

(1981)

Newark v. West Milford

Judge Rubin's Opinion + attorney note

5 pgs

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February 26, 1981

Mr. Alan Mallach
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RE: Newark v. West Milford

Dear Alan:

Enclosed is a copy of Judge Rubin's Opinion. No comment
is needed.

Very truly yours,


PHILIP ELBERG

PE:pr
Enclosure

SUPERIOR COURT OF NEW JERSEY



IRVING I. RUBIN
JUDGE

COURT HOUSE
PATERSON, NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

February 19, 1981

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RE: City of Newark v. Tp. of West Milford
Docket No. L-25413-77 PW

Gentlemen:

This matter was before the Court pursuant to the Pre-trial Orders of June 14, 1979 and July 30, 1980 and the judgment entered May 15, 1980, on the issues of the type of relief and damages, if any, to be awarded plaintiff.

February 19, 1981

Re: City of Newark v. Tp. of West Milford
Docket No. L-25413-77 PW

The relief to be awarded in similar situations has received attention by our courts. In Southern Burlington v. Mt. Laurel, 67 N.J. 151, 191-192, the municipality was granted the opportunity to correct its ordinance which the court found invalid. Although Oakwood v. Madison, 72 N.J. 481, decreed specific relief for the plaintiff (p.549-550), such action appeared limited to the facts of that case, the court saying in a footnote (p.551-552)

"This determination is not to be taken as a precedent for an automatic right to a permit on the part of any builder-plaintiff who is successful in having a zoning ordinance declared unconstitutional. Such relief will ordinarily be rare, and will generally rest in the discretion of the court, to be exercised in the light of all attendant circumstances."

The foregoing caveat was reaffirmed in Pascack v. Washington Tp., 74 N. J. 470, 485, 487-488, which principle was followed by Home Builders v. Berlin, 157 N. J. Super. 586, 602, where the court said, "---A court does not enact ordinances; local legislatures do.---"

It should also be noted, Item 9 of the pretrial order of July 30, 1980 stated, "---the plaintiff in this litigation is not seeking any building permits,---".

Accordingly, judgment shall be entered on the issue of relief:

- (1) Ordering West Milford to revise its Zoning Ordinance (Land Development Ordinance) within 90 days from the date of the judgment herein, to provide for low and moderate income and least cost housing consistent with the opinions and judgments herein;
- (2) the court will retain jurisdiction upon proper application to enforce the provisions of the judgments entered in the matter;

Re: City of Newark v. Tp. of West Milford
Docket No. L-25413-77 PW

- (3) the present zoning ordinance shall be continued in full force and effect until the effective date of such new superceding ordinance or the further order of the court.

AS TO THE DAMAGES ISSUE

Plaintiff demands damages resulting, it alleges from the placing of its property set forth in the complaint, in the R-4 district.

The Ordinance (P-1) adopted January 25, 1979, while requiring four acres for a dwelling (held invalid by the court's judgment of 5/15/80) allowed other uses in such zone.

As said in Usdin v. Environmental Protection, 173 N.J. Super. 311 at 321;

"Compensation was not required by a municipal zoning provision even though it deprived the owner of the property's most beneficial use***".

In Agins v. City of Tiburon, 65 L. Ed. 2nd 106, it was held that restrictions placed on property by way of zoning and similar plans which deprived the property of its most beneficial use were not per se deemed a taking or a basis for a claim of inverse condemnation.

Zoning laws have been described as the classic example of permissible governmental action even when prohibiting the most beneficial use of property. Annotation, 57 L. Ed. 2nd 1254, 1262; Penn Central v. City of New York, 438 U.S. 104.

February 19, 1981

Re: City of Newark v. Tp. of West Milford
Docket No. L-25413-77 PW

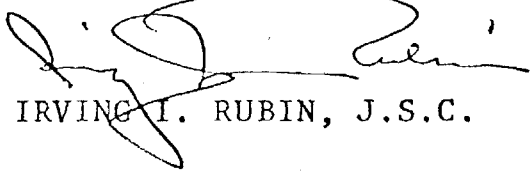
And, as indicated in In Review of Health Care v. Finley, 168 N.J. Super. 152, 164, the type of loss suffered under the within facts would not be recoverable.

Plaintiff urges Lomarch v. Englewood, 51 N.J. 108 and Washington Market v. Trenton, 68 N.J. 107 as authority for granting it damages. Both are inapplicable. In Lomarch, the temporary taking was, in effect, to prohibit any use of the property. In the present case the defendant did not deprive plaintiff of all beneficial use of the property which was not income producing, all making the within matter distinguishable to the situation in Washington Market. See Schnack v. State, 160 N.J. 343, 348-349.

It would further appear that immunity both under common law and the provisions of the New Jersey Tort Claims Act bars plaintiff. N.J.S.A. 59:2-3b; Woodsum v. Tp. of Pemberton, 172 N.J. Super. 489. See also Centennial Land v. Tp. of Medford, 165 N.J. Super. 220; Expo v. City of Passaic, 149 N.J. Super. 416, 424-425.

A form of judgment should be submitted embodying the foregoing determinations.

Very truly yours,


IRVING I. RUBIN, J.S.C.

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