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Brief of defendant
Borough of Kinnelon
to dismiss

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ML000627B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO. L-60001-78 P.W.

Plaintiffs, :

MORRIS COUNTY FAIR HOUSING COUNCIL, et al :

vs. :

Defendants, :

TOWNSHIP OF BOONTON, et al :

Civil Action

BRIEF OF DEFENDANT BOROUGH OF KINNELON

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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 Borough of Kinnelon is located in what is known as the northern highlands of New Jersey, and is characterized by high, rough, and rocky hills, which are extensively wooded. Its approximate twenty square mile area is subject to such severe geological, geographical and environmental constraints that only development of the absolute lowest density is advisable.

The long ridges and narrow valleys of the Highlands Province in which the Borough is located have been traditional obstacles to westward expansion. The steep slope conditions found throughout the Borough discourage development at high densities. Because of its geological structure, the Highland Province is water poor relative to the Piedmont Province, and the low groundwater yields from rock fissures limit residential densities and industry.

The natural resources and environmental characteristics of the Borough which limit development densities are not some make-weight argument to justify existing zoning, but rather,

are substantial and genuine concerns. The Borough occupies an environmentally sensitive location in which three reservoirs are partially or wholly located. Approximately 45% of all surface water stored in the Borough is utilized as a source of supply for public water systems while 44% of the Borough lies in the drainage basin of four major water supply reservoirs. Simply stated, development densities must be limited to protect regional water supplies.

The availability of sufficient potable water supplies is another important limitation on development densities. As noted above, the geological structure of the Highlands limits the development of groundwater supplies, which service some 91% of the Borough. The surface supplies are owned and operated by users outside the Borough. The precambrian rock structure renders unlikely the possibility of developing a significant ground water source at any single location with the potential for supporting high density development. Thus, since the only sources of water are individual wells and the hydraulic characteristics of the geological formation place real and defined limits on the safe yield without mining, large lot zoning is unavoidable.

The soil and geographical conditions which require large lot zoning to protect the safe yield from individual wells also limit density based upon on-site waste capacities. Over 75% of the Borough's soils are such as to present severe limitations on septic tank absorption field capacities. Due to the soil

and topography in many areas, public utilities would be of prohibitive cost if provided.

Unlike many other municipalities joined in this action, the Borough of Kinnelon does not have adequate transportation access. Access to the Kinnelon border is limited to one major State Highway, Route 23, which merely skirts the northern boundary along the Pequannock River. Neither the major interstates which service Morris County, Routes 287, 280 and 80, nor Routes 10 and 46, the heaviest trafficed State Highways in Morris County, pass near the Borough. The Erie-Lackawanna, which has commuter services to 11 Morris County municipalities, bypasses the Borough.

Similarly, Kinnelon differs from "developing municipalities" in that it is not acting as a magnet for commercial, industrial and office development. Kinnelon has only one industry, a machine company occupying 2.6 acres. The land devoted to retail and commercial uses totals 75.5 acres and is generally located along Route 23. This represents a total of 3.1% of the developed land area.

The final considerations in this brief outline are the recommendations for development in Kinnelon by the State, county and Tri-State Regional Planning agencies. All three have recommended that Kinnelon's low density character be retained.

POINT I

PLAINTIFFS' CAUSE OF ACTION AGAINST DEFENDANT SHOULD BE DISMISSED BECAUSE DEFENDANT IS NOT A "DEVELOPING MUNICIPALITY" WITHIN THE INTENDMENT OF MOUNT LAUREL.

In rendering its decision in So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975), the Supreme Court made clear that the issues and principles addressed therein were not confined to Mt. Laurel, but rather, were to apply to all "developing municipality". However, the Court also made clear that the obligations recognized in Mt. Laurel were limited to such municipalities when it stated:

> "It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised." (Mt. Laurel at 160)

Defendant respectfully submits that it is not a "developing municipality" within the intendment of Mt. Laurel and is, therefore, not subject to the obligations recognized therein. As noted by Justice Mountain in footnote 2 of his dissent in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 624 (1977), the phrase "developing municipality" has taken on a special, if not entirely precise meaning. That special meaning is apparent from the following analysis in Mt. Laurel:

> "The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of

> the smaller cities outside those areas as well), which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable future residential, commercial and industrial demand and growth." (at 160)

Application of this special meaning to Defendant reveals that, at this point in time, it is not a "developing municipality" within the intendment of Mt. Laurel. While the Borough of Kinnelon contains a sizable land area and is not a central city or older built-up suburb, neither can it be said that it is in the path of inevitable future residential, commercial and industrial growth. The Borough's rugged topography and geological structure have traditionally limited westward expansion and, when combined with the severe density restraints inexhorably imposed by the environment, they are likely to continue to do so. The State Development Plan Guide earmarks a significant portion of the Borough as a conservation area and the remainder as a limited growth area. Also dissimilar from "developing municipalities", the Borough is not strategically served by state and interstate highway systems.

Accordingly, since the Borough of Kinnelon is not a "developing municipality" within the intendment of Mt. Laurel, Plaintiffs' cause of action seeking to apply principles enunciated therein should be dismissed.

POINT II

DEFENDANT'S LAND USE REGULATIONS ARE PRESUMPTIVELY VALID.

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. 40:55D-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 thereof/ 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, 11 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 167

As was said in J.D. Construction v. Board of Adjustment, Township of Freehold, Supra, 119 N.J. Super at 147, 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 US. 365,388, 47 S. Ct. 114, 71 L. Ed. 303 (1926); Harvard Enterprises, Inc. v. Board of Adjustment of Tp. of Madison, Supra, 56 N.J. at 369; 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 requirements 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 181)

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

> "The substantive aspect of 'presumptive' 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 181)

Defendant respectfully submits that its regulations are not facially invalid and leaves Plaintiffs to their burden of proof on this issue.

POINT III

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 185. 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. 40:55D, which they considered pertinent. These sections were:

> "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." (emphasis added)

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 promotethe 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.J.S.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 avoidance 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 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 in the Borough of Kinnelon are environmental constraints. In order for a municipality to utilize ecological and environmental considerations in zoning, the Supreme Court in Oakwood at Madison, at 545, 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, it is not possible to present these proofs in detail at this point in the litigation, since they must be fully developed at trial. However, as clearly indicated by the factual statement, Supra, the natural features of the environment such as topography, soil type, hydrology and geology absolutely mandate large lot, low density development throughout the entire Borough.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that judgment be entered in favor of the Defendant, Borough of Kinnelon.

Respectfully submitted,

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By _____
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