construction.

Q. Take a look.

A. I've reviewed the energy standards and in my opinion, as far as low- and moderate-income housing is concerned, specifically really targeted towards the PD-HD zone, none of the standards in here will increase the cost of construction.

Q. By the way, what zone did the Planning Board designate as the appropriate area for low- and moderate-income housing?

A. That's the PD-HD zone.

Q. Are you presently retained by the Planning Board?

A. My firm is under contract with the Planning Board.

Q. Do you know presently what area in Cranbury the Planning Board deems to be the

appropriate area for low and moderate?

A. It's the PD-HD zone, which is set forth in the land use plan.

Q. Can you tell me basically some of the reasons that went into the Planning Board's decision to designate that as the appropriate zone for low and moderate income housing?

A. Sure. This really relates back to the master plan, and then it evolves down to the details of why does one place a particular house in a particular zone in a particular lot.

Essentially the township took in its Master Plan and tried to divide up where the many uses would be appropriate; the one use being the very high density residential and the other end of the spectrum obviously being residential. What we did is took a regional view of what was occurring within the township and around its borders, we took a look at the plans of the Middlesex County Planning Board, the State Development Guide, which is intimately involved in the Mount Laurel suit, and we then fashioned a very broad model as to where all uses ought to follow.

Essentially, if one takes a look at the

regional models and has determined that all growth ought to fall from Cranbury Village towards the east, meaning towards the Turnpike, and that all growth would or should be planned for this area.

We then took a look at our requirement for housing and we asked ourselves where would low- and moderate-income housing and where would high density housing be most appropriate? There were many factors that went into our conversation.

One of the things which from purely a physical development point of view was very important was the availability of sewer.

If you take a look at the existing sewer lines and sewer capacities and the sewer plans within the township as set forth in the Master Plan, you will find that the area chosen for high density housing within Cranbury Township is indeed the best and most likely place to have any kind of high density residential development, reasons being several.

One, it falls within the natural ridge line so that all sewers would be gravity fed.

Number two, there's a deadend main stem trunk line to the sewer plant which stops at approximately, I think it's Scott Avenue, but it's right near Route

130 and Brainerd Lake.

But that was the reason that most of the growth within the township was planned for that particular area on a physical basis.

The other thing, if you take a look at the County Master Plan, they also call out for that particular spot as being one where high density development ought to go, and the other things, proximity to the village area, trying to concentrate the residential growth, and other similar planning rationale that went into the location, high density zoning in that particular area.

Q. In your experience, is it likely that high density zoning in an agricultural area could, over long term, co-exist with agricultural uses for the land?

A. As specifically targeted for what area?

Q. Say the A-100 zone.

A. No, it could not.

Q. Why is that?

A. What invariably happens when you get residential next to agricultural, through time, the people who are in the agricultural business find it more difficult to carry on that business.

Even though they are in farming, they have some things that are part of farming which are just nuisance value to residential areas. They go, include everything from spraying of crops to 24-hour operations, to fertilization, and other kinds of things.

These are not just my personal findings, these are really the thought of planning as evidenced by various studies that do come out. It's very difficult to have any residential, particulary high residential living next to any agricultural area.

Q. Good planning would call for segregation of especially high density residences and agricultural uses?

A. You would really try to phase that in.

Q. Do you recall what the density requirement is in the A-100 zone at the moment?

A. Well, as I recall, it's one unit per six acres? I ask that as a question.

Q. That's correct.

A. Okay, thank you.

Q. Would you anticipate significant residential development given that density.

A. Significant? Does that mean an

Q. Mr. Raymond, in your view, would any land in the A-100 zone in Cranbury be the appropriate site for low- and moderate-income housing development?

A. No.

Q. In your view, is the most appropriate location in Cranbury for low- and moderate-income housing development east of the town?

A. The area that's readily sewerable, which is the basis on which the area east of the town was selected for higher density zoning.

Q. Does the fact that the area east of the town is also quite close to Route 130 play any part with respect to availability of transportation for low- and moderate-income families?

A. The area was selected on the basis of many planning factors, including the County Planning Commission recommendations regarding where higher density residential growth in Cranbury should be located.

Clearly the area between 130 and the Turnpike was selected to begin with and the area closest to the village is where the residential area should be with the employment areas being the ones that are

farther from the heart of the village.

Q. Let me see if I can get another yes or no.

Is that provision of the zoning ordinance which requires developers in the PD-HD zone to purchase transfer of development credits in compliance with the Supreme Court's decision in Mount Laurel II?

A. It is not inherently not in compliance. The issue is economic feasability of the 20 percent set-aside. And that has to be analyzed, and I haven't done it.

Q. Let me ask you. Does the necessity of purchasing development credits in the PD-HD zone increase the cost of building housing there? Yes or no?

A. Well, what are we starting with? You have to tell me. Are we starting with a zone that permits five units per acre, and requires -- and requires development credits, or are we starting with a zone where the land is valued at one unit per two acres, you give the man the possibility of developing five units per acre, increase the value of his land from what it's worth at one unit per two acres to

A. Would you rephrase that? Restate it.

Q. Well, let me repeat it. Is it your testimony that neither the Planning Board nor the Township Committee undertook any studies to determine what the probable price of the TDC would be?

A. Neither the Township Committee nor the Planning Board undertook a study in and of itself. They were advised both by our planner and by a planner representing a very large group of land owners in the western portion of the Township that a transfer unit would be worth in the neighborhood of eight to $10,000 with our planner saying eight to 10 and the landowner's planner saying 10.

Q. Going for a moment to the density bonus in the PD-HD zone where you get one extra unit per acre if you build I think it is 15 percent, low and modern income -- 15 or 20 percent --

A. Yes.

Q. Will the developer have to purchase TDCs in order to secure that density bonus?

A. No.

Q. He will not.

A. No.

(Discussion held off the

Cranbury?

A. Oh, I am sorry, I don't remember exactly but I mean the plan houses the entire concept of a complete transfer development out of the agricultural area into the area of planned unit development.

Q. How much do you anticipate each TDC will sell for?

A. Again, in our discussions we felt that there was a free market situation. We were not absolutely sure of the exact dollar amount. We had a concept of what we thought the range might be.

Q. Tell me what you thought the range would be.

A. As mentioned before as I sit here, I agree with the Mayor that $10,000 was mentioned as a possible value.

Q. Is that per credit?

A. Yes.

Q. Do you agree with the Mayor that with respect to the low and moderate income density bonus in the PD-HD zone it will not be necessary for the developer to purchase a transfer development credit in order to --

A. That's right, it was an extra bonus if he

clause by clause to make sure something could not be reworded or eliminated or changed or whatever in order to make it less cost generative.

I am not at the moment prepared to cite a single provision that I am aware of that is unnecessarily cost generating.

Q. Or presumably that is not unnecessarily cost generating.

A. Correct.

Q. Under the transfer of development credit scheme in the zoning ordinance, assuming for the moment, and I know it's a big assumption, that all of the qualified land owners in the A-100 zone filed the appropriate sketch plats, how many transfer of development credits would you anticipate would exist?

A. There's close to 36, I think 3600 acres in the agricultural zone, and they -- there couldn't be any more than 1800, so probably 1500 hundred.

Q. Somewhere around 1500.

A. Yes.

Q. 1450 to 1500. I think in the interrogatory answer it was about 1450.

A. Okay.

Q. How many would be necessary to fully

develop the PD-HD and PD-MD zones?

A. Well, we have a maximum, a maximum of, in round figures, 2500 units in those two zones, of which approximately 3300 could be developed under the existing zoning, so that's 2200. So we need about 2200. If my numbers are right.

I'll tell you what I used, I had used the table on page III-20.

Q. Let's see how you got that.

A. I used the table on page Roman III-20, and I took the medium density planned development zone, which has a maximum capacity of 450 on it, and a high density plan development zone, maximum capacity of 2120, and I rounded that out to 2500. I mean, the sum of the two to 2500.

Then I took the existing vacant developable acres in the two zones which amount to 665, and I deducted the 65 acres for roads and whatnot and non-developable land, and that gave me 600, and that gives me, at the rate of one unit per two acres, 300 units.

Deducting the 300 units from the 2500 units leaves 2200 development credits required to develop those two zones.

Q. Let's take the high density zone first.

A. Okay.

Q. My understanding is that you need 3.5 development credits per acre to reach maximum density, is that correct?

A. I beg your pardon?

Q. 3.5 development credits per acre to reach maximum density. You're given half a dwelling unit per acre as of right, so to get up to 4, you need 3.5 development credits, is that correct?

A. Yes.

Q. So it would be 3.5 times 530?

A. Roughly.

Q. To get your gross.

A. Yes, okay.

MR. MORAN: 1855.

Q. So that's 1855 units?

A. Credits.

Q. Credits. And in the MP-PD, 135 acres, 2.5.

A. Right.

Q. Is 337.5.

A. Okay.

Q. If we add those together, we get

2,192.5.

A. And I said 2200. So I was pretty close.

Q. And how many -- I believe in response to Garfield and Company interrogatories you stated approximately 1450 would be available. So we have a short fall of -- We have a short fall.

Q. 700 units.

A. That's right.

MR. MORAN: Credits.

Q. Credits, I'm sorry. Is this one of the reasons that you believe the ordinance with respect to TDC's has to be restructured?

A. That would have to be done in any event, whether we had Mount Laurel or not. We would have to increase the potential supply of credits in order to realize the maximum development potential. If that's what the township wanted to do.

I mean, there is no -- except for Mount Laurel II, there is no directive to the township that the higher density zones have necessarily got to be developed to the full maximum number, but theoretically permitted.

So if there's inadequate number of development credits available, some of the owners of the land in

the development areas, instead of having four to the acre, may only get three to the acre on their property.

Q. So as I understand it, right now, potential supply and potential demand are out of whack.

A. Well, the potential demand is higher than the available supply, no question about that.

Q. And that would have the result, I presume, of increasing the cost of a development credit.

A. Well, the development credits are not priced on the basis of the value of the land from whence they come. They are a function of what a developer is willing and able to pay for the kind of housing that he builds.

If one builds exclusively high priced housing, one can pay more for the land per unit than a developer of average priced housing, and certainly that one can pay more than one who wants to build a 20 percent set-aside.

So that if -- I'm assuming that the owner of land in the agricultural area is as interested in selling his credits as the owner of land in the

that will be repeated, because Mount Laurel is only a year old, and they are moving much faster now.

Q. It's your view to a reasonable degree of professional certainty that the Cranbury ordinance does not comply with Mount Laurel and will have to go before a master?

A. I think so. I think there will have to be some adjustment made.

MR. WARREN: No further questions.

CROSS EXAMINATION BY MR. BISGAIER:

Q. Mr. Raymond, as I understand the present concept of the PD-HD zone, there is a base density of one unit per two acres, a potential to increase that to four units per acre by obtaining development credits, is that correct?

A. That's correct.

Q. Furthermore, there's the opportunity in that zone to build low- and moderate-income housing at a density bonus of one unit per acre, is that correct?

A. Yes.

Q. If a developer in that zone purchased

hereof. Having participated in its development, I am accepting the reasoning and conclusions advanced in that report in all instances other than those which are specifically questioned and dealt with in this report.

B. Cranbury's Region

1. Cranbury's prospective need region consists of six counties: Burlington, Mercer, Middlesex, Monmouth, Ocean and Somerset (Lerman Report, Table 9).

2. Cranbury's present need region consists of the 11-county northeast New Jersey area that includes Bergen, Essex, Hudson, Hunterdon, Middlesex, Morris, Passaic, Somerset, Sussex, Union and Warren Counties (Lerman Report, p.5).

C. Cranbury's Fair Share of the Regional Need

1. Present Need

The present need in the region consists of the aggregate of units in all the municipalities in the region which are overcrowded or lack adequate plumbing or heating and which are occupied by lower income households (hereinafter referred to as Mount Laurel households)--(Lerman Report, Appendix A, A.(1), p.1).

derived using a linear regression model, yielded an average annual employment growth of 19,011.

(3) Cranbury's average annual employment growth during the same period was 77 (Lerman Report, Table 10), which represented 0.405 percent of the corresponding 19,011 regional average.

(4) The ratio of Cranbury's median household income to that of its prospective need region is 1.13.[8]

(5) Cranbury's fair share of the 1990 prospective need in its region thus equals:

$$\frac{0.625 + 0.405}{2} \times 1.13 = 0.582$$

$$\frac{0.625 + 0.405 + 0.582}{3} = 0.537 \times 83{,}506 = 448 \text{ units}$$

Adding 20% for reallocation	90
Sub-total	538
Adding 3% for vacancies	16
Total	554

D. Summary

Cranbury Township's fair share Mount Laurel obligation, to be satisfied by 1990, is as follows:

---

[8] Supplied by Carla L. Lerman.

Reallocated Excess Present Need	45	
Prospective Need	554	
Total	599	Units
Indigenous Need	28	Units

E. The Limits of Effectiveness of the 20% Mandated Set-Aside Zoning Technique

It is generally agreed that, in the absence of Federal and/or State subsidies in major quantities and of innovative local programs, Mount Laurel-type housing will be produced almost entirely, if not exclusively, by means of the mandatory 20% set-aside in market rate developments on land rezoned to densities that will make production of such housing economically feasible. In fact, this is the objective of all Mount Laurel law suits.

It is, therefore, important to examine Cranbury's fair share in the light of the limits of effectiveness of the zoning tool in achieving Mount Laurel housing.

As indicated in Section C.2. above, the total 1990 Mount Laurel need for the region is 83, 506 units. This number represents 39.4 percent of the projected increase in the region of households of all types between 1980 and 1990 of 212,749 (995,968 households projected for 1990 less 783,219

SUPERIOR COURT OF NEW JERSEY
[illegible] OCEAN COUNTY
DOCKET NO. C- [illegible]22-73

X - - - - - - - - - - - - - - - - - X

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al,

Plaintiffs

vs.

MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al,

Defendants

X - - - - - - - - - - - - - - - - - X

TRANSCRIPT

OF

JUDGE'S DECISION

May 30, 1984
Toms River, New Jersey

B E F O R E :

HONORABLE EUGENE D. SERPENTELLI, J.S.C.

A P P E A R A N C E S :

BRUCE S. GELBER, ESQUIRE
and
ERIC NEISSER, ESQUIRE
For Urban League

THOMAS R. FARINO, JR., ESQ.
For Cranbury Development Corporation
and Monroe Township

CAYLE L. GARRABRANDT, C.S.R.
Official Court Reporter

Exhibit L

THE COURT: Cranbury Township moves to dismiss the complaints of all the builders except for Garfield, on the grounds that the plaintiffs Cranbury Land, Zirinsky and Toll Brothers, because of the alleged use of Mount Laurel litigation as a threat, and alleged lack of good faith, should not be permitted to pursue the litigation.

As to Garfield, Cranbury acknowledges that even if Garfield is not legally entitled to a builder's remedy because of its alleged eleventh-hour conduct, the Township favors the Garfield site as its preferred location for Mount Laurel construction; and, therefore, Garfield's right to relief is not challenged.

Cranbury rests its motion principally upon the language of the Decision at page 280 and 281, headnotes 66 and 69, and the summary language at page 218 of the Decision, headnote 8. And for the purposes of the record, I will read the pertinent portions of the opinion cited by Cranbury.

Headnote 66 on page 280, which is contained within that section of the opinion dealing explicitly with builder's remedy, says in part, and I quote: "Care must be taken to make certain that

Mount Laurel is not used as an unintended bargaining chip in builders' negotiations with the municipality, and that the Courts not be used as the enforcer for builders' threats to bring Mount Laurel litigation if municipal approvals for projects containing no lower income housing are not forthcoming. Proof of such threats shall be sufficient to defeat Mount Laurel litigation by the developer," unquote.

Then headnote 69, in pertinent part, reads, and I quote: "Finally, we emphasize that our decision to expand builder's remedies should not be viewed as a license for unnecessary litigation when builders are unable for good reason to secure variances for their particular parcels."

I will refer to the first of the two portions which I read as the so-called club or threat exception to the builder's remedy, and the second as the so-called unnecessary litigation exception.

At page 218 of the opinion, in headnote 8, dealing with builder's remedy, the Court says the following in its summary language: Builder's remedies will be afforded to plaintiffs in Mount Laurel litigation where appropriate, on a case-by-case basis. Where the plaintiff has acted in good faith, attempted to obtain relief without litigation,

hereafter vindicates the constitutional obligation in Mount Laurel-type litigation, ordinarily a builder's remedy will be granted.

The parties have placed stipulations in the record concerning the conduct of each of the plaintiffs as it relates to their present claim for builder's remedies. Based on these stipulations, including a document -- documents marked in evidence, the Court is called upon to rule on Cranbury's motion to dismiss.

As far as I am aware, none of the three Mount Laurel Judges has been called upon to make a formal interpretation of the language relied upon by Cranbury, and I do not intend to do that at this time, for the reasons that I will state; however, certain observations should be made to place the motion made by Cranbury in its proper context.

Our Court noted at page 279 of the opinion that experience has demonstrated that builder's remedies must be more readily available if a significant level of Mount Laurel litigation is to be achieved. The Court has also acknowledged that builder's remedies are the most likely device to accomplish actual construction. See pages 308 and 327 of the opinion.

The Court has also emphasized that the profitability of a remedy is a key to its success. Footnote 37, page 279.

The builder's remedy concept is part of the genius of Mount Laurel II. The remedy is a carrot which leads private enterprise in the pursuit of its own personal interest to also serve the public interest by forcing municipalities to comply with the Constitution and, ultimately, by providing decent, affordable housing for the poor.

No one at all familiar with Mount Laurel litigation makes any pretense about the motives of plaintiff builders. By and large, they're not here out of a sense of altruism. They are attracted by the prospect that they may use their land for some purposes more profitable than the generally restrictive or exclusionary uses permitted by the existing zoning ordinances.

The Supreme Court knew this, and used that fact to make Mount Laurel work, and it is working. Of the more than fifty cases before this Court, only two have public interest plaintiffs, and those two cases predate Mount Laurel I. Not a single new public interest case has been brought here since I was assigned as a Mount Laurel Judge.

The rat[illegible] The builder's remedy is accomplishing its purpose. We therefore should not cloud the question by injecting irrelevant moral issues into the picture. A builder's remedy is not a dirty word, and no one who seeks it should automatically be branded with moral invectives.

If we are to engage in such subjective evaluation, how would one describe the disregard of the constitutional mandate of Mount Laurel by so many of our municipalities to this date? How should one characterize the conduct of the municipality which, for over eight years, has maintained its exclusionary posture and then openly admits at trial that its ordinance violates Mount Laurel II?

In fact, the plaintiffs have been heard to complain of the propriety of the conduct of the defendants in allegedly failing to show any flexibility concerning zoning changes which they sought.

Finally, before turning to a brief analysis of the specific factual circumstances relating to each of the plaintiffs who are the subject of this motion, it must be noted that the Court has explicitly and implicitly emphasized the need for liberality in granting builder's remedies, which

signals to this Court a caution in the face of any motion to defeat such relief. Three examples of the Court's explicit recognition of the importance of builder's remedies should be noted.

At page 279 of the opinion, the Court indicated that: Experience since Madison has demonstrated that builder's remedies must be made more readily available to achieve compliance with Mount Laurel. At page 327 of the opinion, the Court says: As we have noted elsewhere, a builder's remedy is no longer to be considered extraordinary. It is to be given where appropriate, in view of our perception that it is one of the most effective tools for implementing Mount Laurel.

And then again at page 330, the Court said, and I quote: "As previously explained, builder's remedies will no longer be rare and will be granted as a matter of course."

Certain other implicit language recognizes the importance of the builder's remedies. At page 280, the Court said, and I quote: "We emphasize that builder's remedies should not be denied solely because the municipality prefers some other location for lower income housing, even if it is in fact a better site; nor is it essential that

considerable funds be invested on the litigation or that the litigation be intensive."

At page 327 of the opinion, the Court says: A builder who has endured intensive litigation and succeeded in vindicating the Mount Laurel right in the interest of the public should not be deprived of his remedy simply because, during the course of the litigation, he sold some of his land and was thereby required to revise his plans.

And again at page 327, in footnote 67, the Court says: A builder's remedy does not require that substantial funds be invested or that litigation extend over a long period of time.

As I have noted, the Court, in recognition of the possible abuse of the builder's remedy device, did create two exceptions or two instances in which certain conduct of the plaintiff might defeat a builder's remedy claim; and I have referred to them solely for the purposes of label as the so-called club or threat exception at page 280 of the opinion, and the so-called unnecessary litigation exception at page 280-281 of the opinion.

And it is appropriate to see how those exceptions apply to the plaintiffs involved in this case.

As to Toll Brothers, the defendant Township contends that the plaintiff's thirty-day letter was a club. Notwithstanding the distasteful language of the letter, it is a fact that the letter proposes a Mount Laurel project and is unequivocal in that regard. The developer was not, by the letter, using Mount Laurel as a means of getting non-Mount Laurel relief.

While the demand by Toll Brothers for relief within thirty days may be unreasonable, it was met with an equally inflexible response. The Township did not exhibit the slightest indication that, given more time, good-faith negotiations would have been fruitful. The Township does not seem to rely on any claim of unnecessary litigation with respect to the second exception, since no variance application was involved.

With regard to Cranbury Land Company, the Township concedes that this plaintiff was far ahead of its time, and that it proposed lower income housing even before Mount Laurel I was a gleam in the eye of the Supreme Court.

At that time, the Township concedes it resisted the efforts, but the Township contends that the plaintiff failed, after Judge Furman's

decision, to renew its efforts, and that the plaintiff should have done so, notwithstanding the plaintiff's claim that it was waiting for the Supreme Court to act upon the appeal taken by Cranbury and others from Judge Furman's decision.

Cranbury Land contends that the Township should not be heard to complain about the plaintiff's failure to renew its request for rezoning, when Cranbury made it amply clear through its position in that case that it did not intend to change its mind about rezoning plaintiff's land, and to this day maintains that position.

Not only has the plaintiff never sought Mount Laurel relief, but also, the plaintiff Cranbury Land has spent years actively seeking to get the Township to allow it to build Mount Laurel housing. Then, as now, the Township has maintained an exclusionary policy which has barred the plaintiff's request, and I find that the plaintiff's position with respect to the propriety of its complaint and its standing is well-founded.

Again, Cranbury Township makes no claim that Cranbury Land has engaged in unnecessary litigation within the meaning of that exception.

With regard to plaintiff Zirinsky, the

Township contends that Mr. Zirinsky purchased or optioned a substantial portion of Cranbury Township and then sought to convert some of it or all of it into office/research zoning.

The Township conceded that Mr. Zirinsky was put off, in the words of Mr. Moran, until after a new ordinance was adopted in July of 1983. It contends, that is, the Township contends that it thereafter heard nothing from Mr. Zirinsky until suit was filed in December of 1983, and that appears to be uncontroverted.

The suggestion is that Mount Laurel was used as a club in this setting; however, there is nothing in the record which would permit the Court to conclude that this plaintiff threatened Mount Laurel litigation to get office development zoning.

Clearly, it did initially seek office development zoning; however, upon being flatly refused such zoning, it sought to make a zoning request more palatable to the Township by offering to build low and moderate income housing in exchange for some zoning relief.

Even had the plaintiff returned with an exclusive offer of Mount Laurel residential development, that would still not be dispositive of a claim

that the plaintiff had used Mount Laurel as a threat. Landowners are entitled to change their mind, and will in fact readily do so if they can make more money, as I have indicated above, if they are rebuffed in their efforts to use the property as they wish.

So, rather than fighting an intransigent town, they choose another alternative. That does not equate to using Mount Laurel as a club.

There is nothing before the Court which indicates that Mr. Zirinsky is not ready to go forward with Mount Laurel construction, and the suggestion that he may not in fact build it himself certainly would not be sufficient reason to defeat the remedy.

Finally, I note in passing that Cranbury seems to also contend that, with regard to Zirinsky, the builder's remedy should be defeated because he never presented a conceptual plan.

To impose such a burden on a developer, when it would be fruitless and futile to present the plan, would have a negative impact upon the attractiveness of the builder's remedy. The Court has indicated, has expressly noted, that it is not necessary that considerable funds be invested before Mount Laurel litigation be pursued.

We have heard today four plaintiffs that, not surprisingly, did not pursue futile efforts to get Mount Laurel relief. It is these plaintiffs who promise to make the opportunity for low and moderate housing a realistic possibility in Cranbury for the first time in eight years; and I might indicate that it is these plaintiffs who this Court will require to perform their promise.

If they are granted a builder's remedy, ultimately, it will not be an open invitation and it will not be an unlimited invitation. They will need to produce the housing, or they will lose their remedy.

To deny these plaintiffs their right on the facts presented to this Court would not only discourage builders from pursuing builders' relief, but would also further delay the day when Cranbury at least satisfied its fair share of the regional need for housing for the poor.

The presence of these entrepreneurs in litigation brought by public interest plaintiffs further ensures the actual lower income housing construction. Their presence also ensures the continuity of the litigation in a day when public interest suits are being curtailed, and the builder's

resources help to [illegible] pursued aggressively and the case presented thoroughly.

That is not in the least sense to detract from the manner in which the case has been presented by counsel for the Urban League. It is only to recognize the reality which they themselves recognized, that in these days, their continuance, their funding, the availability of their personnel and their resources remain problematical.

Our Supreme Court implicitly recognized this reasoning when, in Mount Laurel II, dealing with Mount Laurel, the Town of Mount Laurel itself, in passing upon the appropriateness of a builder's remedy for Mr. Davis, it said at footnote 58, page 309, quote: "It is true that because it did not institute this suit, Davis is not a typical plaintiff developer. Consequently, it could be argued that the primary reason for granting a builder's remedy, encouraging Mount Laurel suits by developer, is not present here.

"However, this is more than outweighed by the reasons set forth in the text for granting the remedy, especially the fact that the Davis project will provide a significant amount of lower income

housing."

For those reasons, the motions brought by Mr. Moran are denied.

(End of proceedings.)

* * * *

C E R T I F I C A T E

I, GAYLE L. GARRABRANDT, a Certified Shorthand Reporter of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings as taken before me stenographically on the date hereinbefore mentioned.

GAYLE L. GARRABRANDT, C.S.R.
Official Court Reporter

Date: 6-7-84

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ATTORNEYS FOR URBAN LEAGUE PLAINTIFFS

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et. al., Plaintiffs, vs. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et. al., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. C4122-73
JOSEPH MORRIS AND ROBERT MORRIS, Plaintiffs, vs. THE TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A Municipal Corporation of the State of New Jersey, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L054117-83

GARFIELD & COMPANY Plaintiff, vs. MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation and the Members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L055956-83 P.W.
BROWING FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A Corporation of the State of New Jersey, RICHCRETE CONCRETE CO., A corporation of the State of New Jersey, and MID-STATE FILIGREE SYSTEMS, INC., A Corporation of the State of New Jersey, vs. CRANBURY TOWNSHIP PLANNING BOARD AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L058046-83 P.W.
CRANBURY DEVELOPMENT CORPORATION, A Corporation of the State of New Jersey, Plaintiff, vs. CRANBURY TOWNSHIP PLANNING BOARD AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L59643-83

CRANBURY LAND COMPANY, a New Jersey Limited Partnership, Plaintiff, vs. CRANBURY TOWNSHIP, A Municipal Corporation of the State of New Jersey located in Middlesex County, New Jersey, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L070841-83
MONROE DEVELOPMENT ASSOCIATES, Plaintiff, vs. MONROE TOWNSHIP, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L-076030-83PW
LAWRENCE ZIRINSKY, Plaintiff, vs. THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L079309-83 PW

TOLL BROTHERS, INC., A Pennsylvania Corporation, Plaintiff, vs. THE TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A Municipal Corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY AND THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L005652-84
LORI ASSOCIATES, A New Jersey Partnership; and HABD ASSOCIATES, a New Jersey Partnership, Plaintiffs, vs. MONROE TOWNSHIP, A municipal corporation of the State of New Jersey, located in Middlesex County, New Jersey, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L-28288-84
GREAT MEADOWS COMPANY, A New Jersey partnership; MONROE GREENS ASSOCIATES, as tenants in common; and GUARANTEED REALTY ASSOCIATES, INC., a New Jersey Corporation, Plaintiffs,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX/OCEAN COUNTIES Docket No. L-32638-84 P.W.

vs.

MONROE TOWNSHIP, a municipal corporation of the State of New Jersey, located in the State of New Jersey, located in Middlesex County, New Jersey,

Defendant.

ORDER AND JUDGMENT AS TO MONROE AND CRANBURY TOWNSHIPS

The above entitled matters having been tried before this Court commencing on April 30, 1984 pursuant to the remand of the Supreme Court in Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II), the Court having heard and considered the testimony and evidence adduced during the trial, and the Court having rendered its opinion in a letter opinion dated July 27, 1984,

IT IS, THEREFORE, ON THIS 13 DAY OF August, 1984 ORDERED AND ADJUDGED AS FOLLOWS:

1. Based on the fair share methodology set forth and fully described in this Court's opinion in AMG Realty Company, et. al. v. Township of Warren, Docket Nos. L-23277-80 PW and L-67820-80 PW, dated July 16, 1984, the Township of Monroe's fair share of the regional need for low and moderate income housing for the decade of 1980 to 1990 is 774 housing units, representing 201 units of indigenous and surplus present need and 573 units of prospective need.

2. Based on the fair share methodology set forth and fully described in this Court's opinion in AMG Realty

Company, et. al. v. Township of Warren, supra, the Township of Cranbury's fair share of the regional need for low and moderate income housing for the decade of 1980 to 1990 is 816 housing units, representing 116 units of indigenous and surplus present need and 700 units of prospective need.

3. The total fair share for the Township of Monroe of 774 units shall consist of 387 low cost units and 387 moderate cost units. The total fair share for the Township of Cranbury of 816 units shall consist of 408 low cost units and 408 moderate cost units. Use of the terms "low and moderate" shall be generally in accordance with the guidelines provided by the Supreme Court in Mount Laurel II at p. 221, n. 8.

4. The Township of Monroe's zoning ordinance and land use regulations are not in compliance with the constitutional obligation set forth in Mount Laurel II in that they do not provide a realistic opportunity for satisfaction of the township's fair share of the regional need for lower income housing.

5. The Township of Cranbury's zoning ordinance and land use regulations are not in compliance with the constitutional obligation set forth in Mount Laurel II in that they do not provide a realistic opportunity for satisfaction of the township's fair share of the regional need for lower income housing.

6. The Townships of Monroe and Cranbury shall, within 90 days of the filing of this Court's letter opinion of July 27, 1984, revise their zoning ordinances to comply with

Mount Laurel II. Both townships shall provide for adequate zoning to meet their fair share obligation, shall eliminate from their ordinances all cost generating provisions which would stand in the way of the construction of lower income housing and shall, if necessary, incorporate in the revised ordinances all affirmative devices necessary to lead to the construction of their fair share of lower income housing.

7. Carla L. Lerman, of 413 Englewood Avenue, Teaneck, New Jersey 07666, is hereby appointed as the master to assist the Township of Monroe in revising its zoning ordinance to comply with this Order and Judgment. Philip B. Caton, of 342 West State Street, Trenton, New Jersey 08618, is hereby appointed as the master to assist the Township of Cranbury in revising its zoning ordinance to comply with this Order and Judgment.

8. The issue of the right to a builder's remedy with respect to both municipalities shall be reserved pending completion of the revision process. To the extent any of the developer-plaintiffs are not voluntarily granted a builder's remedy in the revision process, each master shall report to the Court concerning the suitability of that builder's site for the construction of Mount Laurel housing. As to the issue of priority among builders for a builder's remedy in Cranbury, Mr. Caton shall make recommendations as to the relative suitability, from a planning standpoint, of each builder's site.

9. At the conclusion of the 90 day revision period, or upon enactment of the revised ordinance, whichever occurs

first, a hearing shall be scheduled, on notice to all parties, to determine whether each township's revised zoning ordinance conforms to this Order and Judgment and to the guidelines of Mount Laurel II. All builder's remedy issues regarding either municipality shall be considered as part of this compliance hearing.

EUGENE D. SERPENTELLI, J.S.C.

Table 7
Proposed Mt. Laurel Phasing Plan
Cranbury Township, New Jersey

Time Line	Year 1984	Year 1990	Year 1996	Year 2002
Realistic Opportunity ded for	1640 units (Including 100 Sr. Citizens)	1085 units	1085 units
Phased Zoning	Site 2: .5du/ac.; Site 1: 7 du/ac. (1540 un/max.); Site 3: .5 du/ac.	Site 2: 7 du/ac. (1085 un/max.); Site 1: Developed; Site 3: .5 du/ac.	Site 2: Develped; Site 1: Developed; Site 3: 7 du/ac. (1085 un/max.)
& Moderate Units Provided During Period	429 (Including 21 Rehabilitated Units)	217 units	217 units
	52.57% of Fair Share	26.29% of Fair Shair	26.29% of Fair Shair
Township Population	2,130 people	6,469 people	9,420 people	12,371 people
% Growth from 1984	204%	342%	480%

Note: (1) New population levels assume 2.72 people per non-elderly and 1.50 per elderly household for Mt. Laurel sites.
(2) Population totals do not include possible development on non-Mt.Laurel housing sites or the need to accommodate any post- 1990 Mt. Laurel obligation.

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PLEASE REPLY TO: PRINCETON

January 23, 1985

The Honorable Eugene D. Serpentelli, J.S.C.
Ocean County Superior Court
Ocean County Courthouse
Washington Street, Courtroom 1
CN 2191
Toms River, New Jersey 08754

Re: Garfield & Co. v. The Mayor and Township of Cranbury, et al.
Docket No.: L-055956-83

Dear Judge Serpentelli:

Please accept this letter memorandum in support of plaintiff Garfield & Company's motion for an order declaring it entitled to a builder's remedy in connection with the above captioned litigation. Such an order should issue for two reasons. First, there exists no real factual issue as to Garfield & Company's entitlement to a builder's remedy. Second, without knowing if Garfield & Company is to receive a builder's remedy, neither the other plaintiffs, the Master nor this Court can know whether the compliance proposal submitted by Cranbury to this Court recommends initial construction of low and moderate income housing on Garfield & Company's property or on a neighboring property owned by a non-plaintiff. Mount Laurel II Compliance Program for Cranbury Township, New Jersey at page 89, ¶8.*

In South Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158 (1983) (hereinafter "Mount Laurel II"), the Supreme Court explained that no longer would the award of a builder's remedy be a rare event. Rather, it "will be granted as a matter of course...." 92 N.J. at 330. To be entitled to a builder's remedy a plaintiff need only (1) succeed in Mount Laurel litigation and (2) propose a project which would provide a substantial amount of low and moderate income housing. 92 N.J. at 279. Garfield & Company has met both of these conditions. It is, therefore, entitled to a builder's remedy unless the municipality can shoulder the heavy burden of proving to this Court "that

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* Garfield & Company does not by this motion seek an ordering of the priorities among the builder's remedy plaintiffs who have sued Cranbury in this action.

because of environmental or other substantial planning concerns," the location of Garfield & Company's proposed residential project "is clearly contrary to sound land use planning." 92 N.J. 279-80.

This burden is far greater than just a showing by the municipality that it prefers another site or even that some other location would be a better site for Mount Laurel housing. 92 N.J. at 280. Rather, the municipality must clearly demonstrate that the proposed project "will result in substantial environmental degredation. 92 N.J. at 331, n. 68. However, by its own acts and admissions the municipality has demonstrated that construction of a relatively high density residential project on Garfield & Company's property is not clearly contrary to sound land use planning as a result of environmental or other substantial planning concerns. These admissions take three forms: the present zoning of the site, the testimony at deposition of the mayor, the Chairman of the Planning Board and two of the municipality's land use consultants and the Compliance Program presented to this Court together with the November, 1984 draft of that program.

Given the present zoning of the Garfield & Company site, adopted less than two years ago, it is difficult to imagine any scenario under which the municipality could convince this Court or anyone else that high density residential development of Garfield & Company's property is clearly violative of environmental or other substantial planning concerns. Garfield & Company's property is presently zoned for up to five residential units per acre. No land in the municipality has been given a higher density, and only 307 acres adjoining Garfield & Company's property are even zoned at as great a density. Indeed, had Garfield & Company wished to make use of the municipality's transfer development credit scheme, it could presumably now be constructing housing on its property at five units to the acre while the neighboring property lay fallow. Unless Cranbury takes the position that its present zoning densities are totally violative of sound planning principles, it can hardly argue that such principles preclude high density development of the Garfield & Company tract.

It is also true that every single representative of the municipality who testified at deposition argued that the 525 acre zone in which Garfield & Company's land is located is the most appropriate area in the municipality for the construction of Mount Laurel housing.

> Q. Mayor Danser, at the time the Planning Board recommended the Zoning Ordinance to the Township Committee, did the Planning Board have a view as to what zone would be the most appropriate zone for the construction of low and modern [sic.] income housing in Cranbury?

A. I would presume from the fact that the Planning Board made provisions for a density bonus in the PD-HD zone that they presumed that that would be the most appropriate zone.

Q. At the time the Township Committee adopted the Zoning Ordinance die the Township Committee have an opinion as to what the most appropriate zone would be for low and modern [sic.] income housing for Cranbury?

A. I believe that the Township Committee felt the same way.

Q. The PD-HD zone?

A. Yes.

Q. Can you tell me whether since the Zoning Ordinance was recommended by the Planning Board and since the Zoning Ordinance was adopted by the Township Committee, whether either the Township Committee or the Planning Board has changed its opinion as to what the most appropriate zone would be in Cranbury for low and modern [sic.] income housing?

A. Not to my knowledge. I don't believe that they have.

Q. As far as you're concerned the Planning Board still believes that the PD-HD zone is the appropriate zone for the low and modern [sic.] income housing in Cranbury; is that correct?

A. I believe so.

Q. And the same thing can be said with respect to the Township Committee; is that correct?

A. I believe so. [Deposition of Alan Danser dated March 12, 1984 at 49-50].

Mr. Don Swanagan, Chairman of the Planning Board, confirmed that at the time the Planning Board adopted the Land Use Plan, and even today, it was and is the unanimous view of the Board that the land use zone in which Garfield & Company's land is located is the appropriate location for low and moderate income housing in Cranbury.

Q. When the Planning Board adopted that Master Plan that currently exists, was there a unanimous view as to where low and moderate income housing in the Township ought to be located?

A. Yes, it would logically be where we would allow the higher density multi-type housing.

Q. Is there a particular zone in which the Planning Board expressed its opinion that low and moderate income housing ought to be constructed?

A. Yes, I would say in the planning unit development areas.

Q. PD-HD zone?

A. And, I presume the HD, high density.

Q. And is that still the belief of the Planning Board?

A. Yes. [Deposition of Don Swanagan dated March 12, 1984 at 69.]

Thomas March, planning consultant to the Township of Cranbury, testified to exactly the same effect.

Q. By the way, what zone did the Planning Board designate as the appropriate area for the low and moderate income housing?

A. This's the PD-HD zone.

Q. Are you presently retained by the Planning Board?

A. My firm is under contract with the Planning Board.

Q. Do you know presently what area in Cranbury the Planning Board deems to be the appropriate are of low and moderate?

A. It's the PD-HD zone, which is set forth in the land use plan.

Q. Can you tell me basically some of the reasons that went into the Planning BOard's decision to designate that as the appropriate zone for low and moderate income housing?

A. Sure. This really relates back to the master plan, and then it evolves down to the details of why does one place a particular house in a particular zone in a particular lot.

Essentially the township took in its Master Plan and tried to divide up where the many uses would be appropriate; the one use being the very high density residential and the other end of the spectrum obviously being residential. What we did is took a regional view of what was occurring within the township and around its borders, we took a look at the plans of the Middlesex County Planning Board, the State Development Guide, which is intimately involved in the Mount Laurel suit, and we then fashioned a very broad model as to where all uses ought to follow.

Essentially, if one takes a look at the regional models and has determined that all growth ought to fall from Cranbury Village towards the east, meaning towards the Turnpike, and that all growth would or should be planned for this area. [Deposition of Thomas March dated March 26, 1984 at 38-40].

Cranbury's other planning consultant, George Raymond, was in complete agreement.

Q. In your view, is the most appropriate location in Cranbury for low- and moderate-income housing development east of the town?

A. The area that's readily sewerable, which is the basis on which the area east of the town was selected for higher density zoning.

Q. Does the fact that the area east of the town is also quite close to Route 130 play any part with respect to availability of transportation for low and moderate income families?

A. The area was selected on the basis of many planning factors, including the County Planning Commission recommendations regarding where higher density residential growth in Cranbury should be located.

> Clearly the area between 130 and the Turnpike was selected to begin with the area closest to the village is where the residential area should be with the employment areas being the ones that are further from the heart of the village. [Deposition of George M. Raymond dated March 27, 1984 at 66-67].

Quite apparently, none of these municipal officials or consultants was aware of any substantial environmental or planning concerns which would enable the defendants to demonstrate that construction of a high density residential project on Garfield & Company's land is clearly contrary to sound use land planning. Indeed, Garfield & Company's property is one of the preferred location for such a project, according to the municipal officers and consultants.

Finally, the Mount Laurel II Compliance Program for Cranbury Township which was submitted to this Court by the defendants actually recommends that a residential project with the density of 7 units to the acre be constructed on Garfield & Company's land. Garfield & Company's site is designated by the municipality as a priority site for Mount Laurel II rezoning. See Figure 13. It is true that the municipality suggests that the Garfield & Company property not be developed until after the development of two adjoining properties owned by non-plaintiffs. However, whether or not the properties adjacent to Garfield & Company's land are somewhat more attractive or somewhat less attractive for development than Garfield & Company's land is not an issue here.

> "[T]he mere fact that there may be a better piece of land for this kind of development does not justify rejection of plaintiff's builder's remedy." 92 N.J. at 331.

The issue is whether development of the Garfield tract is clearly contrary to sound land use planning. By designating the Garfield tract as a priority site for Mount Laurel development, the municipality itself has answered that question in the negative.

In fact, the municipality's draft compliance report is even stronger evidence that high density development of the Garfield tract could not possibly be clearly contrary to sound land use planning. That draft actually urged that high density development of Garfield & Company's tract take place before the development of any other land in the municipality. See Exhibit A. This draft report provides the strongest possible evidence that development of Garfield & Company's tract is not clearly violative of substantial planning concerns. If it were, how could the municipality's consultants, Raymond, Parish, Pine & Weiner, Inc., propose not only high density development of the Garfield & Company's tract but actually propose first priority high density development.

By the present zoning of the Garfield & Company tract, the testimony of the Mayor, Chairman of the Planning Board and Cranbury's experts and, finally, the Compliance Program submitted by Cranbury Township to this Court and the November, 1984 draft of that plan, the municipality has conceded in virtually every possible way that development of Garfield & Company's land is not clearly contrary to sound land use planning as a result of environmental or other substantial planning concerns. If it were, it would not presently be zoned five units to the acre; it would not be in the municipality's designated low and moderate income housing development area; and, it would not be a site suggested for Mount Laurel II rezoning by the defendants. Given these undisputed facts, an order awarding Garfield & Company a builder's remedy is appropriate.

Respectfully yours,

William L. Warren

WLW/st

to fluctuate in relation to the cost of such financing. The higher the interest rate, the lower the production level and vice versa. Spread over an 18-year time period, the program would require the construction of an average of 193 units per year. In the first six years this could increase the number of units in the Township by 1,640 units, or 220% over the number existing in 1980.

6. The method proposed to be used to implement the 18-year Cranbury Township phasing plan is also outlined in Table 7. It is based on initially changing the Master Plan and Zoning Ordinance and Map to establish a high density zone for Sites 1-3 in conformance with the Site Suitability Analysis. Between 1984 and 1990, approximately 1,540 new dwelling units (including 308 affordable units) would be permitted to develop on Site 1. To this would be added the 100 senior citizen and 21 rehabilitated units, for a total of 429. This would achieve 52.6% of the Township's 816-unit fair share in six years. Both Sites 2 and 3 will remain zoned at their present minimum 2 acre residential lot base density to discourage their untimely use for multi-family residential development and to keep them in active agricultural use and available to satisfy future Mt. Laurel II low and moderate needs.

The 1,640-unit threshold established for the first 6-year time period considerably exceeds the present sewer allocation to Cranbury Township and will require active renegotiation of the Township's sewer agreement with South Brunswick Township to achieve increased sewer capacity.

After 1990, with adequate sewer capacity achieved during the previous 6-year period, Site 2 would be permitted to develop with 1,085 units (217 Mt. Laurel) while Site 3 would still be zoned for minimum 2 acre lots. Between 1996 and 2002, Site 3 would be permitted to develop with an additional 1,085 units. This will bring the total of low and moderate income units to 863, or 106% of the Township's current fair share.

The Township growth rate of 204% between 1984 and 1990 would exceed that of all but 5 of all New Jersey municipalities in Cranbury's population class (1000-3000) during the 1960 to 1970 and 1970 to 1980 decades (see Table 8). The 342% rate of growth projected for the first 12 years of the program -- which realistically, will occur within 10 years since the first two will be spent on pre-development and development activities -- would exceed that achieved by

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J. SCHUYLER HUFF
WILLIAM C. MORAN, JR.
MICHAEL P. BALINT

DAVID E. ORRON

TELEPHONE
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February 7, 1985

Honorable Eugene D. Serpentelli
Ocean County Superior Court
Ocean County Courthouse
Washington Street, Courtroom 1
CN 2191
Toms River, New Jersey 08754

Re: GARFIELD & CO. v. THE MAYOR and TOWNSHIP OF CRANBURY, et al.
Docket No. L 055956-83

Dear Judge Serpentelli:

I am sending this letter in lieu of a formal brief on behalf of the Township of Cranbury in opposition to the motion of Garfield & Company for an order stating that they are entitled to a builder's remedy.

The motion submitted by counsel for Garfield is ingenious in its simplicity. It seems to be based on the simple premise that since the existing Township Zoning Ordinance provided for low and moderate income housing on the Garfield site at density up to five (5) units per acre, and since the compliance package submitted by Cranbury in compliance with Your Honor's order of July 27, 1984 still calls for low and moderate income housing on the Garfield site, now at a density of seven (7) units to the acre, that there is nothing to argue about and that Garfield should be entitled to a remedy as a matter of law.

What the brief fails to take into account is the fact that other than the two criterion set forth on page one of the letter brief, cited from 92 N.J. at 279 in Mt. Laurel II, our Supreme Court set forth a multi-part

test for entitlement to builder's remedy. It is true that all of the plaintiffs in this case have demonstrated the non-complaince of Cranbury's Ordinance with Mt. Laurel II. They demonstrated it not through the eloquence of their experts, but because of the fact that Cranbury admitted that its Zoning Ordinance could not produce the number of low and moderate income units which were developed as a result of numerous formulas which were authored after Mt. Laurel II. The fact of the matter is that Cranbury's Ordinance would permit the construction of between 350 to 400 units of low and moderate income housing. No one, not even any of the plaintiffs ever anticipated a number of 822 units.

Plaintiff, Garfield, also claims that it has proposed a project which would provide a substantial amount of low and moderate income housing. It has never submitted any plans to the Township of Cranbury with sufficient specificity as to permit the Township to pass on the reasonableness of the project.

At the time the Township's Master Plan and Zoning Ordinance were developed, it was anticipated that the normal forces of the market place would control the development of high-density housing within the Township. Now, in light of the existing litigation, it appears likely that if all plaintiffs had their way, the Township would have to absorb the full 4,000 units of low and moderate income housing mandated by the 4 to 1 set-aside within a period of five years from this date. The consequences of such action are discussed at some length in the Township's Compliance Program submitted to the court in December, specifically at pages 81 through 94 of said report.

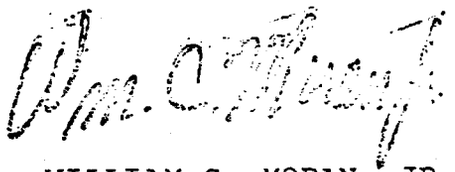
As discussed on page 87 of the report, "The Township's preferred locus of its Mt. Laurel obligation is east of Route 130 and phased so as to permit development to start near Route 130 and move in an easterly direction toward the New Jersey Turnpike." The reason for this phased development is to permit the most efficient use and expansion of the Township's infrastructure from its existing base near the Village area in an outward direction. To develop the Garfield property first would require an expansion from the perimeter of the Township in an inward direction, and such a development plan would be wasteful both of Township infrastructure and Township funds.

Plaintiff, Garfield, correctly cites the language in Mt. Laurel II that indicates that a builder's remedy will not be granted if it is clearly contrary to sound land use planning. 92 N.J. 279, 280. In fact, the term "sound land use planning" or similar terms are used in Mt. Laurel II in almost a score of places.

It is submitted in opposition that to grant a builder's remedy at this time without having the report of the Master and without hearing the concerns of the Township through its expert testimony about the progress and process of development in the Town, would be to ignore the mandate set forth so frequently in Mt. Laurel II that any development in accordance with Mt. Laurel II be done in accordance with sound land use planning.

For the above reasons, it is respectfully submitted that the motion of Garfield and Company, Inc. for an order declaring it entitled to a builder's remedy be denied as being untimely made.

Respectfully submitted,



WILLIAM C. MORAN, JR.

WCM:Dak

cc: Philip Paley, Esq.
Michael J. Herbert, Esq.
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Township Committee, Township of Cranbury

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PLEASE REPLY TO: PRINCETON

March 4, 1985

The Honorable Eugene D. Serpentelli, A.J.S.C.
Ocean County Superior Court
Ocean County Courthouse
Washington Street, Courtroom 1
CN 2191
Toms River, New Jersey 08754

Re: Garfield & Company v. Township
of Cranbury, et al.
Docket No.: L-055956-83 P.W.

Dear Judge Serpentelli:

Please accept this letter memorandum in support of Garfield & Company's motion for an order declaring it entitled to a builder's remedy and in reply to the letter memoranda submitted to this Court by Morris Brothers, Lawrence Zirinsky, Cranbury Land Company and the Township of Cranbury. By this motion Garfield & Company seeks only an order declaring it entitled to a builder's remedy. It does not by this motion seek an ordering of the priorities among the builder's remedy plaintiffs who have sued Cranbury in this action. It does not seek a ruling on the validity of Cranbury's proposed compliance program. It seeks only judicial recognition based on the undisputed facts in this case that Garfield & Company has met each of the elements necessary to entitle it to a builder's remedy.

The absence of any factual dispute as to whether Garfield & Company qualifies for a builder's remedy is, of course, sufficient in itself to entitle Garfield & Company to the builder's remedy order which it seeks. However, three other factors also support entry of such an order. One reason for entry of such an order at this time is that Cranbury's compliance proposal changes depending upon whether Garfield & Company receives a builder's remedy. Without knowing whether Garfield & Company is to receive a builder's remedy, neither the other plaintiffs, this Court, the Master - not even Cranbury itself - can know whether the compliance proposal submitted to this Court contemplates initial construction of low and moderate income housing on Garfield & Company's property or on adjacent land owned by a non-plaintiff. Mount Laurel II Compliance Program for Cranbury Township, New Jersey at pg. 89, ¶8. It is also true that granting Garfield & Company a builder's remedy based upon the undisputed facts presently before this Court may well avoid the necessity of participation by Garfield & Company in the builder's remedy stage of the trial, which is certain

to reduce the time it will take to try that stage of the case. Finally, granting Garfield & Company's application may also limit the necessity of participation by that plaintiff in the pre-trial proceedings to take place before the next issues to be considered by this Court are litigated, with a predictable savings of costs and legal fees Given that the facts upon which Garfield & Company's entitlement to a builder's remedy rest are undisputed, that plaintiff's application should be granted.

Neither the defendants nor the plaintiffs has disputed the elements set out in Garfield & Company's January 23, 1985 letter memorandum as necessary for the grant of a builder's remedy. First, the plaintiff must succeed in a Mount Laurel litigation. Garfield & Company has done that, and no one suggests otherwise. Second, the plaintiff must propose to construct a substantial amount of low and moderate income housing. This too Garfield & Company has done. At the trial of the first stage of this case Cranbury stipulated that Garfield & Company was proposing to construct a substantial amount of low and moderate income housing. Moreover, on September 25, 1984, Garfield & Company proposed to the Cranbury Township Committee and Planning Board a project which would contain 20% low and moderate income units. See Mount Laurel II Compliance Program for Cranbury Township, New Jersey at Table 6. However, Cranbury apparently suggests that perhaps Garfield & Company should not be entitled to a builder's remedy until its proposal moves through the municipal planning board process. This suggestion, of course, places the cart before the horse. The builder's remedy is designed, in part, to expedite the planning board process. To require a plaintiff to go through the planning board process before it is entitled to a builder's remedy would defeat one of the main functions of the builder's remedy.

It is also true that requiring a plaintiff to go through the planning board process before it is entitled to a builder's remedy is impractical. The plaintiffs commenced this suit because the zoning ordinance presently in effect was so cost generating that it precluded construction of low and moderate income housing in Cranbury. That ordinance is still in existence. What, then, would be the basis for the site plan which Mr. Moran implies ought to be submitted to the Planning Board. What would the height requirement be; what about standard for impermeable coverage or recreational facilities or for the myriad of other factors which go into a major residential project. A Planning Board review at this stage of this case would be nothing more than an exercise in futility. Garfield & Company would have spent over $100,000.00 in fees to engineers, architects and other professionals for the privilege, in the end, of appearing before this Court in exactly the same position in which it now stands.

Nowhere in Mount Laurel II is there any suggestion that a plaintiff need go through a costly Planning Board process before it can qualify for a builder's remedy. Rather, plaintiff need only agree to the construction of a significant amount of low and moderate income housing. This, Garfield & Company has done. To require a costly Planning Board review before a plaintiff even knows whether

it is entitled to a builder's remedy is probably the most effective method, short of a constitutional amendment, of eliminating Mount Laurel litigation.

Having succeeded in a Mount Laurel litigation and having proposed a substantial amount of low and moderate income housing, only one issue can stand between Garfield & Company and its entitlement to a builder's remedy. The sole issue remaining is whether Cranbury can demonstrate that development of Garfield & Company's property "is clearly contrary to sound land use planning ... because of environmental or other substantial planning concerns." 92 N.J. at 279-80. Cranbury may be able to do so with respect to some or all of the other plaintiffs, but with respect to Garfield & Company it is quite apparent that Cranbury cannot do so. In its January 23, 1983 letter memorandum Garfield & Company brought the following facts to this Court's attention:

1. Garfield & Company's land is presently zoned at five units per acre.

2. No other land in Cranbury is zoned at any higher density.

3. Both the Mayor and the Chairman of Cranbury's Planning Board testified under oath that the zone in which Garfield & Company's land in located is the most appropriate area of the municipality for construction of Mount Laurel housing.

4. Two planning consultants retained by Cranbury testified under oath that the zone in which Garfield & Company's land is located is the most appropriate area of the municipality for Mount Laurel housing.

5. The compliance program submitted to this Court by Cranbury recommends Mount Laurel development of Garfield & Company's property in order to reach Cranbury's fair share number.

6. The draft compliance program prepared by Cranbury's professional planners provided that the first property in Cranbury to be developed for Mount Laurel housing should be Garfield & Company's land.

Every single one of these facts is undisputed. How then can Cranbury possibly carry its burden of demonstrating that development of Garfield & Company's property "is clearly contrary to sound land use planning ... because of environmental or other substantial planning concerns." Cranbury's own planning consultants in their draft report urged that the first Mount Laurel development

in the municipality take place on Garfield & Company's property. This proposal alone, made by its own professional planners, dooms any effort by Cranbury to argue the development of Garfield & Company's land is clearly contrary to substantial land use planning concerns.

Given the position it has consistently taken from the day the challenged zoning ordinance went into effect, Cranbury cannot possibly present any substantial planning concerns which would preclude Garfield & Company's entitlement to a builder's remedy. Such concerns must rise to the level of "substantial environmental degeneration." 92 N.J. at 331, n. 68. A mere desire on the part of the municipality that development take place in another location is not sufficient. Even the fact that a better piece of land exists for residential development is not sufficient. 92 N.J. at 331. Substantial environmental degeneration is the standard.

Cranbury in its February 7, 1985 letter memorandum does not even attempt to argue that development of Garfield & Company's property would clearly violate substantial planning principles. Given the position Cranbury and its experts have consistently taken in this litigation, it cannot in good faith make such an argument. Perhaps it can argue that substantial planning concerns debar some or all of the other plaintiffs from a builder's remedy, but no such argument can in good faith be made by Cranbury with respect to Garfield & Company. By reference to the acts and testimony of Cranbury's elected officials and consultants, Garfield & Company is entitled to a builder's remedy. Each of the elements which need be met has been met. The facts are undisputed. The remedy should, therefore, be awarded.

Respectfully,

William L. Warren

WLW/st