AFFORDABLE HOUSING: N.H. Supreme Court Issues Its First "Exclusionary Zoning" decision.

In Britton V. Town of Chester (July 24, 1991) the Court said State law prohibits a town from having a zoning ordinance which doesn't allow realistic opportunities for housing which is affordable by low- and moderate—income families. The Court won't throw out the entire ordinance. (At least not yet!) And it won't re—write it. But any affordable housing project which the Court decides is otherwise reasonable will be exempt from that ordinance. Raymond Remillard, who had proposed a multi—family housing project, was allowed to proceed with it, free of the offending ordinance.

Britton is the most far—reaching zoning case in years, and deserves a careful, detailed look:

A. WHAT IS 'AFFORDABLE HOUSING?' The Supreme Court upheld the Trial Court's use of the HUD—determined low and moderate income levels for rural Rockingham County, and the figure of 30% of gross income as the maximum a family should pay for housing.

> **COMMENT:** The Court isn't mandating some particular formula here, to the exclusion of others. But some people, up to now, have been throwing up their hands and saying "Nobody can define 'affordable' anyway." "Wrong!" says the Court. There DO exist measures of affordability in the real world, which CAN be brought in as evidence.

B. WHAT IS A 'REALISTIC OPPORTUNITY?' Most of Chester was zoned for single—family dwellings on 2—acre lots or duplexes on 3—acre lots. Those clearly weren't affordable by the low— and moderate— income plaintiffs. The Town's ordinance ostensibly did allow multi—family dwellings. But the Court said this opportunity was NOT realistic because:

> **1. PRD ONLY.** Multi-family dwellings were only allowed as part of a "planned residential development," a large, risky type of project requiring a mixture of several housing types.
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> > **LESSON:** For towns attempting to comply with this decision, your ordinance will almost certainly be held defective unless some type of affordable housing is allowed as a use in its own right. Limiting it only to developments which are large and rich enough to be fully integrated like a PRD just won't hack it.

2. LAND AREA. When all the undevelopable land was subtracted, the area of Chester in which even a PRD was allowed turned out to be only 1.73% of the Town's land area.

> **LESSON:** Opportunities which exist only on paper won't hack it either. It won't work to zone for affordable housing only on steep slopes, aquifers, areas without roads, or areas already devoted to some other use.

3. SUBJECTIVE REQUIREMENTS. A PRD in Chester required approval by the Planning Board, which was given wide discretion over whether a project complied with some extremely vague and subjective terms in the ordinance.

> **LESSON:** Your ordinance is probably defective unless it allows some type of affordable housing AS A MATTER OF RIGHT in some zone, rather than by special exception or conditional use permit.

QUESTION #1: Does that mean a town can't even exercise site plan review over multi–family dwellings, as RSA 674:43 specifically allows?

ANSWER: No, in my opinion it doesn't mean that. What it does mean is that your site plan regulations covering affordable housing can't be vague and subjective. Your regs. can't give the planning board the discretion to flatly disapprove a use which the zoning ordinance allows as a matter of right. But specific proposals can still be made to comply with reasonable landscaping, parking, etc.

C. OPEN–ENDED FEES. The Court frowned hard on the planning board's ability, in Chester's PRD regulations, to "retain, at the applicant's expense, a registered professional engineer, hydrologist, and any other applicable professional to represent the [board]..." The Court said:

> **"(W)e question the availability of bank financing for such projects, where the developer is required to submit a "blank check" to the planning board along with his proposal, and where to do so could halt, change the character of, or even bankrupt the project."**

QUESTION #2: Whoa! Wait! Does this mean a planning board can no longer charge applicants fees "to cover its

administrative expenses and costs of special investigative studies, review of documents and other matters which may be required by particular applications as RSA 676:4, 1(g) allows?

ANSWER: No, in my opinion it doesn't mean that. What it does mean is that the USUAL applicant shouldn't have to give the town a "blank check." Any engineering or other review which a town has as part of its NORMAL procedure should be made part of the town's published fee schedule. All fees should be made PREDICTABLE by the applicant up front. The only exception should be where special problems are found AFTER the application has been accepted as complete, in cases where the board would be justified in disapproving the application unless some additional study is completed.

D. WHAT 'COMMUNITY' MUST ZONING PROMOTE THE WELFARE OF? The heart of this case is the Court's ruling that the words "general welfare of the community" in the zoning enabling law (RSA 674:16) refer to the public in the ENTIRE REGION, not just the residents of the town. The Court expanded its reasoning in the growth control cases to apply to all zoning:

"In Beck (v. Town of Raymond, 118 N.H. 793), 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.' 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."

QUESTION #3: Hold on! Does that last paragraph mean a town can't maintain a swimming beach for residents only? Can it no longer charge non–residents a fee to use its library if residents go free? Must it open its landfill, or its schools, to non–residents on an equal basis with residents?

ANSWER: I don't think so. The Court isn't announcing some

broad new constitutional principle here – just construing what the legislature meant by the word "community" in the ZONING act. Unless some future case says so, we can't draw any broader implications. [I'll bet we hear some folks try, though.]

E. CONSTITUTIONALITY? Since Chester's ordinance violated RSA 676:16, the Court opted not to discuss whether it might also be unconstitutional. That issue wasn't decided (contrary to the headline in the Union Leader).

F. ORDINANCE NOT THROWN OUT. The Trial Court had declared the entire zoning ordinance void. The Supreme Court said that wasn't proper:

> **"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... (O)ur 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."**

QUESTION #4: What does the word "temporarily" mean?

ANSWER: You've got me! The Court didn't set any specific time limit. Nor did it order the Trial Court to retain jurisdiction of the case. I think the Court assumed that the Town WOULD act soon, because until it does, the "builder's remedy" will remain available for any affordable housing project. The Court seems almost intentionally vague about this, in order to hold the threat of a more drastic remedy like a Sword of Damocles over the Town.

QUESTION #5: Which "sections" of the ordinance are invalid?

ANSWER: The Court was very careful NOT to identify specific clauses of the ordinance. That would have been intruding on the legislative function:

> **"Zoning is properly a legislative function and courts are prevented by the doctrine of separation of powers from**

invasion of this field” (Citation omitted).

In fact, the Court was careful to say that the zoning ordinance was invalid only “AS APPLIED to the facts of this case.” Very often in an ordinance which is of the “permissive” variety (See Treisman V. Kamen, 126 N.H. 372), a prohibition on a use is only IMPLIED by the fact that that use isn’t permitted, making it impossible to single out offending paragraphs of the ordinance. In short, the Court told Chester what was wrong, but not how to fix it.

> **COMMENT:** By ruling only in favor of the “builder’s remedy,” and NOT declaring the ordinance void, the Court has (at least for now, depending on what “temporarily” means) set a pretty high ante for groups of low—income people trying to enforce their rights. They get nothing if they just go into court for an abstract ruling that an ordinance is exclusionary. Instead they must “team up” with a real builder who stands ready, willing and able with a concrete housing proposal.

G. THE BUILDER’S REMEDY. In deciding to allow the plaintiff-builder to go ahead with his project, the Court pointed to: (1) the fairness of allowing a successful plaintiff to enjoy the rewards of his/her efforts, and (2) the fact that the New Jersey courts, in the famous Mt. Laurel cases, had fallen into a quagmire of “paper, process, witnesses, trials and appeals” because of their initial REFUSAL to allow the builder’s remedy.

H. NOT AUTOMATIC. But the builder still can’t build unless s/he proves, by a “preponderance of the evidence” that (1) the proposal DOES provide realistic opportunities for low— and moderate—income housing, and (2) that it is “consistent with sound zoning concepts and environmental concerns.”

In fact the Court specifically REJECTED the Mt. Laurel “arbitrary mathematical quota” approach to determining “fair share.”

> **COMMENT:** Clearly a town defending a lawsuit like this has 2 potential strategies: (1) trying to show that the town’s ordinance DOES provide “realistic opportunities,” and/or (2) trying to show that the particular proposal at issue is NOT “consistent with sound zoning principles and environmental concerns.”

QUESTION #6: If the “fair share” quota approach has been

rejected, then what yardstick is used to measure whether a town is providing ENOUGH "realistic opportunities" for affordable housing?

ANSWER: The Court didn't draw a fine line. Chester would have been nowhere near the line anyway. In my view, whether an ordinance is exclusionary or not will be decided on a case—by—case basis. No relevant evidence will be precluded. Furthermore, by using the "AS APPLIED" approach, rather than voiding the ordinance, the Court seems willing, in a sense, to let the market decide. In other words, if a builder is ready and able to build a "sound" affordable housing project, and that project is effectively barred from the entire town by zoning, that fact by itself counts as evidence of an unmet demand, and thus of an invalid ordinance "AS APPLIED."

QUESTION #7: If the quota approach has been rejected, does that mean the "regional housing needs assessment" required to be completed by the regional planning commissions under RSA 36:47, II is now totally useless?

ANSWER: Not at all. Those figures will still count as relevant (though not conclusive) evidence of whether a town's ordinance is valid. Besides, the best use of the "needs assessment" is to help a town craft its ordinance to meet those needs in the first place. It was never intended as a "quota" for a town to hide behind if challenged.

QUESTION #8: What is meant by the words "sound zoning concepts and environmental concerns," with which a builder must prove that his/her proposal complies?

ANSWER: Good question! The Court's opinion seems to beg us to look at Sinclair Pipe Line Co. v. Richton Park, 167 N.E.2d 406 (Ill. 1960), which is the case whose rule was adopted by our Court in place of Mt. Laurel.

No such luck. Sinclair wasn't even an affordable housing case. It was a case where a zoning prohibition on crude oil storage tanks was held to serve no valid public purpose because of the character of the area — i.e. a "spot zoning" case. It was cited by our Court for its discussion of the REMEDY — i.e. not voiding the ordinance, but instead allowing the particular proposal to proceed. Neither Sinclair nor any of the other 4 cited cases elaborates on what the builder has to prove, except that in Schwartz v. City of Flint, 395 N.W.2d 678 (Mich. 1986), it is said that:

> **"The reasonableness burden should, in our view, be appropriately high, so that a (successful) plaintiff... will not automatically be free to proceed with its proposed use."** (395 N.W.2d at 692)

SPECULATION: In my opinion the phrase "sound zoning concepts and environmental concerns" will turn out to mean that the proposal must comply with all regulations designed to prevent activities HARMFUL to the public. This "harmful activities" distinction is not new to zoning law. For example ordinances which "expressly protect public health standards" are excepted from the so—called "Four—Year Exemption" (RSA 674:39). The "harmful activities" distinction has been used by the Court to distinguish between vested uses which can be terminated, and those which can't (L. Grossman & Sons, Inc. v. Town of Gilford, 116 N.H. 480, comparing "harmful" junkyards to non—"harmful" advertising signs). It has also been used to determine when a regulation constitutes a "taking" (Claridge V. Wetlands board, 125 N.H. 745, contrasting filling of wetlands, which is "injurious to the public" with development of "ordinary woodland," which isn't).

The only issue discussed by the Court in Britton, in determining that Remillard's project was reasonable, was whether it would adversely affect (i.e. pollute) wells, streams and acquifers. That's clearly a "public harm" issue.

QUESTION #9: Does this case say that all 2—acre residential zoning is invalid?

ANSWER: No. Of course it's invalid if that's the only zone the town has! But no specific type of regulation was rejected per se in this case. The overall zoning plan is what counts. On the other hand, nothing in this case makes such a per se rejection in the future by our Court any LESS likely. Some states HAVE rejected large—lot residential zoning altogether (National Land & etc. v. Kohn, 215 A.2d 597 (Penn. 1966)).

QUESTION #10: Can a town argue that economic factors are what's making housing unaffordable, and not zoning?

ANSWER: The Britton case doesn't say. But logically, if there's a builder—plaintiff who is genuinely ready and able to build truly affordable housing (a prerequisite to the Britton remedy) then the "other economic factors" argument CAN'T be true. The New Jersey court, for one, said it wouldn't listen to that argument unless "all excessive restrictions and exactions, i.e.

those not essential for safety and health, have been removed...” (See “Mt. Laurel II,” 456 A.2d 390 at 451). [Note again the “harmful activities” distinction.] In my view, a town without affordable housing won’t be able to claim that its zoning hands are clean unless it has already set up a nearly restriction—free Zone.

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