

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING
DOCKET NO.

IN THE MATTER OF THE)
BOROUGH OF OCEANPORT)

Civil Action
ORDER

This matter having been opened to the Council on Affordable Housing by applicant Borough of Oceanport, on a motion to exclude from consideration for Mt. Laurel use certain vacant property within the Borough, owned by the New Jersey Sports and Exposition Authority;

And oral argument having been held on July 6, 1987, and the Council having considered the arguments presented at oral argument, as well as all papers filed by the Borough in support of its motion, and for the reasons set forth at length in the Council's written opinion of this date;

IT IS on this 20th day of July, 1987

ORDERED that the motion to exclude from Mt. Laurel consideration the property owned by the New Jersey Sports and Exposition Authority, filed by the Borough of Oceanport, is hereby denied.

COUNCIL ON AFFORDABLE HOUSING

By


Arthur R. Kondrup
Chairman

JL/mlb/s3/014

Borough over two acres that could be zoned for Mt. Laurel purposes. N.J.A.C. 5:92-1.3; N.J.A.C. 5:92-8.1 et seq... No objections to the plan were received within the 45 day period mandated by N.J.S.A. 52:27D-314.

Following its initial review, the Council returned the final housing element and fair share plan to Oceanport to permit the Borough to remedy certain deficiencies. The Borough was provided with a detailed report of the deficiencies, and given 60 days from receipt of the report to resubmit an amended plan. One of the problems cited by the Council was a failure to zone for Mt. Laurel purposes certain property within the Borough owned by the New Jersey Sports and Exposition Authority. The property, consisting of over 200 acres, is vacant at the present time.

By motion dated May 7, 1987 the Borough requested that the Council determine that the Authority's property should be excluded from Mt. Laurel consideration. Because the date for resubmission was approaching, the Borough also asked for an extension in order to first address the legal issue of the Authority's land.* By resolution dated June 1, 1987 the Council found that determination of the legal issue concerning the Authority's land was essential to resubmission of Oceanport's plan. The Council thus stayed the period for resubmission pending its determination on Oceanport's motion. Oral argument on the motion was held on July 6, 1987.

* To protect itself, the Borough also filed, on May 19, 1987, a request to withdraw its petition for certification. However, the Council did not need to reach this issue.

Oceanport advances two main arguments in support of its motion. First, Oceanport cites N.J.A.C. 5:92-8.3(a) for the proposition that the property in question must be excluded from Mt. Laurel consideration. The section provides that:

Municipalities may reserve three percent of their total developed and developable acreage for active municipal recreation and exclude this acreage from consideration as potential sites for low and moderate income housing. In determining developable acreage, municipalities shall calculate their total vacant and undeveloped lands and deduct from that total number the lands excluded by the Council's policy regarding historic and architecturally important sites, agricultural lands and environmentally sensitive lands. Municipalities shall also exclude from this calculation of total vacant and undeveloped lands, those owned by nonprofit organizations, counties and the state or federal government and when such lands are precluded from development at the time of substantive certification.

To be acceptable for Mt. Laurel zoning, sites selected by a municipality must be vacant, suitable, developable, available and approvable, as those terms are defined in N.J.A.C. 5:92-1.3, and not be the subject of a specific adjustment pursuant to N.J.A.C. 5:92-8.1 et seq. The property in question seems to meet this threshold requirement (although further Council review must be done to insure that there is adequate infrastructure access). However, it is undisputed that there is more than sufficient property to meet Oceanport's new construction component of 124. Further, no evidence has been brought forth to indicate that the property can be properly eliminated as per the adjustment process. In this regard, Oceanport's reliance on 5:92-8.3(a) is misplaced. The section permits a municipality to reserve three percent of its total "developed and developable acreage" for municipal recreation,

thus effectively excluding the sites from Mt. Laurel consideration. To determine the total "developable acreage" for purposes of this section, the regulation directs the municipality to utilize a formula -- the municipality must calculate the total vacant and undeveloped land, and subtract from that historic, agricultural, and environmentally sensitive sites pursuant to N.J.A.C. 5:92-8.2; as well as vacant land owned by nonprofit organizations, and vacant land owned by the county, state or federal government. This figure, minus active municipal recreation areas, is used to determine the 3% that may be reserved as municipal recreation land.

While state government land may be utilized for the specific purpose of computing allowable recreation space pursuant to N.J.A.C. 5:92-8.3, this does not similarly mean that it is exempt from Mt. Laurel consideration. There is no provision in the regulations exempting such property from use for Mt. Laurel, or permitting a municipality to adjust its fair share number based on government property. On the other hand, N.J.A.C. 5:92-8.2 has specific sections exempting from Mt. Laurel consideration land designated as historically important, agricultural, or environmentally sensitive. No comparable provision exists in the regulations exempting land due to its government ownership. This is further evidenced by N.J.A.C. 5:92-8.4, which provides in pertinent part that:

Vacant sites not specifically excluded from consideration for low and moderate income housing as a result of the Council's policies regarding historic and architecturally important sites, agricultural lands, environmentally sensitive lands and recreation, conservation and open space shall be considered ... as

potential sites for low and moderate income housing.

This section pointedly omits any reference to government property. Thus, pursuant to the regulations, the property owned by the New Jersey Sports and Exposition Authority should be considered for Mt. Laurel development.

Second, Oceanport argues that it is powerless to enforce zoning on the Authority's land. It cites Rutgers v. Piluso, 60 N.J. 142 (1972) for the proposition that a state agency or authority is immune from the municipal zoning power, where there is a clear legislative intent to confer such immunity. As proof of such intent, Oceanport relies upon the New Jersey Sports and Exposition Law, N.J.S.A. 5:10-1 et seq. Specifically, the Act creates the New Jersey Sports and Exposition Authority as a "body corporate and politic" which is "hereby constituted as an instrumentality of the State exercising public and essential governmental functions...." N.J.S.A. 5:10-4(a). The Authority has the power "to determine the location, type and character of [its] project ... notwithstanding any land use plan, zoning regulation, building code or similar regulation, heretofore or hereafter adopted by the State, any municipality, county or public body." N.J.S.A. 5:10-5(x).

At issue in Rutgers was a municipal attempt to limit the number of housing units that could be utilized by Rutgers for married students and their families. The court stated that the test for immunity is "the legislative intent ... with respect to the particular agency or function involved." 60 N.J. at 192. Intent is to be ascertained from a number of factors, including the nature of the instrumentality seeking immunity, the kind of

function of land use involved, the extent of the public interest to be served, the effect of local regulation on the enterprise concerned, and the impact upon legitimate local interest. 60 N.J. at 133. The court concluded that the local ordinance in question was acting so as to restrict the growth and development of Rutgers, contrary to Legislative intent. 60 N.J. at 153 and 158.

Oceanport may be correct in its assertion that the Legislature similarly intended the Authority to be free from restriction by local zoning on any Authority held property. However, that is not what would be accomplished in the present case. Recognizing the Authority's control over its property, the Council is merely requesting that the Borough zone the vacant Authority land for Mt. Laurel purposes, such that in the event the property is sold or transferred by the Authority it can be used accordingly. While the Authority continues to own the property, it will remain under its exclusive control and direction. At oral argument, counsel for Oceanport admitted that Oceanport could apply such conditional zoning, and that, in fact, the property was presently zoned for industrial and commercial uses. All that would be required is that this underlying zoning be changed. The present situation is thus clearly different from that in Rutgers, as the conditional zoning would not frustrate in any manner the governing body's use of the property, but would merely preserve the site for Mt. Laurel use in the event it changes hands. Oceanport argues that this does not present the "realistic opportunity" Mt. Laurel is premised on. However, it must be recalled that this is the last vacant site within the Borough. Certainly, if other vacant, suitable sites

existed the Council would require that they be utilized instead. However, in the undisputed absence of any other property, the Council must use whatever land is available. Finally, such zoning will certainly impose no burden on the Borough. By enacting the zoning ordinance, Oceanport will have done all that it can to provide for its fair share.

For all of the above reasons, the Council will order that Oceanport's motion to exclude the Authority's property from Mt. Laurel consideration be denied. Further Council review will indicate whether the property is appropriate, as noted above. Finally, the exact terms of any conditional zoning remains to be dealt with; however, the Council need not address that question at this time.

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DATED: JULY 20th 1987