RULS-AD-1980-170

26 March 1980

Mm> from Hill to Raymond, et. al.

Re: Revised Land Development Regulations

Pgs 7

RU 8 - AD - 1980 - 170

MEMORANDUM

TO: George Raymond: Raymond, Parish, Pine & Weiner
Gerry Lenaz: Raymond, Parish, Pine & Weiner
Alfred Ferguson, Esq.: McCarter & English
Edward Bowlby, Esq.
Richard Coppola

FROM: Henry A. Hill, Jr., Esq.

RE: Revised Land Development Regulations - Memorandums 1, 2, 3 and 4

DATE: March 26, 1980

At the morning meeting on March 17, 1980, I agreed to set forth in writing my commments with regard to those sections of Richard Coppola's proposed "Land Development Ordinance" which were distributed at that meeting. The purpose of this memorandum is to set forth those comments for your and Bedminster Township's consideration.

Memorandum 2-80, dated March 11, 1980

1. Section 103

We note that Richard Coppola has copied some, but not all, of the purposes set forth by the legislature in N.J.S.A. 40: 55D-2 authorizing the municipality to adopt land use regulations. Is there any reason for his omission of the statutory purposes of zoning set out in N.J.S.A. 40:55D-2(g) to the effect that the municipality has an obligation

> "to provide sufficient space in appropriate locations... in order to meet the needs of all New Jersey citizens".

We suggest that if the Township intends to copy the purpose section of the Municipal Land Use Law, it copy all of the language so that its motives are not misunderstood.

2. Section 104

While we have no objection to this language, Bedminster officials should be advised that this language will not control where there are state and federal regulations which preempt municipal

regulations, such as in areas concerning effluent quality or sewage, treatment plant design.

3. <u>Section 303-A</u>

We are concerned with this reference to a "CA" zone or critical area zone because we believe that the Township's technique of designating sensitive areas as separate zoning districts, where only limited uses are permitted, is an awkward, inflexible and unreasonable way of handling the problems associated with development on sensitive lands. We think that, particularly within the context of planned unit development, performance standards can be adopted which will adequately discourage the use of more sensitive areas and encourage flexibility. We strongly object to any new attempt to place a portion of the Allan-Deane property in a so-called "critical area zone" and protect any such zone unless it permits independent economically feasible use of that property. Given that standard, we believe the municipality can do more to discourage development on the more sensitive areas with performance standards than through another attempt to create a "no-use" zone. The comments of Judge Leahy, J.S.C. at page 28 of his Opinion of December 13, 1979 are instructive on this question:

> "In short, careful scrutiny of the record shows that while a legitimate goal of a municipality may be to discourage development on slopes in excess of 15%, no support is found for the technique of prohibiting all development on such land. Testimony at trial established, and the planning guides mentioned above reflect, the fact that careful development is possible involving slopes in excess of 15%. So long as sensitive conservation techniques are utilized, the environmental impact can be minimized. Bedminster has chosen to totally bar development without showing that all development would be harmful."

4. <u>Section 303-C</u>

This provision, insofar as it purports to delegate to the Planning Board the power to determine the zoning district boundary, is in derogation of <u>N.J.S.A.</u> 40:55D-70(b) which provides that the Zoning Board of Adjustment shall have the power to decide requests for interpretation of the zoning map. We believe that, municipalities do not have the power to delegate that function to a Planning Board under the Municipal Land Use Law.

Memorandum 3 - 80, dated March 12, 1930

1. Section 702(f)

Insofar as it purports to require that the Zoning Board of Adjustment may only take a certain type of action by the affirmative vote of a majority of the full authorized membership of the Zoning Board of Adjustment this section, in our view, is unauthorized by the Municipal Land Use Law. Although N.J.S.A. 40:55D-76(a) allows a Board of Adjustment to direct the issuance of a construction permit within the bed of a mapped street, etc., it does not require an affirmative vote of a majority of the authorized membership but only the majority of those present to take this action. Since the state legislature has explicitly set out, in the Municipal Land Use Law, when a majority vote is required and defined "majority" in other cases as a majority of the members present (which membership can be no less than a quorum) we do not believe the municipality has the power to vary the affirmative vote requirement that was set forth in the enabling statutes.

Memorandum 4-80, dated March 13, 1980

1. Section 901

We have substantial problems with the suggested open-ended fee schedule provisions. These provisions would, in effect, give the municipality a license to charge any amount its consultants ask for to review the Allan-Deane application. The escrow mechanism proposed to cover the costs of all professional services including "engineering, legal, planning and other expenses connected with the review of the submitted materials" is clearly unauthorized by the Municipal Land Use Law and violates public policy.

The Superior Court, Appellate Division, made it clear in 1969 in the case of Economy Enterprises, Inc. v. Township Committee of Manalapan Township, 104 N.J.Super 373 that municipalities may not require the posting by applicants of escrow accounts which are paid directly to the municipal consultant for the cost of review. In the Economy Enterprises case, the Court invalidated the specific fee arrangement proposed by Section 901 as being contrary to public policy. In addition, there is no statutory authorization which would permit a municipality to attempt to recoup directly the expenses incurred by way of legal fees and planning fees for the review of a particular application. N.J.S.A. 40:55D-53(h) allows a municipality to obtain reimbursement for "all reasonable inspection fees paid to

the municipal engineer for the foregoing inspection of improvements." N.J.S.A. 40:55D-8 which permits a municipality, by ordinance, to provide for reasonable fees to be charged an applicant for review of an application for development has been interpreted by the Court to mean the municipality may adopt a reasonable fee schedule which achieves the object of recovering from developers as a class, fees which are relatively correlative with the reasonable cost of administration of the municipal review process. This does not permit a municipality to both determine the extent which a particular application should be reviewed and then directly bill the cost of that review to that applicant. It seems to me that if that were the case, it would be clearly possible for a municipality to manipulate the cost of the review process as to discourage a particular application. If the power to tax is the power to destroy, then the power to determine the extent of review and charge for the cost thereof is probably the power to make any application economically unfeasible.

Subparagraph D under which the applicant might be required to "agree in writing" to pay for these costs, including costs incurred in connection with an informal review of the concept plan (prohibited by Section 8 of Chapter 216, Laws of N.J. 1979) is also inappropriate. Clearly the municipality cannot require an applicant to enter into a written agreement to do something he cannot be required to do under the Municipal Land Use Law.

We would suggest that Bedminster adopt a reasonable fee schedule and omit Paragraphs 901B and 901D and other references to an open-ended escrow mechanism.

2. Section 902A(2)

This section purportedly sets time limits for completion of improvements for all classes of development and is not appropriate for planned developments to be phased over a period of more than two years. These time limits, unauthorized by the Municipal Land Use Law* cannot be justified by any health, safety or welfare purpose and

---

*Levin v. Livingston TWP., 35 N.J. 500, 519 (1961) discussed this question under the Municipal Land Use Law source law, N.J.R.S. 40: 55-1.28:

> "Final approval, since it may be obtained by sections of the whole, is based on the idea of intention and readiness

would be inappropriate in many instances. An example of such an instance would be a case in which a planned unit development were approved involving 50 acres or more and the Planning Board agreed, as provided in N.J.S.A. 40:55D-52(b) that it was to be phased over a ten year period. In that case, a requirement that all improvements be completed within two years years would be inappropriate. We think that the Planning Board should decide on a case by case basis, the issue of which improvements should be built, and when and not adopt ordinances of this kind which have no logical basis and will just impair the Board and the applicant's flexibility.

3. Section 902C

The provision in paragraph 902C requiring that:

> "Every bond, whether cash or surety, shall contain a clause to the effect that a determination by the Township Engineer that the principal has defaulted in the performance of his obligation shall be binding and conclusive upon the surety and the principal."

is simply outrageous.

4. Section 902C(2)

The 10% cash performance guarantee requirement is unduly cost generating and precludes the opportunity for the construction in Bedminster of least-cost housing.

5. Section 902D

Here again the requirement that the applicant deposit 7% of the amount of the performance guarantee (which, in turn, is

---

Footnote continued from Page 4

> to proceed to completion at once. In 1948 the Legislature provided that a performance bond for improvements shall run for a period not to exceed three years, with the right in the planning board to extend for an additional time not exceeding three years. L.1948, c.464, p. 1906, sec. 5. This was repealed by the revision of the planning act in 1953 (N.J.S.A. 40:55-1.28) and the statute is presently silent. It could be argued therefrom that the Legislature thereby intends that time for completion of improvements and the effectiveness of final approval shall not extend beyond a reasonable date after the grant."

120% of the estimated cost of the improvements) is entirely unreasonable because it does not protect developers from unjustified costs. In Economy Enterprises, Inc. v. Township Committee of Manalapan Township, the Appellate Division held that a 5% escrow for inspection was excessive and unreasonable; by comparison, the escrow provision proposed in Section 902D amounts to 8 1/2%. Once again, I would like to suggest that the ordinance should be drafted with the objectives in mind of recovering from developers as a class fees which are roughly correlative with the reasonable costs of administration and inspection.

Finally, we would like to suggest that the ordinance address the issue of which improvements are appropriately the subject of performance guarantees and inspections and which are not. We take the position that in the case of a planned unit development, the municipality may appropriately require maintenance and performance guarantees with respect to utilities, roads, etc. which the developer intends to dedicate to the municipality but not with respect to private streets, private utility systems, etc. The reason for this is that the municipality may appropriately protect itself with respect to such private improvements, which may later be deeded to a homeowner's association, under the power granted to them through N.J.S.A. 40:55D-43 and 40:55D-45 which permits them to examine the structure of the homeowners' association and assure themselves that the provisions protect the interests of the public and of the residents and occupants of the proposed development adequately. This position is supported by the N.J.Supreme Court decision in Levin v. Livingston Township:

> "The legislative design is plain. It has said that, in addition to requiring basic and necessary general terms and conditions, to be determined on the application for tentative approval, the municipality may also automatically and in all cases require the developer to install or provide for certain specific improvements, which will become public property and the subject of municipal maintenance in the future and which otherwise the municipality would have to construct at public expense, provided they are set forth in the ordinance in advance. This assures the protection of the public interest in this respect and at the same time sufficiently advises the developer of the kind of thing he must install so that he may make his broad financial and other plans and estimates accordingly."

In addition, we feel that the ordinance should be written in such a way as to make it clear that the municipality does

not have the power to require a bonding and inspection of the sewage treatment plant since the inspection of such plant has been preempted by the Department of Environmental Protection which must give design approval and assure itself that the plant is built in accordance with the approved design (see N.J.A.C. 7:14-2.23).

6. Section 902F(3)

The Municipal Land Use Law provides that a municipality may require "a maintenance guarantee in an amount not to exceed 15% of the cost of the improvement." The proposed ordinance says 15% "of the original estimate of the cost of installing the improvements." The significance of this difference between the proposed Bedminster ordinance and the Municipal Land Use Law is that the Township Engineer by overestimating the cost of the improvements may require the developer to end up posting maintenance guarantees which exceed 15% of the cost of installation. This may appear to be a minor point, however, we are very sensitive, because of the history of this case, to deviations from the Municipal Land Use Law which could result in unauthorized cost generating requirements.

7. Section 902F(4)

This section requires that a developer provide "as built" plans and profiles of all utilities and roads certified to represent the actual construction of improvements. This is an unusual, cost generating requirement which is not authorized by the Municipal Land Use Law and bears no rational relationship to the municipality's obligation to promote the public health, safety, morals and general welfare. The municipality can achieve the same purpose by requiring the developer's engineer to certify that facilities were constructed in accordance with the approved plan as all reasonable land use ordinances provide.