

CN - Orge Farms + Greenhouses, Inc.

~ 5/1985

Twp ^{v.} Of Colts Neck

Brief for Δ, Twp of Colts Neck highlighting
aspects of trial testimony in support objecting
to granting a builders remedy to Orge, its

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ATTORNEYS FOR Defendant, Township of Colts Neck
----- : SUPERIOR COURT OF NEW JERSEY
ORGO FARMS & GREENHOUSES, INC., LAW DIVISION
a New Jersey Corporation, and : MONMOUTH COUNTY
RICHARD J. BRUNELLI, DOCKET NO: L-3299-78 PW

Plaintiffs,

-vs-

Civil Action

TOWNSHIP OF COLTS NECK,
a Municipal Corporation, : BRIEF

Defendant.

----- :
ORGO FARMS & GREENHOUSES, INC., DOCKET NO: L-13769-80 PW
a New Jersey Corporation, and :
RICHARD J. BRUNELLI, :

Plaintiffs,

-vs-

TOWNSHIP OF COLTS NECK, et als,

Defendants.

----- :
SEA GULL LTD. BUILDERS, INC., : DOCKET NO: L-3540-84

Plaintiff,

-vs-

THE TOWNSHIP OF COLTS NECK,

Defendant.

INTRODUCTION

The Defendant, Township of Colts Neck in the within memorandum will set forth a Statement of Facts drawn from the testimony in evidence elicited at the trial. In such Statement of Facts, conclusions will be drawn therefrom.

The legal issues have been briefed on several previous occasions; therefore, the Defendant Township will refer the Court to such earlier legal memoranda.

STATEMENT OF FACTS:
CONCLUSIONS DRAWN THEREFROM

The within memorandum is filed on behalf of the Township of Colts Neck at the direction of the Honorable Eugene Serpentelli. It is intended in this memorandum to highlight certain aspects of the testimony elicited at the trial by way of oral testimony, as a result of reports admitted into evidence and finally, by reference to exhibits introduced into evidence.

At the outset, attention must be given to the testimony of the Planners who testified in the trial. The Master Planner, Philip Caton, called as the Court's witness, concluded that both the Sea Gull site and the Orgo site were physically suitable for the development of high density zoning. Covering each of the points regarding access, environmental constraints, proximity to goods and services, etc., Mr. Caton concluded that both sites were well situated. However, Planner Caton concluded that the Sea Gull site was far more desirable from a planning prospective than the Orgo site for Mt. Laurel housing. The Master referred to the character of the southeast quadrant of Colts Neck, which is developed at a density of one dwelling unit for each fifty

acres and concluded that the Orgo project was grossly out of character. Mr. Caton asserted that if the Orgo site were developed, it would have a drastic impact upon the Stavola farm which shares a common boundry extending over 4,000 linear feet. Mr. Caton feared that the Stavola farm would fall to development if the Orgo project were approved. In this regard, Mr. Caton testified that the Orgo project, with its high density, threatened the entire block of land situated on the south side of Route 537, extending from the Orgo site to Swimming River Road, a distance of 3.7 miles. The planned commerical development of the Orgo site with its projected hotel, 45,000 square foot office building and 100,000 square foot office building were grossly out of character, not only with the nearby agricultural development, but also with existing commercial development in close proximity.

Mr. Caton was asked to examine the Orgo project from the perspective of the State Development Guide Plan (SDGP) and the Monmouth County Growth Management Guide (GMG). In this regard, the Planner testified that the Orgo project was grossly out of character with both planning documents. The Master was troubled with the development of the massive Orgo projects within a limited growth area and testified as to the many problems which

would arise from the granting of a builder's remedy within the limited growth area in Colts Neck which problems include, but are not limited to, frustration of the state-wide blueprint, encroachment of a large development which leapfrogs away from developed sections located both east and west of Colts Neck and into virgin territory, secondary impacts involving the spurring of growth on nearby properties, development of a large project away from areas serviced by utilities, etc. Similarly, Mr. Caton concluded that the Orgo project could not find solace in the GMG as the concept of expansion of the village area could not be used to rationalize the massive Orgo project. Particularly troubling to Mr. Caton was the need to resort to the Monmouth Consolidated Water Company to provide water to the Orgo project. Whether the water line was to be extended down Monmouth County Route 537 as proposed by the water company, or down Route 34 as suggested on behalf of Orgo, the water main extension frustrated the aims, purposes and goals of the SDGP. Similarly, whether the water line was a 36 inch line, as proposed by the water company, or a line sized solely for the Orgo project and nearby commercial development, Mr. Caton opined that such extension was firstly poor planning, and secondly, a violation of the SDGP. If the

water line were extended under either proposal, i.e. down Route 537 or down Route 34, it would drastically spur growth within Colts Neck. This is particularly so if the water line were to be extended westward on Route 537 as both the north side and the south side of the street are for the most part made up of open farmlands.

By way of contrast, Mr. Caton indicated that the Sea Gull site was located within the growth area, and adjacent to residential as opposed to agricultural development in Freehold Township. Moreover, the scale of the Sea Gull site was not as threatening as the Orgo proposal and in any case, was bounded on the east by the Route 18 overpass. The location of both sewer and water lines in nearby Freehold was sited as a positive feature of the Sea Gull site by the Master. The extension of such lines into Colts Neck was found to be consistent with the aims and purposes of the SDGP. Similarly, Planner Caton concluded that the channeling of growth into the southwest corner of Colts Neck was consistent with development of the Manasquan River Reservoir project. In this regard, Mr. Caton referred to the Manasquan Report of the New Jersey Water Supply Authority (Exhibit DT-24) in evidence, which provided under either

alternate Plan A or B to serve water to both Freehold Township and Freehold Borough. In the same vein, Mr. Caton indicated that if water could be obtained for Sea Gull through a tri-party agreement between Sea Gull, the Matchoponix Water Company and Freehold, development of the Sea Gull site was certainly feasible. By way of contrast, Mr. Caton concluded that the Monmouth Consolidated Water Company had experienced extreme water shortages and was expected to have increased responsibilities for water service in the future which casts serious doubt upon their ability to serve the Orgo project. In this regard, the Court's attention is called to the Manasquan Report which indicates that in the future, the Monmouth Consolidated Water Company will be encouraged to supply the Bay Shore area, as well as the Boroughs of Red Bank and Allenhurst. It was significant to Mr. Caton that the present service area of the Monmouth Consolidated Water Company consisting of 23 municipalities, as well as the proposed additions, are all located within the growth area, as designated by the SDGP. Certainly, Mr. Caton opined the water company should be encouraged to serve Mt. Laurel projects within their service area, as opposed to extending a water line some 3.7 miles into virgin limited growth territory.

Finally, Mr. Caton was asked which project in his opinion from a planning viewpoint should be awarded a builder's remedy. He promptly responded the Sea Gull site was the preferred location.

Mr. Robert Clark, the Director the Monmouth County Planning Board, testified as a witness on behalf of the Plaintiffs Orgo and Richard J. Brunelli. Mr. Clark advised that the Orgo project was a violation of the village concept for Colts Neck which he described as residential development between 50 to 200 dwelling units plus commercial development. Director Clark advised that the GMG town center designation which Orgo suggested, should have been given to Colts Neck, could also spur secondary impacts. For this reason, the county plan envisioned a feathering out of development outward from the core of the town center. Mr. Clark concluded that the Orgo project would spur growth on nearby properties which development would not only frustrate the Monmouth County plan, but would cause nearby farms to fall to development. Such growth threatened the Swimming River Reservoir. Planner Clark testified that the Sea Gull site likely would not cause secondary growth in Colts Neck because the Route 18 overpass could serve as a physical barrier separating

Sea Gull from the balance of Colts Neck. When asked the direct question, Mr. Clark concluded that the Orgo proposal did greater damage or violence to the county plan than did the Sea Gull project.

Even the Planners retained by Orgo did not help the Plaintiff as both Carl Hentz and John Rehencamp in their reports and depositions concluded that if Orgo were served by public water, it would spur growth on nearby properties (see Appendix, pages 1-3).

William Queale, Planner for the Township testified on direct examination by the admission of his report into evidence. Rather than repeat the context of the report, we submit that Planner Queale concluded that the granting of a builder's remedy to Orgo would frustrate the intent and purposes of all public planning documents, would drastically impact upon and indeed transform Colts Neck and would frustrate the intent and purpose of the recently adopted Colts Neck Master Plan. For a more complete view of Mr. Queale's testimony, the Court's attention is called to his report. In this regard, it is significant to note that there was very little cross-examination of the Township Planner.

The Plaintiff Orgo called as its witness Richard Ginmann, former Director of the office of State and Regional Planner. Essentially, Mr. Ginmann did not shed any light on this controversy. His letter admitted into evidence (Exhibit PO-29) did not favor Orgo, but rather set forth qualifying clause upon qualifying clause upon disclaimer.

Thomas Thomas, the Planner for Freehold Township, called as a witness by Orgo contended that the Sea Gull development would be out of character with the nearby R-25 and R-40 zones in Freehold and that Freehold objected to zoning of Colts Neck's Mt. Laurel obligation on its boundary. In the next breath, he admitted that Freehold Township itself had zoned to satisfy its Mt. Laurel obligation in part on lands adjacent to Manalapan Township in one instance, and adjacent to Howell Township in the other. Thereafter, he admitted that these Mt. Laurel zones were located immediately adjacent to R-40 zones. The Freehold Master Plan depicted a real mix of high density housing, planned adult communities, planned unit development, Mt. Laurel housing, Mt. Laurell II-A housing immediately adjacent to

areas designated for low density development. The planned Mt. Laurel II-A areas in Freehold Township were some 2.5 to 3 miles from the closest commercial and/or public services.

When the testimony of the planners is compared, it is clearly evident that the Sea Gull site is favored over the Orgo proposal from a planning prospective.

Examine from the viewpoint of water supply, the Sea Gull site is again favored over the Orgo proposal.

The issue of water supply can and should be viewed from two prospectives, i.e. the short term and the long term. Examined from the short term, we see there are three alternatives which will make sufficient water available to the Sea Gull proposal. Sea Gull proposes to sink a well into the Englishtown aquifer. Heretofore, they have secured a permit to divert not more than 100,000 gallons per day. The recent deliniation of critical areas within Monmouth County requires that a closer look be taken of this permit. In this regard, the testimony of Ernest Harden of the Division of Water Resources is illuminating. Firstly, he confirmed that the Englishtown aquifer is not as stressed as the Raritan aquifer. Secondly, the stressed part of the Englishtown aquifer is for the most part located east and

south of the Sea Gull site. The Court will recall the demarcation of the critical areas in the Englishtown aquifer circling out from the east coast. Bordering such critical area is a buffer area, which is three miles wide. The Sea Gull site is situated at the northern most edge of this buffer area. Mr. Harden advised that each request for diversion rights would be judged on its own merits. Among the criteria were public necessity, availability of supply, impact on other users, etc. The location of the Sea Gull site coupled with supply to Mt. Laurel households make it likely that approval would be given to Sea Gull's request for diversion. This assumption is supported when one considers that the State Department of Environmental Protection has promoted the concept of conjunctive use. The Matchoponix Water Company, which controls a source of surface water, has indicated its willingness and ability to contract with Sea Gull to supply additional water. Mr. David Monie advised that the water would be made available either as a result of contractual agreement with Freehold Township, or as a result of recharge into the Englishtown aquifer. As to the contractual agreement, Matchoponix has already agreed to serve Freehold Township 750,000 gallons of water per day. The contract awards

Freehold an option for an additional one million gallons per day. Mr. Monie advised further than if Freehold served water to Sea Gull, the Matchoponix company would supply such additional water without any effect on Freehold's application. In other words, a pass through calculated on the gallonage consumed by the Sea Gull residents.

Finally, Mr. Monie described the recharge method whereby surface water will be forced or injected into the Englishtown aquifer to allow an increase withdraw by Sea Gull at its site. Certainly, no one could expect that in the beginning the Sea Gull development would withdraw the same water injected into the ground days, weeks or months before. Ultimately, there would be a correlation between the water recharged into the ground and that diverted by the Sea Gull development. In viewing this recharge proposal, it is important to recall Mr. Harden's testimony which located the Sea Gull site not in the critical area, but rather at the northern edge of the buffer area. The recharge proposal which will replenish the Englishtown aquifer should therefore be given careful consideration by the Division of Water Resources.

One thing is clear; Mr. Monie's testimony put to rest any objection by Freehold Township. Initially, it is to be noted that Freehold's present water needs are not as critical as related by either Mr. Thomas or Mr. Jahn. If such were the case, Freehold would have made immediate arrangements to purchase the entire 1,750,000 gallons per day from Matchoponix or perhaps, purchase a greater portion of the Matchoponix supply. Secondly, under the passthrough procedure described by Mr. Monie, service of the Sea Gull site will not impact on Freehold's supply at all. Perhaps Freehold Township will continue to have political objections to the Sea Gull proposal, but certainly they cannot claim their objection rest on a lack of water supply.

In any case, it is evident that there is present ability to supply the Sea Gull Development. Perhaps the final form of supply allowed by the Division of Water Resources will be a combination of the three proposals above described; in other words, conjunctive use.

Examined from the long-range viewpoint, it again clearly appears that Sea Gull Builders own or control the preferred site. In this regard, the Court's attention is called to Exhibit DT-24, the report of the New Jersey Water Supply

Authority. Under either alternative Plan A or B, Freehold Township will be served with ample water supply from the Manasquan River Reservoir. In fact, alternative Plan A depicts a water transmission line crossing the growth area in Colts Neck. The Manasquan Study in its text indicates that Colts Neck, because of its rural character, is outside the expected service area of the Manasquan Reservoir. However, the short extension of service for the benefit of the Sea Gull site is not a major deviation from the water allocation plan. The Court will recall that water lines are located across the street from the Sea Gull site. In their cross-examination, the Defendants Orgo and Brunelli emphasised that the reservoir was at least five years from completion. This certainly is no obstacle to the Sea Gull project. Clearly, the necessary financial arrangements, construction schedule and marketing will not allow either project to become completely developed in less than five years. The evidence is clear that the Manasquan Reservoir project will be developed in time. Therefore, ample water will be provided Freehold Township. Pending construction of the reservoir, it is not unreasonable to suggest that in the beginning, Sea Gull may rely upon ground supply, whether or not augmented by the

Matchoponix Company. Thereafter, as the Manasquan Reservoir is completed, water service will perhaps come from a combination of the three sources of supply, i.e. ground water, Matchoponix Water Company, and the Manasquan Reservoir.

By way of contrast, the supply to Orgo is questionable. Firstly, the water demands of the Orgo project are greater than Sea Gull, bearing in mind the proposed substantial residential and commercial development. Secondly, supply of public water to Orgo substantially violates all governmental and planning parameters. In this regard, reference is had to the 201 Studies, the Manasquan Report, the SDGP, the GMC and finally, the reports of the Tri-State Planning Commission, all of which recommend against the extension of utilities to rural, limited growth areas.

Certainly, it is acknowledged that the Monmouth Consolidated Water Company has corresponded with Mr. Brunelli indicating their willingness to serve the Orgo project.

Clearly, this position of the water company must be viewed as a money-making grab for power and control, bearing in mind the present limits of supply.

Initially, the Court's attention is called to the previously stated aims or position of the Monmouth Consolidated Water Company to limit growth within the watershed to the Swimming River Reservoir. In this regard, we must bear in mind that earlier, the Monmouth Consolidated Water Company had intervened in the action against Orgo and contended that, in fact, development within the watershed threatened the integrity of the Swimming River Reservoir. At the depositions of William Pearce, the Assistant Manager and Vice President of the Monmouth Consolidated Water Company, reference was had to the reports of Richard Moser, an employee of the parent American Water Works Company, and General William Whipple, Jr., then a professor at Cook College, now a high level employee of the Division of Water Resources. Both reports are in the Court records. Indeed, both men testified at the trial before Judge Lane, and again before the Colts Neck Zoning Board of Adjustment, and each contended that development of the Orgo project would negatively impact on the Swimming River Reservoir. When asked whether the Monmouth Consolidated Water Company had received a subsequent report or

study indicating that the Orgo project would not threaten the reservoir, Mr. Pearce was forced to admit that they had not (deposition of William Pearce, pages 145 through 149).

A key to understanding the position of Monmouth Consolidated is found in the realization that the Manasquan Reservoir will be the key in future years to development and water consumption in Monmouth County. He who controls the allocation from the Manasquan will make huge profits. The allocation from the new reservoir will of course be based upon need, whether real or perceived, whether present or future. Therefore, a larger service area, more customers and greater need will redound to the benefit of the Monmouth Consolidated Water Company.

Careful review of the facts prove the conclusion above stated: Thus, in 1983, Monmouth Consolidated sought an increased diversion of six million gallons per day (Exhibit DT-25). The water company stated that such diversion was needed to meet the present dry season demands of its service area of twenty-three municipalities (DT-27). All of the requested diversion was to come from ground sources of supply. The Division of Water Resources contended that the water company did not provide

sufficient backup data. For either of these reasons, or both, the diversion request was denied. Mr. William Pearce, C.E. stated that the denial resulted in a shortfall to the water company of between four to five million gallons per day (page 115, lines 4 through 12). In September of 1984, the water company filed a request for additional diversion of eight million gallons per day, three million gallons of which was to come from ground sources and five million gallons from the Manasquan River. Both Mr. Pearce and Paul Burdan, Manager of the Monmouth Consolidated Water Company, testified that the additional water was needed entirely within the company's existing service area (Burdan deposition pages 70 and 71; Pearce deposition page 119-120) and did not provide for service of new areas. The report of the New Jersey Water Authority (DT-24), provides that Monmouth Consolidated will supply water to the Bay Shore towns, as well as Red Bank, Allenhurst, etc. In their application to the DEP, Monmouth Consolidated makes reference to future anticipated service to Bay Shore area. In this regard, at his deposition, Mr. Pearce opined that the Water Company ultimately would supply 5.75 million gallons per day to the Bay Shore towns (Depositions page 132). Similarly, the water company made reference in their

1984 application to future anticipated supply to the north coastal towns above Manasquan. At the depositions, Mr. Pearce advised that the water company would need an additional 4.5 million gallons per day for such supply in the year 2000 to meet this demand (Depositions page 133). In its application to the Division of Water Resources, Monmouth Consolidated Water Company indicated that it could supply water to the Gordon's Corner Water Company (DT-28). In this regard, the water company proposes the extension of the water line from Holmdel to Marlboro Township westward on County Route 520. Finally, the water company in its diversion application (DT-28) proposes running a water line down County Route 537, beginning at Swimming River Road and running all the way into Freehold Township.

When questioned at depositions, Mr. Pearce advised that ultimately, the water company envisioned supply of 6.5 million gallons per day to Freehold and Freehold Township (Depositions page 134). Since the 1984 diversion request was limited to their present service area of twenty-three towns, all of this additional supply above noted will require subsequent requests for diversion by the water company. The grandiose schemes of Monmouth Consolidated are at variance to the report of the New

Jersey Water Supply Authority, above referenced, which presumes that the water company's ground water diversion rights will be reduced by half, that Monmouth Consolidated Water Company will serve the Bay Shore towns and that the water company will receive a smaller allocation from the Manasquan than that requested in the 1984 application. In this regard, it is important to note that the New Jersey Water Supply Authority in its Manasquan Study emphasised that the Manasquan Reservoir is not designed to spur new growth in virgin territories, but rather is designed to provide water to present and future consumers in existing service areas. There simply is not enough available water to allow fulfillment of the water company's schemes.

The attitude of the water company is perhaps best illustrated in the depositions of William Pearce (pages 150 through 152). Thus, notwithstanding present insufficient supply and the proposed allocation of the requested diversion to their existing service areas and ignoring the clear potential for growth along Route 537, Mr. Pearce contends that service to some 1,200 dwelling units and commercial development as noted herein will not effect the water company as they serve 65,000 consumers. In the report of Elson T. Killam Associates, Inc., dated June,

1980 (same being commissioned by Orgo), the consultants noted that the average daily demand of the Orgo project was 280,000 gallons per day (Appendix page 13).

This need is considerable as it is greater than the water demands of Avon, Brielle, Allenhurst, Farmingdale and Englishtown and equal to Sea Girt (DT-24, page 31, Table 6, Appendix A).

Finally, the Court will recall Richard Brunelli was called as a witness. Mr. Brunelli did not submit to cross-examination because of scheduling problems, but upon direct examination, he advised that he had been attracted to the Orgo site because of its marketing possibilities. In fact, Mr. Brunelli, in an earlier deposition, advised that he expected to sell the rural land with approvals in 1981 for the sum of \$9,762,650.00 (Appendix, page 10, Brunelli depositions page 119). Mr. Brunelli advised in the same depositions that he gave no consideration to developing the project in any location other than Colts Neck (Appendix page 1 & 2, Brunelli depositions pages 78 & 79). At the outset, Mr. Brunelli sought to have the Monmouth County Planning Board change its Master Plan to provide for high density development at the intersection of Route 537 and

34 (Appendix pages 5-8, Brunelli depositions pages 87-90), as he thought a change of position by the county would help him in his application with the Township. Before meeting with Township officials, Mr. Brunelli met with Robert Halsey in this regard, but was disappointed as the County Planning Director advised that high density development did not belong at this intersection.

During the pendency of the within action, the Plaintiffs Orgo and Brunelli instituted suit in the Federal District Court seeking money damages against the Township and three township officials in their personal capacities. This action was instituted while the hearing before the Zoning Board of Adjustment was ongoing. When service could not be swiftly arranged through the United States Marshall, Mr. Brunelli caused a copy of the Summons and Complaint to be mailed to Gerald Marx, Esquire, then attorney for the Colts Neck Planning Board, as "I wanted Mr. Fessler (George Fessler, Chairman of the Colts Neck Planning Board) to know we were doing this (Appendix pages 11-12, Brunelli depositions, pages 192-193). The Federal action was groundless and subsequently, Mr. Brunelli voluntarily dismissed the suit.

ARGUMENT

POINT

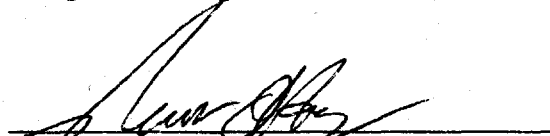
GRANTING OF A BUILDERS REMEDY TO ORGO IS CONTRARY TO
THE PRINCIPALS OF SOUND PLANNING.

The Township of Colts Neck has set forth a lengthy resitation of the facts to prove that the weight of the evidence favors the granting of a Builders Remedy to Sea Gull Builders. The evidence clearly establishes that the award of a Builder's Remedy to Orgo violates the principals laid down by the Supereme Court in Mt. Laurel II. In earlier legal memoranda, the Township has referred to the planning parameters laid down by the Supreme Court and respectfully refers the Court to same. In this memorandum, it is sufficient to state that the Supreme Court's decision stands as a victory for sound planning. In the opinion of the Township, this Court has fleshed out the Supreme Court's rule in the Franklin Township case. Read together, it clearly appears to the Township of Colts Neck that Orgo's location within a limited growth area, in the factual context of the within case, procludes the granting of a Builder's Remedy to them. The facts set forth above serve as the underpinings for such conclusion and

make it clearly evident that application of sound planning principals militate against the granting of a Builder's Remedy to Orgo.

On the other hand, the award of a Builder's Remedy to the Plaintiff, Sea Gull, in keeping with Colts Neck's new zoning ordinance, is consistent with sound planning principals.

Respectfully submitted,



ROBERT W. O'HAGAN