RULS-AD-1979-80
3/19/79

Brief in Opposition to Defendant's Motion to Dismiss
for lack of Standing

Pg. 28

RULS - AD - 1979 - 80

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,

vs.

THE TOWNSHIP OF BERNARDS, et al.,

Defendant.

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF STANDING

MASON, GRIFFIN & PIERSON
Attorneys for Plaintiff
201 Nassau Street
Princeton, N.J. 08540
(609) 921-6543

HANNOCH, WEISMAN, STERN
& BESSER
744 Broad Street
Newark, New Jersey 07102
(201) 621-8800

On the Brief:
Henry A. Hill, Jr., Esq.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT

POINT I

ALLAN-DEANE HAS STANDING AS A LANDOWNER, DEVELOPER AND TAXPAYER TO CHALLENGE BERNARD'S LAND USE ORDINANCES AS EXCLUSIONARY, CONFISCATORY AND ARBITRARY AND CAPRICIOUS AND FOR THEIR LACK OF COMPLIANCE WITH THE MUNICIPAL LAND USE LAW 3

POINT II

PUBLIC POLICY WOULD NOT BE SERVED IF LANDOWNERS AND DEVELOPERS WERE EXCLUDED AS A CLASS FROM INSTITUTING EXCLUSIONARY ZONING LITIGATION 11

POINT III

ALLAN-DEANE IS PREPARED TO ASSIST IN PROVIDING BERNARDS TOWNSHIP'S FAIR SHARE OF LOW AND MODERATE INCOME HOUSING 17

CONCLUSION 19

PRELIMINARY STATEMENT

Defendants assert, in their brief, that the Allan-Deane corporation lacks "standing" to attack the land use ordinances of Bernards Township. This argument rests on the following fragile legal and factual assertions:

1. They assert that a landowner, developer and taxpayer does not, as a matter of law, have "standing" to attack municipal land use ordinances that effect their right to develop their property on the grounds that the ordinances are exclusionary, confiscatory, arbitrary and capricious and fail to follow the enabling statutes.

2. They claim that to have "standing" to assert these issues, a property owner must intend to build low and moderate income housing on its land and must include, as indispensable parties to such a law suit, persons of low and moderate incomes.

3. They assert, as a matter of fact, that "plaintiff has absolutely no intention to build low or moderate income housing upon its land." (1) (See page 4 of Plaintiff's Brief, line 16)

4. They assert that Allan-Deane's profit motive so taints the company, as a matter of law,

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(1) This statement is curious in view of Mr. Murar's clear statements on pages 27-31 of the Transcript of the Deposition included in Defendant's Appendix as Exhibit "D" to the effect that Allan-Deane does intend to provide low and moderate income housing. Plaintiff's are apparently arguing here that to have "standing" the actual physical construction of the low and moderate income housing must be performed by plaintiff-landowner since the reference to the transcript (pp. 37-37) is to the section where Mr. Murar explains that Allan-Deane will not do the actual physical construction but is functioning as a "land developer doing the overall planning" and will sell to builders who in turn will be legally bound to Allan-Deane to carry out the plan.

that this court should not bar it from bringing this action on some equitable principle.

Plaintiff argues in this Brief that each of the legal and factual assertions upon which the Township of Bernards has constructed its standing argument are erroneous.

We assert that as a matter of law in New Jersey, a landowner or taxpayer has standing to challenge land use ordinances. That there is no "standing" argument that a property owner intend to build low and moderate income housing. That in fact the municipalities' Mt. Laurel, low and moderate income housing obligation, which never went to a plaintiff's "standing" anyway, was changed by Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481 (1977) to a least cost obligation. Finally we assert that there is no factual basis in the record for defendant's bald statement to the effect that Allan-Deane has no intention to provide a broad range of housing opportunities, including low and moderate income housing.

ARGUMENT

POINT I

ALLAN-DEANE HAS STANDING AS A LANDOWNER, DEVELOPER AND TAXPAYER TO CHALLENGE BERNARD'S LAND USE ORDINANCES AS EXCLUSIONARY, CONFISCATORY AND ARBITRARY AND CAPRICIOUS AND FOR THEIR LACK OF COMPLIANCE WITH THE MUNICIPAL LAND USE LAW.

Allan-Deane has alleged that Bernards' land use ordinances are exclusionary (See paragraphs 30-34 of Second Amended Complaint), that they are confiscatory (See FOURTH COUNT of Second Amended Complaint), that they are arbitrary and capricious (See THIRD COUNT) and that they do not comply with the Municipal Land Use Law. (See Pre-Trial Order, Paragraph 7.) Defendants seek, in this motion, to dismiss this entire action on the grounds that Allan-Deane lacks standing.

The Allan-Deane corporation is the owner of 1,071 acres of undeveloped land in Bernards Township located northeast of the intersections of Federal Interstate Highways 78 and 287 (See Second Amended Complaint, Paragraphs 17, 18 and 19) and requested the township to rezone that land from a single-family detached dwelling three acre zone so that housing could be constructed on the property "at a price range affordable to all categories of people who might desire to live there, including those of low and moderate income." (See Second Amended Complaint, Paragraph 28.)

In New Jersey the owners of property within a municipality have always had standing to challenge that municipality's land use ordinances. See Creskill v. Dumont, 15 N.J. 238 (1954) and "Standing of Owner of Property Adjacent to Zoned Property, but not within Territory of Zoning Authority, to attack Zoning," 69 A.L.R. 3rd 805; Kozesnick v. Montgomery Township, 24 N.J. 154, 177-178 (1957); Booth v. Board of Adjustment, Rockaway Township, 50 N.J. 302 (1967).

Indeed, even under the allegedly more restrictive federal test, standing has been found on behalf of property owners and sponsors of particular projects. See Kennedy Park Homes Association v. City of Lackawanne, 318 F.Supp. 669, (W.D.N.Y. 1970), aff'd 436 F. 2d 108 (2 Cir. 1970), cert. den. 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed. 2d 546 (1971); Park View Heights Corporation v. City of Black Jack, 467 F.2d 1208 (8 Cir. 1972); Sisters of Providence of St. Mary of the Woods v. City of Evanston, 355 F.Supp. 396 (N.D. Ill. 1971); Crow v. Brown, 332 F.Supp. 382 (N.D. Ga. 1971) aff'd 457 F.2d 788 (5 Cir. 1972); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L. Ed. 2d 450 (1977). See also Dailey v. City of Lawton, 425 F.2d 1037 (10 Cir. 1970), and, of course, see the discussion in Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975), regarding the fundamental failing in that case to have an individual developer-plaintiff who was

alleged to have been thwarted in his desire to build low-cost housing.

Exclusionary zoning litigation has usually been instituted by two different groups: (1) developers and local property owners who are prevented by local ordinances from undertaking particular projects; and (2) non-residents who are effectively barred from residing in particular communities because of restrictive land use measures. If there is any confusion in the national case law, and there is none in New Jersey, it is with respect to the standing of the second group, the non-residents, to bring exclusionary zoning litigation. Resident property owners and developers have always had standing to challenge ordinances which prevent them from undertaking particular developments. (See cases cited above)

In New Jersey non-residents also have standing. See So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975), footnote 3 at p. 159; Urban League of New Brunswick v. Mayor and Council Carteret, 142 N.J. Super 11 (1976) at p. 18.

Patrick J. Rohan, in his six volume treatise, Zoning and Land Use Controls, (Mathew Bender, 1978) states at Volume I, Chapter 2, "Exclusionary Zoning: Introduction: Standing

to Sue", p. 2-56:

> Most zoning cases are litigated in the state courts. In the typical situation, a specific ordinance is challenged because of its alleged failure to comply with a state's enabling act. Generally, these statutes require that the plaintiff show some property interest, such as ownership of land affected by the local zoning ordinance.(2) Recently, some courts, notably in New Jersey, have begun to liberalize their state's standing concepts to include persons who lack a proprietary interest but who are nonetheless affected by an exclusionary ordinance. While this new attitude in favor of recognizing the rights of interested parties(3) who are not landowners appears to be the most equitable approach, there have only been a handful of state court decisions involving standing in exclusionary zoning situations.

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(2) footnote ours

The Supreme Court in Mt. Laurel, 67 N.J. at 159 footnote 3 indicated that the state legislature conferred standing on those persons defined in N.J.S.A. 40:55-47.1 as "interested parties." N.J.S.A. 40:55-47.1 was repealed upon adoption of the Municipal Land Use Law and readopted as N.J.S.A. 40:44D-4.

(3)

N.J.S.A. 40:55D-4 defines "interested party" as "(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 affected by any action taken under this act, or whose rights to use, acquire, or enjoy property under this act, or under any other law of this state or of the United States have been denied, violated or infringed by an action or failure to act under this act.'" Since the act in question is the Municipal Land Use Law which delegates to municipalities the power to zone, plan and enact subdivision and site plan ordinances and to enforce them the legislative "standing" requirements are, to say the least, liberal.

Standing, under the federal cases, is an issue which finds its origins in Article III of the Federal Constitution which limits federal judicial power to "cases" and "controversies." 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 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,[4] 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 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 prople. 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 is 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 or prudential considerations defining and

(4) Note that this case was decided well before the Supreme Court decision in Oakwood at Madison, Inc., 77 N.J. 481 (1977) cleared up the question of whether low and moderate income housing had to be provided.

> 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, 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 landowner 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 Oakwook at Madison v. Township of Madison, 128 N.J. Super 438 (1974) and by Judge Leahy in the Allan-Deane v. Bedminster case, the Taberna housing was not affordable to persons making less than $27,500.00 per year.[5] 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 that 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-39298-74

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(5) In Oakwood at Madison v. 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 Corporation, et al. v. the Township of Bedminster, et al., Docket No. L-36896-70 P.W., Judge Leahy also assumed, holding Bedminster's Ordinance invalid, "that a family can afford a house costing twice the family's income."

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.

POINT II

PUBLIC POLICY WOULD NOT BE SERVED IF LANDOWNERS AND DEVELOPERS WERE EXCLUDED AS A CLASS FROM INSTITUTING EXCLUSIONARY ZONING LITIGATION.

Defendants argue that speculative developers have abused Mt. Laurel thereby subjecting the citizens of exclusionary municipalities to great legal expense and emotional upset. They propose that this court put an end to this era of permissive "standing" standards and adopt a new standard which would require every developer attacking a zoning ordinance on exclusionary grounds to physically construct himself* low and moderate income housing. Public policy, Defendants argue, would justify this reversal of the "permissive" interested party standard set forth by our Supreme Court and Legislature.

Although Plaintiff relies on the argument that this court is bound by the legal and procedural standards set forth by our highest court and by the state legislature this argument is, nonetheless, worth analyzing.

To begin with, the author of the "Brief in Support of Defendant's Motion to Dismiss for Lack of Standing" was apparently unaware or forgot that the New Jersey Supreme Court on January 26, 1977 published its decision

*See footnote 1

entitled Oakwood at Madison, Inc. v. Township of Madison, 77 N.J. 481, which substantially revised its previous decision in Mt. Laurel.

The Madison case was decided after the oral argument on Defendant's first motion to dismiss so there was some basis for Judge Leahy's concern in May, 1976 that the Allan-Deane plan include low and moderate income housing. (See pages 59-63 of Transcript of Motion of May 11, 1976).

In the Madison case the Supreme Court concluded that because private enterprise could not construct low and moderate income housing, without government subsidies, and because these subsidies were only fragmentarily available, the concept of low and moderate income housing would have to be abandoned. See 72 N.J. at 510. Municipalities were required instead to adjust their zoning regulations so as to render possible and feasible the "least-cost housing" which "private industry will undertake." The court indicated, furthermore, that they were convinced that if the total housing supply available to middle income families were increased more lower income housing would become available through a process known to economists as "filtering down." 72 N.J. 513.

The Supreme Court in Madison, moreover, addressed directly the question of whether private developers who "bear the stress and expense of this public interest litigation, albeit for private purposes . . . yet stand in danger of having won but a pyrric victory" (if other land is rezoned) should be encouraged or discouraged. The court decided to encourage such actions and reward them with building permits because:

> "Such judicial action, moreover, creates an incentive for the institution of socially beneficial but costly litigation such as this and Mt. Laurel, and serves the utilitarian purpose of getting on with the provision of needed housing for at least same portion of the moderate income elements of the population. We have hereinabove referred to the indirect housing benefits to low income families from the ample provision of new moderate and middle income housing. 72 N.J. at 550

In the Madison case, the Supreme Court made it clear that:

1. Exclusionary zoning litigation is "socially beneficial," "public-interest" litigation which the New Jersey court system should encourage. 72 N.J. 549-550.

2. Because low and moderate income housing cannot be built in any quantity without public subsidies, which in turn are not available in sufficient quantities, New Jersey must look to the private sector of the economy to meet its housing need. 72 N.J. at 510.

3. Municipalities must adjust their zoning regulations so as to render possible and feasible the "least cost" housing

which private industry will undertake.
72 N.J. at 511-512.

4. Where a private developer undertakes to allocate a portion of his project to low and moderate income housing and he proves that an ordinance is exclusionary, he should be awarded specific corporate relief in the form of building permits. 72 N.J. at 551.

It is, therefore, clearly not necessary that a developer build low and moderate income housing in order to have standing to contest an exclusionary zoning scheme. Allan-Deane's intentions in this respect can only be relevant, if they are legally relevant at all, after this court makes a ruling on the merits of this case and comes to the issue of the appropriate remedy. At that juncture of the case, we will request specific corporate relief in the form of building permits, as did the plaintiff in Madison, and will guarantee this court an appropriate allocation of units for low and moderate income families. See 72 N.J. 551.

Finally, Allan-Deane has a personal and direct interest in Bernard's exclusionary land use scheme which should give it standing, even under the federal rules, to challenge the township's land use ordinances.

In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) the United States Supreme Court considered 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."

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 and Madison represent a policy determination by the Supreme Court with regard to the evils of exclusionary zoning and the desirability of encouraging public-intest litigation in this area, the Courts should be more liberal with regard to standing. If the Madison and Mount Laurel decision are to have vitality, developers seeking to build housing for persons who cannot presently afford to live in a municipality must have standing to challenge existing zoning.

POINT III

ALLAN-DEANE IS PREPARED TO ASSIST IN PROVIDING BERNARDS TOWNSHIP'S FAIR SHARE OF LOW AND MODERATE INCOME HOUSING.

Defendant's assertion that "Plaintiff has absolutely no intention to build low or moderate income housing upon its land" (see page 4 of Plaintiff's Brief, line 16) is undeniably inaccurate in view of Mr. Murar's deposition testimony of May 25, 1976. In this deposition, Mr. Murar responded to Defendant counsel's question concerning when Allan-Deane decided to provide low and moderate income housing in its project as follows:

> "Since I have been associated with the project, the inclusion of moderate [income housing] was always a portion of the plan. We've been using, I believe, 50 per cent of the median being low income, the range of 50 to 80 per cent of median being moderate income." (Defendant's Appendix Exhibit "D", p. 27-28).

In response to counsel's follow-up question concerning the reasons for Allan-Deane's attempt to provide for low income housing, Mr. Murar testified:

> "There were reasons in terms of trying to provide a balanced community and in attempts to accelerate absorption by providing a full range of various land uses. The market studies completed indicated that the lower median income and monthly rentals that you could get to in terms of housing, the larger the absorption of number of units per year." (Exhibit "D", p.30).

Although the Allan-Deane Corporation will function on this project as a land developer to do the overall planning and design then selling the package to public or private developers for construction of the actual housing units, a mechanism utilized in other Allan-Deane projects is available to require and enforce plans for provision of low and moderate income units. This mechanism is the process of recorded covenants, conditions and restrictions which run with the land and which are legally enforceable after a sale. (Exhibit "D", p.37-39).

CONCLUSION

For the foregoing reasons, the Allan-Deane Corporation has standing to attack the land use ordinances of Bernards Township and Defendant's motion to dismiss for lack of standing should be denied.

Respectfully submitted,

MASON, GRIFFIN & PIERSON
Attorneys for Plaintiff

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

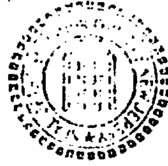
HANNOCH, WEISMAN, STERN & BESSER

By: Dean A. Gaver
Dean A. Gaver

Dated: March 19, 1979

SUPERIOR COURT OF NEW JERSEY

ARTHUR S. MEREDITH
JUDGE



SOMERSET COUNTY COURT HOUSE
SOMERVILLE, NEW JERSEY 08876

July 29, 1975

William E. Ozzard, Esq.
Ozzard, Rizzolo, Klein, Mauro & Savo
75 North Bridge Street
Somerville, New Jersey 08876

Henry A. Hill, Esq.
Mason, Griffin & Pierson
201 Nassau Street
Princeton, New Jersey 08540

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 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 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 unicipality 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 hey 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 cf 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."

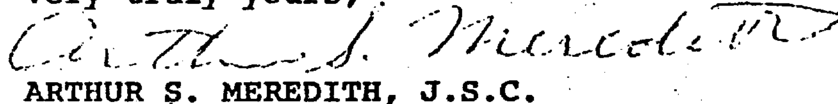
In making this final determination, the Court feels it must again look at the population projections for the area. The defendants present another analysis which again takes this consideration into account. The population projection for the Township for 1985 is around 13,000 less 1,000 for those in group 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 years 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, J.S.C.

ASM/acm

cc: Clerk, Superior Court of New Jersey
Clerk, County of Somerset
John Palaschak, Jr., Esq.
Alfred L. Kettell, Jr., Esq.

MASON, GRIFFIN & PIERSON
COUNSELLORS AT LAW
201 NASSAU STREET
P. O. BOX 391
PRINCETON, NEW JERSEY
08540

RALPH S. MASON
GORDON D. GRIFFIN
KESTER R. PIERSON
RUSSELL W. ANNICH, JR.
HENRY A. HILL, JR.
G. THOMAS REYNOLDS, JR.
RICHARD M. ALTMAN
CRAIG H. DAVIS
BARBARA ULRICHSEN
BENJAMIN N. CITTADINO
ALAN G. KELLEY
EDWIN W. SCHMIERER
RALPH S. MASON, III

TELEPHONE
921-6543
587-2224
AREA CODE 609

March 19, 1979

RECEIVED
AT CHAMBERS
MAR 19 1979
HON. DAVID G. LUCAS

Honorable David G. Lucas
Court House
Somerville, New Jersey 08876

Re: Allan-Deane vs. Township of Bernards
Docket No. L-25645-75 P.W.

Dear Judge Lucas:

With respect to the motion to dismiss for lack of standing of Defendant, Township of Bernards, in the above matter, we enclose for the Court's consideration, an original and one copy of plaintiff's brief in opposition to this motion.

Respectfully yours,

Henry A. Hill, Jr. ejm

Henry A. Hill, Jr.

HAH/ejm
cc: Alfred L. Ferguson, Esq.

π's brief in opp to motion to dismiss for lack of standing

Noted D.G.L. 3/19/79