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Letter Supplementing arguments

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JUDGE SERPENTELLI'S CHAMBERS

Hon. Eugene D. Serpentelli
 Ocean County Court House
 CN-2191
 Toms River, New Jersey 08754

Re: Timber Properties et al v. Township of Warren et als
Docket No. L-67820-80 P.W.

Dear Judge Serpentelli:

I would like to address as succinctly as the trial testimony will permit the impact of availability of sanitary sewers upon the builder's remedy issue. Mount Laurel II outlines the third element of the builder's remedy in the following language: "A builder's remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff's proposed project is clearly contrary to sound land use planning." As a planning concept, N.J.S.A. 40:55D-28 (b) (5) provides for a utility service plan element analyzing the need for and general location of sewerage and waste treatment facilities. Clearly, the intent of the law is to encourage municipalities to plan for present and future sewerage and waste water treatment facilities to meet the municipality's needs as well as maintain the purity and integrity of waters throughout the State of New Jersey. The entire subject matter of clean waters was fully addressed in the Federal Water Pollution Control Act Amendments of 1972 and 1977. The respective vehicles utilized were the 208 Water Quality Management plans for the Upper Passaic River basin and the Upper Raritan River basin together with the implementing 201 facilities plans. While the 208 plans presume not to place limitations upon population growth, they obviously intend to restrict the amount of sewage effluent and the level of treatment of same within a particular drainage basin. The obvious and practical impact of this latter objective is indeed to monitor population growth within a particular drainage basin since density of development and waste water quality are inextricably related. ←

The 201 plans utilize a logical approach to waste water quality management within a drainage basin, one of the main ingredients of which is identical to that utilized in the fair share housing process, i.e., population projection. Not only are the resources of State offices

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utilized in the population projection analysis but the process also draws upon the expertise of various agencies including that of the Department of Commerce and the Bureau of Economic Analysis. This latter agency basis its projections upon a very sophisticated econometric model which has apparently proved to be quite successful. Chapter IV of the 208 plans outlines generally the approach used in formulating population projections for the State of New Jersey (and used throughout the country) which projections are then disaggregated to counties and in turn disaggregated to municipalities. It should be noted that the projections indicated in the 208 plans for New Jersey were somewhat higher than those projected by the New Jersey Department of Labor and Industry.

208
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Once population projections are formulated and disaggregated as outlined above, waste water treatment flow capacities are then assigned to each drainage basin within a municipality. Clearly, this is the very essence of the sewer planning process. Warren Township Sewerage Authority engineer, Stanley Kaltnecker, testified that the 208 and 201 regional waste water studies for the Upper Passaic River basin provided for 1,900 equivalent connections or 530,000 gallons per day flow in the Stage V service area. Of the maximum potential 530,000 gallons per day, 380,000 gallons per day have been paid for by potential users, 11,200 gallons per day of which were assigned to plaintiff Timber Properties. If one were to assume that plaintiff Timber Properties were to construct 850 units of which 365 would be 2 person households, 405 - 2.63 person households and 80 - 3.35 person households, a total of 2,063 potential individuals would be accomodated. That number of persons at an average flow of 75 gallons per day would amount to a total of 154,725 gallons per day. Even considering the allowance for 40 equivalent connections assigned to Timber Properties, accomodation of a total of 850 units with the mix as proposed by Timber would utilize substantially all of the remaining capacity existing within the Stage V sewer district. In addition, one should keep in mind that sewer line infiltration has no relationship to size of household and will occur regardless of intensity of use by household members.

The proposed Skytop Development is also located within the Stage V sewer district for which an allowance of 42,000 gallons per day was made during the planning process to sewer that basin. If the Skytop property were developed at a density yeilding 1,936 units as it proposes, assuming a similar household mix as suggested by Timber Properties (approximately 180 gallons per day per unit), the total flow would translate to 348,480 gallons per day. Even making some allowance for the 42,000 gallons per day assigned to the Skytop tract, it is quite obvioius that development as proposed would far exceed the pro rata maximum

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under the 208 and 201 regional waste water studies. Again, attention is directed to the fact that infiltration into sewer lines is unrelated to the intensity of use by household members. In this sewer planning process it would be most unfortunate to ignore the impact of high density use of sewer capacity on neighboring municipalities sharing the same drainage basins. Bernards Township may very well, for example, have a similar Mount Laurel obligation and be required to utilize maximum allowable sewer capacity under the 208 and 201 regional waste water studies. The only sensible approach which would avoid potential future problems would be to stay within sewer planning projections formulated under the 208 and 201 studies.

Another critical factor that generates planning concerns is that of the receiving capacity of the Dead River. Testimony on behalf of defendants was quite clear that the receiving capacity of the Dead River was extremely limited because of its varying seasonal flow rates and its ability to accept sewerage effluent was a subject matter considered in the Environmental Impact Statement for the Upper Passaic River watershed. In addition, the fact that Bernards Township treatment plant also flows into the Dead River should not be ignored. Finally, water quality of both the Dead River and Passaic River was of significant concern in the 201 Facilities Plan for the Upper Passaic River. See pp.4-85, 5-3, 8-2 and 9-55.

Plaintiff AMG suggested, through testimony, alternatives to sewerage of the Skytop property, i.e., sewerage part of the premises through the Stage IV district, a portion into the Stage V district and the balance through the Middlebrook Trunk system. In this respect, it should be noted that the Federally funded Middlebrook Trunk sewerage system was again in accordance with the 208 and 201 regional waste water studies for the Upper Raritan River basin and designed to accommodate development substantially in accordance with existing zoning in Warren Township. Limitations were imposed both on the capacity of the interceptors, pumping facilities and ultimate treatment of effluent by the Somerset Raritan Valley Sewerage Authority.

Question arises as to whether these are issues concerning compliance or issues related to the appropriateness of a builder's remedy. If we are dealing with the latter, defendants must establish that what plaintiffs propose generates substantial environmental or other planning concerns leading to the conclusion that to allow same would be clearly contrary to sound land use planning. If one is to give any weight to the Federal Water Pollution Control Act Amendments of 1972 and 1977 and the 208 and 201 regional waste water studies as well as the Environmental Impact Statement, one would be hard pressed not to conclude that what plaintiffs propose is simply contrary to sound land use planning. The

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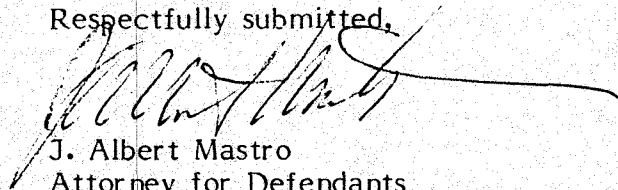
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very purpose of 208 and 201 regional waste water studies as well as the Environmental Impact Statement is to insure development in accordance with sound planning principles, i.e., distribute density with some measure of balance throughout the municipality as to not unduly create environmentally unsound hot spots. To permit extremely high density development concentrated into one small area of a rather large municipality suggests gambling with the municipality's future by seeking short term gains and ignoring long term consequences. Nor can the legitimate interests of development of neighboring municipalities within Upper Passaic and Upper Raritan watershed be ignored. To address the immediate needs of the proposed high density projects and ignore the needs of the balance of available developable land in the municipality is the antithesis of the planning process. Planning by definition involves guided growth for future generations; a crash program resulting in inordinate densities of population within small areas is simply contrary to that concept. Applications for modification of 208 and 201 regional waste water studies can be made and probably processed with some measure of success provided the end results are within the spirit and intent of those studies. An approach in which the tail wags the dog must be viewed with a substantial measure of concern. Premature and concentrated utilization of allowable sewer capacity within a total drainage basin (allowable in the sense of being consistent with federal and state policy for clean water management) which will prejudice the ability of other property owners to develop their respective properties within that basin raises significant issues of Due Process and Equal Protection as far as the rights of the latter category are concerned. Minimum standards of Due Process ordinarily require an opportunity for some kind of hearing prior to the deprivation of a significant property interest. Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981), at 299.

I shall be pleased to refine or amplify any of the arguments presented herein as you might feel appropriate.

Respectfully submitted,



J. Albert Mastro
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Warren Township Sewerage Authority

JAM/jc

cc: John E. Coley, Jr., Esq.
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