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GROUPCO v. Twp. of Gloucester

P's Brief in Opposition to Motions for partial Summary Judgment and to Dismiss P's complaint for failure to exhaust administrative remedies and for a remand based on the doctrine of Primary Jurisdiction

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GROUPCO, a New Jersey partnership, Plaintiff, v. GLOUCESTER TOWNSHIP, etc., Defendant. TRIESTE, INC., II, Plaintiff, v. TOWNSHIP OF GLOUCESTER, etc.. Defendant.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAMDEN COUNTY/ATLANTIC COUNTY DOCKET NO. L-061299-84 PW Civil Action (Mount Laurel) DOCKET NO. L-037692-84 PLAINTIFF'S BRIEF IN OPPOSITION TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND FOR A REMAND BASED ON THE DOCTRINE OF PRIMARY JURISDICTION

On the Brief:

Carl S. Bisgaier, Esquire

I. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDMENT THAT OCCUPANCY STANDARDS ARE NOT NECESSARY IN THE CONTEXT OF MT. LAUREL II.

The issue presented is whether a dwelling can qualify as a low or moderate income unit under Southern Burlington Co. N.A.A.C.P. v. Tp. of Mt. Laurel, 92 N.J. 158 (1983) (hereinafter "Mt. Laurel II") in the absence of an occupancy or eligibility standard which assures that the unit is actually occupied by a low or moderate income household. The defendant avers that occupancy standards are irrelevant. Plaintiff maintains that they are generally necessary; however, under special circumstances, a unit may qualify in the absence of an occupancy standard.

The distinction being drawn is between the affordability of the unit for a lower income occupant and the need to adopt measures to insure lower income occupancy regardless of unit affordability. It is a distinction between "use" and "user" and raises an issue as to the nature of the fundamental thrust of Mt. Laurel II.

A. Background

The context of the dispute is revealing. The defendant maintains that there are 2990 dwellings in the municipality which are rent: ^stabilized and which are affordable to lower income households. Thus, the defendant concludes that

it has 2990 affordable units which are subject to rental controls and that these units should count as a "credit[1]* against its fair share obligation.

The defendant is focusing on only two of the criteria imposed by the Supreme Court to be used in determining whether a realistic housing opportunity has been created: affordability and resale/rental controls. See Mt. Laurel II, supra, 92 N.J. at 220-222, 221 fn. 8 and 268-269. The former, affordability controls, assures that it is financially feasible for a lower income household to purchase or rent the unit. The latter, resale/rental controls, assures that the unit remains affordable after the initial occupancy is terminated.

Plaintiff contends that two other factors are equally, significant in determining whether any unit qualifies for Mt. Laurel II purposes. They are: first^the^date^the^unit^first^^ became available as an affordable unit; and, second^whether? the unit was required to be (and, in fact, is) occupied by a lower income^household.* As will be discussed, plaintiff does acknowledge one circumstance where an occupancy standard need not be present.

The timing of unit availability is critical. The municipal obligation under Mt. Laurel II is based on an analysis of lower income housing needs (locally for all municipalities and regionally for those, like the defendant, which are situated in SDGP growth areas). Mt. Laurel II, supra, 92 N.J. at 214-215.

Thus, the quantified need to be addressed by a "growth area" municipality is composed of two types of need: indigenous (resident lower income households in overcrowded or dilapidated units) and regional (reallocated present and allocated prospective regional lower income households). The fair share is generated by a snapshot of "present need" at a given time (for example, as of the 1980 census) and a projection, for a given $time_r$ of future needs based on population growth and household size projections (for example, 1980-1990). The period which is inclusive of the date of the "snapshot" (1980) and the end of the projection (1990) is the fair share period. It is axiomatic, therefore, that only "new" units provided in that period can qualify as satisfying the need. See Countryside Properties Inc. v. Ringwood, L-42095-81 (Law. Div. 1984), p. 115 of the slip opinion.

"New" is put in quotes because a unit may qualify although it is not actually "newly" constructed. For example, a local unit would have been included in the indigenous need if the 1980 "snapshot" revealed it to be dilapidated. If, subsequent to 1980, and within the fair share period, the unit is rehabilitated to a standard unit, it should qualify. It is, for Mt. Laurel II purposes, a "new unit". See Countryside Properties, Inc., supra, and Urban League of Essex Co. v. Mahwah, L-17112-71 (Law. Div. 1984). Likewide, a municipality may, through various means, "retrofit" existing units; that is, take a unit which would

not have qualified for Mt. Laurel II housing as of 1980 and, subsequent to 1980 but within the fair share period, do something which would qualify the unit. While not newly constructed, it is "new[11] in the sense of qualifying as a Mt. Laurel II unit.

The above is provided as background to the subject matter of this motion. Essentially, we must assume, for purposes of this argument, that the disputed units were newly provided after January 1, 1980, are affordable to lower income households and are subject to resale or rental controls which will maintain affordability. While assuming the truth of these averments, plaintiff is by no means admitting them. In fact, to the best of plaintiff's knowledge, all of the units were provided prior to 1980, few, if any, are affordable and none are subject to resale or rerental controls which will maintain affordability.

Plaintiff and defendant do agree that noneeof thesHnils are constrained ,bv occupancy ^standards• Presumably this joins the matter for purposes of partial summary judgment.

B« Occupancy Standards Under Mt. Laurel II

There is no explicit statement in Mt. Laurel II that for a lower income housing opportunity to be "realistic", it must include provisions mandating that the occupant qualify as an eligible lower income household. On the other hand, it should be

noted that, to the best of plaintiff's knowledge, every ordinance proposed or adopted to comply with Mt. Laurel II, every settlement involving Mt. Laure1 II, every builder's remedy, mandatory set-aside or density bonus provision proposed or implemented pursuant to Mt. Laurel II have allscontainedssoccupanc^stlii^irSs?

While no clear legal conclusion may be drawn from the existence of a universal assumption, it can be said rather safely that, to the extent known, virtually everyone who has ever read the opinion has come away with a clear sense that, except in the rarest case, occuP[a]AGy^standar^s^ar^^ejsjse^^aX$_{ftt}$ The question here is whether there is a legal basis for the assumption.

The clearest judicial pronouncement on this subject appears in VanDalen v. Washington Tp., L-045137-83 P.W. (Law Div. 1984) where Judge Skillman ordered rezoning to comply with Mt. Laurel II. At page 38, fn. 16 of the slip opinion, he stated:

> The rezoning must retain the provision that at least half of the 227 units be affordable ^v and exclusively available to low income households.

(emphasis added). It is significant to note both that Washington Township had assumed the need for an occupancy standard and that the court ordered it retrained in the revision. Likewise, in the Mahwah case. Judge Smith refers to "units sold to low income households" in discussing marketability (see p. 36 of the slip opinion) indicating his assumption that only qualified households would occupy the Mt. Laurel II units.

Before addressing Mt. Laurel II itself, it is significant to discuss the implications of not imposing an occupancy standard. If, for example, the indigenous need reflected an existing lower income tenant in an overcrowded structure, would the municipal obligation be met by removing that household from the community while a non-lower income household then occupied the unit? If the unit were dilapidated, would the municipal obligation be met by the landlord rehabilitating the unit, raising the rent, forcing the household out, and renting to a non-lower income household?

The point is that the focus of Mt. Laurel II is caring for the lower income household's housing needs. It is not a concern for the unit, but for the occupant. Affordability is just one aspect of that concern, access is another. Thus, it is said that the "central core" of the doctrine relates to the housing needs of this particular class. Mt. Laurel II, supra, 92 N.J. at 205. In fact, the Court specifically stated that it is presently inapplicable to other classes. Id. at 211. The Court discusses the plight of the poor (id at 209\ and suggests the benefits which will be attained by compliance with its decision (id.at 210, fn. 5):

1. deconcentration of the poor from the cities?
2. bringing the poor closer to job opportunities; and
3. economic integration.

These goals would obviously make little or no sense if the "affordable*[1] unit were occupied by a non-lower income household.

Throughout the opinion, there exists ample evidence of the'Court's assumption that the provision of the lower income housing opportunity was tied to the occupancy by a lower income household. This is clearest in the legal analysis offered by the Court in support of its condonation of the use of density bonuses and mandatory set asides. Jld. at 270-274. The concern was whether such land use regulations, which addressed the potential "user", were constitutionally valid since they did not directly address the physical "use" of the property.

The Court perceived that density bonuses and mandatory set asides were meant to address the needs of a particular class and to provide housing for them. It justified this by citing a line of cases which also addressed the needs of a particular "user" class and the validity of regulations adopted to address those needs as opposed to mere "physical use". It stated:

> We find the distinction between the exercise of the zoning power that is "directly tied to the physical use of the property" ... and its exercise tied to the income level of those who use the property artificial in connection with the Mount Laurel obligation.

Id. at 273 (emphasis added) . In the footnote to the above- .. quoted language, the Court stated:

> The inclusion of some lower income units in a multi-family housing project that may also house families with other income levels may be socially beneficial and an economic prerequisite to the creation of the lower income units.

Id, at 273, fn. 34. The obvious assumption here is that lower-income households would occupy these units and that economic integration would occur. This echoes an earlier statement:

> Where set-asides are used, courts, municipalities, and developers should attempt to assure that lower income units are integrated into larger developments in a manner that both provides adequate access and services for the lower income residents and at the same time protects as much as possible the value and integrity of the project as a whole.

Id. at 268, fn. 32. See also the statement that "(e)c©nomically integrated housing may be better for all concerned in various ways". Id. at 279, fn. 37. Obviously, the economic integration being referred to was not the integration of different classes of units (with different sales prices or rent levels) but of occupants (with different income levels),

The Court understood that the provision of housing affordable to lower income households would, for the most part, mandate "below market" sales prices and rent levels. This was the primary reason for the imposition of resale or rerental controls:

> Because a mandatory set aside program usually requires a developer to sell or rent units at below their full value so that the units can be affordable to lower income people, the owner of the development or the initial tenant or purchaser of the unit may be induced to re-rent or re-sell the unit at its full value.

Id. at 269. It is noteworthy that in discussing mechanisms to deal with this problem, one which the Court said "municipalities must address[11] (ibid, emphasis in original), the Court cited a Cherry Hill ordinance which requires that there be "regulations [which reasonably assure that the dwelling units be occupied by (lower income persons)[11]. Ibid, emphasis added. (Ironically, the defendant cites this passage at page 5 of its brief.) … . »

The problem of "below market levels" is one of competition in the market place. It refers to newly constructed units selling "below market"; retrofitted or old price-controlled units selling or renting below market or older units which sell for less than a similar sized "new" unit because of its age, condition, style, amenities, etc. Non-lower income households can afford market level units and, of course, could afford below market units. Lower income households can only afford lower income units. The Court was seeking a way to insure that lower income households would benefit.

The Court realized that it was dealing with "the special needs of a particular class of citizens". .*Id.* at 272. It compared providing housing for the poor with age-restricted zoning which targets housing for the elderly. Ibid. It was explicitly opposed to devices which went about this task "indirectly" unless they worked; that is, unless they actually provided housing occupied by lower income households.

The Court essentially assumed that there were, in reality, two methods of providing new (not necessarily newly-constructed) housing opportunities for lower income households: subsidies or incentive/mandatory zoning. Subsidies are designed to guarantee that the beneficiary is the lower income user. In the context of subsidy programs, occupancy or income standards , are already built into the program or guidelines. Any developer utilizing such subsidies is bound by those guidelines.

The Court also assumed that developers who built pursuant to inclusionary zoning techniques (incentives/mandatory set asides) would also use subsidies if available. However, it stated that: "Where practical, a municipality should use mandatory set-asides even where subsidies are not available"• Id. at 268. Since occupancy standards insure lower income household occupancy, it makes no sense to have their imposition depend solely on the availability of subsidies.

The Court did leave to municipal discretion the initial decision on how to devise a compliant program. With regard to the decision to use subsidy programs and/or inclusionary zoning techniques, the Court stated: "Which, if either, of these devices will be necessary in any particular municipality to assure compliance with the constitutional mandate will be initially up to the municipality itself". Id, at 262. However, the Court insisted that:

> (T)he opportunity for low and moderate income housing found in the new ordinance will be as realistic as judicial remedies can make it.

Id. at 214 (emphasis added).

The municipality cannot devise a compliance program * which does not provide access to the poor when one is readily available which does provide access. To permit that result would be to undermine the clear mandate: to do whatever is necessary and appropriate to satisfy the housing needs of lower income households. These needs are not being satisfied by merely providing units which are "affordable[11] to, but not occupied by, a lower income household. Such a unit, rent controlled or not, occupied by an upper income household, does nothing to satisfy lower income housing needs.

C, Where Occupancy Standards Are Not Necessary;

Plaintiff's experts do accept that there are facts in which an occupancy standard is not necessary to obtain a credit for the, Mt. Laurel II units, They are:

1. the unit is newly available after 1980;

2.. the unit is affordable to lower income households;

3. the unit is subject to a resale or rerental control which maintains its affordability; and

4. there exists a factually-docuraented, historical basis to show that a percentage of the units, so qualified, are actually occupied by lower income households (subtracting out such households which are living in overcrowded or dilapidated units).

Thus, if historically twenty percent (20%) of the units are occupied by lower income households who can afford the unit but half of those (ten percent [10%] of the total) are in overcrowded or dilapidated structures, then it will be assumed that ten percent (10%) of the new, affordable and price-controlled units are occupied by lower income households even in the absence of an occupancy control.[1]

One caveat applies to the possibilities of: repeal of rent control; hardship increases in the rent level above the

[1] The distribution between low/moderate will depend on the actual rent levels.

affordability range; and condominium conversions. A mechanism would have to be in place to protect lower income households in a timely manner against the occurrence of these events.

Census data indicates that, given this analysis, approximately ten percent (10%) of the rental units are occupied by lower income households who can afford the rent they are paying. However, they are in pre-1980 units, do not represent any addition to the housing stock and cannot be credited against the municipal fair share.

D. Conclusion

As the aforementioned analysis indicates, occupancy controls are mandated for Mt. Laurel II compliance. Credits may be given in special circumstances, if factually supported. There are relevant facts which may be in dispute as to the actual occupancy of affordable units by lower income households and it may well be sensible to await a full hearing on this issue before rendering a final determination.

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GROUPCO, a New Jersey partnership,

Plaintiff,

V.

GLOUCESTER TOWNSHIP, etc.,

Defendant.

-AND-

TRIESTE, INC., II,

Plaintiff,

V.

TOWNSHIP OF GLOUCESTER, etc..

Defendant.

SUPERIOR COURT OP NEW JERSEY
LAW DIVISION
CAMDEN COUNTY/ATLANTIC COUNTY
DOCKET NO. L-061299-84 PW

Civil Action
(Mount Laurel)

DOCKET NO. L-037692-84

AFFIDAVIT OF HARVEY S. MOSKOWITZ

STATE OF NEW JERSEY:
SS
COUNTY OF ESSEX

HARVEY S. MOSKOWITZ, of full age, being duly sworn according to law, upon his oath, deposes and says;

1. I am a licensed planner of the State of New Jersey, a copy of my resume is attached.

2. I have been retained as a consultant to the plaintiff Groupco *in* the above-captioned matter.

3. The following is ray opinion as to whether credits should be awarded, under Mt. Laurel II, against the municipal fair share obligation in two separate contexts:

a. Units constructed before January 1, 1980; and

b. Units containing no occupancy constraint requiring that occupants must be lower-income households.

4. There are three exceptions to the rule that units constructed prior to January 1, 1980, cannot be credited against a fair share assessed for the period 1980-1990. They ares

a. Turnover in subsidized elderly units where the turnover represents a newly-available unit; that is, a net increase in the available regional housing stock;

b. Indigenous need units which have become standard units between 1980 and 1990; and

c. Units which were not standard, affordable, price and occupancy controlled units occupied by lower income households prior to 1980 and which are retrofitted with affordability, occupancy and price controls after January 1, 1980, and which turn over and are newly occupied by a lower-income household.

5. The reason why units constructed prior to 1980 cannot be credited is as follows:

a. The fair share is composed of these categories of need: indigenous, present reallocated and prospective;

b. Indigenous need can only be satisfied by upgrading the unit or providing a "new" unit; post-1980. Obviously, the existence of another pre-1980 unit is irrelevant to the satisfaction of indigenous need;

c. Allocated present need represents households living in substandard conditions regionally and the portion of

that need allocated to the municipality for satisfaction. Only •new* units in the municipality can satisfy that need since it is dependent on the net increase in the housing stock in the region;

d. prospective need represents a proportion of the regional future increase in lower-income households. Since these are newly added households, their needs can be satisfied only by a net increase in the housing stock in the region;

e. Turnover of pre-1980, even if those units would otherwise qualify for Mt. Laurel II purposes, does not represent a "new" unit? that is, a net increase in the regional housing stock of lower-income units. A household moving out of a unit in Gloucester Township moves into a unit somewhere else. That unit was vacated by another household, etc. ultimately leading to the occupancy of the Gloucester Township unit which had been vacated. The mobility of lower-income households occupying pre-1980 units is largely irrelevant to fair share satisfaction. The fair share number assumes the existence of that mobility; that is, that some lower-income households will move in and out of the region as well as within the region. This is similar to the assumption that some will become middle-income and some middle-income households will become lower-income. A distinction is made for elderly units to the extent the turnover represents a net increase of an available lower-income unit.

6. The reasons why units which are not subject to an eligibility (occupancy) constraint cannot be credited is, from a planning perspective, the thrust of Mt. Laurel II is to provide housing for lower-income households. Merely providing affordable housing, even with resale or rerental controls, does not assure that lower-income households will benefit;

7. There are numerous reasons why affordability (only) is insufficient:

a. Many non-lower income households will take advantage of the opportunity to occupy a standard, less-expensive dwelling;

b. Non-lower income households are likely to have a better credit history and, for that and reasons associated with

prejudice, are more likely to be acceptable to landlords, credit institutions and sellers;

c. Non-lower income households are more likely to be aware of suburban housing opportunities and can better compete for those opportunities than lower-income households.

8. Occupancy standards may not be essential in certain circumstances. Thus, if the defendant can show that, historically, a percentage of lower-income households do occupy affordable housing in Gloucester Township, we can assume a similar percentage will occupy such housing built after 1980.

a. The formula would be:

- establish the total number of affordable units and the total number of Mt. Laurel households living in affordable units;

- subtract out the indigenous need number from both the total pre-1980 affordable units and total pre-1980 lower-income households occupying affordable units;

- establish the percentage of total pre-1980 units (excluding substandard and overcrowded units) which are both affordable to and occupied by lower-income households;

- establish the number of post-1980 units which are affordable and subject to resale or rerental controls; and

- multiply the percentage against the post-1980 units.

b. The credit would also depend on the existence of a mechanism to deal with the potential repeal of rent levelling, hardship approval of a rent increase beyond affordability limits and condominium conversions; and

c. The distribution of actual low/moderate households would depend on the relationship of the rent level to the relative income limits.

9. I should note that the above analysis assumes both affordability and rerent controls adequate to maintain

affordability. Jn the case of the defendant, neither can be assumed:

a. The information presented on affordability is inadequate and does not reveal bedroom size data and other potential shelter costs; and

b. The rent levelling ordinance is not geared to increases in median household income or a relevant standard. It is a flat increase which would appear to take rentals out of the affordability range.

10. My conclusion is there is a complete absence of proof that post-1980 affordable units have been provided other than the possibility of some FMHA dwellings. There appears to be no justification for credits for non-occupancy controlled or post-1980 affordable units.

(L.S.)
HARVEY S. MOSKOWITZ

Sworn to and Subscribed
Before me this 7"/^ day
of February, 1985.

LINDA M. MASCHLER
NOTARY PUBUC OF NEW JERSEY
My Commiasion Expire* September 18,1988