ML - Morris County Fair Housing Council v. Boonton Twp (Denville / Randolph Twp)

6/6/86

Letter-brief on behalf of πs Morris County Fair Housing to address issue of prior notice for parties who may be indirectly affected by interlocutory restraints

p 13

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JUDGE STEPHEN SKILLMAN

Honorable Stephen Skillman
Superior Court of New Jersey
Middlesex County Court House
New Brunswick, N.J. 08903

Re: Morris County Fair Housing Council v. Boonton Township, Docket No. L-6001-78 P.W. (Denville and Randolph Townships)

Dear Judge Skillman:

I am writing on behalf of plaintiffs Morris County Fair Housing Council et al. in the above-entitled matter to address an issue raised by the Court in the course of oral argument on April 10, 1986. At that time the Court raised the question of whether prior notice must be given to parties who might indirectly be affected by any interlocutory restraints that the Court might impose as a condition upon transfer of these cases to the Council on Affordable Housing.

Plaintiffs submit that there is no legal obligation to provide prior notice to persons who may indirectly be affected by the restraints proposed by plaintiffs. Providing such notice would delay and complicate proceedings, would not materially assist the Court in its determination as to whether interlocutory

restraints are justified, and is not necessary to protect the constitutional rights of any third parties.

Nonetheless, plaintiffs submit that it would be appropriate for the Court to include in any order imposing conditions upon transfer both (1) a provision that notice be given by the defendant municipality by publication or other means to property owners and residents who may indirectly be affected by the interlocutory restraints, and (2) a streamlined procedure for consideration of individual claims that development of particular sites will not affect scarce resources in the municipality.

## I. THERE IS NO LEGAL OR CONSTITUTIONAL DUTY TO PROVIDE PRIOR NOTICE OR AN OPPORTUNITY TO BE HEARD TO PERSONS WHO MAY INDIRECTLY BE AFFECTED BY CONDITIONS IMPOSED BY THIS COURT.

Neither court rules, the laws governing zoning nor constitutional principles of procedural due process require prior notice or an opportunity to be heard to residents or property owners in Denville or Randolph in this proceeding. The federal courts have repeatedly and consistently held, under the federal rules governing joinder of parties, that where a litigant seeks the vindication of a public right, third parties who may be adversely affected by a decision favorable to plaintiffs need not be joined as parties or given special prior notice. _See_, _e.g_., _Kirkland v. New York State Department of Correctional Services_, 520 _F_.2d 420, 424 (2nd Civ. 1975) _cert_. denied 429 _U.S_. 823 (1976) (party seeking a determination that civil service

examination was racially discriminatory and an order invalidating results of examination is not obliged to join persons who had passed the examination and had thereby acquired rights under civil service laws); Natural Resources Council v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978) aff'd 609 F. 2d 553 (D.C. Cir. 1979) (party challenging legality of issuance by Department of the Interior of permits for coal prospecting on Federal land need not join 183 holders of permits whose legality is at issue). Although this issue has not been addressed by the courts of this State, the relevant state procedural rule, R. 4:28-1, is identical to the federal rule governing joinder. Pressler, Rules Governing the Courts of the State of New Jersey Comment to R. 4:28-1 at p. 800 (1986 ed.). Therefore, the above federal decisions provide persuasive authorty for a resolution of the question posed by the Court.

In the present case, plaintiffs seek to enforce public rights. They seek to compel Denville and Randolph Township to comply with their constitutional obligations under the Mt. Laurel decisions. In accordance with the procedures set forth in Hills Development Corp. v. Township of Bernards, Docket No. A-122-85 (N.J. Sup. Ct. Feb. 20, 1986), (hereinafter Hills Development Corp.), plaintiffs seek to "protect and assure the municipalit[ies'] future ability to comply with a Mount Laurel obligation" pending proceedings before the Council on Affordable Housing. Id., slip op. at 88. Consequently, the rule governing joinder of parties do not require prior notice of an opportunity

to be heard to third parties affected by judicial order imposing restraints.

Moreover, it is well-established as a matter of state law that in cases involving zoning challenges and the imposition of limitations upon connections to public sewer systems, prior notice and hearing are not required for persons who may be adversely affected but who do not already have legally vested rights. Thus, adjoining property owners who have objected to a proposed zoning variance need not be joined or given notice when denial of that variance is appealed, even though they may suffer injury as a result of the variance being granted. Peoples Trust Company of Bergen County v. Board of Adjustment of Borough of Hasbrough Heights, 60 N.J. Super. 569, 575 (App. Div. 1959), Moore Realty Co. v. Middlesex Properties, Inc., 182 N.J. Super. 659, 662 (Law Div. 1981).[1]

In the present case, plaintiffs seek no relief against parties with vested rights under the Municipal Land Use Law. To the contrary, plaintiffs seek only to bar municipal agencies temporarily from granting approvals for developments by owners of vacant property who have acquired no vested rights. The Supreme Court has recently noted that the interests of such property owners are to be given relatively little weight, since their path to securing the various governmental approvals necessary for

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1. On the other hand, a party who has acquired a vested right to develop on a site as a result of the granting of a variance, must be joined in any appeal challenging that variance. Stokes v. Township of Lawrence, 111 N.J. Super. 134, 138 (App. Div. 1970).

development is necessarily "rough, uneven, and unpredictable" and subject to "changes in both the statutory and decisional law." Hills Development Corp., slip op. at 76.

For similar reasons, when the Department of Environmental Protection imposes a ban on connection to public sanitary sewage systems, no prior notice or hearing is required for residents or property owners in the area served by the system. N.J.A.C. 2-9-13.1 et seq. The only notice to residents and property owners required by law is a periodic post-ban informational notice. N.J.A.C. 7:9-13.5 (a)(3)(iii).

Finally, constitutional principles of due process do not require prior notice or an opportunity to be heard under these circumstances. There are two distinct constitutional bases for this conclusion. First, principles of due process do not require prior notice or hearing to third parties who are only indirectly affected by the governmental action at issue, regardless of how severe the affect may be. Thus, in O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), the United States Supreme Court held that when the federal government forced a nursing home to shut down for failure to meet federal standards, indigent aged patients were not entitled to prior notice or hearing, even though they might suffer both personal harm and impairment of their contractual rights against the nursing home. The Court concluded that these patients were merely indirectly affected by governmental action directed at the nursing home and had no

rights under the due process clause. The Court stated the principle in the following terms:

> The simple distinction between governmental action that directly affects a citizen's legal rights or imposes a direct restraint on his liberty, and an action that is directed against a third party and affects the citizen only indirectly or incidentally, provides a sufficient answer to all of the cases on which the patients rely in this Court. 447 U.S. at 786.

The Court noted that this distinction was particularly significant when the target of the government action itself has a strong incentive to oppose the governmental action. 447 U.S. at 789 n. 22.

In the present case, plaintiffs seek action by this Court directed at municipal agencies in Denville and Randolph. Any impact upon property owners or residents of those municipalities is merely indirect and consequential. Moreover, the various municipal agencies have already demonstrated their intention to vigorously and aggressively oppose the imposition of restraints in this matter.

Second, in a long line of decisions, both the federal courts and the courts of this State have held that principles of due process do not require prior notice or hearing when public actions are being taken that affect numerous persons but which do not turn on facts peculiar to each individual. Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) (in setting assessment levels, taxing agency need not give

prior notice and right to be heard to individual property owners); Becker v. Conn, 518 F. Supp. 740, 747-49 (E.D. Ky. 1980) (when state welfare officials adopt statewide policies that result in reduction or termination of welfare benefits, individual recipients are not entitled to prior notice or hearing); Cunningham v. Department of Civil Service, 69 N.J. 13, 20-22 (1975) (agency need not provide prior notice and hearing where matter does not turn upon "fact finding involv[ing] a certain person or persons whose rights will be directly affected."); Heir v. Degnan, 82 N.J. 109, 119 (1980) (agency need not hold hearings where it adopts policies affecting entire industry).

In the present case, many residents of Denville and Randolph are potentially indirectly affected by the relief sought by plaintiffs. Whether that relief should be granted, however, does not turn upon facts peculiar to any of those individuals. Rather, as set forth in Hills Development Corp., slip op. at 86-88, relief must be granted if 1) there exist "scarce resources" which may be necessary for the provision of lower income housing, 2) it is necessary or desirable to preserve these resources to assure and preserve the ability of the municipality to satisfy a Mt. Laurel obligation, and 3) it is "appropriate" for the court to grant such relief. The facts relevant to these determinations are all municipality-wide in their dimensions. For example, the Supreme Court expressly declared that the question before the trial courts is not whether any particular site will be available for construction of lower income housing, but whether there will be sufficient developable land in the municipality as a whole.

Hills Development Corp., slip op. at 88. Facts peculiar to particular individual residents are thus not germane to any of these determinations.

Municipal agencies are the opposing parties in the best position to offer municipality-wide evidence relevant to these determinations. No individual resident has anything to add to this matter which cannot more appropriately be presented by the municipality or its various agencies. Individual residents suffer no deprivation of procedural due process by not being given notice of a proceeding in which they have no relevant evidence to offer. Hence, on this ground too, constitutional principles of due process do not require notice or hearing to individual residents of Denville or Randolph Township.[2]

In sum, there is no legal obligation to provide prior notice and the opportunity to be heard to individual residents of

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2. This case is analogous to Robinson v. Cahill, 62 N.J. 473 (1973). In that litigation, the Supreme Court, seeking to enforce the constitutional rights of children to a "thorough and efficient" education, ordered the reallocation of certain state aid among local school districts to the detriment of children in affluent school districts and the benefit of children in poorer school districts, 69 N.J. 133 (1975) and then enjoined altogether the operation of public schools in New Jersey pending action by the Legislature, 69 N.J. 449, 468 (1976), 70 N.J. 155 (1976). This last order went into effect and remained in effect until the Legislature enacted revenue-raising legislation to fund a constitutional state aid to public schools program. 70 N.J. 465 (1976). While the Supreme Court gave prior notice of its intention to all school districts and permitted them to be heard as amici, 69 N.J. at 143, it did not consider it necesry to give notice to public school students or their parents generally, or even to public school students in affluent school districts, even though the constitutional rights of those children were potentially affected by remedies ordered by the Court.

Denville or Randolph Township who may indirectly be affected by the restraints proposed by plaintiffs.

II. THE COURT MAY PROPERLY PROVIDE IN ITS ORDER BOTH FOR NOTICE TO PERSONS WHO MAY INDIRECTLY BE AFFECTED BY CONDITIONS IMPOSED BY THE COURT AND MAY ESTABLISH A STREAMLINED PROCEDURE FOR CONSIDERATION OF CLAIMS THAT DEVELOPMENT OF A PARTICULAR SITE WILL NOT AFFECT SCARCE RESOURCES.

As set forth in the preceding section, principles of due process do not require that prior notice or hearing be given to persons who may indirectly be affected by conditions imposed by the Court upon transfer of these cases to the Council on Affordable Housing. Nonetheless, plaintiffs submit that it would be appropriate for the Court to include in its order imposing interlocutory restraints provisions (1) for notice by the defendant municipality to persons who may indirectly be affected and (2) establishing a procedure for streamlined consideration of claims that development of a particular site will not affect scarce resources.

An appropriate model for the Court in this proceeding is the procedure utilized by the Department of Environmental Protection when it imposes a ban on sewer connections. This procedure is employed in circumstances where DEP imposes restraints that are analogous to those being sought by the plaintiffs here. After the DEP issues an order imposing a ban on sewer connections, it require the municipality to give notice to persons who are potentially affected. N.J.A.C. 7:9-13.9(a)(iii). It also

permits persons asserting certain very narrowly defined classes of claims for exemption to make such claims and, in appropriate circumstances, to have an evidentiary hearing. N.J.A.C. 7:9-13.9(a).

Plaintiffs suggest that implementation of this model in the present cases involves four steps:

1. Notice. The Court should, as part of its order imposing restraints, direct the municipal defendant to give notice of the restraints (a) by publication in daily and weekly newspapers of general circulation, (b) by mail to property-owners who have site plan or subdivision applications pending before the municipal planning board or board of adjustment, and (c) by mail to property-owners on the waiting list for sewer connections maintained by the municipal sewer ban committee.

2. Grounds for exemption. The court should spell out the permissable grounds for exemption. Exemptions should be available to those persons who can demonstrate that grant of a site plan or subdivision application (or connection to the sewer system or whatever action they wish to take that would otherwise be temporarily forbidden by the interlocutory restraints) would not affect the availability of the scarce resources which the order is designed to protect. Where approval of a site plan application or a subdivision is sought, this should be granted only if the property owner can demonstrate that the site is physically unsuitable for the development of multifamily housing, i.e., that all or almost all of the site

a) lies within the 100-year flood hazard area as mapped by the Federal Emergency Management Agency or the Department of Housing and Urban Development;

b) lies within wetlands mapped by the Federal Fish and Wildlife Service;

c) has its seasonal high water tables within a foot of the surface;

d) has bedrock within four feet of the surface;

e) lies on slopes in excess of fifteen percent.

These are standards that have been identified as appropriate by the expert for Denville, see Montney, Revised Vacant Land Analysis (June 1984); and are less restrictive than those identified as appropriate by the expert for Randolph, see A. Humbert, Deposition, January 31, 1984, pp. 32-35. They are also similar to the standards utilized by special master David Kinsey in his evaluation of sites in Denville. D. Kinsey, Master's Report: The Compliance of Denville Township, Morris County New Jersey with Mr. Laurel II (1985).

3. Master. The Court should appoint a special master to review claims by property owners that they should be exempt from some or all of the Court-imposed restraints. This is consistent with the provisions of Mt. Laurel II, 92 N.J. 158, 293 (1983), which favor the liberal use of masters to assist the court.

4. Procedure. The order should establish a simplified procedure for consideration of requests for exemption from the Court's order. The procedure should provide that any requests for exemption should be submitted to the master in writing together with any supporting expert reports or other documentation

and served on the parties. All parties should have an opportunity to respond in writing. The master should review the request and make a recommendation to the Court. The parties and the applicant should have an opportunity to object to the master's report. The Court should hold an evidentiary hearing only when the exhibits and documents submitted by the various parties and the applicant, together with the master's report, do not provide a sufficient basis for the Court to determine whether an exemption would be justified.

This type of procedure ensures that individuals who have legitimate claims that their particular properties should not be covered by the interlocutory restraints imposed by the Court have an opportunity to present those claims. It makes efficient use of judicial resources and does not needlessly burden the parties or the Court.[3] Finally, it does not inappropriately delay imposition of restraints which are essential to protect scarce resources that may be necessary for the ultimate satisfaction of municipal obligations under the <u>Mt. Laurel</u> doctrines.

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3. As narrowed in plaintiffs' supplemental memorandum, plaintiffs' proposed order would automatically exclude applicants for site plan approval who hold valid preliminary site plan or subdivision approval or whose sites are no more than two acres in area. It would also exlcude from restraints on sewer or water connetions parties whose connection is required for health or safety reasons. Thus the number of parties requesting exemption is likely to be relatively small.

## CONCLUSION

For the foregoing reasons, there is no legal or constitutional obligation to provide prior notice or hearing to persons who may indirectly be affected by conditions imposed by this Court upon transfer of this case to the Council on Affordable Housing. Plaintiffs submit, however, that it would be an appropriate for the Court to provide for subsequent notice to such parties and to establish a streamlined procedure for consideration of claims that particular properties should be exempted from some or all of the Court-imposed restraints on the grounds that doing so will not affect scarce resources in the municipality.

Respectfully submitted,

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