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Urban League Plaintiffs Memorandum of Law Concerning Builder Remedy Priorities

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-MIDDLESEX COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

v.

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

Defendants.

Docket No. C 4122-73

Civil Action

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# URBAN LEAGUE PLAINTIFFS MEMORANDUM OF LAW CONCERNING BUILDER REMEDY PRIORITIES

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The present litigation against the Township of Cranbury lias revealed serious probl^ with the builder's remedy, occasioned by the presence of niulMple builder plaintiffs who claim a willingness to provide low amf moderate income housing units far in excess of Cranbury's probable fair share obligation. This problem is not addressed, let alone resolved, by the opinion in Mount Laurel II. The Urban league plaintiffs submit that this problem must now be faced by this Court and that it is one which can be resolved within the spirit of the Supreme Court's decision. In summary, it is the Urban League plaintiffs[1] position that the Court must establish an order of priority among the claimants, based on an appraisal of the relative^ suitabi1ity Qf jgach proposal, and that the total number of builder plaintiffs permitted to claim the builder's remedy must be limited to those which amongst them can satisfy the municipality's fair share.

Background. This litigation was pursued through its initial trial and appellate stages without any builder plaintiffs. After Mount Laurel IJ_ affirmed the routine availability of the builder's remedy, however, several builder suits were filed against the Township of Cranbury and these suits were consolidated with the main Urban League case by order of the Court on December 15, 1983. The builder suits were filed in the following order:

1. (September 7, 1983) Garfield and Company, seeking relief from cost-generating restrictions in the PDHD zone, including relief from

vtfee transferrable development credit system, in order to construct approximately *2QQQ* units, of which 15-20% would be for low ^tnd moderate income households. Garfield owns 220 acres, east of the South River Road and west of the New Jersey Turnpike.

2. (November 10, I983) Cranbury band Company, seeking rezoning of land partially within and partially without the growth zone, and relief from the TDC system, in order to construct an unspecified number of housing units, of which a "substantial" number would be for low and moderate income households. Cranbury Land owns 140 acres, south and west of Cranbury village, along Old Trenton Road.

3. (December 20, 1983) Lawrence Zirinsky, seeking rezoning of land partially within but largely without the growth zone, and relief from the TDC system, in order to construct "a reasonable amount" of low and moderate income housing, subsidized as part of a planned development that would' also include extensive non-residential uses. Zirinsky holds options to purchase approximately 1800 acres, in the northwestern portion of Cranbury extending along the PIainsboro Road.

In addition, in February 1984, the Court permitted consolidation of a further action brought against Cranbury by Toll Brothers, Inc., on the condition that Toll Brothers not participate in pre-trial discovery or the methodology trial, and be bound by the results thereof.* Toll Brothers land is located northwest of Cranbury village, wholly in the limited growth zone.

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Plaintiffs concentrate in this memorandum only on the circumstan--

eranbury's fair share obligation is in the range of 820 units. The court-appointed expert's final report, dated April 2. 1984, recommended a fair share of 822 units. The Urban League Plaintiffs expert, in his December, 1983 report, concluded that the obligation was 577 units, although this number would increase somewhat under changes in methodology testified to more recently at trial. The township's expert recommended a fair share number of 627 units in his March 19, 1984 report. Although the number of low and moderate income units offered by the four builders is imprecise, it is obviously in excess of any of these fair share opinions.

As a result of this disparity between the number of units for which the builder's remedy is claimed and the number of units which Cranbury can be required to accomodate as a matter of constitutional obligation, it has been impossible to undertake meaningful settlement discussions in this case. So long as each builder is entitled to pursue its builder's remedy claim as of right, any proposed solution that the township could reasonably have accepted would have been in a numerical range that required disregard of the claim of one or more of the builders, and the losing builder would have been free to pursue its claim at trial and on appeal. Thus, there could be no certainty

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ces of the builder's remedy claims against Cranbury. It should be noted, however, that late interventions have occurred as to Monroe Township and Piscataway Township, and the resolution of the Cranbury situation would presumably affect the interests of other townships and other builders as well.

that the township's obligation was truly fixed, and all parties would be compelled to participate in the full trial, thus destroying the incentive to settle. Indeed, although there a rough tmderstanding arnong the parties as to what a reasonable settlement would, in the abstract, have entailed, there has been no settlement to this late date in the trial.

This memorandum of Law is sumitted by the Urban League plaintiffs to assist the Court in establishing a general mechanism for resolving priorities amongst buiTders, applicable not only to this case but as a general guide to future litigation of this type. Even though the Court has indicated that the issue need not be resolved immediately in the present 1itigation, plaintiffs submit that a general understanding of this complex problem would assist all concerned to conduct the remaining aspects of the Cranbury trial most effectively. To this end, the Court is urged to set argument on the issue of law (although not on the application of its ruling to specific suitability issues) as soon as possible.

The builder's remedy. The Supreme Court's general treatment of the builder's remedy issue in Mount Laurel II was quite brief. See 92 N.J. 278-81, 456 A.2d 390, 452-453. The heart of the Court's conclusion was its decision that the remedy should be generally available to prevailing plaintiffs, rather than a "rare" occurrence as it had previously held in Oakwood at Madison v. Madison Township, 72 N.J. 481, 371 A.2d 1192 (1977). Although the Court emphasized that the use of

the builder's remedy as a "threat" to the municipality would not be condoned, it did regard the remedy as essential to maintaining a significant level of Mount Laurel litigation, as a reward to the plaintiff who pursued that litigation, and as a mechanism to insuring that low and moderate income housing actually got built.

The court indicated a number of significant limitations on the availability of the builder's remedy, in addition to disqualifying builders who used it as a threat to obtain non-Mount Laurel concessions. The amount of lower income housing included within a builder's remedy must be "substantial," as found by the trial judge; the builder's site must not violate "environmental or other substantial planning concerns;" and the specifics of the remedy are to be worked out by the remedial master in close consultation with, among others, the defendant's planning board.

The Court also indicated arguments that could not be used to defeat the builder's remedy:

> "We emphasize that the builder's remedy 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 or that the litigation be intensive." 92 N.J. at 280, 456 A.2d at 452.

The builder's remedy was also discussed by the Court in its specific resolution of four of the six cases before it, although in each of the four cases there was only one builder and no apparent doubt that the builder's contribution would fall within the fair share number that would ultimately be found.

In Mount Laurel itself, the Court concluded that the intervenor, Davis Enterprises, was entitled to a builder's remedy because it was offering to build at least 20% low and moderate income mobile home units, using Section Eight subsidies, on a site plainly suited to such development. 92 N.J. at 307-09, 456 A.2d at 467. The only real problem perceived by the Court was that Davis was not a "typical" builder-plaintiff since it had intervened long after the suit began. Id. at 309n.58, 456 A.2d at 467n.58. The Court acknowledged that one rationale for allowing the builder's remedy, stimulation of suit, was not present, but found this "more than outweighed by [other] reasons . . ., especially the fact that the Davis project will provide a significant amount of lower income housing." Id.

In Caputo v. Chester, the builder plaintiff was denied a builder's remedy because of the finding that its environmentally-sensitive site was "unsuitable" for development at all. The Court went to some lengths to state the burden which Chester had to *carry* on this issue, emphasizing that the builder's remedy would not be denied "simply [because] there were better places in Chester for lower income housing." Id. at 316, 456 A.2d at 471.

In Glenview Development Company v. Franklin Township, the Court also denied the builder's remedy, because the township, wholly outside the SDGP growth area, was found to have no fair share obligation other than to provide for its indigenous need. Even as to the latter, the Court held that a builder's remedy would be inappropriate since the

builder's complaint sought only to challenge the regional need obiigation. 21* at 321, 456 A.2d at 474. This uncharacteristically narrow holding as to the indigenous need underscores the Court's concern about sound planning principles, and its unwillingness to disregard those concerns where unnecessary to do so.

Finally, in Round Valley v. Township of Clinton, the jourt again found that a builder's remedy might be appropriate, but indicated more^ fully jTOW guestions of appropriateness should be det^nnijTed. ('First*, the court made clear that lower income housing had to be actually provided, not just "least cost" housing, and that meeting this threshhold requirement must be proven to the satisfaction of the trial court. 92 N.J. at 330-31, 456 A.2d at 479. (£econjily, the Court indicated that the builder should be allowed to develop its specific plans for the use of the site, and that the Court should then determine the environmental suitability issue, again with emphasis that the existence of a better site would not in and of itself defeat the builder's claim.

Multiple builders' claims on the builder's remedy. Because the Court in Mount Laurel /_ was confronted only with single builder's remedy claims, it did not need to address specifically the type of situation which has arisen in the Urban League case. The Supreme Court's treatment of the builder's remedy technique suggests, however, that it was not unmindful of sound pl annjng considerations, and that it was prepared to depart from the optimal planning solution only to the extent necessary to achieve Mount Laurel results that could not otherwise be achieved./ Thus, its emphasis was on reward for bringing

litigation and for actually building low and moderate income housing

UJVTtS.

To thsse criteria •*•- sound planning, litigation incentive, -am! housing pRpteMon •—• owe further ^ftsiteration should be added. Although tfe Court did not address tfche question of excess building capacity at all, it did emphasize clejLiily that a municigajity[f]s constitutional obligation extends only to the limit of its fair share:

> Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the Mount Laurel doctrine requires it to do no more. For instance, a municipality having thus complied, the fact that its land use regulations contain restrictive provisions incompatible with lower income housing . . . does not render these provisions invalid under Mount Laurel. . . . Mount Laurel is not an indiscriminate broom designed to sweep away all distinctions in the use of land. 92 N.J. at 259-60, 456 A.2d at 442.

This limitation on the reach of the Mount Laurel doctrine strongly suggests that the builder's remedy must be numerically limited to the municipality's fair share obligation. When read in conjunction with the Supreme Court's emphasis on results, however, it also suggests that up to the point where the fair share obligation is satisfied, multiple builder's remedies should be permitted. The remedy allowed to Davis Enterprises in the Mount Laurel case, based on its abilty to provide actual housing, illustrates this point. There, the court^was, prepared to ignore the litigation incentive rationale ijL^jg^^j[0] achieve housing in place; similarly, in the multiple builder

situation, there is no need to encourage litigation, since by definition other builder plaintiffs are available to do that, but the additional plaintiffs increase the likelihood that housing will be built promptly.[2]

By extension of logic, once the fair share number is reached, possibly at the time of litigation if there are enough builder plaintiffs, both the litigation incentive and housing production rationales lose their forces and the court's underlying respect for sound planning becomes crucial. Hence, it is neither inappropriate nor inconsistent with Mount Laurel II for this court to establish a priority among excess builder plaintiffs who claim the builder's remedy, so that the municipality's constitutional obligation is not exceeded.[3]

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[2]Even when the fair share number has not been exceeded, however, a builder's remedy should not be allowed to any plaintiff which is not fully consolidated for trial of the constitutional issues in the case. Toll Where considerations of timeliness, prejudice to other parties, or judicial economy dictate that a late-filing plaintiff not be consolidated, the proper solution, as has been fashioned for several parties seeking to intervene in the branch of this case against Monroe Township, is to assure that they be given site-specific consideration whejTjmd if the remedy stage is reached. This procedure will increase the likelihood that Mount Laurel housing actually gets built, as the Supreme Court required, although to a lesser degree of certainty than when the builder's remedy is allowed. At the same time, by creating some degree of differential between those who bear the load of litigation and those who ride free, it preserves the significant incentive to the active litigants which the Supreme Court also intended. Without such a distinction, there is actually an incentive to file late, so as to minimize litigation costs.

[3]Since fair share methodology is not a precise science, even when it produces a precise number, the ceiling on the fair share obligation which plaintiffs believe should be respected need not be mechanically applied. It may well be the case that a group of builders can be given a realistic remedy (based on the 20% set-aside mechanism) that

It would be ^ossi&le, of course, to adhere to the fair share number whi le at ttie.• same time .accommodat i ng...multiple bui1 ders by what might be termed the "Solomon" solution, si icing up the *mmfeer* into as many small pieces as required to give each builder-plaintiff a participation. Th^effifr^of this, however, would be to reduce the percentage set-aside that each builder is required to provide, rather than using the 20% technique to maximize the Mount Laurel contributlon of each party.

The Urban League plaintiffs vigorously urge that the court not reduce the set-aside percentage as a means of allowing more builders to participate in the builder's remedy. Doing so is facially inconsistent with the e/mplrasis in Mount Laurel II on -substantial production of low and moderate income units as a threshhold test of the builder's remedy. More importantly, doing so is inefficient and counterproductive in the long run, because any development with a low set-aside consumes the same amount of land asa 20% set-aside, yet removes that land from the inventory that will be available to satisfy future Mount Laurel needs. The Supreme Court, with its pragmatic view of the

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will produce somewhat more than the fair share number derived from the methodology. It should be within the Court's power to make sensible adjustments of this sort, the extent of which may vary with specific circumstances. Moreover, since the presence of multiple builder claims is per se an indication of significant development pressure on a municipality, the Court should consider carefully in such a situation whether there are unique justifications for increasing the fair share beyond what the formula produces.

builder's remedy, cannot have intended that it work in such a perverse *my.*

Moreover, plaintiffs submit that it is possible to establish a mechanism vfor determining priority amongst builders, so that tfoe remedy can be awarded at 20% yet kept within the municipality's fair share. This involves two considerations --timing the finding of priority> and determining the criteria for priority. Plaintiffs submit that priorities should be established at the time of trial, and that planning suitability should be the dominant^criterion;Jn award of priority to one or more builders. For ease of analysis, these considerations are discussed in inverse order.

Priority criteria in multiple-builder cases. The availability of the builder's remedy rewards those who carry the litigation and it helps assure that Mount Laurel housing is actually built, but at the cost of significant intrusion into sound planning considerations. When these objectives can be served by any one of a number of builders, however, as is the case when the fair share ceiling has been reached, it is no longer necessary to subordinate soundj)lanning principles to the Mount Laurel goal. On the contrary, such principles, should then become the principal measure of which builder or builders are the most suitable recipients of the substantial advantages that the builder's remedy confers.

The determination of suitability must be made by the trial court, in keeping with the procedures set out in the Round Valley case, sub-

ject to timing considerations to be discussed below. In making this determination, the court may in its discretion refer the matter to the court-appointed expert for recommendation.

The Urban League pMtntiffs suffest tMt the following criteria should be considered in determining the relative suitability of each proposal:

(a.) Location in the SDGP growth area should be preferred to other locations.

(b.) Proposals most conforming to sound planning concerns should be preferred. Included in this criterion are such matters as:

- physical suitability of the site

~ suitable relationship to infrastructure

- municipal preferences, as shown by conformity to zoning ordinance and master plan criteria, provided that such criteria are themselves reasonable

- successful integration of the proposed housing into existing housing patterns so as to avoid isolation

*(cj* Relative number of low and moderate income units proposed. Generally speaking, proposals containing a 20% set aside will be preferred to those with lower percentages, and proposals exceeding 20% (such as those utilizing subsidies, or modular/manufactured techniques) will be preferred over all others.

(ay Proposals should be sufficiently detailed to determine that the low and moderate income units can actually be built at an affordable price. Complaints that promise Mount Laurel housing on paper without such a proposal should be disfavored, and proposals that are fully developed should be favored, although it should not be necessary to have plans that are as specific as those required for a subdivision or site plan application.4 The applicant's prior experience in successfully providing low and moderate income housing elsewhere can be considered, as can the degree to which the land is already assembled in the ownership of the developer.

(eJ Time of filing. All else equal, time of filing can be used to break a deadlock between comparable applicants, but this criterion should not otherwise be applied mechanically. Instead, consideration should be given to whether earlier applicants have actually borne a disproportionate share of the pre-trial work in the case, and whether there is any clear line of demarcation between one or more groups of plaintiffs who filed early and one or more who tagged along relatively close to the time of trial. These timing considerations should be modified, however, to recognize legitimate efforts that a builder-plaintiff may have made prior to filing suit to obtain municipal approvals for a suitable Mount Laurel development, so that there is not a premium on a race to the courthouse.

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4It should also be clearly understood that the completeness of the proposal goes only to the issue of priority. A builder-plaintiff need not prepare a detailed proposal prior to filing his complaint in order to be awarded a builder's remedy. The Supreme Court clearly indicated that the detailed proposal not only can but should be worked out by

The criteria set forth above are not intended to be applied mechanically. As indicated at the outset, when multiple builders claim a builder's remedy, it is appropriate to consider pJarunjT£ factors to a greater extent than when a single builder carries the entire burden of litigation* and pi aiming considerations almost by definition require sensitive analysis rether than formulaic application. For this reason, any numerical scoring system will be too crude to be workable, and since priorities will be determined at the end of the trial, there is no particular advantage to the efficiency of this type of system, as there would be at the initial trial stages. Use of an expert will ordinarily be appropriate and both court and expert should not hesitate to modify the factors suggested above or to add new ones to meet the circumstances of any individual case.

Timing the determination of priority. Ideally, a builder plaintiff should know at the time of filing whether it is entitled to the builder's remedy or not, but this ideal is hardly practicable. Until additional builders appear, the issue does not arise, and even after the field has become crowded, the substantial hearing process necessary to determine suitability may well be the heart of the trial, once a fair share methodology has been given presumptive validity. To hold a "trial" early on for the purpose of allowing some builders to

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the master in conjunction with the municipality as well as the builder, during the remedial phase of the case. See 92 N.J. at , 456 A.2d at 453.

avoid a "trial" later is obviously circular and inefficient. Thus, there seems, no choice but to delay determination of ttoe buiWer^s remedy question to the plenary trial, and to include it along with fair Share and non-compliance in the questions to be resolved by the eourt prtor to referring the case to a master.

This timing has the disadvantage of putting all the builder-plaintiffs to the risk of bearing the' costs of trial without receiving a builder's remedy, but this disadvantage is significantly less than it may initially appear. The criteria set out above are fairly concrete, and will become more so as they are applied over time. Thus, in the pre-trial stage, a builder contemplating intervention can make a realistic evaluation of its chances-and, as in any 1itigatton, decide what level of risk is acceptable to it. (In this, it should be kept in mind that the fair share number will be much more quickly determined in future cases, once a presumptive region and fair share methodology exists.)

if so, supports not much argument from originally consolidated T's

The ability of all the builder-plaintiffs to make a realistic evaluation of suitability should also facilitate settlement, because those least likely to prevail will no longer have as great an incentive to hold out for trial. Settlement at an early point in the litigation will also be encouraged, since the municipality will thereby retain maximum flexibility in rezoning its lands, and the initial builder-plaintiffs will reduce the risk to their priority that a later intervenor might bring.

Several ofeJier "tMfiig procedures bear note:

1. As at present, builder's per^dy suits agaitt^^^ a single municipality should ordinarily be consolidated, unless the general civil practice criteria for consolidation are not satisfied. A mechanical point should be establisfo&d, however, beyond which additional eonsolidations will not be permitted, because of the detriment to the orderly conduct of the trial. The 'date of the pre-trial conference should be the absolute latest cut-off point, and the court should consider establishing an earlier cut-off, keyed to the discovery schedule, at an early case management conference* After this cut-off point, prospective plaintiffs should have the more limited rights ordered by the Goart in the tori••/Hab.d consoli#atton aott&n-against the Township of Monroe.

2. Where one or more builder-plaintiffs is denied the builder's remedy, the successful applicants shall be required to obtain all necessary^ permits and commence construction within a s^ecrfjed jtiie_ period, or forfeit their rights. In this case, the court may order that the forfeited portion of the municipality's fair share obligation be satisfied by rezoning for one or more of the plaintiffs initially denied the builder's remedy, if that plaintiff's proposal remains viable.

3. Early in the litigation, through a case management order or similar vehicle, the Court should determine whether and if so when it will consider builder's remedy entitlement issues that do not go to

priwtttes *mrnnq* Mjltiple claimants. Ordinarily, such issues as a municipality's claim that the builder-plaintiff threatened Mount Laurel suit in order to obtain non-Mount Laurel relief should be resolved as early as possible, although by its nature the environmental defense should probably avteit the plenary trial.

The public interest in builder's remedy suits. As the present case demonstrates, the builder's remedy is a powerful inducement to suit, and ft is not unlikely that this holdover case-will be one of the last that has been guided more by a public interest plaintiff than a builder plaintiff. Although not strictly relevant to decision of the matter at hand, this factor should be noted in terms of future procedures.

Where multiple builder plaintiffs are present in the litigation to an extent that most or all; of the municipality's fair share ts accounted for, the court, its independent expert and the master should ordinarily have a sufficient diversity of viewpoints presented to them that the public interest will be adequately guarded. When a single builder plaintiff, or a relatively small group of builder plaintiffs carries the burden of litigation, however, it is unrealistic to expect that that party will give detailed attention to those aspects of the remedial process that do not affect its site specific relief. Thus, rezoning of additional tracts, municipal subsidization requirements and the like may not be vigorously pursued.

Of course, the court and its master can be expected to be attentive to these concerns, but the process would be better served by

having a representative of the public interest participate in these compliance proceedings. Mount Laurel cases should not be needlessly adversarial, but the broader point of view that a public interest plaintiff can bring to this litigation will help expand the court's understanding of its alternatives without becoming obstructive. Plaintiffs submit that the mixture of public and private plaintiffs in the Urban League case has proven effective and suggest that the court give recognition to this fact by noting that an entity representative of the public interest (be it the Public Advocate or an independent group) ought to be asked to participate in the remedial phase of any significant builder's remedy case in the future.

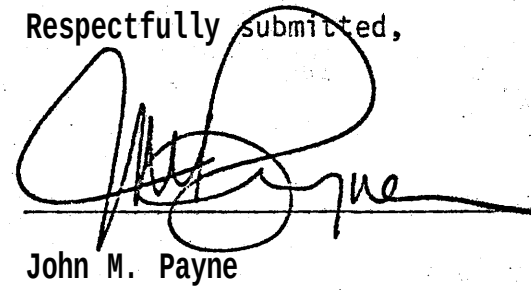
The builder's remedy in Cranbury. The Urban League plaintiffs[1] concern is with the mechanism for assigning builder priorities, so that this and other cases can be managed effectively, settlement encouraged, and housing opportunity co-exist with sensible planning. If the principles and mechanisms suggested here are adopted, it would then be more appropriate for the builder-plaintiffs, rather than the Urban League, to go forward with the specific resolution of the suitability question. However, plaintiffs reiterate their position, stated above, that the builder's remedy entitlement should not be resolved by diluting the 20% set aside standard in order to allow an excessive number of builders to participate in the remedy.

The Urban League plaintiffs concur in the position taken by the Township of Cranbury in its letter brief on this issue dated May 18,

1§84 that the question is an open one, and may properly be decided *by* the c^urt. The criteria suggested here are sufficiently obvious that the failure to articulate them earlier has not significantly disadvantaged *any party, and it has been apparent in numerous formal and informal contexts that the parties have regarded the entitlement question as one to be ultimately decided by the court at the time of trial.

Throughout its long history, and most recently in the development of a Mount Laurel II fair share methodology, the Urban League case has been the pace setter. Breaking the builder's remedy logjam in Cranbury would be a fitting contribution to this history.

Respectfully submitted,



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