

ML - Cranbury

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- Letter from Mallach to Payne re: Builder's
Remedy Issues

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RE: Builder's Remedy Issues
Cranbury Township, New Jersey

Dear John:

This letter will seek to address the planning issues associated with the problem of the builder's remedy as it affects the rezoning activities now under way in Cranbury as a result of the Urban League litigation. In order to do so, however, it is important to begin with some discussion of the planning issues associated with the builders' remedy generally, and to see if some meaningful frame of reference can be established to enable one to interpret the central Mount Laurel II language:

Where a developer succeeds in Mount Laurel litigation and proposes a project providing a substantial amount of lower income housing, 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 (92 NJ at 279-280).

While it is clear that the Court intended the builder's remedy to be applied liberally, it is equally clear, in my reading of the decision, that they did not mean the concept of "environmental or other substantial planning concerns" to be limited to narrow or site-specific concerns, such as unsuitable soils for development, steep slopes, or inadequate traffic capacity on adjacent roads. This is stressed in general language early in the decision:

Subject to the clear obligation to preserve open space and prime agricultural land, a builder in New Jersey who finds it economically feasible to provide decent housing for lower income groups will no longer find it governmentally infeasible. Builders may not be able to build just where they want - our parks, farms, and conservation areas are not a land bank for housing speculators (92 NJ at 211).

Indeed, the concept of sound land use planning that runs as a

consistent thread through the decision is that of preventing sprawl, along with the attendant benefits of so doing: preserving New Jersey's farmlands, protecting environmentally sensitive areas, and husbanding open spaces. This emphasis is central to the Court's strong reliance on the State Development Guide Plan.

It logically follows, therefore, that a municipality could successfully argue that a builder's remedy should be denied with regard to a site which, although developable from a technical standpoint, is so located that its development would potentially significantly affect goals of this nature. Farmland preservation is one goal which could serve as the basis for such an argument. Since, for example, it is widely held that successful farming requires a large contiguous farmed area, construction of a development that would result in a significant break in contiguity of such an area could be argued to be "clearly contrary to sound land use planning".

In order to succeed in such an argument, however, given the strength of the near presumption in Mount Laurel II that builder's remedies should be granted, the municipality bears a strong burden. One might suggest, for example, that for a municipality to prevail in its argument that a builder's remedy should be denied because of its impact on farmland preservation, it would have to show a strong probability that:

(1) The farming area that the municipality seeks to preserve has a reasonable probability of survival; i.e., there are no compelling circumstances which strongly suggest that efforts to preserve the area are doomed in any event;

(2) The effect of the proposed development on that farming area is potentially significant;

(3) Mitigation measures which would eliminate the significant impacts of the proposed development are not realistically available; and

(4) The other land use planning and zoning activities of the municipality with regard to the area in question are fully consistent with the objective of farmland preservation.

This is not meant to be a statement of a definitive test, but a suggestion of the nature of the inquiry that appropriately should be made in response to such an argument by a Mount Laurel II defendant.

This standard is, of course, significantly more stringent than that which would be used to evaluate municipal planning in a conventional setting, or to evaluate whether a Mount Laurel ordinance adopted by a municipality in the absence of litigation would stand. In those cases, the municipality would be entitled to a presumption of validity; as long as the planning and zoning

scheme was reasonable, had a rational basis, and was not arbitrary or capricious, it could be assumed to prevail. The corollary to this proposition is perhaps even more significant: a municipality which seeks to deny a builder's remedy to one or more developer plaintiffs, on the basis of planning standards no more stringent than those commonly used to support a master plan or zoning ordinance, will not, on the basis of a clear reading of the decision, prevail.

One further issue arises in those circumstances in which there are more than one developer plaintiff, a situation apparently not contemplated in the Mount Laurel II decision. Clearly, in those cases in which there is a single developer plaintiff, and he is the sole immediate vehicle for the production of lower income housing in the community, the standards for eliminating his site from consideration in the rezoning effort must be stringent in the extreme. If, however, there are many developer plaintiffs, the public interest argument that all of the plaintiffs must obtain rezoning (up to the extent of the fair share obligation) is substantially weaker. If some of the plaintiffs obtain rezoning, and the remainder of the fair share is realistically provided for in the balance of the compliance program, the outcome, in terms of production of lower income housing is not likely to be significantly different. Thus, to the extent that the public interest justification for the builder's remedy lies in its bringing about more lower income housing units sooner, it is significantly attenuated in the case of multiple developer lawsuits*. There are, of course, other justifications for this remedy, but I believe that the above is the most significant one from the public interest perspective. If this is the case, then it suggests that an overall planning scheme adopted by a municipality as a result of Mount Laurel II litigation, which incorporates some developer plaintiffs, but denies rezoning to others, could be approved by the courts on the basis of standards still more stringent than those used to uphold a master plan in conventional zoning litigation, but less stringent than those which would have to be applied to an effort to deny a solitary developer plaintiff his remedy.

*There are at least two other relevant considerations worth noting briefly. First, the greater the amount of the fair share that must be awarded to developers as a result of litigation, the more the compliance program is locked into the "4 to 1" problem, with its attendant impacts on the community, and the less opportunity remains for the community to undertake creative affirmative steps to provide housing in other ways, ways which might well be more appropriate from a public policy perspective. Second, looking back at the Mount Laurel II decision itself, it seems clear that the expectation of the court was not that hundreds of builder's remedies would be granted, but rather, that the threat of the builder's remedy would prompt many, if not most, potentially vulnerable municipalities into rezoning to comply with Mount Laurel rather than risk that eventuality. As a result, the court did not explore in any depth the ramifications of what would happen if that eventuality became real, which, is precisely the case.

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Given these general principles, which I recognize contain considerable expression of opinion, rather than being matters of settled law or planning practice, the question then becomes one of applying them to the particular facts of Cranbury Township. There are four sites potentially subject to a builder's remedy, assuming for argument's sake that the legal question affecting Toll Brothers is resolved in their favor. None of the four sites presents any significant environmental issues, in the sense of site-specific problems, and none of them seems clearly inappropriate or unfeasible in terms of specific planning issues, such as traffic or circulation, access to community facilities, and the like*.

There are, however, two arguably significant planning issues raised by the Township; historic preservation, with regard to the historic village of Cranbury, and farmland preservation. As noted earlier, farmland preservation is given particular attention in the Mount Laurel III decision as a legitimate planning goal; it is not unreasonable to argue that protection of a demonstrably significant historical area such as the village of Cranbury is also a sound planning goal, worthy of consideration even in a Mount Laurel context. Each of the four sites arguably affects achievement of one or both of these goals.

With regard to historic preservation, there appear to be two significant issues. One is simply the loss of the historic character of the village through excessive or incompatible growth on sites contiguous to the historic area, and the second is the deleterious effect of Main Street becoming a congested artery for through traffic. While the Zirinsky site is the only one immediately adjacent to the village, all of the others have at least potential traffic impacts on the village.

Denying approval to any of the plaintiffs' development proposals, however, on the basis of their inconsistency with the goal of historic preservation, would be hard to sustain on the basis of the tests that were suggested earlier in this letter. Specifically, both of the issues raised above are readily subject to mitigation. The effect on the historic character of the village of contiguous development can readily be mitigated through careful planning and design controls; there are many examples throughout the United States and Europe where new development has been accommodated in historic areas with no ill effects. The more complicated question

*In the Suitability Evaluation Analysis prepared for the Township by Raymond, Parish, Pine & Weiner, a variety of distinctions are made between the sites on such grounds, as well as on other grounds such as "consistency with the Township land use plan", and so forth. Careful scrutiny of this analysis, however, leads to the conclusions that [1] certain suitability criteria applied, such as the above "consistency" test, are inappropriate in a Mount Laurel context; [2] others, such as the distinctions made between certain soil types in the environmental suitability assessment, are specious; and [3] others, such as much of the traffic assessment, simply does not establish differences between the sites of enough significance to justify serious consideration.

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of traffic can, in all probability, be mitigated through a series of bypass routes designed to divert through traffic from the historic center. Although the Township has failed in the past to pursue a program of bypass routes, in the process losing a number of opportunities through development, it is still readily feasible to implement such a program. It appears unlikely, therefore, that the Township could justify denial of a builder's remedy to any developer on grounds of preserving the historic village. This is not to denigrate the importance of that objective; rather, that it is unlikely that any clear planning connection can be established between that objective and the denial of any builder's remedy sought.

The farmland preservation issue is considerably more complex. All of the four sites are on ground which is being farmed at present, so all would remove farmland from the inventory. That is true, however, of a very large part of all development in New Jersey, and (given, in particular, the large number of farms throughout the state which have been allowed to revert to woodlands for reasons unrelated to development) can hardly be considered an issue in itself. The real threshold issue is whether a sustained farming area economically capable of survival exists in Cranbury, and whether it would be significantly impaired by development of any of these sites.

There are two extended farming areas in Cranbury, one between Route 130 and the New Jersey Turnpike; the second between Cranbury village and the western municipal boundary with Plainsboro Township. Of the two, the latter is considerably larger, and as a farming area extends to encompass a substantial part of Plainsboro and South Brunswick Townships. The Township has made a decision to focus its farmland preservation efforts on this latter area, and on its face, this appears to be a reasonable decision. That in itself does not, of course, support a conclusion that farming in this area is economically viable on a long-term basis. The circumstances which would enable one to reach such a conclusion are numerous and complex, and well beyond the scope of this analysis.

The Garfield site is located in the farming belt between the Turnpike and Route 130, and while farmland, does not conflict with any of the municipality's farmland preservation goals. The other three sites are all located in the western area which the Township seeks to preserve as farmland. The issue affecting those sites is whether their development would have a significant impact on the continued viability of farming in the balance of the area. There are at least two reasons to anticipate such an impact: [1] the established potential for serious conflict between adjacent agricultural and residential uses; and [2] the importance, in terms of long-term agricultural viability, of maintaining extended contiguous areas in farming.

From this perspective, the least impact arguably arises from the Zirinsky site. Although farmed, it is at least as much a part of the village from a locational standpoint as part of the western farmland belt, and really abuts only one other farmed parcel (the Toll Brothers site). The potential impacts of the other two sites are more substantial.

The Cranbury Land holdings, from this standpoint, may be seen as two sites, divided by Ancil Davison Road. The section to the east of that road can perhaps be seen as a logical extension, up to a point, of the approved (and partially constructed) Shadow Oaks development. While it is clear that approval of that development by the Township was manifestly at odds with farmland preservation goals, the fact remains that it exists, the damage has been done, and cannot be undone. Development of the area west of the road moves into an area that is still consistently devoted to agriculture. As a result, while all of the Cranbury land holdings encroach on the agricultural area, a reasonable argument can be made for a distinction between the two halves of the tract (the strong possibility that Route 92 will take a large part of the western site is another consideration to be noted)*. There are, therefore, some potential farmland preservation impacts associated with development of this site, which will have to be balanced against the achievement of Mount Laurel goals through that development.

The fourth site, that owned by Toll Brothers, also encroaches significantly into the area designated for agriculture, thus dictating a similar effort of balancing. It should be noted that development of the Zirinsky tract does not lead logically to development of the Toll Brothers tract, particularly if development of the former is concentrated in the areas of immediate proximity to the village, and adequate buffers are provided between that development and the farming areas to the west.

This summarizes the relevant issues, as they affect each site. At this point, Cranbury Township has three alternative routes:

[1] The Township can rezone all four builder plaintiffs' sites, thereby achieving the lion's share of its fair share goal, and take such additional steps, if any are needed, for the balance of its fair share obligations. If they were to do so, in a reasonable fashion, it is unlikely that any of the plaintiffs, including the Urban League, would object.

[2] The Township can seek to have its original zoning scheme, as

*The argument that development of the Cranbury Land site represents a logical extension of the existing development to the south in East Windsor Township is not well-founded. The municipalities are separated in this area by the Millstone River and a thickly wooded flood plain area, which acts as a substantial divider between the two.

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reflected in the 1983 Master Plan and zoning ordinance, reaffirmed, with only such changes as are necessary to comply with its fair share obligations. This would, presumably, involve offering rezoning of the Garfield site, but seeking to have all three other developer plaintiffs denied a remedy. The balance of the fair share would be met by rezoning other tracts, principally or entirely in the PD-HD zone east of Route 130 for multifamily housing at reasonable densities with a lower income setaside.

Although such a scheme might be supportable, if it had been an effort to comply with Mount Laurel II adopted in the absence of litigation, it is very doubtful that it can serve as a basis for denying any plaintiff a remedy. Its apparent approach to preserving the historic village, by discouraging contiguous development, is simplistic, while its approach to farmland preservation is grounded in a dubious scheme for the transfer of development rights. Furthermore, in the context of the outcome of this litigation, it shows no evidence of careful balancing of these objectives against the Mount Laurel objectives reflected in the developers' proposals. I do not see how the Urban League could support such a proposal.

[3] The third option available to the Township is to seek to arrive at a scheme somewhere between options [1] and [2] outlined above. Such a scheme, if it is to be worth consideration, would have to demonstrate both a careful balancing of Mount Laurel considerations as well as the community's historic preservation and farmland preservation goals, and incorporate mitigation measures by which some or all of the proposed sites could be developed, in whole or in part, without negative impact on those goals. This scheme might proposed that rezoning not be offered to some developer plaintiffs; or alternatively, that rezoning be limited to only some part of one or more plaintiffs' site.

Whether such a scheme could be supported by the Urban League, in my opinion, would depend on the specific features of the plan. Clearly, it is in our interest, as well as in the broad public interest, to balance the Mount Laurel objectives with other planning objectives, and to work toward a planning process which successfully integrates provision of lower income housing with other planning and environmental goals. Implementing such a process in Cranbury could have a potentially significant impact on the implementation of Mount Laurel remedies throughout New Jersey.

I look forward to your reactions to these thoughts.

Sincerely,



Alan Mallach

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cc: B. Williams, Esq.
B. Gelber, Esq.