

ML - Morris County Fair Housing Council
vs. Boonton

Sept. 27, 1979

Brief in Support of Motion for Summary Judgment by
Defendant Township of Boonton

pg. 17

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MORRIS COUNTY FAIR HOUSING
COUNCIL, et al.

PLAINTIFFS

vs.

BOONTON TOWNSHIP, a municipal
a corporation of the State of
New Jersey, et al.

DEFENDANTS

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

CIVIL ACTION

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BRIEF IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT
BY DEFENDANT TOWNSHIP OF BOONTON

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STATEMENT OF FACTS

Plaintiffs, alleging the Township of Boonton to be a "developing community", brought suit for a judgment declaring the defendant's land use plans and ordinances unconstitutional, illegal and void in so far as they "unlawfully" exclude their fair share of the regional need for low and moderate income housing opportunities, and for other relief in conjunction therewith.

Defendant, Township of Boonton denies that it is a "developing community" and seeks dismissal of the complaint on that ground.

The territory of the Township of Boonton lies in the Rockaway River Valley, include its tributary Beaverbrook, and on the steep rocky wooded hillsides sloping down to the valley on the northwest, north and east. The Township is bordered on the north by the Borough of Kinnelon, on the east by the Township of Montville, on the south by the Town of Boonton and Borough of Mountain Lakes, on the southwest by the Township of Denville and on the northwest by the Township of Denville and the Township of Rockaway.

The Township is dotted with lakes, ponds and marshes both in the uplands and along the Rockaway River and its tributaries. Its water supply consists primarily of individual wells. It also contains the well-field which is the major source of water supply for the Town of Boonton, major aquifer and aquifer recharge areas. Much of the public water supply for the City of Jersey City enters the Rockaway River through Boonton Township. (Affidavit of Diane C. Nelson).

There are three farms in the Township. Hamilton Farms, in an R-1 Zone on the northwest border, extends along the Rockaway River into Denville. Johanson Farm (formerly Bott Farm) is in an R-1 zone in the center of the Township. Kincaid farm is in the northeasterly corner of the Township near the headwaters of Beaverbrook near the Kinnelon border, also an R-1 zone.

A substantial part of the Beaverbrook Valley is zoned I-P because it was occupied by industry at the time the first zoning ordinance was passed. All the land in this I-P zone is owned by long-existing industry, consisting of Aircraft Radio & Control, Division of Cessna Aircraft Corp. (formerly Aircraft Radio Corp.) which was founded in the 1920 s, RFL Industries, Inc. (formerly Radio Frequency Laboratories) which was also founded in the 1920 s, and Johanson Manufacturing Co. which was founded in 1945 by a former Vice-President of Aircraft Radio Corp.

Aircraft Radio & Control currently employs approximately 1,076 person. In 1945 it employed 1,100 persons. Its employment fluctuates with economic condition in the Aircraft communications business, dropping to only 630 persons in 1972 (Affidavit of Richard B. Foster; Affidavit of John E. Johanson).

RFL Industries, Inc. currently employs approximately 340 people. In 1972 it employed 225 people and in 1965 190 people. Its growth since 1927 has been gradual (Affidavit of Edwin S. Seabury, Jr.)

Johanson Manufacturing Co. was founded in 1945. It experience a gradual growth to 191 employees in 1972 and 215 employees in 1979 (Affidavit of John E. Johanson).

Interlox Punch & Die Co. occupies a small I-P zone along North Main Street. It has few employees.

From the foregoing figures it appears that the total industrial growth in the Township of Boonton since 1945 has been in the order of 215 employees at Johanson Manufacturing Co. and 150 employees at RFL Industries plus a small number at Interlox Punch & Die.

Other sources of employment within the Township of Boonton are Riverside Hospital and Sarah Frances Nursing Home and Tally-Ho Rest Home. These health facilities serve all of Morris County, particularly the northwest section. The hospital is near the border of the Town of Boonton, which has no hospital but does have substantial industry and commerce and a high percentage of low and moderate income families, all served by Riverside Hospital.

Commercial establishments in the Township of Boonton consist of one small tavern, one liquor store and a branch office of a bank all located near the border of the Town of Boonton., and one gasoline station. (Affidavit of Mary H. Rusnack).

The Township of Boonton employs 10 full time employees, of which 7 are police officers, and approximately 10 part time employees. It has a total general budget for 1979 of \$647,209.60 and an operating budget within CAPS of \$421,424.00. It has approximately 1100 residential parcels of which approximately 1/3rd are assessed at \$20,000.00 or less. Approximately 150 residences are connected to public sewers, and the rest depend upon individual sanitary sewage disposal systems on the property. A total of 181 new residential units have been constructed in

the Township from January 1967 through December, 1978, or an average of approximately 15 per year. (Affidavit of Mary H. Rusnack).

The road and street network of the Township of Boonton consists of two county roads and about 30 miles of secondary roads and streets. Most main roads are paved 22 feet wide on a 60 foot right-of-way. Many roads and streets are paved 16 feet wide on a 40 foot right-of-way. No main road is within a mile of any major highway from its nearest access point. Due to the hilly, wooded, rocky terrain occupied by most of the Township of Boonton, except the Rockaway River Valley which is largely in the flood plain, the road network of the Township is not readily expandable to accommodate any substantial population expansion (Affidavit of John Kline).

No public transportation enters the Township of Boonton. The Lakeland bus line runs along Main Street and West Main Street in the Town of Boonton and discharges passengers only in New York. Boonton Station is about a mile and half from the end of Powerville Road and the trains runs to Hoboken with a stop at North Newark. Morris County Transportation buses leave Boonton station at 7:28, 8:06 and 10:19 a.m. and arrive in Morristown 36 minutes later. Virtually all access to Boonton Township except along the Town of Boonton border is by private automobile. (Affidavit of John Kline).

Although the Rockaway Valley Regional Sewerage Authority trunk line sewer crosses the Township of Boonton from Denville to Boonton, all of its sewage treatment capacity is presently used up except for a small reserve under the control of the Superior

Court. Every sewer hook-up requires a court proceeding to release gallonage from the Court reserve. (Affidavit of John Kline).

A major part of the Township of Boonton is environmentally critical or sensitive. The underlying geologic structure is Precambrian Gneiss, a fractured rock which does not hold water for wells and transmits sanitary effluent underground, without effective filtration, to the aquifer storage areas. The valley of the Rockaway River and Beaverbrook are overlaid with stratified drifts which create prime aquifers. These furnish local water through private wells, public water to the Town of Boonton, and water for the flow of the Rockaway River on its way to the Jersey City Reservoir. The pollution of the aquifers or the tributaries of the Rockaway River by over-development or otherwise would seriously affect not only the health and welfare of the Township, but also that of the Town of Boonton and even Jersey City. (Affidavit of Diane C. Nelson and exhibits thereto.)

The Township of Boonton contributes to its surrounding region not only land for water accumulation, but also woodlands for the purification of air, open spaces in the valleys including farmlands, the Tourne County Park and Sheep Hill Park for recreation, Riverside Hospital for the ill of the surrounding region, Riverside Hospice for the terminally ill, Sarah Frances Nursing Home and Tally-Ho Rest Home for the recuperating, various private lake recreation areas, and easements along the Rockaway River for hiking and fishing. (Affidavit of Diane C. Nelson.)

The Township of Boonton is, and for many years past has been, a well-balanced community incorporating industry, residence facilities and public service health and recreation facilities and water resources within its borders. Its long-existing facilities have gradually expanded, but it has not actively encouraged development of any kind. Its original zoning was based on existing fact. Its present zoning suits its ecologically sensitive environment not only for the benefit of the Township but for the benefit of the health and welfare of its region. In no sense is it a "developing community".

POINT I

SUMMARY JUDGMENT FOR DEFENDANT SHOULD BE GRANTED BECAUSE THERE ARE NO GENUINE MATERIAL ISSUES OF FACT AND THE ISSUES IN DISPUTE SHOULD BE RESOLVED AS A MATTER OF LAW.

N.J. Rule 4:46-2 states that summary judgment shall be rendered forthwith

". . . if the pleadings, depositions, and admissions on file, together with the affidavits if any, show palpably that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment as a matter of law".

The classic statement of the standards which should be applied in determining whether to grant summary judgment was expressed by Justice Brennan in Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954):

"It (Summary Judgment) is designed to provide a prompt, business like, and inexpensive method of disposing of any cause which a discriminatory search of the merits in the pleading, depositions, and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial. In conjunction with the pretrial discovery and pretrial conference procedure the summary judgment procedure aims at the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial". (citations omitted)

The instant case is doubtless one in which summary judgment is appropriate. There are no genuine material issues of fact. The only issue to be resolved is a question of law. Is Boonton Township a "developing community" within the decisions of the Courts on this issue.

POINT II

BOONTON TOWNSHIP IS NOT A DEVELOPING
COMMUNITY WITHIN THE PURVIEW OF CURRENT
CASE LAW

Plaintiffs, in a shotgun suit, have alleged that Boonton Township, along with 26 other municipalities, is a developing municipality which is experiencing, sharing in and benefiting from the growth and development of the county and the region as a whole. (Complaint Paragraph 8). Plaintiffs further allege that the defendant Boonton Township has encouraged and welcomed industrial and commercial growth which has generated housing needs for persons of all economic classes (Complaint Paragraph 11), and that Boonton Township has sufficient vacant land appropriate for development to enable it to provide needed housing, particularly for low and moderate income persons, but has not been and is not creating such opportunities (Complaint Paragraph 12).

Plaintiffs rely on the following decisions rendered by the Supreme Court of New Jersey:

Southern Burlington County N.A.A.C.P. et al v. Tp.of Mount Laurel, 67 N.J. 151, 336A 2d 713,

and

Oakwood at Madison, Inc. et al v. Tp. of Madison and State of New Jersey, 72 N.J. 481 371 A 2nd 1192 (1977)

The foregoing decisions apply only to "developing communities" the Supreme Court has held in Pascack Association, Ltd. v. Mayor and Council of Washington Tp. 74 N.J. 470, 486 (1977), where it commented at page 486, foot note 4:

"The only apparent substantive use change in the recent Municipal Land Use Law specifically dealing with housing density is that authorizing "senior citizen community housing construction consistent with provisions permitting other residential uses of a similar density in the same zoning district" N.J.S.A. 40:55 D-21; 52(g) . . . To the extent that it is held in Windmill Estates Inc. et al v. Zoning Board of Adjustment of the Borough of Totowa et al 147 N.J. Super 65, 370 A 2d 541 (Law Div. 1976) that anything contained in the Municipal Land Use Law affects or alters the developing municipality criterion of Mount Laurel, we disapprove such holding.

In the case of Boonton Township it is clear that the plaintiffs made no careful analysis of all the facts before bringing this suit. Plaintiffs, examining the zoning map and zoning ordinances of the Township of Boonton, have taken a one-dimensional view of a land area which is critically three dimensional both above and below the surface of the land. (See affidavit of Diane C. Nelson and particularity Exhibit A and figures 38 and 42 to Exhibit F thereof).

The true facts as shown by the affidavits accompanying defendant's Notice of Motion for Summary Judgment and the exhibits attached to those affidavits show that the Township of Boonton is in fact mostly a cul-de-sac which sits among the wooded hills well to the North of the main stream of development in Morris County. Such industry as the Township has has existed for more than 30 years. Although existing industry has grown somewhat within the confines of the I-P zone, the Township has not actively sought new industry, nor has it zoned for development of new industry. A modest increase of less than 500 employees in more than 30 years is hardly a boom. (Affidavits of Richard B. Foster, John E. Johanson and Edwin S. Seabury, Jr.)

Similarly, housing growth has been at the rate of approximately 15 units per year. Boonton Township, with approximately 1/3 of its 1100 housing units assessed at less than \$20,000, was furnishing low cost housing in its developed areas adjacent to the Town of Boonton and near the Township of Denville long before the first zoning ordinance was passed, just as its industrial area was established long before the first zoning ordinance was passed. (Affidavit of Mary H. Rusnack).

Access to the Township is afforded primarily by County roads which run along the Rockaway River between Denville and Boonton. Even these roads are narrow two lane roads. Most of the other roads and streets are even narrower two lane roads. The nearest major highway and the nearest railroad station are more than a mile from the end of Powerville Road, the main traffic artery of the Township. There is no public transportation within the Township. (Affidavit of John Kline).

The Township's total general budget for 1979 is \$647,209.60 and its operating budget within CAPS is only \$421,424.00. It has only 10 full-time employees of whom 7 are police, and 10 part-time employees including special police.

The Township of Boonton is not in the path of inevitable growth, which is passing it to the South, it has not sought out development of any kind, nor is its land suited for major development. It is not a "developing community" under the law.

POINT III

ZONING IN BOONTON TOWNSHIP MEETS REGIONAL
NEEDS WITHIN THE GEOLOGICAL STRUCTURE OF
ITS LAND AND SUBSURFACE AND IS IN HARMONY
WITH ZONING IN ADJACENT MUNICIPALITIES

On of the chief contributions of the Township of Boonton to the region is water. The entire Township collects water for the City of Jersey City and the Town of Boonton as well as for its own use. The watershed area extends into the Township of Denville, where the adjacent zoning is 81,000 square feet per building lot, the Township of Rockaway, where the adjacent zoning is 88,000 square feet per building lot, the Borough of Kinnelon, where the adjacent zoning is 60,000 square feet per building lot, and the Township of Montville, where the adjacent zoning of 125,000 square feet per lot has been upheld by this Court in Davanne Realty Company et al. vs. Mayor and the Township Committee of the Township of Montville et ano. (Superior Court-Law Division-Morris County, Docket No. L-292-74 P.W. January 9, 1976, Gascoyne, J.C.C. t/z); Affirmed by App. Div. per curiam Feb. 5, 1979, Docket No. A-3338-75; Petition for Certification denied by the Supreme Court on May. 1, 1979, Docket No. C-649 Sept. Term 1978. Not otherwise reported.) The significance of the geology and hydrology of the area was recognized by Judge Gascoyne in his opinion as a factor in zoning. See also Affidavit of Diane C. Nelson and accompanying exhibits.

The Township of Boonton contributes to its surrounding region not only land for water, but also heavy woodlands for the purification of air, open spaces in the valley, including farm-

lands, the Tourne County Park for regional recreation, Sheep Hill Park for the Town of Boonton, private recreation areas, Riverside Hospital for the ill, Sarah Frances Nursing Home and Tally-Ho Rest Home for the recuperating, Riverside Hospice for the terminally ill, and easements along the Rockaway River for hiking and fishing. Commensurate with its geology and ecology, it contributes in such ways as are appropriate to its land to the region as a whole (Affidavit of Diane C. Nelson).

To sum up, the Township of Boonton is very nearly fully developed along its borders where intensive development is permitted by public services and transportation facilities, undevelopable in critical areas, and open to development only in sensitive areas where large lot sizes are required to protect the water supply and prevent its pollution. It is even now in this Court defending two cases where it has refused permits to build on land which will not percolate, and is a defendant in a suit by the Township of Parsippany-Troy Hills to prevent further expansion of sewerage treatment facilities in the Rockaway River Valley. (Township of Parsippany-Troy Hills vs. Douglas Costle et al. (U.S.D.C. District of New Jersey Civil 68-1174))

Taken in three-dimensional perspective, the Township of Boonton has zoned to serve its region as best it can.

POINT IV

IN AN AREA WHICH IS ALMOST ENTIRELY CRITICAL OR SENSITIVE ENVIRONMENTALLY THE DEVELOPMENT OF LAND FOR HIGH DENSITY OCCUPANCY SHOULD BE APPROVED THROUGH THE VARIANCE PROCEDURES UNDER N.J.S.A 40:55D-70 (d) SO THAT DETAILED STUDY OF THE ENVIRONMENTAL IMPACT CAN BE MADE.

Figures 38 and 42 of Exhibit F to the Affidavit of Diane C. Nelson show how little land qualified for development actually exists in the Township of Boonton. Most of that land is developed, or else is remote from the public services needed to support high density.

As has been pointed out heretofore, the plaintiffs in this suit have not taken a three-dimensional view of Boonton Township. As is shown by plaintiff's interrogatories to Boonton Township and by plaintiffs' answers to the interrogatories propounded by Boonton Township, plaintiffs have looked at flat pieces of paper in the form of zoning maps and zoning ordinances without examining terrain and availability of public services such as water, sewer, transportation and the other components of the infrastructure necessary to support dense populations before bring this suit.

While small lot or multiple dwelling zoning may have been a viable answer to the problems in the flat lands of Mt. Laurel (67 N.J. 151 at 161) and Madison, it is not a viable answer to the terrain here. As Judge Gascoyne recognized in Davanne Realty v. Montville, supra, terrain and water are factors to be considered in zoning this part of Morris County.

Mt. Laurel (67 N.J. 151 at 219) also recognized that environmental factors are valid reasons for large lot zoning.

This Court is urged to hold that in an area which is ecologically critical or sensitive, relief for proposed high-density development should be obtained by use of the variance procedure provided under N.J.S.A. 40:55 D-70(d), with due regard for the dictates of the courts with respect to the need for low and moderate income housing, but also with due respect for the limitations of the land itself and the health and welfare of the community and the region.

POINT V

IF PLAINTIFFS EXPECT DEFENDANT TO DO THEIR HOMEWORK FOR THEM, PLAINTIFFS SHOULD BE REQUIRED TO PAY FOR IT.

Plaintiff's interrogatories and plaintiffs' answers to defendant Boonton Township's interrogatories show that plaintiffs seek to prove their case at the expense of defendant, without doing their own homework.

Boonton Township has exhausted its legal budget and has absolved its Township Attorney of responsibility for further defense of this case. (Affidavit of Mayor of Boonton Township). The Township has only 3 regular employees outside of the police, and only 10 part-time employees. Its meager budget is further limited by CAPS. (Affidavit of Mary H. Rusnack). There is no way that the Township can finance the research required to answer such of plaintiff's interrogatories as deserve answer

within its budget and without seriously impairing municipal services.

If this Court sees fit to order Boonton Township to answer plaintiffs' interrogatories, then in the interest of justice, and in that public interest which the Public Advocate is supposed to support, it should order the Office of the Public Advocate to pay the bill for legal and clerical services to obtain the answers to the interrogatories and to continue defense of this suit.

CONCLUSION

There can be no dispute as to the facts established by the Affidavits submitted in support of the motion for summary judgment. The future development of Boonton Township is limited by its terrain and must be approached cautiously. It has not encouraged development, nor can it afford to do so due to its terrain. It is not a "developing community" within the legal definition of that term.

Boonton Township cannot legally support the further defense of this suit financially. If the defense must continue, the Office of the Public Advocate should be ordered to pay the bill as a matter of justice and public interest.

Respectfully submitted,

Nathaniel F. Bedford

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Township of Boonton