Marian Manor v. Borough of Caldwell 7/14/76

MM action in lieu of prerogative writ

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SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
CHARLES S. BARRETT, JR.
JUDGE

ESSEX COUNTY COURTS BLDG.
NEWARK, N. J. 07102

July 14, 1976

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

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Re: Marian Manor, Inc., et al. vs.
Borough of Caldwell, et al.
Docket No. L-23736-75 P.W.

Gentlemen:

This is an action in lieu of prerogative writ. It was pretried on May 14, 1976 and I heard oral argument on May 28, 1976, June 4, 1976 and June 18, 1976. The Public Advocate was permitted by me to attend the oral arguments and to file a brief amicus curiae.

Plaintiff, a nonprofit corporation, was organized to construct and operate a senior citizens housing project (Marian Manor) in Caldwell. It applied for a building permit to the Building Inspector of the Borough of Caldwell who, on March 25, 1975 denied the application. Plaintiff then filed its appeal from this denial to the Board of Adjustment seeking a variance for special reasons in accordance with N.J.S.A. 40:55-39(d). The Board of Adjustment (Board) held extensive hearings on April 16, 30, May 7, 14, 21, 22, 29 and June 3, 4,

11, 17 and 26, 1975. Board recommended the granting of the variance on June 26, 1975 and set forth in detail its reasons.

In paragraphs 14, 15, 16, 17 and 19 Board recommended the reduction of the proposed structure from six (6) stories to four (4) stories with limitations upon site coverage and side and rear yard dimensions, holding that if reduced the proposed variance would do no violence to the zone plan or to the zoning ordinance. Subsequent to the decision of Board plaintiff accepted the reduction from six (6) stories to four (4) stories and voluntarily reduced the total number of units to be contained in the building from the original 217 apartments to approximately 186 apartments.

The Borough Council (Council) held a public hearing on January 6, 1976 with regard to Board's Resolution. On February 14, 1976 Council held what was called a conference session and on February 20, 1976 Council reversed the unanimous decision of Board adopting a Resolution in support of its action.

The site in question is zoned in a residence A one-family zone of Caldwell. The site consists of 5.23 acres of an approximate 10 acre tract located on the upper southerly portion of the tract fronting to the west on Ryerson Avenue, a wide two-lane residential street. The north side is densely wooded and slopes steeply to a railroad right-of-way. Slightly behind this right-of-way, and running parallel to the railroad is Bloomfield Avenue, the main street of Caldwell. Undeveloped wooded land owned by the Community of Sisters of Saint Dominic of Caldwell is to the east of the site. The southerly portion of the site fronts on Ashland Street on the other side of which is additional property owned by the Community of Sisters of Saint Dominic and on this property is located a private dwelling beyond which is an area of private homes. On the westerly side of Ryerson Avenue is the 82 acre campus of Caldwell College, which contains 12 buildings, including dormitory and other living facilities incident to college, high school, elementary school and convent uses.

I have studied the lengthy transcripts of the hearing before Board which developed the following information.

The Dominican Order in Caldwell is made up of four hundred and thirty (430) nuns, most of whom are teachers in various schools at different educational levels. In 1972, this Order made a study to determine the housing needs of the parents of the Dominican Sisters as well as the housing needs of senior citizens in northern New Jersey, it being the design of the Order to use its resources in terms of

property and personnel to help out in this area. The survey proports to develope that there is a likelihood on the part of 200 Sisters that over the next 10 years someone in their family would need residence in a senior citizens home, with some 38 professing an immediate need.

According to the testimony the Board of Trustees of the plaintiff Marian Manor would always be controlled by the Dominican Sisters with an advisory board made up of both residents of the West Essex area and Sisters from the Dominican Order.

An architect, Mr. Azeglio Pancani, Jr., well qualified in the field of senior citizen housing and multi-family projects testified, at length, as to his work on plaintiff's project. He described the site and the plans he had made for the building and its particular features for senior citizens. There are to be efficiency apartments with a kitchen and one bedroom apartments. Fifty percent parking would be available and the building would be fire resistent. As much natural vegetation as possible was to be retained. (The architect said that his plans were in compliance with the requirements of the HFA, with land coverage being 13.3%.) When the site is approved there is to be an environmental impact study. The architect stated that he would have liked to design a nine (9) or ten (10) story building but was afraid of community objection and he noted that there were already six (6) story multi-unit dwellings in Caldwell, and indeed there was one nine (9) story building. He stated also that the nearest one-family dwelling is approximately three hundred (300) feet away on Ryerson Avenue with no homes on Ashland Street itself.

Mr. Joseph Brown, a Housing Consultant, testified in detail as to the proposed financing. He also discussed the rent levels and the relationship between the New Jersey Housing Finance Agency and its availability to provide a long-term low-interest mortgage to the project together with rent subsidies which could possibly be furnished by HUD to some tenants. He outlined the income eligibility requirements imposed by the HFA. Certain payments, he said, would have to be agreed upon with Caldwell in lieu of taxes.

He testified further that financing by the HFA of New Jersey would be under the middle-income housing law and this would require site plan approval from HFA. There would have to be an ecology study and market feasability study. Section 8, sponsored by the United States Department of Housing and Urban Development (HUD)

is a federal rent subsidy program which takes into consideration the "fair market rent" of a given area and then reduces that amount of rent for the tenant to approximately 25% of the tenant's income. This subsidy is assigned to the project but comes through the tenants. Rent payments to Caldwell in lieu of taxes would be based on the rental income of the project amounting to about 15% of gross rentals. Mr. Brown thought that such payment would be around $130,140 per year. The project is not "public housing" as formed by local housing authorities but is planned under New Jersey's middle income housing law.

He felt plaintiff's tenants should be economically mixed. There would be some that would require subsidies that are dependent upon need, and with the current law he thought a family could make up to $21,000 a year and still be admitted to the project but it was believed that the adjusted income of a tenant would average around $8,500 a year.

Sister Rita Margaret Chambers, with a long background in the area of senior citizen housing, testified as to two hundred and eighty-six (286) residents who expressed interest in living in a complex such as the one contemplated by plaintiff.

Sister Chambers testified as to various other studies as to people over 65 and as to the number of senior citizens in Caldwell living under the national poverty level, and as to certain aging surveys and estimates. She testified as to the paramount importance of residents' organizations and involvement in the management of their building and as to the training being given to one of the Sisters relative to senior citizen housing administration. She said one hot meal would be provided daily in the main dining room. All senior citizens would be encouraged to participate in Caldwell College activities, and would be permitted to audit courses there. She testified further as to a plan to provide a mini bus. She testified as to the proposed selection process for choosing the residents of the building. The minimum age requirement would be 62, with priority given to residents of Caldwell and Sisters' parents to some degree.

Mrs. Anne Shulman testified that she was a resident of Caldwell for twenty (20) years and worked with the aged for the past ten (10) years. She testified as to a survey she made of Caldwell and as to the need for senior citizen housing in Caldwell.

A Mr. David Zimmerman, who is a licensed professional planner, testified as to his familiarity with Caldwell and the area surrounding the proposed site. He said that there are twenty-two (22) apartment complexes in Caldwell and he viewed the density of Marian Manor as being approximately the average of the other multi-

unit dwellings in Caldwell. He felt that the proposed building would not be obtrusive, that there would be no substantial traffic problem and that the proposed project would be the most appropriate use of the property in question.

Mr. John D'Onofrio, a civil engineer, testified as to the lack of any sewerage problem.

Mr. Bernard Gallagher, Director of the Essex County Office on Aging, testified that the expenditure of a majority of senior citizens brought their housing needs to 35% of their total income, on a national basis. He further testified that Senator Harrison Williams revealed that in Essex County the elderly are paying up to 60% of their income for shelter. (Mr. Gallagher finds such an expenditure to result in nutritional problems.)

Mr. Brown again testified as to the mechanics of HUD's Section 8 program and as to its application to fair market rents.

With this testimony the applicant rested its case.

Mr. Grover Kayhart of the Save Caldwell Committee called certain witnesses including Mr. Horace Terhune, the Tax Assessor of Caldwell, who gave his opinion of what might be paid in lieu of taxes disagreeing with Mr. Brown's estimate of approximately $130,000 -- that estimate being too high. Mr. Terhune also testified as to various types of multi-family complexes in Caldwell. (He later testified that Marian Manor's payment in lieu of taxes would be approximately $189,422.)

A Mr. Arthur Johnson was called by Mr. Kayhart as a licensed professional planner. Mr. Johnson felt the variance was not justified because it would be "spot zoning" and that the building would be detrimental to the surrounding area. He knew of no reason why the property could not be developed with single family residences. He felt the financing was uncertain and pointed out that Section 8 is new. (He did not think that there would be any significant traffic problems.)

Mr. Barry Thompson was called by Mr. Kayhart and a survey by him concluded that there were at least three hundred and eighty-five (385) homeowners in favor of senior citizen housing in Caldwell and one hundred and eighty-five (185) against.

Mr. Kayhart next testified that he is in the insurance business and is a realtor in the West Essex area. He gave his

opinion that there would be a 25% depreciation in Caldwell if plaintiff's building was erected. He estimated that the payment in lieu of taxes would be $114,738.

Mr. Calvin Ehehalt, a fire captain from the Irvington Fire Department, testified as to his quarrel with the adequacy of the volunteer fire department in Caldwell to deal with any fire problems in the proposed building.

Mr. Walter Koch, was called by Mr. Kayhart as to an experiment he conducted with a balloon relative to the ability to see the new building from various points nearby, and a Mr. William Dougherty also testified as to the balloon experiment.

Mr. James Adams, a local resident, testified that he felt that too many elderly people would be brought into Caldwell by the new project.

Ms. Maryann Shingle, a resident of Caldwell, entered a formal appearance for the West Essex Area League of Women Voters and said that the League encouraged the building of senior citizen housing.

Persons from the floor spoke, with some encouraging the granting of the variance and others opposing the variance.

There was testimony by a Mr. Alcaro as to alleged flooding.

What has been given is a brief summary of some but certainly not all of the voluminous transcripts of Board's extended hearings and I will next discuss the principles of law which govern a court in the problem now presented.

From Tomko v. Vissers, 21 N.J. 226, 237 (1956) we learn that:

> "A zoning ordinance is presumed to be reasonable and fair in its impact upon the territory encompassed within its terms and the burden falls upon the property owner who seeks relief from the restriction to prove the statutory requisites which justify alleviation."

It is further stated that:

> "The statute does not define rules of procedure for the applicant to follow in the

> presentation of its case, but the rule-making power given the board (R.S. 40:55-37) contemplates that certain standards of guidance will be promulgated to insure an orderly hearing. A rigid formality is neither practical nor necessary." Id. at 238.

In Kenwood Associates v. Board of Adjustment of the City of Englewood, et al, _____ N.J.S. _____ (Slip Opinion, March 31, 1976) it was held that the municipal action is presumed to be valid and the function of the Court is discussed relative to the need of the trial judge setting forth fully his findings and reasons, both factual and legal in reaching his decision.

In Sun Oil Co. v. City of Clifton, 16 N.J.S. 265, 270 (App. Div. 1951) the court discussed the obligations of a Board of Adjustment in connection with the functions of the governing body.

> "The function of a board of adjustment under R.S. 40:55-39(d) is merely advisory to the municipality which may, by resolution, approve or disapprove its recommendation." Id. at 270.

The governing body of a municipality has authority to review the determination of the Board of Adjustment and to make its own ultimate conclusions from the facts adduced before the board, but it cannot make new findings of fact not based on the record made before the board. Verona, Inc. v. Mayor and Council of West Caldwell, 49 N.J. 274, 284 (1967).

It is presumed that Boards of Adjustment and municipal governing bodies will act fairly and with proper motives and for valid reasons. Such public bodies, because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. Courts are not permitted to substitute an independent judgment for that of the boards in areas of factual disputes. If there is substantial evidence to support the local action, the judicial branch of the government cannot interfere and the test is whether the zoning determination was arbitrary, capricious or unreasonable. Even if there is doubt as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965). See Bonsall v. Township of Mendham, 116 N.J.S. 337 (App. Div. 1971), certif. den. 59 N.J. 529 (1971).

In DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 440 (1970) Justice Hall, writing for a unanimous court discussed an affirmative finding of "special reasons" "in particular cases", together with the negative findings, that the "relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance". The opinion pointed out that "special reasons" is a flexible concept including promotion of "health, morals or the general welfare". Many variances have been approved for public and semi-public uses because they further the general welfare, including schools in residential zones, telephone equipment buildings in residential zones and private hospitals for emotionally disturbed in residential zones.

An important, perhaps crucial point in this case, is of course, whether the variance constituted special reasons and if so would it be such as a matter of law. "In the nature of the subject, a precise formula is not feasible. Each case must turn upon its own circumstances." Andrews v. Ocean Twp. Board of Adjustment, 30 N.J. 245, 251 (1959). Unless the determination with respect to the "special reasons" as well as the "negative criteria" are arbitrary, or capricious, there is no basis for judicial intervention in municipal actions. Id. at 251.

The denial of a variance is more cogently applicable to a case where a denial is involved than when a grant is before the court because more is to be feared from a breakdown of a zoning plan by ill-advised grants of variances than by refusals thereof. Mahler v. Borough of Fair Lawn, 94 N.J.S. 173, 186 (App. Div. 1967), aff'd. 55 N.J. 1 (1969).

Finally, I note that in Tzeses v. Board of Trustees of South Orange, 22 N.J.S. 45, 62 (App. Div. 1952) we have this language:

> "The Courts should not lend themselves to impairment of established residential areas, and thus undo the careful thinking that has gone into a zoning arrangement projected by a planning board and implemented by action of the governing body in passing the necessary zoning ordinance."

Is there evidence in the record to support the principle findings of the Borough Council? The Council has concluded in paragraph 3 of its Resolution of February 20, 1976 that the proposed senior citizen housing facility is in the form of a luxury apartment

type structure and use. Despite the rather unfortunate use of the word luxury by one of plaintiff's witnesses I cannot find any evidence in the record made before Board to support this conclusion of the Council. Luxury to me would mean a type of multi-family dwelling which contains a swimming pool, tennis courts, attendants, valet parking and so forth. Marian Manor, as contemplated, is designed for older people providing some of the amenities which would not be available in an ordinary apartment, such as provisions for widened doors for wheel chairs, a community kitchen designed to serve one hot meal a day, and such like items. If erected it will constitute modest community living. Of course, it will be expensive to build but this would be true of any building to be put up in this time of inflation.

In paragraph 5 of its Resolution the Council has determined that there is no need on the part of senior citizens of Caldwell, or the West Essex area, for the type of housing sought. Again, there is just no evidence in the record to support this conclusion. Plaintiff has represented that financing will be sought under N.J.S.A. 55:14I-2 and 55:14J-2. N.J.S.A. 55:14I-2 states as its declaration of policy that:

> "...there exists in various parts of this State a seriously inadequate supply of decent, safe and sanitary rental housing for elderly persons and elderly families in the lower middle-income brackets at rentals which said persons and families can afford; that this situation tends to cause serious social unrest; that the lack of properly constructed rental housing units designed specifically to meet the needs of the elderly of this State in the lower middle-income bracket at rentals which this class of elderly can afford constitutes a menace to the health, safety, welfare and morals of the public..."

The said declaration of policy continues with more details of the need.

N.J.S.A. 55:14J-2 as a declaration of policy says:

> "It is hereby declared that there exists in this State a need for adequate, safe and sanitary dwelling units for many families of moderate income in this State; that a large and significant proportion of the

families compelled to relocate by reason of urban renewal, highway construction and other public work programs will be subject to extreme hardship in finding adequate, safe and sanitary housing unless new facilities are constructed and existing housing, where appropriate, is rehabilitated, and such new or rehabilitated housing facilities are made available at a rental level within their means; and that, unless the supply of housing for families of moderate income is increased significantly and expeditiously, a large number of the residents of this State will be compelled to live under unsanitary, overcrowded and unsafe conditions to the detriment of the health, welfare and well-being of these persons and of the whole community of which they are part. It is further declared that the building industry can provide a fully adequate supply of safe and sanitary accommodations at rental or carrying charges which families of moderate income can afford only if a public agency is created to encourage the investment of private capital and stimulate construction and rehabilitation of dwelling units to meet the needs of such families through the use of public financing, public loans and otherwise; that, to accomplish the foregoing, co-ordination, co-operation and agreement of and among private enterprise, State and local government is essential; that the acquisition of land, the construction, rehabilitation, financing by mortgage or otherwise, management, operation, maintenance and disposition of dwelling units constructed or rehabilitated hereunder, and the real and personal property and other facilities necessary, incidental or appurtenant thereto is a public use for which public moneys may be spent, advanced, loaned or granted; and that the enactment of the provisions hereinafter set forth is in the public interest and is hereby so declared to be such as a matter of legislative determination.

All of the evidence, including the surveys and the testimony of plaintiff's witnesses, demonstrate beyond a shadow of a doubt that the need exists in Essex County and in Caldwell itself. In support of his argument of need, Amicus has stated in his brief that the necessity for providing the opportunity of construction of housing for persons of low and moderate income has been cited by every branch of government in New Jersey, and in a footnote makes reference to an Executive Order by one governor, to a special message by another governor and to a report. He cites numerous cases on the subject.

It is entirely clear from the record and from oral argument that this project cannot be built without public financing and public financing must be sought under the New Jersey Housing Financing Agency set up in accordance with the provisions of N.J.S.A. 55:14J-4.

Prior to the formal seeking of the finance mentioned from the agency involved there must, according to the record, be a clearance by the local municipality of any zoning objections. The record is clear that before there can be approval of the appropriate state agency there must be a great amount of data submitted to establish that the project comes within the scope of the statutory requirements and of the criteria set by the agency. If the agency is not satisfied, the project just doesn't proceed. If it is satisfied that the project should be financed then the statutory scheme has been fulfilled and in my view local municipal objections should not prevail.

In connection with the need of this building, as I have indicated, I am of the view that there is unquestionably an undisputed general need. Could the project be somewhere else? Possibly, but this particular location is peculiarly attractive for the type of structure and use envisioned. It is under the sponsorship of a well established group of women who have proven their ability to maintain substantial structures by their operation of their order and of their colleges and schools. For the proposed beneficiaries there is the attraction of a nearby college campus where they will be encouraged to attend programs, audit courses and otherwise avail themselves of entertainment and of cultural opportunities. Certainly, this undertaking of plaintiff would, if it comes to fruition, significantly further the general welfare, and within the concept of "special reasons" as set forth in DeSimone, supra should not have been denied by Council.

In the absence of anything on the record indicating the lack of a special reason or the lack of a special need I believe the Council was not justified in its finding.

True, as paragraph 7 of the Council's Resolution states the proposed use would be located on a tract zoned for one family use

and would be bounded by such properties with the exception that across the road from it are many substantial college buildings, including dormitories, classrooms, recreation buildings, residence halls for nuns, etc. Nevertheless the zoning statutes permit variances under certain circumstances and to my mind the record is bare of any evidence which would negate a variance in this instance.

In paragraph 9 of it's Resolution, Council states that a four story building imposes a significant, adverse and unacceptable burden upon the surrounding property insofar as one family use is concerned. Paragraph 9 goes on to cite examples of such burden as increased pedestrian and vehicular traffic, reduction in property value, increased flood potential and strain on existing storm drain facilities and detraction from aesthetic appearance of the neighborhood and the Borough. Any use of this property for one family dwellings or for a school or a church as permitted in one family zones would increase pedestrian and vehicular traffic, and there is just no real evidence that this project would so burden traffic as to be unreasonable. One witness did indicate that there might be some flood dangers but this would be one factor which would be considered by the agency of the state who must approve the building before it can be erected. Under these circumstances which involve the submission of an environmental study the building would just not be put up unless this problem of drainage was satisfactorily solved. Moreover, I was told at oral argument that the Planning Board of Caldwell has to give site approval and proceedings on this score are already underway before the said Planning Board. As to aesthetic appearances there is nothing in the record to demonstrate that the contemplated building would do any harm in this regard.

Paragraph 8 simply states that other areas of the municipality could be more appropriately used. Even if this finding is in any way relevant, I know of no requirement of law which requires an applicant to eliminate other sites, and, in any event, there is no real proof in the record of the availability of any other site. I also find no support in the record for defendant's argument that this building as reduced in size will dominate the surrounding areas particularly when we consider what I have already mentioned with regard to the sizable buildings of the college immediately across the road.

One objector testified that in his opinion approval of the variance would depreciate values in the municipality by 25 percent. This flat statement does not establish the fact and there is no other evidence on the subject.

In it's final paragraph the Resolution of the Council concludes that:

> "... The relief sought cannot be granted without substantial deteriment (sic) to the public; to grant relief would substantially impair the intent and purpose of the Zone Plan; and insufficient need has been demonstrated for the particular use proposed to form a special reason as required by the statute aforesaid."

In short, the negative criteria, according to the Council, has not been met. As I have indicated above I conclude that the record does not support the Council in this conclusion. I cannot find any evidence to support it. The mere fact that a multi-family structure and use is being proposed in a single family zone is not conclusive against the zoning variance. The variance procedure is intended for such a purpose. Most all variances would perhaps cause some detriment but this variance has not, on Board's record, shown any substantial detriment nor any substantial impairment of the intent and purposes of the zone plan and ordinance. DeSimone, supra cannot be narrowly construed. At 56 N.J. 437 the court said:

> "Sadly to relate, however, the objectors, despite all the legalisms in which this intense and pervading litigation is couched, in truth are not trying to vindicate the policy of the many statutes they invoke, but rather only in any way at all to oppose this project."

Such, I think, is the situation in the case before me insofar as the objectors to the variance are concerned. Realizing that Council's decision is presumed correct, I am nevertheless forced to conclude on the record of the hearings before Board that the denial by Council of the variance is arbitrary, capricious and unreasonable. Thus, reversal is required.

Please submit an agreed form of order in five (5) days or appear before me on short notice within that time.

Yours truly,

Charles S. Barrett Jr.

Charles S. Barrett, Jr.

CSB:c

P. S. - Amicus forwarded to me what purports to be a resolution of the Council of the Borough of Caldwell dated July 14, 1970, certifying that there "is a need for moderate income housing projects in" Caldwell. I am of the view that this certificate adopted pursuant to N.J.S.A. 55:14J-6 (Supp. 1975) is not essential to the conclusion I have reached above.