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- Ltr from George Raymond to Judge T. Leahy
  Re: Article written by G. Raymond, "Use of a Court-Appointed Master — The Master's View"

  (18 pgs.)

RPPW

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October 17, 1980

REC'D AT CHAMBERS
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JUDGE LEAHY

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

My dear Judge Leahy:

Enclosed please find the article I wrote for possible publication in the New Jersey Law Journal. I thought you might want to see it, particularly since I have no assurance that it will be published.

I wish also to confirm that both Messrs. Ferguson and Hill, far from objecting, actually encouraged me to write it for publication.

Sincerely yours,

George M. Raymond, AICP, AIA, P.P.
President

GMR:kfv

Enc.

Use of a Court-Appointed Master: The Master's View

by George M. Raymond, AICP, AIA, P.P.

A historic decision, handed down on December 13, 1979, and the subsequent March 6, 1980, Order for Remedy by the Honorable B. Thomas Leahy, Justice of the New Jersey Superior Court, made the first direct and quantitatively significant judicial contribution to the actual provision of low- and moderate-income (or least cost) housing in formerly exclusionary territory in the State of New Jersey. As a direct result of that decision, the Township of Bedminster has rezoned major tracts of land to permit some 5,700 additional dwelling units where the previous zoning permitted only between 400 and 500. Within the area so rezoned, the plaintiff, Allan-Deane Corporation, will be able to erect some 1,800 units, including one-family house clusters, town houses, garden apartments, and possibly also mid-rise apartments for the elderly. Of these 1,800 units, 1,400 or so will be built as part of a Planned Unit Development with 20 percent of its units intended for rental or sale to lower income families. In the absence of subsidies that would make possible the provision of low-rent housing, these units would have to be built to near-minimum standards as established by the New Jersey Housing Finance Agency, to make them available to families as low on the income scale as it is possible to reach without subsidies.

The court appointed a "planning expert as Master to act as witness, consultant and advisor" to the Court.

The Master's specific charge was to monitor the Township's efforts to revise the zoning map and regulations affecting development in a specific "corridor" of the Township -- an area which was impacted by two interstate highways (I-287 and I-78), two state highways (Routes 202 and 206), and the presence of the 3,000-employee AT&T Long Lines Headquarters office building -- so as to satisfy the constitutional housing requirements as well as grant the corporate plaintiff "prompt and specific relief." Pursuant to the Court order appointing him, the Master was to

(1) "attend . . . and, if he chooses, participate in all . . . meetings . . . of the Township Committee, Planning Board or other special committee at which (the) Township's duties under this Court's Orders are discussed or acted upon;"

(2) Report to the Court whether the ordinance which the Township had been ordered to draft was in compliance with the Court's opinions and orders and "in substantial conformity with the regional planning for the area" by the County, Tri-State Regional Planning Commission and the State of New Jersey; and

(3) "To observe and monitor the application process by the plaintiff . . . through at least the

preliminary approval stage" and to report to the Court if any dispute should arise in that process.

* * *

The Court had ordered the Township to rezone so as to "permit an ultimate development capacity of not less than five nor more than fifteen units per gross acre throughout the corridor, unless in specific areas, for particular reasons, such density would constitute improper land use." The fact that the Court's determination of the appropriate density was based on the Master Plan of Land Use adopted by the Somerset County Planning Board on November 24, 1970, as confirmed in the March 1978 Regional Development Guide prepared by the Tri-State Regional Planning Commission, is of greatest significance in the history of land use planning in this country. Regional agencies were originally established in recognition of the unfortunately unalterable fact that local decision-making bodies are incapable of initiating or supporting measures in the broader interest of the region due to parochial pressures from their constituents. Since the power to regulate land use has been delegated completely to local governments by most state legislatures, the area-wide land use plans which were drawn up by such agencies have, until now, largely been allowed to wither on dusty shelves. Judge Leahy's decision

places them squarely in the arena where major issues are in fact decided.

If a county or regional agency wishes to play this type of decisive role, however, it must remain "above the fray." In explaining why it sought the assistance of an outside planning expert to act as Master, the Court indicated to both parties that, while it accepted the County Master Plan as a guide in its determination, it explicitly deemed "the use of the County Planning Board . . . staff (as) being improper in light of the fact that the Planning Board is a defendant in a pending suit by the corporate plaintiff against an adjacent township . . . It would place the Planning Board and its staff . . . in an awkward position, (subject to) possible charges of having conflicting interest while they are parties to litigation. So, the Court rejects the idea of using the personnel of either the Planning Board or its staff to assist the Court. . ."

This judicial view of the role of areawide planning agencies demonstrates better than any theoretical argument the invalidity of area-wide plans that are no more than aggregations of the plans of the individual constituent municipalities prepared by their own Planning Boards. Even

where such individual plans are prepared by county planning personnel acting as consultants to local authorities, the result is no different from plans prepared by the localities with their own staffs or using outside consultants. Any professional who works with a locality inevitably must seek to advance its interest, as it sees it, within the law. The reconciliation of local with regional interests can only be attempted meaningfully on the regional level -- and that can only be done within the framework of a regional plan developed by a detached, impartial agency whose primary responsibility is the well-being of the region as a whole.

The use of an objective area-wide plan can help the Courts determine what constitutes the "fair share" of the regional housing responsibility of any given municipality without having to resort to numbers of debatable validity. If properly developed, a regional plan makes provision for future major employment centers in the vicinity of transportation nodes and along major arteries; places enough land in various residential densities in appropriate locations to provide housing for the future work force; and shows all environmentally sensitive areas in land use classifications clearly intended to offer them maximum protection. In developing a regional plan of this type, municipal boundaries -- which, from a functional perspective,

are no more than imaginary lines, drawn in other eras, in response to considerations whose meaning, if any, has long been lost -- can be drawn last, purely for orientation purposes. When arrived at in this manner, the amount of land intended for housing of various types in any given area is determined on the basis of factors that are of the same type as those that the courts have traditionally considered in deciding the reasonableness of land use decisions on the local level.

True, the use of an area-wide plan would not help the Court determine the responsibility for satisfying locally generated housing needs in the case of a given municipality which the plan locates in the low density portion of the region. The patterns of development that have actually materialized across the landscape amply prove that even low-density development, if it covers wide areas, contains within it shopping areas, minor office and service centers, occasional small manufacturing operations, and public and quasi-public institutions, all of which can be expected to employ people with a broad range of incomes. Furthermore, like people everywhere, the residents of low-density residential communities grow old, occasionally become widowed or divorced, or lose their job. Inevitably, thus, every community generates a certain need for low and moderate income housing the satisfaction of which, in all fairness, no

community should be allowed to pass on to others. Fortunately for the Courts, however, this type of housing need can be relatively easily proven by means of surveys, waiting lists in existing accommodations, etc. In deciding such cases, therefore, the Courts would not have to perform the difficult task of choosing one of the many doubtful sets of statistics that are usually presented in support of, or in opposition to, an abstractly conceived "fair share" allocation of the regional housing responsibilities.

* * *

The Court's decision to adopt the "five to fifteen" dwellings per acre range was based on the County Master Plan conception of Village neighborhoods developing in the vicinity of major transportation nodes (as in Bedminster). As defined in the county plan, these are to be areas where housing would range "from modest houses to substantial residential establishments, often placed jowl to jowl . . . Existing densities of development (would) range over a considerable spectrum . . . Density . . . (in the) compact areas of development may well approximate five to fifteen families per acre."

The first task in the Bedminster situation was to determine the "compact area of development" that was to be subject

to the "5 to 15" density order. Since a large portion -- some 700 acres -- of the "corridor" consisted of wetlands, and substantial public lands and areas in non-residential use, all those areas were subtracted from the original total corridor area (exclusive of roads) of approximately 1,940 acres, leaving 1,240 acres subject to the order. The planning process described below then produced a zoning pattern which -- when translated into potential dwelling units and taking into account the existing population in the area -- had a capacity for ultimate development of 4.83 dwellings per acre. The Court deemed this to be sufficiently near the bottom of the "5 to 15" density range to satisfy its order.

The reason why the density that resulted was 4.83 and not precisely 5.0 or some other number is interesting since it serves to illustrate the process of interaction between the Township, the developer, and the court-appointed Master. Early in the game, the Master adopted the position that he was not being asked by the Court to help plan the Town -- only to report to it whether what the Town wished to do was or was not in compliance with its order. The Master thus left the planning initiative entirely up to the Township's own planning authorities and their consultant. At the same time, however, the plaintiff, the owner of the

largest (457 acre) single tract in the "corridor," was pressing for some 2,200 units on his land, in addition to a substantial shopping center. In the abstract, this proposed level of residential development was entirely within the Court-imposed range. The Master requested that the developer prepare a test plan showing the proposed arrangement of the 2,200 units on the site. Since much of the site consisted of slopes of over 15 percent, and since the developer's own assessment of the market demand dictated his using mostly one-family detached house clusters and town houses, the 2,200 units greatly overcrowded the land. The Master -- who is the head of a multi-disciplinary planning firm, and who thus had quick and easy access to all the requisite types of expertise -- then revised the proposed site plan so as to achieve a layout that he could recommend to the Town as acceptable. This limited the capacity of the tract to about 1,800 units, some 1,400 of which were in the approximately 150-acre flat portion of the tract at the bottom of the hill and closest to the existing center of Pluckemin Village.

The zoning to higher densities of the remaining tracts of vacant developable -- or developed, but redevelopable -- land in the Corridor was tailored so as to be compatible with already developed adjoining neighborhoods. Even though this

resulted in a fraction under the court-ordered 5 per acre minimum, the Master advised the Court that, in his opinion, to ignore the need for protecting the character of already developed areas would constitute "improper land use" and that, consequently, such protection was explicitly sanctioned by the Court even if it resulted in a diminution of the zoned capacity of the corridor below the mandated minimum. It is important that this point be emphasized. If the residential communities that may materialize pursuant to court-mandated rezonings are to prove the wisdom of the decisions which gave them birth, it is essential that they be permitted to develop in accordance with good planning standards that, in the long run, will help them remain competitive in the region as desirable residential environments.

The Master was guided by this same principle in his consideration of the proper manner for the Township to comply with that part of the court order that mandated that "specific percentages" of the housing units to be permitted be "subsidized or least cost." The developer corporation had committed itself during the trial to the provision of not less than 20% of its units in the form of housing of that type, and the court expressly intended this to become part of the resulting development pattern. The Master suggested the following guidelines in the development of a specific solution:

(1) The 20% rule should apply not only to the Allan-Deane Corporation, but to all like developers of substantial tracts of land.

(2) The total 20% requirement should be split into separate allocations for subsidized senior citizen and family housing on the one hand, and "least cost" housing for sale (built approximately to the minimum spacial standards established by the state housing agency).

(3) The developer should be permitted to substitute "least cost" sales housing for subsidized rental housing upon providing satisfactory proof that the necessary subsidies are not available despite a good faith effort on its part to secure them.

Guided by the belief that the Court could not possibly wish to impose upon the Township a solution containing proven seeds of deterioration, the Master suggested the rejection of the concept of density bonuses for the provision of below-market housing. He based his opinion on two considerations:

(a) The maintenance and operation of housing that is offered to families that are barely able to afford it initially is no less prone to inflationary pressures than that of any other housing. Therefore,

in the absence of assurances that such housing will be economically capable of being properly maintained and serviced regardless of the income fluctuations of its tenants, its presence in the community would present a latent threat to the long-term soundness of the surrounding unsubsidized residential environment. Recent experience with all federal and state rental housing programs, including public housing and various interest-subsidy programs, has shown conclusively that the units built with their assistance cannot survive in an inflationary economy absent operating subsidies to absorb increased costs. A "one-shot" density bonus does not provide the necessary long-term assurance of solvency as does, for instance, the federal Section 8 Housing Assistance Payments program.

(b) The "density bonus" concept runs counter to the basic logic that governs the determination of appropriate residential densities. Lower income families, if for no other reason than financial inability to take advantage of far flung amenities, impose a greater stress on their immediate environment than do wealthier ones. If this is so, it is difficult to defend the proposition that a project that includes a substantial proportion of such housing can be appropriately developed at a density higher than that which the locality demands of developments that do not.

The developer's proposed plan included a 300,000 square foot shopping center and hotel-conference center on a 30-acre site. Since the Court decision dealt exclusively with the constitutional housing issue, the Township did not feel in any way compelled to approve commercial development that it considered to be either irrelevant to the needs of the present or future residents of the community -- such as the proposed hotel -- or in excess of the residents needs. In rejecting the proposed hotel, the Township was aware of, but unimpressed with its possible usefulness to the AT&T Long Lines Headquarters -- and, by extension, to the AT&T Corporate Headquarters in Basking Ridge, some 10 miles away, and other major employers in the region. Beyond offering the opinion that this use in the heart of a transportation node would be appropriate from a land use planning stand point, the Master refused to be drawn into any discussions bearing on this issue since he considered it to be totally unrelated to his specific assignment under the Court order.

* * *

A second set of concerns were those provisions of the Township's proposed land development regulations that could be deemed subjective and unnecessarily cost-generating, both of which the Court enjoined the Township from enacting. Here, again, the Master viewed his role as that of having to review the provisions proposed by the Township rather than of taking any initiative. In that task, he was ably assisted by the developer's attorneys and planning staff and consultants who, in pursuit of their own interest, combed each draft submitted by the Township with as fine a

tooth comb as has ever been devised. The first draft drew over 150 specific complaints from the developer. An all-day meeting of all parties, convened by the Master, resolved every one of these issues, one by one. A second, similar meeting involving the Township's, the developer's, and the Master's own staff engineers resolved another series of differences having to do with improvement standards. Subsequent drafts raised new issues, all of which were handled in similar fashion. The last set of modifications was suggested after publication of the notice of hearing on the ordinance. In order not to delay the adoption process beyond the court-imposed deadline, the Township adopted the basic ordinance, introduced the final amendments to that document on the same night, and adopted them also four weeks later.

* * *

The Master's assignment is continuing since the plaintiff's application for preliminary approval of its development is only now in process of being prepared. It would be useful, however, to summarize at this point some of the reasons why the court-mandated process using a planning Master may have been as successful as it seems to have been in this instance:

1. Both the Township and the developer were bound by a specific numerical court-imposed standard. Much

though the Township may have wished to mitigate the suddenness of the mandated change in densities, it was compelled to stay within the 5 to 15 range. As for the developer, it was in his own interest to produce a marketable community. Since its evolution to maturity would take years, it was important to him that each step produce an environmentally sound product. It was, therefore, within reason to expect that the plaintiff would not object to being held to somewhere near the bottom of the court-mandated density range.

2. Throughout the lengthy process of development of a highly complex and sophisticated set of land development regulations, the Master's ability to question the need for, or severity of, various provisions was backed up by a Court order which mandated that the ordinance be free of "subjective standards."

3. The Master's guiding principle was the belief that the Court could not possibly wish the result of its decision to be less than the best achievable community of a type that would satisfy the constitutional housing requirement. The Court did admonish the Township at one point that its effort to reduce the geographic extent of the corridor could result in the

development of "Hudson County highrises." The Master interpreted this to be an expression of the Court's belief that, given a reasonable acceptance by the Township of the implications of the location within its boundaries of two interstate highways and a major employment center, the type of development that would satisfy its mandate should be as compatible as possible with the remaining 90 percent of the Township where the Court permitted a rural 3-acre minimum lot area regulation to remain in force.

Given the distance of the Township from major urban centers, its rural past, the rural character of the areas immediately beyond its confines and the acceptance in both the County plan and the regional plan of a likely long term rural future for those areas, the Master considered achievement of the bottom of the mandated density range to be an acceptable solution.

4. The many-faceted planning issues that arise in the review of a large scale development transcend the expertise of even the most seasoned individual planning professional. The ready availability to the Master of a multi-disciplinary planning organization that includes architects, engineers, traffic experts,

development economists, etc. who are able to respond to issues from their different perspectives in the pursuit of a comprehensive and objective solution to land use concerns, was extremely helpful. The fact that the Master's own experience included the preparation of development plans for the private sector as well as for public bodies may have given him an added sensitivity to, and understanding of, the concerns of both sides, thus contributing to his ability to strike what proved to be balanced solutions to knotty problems.

5. Throughout the process -- which stretched over a 10-month period, involved numerous meetings, and included a couple of dozen representatives of the Township, the developer, the Master's office, as well as the New Jersey Public Advocate's office and the Americal Civil Liberties Union (which represented the civil rights plaintiffs in the case) -- the most salient characteristic of all participants was the courtesy and civility with which they engaged in discussions of even wide differences. Whether because of an innate sense of social responsibility or because this decision,which came at the end of a 9-year process of litigation, seemed to the Township to be as definitive as anything could be, the Township unfailingly agreed to modify even long-cherished provisions in the interest of achieving a reasonable resolution of the problems. The

developer, with a major, highly profitable victory in his pocket, was most amenable to reason, also. Under conditions such as these, and with as clear a mandate and its underlying basis as Judge Leahy's decision and Order, the task of the Master was not only immensely challenging, but also highly satisfying in personal terms. But it should not be forgotten that he was able to achieve his results in a soft-spoken manner -- as one newspaper reporter characterized him -- only because he was carrying a universally perceived and unambiguous big judicial stick.