

Wasser v. Twp of Bridgewater

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## SOMERSET COUNTY COURT

ROBERT E. GAYNOR  
JUDGE



SOMERVILLE, NEW JERSEY  
08876

August 8, 1974

Re: Edward Wasser v.  
Township of Bridgewater, et als.  
Docket No. L-17289-72 PW

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Gentlemen:

This is a prerogative writ proceeding in which plaintiff challenged the denial of his application for a variance and, alternatively, attacked the validity and constitutionality of the zoning ordinance of the defendant municipality. The denial of the variance was upheld by this court for the reasons stated in its letter opinion dated January 9, 1974. The hearing as to the validity of the ordinance has been completed and the determination of that issue is the subject of this opinion.

Plaintiff's contention is that the exclusion by ordinance of multi-family dwellings as a permitted use in any zone district of the municipality is an unlawful exercise of the municipal authority and violative of the constitutional guarantees of due process and equal protection. The gravamen of this contention is that such an

exclusionary proscription in the zoning ordinance ignores the housing needs of the population of the Township and of the region encompassing the Township and by virtue thereof fails to promote reasonably a balanced community in accordance with the general welfare. Defendant asserts that the ordinance is valid, having been adopted in accordance with, and in furtherance of, a comprehensive plan for the zoning development of the Township, that there is no legal requirement that multi-family dwellings be one of the permitted uses as prescribed by the zoning ordinance, and further that defendant is meeting its obligation to provide the housing needs of its own population and that of its region.

Bridgewater Township is centrally located within Somerset County and comprises an area of 32.67 square miles, or more than 10% of the total area of the County. It is served by 5 major highways and 3 rail lines. Although a major portion of the developed area of the Township is devoted to residential use, industrial and commercial activities occupy a significant area and are presently expanding as a result of new highway construction. The population of the Township as reported by the 1970 census was 30,235, and that of the County was 198,372. The projected population increase as of 1980 is 40,000 for the Township and 280,000 for the County. The Township and the County are also experiencing an increase in industrial and commercial activity. A study prepared by the Somerset County Planning Board and the Office of Economic Development forecast an increase of 32,400 employees

in the County from 1970 to 1980.

The zoning ordinance, enacted in 1962, divides the Township into 4 residential zones, a commercial zone, a highway business zone and an industrial zone. The residential uses are limited to single family dwellings on minimum lot sizes ranging from 10,000 square feet to 50,000 square feet. The ordinance was adopted on the basis of the then existing uses as well as the plan for the future desired development of the community and was in accord with the Master Plan subsequently adopted in 1966. Of the 20,915 acres comprising the Township, 15,264 acres are within the residential districts, 516 acres are within the commercial districts and 5,131 in the industrial districts. Approximately 43% of the residentially zoned area is limited to a minimum lot size of 50,000 square feet and approximately 30% is limited to a minimum lot size of 40,000 square feet. There are approximately 900 multiple family dwelling units located in the Township which are either non-conforming uses or permitted under variances.

The plaintiff presented the testimony of Mr. John Lynch, a professional planning consultant, in support of his contentions that the existing ordinance does not promote a well balanced community and does not provide for the present and reasonably anticipated housing needs of the Township, as well as its proportionate share of such needs of the region, which he considered to be generally Somerset County. Mr. Lynch presented an analysis of the housing market of the municipality and county and on the basis of such an analysis he opined that by 1980

the need for smaller housing units (primarily one and two bedroom units) in the county would approximate 33,500 units, of which the Township's proportion should be between 10,000 and 15,000 units. This conclusion was based upon the projected population and employment growth in the county, together with an assessment of the trends in age composition and family size, housing vacancy rates and replacement of substandard housing units. His study reflected a general decrease in household size throughout the State and County but an increase in the Township. Also, while a healthy housing market should have a rental vacancy rate of about 5%, the present vacancy rate for the county is 1.97% and 1.54% for the Township, the result of which is to increase rent levels to the detriment of those seeking housing. His analysis of the projected population increase in the county indicated a substantial proportional increase in the age groups of 15-24 and over 55, and he concluded that to accomodate these new households about 3,000 new housing units per year would be needed in the county during 1970-1980. Total employment within Somerset County by 1980 was estimated at 92,000 by Mr. Lynch, representing an increase of about 30,000 over the 1970 figures, and according to his survey of present employee population, approximately 43% of all county employees were located in Bridgewater Township. Present housing production in the county and township is far below that of the 1960's, averaging only 861 units over the past 4 years, of which only 102 were milti-family dwellings. There

has been only single family construction in the Township with 103 units started in 1971. A total of 8,152 multi-family units are planned or under construction in neighboring Montgomery and Hillsborough Townships which will provide a portion of the needed rental and lower priced homes. At the present time, families with high incomes are able to meet their housing needs, but the lower income groups, which represent about 85%-90% of the households in the county, are unable to obtain adequate housing within their means. Mr. Lynch concluded that, in order to meet the housing needs in the county and township which will exist over the next decade, production must proceed at a much greater rate than at present. In order to accomodate those households requiring primarily one and two bedroom units (50 and over age group and 30 and under age group) approximately 33,500 additional units will be needed by 1980, of which from 10,000 to 15,000 units should be located in Bridgewater Township.

A real estate expert, Mr. T. Sanford Van Syckle, also testified on behalf of the plaintiff as to the present character of dwellings available for purchase in the county and township and the demand for housing. During 1973 a total of 254 dwellings were sold for an average price of \$57,114.00. Of these 222 were sold for prices in excess of \$40,000.00. As of April, 1974, 87 dwellings were listed for sale through the Multiple Listing Service, and of these 79 were listed for prices in excess of \$40,000.00. During 1973, 14 rentals were negotiated through the Service. He stated that

there was a continuing demand for rental units, as well as for lower priced single-family dwellings, in the county and township which demand could not be met. This type of housing was desired by young persons and older persons, including persons now employed in Bridgewater, but was unavailable. The available housing was generally beyond the means of the majority of the wage earners in the county and township.

The plaintiff also introduced through the testimony of Mr. Arthur Reuben, Assistant Director of Planning for Somerset County, the "Master Plan of Land Use" for Somerset County, dated September, 1971, prepared by the County Planning Board, and also a report entitled "Housing and Jobs", dated February, 1970, prepared by the County Planning Board and the Office of Economic Development. The Master Plan of Land Use projected the 1980 population of the county as 280,000, and that of the township as 40,000. This report also included statements that "the County Planning Board has advocated greater attention to be given to providing a variety of community development and of housing types, including a range of housing to meet needs of all sectors of the population", and "the design of housing in relation to various age groups is also of critical importance . . . a basic postulate of the Master Plan of Land Use (is) that the stages of the life cycle require a variety of housing types - apartments, garden apartments, townhouses, and single family houses". The conclusion of the report entitled "Housing and Jobs" was that "during the early part of the Sixties, Somerset County was largely meeting its needs for housing, except the lowest



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income groups. Upon entering the seventies, we are not able to meet the needs of a majority of the people requiring new housing. It is expected that employment will grow by about 32,000 during the seventies and that there will be a commensurate need for 27,500 units during the decade; or, production at the rate of about 2,500 units per year during the first five years and 3,000 units per year during the last half of the decade . . . with an increasing proportion of townhouses and garden apartments, requirements for the Seventies can be obtained . . . There must be greater attention to providing a variety of community development and of housing types, including a range of housing to meet the needs of all sectors of the population. Community design should include all densities of housing and allow for clustering of residential and community facilities. Many older residents would prefer apartment accommodations, and thereby allow for a natural progression in the style of life and thus making available additional single family houses. A development plan for a county of hundreds of thousands must provide a full range of community development".

Mr. Robert Strong, a professional planning consultant, who has acted as the consultant to the Planning Board of Bridgewater Township since 1958, testified on behalf of defendant. It was his opinion that the area to be considered as an appropriate region in determining the need and availability of housing as it pertained to the Township extended beyond the boundaries of Somerset County, and more properly should be related to the travel distance between work and home locations. For such purpose, he suggested that a



reasonable distance would be that which could be traveled by automobile within a period of 30 minutes. On this basis, his studies indicated that the appropriate housing region for Bridgewater Township extended into the adjoining counties of Hunterdon, Morris, Union, Middlesex and Mercer. He presented statistics showing that of the number of persons employed in the Township, 17.3% reside in the Township, 61.3% reside within 15 minute travel-time distance, 91% reside within a 30 minute travel-time distance, and 8.19% reside beyond a 30 minute travel-time distance, and concluded that the employee population of defendant has found housing within the regional area. Mr. Strong also cited data as to the number of housing units within a 15 minute and 30 minute travel-time distance from the Township, which indicated that there are a total of 74,655 housing units within the 15 minute radius (52,323 owner occupied and 20,761 renter occupied), and 392,329 housing units within the 30 minute radius (273,198 owner occupied and 110,640 renter occupied). The present unit vacancies, both for sale or rent, were 687 within the smaller area and 3,825 within the larger area. The vacancy level of the units for sale in Bridgewater corresponded proportionately to the regional area, however the vacancy level of units for rent was about 25% lower in Bridgewater. Mr. Strong also presented figures as to building permits issued during the periods 1960-1969 and 1970-1973 in the Township, County, 15 minute radius and 30 minute radius, which indicated that during the latter period the percentage of permits issued compared to the 1969 housing units was about

the same for all areas. He further testified that the available land within the Township would permit the construction of an additional 4,126 housing units, which, at the rate of 3.8 persons per unit, would provide housing for 15,678 persons. It was Mr. Strong's conclusions that under the present ordinance the Township has made an appropriate contribution to the housing needs of the region and will be able to meet its share of the housing needs of the increasing township and regional population.

Mr. Strong also stated that the Planning Board of the Township has considered providing for multi-family uses, and that in 1971 he was directed to prepare and submit to the Board an evaluation of the market and demand for such housing facilities and, in the event of such demand, the manner in which zoning changes might be made to accomodate this type of housing. Such a report was made and the conclusions therein included the following recommendati

It is apparent from all available research material that there is, at the present time and in the foreseeable future, a demand and need for a greater variety of housing types in the region in which Bridgewater is located. Bridgewater centrally located in the region, possessing a substantial undeveloped quantity of the regions industrial development, and having substantial undeveloped land areas to accomodate such development, and having the road and sanitary facilities needed for multi-family development is in a unique position to assist in providing the needed housing variety.

Based upon these considerations, it is this consultant's recommendation that the Bridgewater Township Planning Board amend the Township Master Plan to establish the general conditions under which a variety of multi-family housing types be permitted, with appropriate controls . . .

This recommendation has not been accepted by the Planning Board, however the matter is still the subject of discussion.

Mr. Strong voiced the opinion that the existing zoning ordinance is reasonable, and that there has been no change in conditions since its enactment which would require or warrant any major change in its provisions. In his opinion the Township is not required to provide <sup>for</sup> all kinds of housing, although he still holds to the recommendations contained in his 1971 report to the Planning Board as being applicable.

It is plaintiff's contention that the exclusionary aspect of the Bridgewater Township zoning ordinance, i.e., the exclusion of multi-family residences as a permissible use in any district of the community, has no relation to the public health, safety, morals or general welfare, has evinced a disregard of the housing needs of the Township and its region, and has resulted in an unconstitutional deprivation of equal protection. As indicated previously he argues that the prohibition against multi-family dwellings ignores the housing needs of the populace of the Township and its region and results in a failure to promote a balanced community in accord with the general welfare. Plaintiff recognizes that certain exclusionary zoning provisions have been upheld by our courts as a proper exercise of a municipality's authority.

(See Lionshead Lake Inc. v. Township of Wayne, 10 N.J. 165 (1952); Fischer v. Township of Bedminster, 11 N.J. 194 (1952); Fanale v. Borough of Hasbroude Heights, 26 N.J. 320 (1958); Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, (App. Div. 1951);

Vickers v. Township Comm. of Gloucester Township, 37 N.J. 232 (1962).

However, plaintiff argues that the concept of the promotion of the general welfare through zoning is changing from a consideration of its application to the particular municipality to one of applicability to the citizenry of a larger area. Further, that the reasonableness of restrictive provisions must be viewed in the light of existing circumstances and conditions, and that one of such conditions of substantial importance is the present need for all types of housing accommodations.

Defendant contends that it has no legal requirement to zone for all types of housing facilities and that its total exclusion of multi-family dwellings as a permissible use is a proper exercise of its zoning powers, citing Fanale v. Borough of Hasbrouck Heights, supra. and Guaclides v. Borough of Englewood Cliffs, supra. Defendant further asserts that its zoning ordinance was enacted in accordance with a comprehensive plan and that its subsequent development has been in furtherance of that plan. Also, that the land as zoned is reasonably marketable for the permitted uses. However, defendant while recognizing the trend toward regional planning, contends that the appropriate region applicable to it is an area which presently includes sufficient housing units to meet present demand, and that under its ordinance it will be able to meet its fair share of future housing needs.

Thus, it appears that the basic conflict in this proceeding is whether the ordinance as presently structured does provide the means whereby the Township will develop as a balanced community and

be able to meet the housing needs of its own population and of the applicable region. All the evidence adduced at the trial was directed to this issue.

It is well recognized that there is a strong presumption in favor of the validity of a zoning ordinance. Ward v. Montgomery Township, 28 N.J. 529, (1959); Harvard Enterprises v. Board of Adj. of Madison Twp., 56 N.J. 362 (1970). This presumption of validity may be overcome only upon a clear and affirmative showing that the ordinance is arbitrary or unreasonable when measured by the standards prescribed by statute and it bears no reasonable relationship to public health, morals, safety or general welfare. N.J.S.A. 40:55-32; Harvard Enterprises v. Board of Adj. of Madison Twp., supra.; Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super 11 (Law Div. 1971).

The housing needs of the municipality and its region is a valid purpose of zoning and is encompassed within the general welfare. In Oakwood at Madison, Inc. v. Twp. of Madison, supra, the court stated in this regard:

The exclusionary approach in the ordinance under attack coincides in time with desperate housing needs in the county and region and expanding programs, federal and state, for subsidized housing for low income families.

Regional needs are a proper consideration in local zoning. DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970); Duffcon Concrete Products v. Cresskill, 1 N.J. 509, 513 (1949); Gartland v. Maywood, 45 N.J. Super. 1, 6 (App. Div. 1957); Molino v. Mayor, etc. Glassboro, 116 N.J. Super. 195, 204 (Law Div. 1971).



In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary. Large areas of vacant and developable land should not be zoned, as Madison Township has, into such minimum lot sizes and with such other restrictions that regional as well as local housing needs are shunted aside. *Vickers v. Tp. Com., Gloucester Tp.*, 37 N.J. 232 (1962), upholding a prohibition against trailer camps anywhere within a municipality, is not to the contrary.

The ordinance under attack must be held invalid because it fails to promote reasonably a balanced community in accordance with the general welfare, unless it is defensible on some other ground.

And in *Molino v. Mayor and Council of Bor. of Glassboro*, 116 N.J. Super 195 (Law Div. 1971), the court referred to this rule in the following language:

Exclusionary zoning may lead to illegal and unwanted conditions, which are violative of individual rights. No municipality can isolate itself from the difficulties which are prevalent in all segments of society. When the general public interest is paramount to the limited interest of the municipality then the municipality cannot create road blocks. Zoning is not a boundless license to structure a municipality.

This amendment to the ordinance can find no legal support when its provisions are analyzed in relation to the Borough of Glassboro. This determination can only be made when the trial record is adequate to fully reveal the needs of this community. Counsel for the parties made this possible. Justice Hall, in supporting a use variance in *DeSimone v. Greater Englewood Housing Corp.*, 56 N.J. 428 (1970), held "as a matter of law in the light of public policy and the law of the land" that housing needs must be met by official action. The same reasoning applies to the instant case when the governing body legislates to defy the public need for housing.

The test then to be applied to the Bridgewater zoning ordinance is whether it promotes reasonably a balanced and well ordered plan for the entire municipality and does not ignore the housing needs of its own population and of the region.

The evidence clearly supports a finding that the complete restriction against multi-family residences prevents the development of the Township as a balanced community. The major portion of the land area available for residential use is so zoned that it can be utilized<sup>only</sup>/for high-priced, single-family dwellings. The Township is encouraging, and experiencing, expansion of industrial and commercial activity, yet it is precluding, through its zoning provisions, a large segment of its employee population, as well as others presumptively desiring to reside in the municipality, from obtaining housing within the community. The proofs support the conclusion that there is a demand for low and moderate priced housing in Bridgewater which cannot be met because of the restrictive zone plan adopted in 1962 and rigidly adhered to since then. A large portion of the multi-family housing now existing in the Township is the result of variances reluctantly approved.

Whether a particular use may be excluded depends upon its compatibility with the circumstances of the particular municipality, always to be judged in the light of the statutory standards for zoning. Each case must turn upon its own facts. Fanale v. Hasbrouck Heights, supra. The case sub judice differs substantially from the



factual situation presented in the Fanale case and in the cases of Guacildes v. Englewood Cliffs, supra, and Duffcon Concrete Products, Inc. v. Bor. of Cresskill, 1 N.J. 509 (1949). We concur with the observation of Judge Furman in Oakwood at Madison, Inc. v. Twp. of Madison, (Law Div., May 30, 1974), that, "Presumptively the Supreme Court would have recognized the general welfare as overriding and struck down the ordinances under review in Duffcon and Fanale if, respectively, there had not been adequate industry or adequate multi-family housing nearby". The following portion of Justice Hall's dissent in Vickers v. Twp. Comm. of Gloucester Twp., supra, forecast current judicial thinking as to this issue:

In my opinion legitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation deeper considerations intrinsic in a free society gain the ascendancy and courts must not be hesitant to strike down purely selfish and undemocratic enactments.

The cases of Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) and Township of Williston v. Chesterdale Farms, Inc., 7 Pa. Cmwlth. 453, 300 A.2d 107 (1973), cited with approval in Chandler Associates v. Bd. of Adj., etc., unreported (App. Div. 1974), in which zoning ordinances failing to provide for apartments as permissible uses were struck down, are applicable to the issues presented in the instant case. In Girsh, the court found "(i)n refusing to allow

apartment development as part of its zoning scheme, appellee has in effect decided to zone out the people who would be able to live in the Township if apartments were available", and it further commented that "(a)partment living is a fact of life that communities . . . must learn to accept". The effect of exclusionary zoning is noted in the following portion of the decision in Williston:

Zoning has been said to be exclusionary when the zoning laws of a community seriously impede or absolutely prevent the construction of low-cost housing. By an definition, however, the term "exclusionary zoning" has come to signify the general problem created by local zoning ordinances that render suburban housing costs of prohibitively high that low-and moderate-income families cannot afford to buy. Exclusionary zoning may bar not only the poor or near poor, but a fairly substantial segment of the middle class as well.

Additionally, from the evidence presented it can be concluded that Bridgewater has failed to adequately react to the burgeoning population of its region and to the need for reasonable housing alternatives. Its own planning consultant reported to it in 1971 that "Bridgewater Township cannot remain unaffected by the condition and needs of the rest of Somerset County or for that matter, the State of New Jersey", and that "multi-family housing will have to fill some of that need". The proofs leave no doubt that there exist in the Township's region a need for low and moderate income housing. We are not convinced that the regional area as suggested by the defendant is appropriate. Although such areas may be difficult of exact specification and must be considered in relationship to the peculiar conditions of a particular municipality, the area

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generally co-extensive with Somerset County appears to be an appropriate region for the purpose of considering the zoning regulations of Bridgewater Township. It should be noted that this area substantially coincides with the 15 minute radius (more realistically 20-30 minutes) advanced by defendant's expert. Regional needs have long been regarded a proper consideration in local zoning. Oakwood at Madison, Inc. v. Twp. of Madison, supra. A continuance of the zoning exclusion of multi-family residences in Bridgewater would permit that Township to abrogate its obligation to provide a fair share of the housing needs of the region and to cast upon its neighbors this governmental responsibility for accomodating regional housing demands. Such municipal action would constitute an inadequate governmental response to the fundamental societal need for reasonable housing. An exclusionary ordinance permitting and inducing such abrogation of responsibility cannot be regarded as a measure calculated to advance the general welfare.

A consideration of all the evidence compels the conclusion that plaintiff has overcome the presumption of the validity of the ordinance and has established that this zoning ordinance, by reason of its exclusion of multi-family dwellings as a permissible use, fails to promote a reasonably balanced community and ignores the housing needs of its own population and of the region and is thereby violative of the general welfare. There was no showing

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that such exclusion, because of any other condition of the municipality, bears any rational relationship to the advancement of public health, safety, morals or welfare. That the enactment of the ordinance was in accord with a comprehensive plan adopted and being followed by defendant is of no significance when such plan is not in furtherance of the general welfare. Accordingly, we hold the ordinance to be invalid. This conclusion makes it unnecessary to consider the constitutional issues advanced by plaintiff.

In order to permit the municipality a reasonable time within which to take such action as it deems appropriate because of this ruling, the judgment to be entered herein shall not become effective until 90 days after it is entered.

A judgment in accordance with the foregoing may be submitted.

Yours very truly,

Robert E. Gaynor

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