

THE BARNES TRACT AND THE MOUNT LAUREL DOCTRINE

The Borough's plans for the Barnes Tract have their roots in two cases decided by the New Jersey Supreme Court in 1975 and 1983, setting forth what is known as the Mount Laurel Doctrine. The Mount Laurel Doctrine says that zoning ordinances that do not provide affordable housing opportunities are unconstitutional, and it requires New Jersey municipalities to zone for and take affirmative actions to provide their "fair share" of affordable housing. The Doctrine defines affordable housing as housing that is affordable for low and moderate income people.

Developers use the Mount Laurel Doctrine

Developers try to identify municipalities that do not provide affordable housing and then bring lawsuits to have the courts set aside their zoning ordinances as being unconstitutional. The developers then try to build projects with 20 to 30 apartments or condos per acre, which is far more than the municipality's zoning ordinance would have permitted. The lawsuits are called Mount Laurel suits, or builder's remedy lawsuits.

The Three Mount Laurel Suits Brought Against the Borough

The first Mount Laurel suit against the Borough was brought in the early 1980s. The suit was successfully defended on the basis that the Borough was fully developed, and that there was no vacant land in the Borough on which to provide affordable housing. The Borough Planning Board adopted a Master Plan in 1989 that assumed the Borough was fully developed and did not provide for affordable housing.

After the first suit, in 1985, the Legislature, in response to the *Mount Laurel* decisions, created the Council on Affordable Housing (COAH) to assess New Jersey's need for affordable housing, allocate that need to municipalities on a fair share basis, and review and approve municipal housing plans that would implement the local fair share obligation. COAH's approval of a plan insulated the town receiving the approval from Mount Laurel suits.

The second Mount Laurel suit against the Borough was brought by Canada Land Company in October, 2003. Canada Land wanted to build a high density apartment project on vacant property on Rt. 22 Eastbound between the Spanish Tavern and Uncle Bob's Self Storage. One of their concepts for the property involved two four story apartment buildings with a total of 132 units and a density factor of 38 units per acre.

By the time the Canada Land suit was filed, COAH had allocated 74 affordable units to the Borough and the Governing Body had realized that it would have to provide for affordable housing in Mountainside. While the Canada Land suit was pending, the Borough spent several years working with a Court appointed Special Master to develop a Mount Laurel Compliance Plan based on COAH regulations that were in effect at the time -- 2005. The Plan involved using the Barnes Tract as a site for a 25 unit affordable housing project for physically disabled persons that would be constructed and operated by a non-profit corporation. The balance of the Borough's allocation of 74 affordable units would be dealt with by means of Regional

Contribution Agreements, rental credits, and other means that were available under the COAH regulations that were in effect at the time.

In 2007, Canada Land voluntarily dismissed its lawsuit, and the COAH regulations on which the Borough's 2005 Plan were based were invalidated by the courts. Nonetheless, the Borough continued to work on meeting the Borough's affordable housing obligation. The work was underway on October 13, 2011 when The Pond At Mountainside, LLC brought the third Mount Laurel suit against the Borough.

The Court approves a Mount Laurel Compliance Plan for the Borough

By October 13, 2011, the Courts had invalidated the COAH Regulations, Governor Christie had attempted to abolish COAH, and municipalities in the state were left without guidance as to how their affordable housing obligations would be calculated, and without guidance as to how they could go about meeting those obligations.

Notwithstanding the chaos and confusion which prevailed when the Pond case was filed, the Borough determined that when the dust settled, it would confront even more Mount Laurel suits if it did not make a Plan. Accordingly, the Borough asked the Assignment Judge in Union County, Karen Cassidy, to appoint Retired Judge Eugene Serpentelli as a Special Master to help the Borough design a new Mount Laurel Compliance Plan. Before his retirement, Judge Serpentelli had authored many of the most important decisions implementing the Mount Laurel Doctrine and he is recognized as a leading authority regarding Mount Laurel jurisprudence. The goal was that once Judge Serpentelli had approved a plan, it would be submitted to the Court for approval and a Judgment of Compliance and Repose, which would give the Borough the same kind of protection that COAH had been providing before it ceased functioning.

Judge Serpentelli worked with the Borough and the parties in the Pond case to formulate a Mount Laurel Compliance Plan for the Borough. By December, 2013, the Plan had been fully prepared and approved by Judge Serpentelli, and it was ready for a Fairness Hearing before Judge Cassidy.

The Borough's Plan determined that the Borough's Affordable Housing allocation for the period 1987-2018 was 123 units and that six of those units were satisfied by an ARC home in the Borough, so that there were 117 units to be actually dealt with. The Plan anticipates that 16 affordable housing units will be constructed on three sites that are identified in the Plan and the remaining units are provided for in an "Overlay Zone," to be constructed if, as, and when property owners in the Overlay Zone determine to do so.

The density factor incorporated in the Plan is 6 units per acre with 20% of such units being set aside for affordable units. The 16 affordable units that will be constructed on sites identified in the Plan are distributed among three properties: (1) Block 3-A, Lots 17 and 18, approximately 5 acres in size which will accommodate 23 market units and 6 affordable units that are all age restricted (this is the property owned by the Plaintiff in the Pond case); (2) Block 14, Lot 14, approximately 5 acres in size which will accommodate 24 market units and 6 affordable units and approximately two retail stores (the so-called Barnes Tract, which is owned

by the Borough); and (3) Block 15-I, Lot 48-B, approximately 8.3 acres in size but only 3.2 developable which will accommodate 23 units of which 4 will be affordable units (this property adjoins the Brighton Garden Facility on Rt. 22)

The Fairness Hearing was held as scheduled and advertised on February 26, 2014 and nobody lodged any objection to the Plan. At the conclusion of the Hearing, Judge Cassidy entered an Order approving the Plan and remanding the case back to the Planning Board and the Governing Body for implementation.

Implementing the Borough's Mount Laurel Plan

As Judge Cassidy ordered, first the Planning Board held a Public Hearing, which was advertised, and then passed a Resolution on May 27, 2014 finding that the Plan was consistent with our Master Plan. Following the Planning Board action, the Governing Body adopted the requisite amendments to our Zoning Ordinance, which were advertised and considered at a Public Hearing on June 17, 2014. There were no objections made to the Plan at either the Planning Board hearing or the Governing Body hearing.

Having complied with Judge Cassidy's February 26, 2014 Order, the Borough received a Judgment of Compliance and Repose from Judge Cassidy on September 10, 2014. So long as the Borough complies with the terms of the Judgment, it is immune from Mount Laurel suits until September 10, 2024.

Role of the Barnes Tract in our Mount Laurel Plan

The Judgment of Compliance and Repose incorporated Judge Serpentelli's report by reference. Regarding the Barnes Tract his report states:

Obviously, the Borough is committed to utilize its property designated in the Plan as Site 2, known as the Barnes tract for affordable housing purposes. As stated in the report, various strategies are under consideration for marketing the property and its development. The six unit credit taken for the Borough site is the minimum which the Borough will achieve from marketing it . .

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In order to preserve the immunity from Mount Laurel suits that is provided by the Judgment of Compliance and Repose, it is necessary that the Borough proceed with development of the Barnes Tract in accordance with the Plan.

Development Options Available regarding the Barnes Tract

There were basically two alternatives available to the Borough for development of the Barnes Tract. First, the Borough could sell the Barnes Tract at a public auction pursuant to N.J.S.A. 40A: 12-13. Second, the Borough could declare the Barnes Tract in need of

“redevelopment” and then sell it to a developer under the New Jersey Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 et seq.*

The Borough chose the second option because that option gives the Borough far more control over the actual development process, including what the development will eventually look like than the first option. Had the Borough sold the Barnes Tract at a public auction, while it could have imposed certain limited restrictions and conditions on the use of the property, those conditions could not have imposed a higher standard than any zoning ordinance then in effect. Concretely this means that the Borough could have exerted no more control over what the eventual development would look like than was available under the use provisions and bulk requirements of its zoning ordinance.

The selection of the Redevelopment Option does not, however, alter in any way the fact that in addition to the retail units there will be 30 housing units on the Barnes Tract, of which 6 will be affordable. That result was going to happen regardless of which development option the Borough chose.

The Borough Chooses and Implements the Redevelopment Option

On November 5, the Planning Board considered a report from John Chadwick, the Borough’s Planning Expert, and passed a Resolution that the Barnes Tract should be a Redevelopment Area. After receiving the Resolution from the Planning Board, the Governing Body considered a Redevelopment Plan for the Barnes Tract that Mr. Chadwick had also prepared. Having considered the Redevelopment Plan, the Governing Body determined to take two steps required by law to continue implementing the Redevelopment Option.

First, we are introducing on first reading an Ordinance adopting the Redevelopment Plan for the Barnes Tract prepared by Mr. Chadwick. The Ordinance and the Plan will be advertised and then we will have a public hearing on the Ordinance and the Plan, and then vote on it again at our December 29 meeting.

Second, we are passing a Resolution sending the Redevelopment Plan to the Planning Board and asking it to advise us whether it is consistent with the Borough’s Master Plan. We are precluded by law from adopting the Redevelopment Plan until the Planning Board has advised us that it is consistent with our Master Plan.

Assuming that all goes as planned, in early 2016, we will circulate an invitation for proposals to anyone who has expressed an interest or has been identified as a potential partner for us in the development of the Barnes Tract, per our Mount Laurel Compliance Plan.