MM Lumberton Farms, Inc. v. Twp Lumberton 5/2/80

opinion of Wood, JSC

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BURLINGTON COUNTY

DOCKET NUMBER L-36104-75

LUMBERTON FARMS, INC., a corporation of the State of New Jersey,

Plaintiff

v.

THE TOWNSHIP OF LUMBERTON, et als.,

Defendants.

9235

CIVIL ACTION

OPINION

Messrs. Capehart & Scatchard (William B. Scatchard, Jr. appearing), attorney for plaintiff.

Messrs. Parker, McCay and Criscuolo (Barry T. Parker appearing), attorneys for defendants, Township of Lumberton and Township Committee of the Township of Lumberton.

Alfred O. Powell, attorney for defendants Planning Board of the Township of Lumberton and Harlan Greenberg

Decided: May 2, 1980

WOOD, J.S.C.

Plaintiff, a builder and developer specializing in development of residential housing, is the owner of a tract of land about 144 acres in extent, situate in defendant township. It desires to erect thereon a residential development consisting of a combination or "mix" of single family dwellings of modest size, condominiums, apartments and town houses in relatively high density. The Township Zoning Ordinance limits building on the tract to large single-family dwellings on lots of 2 acres or more. Plaintiff's efforts to secure a zoning change or variance to permit its proposed development having been unsuccessful, it brings this action in lieu of prerogative writ, challenging the legality and constitutionality of the ordinance as it affects plaintiff's property.

The essential facts are largely undisputed.

Plaintiff, a New Jersey corporation, acquired the tract of land in question, known as the Worth Farm, in February 1972. The land, heretofore occupied and used as a farm, is situate at the junction of the Medford-Lumberton Road and Fostertown-Eayrestown Road and is bounded by them and by Bella Bridge Road, the Rancocas Creek and the tracks of the long unused Mount Holly-Medford Railroad. An ease-

ment for an electric power line of Public Service Electric & Gas Co. bisects the property. The tract is adjacent to the residential Village of Lumberton. Abutting it, also, are residences on lots of various sizes, particularly along Bella Bridge Road. The land is suitable for residential development. Public water and sewer lines are in place on the boundaries of the tract and plaintiff asserts its readiness to instal sewage disposal facilities if necessary.

The efforts of plaintiff to obtain the necessary zoning changes to permit the use of the land for residential purposes actually began before its acquisition of the Worth Farm. In June 1971 plaintiff entered into an agreement with the then owners for the purchase by plaintiff of a portion of the farm comprising 24 acres. In November 1971 plaintiff presented to the Zoning Board of Adjustment of Lumberton Township an application for a variance to permit the use of this 24 acre tract for construction of apartments. The application was denied. About the same time plaintiff presented to the Township Planning Board a preliminary proposal for a recommendation for a change in the zoning ordinance for the same purpose. That proposal was likewise rejected with the suggestion, however, that a proposal for a broader mixture of housing types might be favorably

considered. Thus encouraged, plaintiff proceeded to complete the acquisition of the entire Worth Farm on May 8, 1973. The purchase price was $3700. per acre.

Plaintiff's proposal was revised and thereafter, acting through its president and principal stockholder, Ralph Griffin, it presented various plans for the residential development of the farm. Under the provisions of the zoning ordinance then in effect the property was zoned for agricultural use or residential developments on lots having a minimum area of 5 acres. All of the numerous proposals of plaintiff were rejected.

Ultimately plaintiff instituted suit in this court challenging the validity of that zoning ordinance as it applied to the Lumberton Farms property. During the pendency of that action, Lumberton adopted an "interim" zoning ordinance establishing a moratorium to permit completion of a new zoning study and master plan. The action by plaintiff was dismissed, the court upholding the validity of the interim ordinance. Lumberton was allowed about one year to complete its zoning study. Thereafter the present zoning ordinance was adopted.

In January 1976 plaintiff filed application with the Lumberton Planning Board seeking subdivision approval of a site plan, and a recommendation to the township committee for a zoning change as to plaintiff's property.

The site plan application was withheld from consideration by the planning board pending its action on the zoning application. In April 1976 the planning board rendered a decision declining to recommend the requested zoning change. The present suit followed.

While this action was pending, plaintiff presented to a joint meeting of the township committee and planning board yet another plan for development of the property for both residential and agricultural purposes. This plan called for retention of a specific tract containing 50 acres more or less for agricultural purposes. By a letter dated November 3, 1978, plaintiff was advised that the township committee and planning board rejected its "request for proposed change in zoning."

When the applications were made, and during the proceedings before the planning board, its chairman was Harlan F. Greenberg. At the same time, Mr. Greenberg was the owner of all lands in Lumberton Township then and now zoned R-6, and some of the lands zoned R-12. These are the only zones in which multi-family housing is permitted. Mr. Greenberg was asked to disqualify himself from consideration of plaintiff's application on the ground that his ownership of these lands placed him in potential economic competition with the plaintiff and thus creating impermissible conflict

of interest. Mr. Rockhill, the present lessee of plaintiff's lands, who is also a member of the planning board, was also asked to disqualify himself. Although Mr. Rockhill did so, Mr. Greenberg declined, and he participated fully in the consideration and rejection of plaintiff's application.

At the present time the land is devoted principally to farming, consisting of the growing of truck crops and cover crops. Witnesses for the plaintiff, including the former owners, testified that, under present economic and environmental conditions it is difficult if not impossible to conduct a profitable farming operation on the Worth Farm. Reasons given are difficulty caused by irregularity of the field boundaries and their proximity to heavily traveled roads, making it difficult and dangerous to operate farm equipment; the porous nature of some of the soil brought about by removal of subsurface clay in an earlier quarrying operation necessitating constant and excessive irrigation; proximity of residential developments whose occupants object to noise and dust caused by the tilling of the soil, and who sometimes vandalize the fields and steal the crops. These difficulties are of course compounded by escalating costs of fuel, fertilizer, labor and equipment, making it exceedingly

difficult to conduct a profitable farming operation.

Plaintiff therefore contends that the effect of zoning restrictions which in effect limit the use of the property to agriculture is to zone it into idleness. It urges that the ordinance, or at least so much thereof as imposes the residential requirement limiting residential construction to single family dwellings on lots of 2 acres or more be declared to be invalid. It rests this contention on a number of legal and constitutional grounds:

1. The ordinance is exclusionary in failing to make reasonable or adequate provision for housing opportunity for persons of low and/or moderate income. Southern Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975); Oakwood at Madison Inc. v. Tp. of Madison, 72 N.J. 481 (1977).

2. As applied to plaintiff's property the ordinance is confiscatory. By limiting the use of plaintiff's land, along with 61.4% of all the land in the township to agriculture or to residential building of 2 acre lots, it effectively zones the land into idleness and deprives plaintiff of any practicable or economic use thereof. This, it is argued, amounts to confiscation - a taking of plaintiff's property without just compensation. Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973); Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249 (1976).

In addition, plaintiff argues that the action of the Lumberton Planning Board in rejecting and denying plaintiff's proposed site plan and variance applications must be declared invalid because of the conflict of interest on the part of the chairman of the planning board, Mr. Greenberg. Under the circumstances related above, it appears that any recommendation for zoning changes or site plan approval permitting higher density development of plaintiff's lands poses a direct conflict with the economic interest of Mr. Greenberg. Plaintiff contends that this conflict of interest requires the rejection and setting aside of any planning board decision involving plaintiff's land in which Mr. Greenberg participated.

Plaintiff contends that the Lumberton ordinance must be held invalid, both generally and as it applies to and affects the lands of plaintiff. It is argued (a) that the ordinance fails to meet the township's affirmative constitutional obligation to provide reasonable opportunity for housing to meet the needs, desires and resources of all categories of people who may desire to live there, Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975); and (b) that even if the ordinance does meet this obligation, it still is invalid as to plaintiff's lands

because, as a practical matter, it prevents their economic use for any purpose and thus is, as to plaintiff, arbitrary, capricious, and confiscatory and amounts to a taking of plaintiff's land without just compensation.

Lumberton Township encompasses a land area of 8505 acres, or 13.29 square miles. Of this area, 5220 acres or 61.4% of the entire area of the township is zoned RA, limiting housing construction to single family residencies or lots of at least 2 acres. All of plaintiff's land is within the RA zone. Lands zoned R-2.5, R-6 and R-12, which purport to provide for low and moderate income housing, comprise 1370 acres, or 16.1% of this area; only 28.78 acres are presently undeveloped in the R-12 zone. As previously stated part of the R-12 lands and all of the R-6 lands are owned by Harlan F. Greenberg, of whose status more anon. Only 340 acres are zoned for residential use at a density of 6 units to the acre or greater. Accordingly, 96% of the township either cannot be developed at greater densities or cannot be developed for residential use at all, being restricted to commercial or industrial use.

The proofs overwhelmingly and without effective contradiction support the plaintiff's contention that, to

all intents and purposes, there is no market for large houses on 2 acre lots and that such zoning effectively prevents the construction of substantial numbers of dwellings (whether of the single-family or multi-family variety), particularly at low cost. Such massive large-lot zoning was specifically disapproved in Oakwood at Madison Inc. v. Tp. of Madison, 72 N.J. 481 (1977). The court there found that the cost of such housing placed it beyond the reach of 90% of the population - a condition surely more clearly true today. On its face, such zoning with respect to all but a minute fraction of the township's land area would appear to be exclusionary, as as to fly directly in the face of the principles enunciated in Mount Laurel and Oakwood at Madison.

Lumberton, however, argues to the contrary that its ordinance is not exclusionary, but that it effectively complies with those zoning principles by fully affording the opportunity for Lumberton's fair share of low and moderate income housing. It is said that the ordinance does indeed provide realistic opportunity for an appropriate variety of housing, including housing for persons of low and moderate income, for a township population projected through the year 2000. Moreover, Lumberton argues that it is fully in compliance with the Land Use Law, N.J.S.A. 40:55D-1 et.seq., which, among other things,mandates periodic re-examination and review by every

municipality of its master plan and development regulations at least every six years. Thus it is said, the ordinance is not and has not been proven to be discriminatory.

Zoning is a municipal legislative function, beyond the purview of interference by the courts unless it is seen, in whole or as applied to any particular property, to be arbitrary, capricious or unreasonable. The decisions of our highest court, while prescribing as a standard that each municipality shall, by its land use ordinances, provide for its fair share of low and moderate income housing, have not mandated how it is to be done. It is not for the courts to substitute their conception of what the public welfare requires by way of zoning for the views of those whom the Legislature and the local electorate have vested that responsibility. Pascack Ass'n Ltd. v. Washington Tp., 74 N.J. 470, 485 (1977).

In the present case Lumberton's ordinance evolved following detailed study taking into consideration its physical, social and rural characteristics as well as existing and projected traffic patterns. It is therefore entitled to the presumption of validity and that presumption has not been here overcome. cf. Montgomery Associates v. Tp. of Montgomery, 149 N.J.Super. 536 (Law Div.1977).

To uphold the general validity of the Lumberton ordinance does not, however, dispose of this case. The plaintiff maintains that, even if the ordinance be held generally valid, it is definitely not so as it affects plaintiff's land.

Although, as stated, the ordinance appears in general to provide for an appropriate variety and mix of housing, the fact remains that by far the largest part of its land area is zoned for a type of housing which puts it beyond the reach of all but a few in the upper income echelons. All of plaintiff's land is within this zone. Plaintiff contends that the effect of this 2 acre zoning is to deprive its land of any reasonable or practicable economic use. I conclude that this contention is correct.

Lumberton's rationale for this restrictive zoning is that its object is protect and preserve the land for agriculture. However, the restriction of development to single family dwellings on 2 acre lots is not an effective means to accomplish that laudable policy. Plaintiff's witness, John Rahenkamp, a planner of considerable qualifications, testified that 2 acre residential zoning was "a paradox" and not a proper tool for the preservation of farm land. He

presented a plan calling for reservation of a tract of approximately 50 acres as being of suitable size to reserve for farming purposes. Moreover, plaintiff's other witnesses, including the former owners of plaintiff's land testified without contradiction that plaintiff's land itself is simply not suitable for the carrying on of a farming operation, let alone one that is reasonably profitable. Not only are the irregular shape and dimensions of the farm such as to render difficult the tilling of the fields, but the location of the land, and its juxtaposition to heavily traveled roads and to encroaching residential areas render the farming operation not only unreasonably costly but hazardous as well. Prior to its acquisition by the plaintiff's predecessors in title a large portion of the farm was used for the mining of clay. Topsoil was stripped off in order to secure the subsurface clay, and was later replaced after the clay had been removed. The result was to render the ground exceedingly porous and incapable of holding moisture necessary for the growing of crops without continuous and extensive and increasingly costly irrigation. The same condition has made fertilizing difficult and excessively costly. In fine, plaintiff's witnesses, including Mr. Robert Worth, one of the former owners, testified that the land today is unsuitable for farming and that it is

difficult if not impossible to conduct thereon a profitable farming operation.

The effect, then, of zoning which restricts the use of the land to farming or single family dwellings on very large lots is to deprive it of usefulness for any practicable purpose. That a restraint against all use is confiscatory and beyond the police power and statutory authorization is too apparent to require discussion. Kozesnick v. Montgomery Tp., 24 N.J. 154, 182 (1957). In Morris County Land Imp. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539 (1963), the Supreme Court held that an ordinance greatly restricting the use of swamp land, which had the object of preserving land in its natural state essentially for public purposes such as a floodwater detention basin and wildlife preserve, was a taking of private property without just compensation and was thus unconstitutional. The court said at p. 557:

> The same result [unlawful taking] ordinarily follows where the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose, or when the only permitted uses are those to which the property is not adopted or which are economically unfeasible.

In Schere v. Tp. of Freehold, 119 N.J.Super. 433 (App.Div.1972), certif. den. 62 N.J. 69 (1972), cert. denied

410 U.S. 931, 93 S.Ct. 1274, 35 L.Ed.2d 593 (1973) the facts were similar to those here considered. In that case, plaintiff owned two tracts, 200 acres and 100 acres in extent. The ordinance restricted their use to farming and, by special exception, to "planned adult communities." The court held that such restriction "in relation to the most natural current and prospective utilization of such substantial aggregations of land in a rapidly growing community area" was confiscatory. It found that the restriction was designed to inhibit residential development at a rate which, it was thought, would outstrip the fiscal outlay for services which the taxpayers would accept. The court held that such fiscal considerations could not justify imposing "substantial functional non-utilization" of a property owner's lands.

In the present case, plaintiff has amply demonstrated that its property cannot, for economic and practical reasons, be used for agricultural purposes. There is, furthermore, no development on 2 acre lots within the region and no market for residences on 2 acre lots. This was admitted by the township's planners. The 2 acre zoning was intended more realistically to "stockpile" land east of the Rancocas Creek for development at some undetermined date in the future. This constitutes a taking of plaintiff's land without just

compensation and the provision of the ordinance with respect to the establishment of the RA zone and inclusion therein of 61.4% of the area of the township, including all the lands of the plaintiff, is therefore declared unconstitutional and void.

It is only necessary to add that, in view of the demonstrated and admitted personal financial interest of Mr. Greenberg in the decisions of the planning board affecting plaintiff's lands, he was burdened with a disqualifying conflict of interest, and any and all decisions of the board affecting plaintiff, in which he participated must be declared null and void. N.J.S.A. 40:550-23(b); S.& L. Associates Inc. v. Washington Tp., 61 N.J.Super. 312 (App.Div.1960).

There remains to be considered the award of an appropriate remedy and relief to the plaintiff. Although plaintiff has attacked the Lumberton ordinance on the grounds of general illegality as well as by reason of its unconstitutional application to plaintiff's lands, my finding here is limited to the latter. I specifically do not conclude that the ordinance generally must be struck down as exclusionary or for failure to provide housing opportunities in accordance with the standards established by Mount Laurel and Oakwood at Madison. Nevertheless, I find that so much of the ordinance

as creates the highly restrictive RA zone, limiting development of 61.4% of the land in the township to uses which are clearly uneconomic and unrealizable, drastically restricts and circumscribes the availability of housing opportunities within the township. For these reasons, as well as because of its confiscatory application to plaintiff's lands, the provisions of the ordinance creating and limiting permitted uses in the RA zone are declared illegal.

The first consideration must be of a remedy for plaintiff, which has borne the stress and expense of application and litigation since 1971 and has seen its highly reasonable proposals for orderly development frustrated by an ordinance which illegally limits all such development. Mere invalidation of the ordinance pro tanto is not an adequate remedy. Under these circumstances specific relief for plaintiff is justified similar to that awarded plaintiff in Oakwood at Madison, 72 N.J. 481, 550. Plaintiff has presented plans for residential development which are reasonable and entirely consistent with the development of the neighboring lands. Subject to the receipt of appropriate applications for subdivision and other appropriate and necessary permits applicable to plaintiff's land, it will

be directed that defendant township, Lumberton, through its municipal agencies, shall forthwith issue appropriate permits to allow and facilitate construction thereon of residential units as depicted in the plan prepared by Mr. John Rahenkamp and previously proffered to the township and its planning board. Included therein shall be allocation for at least 10% of the housing, in single-family homes as well as various types of multi-family housing, to persons of low and moderate income. It may of course be assumed that such permits may be coupled with reasonable conditions for building code, site plan, water, sewer, and other requirements so as to protect and provide for the public health and safety.

In addition, the township is directed to amend its zoning ordinance to provide for reasonable and economic uses of the lands heretofore included in the RA zone here declared illegal. A period of 6 months will be granted for this purpose. In the interim, the present zoning provisions, except with respect to plaintiff's land, will remain in effect.

The court will retain jurisdiction only so far as is necessary for enforcement of this directive with respect to the plaintiff's lands. It should be emphasized that the court does not wish nor does it propose, to arrogate to

itself the powers and duties of an "ad hoc super-zoning legislature." cf. Pascack Ass'n Ltd. v. Washington Tp., 74 N.J. 470, 485-489 (1977).

Counsel for the parties will please cooperate in the preparation and submission of an appropriate order in accordance with these conclusions.