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Master's letter to Judge

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JAN 25 1985

January 24, 1985

JUDGE SERPENTELLI'S CHAM

The Honorable Eugene D. Serpentelli, J.S.C.
Superior Court of New Jersey
Ocean County Court House
Toms River, New Jersey 08753

My dear Judge Serpentelli:

The attorneys representing Bedminster Township have requested I supplement my letter to Your Honor dated September 14, 1984 by elaborating my role with regard to the issue of Mount Laurel site sewerability.

As I stated on the witness stand, I raised the issue of site sewerability in my very first report to Judge Leahy (dated May 27, 1980--please see Appendix A hereto). It was always perfectly clear to me that an unsewerable site cannot be offered validly in satisfaction of a housing obligation. In fact, I urged the Court at that time to do whatever it might deem appropriate to assure that "the zoning actions of the Township will result in a real probability, rather than a theoretical possibility" that the mandated housing will actually materialize. Please note that I used that particular language almost three years prior to Mount Laurel II.

As the Supreme Court found in Mount Laurel II, Mount Laurel I and Madison had stopped short of requiring either affirmative steps on the part of municipalities or assurances that the zoned-for housing will actually be provided within a stated period. I assume that it was for these reasons that the Court did not feel it appropriate to follow the avenue I had opened up.

Between the entering of Judge Leahy's Final Order in March, 1981, and November 3, 1983 when I was requested by Your Honor to review the Township's Mount Laurel II compliance I acted pursuant to the terms of my original appointment which limited my continuing role to that of monitoring the Township's approval process as it affected the Allan-Deane (Hills) development. Following my reappointment, however, I fully understood that my role was changed again to that of assistant to the Court in reviewing and

reporting on the Township's compliance offer in the light of Dobbs' critique thereof. This I did in my report dated January 10, 1984.

I think it would be useful to set forth my concept of my role regarding the sewerability of proposed sites. As I stated to the Court on several occasions, I feel that large obligations imposed on suburban or rural municipalities will inevitably run into sewer inadequacy problems. Unless reliance is to be placed on haphazardly distributed on-site plants--which NJ DEP tends to accept only as a last resort--, the only realistic course of action is to allow municipalities time to work out complex engineering, financial, institutional, intergovernmental--and political--problems in the devising of solutions. This work would have to be done after the entering of the Order conditionally accepting the sites since it clearly cannot be accomplished within a period of time the length of which is limited in response to the need to resolve as speedily as possible the broader Mount Laurel compliance issue.

As Your Honor will recall, in the instant case I had been asked to report my findings and recommendations within sixty days following the November 3, 1983 Order. The last of the Township's data reached me on December 20. I acted on the assumption that the Court was anxious to arrive at a determination as early as possible. It would have been difficult for me to reconcile the need for elaborate technical and legal studies with the deadline established by the Court. Furthermore, the feasibility of certain alternative courses of action which the Township claimed were available to it and to the Court (such as the possibility of mandating that EDC provide priority sewer service to Mount Laurel developments in its franchise area) was not clear and could only have been resolved by the Court.

In Allan-Deane, the plaintiff-builder was not particularly affected by delays in the ultimate resolution of the case since it was hard at work building its approved 1,287 units. In other situations, however, where implementation of the builder's remedy cannot commence until after the entering of a Final Order, the pursuit of sewerability issues to the lengths implied in Peter O'Connor's letter to me dated December 29, 1983 would have two undesirable consequences: (a) it would cause major delays in the builder's remedy development planning and approval processes; and (b) might preclude meaningful builders' participation in the devising of sewer solutions since they would not be assured of receiving their basic zoning until all these issues are put to rest.

For these reasons I felt that a package of sites which were otherwise suitable and which appeared to be sewerable within the projection period should be accepted by the Court, subject to continuing Court oversight of the Township's efforts to actually provide the sewers that would make the sites useable within the period. I made a recommendation to that effect in my reports of January 10 (page 4 of letter of transmittal and page 52 of the report) April 11 (page 22).

It seems to me that the fact that a more advanced solution proved capable of being devised in Allan-Deane does not disprove my theory. The presence in the picture of a sophisticated developer who had already built a major sewage treatment plant designed for expansion and who had actually built hundreds of units will be the exception rather than the rule. The possibility--if not the probability--did exist that the existing capacity of the plant would be allocated by the Court to Mount Laurel developments in the EDC's franchise area rather than to the developer's market rate units. This may have had something to do with the developer's cooperative attitude. As for the Township, it was equally cooperative inasmuch as the eventual solution involving expansion of the EDC plant accorded with its own plans and with its proposals to the Court, most of which (as detailed in my letter of September 14, 1984) were part of the package approved by Judge Leahy as far back as March, 1981.

To summarize, there was never any question in my mind that all site offered as part of a compliance package had to be useable for multi-family housing at the proposed densities. I had not assumed, however, that it was my role to retain a sewer expert and an attorney to determine the precise steps that would be required to achieve the desired ends prior to a judgement as to whether the otherwise suitable and apparently sewerable sites offered a realistic opportunity for the construction of housing. Instead, I relied on the Court's prerogative of continuing to monitor the Township's compliance efforts and of its ability to require more acceptable substitutes if it deemed those efforts to be inadequate.

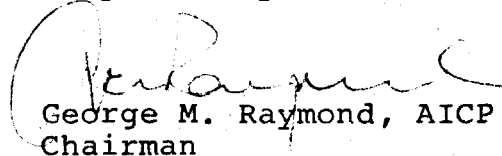
During the evolution of the Township's compliance package I was supplied with Dr. Hordon's opinions regarding the feasibility and probable timing of expansion of the EDC plant. Based on

* Since the Township had approved, years earlier, the construction of a sewage treatment plant designed for expansion to double the initial capacity, I had no doubt whatsoever that sites within its franchise area would be sewerred.

preliminary investigations, I considered his views to be overly conservative. The same was true of his evaluation of the feasibility of expanding the Bedminster-Far Hills plant to the extent required. As I indicated in my April 11, 1984 report to the Court, neither I nor anyone else was in a position to offer iron-clad guarantees as to how or when the additional sewer capacity would actually come on line. The willingness of the Township and the EDC to pursue its realization jointly out of mutuality of interest offered the best guarantee that, if feasible, such additional capacity will be accomplished. Under the circumstances, I urged the Court to approve the sites proposed by the Township and hope that the Court will condition such approval upon its continued oversight of the Township's progress.

I hope that the above will be helpful.

Respectfully submitted,



George M. Raymond, AICP, AIA
Chairman

GMR:kfv

cc: Alfred Ferguson, Esq.
Joseph L. Basralian, Esq.
Henry A. Hill Esq.
Kenneth J. Meiser, Esq.

Appendix A

Regarding land capacity, I feel compelled to make the following observations: The number of residential units which can be developed on a given tract of land is limited by availability of sewers. On the Allan-Deane property, the probable realization of the planned capacity is assured by the fact that the developer will provide his own sewerage and sewage treatment systems. In the Bedminster Village portion of the Corridor, however, the development capacity is now limited by the fact that the Town's sewage treatment plant has an excess capacity sufficient to serve only about 300 additional units. Under the circumstances, the efforts of the Township and the Court to assure that the land in the Corridor will accommodate a sufficient and balanced housing supply could be thwarted if the Township took no initiative to develop added sewerage capacity, or if the New Jersey Department of Environmental Protection refused to approve private sewerage treatment plants upon the failure of the Township to expand its plant. I am also not aware of any funding priority on the part of the Department of Environmental Protection favoring Townships which are under Court order to expand their housing supply.

I do not know the limits of the Court's jurisdiction in this regard. I would recommend, however, that, having retained jurisdiction "to the extent necessary to carry out and supervise the acts and procedures" of your Order, you convene a meeting with representatives of the Township and of the State of New Jersey, as well as the American Civil Liberties Union, to explore ways in which the zoning actions of the Township will result in a real probability, rather than a theoretical possibility, that it will be feasible to actually build the housing supply which you found it necessary to mandate be permitted in the Township.

2. ZONING ORDINANCE

The proposed zoning ordinance was carefully examined so as to eliminate to the extent feasible subjective standards and unduly cost generating requirements. I believe that the zoning ordinance now before you complies with your Order in this regard.

3. SUBSIDIZED AND LEAST COST HOUSING

In addition to mandating that provision be made for some moderate and many very small lots for detached one-family and two-family units, your Order also mandated that the planned