

CA - Old Bridge

6/18/84

letter in lieu of formal brief in support
of TTS motion for full summary judgment
on constitutional invalidity of Twp of
Old Bridge Land Development Ordinance

p 10

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BRENER, WALLACK & HILL

ATTORNEYS AT LAW

**2-4 CHAMBERS STREET
PRINCETON, NEW JERSEY 08540**

(609) 924-0808

**CABLE "PRINLAW" PRINCETON
TELECOPIER:(609) 924-6239
TELEX: 837652**

**HARRY BRENER
HENRY A. HILL
MICHAEL D. MASANOFF**
ALAN M. WALLACK***

**GULIET D. HIRSCH
GERARD H. HANSON
J. CHARLES SHEAK**
EDWARD D. PENN+
NATHAN M. EDELSTEIN+
THOMAS L. HOFSTETTER**
ROBERT W. BACSO, JR.+
EDWARD M. BERNSTEIN^
MARILYN S. SILVIA
THOMAS J. HALL
SUZANNE M. LAROBARDIER
ROCKY L. PETERSON
VICKI JAN ISLER
MICHAEL J. FEEHAN**

*** MEMBER OF N.J. & D.C. BAR
** MEMBER OF N.J. & PA. BAR
+ MEMBER OF N.J. & N.Y. BAR
^ MEMBER OF N.J. & FLA. BAR**

FILE NO.

June 18, 1984

**The Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, New Jersey**

**Re: Olympia & York Old Bridge Development Corporation v.
The Township of Old Bridge, the Township Council of Old
Bridge and the The Planning Board of the Township of Old
Bridge, Docket No. I-009837-P.W.**

Dear Judge Serpentelli:

Please accept this letter memorandum in lieu of a formal brief in support of Plaintiff's Motion for Full Summary Judgment on the constitutional invalidity of the Township of Old Bridge Land Development Ordinance. In support of this Motion Plaintiff will rely on the Affidavits of Andrew T. Sullivan, P.P and Ralph Orlando, P.E. from Garmen Associates. In addition, Mr. Sullivan's Affidavit contains copies of the Old Bridge Township Ordinance, the Off-Site Improvements Report prepared by Louis Berger Associates, and standards prepared by the U.S. Department of Housing and Urban Development.

We have not prepared a "fair share" report, since we will rely on the report prepared for Your Honor by Carla Lerman, and submitted to the Court on March 27, 1984, as part of the Urban League case.

It is Plaintiff's position that the Old Bridge Township Land Development Ordinance is invalid because it fails to provide a realistic opportunity for the production of low and moderate income housing and contains expressly proscribed requirements or restrictions which substantially hinder the

The Hon. Eugene D. Serpentelli
June 18, 1984
Page 2

production of low and moderate income housing in violation of the constitutional mandate of Southern Burlington County NAACP v. Mount Laurel 92 NJ, 158 (1983) (hereinafter referred to as Mount Laurel II.) Plaintiff therefore moves before this Court for an Order declaring the Land Development Ordinance of Old Bridge Township constitutionally invalid, appointing a Master to oversee the Township's efforts to comply with Mount Laurel II, and setting a hearing date to address Plaintiff's eligibility for a builder's remedy.

We believe that Old Bridge Township's persistent failure to provide for any mechanism to generate the production of low and moderate income housing coupled with the total exclusion of mobile homes, and an ordinance replete with unnecessary cost-generating standards for all residential zones is part of a pattern of exclusionary zoning. It is the contention of Olympia and York/Old Bridge Development Corporation (hereinafter, O&Y/OBDC) that this persistent pattern of behavior with respect to exclusionary zoning makes this case particularly appropriate for summary judgment with respect to all compliance issues.

PROCEDURAL HISTORY

There has been a history of land use controversy within Old Bridge Township within the past two decades. Very briefly, Old Bridge Township, then known as Madison Township, was declared to have an exclusionary zoning ordinance in Oakwood at Madison v Township of Madison, 117 N.J. Super 11 (Law Div. 1971); which judgment was ultimately affirmed by the New Jersey Supreme Court in Oakwood at Madison v. Township of Madison, 72 N.J. 481, 1977.

Thereafter, the Township was sued by the Urban League of Greater New Brunswick, and was found to have an exclusionary zoning Ordinance (Urban League v. Carterert, et al, 142 N.J. Super 11 (1976). Thereafter, Old Bridge Township consented to a judgment which required it to rezone specifically to accomodate lower income housing. Whether or not Old Bridge Township has, in fact, complied with that judgment is an issue which is currently before Your Honor.

O&Y/OBDC had purchased extensive acreage in Old Bridge with a view toward building a development which would include a residential component in excess of 10,000 units, but found itself confronted with a bewildering maze of land development regulations, which were replete with cost-generative standards and provisions which apparently violated the New Jersey Municipal Land Use Law and then-extant caselaw. After attempting in good faith to comply with the Old Bridge Ordinance, O&Y/OBDC eventually reached the conclusion that litigation would be necessary, and filed suit against Old Bridge on February 18, 1981.

After extensive discussions and negotiations, the Old Bridge Township Council passed a resolution agreeing to revise the Ordinance so as to permit the construction of a development which would include 10,260 units of housing. O&Y/OBDC worked with the Old Bridge Township Council and Planning Board to pass a workable Ordinance, but despite the best efforts of O&Y/OBDC, the Planning Board recommended, and the Township Council adopted, a land development ordinance which, with the Planning Board procedures then in existence, could only be described as Byzantine.

O&Y/OBDC attempted to work with the Township to submit a Development Plan application acceptable to both parties, but found the Township and its Planning Board still engaged in the same process of exclusionary practices which had led to the above-mentioned litigation. Thus, in December, 1983, O&Y/OBDC informed the Planning Board that it would grant no more extensions of time for the consideration of its application; the Planning Board then denied O&Y/OBDC's application; O&Y/OBDC then dismissed its previous suit and filed the current Mount Laurel II suit, docketed as L-00937-84 P.W.

In the meantime, the Urban League plaintiffs have raised the question before this Court as to Old Bridge Township's compliance with the 1976 judgment.

The current posture of these cases is as follows:

O&Y/OBDC filed suit in February. A delay in answering the Complaint was requested and agreed to by Counsel for O&Y/OBDC; the Township then requested this Court to delay the trial pending the hiring of a planner and a determination as to whether or not the Township would seek to settle this case or to litigate it. O&Y/OBDC, after patiently waiting for an answer to the issue as to whether the Township would settle or fight, has now commenced discovery proceedings against the Township and has filed this Motion for Summary Judgment.

The Urban League plaintiffs have had meetings with counsel for the Township and have requested answers to interrogatories and apparently engaged in other discovery proceedings, but apparently the Township has again delayed its responses. O&Y/OBDC is aware of at least one motion filed by the Urban League plaintiffs to force the Township to reply or to find its rights limited.

Your Honor has now scheduled a case management conference for June 19th on the Urban League Case. As to the O&Y/OBDC suit, it is our intention to seek to have this Motion for Summary Judgment heard as soon as Your Honor can schedule it.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

On this Motion for Summary Judgment, movant must exclude all reasonable doubt of the existence of any genuine issue of material fact, Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-5 (1954). In order to withstand summary judgment, defendants must respond by way of affidavit setting forth specific facts which demonstrate a genuine issue for trial. R. 4:46-5(a). "Bare conclusions and pleadings, without factual support and tendered affidavits, will not defeat a meritorious application for summary judgment." A. Kaplen & Son v. Housing Auth. of Passaic, 42 N.J. Super. 230, 235 (App. Div. 1956).

It is well settled that in a Mount Laurel case, "Plaintiff's may prove a prima facie case, without proving the precise fair share of the municipality, by proving that the zoning ordinance is substantially affected by restrictive devices, that proof creating a presumption that the ordinance is invalid." Id. at 216. The Court in Mount Laurel II found that once the facial invalidity of a local zoning ordinance has been established:

"The municipality shall then have the heavy burden of demonstrating, by a preponderance of the evidence, its fair share and its satisfaction of that share, or any justification of its failure. It shall not be sufficient in such cases to show merely that there are one, two or three zones that purport to contain provisions for multi-family dwellings; what is needed where facial invalidity is relied upon by the plaintiff is a definite presentation of facts by the defendant municipality that shows that it has satisfied its fair share obligation. Mount Laurel II at 223 (emphasis is court's).

Thus, in the instant case, once the facial invalidity of the Township's Ordinances is established, Old Bridge Township shall have the heavy burden of demonstrating, by a preponderance of the evidence, its fair share and its satisfaction of that fair share or any justification for its failure. Mount Laurel II, 92 N.J. 158, 223.

Mount Laurel II clearly requires that a township's land use ordinances provide a mechanism to ensure that realistic opportunities for the construction of low and moderate income housing exists within the Township. Mount Laurel II at p. 217. To accomplish this goal, affirmative governmental devices, such as lower income density bonuses and mandatory set asides are required and restrictive devices are prohibited, Id. p. 217, 260-261.

Applying these principles to the instant case, as discussed more fully below, it is clear that the current Old Bridge Township Land Use Ordinance, on its face, is violative of the constitutional mandate of Mount Laurel II, and that Plaintiff's motion for summary judgment should be granted.

SUBSTANTIVE DISCUSSION

1. The Old Bridge Township "fair share"

There is no factual dispute that Old Bridge Township has a burden, not only to provide for its indigeneous need for housing oppourtunities, but also to provide for its fair share of the region's need for housing for persons of low and moderate income. The entire Township is either within the Growth Area or the Coastal Zone High Growth Area as shown on the State Development Guide Plan; and the Township has admitted in its Answer that it is in the Growth Zone and subject to the Mount Laurel II mandate. (See Township's Answer, Paragraph 1, Planning Board's Answer, Paragraph 25).

Once there is an admission as to the liability, there is only a potential dispute as to the size of the obligation. For purposes of this Motion, and for these purposes only, we think it immaterial whether the Township's obligation is 1,000, 2,000 or 3,000 housing units by the year 1990. The Lerman Report indicates that Old Bridge Township has a need to provide 2782 units for low and moderate income households by 1990, and we would be prepared to accept that number for purposes of this Motion. The Township may dispute that figure and may well have a different number, but there is no doubt that the number of low and moderate income housing units which will be needed to be built within the Township will be substantial. Thus, while there may be a dispute over the Lerman number, we think it is indisputable that Old Bridge (a) has a fair share obligation; (b) that fair share obligation is substantial; and, in fact (c) it is in excess of 1,000 units by the year 1990.

2. The Old Bridge Township Land Development Ordinance

Mr. Sullivan's Affidavit and the exhibits thereto make it abundantly clear that:

A. The Old Bridge Township Land Development Ordinance fails to provide areas where mobile homes are permitted, anywhere in the Township, and zones the entire Township at densities too low to permit the construction of low and moderate income housing by private developers;

B. The Old Bridge Township Land Development Ordinance heavily favors industrial and commercial uses at the expense of housing, particularly at the expense of lower income housing.

C. The Old Bridge Township Land Development Ordinance is replete with cost-generative standards; and

D. The Old Bridge Township Land Development Ordinance fails to provide sufficient incentives, concessions, or other constitutionally required measures to encourage the construction of housing for persons of low and moderate income.

Specifically:

Mr. Sullivan's Affidavit contains a zone-by-zone analysis of the seven residential districts provided in the Ordinance, which discloses:

(a) The zoning contains no mandatory inclusionary provisions for lower income housing. (Sullivan Affidavit, p. 9);

(b) The density bonus provisions which are available:

i. favor the construction of commercial, office and industrial uses over housing, and particularly over lower income housing; and

ii. are, in the case of the provisions available to assist lower income housing, wholly insufficient to induce any market-oriented developer to build lower income housing. (Sullivan Affidavit, p. 9).

(c) There are procedural and substantive flaws built into the zoning Ordinance, including a requirement for the construction of commercial, office/industrial uses in the Planned Development Zones in tandem with the construction of residential uses, and a requirement that the developer set aside 23% of the development as open space/community facility, which, when coupled with the low by-right densities provided in these districts make the provision of lower income housing economically infeasible. (Sullivan Affidavit, p. 9).

(d) Interestingly, even though the Old Bridge Land Development Ordinance provides stringent standards for mobile homes which are higher than HUD standards, (Sullivan Affidavit, p. 12) the Ordinance nowhere provides mobile homes as a permitted use. (Sullivan Affidavit, pp. 9-10)

Mr. Sullivan's Affidavit also reviews the cost-generative aspects of the Old Bridge zoning. The Affidavit points out:

(a) There is a two-step Environmental Impact Review proceeding which places the developer at peril, since it is highly subjective and standardless. This has the consequence of forcing a developer to commit large sums of money

to studies with few guidelines as to what the Planning Board is likely to find "acceptable". (Sullivan Affidavit, p. 11)

(b) The General Development Plan Application process-- in itself, a laudable feature of a zoning ordinance in a Township such as Old Bridge--has, unfortunately, been laden with a host of procedural defects and substantive requirements such as to make this otherwise useful process more expensive than it is worth to a competent market-oriented developer. (Sullivan Affidavit, pp. 11-12)

(c) The Ordinance has many discretionary features, such as:

i. the requirement that curbs, sidewalks, bikeways and open-space pathways be installed " as required by the Township Planner and Township Engineer" (Sullivan Affidavit, p 12);

ii. The requirement that the applicant install street lighting "...as approved by the Township Engineer and Township Planner" (Sullivan Affidavit, p. 12);

iii. The General Design Standards, which are replete with terms which vest unbridled discretion in the Planning Board or the Township Officials, such as:

- Parking spaces must be " usable, safely and conveniently arranged (Sullivan Affidavit, p. 14);

- buildings and parking shall " provide an aesthetically pleasing design and efficient arrangement" (Sullivan Affidavit, p. 14);

- Signs " shall be designed so as to be aesthetically pleasing" (Sullivan Affidavit, p. 14); and

- Design of the plan shall " minimize any adverse impacts on environmental elements" (Sullivan Affidavit, p. 14).

iv. Street design standards are also vague and replete with subjective standards, as the use of " more desirable layout" and " appropriate for the locality" indicate. (Sullivan Affidavit, p. 14).

(d) The Ordinance also has many features which are cost-generative in ways which are unrelated to health and safety considerations. For example:

i. Parking requirements generally are more than required for safe movement, as illustrated by:

- The eight-foot parking lane requirement for culs-de-sac and minor streets, unnecessary in view of off-street parking requirements (Sullivan Affidavit, p. 15);

- parking spaces of 10' x 20', rather than the very acceptable 9' x 18' (Sullivan Affidavit, p. 15);
- acceleration and deceleration lanes required for off-street parking areas. (Sullivan Affidavit, p. 15);
- The parking islands required at the end of each row, which merely add to site development costs without enhancing public safety (Sullivan Affidavit, p. 15)

ii. The requirement that the land developer obtain a local land disturbance permit in addition to the Soil Erosion and Sediment Control Permit required by the Soil Conservation District. (Sullivan Affidavit, p. 15.) It can be pointed out here that many municipalities in New Jersey have written ordinances which conform to the requirements of the Soil Conservation District, as set forth in P.L. 1975, C. 251, N.J.S.A. 4:24-39 et seq.; Old Bridge has no such certified Ordinance, hence the dual application procedures.

iii. The redundant and confusing drainage requirements, which have the effect of adding untold dollars to a project for no apparent purpose. (Sullivan Affidavit, p 16)

(e) Worthy of special note are the "Berger Report" requirements. Old Bridge Township, in an attempt to capture funds from developers for any off-site improvements which could be conceivably required by the development, set up a formulaic approach to garner revenues from developers. The way the formula works, O & Y/OBDC would have the unenviable problem of having to pay for improvements twice-- once, when O & Y/OBDC put the improvements in to service the development, and another time, when the Township assessed the developer for the costs of "improving" these very same roads which O & Y/OBDC must improve on its own. Moreover, there are no standards and mechanisms within the "Berger Report" which render the formula susceptible to specific identification of project cost which can fairly be attributed to a specific development, contrary to the "rational nexus" requirement enunciated in Longridge Builders v. Princeton, 52 N.J. 348 (1968) and Divan Builders v. Wayne, 66 N.J 582 (1975).

These, and other vague, confusing and unnecessary provisions of the Land Development Ordinances of the Township of Old Bridge have the effect of rendering the developmental process far more expensive than necessary; and this additional expense makes it impossible for a developer to build market housing and to undertake to provide housing which is affordable to persons of lower income.

Mr. Sullivan's Affidavit further reviews the affirmative measures which are needed to insure that a municipal zoning ordinance is in compliance with the requirements of Mount Laurel II. He concludes:

(a) The " optional density bonus" provision set forth in Section 9-5:2.1.3 of the Ordinance is, by its own definition, not capable of producing "affordable" housing in the Mount Laurel II sense, since it merely requires a developer to produce housing which is affordable to a household earning 120% of median income for the region.(Sullivan Affidavit, p. 16)

(b) The "bonus" provision is optional, not mandatory; and the bonus offered is too little to attract serious attention from market-oriented developers (Sullivan Affidavit, p. 16)

(c) There are no other mechanisms to encourage a developer to build lower income housing, nor even to apply for Federal or State subsidy funds, if and when these may become available. (Sullivan Affidavit, p. 16)

The Ordinance, on its face, fails to provide any effective mechanisms to affirmatively provide for the construction of lower income housing.

Mr. Sullivan concludes his Affidavit by stating,

"...no low and moderate income housing units will be provided in Old Bridge Township, given the combination of low gross densities, paucity of affirmative measures to promote the provision of lower income housing and the restrictive cost-generative provisions pursuant to the Township of Old Bridge Land Development Ordinance." (Sullivan Affidavit, p. 17)

In addition to Mr. Sullivan's review of the Land Development Ordinance, O &Y/OBDC requested Mr. Ralph Orlando, P.E. to review the Old Bridge Township Land Development Ordinance and related standards in comparison with the standards set forth by the State of New Jersey, Middlesex County, other municipalities, and generally accepted standards of the engineering profession. Mr. Orlando determined:

(a) The Ordinance is replete with cost-generative standards, such as:

i. sidewalk requirements, which may bear no relationship to the actual need of the particular subdivision or site. (Orlando Affidavit, p. 3)

ii. lighting standards, and standards for light fixtures, which add unnecessarily to costs without yielding any public health or safety benefit. (Orlando Affidavit, p. 4)

iii. the requirements for curbing in areas where curbing serves no useful purpose. (Orlando Affidavit, p. 5)

(b) The Ordinance may require unnecessary filling and grading, which will give roadways an undesirable "rollercoaster" effect, in order to attain a drainage gradient, even though other drainage mechanisms exist which could accomplish the same desired end at less cost. (Orlando Affidavit, p. 3)

(c) The Ordinance and Design Standards specify pavement depths, thicknesses and construction details which go beyond those required by Middlesex County for County Roads. (Orlando Affidavit, pp. 4-5)

(d) The Standard Details for Streets specify a pavement thickness for minor streets and culs-de-sac which go beyond the requirements of most municipalities in the area. (Orlando Affidavit, p.5)

Orlando sums up his Affidavit by concluding that the Old Bridge Township Ordinance and Standards have cost-generative features which go beyond the requirements of public health and safety (Orlando Affidavit, p. 6)

CONCLUSION

It is the contention of O&Y/OBDC that no issue of genuine fact exists as to the fact that Old Bridge Township does have a "fair share" of the region's housing need; that the need is in excess of 1,000 units; and that the Old Bridge Township Land Development Ordinance, is, on its face, exclusionary.

For the reasons stated above, Plaintiff respectfully requests that Your Honor grant O&Y/OBDC's Motion for Summary Judgment and declare the Old Bridge Township Land Development Ordinance constitutionally invalid. Plaintiff further requests that a Master be appointed immediately to determine the Township's fair share and to ensure that Old Bridge Township is properly rezoned to be in compliance with Mount Laurel II, and that a hearing date be set to determine Plaintiff's eligibility for a builder's remedy.

Respectfully submitted,

BRENER, WALLACK & HILL,
Attorneys for Plaintiff

By: 
Thomas J. Hall