AD - Chiswick v. Bedminster

Jan. 24, 1984

Letter summarizing the Plaintiffs' response to ~~the~~ George Raymond's 1/10/84 report

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State of New Jersey

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January 24, 1984

Honorable Eugene D. Serpentelli
Court House
CN 2191
Toms River, New Jersey 08754

Re: Ceiswick v. Bedminster

~~Dear Judge Serpentelli:~~

This letter will summarize the plaintiffs' response to the January 10, 1984 report of George Raymond. The master's report discussed the proposed inclusionary zoning ordinance of Bedminster, fair share and phasing. Before commenting upon the substance of the report, plaintiffs should discuss the context in which these comments are being submitted. A court appointed master, George Raymond, was appointed in early 1980 to work with the parties to rezone Bedminster Township. At the meetings with the master, plaintiffs did not challenge the amount of land which Bedminster proposed to set aside for high density housing. Plaintiffs sought rather to ensure that Bedminister, in rezoning these lands, would include a requirement that a percentage of the units be made available for lower income units. The master in a May 27, 1980 letter to the court recommended that Bedminster require a developer who could not obtain Federal subsidies to provide a percentage of units that were affordable to low income persons, and also establish resale controls to keep them affordable. On June 27, 1980, the trial court held that the Supreme Court had not required municipalities to take any affirmative steps beyond least cost zoning. Based on this ruling, the Township rejected the master's advice and adopted a zoning ordianance which imposed no inclusionary requirements upon a developer in the event subsidies were unavailable.

Plaintiffs on May 1, 1981, filed a limited notice of appeal. Choosing not to challenge either fair share or the amount of land rezoned, they confined their appeal to two issues: the granting of a developer's remedy to Alan Deane without a low and moderate income housing component and the failure of the Township to make realistically possible the construction of lower income housing on the sites which Bedminster established for "least cost" housing. During the pendency of the Bedminster appeal, both before and after the Mt. Laurel II decision, the plaintiffs informed Bedminster that they would dismiss the appeal if sufficient affirmative steps were taken to ensure the construction of lower income housing on the sites that had been rezoned in 1980.

It is with this background that plaintiffs reviewed the master's report. Much of their review focuses upon the terms of the proposed inclusionary

zoning amendments since these amendments go to the heart of the plaintiffs' appeal. Plaintiffs acknowledge that the revised ordinance is a substantial improvement over the ordinance which is now in effect. In this letter to you and in the December 19 letter to the master, plaintiffs have, however, suggested additional revisions that should be made in the ordinance.

Plaintiffs have reviewed the master's proposed fair share and phasing recommendation. In view of the limited nature of plaintiffs' appeal, they do not propose to challenge either number. Plaintiffs have, nevertheless, reviewed with concern the master's conclusions about sewer availability. According to the master's own findings, six of the eleven sites which Bedminster chose to rezone for high density housing are unavailable for construction until after 1990 because of sewer constraints. Plaintiffs submit that the sites which Bedminster itself choose to rezone are not realistically available under these circumstances unless Bedminster upgrades its sewer system. Accordingly, plaintiffs recommend that the master should be asked to supplement his report to determine what steps need to be taken to upgrade the sewer system and to propose a timetable for such updating. Compliance with such a timetable could be a condition of dismissal of the litigation or of "repose."

I. INCLUSIONARY ZONING

Plaintiffs believe that the proposed inclusionary zoning ordinance of Bedminster is a substantial improvement, but submit that the modifications suggested in our December 19, 1983 letter are necessary. The report of George Raymond, the court-appointed master, recommends the adoption of most of these suggestions. Plaintiffs will not repeat here the contents of the December 19 letter, but will elaborate on several suggestions that were either not approved or were modified by the master.

(A) Flexibility

An inclusionary ordinance must be flexible enough to permit the construction of an inclusionary development even in the light of unforeseen circumstances. The density and conditions offered in an inclusionary ordinance may simply not be sufficient to permit the construction of the inclusionary development, particularly if the planning board imposes additional conditions or restrictions beyond those in the ordinance. In footnote 37 of the Mt. Laurel II decision the Supreme Court recognized that if a builder's remedy is not profitable, then the remedy is meaningless. Likewise, if an inclusionary ordinance does not permit the profitable construction of an inclusionary development, the ordinance is meaningless.

George Raymond and I discussed the possibility of having the Planning Board or municipality draw up a list of five housing experts. A developer who sought additional relief could pay to have one of these experts review his application to determine if additional assistance were necessary. If the special expert so recommended, the Planning Board or the Township Committee would be authorized to increase densities, reduce cost generating features, grant tax abatements or waive fees, where necessary. As a last resort, if the special expert concluded that even with all of this assistance

it was not feasible for the developer to meet the literal terms of the ordinance concerning low income housing, the expert could make recommendations permitting the low income units to be raised in price to the extent absolutely necessary (e.g. made affordable to persons at 60% of median rather than 50% or made affordable with an expenditure of 28% of income rather than 25%). Such options would be permissible only after the municipality had implemented all the other recommendations.

Mr. Raymond discusses and recommends adoption of this concept in his report. I do not think, however, that we have enough experts in the state to permit three special experts per project as Mr. Raymond's report recommends, p. 47. Further, while I agree with Mr. Raymond that it is not feasible to force the municipality to accept the experts' recommendations, I think the municipality should give reasons for rejecting any of them. These details aside, it is imperative that such a provision for outside review be in the ordinance, as the master recommends.

(B) Transfer of Development Rights

We also discussed the option of transfer of development rights. Developer one could enter into an agreement whereby he would provide 40% of his units as low and moderate so that the developer who compensated him need not provide any, so long as twenty percent of the combined developments was low and moderate income. This transfer option has been widely used in California. Mr. Raymond rejects this suggestion for two reasons: "first, it would tend to result in the segregation of the affordable units rather than being provided as an integral part of market rate developments .... and second, the difficulty of phasing in the construction of the required affordable units with that of the market rate units...." p. 48

The administrative difficulties of phasing could be resolved by a developer who sought to take advantage of the option. On the subject of segregation, it should be recognized that Bedminster is not a Newark or a Trenton. While plaintiffs would strenuously oppose any attempt to transfer lower income housing to a inner-city ghetto, they do not believe that a financial arrangement whereby, for example, the Hills Development would have contained 40% lower income housing will result at all in "the segregation of affordable units." On the other hand, such a voluntary transfer option might facilitate the construction of a municipality's fair share of lower income housing.

(C) An inclusionary developer should be given maximum flexibility to produce lower income housing. It should be his choice whether to provide the units through garden apartments, townhouses, or single-wide or double-wide mobile homes, and at densities recommended by the Sternlieb Report and the D.C.A. Affordable Housing Handbook. The ordinance does not give this flexibility or this density in all zones. See December 19, 1983 letter, paragraph 3.

The proposed Bedminster zoning ordinance is a major improvement over Bedminster's previous ordinance. Nevertheless, to be fully in compliance with Mt. Laurel II principles, the modifications suggested in our December 19 letter, most of which were recommended by the master, should be adopted.

II. FAIR SHARE AND PHASING

The master accepted an eight county region and within that region concluded that Bedminster's fair share number is 908. More importantly, the master suggested that Bedminster should be permitted to phase in its fair share over a period of years to avoid an excessive rate of growth. The master declared that providing 506-665 units of Mt. Laurel II-type housing in Bedminster within six years "would definitely cause it to lose that negative quality-exclusionary zoning-which the Mt. Laurel II decision intends to eradicate." (p. 57). The concept of phasing was recognized in Mt. Laurel II, where the court indicated that it would not require the construction of "lower income housing in such quantity as would radically transform the municipality overnight." Mt. Laurel II at 219. To prevent this, the Court gave the trial courts discretion, which should be exercised sparingly, to permit the lower income units to be phased in.*

The master recommended phasing in this case, pointing out that Bedminster had only 938 housing units in 1980. The following chart shows what would occur, if various fair share plans were fully implemented between now and 1990 in developments with 20%** low and moderate income housing.

Fair Share Number	Total New Housing Units (20% Inclusionary Developments)	Percentage Increase in Housing Units
506	2,530	270%
666-771(Bedminster)	3,330-3,750	355-394%
944 (Raymond)	4,720	503%
1179 (Abeles)	5,835	622%
1360 (Dobbs)	6,800	725%

These percentage increases may become more relevant when contrasted with what happened in the past two decades. From 1970 to 1980 the largest percentage increases in the state in housing units among New Jersey municipalities were:

1. Plainsboro 513%
2. Manchester Tp. 335%
3. Berkeley Tp. 198%
4. Vorhees Tp. 188%

The decade from 1970 to 1980 was a decade of exclusion and limited growth. On the other hand, the decade from 1960 to 1970 involved some of the most productive years for new construction in New Jersey. In that decade, the fastest growing municipalities were the following:

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* Phasing defers rather than reduces a fair share obligation.

** In the absence of subsidies, it is not realistic to require a developer to provide more than 20% low and moderate income housing.

1. Little Egg Harbor Tp. 525%
2. East Windsor 468%
3. Hi-Nella Borough 295%
4. Manchester 286%
5. Willingboro 218%
6. North Hanover 206%*

There are obvious limitations on the suitability or use of percentage increases. Obviously, a municipality with a low amount of housing units can very easily have a high percentage of growth. Likewise, it is possible that the reason a municipality has a small number of units is because of its prior exclusionary practices. Plaintiffs are also aware of the growth in employment in Bedminster from 1970 to 1980. Recognizing these limitations, the presence of a very high percentage increase in housing units can nevertheless be one indicator of an "overnight radical transformation," Mt. Laurel II at 219. It should be noted that if the phasing plan proposed by the master were fully implemented by 1990, Bedminster would have a rate of growth which was exceeded by only two municipalities in the state in either of the last two decades.

As discussed in the introduction of this letter, the plaintiffs made a deliberate choice not to challenge Bedminster on fair share grounds, when they filed their notice of appeal from Judge Leahy's decision. Plaintiffs' position was that if Bedminster took all feasible steps towards assuring that inclusionary developments with a lower income housing component could be built on the sites which were rezoned as a result of the prior proceedings, then plaintiffs would dismiss their appeal. Plaintiffs took this position both during the pendency of the appeal and after the Mt. Laurel II decision was rendered. Under these circumstances, plaintiffs do not plan to challenge either the master's fair share number or his phasing recommendation.

III. SEWER CAPACITY AND REALISTIC OPPORTUNITY

Whether the issue in this case is viewed as involving the validity of the master's phasing analysis, or the more limited question of Bedminster's affirmative duty to make realistic the provision of lower income housing on the sites which it chose for this purpose, several unanswered questions about sewer capacity remain. The master adopts a phasing number of 506** and concluded that the follwing number of units could be developed:

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* Source: United States Census

** Although Mr. Raymond establishes a phasing limit for six years of between 506 and 665, plantiffs will assume that the phasing number is 506. The 665 is based upon the assumption that one developer will use the entire site E for senior citizen subsidized housing. There is no indication that the developer has such an intention or that subsidies can be obtained. In 1983, 3 developers in the state out of 40 applicants received Section 202 subsidies.

Available for Immediate Development	466
Probably Available Within Three Years	40
Other Affordable Sites (After 1990)	255
	761*

The fair share goal which Mr. Raymond concludes can be phased in--506--is achievable only if all five sites (I,J,K,L. and E), which he feels are immediately available or available within three years, are constructed at the maximum possible densities. According to the master, the other high density sites will not be available until after 1990 because of sewer constraints.

The Supreme Court in Mt. Laurel II discussed the zoning ordinance of Mt. Laurel Township which had provided lower income zones consisting of three tracts of land owned entirely by three individuals. The court noted:

> (T)he individuals may, for many different reasons, simply not desire to build lower income housing. They may not want to build any housing at all, they may want to use the land for industry for business, or just leave it vacant. Mt. Laurel II, at 260.

It is not likely that Bedminster can meet even its phased-down fair share under these circumstances because it is simply not likely that all five developers will construct inclusionary developments at the maximum permitted densities within the next six years. Yet, unless this happens, even the fair share of 506 will not be met. To prevent a fair share goal from being frustrated in this manner by a developer's indifference or inaction, Mt. Laurel II and Madison stress overzoning for lower income housing as a means to ensure the realistic, rather than theoretical, opportunity for lower income housing. If a municipality zones more land for lower income housing than it needs to meet its fair share, then there is a margin of error to cover the land that remains vacant.

Bedminster has engaged in some overzoning, but the other sites have sewer problems, as both Mr. Raymond (p. 53-4) and Dobbs recognize. The master notes that an additional 200 lower income units could be produced on lands now zoned for high density if the sewer line were expanded to these sites. (p. 53-4) There is no discussion in the master's report as to what expansion is needed or when it will be provided.

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* Acceptance of the phasing number is premised upon the assumption that developers cannot provide more than 20% lower income housing in a development. Should a developer obtain subsidies for a 100% lower income development, those units in excess of 20% low income should not be considered part a phasing ceiling component.

Were these sites sewered for construction, it is possible that sufficient overzoning would exist to provide a realistic opportunity for 500 units. The unavoidable fact, however, is that without a satisfactory plan for disposition of sanitary waste a development cannot be approved. Field v. Franklin Tp., 190 N.J. Super. 326 (App. Div. 1983). Without a satisfactory sewerage plan, a inclusionary zoning ordinance is meaningless. Indeed, without a sanitary waste option - sewer, package treatment, etc. - the Township could rezone all lands in the municipality at 20 to the acre and no lower income housing would be produced. Resolution of unanswered questions about sewer capacity then is crucial to any determination of the adequacy of a fair share plan.

Even though plaintiffs are not challenging fair share, resolution of the sewer issue from their perspective is also essential. They are willing to end their litigation if Bedminster does everything possible to facilitate lower income housing on the sites which Bedminster, in conjunction with the master, itself chose for least cost and/or lower income housing. Plaintiffs cannot, however, accept Bedminster's rezoning of these lands as satisfactory if, because of lack of sewer capacity, the result is that six out of the eleven sites which it chose are undevelopable until after 1990. (See master's Report, p. 55).

In light of these factors, plaintiffs submit that the master should be asked to supplement his report to the Court. He should personally determine what excess sewer capacity presently exists; what is being done to resolve the infiltration problems (see January 8, 1984, Cappola letter) and the likelihood of success); the probability that A.T.&T will defer or relinquish its allocated capacity; the possibility of a written commitment or incorporation of such a commitment into a court order; and specific other steps that can be taken to upgrade the sewer capacity, as well as a timetable for doing this. In this context, the master should consider the January 13th letter of Dobbs' water resources expert, Robert Hordon. The Hordon letter suggests that even some of the sites which the master determined to be immediately available for development may in fact not be available because of sewer constraints. In view of this uncertainty, the master's supplemental report should make specific recommendations about what, if anything, needs to be done by the municipal utility authority to make realistic the opportunity for lower income housing on these eleven sites in the near future.

Plaintiffs ask Bedminster to take whatever affirmative steps are necessary to ensure that the sites which Bedminster chose produce lower income housing. Bedminster seeks six year "repose" which would result from a declaration that it has made a realistic opportunity for lower income housing. If the court accepts the master's 506 number, Bedminster's obligation would be to make realistically possible 244 units beyond those 260 units provided by Alan Deane. It is possible that sufficient overzoning to provide 244 units would exist under the present zoning, if an acceptable sewer expansion plan were submitted.

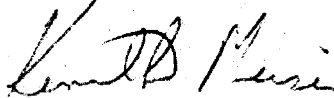
Nothing in the Mt. Laurel II decision prohibits this court from conditioning a six year repose upon acceptance of, and compliance with, a plan and timetable for resolving sewer capacity issues. Indeed, in the Mt. Laurel II case itself, after remand, the trial court ordered the Mt. Laurel

Township M.U.A. joined as a defendant so that it was bound by any court orders which were entered. Such action could be taken here.

In sum, this Court should request the master to provide a supplemental report on the subject of sewer capacity. Once the Court receives the supplemental report, all parties and the Court will be in a better position to evaluate whether this action can be dismissed, whether repose is appropriate, and, if so, whether any conditions for repose are necessary.

Thank you for your consideration of this letter.

Respectfully yours,



KENNETH E. MEISER
Deputy Director

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