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Montgomery Twp.

7-29-75

Taberna Corp v. Twp. Montgomery

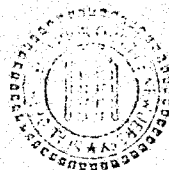
In lieu of prerogative writ

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SUPERIOR COURT OF NEW JERSEY

ARTHUR S. MARSDEN
JUDGE



SOMERSET COUNTY COURT HOUSE
SOMERVILLE, NEW JERSEY 08876

July 29, 1975

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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 controversy 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

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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.

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 municipality. 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

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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 provided 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

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dwelling units in the 1970-1985 time period. According to census data, 67.5% of the families of 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 period 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 determining 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 throughout 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.

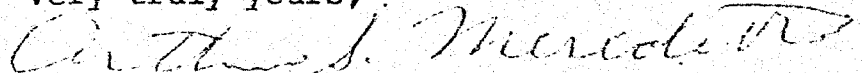
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Therefore, this would require an opportunity for about 119 units of multi-family housing per year for the next ten years. The conclusion is that this is well within the potential of the present apartment/townhouse zone.

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.