

ML - Rendeiro, Peck, + How-Bilt Inc.  
v. Lincoln Park

Oct. 10, 1985

Affidavit of Susan Small

Pgs. 6

UL 000713V

SCANGARELLA & FEENEY, ESQS.  
565 Newark-Pompton Turnpike  
Pompton Plains, New Jersey 07444  
(201) 839-5100  
Attorneys for Defendant,  
Borough of Lincoln Park.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION:MORRIS/MIDDLESEX  
COUNTIES  
DOCKET #L-6001-78 P.W.

JOSEPH RENDEIRO, GEORGE C. :  
PECK and HOV-BILT, INC., a :  
New Jersey Corporation, :

Plaintiffs, :

CIVIL ACTION

vs. :

AFFIDAVIT

BOROUGH OF LINCOLN PARK, a :  
Municipal Corporation :  
located in Morris County, :

Defendant. :

STATE OF NEW JERSEY )  
 ) ss.:  
COUNTY OF MORRIS )

SUSAN SMALL, of full age, being duly sworn according to  
law upon her oath, deposes and says:

1. I am the Director of the Lincoln Park Department of  
Planning and Building and have served in this capacity since  
June of 1982.

2. My office is responsible for processing development  
review applications and with the supervision and assistance of  
the Borough Planning Consultant, Planning Association of North  
Jersey and the Borough Engineer, we review applications for  
completeness and ordinance compliance and make recommendations  
to the Boards.

3. At the time the Complaint in this action was filed, Hov-Bilt, Inc. had pending before the Planning Board, an application for development of a 360 unit condominium housing project, including 72 Mt. Laurel Set-Aside units.

4. The Phasing Ordinance, which is the subject of this litigation, establishes a Borough-wide limitation upon development approvals in all Set-Aside Zones, including the Hov-Bilt site. In particular, the Phasing Ordinance prohibited the Planning Board from granting approval to more than 600 units (120 Set-Aside units), through December 31, 1986, and in a subsequent Phasing allocation under the same Ordinance, the Planning Board was prohibited from approving more than 890 units (178 Set-Aside units) through December 31, 1988.\*

5. The Phasing Ordinance further established a priority ranking if more than one application for development had been submitted and had not yet received preliminary approval and such application would bring the total of Set-Aside units in all zones to more than the limitation numbers, that is, either a total of 600 units through December 31, 1986 or 890 units through December 31, 1988. In such event the Planning Board was then authorized to prioritize pending applications based upon certain factors; after which a ranking determination would be made, and the lesser ranked applications would be subject to dismissal without prejudice.

\*Phasing Ordinance hereto annexed as Exhibit "A".

6. Pursuant to the negotiated Settlement and Order of Compliance of the Court, entered on October 31, 1984, Lincoln Park had already granted preliminary and final site plan approval to Society Hill at Morris II, Inc., a Hovnanian development, authorizing the construction of 276 condominium units, including a 56 Mt. Laurel Set-Aside units.

7. In addition to the Hovnanian approval previously granted there was pending before the Planning Board at the same time as the Hov-Bilt application was being considered, an application for development of a 384 unit project, including 77 Mt. Laurel Set-Aside units by Custom Living Communities. The combined total of the Hov-Bilt and Custom Living projects was 744 units, including 149 Mt. Laurel Set-Aside units. The combined total of Custom Living and Hov-Bilt, added to the previously approved Hovnanian II project, amounted to 1020 units, including 205 Mt. Laurel Set-Aside units.

8. Given the total number of units approved and the total number of units then pending for consideration, the ranking, phasing and prioritizing provisions of the Phasing Ordinance were triggered.

9. In the exercise of its responsibilities under the Phasing Ordinance, the Planning Board conducted public hearings which resulted in the assignment of a first priority ranking to the Custom Living development. There was, however, no formal dismissal action of the Hov-Bilt application because at about the time of the public hearings, Lincoln Park Borough was informed by the Public Advocate of his disapproval of certain aspects of the Phasing Ordinance.

10. In response to that partial disapproval, on September 9, 1985, the Borough adopted a Limitations of Development Ordinance\*, which had the effect of repealing the title, interim phasing limits (600 units, including 120 Mt. Laurel Set-Aside units' limitation as of December 31, 1986), and ranking provisions of the Phasing Ordinance. The Limitations Ordinance, now in effect, limits the number of multi-family units to be constructed, pursuant to Lincoln Park's Negotiated Settlement and Supplemental Agreement, to not more than 890 units over-all, including 178 new Set-Aside units in the GA-S and TH-S Set-Aside Zones. This limitation is accomplished by the provisions that the Planning Board shall not grant approval for more than the above stated number of units, through December 31, 1990.

11. It should be noted, however, that the Limitations Ordinance provides for no interim approval for a lesser number of units at an earlier date, such as existed in the Phasing Ordinance. The Limitations Ordinance also provides that development applications shall be considered and acted upon on chronological order of being declared complete, except as may be modified by extensions of time. When preliminary site plan approvals have been granted for 890 units, including at least 178 Set-Aside units, the Planning Board is required to deny further site plan approvals for Set-Aside development, and shall not process further applications.

12. In effect, the Limitations of Development Ordinance constitutes a repealer in the title and scope of the \*Limitations Ordinance hereto annexed as Exhibit "B".

Phasing of Development Ordinance and specifically repeals the following elements thereof:

1. Interim Phasing Limitation, effective December 31, 1986, of 600 over-all, 120 Mt. Laurel Set-Aside units.

2. Ranking.

3. Prioritization.

13. Even in advance of the adoption of the Limitations Ordinance, the Borough adopted a Resolution of Intent to introduce for consideration at a Public Hearing, a Limitations of Development Ordinance, and based upon the authority of that Resolution and the Governing Body's subsequent introduction of the Limitations Ordinance, the Planning Board determined that it would continue to review and process the Hov-Bilt application for development approval notwithstanding the secondary ranking status previously accorded Hov-Bilt's application as a result of the ranking and prioritization under the Phasing Ordinance.

14. It should be specifically noted that no dismissal action was taken of the Hov-Bilt application as a result of the application of the Phasing Ordinance.

15. In full knowledge of the intent of the Governing Body, the Planning Board continued to process the Hov-Bilt application. A Public Hearing thereon was held on September 5, 1985 at which time the application was denied, and on October 3, 1985 a Resolution of Memorialization denying final site plan approval was adopted. (See Exhibit "C" hereto annexed.)

16. Briefly, the basis for the Planning Board's denial action was for a). non-compliance with storm water management

standards; b). insufficient proof to warrant the grant of a waiver of the fill limitation requirements; c). negative recommendations from the Morris County Planning Board; d). questions raised by the USF & WL Service regarding the feasibility of granting a Stream Encroachment Permit by the Department of Environmental Protection; e). failure by the applicant to provide an acceptable plan for the removal of large amounts of muck and replacement with suitable fill; and f). failure by the applicant to provide an acceptable plan for the transportation of such soil from the site. The denial was further based upon Hov-Bilt's failure to prove that the project would not cause increased flood heights, additional threats to the public health, safety and welfare, and the possibility that the project would substantially impair the appropriate use of adjoining property. It also left unanswered the question of the public safety by virtue of the fact that the development was located within the prohibited area as defined by the Airport Hazard Safety Act of the State of New Jersey.

17. Notwithstanding that the Planning Board requested the applicant to consider reduction in the size of its proposed development so as to minimize and reduce the negative impact set forth in Paragraph 16. above, no modification action was taken or otherwise proposed by the applicant and the Board was constrained to deny such site plan approval.

Sworn to and Subscribed  
before me this 10th day  
of October, 1985.

*Janice N. Troiano*  
\_\_\_\_\_  
JANICE N. TROIANO  
A Notary Public of New Jersey  
My Commission Expires May 22, 1989

*Susan Small*  
\_\_\_\_\_  
SUSAN SMALL