CN-Sea Gull LTD. Builders Inc v. Twp of Colts Neck 5/1985

(post-trial)

Supplemental memorandum on behalf of Sea Gull Ltd. Builders, Inc in support of an award for TI of a builders remedy

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY
(MT. LAUREL)
DOCKET NO. L-3540-84

SEA GULL LTD. BUILDERS, INC.,

Plaintiff,

vs.

THE TOWNSHIP OF COLTS NECK,

Defendant.

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SUPPLEMENTAL MEMORANDUM ON BEHALF OF SEA GULL LTD. BUILDERS, INC.

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The purpose of this memorandum is to review to some limited extent the evidence that has been laid before the Court during the respective phases of trial in this matter and to emphasize the position of the plaintiff Sea Gull as to why its site, in accord with the Mount Laurel Decisions, would be best suited for the application of the builder's remedy referred to therein (So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp. 456 A.2d 390 at p. 452, 453; 92 N.J. 158 (1983).

The Court has already made its determination as to where the area of growth or limited growth is to be established. The Court in its prior opinion has clearly indicated that it has adopted the State Development Guide Plan lines of demarcation and has denoted that area within which the plaintiff Sea Gull's tract is located as the growth area. The area in which the plaintiff Orgo's tract is located has been designated as a limited growth area.

Notwithstanding these determinations both parties recognize that it is still within the Court's purview to determine which of the two sites is best suited and capable of providing an immediate Builder's Remedy so as to comply with the avowed aims of the Mount Laurel Decision to "provide a realistic

opportunity for low and moderate income housing" (Mt. Laurel at p. 410). Of course, it is recognized that the initial question in every Mt. Laurel Case is whether the municipality is subject to the obligation referred to therein. This determination has already been made and the parties have agreed, after a factual finding by the Court, that the Mt. Laurel obligation of the Township of Colts Neck is to provide 200 low and middle income housing units. The sole remaining question to be determined is which of two parties, both of whom are willing to apply a Builder's Remedy, shall be granted the right to pursue this activity.

As the Court knows, the Township of Colts Neck has already rezoned and that area designated by the Court as the growth area now provides for multi-family dwelling with a density of approximately five and one-half units per acre. The area encompassed by the Colts Neck amendment to the zoning ordinance encompasses approximately 155 to 160 acres of which 76.5 acres are owned by the plaintiff Sea Gull.

The area and site owned by the plaintiff Orgo Farms and Brunelli has not been re-zoned, except to provide partially for an increase in the size of the acreage to be developed for one family units and commercial and/or business activities.

It does not provide for the construction of multi-dwelling units.

It is recognized that the Court has already ruled and determined that the "time of decision rule" is not applicable in this case and that the Court will rely upon the principles established in the Mount Laurel Decision to reach its determination rather than the fact that Colts Neck has amended and adopted its zoning ordinance to comply, to a certain extent, with the admonition of the Court in determining the growth area.

The Court has also determined that the "time of decision" rule will not be applied in order not to establish a position that would, in effect, "discourage future litigation" as enunciated in Mount Laurel II.

It is suggested, however, to the Court that, notwithstanding its opinion with reference to the sound reasons for its determination; some consideration should be given not only to the determination of the areas already established by the Court as coming within the guidelines of the State Development Guide Plan but to acknowledge and accept the fact that to a certain extent the planning boards and planners of the defendant, Colts Neck, should be given some consideration in

assisting the Court in reaching a determination as to which of several sites may be best suited for the application of a Builder's Remedy. To maintain to some extent that degree of communal development which may be least onerous to the municipality involved the opinions and actions of the board above should be weighed. It of course should be recognized by "the trial court and master should make as much use as they can of the planning boards expertise and experience so that the proposed project is suitable for the municipality" (Mt. Laurel II at p. 453).

In addition, it is suggested to the Court that the basic concern of the trial court in determining to whom a Builder's Remedy will be granted should be fashioned and conditioned to assure that, in fact, the plaintiff-developer constructs a substantial amount of lower income housing.

Inherent in this basic posture is the ability of the plaintiff-developer to construct the "substantial amount" of lower income housing in conformity with its percentage of non-lower income housing. Again inherent in this admonition is the availability of utilities and other services that must be present in order to enable the builder to provide the type of remedy sought in Mount Laurel and to insure that the original Mount Laurel Doctrine will be implemented and to make that

doctrine work.

To comply with these standards and in order to facilitate the completion of the objectives suggested, the Court has developed a five pronged test which it is suggested may better rationalize the application of one particular location for development as against another. Comparison of the respective sites on the basis of this five pronged test will more logically lead to the conclusion that the Sea Gull Tract is not only the better of the two for the purposes of immediate development but is, in fact, the better of the two locations and otherwise it complies not only with the development plans as outlined by regional developers and the State Development Guide Plan, but with the wishes of the township planners who have accepted the determination of the Court that these guidelines will apply and are prepared to implement them from a zoning point of view in order to allow, without zoning hinderance, the development of their obligation to comply with Mount Laurel II.

This Court in the "Franklin Township Case (Op. dated 1/7/85 not yet published, Docket No. L-6583-84 P.W. etc.) at p. 8 indicated as follows:

" The SDGP should not as a matter of law be a

> determinent of a right to a Builder's Remedy. Orgo Farms and Greenhouses, Inc. v. Colts Neck Tp., 192 N.J. Super. 599 (Law Div. 1983). However in light of the planning function described to it by the Court it might be a factor in determining the priority among those seeking a Builder's Remedy."

Here again, reference is made to the Court's determination in both of those cases in order to add emphasis to the fact that the plaintiff Sea Gull has in fact located its application for the right to a Builder's Remedy within that area designated by the SDGP as the growth area.

Bearing in mind the express intention of our Supreme Court to channel development insofar as possible to growth areas and to preserve other areas for limited growth; it would appear that one of the basic factors or requirements of the Mount Laurel concepts would be met by the plaintiff Sea Gull's location.

Without repeating here the requirements that the Supreme Court has established in order to determine those areas which are or are not growth areas, it is suggested that the other considerations brought to bear on a determination of a likely candidate for builder's remedy are those which have been set forth by this Court in prior opinions rendered by it (Franklin Township). Bear in mind that the award of a builder's

remedy is not to be a license for unchecked growth but to devise a solution which maximizes the opportunity for lower income people and minimizes the impact on the municipality (Franklin Township at p. 5).

The whole thrust of a builder's remedy is to insure that, in fact, the person to whom this remedy is awarded will in fact construct a substantial amount of lower income housing. It is on this basis that rationale for 4-1 housing has been suggested in order to allow that builder to in fact develop a sufficient avenue of activity that would permit him to reap whatever rewards he may be entitled to secure by taking on the obligation of providing lower income housing; a not very popular financial endeavor.

In order to overcome some of these problems and to attempt to form some degree of rationalization on which any particular builder may rely in seeking a builder's remedy, this Court has determined that a series of steps should be followed in order to determine which of several builders (and in this instance two builders) should receive the determination that they are entitled to a builder's remedy.

A review of these particular steps and their

applicability to the issues before the Court in the instant matter is appropriate.

With reference to a builder meeting the threshhold test of entitlement; both of these complaints, although filed at different times, resulted in a trial before this Court in a consolidated matter at the same time. Each of the parties both Orgo and Sea Gull participated to a substantial extent in the entire trial, not only that portion dealing with entitlement to a remedy but in establishing Colts Neck's obligations to provide Mount Laurel housing and the ultimate determination of the obligation of Colts Neck. It is therefore suggested to the Court that both of the plaintiffs in this instance have complied with the requirements of step one and are equally entitled to consideration on that basis.

It would appear that in step two that an analysis of the respective positions of the parties shows that a wide divergence exists between the plaintiff Orgo and the plaintiff Sea Gull. Obviously, if each of the plaintiffs are entitled to the first remedy but only if the property is located significantly within the growth area (Franklin Township at p. 13) then its applicability can only refer to the plaintiff Sea Gull. It is conceded by all parties that the Court in its earlier decision has already determined that the only

property located within the growth area is that controlled by the plaintiff Sea Gull.

Much testimony has been heard by the Court concerning the applicability of step 3 to each of the plaintiffs herein seeking entitlement. Here again the only property falling within the confines of step 3 initially is the Sea Gull property, since regardless of the date of filing, it is the only property "located significantly within the growth area" (Franklin Township at p. 13).

Recognizing the modifications applicable to this step, it is still suggested to the Court that the Sea Gull tract is that which more basically complies even with those modifications and is the most logical area to be selected for the builer's remedy.

The court has noted that suggestions have been made concerning a five pronged test to evaluate site suitability bearing in mind that the Court should also include the input of the planning community. In this instance the input of the planning community (Colts Neck) has already indicated that the Sea Gull tract is, from their planning point of view, the most reasonable location to permit that municipality to comply with their Mount Laurel obligations.

The testimony of Mr. Quaele in the form of his report indicates that his planning study of the entire municipality indicates that the location of the Sea Gull

tract is that which is most applicable to afford and comply with these requirements. It should be noted that the entire tract which has been designated for high density housing in the amended zoning ordinance of the Township of Colts Neck provides for approximately 155 to 160 acres of available land for completion of this project. It should be noted, however, and this plaintiff readily concedes, that they are capable of completing approximately 150 to 160 of the low to moderate income housing units or approximately 80% of the Colts Neck obligation. There is readily available in the area however additional acreage which may be secured in order to provide a facility or availability for completing the entire Mount Laurel obligation imposed upon the Township of Colts Neck.

Availability of infrastructure has been introduced to the Court which at this stage, it is suggested, stands uncontradicted, notwithstandng Mr. Hardin's testimony, that at the present time there is available to this site a well which will supply water to the Sea Gull site up to 100,000 gallons per day. While Mr. Hardin suggested in his testimony that they had the right to reduce this availability of water to an amount less than 100,000 gallons, he readily

conceded that as the matter now stood the plaintiff Sea Gull was permitted to draw up to 100,000 gallons per day.

Mr. Hardin stated also that the Sea Gull site was located at the extreme outer perimeter of the buffer zone that had been established to delineate the critical areas of water supply from aquafir souces. In effect, then, Mr. Hardin's testimony established two things. First, that the Sea Gull plaintiff had the right to draw up to 100,000 gallons as matters now stand (bearing in mind no regulations have been implemented for procedures established to limit use of this water draw) and secondly, that the aquafir from which the plaintiff Sea Gull seeks to draw this ground water, is the least critical of the four that serve this portion of New Jersey. In addition, it has also been established through Mr. Hardin that the Englishtown aquafir is not suffering from any of the intrusions that the main source of water supply in Monmouth County has (Raritan Aquafir); there is no salt water intrusion, there has been no lowering of pressure, there has not been excessive pumping and, as has been indicated by David Monie, the Englishtown Auafir has not been invaded in this area for periods of up to 15 to 20 years.

It has also been shown that there is immediately available within two to three hundred feet of the site owned by Sea Gull an existing water conveyance system which

is presently owned and maintained by the Township of Freehold. It is recognized that at the present time Freehold has declined to permit this water conveyance system to be used outside of the geographical limits of the township.

However, it is suggested to the Court that on the basis of the testimony that Mr. Monie has given with reference to supplying to Freehold that amount of gallonage required to service this tract to replace any waters diverted to the tract, that there exists readily available a second source of water supply for the tract, albeit further litigation or action may be required.

In addition, Mr. Monie has also testified that as one of the senior principals in Matchaphonix Water Company, that Matchaphonix Water Company would in fact make available 200 to 250 thousand gallons of water per day to this tract from waters that will be available during the year 1986 upon completion of the Matchaphonix diversion of 5 million gallons per day from Matchaphonix creek.

Concern however is with immediate availability of water so as to permit the developer to go forward with the completion of the multi-family dwellings in order to afford some degree of Mount Laurel remedy. It is suggested that the well referred to will comply with this requirement and that there will be water immediately available to service between two to three hundred units, at least 40 to 60 of those

units being moderate and low income housing. Obviously, the construction of two to three hundred units will not be completed within a year or eighteen months. In fact, it is anticipated that the construction program of the Sea Gull plaintiff will encompass a period of between 3 to 5 years to final completion. It is anticipated, and in accord with the testimony of Mr. Monie, the Matchaphonix's water supply will be available by 1986 and a surface water diversion may be used to implement the ground water supply provided through the well.

In addition to this provision, Mr.Monie has also testified that additional water could be supplied by an application for diversion rights through the Bureau of Water Supply. The efficacy of this application in view of Mr. Hardin's testimony would be a matter to be determined by an appropriate hearing before the Department of Environmental Protection.

It should also be borne in mind that in fact the Sea Gull tract is "barely" located within the buffer zone of the critical water supply area.

The availability of water supply to this tract has been substantiated by Howard Schoor, Engineer, whose testimony consisted of his report which was uncontradicted and unchallenged (PS-7 Ev.), the Goerkin sewer and water report which is uncontradicted and unchallenged, the testimony of David Monie and the contents of his report which

clearly indicate the availability of water (PS-8 Ev.)

The Goerkin report and testimony hereinabove referred to (DT-23 Ev.) clearly indicated that on the basis of Mr. Goerkin's calculation, with the intrusion of water saving devises, the well alone could supply 500 to 530 units without diversion rights (p. 6 of DT-23 Ev.).

The availability of sewer facilities again within three to five hundred feet of the Sea Gull tract stands uncontradicted, the only requirement apparently being that either Colts Neck would have to seek permission of the Manasquan River Sewerage Authority to allow Sea Gull to hook up through the sponsorhship of Colts Neck or, alternatively, permission of the respective members of the Manasquan River Sewerage Authority would be required to enable a hook up.

In any event, both conditions are well within the realm of probability and there seems no indication that it could not be readily accomplished. See Goerkin Sewer Report (DT-23 Ev. ) and Schoor report (PS-7 Ev.).

Adding to this, the position of all engineering witnesses that regionalization is the stated criteria of the Department of Environmental Protection and all planners, it becomes apparent that these sewerage facilities are readily available to the Sea Gull site.

It would appear then that the Sea Gull site readily complies with that criteria involving the availability of infrastructure. The proximity to goods and services has

been clearly indicated by Mr. Caton. He indicates that from a planning point of view both the Orgo and Sea Gull tract do have shopping accessibility. The Orgo tract being located on Route 34 and 537; the Sea Gull tract being located at or near Routes 537 and 18, both of which are major arteries servicing the immediate area. Here again with reference to the major highways servicing both of the tracts under consideration, Mr. Caton again suggested that they both have good regional accessibility and both may be considered from that viewpoint.

Environmental suitability was not raised as a question in Mr. Caton's report and he readily indicated that "the topography of the Sea Gull tract presents site planning challenges but certainly no insurmountable obstacles to its suitability for residential development at the desired density" (p. 50 C2 Ev., Caton report dated July 1984).

With reference to compatibility of the Sea Gull site with neighboring land uses we would rely to a large extent upon the determinations made by Mr. Caton in his report to the Court (C-2 Ev.). At page 63 he stated "the obvious benefit of the Sea Gull tract from a regional planning standpoint is its location within the growth area designated in the State Development Guide Plan" and aside from the political considerations involved (at p. 64) "the Sea Gull

tract is also relatively well located in terms of surrounding land uses. Like may properties in Colts Neck it shares a common border with an operating horse farm. While this would normally pose compatibility problems with residential development, in this case the existence of Mine Brook would serve as a buffer. The flood plain of the brook requires buildings to be set back from this eastern edge of the site and the difference in elevation and vegetation along the stream course should effectively screen the two abutting land uses."

As set forth in Mr. Queale's report (DT 22 Ev. at p. 20) "it is in an area already developed in Freehold Township. Although the development in Freehold is at a lower density it is nevertheless developed residentially rather than being farmland."

Perhaps the most telling point was registered by Mr. Caton when he was subjected to examination by all parties. He agreed that all things being considered and excluding the political involvement with the Township of Freehold that the Sea Gull site was much better situated for selection and development to comply with the Mount Laurel obligations of Colts Neck than any other location within the township.

He also indicated, as at the very conclusion of his testimony, that his preference for selection of the

builder's remedy recipient would be the Sea Gull tract for all of the reasons stated by him in his testimony and cross-examination. Mr. Caton also made quite clear that the key aspect of suitability of a tract was the location of the utilities and that the requirement of an excessive extension of a utility along Route 537 for a distance of some three to three and one-half miles troubled him greatly as a planner. Needless to say this situation does not exist with reference to the Sea Gull tract. Mr. Caton again testified that while he had no specific knowledge of water supplies, that the existing utilities make the Sea Gull tract a much better selection and that the Sea Gull tract is better served particularly in view of the availability of the Matchaphonix diversion. Mr. Caton also testified that he was concerned to some extent about "urban sprawl" and that the development of the Orgo tract would in effect have all of the aspects of urban sprawl, and that, again, the unnecessary extensions of sewer, water, etc. would constitute a form of urban sprawl.

A further factor should be noted; Mr. Thomas who appeared on behalf of Freehold Township, to in effect object to the development of the Sea Gull site, readily conceded that most of the sites selected within Freehold Township for the development of high density occupancy to comply with

Mount Laurel requirements are all immediately adjacent to, or within reasonable distance, of their R-40 (40,000 sq. ft.) and R-25 (25,000 sq. ft.) lots. It was also pointed out that the Sea Gull tract is adjacent to the same or similar type development in Freehold Township.

For the aforesaid reasons it is respectfully submitted that plaintiff Sea Gull should be awarded a builder's remedy.

Respectfully submitted,

DRAZIN AND WARSHAW, P.C.

BY _____

THOMAS T. WARSHAW