

BULS - Ad - 1980 - 300

7/11/1980

- Re: Letter from George M. Raymond proposing ^{reasons to} ~~a denial of~~ reject the density bonus device.

pgs. 7



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July 11, 1980

RULES - AD - 1980 - 300

Re: Bedminster Township ads.
Allan-Deane Corporation

Honorable B. Thomas Leahy
Superior Court of New Jersey
Court House Annex
Somerville, New Jersey 08876

My dear Judge Leahy:

In his letter dated July 1, 1980, Mr. Alfred L. Ferguson, on behalf of the Township of Bedminster, questioned the use of density bonuses as an incentive for the provision of subsidized or least cost housing. Specifically, he suggested the possibility that, should the N.J. Supreme Court adopt the view that density bonuses are appropriate and can be judicially mandated, Bedminster may wish to reduce the densities that were agreed upon to date in compliance with your Order. The Township claims that, should it be forced to grant such bonuses starting from an already high base, this would cause overcrowding.

In this regard, it may be useful to set forth some of my reasoning in suggesting that the density bonus device be rejected. The resulting solution which is embodied in the draft ordinance that was submitted to the Court was accepted by all parties. I would like to stress that even the Public Advocate has agreed that the suggested densities are appropriate if the provision of the necessary affordable housing can be assured by means of public subsidies. His insistence on density bonuses is limited to instances where subsidies that would permit the provision of housing within the means of low- and moderate-income families at proper densities are unavailable. In his view, the objective of giving such families access to some housing in the Township is sufficiently important to justify the Court's ordering the Township to permit development at less than optimum standards.

The setting of residential densities is not an exact science. The numbers used in the design of regulations for lower density multi-family and town-house districts are generally derived on the basis of experience with what works well, what works less well, and what doesn't work at all. The objectives that are sought to be achieved are adequate visual and aural privacy for families, adequate recreation space, avoidance of visually unpleasant strings of parked

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cars along street frontages, a satisfactory level of safety, especially for children and pets, by moderating the volumes of traffic using residential streets, etc. Also sought is a standard of environmental quality that is sufficiently high to guarantee continuity of consumer appeal and with it, the kind of assurance of community stability that only continued market acceptance can provide. Good examples of this are the now venerable, but still highly popular and well maintained, town-house, small lot, and apartment communities -- including Radburn, New Jersey -- that were designed by Clarence Stein, Henry Wright, and their disciples some 50 years ago, in the early days of the new towns movement.

In view of the above one cannot say that, for instance, 10 dwellings per acre would be acceptable but that a density of 12 dwellings per acre would be disastrous. What one has to do is what the courts have had to do in upholding zoning district boundaries the precise delineation of which defies logical explanation i.e., accept the need for a line to be drawn somewhere. I believe that the Madison decision makes it even more imperative to make certain that the appropriateness of the permitted density in each of the locality's residential zoning districts can be defended convincingly. Thus, if a density of 10 dwellings per acre is enacted as proper in a town house district it is difficult to defend permitting a density of 12 units per acre simply because some of the units will be inhabited by lower income families. If, on the other hand, a density of 12 dwellings per acre is deemed to be acceptable, the imposition of a basic limit of 10 dwellings per acre on developments not subject to the affordable housing requirement may be found to be subjective, arbitrary, and unnecessarily cost-generating. This is particularly true as the higher density would be deemed acceptable for developments that include lower-income families since, uncontestably, such families impose much greater pressures on their immediate environment than do families with higher incomes.

The use of density bonuses is even more difficult to justify where the zoning that is imposed by the Court (or voluntarily adopted by a municipality), simultaneously with requiring the provision of a certain percentage of subsidized or least cost dwellings, increases radically the permitted densities in the area to which it applies. In Bedminster, for example, the zoned capacity of the Corridor has been increased some ten-fold, from approximately 400 to 500 additional units to 5,711. This, in itself, is a huge density bonus. In my opinion, the magnitude of the financial advantage that is

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being handed to the land owners is great enough to justify the assumption that they will be financially well able to provide the required affordable housing without requiring yet another bonus to increase their windfall bonanza.

A marginal case for density bonuses could, perhaps, be made in instances where the requirement for affordable housing is imposed on land that is already zoned to permit multi-family or town-house units, to compensate the owner for the diminution in value which may result therefrom. This raises the basic question as to whether a marginal diminution in value due to the housing requirement should be treated differently in law from a diminution in value that may be caused by an amendment to the zoning ordinance in accordance with a comprehensive plan that would lower the permitted density on a given tract of land. As I understand it, the right of a municipality to upzone (other than arbitrarily or capriciously) is well established even if some loss of value results. But, irrespective of the legal answer to this question, it is important to note that a developing municipality which, by definition, still comprises a great deal of vacant land, can avoid having to grant permission for what it may deem to be excessive densities on already zoned land by zoning additional land to permit apartments and town houses at densities matching those in the already established districts -- which, presumably, are acceptable.

In case of transfer of ownership, the zoning requirement for the provision of a certain percentage of least cost units should be applied as if it was a covenant running with the land. Any purchaser of all or any portion of a tract subject to this requirement should be subject to this obligation and be made aware of it to assure that the land sales price will be adjusted to the extent necessary. If the number of units required for the entire tract is provided on only one or more portions thereof -- as would happen if, say, such portion were to be sold to a non-profit entity that would build exclusively subsidized housing in the required number -- the Township should be enabled to release the owner(s) of the remaining portion of the tract from any further obligation.

The above reasoning leads to the conclusion that, since the provision of affordable housing can be mandated, the principal issue that is still unresolved is that of assuring its continued affordability. I have taken the position that, if such housing is to be provided in the form of rental units, the only way in

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which this can be accomplished properly is by means of public rent subsidies that are designed to cover, for as long as the housing is intended for lower income occupancy, the difference between the actual costs of maintenance and operation and the amount each family in residence can be expected to pay. This is the type of subsidy that is being made available under HUD's Section 8 program. The provision of publicly subsidized units under this program does not require any writedown in the value of normally priced unexceptional land,* so that density bonuses are not necessary to enable such housing to be built. This program was developed on the basis of federal experience since 1961 with a host of ways to serve the needs of low and moderate income families by means of one-shot subsidies that had the effect of lowering initial rentals. As costs of maintenance and operation rose, especially following the recent extravagant escalation of fuel costs, at a rate exceeding the increase in incomes of tenants, more and more projects fell into foreclosure. Even public housing was found by Congress to need operating subsidies to prevent what looked like certain disintegration of the projects. The final financial demise of each such project, whether owned by a public authority or by a private landlord, is inevitably preceded by unacceptable reductions in service, maintenance, and operating inputs with a resulting rapid deterioration in the condition of structures and the quality of the residential environment. It seems to me that, now that we are aware of these likely consequences of one-shot subsidies -- including density bonuses if used by themselves -- no locality should be forced to permit the establishment within its boundaries of such a latent cause of instability and disintegration.

Where the affordable housing requirement is being met by means of units for sale, I have advocated the mandatory regulation of both initial and resale prices. The latter are irrelevant to a discussion of density bonuses since they affect subsequent owners whose resale prices would be pegged in some fashion to the initial sales price. I discussed above one reason why I do not believe a density bonus to the developer to be needed to justify the regulation of initial sales prices. Here I would like to argue that, if the imposed initial sales prices are reasonably closely related to actual non-profit development costs, such regulation would not even constitute "rent skewing" in the broad sense in which this term has been used by the N. J. Supreme Court -- i.e., purchasers of other housing units in the development

*These terms are meant to exclude land that is priced at a premium because of special advantages of location, exceptional views, etc.

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would not be called upon to unreasonably contribute to the affordability of the least cost units by paying more for their own. My reasoning is based on the customary pricing system of units for sale in a development. None of the units are priced so as to reflect precisely the cost of construction of each separate unit. If, for example, some of the otherwise standard* units entail extra foundation costs because they are built on soft ground, on steeper slopes, or on rock, they do not command a higher than average price. The sales price of all such units is averaged to reflect market realities, with the objective of producing an overall margin of profit for the entire development.

Viewed from this perspective, the fact that some units may be priced at or even somewhat below cost to satisfy the housing requirement can be equated with the fact that some units, especially in large developments, have always been priced at or below cost for a variety of traditionally accepted reasons. The somewhat higher pricing of some units in the development to compensate for the lower sales price of the affordable units is qualitatively no different from units in one section of the development being priced to compensate for extra development costs incurred in other sections. Thus, if the proportion of units that are subject to controlled initial sales prices is relatively small, no extraordinary internal subsidy concept would be involved.

It is quite important to the workability of the concept that the mandated initial sales price be close to non-profit production costs. Discussion with representatives of the Allan-Deane Corporation have established that, in Bedminster, units for sale could be produced and priced at 2-1/2 times median income. The Public Advocate's brief in the six consolidated zoning cases now pending in the Supreme Court shows that, if prices were to be determined in this manner, there would be a \$6,250 spread between the \$53,250 sales price in the Newark SMSA (of which Bedminster is a part), and the \$47,000 sales price in the Camden SMSA. If land and construction costs in the two areas differ roughly proportionately, then pegging the initial sales price to median income would probably work in the Camden SMSA as well. If these costs in the two areas are more nearly alike, then the formula might have to be modified with the result that what is,

*This term is meant to exclude units with "extras" or units that are specially advantaged by reason of exceptional location, views, etc.

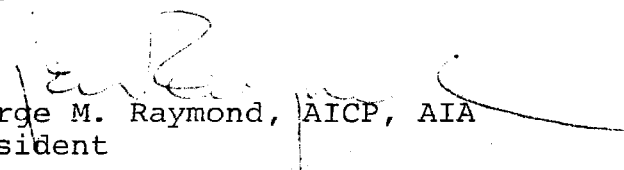
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in effect, unsubsidized housing that would be produced in the area with the lower median would have to be aimed at a higher than median income market.

In summary, and as specifically applicable to Bedminster Township, it is my opinion that an amendment to the zoning ordinance that would permit vastly greater than current densities (i.e., that would permit over 5,700 additional units to be built on land that previously permitted only approximately 400 to 500) can be considered to already include any density bonus that may be deemed to be required to assure compliance with the Court order. Regulations that would prevent land from being zoned to the maximum reasonably supportable density would be cost-generating and therefore legally vulnerable. Density distinctions as between subsidized and unsubsidized housing should, if anything, prescribe lower densities for the former given that -- and assuming all other things, such as size of family, age of family members, etc., to be equal -- it is the lower, rather than the higher, income families that exert the greater pressures on their immediate environment. In the case of rental housing, density bonuses, being equivalent to one-shot subsidies, can be counter-productive in the absence of continuing subsidies that would assure that the lower income family whose ability to rent its unit in the first instance depends upon such assistance will continue to be able to afford it in the future. In the case of units for sale, density bonuses are not needed to justify the regulation of initial sales prices. If the sales prices are set reasonably close to the non-profit production cost of such units and if the number of units affected is relatively small, such regulation would not result in "rent skewing" or "internal subsidies."

I hope the above will help clarify some of the possible effects of density bonuses on community planning.

Respectfully submitted,


George M. Raymond, AICP, AIA
President

GMR:kfv

cc: Alfred L. Ferguson, Esq.
Henry A. Hill, Jr., Esq.
Charles K. Agle
Richard T. Coppola
Gary Gordon, Esq.
Township Clerk, Bedminster