WAYNE BRITTON v. TOWN OF CHESTER
134 N.H. 434, 595 A.2d 492 (1991)

BATCHELDER, J:

....

The plaintiffs [low-income residents and a builder, Remillard] brought a petition in 1985, for declaratory and injunctive relief, challenging the validity of the multi-family housing provisions of the Chester Zoning Ordinance.... [Chester] is a "bedroom community," with the majority of its labor force commuting to Manchester. Because of its close proximity to job centers and the ready availability of vacant land, the town is projected to have among the highest growth rates in New Hampshire over the next two decades.

[The Court described exclusionary features of the ordinance, similar to those involved in the New Jersey cases.]

The defendant first argues that the trial court erred in ruling that the zoning ordinance exceeds the powers delegated to the town by the zoning enabling legislation, RSA 674:16-30.... RSA 674:16 authorizes the local legislative body of any city or town to adopt or amend a zoning ordinance "[f]or the purpose of promoting the health, safety, or the general welfare of the community." (Emphasis added.) The defendant asserts that the term "community" as used in the statute refers only to the municipality itself and not to some broader region in which the municipality is situated. We disagree.

The possibility that a municipality might be obligated to consider the needs of the region outside its boundaries was addressed early on in our land use jurisprudence by the United States Supreme Court, paving the way for the term "community" to be used in the broader sense. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id*. at 390. When an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire affected region must be considered in determining the ordinance's validity. *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 487 (Cal., 1976); see also *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242-43 (N.Y., 1975).

We have previously addressed the issue of whether municipalities are required to consider regional needs when enacting zoning ordinances which control growth. In *Beck v. Town of Raymond*, 394 A.2d 847 (1978), we held that "[growth] controls must not be imposed simply to exclude outsiders, see *Steel Hill Dev. v. Town of Sanbornton*, [469 F.2d 956 (1st Cir. 1972)]; *Nat'l Land and Inv. Co. v. Kohn*, 215 A.2d 597 (1965), especially outsiders of any disadvantaged social or economic group, see *S. Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975)." *Beck*, 394 A.2d at 852. We reasoned that "each municipality [should] bear its fair share of the burden of increased growth." *Id.* Today, we pursue the logical extension of the reasoning in *Beck* and apply its rationale and high purpose to zoning regulations which wrongfully exclude persons of low- or moderate-income from the zoning municipality.

In *Beck*, this court sent a message to zoning bodies that "[t]owns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge." *Id*. The town of Chester appears willing to lower that bridge only for people who can afford a single-family home on a two-acre lot or a duplex on a three-acre lot. Others are realistically prohibited from crossing. Municipalities are not isolated enclaves, far removed from the

concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries. Therefore, we interpret the general welfare provision of the zoning enabling statute, RSA 674:16, to include the welfare of the "community," as defined in this case, in which a municipality is located and of which it forms a part.

... Because the Chester Zoning Ordinance does not provide for the lawful needs of the community, in that it flies in the face of the general welfare provision of RSA 674:16 and is, therefore, at odds with the statute upon which it is grounded, we hold that, as applied to the facts of this case, the ordinance is an invalid exercise of the power delegated to the town pursuant to RSA 674:16-30. We so hold because of the master's finding that "there are no substantial and compelling reasons that would warrant the Town of Chester, through its land use ordinances, from fulfilling its obligation to provide low[-] and moderate[-] income families within the community and a proportionate share of same within its region from a realistic opportunity to obtain affordable housing."

The town further asserts that the trial court erred in ruling that the zoning ordinance is repugnant to the New Hampshire Constitution, part I, articles 2 and 12, and part II, article 5. In keeping with our longstanding policy against reaching a constitutional issue in a case that can be decided on other grounds, however, we do not reach the defendant's constitutional arguments.

The trial court's order declared the Chester Zoning Ordinance invalid and unconstitutional; as a result, but for this appeal, the town has been left "unzoned." To leave the town with no land use controls would be incompatible with the orderly development of the general community, and the court erred when it ruled the ordinance invalid. It is not, however, within the power of this court to act as a super zoning board. "Zoning is properly a legislative function, and courts are prevented by the doctrine of separation of powers from invasion of this field." *Godfrey v. Zoning Bd. of Adjustment*, 344 S.E.2d 272, 276 (N.C., 1986). Moreover, our decision today is limited to those sections of the zoning ordinance which hinder the construction of multi-family housing units. Accordingly, we defer to the legislative body of the town, within a reasonable time period, to bring these sections of its zoning ordinance into line with the zoning enabling legislation and with this opinion. Consequently, we will temporarily allow the zoning ordinance to remain in effect.

... The trial court has the power, subject to our review for abuse of discretion, to order definitive relief for plaintiff Remillard. In *Soares v. Town of Atkinson*, 529 A.2d 867 (1987), we upheld the master's finding that granting a "builder's remedy," i.e., allowing the plaintiff builder to complete his project as proposed, is discretionary. *Id*. at 869. In this appeal, the master found such relief to be appropriate, and the town has not carried its burden on appeal to persuade us to the contrary. A successful plaintiff is entitled to relief which rewards his or her efforts in testing the legality of the ordinance and prevents retributive action by the municipality, such as correcting the illegality but taking pains to leave the plaintiff unbenefitted....

The master relied on *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 456 A.2d 390 (1983) (*Mt. Laurel II*), in determining that plaintiff Remillard was entitled to build his development as proposed.... The court noted that the "builder's remedy," which effectively grants a building permit to a plaintiff/developer, based on the development proposal, as long as other local regulations are followed, should be made more readily available to insure that low- and moderate-income housing is actually built. *Mt. Laurel II*, *supra* at 452.

Since 1979, plaintiff Remillard has attempted to obtain permission to build a moderate-sized multi-family housing development on his land in Chester. He is committed to setting aside

a minimum of ten of the forty-eight units for low- and moderate-income tenants for twenty years. "Equity will not suffer a wrong without a remedy." 2 Pomeroy's Equity Jurisprudence §_423 (5th ed. 1941). Hence, we hold that the "builder's remedy" is appropriate in this case, both to compensate the developer who has invested substantial time and resources in pursuing this litigation, and as the most likely means of insuring that low- and moderate-income housing is actually built.

Although we determine that the "builder's remedy" is appropriate in this case, we do not adopt the Mt. Laurel analysis for determining whether such a remedy will be granted. Instead, we find the rule developed in *Sinclair Pipe Line Co. v. Richton Park*, 167 N.E.2d 406 (Ill., 1960), is the better rule as it eliminates the calculation of arbitrary mathematical quotas which *Mt. Laurel* requires. That rule is followed with some variation by the supreme courts of several other States, and awards relief to the plaintiff builder if his development is found to be reasonable, i.e., providing a realistic opportunity for the construction of low- and moderate-income housing and consistent with sound zoning concepts and environmental concerns. Once an existing zoning ordinance is found invalid in whole or in part, whether on constitutional grounds or, as here, on grounds of statutory construction and application, the court may provide relief in the form of a declaration that the plaintiff builder's proposed use is reasonable, and the municipality may not interfere with it. *Schwartz [v. City of Flint*, 395 N.W.2d 678, 691 (Mich., 1986)]. The plaintiff must bear the burden of proving reasonable use by a preponderance of the evidence. Once the plaintiff's burden has been met, he will be permitted to proceed with the proposed development, provided he complies with all other applicable regulations. See *Sinclair Pipe Line Co. supra.*

[The Court rejected a separation of powers argument and an argument that Remillard's site was environmentally unsound.]

The zoning ordinance evolved as an innovative means to counter the problems of uncontrolled growth. It was never conceived to be a device to facilitate the use of governmental power to prevent access to a municipality by "outsiders of any disadvantaged social or economic group." *Beck*, 394 A.2d at 852. The town of Chester has adopted a zoning ordinance which is blatantly exclusionary. This court will not condone the town's conduct.

Affirmed in part and reversed in part.