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Twp. of Mt. Olive

12/16/1980

Morris County fair housing council v Boonton Twp.

Trial Brief on behalf of A,
Twp. of Mt. Olive

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MORRIS COUNTY FAIR)
HOUSING COUNCIL, et al.,)

Plaintiffs,)

vs.)

BOONTON TOWNSHIP, et al.,)

Defendants)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY

Civil Action

TRIAL BRIEF ON BEHALF OF DEFENDANT
TOWNSHIP OF MOUNT OLIVE

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On The Brief:

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PRELIMINARY STATEMENT

Mount Olive Township has joined in the brief entitled "Trial Brief on Certain Issues Common to All Defendants". This brief is being submitted to supplement the "Trial Brief on Certain Issues Common to All Defendants" and to address certain factual and legal issues peculiar to Mount Olive Township. Generally, this brief indicates that even if the Court accepts the plaintiff's definition of region and any one of the six fair share housing allocations advocated by the plaintiff, the Township of Mount Olive, through its past and present zoning and land use ordinances and through its site plan and subdivision approvals has met and exceeded each of the allocations of low and moderate income housing proposed by the plaintiff. The brief also illustrates that the zoning and land use ordinances of the Township of Mount Olive provide substantial opportunities for least cost housing and low and moderate income housing in full compliance with the Supreme Court's decision in Madison and Mount Laurel.

I. STATEMENT OF FACTS

Mount Olive is a large municipality in northwestern Morris County bordering on Sussex and Warren Counties and the Township of Roxbury and Washington. The Township is approximately 30 square miles in total area and is located more than 35 miles from Newark and more than 45 miles from New York City.

During the period from 1960 to 1980 Mount Olive Township was transformed from a predominantly agricultural and summer resort area (Budd Lake) to a community with a mixture of agricultural, multi-family, single family and limited commercial and industrial uses. During the period from 1960 to 1970 the Township's population increased from 3,807 to 10,394 and in 1977 the population was estimated to be 18,111.

In the late sixties and seventies, recognizing the strong demand in Morris County for multi-family housing, the Township prepared master plans, zoning ordinances and land use ordinances which provided substantial opportunities for the development of inexpensive multi-family apartments and townhouses and other types of low and moderate income housing. This conscious effort to stimulate the development of multi-family housing in addition to single family housing continued throughout the seventies even though the Township only experienced a growth in covered employment from 681 jobs to

1,544 jobs between 1972 and 1978.¹

Since the early seventies, Mount Olive Township has granted site plan approvals for the construction of approximately 7,566 multi-family dwelling units (garden apartments² and townhouses) of which approximately 904 were townhouses. Of the 6,662 garden apartments which received site plan approval, approximately 2,612 garden apartments have been built since 1970. Approximately 104 of the approved townhouses have been built. Therefore, a total of 2,721 garden apartments and townhouses which received site plan approval after 1970 have been built since 1970 alone. It is noteworthy that many additional units were approved prior to 1970 and built during the late sixties and early seventies. Most of the garden apartments approved since 1970 were approved at densities of up to 12 units per acre. Most of the townhouses were approved at densities of up to 6 units per acre.

These figures for approved multi-family units do not include substantial numbers of multi-family housing units,

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1. New Jersey Department of Labor and Industry and Proposed Counterfindings of the Township of Mount Olive Section iii. b.
 2. See the Proposed Counterfindings of the Defendant Mount Olive Township Section iv. and the Affidavit of John J. Lynch, Planning Consultant, March 12, 1979. It is noteworthy that this figure for approved multi-family units does not include those units which were approved since 1970 but whose approvals have been allowed to expire by the developers.

both apartments and townhouses, which have not yet received site plan approval, but which would be permitted under the current zoning ordinance. For instance, in 1979, it was estimated that the 1978 Zoning Ordinance would allow for the construction of 1,500 additional multi-family dwelling units in the R-2 and R-3 Zone Districts.³

With respect to least cost housing, it is apparent that the present and past zoning ordinances of the Township of Mount Olive have overzoned for a wide variety of the least cost housing types proposed by the plaintiff. In fact, the plaintiff's housing expert, Allan Mallach, has admitted in his reports and in the plaintiff's proposed findings as to Mount Olive Township that Mount Olive's zoning ordinance provides a variety of the least cost housing provisions which he has created and advocated. The plaintiff's expert has admitted that Mount Olive's ordinance permits the construction of the following types of least cost housing: (1) two family houses, (2) townhouses, (3) garden apartments, (4) planned unit

3. See the March 12, 1979 Affidavit of John J. Lynch, Planning Consultant for the Township of Mount Olive. This affidavit also provides statistics on building permits which indicate that Mount Olive has been bearing much more than its share of Morris County's multi-family and single family housing development. See also the expert report of John J. Lynch for additional information.

developments, (5) planned residential developments and (6) planned adult communities. Furthermore, Mount Olive Township has permitted the construction of substantial quantities of garden apartments and townhouses at densities of *IT* units per acre and 6 units per acre respectively. The Mount Olive Township zoning ordinance also provides for additional types of least cost housing.⁴ For instance, the ordinance allows for single family detached houses on 6,000 square foot lots, under the clustering provisions of the R-4 and R-5 districts, and 8,000 square foot lots with only 75 foot frontage under the clustering provisions of the R-3 district. These are very close to the 5,000 square foot lot size advocated by the plaintiff's expert, Allan Mallach. In addition, the Zoning Ordinance, although it does not expressly provide for the construction of mobile homes or high-rise apartments, does permit the construction of manufactured housing in certain zones. In compliance with the definition of least cost housing, such manufactured housing is only required to meet the minimum building code standards.

4. See the Proposed Counterfindings of Mount Olive to the Plaintiff's Proposed Findings Section 5, the Zoning Ordinance of the Township of Mount Olive and the report of John J. Lynch, Planning Consultant to Mount Olive.

II. LEGAL ARGUMENT

MOUNT OLIVE TOWNSHIP, THROUGH ITS ZONING AND LAND USE ORDINANCES AND PRACTICES, HAS PROVIDED SUBSTANTIAL OPPORTUNITIES FOR LEAST COST HOUSING AND LOW AND MODERATE INCOME HOUSING IN A MANNER THAT EXCEEDS ITS OBLIGATIONS UNDER MOUNT LAUREL AND MADISON.

A. MOUNT OLIVE TOWNSHIP HAS PROVIDED THE OPPORTUNITY FOR THE CONSTRUCTION OF MORE THAN ITS FAIR SHARE OF THE PRESENT AND PROSPECTIVE NEED FOR LOW AND MODERATE INCOME HOUSING.

In So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, app. disp. and cert., den. 423 U.S. 808, 187-188, 96 S. Ct. 18, 46 L. Ed. 2d 2028 (1975) (Mount Laurel hereinafter), the New Jersey Supreme Court held that a developing municipality, by its land use regulations must make realistically possible the opportunity for an appropriate variety of low and moderate income housing at least to the extent of the municipality's fair share of the present and prospective regional need therefore. In Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, (1977) the New Jersey Supreme Court elaborated on and refined the legal obligations of developing municipalities under the Mount Laurel doctrine. More specifically, the Madison Court elaborated on the definitions of "region", "fair share" and "low and moderate income housing" and also incorporated the concept of "least cost housing" into the Mount Laurel doctrine. Madison, 72 N.J. at 503-5, 31.

^{In} Madison the court pointed out that in assessing expert

testimony on the concept of region, trial courts must give substantial weight to the degree to which the expert gives consideration to the areas from which low and moderate income persons would substantially be drawn absent exclusionary zoning. Madison at 539. The Court indicated that this concept of region is broadly comparable to the relevant housing market area. Madison at 540. In elaborating on the concept of fair share, the Madison Court held that the trial court is not required to establish a specific region or fix a specific fair share housing quota for the developing municipality. Madison at 543. With these general principles in mind, it is the position of the Township of Mount Olive that the eight county region and the various alternative fair share allocations proposed by the plaintiff are totally inadequate in that they do not bear any relationship whatsoever to the area from which the low and moderate income population would be drawn absent exclusionary zoning (ie. the housing market region). This is particularly apparent with respect to Mount Olive Township, which along with Washington Township is in the westernmost corner of Morris County. Therefore, the court should reject or at least critically review the plaintiff's proposed region and fair share allocation in light of the above Madison principles and in view of the fact that the plaintiff's proposed allocations have been revised upwardly in a clear attempt to provide room for negotiation.

Nonetheless, even if the Court accepts the definition of region and the allocations of the 1990" need for low and moderate income housing which have been advocated by the plaintiff, it is clear that Mount Olive Township has provided the opportunity for the construction of more than its fair share of the regional low and moderate income housing need. A comparison of the 6 alternative 1990 fair share allocations proposed by the plaintiff's expert, Mary Brooks, with merely the amount of multi-family housing approved or built since 1970 clearly indicates that Mount Olive Township is already meeting and substantially exceeding the proposed allocations. Table I portrays the six different 1990 fair share allocations of low and moderate income housing units proposed by Mary Brooks and the plaintiff for Mount Olive Township.⁵

5. See the Reports of Mary Brooks and the Plaintiff's Proposed Findings as to Mount Olive Township, at the pages between page 8 and 9.

TABLE I

PLAINTIFF'S PROPOSED ALTERNATIVE 1990
LOW AND MODERATE INCOME HOUSING ALLOCATIONS[^]

1.	Brooks Adjusted N.J.D.C.A. Allocation . . .	4,766 units
2.	Brooks Adjusted N.J.D.C.A. Percentage for Mount Olive X Morris County 208 Projection	4,647 units
3.	Brooks Adjusted N.J.D.C.A. Percentage for Mount Olive X O.D.E.A. Projection . . .	4,113 units
4.	N.J.D.C.A. Housing Report.	2,228 units
5.	N.J.D.C.A. Percentage for Mount Olive X Morris County 208 Projection . . .	2,100 units
6.	N.J.D.C.A. Percentage for Mount Olive X O.D.E.A. Population Projection	1,656 units

A comparison of these proposed allocations with the 7,566 multi-family housing units (6,662 garden apartments and 904 townhouses) which have been granted site plan approval in Mount Olive Township since 1970 is provided in Table II. It is noteworthy that, approximately 2,612 of the garden apartments and 104 of the townhouses which received site plan approval since 1970 have already been constructed. In addition, these figures do not include approvals which have lapsed or expired because applicants decided not to develop; they also do not include the additional multi-family units which would be permitted under the zoning ordinance but for which no site plan approvals have been granted.

TABLE II

COMPARISON OF PLAINTIFF'S PROPOSED 1990
FAIR SHARE WITH THE TOTAL NUMBER (7,566 units) OF
LOW AND MODERATE INCOME MULTI-FAMILY HOUSING
GRANTED SITE PLAN APPROVAL SINCE 1970.⁶

<u>Plaintiff's 1990 Allocations</u>	<u>Amount of Approved Multi-Family Units in Excess of Plaintiff's 1990 Allocations</u>
1. Brooks 4,766	2,800
2. Brooks/208 4,647	2,919
3. Brooks/ODEA 4,113	3,453
4. NJDCA 2,238	5,338
5. NJDCA/208 2,100	5,466
6. NJDCA/ODEA 1,656	5,910

6. See the Proposed Counterfindings of Defendant Mount Olive Township Section iv. The statistics are based on site plan approvals and certificates of occupancy. It should be noted that these figures do not include over 1,000 multi-family units (more than 2 units) which were granted building permits since 1979, but which received site plan approval prior to 1970. The Proposed Maxi Trial Findings of the Plaintiff Chapter I, Section B. 14 indicates that between 1970 and 1979 Mount Olive issued building permits for 3,694 multi-family units (2 or more units) and 946 single family units for a total of 4,640 permits. These building permit statistics would include multi-family housing units which were granted site plan approval prior to and during the 1970 to 1979 period, but which were granted building permits after 1970. The total of 3,694 multi-family units is more than any other municipality in Morris County and is more than 50 percent of the County-wide total of only 7,100 multi-family unit building permits. See Plaintiff's Proposed Findings Chapter I, Section B. 14, Tables 1-3 for a comparison of Mount olive Township's total with other municipalities. See also the affidavit of John J. Lynch; which provides building permit statistics which were based on 1978 statistics.

The comparison in Table II clearly illustrates that merely in terms of the amount of multi-family units (garden apartments and townhouses) which have received site plan approval since 1970, Mount Olive Township is already providing the opportunity for 2,800 to 5,910 more multi-family units than plaintiff's proposed 1990 alternative allocations.

Table III provides a comparison of the total number of building permits issued between 1970 and 1979 by Mount Olive Township for multi-family units (2 or more units). These figures would include duplexes in addition to garden apartments and townhouses which received site plan approval in the sixties and seventies but were granted building permits during the 1970 to 1979 period. The comparison clearly indicates that in 1979 that Mount Olive Township was already providing between 78 percent and 223 percent of the 1990 alternative fair share allocations which plaintiff has proposed.

TABLE III

COMPARISON OF PLAINTIFF'S PROPOSED
1990 FAIR SHARE WITH THE NUMBER OF
BUILDING PERMITS (3694) FOR MULTI-FAMILY
UNITS GRANTED BETWEEN 1970 AND 1979 "

<u>Plaintiff's 1990 Allocations</u>	<u>Amount of Multi-Family Units In Excess of Plaintiff's 1990 Allocations</u>
1. Brooks 4,766	-1072*
2. Brooks/208 4,647	- 953*
3. Brooks/ODEA 4,113	- 419*
4. NJDCA 2,228	1,466
5. NJDCA/208 2,100	1594
6. NJDCA/ODEA 1,656	2,038

Source: Table 3 of Plaintiff's Proposed Findings for the
Maxi Trial, at I. B. 14.

* The negative numbers indicate the number of units by which
plaintiff's allocation exceeds the 1970 to 1979 building
permits.

Certainly, just in terms of building permits for multi-family housing, Mount Olive Township in 1979 had already permitted the construction of more than three quarters of the highest 1990 fair share allocation of low and moderate income housing proposed by the plaintiff. When these figures are added to the additional multi-family housing units which have already received site plan approval and to the hundreds, perhaps thousands, of additional, multi-family units which are permitted under the zoning ordinance, it is clear that Mount Olive is already providing the opportunity for a quantity of low and moderate income housing far in excess of each of the plaintiff's 1990 fair share allocations.

CONCLUSION A

Based on the above facts and legal principles, it can be concluded that Mount Olive Township has provided the opportunity for the construction of more than its fair share of the present and prospective regional need for low and moderate income housing.

B. MOUNT OLIVE TOWNSHIP THROUGH ITS ZONING AND LAND USE ORDINANCES, HAS PROVIDED THE OPPORTUNITY FOR LEAST COST HOUSING IN AMOUNTS AND VARIETIES SUBSTANTIALLY IN EXCESS OF ITS OBLIGATIONS UNDER MADISON.

In Madison, the New Jersey Supreme Court, recognizing that under current market condition it may not be feasible for builders to construct unsubsidized low income housing, ruled that a developing municipality must enact zoning regulations which render possible and feasible the "least cost" housing consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share. Madison at 512. The court, therefore, defined "least cost" housing as housing which was consistent with minimum standards of health and safety. The Madison Court imposed the obligation of least cost housing provisions in order to allow "filtering" of housing so that lower income persons could hopefully obtain housing vacated by moderate income persons. Madison at 512-513.

It is clear that neither the Madison decision nor the Mount Laurel decision established specific standards for lot sizes and densities which would be considered least cost. The lot size and density provisions created by the plaintiff's expert, Allan Mallach, are not directly supported by either the Madison or the Mount Laurel decision. Clearly, experts will differ within reasonable ranges on the specific minimum

lot size and density provisions which constitute least cost provision. Nonetheless, it is the position of Mount Olive Township that the past and present zoning ordinances of the Township have rendered feasible and possible a wide variety of least cost housing types in a manner that fully complies with and in fact substantially exceeds its obligations under Madison.

The plaintiff's expert, Allan Mallach, has acknowledged that the Mount Olive Township's zoning ordinance contains many of the provisions which meet his own, least cost parameters.⁷ More specifically, the plaintiff has acknowledged that Mount Olive's present zoning ordinance permits the following types of least cost housing as defined by Mr. Mallach: (1) two family houses; (2) townhouses; (3) garden apartments; (4) planned unit developments; and (5) planned adult communities. The Mallach report mistakenly states that the smallest minimum lot size provided under the ordinance is 10,000 square feet in the R-5 zone. The Report fails to recognize that the clustering provisions of the R-4 and R-5 districts permit single family detached houses on 6,000 square foot lots and that the clustering provisions of the R-3 district permit single family detached houses on 8,000 square foot lots with 75 foot frontage. These minimum lot

7. See the March 12, 1979 report of Allan Mallach Associates and the Plaintiff's Proposed Findings as to Mount Olive.

sizes are clearly very close to the Mallach standard of 5,000 square feet. Furthermore they can clearly be considered "very small lots" and "least cost" under the requirements of Mount Laurel and Madison. In criticizing Madison's 10,000 square foot and 15,000 square foot single family districts, the Madison court stated:

Calling for some "very small lot" zoning in a developing municipality, 67 N.J. at 170, n. 8, 187, Justice Hall noted that minimum size lots of 9,375 to 20,000 square feet "cannot be called small lots and amounts to low density zoning," 67 N.J. at 183.

The Madison court did not require 5,000 square foot lots, as suggested by Mr. Mallach, and it can certainly be concluded that 6,000 square and 8,000 square foot lots are "very small lots" and are within the least cost parameters of Madison. Furthermore, Mount Olive Township, unlike the Township of Madison, has zoned substantial portions of the Township for the R-3, R-4 and R-5 districts which allow these very small lots and for R-2 which permits reasonably small lots of 10,000 square feet with only 80 foot frontage.

Mount Olive Township has also zoned substantial areas for townhouses and garden apartments under density and other land use regulations which are within the least cost definitions in Madison and are very close to the least cost provisions suggested by Allan Mallach. For example, the zoning ordinance currently permits townhouses to be built in

various zones at densities of up to 6 units per acre and garden apartments at up to 10 units per acre. Furthermore, substantial numbers of garden apartments were built or are currently still under site plan approval for densities up to 12 units per acre.

The Mallach report also indicates that unit sizes or bedroom restrictions were "not specified" in the Mount Olive zoning ordinance for the residential zones. This is because the zoning ordinance does not impose any unit size or minimum or maximum bedroom requirements for any of the single or multi-family uses permitted in any of the residential zones. This lack of limitation on unit size and bedroom numbers is clearly a least cost provision which was fully intended to meet and exceed the "least cost" concept under Madison.

The plaintiffs have indicated that the Mount Olive Township ordinance does not provide for mobile homes or high-rise apartments. The plaintiff's and the Mallach Report fail to recognize that the zoning ordinance does permit the development of manufactured housing in various zones, so long as it is consistent with the minimum building code standards; this is clearly in direct compliance with the Madison definition of least cost housing. There is no requirement in Mount Laurel or Madison that a developing municipality provide every type of least cost housing. The Madison court only indicated that

developing municipalities should zone a substantial quantity of land for a variety of least cost housing, so as to provide a reasonable margin or cushion over the fair share quota for least cost housing. Madison at 519. As indicated-above, Mount Olive, through its zoning ordinance and site plan approvals, has provided the opportunity for an extremely wide variety of low and moderate income housing and least cost housing to an extent that far exceeds each and every one of the formulaic fair share quota's advocated by the plaintiff. See Sub-Point A above. Moreover, the plaintiff's have provided little or no evidence to support their position that mobile homes and high use apartments are truly least cost. For the above reasons, Mount Olive takes the position that it is not required to provide zones for mobile homes or high use apartments.

The plaintiff's have also failed to indicate any unreasonable and undue cost-generating restrictions under the provisions of the zoning ordinance regarding Planned Unit Developments, Planned Residential Development or Planned Adult Community to support a finding that these provisions are not within the least cost parameters of Madison.

CONCLUSION B

Based upon the above facts and principles of law, it can be concluded that Mount Olive Township, through its zoning and land use ordinances, has provided the opportunity for least cost housing in amounts and varieties substantially in excess of its obligations under Madison.

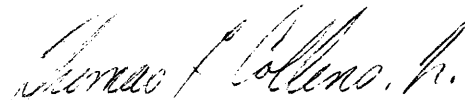
III. CONCLUSION

Considering the foregoing facts and legal principles, it is respectfully submitted that Mount Olive Township, through its zoning and land use ordinances and practices, has provided substantial opportunities for least cost housing and low and moderate income housing, in a manner that far exceeds its obligations under Mount Laurel and Madison. It is, therefore, respectfully submitted that the plaintiff's case against Mount Olive Township should be dismissed.

Respectfully submitted,

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