

AM ~~000~~ - Far Hills

9/4/85

Haue is v. Far Hills

transcript of decision -

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LOIS HAUEIS, ERNA
HAUEIS, JOHN OCHS,
Plaintiffs,
-v-

) **RECEIVED** Transcript

) SEP - 8 1985 of

) JUDGE SERPENTELLI'S CHAMBERS Decision

BOROUGH OF FAR HILLS,
PLANNING BOARD OF FAR)
HILLS, BOROUGH COUNCIL)
OF FAR HILLS,)
Defendants.

OCEAN COUNTY COURTHOUSE
TOMS RIVER, NEW JERSEY
September 4, 1985

B E F O R E:

HONORABLE EUGENE D. SERPENTELLI, A.J.S.C.

A P P E A R A N C E S:

THOMAS F. COLLINS, ESQ.,
For the Plaintiffs.

J. ALBERT MASTRO, ESQ.,
For Far Hills.

ERIAL SCHWARTZ, ESQ.,
For Kinder Properties.

DAYLETT J. SANTIOLIO, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, NJ

1 THE COURT: All right. It's my intention
2 to dispose of this right now. I should say that
3 by doing so, I don't want there to be a feeling
4 that I'm making short of any argument that's been
5 made here.

6 In the last several compliance hearings
7 which have come before the Court, I have issued
8 oral opinions upon completion of the testimony and
9 presentation of the evidence, as opposed to
10 issuing a formal opinion. And I really do that
11 for several reasons: First of all, I think that
12 the whole thrust of the Court in assigning three
13 Judges to Mount Laurel cases was to develop some
14 expertise in handling of these cases.

15 And at the risk of self-flattery, I
16 hesitate to say that I'm beginning to become
17 familiar with the issues involved in compliance,
18 to the point that many of them are not novel
19 anymore; and therefore, in most cases, I'm able to
20 identify, with the help of the Court-appointed
21 expert, those issues upon which the Court should
22 zero-in at the time of the compliance hearing.

23 And secondly, in most cases, the package
24 does not reach the Court before most of the
25 problems have been eliminated, or at least clearly

1 identified and refined.

2 What is happening is, as we proceed through
3 this process, the municipalities are learning from
4 the experience of those who've gone before, and
5 are presenting to the Court packages which are
6 more in keeping with what the Court has approved
7 in the past.

8 Additionally, the delay involved in issuing
9 a written opinion is to nobody's benefit. And
10 finally, of course, there is before the Court some
11 rather large issues in other areas of Mount Laurel
12 that have not been met yet. And I am assuming
13 that they will take a good deal of the Court's
14 time in the next few months.

15 Therefore, for all of those reasons, I will
16 issue a rather early-composed oral opinion, since
17 I'm doing it extemporaneously.

18 The first area that I think requires some
19 attention is the whole question of growth area in
20 the calculation of the fair share.

21 During the process of the development of
22 the anti-sprawl law that was adopted in A.N.C., a
23 sagacious and well-respected planner suggested
24 that anti-sprawl law should not be a factor in
25 the methodology at all. And that's what I've seen.

1 today, maybe I'm going to change my mind and say,
2 he was right. However, I didn't.

3 The argument can be made that the growth
4 area really should be considered after the fact.
5 But the reality is that the A.M.G. methodology
6 adopted the concept that one of the factors
7 involved in the calculation of the fair share
8 obligation should be growth area. But the
9 opinion, itself, recognized that it was really not
10 a very -- or the most desirable method of
11 identifying a municipal responsibility.

12 The opinion, starting at page 49, discusses
13 the inclusion of growth area as a factor in
14 establishing the responsibility, the fair share
15 responsibility of a municipality. And it
16 identifies the area within the municipality which
17 has been earmarked by the S.D.G.P. as an
18 appropriate place for development.

19 However, it -- the opinion acknowledges
20 also that the capacity of a municipality to accept
21 lower-income housing would be better measured by a
22 factor which would identify the amount of vacant
23 developable land within the growth area, because
24 not all growth area land is vacant, or not all
25 growth area land is suitable.

1 Some towns designated as growth areas are
2 fully developed. Other vacant land is either
3 physically constrained, due to water courses,
4 slopes, or other conditions; or inappropriate for
5 high-density housing because of planning or other
6 environmental factors. And the decision not to
7 use vacant developable land within the growth area
8 was simply dictated by the unavailability of
9 reliable data.

10 If we had been able to do a land inventory,
11 as was essentially done in this case before Judge
12 Lucas, for the entire State, there's no question
13 in my mind that I would not have used the growth
14 area factor. And it is likely that we would have
15 used vacant developable land within the growth
16 area as a better indicia of -- or at least one
17 factor in identifying the fair share component.
18 And the A.L.G. opinion says that at somewhat
19 greater length.

20 Furthermore, A.L.G. points out that our
21 Supreme Court has recognized that the important
22 factor is vacant developable land within the
23 growth area, not the extent of growth area land.

24 So, therefore, in remanding the Round
25 Valley versus the Township of Clinton case, the

1 Court said, and I quote, "On remand, the trial
2 Court shall determine whether the fair share can
3 be accomodated completely in the growth area,
4 consistent with sensible planning. If it can,
5 then the fair share determination below shall
6 stand. If not, it shall be revised
7 appropriately." I think that rather clearly
8 emphasizes the intention of the Court to direct
9 growth, to channel growth into the growth area.

10 The Court did the same thing in the Urban
11 League of Greater New Brunswick versus Borough of
12 Carteret remand, when it said at page 315, "As
13 previously stated, determination of the fair share
14 must take into consideration, where it is a fact,
15 the inclusion within a particular municipality of
16 nongrowth areas, where, according to the Plan,
17 growth is to be discouraged."

18 Same page, "In determining fair share, the
19 trial Court shall review the S.D.G.P.'s
20 characterization of each of the municipalities
21 before it."

22 In the A.H.G. opinion, I verbalized what I
23 intended to be a specific defense to a fair share
24 determination and said that to the extent that
25 land within a growth area is developed or

1 constrained, the vacant developable land defense
2 can be raised to reduce the Town's fair share.

3 Because that possibility was recognized,
4 and because the planners who were engaged in
5 developing the methodology which in large part
6 found its way into the A.M.G. opinion recognized
7 that a large portion of the area, designated as
8 growth was already developed, they added a 20
9 percent surcharge on the fair share.

10 A lot of people have argued that that
11 surcharge was unnecessary, for a number of
12 reasons. But its principal purpose was
13 essentially to meet what we've hit in Far Hills,
14 and what we've hit in other municipalities.

15 As the Court mentioned earlier, in the
16 Township of Piscataway, the fair share obligation
17 is calculated in accordance with the methodology
18 at approximately 3,800. And yet, reality, in a
19 lot-by-lot survey of the Town, led the Court to
20 conclude that at the very best, the Township could
21 do perhaps 2,200 units.

22 And the Court has left open the possibility
23 that the Township can demonstrate further that the
24 sites at least preliminarily found suitable are
25 not. And the amount of vacant land would be

1 appropriately reduced, and the fair share reduced.

2 So, I keep it entirely within the decision
3 of Mount Laurel II, to channel growth in the
4 growth area; and entirely consistent with the
5 methodology developed, to limit growth in the
6 growth area, and to adjust a fair share downward
7 where it is demonstrated to the satisfaction of
8 the Court that the land is not there to accommodate
9 the number arrived at through an unadjusted
10 application of the methodology.

11 It mis -- it misconstrues the methodology
12 to believe that the number's arrived at, and then
13 you find the land to satisfy it. That was never
14 intended. And the methodology intends to include
15 as a factor an adjustment for vacant developable
16 land, and to pick up the loss that occurs, a
17 surcharge in other municipalities for that loss of
18 land.

19 Now, I think Mr. Castro is correct when he
20 said that there is some misunderstanding as to the
21 meaning of the first opinion of the Court in Gregg
22 Farms, which, by the way, is a reported decision
23 in 198 New Jersey Super at 399. I don't have that
24 case before me, but I remember rather vividly that
25 the opinion ends with a disclaimer that the case

1 stands for nothing more than the proposition that
2 as a matter of law, a builder's remedy is not
3 precluded simply because a property is in a
4 limited growth area. And I stand by what I said
5 in that case. I was dealing with the potential
6 that circumstances could theoretically exist which
7 would justify a remedy.

8 For example, if the community had allowed
9 massive development in the limited growth area, if
10 a site was immediately on the line, and all sites
11 surrounding it in the growth area contained
12 multiple dwellings, it might be appropriate under
13 those circumstances to disregard the line. But I
14 think I've signaled rather clearly in Orgo I that
15 these were going to be rather unique and rare.

16 And, in fact, in the opinion just filed in
17 the Orgo Farms case, decided on August 7th, 1985,
18 the Court said the factual circumstances in the
19 Orgo case did not justify the grant of a remedy in
20 a limited growth area. So, in the very case the
21 Court found it was conceivable, it denied such a
22 remedy.

23 The circumstances in Lois Park, the
24 defendant in the Orgo Farms case, are strikingly
25 similar to the circumstances in Far Hills. A

1 sliver of the Town of Colts Neck was included in
2 the growth area, a small fraction, perhaps a
3 smaller fraction than Far Hills; but both of them
4 essentially have been characterized as limited
5 growth.

6 In both cases, the area shown as limited
7 growth is, in fact, limited growth and has stayed
8 essentially rural and has avoided any large-scale
9 development.

10 From what I've heard so far as undisputed,
11 I think it's fair to say that Far Hills is even
12 more undeveloped in its limited growth area than
13 is Colts Neck. But the more important fact is
14 that both Towns have essentially not encouraged
15 growth in their limited growth area.

16 Now, the question arises as to what occurs
17 as a result of the failure of somebody to revise
18 the S.B.G.P.. And of course, the Supreme Court
19 did address that issue, and I was required to
20 address it in the Orgo Farms opinion, since the
21 plaintiff, Orgo, who sat squarely in the middle of
22 the limited growth area, argued that there was no
23 such thing as a limited growth area anymore. And
24 in a strictly technical sense, I suppose one can say
25 that. However, that's not what the Supreme Court

1 suggested, as far as I'm concerned.

2 The Court left open to the trial Courts the
3 avenue to be taken by virtue of the failure to
4 revise the plan. In the Orgo opinion just filed,
5 I found that it didn't make sense to throw
6 planning to the wind, if, in fact, the land use
7 patterns recognized as appropriate by the State
8 Development Guide Plan continued to exist, at
9 least at the present time.

10 There may come a time, assuming that we
11 continue in this process over many years, that one
12 could argue that any viability of that plan had
13 disappeared by the passage of time, and the
14 overall growth of the State and other similar
15 factors; but that's an argument for a number of
16 years hence.

17 At this point, I don't see the passage of
18 January 1, 1935 as being sufficient reason for
19 disregarding all of the sound planning that went
20 into the development of the concept maps and the
21 underlying theory which -- which support the
22 concept map.

23 It seems to me that the S.C.C.P. still
24 stands for sound planning; and absent the
25 Municipality's actions in disregarding such sound

1 planning, that the Court should continue to try to
2 channel growth into areas where growth is
3 occurring, and continue to limit growth where it
4 has occurred.

5 Now, I think that covers the question of
6 the fair share and the issue of the Timber site,
7 itself. I can support the finding made by the
8 Master that the fair share should be established
9 as 25, together with the indigenous
10 responsibility. The responsibility has been
11 identified as four.

12 Mr. Iastro has indicated that perhaps it's
13 less than four when they do a survey. I would
14 think the concomitant would be more than four when
15 they do a survey, and I think that the indigenous
16 responsibility should be assigned as that which is
17 found by an actual inspection of the premises,
18 which the Municipality has represented will occur
19 on or before the end of next year.

20 So that the indigenous responsibility will,
21 in fact, be that which is -- which is identified
22 when the Municipality identifies it. It will have
23 to submit a plan binding to the Master of the Court;
24 and, of course, submit a program for elimination
25 of the deficiencies that are -- are found.

1 And of course, when we talk about
2 deficiencies, I am talking about the deficiencies
3 that A.M.G. identifies as making a unit
4 substandard.

5 As a result, I'm going to approve the
6 compliance package submitted, subject to a series
7 of conditions, most of which have been set forth
8 on the record. I'm going to try to caption them
9 all here by my notes. But if I have missed any,
10 they will be deemed incorporated by virtue of
11 what's been said earlier.

12 The first one is that the Municipality will
13 prepare and submit to the Master, and thereafter
14 to the Court, acceptable provisions relating to
15 sale and resale, affirmative marketing, and
16 monitoring of the sale and resale of Mount Laurel
17 units.

18 Secondly, the Municipality will eliminate
19 any provision which would require a Mount Laurel
20 household unit to vacate a Mount Laurel household,
21 simply because the income of the household has
22 grown to a point where he exceeds -- where it
23 exceeds permissive limits.

24 Of course, upon resale, the Mount Laurel
25 household will be limited in its right of resale

1 by provisions which the municipality should
2 incorporate in its resale restrictions. But no
3 one should be forced to vacate a unit if they
4 qualified in the first place.

5 Third, the Court will require the
6 elimination of restrictions on rental of the Lount
7 Laurel units.

8 Fourth, the defendant has indicated, shall
9 survey its existing housing stock as part of its
10 revaluation plan, and identify any substandard
11 unit within the definition contained in A.M.G.
12 versus Warren. That will be completed by the end
13 of 1986. And the Municipality will, thereafter,
14 report its findings to the Master and Court, and
15 develop a program for rehabilitation.

16 The program must be submitted to the Master
17 and the Court by July 1, 1987, unless the Court
18 further extends that date.

19 I leave that proviso, because I don't know
20 what the magnitude of this problem is. But it
21 seems to me that if there are only four units, the
22 municipality should be able to do something within
23 six months.

24 First, the ordinance should include
25 condominium fees as an element of the calculation

1 of 28 percent in accordance with the Master's
2 recommendations as contained on pages ten and 11
3 of his report.

4 Six, the eligibility standard should be
5 calculated at 90 percent of median; that is, 90
6 percent of the eight percent, and 90 percent of 50
7 percent, in accordance with the Master's
8 recommendations on page 11 of the report.

9 Seven, the Township is to acquire the
10 property which is required by the plaintiff's
11 project for a detention basin and the plaintiff's
12 order to improve it, as stipulated on the record.

13 Eighth, the plaintiff agrees to improve
14 Sunny Branch Road at its own cost and expense, and
15 that that will be a condition of the site plan
16 approval.

17 And nine, that the terms and conditions
18 regarding sewerage, which were set forth on the
19 record prior to the luncheon break, shall be a
20 condition of approval of this package. That
21 condition may be the most important condition of
22 all. And I just want to address that, should
23 there be a breakdown in that -- our assumptions with
24 regard to that question, then, of course, I would
25 expect that we would have to have this matter back

1 before the Court.

2 Mr. Raymond is going to monitor that issue
3 and be sure that Bedminster is proceeding in good
4 faith. They have stipulated on the record,
5 they're going to do so.

6 The most common problem in providing Mount
7 Laurel housing is the absence of sewerage. And
8 one can fault the Court's approval of a compliance
9 package, because it leaves that issue in such a
10 tentative state in a number of municipalities.

11 The fact of the matter is, the Court can't
12 require any more than the best efforts of everyone
13 involved to solve the problem. And there seems to
14 me here to be no better resolution than that which
15 we've arrived at. There couldn't come a time that
16 perhaps an issue might be joined in terms of
17 ordering Bedminster to do something. I don't
18 think that that is an appropriate alternative at
19 this point.

20 The representations of counsel for
21 Bedminster, it appears that they are ready,
22 willing and able to cooperate, and that the
23 impediments that exist will more likely exist at a
24 State level than at a municipal level. And if
25 that occurs, then the Court will deal with that.

1 I do, however, for the record, state that I
2 consider the -- the stipulation made here to be
3 important, to the extent that the Department of
4 Environmental Protection or any other agency of
5 the State of New Jersey is looking for support in
6 terms of approval of its -- of the expansion of
7 B.F.H. to service the plaintiff by virtue of a
8 Court Order. They may deem the Court's finding
9 here that an expansion of that plant is necessary
10 to accomplish Mount Laurel housing; and that,
11 therefore, all other things being equal, that they
12 would look upon the Court's determination as being
13 in the public interest.

14 I believe that covers everything. And
15 however, I'll hear from counsel as to
16 clarification.

17 MR. MASTRO: Judge, condition number two,
18 where you eliminate any provision requiring
19 households to vacate in the event they exceed the
20 applicable range of income, I'd like the Court to
21 clarify that. We would not lose credit of that
22 unit.

23 THE COURT: That's correct.

24 MR. MASTRO: As a lower income household.

25 THE COURT: That's correct. You would only

1 lose credit if upon resale they're not sold to
2 lower income housing.

3 MR. MASTRO: And the second thing, Judge,
4 you haven't mentioned repose.

5 THE COURT: Are you tired?

6 Clearly, upon compliance with these
7 conditons, a judgment of repose can be submitted
8 to the Court.

9 MR. MASTRO: And can the interim repose
10 continue?

11 THE COURT: Of course it continues.

12 MR. COLLINS: Judge, on item number seven,
13 I believe it was, but I won't count the numbers --

14 THE COURT: Okay.

15 MR. COLLINS: It was regarding the
16 detention basin, I just wanted to clarify that
17 that would be -- the property would be re --
18 acquired by the Borough within one year. I don't
19 know that they -- that you said that.

20 THE COURT: That's right. We did say that
21 earlier on the record, and I think that that could
22 be incorporated in that condition. That's a
23 reasonable period of time.

24 Mr. Raymond, have I missed anything?

25 MR. RAYMOND: At lunch today, the

1 possibility was discussed that Far Hills may go
2 into the Bedminster Affordable Housing Structure.
3 And I just wanted a clarification that if they do
4 so, then some of the things that are being
5 required of them directly would not be in the same
6 form.

7 THE COURT: Well, any -- any unacceptable
8 monitoring provision would be within keeping
9 within the parameters that I have in mind. They
10 don't have to do it themselves if there's some
11 other acceptable way. And as a matter of fact,
12 I'm going to encourage that. It seems to me that
13 each town doing its own monitoring is a little bit
14 cumbersome.

15 MR. NASTRO: Clarify for me, number three,
16 was rent --

17 THE COURT: I'm simply asking you to
18 eliminate the restrictions on rentals that are
19 present. As I've indicated on the record, there's
20 a tremendous need on rental housing --

21 MR. NASTRO: Well, the interim order
22 indicated these would be sold.

23 THE COURT: Initially. Sure. They're
24 going to be --

25 MR. NASTRO: You're talking about rentals

1 thereafter.

2 THE COURT: That's right. They're intended
3 to be sold.

4 MR. COLLINS: Yes, they are, your Honor.
5 And my client is here to confirm that. But it's
6 not a problem. We expect to sell them.

7 MR. MASTRO: Okay.

8 THE COURT: And I don't believe, as a
9 practical matter, that there's going to be a great
10 deal of rental thereafter. But I may be wrong,
11 but that's my guess. I think what Mr. Raymond was
12 saying was: A, the owner shouldn't be precluded;
13 and B, it waives a -- an inappropriate flag to say
14 that there's no rental housing for Lount Laurel --
15 Mount Laurel households.

16 MR. MASTRO: What we intended, and -- I
17 don't think Mr. Raymond disagreed, that the -- the
18 rental and sales would be restricted, so we don't
19 end up with a -- with an absentee landlord, in
20 effect. It generates all sorts of problems if you
21 don't look at the resident report.

22 THE COURT: Well, I don't know how you
23 can -- how you can restrict them, Mr. Mastro.
24 You've got to have an absentee landlord, if you
25 rent.

1 MR. MASTRO: Say, it restricted for a
2 one-year period, after which it's evaluated again
3 or reviewed again.

4 THE COURT: No. I -- I don't know how you
5 can come up with anything viable along those
6 lines.

7 Mr. Raymond?

8 MR. RAYMOND: Your Honor, I simply don't
9 believe that it would be logical to expect anyone
10 to want to rent at the rental level that is
11 mandated by the Affordable Housing Structure,
12 because there's no profit in it. And I don't see
13 that would be something that an owner would engage
14 in. If they can't use the unit, they probably
15 want their equity out of it and go somewhere else.

16 THE COURT: Yeah. I really think it's a
17 nonproblem.

18 MR. MASTRO: Well, the owner -- I assume
19 the owner can only rent to a qualified --

20 THE COURT: That's right. And what Mr.
21 Raymond is saying is, under those circumstances,
22 he'd probably sell.

23 MR. MASTRO: No. No. At the same rate.

24 THE COURT: The rental rate would be capped
25 by 30 percent of income. And the -- as a

1 practical matter, he's probably not going to find
2 it. So I don't really think you have much of a
3 problem.

4 Okay. Anything further?

5 All right. Let me commend counsel for all
6 of their efforts in this matter. I want to
7 commend the Municipality for having voluntarily
8 resolved the issue. I should have, at the opening
9 of this proceeding, as I have been doing since the
10 adoption of the legislation, in essence, read the
11 Municipality its rights, but I know that Mr.
12 Mastro is entirely aware of its rights. And we
13 proceeded today at the request of the Township.

14 Mr. Mastro, that's correct, I take it.
15 You're being silent.

16 MR. MASTRO: You keep referring to us as a
17 Township.

18 THE COURT: I'm sorry. As a Borough, as a
19 request of the Borough. And the Court did not
20 require this proceeding to go forward.

21 MR. MASTRO: That's true.

22 THE COURT: Yes.

23 MR. MASTRO: I represent that to the Court,
24 it was at our request. The compliance hearing was
25 at our request.

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THE COURT: Okay.

MR. MASTRO: I would like the record to reflect that the Mayor of Far Hills, Harry Hoffman, is present in Court.

THE COURT: All right. And I am -- I only knew that, because we're very sensitive to the fact that there is legislation, and we're sensitive to the rights created hereunder, and would not want it to appear that the Court has in any way required the Municipality to go forward.

I also want to commend Mr. Raymond again for his efforts in helping resolve the matter. And we go forward from this to the next one, I guess. All right. Have a good day.

MR. MASTRO: Thank you, your Honor.

MR. COLLINS: Thank you, your Honor.

THE COURT: Thank you.

(Matter concluded.)

* * *

C E R T I F I C A T E

I certify the foregoing to be a true and accurate partial transcript of the proceedings in the above-entitled cause.

Date:

4/3/85

Dayette J. Sampolin
DAYETTE J. SAMPOLIN, C.S.P.
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