

Garfield + Co. v. Cranbury Twp 3/4 (1985)

letter

Memo in ~~support~~ support of Garfield + Co.'s

Cross-motion for an order declaring it entitled to first priority in award of any builder's remedy

+ letter requesting Cranbury Land Co. to join<sup>in</sup> said ~~motion~~ motion.

4 pgs

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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 08754Re: 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 cross-motion for an order declaring it entitled to first priority in the award of any builder's remedy in the above captioned action. By its letter memoranda dated January 23, 1985 and March 4, 1985 filed in support of its application for a builder's remedy, Garfield & Company has already presented to this Court the factual and legal basis for its entitlement to a builder's remedy in the above captioned action. By this letter memorandum Garfield & Company will present to this Court the factual and legal basis for its right to a first priority in the award of a builder's remedy.

The issue of priorities among builder's remedy plaintiffs arises if the development capacity of the properties owned by the various builder's remedy plaintiffs is in excess of the number of units which must be constructed to reach a municipality's fair share as ordered by the court. Such a situation can arise either because (1) the capacity of the builder's remedy plaintiffs' properties exceeds the gross fair share awarded by the court or (2) the capacity of the builder's remedy plaintiffs' properties exceeds the phased fair share as ordered by the Court. Faced with the issue of ordering priorities among builders' remedy plaintiffs' in an action brought against Franklin Township, this Court developed a four step test. Utilizing this test, it is unnecessary to advance past the second step to conclude that Garfield & Company is entitled to a first priority builder's remedy. J.W. Field Company, Inc. v. Township of Franklin, Docket No.: L-6583-84 P.W. (January 3, 1985).

Step one in the analysis created by this Court requires that the builder's remedy priority applicant has participated in the compliance stage of the litigation. This, Garfield & Company has done. Step two requires a

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The Honorable Eugene D. Serpentelli, A.J.S.C.  
Letter of March 4, 1985  
Page 2.

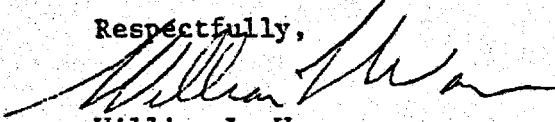
bifurcated inquiry:

1. Is the property of the builder's remedy plaintiff significantly within the growth area.
2. Was the builder's remedy plaintiff the first builder's remedy plaintiff to have filed a complaint.

The answer to both of these inquiries with respect to Garfield & Company is indisputably "yes". Garfield & Company is the only builder's remedy plaintiff in the instant case which has all of its land located within that portion of Cranbury designated by the 1980 State Development Guide Plan as Growth Area. Compare ¶2a3b of the March 16, 1984 Pre-Trial Order in this case with ¶¶2a4b, 2a6b and 2a7b. In fact, all of Garfield & Company's property in Cranbury is actually located within the Growth Area designated in the Department of Community Affairs' January 1981 concept map; a map which significantly reduced the portion of Cranbury designated as Growth Area. Id. at ¶2a3b. It is also true that Garfield & Company's complaint in this action was filed more than two months before the next complaint filed by any of the prospective builder's remedy plaintiffs.\* Indeed, both Cranbury and its Planning Board had filed answers to Garfield & Company's complaint before any other prospective builder's remedy plaintiff had even filed a complaint.

Applying the test set out by this Court in the Franklin Township case, first priority among builder's remedy plaintiffs must be awarded to Garfield & Company. Even should this test be modified to take into consideration the preference of the municipality with respect to which builder's remedy plaintiff's property should be developed, the prior zoning of the builder's remedy plaintiff's property or the ownership interests of these plaintiffs, Garfield & Company is still entitled to first priority.\*\* An order should therefore issue declaring Garfield & Company entitled to first priority among the builder's remedy plaintiffs.

Respectfully,

  
William L. Warren

WLW/st

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- \* Garfield & Company ---- September 7, 1983  
Cranbury Land Co. ---- November 10, 1983  
Lawrence Zirinsky ---- December 20, 1983  
Toll Brothers ---- January 26, 1984

- \*\* Trial Brief of Plaintiff Garfield & Company dated May 1, 1984.

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Rec'd 1/29/85

CARL S. BISGAIER  
LINDA PANCOTTO

January 28, 1985

HONORABLE EUGENE D. SERPENTELLI, J.S.C.  
Ocean County Court House  
CN 2191  
Toms River, New Jersey 08754

Re: Cranbury Land Company v. Cranbury Tp.  
Garfield Motion for Builder's Remedy

Dear Judge Serpentelli:

I am in receipt of Mr. Warren's papers on behalf of Garfield & Co. seeking an order relating to the builder's remedy. Please accept this letter in lieu of brief on behalf of Cranbury Land Co. joining in said motion and seeking identical relief.

As Mr. Warren points out, Garfield & Co. has clearly satisfied the first two criteria for a builder's remedy; i.e. a showing of non-compliance and an agreement to provide a substantial amount of lower income housing. Cranbury Land Co. stands on equal footing.

Mr. Warren further discusses the last criterion; i.e. that the proposed development will not create substantial environmental degradation. He relies on positions taken by the defendant and its consultants that a density of five (5) units per acre is appropriate on the site. Thus he is simply relying on the municipal position as to a proper density and is offering an estoppel theory.

Presumably, even under Mr. Warren's theory, the Township could argue against any greater density (which they have). The Township's position as to Cranbury Land Co.'s land has been not to rezone it; however, it is zoned for residential use at a density which the Township has approved.

Therefore, Cranbury Land Co. is also entitled to the relief sought by Mr. Warren for his client; that is, a builder's remedy subject to further judicial review if Cranbury Land Co. wants a greater density.

January 28, 1985

Re: Cranbury Land Company v. Cranbury Tp.  
Garfield Motion for Builder's Remedy

While I am not sure this gets us much further than where we are now, I just want it to be clearly understood that both plaintiffs are entitled to similar relief. My recollection of the Garfield proposal is for a development at far greater densities than now proposed by Cranbury. The same is true of Cranbury Land Co. If either party seeks approval of densities not agreed to by the defendant (which we do), the matter is still subject to a hearing on the extent of the builder's remedy.

Mt. Laurel II contemplates a review by the court of a specific concept plan for the site when considering a builder's remedy. If Garfield intends to submit one consistent with the defendant's proposed compliance programs (disregarding phasing), the defendant certainly must be estopped from challenging it on environmental grounds. However, I do not understand that to be the case.

No oral argument was requested by Mr. Warren. I do request it and suggest a telephone conference if possible to resolve this issue and also procedures for completing the trial stage of this litigation.

Respectfully yours,

  
CARL S. BISGAIER

CSB:emm

cc: all counsel of record