ML – Franklin

(Field v. Franklin)

7/6/81

Decision

- Cover letter to Alan Mallach

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August 17, 1981

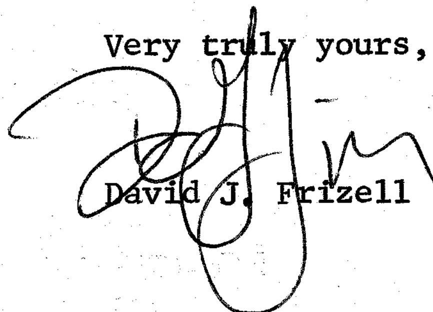
Mr. Alan Mallach
1 South New York Avenue
Atlantic City, New Jersey 08401

Re: Jack W. Field v. Township of Franklin
Docket No. L-47672-78 P.W.

Dear Alan:

Enclosed find a copy of the decision by Judge Leahy in the above referenced matter.

Very truly yours,



David J. Frizell

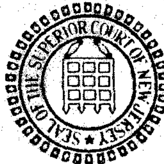
DJF:jb

Enclosure

NOT [illegible]ICATION WITHOUT THE APPROVAL OF THE [illegible]TEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY

B. THOMAS LEAHY
JUDGE



SOMERSET COUNTY COURT HOUSE
SOMERVILLE, NEW JERSEY 08876
(201) 725-4700

July 6, 1981

Original hereof filed with the Clerk of the Superior Court on 7-6-81
B. THOMAS LEAHY, J.S.C.

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Re: Jack W. Field v. Township of Franklin
Docket No. L-47672-78 P.W. (S-5131)

Gentlemen:

Plaintiff, beginning in 1965, acquired 2,200 acres of land in the defendant township. Between 1972 and 1978 he retained the services of professional planners, environmental consultants and other expert advisors. On November 10, 1978, he submitted an application to the Franklin Township Planning Board for approval of a Planned Unit Development on 396 acres of his property. The proposed project, which included 1,332 town houses, 1,332 garden apartments, 20 acres for commercial uses and 99 acres of open space, complied fully with the provisions of the 1976 zoning ordinance which was then in effect and with a 1972 updated version of the 1968 township master plan.

On December 28, 1978, plaintiff's P.U.D. application was declared complete by the Planning Board. Hearings were held through May 29, 1979 and on June 13, 1979 the Planning Board granted preliminary approval to plaintiff's plan.

Prior to that favorable decision by the Planning Board, however, the Township Council amended the municipal zoning by adopting ordinances 940 and 942 on April 12, 1979 and April 26, 1979 respectively.

Plaintiff's proposed P.U.D. did not satisfy the more restrictive limitations on development contained in the amendments which reduced by one-half the number of dwelling units allowed in the applicable zone.

On May 31, 1979, the Council adopted ordinance 950 which purported to re-adopt the revised and recently amended zoning ordinance as an interim zoning ordinance pending preparation and adoption of a new master plan for the municipality.

On June 22, 1979 a group entitled Franklin Citizens for Orderly Planning and other individuals filed appeals as to the June 13, 1979 Planning Board approval of plaintiff's P.U.D. application. The Township Council, on January 14, 1980, adopted a resolution remanding the application to the Planning Board with direction that the Council deemed ordinances 940 and 942 applicable and binding on the proposed development unless "estoppel" should bar their being applicable. The Planning Board was directed to "develop testimony and make findings of fact on the issue of estoppel." The Council also determined that there was insufficient basis in the record to support the finding that the proposed methods of sewering the development were adequate and directed the Planning Board "to develop testimony and make findings of fact" on that issue as well. There was no evidence presented that the Planning Board took any action with regard to the Council's remand resolution. Ultimately the court entered an order staying any action with regard to plaintiff's P.U.D. application.

Plaintiff argues that ordinances 940, 942 and 950 are void _ab initio_ and seeks a decision to that effect.

It is necessary to recall that _N.J.S.A._ 40:55D-1 _et seq._ the Municipal Land Use Law, became effective August 1, 1976. The defendant township's master plan was adopted in 1968 and revised to some extent in 1972. The township re-adopted its zoning ordinance on December 30, 1976. Plaintiff's P.U.D. application conformed to the 1976 zoning.

Plaintiff argues that the township's 1968-72 master plan does not satisfy the requirements of the state Land Use Act and is not a valid master plan and, therefore, the disputed ordinances were not adopted "after the planning board has adopted the land use plan element of a master plan...." _N.J.S.A._ 40:55D-62.

Extensive testimony was presented on both sides of this issue. Clearly, if the 1968-72 master plan does contain all the required provisions of a land use plan element, _N.J.S.A._ 40:55D-28, it does so only in a relatively imprecise manner through a convoluted system of cross referencing. However, since the township has recently adopted a new master plan and zoning ordinance, which are not before this court for review, thus rendering that point generally moot, and since it is not necessary to resolve that question to decide the controversy at issue in this case, this court finds it unnecessary to resolve the question of whether the 1968-72 master plan fully satisfied the requirement of _N.J.S.A._ 40:55D-28.

The key issue in this case is whether, according to N.J.S.A. 40:55D-62, the zoning amendments embodied in ordinance 940 and 942, and reflected in ordinance 950, are "substantially consistent with the land use plan element of the master plan or designed to effectuate such plan element." (It is undisputed that the council did not set forth any purported reasons why it was adopting zoning amendments it believed to be inconsistent with its master plan provisions. The council took the position that the amendments were consistent with the master plan.)

Prior to 1976 and the Land Use Act there was no requirement of consistency between a municipality's planning documents and zoning regulations. In fact, the "comprehensive plan" with which zoning regulations had to be in accord, N.J.S.A. 40:55-32, could be found within the zoning ordinance itself. Kozesnik v. Montgomery Tp., 24 N.J. 154 (1957); Angermeier v. Sea Girt, 27 N.J. 298 (1958).

There was no requirement of a detailed master plan as is now found in N.J.S.A. 40:55D-28. The master plan, when one existed, and the zoning ordinance, together, frequently constituted the comprehensive planning required by the legislature. It is, therefore, not unusual that the township 1968-72 master plan is somewhat broad in language and apparently ambiguous at first reading. The precise meaning and details are found in the zoning ordinances of 1968 and 1976 which differ little, if at all, in their development restrictions. When the master plan discussed planned unit development along Route 27 we find in the zoning ordinance that that meant overall density of no more than 7 dwelling units per acre within a P.U.D. in that zone. One needed 100 acres to design and apply for a P.U.D. The lands had to be generally adjacent or contiguous but need not have been totally in physical contact as one uninterrupted unit.

Ordinance 940 imposed a limitation of 3.5 dwelling units per acre and a requirement of at least 300 acres for a P.U.D. Ordinance 942 imposed the requirement that all land had to be in "actual physical contact" to constitute a P.U.D. tract. Ordinance 950 re-adopted the zoning ordinance including the amendments embodied in ordinances 940 and 942 which had been adopted a month earlier.

The township argues that 3.5 units per acre on 300 acre minimum tracts of land all in physical contact is not a substantial change from 7 units per acre on 100 acre minimum tracts of adjacent or contiguous land. Since the zone included nearly 2,000 acres the amendments effectively eliminated 7,000 potential dwelling units in a community with a 1980 population of approximately 35,000 persons. That is not a minor deviation. With an average household size of only 2 to 3 persons per dwelling unit the result of the amendment is the elimination of potential housing for 14,000 to 21,000 persons. It cannot be argued persuasively that fourteen to twenty-one thousand persons are not substantial.

Unquestionably the township adopted amendments to its zoning ordinance which were not consistent with its master plan. It did not amend, revise or review its master plan in preparation for that. It did not adhere to the requirements of the Land Use Act.

The legislature knew the prior statutory law and its judicial interpretations before it adopted the Land Use Law. The requirement calling for a comprehensive plan was not re-enacted. A requirement of adopting a master plan before zoning and a requirement of consistency between the zoning ordinance and the master plan was imposed. N.J.S.A. 40:55D-62.

The defendant township argues that changed conditions and circumstances support the zoning changes reflected in the amending ordinances 940 and 942. It calls attention to the fact that Route 27 was not improved by the state, that population growth, both actual and anticipated, in the area was not as great as had been earlier expected, and that sewage treatment facilities to serve the subject area had not been installed by public authorities. Plaintiff responds that it had never been anticipated that Route 27 would be improved before development in the subject zoning district and such road improvements were never declared conditions precedent to development of a P.U.D. in either the 1968-72 master plan or the 1968 or 1976 zoning ordinances. They also call the court's attention to the fact that the planning board approval of plaintiff's P.U.D. application is expressly conditioned on plaintiff providing adequate means of sewage treatment or disposal.

Whether plaintiff or defendant is right on these issues is irrelevant. The fact is that these are appropriate issues to be addressed in the planning process which the legislature has now expressly and clearly made a prerequisite to zoning changes of any significant magnitude. Planning, by those insulated to some extent from the elective process by their appointive status, must precede zoning changes voted by the governing body. Major zoning amendments are not to be accomplished during the heat of an election period, as was done here, without prior study and analysis pursuant to the planning process. (Franklin Township holds its elections in May and June under a Faulkner Act form of government).

As was recently stated,

> A municipality, in exercising the zoning powers delegated to it, must act within such delegated powers and cannot go beyond them, and where a statute sets forth the procedure to be followed, no governing body or subdivision thereof can adopt any other method of procedure. Midtown Properties, Inc. v. Madison Tp., 68 N.J. Super, 197, 307 (Law Div. 1961) aff'd 78 N.J. Super 471 (App. Div. 1963). When a statutory power is exercised in a manner that could not have been within the contempletation of and produces a result that could not have been foreseen by the Legislature, such exercise of power must be restrained within proper bounds by being held void, Grogan v. DeSapio, 11 N.J. 308, 322 (1953). Pop Realty Corp. v. Springfield Tp. Bd. of Adj., 1976 N.J. Super 441 (Law Div. 1980).

This court agrees. Ordinances 940 and 942, and ordinance 950 which attempted to perpetuate them,are void, ab initio.

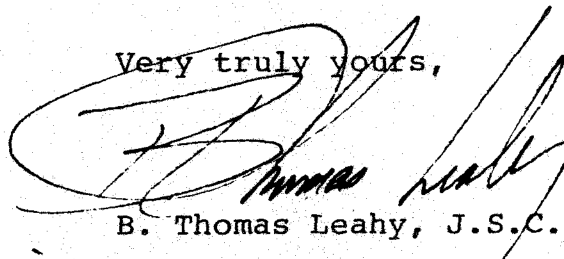
Since the decision already reached disposes of the issue to be decided, it is not necessary for the court to reach or decide the Mt. Laurel issues. However, it cannot go unnoticed that the township successfully defended a Mt. Laurel type attack on its zoning in 1973. (Mindel v. Tp. of Franklin and Virginia Constr. Corp., L-11440-72 P.W., (L. Div., Dec. 19, 1973). In that litigation the township argued strenuously that the various provisions of its zoning ordinance, especially the P.U.D. provisions, provided opportunity for a suitable variety of housing for persons of all income levels. The trial court agreed and the Appellate Division affirmed in 1975 after Mt. Laurel (So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975)) was decided.

> Nothing in the record suggests to us that the challenged ordinance fails to comply with the criteria set forth in So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) the landmark case decided after the trial court decision was rendered. Alternative modes of housing for present and projected residents of differing economic status of the Township have been provided for. Careful consideration has been given not only to the needs of the Township but to the region of which it is a part. The decision as to how the municipality should go about performing the affirmative duties imposed by Mt. Laurel is one initially to be made by the officials of the municipality. Id. at 215. Franklin Township has by its newly adopted ordinance, attempted to perform these obligations. Mindel v. Township of Franklin, A-1213-73, 1,3-4 (App. Div. Oct. 16, 1975).

Now, when plaintiff's application (the first such application for P.U.D. approval in the more dense of the township's two P.U.D. zones) was close to achieving what turned out to be planning board approval, the governing body amended the zoning ordinance and reduced by half the number of housing units which could be developed. Such action was questionable at best. However, since the township has since adopted a new master plan and zoning ordinance, a broad Mt. Laurel type ruling is not needed and will not be rendered.

Plaintiff's counsel will submit an order reflecting this decision.

Very truly yours,



B. Thomas Leahy, J.S.C.

BTL/d