CA – EAST BRUNSWICK

(filed 10/24/74)

Brief of Defendant, Twp of East Brunswick in Support of Motion to Dismiss

19 pages

CA001284B

CA001284B

FILED

OCT 24 1974

DAVID B. FURMAN, J.S.C.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

DOCKET NO. C 4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, a non-profit corporation of the State of New Jersey, CLEVELAND BENSON, FANNIE BOTTS, JUDITH CHAMPION, LYDIA CRUZ, BARBARA TIPPETT, KENNETH TUSKEY, JEAN WHITE, On their own behalf and on behalf of all others similarly situated,

Plaintiffs,

-vs-

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EAST BRUNSWICK, et als,

Defendants.

Civil Action

BRIEF OF DEFENDANT, TOWNSHIP OF EAST BRUNSWICK IN SUPPORT OF MOTION TO DISMISS

BERTRAM E. BUSCH, ESQ.
On The Brief

BUSCH AND BUSCH, ESQS.
Attorneys for Defendant, Township of East Brunswick
99 Bayard Street
New Brunswick, New Jersey

PRELIMINARY STATEMENT

The Township of East Brunswick adopts the Statement of Facts presented by the Township of Cranbury.

POINT I

THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE 23 MUNICIPAL DEFENDANTS DO NOT CONSTITUTE A CLASS UNDER RULE 4:32.

In their Complaint, the Plaintiffs state that the policies and practices of the 23 Defendant municipalities, taken together, bar Plaintiffs from securing housing and employment opportunities throughout the 23 municipalities, the rest of Middlesex County and the region of which Defendant municipalities are a part. It is clear that Plaintiffs are attempting to have the Court classify the Defendants as a representative class under Rule 4:32.

Rule 4:32-1(a) provides among other things that the Defendants may be sued as representative parties only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

East Brunswick would agree that the class is so numerous that joinder of all members is impracticable, simply because all other towns in the region would have to be included. The Court would then have to deal with a multiplicity of factual settings and individual and unique history for each muncipality, a variation in type and language of ordinance provisions and a potpourri of existing local conditions.

If the Court were to rule that an ordinance of the Township of East Brunswick were unconstitutional, would Westfield or Freehold or Princeton, each with its own individual history, be bound by such a ruling.

Where there are no logical limits to the number of parties to the litigation and where there would be minimum standards which would apply to all municipalities in this State, the appropriate method to regulate the municipalities would be through the legislature and not the Courts.

The Court should refuse to certify the Defendants as a class because the class is too vague and incapable of reasonable definition of interest. Surely, one cannot lump together industrialized municipalities such as Carteret with built-up municipalities such as Highland Park, Suburban-Rural municipalities such as East Brunswick and rural municipalities such as Cranbury. Under the circumstances, there can be no question of law or fact common to the class as required by Rule 4:32-1(a). Each municipality must, of necessity, rest its case upon its own factual context. Accordingly, there can be no common factual basis sufficient to justify maintenance of a class action. Plaintiffs, in effect, are saying that the particularities of the 23 municipalities are of no material significance in determining whether a "typical" provision is illegal on its face regardless of the factual context.

The Court's attention is called to the case of Almenares v. Wyman, 334 F. Sup. 512, 519 (S.D.N.Y. 1971), Mod.

453 F. 2d 1075 (2d Cir. 1972), cert. den. 405 U.S. 944 (1972) which was a suit challenging welfare regulations as discriminatory.

Finally, the Plaintiffs are unable to prove that the Defendant municipalities represent fully and fairly the interests of all municipalities in the County and region which may have zoning provisions which fall within the dragnet of Plaintiffs' "categories". See Koehler v. Oglivie, 53 F.R.D. 98 (N.D. Ill. 1971), affirmed per curiam 405 U.S. 906 (1972). The mere alleged fact of similarity of legislative enactment hardly overcomes the divergent interests and practical differences of all other municipalities which may have an interest in the outcome.

Even if the Plaintiffs were able to demonstrate compliance with Rule 4:32-1(a), they would still be required to meet one of the requirements of 4:32-1(b). This would mean that Plaintiffs would have to show that separate trials on the merits would risk the possibility of inconsistent determinations or that adjudication of the class action would, in effect, dispose of all interests of the class party. In the alternative, Plaintiffs may show that the nominal Defendants have acted in a way generally applicable to the class, or that common questions of law and fact predominate over individual considerations.

It is submitted that if, as the Plaintiffs assert, their case is premised solely on the contentions that the challenged "type" of zoning provisions are illegal per se, then

it is immaterial who are the defendants, for a favorable determination would establish a uniform rule of law.

It is the position of the Township of East Brunswick that "inconsistent" determinations are possible and even probable, but not because of the procedural structuring of this cause, but rather because the test of constitutionality is factual and not solely legal; therefore, the constitutionality of the respective zoning provisions of each community in the region will stand or fall on their own independent factual patterns.

There is no indication that the Defendants have acted in concert or conspired against the Plaintiffs or that the intent or historical background of each zoning action of each of the Defendants is in any way similar to that of the other Defendants or other potential members of the Defendant class.

Accordingly, the Plaintiffs are unable to demonstrate any of the additional elements of Rule 4:32-1(b) and the Defendants "class" cannot be maintained.

Plaintiffs admit that they have made no applications to any of the 23 defendant municipalities for building permits, variances or planning board approval. They have notmade the Defendant municipalities aware of the contents of the Complaint prior to filing and service. Had the Plaintiffs been denied the right to build on particular land within any of the Defendant municipalities, the controversy might, in that event, be ripe for adjudication.

Instead, Plaintiffs have made broad attacks on the Defendant municipalities for having adopted certain types of zoning provisions and having not availed themselves of certain optional subsidies from the State or Federal Government. Even if the Plaintiffs were able to prove the allegations contained in the Complaint, they would have established no viable cause of action unless they were further to demonstrate some constitutional "right" to access to housing of some particular type or quality, which would form the basis of a Court-ordered requirement for the communities to act.

The essential limitation upon the judicial function in resolving zoning disputes was stated by Justice Weintraub in Kozesnik v. Montgomery Township, 24 N.J. 154, 167 (1957).

> "The zoning statute delegates legislative power to local government. The judiciary of course cannot

> exercise that power directly, nor indirectly by measuring the policy determination by a judge's private view. The wisdom of legislative action is reviewable only at the polls. The judicial role is tightly circumscribed. We may act only if the presumption in favor of the ordinance is overcome by a clear showing that it is arbitrary or unreasonable."

A similar philosophy of judical restraint was articulated in Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164 (Law Div. 1972) cert. granted 62 N.J. 190 (1972), wherein the Court ultimately determined unconstitutional municipal zoning ordinance on the facts:

> "The judiciary cannot be expected to alleviate a condition that definitely calls for legislative action from either the national or state governments. The Courts can only meet each specific situation as it is presented, and while one community may have facts which justify court intervention, the relief will not necessarily be the same in all areas unless the factual content justifies intervention, as this court believes in the case at hand. The Federal Government has left zoning problems to the states, and the states have largely, but not entirely, left them to the local governments. Housing, to be adequate for the poor, must be left primarily in the hands of a governmental body other than a local unit. The judiciary can only expect to give relief on a piecemeal basis, and "legislation" by the courts is often less than satisfactory."

Plaintiffs present no judiciable controversy within the meaning of Declaratory Judgment Act. See N.J.S.A. 2A:15-60.

In order to rule favorably to the Plaintiffs, this Court would have to disregard not only the factual patterns of each municipality but also the differences in language and type of each ordinance provision. Such a ruling would plainly be advisory and abstract, and thus not within the permissible limits prescribed for a "justiciable controversy" under the Declaratory Judgment Act. See for instance, New Jersey Sports and Exposition Authority v. McCrane, 61 N.J. 1 (1972); Donadio v. Cunningham, 58 N.J. 309 (1971): Borough of Rockleigh, Bergen County v. Astrial Industries, 29 N.J. Super. 164 (App. Div. 1953). In the case of Baylis v. Borough of Franklin Lakes, et al, Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-33910-71 P.W., Judge William R. Morrison was confronted by a similar problem. In an oral Opinion delivered on February 8, 1974, Judge Morrison held that the Plaintiffs, allegedly low income members of minority groups, failed to present a justiciable issue in the class suit against 5 municipalities accused of exclusionary zoning. Judge Morrison relied upon Sperry and Hutchinson Co. v. Margetts, 25 N.J. Super. 568 (Chan. Div. 1963) which required not only a concrete contested issue and a definite assertion of legal rights on the one side, but also a positive denial of them on the other.

Judge Morrison also cited The County Board of Freeholders v. Union County Park Commission, 77 N.J. Super. 425 (Law. Div. 1962), at page 432; Bress v. LF Dommerich and Co., Inc. 94 N.J. Super. 282 (App. Div. 1967). Judge Morrison noted that

a proper justiciable matter for determination by declaratory judgment could be neither hypothetical nor abstract.

Judge Morrison also relied upon N.J. Turnpike Authority v. Parson, 3 N.J. 235 (1949) at page 241; and Unsatisfied Claim and Judgment Fund Board v. Concord Insurance Co., 110 N.J. Super. 191 (Law. Div. 1970) at page 196.

Judge Morrison properly noted that the issues raised by the complaint in the 5 towns suit should be addressed directly to the legislature and not to the Court.

"Justiciability" is essential to the establishment of jurisdiction. The requirements for a jusiticiable controversy are as demanding in a declaratory judgment action as in any other type of suit. See 26 C.J.S. Declaratory Judgments §27, pp. 99-100 (1956); E. Borchard, Declaratory Judgments at p. 29 (2d ed. 1941). The controversy must be presented in a form which permits proper and appropriate exercise of the judicial function. It must be one which allows an immediate and definite determination of the legal rights of the parties, admitting of specific relief through a decree of a conclusive character. See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 241, 57 S. Ct. 461, 464, 81 L.Ed. 617 (1937).

The reasons why courts decline to exercise jurisdiction in the absence of an actual controversy go to the essence of the common law. Of primary concern is the recognition that the strength of the common law has developed through the detailed examination of specific, clearly defined factual dis-

putes existing between adverse litigants, and courts simply are not suited in their procedural or decision-making capabilities to hearing abstract matters.

The likelihood of error is only one of several reasons for precluding judicial consideration of such abstract legal questions as those presented by plaintiffs in the present case. In their classic text, Professors Hart and Wechsler note that "...the integrity and continued workability" of judicial decisions "depends upon having some means of settling uncertain or controverted questions about their application to particular situations as and when the situations arise." H. Hart & H. Wechsler, The Federal Courts and the Federal System, 77-78 (1953). They go on to catalogue the following factors as supporting the refusal of courts to determine abstract legal questions:

> "(a) The sheer multiplication of matters to which attention must be directed, and the resulting dispersion of thought, when a legal proposition is being formulated in the abstract;
>
> (b) The special disadvantages of dispersion of thought when a legal proposition is being formulated by a process of reasoned development of authoritative premises rather than by such a process, for example, as that by which statutes are enacted;
>
> (c) The importance, in the judicial development of law, of a concrete set of facts as an aid to the accurate formulation of the legal issue to be decided--the weight, in other words, which should be given to the maxim, ex facto ius oritur;
>
> (d) The importance of an adversary presentation of evidence as an aid to the accurate

determination of the facts out of which the legal issue arises;

(e) The importance of an adversary presentation of argument in the formulation and decision of the legal issue;

(f) The importance of a concrete set of facts in limiting the scope of the legal determination and as an aid to its accurate interpretation;

(g) The diminished scope for the play of personal convictions or preferences with respect to public policy when decision is focused upon a definite legal issue derived from a concrete set of facts;

(h) The value of having courts function as organs of the sober second thought of the community appraising action already taken, rather than as advisers at the front line of governmental action at the stage of initial decision;

(i) The importance of all the factors enumerated in maximizing the acceptability of decisions, and the importance of acceptable decisions."
Id. at 78-79.

In the present case, these established reasons for this Court to refuse to exercise its jurisdiction are, as we intend to show, fully present. The Plaintiffs' complaint seeks to have the Court grant judgment on abstract legal issues without showing the existence of a concrete controversy, and accordingly must be dismissed.

Although in Oakwood at Madison, Inc., et al v. Tp. of Madison, et al., 117 N.J. Super. 11 (Law Div. 1971) certif. granted, 62 N.J. 185 (1972), the Court held that a zoning ordinance which arbitrarily restricted the number of units in multi-family buildings, set minimum acreage and floor-space

requirements were invalid, it did so only upon a challenge to specific ordinances as they operated factually in a particular municipality. In its discussion of the municipality's contention that zoning for low population density was justified to insure proper drainage, the court indicated that while the record before it did not contain such evidence,"...ecological data and expert opinion could justify the ordinance under attack." 117 N.J. Super. at 21-22. It is accordingly clear that the Law Division in Oakwood did not hold that such ordinances as those setting minimum floor space requirements for dwelling were invalid on their face, but determined only that they had not been justified on the evidence before the Court concerning the special characteristics and housing needs of the particular municipality.

Oakwood's companion case now pending before the Supreme Court, Southern Burlington County NAACP, et al., v. Tp. of Mt. Laurel, et al., 119 N.J. Super. 164 (Law Div. 1972), certif. granted 62 N.J. 190 (1972) provides further support for the defendant-municipalities' position. As in Oakwood, the Mount Laurel court clearly declined to base its decision on per se invalidity; it rather focused sharply on the particular history of the defendant municipality's adoption of its zoning provisions, particularly the evidence of discriminatory intent indicated by various statements uttered by municipal officials during the course of zoning determinations. See 119 N.J. Super. at 169-170, 178. On the basis of this evidence, the Court found that the "patterns and practice" of the municipality

indicated economic discrimination against the poor, and that the ordinances were therefore invalid. There was no suggestion by the Court that the ordinances were per se void, and the decision is clearly tied to the peculiar evidence of the motivation of the municipality and its officials in the adoption of its particular ordinances. In any event, the mere allegation of infringment of constitutional rights is, in and of itself, insufficient to create a justiciable controversy. See Davis v. Ichord, 442 F.2d 1207 (D.C. Cir. 1970).

One of the main purposes of the Declaratory Judgment Act is to establish definitely private rights, duties and obligations and thereby forestall a multiplicity of actions. The Act cannot be used to decide or declare rights or status of parties upon facts which are contigent and uncertain, and the Act is not to be used to obtain advisory opinions. See Lucky Calendar Co. v. Cohen, 20 N.J.451 (1956).

"Justice and equity do not require an equity court to act in a factual vacuum. Equities arise and stem from facts which call for relief from the strict legal effects of given situations." Untermann v. Untermann, 19 N.J. 507, 518 (1955). Declaratory relief should generally be declined where the declaration will not terminate the uncertainty which is the subject of the action. See N.J.S.A. 2A:16-61.

The declaration which the Plaintiffs seek in the present case can in no way conclude this controversy. First, the declaration issued will only provide the Court's opinion as to

what general classes of ordinances are invalid. Further proceedings will then be required to determine whether particular ordinances, of differing language and type, in each nonparty municipality fit within the general class prescribed. If it is determined that particular ordinances fit within the general description, still further determinations must be made concerning whether those ordinances actually have a discriminatory effect in the context of the total housing situation in the particular municipality and its region. In short, the validity of the ordinances of the defendant municipalities or of any other municipality will not be affected until it is shown what the provisions of each ordinance are, and how they foster discrimination in the context of each municipality.

If the Court were to attempt to adjudicate the sole issues in this cause-the alleged per se invalidity of purported categories of zoning provisions and the decision by municipalities not to avail themselves of certain Federal and State programs-nothing would be resolved and the Court would be rendering an advisory opinion in the abstract.

POINT III

THE COMPLAINT SHOULD BE DISMISSED ON THE GROUNDS THAT THE LEGISLATURE AND NOT THE COURT SHOULD RESOLVE THE ISSUE OF ADEQUATE HOUSING.

Even if the Plaintiffs are able to establish a justiciable controversy, the Court would be well advised to dismiss the Complaint on the grounds that the issues raised are more properly the subject of the Legislation.

As Judge Morrison noted in Baylis v. Borough of Franklin Lakes, the suit involving 5 towns affected billions of dollars to property rights and hundreds of thousands of individual rights in real estate. These issues should be brought before a body which is responsive to the electorate and which is intended to handle state wide or regional problems.

In the case of Lindsey v. Normet, 405 US 56, 92 S. Ct. 862, 31 L.Ed. 2nd, 36 (1972), the United States Supreme Court, in considering a constitutional challenge to Oregon's Landlord-Tenancy Laws held that:

> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality...Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." 405 U.S. at 74, 31 L.Ed. 2d at 50-51.

POINT IV

THE COMPLAINT SHOULD BE DISMISSED FOR FAILURES TO STATE A CLAIM.

The Township of East Brunswick joins the Township of Cranbury in its application to dismiss the Complaint for failure to state a claim as provided by Rule 4:6-2(e).

In considering a Motion to Dismiss for failure to state a claim upon which relief can be granted, the Defendants are aware that the Court searches the Complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of a claim. De Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244 (App. Div. 1957) at page 252. All the liberality in the world will not change Plaintiffs' claim. While it is lengthy and raises interesting legislative issues, the Court must recognize that it does not have the power of ordering the Defendants to comply with the Plaintiffs' prayer for relief. The Court cannot, as requested, require the Defendants acting collectively to prepare and implement a joint plan which would be satisfactory to the Plaintiffs.

The Defendants are not obligated to zone for every possible use. Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509 (1949). No definitive pattern can be judicially prescribed; each case must turn upon its own facts. Fanale v. Hasbrouck Heights, 26 N.J. 320 (1958) at page 326.

In every case, the question is one of reasonableness

under the circumstances. The point sufficient for the present is that there is no rule of law, statutory or constitutional, which ordains that any use has an exalted position in a zoning scheme entitling it to move everywhere as of right. Kozesnik, Super.

In the very recently decided case involving an applicant for multi-family use in the Township of Marlboro, Judge Merritt Lane, Jr., stated that he could find no statutory basis for requiring a municipality to zone for apartments. Accordingly he dismissed the Complaint and ruled in favor of the municipality.

The fatal defect in the Plaintiffs' complaint appears to be that they are alleging that certain zoning practices are illegal per se and that the municipalities are required to take affirmative action in order to remedy these alleged deficiencies. The Court simply cannot rule in favor of the Plaintiffs on this basis.

CONCLUSION

For the reasons set forth above, it is submitted that the Complaint is materially defective and should be dismissed.

Respectfully submitted,

BERTRAM E. BUSCH
Attorney for Defendant, Township of East Brunswick