ML Cranbury 21-Feb-1985

Memorandum of Law in Lieu of formal brief in support of Toll Brothers' motion to be declared eligible for a builders' remedy.

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See Clarke Cranbury brief

February 21, 1985

FILE NO.

Honorable Eugene D. Serpentelli
Superior Court of New Jersey
Ocean County Courthouse - 2191
Toms River, New Jersey

Re: Urban League of Greater New Brunswick v.
Borough of Carteret - Cranbury Township Litigation

Dear Judge Serpentelli:

Please accept this Memorandum of Law in lieu of formal brief in support of Toll Brothers' motion to be declared eligible for a builder's remedy. Since Your Honor is well aware of the facts and procedural history of this matter, we have omitted same from this letter memorandum.

In Your Honor's January 3, 1985 Opinion in the consolidated Franklin Township cases, Your Honor held that a plaintiff who did not participate in demonstrating ordinance non-compliance and was joined only for the purpose of participating in the court ordered revision process, was not entitled to a remedy or to participate in the prioritization scheme. See slip op. at page 13-14. Toll Brothers contends that it should not be barred from a builder's remedy based upon this holding in the Franklin decision because of its good faith reliance on the pre-existing law. See, Minza v. Filmore Corp., 92 N.J. 390-397 (1983). Additionally, Toll Brothers requests this Court to use its discretion to limit the

unfair surprise which would result from application of the Franklin principles to the Cranbury cases. Since the rule of law therein stated is novel, Your Honor has such discretion:

> "The Court is empowered and justified in confining the effect of a decision of first impression or of novel and unexpected impact to prospective application if considerations of fairness and justice related to reasonable surprise and prejudice to those affected, seem to call for such treatment. Oxford Consumer Discount Co. v. Stefanelli, 104 N.J. Super. 512, 520 (App. Div. 1969), aff'd, 55 N.J. 49 (1970).

In Mount Laurel II, the Supreme Court held out the builder's remedy as an incentive to litigation, declaring the remedy to exist when: "a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of low income housing ..." Mount Laurel II at 279. Although the Court did not characterize what it meant by success in litigation, it did provide the following rationale for the award of a builder's remedy:

> "...these remedies are (i) essential to maintain a significant level in Mount Laurel litigation and the only effective method to date in enforcing compliance, (ii) required by principals of fairness to compensate developers who have invested substantial time and resources in pursuing such litigation; and (iii) the most likely means of ensuring that low income housing is actually built. Mount Laurel II at 279. (emphasis ours).

In Mount Laurel II, the Supreme Court did not have cause to establish rules for prioritization of builder's remedies in the event of multi-plaintiff litigation. The Court also did not establish any rules for evaluating the timeliness of a builder-plaintiffs' suit. In fact, the only builder-plaintiff granted the remedy in the consolidated Mount Laurel II actions was Davis Enterprises - a developer who filed suit five years after the original Complaint by Southern

See ML II

Burlington N.A.A.C.P., and more significantly, after Mount Laurel Township had adopted its ninety day compliance ordinance. 92 N.J. at 292.

In two post Mount Laurel II decisions, trial courts have taken a flexible approach to evaluating whether a developer had succeeded in exclusionary zoning litigation. In Morris County Fair Housing Council v. Boonton Township, Docket No. L-54599-83 P.W. (decided May 25, 1984 and approved for publication December, 1984), Judge Skillman required a developer-litigant challenging a settlement which allegedly brought a defendant-municipality into compliance without rezoning that litigant's property to demonstrate that:

> "its law suit played a substantial part in bringing about the rezoning ... embodied in the proposed settlement and that consequent approval of the settlement would be inconsistent with the court's "decision to expand builder's remedies", in order to "maintain a significant level of Mount Laurel litigation, "to compensate developers who have invested substantial time and resources in pursuing such litigation" and to ensure that "low income housing is actually built". Mount Laurel II at p.279-280; slip op. at 14, n.3.

The Morris County Fair Housing Council case was in fact, a multi-plaintiff case, involving a public interest plaintiff who had filed suit in 1978, a developer who brought suit and reached settlement with the municipality and a second developer who was unable to attain a voluntary rezoning of his property.

Similarly, the Urban League of Essex County case against the Township of Mahwah involved a public interest plaintiff who filed a suit in 1972 and was joined by five developers many years later. After the case was remanded by the New Jersey Supreme Court, a Master was appointed and an

expedited fair share hearing date was set. Prior to the fair share hearing, one builder-plaintiff, Beaver Creek, Inc. was permitted to intervene, although it did not offer expert testimony during the fair share hearing that followed. See, Urban League of Essex County, et al v. the Township of Mahwah, et al, Docket No. L-17112-71 (Law Div., August 1, 1984), slip op. at 2-4. Four other developers sought intervention in the action after Mahwah offered a ninety day revision ordinance which failed to rezone their properties. slip op. at 7. After reviewing the suitability of all builder-plaintiff's properties with respect to access, topography, availability of utilities and surrounding development and zoning, the court awarded a builder's remedy to all but one plaintiff. The plaintiff not awarded a builder's remedy had property located in the conservation area on the State Development Guide Plan which contained a large amount of steep slopes, as well as the remains of a huge concrete missile launching platform, underground silos, dilapidated army barracks, etc. slip op. 98-105. Three out of four developers awarded builder's remedies in the Mahwah case did not have any substantial involvement in the case until after the compliance ordinance was adopted.

Toll Brothers is requesting, through this motion, the opportunity to establish its right to a builder's remedy by substantially participating in the ordinance revision hearing to be held before Your Honor. The fact that its law suit was only "partially" consolidated with the other suits against Cranbury Township should not be a deciding factor in the question of builder's remedy entitlement because of the reasons for Toll Brothers' late filing. On January 6,

1984, Toll Brothers sent the Cranbury Township Committee and Planning Board a letter requesting a Mount Laurel rezoning, which letter enclosed proposed ordinance amendments, Master Plan amendments and a concept plan for development of its tract. On January 18, 1984, Mayor Danser sent a letter refusing Toll Brothers' request. Toll Brothers' Complaint was then filed on January 26, 1984 and consolidation was requested by Notice of Motion filed on January 27, 1984. Obviously, if Toll Brothers had acted in disregard for the Supreme Court's admonition that it should attempt to obtain relief without litigation, it could have filed its Complaint on January 6, 1984, just 17 days after the filing of plaintiff-Lawrence Zirinsky's suit on December 20, 1983. Toll Brothers should not be penalized for a delay caused by its efforts to comply with the Mt. Laurel II requirement of attempting to obtain relief without litigation.

In addition to the then existing law on builder's remedy entitlement, Toll Brothers rightfully relied on a number of events during trial which led it to believe that it had a colorable claim to a builder's remedy. First of all, during the fair share and ordinance hearing in the first phase of this case, defendants were required by the court to raise all defenses they might assert against any plaintiff's entitlement to a builder's remedy. Toll Brothers' status as a partially consolidiated plaintiff was not offered as a defense by either the defendants or the plaintiff Urban League. Your Honor denied Cranbury Township's Motion to defeat builder's remedies, and on July 27, 1984 issued a Letter Opinion which required the Master to report to the court concerning the suitability of each

builder's site "to the extent that any of the plaintiff-builders are not voluntarily granted builder's remedy in the revision process". (emphasis ours).[1]

Toll Brothers then began participating in the numerous Township hearings held in the ninety day revision process. It attended virtually all hearings, submitted ordinance amendments, a concept plan and report on its proposed development as well as numerous letters and memoranda on a variety of planning and legal issues which arose at the hearings. (See Affidavit of Louise Krinsky). Toll Brothers participated in the hearings because it believed that the February 23, 1984 Consolidation Order preserved the only remedy of any consequence to it, its right to a builder's remedy.

When was she first on notice of UL's position vis à vis Toll's?

The issues of entitlement and priority addressed by Your Honor in the Franklin decision were matters of first impression. Even so, prospective application has not been limited to novel matters but also has been applied where a decision clarifies a "murky or uncertain area of the law ... under circumstances where members of the public or public entities could be found to previously and not unreasonably relied on a different conception of the state as law." Oxford Consumer Discount v. Steffnelli, 104 N.J. Super. 521; Turner v. Aldens, Inc., 179 N.J. Super. 596 (App. Div. 1981); Willingborough Township Board of Ed. v.

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[1] The doctrine of the "law of the case" also supports Toll Brothers' request. This doctrine is predicated upon the policy that the litigation of an issue and a decision by the judge on the issue during the course of a case should preclude its further consideration. State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974). A prior Order such as Your Honor's decision denying Cranbury's Motion to preclude builder's remedies is normally considered "the law of the case" and should not be lightly modified or set aside by the court. Valle v. North Jersey Auto Club, 125 N.J. Super. 302, 307 (Ch. Div. 1973).

What about consideration

Willingborough Emp. Associates, 178, N.J. Super. 477 (App. Div. 1981). Toll Brothers urges Your Honor to apply the Franklin decision prospectively and enter the proposed Order declaring it eligible for the award of a builder's remedy.

Respectfully submitted,

Guliet D. Hirsch