ML- General (Rockleigh) 5/14/73

Wilgnn v Rockleigh

Decision (Labeled as part of an appendix)

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Decision Judge VanTassel - 5/16/73

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. L-29014-71

WILANN ASSOCIATES, a New Jersey Corporation,

Plaintiff,

v.

BOROUGH OF ROCKLEIGH, a Municipal Corporation,

Defendant.

Civil Action

DECISION

.. ..

Mr. Charles J. Sakany, Attorney for Plaintiff

Messrs. Logan and Logan, Attorneys for Defendant

VAN TASSEL, E.J., J.D.C. T.A.

Decision Judge VanTassel - 5/16/73

This complaint in lieu of prerogative writ brought by the plaintiff against the defendant, Borough of Rockleigh, New Jersey, seeks to invalidate the residential two acre minimum lot size requirement of the Rockleigh Zoning Ordinance of 1960.

Plaintiff demands judgment declaring the above-mentioned ordinance unconstitutional and hence null and void, alleging that the ordinance is confiscatory as applied to plaintiff and that it is generally discriminatory in that it discriminates against potential residents of the municipality. The plaintiff further contends that the zoning ordinance is not intended to create an orderly development of the municipality, but intends and does in fact discriminate against classes of persons in violation of federal and state law. Alternatively, plaintiff demands judgment declaring the ordinance of the Borough of Rockleigh, as it pertains to the plaintiff's property to be invalid, arguing that the ordinance as it applies to the premises of the plaintiff is arbitrary, capricious, and unreasonable in that it does not take into consideration the location of plaintiff's property with regard to an adjacent factory and commercial stable, thereby effectively denying plaintiff the reasonable use of its property.

Wilann Associates, the corporate plaintiff, is the owner of approximately five acres of land in the residential zone of Rockleigh and successor in title to land acquired in 1949

by its sole stockholders who now reside in a one-family house thereon.

This residence, located to the south of Willow Avenue in Lot 8 of Block 3 as indicated on the Tax Map of the Borough of Rockleigh (P-3 in evidence), is to the west of a plastic factory known as the Carlee Corporation plant, a non-conforming use, and on the southside adjacent to a commercial riding stable which conforms to the zoning ordinance. To the east of plaintiff's property, in Lots 5, 6 and 7 of Block 3, there are three one-family residential dwellings, one of which is now under construction. A creek running north to south passes through these lots in close proximity to plaintiff's land and, as indicated further in this opinion, creates a flood area. To the north side of Willow Avenue there are also residential properties, including Lot 21 of Block 4 owned by John Hanson and directly across Willow Avenue from the Happel property. It was testified that Mr. Hanson has built a swimming pool on his property and is now in the process of constructing a tennis or squash court thereon.

The testimony of Mr. and Mrs. Happel, sole stockholders of the corporate plaintiff and residents of the subject property, indicates that the Carlee Corporation, once an airplane hangar and now a factory for the manufacture of plastics, is situated approximately 350 feet to the west of plaintiff's property and, is about 300 feet long, 100 feet wide and 28 feet high and

is constructed of metal and glass. There are four stacks to the rear of the building, one of which is nearly 50 feet high. Mrs. Happel made known her objections to this factory by indicating, through her testimony, that Carlee Corporation operations are conducted from 7:30 A.M. until 2:00 A.M. and that during that period she was subjected to the noise of the machinery, the coming and going of trucks, smoke and soot spewing forth from the chimney, a terrible rubbery smell permeating the air and television interference. These complaints were corroborated by the testimony of Mr. Happel. Mrs. Happel further testified that the riding stable located to the south of her property was open to the public and that periodic horse shows created a carnival-like atmosphere in close proximity to her property.

The Happels also related their attempts to sell their property. At or about 1965, Mr. Goldman, the owner of the Carlee plant, offered $35,000. for this property, but this offer never culminated in a sale. There was testimony that the property had been listed with various real estate brokers for about $60,000. in 1965 and that one broker had listed it at about $70,000. None of these listings culminated in a sale, either. Mr. James W. Mason was called by the plaintiff as an expert real estate appraiser and he testified that no dwellings could be erected under the present zoning laws of the Borough of Rockleigh on plaintiff's land. He also offered his opinion that the Carlee factory adversly affects the value of plaintiff's property as a residence.

From all of the evidence, including the testimony of experts and various exhibits prepared for the benefit of this court, the unique characteristics of the Borough of Rockleigh are apparent. The defendant municipality is located in a sparsely populated area of the region known as the "Northern Valley," situated in the northeastern section of the State. It comprises .98 square miles or approximately 600 acres and, according to the 1970 census has a population of 300, including the residents of St. Joseph's Village, a children's home located within the borders of the Borough.

Rockleigh is, in fact, the smallest residential community in Bergen County.[1] It has no police department of its own, but contracts with the Bergen County Police Department for the limited police services it requires. Furthermore, it has no schools but sends its few children to the schools of larger adjoining communities.

Rockleigh is zoned for three uses, specifically residential commercial and industrial, the latter zone being an Industrial Park containing 80--90 acres. There are a total of 167.9 acres zoned for residential use, excluding the County owned golf course, St. Joseph's Village and certain lands owned by the Boy Scouts of America and used for camping and other related activities. There are approximately 46 homes now existing in

1. Teterboro is an industrial artifically created entity with only 20 residents.

the residential zone, leaving 13 vacant lots having an average size of 2.0 acres available for future residential development. The townships which border Rockleigh (i.e., Alpine, Norwood and Northvale in Bergen County, New Jersey, and Orangetown in Rockland County, New York) are typically rural communities. The non-urban character of this region is apparent from, among other factors, the lack of highway development in the area, the non-existence of a regional utility system (the Bergen County Sewer Authority does cover Northvale, but there is no evidence that its services extend to Rockleigh) and the low density of population. The nature of the defendant community and the region in which it is located appears to have remained unchanged for at least several decades and, because of the minimal amount of land available for residential development, may be characterized as "stable" or "established."

The challenged portion of the zoning ordinance of the Borough of Rockleigh which became effective in 1955 reads as follows:

> "(g) Lot size-No new building shall be erected on a lot having an area of less than two acres (87,120 square feet), a road frontage of less than two hundred feet (200') and a depth of less than two hundred (200) feet."

The plaintiff attacks this ordinance alleging that it was not enacted in reasonable furtherance of legislatively sanctioned zoning purposes, but that it was designed to thwart the

entry of middle and lower class persons into the community in order to preserve the low tax rate and high standard of living enjoyed by those residing in Rockleigh at the time the ordinance was passed. The defendant contends that the passage of the minimum two acre building restriction was and is reasonably related to proper zoning purposes in that it was aimed at preserving the already established rural nature of the community, and furthermore that such a restriction was and is necessarily related to the geographical nature of the land with respect to sewage disposal and other services.

To conserve the character of an established community, the courts of New Jersey have upheld minimum area lot requirements in several cases. In Fisher v. Township of Bedminster, 11 N.J. 194 (1952) such a requirement was upheld in order "to preserve the character of the community, (maintain) the value of the property therein, and (devote) the land throughout the township to its most appropriate use." In Clary v. Borough of Eastontown, 41 N.J.Super. 47 (App. Div. 1956) and in Mountcrest Estates, Inc., v. Mayor and Township Committee of Rockaway Township, 96 N.J.Super. 149 (App. Div. 1967) similar ordinances were upheld. The case of Oakwood at Madison, Inc. v. Tp. of Madison, 117 N.J. Super. 11 (Law Div. 1971) in which the court ruled that an ordinance requiring minimum lot sizes of one and two acres was invalid because "it fails to promote reasonably a balanced community in accordance with the general welfare," has been

considered a "watershed" case, signalling a judicial trend toward invalidation of minimum lot size ordinances. Nevertheless the holding in Oakwood at Madison, Inc., supra, must be confined within its own factual context, and its effect upon this court's decision in the case sub judice depends upon the differences or similarities found after a comparative analysis of the relevant characteristics of the Township of Madison as compared with the Borough of Rockleigh.

The facts of Oakwood at Madison, Inc., supra, indicate that Madison Township covers an area of 42 square miles and that, from 1950 to 1970 the population grew from 7,366 to 48,715. It was also determined that 30% of the land restricted by the two acre minimum lot size requirement was vacant and developable, and an expert testified that the township could hold a population of 200,000 without overcrowding. The plaintiff in that case suggested "that the purposes of zoning which were enacted in 1928, a time of relatively static population are not commensurate with general welfare today, a time of rapid population expansion. Specifically plaintiffs contend that the declared zoning purposes are fatally defective, thwarting the general welfare, because they fail to encompass housing needs." The court determined that new housing was in short supply since, for one reason, the township was encouraging the influx of industry. As the court indicated, large areas of vacant and developable land should not be zoned, as Madison Township has, with such minimum lot sizes and with such other restrictions that regional as well

as local housing needs are shunted aside.

As clearly demonstrated previously in this opinion, the nature of the Borough of Rockleigh is unique and apparently contra-distinct to the facts under which the two acre lot restriction was struck down in Oakwood at Madison, Inc., supra. Rockleigh is more closely akin to the town of Bedminster, most importantly with respect to the factors used by the court in Oakwood at Madison, Inc., supra, to distinguish that case from the case of Fisher v. Township of Bedminster, supra, which upheld a five acre minimum lot ordinance. In Madison Township the court was dealing with one-acre and two-acre minimum lot sizes on largely vacant land, which as such had no established residential character or residential property values. The similarities between Bedminster and Rockleigh which distinguish both of those communities from Madison are that both have established residential character, both are surrounded by rural towns of low population density, and both have a minimal amount of vacant land available for residential development. As was stated in Fisher, supra, "as much foresight is now required to preserve the countryside for its best use as has been needed to save what could be salvaged of our cities."

Another recent case relied on by plaintiff is Southern Burl. Cty. NAACP v. Tp. of Mt. Laurel, 119 N.J.Super. 164 (Law Div. 1972) which struck down an ordinance which was clearly discriminatory because it permitted multi-family dwellings but only

for farmers and their help. Thatcase is clearly distinguishable from the case now being considered for several reason. An expert witness testified that 66% of the land in the township of Mt. Laurel was vacant; that people were living in substantard, deplorable facilities within the township; and that these low income families were not being provided with standard housing in the township. Since the zoning ordinance of Mt. Laurel allowed multi-family dwellings for one segment of the population, i.e., farmers and their help, but not for those on welfare, it was struck down as discriminatory. None of the factors upon which the holding in the Mt. Laurel case was based are evident in the Borough of Rockleigh. As stated previously, there is a minimal amount of vacant land in the Borough. Also there is no evidence that any of the residents of the community are on welfare or reside in substandard housing. Therefore the decision in Southern Burl. Cty. NAACP, supra, is distinguishable and not binding with respect to the case sub judice.

In earlier times large tracts of land were available in Rockleigh, but these tracts were utilized for non-residential purposes such as the County golf course, St. Joseph's Village and the Boy Scout property. The small amount of land left for residential development, if zoned to increase the population desnity appreciably would not only discourage the most appropriate use throughout the municipality, but would tend to overburden the limited services available to the present residents. The court heard the testimony of Mr. Dean K. Boorman, a professional city planner, who indicated, by means of facts and statistical

data, the physical necessity for a two acre minimum lot size. Rockleigh does not have a sewer system of its own. A few homes and the Industrial Park are serviced by the Orangetown sewer system, but the remainder of the Borough relies on septic tanks for its sewage disposal. Mr. Boorman testified that due to the soil conditions of the Borough, large lots are needed to handle, properly, septic tank usage. Exhibits D-6, D-7 and D-9 (an aerial photograph of the Borough, a topographical survey map, and a tabulation of land uses) together with Mr. Boorman's testimony demonstrate that due to the sub-soil conditions, there is virtually no land that can be built upon on less than a two acre tract without causing sewerage problems. Several other factors such as low and swampy areas, a number of steep rocky areas and a creek running north to south creating a flood area inhibit building development. There was further testimony that the Borough is serviced by four main roads, each of which is two lanes and narrow and that any substantial increase in Rockleigh's population would cause traffic difficulties.

The Mayor of Rockleigh, Gordon Hutcheon, was called as a witness for the defendant and he testified to other limited services available to the residents of the town. Electricity and gas are available, but gas is only available in limited areas. Water is available on Piermont Road and Paris Avenue but not elsewhere in the Borough, although there was testimony with respect to the feasibility of running water lines from these roads

to other areas of the community. There are no sidewalks in the community and as indicated above, the four roads crossing Rockleigh are narrow and limited in the volume of traffic they could bear.

In consideration of the previously enumerated factors, the court finds that the challenged ordinance is reasonably related to valid zoning purposes such as the lessening of congestion in the streets, promotion of health and the general welfare and the avoidance of undue concentration of population (see N.J.S.A. 40:55-32). Furthermore the plaintiff's contention that this ordinance discriminates against "potential residents" of Rockleigh, because of its failure to provide for low and middle class housing needs is untenable. It has never been held that the regional need for low cost housing is the sole criterion for determining the validity of a zoning ordinance, but rather all of the valid purposes of zoning should be considered. Even if regional housing needs were the sole or primary consideration, the record clearly indicates that no housing shortage exists in Rockleigh or in the low population density areas immediately surrounding it. Therefore, it cannot be argued that the preservation of the rural nature of Rockleigh and its environs was accomplished at the expense of regional housing needs.

The plaintiff also contends that as a result of the location of its land between the Carlee Corporation factory and the commercial riding stable, plaintiff is denied the reasonable use of its property as a residence and since its land is zoned for only residential use, the result is a confiscatory taking of plaintiff's property and hence violative of due process. The Supreme Court of New Jersey in Morris County Land, etc. v. Parsippany-Troy Hills Tp., 40 N.J. (1963), at p. 557 said the following:

> "As was said in Kozesnik v. Montgomery Township, 24 N.J. 154, 182 (1957): 'That a restraint against all uses [for the benefit of another private land owner] is confiscatory and beyond the police power and statutory authorization is too apparent to require discussion.' (Insertion ours). The same result ordinarily follows where the ordinance so restricts the use that the land cannot practicably be utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or which are economically infeasible. Gruber v. Mayor and Township Committee of Raritan Township, 39 N.J. 1, 12 (1962); Arvene Bag Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E. 2d 587, 117 A.L.R. 1110 (Ct. Appeals 1938)."

However, it is this court's conclusion that the plaintiff has failed to carry its acknowledged burden of showing that the ordinance in question was unduly restrictive and therefore unreasonable or confiscatory. The proofs indicate only that the residents of plaintiff's property were burdened with an annoying and abnoxious neighbor since the property was

acquired in 1949 and further that attempts to sell that property at a price consonant with real estate values in the community were unsuccessful. As indicated in Kirsch Holding Co. v. Borough of Manasquan, 265 A. 2d 333, 11 N.J.Super. 359 (Law Div. 1970), a zoning ordinance does not contravene constitutional limitations because restricted use may not be the most profitable use to which the property can be devoted. Since the stated purpose of the plaintiff is to remove the two acre minimum lot size restriction in order to enable it to sell the subject property for a different use than now exists, i.e., for the erection of garden-type apartments or for a laboratory, it is clear that plaintiff is seeking to obtain a more profitable use for its property rather than merely a reasonable or economically feasible use. In any event, this court has no basis to conclude that this land cannot practically be utilized for any reasonable purpose. It has been utilized as a residence since 1949 and the complaints now raised concerning plaintiff's land with respect to its proximity to the Carlee plant and riding stable are cognizable by the Borough's Board of Adjustment. The court's decision in this case, however, is not based on plaintiff's failure to exhaust its administrative remedies.[2] Rather, it is based on the conclusion, derived from a

2. Mr. Happel testified that he and an attorney met in 1956 with representatives of the Board of Adjustment of Rockleigh and there was some discussion of the subject property wherein a buffer zone of 100 feet seemed to be indicated. It was not clear that this was anything else but an informal discussion. No other approach to the municipality has ever been made by plaintiff.

review of the evidence, that the Happel property is not subject to a restriction so unreasonable as to deprive its owners of any practical use of that land and that the challenged zoning ordinance is not so restrictive as to cause this property to be subject to only economically unfeasible uses. The testimony most helpful to plaintiff was to the effect that the Carlee factory adversely affects the value of plaintiff's property as a residence. If the court were to accept this as true, the plaintiff has still fallen well below sustaining its burden of showing that the effect of the challenged ordinance is confiscatory.

Therefore this court holds that the Rockleigh Zoning Ordinance of 1960 is valid and applicable to the subject premises.

Submit an appropriate order.

Edward J. VanTassel

Edward J. VanTassel, J.D.C. T.A.

Dated: May 16, 1973