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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-4681-75

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	:	Civil Action
Plaintiffs,	:	On Appeal from Judgment of the Superior Court of New Jersey, Chancery Division, Middlesex County
v.	:	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	
Defendants	:	Sat Below: Hon. David D. Furman, J.S.C.

REPLY BRIEF AND APPENDIX FOR PLAINTIFFS AS APPELLANTS AGAINST THE TOWNSHIP OF NORTH BRUNSWICK

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PRELIMINARY STATEMENT

Defendant-Respondent Township of North Brunswick has recently filed with the Superior Court, Appellate Division, a Brief and Appendix in response to the Brief and Appendix for Plaintiffs as Respondents, Cross-Appellants, and Appellants, which was filed in August, 1977. While plaintiffs submit that their Brief and Appendix adequately address the legal issues raised by North Brunswick's brief, plaintiffs deem it necessary to clarify several claims proffered by the Township. Furthermore, plaintiffs wish to reaffirm the grounds for their appeal against the Township. Plaintiffs' appeal against North Brunswick was taken on the grounds that the court below was obligated to order defendants to do more than rezone not to exclude the possibility of low and moderate income housing.

POINT I. THE TOWNSHIP OF NORTH BRUNSWICK IS NOT THE ONLY MUNICIPALITY ASSIGNED A FAIR SHARE ALLOCATION WHICH FAILED TO FILE AN APPEAL FROM THE JUDGMENT BELOW.

Defendant-respondent Township of North Brunswick claims that it is the only municipality assigned a fair share allocation which did not file an appeal from the judgment below. (DNBb 2-1, 3-20, 4-22.) This is not accurate. In addition to the Township of North Brunswick, defendants Townships of Edison and Old Bridge did not file appeals from the judgment below and are before the Appellate Division as respondents to plaintiffs' appeal. (See Procedural History, Pb7-15.)

POINT II. THE PLAN OF ZONING CHANGES SUBMITTED BY THE TOWNSHIP TO THE COURT BELOW HAS NOT BEEN ADJUDGED TO BE IN COMPLIANCE WITH THE TRIAL COURT'S OPINION AND JUDGMENT.

In their brief, the Township of North Brunswick asserts the claim that it has made changes in its zoning ordinance which render the Township's ordinance in compliance with Judge Furman's judgment below. (DNB 1-50, 2-2, 8-40, 10-33, 11-38.) Plaintiffs submit that this is not the case and that it is necessary to set forth for this Court the existing situation with regard to North Brunswick's zoning ordinance.

On February 23, 1977 the Township of North Brunswick submitted to the trial court a proposed Order for Dismissal from the case at hand on the basis of its amended zoning ordinance. After requesting and receiving additional information regarding the Township's zoning changes, plaintiffs filed a letter with Judge Furman (submitted herewith as appendix to this brief -- Pral) objecting to the entry of any order of compliance with the trial court's judgment. Plaintiffs' objections to the ordinance were based on three principal grounds: (1) that the amended zoning ordinance fails to remove exclusionary provisions; (2) that it fails to meaningfully rezone available acreage; and (3) that it fails to meet housing needs for low and moderate income households.

In addition, the Township failed to show how it would comply with the requirement set forth in the trial court's opinion in this case that "in implementing this judgment the

11 municipalities charged with fair share allocations must do more than rezone not to exclude the possibility of low and moderate income housing . . . ." 142 N.J. Super. at 38.

The Township's amended zoning ordinance has not been ruled to be in compliance with Judge Furman's opinion or judgment. In fact, as of the date of this reply brief, no hearing has been held as to that issue. The claim by defendant Township of North Brunswick that its amended zoning ordinance complies with Judge Furman's opinion or the judgment order entered in the case at hand is little more than a self-serving assertion, since the claim lacks any judicial imprimatur.

Respectfully submitted,

BAUMGART & BEN-ASHER

BY: David H. Ben-Asher
DAVID H. BEN-ASHER

BY: Marilyn Morheuser
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BY: Martin E. Sloane
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ROGER C. ROSENTHAL

ATTORNEYS FOR PLAINTIFF

DATED: July 25, 1978

APPENDIX

May 20, 1977

Honorable David D. Furman
Judge of the Superior Court
Middlesex County Courthouse
New Brunswick, New Jersey 08903

Re: Urban League of Greater New Brunswick, et al.
v. Mayor and Council of the Borough of Cartaret, et al.

Dear Judge Furman:

On February 23, 1977 the Township of North Brunswick submitted a proposed Order for Dismissal on the basis of its amended zoning ordinance. On March 8, 1977 Roger Rosenthal, staff attorney, NCDH, requested additional information from Mr. Burns, which information was received March 25th.

All of these materials have been reviewed and analyzed by plaintiffs' expert, Mr. Alan Mallach.

As set forth more fully below, plaintiffs strenuously oppose dismissal of defendant North Brunswick Township because the zoning ordinance as amended by Township officials (1) fails to remove exclusionary provisions; (2) fails to meaningfully rezone available acreage; and (3) fails to meet housing needs for low and moderate income households. Additionally, defendant North Brunswick fails to indicate what actions it will take to assure realization of its fair share allocation.

Before expanding on these objections, we wish to summarize the actions taken by North Brunswick in what appears to be a random amendment of some features of its ordinance. The sum total of changes to existing ordinance provisions are:

(a) the requirement that private garages be provided in each home has been deleted in the R-2, R-3, and R-4 zones, and made optional. This has also been done with regard to single family homes in the R-6 zone.

(b) minimum floor requirements have been reduced as follows: in the R-2 zone, from 1400 sq. ft. to 1200 sq. ft.; in the R-3 zone from 1200 to 1000; and in the R-4 zone from 1000 to 900.

(c) in the R-5 garden apartment zone the provision of air conditioning has been deleted as a mandatory requirement. Similarly, the provision of swimming pools has been made optional.

(d) minimum off-street parking requirements have been set at 1.5 spaces per dwelling unit for all zones and housing types, with the exception of garden apartments which remain 2 spaces per dwelling unit.

It is clearly established under Mt. Laurel and under this court's judgments that the first step incumbent on a municipality found exclusionary is the removal of all existing zoning provisions of an exclusionary character. Plaintiffs are constrained to point out that notwithstanding the changes noted above, defendant North Brunswick has failed to take this first step.

I. Exclusionary Zoning Provisions Have Not Been Removed.

The North Brunswick ordinance still contains the following exclusionary provisions, among others:

(a) excessive lot size requirements in R-1, R-2, R-6 and possibly R-3 zones; excessive frontage (width) requirements in R-1, R-2, R-3, and R-6 zones.

(b) extensive exclusionary provisions governing garden apartments in the R-5 and R-6 (ERD) zones; e.g.,

1. an 80:20 1 bedroom 2 bedroom regulations, and a prohibition on units larger than 2 bedrooms.

2. a requirement that 2 parking spaces be provided per dwelling unit.

3. a requirement that 420 cubic ft. of storage space and 450 sq. ft. of playground space be required per dwelling unit.

4. numerous other requirements, including a 'zigzag' provision on ostensibly aesthetic grounds, and a requirement that one parking space per dwelling, in developments over 10 acres, be in a carport or garage.

(c) exclusionary provisions in the PUD zone, including elaborate percentage requirements regarding unit types, an 80:20 regulation affecting garden apartments, and provisions for townhouses including (1) no more than 50% 3 bedroom units, and (2) no units with more than 3 bedrooms.

Certainly North Brunswick Township has a minimal obligation to remove these unequivocally exclusionary ordinance provisions before representing itself as in compliance with this Court's judgment.

II. The Amended Ordinance Fails to Meaningfully Rezone.

Before detailing plaintiffs' second and third objections, it is necessary to set out our analysis of the rezoning which has been approved by North Brunswick officials. Two new zones have been created under the amended ordinance. They are:

A. The R-T-D zone, which permits duplex homes and townhouses under what are generally reasonable provisions. The only significant exception is that a density of 7 dwelling units per acre is low with regard to townhouse development, and should be higher. It is unclear why garden apartments have not been permitted in this zone, inasmuch as they are wholly compatible uses with those permitted.

There are, according to information provided by Mr. Burns, approximately 20 vacant acres zoned R-T-D in the Township, which can accommodate under the ordinance approximately 140 dwelling units, either duplex houses or townhouses.

B. The R-M zone which provides for mobile home parks in the designated part of the Township. The provisions regarding mobile homes are not unreasonable, with the following exceptions:

1. Although the prohibition on mobile homes has been deleted from the ordinance, mobile homes are still prohibited outside the mobile home park; i.e., they cannot be used elsewhere in the Township as an alternative to conventional housing.

2. A minimum of 25% of the units in a mobile home park must be occupied by individuals aged over 55 (or a couple, one of whom is over 55).

3. The requirement that interior streets be 36 or more feet in width is excessive.

There are, according to Mr. Burns, 112.14 acres in the R-M zone after the utility right of way is subtracted. This is capable of accommodating just under 900 mobile homes under the ordinance provisions.

With modest revisions, the provisions of the R-T-D and R-M zones are not inappropriate for their purpose. This, however, is not the central issue.

Plaintiffs' first objection to these rezoning amendments is that they do not represent a good faith effort to meaningfully rezone available, developable land in the Township. According to the Township, there are 2717 acres of vacant and undeveloped land in North Brunswick, exclusive of agricultural uses, water, and watershed land. DCA, in their housing allocation report, cite a figure of 2537 acres of vacant and developable land. Although the Township has not provided plaintiffs with information on vacant land by zone, a review of the zoning map makes clear that the majority of vacant land is in non-residential zones (I2, I1, ERR, and SPD) and the majority of residential land is in R-1, R-2, R-6 and PUD zones. There appears to be no noticeable amount of vacant land in the R-4 zone, the only zone prior to the recent amendments that can be considered non-exclusionary.

The Township has now zoned a total of ± 5% of the available vacant land for ostensibly meeting their fair share. The remaining 95% of the land is zoned either for non-residential purposes, or for exclusionary residential purposes. This is not responsive either to the general thrust of this Court's opinion, nor to the specific language in which you stated that "The Township is overzoned for industry by nearly 1,000 acres and 200%" 143 N. J. Super at 31. From a purely numerical standpoint, the rezoning that North Brunswick has carried out is a blatantly inadequate response to the decision.*

III. The Amended Ordinance Fails to Meet Housing Needs for Low and Moderate Income Groups.

Additionally, plaintiffs object to the inadequacy of the rezoning to meet the housing needs in North Brunswick.

Assuming arguendo that all the units theoretically possible are constructed in the two "fair share" zones described above, a total of roughly 1,040 units will ensue, of which 900, or 86.5%, would be mobile homes. Although we will readily accept that mobile homes can meet some part of low and moderate income housing need, plaintiffs argue that it is a small part of such needs, and should be only a small part of the total program to meet the municipality's fair share.

The rationale for such a position is clear. Under currently available programs for low income housing needs, particularly Section 8, it is nearly impossible to participate in these programs through mobile home development. Section 8 housing, particularly for senior citizens, is multifamily housing.

Section 515 housing (assuming one can build under Farmers Home Administration in North Brunswick, which we are not certain of) is multifamily housing. Indeed, a program to meet low income housing needs must provide extensive land area in which it is possible to build (a) garden apartments and town houses with no exclusionary constraints; and (b) mid-rise apartments for senior citizens. The Township has provided a token amount of land for townhouses, and no land for either garden or mid-rise apartments on a non-exclusionary basis. The Township has provided no land for modest single family homes (either conventionally constructed or individual mobile homes) on small lots.

* If a township zoned "15% for low income and 19% for moderate income on the basis of 100% zoning for housing" (142 NJSuper at 38), this would yield, by Mr. Mallach's calculation, a rezoning of 924 acres for North Brunswick's initial fair share allocation.

Furthermore, even if the number of units were theoretically feasible to build, there is no assurance that they will be built. As Justice Conford recognized in his Madison opinion (and as housing experts have long recognized), if you want to make possible construction of X number of low and moderate income units, you must rezone far more land than the acreage on which X units can theoretically fit.

Applying that axiom to the newly created zones, it is important to note, first, that the language of the R-M zone does not limit that zone to mobile homes, it merely permits mobile homes in the zone, along with other uses. Since this zone is surrounded by industrial uses and industrially zoned land, and backs onto the railroad line, it is not unreasonable to expect some landlowners to utilize that land for industrial purposes. Secondly, even if all land in both zones were developed as per the zoning ordinance, there is no assurance that the units would be available for low or for moderate income families. The proposed R-D-T zone, for example, might be developed for luxury housing similar to other developments nearby along State Highway 27.

IV. The Township Fails to Show How It Will Assure Realization of Its Fair Share Allocation.

In addition to the problems presented by their underzoning for effecting realization of their fair share allocation, Township officials have failed to indicate in any way how they intend to comply with this Court's requirement that "in implementing this judgment the 11 municipalities charged with fair share allocations must do more than rezone not to exclude the possibility of low and moderate income housing . . ." 142 N.J. Super at 38.

In summary, plaintiffs oppose dismissal at this time. For all the reasons set forth above, it would be premature to dismiss North Brunswick until or unless the Township will:

(a) remove exclusionary provisions affecting all residential zones in the Township;

(b) rezone significantly more acreage for uses appropriate to meeting fair share low and moderate income housing needs;

(c) rezone substantial amounts of that acreage for

(1) garden apartments at densities of at least 15 DU/acre;

(2) mid-rise apartments up to six stories in height; and

(3) small houses on small lots (preferably allowing mobile homes as well as conventional structures); and

(d) undertake responsible and appropriate action to facilitate development of low and moderate income housing consistent with the language of the Urban League decision and Order.

10

Respectfully submitted,

Marilyn J. Morheuser
Attorney for Plaintiffs

MJM/lm

cc: Joseph H. Dunne, Esq.
bcc: Roger Rosenthal
Martin Sloane
David Ben-Asher
Alan Mallach

SUPERIOR COURT
OF
NEW JERSEY
APPELLATE DIVISION

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs, v. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	)	Docket No. A-4681-75 CIVIL ACTION

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 1978 two copies of the Reply Brief and Appendix for Plaintiffs as Appellants Against the Township of North Brunswick were sent by United States mail, postage prepaid, to the following attorneys for the defendants:

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Dated: July 25, 1978

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

Sworn and subscribed to
before me this 25 day of
July, 1978

Helen C. Stuckler
Notary Public

My commission expires: May 31, 1981

SUPERIOR COURT
OF
NEW JERSEY
APPELLATE DIVISION

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al., Plaintiffs,	)	Docket No. A-4681-75
v.	)	CIVIL ACTION
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al., Defendants.	)	

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Dated: July 25, 1978

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

Sworn and subscribed to
before me this 25 day of
July, 1978

Helen C. Stricklen
Notary Public

My commission expires: May 31, 1981