ML 2

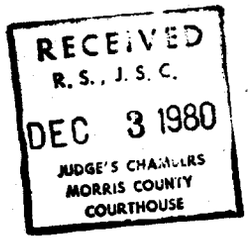
~~Boonton~~ ~~Morris~~
Boonton

12/3/1980

Trial Brief. for Δ in
support that Morris Twp is
not a developing municipality

pgs 19

ML0006443



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

John M. Mills, Esq.
Charles T. Hock, Esq.
Of Counsel

John M. Mills, Esq.
Charles T. Hock, Esq.
On the Brief

MILLS, HOCK, DANGLER & MILLS
Attorneys for Defendant,
Township of Morris
One Western Avenue
Morristown, New Jersey 07960
(201) 538-0950

STATEMENT OF FACTS

Morris Township contains approximately 16 square miles and virtually surrounds the Town of Morristown which is a fully developed historic community that has been the commercial and governmental center of Morris County. Its proximity to this county center has resulted in extensive development within the Township of Morris.

The population of the Township grew until 1970 when the census showed a population of a bit over 18,000. The 1980 census indicates that the population has remained static since then with the population remaining at slightly over 18,000.

At present less than seven percent of the total land area of the Township remains available for development and much of what remains continues to be developed on a "filling in" basis. Considerable portions of the available remaining land are subjected to topographical constraints, particularly steep slopes and soil conditions which are not the best for septic disposal. These areas are not sewered and none are proposed due to the topography and limited road system servicing these areas. Most of the remaining available land lies in the western portion of the Township, in the area of the proposed county reservoir, and is designated a limited growth area in the State Development Guide Plan.

At this time extensive areas of development are in the more outlying portions of Morris County and Morris Township has now been essentially bypassed in terms of future development. This is only natural considering the limited available land remaining in the Township which is suitable for development. Morris Township has passed through its developing stage and is now merely filling in the small scattered areas remaining.

The Township long ago recognized the need for sound comprehensive planning which is reflected in its 1972 Master Plan. The application of sound planning is evident from the nature of its development and the continued updating of its zoning. Recent changes are indicative of the Township's recognition of the need for higher density development where proper planning permits such development. The municipality's effort has been to make realistic, reasonable use of what little land remains.

Presently accepted court standards for determining whether a municipality is developed when applied to Morris Township dictate the conclusion that Morris Township is not a developing municipality.

MORRIS TOWNSHIP CANNOT BE HELD A DEVELOPING MUNICIPALITY WHEN TESTED BY THE MT. LAUREL CRITERIA.

The state of the law today is that only municipalities deemed to be developing are subjected to the mandate of South Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N. J. 153 (1975) (Mt. Laurel) and Oakwood at Madison, Inc. v. Township of Madison, 72 N. J. 481 (1977) (Oakwood).

The Supreme Court in Mt. Laurel and Oakwood have clearly established that, in order for a municipality to be subjected to obligations enunciated in those cases, the municipality must be found to be a "developing municipality." The standards by which a municipality was tested on this question were set forth in Mt. Laurel and applied by the court in Oakwood.

Shortly after the decision in Oakwood, the Supreme Court decided Pascack Association, Ltd. v. Mayor & Coun. Washington Tp., 74 N. J. 470 (1977) (Pascack) in which the court reaffirmed and restated under what circumstances the principles of Mt. Laurel would apply. In Pascack, the court stated:

> "[T]he relevance of Mt. Laurel here is affected by two important considerations: (1) the population category effectively excluded by the ordinance involved in Mount Laurel -- and the class intended to be relieved by our decision therein -- was that of persons of low and moderate income; (2) the municipal category subjected to the mandate of the decision was that of the "developing municipality." It required the combined circumstances of the economic helplessness of the lower income classes to find adequate housing and the wantonness of foreclosing them therefrom by zoning in municipalities in a state of ongoing development with sizable areas of remaining vacant developable land that moved this court to a decision . . . 74 N. J. at 480-481."

The court in Pascack pointed out the mandate of Mount Laurel does not apply in every instance:

> "We have recently reaffirmed and faithfully enforced the principles of Mount Laurel in an appropriate fact situation. See Oakwood, supra. But, it would be a mistake to interpret Mount Laurel as a comprehensive displacement of sound and long established principals concerning judicial respect for local policy decisions in the zoning field.

Also,

> "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." 74 N. J. at 481.

It is clear that the court never intended every municipality to be subjected to the mandate of Mount Laurel and that a municipality found not to be a "developing municipality" should not be subjected to litigation requiring compliance with that mandate.

The criteria set forth in Mt. Laurel to determine whether a municipality was developing were outlined at page 160 of that case. The court held that developing municipalities were municipalities with sizable land use area outside the central cities and older built-up suburbs which have substantially shed their rural characteristics and have undergone great population increases, or are now in the process of doing so, but are still not completely developed and remain in the path of future residential, commercial and industrial demand and growth.

It is submitted that, when Morris Township is measured by those criteria as applied in subsequent cases by the courts, Morris Township cannot be found to be a developing municipality in the Mt. Laurel sense.

The population of the Township has remained static or gone down between the 1970 and 1980 census. Less than seven

percent of its total land remains available for development and that figure continues to become smaller, due to ongoing development of the remaining land. The Township no longer remains in the path of future development, but has essentially been bypassed. At present, the Township is experiencing a "filling in" process in terms of utilization of its remaining land available for development.

Under any reasonable application of the Mt. Laurel criteria, Morris Township cannot be found to be developing.

Plaintiff alleges in its pleadings that, even if a municipality is not a "developing municipality" within the context of Mt. Laurel, the New Jersey Municipal Land Use Law creates Mt. Laurel type obligations.

In Pascack Association, Ltd. v. Mayor & Coun. Washington Tp., 74 N. J. 470 (1977), the Court stated at page 483:

> "[T]here has been no fundamental change, beyond the holding in Mount Laurel itself, in the statutory and constitutional policy of this State to vest basic local zoning policy in local legislative officials." N. J. Const. 1947, Art. 4, §6, par. 2; cf Art. 4, §7, par. 11.

The Court also stated in "Pascack":

> "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. The legislative designation of the purposes and criteria of zoning, as set forth in N.J.S.A. 40:55-32, is broad and comprehensive. . .
>
> "The purposes and objects of zoning reflected by the new Municipal Land Use Law, L. 1975, c. 291 (effective August 1, 1976) N.J.S.A. 40:55D-1 et seq., although broadened in several respects, are not essentially dissimilar from those enunciated above. See N.J.S.A. 40:55D-2 a., c., e., g., j., 49 a., 52 b. and see Oakwood, supra 72 N. J. at 499.

The Court went on in Pascack to reject the Public Advocate's argument that the Municipal Land Use Law broadened the Mt. Laurel mandate to include non-developing municipalities when it said:

> "The Public Advocate argues that the lesson of Mount Laurel and the implications of such decisions as Sente v. Mayor and Mun. Coun. Clifton, 66 N. J. 204 (1974) and DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N. J. 428 (1970), are that housing needs of all segments of the population are a priority charge on the zoning regulations of all municipalities, whether or not developed. There

is no such implication in the cases cited, individually or collectively. None of them stands for the proposition that, because of the conceded general shortage of multi-family housing, the zoning statute has, in effect, been amended to render such housing an absolute mandatory component of every zoning ordinance as virtually contended for by plaintiffs and the Public Advocate. In this regard, it is significant that the Legislature has just completed a comprehensive revision of the zoning statute and has made no change approaching the impact of the proposition just stated.

"The only apparent substantative 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 similar density in the same zoning district.' N.J.S.A. 40:55D-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 (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." Pascack Ass'n Ltd. v. Mayor & Coun. Washington Tp., supra, note 4 p. 486.

THE PLAINTIFF'S PROPOSED REGION IS NOT A PROPER REGION WHEN MEASURED BY COURT ACCEPTED STANDARDS AND ACCEPTED PLANNING METHODOLOGY.

Plaintiffs allege Morris Township and Morris County are part of an eight county region established by the Department of Community Affairs as "DCA Region 11." First, the allegation as to Morris County as being included in the region is irrelevant as to the determination of any region in which Morris Township might be included.

The determination of an "appropriate region" is significant in that it dictates the allocation which will necessarily flow from such determination . The courts of this State have set down some guidelines when determining what constitutes an appropriate region for a particular municipality. In Oakwood at Madison, Inc. v. Township of Madison, 72 N. J. 481, 537 (1977) (Oakwood), the court affirmed Judge Furman's concept of an appropriate region as being "an area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary zoning." The court, in Oakwood, goes on to quote from Justice Hall's opinion in So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N. J. 151 (1975) (Mt.

Laurel), where he discusses the concept of region. In Mt. Laurel, the region was established as portions of three counties within a semi-circle, having a readius of 20 miles or so from the heart of Camden City. 67 N. J. at 162, 190. What was material to the determination of that region were (1) the proximity of Mt. Laurel to Camden; (2) Mt. Laurel's residential development due to the influx of new residents from nearby central cities; (3) existing and projected employment patterns; (4) highway network linking Mt. Laurel to the Camden area; and (5) the contrast of Mt. Laurel's vacant area (65%) with the land supply situation in those nearby central cities. Oakwood at 537.

The court specifically indicated it distinguished the situation where the municipality whose ordinance was under attack would have been the subject of an official fair share housing study. They indicated a region established in such a study might be given prima facie judicial acceptance, but the preliminary statewide housing allocation plan (which established DCA Region 11) was not accorded such status. They indicate, absent such stature, a proposed region should be only given such weight as it deserves on its merits when analyzed and measured by the standards espoused by Justice

Hall in Mt. Laurel and Judge Furman in Oakwood. Oakwood at 537, 538.

The court, in Oakwood, went on to point out that there is no specific geographical area which is necessarily the authoriatative region as to any single municipality in litigation. "But, in evaluating any expert testimony in terms of the Mt. Laurel rationale, weight should be given to the degree to which the expert gives consideration to the areas from which the lower income population of the municipality would substantially be drawn absent exclusionary zoning." Oakwood at 539.

This they found to be comparable to the relevant housing market area concept. They stated the factors, which draw both employed and unemployed people to a municipality for housing, are reasonable proximity to jobs and availability of transportation to jobs (mentioned by most experts), and, also, proximity to and convenience of shopping, schools, and other amenities. Oakwood at 540, 541.

> The court finally held that region "is that general area which constitutes, more or less, the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning." Oakwood at 543.

Since the preliminary statewide housing allocation plan which establishes DCA Region 11 was not afforded status as an official fair share housing study, its merit must be measured by the standards set forth in Oakwood. The DCA study rejected the journey to work criteria and established its own tests, i.e., shared housing needs, socio-economic interdependence, data availability, and Executive Order 35. This methodology ignores reality in terms of considering the source of potential persons attracted to a given housing market area. It further ignores accepted planning methodology in establishing such a region and the methodology espoused by the court in Oakwood.

Although one of the criterions, "socio-economic interdependence," is essentially a housing market test. The study states the criterion of "sharing housing needs" was the most important and would take precedence over the other three criteria. It is clear that, in establishing DCA Region 11, that criterion controlled and resulted in the establishment of a region essentially ignoring the housing market methodology approved by the court and even advocated by the Federal Housing Authority. That agency defines a housing market region as the geographic entity within which non-farm dwelling units are in mutual competition. Oakwood at 540.

Because the creation of DCA Region 11 virtually ignores approved methodology in establishing housing regions, it should be rejected as the appropriate region in this litigation.

Finally, there is no legislative authority in this State for the adoption of a fair share housing plan and in the absence of such authorizing legislation, no municipality, whether it is developing or not, is obligated by law to abide by any plan promulgated by any agency of state government. It is not even a regulation adopted by the Department of Community Affairs, no municipality is "affected" by it, and no municipality would be entitled to appeal even though it contained some improper or arbitrary and capricious elements as it is contended here. It has not been "adopted" by the Department of Community Affairs, nor does the Department of Community Affairs have any intention of adopting it. Amicus Brief of Department of Community Affairs, Urban League of Greater New Brunswick v. Mayor and Council of Carteret, Docket No. 16, 492 at 11 (herein "Urban League Community Affairs Brief"). Indeed, as the Department of Community Affairs has indicated in its supplementary brief in the same action dated October 24, 1980 at p. 5, "The Housing Allocation Report is not presently intended to have the binding force and effect of law with respect to the matters discussed therein." In short, the DCA Report represents only the view of a handful of planners in one agency of government.

PLAINTIFF'S HOUSING ALLOCATIONS PLAN IS FLAWED AND SHOULD BE GIVEN NO WEIGHT BY THE COURT.

It logically follows that, if the plaintiffs' alleged region is inappropriate when tested by court approved standards, the fair share allocation which flows from it must be flawed. This connection between region and allocation was recognized by the court in Oakwood when it stated:

> "Finally, we submit general observations as to the techniques of 'fair share' allocation to municipalities within an assumedly valid region." Oakwood at 541.

The court, in Oakwood, further pointed out that the number and variety of considerations in formulating a fair share plan is such that the entire problem involved is essentially and funtionally a legislative and administrative problem, not a judicial one. Oakwood at 541, 542.

Inasmuch as the legislature has chosen not to deal with the problem to date, nor has any administrative body adopted what might be called an official plan, any proposed plan must be given only such weight as it merits based on the court's pronouncement. Oakwood at 543.

Speaking in Oakwood at 543 and 544, the court stated:

"2. The objective of a court before which a zoning ordinance is challenged on Mount Laurel grounds is to determine whether it realistically permits the opportunity to provide a fair and reasonable share of the region's need for housing for the lower income population.

"3. The region referred to in 2 is that general area which constitutes, more or less, the housing market area of which the subject municipality is a part, and from which the prospective population of the municipality would substantially be drawn, in the absence of exclusionary zoning.

"4. Fair share allocation studies submitted in evidence may be given such weight as they appear to merit in the light of statements 2 and 3 above. But, the court is not required, in the determination of the matter, itself to adopt fair share housing quotas for the municipality in question or to make findings in reference thereto."

Inasmuch as the plaintiffs' fair share allocations are based on a region which was not created on what the court has considered proper criteria, it should be afforded no weight.

The court in Oakwood clearly stated establishing fair share housing quotas are not a proper function of the court. Oakwood at 544. Rather, it is the court's role to ascertain whether a challenged ordinance realistically permits the opportunity to provide a fair and reasonable share of a

region's housing for lower income population. Oakwood at 543. This is a "numberless fair share" concept. Simply put, it requires that a municipal ordinance realistically provide a reasonable amount of zoning which allows construction of housing units at densities which planners generally consider acceptable for the development of the type of housing sought, without regulations which unnecessarily increase the cost of such housing.

How much zoning is provided depends on the needs of an appropriate region of which the municipality is a part, tempered by the application of sound, accepted zoning principles.

MORRIS TOWNSHIP'S ZONING ORDINANCE MEETS ITS OBLIGATION TO PROVIDE AN OPPORTUNITY FOR THE DESIRED HOUSING AND IS NOT EXCLUSIONARY.

If the plaintiffs alleged region and allocation do not meet the scrutiny of the court and fail because they do not measure up to the court approved standards, then the last question that must be asked is whether the Morris Township zoning ordinance sufficiently meets the Township's obligation to provide the opportunity for lower cost housing needed in the region. Oakwood at 543.

In 1972, the Morris Township Master Plan recognized it had an obligation to meet this need, and efforts directed toward that end have been ongoing ever since. It should be pointed out that this fact was recognized before the decision in Mt. Laurel and the mandate which resulted from that decision.

An examination of the amendments to the Morris Township zoning ordinance since 1969 will show that all minimum livable floor area requirements have been eliminated, and lot sizes have been reduced in several zones. The Planning Board has recommended amendments to the Master Plan which would mandate a certain percentage of all dwelling units be

other than single family detached housing. Various tracts have already been rezoned for attached family dwellings, amounting to approximately 330 units. Recent recommendations for rezoning, including actual proposed rezoning would result in sufficient land for additional multi-family units.

A fact which plaintiffs ignore is the reality that private developers build the type of housing in a municipality which is demanded by people who desire to live in that municipality. The developers build to the market, and, in Morris Township, this is not low and moderate income housing, for the most part. It is a proven fact in Morris Township that a builder will construct the largest and most expensive structure he can within the limits established by the ordinance, and this applies to both single family and multi-family housing.

An examination of the Morris Township ordinance will show that it does not impose undue cost generating factors, yet builders, on their own, introduce construction methods, styles and types that tend to increase the cost of construction and, thereby, the sales price. This is done because they recognize the housing market in Morris Township demands this type of housing, and their profits lie in building housing which will sell.

This matter of affordability does not prove that a municipality is engaging in improper zoning, and such evidence should not be considered when determining whether an ordinance is exclusionary.

In Mt. Laurel, the court spoke of the presumptive obligation on the part of developing municipalities at least to afford the opportunity by land use regulations for appropriate housing for all. Mt. Laurel at 180. That obligation is keyed on the word opportunity, an opportunity to construct small lot, single family dwellings and multi-family housing. This type of housing has been permitted in the Township, presently exists, and is zoned for at present.

It is calculated that approximately thirty percent of the existing and prospective dwelling units in Morris Township fall into the category of small lot, single family and multi-family units. Morris Township has afforded the opportunity during its period of development for the construction of the type of housing demanded in Mt. Laurel and in sufficient numbers of units to meet its regional fair share. The fact that the cost of most of this housing is not affordable by lower income people should not be construed as making Morris Township's ordinance exclusionary. What has been built and what will be built in areas zoned for this

type housing has been and will continue to be determined by the developers of the land. The cost of this housing, whether it be sales price or rentals charged, will be a factor of the market place.

The significance of all this is that Morris Township has provided an opportunity for the construction of small lot, single family and multi-family housing in substantial numbers over the years of its development. The presumptive obligation to afford the opportunity has been satisfied. Courts and municipalities do not build low and moderate income housing, developers do. The courts have required that developers be given the opportunity by providing appropriately zoned areas to build such housing. What the developers in fact choose to build and what they charge for such housing is their decision and nowhere is it suggested that a municipality has obligations in that area.

Morris Township has afforded the opportunity during its period of development for the construction of the type of housing demanded in Mt. Laurel and in sufficient numbers of units to meet its regional fair share. The fact that the cost of most of this housing is not affordable by lower income people should not be construed as making Morris Township's ordinance exclusionary.

CONCLUSION

An Application of the tests espoused by the Supreme Court to determine whether a municipality is a "developing municipality" requires a finding that Morris Township is not a developing municipality.

In addition, a further application of accepted methodology necessitates a finding that the proposed DCA Region 11 is under no stretch of the imagination a proper region and any allocation which flows from it is flawed.

Even if the "developing municipality" distinction were eliminated Morris Township's zoning cannot be found to be exclusionary when measured by standards enunciated by the Courts of this State.

Respectfully submitted,

MILLS, HOCK, DANGLER & MILLS
Attorneys for Defendant,
Township of Morris

By: Charles T. Hock
Charles T. Hock
A member of the Firm

December 1, 1980

John M. Mills, Esq.
Charles T. Hock, Esq.
Of Counsel

John M. Mills, Esq.
Charles T. Hock, Esq.
On the Brief