Cranbury Land Co. v Cranbury, 1984 7/5

- letter brief to Judge re prioritization of remedial relief to developer-plaintiffs

Pgs. 7

ML000019L

ML000019L

Jeff
Priority briefs
do you have them

BISGAIER AND PANCOTTO
ATTORNEYS AT LAW
510 PARK BLVD.
CHERRY HILL, N.J. 08034
TEL. (609) 665-1911

CARL S. BISGAIER
LINDA PANCOTTO

July 5, 1984

RECEIVED
JUL 11 1984
JUDGE SERPENTELLI'S CHAMBERS

HONORABLE EUGENE D. SERPENTELLI, J.S.C.
Ocean County Court House
118 Washington Street
Toms River, New Jersey 08753

Re: Cranbury Land Company v. Cranbury Tp.
Docket No. L-070841-83PW
"Builder's Remedy Entitlement and Prioritization"

Dear Judge Serpentelli:

Please accept this letter in lieu of brief relevant to the issue of prioritization of remedial relief to developer-plaintiffs in Mt. Laurel II cases. While no motion is before the court and no formal request for briefs has apparently been made, several parties have chosen to brief the issue in light of its likely relevance in the Cranbury matter. If the court is to rule on these issues, I believe they should be the subject of oral argument.

I will address two issues here: entitlement and prioritization My conclusion is that among developers "entitled" to the remedy, there is only one reasonable standard for prioritization: timing; that is, absent unusual circumstances, the first litigant in time must be the first considered for full relief. If another is entitled and the fair share remains unsatisfied, then the next in time must be considered for full relief and so on until either no more developers are "entitled" to consideration or satisfaction of the fair share. I believe that, upon consideration, the court will find this proposal consistent with Mt. Laurel II, the only one to maintain the thrust of the reasoning behind the adoption of the remedy by the Supreme Court, simple to enforce and, most importantly, the only one capable of reasonable evaluation by potential litigants.

ENTITLEMENT TO THE BUILDER'S REMEDY

The issue of prioritization arises only if several plaintiffs are otherwise entitled to the remedy and the relevant fair share is less than that contemplated by the totality of development proposed. The issue of entitlement is, however, completely separate from prioritization. My reading of the briefs submitted is that they have confused the two and, as a result, may have inadvertantly proposed standards for prioritization which will undermine the efficacy of the remedy. If so, drastic consequences may follow since the remedy is crucial in two respects to Mt. Laurel II implementation.

The builder's remedy was adopted for one primary reason: to create a class of plaintiffs to litigate Mt. Laurel II cases. Supporting this reason are several secondary purposes: first, the class created would also be producers of lower income housing; second, the exposure to municipalities for not complying voluntarily would be increased. The remedy had created a greater likelihood that non-compliant municipalities would be sued and full compliance mandated and, further, that development might occur in areas of developer selection rather than municipal choice. It is important to remember that these effects were exactly what the Supreme Court intended to occur as a result of the remedy.

In order to create this plaintiff class, the Court established very clear guidelines for entitlement to the remedy:

1. the developer must succeed; that is, the ordinance challenged[1] must be proven invalid and a compliant ordinance secured; and

2. the developer must propose a "project providing a substantial amount of lower income housing". 92 N.J. at 279.

---

[1]While it is not relevant here, I believe it is clear that the "ordinance" in question is the ordinance in effect at the time of the commencement of litigation. Post-complaint amendments should be viewed as part of the court's remedial review and not compliance.

Re: Cranbury Land Co. v. Cranbury Tp.

The first standard, proof of non-compliance, may be clouded by the existence of a public interest litigant or another developer litigant. My position here is that any developer litigant who participates in a significant manner in the litigation prior to a finding of non-compliance or a finding of compliance through settlement is "entitled" to the remedy. Thus, the following litigants would be "entitled":

1. a litigant who participates in the trial on fair share, region and compliance (as opposed to remedy) and there is a finding of non-compliance;

2. a litigant who has acted diligently through discovery but the municipality settles with another litigant and the court finds the settlement to effectuate compliance. See recent opinion in Morris Co. Fair Housing Council v. Boonton Tp. (Morris Tp.), L-6001-78 PW (May 25, 1984) where the court stated at page 14 of the slip opinion, footnote 3, that an approved settlement would not bar an otherwise entitled third-party developer from the remedy. It is obviously important to prevent defendants from shopping among litigants to secure a settlement and bar others from the remedy. Such a result would create an inordinate disadvantage to potential litigants in their ability to assess whether to move forward.

Reasonable limitations to "entitlement" may be imposed. Thus, the court might well refuse consolidation once a trial has begun or after the pre-trial conference; even after a reasonable period after a complaint is filed where proper notice is given. Certainly, each case may have to be viewed on its own facts; however, nothing should be done to discourage multiple litigants.

The need to encourage multiple litigants is demonstrated by the fact that there is no way to assure that any one litigant will survive and carry the case to finality. This problem has certainly been demonstrated by public interest litigants. Developer litigants are also susceptible to financial pressures and potential settlements which could result in something short of full compliance and, in any event, a failure to fully litigate.

The municipal exposure to multiple litigants should not concern the court. Here, the municipality holds the key to its own cell. The builder's remedy will be constrained by the fair share and the extent of municipal compliance with the fair share. A municipality

with a 1000 unit fair share will be susceptible to multiple litigants only if it has done nothing to comply. If it has voluntarily complied, then no developer will be awarded the remedy. If it has complied up to 800 units, then the remedy will be awarded for only 200 units regardless whether there is one, two or ten developer litigants. The Supreme Court wanted there to be exposure to encourage voluntary compliance. There is nothing inconsistent with Mt. Laurel II to award remedies to multiple developer litigants where appropriate. If this burdens the municipality, it is because of its illegal action and only to the extent of illegality - nothing more.

In any event, once non-compliance is proven and the developer agrees to provide sufficient lower income housing, entitlement is created. Nothing more is required. The plaintiff may then expect to receive a building permit except under the following circumstances:

1. the court is convinced that the plaintiff has not attempted to use the threat of Mt. Laurel II litigation as a "bargaining chip" to obtain non-Mt. Laurel II relief (92 N.J. at 280);

2. under certain circumstances, plaintiffs are required to act in good faith in the context of attempting to obtain relief without litigation (92 N.J. at 218); or

3. the plaintiff's proposal is contrary to sound land use planning for environmental or other substantial planning concerns (92 N.J. at 279-280).

The above presents a very clear picture to a potential litigant who is undertaking the economic and political analysis of whether to proceed with litigation. Such a litigant will ask himself:

a. is the ordinance vulnerable?

b. can I propose lower income units as economically feasible?

c. is my site reasonably developable from a sound planning perspective?

d. is it reasonable to approach the municipality or go directly to court?

e. have I used the threat of litigation in an unlawful manner?

These are all questions which a potential plaintiff can answer with some degree of certainty and then determine whether to litigate. The Supreme Court clearly wanted developers to be able to evaluate these concerns, to do so easily and to facilitate the decision-making process which the Court anticipated would lead to litigation against non-compliant municipalities.

If there was one thing the Court clearly did not want to do, it was to create a new ambiguity which was relatively unanalyzable and therefore which would constrain potential litigants from moving forward. This is exactly what will happen if this court adopts the suggestions of the parties who have briefed the issue of prioritization. The effect will be that no developer will be able to determine whether, even if it prevails after years of litigation, it will be awarded the remedy. This would seriously damage the potential for an active plaintiff class.

PRIORITIZATION AMONG ENTITLED PLAINTIFFS

If more than one builder is "entitled" to relief, how should the Court determine which should be granted the relief? Much can be gleaned from Mt. Laurel II in this regard. Specifically, the Court iterated and reiterated that the remedy should be granted regardless of whether there are other, even better, sites in the township and regardless of municipal preference. The preference of the municipality, whether reflected in its master plan, zoning ordinance, expert reports or overt municipal choice among plaintiffs, is totally irrelevant. (92 N.J. at 279 and 280). The Court stated:

> We emphasize again that the 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.

Thus, regardless of whether a plaintiff is an owner or contract-purchaser, regardless of relative proximity to roads, schools, sewer, water, fire stations, public facilities and regardless of whether all of the other vacant land in the Township is "better", relief will be granted, regardless of municipal choice, if the proposal is consistent with principles of sound land use planning. This is true among developer litigants. There is nothing in Mt. Laurel II which suggests a modification of this principle where there are multiple litigants.

There is a critical reason for this and the Supreme Court anticipated it. If other sites can prevail because they are "better", no litigant will proceed freely unless his site is "best". The Court specifically did not want to burden potential litigants with that problem. First, it would unduly force litigants to stay their hand. As long as development would be effectuated consistent with sound planning, the Supreme Court wanted a developer to move forward. The Court did not want the developer, master or trial court to debate whether other lands were better. Second, the Court was seeking a relatively objective standard. Permitting a competition among sites would permit the most subjective decision-making process.

The Davis tract in Mt. Laurel, for example, is miles from water and sewer, major roads and the municipal infrastructure. It is on lands under active agricultural cultivation, zoned for the lowest density permitted by the Township. Davis was a contract purchaser. He decided to litigate. Should his right to relief have been jeopardized if other developers with "better" land had come in after him? If so, why? How would that further Mt. Laurel II. Clearly, if they had not, he would be entitled to full consideration, regardless of how many better sites there are. Clearly, the Supreme Court would allow the "worst" site to be acceptable so long as it was developable within the context of sound land use planning.

A developer who is contemplating litigation should be able to calculate, within a reasonable degree of probability, what level of risk he is taking. He cannot undertake this calculation at all if a totally unknown variable enters the equation: after I sue, will someone come forward with "better" land and take the remedy? Will I have undertaken this effort for nothing based on a circumstance wholly out of my control and one which I could not reasonably foresee or calculate?

The answer is obvious. The Supreme Court wanted plaintiff-developers to sue. It is relying on them to do so to implement the mandate. The first in should be the first considered for the award. There is nothing anathema about the rush to the court house door. The "rush" is consistent with Mt. Laurel II, and the Court has built in standards to protect defendants from unsound development.

Re: Cranbury Land Co. v. Cranbury Tp.

The first in, under normal circumstances[1], should be the first considered for relief for its full development up to the full fair share. The next in should then be considered and so forth. No consideration should be given to the relative merits of the sites. Each should stand alone and be considered only under the standards set forth by the Supreme Court. Once the fair share is exhausted, no other relief should be granted.

Thus, potential litigants can evaluate their chances. If someone has already begun litigation, the second can evaluate their site, their proposal, the potential fair share and municipal compliance. All of these are "known" factors and can form the basis for a reasoned judgment by a potential litigant. All of these are completely consistent with the Supreme Court's opinion and none will undermine its efficacy.

There is no reason to adopt any other standard. The negative effects of the builder's remedy were considered by the Supreme Court and rejected. Builders who pursue the remedy, consistent with the principles outlined by the Court, and are "entitled" to relief should get the relief in the order that they litigated. The complex standards set forth in other briefs are ridiculous adjuncts to what the Supreme Court intended as a simple analysis. The "first in" standard will do no disservice to Mt. Laurel II, is fully consistent with the principles set forth therein, is fair to the defendant and fair to the plaintiffs. Most importantly, it presents a readily analyzable standard for pre-complaint evaluation by a potential litigant. For the foregoing reasons, it should be adopted by the court where relevant to awarding the remedy.

Respectfully submitted,

CARL S. BISGAIER

CSB:emm
cc: all counsel of record

---

[1] Two such circumstances come to mind. The first is evident in the Cranbury case where Cranbury Land Company has had an extensive prior history of involvement seeking relief for lower income housing. In fact, Garfield was first to litigate under Mt. Laurel II. Cranbury Land Company was second, but its prior history might suggest its being considered first. In any event, the Cranbury fair share is such that that is irrelevant here. The second circumstance is where a potential litigant is actively negotiating with a municipality in good faith when another developer sues. If the first is ultimately forced to sue and does so expeditiously, then it should be given priority over the first one in.