ML-Morris County Fair Housing Council vs. Boonton - Hanover

Dec. 1, 1980

Trial Brief on Behalf of Defendant Township of Hanover

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ML0006403

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

MORRIS COUNTY FAIR HOUSING COUNCIL, et al.,

Plaintiffs,

vs.

BOONTON TOWNSHIP, et al.,

Defendants.

CIVIL ACTION

TRIAL BRIEF ON BEHALF OF DEFENDANT TOWNSHIP OF HANOVER

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INTRODUCTORY STATEMENT

This brief is submitted on behalf of the Township of Hanover and as a supplement to the joint brief being submitted by counsel for a number of the defendant municipalities.

STATEMENT OF FACTS

The Township of Hanover did in fact comply with that portion of Judge Muir's Pretrial Order which required the submission of proposed findings and conclusions of fact. The Township submitted counter-findings and conclusions by its experts,

(1) Carl Lindbloom, P.P.;

(2) Fletcher Platt, P.E.;

(3) Gary Salzman, P.E.;

(4) Robert Catlin, P.P.;

(5) William Kirk, (Land Development Expert);

(6) Lewis Goodfriend, P.E.

Copies of those counter-findings and conclusions are attached and incorporated herein by reference. Since those proposed findings are essentially a restatement of each expert's report duly submitted in this matter, which reports taken together deal with the factual background of Hanover Township for purposes of this litigation, the facts will not be re-

stated at length herein.

Certain basic facts are, however, highlighted at this point.

The Township's population has increased on a very limited basis during the last 20 years and the rate of population growth during the last 10 years has been at a rate of less than one (1%) percent per year. The actual census figures are as follows:

1950 - 3,756
1960 - 9,329
1970 - 10,700
1980 - 11,764

The Township is composed of some 6,889 acres. Of its total acreage, 5,662 acres are already fully utilized, leaving approximately 1,227 acres vacant. Of the total vacant acreage of 1,227, over 1,000 acres are significantly impacted by one or more types of environmental restraints, which are detailed in the Proposed Findings of Fact, making these lands' availability for "low cost" or "moderate cost" or "least cost" housing out of the question. In this connection, we bring the Court's attention to the fact that the Township has one rather unique type of environmental restraint in connection with the utilization of its vacant land, namely, noise eminating from the Morristown Municipal Airport located in Hanover Township and from Route I-287.

Finally, we would have the Court note the study prepared by William Kirk, a land development specialist, to the effect that leaving aside the substantial additional expense

that would be incurred in the course of construction where various environmental restraints are encountered, the cost of constructing the type of housing units suggested by the Public Advocate, given the cost of land in Hanover Township, as well as the general cost of construction and financing, that low and moderate income families could never afford, either on a rental or purchase basis, such housing in Hanover Township.

ARGUMENT

POINT I

DEVELOPED VS. DEVELOPING COMMUNITIES

Given the genius of our judicial system, few basic principles of law have been refined to specific formulae. This is certainly true in the quest for a definition of the term a "developed community". We are, therefore, required to identify those characteristics which the Supreme Court identified as being illustrative of a municipality which was "developing". There are two which appear significant: (1) rapid population growth; and (2) significant amounts of developable vacant lands.

In the case of Madison Township, its population had "exploded" over a 24 year period by some 646%, resulting in a population of 55,000, with 40% of the Township's lands being vacant and between 8,143 - 11,000 acres available and developable, which amounted to nearly 20% of the vacant developable land in Middlesex County, Oakwood at Madison, 72 N.J. 481 (1977) at page 502.

In the case of Mt. Laurel, the population had grown by some 400% over the same period of time, resulting in a population of some 40,000, with still 65% of the Township's land area vacant or some 9,100 acres available for development.

A comparison of these two basic elements, rate of population growth and vacant developable lands, between the two

notorious developing communities and the Township of Hanover must lead to the inevitable conclusion that Hanover is developed, i.e., in 20 years, Hanover's population has increased by 23%; the last ten years, the annual rate of increase has been less than 1%; the amount of vacant land is less than 15%; and the amount of vacant developable land is less than 3%.

Hanover has, of course, developed essentially as a single-family community. In this connection, we would bring the Court's attention to Judge Conford's statements in the case of Pascack Ass'n. Ltd. v. Mayor & Coun. Washington Tp., 74 N.J. 470 (1977).

> "There is no per se principle in this State mandating zoning for multi-family housing by every municipality regardless of its circumstances with respect to degree or nature of development."
> at page 481
>
> "It is obvious that among the 567 municipalities in the State there is an infinite variety of circumstances and conditions, including kinds and degrees of development of all sorts, germane to the advisability and suitability of any particular zoning scheme and plan in the general interest. There must necessarily be corresponding breadth in the legitimate range of discretionary decision by local legislative bodies as to regulation and restriction of uses by zoning."
> at page 482
>
> "...Thus, maintaining the character of a fully developed, predominantly single-family residential community constitutes an appropriate desideratum of zoning to which a municipal governing body may legitimately give substantial weight in arriving at a policy legislative decision

as to whether, or to what extent, to admit multi-family housing in such vacant land areas as remain in such a community. Cf. Village of Belle Terre v. Boraas, 416 U.S. 1, 9, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); Fanale v. Hasbrouck Heights, supra, 26 N.J. at 326. quoted above."

"...There was thus nothing invidious about such development or about the decision of the township municipal planners in 1963 to continue the basic scheme of development in order to maintain the established character of the community. Such a determination fully accorded with the statutory criteria of consideration of the character of the municipality and the most appropriate use of land throughout the municipality. As to the potential deleterious zoning effects of emplacing apartment house projects amidst solid single-family development, as here, see Leimann v. Board of Adjustment, Cranford Tp., 9 N.J. 336, 341-342 (1952); Shipman v. Town of Montclair, 16 N.J. Super. 365, 370 (App.Div.1951)."

"[6] The decision of the municipal legislators, prior to the institution of the present litigation, to keep the municipality free from mulit-family development, was, for the reasons stated above, not an arbitrary one, although, concededly, respectable arguments could be mounted for a different policy determination."
at pages 483-484

POINT II

MT. LAUREL AND MADISON'S LAND USE ORDINANCES VS. HANOVER'S LAND USE ORDINANCE

Assuming for purposes of argument, that the Public Advocate should establish that Hanover is a "developing community", the Public Advocate would still have to fulfill the burden that the Township has enacted an ordinance, which by the restrictions contained therein, preclude low and moderate income housing.

As noted in the case of Pascack Ass'n Ltd. v. Mayor and Council of Washington Tp., 74 N.J. 470 (1977), at pages 480-481, there must be a combination of circumstances: (1) "the economic helplessness of the lower income classes to find adequate housing and the watonness of foreclosing them therefrom"; and (2) by zoning in developing municipalities with large areas of "vacant developable land".

In both Mt. Laurel and Madison Twp.*, the ordinances were gross. Mt. Laurel and the Township of Madison, in part, enacted ordinances effectively precluding low and moderate income housing. In fact, the regulations in the PUD zones in Mt. Laurel and the Township of Madison were classically discriminatory and cost producing. In Mt. Laurel, four PUD developments were created by agreement, not by ordinance, and the construction of these units would quadruple Mt. Laurel's

*Note the term "low and moderate" was supplanted by least cost in Oakwood at Madison Twp.

population. The resolution approving the PUD's provided in part:

a. the development would attract a highly educated and trained population;

b. the number of bedrooms was sharply limited;

c. one-bedroom units could not be leased to tenants with school-aged children;

d. before issuance of a certificate of occupancy, the developer had to record a restrictive covenant running with the land that if there were more than 0.3 school-age children per unit, the developer would have to pay (1) tuition; (2) other school expenses for all children over .3 per unit;

e. among other items, the developer had to contribute moneys for (1) ambulances; (2) fire houses; (3) very large sums for education facilities, a cultural center and the Mt. Laurel Library.

In the Township of Madison, in the PUD zones, among other items the developer was required to construct a school large enough to accommodate .5 students per unit. The school alone would cost 2.2 million dollars or 66% of all central improvement costs. Madison Township at 508.

The PARC zone in Mt. Laurel was limited to persons over 52 years old and a spouse; with a limit of three persons per unit; and no children under eighteen.

Without going further, it is evident that both Mt. Laurel and the Township of Madison enunciated policies with

restrictions precluding least cost housing. School children were limited or excluded; educational expenses (tuition, etc.) were imposed upon the developer; school construction costs were imposed upon the developer; and in Mt. Laurel, moneys were to be extracted for a cultural center and the Mt. Laurel Library.

No such cost producing elements exist in Hanover Township either by way of ordinance or resolution. The restrictions contained in the Hanover Land Use Ordinance are essentially restrictions to protect those for whom the housing is being created and to require the developer to assume the reasonable cost for developing his lands, such as storm drainage, rather than to throw the cost of same upon the remainder of the community.

POINT III

PRESUMPTION OF VALIDITY - AND THE BURDEN OF GOING FORWARD

The plaintiff has apparently determined that Hanover is a developing community and that it has not complied with Mt. Laurel in tems of its land use ordinances. It is respectfully submitted that in the first instance it is neither the plaintiff's or the Court's prerogative to substitute its judgment for that of the Township of Hanover. As Professor Rose stated,

> "It would be wrong to conclude that the post-Mount Laurel decisions of the New Jersey Supreme Court have repudiated the principle that developing municipalities must provide their fair share of regional housing needs. The language of the Pascack Association decision, however, indicates that the court has reconsidered the propriety of judicial intervention in the process of determining regional needs and allocating land use. The court's restated position illustrates that it will be less likely to substitute its conception of the public welfare for that of local officials vested with that responsibility: "'Zoning is a municipal legislative function, beyond the purview of interference by the courts ....'" Since, in the court's view, the "judicial branch is not suited to the role of an ad hoc super zoning legislature," it stated its function as follows: "In short, the (judicial role) is limited to the assessment of a claim that the restrictions of the ordinance are patently arbitrary or unreasonable or violative of the statute, not that they do not match the plaintiff's or the court's conception of the requirements of the general welfare, whether within the town or the region."
>
> "This statement raises the question whether the Mount Laurel decision can be implemented

> without violating the principles of Pascack Association. To a great extent, this dilemma results from the adoption of the "fair share" test in Mount Laurel instead of the more usual and appropriate "reasonableness" test. Calculation of "fair share" will necessarily involve the litigants and the courts in a form of statistical warfare over planning concepts and methodology and their relation to legislative policy judgments. It will be very difficult, if not impossible, for a court to adhere to the Pascack Association principles of judicial restraint and at the same time make a judgment based upon such problematic data. On the other hand, it would be impossible for the courts to avoid becoming a "super zoning legislature" if they abandon the "fair share" test in favor of a standard requiring every municipality, whether developing or not, to make a "reasonable" provision for local and regional housing needs. (Emphasis supplied). Rose, Conflict Between Regionalism and Home Rule: The Abivalence of Recent Planning Law Decisions; 13 Rutgers L. Rev. 1, at 19."

The key question in zoning litigation of this type or any other type is whether the zoning is a reasonable exercise of the police power. Unless the ordinance is "... arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute", it must be sustained. Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973); Pascack at 481.

It is in the reasonableness context that the Court should determine whether the burden of going forward with the evidence shifts from the plaintiff to the defendant.

"A presumption is a rebuttable assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts proved or other-

wise established in the action." Evid. R. 13. As noted in the State Rules of Court Review Commission Annotation, "Since a presumption is no more than a mandated choice of inferences, if a trier of fact would act unreasonably in drawing a particular inference neither the courts nor the Legislature may require him to do so." Simply, in order for the presumption or inference to arise, it must be bottomed upon proven facts from which it would be reasonable to derive the presumption.

In short, if plaintiff presents a broad overview of what plaintiff conceives as cost exactions, fair share, variety of housing required, etc., this alone is not enough to shift the burden of going forward with the evidence. The quantum of proof that plaintiff must adduce to shift the burden of going forward with the evidence must be weighed against the specific ordinance in its entirety and the legal presumptions of validity attached to the ordinance:

1. Hanover is not a developed community.

2. it is valid unless plaintiff proves it is arbitrary or capricious;

3. neither the plaintiff's or the Court's judgment should be substituted for that of the local legislative body.

In this context, a broad brush overview is not sufficient to shift the burden of going forward with the evidence. Plaintiff must be specific and detailed in its proofs.

POINT IV

THE BURDEN OF ESTABLISHING REGION RESTS WITH THE PLAINTIFF

The plaintiff before being permitted to proceed with any other issue in this case, should be required to establish the reasonableness of the region into which it has grouped the Township of Hanover as part of an 8 county region. The validity of a municipality's ordinance, and whether the municipality provides its fair share of least cost housing cannot be determined without first establishing region, since it is from region that any fair share allocation must spring.

The proposition that plaintiff must prove region is simply stated in Urb. League of New Bruns. v. Mayor & Coun. of Carteret, 170 N.J. Super 461, 477 (1979).

> "As we stated earlier, plaintiffs have failed to prove the appropriate region for which defendants have an obligation to provide their fair share of opportunity for construction of low and moderate-income housing. Since the definition of such a region is essential to prove that defendants exclude such housing through their choice of zoning policies (a choice, we add, which must be proved "arbitrary," Pasack Ass'n, Ltd. v. Washington Twp., supra at 484), it follows that the proofs were insufficient to support the claim of exclusionary zoning."

In this connection, it will be quickly noted that the plaintiff has placed the defendants in this suit, including Hanover Township into a region composed of 8 counties. In the

State of New Jersey there are only two regions, based upon the determinations made by the Division of State and Regional Planning which are composed of more than one county.

Counties are, of course, nothing more than political subdivisions. Counties do not provide the nexus between housing and employment that is required to develop a housing region, as determined by the New Jersey Supreme Court. The criteria for determining a housing region was set forth in Madison, 77 N.J. 481 (1977) footnote 44:

> "The most important factor is journey to work - i.e. distance from job or place of business," (Blank and Winnick, The Structure of the Housing Market, 1953 A.J. Econ. 107; U.S. Dept. of Housing and Urban Development, FHA Economic and Market Analysis; Wash. D.C. GPO 1970; E. Fisher & R. Fisher, Urban Real Estate 223, (1954); Charles Abrams The language of citites (1960).

Almost without anything further it should be obvious that the Public Advocate's region, based upon political subdivisions, and not upon the "factor of journey to work" necessarily results in an inappropriate region.

The Township of Hanover retained a planner to develop a region based upon the concept and/or methodology of "journey to work". His study, which has, of course, been submitted, will clearly show that most of the "Region", as defined by the Public Advocate bears no relation to the Township of Hanover.

POINT V

THE D.C.A. REPORT IS SERIOUSLY FLAWED

The D.C.A. Report allocating housing units is flawed in two critical ways. The first is the issue of "region" discussed in Point IV and the second is the fact that the housing allocations which are developed by the Public Advocate from the D.C.A. is based upon the theory of population growth for the region during the period of 1970 - 1990 from 4,598,050 in 1970 to 4,688,343 in 1990.

The following table accurately shows, for the eight counties in D.C.A.'s Region II, actual 1970 population based on the U.S. Census Count; 1977 population based upon the latest U.S. Census estimates; 1978 population based on Official State Estimates for New Jersey; 1980 population based on Preliminary U.S. Census figures; and, 1990 population projections utilized by the D.C.A.:

	(1) 1970 Population	(2) 1977 Population	(3) 1978 Population	(4) 1980 Population	(5) 1990 DCA Projection
Bergen	897,148	874,329	865,200	837,835	949,507
Essex	932,526	852,345	829,900	*	924,512
Hudson	607,839	564,189	554,000	534,184	600,534
Middlesex	583,813	593,823	591,100	581,545	677,617
Morris	383,454	396,513	404,000	404,148	463,517
Passaic	460,782	460,288	466,800**	439,807	501,825
Somerset	198,372	203,650	207,800	197,157	226,337
Union	534,116	512,273	509,600	*	570,831
TOTAL	4,598,050	4,457,410	4,428,400		4,688,343

*1980 figure not yet available.

The population within the region as defined by D.C.A. has actually decreased between 1970 - 1977 by approximately 141,000 or 3.1% and decreased by approximately 169,650 or 3.7% from 1970 - 1978 and, although the census figures are not complete for 1980, it is clear that the decrease in population is continuing. "Region" as established by D.C.A. is a region from which there is a present outward migration of population, with 6 of the 8 counties within the region having experienced net losses of population during the period 1970 - 1978. Furthermore, although Morris and Somerset, two counties within the D.C.A.'s Region II, have not suffered from outward migration, the net inward migration into Morris for 1970 - 1978 was only .03%. Official State Estimates at 6. And, therefore, it may be concluded that those migrating from the other counties of Region II are NOT migrating into Morris as indicated by the Offical State Estimates.

Therefore, it is respectfully submitted that the D.C.A. report is seriously flawed by its composition of the region and by its underlying concept of an ever expanding population whether the region, rather than the actual fact of a decreasing one.

It should also be noted, that the D.C.A. report is further flawed by the fact that it fails to acknowledge significant amounts of vacant and developable land in Hudson and Essex counties (the report assumed none) and the significant

residential development which is occurring within the Hackensack Meadowlands.

Furthermore, the plaintiffs expert, Mary Brooks, working with the D.C.A. report, has tripled and quadrupled housing allocations for the defendant municipalities by factoring into the equation an element for vacant land. This is simply another means by which the Public Advocate's methodology is further flawed since there is no basis for the utilization of such a factor to develop housing allocations.

The extent to which the D.C.A. Report and the analysis by Ms. Brooks are flawed by the failure to establish a proper region, the assumption of an expanding population within the region and the inclusion of vacant land as an element in establishing housing allocation for each municipality, has been publicly admitted by the Public Advocate in connection with its dealings with the Township of Jefferson.

The D.C.A. report in its Appendix A indicates a housing allocation for Jefferson Township, of 2,195 units. Mary Brooks, plaintiff's expert adjusted Jefferson's allocation by her report of August 30th, 1979 to 4,780 units. Plaintiff and Jefferson Township settled on the basis of zoning for 500 units in Jefferson Township by the year 1990. Approximately 10% of the units projected by the plaintiff's own experts as being needed.

We submit that the Jefferson settlement, which is a matter of record discloses the extent to which the Public Advocate now admits the extent to which its concept of region and methodology is fatally flawed.

Although it is unusual to mention the terms of a settlement in litigation we are here faced with a unique situation. The Public Advocate and the defendants are all public bodies. The Public Advocate proceeds in accordance with his statutory authoriztion, N.J.S.A. 52:27E-1 and, as such, is required to proceed in the public interest. Neither the Advocate or the defendants have the right to proceed outside the view of public scrutiny and surely the Public Advocate cannot "benefit" a municipality who decides to settle early over another municipality who seeks to defend its ordinance.

Presumably the Court has been made privy to the Jefferson settlement since Judge Muir refused to grant his judicial imprimatur to same. The tremendous disparity between Brooks' allocation of 4,780 and the least cost zoning for 500 units is at the least befuddling. The settlement can be interpreted in a number of ways: 1) The Advocate places no or little reliance upon the D.C.A. Report and Brooks; 2) special considerations exist in Jefferson that would justify such a drastic reduction from the D.C.A. and Brooks' allocation; or 3) The Advocate has not acted in good faith.

Dealing with each item: 1) If the Advocate places little reliance on the D.C.A. Report and Brooks' testimony -

he should (in fulfilling his public trust) not attempt to foist this testimony on the defendants; 2) if special considerations exist in Jefferson Twp. - those considerations should be assessed by the Advocate as to their applicability to the other defendants so that the public trust is in fact protected; 3) If neither of the above 2 rationales apply - then the Advocate must justify the settlement to this Court, before being permitted to use either the D.C.A. Report or Ms. Brooks as weapons against other governmental entities; or in the least both the D.C.A. Report and Ms. Brooks' testimony must be scrutinized with great care.

We submit that the question must be raised and answered by the Public Advocate as to how he, as a statutory officer, disregards his own experts and a State report, which he argues is a valid report in effecting settlements, and at the same time utilize those same reports against Hanover and the other defendant municipalities. Does this conduct bespeak on its face of "good faith"? Is the Public Advocate entitled to "reward" those who capitulate early in the proceedings and "punish" those who do not? Where do the units previously assigned to Jefferson by Brooks and the D.C.A. Report go now?

We believe that the conduct, which must be deemed to be public, establishes that the Advocate's concept of region, the D.C.A. report, the Brooks analysis, as well as the methodology is totally flawed.

POINT VI

THE TYPE OF HOUSING SOUGHT BY THE PUBLIC ADVOCATE CANNOT BE CREATED AT COSTS AFFORDABLE TO LOW AND MODERATE INCOME GROUPS IN HANOVER TOWNSHIP

We assume that the Court in reaching a judgment in this matter is not interested in merely completing a philosophical or intellectual exercise. While the stated purpose of the Public Advocate may have merit, i.e., to create housing for low and moderate income groups, it is respectfully submitted that it cannot be achieved by this type of zoning litigation at least in terms of the Township of Hanover.

The factors which prohibit the construction of so-called low and moderate income housing are beyond the control of either the Public Advocate or the governing body of the Township of Hanover. Those factors are essentially inflation and scarcity of land for development purposes.

This fact was recognized by the plaintiff's chief expert witness, Allan Mallach in a memo to Carl Bisgaier, Esq. dated December 10, 1979. Therein, Mallach stated in part in discussing the issue of "Remedy" in the law suit,

> "It is essential to recognize that Morris County (or at least most parts of the County) is a high demand area for all income groups. Higher density housing, e.g., townhouses can be built and sold for premium prices in many county locations.

b. certain housing needs, particularly those of all low and most moderate income households, cannot be met without subsidies.

d. ". . . the only way to provide more than token housing opportunity for low income families in Morris County is through use of public subsidy funds."

It would appear obvious that the course of inflation during the pendency of this suit has made Mr. Mallach's observations certain.

The Township retained the services of a land development specialist to study the costs of constructing housing along the lines suggested by the Public Advocate, namely, at a density of up to 13 units per acre. The study prepared by William Kirk determined that regardless of whether the units were built at a ratio of 4 units per acre or up to 13 units per acre, that the annual income of the typical family of four would have to far exceed the income of those designated as low and moderate income. In addition, a study prepared by Gerald Lenaz for Harding Township, similarly established that the so called low and moderate income family can not afford a mobile home, assuming, of course, that any landowner in Hanover Township would permit his land to be put to such an unproductive use in terms of income generation.

It is, therefore, submitted that the invalidating of Hanover's Land Use Ordinance or the striking of particular restrictions, believed by the Township to be appropriate and necessary for the public welfare WILL NOT create housing for

low and moderate income families. What it will do at best, will be to permit developers of luxury type housing to either construct an inferior product or foist the cost of a part of such product on to the Township, i.e., the cost of adequate storm drainage, etc.

CONCLUSION

It is respectfully submitted that the Township of Hanover is a developed community and is not characterized by those factors which the Supreme Court particularly noted in connection with Mt. Laurel and Madison; that the region and allocations put forth by the Public Advocate are significantly flawed in two ways, (a) the region is not based upon the journey to work concept but upon the grouping of political subdivisions; and (b) the Public Advocate has assumed an expanding population for the region, which in fact is the antithesis of the actual situation. These basic flaws appear to be admitted implicitly by the Public Advocate in light of its settlement with Jefferson Township in which it settled for 10% of the units projected by its experts.

Finally, it is submitted that even the Public Advocate's principal expert admits that the ultimate goal of the suit, i.e., the creation of low income housing, cannot be achieved through this litigation. The goal can only be achieved through political action. And, therefore, the result sought by the plaintiff in this ligitation is in the final analysis academic and destructive of the basic concepts

of local control and variety that underlie land use and zoning in our system.

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BY: JOHN H. DORSEY

DATED: December 1, 1980