CA

Piscataway

5-4-84
(possibly)

Memo in opposition to
Ps show cause order
-w/ Cert of William Klein

pgs. 18

CA 002234D

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C 4122-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al,

Plaintiffs,

-vs-

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al,

Defendants.

Civil Action

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SHOW CAUSE ORDER

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INTRODUCTION

Mount Laurel II is obviously of seminal importance in exclusionary zoning. However, there are other zoning considerations which are also important. Under the Municipal Land Use Law municipalities have an obligation:

> "g. To provide sufficient space in appropriate locations for a variety of agricultural, residential recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;"

The final judgment provided in paragraph 17 that: "This Court retains jurisdiction over the pending litigation for the purpose of supervising the full compliance with the terms and conditions of this Judgment." The plaintiff is ostensibly interested in the zoning of the defendant municipalities. Yet the plaintiffs can not show where they monitored Piscataway's planning for the six year period following the final judgment. Indeed, the plaintiffs are attempting to preclude three industrial subdivisions. They apparently discovered the subdivisions when the Municipal Planner was deposed on March 21, 1984. Had their been a real monitoring of Piscataway's planning process, then the request for emergent relief, to the detriment of three property owners, would not be before this court.

The plaintiff claims that there is insufficient land in Piscataway Township for the municipality's allocation of low and moderate income housing. It is claimed that land in the municipality should not be zoned industrial when there is an unmet housing need. Curiously, the trial court found that the municipalities had not overzoned for industry, 142 N.J. Super. 32. This comported with Alan Mallach's testimony.

The plaintiffs have a myopic view of Mount Laurel II. They see it as the sole zoning consideration. They fail to realize that industrial establishments such as those proposed by the three defendants will create jobs for the citizens of the State of New Jersey. The choice is not between placing office development in the suburbs or in the cities. The choice is between placing industrial development in attractive suburban settings in New Jersey or comparable settings in other states. How does it aid poor families if they receive a set-aside apartment, yet have no work? It would make more sense to provide jobs for families so that they can afford housing. It may be argued that office development does not provide exclusive employment for low income persons. However, even the plaintiffs would concede that this type of development will require unskilled as well as white collar personnel.

The plaintiffs' show cause order places the defendants in a precarious position. Through no fault of their own, their projects may be enjoined because of the plaintiffs' conception of what Piscataway Township must do to satisfy Mount Laurel II. If the plaintiffs were truly concerned with Piscataway's planning, they would have monitored the zoning amendments and applications for development which took place since the final judgment in 1976. Why have they remained dormant for six years and lulled the three defendants into proceeding in good faith to develop their parcels? Should the three defendants be penalized by the plaintiffs' sloppy monitoring of the municipality? At this point, the defendants are seeking preliminary subdivision approvals from the Piscataway Township Planning Board. This court should not enjoin that approval.

PROCEDURAL HISTORY

The complaint in the present case was filed on June 23, 1974. After a lengthy trial, the court issued its opinion on May 4, 1976. The final judgment was dated July 9, 1976. The trial court ruled that the defendants Cranbury, East Brunswick, Edison, North Brunswick, Piscataway Township, Plainsboro, Sayreville and South Brunswick had to amend their zoning ordinances in order to provide for their fair share of low and moderate income housing, plus 1,333 units for each municipality. Piscataway and Plainsboro were the only communities which were found not to have a disparity in their existing percentage of low and moderate income individuals. Their total obligation was 1,333 units. The trial court opinion is reported in 142 N.J. Super. 11 C.D. (1976). It was reversed by the Appellate Division, 170 N.J. Super. 461 (App. Div. 1979) and partly reinstated by the New Jersey Supreme Court, 92 N.J. 158 (1983). The Supreme Court remanded the case to the trial court for a new determination of each defendant municipality's obligation for low and moderate income housing. The present litigation is in accordance with the remand order of the New Jersey Supreme Court.

STATEMENT OF FACTS

The plaintiffs in their show cause order rely upon the affidavit of consultant Alan Mallach. It should be noted that Mr. Mallach, although not a planner, essentially gives planning conclusions in his affidavit. Mallach claims that there are between 1,100 and 1,250 vacant acres in Piscataway Township which are potentially suitable for multi-family development. Mallach gives no factual support for this claim. Why should this court accept Mallach's unsupported number against landowners who have no connection with the present litigation?

Mallach claims that the achievable average density of development would be between eight and ten units to the acre. Mallach assumes that all of the units will be constructed on a set-aside basis, and that the yield of low and moderate income units will be less than those which he and the other plaintiffs' witnesses and the court-appointed planner claim are required. Mallach disregards the possibility of constructing senior citizen housing whereby all units would count as low and moderate income units without the necessity of concomitant market units.

Mallach uses a comparatively low density figure because it serves his purposes.

Attached hereto is a report which Mr. Mallach had prepared on March 12, 1979 for the Morris County Fair Housing Council, et al v. Township of Boonton, et al. In that report Mallach contended:

> "It is our judgment that a density of less than 10 DU/acre (as a ceiling in the ordinance) is impossible to justify in the context of a least cost housing." p. 5

. . .

"Attractive garden apartments meeting all health and safety requirements can be constructed at densities of 15 to 20 DU/acre, if the typical building is a two story (or 2 1/2 story building); densities of 25 DU/acre or more are possible with 3 story garden apartments."

. . .

" . . .permitting higher density in keeping with the number of stories; e.g., a 5 story senior citizen building can be built at 45 DU/acre without exceeding 15%-20% coverage of the site."

Mallach was deposed in the Morris County Fair Housing Council case on April 16, 1979. He had the following comments on density:

"Q And you have never found a zoning ordinance which did not meet the standards of at least ten dwelling units per acre for townhouses and at least 15 dwelling units per acre for garden apartments to be reasonable? That is correct; isn't it?"

"A. Yes." p. 40, l. 3

"Q Well, here is the problem I have with that, Mr. Mallach. Are you saying that you have no objection to densities that are lower than ten units per acre for townhouses and 15 units per acre for garden apartments as long as they are not significantly lower? In other words, where do you make the cutoff point? Where would you say that the ordinance is reasonable or unreasonable?"

"A Well, the figures of ten and 15 to the acre respectively that I cited in my report are certainly very conservative figures. They are not by any stretch of the imagination the highest densities at which housing of the types specified can be built while still consistent with health and safety." p. 69, l. 12.

"Q Since you have given us the minimums that you feel are acceptable, what maximums do you feel would be acceptable with regard to first townhouses and secondly garden apartments?"

"A I think that's difficult to say. I think it's a question of site planning and a lot of other factors. I think there are abundant examples in planning and architectural literature of apartments that do not require elevators, housing developments that do not require elevators being constructed with densities of over 30 units to the acre.

I have no, you know, philosophical objection to anything like that. I live in an area where everyone has their own yard. There are not elevators. The living conditions are certainly ample for health, safety and welfare. And the density is well over 20 to the acre. So the maximums can be a function of the sensitive design and site planning of a unit." p. 71, l. 11.

"Q Now, I believe you testified that you lived in what you considered an attractive garden apartment. I assume it is."

"A No, it's a townhouse." p. 73, l. 2.

"Q A townhouse. What density is the townhouse where you are living?"

"A The townhouses are—As I say, the density for the area in which I live is approximately 20—between 20 and 25 units to the acre."

"Q And you find it appropriate?"

"A I personally certainly do. And as far as I can tell, the family that lives next door to me that has five children also finds it appropriate."

"Q And from a professional basis, you see no problem with it?"

"A No." p. 72, l. 3.

"Q Can you give us an estimate as to what the maximum figure would be? If I can refresh your rrecollection, you testified a few moments ago to a density I believe of 20 to 25 units to the acre for townhouses. Would you feel that that would be a reasonable maximum density?"

"A That would not provide as miuch parking as one unfortunately would need in a suburban area, so that the densities in this case would probably be between 15 and 18." p. 101, l. 4.

If Mallach's densities which he espoused in the Morris County Fair Housing Council case were used in the present litigation, then the vacant acreage could provide all of the housing which would be required, and also leave a surplus.

LEGAL ARGUMENT

APPLICANTS CAN NOT BE ENJOINED FROM APPLYING FOR AND RECEIVING PRELIMINARY SUBDIVISION APPROVAL.

A. N.J.S.A. 40:55D-48c Gives an Applicant Automatic Approval Unless a Subdivision is Approved Within the Time Limits Set Forth in the Statute.

N.J.S.A. 40:55D-48 c provides:

> "Upon the submission to the administrative officer of a complete application for a subdivision of 10 or fewer lots, the planning board shall grant or deny preliminary approval within 45 days of the date of such submission or within such further time as may be consented to by the developer. Upon the submission of a complete application for a subdivision of more than 10 lots, the planning board shall grant or deny preliminary approval within 95 days of the date of such submission or within such further time as may be consented to by the developer. Otherwise, the planning board shall be deemed to have granted preliminary approval to the subdivision." pp. 40, 41.

The plaintiff concedes that 287 Associates filed an application which was deemed to be complete on March 22, 1984. Under the statute the applicant is entitled to a determination within 95 days of the filing of a complete application or the application shall be deemed to be approved. The purpose of the statute was to insure prompt determinations on development applications. The plaintiff is asking the court to act contrary to the Municipal Land Use Law and enjoin 287 Associates' application for preliminary subdivision approval.

B. A Subdivision Application Can Not Be Precluded Because of a Municipality's Alleged Need for Low Income Housing.

In the past municipalities have attempted to preclude a subdivision

because of a lack of municipal services. In Midtown Properties v. Madison Tp., 68 N.J. Super. 197 (L.D. 1961) aff. o.b. 78 N.J. Super. 471 (App. Div. 1963). In Midtown Properties the court held that a municipality could not deny a subdivision because of a lack of schools to serve the residents of the development. To the same effect is West Park Ave. v. Ocean Tp., 48 N.J. 122 (1966) and Township of Springfield v. Bensley, 19 N.J. Super. 147 (C.D. 1952). A subdivision should not be denied because of a municipality's failure to zone for low income housing.

C. Even Where the Municipality is Given the Right to Freeze a Subdivision Application, It Can Only Be Done After Final Subdivision Approval.

N.J.S.A.40:55D-44 provides for the reservation of public areas. A planning board is given the right to freeze the use of these lands for one year after final subdivision approval. The plaintiffs are looking to supersede this procedure and to prohibit three developers from proceeding with their subdivision applications. Not only have they failed to cite a single case which authorized this procedure, but they have chosen a path which is in conflict with the Municipal Land Use Law.

D. The Three Developers Are Entitled to Damages If The Court Freezes The Use Of Their Property After Final Subdivision Approval.

It is this author's opinion that the Court should not grant any injunction. However, if one is to be granted, it should be done after final subdivision approval is obtained.

Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108 (1968) is relevant to the case at bar. The Official Map Act (N.J.S.A. 40:55-1.32)

permitted a municipality to reserve for future public use any portion of a subdivision which was designated on the official map as park or playground. The municipality had one year in which to acquire or condemn the designated land after the approval. Since the property could not be developed for one year, the developer was found to be entitled to the option value of the property for the time when it couldn't be used. This concept has been incorporated in the MLUL in N.J.S.A. 40:55D-44. If a one year holdup in development requires compensation, then a fortiori compensation is required for an enjoined development which is brought by a private party.

Are the plaintiffs proposing to pay the option value of the developers' property? Is it fair that the landowners have the use of their property taken without any compensation? The plaintiffs' action would constitute a taking of property without adequate compensation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the plaintiffs' request for a preliminary injunction should be denied.

Respectfully submitted
BERNSTEIN, HOFFMAN & CLARK, P.A.

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SUPERIOR COURT OF NEW JERSEY
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URBAN LEAGUE OF GREATER NEW BRUNSWICK, et als.

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*Defendant*s

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

*Docket No.*C-4122-73

CIVIL ACTION

CERTIFICATION OF WILLIAM KLEIN

I, WILLIAM KLEIN, hereby certify that:

1. I am Vice President of The Sudler Companies, agent for David S. Steiner and Samuel Sudler, General Partners of 287 Associates. They are the purchasers under contract of approximately 52 acres of land in the Township of Piscataway designated as Lots 3 and 3Q in Block 497 on the municipal tax map.

2. I have been in charge of the project on behalf of the partners.

3. A copy of the contract is attached hereto.

4. The contract provides for the closing of title on June 27, 1984, subject to certain contingencies which have been met. Therefore, the partners are under a duty to acquire the property for the price of $2,100,000.00.

5. The partners rights would be prejudice if they were forced to close title prior to obtaining preliminary subdivision approval. If the injunction were granted, the partners would be in the position of owning land which they could not develop. If a temporary injunction were granted, the partners would suffer damage by reason of the unnecessary delay.

6. Had the plaintiff monitored the activities of the Piscataway Township Planning Board and Township Committee, they could have challenged the rezoning and not waited until the partners had expended substantial funds on this project. It would be unjust for the Court to issue an injunction against David S. Steiner and Samuel Sudler, who are innocent purchasers of land.

7. I estimated that the following costs have been incurred or will be incurred by the partners respect to Lots 3 and 3Q in Block 497:

	INCURRED	ESTIMATED
LEGAL		
1. Contract Costs		
Lasser, Hochman, etc. West Orange, N. J.		
Six revisions of Contract; review of title policy; determination on marketability; Contract negotiation and preparation; conferences with clients and Sellers.		
22 hours @ $150.00 per hour.....	$3,300.00	
Estimated additional expenses for conferences; document preparation for mortgage, notes and closing, title examination, run-down.....		$2,500.00
2. Zoning Change		
Meetings with Bernstein, Hoffman & Clark, P.A.; meetings with members of Planning Board, governing municipal officials, such as Planner, Engineer and Planning Staff; attendance at meeting.		
36 hours @ $125.00 per hour.....	4,500.00	
3. Subdivision Costs		
Examination of papers to submit to the Planning Board for subdivision, including application, check list requirements, notices to adjacent property owners within 200 feet, affidavits, conferences with municipal Planner, clients and Secretary to the Planning Board; publication in P.D. Review; examination of Ordinance for a subdivision.		
18 hours @ $125.00 per hour.....	2,250.00	

(continued)

	INCURRED	ESTIMATED
Appearance at Planning Board; presentation of matters; review of reports from Planner, Traffic Engineer Construction Engineer; examination of plans; conferences with client.		
24 hours @ $125.00, per hour.....	$	$ 3,125.00
4. Site Plan submission for specific structures to be erected which may be incurred for one lot or nine separate lots		
34 hours @ $125.00, per hour		$ 4,250.00
5. Mt. Laurel Litigation		
Bernstein, Hoffman & Clark, P.A. Scotch Plains, New Jersey		
Examination of documents seeking injunctive relief; research; preparation of responding documents; answer; appearance before Honorable Eugene D. Serpentelli at Toms River, N.J.; lengthy conferences with clients; telephone conferences with attorney for plaintiff, municipal officials, two attorneys, for properties affected by the proceeding.		
53 hours @ $125.00, per hour.....		$ 6,625.00
TOTAL LEGAL.....	$10,050.00	$16,500.00
PLANNING-ARCHITECTURE		
1. Zoning Change		
Raymond, Parrish, Pine & Weiner Princeton, New Jersey		
For analysis, graphic presentation; conferences and appearances with Planning Board and governing body.		
21.5 hours @ $65.00 per hour.....	$ 1,400.00	

(continued)

	INCURRED	ESTIMATED
2. Master Plan-Subdivision		
Raymond, Parrish, Pine & Weiner Princeton, New Jersey		
Consultation; conferences; presentation of material and appearances before the Planning Board		
80 hours @ $65.00, per hour.....		$ 5,200.00
3. Architectural, Site Plans, Study Work and Ordinance Examination		
Jacob M. Block, R.A. Newark, New Jersey		
Conferences; planning study preparation; drafting; appearances.		
119 hours @ $75.00, per hour.....	$ 8,925.00	
TOTAL PLANNING-ARCHITECTURE.....	$10,325.00	$ 5,200.00
ENGINEERING		
1. Survey		
Control Layout, Inc. Highland Park, New Jersey		
Topographical and boundary survey preparation; fieldwork; conferences with client, title company; title examination; meetings with County and Municipal Officials and meetings with Sun Oil Company for probable right-of-way.....	$ 3,000.00	$ 3,000.00 (additional)
2. Subdivision Plat		
Menlo Engineering, Inc. Highland Park, New Jersey		
Preparation of final subdivision plat for submission to municipality; conferences with client and Municipal and County Officials.....	7,100.00	

(continued)

	INCURRED	ESTIMATED
3. Additional work for sanitary drainage, engineering, hydraulic design and soils testing and analysis; appearances		
183 hours @ $65.00 per hour.....		$11,900.00
4. Traffic Engineer		
John Christ, P.E. West Caldwell, New Jersey		
Analysis; conferences and appearances; studies in gravitational modeling.....	$ 1,300.00	5,700.00
TOTAL ENGINEERING.....	$11,400.00	$20,600.00
TAXES PAYABLE AS PER CONTRACT TO PURCHASE WHICH REQUIRES TAXES PAID FROM DATE OF CONTRACT TO DATE OF CLOSING, including rollback taxes as per Contract.....		$86,736.00
DEVELOPER'S COST		
For negotiation; conferences; Contract administration; coordination with attorneys engineers, architects, planners, surveyors, traffic engineers, accountants, mortgage finance institutions		
328 (estimated) partial days @ $150.00 per day.....	$49,200.00	
FINANCING COSTS		
Acquisition-Carrying Costs (other than taxes)		
$115,200 @ 14% per annum ($44.80 per day x 328 days)	$14,694.00	
BROKERS COMMISSION - pursuant to Contract	$130,000.00	
TOTAL	$193,894.00	$86,736.00
TOTAL INCURRED.....	$225,669.00	
TOTAL ESTIMATED.....	126.436.00	
TOTAL.....	$352,105.00	

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

WILLIAM KLEIN

Dated: May 4, 1984.