Mt. Laurel Fairness Hearing, Township of Wayne,
Superior Court of New Jersey, Docket No. PAS-L-2396-15,
The Hon. Thomas F. Brogan, P.J.Civ., Presiding

The Court Should Deny Or Remand For Review The Proposed Wayne Settlements Due To Deficits In Environmental Analysis And Overly Destructive Impacts

Submitted by Richard A. Brummel, environmental activist

Introduction

Applicant belatedly wishes to bring to to the Court's attention serious deficiencies of an environmental character in the proposed Wayne Township Mt. Laurel settlements scheduled to be reviewed by the Court on March 23, 2021.

The issues applicant raises are directly under the Court's jurisdiction in its duty to assure settlements are "in the public interest" (N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 304 (App. Div. 2018)), and with respect to Mt. Laurel proceedings specifically, "in accordance with sound zoning and planning concepts, including [] environmental impact," So. Burlington Cty. NAACP v. Mount Laurel Tp., 92 N.J. 158, 218 (1983).

In the present matter the proposals violate those principles, by *commission* – the improper blanket exemption of the projects from important local environmental rules, and by *omission* – the absence of any environmental analysis to support the proposals and exemptions, as described below.

Applicant will begin by requesting the Court excuse the lateness of this filing, as a matter of public interest.

1. Lateness

Applicant is a lone citizen-environmental-activist with limited time and resources. Yet as far as applicant is aware, this is the only submission to the Court addressing the environmental impacts and issues raised by Wayne Township's current Mt. Laurel development proposals. This submission thus offers an important perspective otherwise missing.

Applicant shows below how the Township has offered reckless exemptions from Township environmental protections for woodlands and trees (see points 2 and 3 below).

The submission also for the first time anywhere applicant is aware of attempts to quantify the overall environmental impact in terms of acreage, and further raise public policy questions regarding the the absence of formal environmental impact accounting by the Township with respect to the proposed settlements.

Applicant thus believes the important, compelling character of this submission makes its late acceptance a matter of public value the Court respectfully should allow.

Applicant admittedly did not adequately follow the Township's Mt. Laurel proceedings.

But applicant, who is often in Wayne near *all* the proposed developments except GAF, was also handicapped in that the Township systematically conceals the land-use processes affecting prominent Township physical features by failing to display at the features signage alerting the public they are under review and subject to massive transformation at a date certain.

By contrast, applicant is aware many other governmental entities – including at least in some cases the NJ DOT -- do in fact publicize, by large signage at prominent physical locations, whether alteration is pending there, which the public is directly invited to address. Indeed, applicant believes he raised this exact issue with the Township at some point in the past in the course of a zoning board hearing.

Therefore, applicant requests the Court accept this comment in the public interest, at this point still one week prior to the scheduled hearing and two weeks past the Court's deadline for comments, and applicant is making it available to all parties by email today.

The comments and revelations merit the Court changing the schedule of the hearing if necessary, in the public interest.

2. The Court Has A Mandate to Consider “the Public Interest” and the Environment

In a landmark Meadowlarks oil-pollution case in which a settlement by the Christie administration was challenged as inadequate – and a 'sweetheart deal' -- the judge ruled that “the public interest” must be taken into account as the Court approves a settlement:

> “In his written decision approving the settlement, Judge Hogan recognized that none of our state court decisions had addressed the applicable standard for his review of the proposed settlement. He analogized to the standard employed by federal courts in reviewing CERCLA settlements....Under CERCLA, "[a] court should approve a consent decree if it is fair, reasonable, and consistent with CERCLA's goals.".... Judge Hogan added he must also determine if the proposed settlement was "in the public interest."

N.J. Dep't of Envtl. Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 304 (App. Div. 2018) (emphasis added)

Moreover the Supreme Court in "Mt. Laurel II" empowered the Mt. Laurel courts specifically and emphatically to take environmental impacts into account:

> "...Builder's remedies will be afforded to plaintiffs in Mount Laurel litigation where appropriate, on a case-by-case basis....[A] builder's remedy will be granted...provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact."
>
> So. Burlington Cty. NAACP v. Mount Laurel Tp., 92 N.J. 158, 218 (1983) (emphasis added)

Furthermore:

> "...Mount Laurel is not designed to sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators."
>
> (*id.*, at 219, emphasis added)

As applicant shows below, in the present case the Township – whose officials are no friend of the environment – used the fig leaf of Mt. Laurel to literally "sweep away", by blanket exemptions, critical local "land use restrictions" (*id*.) to facilitate the new development, which they overwhelmingly embrace.

Thus it is the recognized role of this Court in general in approving a settlement involving a public entity, to assure it is "in the public interest", N.J. Dep't of Envtl. Prot. *id.* And furthermore, this Mt. Laurel court is specifically empowered to assure actions taken are "in accordance with sound zoning and planning concepts, including its environmental impact", and "not designed to sweep away all land use restrictions" (So. Burlington NAACP, *id.*).

As shown below this Court's role is more critical than ever, and the astute admonitions of the Supreme Court were aimed squarely at situations such the present one, giving this Court a clear and strong mandate to act against the proposed settlements.

3. Wayne's Established Environmental Principles Are "Swept Away" (*id*.) And Undermined by the Proposed Settlements:

In the case of the Mt. Laurel settlements proposed between Wayne Township and the various owners of the WayneBridge, Rockledge/Hovnanian, GAF, Preakness and

AvalonBay (Valley Bank) sites, part of the "public interest" (N.J. Dep't of Envtl. Prot., *id.*) is defined by statute in Wayne as protection of trees.

The duty of the Township zoning and planning boards – the the latter of which is a party to the various proposed settlements – is defined in Township Ordinances Chapter 134, Section 134-90.1 as protecting mature woodlands "to the greatest extent possible":

> "§ 134-90.1. Principles.
>
> The principles and objectives of this article shall be fostered, promoted, and achieved to the greatest extent possible in the review and approval of any application governed by this article. The principles and objectives are as follows:
> A. Alterations to existing topography, hydrology, and geology shall be minimized.
> B. Destruction of mature woodlands shall be minimized.
> ...."
>
> (emphasis added)

The reasons for doing so are also set out in the ordinance:

Wayne Township Ordinance § 134-91.1. "Purpose, environmental factors; applicability; definitions":

> "A. Purpose. The purpose of this article is to protect the health and safety of the community insofar as it relates to the protection and the preservation of those natural features including geology, hydrology, soils and vegetation considered as development constraints. It is of particular concern to maintaining ecological balance, a healthful environmental quality and protection of historic resources. Additionally, the purpose of this article shall be to control the indiscriminate, uncontrolled and excess destruction, removal and culling of trees upon lots and tracts of land within the Township which will result in creating increased soil erosion and dust, deteriorated property values and most particularly adversely altering the biological and ecological composition and balance of the Township thereby resulting in irreparable harm to the environment to the detriment of this community. In order to maintain the biodiversity of the entire community of which the natural fauna and most specifically its existing tree stock is an integral and critical component, it shall be the requirement of the Township as expressed by this article that trees be replaced either onsite or throughout the Township...."

Those principles of environmental protection are implemented in Wayne law by two

sections of the Land Development ordinance: Section 134-85.3(b) “Tree Preservation” and Section 134-91.4 “Tree Removal”.

The rules, quoted below, both emphatically provide for the protection of existing trees, and seek to assure that any trees removed are generously replaced.

Yet both rules are undermined and negated by the proposed settlements now before this Court. They are indeed “swept away” at the Supreme Court warned against in Mt. Laurel II (So. Burlington NAACP, id.).

Analysis of the various proposed settlements, and the ordinances implementing them, shows Wayne has abdicated its role in protecting the environment in the course of the Mt. Laurel settlements. This is unsurprising to anyone who has watched the zoning board, planning board, and Council typically rubber-stamp proposed development, regardless of its environmental impacts.

In fact this Court itself had a clear demonstration of Wayne's essentially lawless development practices in the case brought last year by this applicant, “Brummel v. Township of Wayne et al.”, which is currently before the Appellate Division[1].

In the Mt. Laurel matters now before the Court, the settlements and their implementing ordinances also fail utterly to show any diligent effort by the Township or its planning board -- which is incorporated as a party and bound by the agreements -- to protect the woodlands affected by the proposed developments, just as occurred in the prior matter scrutinized and revealed in the action this Court reviewed.

The delinquencies now at issue are, at least in part, as follows:

A. There Are No Environmental Analyses Provided

There is absolutely no statement of environmental impact analysis included in any settlement or implementing ordinance that evaluates the impacts on trees, woodlands, and wildlife of the developments.

1In that case (PAS-L-1001-20, A-003892-19T), the Court was shown, in the context of efforts to preserve a three-acre neighborhood forest along Preakness Ave., that Wayne and its officials systematically crippled environmental protection of its remaining local woodlands by: (1) failing to appoint an Open Space Committee; (2) the Mayor unilaterally vetoing proposed open-space protection that was not supposed to be under his jurisdiction, but rather the Open Space Committee which he and the Council failed to constitute, contrary to local law; (3) the zoning board chairman deliberately misstated – in this case, at very least -- his board's duty under local law to work diligently to protect remaining woodlands, and instead he promoted development to the detriment of such woods; and (4) promulgating accounting statements for the taxpayer-funded Open Space Fund that repeatedly, year after year,omitted key information that would show the perversion of the fund to omit any protection of natural open space.

Nor is such documentation presented anywhere applicant is aware in the extensive documentation Wayne put on its website for this hearing at https://waynetownship.com/affordable-housing-mt-laurel.html [3/14/21, etc.]

As such it is not possible for the public, the Township Council, or this Court to ascertain, as provided in Mt. Laurel II (above) that the settlements are "in accordance with sound zoning and planning concepts, including its environmental impact," (So. Burlington Cty. NAACP, *id.*), and the settlements respectfully cannot be approved by the Court in the absence.

B. The Settlements Recklessly Contain Exemptions From Local Laws For Tree Protection, Part I:

Each settlement affecting the properties which contain woodlands[2] – GAF, AvalonBay (Valley Bank), WayneBridge, and Rock-Ledge/Hovnanian -- allows and encourages wholesale destruction of woodlands and trees by exempting the developments from two key Wayne environmental rules.

Meanwhile, there is no finding in the papers posted as part of the settlement proposals (https://waynetownship.com/affordable-housing-mt-laurel.html (3/14/21 etc.)) that the exemption is in the public interest. Nor is there any analysis of the environmental impact of the exemption.

Similarly, the same failure of environmental disclosure and 'due diligence' affects a second class of exemptions from Wayne's environmental protections.

Initially, the settlements and implementing ordinances contain language exempting them from the Township Ordinance Section 134-85.3(b), "Tree Preservation", which states:

> "B. Tree Preservation.
> (1) Existing mature trees, hedge rows, tree lines, stone rows and woodlands shall be preserved and included as a design element in the landscape plan for all new development. Building placement shall preserve existing vegetation and the character of the site.
> (2) Trees with calipers of 18 inches or greater shall be preserved, whenever possible. Grading, filling, or impervious coverage must not include the drip line of trees which are to be preserved.
> (3) Trees considered to be unique and irreplaceable by reason of age, historical association or botanical rarity shall be preserved, whenever possible.

2The Preakness development is on land already deforested almost in its entirety, thus it is not as affected by the environmentally-destructive provisions the Township has otherwise allowed, although the Preakness settlement does contain the same pro forma exemptions: see, Section 4.2.2, p. 10, settlement of 10/27/20.

(4) Clearance of trees for rights-of-way as approved by the Planning Board or Zoning Board shall be limited to the paved width of such rights-of-way plus 10 foot width on each side. Alignment of the rights-of-way shall be planned to save as many trees as possible....."

...

(6) Trees in the area between the street and the setback line of the buildings shall be preserved to the greatest extent possible.

...."

(Wayne Township Ordinance, Section134-85.3(b), emphasis added)

In each settlement, the exempting language resembles that of the AvalonBay (Valley Bank) agreement, which reads:

"**iv. § 134-85.3(B) (Tree Preservation) shall not be applicable within the area of disturbance;**"

(Wayne Township Ordinance #9-2021, adopted 3/3/2021, Section G, p. 6)

From a public policy standpoint, it is a reckless abdication environmental protection for the Township to effectively cancel a significant provision of its environmental ordinances with respect to a collection of large developments without measuring in any way the environmental impact thereof.

By contrast if this were a federal project, or one in neighboring New York, a large-scale environmental review would be a critical part of the public debate.

In this case, it falls to this Court to protect the public interest.

Request the Court to Reject: Thus, to assure the public interest is served, it should be required of the Township that it evaluate the impact of the environmental exemption provisions on woodlands and wildlife.

As such the public interest cannot be shown to have been served, and the Court respectfully should not approve the settlements until such issues are properly addressed.

C. The Settlements Recklessly Contain Exemptions From Local Laws For Tree Protection, Part II:

In each proposed settlement, there are additional provisions which in various ways exempt the proposed developments from another key tree-protection rule, Township Ordinance Section 134-91.4, which mandates that developers make "every effort" to protect trees eight inches in diameter or greater, and furthermore to generously replace

those trees destroyed, or to pay a fee, thus:

> "A. All trees 8 inches in caliper or greater within and 20 feet beyond the limit of disturbance shall be indicated on the required site plan. Every effort shall be made to provide a layout to avoid any disturbance within the trees' driplines. An estimate of all trees eight inches or greater in caliper on the entire site shall be submitted. If, in the opinion of the approving authority, the estimate is not a reasonable projection of actual field conditions, a precise count shall be required. The elimination of any deciduous or coniferous tree of this caliper shall be replaced on site...."
>
> (Wayne Township Ordinance Section134-91.4, emphasis added)

The ordinances implementing settlements with AvalonBay and GAF *entirely* exempt the proposed developments from the tree-preservation and replacement rules. Moreover, the GAF agreement appears to achieve full exemption – particularly from replacement -- in a deceptive manner (see below).

Meanwhile, the proposed settlements and ordinances for WayneBridge and Hovnanian/ Rockledge permit the wholesale destruction of large trees (greater than 18"), but are ambiguous about smaller trees. Nevertheless, the implication is clear that the sites can be clearcut.

Again, as with the tree-protection exemption previously discussed, there is nowhere to be found supporting documentation showing the environmental consequences of the wholesale exemptions. Yet one can easily foresee wholesale destruction of wildlife habitat and scenery, as the illustrations of the developments suggest.

(The estimated destruction of woodland acreage, similarly omitted from the proposals before the Court, is discussed below based on applicant's original research.)

The ordinance implementing the AvalonBay agreement states:

> "G. Exemption from limitations on development: Development in the MLR3D-4 zone is exempt from the standards set forth in the following sections to facilitate the implementation of the AvalonBay Settlement Agreement and to reduce cost-generative measures in accordance with N.J.A.C. 5:93-10:
> ...
> iv. § 134-85.3(B) (Tree Preservation) shall not be applicable within the area of disturbance;
> v. §134-91.4 (Tree removal)"
>
> (Wayne Ordinance/Resolution #9-2021, Section G, approved by the Township

Council 3/3/21, emphasis added)

The ordinance with respect to GAF appears to have been engineered to obfuscate, because the insertion of three words -- "and no replacement" (below) -- achieves a generous giveaway while essentially rendering the rest of the provision meaningless. Further, it slyly modifies a very similar sentence used in two other settlements, evidently to essentially cloak the true import of the sentence. Thus, the GAF ordinance confusingly states:

> "... trees of 18" in caliper located within the area of disturbance are permitted to be removed, an estimate of trees over 8" in caliper shall be required of the Developer but no precise count of trees shall be required and no replacement or in lieu fee shall be assessed on account of such tree removal."
>
> (Wayne Ordinance #26-2020, p. 5 #c, adopted 8/19/2020, emphasis added)

By the "no replacement" language, he entire provision becomes pointless because the purpose of the tree-count – for replacement or payment in lieu – is eliminated.

By contrast, the "model sentence" contained in the WayneBridge and Rockledge/ Hovnanian ordinances contains no such "no replacement" wording, and the provision thus has a reasonable meaning:

> "...trees over 18" in caliper located within the area of disturbance are permitted to be removed, an estimate of trees over 8" in caliper shall be required of the Developer but no precise count of trees shall be required and no in lieu fee shall be assessed on account of such tree removal.""
>
> (Hovnanian/Rock Ledge settlement of 3/9/2020, p. 12, Section 4.4.2, emphasis added)
>
> "...trees over 18" in caliper within the area of disturbance may be removed, an estimate of trees over 8" in caliper shall be required but a precise count shall not be required and no fee in lieu shall be assessed;"
>
> (WayneBridge ordinance #12-2021, p. 6, #7, adopted 2/4/21, emphasis added)

The Preakness settlement of 10/27/20 has similar language: see, Section 4.2.2, p. 10.

Language games, in each settlement the environmental giveaway is both grave and unanalyzed.

Serious environmental degradation will assuredly result from the exemptions – full or

partial -- due to the permission granted in *each* development to cut down every large tree (over 18"), and the explicit or implied permission to cut down or ignore the impact on trees over 8" in diameter as well, in an environmentally damaging proposition.

And while it was incumbent on the Township to disclose and evaluate the impact of such provisions on woodlands and wildlife, in the papers that are available on the Township website as part of the Fairness Hearing (https://waynetownship.com/affordable-housing-mt-laurel.html, [reviewed 3/14/21]) there is no indication that any such review was conducted, or that the question of the impact was considered in any way by the Township as part of its deliberations.

As such the public interest cannot be shown to have been served, and the Court respectfully should not approve the settlements.

D. There Are No Analyses of The Proposed Developments' Quantitative or Qualitative Impacts on Woods and Wildlife:

There are about 158 acres at issue in the proposed developments which contain woodland habitats (i.e. the developments aside from Preakness), according to the settlements, below.

As noted above, despite the reckless and wholesale exemptions of the proposed developments from Wayne's two central woodland-protection provisions -- Wayne Township Ordinances 134-85.3(b) and 134-91.4 -- the Township appears to have neither undertaken itself nor required of the developers any environmental analysis of the proposed developments, individually or together.

As further noted above, if this settlement package were a federal project -- subject to the National Environmental Policy Act (NEPA), or a local project next door in New York State -- subject to the State Environmental Quality Review Act (SEQRA), environmental questions would be required to be analyzed – and impacts mitigated -- before any approval by the Township could occur.

Applicant's analysis of the documents posted, particularly the settlements, shows that at least half and possibly two-thirds or more of the woodlands present will be destroyed if the developments proceed as the renderings suggest.

(It is however a guessing-game that is impermissible in this type of legal process, because the data should be readily forthcoming prior to any approvals by the Council or the Court.)

WayneBridge as proposed will clearly destroy most of the roughly seven acres of woods present (see, Settlement of 8/27/20, p. 2 (acreage); rendering in "Basement and Ground

Level Plans" posted on Town website https://waynetownship.com/affordable-housing-mt-laurel.html (3/14/21 etc.)) (also Powerpoint presentation to Council, 2/24/2021).

AvalonBay (Valley Bank) has two three-acre parcels subject to destruction based on the rendering ("2020-12-09 Avalon Wayne Concept Sketch and Section_Exhibits to Zoning Or.pdf" from https://waynetownship.com/affordable-housing-mt-laurel.html (3/14/21 etc.)) (also Powerpoint presentation to Township, 2/24/2021) and an analysis of the area using Google acreage analysis supplied at daftlogic.com.

The Rock-Ledge/Hovnanian site contains about 25 acres (Settlement of 1/3/2020, p. 2) which acreage appears to be largely undeveloped from satellite views.

Meanwhile from the subdivision rendering ("Conceptual Subdivision Plan, 6/8/16, "95139090_1_K. Hov. _ Wayne Settlement Agreement EXHIBIT B (page 1) Subdi (1).pdf")(also Powerpoint presentation to Township, 2/24/2021) as supplied on the Township website, the entire 25 acres appears to be subject to destruction. (It must be said the rendering is difficult to decipher, however.)

Finally, the GAF site appears to contain about 70 acres of woodlands: an analysis using the satellite-image-analysis website "daftlogic.com" shows that about 29 acres are currently paved over out of of the claimed 99 acres total (p. 2, settlement signed by Mayor 12/19/2019).

From the rendering contained in Township Council's Powerpoint presentation of February 24, 2021 (see, https://waynetownship.com/affordable-housing-mt-laurel.html (3/14/21 etc.)), it appears the development will cover the entire current paved area, and leave about 25 acres buffer spread across the site. That suggests 70 acres minus 25 acres, or 45 acres of woodlands will destroyed.

However, the daftlogic.com analysis shows about 116 acres of woodlands on the overall GAF landmass, but it is unclear where other property lines exist. This is significant because if the actual site is smaller, as the settlement suggests, the buffers are not entirely countable as preserved woodlands of the GAF site, and the destruction of woodland would be higher, possibly by the full 16 acres, meaning a total of 61 acres destroyed.

But notably this type of guessing should not be required, because the data should be supplied by the applicants and Township, yet it is not.

From an ecological standpoint, the woodlands left standing from each development are deeply "fragmented" and represent a quantum diminution of the ecological value of the original woodlands.

That being said our rough analysis suggests that of the 158 acres of woodlands on the four

sites at issue about 83 to 99 acres will be destroyed (using the high and low estimates for the GAF acreage, above).

The Court and the public should have a clear statement of what is being lost in terms of mature trees and wildlife habitat.

Without that information the public interest cannot properly be served by the Court approving the settlements.

While Township Ordinance Section 134-85.3(B) states that the public interest requires special efforts be made to preserve trees "considered to be unique and irreplaceable by reason of age, historical association or botanical rarity shall be preserved," despite the dozens if acres of mature woodlands slated for destruction there is absolutely no effort to identify and preserve any such trees in these settlements.

Conclusions

Wayne Township has been blanketed by overdevelopment to the dismay of many of its residents. Repeatedly one reads in The Record of neighbors futilely opposing new local scale developments like a WaWA, or a jug-handle on Hamburg Tpk., or the destruction of a church-owned forest, or massive re-developments like Toys 'R Us.

Yet it is clear the citizens are outgunned and outmaneuvered by the developers and their allies in construction, banking, and the political class.

It seems clear from the constant churn of new bulldozing and building, and statements by the Mayor and other officials reflect, the Township prizes development far more than preservation, the environment – and the preferences of many residents -- be damned.

This Court has a duty, as stated in Mt. Laurel II (above) to assure sound environmental principles are adhered to in Mt. Laurel enforced development.

It is naïve and contrary to the evidence to presume the Township is upholding its laws and negotiating with developers with an eye to protecting the environment. It is more like the proverbial fox is guarding the hen-house. Wayne embraces development, and the Mt. Laurel settlement process is simply a charade when it comes to environmental protection.

Indeed, when one notices that zero 'one-bedroom' (or studio) affordable units are included in the proposed 473-unit Avalon Bay (Valley Bank) project, one can also feel the process is a charade even with respect to affordable housing (see, settlement agreement of 1/6/2021, p. 3).

Inasmuch as there is a utter absence of environmental analysis for the Fairness Hearing,

accompanied by the reckless exemption of the projects from key Township environmental rules (above) – including one instance of evident deceit, with respect to the GAF agreement -- here it falls upon to this Court to assure the settlements are "in the public interest" (N.J. Dep't of Envtl. Prot., *id.*), and the proposed developments are "in accordance with sound zoning and planning concepts, including [] environmental impact," (So. Burlington Cty. NAACP, *id.*).

As such, respectfully, the Court should remand the settlements for review and modification as needed to uphold the public interest and sound environmental regulation.

Furthermore with respect to lateness, Applicant respectfully asks the Court to consider the public value of considering the instant analysis, context and comments as outweighing their lateness, permitting reasonableness and the public good thus brought into the Court's deliberations to counter-balance the otherwise compelling need for efficiency in the judicial process.

Applicant also respectfully invokes the blanket 'reasonableness' requirement of the Rules of the Courts of New Jersey, 1969, Rule 1:1-1 to permit the Court to exercise discretion in allowing this late submission.

Dated: Pompton Lakes, N.J.
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Respectfully,

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