~~SAH~~ ML Randolph Twp 12/2/80

(Morris County fair housing council v. Twp. of Boonton)

Brief of D, Twp of Randolph.

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SUPERIOR COURT OF NEW JERSE^
LAW DIVISION - MORRIS COUNTY
DOCKET NO. L-6001-78 P.W.

Plaintiffs,	:	
MORRIS COUNTY FAIR HOUSING COUNCIL, et al	:	
vs.	:	Civil Action
Defendants,	:	
TOWNSHIP OF BOONTON, et al	:	

BRIEF OF DEFENDANT
TOWNSHIP OF RANDOLPH

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STATEMENT OF FACTS

In evaluating the issues in this case, the factual considerations unique to each municipality cannot be overly emphasized, since they provide the framework for understanding and evaluating the pertinent land use regulations. While this framework will be fully developed at trial, a brief outline is useful at this point to place the subsequent legal arguments into prospective.

The Township of Randolph is an approximately 21 square mile area in central Morris County characterized by rolling to rugged hills that rise prominently above the surrounding terrain. Approximately one quarter of the Township's land area has slopes exceeding ten percent, creating conditions not conducive to intensive residential development. Its geology, soil conditions, position as a headwaters location, and total reliance on ground water sources for its potable water mandate extreme care to protect the public health against hazards associated with excessive land development. Other environmental constraints limiting development density are the existence of four designated flood areas and four large environmentally sensitive areas.

Existing land use patterns reveal that slightly over half the Township is removed from further development prospects. The largest portion of developed property, 23%, is residential. While only 1% of the Township land area is multi-family, it contains 1550 units representing one-quarter of all dwelling units in the Township at a permitted density of *Ik* units per acre. An additional 18% of the land is devoted to public and

quasi-public use with another 9$ consisting of streets, utility corridors, abandoned railroad and streams.

Water service is more extensive than sewer service, and in general serves the developed areas. The MUA network is available to serve those areas contemplated for higher intensity development, e.g. commercial and higher density residential. The general trend in water and sewer service in the Township has been expansion of the present system to serve the community. Design capacities within the system have a practical effect of establishing limits on development until that capacity can be increased. Randolph is included in the Court imposed building ban in effect since August 8, 1968, due to limited sewerage treatment capacity at the RVRSA.

For the past two decades, a major planning objective of the Township has been to provide a broad range of housing types in the context of a balanced land use plan. Since 1970, nearly two out of every five units constructed were rental, garden apartment units. Rental units showed an increase of more than 300$ in the 18 year span from i960 to 1978. There are eight zoning districts permitting residential uses.

As will be fully developed at trial, the foregoing considerations were all incorporated into the Township's comprehensive land use regulations and Master Plan. The regulations were designed to be consistent with the present land use patterns, the natural characteristics and features of the Township, and the availability and potential availability of essential public

services and facilities such as water and sewer facilities. Further, it will be shown that the Township's land use policies are consistent with the area wide planning recommendations made in the State Development Guide Plan (September, 1977), Tri-State Planning Commissions Regional Development Guide, 19Z7-2OOO (March, 1978), and the Morris County Master Plan.

POINT I

DEFENDANT'S LAND USE REGULATIONS ARE PRESUMPTIVELY VALID SINCE THEY MAKE REALISTICALLY POSSIBLE A VARIETY AND CHOICE OF HOUSING, INCLUDING ITS REGIONAL SHARE OF LEAST COST HOUSING.

It is well-settled that "zoning is inherently an exercise of the State's police power." Taxpayer's Association of Weymouth Township v. Weymouth Township, 71 N.J. 249, 263 (1976) (emphasis added) citing Rockhill v. Chesterfield Township, 23 N.J. 117, 124-125 (1957); Schmidt v. Newark Board of Adjustment, 9 N.J. 405, 413-14 (1952); Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926). Since all zoning power derives constitutionally from the State, municipalities have no power to zone except as such power is delegated to them by the Legislature. Weymouth, Id.; citing J.D. Construction Corp. v. Freehold Township Board of Adjustment, 119 N.J. Super 140, 144 (Law Div. 1972); ~~Kirsch Holding Company v. Manasquan, 111 N.J. Super 359, 365 (Law Div. 1970), rev'd on other grounds, 59 N.J. 241 (1971); Piscitelli v. Scotch Plains Township Committee, 103 N.J. Super 589, 594-95 (Law Div. 1968).~~

The Legislative delegation of zoning power to municipalities is contained in the Municipal Land Use Law, L. 1975> c. 291, ~~N.J.S.A.~~ 40:55D-1 et seq. Section 49 of the aforesaid act provides that "~~/t~~/he governing body may adopt or amend a zoning ordinance relating to the ~~nature~~ and ~~extent~~ of the uses of land and of buildings and structures thereon." ~~N.J.S.A.~~ 40:55^-62 (emphasis added).

Zoning ordinances must be given a reasonable construction and application and are to be liberally construed in favor of the municipality. J.D. Construction v. Board of Adjustment, Township of Freehold, Supra, 119 N.J. Super 140, 145 (Law Div. 1972) citing N.J. Constitution, Article IV, § VII, paragraph 11; Place v. Board of Adjustment of Saddle River, 42 N.J. 324 (1964); Yates v. Board of Adjustment of Franklin Township; 112 N.J.Super 156, 158 (Law Div. 1970).

The test of the validity of a municipal zoning ordinance is the reasonableness of the ordinance viewed in light of existing circumstances in the community and the physical characteristics of the area, (emphasis added) Cognizance must be taken of the problem to be solved by the municipality. J.D. Construction, Supra; Vickers v. Township Committee of Gloucester Township, 37 N.J. 232, 245 (1962); cert. den. 371 U.S. 233 (1963); Tidewater Oil Company v. Mayor and Council of Borough of Carteret, 84 N.J. Super 525 (App. Div. 1964), aff'd 44 N.J. 338 (1965); Glen Rock Realty Company v. Board of Adjustment of Borough of Glen Rock, 80 N.J. Super 79 (App. Div. 1963); Kirsch Holding Company, Supra), 111 N.J. Super at 365.

Ordinances enacted pursuant to the delegated grant of the zoning power discussed above are accorded a strong presumption of validity, ". . . and the court cannot invalidate /the zoning ordinance itself or any provision thereoj unless this presumption is overcome by a clear showing that ^the ordinance or provision/ is arbitrary or unreasonable." Swiss Village

Associates v. The Municipal Council, Wayne Township, 162 N.J. Super 138, 143 (App. Div. 1978); Weymouth Township, Supra; Harvard Enterprises, Inc. v. Madison Township Board of Adjustment, 56 N.J. 362, 368 (1970); Johnson v. Montville Township, 109 N.J. Super 511, 519 (App. Div. 1970); Vickers v. Gloucester Township Committee, 37 N.J. 232, 242 (1962) cert. den. 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed.2d 495 (1963); Bow and Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973).

The party attacking the validity of a zoning ordinance has a heavy burden of affirmatively showing that it bears no reasonable relationship to the public health, morals, safety or welfare. Proof of unreasonableness must be beyond debate. J.D. Construction v. Board of Adjustment, Township of Freehold, Supra, 119 N.J. Super at 146; Barone v. Bridgewater Township, 45 N.J. 224, 226 (1965); Vickers v. Gloucester Township Committee, Supra, 37 N.J. at 242; Fisher v. Township of Bedminster, 14 N.J. 194, 204 (1952); Johnson v. Montville Township, 109 N.J. Super 511, 519 (App. Div. 1970); Bellings v. Denville Township, 96 N.J. Super 351, 356 (App. Div. 1967).

Because of the presumption of legislative validity, the judicial role in reviewing a zoning ordinance is tightly circumscribed. A court cannot pass upon the wisdom or lack of wisdom of an ordinance. It may only invalidate a zoning ordinance if the presumption in favor of its validity is overcome by a clear, affirmative showing that it is arbitrary or unreasonable. J.D. Construction v. Board of Adjustment, Township of Freehold,

Supra, 119 N.J. Super at 146; Harvard Enterprises, Inc. v. Board of Adjustment of Madison, 56 N.J. 362, 368 (1970).

In Kozesnik v. Montgomery Township, 24 N.J. 154 (1957), then Justice Weintraub said:

> "The zoning statute delegates legislative power to local government. The judiciary of course cannot exercise that power directly, nor indirectly, by measuring the policy determination by a judge's private view. The wisdom of legislative action is reviewable only at the polls. The judicial role is tightly circumscribed. We may act only if the presumption in favor of the ordinance is overcome by a clear showing that it is arbitrary or unreasonable." 24 N.J. at I67.

As was said in J.D. Construction v. Board of Adjustment, Township of Freehold, Supra, 119 N.J. Super at l47, judicial construction of a zoning ordinance requires that:

> "The total factual setting must be evaluated in each case. If the validity of the ordinance is in doubt, the ordinance must be upheld." Euclid v. Ambler Realty Co., 272 U.S. 365, 388, *k7* S. Ct. 114, 71 L. Ed. 303 (1926); Harvard Enterprises, Inc. v. Board of Adjustment of Tp. of Madison, Supra, 56 N.J. at 3^9; Vickers v. Township Committee of Gloucester Tp., Supra, 37 N.J. at 242; Bogert v. Washington Tp., Supra, 25 N.J. at 62; Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 353 (1953): Bellings v. Denville Tp. in Morris County, Supra, 96 N.J. Super at 356.

The recent New Jersey Supreme Court case of Pascack Ass'n, Ltd. v. Mayor and Council, Washington Tp., 74 N.J. 470 (1977) summarizes the judicial role in reviewing the validity of municipal zoning ordinances:

> "It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any

> particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute. N.J.S.A. 40:55-31,32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained." 74 N.J. at 481 (emphasis added).

Notwithstanding this presumption, the zoning ordinance must also advance one of the several purposes specified in the enabling statute, N.J.S.A. 40:55D-2, among which is promotion of the general welfare. Weymouth Tp., at 264.

In So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975)» the Supreme Court considered the general welfare purpose of providing appropriate housing to be of such basic importance that it found:

> ". . . the presumptive obligation on the part of developing municipalities at least to afford the opportunity by land use regulations for appropriate housing for all." (at 180)

Thus, in addition to promoting one of the several purposes of the enabling statute, land use regulations in a developing municipality are to be tested by this presumptive obligation.

The Court in Mt. Laurel emphasized that in speaking of this obligation of such municipalities as "presumptive", it used the

term in both procedural and substantive aspects. Procedurally, it established a two-tiered analysis with a shifting burden of proof as follows:

> " . . . when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including low and moderate income housing or has expressly prescribed requirement or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or nonaction." (Mt. Laurel, at I8l)

The substantive implications were described by the Court in Mt. Laurel as follows:

> "The substantive aspect of 'presumptive[1] relates to the specifics, on the one hand, of what municipal land use regulation provisions, or the absence thereof, will evidence invalidity and shift the burden of proof and, on the other hand, of what bases and considerations will carry the municipality's burden and sustain what it has done or failed to do. Both kinds of specifics may well vary between municipalities according to peculiar circumstances." (at I8l)

Defendant respectfully submits that there is no need to go beyond the first tier, since a substantive evaluation of Defendant's land use regulations indicates Plaintiffs have not carried their heavy burden of showing that Defendant has not met its obligations as established by Mt. Laurel and its progeny, Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977).

As will be more fully developed by expert witnesses at trial, Defendant provides for a wide variety of housing types in its

zoning ordinance and zone districts. That this has been a major planning objective of the Township for the past twenty years cam be seen from existing land use. The largest portion of developed property, 23$» is residential. While only 1$ of total developed property is multi-family, this represents one-quartar of all dwelling units in the Township at an average density of almost 14 units per acre.

The Township Master Plan, in anticipating an approximate doubling of the population, sets forth the opportunity for mixing housing types between the small lot single family units, larger single family units, apartments, townhouses and duplexes. The apartment district permits 14 units per acre and is along Route 10 in an area served by water and sewer and with major highway access. The density for townhouses in the Mount Freedoiji area is 6 units per acre and duplexes in that area are both 6.0 and 4.6 units per acre. Among the reasons for earmarking Mount Freedom for expansion were existing commercial/residential patterns, and because sewer systems necessary for higher density development could be designed to flow into available or proposed treatment facilities.

There are eight zoning districts in the Township permitting residential uses as follows:

RLD-3	135,000 sq. ft.	
RLD	80,000 sq. ft.	
R-l	45,000 sq. ft.	1 unit/ac.
R-2 & RT	25,000 sq.. ft.	1.4 units/ac.
R-3	15,000 sq. ft.	3 units/ac.
R-4	Garden Apartments @l4 units per acre	
TCR	Townhouses & Duplexes @6 units per acre	
B-l	Single-family & Duplexes @2.3 & 4.6 units per acre	

Of course, it must be recognized that private enterprise will not in the current and prospective economy build low or moderate income housing without subsidization or external incentives of some kind. Oakwood at Madison, at 510. However, in terms of municipal responsibilities in the area of zoning, the Defendant's zoning regulations presumptively make possible its fair share of low and moderate income housing.

It must be emphasized that municipalities themselves do not have an obligation to subsidize housing. Oakwood at Madison, at 499* Rather, the obligation of the municipality is to adjust its zoning regulations so as to render possible and feasible "least cost" housing consistent with minimum standards of health and safety, and in amounts sufficient to satisfy its hypothesized fair share. Oakwood at Madison, at 512.

Defendant respectfully submits that based on the foregoing, it has provided sufficient area at a reasonable intensity of development to satisfy its "hypothesized fair share"• As to the parameters of the hypothesized fair share by which Defendant's land use regulations are to be measured, it is impossible to be precise at this point in the litigation. The Court is confronts with three different theories for making this determination. Further, such precision is not necessary, since a municipality whose ordinances are attacked as exclusionary is not required to devise a formula for estimating its precise fair share. Oakwood at Madison, at 449.

Instead, the Court's attention is better turned to examining

the substance of Defendant's zoning ordinance and the bona fide efforts toward the elimination or minimization of undue cost generating requirement than to formulaic estimates of specific unit fair shares. This is the approach which the Supreme Court is convinced " . . . represents the best promise for,—adequate productiveness without resort to formulaic estimates of specific unit 'fair share' . . ." Oakwood at Madison, at ^99• As will be more fully developed by our experts at trial, the substance of Defendant's zoning ordinance and its good faith efforts to comply with its obligations indicate it has satisfied its fair share•

Accordingly, Defendant respectfully submits that Plaintiffs have failed to carry their burden of showing facial invalidity. Since they have not shifted the burden to the municipality, its zoning ordinance should be accorded its presumption of validity.

POINT II

ALTERNATIVELY, SHOULD THE COURT FIND THAT THE DEFENDANT'S LAND USE REGULATIONS ARE FACIALLY INVALID, THEY NEVERTHELESS REMAIN VALID SINCE THEY ARE IN COMPLIANCE WITH RESPONSIBLE AND SOUND PLANNING PRINCIPLES.

Once a facial showing of invalidity has been made, the burden of presenting evidence establishing valid superseding reasons is shifted to the municipality. Mt. Laurel, at I85. Admitting such facial invalidity for the purposes of this argument only, Defendant respectfully submits that its land use regulations remain valid since they are in compliance with sound and responsible planning principles.

In Oakwood at Madison, at 596, 597> the Supreme Court reviewed those purposes enumerated in the Municipal Land Use Law, N.J.S.A. 4O:55D, which they considered pertinent. These sections are:

> "d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole.
> e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;
> g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open spaces, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens."

After citing these sections, the Court went on to state:

> At the same time, the new law reminds us, as we emphasized in Mt. Laurel, that out of our proper concern for adequate housing there should not and need not be over intensive and too sudden development, future suburban sprawl and slums, or sacrifice of open space and local beauty. 67 N.J. at 191. Thus, the newly articulated purposes of Section 2 (N.J.S.A. 40:55D-2) of the statute include:
>
> c. To provide adequate light, air and open space.
> j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land.

It is, therefore, apparent both from the Supreme Court's citations of the purposes of the Land Use Law, its substantive evaluations of justifications raised in Mt. Laurel and Oakwood at Madison, and its direction that environmental factors be considered on remand in Oakwood at Madison, that the challenged provisions of Defendant's zoning ordinance are to be viewed in the context of the comprehensive planning needs of the municipality. As noted by Justice Schreiber in his separate opinion in Oakwood at Madison, at 422:

> "Environmental, ecological, geological, geographical, demographic, regional or other factors may justify exclusion of certain types of housing, be it two-acre or multi-family. See N.JS.A. 40:55D-2 e, i,j.k. It should be noted that the general welfare includes public health, safety, morals and welfare by means of adequate light and air, the avoidence of overcrowding of land and buildings and the undue concentration of population, these among other considerations related to the essential common good, the basic principle of civilized society."

As will be fully developed by expert testimony at trial, Defendant's land use regulations are the result of comprehensive

planning in which all relevant factors, including provision for a hypothesized fair share of least cost housing, were taken into consideration. Defendant respectfully submits that any provisions which appear facially invalid are, in fact, rationally related to other planning considerations which mandate their presence and which render the provisions valid.

Of particular importance among these other considerations are environmental constraints. In order for a municipality to utilize ecological and environmental considerations in zoning, the Supreme Court in Oakwood at Madison, at 5^-5 > established the following standard by citing Mt. Laurel;

> "the danger and impact must be substantial and very real (the construction of every building or the improvement of every plot has some environmental impact)-not simply a make-weight to support exclusionary housing measures or preclude growth . . ." 67 N.J. at 187.

Unlike the environmental proofs presented in Mt. Laurel and Oakwood at Madison, it is Defendant's position that the proofs will be sufficient to justify its regulations.

Again, at this point in the litigation, it is not possible to present the detailed proofs which must be developed by experts at trial. The factual statement does, however, provide a framework for this issue. As noted herein, the natural features of the environment in Randolph Township, such as the topography, soil type, hydrology, location of water resources, and geology, places limits on both population density and type of land use.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Judgment be entered in favor of the Defendant, Township of Randolph.

Respectfully submitted,

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By _____
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