

ML - Cranbury
(Morris v. Cranbury)

5 - June - 1984

Letter Brief on behalf of Garfinkl in opposition to the application
of Morris for permission to seek a builder's remedy

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PLEASE REPLY TO: PRINCETON

June 5, 1984

The Honorable Eugene D. Serpentelli, J.S.C.
Superior Court of New Jersey
CN 2191
Toms River, New Jersey 08754

Re: Morris v. Township of Cranbury
Docket No.: L-54117-83 P.W.

Dear Judge Serpentelli:

Please accept this letter in lieu of a formal brief on behalf of Garfield & Company and in opposition to the application of Joseph and Robert Morris for permission to seek a builder's remedy against Cranbury Township or to amend their Complaint to include a request for relief in the form of a builder's remedy.

Having commenced an action which explicitly failed to allege that Cranbury's zoning ordinance did not provide for its fair share of low and moderate income housing; having commenced an action which explicitly failed to seek a builders remedy; having failed to retain experts and to present expert reports on the issues of compliance and fair share; having failed to participate in the trial of these issues; and, finally, having subscribed to a pre-trial order dated March 16, 1984 characterizing its suit as a prerogative writ action seeking to invalidate Cranbury's zoning ordinance on non-Mount Laurel grounds, Messrs. Morris now seek permission to apply for a builder's remedy. Such permission should not be granted for three reasons:

1. Joseph and Robert Morris cannot be said to have prevailed on the issue of compliance.
2. Cranbury has not been given an opportunity to challenge Joseph and Robert Morris' right to a builder's remedy or the grounds of exhaustion of remedies, standing or on the grounds of environmental and planning considerations.

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3. * Joseph and Robert Morris have presented no reason that equity or justice would require granting them permission to amend their Complaint, thereby restructuring this case, after trial on the issues of fair share and compliance has been completed.

1. FAILURE TO PREVAIL ON THE ISSUE OF COMPLIANCE:

A builder's remedy is to be granted only where the plaintiff developer "vindicates the constitutional obligation [to provide to low and moderate income housing] in Mount Laurel - type litigation." South Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 218 (1983). See id. at 270. However, Joseph and Robert Morris did not retain experts on this constitutional issue. They did not submit expert reports. They did not attend any depositions or make experts retained by them available for deposition; and, finally, they did not participate in the trial of the issues of fair share and compliance. Under these circumstances, it can hardly be claimed that they have vindicated "the constitutional obligation in Mount Laurel - type litigation." Id. at 218. They are, therefore, not entitled to a builder's remedy and are certainly not entitled to claim their right to such a remedy more than a week after the completion of the constitutional phase of the trial in this consolidated action.

2. FAILURE TO PARTICIPATE IN THE BUILDER'S REMEDY PORTION OF THE TRIAL;

The trial of this consolidated action not only included presentations on the issues of fair share and compliance but also presentations on the right to a builder's remedy. The Township of Cranbury specifically challenged, through testimony and legal argument, the right of Zirinsky, Cranbury Land Company and Toll Brothers to a builder's remedy. Grounds urged by Cranbury included, inter alia, standing, exhaustion of remedies and land which was inadequate for planning or environmental reasons. Having chosen not to participate in this or any other stage of the trial, Messrs. Morris should not now be permitted to restructure their Complaint and this case, requiring a reopening of the trial in this consolidated action on the builder's remedy issues.

3. FAILURE TO SHOW THAT EQUITY OR JUSTICE REQUIRES THE RELIEF SOUGHT;

This is not a situation in which the movant can argue that he was legitimately unaware of the existence of the consolidated action and should therefore be permitted to participate in the action as a builder's remedy plaintiff, even though the constitutional issues have already been tried. Messrs. Morris were plaintiffs in this consolidated proceeding from the very beginning. They made the affirmative choice not to allege a violation by Cranbury of the Mount Laurel constitutional mandate. At no time prior to or even during the trial of this action did they seek to amend their Complaint to add Mount Laurel claims. Indeed, the Pre-trial Order in this case, signed by

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counsel for Messrs. Morris on March 16, 1984 specifically recites that the Morris Complaint is a prerogative writ action "seeking to invalidate the zoning ordinance on non-Mount Laurel grounds. [1C], Under these circumstances and given the fact that the trial of this case on the issues of fair share, compliance and entitlement to a builder's remedy has already been completed, Messrs. Morris should not now be permitted - without any justification whatsoever - to restructure this case to make themselves Mount Laurel plaintiffs.

I am sending a copy of this letter memorandum to all counsel on the annexed service listing.

Respectfully,

A handwritten signature in black ink, appearing to read "William L. Warren", written over the typed name below.

William L. Warren

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