RULS-AD-1976-20

4/22/1976

- Brief of P in opposition to Ds Motion to dismiss
  - attached is letter from judge to parties re: prerogative writ

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-SOMERSET COUNTY
DOCKET NO. L-25645-75 P.W.

THE ALLAN-DEANE CORPORATION, a Delaware corporation, qualified to do business in the State of New Jersey,	)	
Plaintiff,	)	Civil Action
vs.	)	
THE TOWNSHIP OF BERNARDS, et al.,	)	
Defendants.	)	

BRIEF OF PLAINTIFF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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POINT I

PLAINTIFF'S COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants allege that some of Plaintiff's prayers for relief are extraordinary and go beyond the scope and type of relief asked for in the traditional exclusionary zoning case. For this reason, Defendants argue that these prayers for relief should be stricken.

It would appear that the relief which Plaintiff seeks in this portion of its Motion is a common law demurrer or its later equivalent, the motion to strike, provided for in Rule 4:6-5 of the Rules governing New Jersey Courts.

It is elementary law that the prayer or demand for relief is no part of the Plaintiff's cause of action. The sufficiency of the Complaint depends not upon the prayer for relief, but upon the facts pleaded; if those facts entitle the Plaintiff to any relief, either legal or equitable, although they may not entitle him to all the relief prayed for, the Complaint is not subject to demurrer or a motion to strike. On the other hand, while the prayer cannot aid in making out a case otherwise defectively stated in the Complaint, it may serve to show what kind of case the Plaintiff supposes he has,

and the kind of relief to which he conceives himself to be entitled, and indicate the object which he seeks to accomplish. See 61 Am. Jur. 2d §122; Prayer for Relief; Effect on Sufficiency of Complaint, and cases cited therein.

It is hornbook law, therefore, that a demurrer or motion to strike will not lie against a mere prayer for relief. See 61 Am. Jur. 2d §252; Demurrers; Grounds; Prayer for Relief. If the facts pleaded entitle the Plaintiff to any relief, either legal or equitable, the objection that the prayer has not demanded the correct relief may not be raised either on demurrer or on a motion to strike. See R. 4:6-5 and Second National Bank v. Dyer, 121 Conn. 263, 184 A. 386, in which the Court stated that on a motion addressed solely to the substance of the pleadings that it would not inquire as to whether the specific relief sought was the proper method of working out the rights of the parties.

Although the rule of law stated above disposes of this portion of Plaintiff's Motion, Defendants would like to take this opportunity to point out that the relief prayed for is not as extraordinary as Defendants suggest. In the case of Sinclair Pipe Line Co. v. Village of Richton Park, 167 N.E. 2d 406 (1960), the Illinois Supreme Court determined that a landowner who had success-

fully invalidated a zoning ordinance might also be permitted to use his land for the purpose he sought, provided the Court found this use to be reasonable. That Court was concerned that the mere invalidation of the ordinance would lead to prolonged litigation if the municipality rezoned in such a way as to still prohibit the use Plaintiff sought. This same concern was expressed by the Pennsylvania Supreme Court in Casey v. Zoning Board of Warwick Tp., 328 A. 2d 464 (Pa. S. Ct. 1974). The Court in that case said,

> The municipality could penalize the successful challenger by enacting an amendatory ordinance designed to cure the constitutional infirmity, but also designed to zone around the challenger. Faced with such an obstacle to relief, few would undertake the time and expense necessary to have a zoning ordinance declared unconstitutional. ... This Court, in response to a petition for enforecement of our order in the Girsh Appeal [263 A. 2d 395 (1970)] directed the Township's Building Inspector to issue such building permit upon compliance by the petitioners with the Township Building Code. In so doing, we recognized that an applicant, successful in having a zoning ordinance declared unconstitutional, should not be frustrated in his quest for relief by a retributory township. ... To forsake a challenger's reasonable development plans after all the time, effort and capital invested in such a challenge is grossly inequitable. (at 468-469)

The Court in Casey held that, in such a case, the Court should order a building permit to issue provided

the developer complies with all other applicable codes (subdivision, building, etc.).

Last July, the Pennsylvania Supreme Court decided Township of Williston v. Chesterdale Farms, 341 A. 2d 466 (1975). Relying largely on Mount Laurel, the Court held that although the Township had zoned for apartments, it had not provided "for a fair share of the township acreages for apartment construction." Accordingly, the Court directed that "zoning approval for appellee's tract of land be granted and that a building permit be issued given appellee's compliance with the administrative requirements of the zoning ordinance and other reasonable controls, including building, subdivision and sewage regulations which are consistent with this opinion."

Federal Courts in Crow v. Brown, 332 F. Supp. 382, 395 (N.D. Ga. 1971), aff'd 457 F. 2d 788 (5th Cir. 1972); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), aff'd 425 F. 2d 1037 (10th Cir. 1970); and Kennedy Park Homes Assn. v. City of Lackawanna, 318 F. Supp. 669 (W.D. N.Y.), aff'd 436 F. 2d 108 (2nd Cir. 1970) all ordered building permits to issue in cases involving racial discrimination.

The rationale underlying the Illinois and Pennsylvania decisions is persuasive. Thus, the Court might consider adopting the approach of Casey and Chesterdale Farms. There is, however, a countervailing consideration.

A builder should not be permitted to construct housing on land that is totally unsuitable simply because he was the victorious plaintiff in an exclusionary zoning case. The New Jersey Department of the Public Advocate has advocated before our Supreme Court in Oakwood at Madison, Inc. v. The Township of Madison, Supreme Court Docket No. A-52-74, in their amicus brief that a remedy could be framed which would satisfy both this concern and the concern expressed in Casey about prolonged litigation and municipal retribution. The trial Court should order, they propose, that the municipality, in amending its Zoning Ordinance, rezone Plaintiff's land to permit the type of unit sought unless the municipality can carry a heavy burden of proving that there are special circumstances why it should not be so zoned.

This approach, they argue, would avoid the situation present in the instant case where the claims of the Plaintiff-Developer have gone unresolved for years and with no guarantee of the ability to build despite years of successful litigation. It would also avoid the result of the early Pennsylvania cases and that in both Madison and Pascack Ass'n. v. Tp. of Washington, 131 N.J. Super 195 (Law Div. 1974), where developers' "victories" have been pyrrhic; that is, where the result is that someone else's land (a non-party) gets rezoned and the Plaintiff-Developer gets nothing.

Thus, Plaintiff's prayer that its property be rezoned and that the Court require building permits to issue, permitting it to construct multi-family housing at reasonable densities on its property, is not unusual or extraordinary relief. It may, in fact, be required in New Jersey by the Supreme Court if the Department of the Public Advocate's position in the Madison case is adopted by the Court.

POINT II

PLAINTIFF HAS THE STANDING TO ASSERT A CLAIM THAT THE BERNARDS TOWNSHIP ORDINANCE IS EXCLUSIONARY.

For the purpose of this Motion, all facts alleged in the Complaint should be taken as true. Plaintiff has alleged, inter alia:

1. That it is the owner of 1,071 acres of land in Bernards Township (see Complaint, paragraph 17);

2. that Bernards Township has failed to meet its "fair share" of the regional housing need and that its entire system of land use regulations unnecessarily increases housing costs and excludes persons in all income categories of less than $30,000 per year (see Complaint, paragraphs 26(e), 30, 31, 32, 33);

3. there is a critical housing need in the Bernards Township housing region (see Complaint, paragraph 35) and Allan-Deane's proposals for the development of its property would substantially relieve the existing housing shortage

and would enable persons who cannot presently afford to buy or rent in Bernards to live there (see Complaint, paragraph 27);

4. Bernards has failed to zone intelligently and in the public interest and the Township's exclusionary land use policies have a substantial external impact contrary to the general welfare (see Complaint, paragraph 43);

5. Allan-Deane can construct housing, because of the size of its land holdings and economies of scale, at a price affordable to all categories of people including those of low and moderate income but for Bernards' exclusionary land use regulations (see Complaint, paragraph 28); and

6. Allan-Deane is prepared to work with Bernards or some other sponsoring agency to assure that a substantial portion of the multi-family homes constructed on the site are elegible for Federal or State subsidies in order to help provide for the regional housing

needs at all income levels (see Complaint, paragraph 29).

The issue before the Court on this Motion is, thus, whether a developer and landowner who proposes to build housing for persons in a range of income levels, including persons of low and moderate income, all of whom cannot presently afford to live in the municipality, has standing to attack existing zoning as exclusionary.

A judicially developed procedural rule, standing finds its origins in Article III of the Federal Constitution, which limits Federal judicial power to "cases" and "controversies." As Defendants point out, the New Jersey Constitution, unlike its Federal counterpart, contains no express language which limits jurisdiction in the State Courts to actual cases or controversies.

The issue of standing in New Jersey must, therefore, turn on the policies of this State's Court system with respect to whom and on what issues litigants may have access to our Courts.

The most thorough treatment in an Opinion handed down since Mt. Laurel of the standing issue and its application to exclusionary zoning litigation, known to counsel, is Judge Arthur S. Meredith's treatment of this question in the unreported case of Taberna Corporation v. Township of Montgomery, Docket No. L-699-75 P.W., a copy of which is

attached. In that case, Judge Meredith said:

> The first legal question which must be addressed by the Court concerns the standing of the plaintiffs. The defendants argue that the plantiffs cannot challenge the zoning ordinance on the grounds that it excludes low and moderate income persons when their proposed townhouse development will not provide for the needs of these aggrieved groups. The defendants maintain that the plaintiffs have no real interest in the welfare of low and moderate income people. In addition, the defendants raise the recent United States Supreme Court case of Warth v. Seldin, ____, U.S. ____, 95 S. Ct., 2197 (1975). In that case, a group of organizations and individuals challenged the zoning ordinance of Penfield, New York, on the grounds that it excluded persons of low and moderate income from living in the town. In affirming the dismissal of the complaint for lack of standing, the Court said:
>
> > 'The rules of standing, whether as aspects of the Art. III case or controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers *** none of the petitioners here has met this threshold requirement * * *' ____ U.S. at ____, 95 S.Ct. at 2215.
>
> The New Jersey courts have traditionally taken a much more liberal approach to standing than have the

approach to standing than have the federal courts. Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 101 (1971). Part of the reason for this might be that the New Jersey Constitution, unlike the Federal Constitution, has no express language which limits the exercise of judicial power to actual cases and controversies. The fundamentals of standing in this State are appropriately set out in the following language:

> 'Without ever becoming enmeshed in the federal complexities, we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and ral adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughOut our law we have been sweepingly rejecting procedural frustrations in favor of 'just and expeditious determinations on the ultimate merits'.' Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., supra, 58 N.J. at 107-108.

Although the Court can sympathize with the apparent contradiction in allowing the plaintiffs to assert the welfare of low and moderate income groups in order to achieve standing, the Court finds that the plaintiffs' ownership of land in an area affected by zoning is sufficient to create standing to contest the validity of the zoning ordinance. Cresskill v. Dumont, 15 N.J. 238 (1954). Specifically, the Court holds that a land owner in a municipality has standing to challenge exclusionary zoning since his own welfare is affected by a restrictive land use program. Not

> only are those who are excluded injured by exclusionary zoning, but also those landowners presently in the municipality suffer from the isolation and segregation that develop from restrictive zoning. Therefore, the plaintiff landowners and developer have "a sufficient stake" to give rise to standing and they have thereby demonstrated that they are "proper parties" to obtain the relief of the Court.

In the Taberna case the plaintiff-developers had testified that they proposed to build townhouses which would sell for at least $55,000.00. Under the rule of thumb approach employed by Judge Furman in Oakwood at Madison v. Township of Madison, 128 N.J. Super 438 (1974) and by Judge Leahy in the Allan-Deane vs. Bedminster case, the Taberna housing was not affordable to persons making less than $27,500.00 per year.[1] Thus, the Taberna Plaintiffs who did not intend to build for the lower income spectrums or to build subsidized housing had a weaker standing argument than Allan-Deane.

Judge Meredith's position on the standing issue was adopted by Judge Charles M. Egan, Jr. in the case of Phil Realty Co. v. Township of Mine Hill, Docket No. L-

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[1] In Oakwood at Madison vs. Township of Madison, 128 N.J. Super 438 (1974), hereinafter referred to as Madison Two, at page 445, the planners testified and the Court found that "A family can afford to buy a dwelling at twice its annual income or pay rent of about one-fourth annual income." In Allan Deane Cororation, et al. vs. the Township of Bedminster, et al., Docket No. L-36896-70 P.W. and L-28061-71 P.W., Judge Leahy also assumed, holding Bedminster's Ordinance invalid, "that a family can afford a house costing twice the family's income."

39298-74 P.W., in his opinion on January 12, 1976. Thus, although no exclusionary zoning case on this issue has reached the Appellate Division, the trial Courts which have considered this issue have unanimously held that developers or property owners have standing to raise Mount Laurel issues.

Traditionally, Courts have examined the intent behind the rule or statute being evoked in order to determine whether a specific category or class of plaintiffs should be given legal standing to raise the issue. Such an examination was conducted by the United States Supreme Court in the case of Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), in order to determine whether white residents of a San Francisco apartment complex should have standing under a new Civil Rights Act to attack discriminatory housing practices which "deprived the plaintiffs of the right to live in a racially integrated community." The Plaintiffs had alleged (409 U.S. at 208) that (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; and (3) they had suffered embarrassment and economic damage in social, business and professional activities from being "stigmatized" as residents of a "white ghetto." In that case, the Court determined

that the Plaintiffs should have standing to "give vitality" to the legislative policy.

Justice Douglas said in Trafficante, at 409 U.S. 211,

> ...The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'The whole community,' 114 Cong. Rec. 2706, and as Senator Mondale who drafted §810(a) said, the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.' 114 Cong. Rec. 3422.

The executives of Allan-Deane and its parent corporation, Johns-Manville, make the same allegations as the Plaintiffs in Trafficante. Bernards' exclusionary land use policies deprive it of the opportunity of developing a balanced community and they have no desire to be "stigmatized" and to suffer embarrassment and economic damage in social, business, and professional activities as the developers of another wealthy "white ghetto."

It is our contention that in an exclusionary zoning case, the only standing requirement is that the party which comes before the Court has a sufficient stake in the resolution of the conflict to litigate effectively and sharpen the issues presented for adjudication. The only standing requirement is "a sufficient stake and real adverseness." See Crescent Pk. Tenants Assoc., supra, at 107.

The mere fact that Allan-Deane owns substantial property in Bernards and is prevented from pursuing its development plans by a system of land use regulations which it alleges are exclusionary should be sufficient for it to obtain standing. The additional fact that Allan-Deane intends to build housing at price levels not presently available in Bernards and to apply for Federal and State subsidies in order to construct housing for persons of low and moderate income should assure that standing.

This test of standing is also known under our case law as the "aggrieved person" requirement and requires that the litigant seeking review of the municipal action be especially, personally and adversely affected by the zoning ordinance. In Kojenik v. Montgomery Township, 24 N.J. 154 (1957), the Supreme Court said:

> ... and we need not stop to consider the quantum of detriment to the Slovers (the only property owners within the limited industrial district who are party plaintiffs) since we have recognized a broad right in taxpayers and citizens of a municipality to seek review of local legislative action without proof of unique financial detriment to them ... (citations omitted) The community-at-large has an interest in the integrity of the zoning plan ... (citations omitted), sufficient to justify an attack which goes to the validity of the entire district. 24 N.J. at 177

Allan-Deane has a recognized right as a taxpayer under our zoning law to seek a review of local legislative

action sufficient to justify a conventional attack on the Zoning Ordinance. There is no reason to assume that a property owner should have less standing to advance a Mount Laurel issue than any other constitutional zoning issue. In fact, in the Mount Laurel case itself, Justice Hall indicated that residency alone was sufficient to ensure standing when he said in footnote 3 (67 N.J. at 159):

> ... The township originally challenged plaintiff's standing to bring this action. The trial court properly held (119 N.J. Super at 166) that the resident plaintiffs had adequate standing to ground the entire action and found it unnecessary to pass on that of the other plaintiffs. The issue has not been raised on appeal. We merely add that both categories of nonresident individuals likewise have standing. N.J.S.A. 40:55-47.1; c.f. Walker v. Borough of Stanhope, 23 N.J. 657 (1957)

The Supreme Court indicated in Mount Laurel that the test of standing in an exclusionary zoning case was set forth in N.J.S.A. 40:55-47.1 and in Walker v. Borough of Stanhope, supra. N.J.S.A. 40:55-47.1 sets forth the "interested party" standing test for persons desiring to attack municipal land use decisions. That Statute provides,

> For the purposes of the article to which this act is a supplement, the term "other interested party" in a criminal or quasicriminal proceeding shall include: (a) any citizen of the State of New Jersey; and (b) in the case of a civil proceeding in any court or in an administrative proceeding before a municipal agency, any person, whether

> residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be effected by any action taken under the act to which this act is a supplement, or whose rights to use, acquire, or enjoy property under the act to which this act is a supplement, or under any other law of this State or of the United States have been denied, violated or infringed by an action or a failure to act under the act to which this act is a supplement.

In the case of Walker v. Stanhope, supra, a retail seller of trailer homes in Roxbury Township brought suit against the Borough of Stanhope for excluding trailer camps and the occupancy of trailers. The trial Court dismissed the Complaint and the Appellate Division affirmed on the grounds the Plaintiff, who owned no land in Stanhope, lacked standing.

The Supreme Court reversed and pointed out that the Federal standing cases had no application in New Jersey because "[u]nlike the Federal Constitution, there is no express language in our State Constitution which may be aid to confine the exercise of our judicial power to actual cases and controversies." (23 N.J. at 660)

In the course of a long discussion of the liberal standing rules in New Jersey, the Court observed that "(i)n our State, perhaps more than any other, the perogative writ has been broadly made available as a comprehensive safeguard against wrongful official action." 23 N.J. at

661. The Court concluded, 23 N.J. 666,

> We are satisfied that, under the particular circumstances presented in the instant matter, the plaintiff may fairly be deemed to have a sufficient standing to maintain its action. There has been real and substantial interference with its business and the serious legal questions it has raised should, in the interest of the public as well as the plaintiff, be passed upon without undue delay. We are not disturbed by the Borough's spectre that continued logical liberalization of the standing requirement might bring a flood of litigation which would tax our judicial facilities and unduly burden our governmental subdivisions. Justice Holmes long ago pointed out that experience rather than logic is the life of the law - there should be little doubt as to this court's capacity to deal fairly and effectively with the suggested eventuality. In the meantime, justice would appear to dictate that the plaintiff be afforded an opportunity to be heard on the merits of the claim it has been diligently seeking to assert since the institution of its action in the Law Division.
>
> Reversed.

There is no support for Defendant's argument that, in exclusionary zoning cases, the standing requirements are more rigorous than those in a conventional zoning case. In fact, because standing involves a judicial policy determination regarding access to the Courts and Mount Laurel represents a policy determination by the Supreme Court with regard to the evils of exclusionary zoning, the Courts should be more liberal with regard to standing. If the

Mount Laurel decision is to have any vitality, developers seeking to build housing for persons who cannot presently afford to live in a municipality must have standing to challenge existing zoning. We believe that the Supreme Court made it clear in the Mount Laurel case itself that it intended to follow the liberal standing requirements set forth in N.J.S.A. 40:55-47.1 and Walker v. Borough of Stanhope, supra.

POINT III

NEITHER THE SOMERSET COUNTY PLANNING BOARD NOR THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY IS AN INDISPENSABLE PARTY TO THIS ACTION.

Defendants assert that both the Somerset County Planning Board and A.T.&T. are indispensable parties to this action and that the Complaint should be dismissed because they were not joined. There is no authority cited for the contention that the proper remedy for failure to join a necessary party is the dismissal of the Complaint. This oversight may be due to the fact that the case law of the State uniformly holds that this is not a proper remedy. See Sikkema v. Packard, 79 N.J. Super 599 (1963) holding that even where there is a specific statute requiring joinder the plaintiff should be permitted to amend; Day v. Grossman, 44 N.J. Super 28 (1957). In fact, Rule 4:30 specifically provides,

> Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by court order on motion by any party or its own motion. Any claim against a party may be severed and proceeded with separately by court order.

In fact, Rule 4:28(b) even allows a Court to proceed with the adjudication of a case in which the joinder of a necessary party is not feasible.

THE SOMERSET COUNTY PLANNING BOARD

Defendants contend that the Somerset County Planning Board is a necessary party because it has adopted a County Master Plan which does not provide for the development of Plaintiff's lands at reasonable densities. Defendants assert, once again without citing authority, that they are obliged to consider and follow the Somerset County Planning Board's recommendations. This is another mis-statement of the law. In the supplemental opinion rendered by Your Honor on October 17, 1975, in the case of Allan-Deane Corporation v. Bedminster, et als, Docket Nos. L-36896-70 P.W. and L-28061-71 P.W., Your Honor held:

> In rendering its original decision it was the considered opinion of this court that the New Jersey Legislature had, since 1957 when Kozesnik v. Montgomery Tp., 24 N.J. 154, was decided, enacted legislation in compliance and conformity with federal legislation which imposes a requirement upon local zoning ordinances of reasonably complying with existing regional and county planning. this court was of the opinion that the "accordance with a comprehensive plan" required of a zoning ordinance by N.J.S.A. 40:55-32 could no longer be met by merely finding a comprehensive plan within the terms of the zoning ordinance itself in light of those legislative enactments.
>
> The Supreme Court, in Mount Laurel, has clearly held, however, that ... 'under present New Jersey legislation, zoning must be on an individual municipal basis, rather than regionally.' In footnote No. 22 of that

> opinion the Supreme Court noted that the Legislature has, by statute, accepted the fact that land use planning must be done more broadly than on a municipal basis. The court recognized the statutory obligation of county planning boards to prepare county master plans, recognized the coordinating functions of the Department of Community Affairs and its Division of State and Regional Planning and recognized the Tri-State Regional Planning Commission and the federal grant requirement of compliance with comprehensive regional planning before approvals can be made to advance federal funds for a myriad of public purposes. The Supreme Court clearly stated, however, 'authorization for regional zoning - the implementation of planning -, or at least regulation of land uses having a substantial external impact by some agency beyond the local municipality, would seem to be logical and desirable as the next legislative stop.' This is a clear holding that the legislature has not yet taken the step of imposing any requirement that zoning comply with regional planning requirements.

There can be no doubt that Your Honor was correct in that opinion and that the zoning power is in the hands of the municipality alone under existing New Jersey law. The County Planning Board's function is advisory only and that Board has no "interest" in any legal sense in Bernards' zoning scheme. Plaintiff believes that the Somerset County Planning Board has conspired with Bernards and other communities in the Somerset Hills and has taken various officious actions in order to frustrate Plaintiff's plans for the development of its property. It also is convinced that the

County Planning Board has been derelict in its duties and has actually encouraged Somerset County municipalities to defy the Mount Laurel decision and its mandate that developing municipalities provide for their fair share of the regional housing need. Because the County Planning Board is purely an advisory body with no power over local zoning there is no relief which this Court can give against their officious intermeddling or their willful disregard of state and judicial housing priorities. They are no more necessary parties to this case than the Regional Planning Association, the Port Authority, the State Division of Regional Planning or any other private or public group interested in the overall planning of the metropolitan area. It is our contention that the joinder of the County Planning Board would unnecessarily complicate this litigation and that the multiplication of parties who have no real interest in this litigation should be avoided in the interest of judicial economy and efficiency.

A.T.&T.

Plaintiff is not aggrieved by any action or inaction of American Telephone & Telegraph Co. (A.T.&T.), and is not seeking a judgment against that entity. Restraints are sought only against Bernards Township with respect to providing housing for employees of the A.T.&T.

facility; and those restraints may be construed as mandatory in nature, affecting Bernards Township, as opposed to prohibitory, affecting A.T.&T. In other words, since A.T.&T. is not a party to this action, the Court may construe the demand contained in Part F of the ad damnum clause of Count I as an application for mandatory injunctive relief as against Bernards Township, not a prohibitory injunction directly affecting A.T.&T.'s ability to occupy its facility.

Thus, if the Court finds in favor of Plaintiff a remedy which may be ordered may be the provision by Plaintiff of a zoning scheme which will result in the availability of housing for A.T.&T. employees, not an Order restraining A.T.&T. in any way.

Secondly, if A.T.&T. is found by the Court to be a party which should be joined; then, the only proper joinder would be as a co-Plaintiff. The action, if successful, would obviously benefit A.T.&T. and its employees, as well as the present Plaintiff.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asserts that Defendants' Motions are without merit.

Respectfully submitted,

MASON, GRIFFIN & PIERSON
Attorneys for Plaintiff

By: Henry A. Hill, Jr.
Henry A. Hill, Jr.

Dated: April 22, 1976

SUPERIOR COURT OF NEW JERSEY

ARTHUR S. MEREDITH
JUDGE

SOMERSET COUNTY COURT HOUSE
SOMERVILLE, NEW JERSEY 08876

July 29, 1975

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Re: Taberna Corporation, et als. -v-
Township of Montgomery, et als.
Docket L-699-73 P.W. (S-10199 P.W.)

Gentlemen:

This is an action in lieu of prerogative writ in which the plaintiffs ground their complaint on two counts. First, it is alleged that the Montgomery Township Zoning Ordinance is exclusionary and restrictive and, therefore, unconstitutional. Secondly, the plaintiffs allege that they have been unfairly treated in their application before the Township Board of Adjustment. The present action concerns only the first count of the complaint, as the case has previously been bifurcated by the Court.

The basic facts which form the basis of this action are as follows. The plaintiffs consist of the parties to a contract for the sale of approximately 20.40 acres of land in Montgomery Township. The land is presently in a research development zone. The purchase of the land is contingent upon getting the land rezoned so as to permit the construction of multi-family units for senior citizens on the tract. Presently, the Township has approximately 453 acres of land in its southeastern corner zoned for apartment/townhouse development.

The first legal question which must be addressed by the Court concerns the standing of the plaintiffs. The defendants argue that the plaintiffs cannot challenge the zoning ordinance on the grounds that it excludes low and moderate income persons when their proposed townhouse development will not provide for the needs of these aggrieved groups. The defendants maintain that the plaintiffs have no real interest in the welfare of low and moderate income people. In addition, the defendants raise the recent United States Supreme Court case of Warth v. Seldin, _____, U.S. _____, 95 S. Ct., 2197 (1975). In that case, a group

organizations and individuals challenged the zoning ordinance of Penfield, New York, on the grounds that it excluded persons of low and moderate income from living in the town. In affirming the dismissal of the complaint for lack of standing, the Court said:

> "The rules of standing, whether as aspects of the Art. III case or controvery requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers *** none of the petitioners here has met this threshold requirement * * *" _____ U.S. at ___ , 95 S.Ct. at 2215.

The New Jersey courts have traditionally taken a much more liberal approach to standing than have the federal courts. Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 101 (1971). Part of the reason for this might be that the New Jersey Constitution, unlike the Federal Constitution, has no express language which limits the exercise of judicial power to actual cases and controversies. The fundamentals of standing in this State are appropriately set out in the following language:

> "Without ever becoming enmeshed in the federal complexities and technicalities, we have appropriately confined litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness. In the overall we have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of 'just and expeditious determinations on the ultimate merits'."
> Crescent Pk. Tenants Assoc. v. Realty Eq. Corp of N.Y., supra, 58 N.J. at 107-108.

Although the Court can sympathize with the apparent contradiction in allowing the plaintiffs to assert the welfare of low and moderate income groups in order to achieve standing, the Court finds that the plaintiffs' ownership of land in an area affected by zoning is sufficient to create standing to contest the validity of the zoning ordinance. Cresskill v. Dumont, 15 N.J. 238 (1954). Specifically, the Court holds that a land owner in a municipality has standing to challenge exclusionary zoning since his own welfare is affected by a restrictive

land use program. Not only are those who are excluded injured by exclusionary zoning, but also those landowners presently in the municipality suffer from the isolation and segregation that develop from restrictive zoning. Therefore, the plaintiff landowners and developer have "a sufficient stake" to give rise to standing and they have thereby demonstrated that they are "proper parties" to obtain the relief of the Court.

At the end of the plaintiffs' case, the defendants made a motion for dismissal upon the grounds that a prima facie case of exclusionary zoning had not been made. At that time, the Court reserved on the motion.

The testimony presented by the plaintiffs indicated that the low-zoned population capacity of the Township was evidence of exclusionary zoning and that the Township's apartment/townhouse designation would have a ghettoizing effect upon the municipaltiy. In view of the favorable inferences that must be given to the plaintiffs' case at that point, the Court finds that there is evidence of a prima facie case. See Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). Therefore, the defendants' motion for dismissal at the end of the plaintiffs' case is denied.

One of the major points raised by the plaintiffs' experts is that the present zoning for multi-family dwellings will create a ghettoized area of apartment dwellers. The plaintiffs contend that multi-family housing should be spread throughout the Township. The defendants, on the other hand, present substantial evidence as to the benefits of concentrating apartments in one area. Specifically, reference is made to the availability of sewers and water; the proximity to places of employment and shopping; the availability of road systems; and the advantages in developing municipal services, recreation and mass transit.

The Court finds that there are substantial factors upon which the Township could base its decision as to the location and concentration of the apartment/townhouse zone. Therefore, the Court feels that the municipal judgment should be sustained. Bogert v. Washington Twp., 25 N.J. 57 (1957). Without a showing that the Township's policy choice is clearly unreasonable or arbitrary, the Court will not upset the determination made by the municipality. Bow and Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335 (1973).

Since the plaintiffs' evidence has established a prima facie case, the Court feels that the burden shifts to the Township to sustain its zoning policy. The Court in So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) seems to establish this burden when it says:

> "It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use

> regulations the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries." 67 N.J. at 179.

All parties agree that the burden that the Township must meet is the one pronounced in the Mt. Laurel decision; namely, that a developing municipality must provide an opportunity for low and moderate income housing "at least to the extent of the municipality's fair share of the present and prospective regional need therefore." 67 N.J. at 174.

The first question which must be addressed is the determination of the region in which Montgomery Township is located. The major thrust of the defendants' analysis defines the region as Somerset and Mercer Counties. This determination is reached upon the basis of the work trip destinations of residents of the Township; 80.1% of which are within the two counties.

The Court feels that the defendants' selection of a region is a very appropriate and reasonable one. County borders offer delineations between areas that are convenient for statistical and administrative purposes, but they do not always reflect the true sphere of daily interactions that a given municipality might have. The defendants' approach to a region combines the statistical ease that comes with using established political units and the reality of demonstrating where people actually go everyday. This approach allows the flexibility of determining a distinctive region for each municipality. Thus, although two communities may be in the same region for purposes of one analysis, their inclusion may result from an overlapping of their own regions, rather than a complete concurrence of the areas in the regions of each municipality. For example, for the present purposes, Montgomery Township and Bernards Township are within the same region. Yet, if it became necessary to define a region for Bernards under this approach, that region would very likely not include Mercer County. The Court finds that by using county units and work trip destinations, a viable and realistic region can be defined.

The next question is whether Montgomery has provided its "fair share" of the housing needs of its applicable region. The primary analysis offered by the defendants to indicate that the Township has provied its "fair share" is based upon determining the ratio between the amount of land Montgomery has zoned and available for employment generating uses and the total amount of land so zoned for such uses in the whole region. The defendants' expert projected that 56,900 new households will be needed in the Somerset-Mercer region between 1970 and 1985. Further, he stated that Montgomery should provide 7% of the total need because it has 7% of the employment generating land of the entire region. Thus, the Township needs 3,983 new

dwelling units in the 1970-1985 time period. According to census data, 67.5% of the families of the region have family incomes below $15,000 and could be candidates for multi-family housing. Thus, the Township is obligated to make possible the opportunity of 2,689 units of multi-family housing during the 15-year peiod or about 178 units per year. The conclusion of the defendants' expert is that the present apartment/townhouse zone is sufficiently large to accommodate these needs for the foreseeable future.

The Court feels that the above analysis is an appropriate and necessary first step in determing whether a municipality has met its "fair share." The element of employment producing areas within a municipality is an essential one in any analysis because "when a municipality zones for industry and commerce for local tax benefit purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses." Mt. Laurel, supra, 67 N.J. at 187. This analysis answers the threshold questions that must be addressed in a determination of "fair share."

However, complete reliance upon this analysis in ascertaining "fair share" would be misplaced. The analysis relies too heavily upon present land use patterns. If a developing municipality is primarily upper income residential, it could keep that character by simply zoning very little land for employment generating uses. By limiting the amount of land zoned for industrial or commercial development, the municipality could make the basic ratio used in the analysis very low, and thereby avoid its obligation to provide its "fair share" for moderate and low income housing. It seems that the problem is that there is too much emphasis on providing balance within the particular municipality rather than providing balance throught the entire region. Thus, if the possible abuse in this approach is carried to its ultimate conclusion, a region could consist of elite residential communities on the one hand, and industrial-commercial, middle-low income municipalities on the other.

As indicated earlier, this analysis is a necessary and valuable first step in determining whether a municipality has met its "fair share." The Court feels, however, that it must look beyond this approach in making a final determination of "fair share."

In making this final determination, the Court feels it must again look at the population projections for the area. The defendants present another analysis which again takes this consideration into account. The population projection for the Township for 1985 is around 13,000 less 1,000 for those in group quarters. Assuming 3.5 persons per household unit, there would be about 3,430 units in the Township in 1985. Adding a 4% vacancy rate, the defendants' expert indicates a total of 3,567 units would be required in 1985. At present, there are 1,800 dwelling units in the Township. This leaves a need for 1,767 units over the next ten yea: or about 177 units per year. Of these, the Township has an obligation to provide 67.5% or 1,193 units to persons with incomes below $15,000.

Therefore, this would require an opportunity for about 119 units of multi-family housing per year for the next ten years. The conclusion is that this is well within the potential of the present apartment/ townhouse zone.

The Court agrees with the conclusions of the defendants' expert that the present apartment/townhouse zone is sufficiently large to meet the Township's obligations as projected in the above two approaches. Consequently, the Court finds that by the combination of the above two analyses, the defendants have carried their burden and have shown that Montgomery has met its fair share of the regional need for moderate and low income housing.

The Court, therefore, holds that Montgomery's zoning ordinance is valid and enforceable with the exception of the provision that deals with bedroom requirements in the apartment/townhouse zone. The Township "must permit multi-family housing, without bedroom or similar restrictions." Mt. Laurel, supra, 67 N.J. at 187. Thus, the provisions of the zoning ordinance (Section 406-G, 1 and 2) which require apartments and townhouses not to exceed a certain number of bedrooms per acre are declared invalid. The remainder of Montgomery Township Zoning Ordinance is sustained and as to the first count of the plaintiffs' complaint, the court finds no cause of action.

Very truly yours,

Arthur S. Meredith

ARTHUR S. MEREDITH, J.S.C.

ASM/acm

cc: Clerk, Superior Court of New Jersey
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