AMG

11-22-83

letter brief in opposition to Twp's motion for SJ

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IN REPLY REFER TO FILE NO 5323-02

November 22, 1983

Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
CN 2191
Toms River, New Jersey 08753

Re: AMG Realty Company and Skytop Land Corp. vs.
Township of Warren, et. als.
Docket No. L-23277-80

Dear Judge Serpentelli

This letter is submitted on behalf of AMG Realty Company and Skytop Land Corp. in opposition to the motion for summary judgment filed on behalf of the Warren Township Sewerage Authority returnable November 28, 1983, at 1:30 P.M.

As a point of reference AMG and Skytop share common principals. The lands owned by AMG Realty Company (Lots 22 and 25, Block 137) consist of 89 acres and the lands owned by Skytop Land Corp. (Lot 10, Block 125) consist of 214 acres. Both parcels are capable of current development for low-cost housing.

The present motion must be denied for various good reasons:

1. <u>The Sewerage Authority Has No Standing to Question the Legal Position of AMG or Skytop</u>.

The pleadings filed in this matter by AMG and Skytop are directed solely against the Township of Warren and not against the Sewerage Authority. It is only Timber Properties which has a direct action against the Authority. If this motion is to be brought against Skytop it has to be by a party in litigation with Skytop, i.e. the Township of Warren. Warren Township has not sought to limit the participation of Skytop as a plaintiff either in this case or in the prior case.

2. Factual and Legal Issues Bar Summary Judgment.

Rule 4:46-2 permits the entry of summary judgment only if "there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. At this point, on the eve of trial, the pleadings and other documents on file with the Court raise substantial legal and factual disputes which require all of the issues presented in the complaint of AMG and Skytop to proceed through trial.

These issues initially include all of the Mt. Laurel legal and factual disputes relative to Ordinance 82-19 and the newly proposed 30 percent mandatory set-aside ordinance. It is inconceivable to believe that the Sewerage Authority, or any other party to their case, could consider these issues ripe for summary judgment. It is respectfully submitted that no party is in a position to obtain this form of relief as to this issue, and both AMG and Skytop have a right to try the matter as to the legality of this ordinance.

As to the "builder's remedy" aspect of the case the Sewerage Authority, assuming it has standing to question this claim, has not presented an issue which is ripe for summary judgment. The various standards justifying builder's relief are set forth in Mt. Laurel II, 92 N.J. at 279-281 (1983). These standards, reduced to three as set forth in Orgo Farms contain a total of ten basic factual and legal ingredients of affirmative and defensive proofs. The Court, at this time, cannot select, in a summary manner, which of the present plaintiffs meet these standards or further determine which of the present plaintiffs are entitled to obtain such relief even if the standards are met.

As to be set forth in the trial brief of AMG and Skytop, Warren Township has expressly stated in public meetings that it will do only the "bare minimum" to comply with its housing obligation. As also to be proved at trial is the contention of AMG and Skytop that it was not until eleven months after Warren adopted Ordinance 82-19 that it received any indication from its planner as to what its fair share of the regional housing need was. This share, as reported by its planner, is 519 low- and moderate-income units and it has currently zoned for none. The expert planners on behalf of the plaintiffs in this case have fairshare figures ranging from 631 to 1,661 low- and moderate-income units. If a builder's remedy is to be of a nature to obtain at least a partial satisfaction of this obligation, it most likely will have to be sought and granted to a developer who has sufficient land area to

utilize the concept of internal subsidization through economy of scale. See Mt. Laurel II, 92 N.J. at 279, note 37. Skytop's presence is necessary for this purpose. See also, 92 N.J. at 268, note 32 wherein it is stated:

> Where (as here) set-asides are used, courts, municipalities, and developers should attempt to assure that lower income units are integrated into larger developments in a manner that both provides adequate access and services for the lower income residents and at the same time protects as much as possible value and integrity of the project as a whole.

Since Warren is proposing a 30 percent mandatory set-aside ordinance it is obvious that the larger parcels will be best suited for development so as to give the internal subsidy. To remove Skytop substantialy impairs AMG's ability to provide low-cost housing whereas the retention of Skytop assures such performance if the builder's remedy is granted to both.

If the defendants are entitled to pick and choose which plaintiffs are to remain in this case, or in any Mt. Laurel case wherein builder's relief is sought, the opportunity to select the plaintiff least likely to perform could result. AMG and Skytop, both having the same individual principals, have and will work together for the purpose of providing, not only the necessary lands to accomplish the internal subsidy, but also to jointly finance the past and present litigation and future construction. If satisfaction of the principles of Mt. Laurel are in the forefront of the Township's intentions as it must be under the prior judgment of May 27, 1982, it should not seek to delete from this case the party (Skytop) whose presence is essential for effective satisfaction of a great part of that duty. To seek to eliminate this plaintiff at this time is an example of the activities, since Mt. Laurel I, that municipalities undertake to frustrate, rather than vigorously pursue, the objectives of Mt. Laurel. "Home rule" used in this manner does not rise to a constitutional principle of a dimension even close to the Mt. Laurel constitutional objectives.

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For these reasons it is submitted that the Warren Township Sewerage Authority's motion, at least as to Skytop Land Corp., should be denied.

Respectfully yours,

McDONOUGH, MURRAY & KORN
A Professional Corporation

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JEM:bp

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