MM - Demarest

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Fore Associates v. Demarest

Opinion, Superior Ct.

pg. 5

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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1965-73

FOBE ASSOCIATES,
a Partnership,

Plaintiff-Appellant,

v.

THE MAYOR AND COUNCIL AND THE
BOARD OF ADJUSTMENT OF THE
BOROUGH OF DEMAREST,

Defendants-Respondents.

Argued June 10, 1975 -- Decided JUL 2 - 1975

Before Judges Kolovsky, Lynch and Allcorn.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County.

Elliott W. Urdang argued the cause for the
appellant (Dorfman & Urdang, attorneys).

Marvin Olick argued the cause for the respondents
(Gruen, Sorkow and Sorkow, attorneys).

The opinion of the court was delivered by

ALLCORN, J.A.D.

Our review of the record convinces us that the plaintiff failed to establish any special reasons within the contemplation of subsection d. of N.J.S.A.40:55-39, which would warrant the

recommendation or grant of the use variance sought by the plaintiff. For this reason, we disagree with the comment by the trial judge in his opinion that had the Board of Adjustment "granted a variance" he would have felt impelled to sustain it. See, DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970); Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268 (1967).

Moreover, given the zoning ordinance of the municipality, which completely excludes multi-family dwellings from within the municipality, no board of adjustment or governing body could find with any degree of candor or legal propriety that the grant of a variance to construct a complex of multi-family dwellings "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A.40:55-39d. The determination to exclude multi-family dwellings from all reaches of the municipality was made by the local governing body. The policy so determined was effectuated by the enactment of an ordinance to such end, attended by the customary deliberative and other processes precedent to and accompanying the adoption of a zoning ordinance or amendment thereto. N.J.S.A.40:55-33, 34, 35; N.J.S.A.40:49-2. Once adopted, the complete ordinance constituted the existing zone plan and zoning ordinance of the municipality, and so remains until altered.

In the very nature of things, the grant of such a variance necessarily would alter fundamentally and substantially the basic zoning scheme as declared and established by the ordinance. Thus,

relief from this type of complete exclusionary stricture cannot be by way of variance, but only by legislative change. If "a zoning ordinance is outmoded or ill-fitting, its alteration must be by amendment or revision -- not by variance." Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 290 (1965).

So far as concerns the action of the Board of Adjustment in receiving into evidence a resolution of the local planning board apparently opposing the recommendation or grant of the requested variance, we perceive no impropriety. A municipal planning board is intimately involved in and closely concerned with both current zoning and land use, as well as with future development of the municipality by way of zoning and land use. To this end, the Legislature has empowered it to prepare, adopt and, from time to time update "a master plan for the physical development of the municipality", N.J.S.A.40:55-1.10; and has endowed it with limited control with respect to the adoption of the original zoning ordinance by the municipal governing body, as well as the adoption of any subsequent amendments, N.J.S.A.40:55-33, 40:55-35.

Thus, a planning board may express to the Board of Adjustment "its non-binding opinion as to whether the variance would be conducive to or detrimental to the planning scheme" in relation to these areas of zoning, the zone plan and zoning scheme, and land use development. Loechner v. Campoli, 49 N.J. 504, 512 (1967).

In any event and even upon the dubious assumption that the receipt of such opinion was improper, the plaintiff could have suffered no prejudice inasmuch as the variance application necessarily had to be denied by reason of its failure to establish special reasons and its inability to satisfy the negative criteria of the statute.

Nor does the total exclusion of multi-family dwellings render the ordinance invalid in the factual complex of this case. Demarest is literally a small community comprised of approximately 1,345 acres. Almost all of the land in the municipality has been developed and is in use, with only approximately 2.5% remaining undeveloped. Fundamentally, as developed and zoned, Demarest is a community of single family homes, serviced by a limited number of retail businesses, and attended by the usual school, church and other public and quasi-public institutional uses customarily found in this type community. Industrial uses are not permitted.

In these circumstances, the exclusion of multi-family dwellings by the local zoning ordinance is neither capricious, arbitrary nor unreasonable; and there is no compulsion, constitutional or otherwise, upon the municipality to set aside a portion or portions of its land area for the construction of multi-family dwellings as a permitted use. See, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Nor do we find anything to the contrary in the decision of the Supreme Court in the recent case of So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975). Indeed, the court expressly limits its mandate to provide "the opportunity for an

appropriate variety and choice of housing for all categories of people who may desire to live there," to developing municipalities. (67 N.J., at page 187) Excluded are "the central cities and older built-up suburbs of our North and South Jersey metropolitan areas". (67 N.J., at page 160) Segal Construction Co. v. Board of Adjustment of Wenonah, ___ N.J. Super. ___ (App. Div. 1975).

We find no merit in the other contentions urged by the plaintiff.

Accordingly, the judgment of the Law Division is affirmed.

A TRUE COPY.

Elizabeth M. Laughlin

Clerk