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

Dec. 12, 1980

Brief of Defendant Township of Denville in support of Judgment

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SUPERIOR COURT OF NEW JERSEY
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 DENVILLE

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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 Denville is an approximate 12.8 square mile area entirely within the Passaic River Basin and centrally located in Morris County. Topographically, it is characterized by relief patterns which range from rugged, irregular, hilly terrain to rolling hills which are often flat-topped, with remnants of "U" shaped glacial valleys in between. Its many lakes provide a unique and very desirable community atmosphere.

Portions of the Township contain important areas of ground water development which are principal sources of potable water not only for Denville, but its neighboring communities as well. Additionally, certain lands situated in Denville within the Beaver Brook tributary of the Rockaway River Watershed have been in the ownership of the Jersey City Water Company to preserve the integrity of its surface water supplies.

Flooding is a recognized water resource problem in Denville. Denville's flood plain is a broad, flat area of approximately 550 acres on the right bank of the Rockaway River. Total development in the flood plain occupies above 175 acres and

consists of approximately 110 owner-occupied residential structures and 40 commercial and industrial structures.

Less than 50% of the Township is presently sewered. Due to the nature of the seasonally high water table in many geologic areas of Denville, disposal by septic systems becomes impractical. Thus, such factors as flooding, excessive runoff, high water table, and protection of water sources influence density. Additionally, although the Township is served by several highway systems, development is limited in certain areas because of topographical factors and railroad lines which restrict access.

Analysis of existing residential development shows that just over 6 percent of the dwelling units were in other than single-family structures. Of these, 192 dwelling units, $4\frac{1}{2}\%$ of the total dwelling units, were garden apartments built at 10 dwelling units per acre. Further, more than one-half of the Township's housing supply is situated in high density areas with densities of 5 dwelling units per acre or more. Another 20% of the housing is of medium density.

After taking into account factors such as steep slopes, topography, unfavorable soil conditions and severe septic effluent limitations, only about 800 acres of the approximate 1800 acres which are undeveloped are suitable for development. This represents less than 10% of the total Township area.

Thus, the existing housing patterns in the Township can be summarized as heavily developed with single family dwellings at a relatively high density. Among the distinguishing

characteristics of the Township's housing are its lake communities, which were developed on small lots and which represent a significant contribution to the moderate income, single family housing needs in Morris County. Many of these dwellings are converted bungalows, which clearly constitutes the "least cost" construction for single family dwellings.

Finally, in 1977, a Comprehensive Revision of the Master Plan was adopted leading to the preparation and ultimate adoption of the present Township of Denville Land Use Ordinance. The Plan took into account regional needs in Morris County and sought to both conform with its characterization as a "growth center" in the Morris County Master Plan and achieve substantial harmony with the zoning and planning of neighboring municipalities. Specific attention was given to population goals and housing needs in the Township, and the Plan concluded that such needs could be met without substantial changes to its present zoning density patterns.

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. 40:55D-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 U.S. 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 Township, Supra, 24 N.J. at 62; Yanow v. Seven Oaks Park, Inc., 11 N.J. 341, 353 (1953); Bellings v. Denville Township in Morris County, Supra, 96 N.J. Super at 356.

The recent New Jersey Supreme Court case of Pascak 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

> 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 annual 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 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 obligation 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, the Township of Denville's existing housing supply already makes a significant contribution to the moderate income housing needs of Morris County. At present, more than one-half of the residential units in the Township are in areas with densities of five dwelling units or more per acre. The lake communities, which characterize much of this housing, were built on small lots. Many of these dwellings are converted bungalows and clearly constitute the "least cost" construction for single family dwellings.

While the Master Plan recognized an imbalance of higher density dwellings over lower to medium density dwellings and the need to promote the future growth of the latter, an examination of the zoning of total vacant land available reveals planning for significant numbers of high density, single family dwellings. Subject to slope, flood plain, and composite limitations, the total area zoned for higher density development (5 or more units per acre) would permit the construction of an additional 311 such units.

Of course, it must be recognized that private enterprise will not in the current and prospective economy build such 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 Denville Township 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 fair share. As noted by Justice Schreiber in his concurring and dissenting opinion in Oakwood at Madison, at 622:

> "The general welfare calls for adequate housing of all types, but not necessarily within any particular municipality." Fanale v. Hasbrouck Heights, 26 N.J. 320 (1958).

Here, Denville's past development has created a substantial supply of moderate income housing and establishes it as a major source of such housing for all of Morris County. In effect, the Township has already provided more than its fair share of its regional housing obligation.

As to the parameters of the hypothesized fair share by which Denville Township's land use regulations are to be measured, it is impossible to be precise at this point in the litigation. The Court is confronted 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.

Defendant respectfully submits that, the Court's attention is better turned to examining the substance of its zoning ordinance and the bona fide efforts toward the elimination or minimization of undue cost-generating requirements 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 shares . . ." Oakwood at Madison, at 499. As will be more fully developed by our experts at trial, the substance of Denville Township's zoning ordinance, its existing land use patterns, 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 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-2, 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 promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through impropr 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, 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. Denville's position as a source of moderate income housing for Morris County, and not simply its own share of needs, must be emphasized here as well.

Of particular importance among these other considerations in Denville Township 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 make a detailed presentation of these proofs since they must be fully developed at trial. However, as more fully appears in the statement of facts, the natural features of the environment such as the topography, soil type, flood plains, high water table, ground water supply

development, hydrology and geology places a development range on land in Denville Township for population density and type of land use. As a result, only 800 of 1800 vacant acres are suitable for development, and of these, a substantial portion must be limited to low density development.

CONCLUSION

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

Respectfully submitted,

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Attorneys for Denville

By _____
ALFRED J. VILLORESI
A Member of the Firm