RULS-AD-1984-600
12/20/84

Statement of facts and conclusions of Law:

Allan-Deane v. Bedminster

- Cover letter to Judge

pg. 11

BRENER, WALLACK & HILL
ATTORNEYS AT LAW
2-4 CHAMBERS STREET
PRINCETON, NEW JERSEY 08540
(609) 924-0808

CABLE "PRINLAW" PRINCETON
TELECOPIER: (609) 924-6239
TELEX: 837652

HARRY BRENER
HENRY A. HILL
MICHAEL D. MASANOFF**
ALAN M. WALLACK*
GULIET D. HIRSCH
GERARD H. HANSON
J. CHARLES SHEAK**
EDWARD D. PENN+
ROBERT W. SACSO, JR.+
MARILYN S. SILVIA
THOMAS J. HALL
SUZANNE M. LAROBARDIER+
ROCKY L. PETERSON
VICKI JAN ISLER
MICHAEL J. FEEHAN
MARY JANE NIELSEN++
E. GINA CHASE△
THOMAS F. CARROLL
JANE S. KELSEY

* MEMBER OF N.J. & D.C. BAR
** MEMBER OF N.J. & PA. BAR
+ MEMBER OF N.J. & N.Y. BAR
++ MEMBER OF N.J. & GA. BAR
△ MEMBER OF PA. BAR ONLY

DEC 21 1984

JUDGE SERPENTELLI'S CHAMBERS

December 20, 1984

FILE NO. 3000-

RULS - AD - 1984 - 600

The Honorable Eugene D. Serpentelli
Judge, Superior Court of New Jersey
Ocean County Court House
Toms River, NJ 08753

RE: Allan-Deane v. Bedminster/Ceiswick v. Bedminster

Dear Judge Serpentelli:

As you requested, I have prepared a very brief summary of what I believe are the essential issues of fact and law in this case.

Mindful of Your Honor's concern for over-documentation, I have deliberately kept this brief, and trust it is of assistance to this Court.

Sincerely,

Thomas J. Hall

TJH:klp

enclosure -

CC: Alfred Ferguson, Esq.
Kenneth Meiser, Esq.
Raymond Wiss, Esq.

STATEMENT OF FACTS AND CONCLUSIONS OF LAW:

ALLAN-DEANE v. BEDMINSTER

I. POSTURE OF THE CASE

This case is before this court as a result of litigation begun in 1971. During the course of this now thirteen year litigation, there have been two full trials and appeals taken to the New Jersey Supreme Court. A "Final Order" was entered by the Hon. B. Thomas Leahy, J.S.C. in 1980; one aspect of that case was appealed to the Appellate Division by the Public Advocate; the case was remanded to the Hon. Eugene D. Serpentelli, J.S.C., as the "Mount Laurel II" judge with appropriate jurisdiction.

The parties to the case include:

The Township of Bedminster and the Planning Board of Bedminster Township, defendants;

The Allan-Deane Corporation (now, Hills Development Company) and Lynn Ceiswick, et al, (represented by the New Jersey Department of the Public Advocate)

During the 13-year litigation, the Township of Bedminster has been ordered to rezone, and the previous corporate plaintiff in the case, the Allan-Deane Corporation (now the Hills Development Company, hereinafter, "Hills") has achieved a satisfactory rezoning its property, particularly with respect to a 168-acre parcel near the village of Pluckemin, on which it is constructing a 1,287 unit residential development, along with a 350,000 square foot commercial development. This section of The Hills Development property is known as the PUD, or, as it was described in Bedminster Township reports and in court testimony, as " Hills I".

The re-zoning of the PUD was a result of the 1971-80 litigation. The PUD, now under construction, also contains 260 units of lower income housing which resulted from an offer to settle its portion of the case made by Hills in October, 1983.

As a result of Hill's offer to settle, and at the request of The Public Advocate, Bedminster Township refrained from adopting revisions to its land development ordinance to bring it into compliance with the constitutional requirements imposed as a result of Mount Laurel II. Adoption of a strategy to bring Bedminster Township into compliance with the requirements of Mount Laurel II remains the sole remaining issue in this case.

Following a series of compliance hearings and discussions between the parties to the litigation in 1983 and 1984, on May 25, 1984, this court directed the remaining two parties to the dispute, the Township of Bedminster and the New Jersey Public Advocate, to settle the case if possible, or to begin preparations for trial. This court gave the parties 30 days to negotiate a settlement, which time was extended by court order and mutual consent.

Following Judge Leahy's 1980 "Final Order", another developer, Leonard Dobbs (hereinafter, "Dobbs"), sought permission from the Township of Bedminster to begin construction of a regional shopping center. Dobbs, having amended his plans several times during period 1980-93, amended his plans again in 1984 to include an offer to construct lower income housing. Dobbs has sought permission to enter this case as an intervenor. This court has reserved decision on whether to grant Dobbs full intervenor status, and Dobbs has been participating in the Court proceedings as a critic of the Town's proposed rezoning to comply with Mt. Laurel II by virture of his status as a landowner (optionee).

Another optionee, Timber Properties (hereinafter, "Timber"), also began

the process of application for permission to develop a portion of property it controlled in Bedminster. Because of an agreement between the optionee and the Township, Timber no longer seeks permission to intervene in the case and no longer objects to the Townships compliance effort.

Following the Court's express direction to the parties, the Township of Bedminster and the Public Advocate reached agreement on all issues, and have presented this Court with a package, designed to create realistic opportunities for the construction of what the parties agree is Bedminster's fair share of lower income housing by the year 1990. The "compliance package" is conditioned upon the Township's receiving a judgment that its Ordinace complies with the constitutional requirements of Mt. Laurel II, thereby insulating the Township from further builder's remedy suits for a six-year period.

It is the Township's view that Hills successfully sued and was awarded a builder's remedy, and that Bedminster has thereafter complied with the conditions imposed by the courts.

II. SUBSTANCE OF THE COMPLIANCE PACKAGE

A. Fair Share

Use of the "Warren Township Methodology" yields, for Bedminster, a total fair share of the region's need for lower income housing (including indigenous need) of 819 lower income units.

Bedminster has indicated that it has re-zoned to meet the 819 lower income unit requirement. However, it has also presented an argument to this Court that its obligation to build lower income housing by 1990 should be 656 lower income units. Bedminster's position, simply stated, is that this case is before this Court in a posture of voluntary compliance with the requirements of Mount Laurel II, that under such a posture, it is entitled to a reduction in its fair-share requirement, and that this

This position is completely untenable.

Court has taken the position that under such voluntary compliance, an appropriate "discount" from the total fair share is to be permitted. Applying a 20% discount factor to that number yields a total fair share, to be provided by Bedminster Township, of 656 dwelling units, to be constructed by the year 1990.

The court's special master in this case, George Raymond, has additionally suggested that it is appropriate for this court to "phase" the introduction of lower income units, as well as the required market units, so as to avoid a "radical transformation" of the community. In a report submitted to the court on January 10, 1984, and reiterated in a report dated July 26, 1984, Mr. Raymond pointed out that the Township's 1980 population was 2,469, and its 1980 total housing units amounted to 938. It was Mr. Raymond's contention that the traditional Mt. Laurel II methodology which relies on the private marketplace permits a developer to build 4 market units for each lower income unit, would produce in excess of 5,000 additional housing units in the Township of Bedminster by the year 1990. Mr. Raymond regarded such a result as the kind of radical transformation discussed in the Mt. Laurel II decision.

Dobbs, through direct testimony of David Wallace, has argued that "radical transformation" is inappropriate when applied to Bedminster; that so long as direct impacts, such as sewage treatment, roads, schools and municipal facilities are provided without municipal bankrupcy, "radical transformation" is a spurious argument. Dobbs has contended that Bedminster should be obligated to construct the entire fair-share of 819 units.

B. Rezoning

The Township has submitted a compliance package which include specific sites which would either be retained as "high density" housing sites, reflecting their rezoning which took place as a result of the Leahy "Final Order", but with a 20%

lower income housing set-aside; or re-zoned so as to provide additional lower income housing opportunities. These housing opportunities include potential senior citizen housing and the use of commercial development as a means of providing land for such housing.

According to the Township Planner, Richard T. Coppola, the Township, as a result of the 1980 Leahy " Final Order" , chose to concentrate development in two "nodes". These included a large development corridor, in the Pluckemin Village area, which was to be physically separated from the remainder of the township by the North Branch of the Raritan River and two interstate highways, I-287 and I-78. A smaller development node, of lower intensity, would take place in the Bedminster Village area. As a means of supporting its original 1980 planning rationale, Mr. Coppola testified, infrastructure development, such as sewer systems, were to be limited to the areas selected through the Township planning process and sized according to the anticipated levels of development. It was Mr. Coppola's further testimony that no timetable for development was set as a result of Judge Leahy's decision, and that the urgency to develop the sites for lower income housing did not come into existence until after the promulgation of Mount Laurel II in January, 1983.

The Township has proposed a number of sites which, it believes, would permit the construction of more than 900 lower income housing units. The court appointed Master has reviewed these sites, and has found most of them acceptable. The New Jersey Public Advocate's expert, Alan Mallach, has reviewed the proposed sites, and while discarding several of them, has indicated that there are sufficient sites remaining available for development which are capable of producing a minimum of 656 lower income housing units by the year 1990.

These sites include two areas which are actively being developed by Hills at the present time. These include :

Hills I, or site A, on which 260 lower income units are currently being constructed, and

Hills II, or site B, on which active preparations are underway in order to provide infrastructural development beginning in the spring of 1985.

actual L-M Units

It is anticipated that Hills will provide a total of 440 lower income dwelling units by the end of 1987.

C. Sewers

It is recognized by the parties to the litigation, as well as by Dobbs and Timber, that public sewers are required in order to achieve the densities necessary to construct low and moderate income housing, as well as the market units necessary to support these units, within the "hard rock" areas of Somerset County, including the Township of Bedminster. This was part of the testimony of both Dr. Hordon, Dobbs' sewer expert, as well as Neil Callahan, President of the Environmental Disposal Corporation who testified on behalf of the Township.

Because there was little anticipated demand for housing in the area prior to 1980, public sewer systems were not constructed in Bedminster Township except as follows.

In 1976, The AT&T Company, in order to serve its own facility, agreed with the Township of Bedminster to construct an advanced waste water treatment system, which was thereafter turned over to the Township of Bedminster. This plant, now known as the Bedminster-Far Hills Plant replaced an existing antiquated system and became the only public sewer system in the Township.

As a consequence of the Leahy 1980 "Final Order", The Hills Development Company was given permission to construct a sewer treatment plant. This plant was designed to service a franchise area which included property held by Hills, as well as

the existing Village of Pluckemin and the commercial development which was projected to take place within the near-term (1980-85). As a result of the agreement between the Township and Hills, Environmental Disposal Corporation (hereinafter, EDC), was established. EDC is a public utility franchised by the Board of Public Utilities and is the owner/operater of an advanced wastewater treatment plant which was completed and began operation in 1984. That plant has a capacity of 850,000 gallons per day.

All parties to the controversy, including the Township, the Public Advocate, Hills, and the objectors, Dobbs and Timber, recognize that some form of additional sewer treatment capacity will be required if Bedminster is to meet its fair share of 656 units, given the reality that adjacent municipalies, such as Far Hills and Bernards Township, will also be revising (or have revised) their ordinances to provide additional lower income housing opportunities.

Everyone agreed that sewer expansion will be necessary.

In order to carry out the rezoning contemplated by its agreement, the Township of Bedminster has entered into an agreement with EDC, which provides for an expansion of EDC's franchise area, and an expansion of the sewer treatment capacity to 1.75 million gallons per day. Neil Callahan, the President of the Environmental Disposal Corporation, has testified that such expansion can be achieved by the spring of 1987.

Three sewerage Proposals.

In addition, the Public Advocate and the Township of Bedminster have agreed that Bedminster shall undertake immediate modifications of the existing BFH plant, in order to achieve a treatment capacity of 253,000 gallons per day. It has been the testimony of the Township of Bedminster that such modifications can be achieved by the end of the summer of 1985.

Leonard Dobbs has indicated that an on-site sewer treatment facility can be constructed to serve his proposed development, with such treatment facility being operational by the spring of 1987.

III. CONCLUSIONS OF LAW

The issues in this case, as in many cases, is a mixture of fact and law. Fundamental issues of fact revolve around the realistic possibilities of constructing lower income units, given the availability of land, sewer supply and economic incentives. The questions of law include the possibility of reducing the Township's fair share due to its "voluntary compliance" with the precepts of Mt. Laurel II; what deference, if any, ought be given a municipality in planning its own destiny; and whether the procedures followed in this case provide a fair and adequate hearing of all parties so as to enable the court to dispose of the issue of compliance with the precepts of Mt. Laurel II with regard to the principles of due process. Not included herein is any discussion of the issue of Builder's Remedy.

The procedural issues in this case are important, and are reviewed here first.

This case is before this court on a remand from the Appellate Division. Bedminster Township's zoning was originally challenged prior to Mt. Laurel I; and the case was before Superior Court during the formulation of the exclusionary zoning doctrine. Allan-Deane, which was awarded a Builder's Remedy; and the Public Advocate, which has represented the public interest in this case, have worked with Bedminster in open court, in open Township meetings, and in the public Planning Board process to make compliance with Mt. Laurel a concrete reality. Bedminster Township's original zoning ordinance was found to be exclusionary; a Master was appointed; the original planning decisions were presented to, reviewed by, and approved by a Superior Court Judge; and, since 1983, there have been a series of public negotiations and discussions in court with respect to formulation of the compliance package. Indeed, as part of the settlement of this case, publication of a notice of settlement was required by the court, and further opportunity to be heard was provided for parties who might have an interest in this settlement.

Through much of the litigation process, avenues have been available for persons who have sought the opportunity to assist the Township to comply with the requirements of Mt. Laurel I or more recently Mt. Laurel II, have been available. It is difficult to argue that procedural due process has not been afforded those interested in participating; and, due to the unique facts of this case, including the use of the Warren methodology and the fact that the adjacent municipalities are also in various stages of Mount Laurel litigation, it is hard to see how any other municipality has been adversely affected by the proposed settlement.

As to the issue of reduction of the "fair share" due to voluntary compliance, it has been the announced policy of this court that voluntary settlements are to be encouraged, which, in view of the volume of litigation and the need to conserve scarce judicial resources, is certainly understandable. Settlement of litigation is encouraged by courts generally, see Tabaac v Atlantic City, 174 N.J. Super 519 (1980) at 534. As Alan Mallach, testifying for the Public Advocate noted, while there is no mathematically certain way to adjust fair share so as to encourage settlements, the "20% solution" has the intuitive ring of truth: it seems large enough a reduction to encourage settlements; yet the remainder--80%-- seems to be a considerable contribution toward lower income housing needs.

The final issue-- deference toward a municipality's planning process-- is the most difficult one for a party which has been a plaintiff for 13 years to address. The fact of the matter is that finally, some entity has to take responsiblity for the planning, zoning and development of a community. If the court finds that the settlement offered by the parties, and concurred in by Hills, is ultimately reasonable and capable of achieving the desired solution, namely, the construction of lower income housing, then, under these circumstances, including the fact that a builder has already been awarded a builder's remedy, the rezoning process has already had the

benefit of a master's scrutiny, the construction of lower income housing is already underway; then, under these circumstances, it appears appropriate to grant the municipality the repose it seeks and to defer to the municipality's selection of specific sites. As the Mount Laurel Court said, " Mount Laurel is not an indiscriminate broom designed to sweep away all distinctions in the use of land." Southern Burlington County NAACP v. Twp. of Mount Laurel, 92 N.J. 158 (1983) at 260.

If we are to approve this package, we must justify the 656 number. The best justification seems to combine phasing and radical transformation. Voluntary "bonus" does not seem tenable.