Zicinsky v. Cambary (1985)

Brief in support of motion for transfer to affordable housing

w/ newspaper article attached.

14 pgs

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Plaintiff,

LAWRENCE ZIRINSKY,

v.

Defendants,

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation, and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

Docket No. L 079309-83 P.W.

Civil Action

Plaintiffs,

JOSEPH MORRIS and ROBERT MORRIS,

v.

Defendants,

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a municipal corporation of the State of New Jersey

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Docket No. L 054117-83

BRIEF IN SUPPORT OF MOTION FOR TRANSFER TO AFFORDABLE HOUSING COUNCIL

Plaintiffs,

GARFIELD & COMPANY,

v.

Docket No. L 055956-83 P.W.

Defendants,

MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, a municipal Corporation, and the members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof.

Plaintiffs,

CRANBURY DEVELOPMENT CORPORATION, a Corporation of the State of New Jersey,

Docket No. L 59643-83

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and theTOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

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Plaintiffs,

BROWNING-FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a corporation of the State of New Jersey and MID-STATE FILIGREE SYSTEMS, INC., a Corporation of the State of New Jersey,

Docket No. L 058046-83 P.W.

v.

Defendants,

CRANBURY TOWNSHIP PLANNING BOARD and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

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Plaintiff,

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.

v.

Defendants,

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

CHANCERY DIVISION: MIDDLESEX COUNTY

Docket No. C 4122-73

Plaintiff,

CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

v.

Defendants,

CRANBURY TOWNSHIP, a municipal corporation of the State of New Jersey located in Middlesex County, New Jersey

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Docket No. L 070841-83 P.W.

Plaintiff,

TOLL BROTHERS, INC.

v.

Defendant,

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY.

Docket No. L 005652-84

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POINT I

THIS COURT SHOULD ABIDE BY THE "CLEAR SIGNAL" OF THE SUPREME COURT AND DEFER TO THE LEGISLATIVE SCHEME TO SOLVE THE PROBLEM OF AFFORDABLE HOUSING.

At long last, the legislative and executive branches of the government have directly responded to the constitutional mandate to provide the opportunity for low and moderate income housing. On July 2, 1985, the Governor signed the "Fair Housing Act", Ch. 222, P.L. 1985. This act specifically states that it is a response to the invitation to legislative action contained in Southern Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp., 92 N.J. 158, 456 A 2d. 390 (N.J. 1983). Mt. Laurel II is replete with statements that this is properly a legislative function and that were the legislature to act, the courts should defer. "...[P]owerful reasons suggest, and we agree, that the matter is better left to the legislature." Legislation "might completely remove this court from those controversies". "...[W]e have always preferred legislative to judicial action in the field..." "Our deference to these legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions." 456 A 2d. at 417. "...[T]he complexity and political sensitivity of the issue now before us make it especially appropriate for legislative

resolution..." 456 A 2d. at 417 n. 7. "As we said at the outset, while we have always preferred legislative to judicial action in this field, we shall continue until the Legislature acts - to do our best to uphold the constitutional obligation that underlies the Mount Laurel doctrine." 456 A 2d at 490.

The Legislature has acted. The Executive has acted. A comprehensive system now exists at an administrative level to approve municipal plans for low and moderate income housing. Cranbury Township has adopted the necessary resolution to notify the Affordable Housing Council of its intention to submit a fair share housing plan. Most of the work has already been done on that plan. §8, Ch.222, P.L. 1985. The compliance package submitted to this court in December 1984 can easily be modified to become a housing element described in §9 of the Fair Housing Act.

A presumption of validity automatically attaches to this long sought legislation. For a discussion of the reasons for this presumption, see Mt. Laurel II, 456 A 2d. at 466.

The act also provides for a transfer of existing legislation to the Affordable Housing Council on the motion of any party to that litigation. §16, Ch. 222, P.L. 1985. The only test for the transfer is whether or not it would

result in a "manifest injustice" to any party. Here, the plaintiff parties fall into two categories - the public interest group and the plaintiff builders. The plaintiff builders suits were filed between August 1983 and February 1984. They have been expeditiously handled. Defendant cannot be accused of any kind of unnecessary delay in its defense of the suits. When this court ordered the rezoning on July 27, 1984, Cranbury did request two extensions totaling forty-five (45) days, but is willing to compare its compliance timetable with any other municipality. Similarly, in meeting the timetable set down by this court for filing experts reports, Cranbury has outperformed the plaintiffs. There is no injustice to plaintiffs whose suits are relatively recent, where the defendant has not been dilatory and where there is now an opportunity for resolution of these issues in the manner preferred by the courts. [1]

With regard to the Civic League (formerly Urban League) other than the fact that they have been in this litigation for a long time, it is difficult to see how the transfer would work on injustice on it. As to the time argument all that Cranbury has done is avail itself

[1] With regard to the question of builder's remedy, see the discussion in Point II, infra.

of the judicial avenues properly open to it. That there was some merit to Cranbury's position is born out by the following facts:

1. The original fair share number which was appealed by the Township has been reduced by the court from 1351 units to 816 units, a 40% reduction. See Urban League of Greater New Brunswick, et al. v. Mayor and Council of the Borough of Carteret, et al., 142 N.J. Super 11, 359 A 2d. 526, 541 & 542. (Law Div. 1976).

2. Of the 92 months from the time of the original decision invalidating Cranbury's Ordinance until the decision in Mt. Laurel II, for 40 months the suit against Cranbury had been dismissed by the Appellate Division, Urban League of Greater New Brunswick et al. v. Mayor and Council of the Borough of Carteret, et al., 170 N.J. Super 461, 406 A 2d. 1322 (App. Div. 1979).

3. The new "Fair Housing Act" recognizes historic preservation and agricultural preservation as necessitating an adjustment of a municipality's fair share number §7(c)(2) c.222, P.L. 1985.

The question of injustice with regard to the Civic League would seem to revolve, then, around the question of additional delay. It should be noted that if this case proceeds there is a right of appeal both with regard to the fair share number and the remedy. That appeal could last at least as long as the proceedings before the Council on Affordable Housing. Any delay with regard to the Civic League will not delay the construction of affordable housing in Cranbury since the Civic League does not propose any housing.

Weighed against the possibility of prejudice to the Civic League is the prejudice to the town in saddling it with a fair share number based on slavish application of the formula developed in AMG Realty v. Warren, Sup. Ct., Law Div., decided July 16, 1984, when numerous municipalities have been allowed to settle for numbers less than that generated by the formula and even neighboring Monroe has been offered a reduction in its fair share number for a settlement. It is clear from the new legislation that any formula that the Council developed would be adjusted for historic preservation, agricultural preservation, established development patterns, and infrastructure costs. All of these are factors which should significantly diminish the fair share number assigned to Cranbury. If the motion is denied, Cranbury would remain one of the very few municpalities in the state whose fair share number would be based on the AMG formula.

For these reasons, this case should be transferred to the Council on Affordable Housing or alternatively the fair share number assigned to Cranbury should be adjusted after consideration of the factors set forth in section 7(c)(1) of the statute.

Cranbury has been much criticized for having done nothing for so long and doubtless will be again

in response to this motion. As indicated in the accompanying affidavit, Cranbury did nothing when it was impossible to do anything and did what it could when it could.

In 1974 when this litigation started, there was no sewer system in Cranbury, but Cranbury had been pursuing both EPA and Farmer's Home Administration grants for sewers since 1969. How can a town zone for high density housing without sewers? In 1978 and 1979, the sewer system was built. At that time the Township was waiting for guidance from the courts as to what it had to do. The direction from the courts was hardly illuminating. The court's decision in Mt. Laurel I, 67 N.J. 151, 319 A 2d. 713 (1975) carved out an exception for non-developing municipalities. Surely a town with zero population growth for thirty years, with 60% of its total land devoted to agriculture, with no sewer system, had some justification for considering itself as being in that category.

In 1979 Cranbury had a judgment of the Appellate Division which, in effect, said it was a winner. Cranbury was defending the appeal to the Supreme Court. After argument in the Supreme Court, it did not appear to make sense to revive the zoning ordinance until the Court issued its

decision. When it became apparent that this was not going to happen quickly, the Township began work in 1981 on a new Master Plan. It was adopted in October 1982, three months before Mt. Laurel II. In some ways it was prophetic. It provided for density bonuses for low and moderate income housing encouraged in Mt. Laurel II. It provided for agricultural preservation also emphasized in Mt. Laurel II. The Plan also reduced substantially the amount of land zoned for non-residential uses and provided for approximately 350 units of low and moderate income housing.

It must be remembered that up until this time there had been three fair share allocations for Cranbury. The first was done by Ernest Erber, a planner on the staff of the National Committee Against Discrimination in Housing, counsel for Urban League. His number of 531 units was rejected by the original trial judge. The second was the trial court's number of 1351 units which was rejected by the Supreme Court in Mt. Laurel II 456 A 2d at 489. The third was contained in Preliminary Draft of "A Statewide Housing Allocation Plan for New Jersey" prepared in November 1976 by the Division of State and Regional Planning". It projected a 1990 fair share for Cranbury of 561 units. That report was never finalized. During this time period Cranbury had spent a larger portion of its Housing and Community Development Revenue Sharing

than any other participant municipality in Middlesex County. It has committed to do so.

Any decision not to transfer this matter based on Cranbury's history would be to punish the town for acting no worse than an average New Jersey town and a lot better than many. The concept of justice referred to in the statute should not be based on punishment.

POINT II

A UNIFORM FAIR SHARE APPROACH FOR THE ENTIRE STATE IS DESIRABLE

This court in AMG Realty v. Warren, decided July 16, 1984 enumerated a fair share formula. In that opinion, this court invited its replacement with something better. "Indeed, the methodology represents the beginning of the refinement process. It is not written in stone and it should therefore provide the impetus for those in the legal and planning community, as well as others, to improve upon it or replace it with something better." Slip opinion at p. 78. As pointed out in this court's opinion in Allen Deane v. Bedminster, decided May 1, 1985, variations in the numbers produced by the AMG methodology have been permitted in numerous instances. Slip opinion at p. 4. Newspaper accounts of other cases indicate that variation in these numbers may be permitted even when this court has already fixed an AMG fair share number.

Now, the legislature has indicated that whatever fair share methodology is developed by the Council on Affordable Housing, it must permit modification based on several factors including historic preservation, agricultural preservation and established pattern of development. §7(c)(2) c. 222 P.L. 1985. None of these factors were taken into account in Cranbury's fair share.

Uniformity of approach is to be desired. This is the reason that only three judges hear Mt. Laurel cases. In light of the language of the Supreme Court cited in Point I, supra and this courts invitation to provide an alternative method, even if the matter is not transferred to the Council, the fair share number should still be adjusted to comply with the statute.

POINT III

ABSENT A SHOWING OF UNCONSTITUTIONALITY, THIS COURT MUST FOLLOW THE MANDATE OF THE "FAIR HOUSING ACT" AND DENY A BUILDER'S REMEDY TO THE PLAINTIFF.

> "No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation which has been filed on or after January 20, 1983, unless a final judgment providing for a builder's remedy has already been rendered to that plaintiff." §28, Ch. 222, P.L. 1985.

The language of the statute could not be much clearer. There is a time limit set after which the provision expires but that limit will not be reached until five (5) months after the Affordable Housing Council adopts criteria and guidelines for determinations of fair share adjustments to fair share and phasing.

The statute is entitled to a presumption of validity. Mt. Laurel II 456 A 2d at 466. Anyone challenging the validity of the statute is required to give notice to the Attorney General. R. 4:28-4(a). "[T]he presumption goes deep, and indirectly includes the assumption of any conceivable state of facts, rationally conceivable on the record, that will support the validity of the action in question. Mt. Laurel II, 456 A2d 466.

It should be noted that a builder's remedy is not a constitutional right. Prior to Mt. Laurel II, they were granted only as extaordinary relief. See Oakwood at

Madison v. Tp. of Madison, 371 A. 2d 1192 n. 50. Their use was expanded in Mt. Laurel II, but only "where appropriate" and only on a "case by case" basis. 456 A 2d 420. It is clear that builder's remedies are only a device "to achieve compliance with Mt. Laurel", 456 A 2d at 452. Nowhere is there even a hint that a builder's remedy has risen to the level of a constitutional right.

It should also be noted that the moratorium on builder's remedies contained in the statute is absolute and not tied to a transfer to the "Affordable Housing Council. No builder's remedy shall be granted to a plaintiff in any exclusionary zoning litigation filed after January 20, 1983..." (emphasis supplied.) There are no other modifiers. This court is required to assume the validity of that enactment and therefore to deny builder's remedies here.

Respectfully submitted,

WILLIAM C. MORAN, JR.

Whittingham project needs subsidized units

By MIKE FABEY
Staff Writer

MONROE — Union Valley Corp. will set aside set five percent of Whittingham, its new planned retirement community, for low-income housing.

Superior Court Judge Eugene Serpentelli recently told the township that at a later date five percent of the Whittingham units must be subsidized for low- and moderate-income residents.

The New Jersey Supreme Court's Mount Laurel II decision requires that municipalities provide their fair share of subsidized housing. The units in Whittingham will be deducted from the total number of units Monroe is obligated to provide.

In a recent telephone interview, Ross Wishnick, vice president of Union Valley, said, plans for Whittigham — to be built across from Concordia on Prospect Plains Road — are coming along just fine.

The judge recently denied a request for a restrainting order sought by the Civic League of Greater New Brunswick, which wanted the project stopped because it wasn't to contain subsidized units.

Instead, the judge indicated that if necessary he would void the township's Mount Laurel II compliance package — Monroe's plan for complying with Mount Laurel II-required housing.

The judge also said that if needed he would appoint a planner to draft a new compliance package and impose his own ordinance on the township.

After the judge's decision was announced at a recent council meeting, William Tipper, president of the council responded, Like hell.

Councilman Michael Leibowitz said the judge told council he would "back out" of Mount Laurel II litigation if the state enacted legislation on the matter. The state recently created a housing council to help municipalities determine their fair share of subsidized housing.

After the meeting Councilman Albert Levinson said the township only agreed to set aside 5 percent of a future PRC for low-income housing. It did not specify Whittingham for the purpose.

"I don't know why the judge is doing this, now. I don't understand how the judge can void the whole package because of this."

Township Attorney Mario Apuzzo told council the judge asked if it would adopt an ordinance to accept a compliance package for 100 low-income units less than it was previously required to have, which would bring the number down to 664.

Council unanimously spurned that proposal because the judge asked it to waive its right to appeal the compliance package once the package was accepted.

Councilman David Rothman said the issue is moot because the judge never has acted on the compliance package council sent him several months ago.