ML - Morris County Fair Housing Council
v. Boonton
- Morris Plains

Dec. 4, 1980

Trial Brief of the Defendant Borough of Morris Plains

pgs. 13

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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

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TRIAL BRIEF OF THE DEFENDANT
BOROUGH OF MORRIS PLAINS

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TABLE OF CONTENTS

## STATEMENT OF FACTS

The Borough of Morris Plains is located in the heart of Morris County surrounded by the Townships of Hanover, Parsippany-Troy Hills and Morris. It's total size is 1600 acres, making it one of the smallest municipalities in Morris County.

Its character is one of predominantly single-family homes many of which may be classified as older homes. Rational and orderly planning has been a long standing hallmark of its government. The first planning efforts date back to 1948, making it a leader in Morris County. Since that time, its development has occurred in stages to the point that it has become today essentially full developed.

Its topography is characterized by hilly terrain in the northwest portion with relatively level areas lying to the east and southwest. A ridge extends from the north central portion to its center.

The Borough has always been and still remains primarily a single-family community. Its residential zones consist of a R-1, 40,250 square foot minimum lot area, R-2, 18,000 square feet, R-3, 7,200 square feet and R-4, 5 condominium dwelling units per acre. In addition, there are B-1 and B-2 Business Zones, B-3, a Planned Shopping Center Zone, C-1, Highway Commercial Zone, L, Research Laboratory Zone and I, Limited Industrial Zone.

In 1979, the R-4 Zone was created permitting the development of 190 units of townhouses at a density of 5 units per acre. Many of these units have been completed and are now occupied. The balance are in various stages of completion.

Such a density is not new to the Borough. The R-3 zone requires a minimum lot size of 7,200 square feet, a net density of slightly greater than 5 units per acre. Table IV of the 1975 Master Plan indicates that 602 dwelling units exist within that zone. In 1975, that constituted approximately 40% of the total housing supply. With the addition of the townhouses provided for in the R-4 zone, 792 housing units will be present at such a density, or 47.5% of the housing supply of lot sizes of approximately 7,200 square feet.

The pattern of population growth clearly indicates that Morris Plains has "peaked" in its growth, to its present 5243.*

Table VII of the1975 Master Plan reveals the following population figures.

| | % Change Morris Plains | % Change Morris County |
|---|---|---|
| 1930 - 1940 | 17.8% | 13.8% |
| 1940 - 1950 | 34.1 | 30.7 |
| 1950 - 1960 | 73.7 | 59.2 |
| 1960 - 1970 | 17.8 | 46.6 |
| 1970 - 1980* | -5.4 | 5.4 |

*1980 statistics were prepared by The Morris County Planning Board on the basis of statistics provided by the U. S. Bureau of Census, July 22, 1980.

The conclusions are self-evident. The growth of population in Morris Plains has been consistently earlier than Morris County in general. The peak growth occurred between 1950 and 1960. Although some growth occurred during the sixties, it was significantly less than the prior decade. The seventies have seen a real decline in population as compared to a modest increase in Morris County.

The Borough Engineer and Borough Planner conducted a vacant land analysis in the fall of 1979, a copy of which was provided to the plaintiff in timely fashion. That report provided the following information:

| Zone | Vacant Land Acres | Flood Hazard Areas & Soil Limitations | Excessive Slopes | Suitable for Development |
|---|---|---|---|---|
| R-1 | 18.34 | 10.17 | 5.07 | 3.10 |
| R-2 | 47.07 | 9.88 | 3.98 | 33.21 |
| R-3 | .77 | | | .77 |
| C-1 | 2.17 | | | 2.17 |
| B | .79 | | | .79 |
| I | 57.09 | | | 57.09 |
| L | 2.70 | | | 2.70 |
| Totals | 128.93 | 20.05 | 9.05 | 99.83 |
| % of Total Borough Area (1600 acres) | 8.1 | | | 6.2 |

The areas designated as Flood Hazard Areas and containing soil limitations (20.05 acres) have been so designated on the basis of Federally designated flood hazard areas and a Soil Survey of Morris County issued in August 1976 by the U. S. Department of Agriculture in cooperation with The New Jersey Department of Agriculture and Rutgers University. "Excessive Slopes" have been defined as 25% or greater. These exclusions have, in principle, been accepted by plaintiff herein. On May 21, 1979, Allan Mallach, plaintiff's probable chief witness, commented on these exclusions.

> "Land that is in floodways is not reasonably developable." (Tr. 34-17 to 18)
>
> "Q - When you say floodways, how would you determine whether or not a certain part of a municipality is within a floodway?
>
> "A - This is mapped by the DEP and other people.
>
> "Q - By the DEP are you saying ---
>
> "A - The DEP I believe by the Flood Insurance Program and I think it's the U. S. Department of Housing and Urban Development also does mapping." (Tr. 35 - 15 to 22)

On the issue of excessive slopes, Mr. Mallach offered the following comments:

> "Land that's, that has a slope that's too steep for affective (sic) development is not developable, although as I believe I have discussed there is a considerable difference of opinion as to how steep steep is." (Tr. 34 - 18 to 22)

"I think it is certainly possible to develop land with the slopes of at least twenty-five percent." (Tr. 36 - 7 to 9)

"Again one can't be absolutely hard and fast about these things but I would say once you get above twenty-five percent serious questions are likely to arise." (Tr. 36 - 14 to 17)

"I guess the point would be over twenty-five percent you are getting into questions where the potential complexities and costs and site preparation and everything really is likely to become excessive for most uses." (Tr. 36 - 24 to 25, to 37-1 to 3)

There is agreement, therefore, that the exclusions of vacant land by the defendant herein are reasonably exclusions.

Of the remaining 6.2% of vacant, developable land, many of the sites consist of isolated tracts of various sizes, none of which exceed one half acre.

## POINT I

## MORRIS PLAINS IS NOT A "DEVELOPING COMMUNITY"

In South Burlington County N. A. A. C. P. v. Township of Mount Laurel, 67 N.J. 153 (1975), the Supreme Court held that a developing community cannot make it physically or economically impossible for low and moderate income housing to be available within its boundaries. Mount Laurel contains 14,000 acres, nearly ten times that of Morris Plains. Between 1960 and 1970 population increased from 5249 to 11,221. Sixty-five percent of the land was vacant land.

Consistently since Mt. Laurel, the Courts of New Jersey have ruled that the housing obligations set forth in the famous Mt. Laurel decision do not apply to fully developed or nearly developed communities.

In Pascask Ass'n, Ltd. v. Mayor and Council of the Township of Washington, 74 N.J. 470 (1977), the Supreme Court held that the defendant municipality was not under a Mt. Laurel obligation as it was a developed community. Its size is 1984 acres, almost 25% greater than defendant herein. It contained 2.3% vacant land, or approximatley 45.6 acres.

Fobe Associates v. Mayor and Council of Demarest, 74 N.J. 519 (1977), held that Demarest was not a developing community. Its land area was 1345 acres with 2.5% vacant land.

The Appellate Division has also grappled with the concept of developing community and has provided the following guidance.

In Nigito v. Closter, 142 N.J. Super. 1 (App.Div.1978), the Appellate Division determined that Closter was not bound to the Mount Laurel duties. Closter contains 3.2 square miles or approximately 2100 acres. It was 6% undeveloped. Then in Windmill Estates, Inc. v. Zoning Board of Adjustment of the Borough of Totowa, 158 N.J. Super. 179 (App.Div.1978), Totowa was found not to be a developing community subject to the Mt. Laurel mandate as it has 2560 acres, 5% of which or 128 acres was undeveloped.

The following chart summarizes the above conclusions:

| Municipality held not bound to Mt. Laurel duty | Size | % Vacant Land | Vacant Land ( Acres) |
|---|---|---|---|
| Washington Twp. | 1984 acres | 2.3 % | 45.6 |
| Demarest | 1345 acres | 2.5% | 33.6 |
| Closter | 2100 acres | 6.0% | 126 |
| Totowa | 2560 acres | 5.0% | 128 |
| Morris Plains | 1600 acres | 6.2% | 99.8 |

Consistent with the above determinations, defendant herein is not a developing community and should not be bound to the duties of Mt. Laurel.

## POINT II

### IT WOULD BE INEQUITABLE AND UNREASONABLE TO IMPOSE MT. LAUREL OBLIGATIONS UPON MORRIS PLAINS

Since Mt. Laurel, supra, a determination that a municipality is a "developing community" has been a mandatory prerequisite to the imposition of the obligation to provide low and moderate income housing. As enumerated in Point I, supra, a line of authority since Mt. Laurel has followed this rule. (See Pascack Ass'n. Ltd. v. Mayor and Council of the Township of Washington, supra, Fobe Associates v. Mayor and Council of Demarest, supra, Windmill Estates, Inc. v. Zoning Board of the Borough of Totowa, supra, and Nigito v. Closter, supra. This issue is treated again in Segal Construction Co. v. Zoning Board of Adjustment of Wenonah, 134 N.J. Super. 421 (App. Div. 1975). Yet, this case is remarkably different in factual setting. Wenonah is a municipality of 660 acres, containing 109 vacant developable acres, almost 17%, seven times the percentage of vacant land within Washington Township and Demarest. The gravamen of Segal Const. Co., supra, is not the issue of "developing community." This case stands for the principles of reasonableness and equity in the analysis of a municipality before a judicial imposition of mandatory zoning for low and moderate income housing. Nowhere in the per curiam opinion does the court find that Wenonah is not a developing community. At the outset, the Court expressly acknowledges Mt. Laurel, supra, and yet concludes that Wenonah has no obligation to provide low and moderate income housing. The Court's own words speak most clearly at pages 423-424.

> "We conclude that the Borough of Wenonah remains unaffected by Mount Laurel. Wenonah is not a municipality of 'sizable land area'; it occupies scarcely one square mile of space. . . of the 660 acres which comprise this tiny borough, only 109 acres have yet to be developed and the only sizable tract available for multi-family construction is the 41-acre parcel upon which Segal, as contract purchaser, proposes to erect its 340-unit condominium complex. . . Wenonah cannot therefore be regarded as one of the developing communities of 'sizable land area' to which the requirements imposed by Mount Laurel apply (emphasis added). . . Requiring multi-family use of this last sizable parcel of developable land within this tiny borough would thus subject Wenonah to a judicially created explosive phenomenon for which it may be ill equipped to deal. . . Wenonah's contribution to the housing needs of Gloucester County must perforce be a minor one because of its limited size, but requiring Wenonah to make this minor contribution may well prove catastrophic to its way of life. . . On balance, the minor contribution of Wenonah to the housing needs, if there be any, of Gloucester County, as against the major impact on Wenonah resulting from this contribution, removes any constitutional or statutory compulsion upon this borough to provide this alternative mode of housing."

Wenonah experienced growth during the 1960s of "but 13%." Morris Plains experienced growth of 17.8% during the same period. Vacant developable land of Wenonah equalled 109 acres, for Morris Plains, 99.8 acres. The words of the court, supra, apply as clearly to Morris Plains as they did to Wenonah. It doesn't matter if Morris Plains is or is not a developing community. Morris Plains "cannot therefore be regarded as one of the developing communities of 'sizable land area' to which the requirements imposed by Mount Laurel apply."

## POINT III

### PRESERVATION OF NEIGHBORHOOD CHARACTER IS A PROPER FUNCTION OF ZONING.

Of the 99.8 acres of vacant developable land in Morris Plains, a portion lies in isolated lots of one half acre or less in the midst of established neighborhoods. The construction of least cost housing as proposed by plaintiff, whether it be multi-family dwellings or mobile homes would cause a significant departure from the established character of the predominantly single family detached home neighborhoods of Morris Plains. In Home Builders League of South Jersey, Inc. v. Township of Berlin, 81 N.J. 127 (1979), the Supreme Court approved "maintaining the character of a fully developed, predominately single family residential community" as a "desideratum of zoning." The principle was set out in Pascack Ass'n. Ltd., supra. There, at 483-6, the court clearly stated that such a goal is proper. The role of the court in reviewing a zoning ordinance is to determine if it is "patently arbitrary or unreasonable."

Maintaining the single family character of defendant Morris Plains with its very limited growth potential is therefore a valid exercise of local authority. It is clear, therefore, that isolated lots may not be subject to zoning changes which would contravene the basic neighborhood character. This conclusion does not even consider the long-standing prohibition against such "spot zoning" efforts.

Indeed, these same principles can be extended to the

vacant land remaining elsewhere with Morris Plains. Because of its limited growth capacity and its clearly identifiable character, the decision as to the future use of the remaining vacant, developable land must be left to the local governing body.

## CONCLUSION

Morris Plains is not a developing community. Reason and equity compel the conclusion that Morris Plains should be permitted to determine, on its own, how its remaining, limited developable land should be used.

DATED: December 4, 1980.

Respectfully submitted,

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By _____
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