ML-Morris County Fair Housing Council v. Boonton Twp 9/25/84

Brief in support of notice of motion for consolidation and motion to intervene

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MORRIS COUNTY FAIR HOUSING COUNCIL, et als Plaintiffs, vs. BOONTON TOWNSHIP, et als Defendants.	SUPERIOR COURT OF N.J. LAW DIVISION MORRIS/MIDDLESEX COUNTY DOCKET NO. L 6001-78 P.W.
MT. HOPE MINING COMPANY, etc., et al Plaintiffs, vs. TOWNSHIP OF ROCKAWAY, etc., et al Defendants.	SUPERIOR COURT OF N.J. LAW DIVISION MORRIS/MIDDLESEX COUNTY DOCKET NO.

BRIEF IN SUPPORT OF NOTICE OF MOTION
FOR CONSOLIDATION AND MOTION TO INTERVENE

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PRELIMINARY STATEMENT

This is a Brief on behalf of Plaintiffs-Intervenors Mt. Hope Mining Company and Halecrest Company in support of their Motion to Consolidate their Prerogative Writ action instituted on September 21, 1984 with the "Fair Housing" case and also the Motion to Intervene by Plaintiffs in the aforesaid "Fair Housing" case. The "Fair Housing" case referred to is the action entitled "Morris County Fair Housing Council, et als v. Boonton Township.

FACTUAL STATEMENT

The Township of Rockaway is presently a Defendant in the aforesaid "Fair Housing" case together with certain other municipalities in Morris County. The thrust of that lawsuit is to require the Defendant Municipality to provide its "fair share" of low and moderate income housing units in the Township of Rockaway.

As a result of the various negotiations between the Public Advocate of the State of New Jersey (hereinafter "Public Advocate") and the Municipality a Settlement Agreement has been arrived at and a Zoning Amendment has been adopted pursuant to said Settlement Agreement. The Zoning Amendment establishes the PRD-1 and PRD-2 Zones with requirements calling for construction of a 20% set aside of low and moderate income housing units in said two zones. Plaintiffs are the owners of 181 acres in the PRD-1 Zone and 735 acres in the PRD-2 Zone. This Agreement (Exhibit A) and this Zoning Amendment (Exhibit B) are subject to the approval to this Court and a hearing is to be scheduled by this Court to determine whether or not said Agremeent and said Zoning Amendment should be approved. In the event that the Agreement (Exhibit A) and the Zoning Amendment (Exhibit B) are approved by this Court, then, the Township would be deemed to have met its "fair share" for such low and moderate income units through 1990 and this, in effect, would bar any suit by a landowner contending that the Municipality had not met its "fair share" of such type housing.

Plaintiffs instituted a Prerogative Writ action (Exhibit C) on September 21, 1984. In the First and Second Counts of this action, Plaintiffs contend that the Agreement (Exhibit A) and the Zoning Amendment (Exhibit B) should not be approved by this Court, that said Agreement (Exhibit A) and Zoning Amendment (Exhibit B), in fact, create "exclusionary" zoning in the Defendant Municipality, and do not provide a reasonable opportunity for the construction of the required low and moderate income housing units in the Defendant Municipality and, more specifically, do not provide for a reasonable opportunity for the construction of the required number of low and moderate income units on the premises of the Plaintiffs in the PRD-1 and PRD-2 Zones.

Plaintiffs also seek, in their Prerogative Writ action, a gross zoning density of at least 2.06 units per acre in the PRD-1 Zone and 3.74 units per acre in the PRD-2 Zone together with appropriate conditions so as to allow them to construct a substantial number of low and moderate income housing units on their premises. Finally, Plaintiffs also seek a "builders remedy" to allow them to construct the aforesaid housing on their premises.

It should also be noted that Plaintiffs do not object to the setting of 1135 units as being the "fair share" of the Defendant Municipality's obligation for low and moderate income units but, as noted previously, strongly contend that these units will not, in effect, be constructed and, specifically, contend that the densities on the Plaintiffs' premises in the PRD-1 and PRD-2 Zones are not sufficiently high enough so as to provide for the construction of the low and moderate income housing units.

LEGAL ARGUMENT

POINT I

BOTH ACTIONS SHOULD BE CONSOLIDATED SINCE THEY DEAL WITH COMMON QUESTIONS OF LAW AND FACT ARISING OUT OF THE SAME TRANSACTION.

At this stage in the "Fair Housing" case, this Court has to determine whether or not the proposed Agreement (Exhibit A) and the proposed Zoning Amendment (Exhibit B) do, in fact, provide a realistic opportunity for the construction of the 1135 low and moderate income housing units in the Defendant Municipality and, furthermore, whether or not the Agreement and the Zoning Amendment do, in fact, provide a realistic opportunity for the construction on the Plaintiffs' premises in the PRD-1 and PRD-2 Zones the required number of low and moderate income housing units. If not, then, said Agreement and said Zoning Amendment will not be approved by this Court on the grounds that the proposed Agreement and Zoning Amendment are "exclusionary" and the zoning in the Defendant Municipality as well as the zoning for Plaintiffs' premises must be redrawn so as to provide for the construction of the aforesaid 1135 housing units.

Plaintiffs' Prerogative Writ addresses itself, in the First and Second Counts, to these very issues. Plaintiffs contend that the Agreement and the Zoning Amendment should not be approved because the 1135 low and moderate income units will not be constructed in the Defendant Municipality and that lack of sufficient density will prevent construction of low and moderate income housing units on Plaintiffs' premises. Plaintiffs' contend that the units in question which are alleged to be constructed on their premises are "phantom units" and, therefore, while looking impressive on a chart or bar graph as statistics, said units will never be constructed. Plaintiffs also seek the right to have their premises rezoned at the appropriate densities so as to allow them to build low and moderate income housing units in the PRD-1 and PRD-2 Zones.

It should be noted that Plaintiffs neither attack the validity of the "fair share" number of 1135 units nor attack the designation of their premises in the PRD-1 and PRD-2 Zones as being properties on which low and moderate income housing units must be set aside and constructed, but, again, ask the Court to give them a sufficient density so as to realistically provide for the construction of the low and moderate income housing units in question.

Under the provisions of Rule 4:38-1(a), actions involving "a common question of law or fact arising out of the same transaction or series of transactions. . . ." may be consolidated. It is submitted that a review of both the "Fair Share" action and the Plaintiffs' action clearly meet the requirements of Rule 4:38 that there be a "common question of low or fact arising out of the same transaction. . . ." Both actions deal with Plaintiffs' premises in Rockaway Township and both actions deal with whether or not the proposed zoning in the Township as a whole and Plaintiffs' premises specifically will provide the required low and moderate income housing units. Both actions deal with the same issue -- whether or not the proposed Agreement and proposed Zoning Amendment meet the requirements of the Mt. Laurel cases.

Therefore, it is respectfully requested that the two actions be consolidated.

POINT II

THE EFFECT OF THE PROPOSED AGREEMENT AND ZONING AMENDMENT ON PLAINTIFFS" PREMISES IN THE PRD-1 AND PRD-2 ZONES IS SO FINAL AND DISPOSITIVE SO AS TO ALLOW PLAINTIFFS TO INTERVENE.

As noted previously, this Court will shortly hold a hearing which will either approve or reject the proposed PRD-1 and PRD-2 Zones and the remaining Mt. Laurel zones in the Municipality. Plaintiffs own a substantial amount of property in these zones namely, 181 acres in the PRD-1 Zone and 735 acres in the PRD-2 Zone.

Under the provisions of Rule 4:33-1, Plaintiffs should be allowed to intervene so that their interests in said premises may be adequately protected. It is obvious that the effect of the proposed zoning on Plaintiffs' premises in the PRD-1 and PRD-2 Zones are significant and, keeping in mind the 1990 bar on lawsuits, is extremely significant and vital to Plaintiffs as landowners.

Reviewing the parties in the present action, there is no party who has an interest which is similar to that of the Plaintiffs nor would be likely to protect and/or foster the interest of Plaintiffs as landowners in the PRD-1 and PRD-2 Zones. The Defendant Municipality given the history of its litigation with the Plaintiffs, and, given the very nature of it being a Municipality as contrasted with the Plaintiffs as landowners, cannot be deemed to be a party who will protect the landowners' interest or adequately represent the landowners' itnerest. Similarly, most respectfully, the Public Advocate does not have the same interests as that of the Plaintiffs as property owners.

Zoning which may well be attractive and/or beneficial to the interest of the Municipality as it perceives it as well as the interest of the Public Advocate as it perceives it could very well be completely antagonistic to that of Plaintiffs as landowners. Without a party status there is a serious question as to whether or not Plaintiffs could appeal and certainly their decision to appeal would not be binding upon either the Defendant Municipality or the Public Advocate if Plaintiffs are not allowed

to intervene.

The remaining criteria of Rule 4:33-1 are satisfied in that Plaintiffs own a substantial amount of property which is located in the PRD-1 and PRD-2 Zones and as of the filing of this Motion, a hearing date has not yet been specifically set although a tentative hearing date of October 25, 1984 has been mentioned. And, even with the October 25, 1984 hearing date, sufficient time would be had for all parties in the event that the Motion to intervene is granted.

Therefore, Plaintiffs have shown that:

(1) they have an interest in the property which is the subject of the lawsuit;

(2) their ownership interest will be effected by the approval or rejection of the zoning in question;

(3) the existing parties do not adequately represent the interest of the Plaintiffs; and

(4) the application is timely.

Given the satisfaction of these criteria of Rule 4:33-1, the Plaintiffs' application for intervention as a matter of right should be granted. Vicendes v. J-Fad, Inc., 160 N.J. Super. 373, 378-379 (Ch. Div. 1978).

Finally, if the Court does not feel that this is a proper application under the provisions of Rule 4:33-1, then, it is respectfully submitted that the Plaintiffs should be allowed to intervene under the provisions of Rule 4:33-2.

CONCLUSION

Based upon all of the foregoing reasons, it is respectfully submitted that the relief sought by this Motion should be granted.

Respectfully Submitted,

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