ML – West Milford

(City of Newark v. West Milford)

3/31/80

Opinion

Pgs. 13

MM0000530

SUPERIOR COURT OF NEW JERSEY

IRVING I. RUBIN
JUDGE

COURT HOUSE
PATERSON, NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

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March 31, 1980

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Re: City of Newark v Tp. of West Milford
Docket No. L-25413-77 PW

Gentlemen:

Plaintiff, owner of approximately 1800 acres of land in the Tp. of West Milford, by these proceedings seeks to void defendant's zoning ordinance, which in effect, requires four acres of such property for a one family unit. This is claimed to be contrary to So. Burl. Cty. N.A.A.C.P. v Tp. of Mt. Laurel, 67 N.J., 151 (1975) (hereinafter referred to as Mt. Laurel) and as further provided in Oakwood at Madison Inc. v Tp. of Madison, 72 N.J. 481 (1977) (hereinafter referred to as Oakwood).

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Plaintiff also asserts that the ordinance is arbitrary, disciminatory and confiscatory. It further demands specific relief and damages. At pretrial, it was provided that the issues other than the type of relief and damages be tried first. Accordingly, we must now address the attack on the validity of the ordinance.

The position of plaintiff is that defendant is a developing community and as such must make realistically possible an appropriate variety and choice of housing. Mt. Laurel, 174,179 or least cost housing, Oakwood, 512.

The preliminary question was squarely raised, is West Milford a developing commuity?

Mt. Laurel is said to have laid down the test which was paraphrased in Glenview Development Co. v Franklin Tp., 164 N.J.Super. 563,567 (Law Div. 1978) as follows:

***A developing municipality:

(1) has a sizeable land area,

(2) lies outside the central cities and older built-up suburbs,

(3) has substantially shed rural characteristics,

(4) has undergone great population increase since World War II or is now in the process of doing so,

(5) is not completely developed and

(6) is in the path of inevitable future residential, commercial and industrial demand and growth.

The testimony reveals that West Milford covers an area of approximately 78.3 miles (10th largest municipality in the State), three times larger than Mt. Laurel and situated about 15-16 miles from the City of Paterson and approximately 21 miles from the City of Newark. Although West Milford meets the express language of criteria number two above, it would comply with the meaning ascribed by defendant's witness of being in close proximity. Glenview Development Co. v Franklin Tp. supra at 570.

West Milford's population grew from 3,650 in 1950 to 8,157 in 1960 (124%) to 17,304 in 1970 (112%) to 21,743 in 1975 (26%) which was in excess of Mt. Laurel's growth which increased in lesser percentages from 2,817 in 1950 to 15,451 in 1975. West Milford's increase in population was far in excess of the remainder of Passaic County and projected to a figure of 47,995 in 1990. (Exhibit P-2).

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The statistics further disclosed that 89% of West Milford was vacant land with a population density in 1975 of 277 persons per square mile. The presence of one or more shopping centers, professional buildings, a movie theatre, financial institutions and the extent of municipal services offered by the community including six elementary schools, two parochial schools, a high school complex, police station and municipal building and an economic development committee actively seeking growth (Exhibit P-4) gave additional weight for the Court's determination that West Milford had substantially shed its rural characteristics. One of the experts, Alan Mallach, summed it up when he said; (T.8/8/79 p.2.49)

> ***Yes sir. To predict future growth, of course, is always done without perfect certainty, but if there's any community that appears to be well suited for future growth, particularly population growth with commercial and industrial growth as well in the New York Metropolitan area during the coming decades, that could well be West Milford Township.

The foregoing and other factors which were included in the testimony would confirm the opinion of plaintiff's experts establishing that West Milford was a developing community.

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Therefore, as said in Mt. Laurel p.179,180;

***the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use 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. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.

****

***Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action.

and on p. 187;

> ***It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing of other types and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like to meet the full panoply of these needs.

By its zoning ordinance, West Milford has created residential zones requiring generally, one, two, three or four acres for a single family dwelling denoted as R-1, R-2, R-3 and R-4 respectively. It appears that with central sewer and water (not presently existent) and meeting conditions imposed by the ordinance, the minimum size lot requires at least 11,000 square feet or 7500 square feet in the R-1 zone but limited to 3.1 lots per acre. (Mallach T. 8/8/79 p. 2.70). The witness Coppola calculated the limitation as up to 3.6 units per acre. (T. 10/23/79 p.32). The overall density provision would work out to require a plot of 14,000 - 15,000 square feet. (T. 8/8/79 p. 2.75).

The provisions of the ordinance will not produce least cost housing. (T. 8/8/79 pp. 2.71,2.73).

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The foregoing was not considered favorably in Oakwood p. 505, quoting Justice Hall in Mt. Laurel;

> ***minimum size lots of 9,375 to 20,000 square feet "cannot be called small lots and amounts to low density zoning."

and as said in Oakwood p.516;

> ***Clearly no effort was made to permit "least cost" single family homes - and certainly not in reasonable numbers.

Approximately 1% of West Milford was zoned for PN uses. (T. 10/23/79 p.35). Provisions for housing in this zone are so circumscribed by conditions, including a 50 acre area, parking provisions and no look-alike as to be cost exacting and proscribe low cost housing. None of the residential zones are available for least cost housing or as a corollary, low or moderate income housing. (T. 8/8/79 p.2.71);

> ***Q.(at 18) Are these factors enough, Mr. Mallach, to make it impossible to produce least cost housing?
>
> A. Yes

The ordinance excludes mobile homes and garden apartments which is further evidence of failure by a developing community to provide least cost housing. Mt. Laurel p.181; So.Burl.Cty. v Tp. of Mount Laurel, 161 N.J. Super. 317, 359 (Law Div. 1978).

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The proofs having established the need for housing in the region, West Milford did not sustain its burden of proof as laid down in Mt. Laurel.

West Milford pleads in effect a special defense to its obligation as a developing community; i.e. ecological and environmental considerations. However, as was said in Oakwood p. 544;

> ***Ecological and environmental considerations were also advanced by the municipality in Mount Laurel to justify large lot zoning throughout the township. We pointed out there that while such factors and problems were always to be given consideration in zoning, the danger and impact must be substantial and very real (the construction of every plot has some environmental impact) - not simply a make-weight to support exclusionary housing measures or preclude growth***

The reference to Mt. Laurel would include statements appearing on pages 186 and 187. As suggested in Oakwood p. 544, the answer may not be prohibition or regulation of the density of development per se, but careful use of the land, with adequate controls.

West Milford based such argument on a number of expert witnesses who introduced a variety of exhibits, all tending to give weight to the proposition that construction of every building has some environmental impact and potential for pollution.

But to limit housing to large lots simply because a problem exists has not been approved by our courts. Mt. Laurel pp. 186,187.

Other than stressing the wisdom of not building within 1000 feet of a water supply, nothing concrete or conclusive was submitted as to destruction or erosion of existing water facilities because of use for housing purposes. The witness Simmons, (T.10/31/79) enunciating the theory, affirmed by other witnesses, that the greater the development, the greater the effect of pollutants on a water supply, did advocate a 500 foot distance for development from any water supply as an environmental protection. The other experts generally repeated such theory except that most espoused a buffer area of 1000 feet. Plaintiff's expert categorically stated that "dwellings can be constructed without endangering the water supply."

A consideration of all the testimony did not establish any facts from the ecological or environmental viewpoint sufficient to bar West Milford's obligation as a developing community.

The testimony established the intent of the adoption of the R-4 zone was to keep the land vacant and prevent the utilization thereof. Every acre owned by plaintiff was placed in the R-4 zone with ownership appearing as the sole test. That appears from the testimony of West Milford's Director of Planning, Kenneth Nelson, who testified plaintiff's lands had been zoned on the basis of Newark's ownership without regard to suitability, location or other factors.

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See testimony of West Milford's Director of Planning, Kenneth Nelson, (T. 8/16/79 p.8:54-3);

> ***Mr. Elberg: Q: Is it then safe to say that the Planning Board proposed that all of the Newark land be zoned on the basis of ownership, that is, that all the residential areas would be included in the R-4 zone, because they were owned by Newark?
>
> A: Yes. But I want to make clear the chronology of the events here. When the Master Plan was adopted, the majority of the Newark acreage was put in the R-4 district, pending the further study that was ultimately conducted by Mr. Coppola, and subsequent to that study, yes the Planning Board and Council put all the Newark acreage in the R-4 district on the basis of ownership.

Further, T. 8/16/79 p.8.62;

> ***Q: As a result of discussions with the experts retained in this litigation, was a decision made to place all of the Newark land in an R-4 zone?
>
> A: That was the decision of the council.

Also T. 10/16/79 p. 136;

***Q: And the ones owned by the City of Newark are zoned R-4, is that correct?

A: Yes.

Q: And the other properties immediately adjacent thereto are zoned R-2; is that correct?

A: R-2 or 3, yes.

T. 10/16/79, p. 136 at 25;

***Q: Now, is there anything different that you know of, or any considerations for zoning those properties differently, Mr. Nelson?

A: Well, relying on my general knowledge and on Mr. Abeles' comments, which I believe used the words virtually identical, I would have to say that the distinction there between the two properties in terms of the zoning was attributable to the Township policy about limiting the use of watershed property to water supply purposes.

T. 10/16/79, p. 155 at 18;

***Q: Are all of the City of Newark's lands zoned R-4?

A: Yes.

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To the same effect, testimony of John Terry, Township Manager and Arthur Mildner (former Mayor).

From the foregoing it must be concluded that the ordinance was adopted to prevent the development of Newark's land for housing purposes and as a corollary, exclude low or moderate income housing. Therefore, it cannot be sustained and as to such lands, the zoning would be deemed arbitrary, discriminatory and confiscatory. Kirsch Holding Co. v Boro of Manasquan, 59 N.J. 241,251 (1971); State v Dennis Baker, 81 N.J. 99 (1979); Rockhill v Chesterfield Tp., 23 N.J. 117, 126 (1957); and as said in Bd. of Ed. of City Council, City of Glen Cove, 29 N.Y. 2d 681; 274 N.E. 2d 749 (Ct. of Appeals 1971);

> ***The undisputed proof in the record establishes that the city's zone classification of the land in dispute as R-1 is part of a general policy affecting all publicly held land and having no rational relation to the location or nature of the land itself.

The prime reason and purpose of West Milford in allocating all these lands to the R-4 zone was not grounded in any of the objectives of N.J. S.A. 40:55D-1 et seq. and therefore such designations are invalid. Homebuilders League of So. Jersey v Van Ness, 157 N.J.Super. 586,596 (Law Div.1978).

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As expressed by the witness Abeles, (T. 8/21/79) there was exhibited a pattern of discrimination against the City of Newark and West Milford's ordinance precludes economic use of such property. The witness Coppola, who had assisted West Milford in the preparation of its Master Plan for the zoning ordinance in question, expressed doubts as to parts of Newark's lands being properly in the R-4 zone.

The pretrial order reserved trial as to the type of relief and damages (claimed by plaintiff) to another trial date if plaintiff was successful on the issues determined herein. Accordingly, the matter is hereby set down for further pretrial conference on Friday, April 18, 1980 at 1:30 p.m. with reference to such issues.

In view of the foregoing, the present ordinance will be continued until a reasonable time to be specified upon completion of the said open items.

The attorney for the plaintiff shall submit a form of judgment in accordance with the Rules.

Very truly yours,

IRVING I. RUBIN, J.S.C.

IIR/ds
cc: Dolan and Dolan Esqs.