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Brief of Δ Cranbury Twp
In Support of Motion to Limit Builder's Remedies

Pg. 47

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Plaintiff,

LAWRENCE ZIRINSKY,

v.

Defendants,

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

Docket No. L 079309-83 P.W.

Civil Action

Plaintiffs,

JOSEPH MORRIS and ROBERT MORRIS,

v.

Defendants,

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a municipal corporation of the State of New Jersey

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Docket No. L 054117-83

BRIEF IN SUPPORT OF MOTION TO LIMIT BUILDER'S REMEDIES

Plaintiffs,

GARFIELD & COMPANY,

v.

Docket No. L 055956-83 P.W.

Defendants,

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.

Plaintiffs,

CRANBURY DEVELOPMENT CORPORATION, a Corporation of the State of New Jersey,

Docket No. L 59643-83

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and theTOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

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Plaintiffs,

BROWNING-FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a corporation of the State of New Jersey and MID-STATE FILIGREE SYSTEMS, INC., a Corporation of the State of New Jersey,

Docket No. L 058046-83 P.W.

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

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Plaintiff,

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

v.

Defendants,

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

CHANCERY DIVISION: MIDDLESEX COUNTY

Docket No. C 4122-73

Plaintiff,

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

v.

Defendants,

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

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Docket No. L 070841-83 P.W.

Plaintiff,

TOLL BROTHERS, INC.

v.

Defendant,

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.

Docket No. L 005652-84

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

After the New Jersey Supreme Court's reversal and remand of Urban League of Greater New Brunswick v. Borough of Carterel in Mount Laurel II, see Southern Burlington County N.A.A.C.P. v. Mount Laurel Township (Mount Laurel II), 92 N.J. 158 (1983), rev'g, 170 N.J. Super. 461 (App. Div. 1979), the defendant Cranbury Township adopted a revised zoning ordinance on July 25, 1983. Thereafter, various landowners and developers brought a series of actions against Cranbury Township, seeking to invalidate the revised ordinance on Mount Laurel grounds. Four of these landowners and developers also sought a builder's remedy, namely, Garfield & Co., Zirinski, Cranbury Land Co. and Toll Brothers.

These actions were consolidated for trial with the remand in Urban League of Greater New Brunswick v. Borough of Carteret. In a Letter Opinion issued on July 27, 1984, the Honorable Eugene D. Serpentelli, J.S.C., determined Cranbury Township's fair share obligation to be 816 units of lower income housing, representing 116 indigenous and surplus present need units and 700 prospective need units for the decade of 1980 to 1990. Because counsel for Cranbury Township had previously stipulated that its revised ordinance did not provide a realistic opportunity for the satisfaction of the municipalities' fair share of lower income housing, the court further held that the township's land use regulations were invalid under Mount Laurel II guidelines. It therefore

ordered Cranbury Township to revise its land use regulations within 90 days to comply with Mount Laurel II. The court also appointed a master, Philip B. Caton, to assist the township in the revision process.

The court expressly reserved the question of the right to a builder's remedy until the compliance hearing to be held after the completion of the revision process. The master was directed to report to the court concerning the suitability of each plaintiff builder's site for Mount Laurel construction. In addition, with respect to the issue of priority of builder's remedies, Mr. Caton was directed to make recommendations, from a planning standpoint, as to the relative suitability of each site.

The court subsequently granted Cranbury Township two extensions—the first to December 7, 1984, and the second to December 21, 1984—to complete the revision of its land use regulation. In late December 1984, the township adopted and filed with the court its Mount Laurel II Compliance Program, thereby completing the revision process. In April 1985, the court-appointed master filed his report reviewing the substance of the Township's Compliance Program and evaluating the suitability of the sites proposed by the builder-plaintiffs for a builder's remedy.

This fall, the court will hold a compliance hearing to determine whether Cranbury Township's revised

zoning ordinance complies with Mount Laurel principles and to consider the propriety of awarding one or more of the builder-plaintiffs a builder's remedy. This brief is filed in anticipation of this hearing in support of the legal proposition that, ordinarily, only one builder's remedy should be granted in a municipality whose zoning ordinance is found to violate Mount Laurel II principles, particularly where the sites proposed by multiple builder-plaintiffs for builders' remedies are scattered throughout the municipality.

STATEMENT OF FACTS

As part of his report, the master, Philip B. Caton, has ranked the plaintiff builders' sites in order of relative suitability of development as follows: (1) site # 1, Garfield & Company, (2) Site # 6, Zirinsky, (3) Site # 9, Cranbury Land Company, and (4) Site # 7, Toll Brothers. Cranbury Township's Mount Laurel II Compliance Program Review And Recommendations at 29 (April 1985). Of these four proposed developments, the master has recommended that the first and second ranked sites be granted a builder's remedy, while rejecting the third and fourth ranked projects as not meeting the Mount Laurel II standard of planning and environmental suitability. Id.

Taking the sites in reverse order of suitability, the master found that development of Toll Brothers' site (Site # 7) for 500 units of housing "would constitute a major intrusion into the Township's farmland preservation area." Id. at 34. Development on this parcel would be an "island surrounded by farmland," thereby undermining "the viability of farming the surrounding lands." Id. Moreover, approximately half of Site 7 is within the State Development Guide Plan's (SDGP's) Limited Growth Area, while the entire site lies within the area recommended for agriculture in the Middlexex County Land Use Plan--2000. The master therefore concluded that development of Site 7 would "induce conversion of other active farmland in the SDGP Limited Growth Area and

threaten the continuity of the Township's agriculture retention district." Id. Because Toll Brothers' proposed development would be a "classic sprawl development" which the SDGP is designed to discourage, it is "clearly contrary to sound land use planning," thereby disqualifying Toll Brothers from obtaining a builder's remedy under Mount Laurel II criteria. Id.

Similarly, the master also found that development of Cranbury Land Company's Site # 9 for 680 housing units also "would constitute a major intrusion into the [Township's farmland preservation] district." Id. at 33. Because the development would be incompatible with the abutting single family home subdivision and, of the four tracts in question, is the most remote from the public water and sewer system in Cranbury, the master also characterized development of Site 9 "as a perpetuation of sprawl." Id.

With respect to Zirinsky's proposed development of 1,152 units of housing on Site # 6 at a proposed density of 8 dwelling units per acre, the master concluded that development of Site # 6 at that density "would be entirely out of scale and inappropriate considering the likely impact on the Cranbury historic district." Id. at 31. In addition, this development would be incompatible with the active farming uses immediately to the west of Site 6, thereby "undermin[ing] the Township's farmland retention efforts." Id. Nevertheless, the master concluded that development at a moderate density

of four to five units per acre within the southeast portion of Site 6 "would be acceptable," as the resulting development of 300 units would "no longer [be] overwhelming to the village." Id. He recommended the grant of a builder's remedy for this modified development plan.

Finally, as for the Garfield tract (Site # 1), the master recommended the grant of a builder's remedy to Garfield. However, the master pointed out that Garfield's requested density of 9.2 dwelling units per acre would result in a development of 2000 housing units, thereby doubling the village's population. He therefore recommended development on Site 1 at a lower density as "preferable on terms of sustaining a sense of balance within the village." Id. at 30.

The township essentially agrees with all of the recommendations of the master, except that it disagrees that even a limited builder's remedy should be granted for development of the Zirinsky tract (Site #6) as any such development "would tend to exert unwanted development pressures on adjacent farmland." Mount Laurel II Compliance Program for Cranbury Township, New Jersey at 33 (December 1984). On the other hand, the Township does agree that a builder's remedy should be granted Garfield on Site #1, since that site is located entirely within the Township's PD-HD Planned Development - High Density Zone, and development on that site would "create a dense, compact settlement pattern which provides realistic

opportunities for jobs, housing, public transit, and the logical extension of utilities." Id.

ARGUMENT

AWARDING MULTIPLE BUILDER'S REMEDIES IN CRANBURY TOWNSHIP IS UNNECESSARY TO ACHIEVE THAT REMEDY'S PRIMARY PURPOSES, AND WILL EFFECTIVELY DELEGATE THE FUNCTION OF RE-ZONING THE TOWNSHIP TO ACHIEVE COMPLIANCE WITH MOUNT LAUREL TO PRIVATE DEVELOPERS CONTRARY TO SOUND PLANNING PRINCIPLES, WHILE UNDULY INCREASING THE ALREADY SUBSTANTIAL JUDICIAL AND ADMINISTRATIVE BURDENS OF OVER-SEEING THE PROJECT OF EACH DEVELOPER AWARDED A BUILDER'S REMEDY. THUS, AS A GENERAL RULE, ONLY ONE BUILDER'S REMEDY SHOULD BE AWARDED PER MUNICIPALITY, ESPECIALLY WHERE THE PLAINTIFF DEVELOPERS' SITES ARE SCATTERED THROUGHOUT THE MUNICIPALITY.

In Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II), 92 N.J. 158 (1983), the New Jersey Supreme Court held that where a developer succeeds in Mount Laurel litigation and proposes a project which provides a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the developer's project is clearly contrary to sound land use planning. Id. at 279-80. However, the supreme court did not address whether, or under what circumstances, more than one builder's remedy should be granted in the same municipality. The township submits that awarding more than one developer a builder's remedy in the same municipality is unnecessary to achieve that remedy's underlying purposes. Those purposes are to provide an incentive to builders to challenge exclusionary

zoning ordinances and to ensure that at least some lower income housing is actually built, not to generate unnecessary litigation or to punish with runaway development a municipality whose zoning ordinances are found to violate Mount Laurel principles. More importantly, the award of multiple builder's remedies in one municipality would effectively delegate the rezoning of that municipality to comply with Mount Laurel to private landowners and developers contrary to sound planning principles. Finally, awarding multiple builder's remedies in a single municipality would saddle trial courts and municipalities with an undue burden to oversee numerous building projects to ensure compliance with each builder's obligation, in return for the grant of a builder's remedy, to provide a substantial amount of lower income housing.

For all of these reasons, the general rule should be that only one builder's remedy may be awarded for each municipality whose zoning ordinances are found to be defective under Mount Laurel principles. This should certainly be the case where, as here, the multiple plaintiff-developers' sites are scattered throughout the municipality.

A. Origin And Development Of The Builder's Remedy in New Jersey.

To understand why the grant of a builder's remedy should be restricted to only one developer per municipality, it is necessary to trace the history and development of the builder's

remedy in New Jersey exclusionary zoning litigation. The propriety of a builder's remedy was first considered by a New Jersey court in Pascack Association, Ltd. v. Mayor of Washington, 131 N.J. Super. 195 (Law Div. 1974), a pre-Mount Laurel I case. The plaintiffs in Pascack were the owner and the contract purchaser of a tract of land in Washington Township, who planned to build a garden apartment development. They brought suit challenging the township's zoning ordinance on exclusionary grounds. In an unpublished opinion filed on December 20, 1972, the court struck down the zoning ordinance insofar as it failed to make any provision for multi-family or rental-type housing. Judgment was entered in accordance with the opinion on January 12, 1973. Following this decision, the township amended its ordinance to establish a 34-acre multi-family district. Only five acres of this district were suitable for multi-family construction, and the plaintiffs' tract was not included in the rezoning. On the motion of the plaintiffs, the trial court issued an order on July 9, 1973, directing the township to carry out "all rezoning required for compliance" with the prior judgment within 60 days.

When the township failed to take further action within the 60-day period, the plaintiffs moved for an order directing the township to issue to the contract purchaser a building permit for its proposed multi-family garden apartment complex

of 520 dwelling units. While concluding that the township had been afforded ample time to comply with the judgment of January 12, 1973, the trial court refused to grant the proposed builder's remedy and instead announced on October 4, 1973, its intention to appoint planning and zoning consultants to make recommendations to the court as to a zoning plan for the township that would carry out the terms of the prior judgment. The consultants recommended rezoning the plaintiffs' property for apartment use subject to certain regulations and controls limiting the number of units on the plaintiffs' 30-acre property to 270, or a density of nine units per acre. See Hartman, "Beyond Invalidation: The Judicial Power To Zone," 9 Urb. L. Annual 159, 172 n.58 (1975).

In adopting the consultants' recommendation of nine units per acre, 131 N.J. Super. at 208, Judge Gelman refused to grant the plaintiffs' proposed builder's remedy by saying:

> The remedy espoused by plaintiffs—to compel the issuance of a building permit for the development of their property as they have proposed it—has the virtue of simplicity but nothing else to commend it. While this course has been followed in at least one other jurisdiction, see Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (Sup.Ct.1970), it affords no protection to other property owners in the community who might be adversely affected by what in essence would be the unregulated development by the plaintiffs of their property.

Id. at 206-07. Thus, the court in Pascack rejected a builder's remedy in favor of judicially-imposed zoning.

One year later, in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I), 67 N.J. 151 (1975), the New Jersey Supreme Court issued its landmark decision requiring "developing municipalities" to provide realistic opportunities for the construction of low and moderate income housing by eliminating exclusionary provisions in their zoning ordinances. But the court refrained from discussing the propriety of any remedy beyond ordering Mount Laurel Township to adopt curative amendments to its exclusionary zoning ordinance, saying:

> It is not appropriate at this time, particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power. See, however, Pascack Association v. Mayor and Council of Township of Washington, 131 N.J.Super. 195 . . . (Law Div. 1974), and cases therein cited, for a discussion of this question. The municipality should first have full opportunity to itself act without judicial supervision.

Id. at 192.

Not until its decision in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977), did the supreme court first approve of a very limited builder's remedy. The plaintiffs in Madison, who instituted the suit in November 1970, consisted of two groups: (1) two corporate developers owning a 400-acre tract of vacant developable land and (2) six low income

individuals representing as a class those persons residing outside the township who had sought housing there unsuccessfully. After concluding that the township's existing zoning ordinance was invalid under the principles laid down in Mount Laurel I, the court concluded that it was appropriate in the case before it to direct the issuance to the corporate plaintiffs, subject to certain conditions, of a permit for the development on their property of a housing project under plans guaranteeing the allocation of at least 20% of the units to low and moderate income families. Id. at 551.

In support of this holding, the court pointed to several considerations. First, it recognized that the corporate plaintiffs had "borne the stress and expense of this public-interest litigation, albeit for private purposes, for six years and have prevailed in two trials and on this extended appeal, yet stand in danger of having won a pyrrhic victory." Id. at 550. Merely invalidating the township's zoning ordinance, "if followed only by more zoning for multi-family or lower income housing elsewhere in the township, could well leave [the] corporate plaintiffs unable to execute their project." Id. In these circumstances, "a successful litigant like the corporate plaintiffs should be awarded specific relief." Id.

With respect to this first consideration, the court

pointed to "judicial precedent for such action" in Pennsylvania exclusionary zoning litigation. Id. Thus, in Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), a developer succeeded in having the Pennsylvania Supreme Court strike down the zoning ordinance of Nether Providence Township as unconstitutionally excluding development for apartment use. Shortly after that decision, the township amended its zoning ordinance to create a new apartment district but failed to include the plaintiff's land. The township then announced its intention to condemn the plaintiff's land for a park. On August 29, 1972, the Pennsylvania Supreme Court entered a clarifying order directing the township's building inspector to issue "a building permit to petitioners to construct apartments upon petitioner's filing of appropriate building plans, drawings and specifications in compliance with the Township Building Code." Order No. MP-12,271 (Aug. 29, 1972); see Krasnowiecki, "Zoning Litigation and the New Pennsylvania Procedures," 120 U. Pa. L. Rev. 1029, 1082 & n.202a (1972) (commenting on Appeal of Girsh by stating that "if judicial review is to result in anything more than a farce, the courts must be prepared to go beyond mere invalidation and grant definitive relief"). Subsequently, the Pennsylvania high court squarely held that a court has the power to grant a developer-challenger "definitive relief," i.e., issuance of a building permit, upon striking

down a zoning ordinance as constitutionally infirm. Township of Willistown v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466, 468-69 (1975); Casey v. Zoning Hearing Board of Warwick Township, 459 Pa. 219, 328 A.2d 464, 469 (1974) ("To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable").

However, the New Jersey Supreme Court in Madison did not rest its decision to grant a builder's remedy solely upon this consideration of fairness towards a builder-challenger. The court further recognized that the availability of a builder's remedy would "create an incentive for the institution of socially beneficial but costly litigation such as this and Mount Laurel . . . " Oakwood at Madison, Inc. v. Town of Madison, supra, 72 N.J. at 550-51. In addition, it would serve "the utilitarian purpose of getting on with the provision of needed housing for at least some portion of the moderate income elements of the population." Id. at 551; see also id. at 598 (Pashman, J., concurring and dissenting) ("[T]his remedial device directly advances the fundamental objective of promoting actual construction of law and moderate income housing").

Nevertheless, the court noted that its determination to direct the issuance of a building permit to the Madison

corporate plaintiffs "is not to be taken as a precedent for an automatic right to a permit on the part of any builder-plaintiff who is successful in having a zoning ordinance declared unconstitutional." Id. at 551-52 n.50. Indeed, the court put a substantial damper on its holding by stating that "[s]uch relief would ordinarily be rare . . . ." Id. at 552 n.50.

In view of this admonition, very few builder's remedies were awarded between the time of the Madison decision and the handing down of Mount Laurel II. The one reported exception was Judge Wood's grant of a builder's remedy to a mobile home park developer in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 161 N.J. Super. 317 (Law Div. 1978), aff'd in relevant part, 92 N.J. 158 (1983) [Mount Laurel II]. After the New Jersey Supreme Court's decision and remand in Mount Laurel I, Davis Enterprises, Inc., was allowed to intervene as a plaintiff in the litigation. Davis Enterprises was successful in having the court declare that Mount Laurel's revised zoning ordinance was invalid insofar as it excluded and prohibited altogether the development of mobile home parks. 161 N.J. Super. at 355-59. The court then granted Davis Enterprise's request for a builder's remedy, reasoning as follows:

> From the evidence and testimony in this case I am satisfied that not only are mobile homes an acceptable form of

> moderate-cost housing, but as their development is proposed by the intervenor, they constitute the only prompt and realistic relief that can be given to plaintiffs to make available an actual supply of least-cost housing in the near future. Indeed, the township does not argue seriously to the contrary.
>
> . . . .
>
> The appropriate Mount Laurel agencies and authorities shall forthwith review the application of Davis for development of a mobile home park and such review shall be in a manner consistent with the least-cost housing principles enunciated in Oakwood at Madison.

Id. at 359.

Five years after Judge Wood's action, Mount Laurel II was decided, in which the supreme court sought "to put some steel into" the Mount Laurel doctrine. Mount Laurel II, supra, 92 N.J. at 200. As part of this overall aim, the court concluded that "builder's remedies must be made more readily available to achieve compliance with Mount Laurel." Id. at 279; see also id. at 327 ("[A] builder's remedy is no longer to be considered 'extraordinary'"). It therefore held that "where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, a builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." Id. at 279-80.

The court decided to expand the use of the builder's remedy because it viewed this remedy as "one of the most effective tools for implementing Mount Laurel." Id. at 327. The court also noted, with apparent approval, the plaintiffs' contention that builder's remedies were "(i) essential to maintain a significant level of Mount Laurel litigation, and the only effective method to date of enforcing compliance; (ii) required by principles of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation; and (iii) the most likely means of ensuring that lower income housing is actually built." Id. at 279; see comment, 15 Rut.-Cam. L.J. 789, 791 n.15 (1984) ("Although the court did not adopt openly the arguments in support of the imposition of the builder's remedy in Mount Laurel II, the court's decision implies acceptance of these concerns"). However, the court appeared to downplay the importance of compensating developers by saying that it was not an "essential" requirement for an award of a builder's remedy "that considerable funds be invested or that the litigation be intensive." Mount Laurel II, supra, 92 N.J. at 280.

In addition, the court took pains to point out that builder's remedies were for the primary benefit of lower income individuals, not developers. The court said:

> [W]e 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 . . . . Trial courts should guard the public interest carefully to be sure that plaintiff-developers do not abuse the Mount Laurel doctrine. Where builder's remedies are awarded, the remedy should be carefully conditioned to assure that in fact the plaintiff-developer constructs a substantial amount of lower income housing.

Id. at 280-81 (emphasis in first quoted sentence added); see also id. at 199 ("The [Mount Laurel] obligation is to provide a realistic opportunity for housing, not litigation").

In actually deciding the six consolidated cases before it, the supreme court in Mount Laurel II had no need to pass on the question of a builder's remedy in two of the cases, namely Urban League of Essex County v. Township of Mahwah and Urban League of Greater New Brunswick v. Borough of Carteret, since these actions had been instituted by non-builder plaintiffs. See id. at 332-33 (Mahwah suit brought by Urban League of Essex County, North Jersey Community Union, and three individuals seeking housing in Mahwah); id. at 341 (Carteret suit brought by Urban League of Greater New Brunswick and seven individuals representing themselves and others similarly situated). In two of the remaining four cases, the denial of builder's remedies was summarily affirmed because no Mount Laurel violation was found. See id. at 315 (Caputo v. Chester; "[o]ne of the conditions for awarding such remedy is that the builder establish

that the municipal ordinance fails to comply with the Mount Laurel obligation"); id. at 321 (Glenview Development Co. v. Franklin Township). And in Round Valley v. Township of Clinton, the court found that the plaintiff-developer might have difficulty in establishing his right to a builder's remedy upon remand because (1) it was unclear whether the developer had plans to build lower income housing on the remaining portion of its property, and (2) there was evidence suggesting environmental problems in the construction of multi-family dwellings on the property. Id. at 330-31.

Only in the Mount Laurel case itself did the court in Mount Laurel II actually affirm the grant of a builder's remedy. In finding that Judge Wood's grant of such a remedy to Davis Enterprises to build a 535-unit, 107-acre mobile home park was "clearly appropriate in this case under the new standard enunciated in this opinion," id. at 308, the court reasoned as follows:

> First, the Davis project will provide lower income housing for Mount Laurel. Beside the fact that mobile homes are generally much less costly than site-built housing, the trial court's decision requires that Davis construct at least 20 percent of its units for lower income persons. In addition, the site chosen by Davis is plainly suited for mobile home development and Mount Laurel has presented no real evidence to the contrary. Finally, we feel that after ten years of litigation it is time that something be built for the resident and non-resident lower income plaintiffs in this

> case who have borne the brunt of Mount Laurel's unconstitutional policy of exclusion.

Id. (emphasis in original).

In a footnote, the court acknowledged that "because it did not institute this suit, Davis is not a typical plaintiff-developer." Id. at 309 n.58. Thus, "it could be argued that the primary reason for granting a builder's remedy, encouraging Mount Laurel suits by developers, is not present here." Id. However, the court found that this fact was "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." Id.

B. The Builder's Remedy After Mount Laurel II.

Comparing Madison with Mount Laurel II, there has been an obvious shift in the focus of the court concerning the builder's remedy. In Madison, the builder's remedy was viewed primarily as compensating a developer in that relatively "rare" case where a developer had instituted and maintained Mount Laurel litigation for many years, investing substantial sums of money in litigation expenses. That compensation was foremost in the court's mind at the time of Madison is further evidenced by the Madison court's heavy reliance on Pennsylvania exclusionary zoning cases where builder's relief was granted solely for the purpose of compensating builder-challengers

for their trouble. In Mount Laurel II, however, the court turned away from the compensation or "fairness to builders" rationale as the primary justification for builder's remedies. Instead, the court viewed encouraging the institution of Mount Laurel suits as the "primary reason" for granting such remedies. Id. at 309 n.58; see Orgo Farms & Greenhouses, Inc. v. Colts Neck Township, 192 N.J. Super. 599, 605 (Law Div. 1983) (Serpentelli, J.) (recognizing Mount Laurel II's suggestion that "Mount Laurel's objective may not be achievable unless adequate economic incentives are held out to developers so that they will seek to enforce the Mount Laurel obligations of our municipalities"); Rose, "New Additions to the Lexicon of Exclusionary Zoning Litigation," 14 Seton Hall L. Rev. 851, 870-71 (1984) ("The underlying purpose of the builder's remedy is to provide builders with an incentive to challenge exclusionary ordinances"). In short, the builder's remedy is now a carrot, not compensation. See Orgo Farms & Greenhouses, Inc. v. Colts Neck Township, supra (describing the builder's remedy as "the carrot").

After Mount Laurel II, the second most important purpose of the builder's remedy is to ensure that at least some lower income housing is built in a municipality having a fair share obligation. The importance of this reason is demonstrated by the Mount Laurel II court's affirmance of Judge Wood's award

of a builder's remedy in the Mount Laurel case. The court acknowledged that the incentive rationale for the builder's remedy was considerably weaker with respect to Davis Enterprises than most builder-challengers due to Davis's status as an intervenor-plaintiff, and nowhere did the court even mention compensation or "fairness to builders" as a reason for granting the remedy. There, the mobile home developer was granted a builder's remedy primarily because its proposed project would lead to the actual construction of some lower income housing in Mount Laurel Township.

As for the question of multiple builder's remedies, the supreme court in Mount Laurel II had no occasion to decide or even comment on this issue since, of the four cases presenting the question of builder's remedies, all involved either a single-plaintiff-developer or a single tract of land. Nor does the court's language indicate that it had passed on or even contemplated the award of multiple builder's remedies. The court repeatedly used the singular form of speech in referring to "a developer," "a builder's remedy," "the plaintiff's proposed project," etc. See 92 N.J. at 279-80 ("We hold that where a developer succeeds in Mount Laurel litigation . . . a builder's remedy should be granted unless . . . the plaintiff's proposed project is clearly contrary to sound land use planning") (emphasis added); id. at 280 ("The trial court . . . should

make sure that the municipal planning board is closely involved in the formulation of the builder's remedy") (emphasis added.) The use of this language as opposed to "any developer" or "all developers," further indicates that the court did not rule on the question of multiple builder's remedies, even by implication.

Only two reported decisions have been handed down since Mount Laurel II on the question of builder's remedies. In Orgo Farms & Greenhouses, Inc. v. Colts Neck Township, supra, Judge Serpentelli held that the location of the plaintiff developer's property in the area of a municipality designated as a "limited growth" area by the State Development Guide Plan did not preclude the grant of a builder's remedy to the developer as a matter of law. 192 N.J. Super. at 611. And in Morris County Fair Housing Council v. Boonton Township, 197 N.J. Super. 359 (Law Div. 1984), Judge Skillman ruled that a developer who has a separate Mount Laurel action pending may not exercise a veto over a proposed settlement between the municipality, the Public Advocate and a second developer by insisting upon his right to a builder's remedy. Id. at 373. Neither Orgo Farms nor Boonton Township addressed the issue of multiple builder's remedies, which remains a question of first impression. This court in its unreported decision in J.W. Field Company, Inc. v. Franklin Tp., Sup. Ct., Law Div. decided January 3, 1985, dealt with priorities among builder's remedies but it is obvious that the question of entitlement to more than one was not raised.

C. Only One Builder's Remedy Should Ordinarily Be Awarded Per Municipality.

While the supreme court in Mount Laurel II did not address the propriety of awarding multiple builder's remedies in one municipality, certain inferences can be drawn from the court's other holdings which clearly point to limiting the award of builder's remedies to one remedy per municipality. First, the award of multiple builder's remedies would be contrary to the Mount Laurel II court's repeated emphasis on achieving compliance with the Mount Laurel obligation without sacrificing basic principles of sound land use planning. Thus, in discussing the constitutional basis for the Mount Laurel doctrine, the court was careful to state:

> Builders may not be able to build just where they want—our parks, farms and conservation areas are not a land bank for housing speculators. But if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor. And if the area will accommodate factories, it must also find space for workers. The specific location of such housing [i.e., low and moderate income housing for the poor] will of course continue to depend on sound municipal land use planning.

92 N.J. at 211 (emphasis added).

This emphasis on sound land use planning prompted the Mount Laurel II court to abandon the judicial construct of the "developing" municipality as the test for determining which of New Jersey's municipalities is subject to a Mount Laurel obligation. The court said:

> [T]he [developing municipality] criteria will not necessarily result in the imposition of the obligation in accordance with sound planning. There may be areas that fit the "developing" description that should not yield to "inevitable future residential, commercial and industrial demand and growth." Those areas may contain prime agricultural land, open spaces and areas of scenic beauty; apart from these their development might impose unacceptable demands on public investment to extend the infrastructure required to support such growth. Indeed, to some extent the very definition of "developing" suggests results that are quite the opposite of sound planning, for the whole purpose of planning is to prevent or deflect what would otherwise be "inevitable."

Id. at 224 (emphasis added). The court therefore concluded that "[t]he obligation to encourage lower income housing . . . will hereafter depend on rational long-range land use planning (incorporated into the [State Development Guide Plan]) rather than upon the sheer economic forces that have dictated whether a municipality is 'developing.'" Id. at 215 (emphasis added); see also id. at 237 ("The constitutional obligation of the State of New Jersey in exercising its zoning power through its municipal subdivisions to provide a realistic opportunity for lower income housing for its citizens can just as well be met by requiring housing in municipalities in conformance with sound planning concepts as with judicially devised characterizations that may or may not advance other important policies of the state") (emphasis added).

In support of its conclusion to adopt the State Development

Guide Plan (SDGP) as the primary tool for determining the incidence of the Mount Laurel obligation, the court warned of the consequences of unplanned growth:

> The lessons of history are clear, even if rarely learned. One of these lessons is that unplanned growth has a price: natural resources are destroyed, open spaces are despoiled, agricultural land is rendered forever unproductive, and people settle without regard to the enormous cost of the public facilities needed to support them . . . . These costs in New Jersey, the most highly urbanized state in the nation are staggering, and our knowledge of our limited ability to support them has become acute. More than money is involved, for natural and man-made physical resources are irreversibly damaged. Statewide comprehensive planning is no longer simply desirable, it is a necessity. . . .

Id. at 236 (emphasis added). In light of these dire consequences, the court concluded that compliance with the Mount Laurel obligation should be accomplished in accordance with sound land use planning.

> [T]here is no reason today not to impose the Mount Laurel obligation in accordance with sound planning concepts, no reason in our Constitution to make every municipality a microcosm of the entire state in its housing pattern, and there are persuasive reasons based on sound planning not to do so.
>
> The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread. It does not require rural municipalities to encourage large scale housing developments. It does not require wasteful extension of roads and needless construction of sewer and water

> facilities for the out-migration of people from the cities and the suburbs. There is nothing in our Constitution that says we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently.

Id. at 238 (emphasis added). See also id. at 329 (directing trial court on remand of Round Valley v. Township of Clinton, to determine whether fair share obligation previously found by trial court could be accommodated in the township's growth area "consistent with sensible planning").

The award of multiple builder's remedies in a municipality found to have violated Mount Laurel would be totally inconsistent with this emphasis on the use of sound land use planning to achieve compliance with the Mount Laurel obligation. Where more than one developer has sued the municipality, the award of a builder's remedy to each successful developer-plaintiff could easily consume, or even exceed, that municipality's fair share obligation. See Meisel, "Guidelines for the Practitioner: The Impact of Mount Laurel II on New Jersey Zoning and Planning Procedure and Practice," 14 Seton Hall L. Rev. 955, 974 (1984) (where more than one builder is involved in litigation and together they have requested builder's remedies involving more than the municipality's fair share allocation, the court must decide what proportion of the remedy should be awarded to each builder). For example,

in the case at bar, the court has determined that Cranbury Township's fair share obligation is 816 low and moderate income units. When the total units of the proposed builder's remedies of the four plaintiff-developers are added together --Garfield & Co. (2,000 unites), Zirinsky (1,152 units), Cranbury Land Company (680 units), and Toll Brothers (500 units)--they equal some 4,332 units. Because at least one-fifth of a builder's proposed development must be devoted to the construction of low and moderate income housing in order for the builder to receive a builder's remedy, see Mount Laurel II, supra, 92 N.J. at 279 n.37 (establishing 20 percent as a "reasonable minimum" for the percentage of the builder's remedy project to be devoted to lower income housing), the minimum amount of lower income housing proposed to be built by the four plaintiff-developers if each is awarded a builder's remedy, namely 866 units, exceeds Cranbury's fair share allocation by 50 units. Even if Toll Brothers, the developer most unlikely to be awarded a builder's remedy due to "substantial planning concerns," id. at 280, is left out of the picture, the three remaining developers still plan to construct 766 units of lower income housing, consuming over 90% of Cranbury Township's fair share allocation.

In view of these circumstances, the award of multiple

builder's remedies would effectively delegate the rezoning of the municipality to comply with Mount Laurel doctrine to private landowners and builders, whose land use decisions are governed wholly by the profit motive. To allow, through the award of multiple builder's remedies, builders "to build just where they want" would be the antithesis of the supreme court's express expectation in Mount Laurel II that the specific location of low and moderate income housing (and the accompanying high density residential development necessitated by such housing) "will of course continue to depend on sound municipal land use planning." Id. at 211 (emphasis added). Particularly in cases like the one at bar, where the proposed development sites are scattered throughout the municipality, in "limited growth" as well as "growth" areas, the award of multiple builder's remedies would thwart the objectives of sound land use planning to avoid the loss of prime farmland, the despoilation of open space, suburban sprawl, and costly extensions of the municipality's infrastructure. In short, the award of multiple builder's remedies for scattered development sites amounts to "bad planning," id. at 238, and is therefore "clearly contrary to sound land use planning" as a matter of law. Id. at 280.

By effectively delegating the rezoning of the municipality to comply with Mount Laurel to private developers, an

award of multiple builder's remedies would also render superfluous the municipality's efforts, with or without the help of a master, to amend its zoning ordinances to comply with Mount Laurel. If a trial court determines that a municipality's zoning ordinance does not satisfy its Mount Laurel obligation, it must order the municipality to revise the ordinance within 90 days, or within such extended time period as the municipality may be granted for good cause shown. Id. at 281. To facilitate the revision, the trial court may, as it has in this case, appoint a special master to assist municipal officials in developing zoning and land use regulations which comply with the Mount Laurel doctrine. Id. However, it is the municipality itself, through its governing body, which develops the new zoning ordinance with the advice and assistance of the master and the participation of other parties, including the plaintiffs, the board of adjustment, the planning board and other interested developers. Id. at 283, 284. This whole process would be rendered wholly or largely nugatory if, after a revised zoning ordinance were drafted and approved by the trial court, multiple builder's remedies were awarded consuming all or most of the municipality's fair share allocation. The municipality's revised zoning ordinance would then have little practical impact on the type and location of lower income housing to be built within its borders, especially in

cases like the one at bar, where many or most of the plaintiffs' proposed development sites are located outside those areas designated for lower income housing by the revised ordinance.

That the supreme court in Mount Laurel II did not intend to so deprive municipalities of all local planning discretion over the location of lower income housing development, except as a last resort, can be seen from that portion of the opinion dealing with remedies for continued non-compliance. If the municipality's revised ordinance does not satisfy its Mount Laurel obligation, or if no revised ordinance is submitted within the time allotted, the trial court may issue any one or more of the following orders:

> (1) that the municipality adopt such resolutions and ordinances, including particular amendments to its zoning ordinance, and other land use regulations, as will enable it to meet its Mount Laurel obligations;
>
> (2) that certain types of projects or construction as may be specified by the trial court be delayed within the municipality until its ordinance is satisfactorily revised, or until all or part of its fair share of lower income housing is constructed and/or firm commitments for its construction have been made by responsible developers;
>
> (3) that the zoning ordinance and other land use regulations of the municipality be deemed void in whole or in part so as to relax or eliminate building and use restrictions in all or selected portions of the municipality

> [the court may condition this remedy upon failure of the municipality to adopt resolutions or ordinances mentioned in (1) above); and
>
> [4) that particular applications to construct housing that includes lower income units be approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof.

Id. at 285-86 (emphasis added).

These remedies have been described as "drastic," amounting to "direct judicial supervision of the community's zoning." Buchsbaum, "No Wrong Without a Remedy: The New Jersey Supreme Court's Effort to Bar Exclusionary Zoning," 17 The Urban Lawyer 59, 79, 80 (1985). They are to be invoked only after the municipality has been found to have violated the Mount Laurel doctrine and then has refused to bring itself into compliance with the constitutional mandate, notwithstanding the advice of a court-appointed master. Id. Yet, an award of multiple builder's remedies would be very similar in its impact to a judicial order requiring municipal officials to approve various developer's applications to construct housing projects including lower income units, the fourth "drastic" remedy listed above. Both remedies essentially deprive the municipality of any local planning discretion over the type and location of its fair share of lower income housing.

But the supreme court in Mount Laurel II clearly did

not intend to take away all local planning discretion until the municipality had had at least one opportunity to correct the constitutional defects on its zoning ordinances. Just as an order directing municipal officials to approve various developer's applications to construct housing projects including lower income housing units cannot be made unless the municipality fails to revise its land use ordinances to substantially comply with its constitutional obligation, an award of multiple builder's remedies similarly should not be made unless the municipality fails to bring its ordinance into substantial compliance with Mount Laurel, despite the advice of a court-appointed master. In other words, if the municipality does act in a timely fashion to revise its zoning ordinance to provide a realistic opportunity for the construction of its fair share of lower income housing, only one builder's remedy should normally be awarded for that municipality.

Aside from improperly delegating (to private developers) the rezoning of the municipality to comply with Mount Laurel, an award of multiple builder's remedies in the same municipality would substantially increase the already heavy judicial and administrative burdens of overseeing the projects of developers awarded such remedies. Once a developer is granted a builder's remedy, the role of the trial court is not terminated.

The court will have a direct and long-term responsibility to assure that the builder's development "provides a substantial amount of lower income housing." Mount Laurel II, supra, 92 N.J. at 279. To fulfill this obligation, the trial court will have to establish standards and an administrative mechanism: (1) to determine the eligibility of low income buyers and/or renters and to review their continuing eligibility; (2) to review rents and other charges to low income renters; and (3) to approve purchasers and the initial and subsequent sale prices of housing units. Rose, supra, 14 Seton Hall L. Rev. at 873. In addition, an administrative mechanism will be needed to respond to technical legal problems arising upon such events as mortgage foreclosure, default in rent payments, and death of an owner. Id.

To set up and run these administrative mechanisms will require personnel, primarily in the form of court-appointed special masters, and money. The compensation of the special master must be paid in its entirety by the municipality. Mount Laurel II, supra, 92 N.J. at 281 n.38. In addition, the municipality will have to absorb the administrative costs involved in maintaining its own staff of personnel to oversee the administrative problems outlined above. Rose, supra, 14 Seton Hall L. Rev. at 873. While these judicial and administrative burdens are quite substantial even if only one

builder's remedy is granted in each municipality, the award of multiple builder's remedies could easily double or triple the cost and complexity of overseeing developer's projects. The costs could have serious tax rate and spending limitation consequences in many New Jersey municipalities. See N.J.S.A. § 40A:4-45.1 to -87 (West 1980) & Cum. Supp. 1984); Rose, supra, 14 Seton Hall L. Rev. at 874 & n.115. More importantly, without limiting the number of builder's remedies that may be awarded to one per municipality, the ability of the specially appointed judges and court-appointed special masters to handle Mount Laurel litigation in a prompt and efficient manner could be severely hampered, if not jeopardized entirely.

On the other hand, limiting the award of builder's remedies in Mount Laurel litigation to one remedy per municipality will not undermine the primary purposes of this remedial device. First, adequate incentives will remain for developers to challenge the zoning ordinances of municipalities on Mount Laurel grounds. If a single developer brings suit against a particular municipality and is successful in showing a Mount Laurel violation, that developer may obtain the sole available builder's remedy if the other requirements of Mount Laurel II for that remedy are met. Once one developer brings a Mount Laurel, suit against a municipality, other developers need not necessarily be discouraged from bringing

additional Mount Laurel suits since they could compete for the sole available builder's remedy by showing that their proposed project will provide more lower income housing and/or will cause fewer environmental or planning problems. Cf. Meisel, supra, 14 Seton Hall L. Rev. at 974 (where more than one builder is involved in litigation and together they have requested more than the municipality's fair share allocation, the court must decide what proportion of the remedy should be awarded to each builder; while the court may elect to award the remedy on the basis of filing of the complaint, "[a] preferable solution is to adopt the best land utilization proposal to consume the town's fair share allocation, as this would assure the most appropriate sites for construction").

Even if other developers are discouraged from instituting additional Mount Laurel suits by a denial of multiple builder's remedies, only one developer is necessary to challenge a given municipality's zoning ordinance on Mount Laurel grounds. Moreover, those developers who are likely to be discouraged from instituting additional Mount Laurel suits against the same municipality will likely be developers whose proposed sites or project plans only marginally qualify, if they qualify at all, for a builder's remedy. By discouraging redundant Mount Laurel suits by such developers, a denial of

multiple builder's remedies will serve the purpose of discouraging "unnecessary litigation.' Mount Laurel II, supra, 92 N.J. at 280-81. It should be noted that the four plaintiff-developers seeking a builder's remedy in this case, like Davis Enterprises in the Mount Laurel case, are not typical builder-plaintiffs, since they, in effect, intervened in this Mount Laurel litigation nearly a decade after it was commenced by non-builder plaintiffs in 1974. "The primary reason for granting a builder's remedy, encouraging Mount Laurel suits by developers, is not present here." Id. at 309 n.58.

Nor will limiting the grant of builder's remedies to one per municipality undermine that remedy's other important purpose to ensure that at least some lower income housing is actually built. For example, in the case at bar, if Garfield & Co. is granted the sole builder's remedy as desired by the township, at least 400 units of lower income housing will be built, or nearly half the municipality's fair share allocation of 816 units.

Finally, it cannot be argued that principles of "fairness to builders" require that multiple builder's remedies be awarded in order to compensate each developer involved in Mount Laurel litigation. As has been discussed above, the Mount Laurel II decision placed less emphasis on the compensation consideration as a reason for awarding a builder's remedy. Moreover, where more than one developer sues a municipality on

Mount Laurel grounds, these developers can pool their resources, thereby substantially reducing the financial burden on any one developer of maintaining the litigation. The need to compensate such multiple-developer-plaintiffs for their time and trouble is not as great as in the case of a single developer shouldering the entire burden of a Mount Laurel suit. In any case, the "fairness to builders" rationale for awarding a builder's remedy is considerably weakened in the case at bar, by the fact that each of the four plaintiff-developers, in effect, intervened in the instant Mount Laurel litigation against Cranbury Township less than two years ago.

Finally, none of the remedies approved by the supreme court in Mount Laurel, are designed to punish a municipality for having violated the Mount Laurel doctrine. See id. at 282-83 ("we do not view the appointment of a master as punitive in the least; it is not designed to settle scores with recalcitrant municipalities"). Thus, the carrot of the builder's remedy should not be turned into a bludgeon or a whip. The award of a single builder's remedy per municipality will adequately serve the purposes of encouraging Mount Laurel suits by developers and ensuring the actual construction of some lower income housing without depriving the municipality of all control over its future development.

CONCLUSION

Awarding multiple builder's remedies in one municipality is unnecessary to achieve that remedy's primary purposes. Such an award effectively delegates the function of rezoning the township to achieve compliance with the Mount Laurel doctrine to private developers contrary both to principles of sound land use planning and to the clear intent of the supreme court in Mount Laurel II to apply such a drastic remedy only to those recalcitrant municipalities which fail to revise their zoning ordinance to comply substantially with Mount Laurel. Moreover, the award of multiple builder's remedies will unduly increase the already substantial judicial and administrative burdens of overseeing the projects of developers awarded a builder's remedy. For all these reasons, as a general rule, only one builder's remedy should be awarded per municipality, especially where the plaintiff-developers' proposed building sites are scattered throughout the municipality. Cranbury Township therefore respectfully requests that the Court award a builder's remedy only to Plaintiff Garfield & Company, as that plaintiff-developer plans to build at least 400 units of lower income housing, more than any of the other plaintiffs, on a site located within the municipality's PD-HD Planned Development-High Density Zone.

Respectfully submitted,

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