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SANBORNTON AND MORALES: THE TWO FACES OF "ENVIRONMENT"

By Richard F. Babcock*

This is a tale of two lawsuits, of two communities, and of the opinions of two federal courts, a thousand miles from each other, the consequences of whose respective judgments are a light year's distance apart. The two decisions highlight the ironies and the potential conflicts between two movements which are occupying the attention of significant portions of our society.

One of these movements is represented by the current opinion, largely white and middle-class, that we are so far down the path to annihilation of our physical environment that it is ridiculous to talk of social problems: we are, in short, witness to a debacle in our physical surroundings. The other movement, less popular but equally impressive in rhetoric (if not in results), is represented by those who state that, until our society can provide adequate shelter reasonably close to decent employment, all talk about "environment" is nothing more than a white, middle-class diversion designed to prevent others from enjoying the perquisites of the white middle-class.

As with so many movements of these sorts, each is dominated by its zealots. Each has within it enough truth to require serious study if we are to achieve an enduring and equitable society.

SANBORNTON, NEW HAMPSHIRE

*Steel Hill Development, Inc. v. Town of Sanbornton*¹ involves a rural community in New Hampshire. The description of that town by Chief Judge Coffin is so evocative that it would be pointless to paraphrase:

Located in the rolling hills of Belknap County, New Hampshire is the tiny town of Sanbornton with a year-round population of approximately 1,000 persons living in some 330 regular homes. Long

popular as a major recreational and resort area, Belknap County commenced to share its rural beauty with visitors in considerably greater degree with the opening in the 1960's of Interstate Highway 93 which funneled droves of touring urbanites from the Boston area, one hundred miles away, into towns like Sanbornton. Since Sanbornton borders Lake Winnisquam, is within easy reach of Lake Winnepesaukee and affords simple access to most New Hampshire ski areas, it is no surprise that its summer population is about 2,000 persons, that it has around 400 seasonal homes, and now is afforded the unique opportunity to serve as a seasonal second home paradise for persons who would buy the proposed 500 to 515 family units planned by appellant Steel Hill Development, Inc. In short, as the district court stated, 'this case reflects the current clash between those interested in opening up new and hitherto undeveloped land for sale and profit and those wishing to preserve the rural character of Northern New England and shield it from the relentless pressure of an affluent segment of our society seeking new areas for rest, relaxation and year round living.'

Steel Hill Development, Inc. bought 510 acres in Sanbornton in December, 1969. It planned construction of second homes in a combination of cluster development and conventional detached single-family houses. At the time that Steel Hill acquired its acreage the property was zoned to require a minimum of approximately 35,000 square feet of land per single family house. According to the court, negotiations between Steel Hill and the Town were at first "cordial." At least that was the case until the first public hearing to consider a proposed rezoning which would have permitted some clustering. A substantial number of local residents attended, and were bitterly opposed to the proposal. The local planning board nevertheless approved 37 conventional houses on 35,000 square foot lots. Then came the reaction and (as any student of the phenomenon of zoning could have foreseen) here followed a rezoning of Steel Hill's property: seventy percent of Steel Hill's land was reclassified "Forest Conservation District," six acres minimum per house, and thirty percent was classified "Agricultural District," three acres minimum per house. Steel Hill sued and, as is expected in such matters, alleged that there was no relationship between the zoning classifications and the "health, safety, morals and general welfare" of the community; that the regulations were in violation of the due process clause of the Fifth Amendment (that is, the rezoning so reduced the value of its land as to constitute taking without compensation); and that the classification of its land violated

the equal protection clause of the Fourteenth Amendment. The United States District Court for the District of New Hampshire found adversely to Steel Hill on all counts.² On appeal, the United States Court of Appeals for the First Circuit recognized the context in which this opinion was being decided:

This court, like other federal and state courts throughout the country, finds itself caught up in the environmental revolution. Difficult and novel legal and factual questions are posed which require the resolution of conflicting economic, environmental, and human values. The problem inherent in quantifying a 'way of life,' [citing case] or the beauty of an unspoiled mountain, [citing case] may never be solvable with any degree of certitude.

Neither the appellate court nor Steel Hill spent much time on the minimum three-acre zoning. The six-acre restriction was another matter. The trial court had observed that if only "health and safety" were to be considered, the six-acre requirement could not be justified. The trial court had, however, considered such problems as the potential for the pollution of neighboring lakes, increased traffic problems, increased air pollution and "interference with smelt spawning in Black Brook." "Several witnesses," the trial court found, "testified not only would the town's rural character be destroyed by Steel Hill's massive plans, which would, in effect, double the town's population, but that there could be immeasurable ecological harm."

Steel Hill attorneys had read the latest cases in which local regulations had been successfully challenged on the ground they were socially and economically "exclusionary."³ The appellate court discerned a difference between rural New Hampshire and the suburbs of Philadelphia:

All these cases refer to an unnatural limiting of suburban expansion into towns in the path of population growth where a too restrictive view of the general welfare was taken. Comment, 50 *Journal of Urban Law* 129 (1972). Instead, appellant here does not seek to satisfy an already existing demand for suburban expansion, but rather seeks to create a demand in Sanbornton on behalf of wealthy residents of Megalopolis who might be willing to invest heavily in time and money to gain their own haven in bucolic surroundings. Note, 57 *Iowa L. Rev.* 126, 127 (1972). These different problems of suburban and rural expansion, their scientific and legal analyses, and their appropriate solutions cannot so easily be equated.

The appellate court sustained Sanbornton's midnight zoning, but this approval was not unreserved. The court cautioned the community:

Yet, though it may be proper for Sanbornton to consider the foregoing factors, we think the town has done so in a most crude manner. We are disturbed by the admission here that there was never any professional or scientific study made as to why six, rather than four or eight, acres was reasonable to protect the values cherished by the people of Sanbornton. On reviewing the record, we have serious worries whether the basic motivation of the town meeting was not simply to keep outsiders, provided they wished to come in quantity, out of the town. We cannot think that expansion of population, even a very substantial one, seasonal or permanent, is by itself a legitimate basis for permissible objection. Were we to adjudicate this as a restriction for all time, and were the evidence of pressure from land-deprived and land-seeking outsiders more real, we might well come to a different conclusion. Where there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channeled by the happenstance of what town gets its veto in first. But, at this time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severely restricts development, may properly stand for the present as a legitimate stop-gap measure.

The court concluded by suggesting that Sanbornton plan with more precision for the future, and that the New Hampshire legislature undertake to assist small towns like Sanbornton to do a better job of developing local land use policies.

Thus, while we affirm the district court's determination at the present time, we recognize that this is a very special case which cannot be read as evidencing a general approval of six-acre zoning, and that this requirement may well not indefinitely stand without more homework by the concerned parties.

Sanbornton is one of those cases where the losing party looks for solace in the rationale, and the winning party, exuberant over the result, worries how seriously it should take the hortatory language that preceded the affirmation.

HARVEY, ILLINOIS

The presumptive companion case, which appears so unlike the circumstances in *Sanbornton*, is *Morales v. Haines*.⁴ The suit was

brought by Mrs. Morales because the City of Harvey had refused to issue a permit to build a house subsidized under Section 235 of the Federal Housing Act⁵ even though her development met all applicable zoning regulations. Mrs. Morales had entered into a contract to purchase a house to be built by a contractor which had already constructed four hundred Section 235-financed houses in Harvey. All, or substantially all, of those houses had been occupied by Blacks. Harvey, Illinois is located in Cook County, south of Chicago, near Gary, Indiana. It is a city of moderate and low-income families; an "ethnic" community in the current phrase. In 1960 the total population of Harvey was 29,071, of which 6.8 percent were Black. In 1970 the population was 33,864, of which 30.9 percent were Black. Mrs. Morales is a Black citizen of the United States.

In the summer of 1970, the City of Harvey, by informal administrative rule, decided the city would not allow any more homes subsidized under Section 235 to be built within the city's limits. The city began to deny permits. On September 27, 1971, the City Council adopted Resolution No. 868 which gave formal recognition to this informal decision. That resolution read as follows:

WHEREAS, it is deemed for the best interest of the City of Harvey not to issue more permits for this type of low construction housing for the following reasons:

- A. It is a concentration of too much low cost housing to one city.
- B. This type of construction can only mean slums in the city.
- C. Building of these homes has discouraged other builders to build better homes in the City of Harvey.
- D. These homes lower the land values of other residents in the City of Harvey.

James Haines, the Mayor of Harvey, testified that Harvey's Black population was "integrated with white population rather than segregated." He also stated "that the city hoped that, if Section 235 homes were delayed for a period of time, some of those which were to be built would be built in other communities rather than in the City of Harvey."

The trial court found that the city's refusal to issue a building permit for a Section 235-financed home violated the equal protection clause of the Fourteenth Amendment because such houses are physically indistinguishable from other houses in their price category, which the city allows to be built. The court concluded: ". . . in view of the foregoing it is unnecessary to decide whether

the decision to ban additional Section 235 houses was motivated to any extent by the likelihood that such houses would be occupied by blacks or by a desire to control 'racial balance.' "

CONCLUSIONS

What can be extracted from these two cases? May one conclude that the relatively affluent may legally keep out other relatively affluent (*Sanbornton*), but that the relatively poor cannot keep out other relatively poor (*Morales*)?

Or that Babcock's Law of the Second Gas Station is once again demonstrated to be ubiquitous in its application; that, in order to exclude development of the kind that you do not wish, you must act promptly and not allow any change from what has existed previously.⁶ Is it easier to keep out the first Section 235-financed house than the four hundred and first?

Or that there is a different constitutional standard for a second home than for a first home; that in balancing the equities between the desire of a community to maintain its "character" and a plea for additional housing, the latter argument is not persuasive when that plea is made by a white stockbroker in Boston hunting a weekend retreat, but is persuasive when it is made by a low-income Black in Cook County seeking to find a permanent shelter outside the ghetto of the central city?

Or that Steel Hill made a threshold error in not joining as individual plaintiffs three Black doctors from Boston who sought second homes, or in failing to include a few subsidized units for low-income families who would service the affluent occupying the development?

On the other hand, did Harvey make a fatal mistake in its candor? The resolution of the Harvey council was blunt to the point of embarrassment. Should it not have taken a lesson from the Town of Sanbornton and used its codes as the exclusionary device? Why did not Harvey insert provisions in its zoning ordinance, subdivision ordinance, or its building code, that would have, by raising costs, effectively prevented construction of Section 235-financed housing, and yet would have appeared to be neutral—to be applicable to all housing, subsidized or market?

What does the future hold for each of these two disparate communities? I picture Sanbornton taking Judge Coffin's warnings to heart. The Town takes a clue from the decision of the New York Court of Appeals in *Golden v. Town of Ramapo*,⁷ and sketches

out a fifteen to twenty-year capital improvements program and no development is permitted until the streets, sewers and parks are provided, as promised in the capital budget. Thus the town of Ramapo cannot be accused of exclusion; it is simply "staging" development; meanwhile, no development is permitted. Ramapo has complied with the decision of Judge Coffin to do something more than "crudely" zone everything minimum six acres. Having undertaken that step Sanbornton would have temporized, and might hope that Steel Hill and its progeny will turn elsewhere to look for more seducible areas in New England, or that an economic depression will cool the Boston affluent.

The prospect facing Harvey, Illinois is less predictable. Another federal judge, in *Gautreaux v. Chicago Housing Authority*,⁸ held that when the Black population of a neighborhood reached approximately 25 percent, the neighborhood had "tipped" and would inexorably move in the direction of being totally occupied by the particular racial group. Harvey is past that tipping point. It faces the prospect of becoming all, or substantially all, Black. The members of the Harvey city council probably had not read *Gautreaux*, but they knew instinctively what it said. Harvey, unlike Sanbornton, was ten years to late. The ironies in *Morales* are underscored by the representation. Mrs. Morales was represented by counsel provided by the Leadership Council for Open Communities, a Chicago area organization dedicated to establishing greater opportunity for low and moderate income housing throughout the entire metropolitan area, and currently concerned with trying to work out some "fair share" voluntary method whereby all suburban communities would take a share of the housing necessary to provide lower-income people adequate shelters near their jobs. I venture that Mrs. Morales' lawsuit was not undertaken without considerable anguish by the Leadership Council. They knew what Harvey feared; it was a result they were dedicated to avoiding. Yet they took Mrs. Morales' case. I suggest that the Council's decision to take this case was correct. Mrs. Morales wanted a house outside the Chicago ghetto; she thought she was able to get one in Harvey. She didn't care about "fair share" or other fantasies. Probably she also wanted a house where she would not be an isolated Black in a sea of white neighbors. Let us further presume that the consequence of *Morales* is that Harvey will go all Black. Is this bad? Certainly not from Mrs. Morales' point of view. Should Mrs. Morales be denied sophisticated legal assistance by a white liberal

legal assistance organization because that organization recognizes the validity of the proposition that there is a correlation between inadequate public services and the racial makeup of a neighborhood or community and that the present Black residents of Harvey would be the ones to suffer most if they lost all or substantially all of their white population?

What possible arguments or techniques might Harvey have followed which could have saved it from the consequences of *Morales*? I earlier suggested that Harvey should have hidden its real motives beneath a maze of "neutral" land use regulations, all allegedly designed to protect the health and safety of any resident, irrespective of race or economic class. (Worse luck, there are no "spawning smelt" in Harvey.) Harvey overlooked a number of ploys. Under the 1970 Illinois Constitution, Harvey enjoys home rule. Why not amend its charter to require a referendum before any further subsidized housing was authorized? This would have brought into play the constitutional imperatives that surround the franchise and it would have permitted the community to invoke the rule of *James v. Valtierra*.⁹

As an alternative, Harvey, being a suburb of Chicago, should have known that Judge Austin still had before him, in a companion case to *Gautreaux*, the question of whether his restriction on public and subsidized housing in Chicago should not be extended to the suburbs. Why not ask the judge in *Morales*, Judge Tone, to defer any decision in *Morales* until Judge Austin had acted on the petition that an equitable plan for low-income housing be developed for all Chicago suburbs? The point, of course, could then have been advanced that Harvey had passed the "tipping" place, precisely what Judge Austin was seeking to put a stop to in his judgment order in the first *Gautreaux* decision. Harvey, the plea would go, should be protected from becoming the suburban ghetto (thereby relieving the other communities of their obligations) until a court-imposed plan had been written for the entire metropolitan area.

Finally, if Harvey felt sufficiently frustrated to put a stop order on all Section 235-financed housing, one wonders why the city did not join as third-party defendants the Governor of Illinois, the State Superintendent of Education, and every member of the state legislature. Harvey could plead that under the present tax system more low-cost housing imposed relatively higher costs on the educational system in Harvey than in more affluent suburbs; that under

the 1970 Illinois Constitution the responsibility for education is clearly upon the state; that the State of Illinois had, by its discriminatory method of disturbing educational funds, contributed to the special fiscal problems that Harvey faces and therefore the State of Illinois was guilty of a denial of equal protection of the law. Until the state acted, Harvey, being only an agent of the state, could not be held solely responsible for assuming the consequential burdens that were a result of the state's nonfeasance.

Environment in Sanbornton and Harvey? For whom? For the residents of Sanbornton it is the rural beauty and the unsubdivided hills. For Mrs. Morales it is a modest home, yet near other Blacks, free of rats and lead-paint walls. For the leadership of the City of Harvey, it is a stable community, predominantly white, but with a substantial percentage of Blacks, and free of blockbusters and more white flight. For Steel Hill, it was an opportunity to develop land and make a profit.

Mrs. Morales won and meanwhile has found herself other accommodations. Sanbornton won what may be no more than a fleeting victory. The City of Harvey lost and can only hope to be saved by some doctrine of fair share that has as yet to establish itself. Steel Hill lost, at least until it finds another, less determined community. And two federal courts surely must wonder why they are expected to jerry-build an equitable system of land use policy.

It does seem that there should be a happier way to treat mobile Boston stockbrokers and Chicago Blacks, threatened New Hampshire valleys and white ethnics.



FOOTNOTES

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¹ 469 F.2d 956 (1st Cir. 1972).

² Steel Hill Development, Inc. v. Town of Sanbornton, 338 F. Supp. 301 (D.N.H. 1972).

³ National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970); Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 197 S.E.2d 390 (1959).

⁴ Docket No. 71 C 762 (N.D. Ill., decided Sept. 22, 1972).

⁵ 12 U.S.C. §1715(Z) (1968).

⁶ Babcock, R., *The Courts Enter the Land Development Marketplace*, CITY (Jan.-Feb. 1971) 58.

⁷ 30 N.Y.2d 359, 285 N.E.2d 291 (1972).

⁸ 204 F. Supp. 736 (N.D. Ill. 1969).

⁹ 402 U.S. 137 (1971).