

re: Cranberry

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Internal memo

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ML000028L

To: Cranbury Team

From: Mark Warshauer

Date: ~~XX~~ 3/4/85

Re: Distinguishing cases cited in letter brief by Toll Brothers.

The flexibility on the intervention of additional builders as plaintiffs in Mount Laurel II litigation does not extend to the facts applicable to Toll Brothers attempt to intervene. Toll Brothers attempts to intervene in an action where three builder-plaintiffs have been involved fully in the fair share stage of the litigation in addition to the builder's remedy stage. Furthermore, if the three builder-plaintiffs receive builder's remedies, their developments will (substantially?) ~~xx~~ fulfill the fair share requirement in Cranbury.

There have instances where the court in special circumstances has treated intervention of additional builders flexibly. In Mount Laurel II, Davis Enterprises was awarded a builder's remedy in Mount Laurel. The Supreme Court stated that although Davis did not institute the suit and thus the primary reason for granting the builder's remedy, encouraging Mount Laurel suits by developers, was not present in their situation, other factors compelled the court to award them a builder's remedy. Those factors were (1) Davis proposed a mobile home park which the court noted would provide a significant number of low income housing (2) the site chosen was particularly suited for mobile homes, and (3) after ten years of litigation the court felt that something be built for resident and non-resident lower income housing. Mount Laurel II, at A.2d. 467.

Another example of flexibility occurred in the case, Urban League v. Township of Mahwah, Docket No. L-17112-71 (Law Div. August 1, 1984). In that case the only plaintiffs involved in the litigation for the decade preceding ~~xxxx~~ the decision in Mount Laurel II was the Urban League and three individual plaintiffs. No builder plaintiffs were involved. One builder was allowed to intervene prior to the fair share hearing. At that hearing the fair share for the municipality was determined to be 469 low income units and 230 moderate income units. Seven additional developers at that point successfully intervened in the action. Clearly ~~xx~~ more than one builder was required for the expedient construction of the town's fair share.

In Morris County Fair Housing Council v. Boomton Township, 197 N.J. Super. 359 (Law Div. 1984) the court addressed ~~the~~ the issue of the rights of builders not part of a settlement agreement between one builder-plaintiff and a municipality. The court held that when such a settlement is made the municipality's ordinance pursuant to the settlement is deemed to be in compliance with Mount Laurel II standards. The policy behind this is to encourage settlements and save plaintiffs and municipalities high legal expenses. A builder whose property is not rezoned by the settlement and is not a party to the settlement has limited recourse. In footnote 3 on page 373 the court stated that for a

builder to challenge the settlement it would have to show that the rezoning was due in substantial part to its efforts in the litigation. The builder would have to show substantial contributions of time and resources. This recourse applies to a full party in the litigation and to non-parties alike.

Special circumstances consistent with Davis and the Mahwah case do not exist regarding Toll Brothers. The existence of three builder plaintiffs who would satisfy the fair share requirements defeats Toll Brothers attempts to intervene on the basis of those cases. *Furthermore, those plaintiffs were fully involved in the fair share stage of the litigation.*

4 Morris County case is cited as an example of flexibility. That case dealt with a specific issue not present in Cranbury.