[redacted] Demarest

FOBE Assoc. v. Demarest

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Concurring Opinion
Dissenting Opinion) Supreme Court

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SUPREME COURT OF NEW JERSEY
A-129 September Term 1975

FOBE ASSOCIATES, a Partnership,)

Plaintiff-Appellant,)

v.)

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

Defendants-Respondents.)

SULLIVAN, J. (concurring).

I concur in the majority opinion subject to my comments in the companion Township of Washington case decided this same date.

SUPREME COURT OF NEW JERSEY
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Outline of Dissenting Opinion

SUPREME COURT OF NEW JERSEY
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FOBE ASSOCIATES, a Partnership,

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

Defendants-Respondents.

PASHMAN, J., dissenting

Demarest is a community which clearly has failed to satisfy regional housing needs. It is composed of five single-family residential zones, with no provision for multi-family dwellings. As the majority recognizes, needs of the "general area" for multi-family dwelling units cannot be satisfied in nearby municipalities. See ante at (slip opinion at 15). Yet, in spite of its exclusionary nature, the majority refuses to impose on Demarest the minimal obligation of utilizing any part of its remaining land to satisfy the general welfare. Because I believe that the majority misconstrues Demarest's constitutional and statutory duty to provide multi-family housing, I dissent.

As I noted in the companion case, Pascack Ass'n, Limited v. Mayor and Council of the Tp. of Washington, N.J. (1977)(Pashman, J., dissenting), any rigid distinction between "developed" and "developing" communities thwarts an effective and equitable implementation of our holding in So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151 (1975), cert. den. and appeal dism'd, 423 U.S. 803, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975)(hereinafter "Mt. Laurel"). For the reasons stated in my dissenting opinion in the companion case, I would hold the Demarest zoning ordinance to be unconstitutional in that it fails to provide for the general welfare as defined in Mt. Laurel.

I further disagree with the majority's treatment of the procedures governing the issuance of a variance for special reasons, pursuant to N.J.S.A. 40:55-39(d). I do not underestimate the difficulties in developing manageable standards to govern the (d) variance procedure; however, I do not believe that the task justifies giving local officials complete discretion in this matter. Both statutory and constitutional considerations require careful review of the variance procedure to ensure that local officials define the general welfare to incorporate regional needs. I note that Mr. Justice Sullivan shares the view that the (d) variance procedure offers a unique opportunity to provide multi-family housing in communities which have enacted exclusionary zoning plans. See ante at (slip opinion at 2, Sullivan J., concurring). He even notes that the meaningful utilization of said variance process may be the "solution" to the problem of exclusionary zoning. Id. To make the process

virtually immune from effective review — as the majority does here — makes remedial efforts all the more difficult, and confuses careful land use planning with local obstructionism.

I

ZONING FOR THE GENERAL WELFARE

The zoning powers of local communities are drawn from the power of the State to promote the public health, safety, morals or the general welfare. Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249, 263 (1976), Mt. Laurel, 67 N.J. 151 at 174; Rockhill v. Chesterfield Tp., 23 N.J. 117, 124-25 (1957).

Courts have traditionally been reluctant to limit the authority of zoning authorities because the concept of the "general welfare" which underlies the police power is not narrowly confined. See Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., supra, 71 N.J. at 264 ("general welfare" tends to encompass all other purposes stated in the zoning enabling legislation); Schmidt v. Bd. of Adjustment, Newark, 9 N.J. 405, 414 (1952) ("It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise."). In Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., supra, we noted the expansive interpretation given this phrase by both this Court and the United States Supreme Court, and its adaptability to changing social conditions. Id. at 265, citing Mt. Laurel,

supra; Vickers v. Gloucester Tp. Comm., supra, 37 N.J. at 368; Pierro v. Baxendale, 20 N.J. 17, 29 (1955); Fischer v. Bedminster Tp., 11 N.J. 194, 205 (1952); 8 McQuillin, Municipal Corporations, §25.20 at 60 (3 ed. 1965). We have repeatedly held that the decisions of governmental officials primarily entrusted with the planning power are presumptively valid and will be overturned only by an affirmative showing that they are arbitrary, capricious or unreasonable. Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973); Harvard Enterprises, Inc. v. Madison Tp. Bd. of Adjustment, 56 N.J. 362, 368 (1970); Vickers v. Gloucester Tp. Comm., 37 N.J. 232, 242 (1962), cert. den. 371 U.S. 233, 83 S.Ct. 326, 9 L.Ed.2d 495 (1963).

Nevertheless, judicial deference to municipal zoning power has limits and courts must take an active role in making certain that the planning power is not abused. Municipalities derive their planning powers from the State Legislature, N.J.S.A. 40:55-30, and must exercise them in accordance with the planning purposes chosen by the Legislature. Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., supra, 71 N.J. at 264; J.D. Construction Corp. v. Freehold Tp. Bd. of Adjustment, 119 N.J. Super. 140, 144 (Law Div. 1972). Accordingly, zoning must not be used as a device for excluding development. Mt. Laurel, 67 N.J. at 188 ("...

assuming some type of timed growth is permissible, it cannot be utilized as an exclusionary device or to stop all further development ...."); National Land and Investment Co. v. Easttown Tp. Bd. of Adjustment, 419 Pa. 504, 527-28, 215 A.2d 597, 610 (1965) ("Zoning is a means by which a governmental body can plan for the future - it may not be used as a means to deny the future. * * * Zoning provisions may not be used * * * to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring."). The realization that excessive restriction of development would represent as great a threat to rational land use as would uncontrolled growth, together with our recognition of the importance of decent housing, led this Court in Mt. Laurel to require local zoning officials to affirmatively plan and provide for multi-family housing. 67 N.J. at 174, 175.

Justice Hall noted the Court's disfavor with communities which failed to provide for the changing needs of society when he stated:

> [T]his Court has ... plainly warned, even in cases decided some years ago sanctioning a broad measure of restrictive municipal decisions, of the inevitability of change in judicial approach and view as mandated by change in the world around us.
>
> [67 N.J. at 176.]

Hence, our deference to the judgment of municipalities on zoning matters today is subject to the requirement that they consider regional needs, particularly the demand for low and middle income housing.

The majority's decision, however, creates a protected niche for "bedroom communities" by ascribing a regional purpose to their role in providing "a desired environment for those whose industrial, commercial and professional activities elsewhere have benefitted the social order." Ante at (slip opinion at 7). But a "desired environment" is not within the range of permissible zoning purposes if it entails exclusion of lower and moderate income persons. As we recognized in Mt. Laurel, single-family dwellings are virtually inaccessible to such groups. Nor do the supposed benefits to the social order deriving from the activities of a community's inhabitants give that municipality a privileged status. Their incomes, not their social contributions, permit them to live in such areas. I see no reason why they should be authorized to exclude others with lesser incomes in the name of the general welfare.

II

THE STATUTORY FRAMEWORK

A person seeking a variance must demonstrate that he has met both the "affirmative" and "negative" criteria for a variance under N.J.S.A. 40:55-39(d). The applicant must prove "1) that 'special reasons' exist for the variance; and 2) that the variance 'can be granted without substantial detriment to public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.'" Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 276 (1967). See also, Kunzler v. Hoffman, 48 N.J. 277, 284 (1966); Wickatunk Village, Inc. v. Tp. of Marlboro, 118 N.J. Super. 445 (Ch. Div. 1972). In the instant case, plaintiff's request for a variance meets both criteria.

A. "Special Reasons"

The majority finds it unnecessary to determine whether satisfying regional housing needs may be a special reason for granting a (d) variance request. The opinion relies solely on the municipality's finding that the variance fails to satisfy the negative criteria under the statute. Ante at (slip opinion at 23). However, I would hold that where an ordinance excludes a use which supplies multi-family housing in an exclusionary community, a court should shift the burden of proof on the issue of meeting the negative

criteria; in such a case, local planning authorities would be required to show that special circumstances exist which would militate against granting the variance.

First, I agree with Mr. Justice Sullivan's statement that providing multi-family garden apartments in a region which is in critical need of such housing is a "special reason" for granting a variance. See ante at (slip opinion at 2, Sullivan, J., concurring). As the majority correctly notes, a use which inherently serves the general welfare per se constitutes a proper special reason for granting a (d) variance. Ante at (slip opinion at 18). The majority, however, stresses the fact that the intended use in this case is not of an institutional or quasi-public nature. Ante at (slip opinion at 18, 22). While uses which are institutional or quasi-public in nature often contribute to the general welfare, I see no reason for limiting (d) variances to such uses and excluding other development which would be of equal benefit to the general public.

Admittedly, several prior cases upholding (d) variances have involved institutional or quasi-public uses. However, those cases were primarily concerned with whether the use would benefit the public, and not with whether the public was sponsoring the proposed use; references to the nature of the use was meant only as a way of distinguishing variances which would substantially serve the public from those which would be of some benefit but

which would not justify a departure from the established zone plan. Compare Kohl v. Mayor and Council of Fair Lawn, supra, 50 N.J. at 279 ("The cases in this Court in which a significant factor has been the contribution of the proposed use to the 'general welfare' all have involved uses which inherently served the public good.") with id., 50 N.J. at 280 ("nearly all lawful uses of property promote, in greater or lesser degree, the general welfare. Thus, if the general social benefits of any individual use - without reference to its particular location - were to be regarded as an adequate special reason, a special reason almost always would exist for a use variance.").

Several cases reject the notion that a use must be of an institutional or quasi-public nature to meet the "special reasons" test. Significantly, in Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268 (1965), a unanimous Court held that a (d) variance was a proper means of allowing landowners to replace an old nonconforming seaside resort hotel with an attractive, modern, fireproof one. And in Brunetti v. Mayor and Council of the Tp. of Madison, 130 N.J. Super. 164 (Law Div. 1974), the court directed the granting of a (d) variance for low and moderate income housing.

More recently, in Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., supra, we commented upon the (d) variance procedure in stressing the social benefits of a particular use over its physical characteristics:

> [A]ny rigid limitation of the zoning power keyed to the 'physical use' test (expressed some years ago in Skaf v. Zoning Bd. of Adjustment of Asbury Park, 35 N.J. Super. 215, 233 (App.Div. 1955), and approved in Justice Hall's dissenting opinion in Andrews v. Ocean Tp. Bd. of Adjustment, 30 N.J. 245, 256, 257 (1959)), must be regarded as implicitly rejected by the consistent line of authority begun by the Andrews case, supra. These cases hold that the beneficent social purposes of a use (apart from its physical nature) will justify 'special reasons' variances under N.J.S.A. 40:55-39(d). Specifically, see DeSimone v. Greater Englewood Housing Corp. No. 1, supra, 56 N.J. at 440, 442 (1970). Zoning for senior citizens' housing, for reasons amply set forth above, clearly involves special use qualities and characteristics ....
>
> [71 N.J. at 278.]

Conspicuously absent from our discussion in that case was any requirement that the (d) variance be limited to institutional, public or quasi-public uses. Any attempt to distinguish multi-family housing which satisfies the needs of citizens generally from housing for specific groups such as the elderly, as in Weymouth, would contradict the broad definition of the welfare which I have already mentioned. See ante at (slip opinion at 2-4, Pashman, J., dissenting). See, Note, "Need for Low-Income Housing Held to be a 'Special Reason' to Support a Use Variance Within the Meaning of N.J.Rev. Stat. §40:55-39(d)." 2 Rutgers-Camden L.J. 400 (1970).

Of course, the Court should not require the granting of a (d) variance upon a showing that a given use would have only a slight benefit to the public. Such a result would have the undesirable effect of disrupting the planning efforts of local officials. See generally, Kohl v. Mayor and Council of Fair Lawn, supra, 50 N.J. at 280; Mahler v. Borough of Fair Lawn, 94 N.J.Super. 173, 184 (App.Div. 1967), aff'd o.b. 55 N.J. 1 (1969); Andrews v. Ocean Tp. Bd. of Adjustment, supra, 30 N.J. at 256 (Hall, J., dissenting). However, plaintiff's application for a variance to build a multi-family housing development would not yield merely some benefit to the general welfare, but would help alleviate a housing shortage which has reached critical proportions in Bergen County. See Pascack Ass'n, Limited v. Mayor and Council of the Tp. of Washington, slip opinion at 21 (Pashman, J., dissenting). Our decision in DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970), established that multi-family housing does have the type of significant impact on the general welfare which is necessary to qualify as a "special reason" for granting a (d) variance:

> We specifically hold, as matter of law in the light of public policy and the law of the land, that public or, as here, semi-public housing accommodations to provide safe, sanitary and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivileged segments of the population outside of ghetto areas is a special reason adequate to meet that requirement of N.J.S.A. 40:55-39(d) and to ground a use variance.
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> [56 N.J. at 442.]

See also, Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., supra, 71 N.J. 249 at 266 ("not only do housing needs fall within the purview of the 'general welfare,' but they have been recognized as 'basic' by this Court"). To limit our holding in De Simone to public or quasi-public projects, or to replacement housing, would subvert the intended purpose of the (d) variance to further the general welfare.

The majority, however, finds that:

> there is substantial support for the determinations that Demarest per se does not need such housing based on the generation of its business or industry and there was no substantial evidence that its present residents need and cannot obtain such accommodations.
>
> [Slip opinion at 15.]

These findings alone are not determinative of the need for such housing. Zoning decisions are to be made with regard to regional considerations. See Pascack Ass'n, Limited v. Mayor and Council of the Tp. of Washington, slip opinion at 3-7 (Pashman, J., dissenting); Oakwood at Madison, Inc. v. Tp. of Madison, N.J. , (slip opinion at 88 (1976)); Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., supra, 71 N.J. at 275 n. 9; Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough, 47 N.J. 211, 288 (1966); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 247-49 (1954); Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 513 (1949). This principle is equally applicable to decisions governing variance

procedures. In Kunzler v. Hoffman, supra, the Court specifically noted that the decision whether or not to grant a (d) variance is to be made on the basis of regional needs:

> General welfare, as that concept is used in the determination of whether special reasons exist under N.J.S.A. 40:55-39(d) for granting a use variance, comprehends the benefits not merely within municipal boundaries but also those to the regions of the State relevant to the public interest to be served.
>
> [48 N.J. at 288.]

Accord, Borough of Roselle Park v. Tp. of Union, 113 N.J. Super. 87, 92-94 (Law Div. 1970). Thus, the majority's finding that housing needs of the region are not satisfied in municipalities surrounding Demarest should serve to underscore the importance of granting the variance in this case. See ante at (slip opinion at 15).

Plaintiff has established that his request for a variance satisfies the "affirmative criteria" under N.J.S.A. 40:55-39(d). Because multi-family housing has a substantial effect in furthering the general welfare, it per se constitutes a special reason for granting a (d) variance. Ante at (slip opinion at 18). Unless there are demonstrable reasons why the intended use would offend the negative criteria of the statute, the Court should require the municipality to grant the variance.

B. The "Negative Criteria"

The "negative criteria" of N.J.S.A. 40:55-39(d), dictate that a variance be denied unless it is "without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."[1]

1

Plaintiff argues that he has satisfactorily carried his burden in meeting the negative criteria, asserting that (1) his land is uniquely situated with access to two county roads which are capable of handling any traffic from the development; (2) because the location is near the center of town it is close to shopping in Demarest, Closter and the proposed Demarest recreation complex; (3) the use would not adversely affect property values: actual experiences of real estate sales, together with aestetic considerations in planning the development support this conclusion (two of the Borough's nonconforming multi-family uses abut the property); and (4) the project would actually produce revenue, and would not put a strain on municipal or school services.

The new zoning statute, the "Municipal Land Use Law," L., 1975 c. 291, effective August 1, 1976, also includes the (d) variance, N.J.S.A. 40:55D-70. The new zoning law embodies the emphasis on meeting regional needs which we first announced in Mt. Laurel. See companion case, slip opinion at 5-7 (Pashman, J., dissenting).

Although the majority makes constant reference to court decisions granting deference to local planning authorities, it never indicates what would constitute an arbitrary, unreasonable or capricious decision on the part of a municipality in denying a (d) variance.[2] Two of the conclusions reached by the local Board for denying the variance were found to be either irrelevant or contrary to the weight of the evidence by the majority (slip opinion at 15). The remaining two "findings" seem to be little more than a recital of the statutory "negative" criteria:

2

A court is not bound by the decision of a municipality to deny a variance. Justice Hall, in DeSimone v. Greater Englewood Housing Corp. No. 1, supra, reviewing a variance for low-income housing in that case, concluded that "a denial of it under the circumstances and proofs could not well be sustained." 56 N.J. at 443.

(a) That the Borough of Demarest is a community of established character that is almost totally developed with one family residential structures and the granting of the variance sought by the Appellant would have a major impact upon the entire Borough generally and even a greater impact upon the surrounding neighborhood.

(d) That the granting of the variance would substantially impair the intent and purpose of the zone plan and Zoning Ordinance of the Borough of Demarest and would operate as a substantial detriment to the public good.

[Slip opinion at 14, 15.]

At least one of the reasons given by Demarest for denying the variance, which the majority found irrelevant, suggests the Board's failure to correctly apply the "negative" criteria to plaintiff's request. The Board found:

(c) That the Borough of Demarest, acting through its Planning Board and Governing Body, adopted a master plan and implemented it with a Zoning Ordinance approximately thirteen years ago. The Zoning Ordinance of the Borough has, from time to time, been amended as the need arose. There is no reason to believe that if the need truly exists for multi-family dwellings within the Borough, that the responsible bodies would not recommend and adopt the appropriate legislation, based upon a thorough evaluation and a complete inventory of needs and available land.

[Slip opinion at 15.]

The above finding implies that the Board believed that multi-family housing could be accommodated only after "appropriate legislation." Rather than consider for itself whether there was a regional need for multi-family housing, the Board found that such a decision could be made only after a "thorough evaluation and complete inventory of needs and available land." But this reasoning obfuscates the distinction between a variance and an amendment to the zoning ordinance. Presumably, the local board would find that a variance request for any use which is not specifically mentioned in the zone plan should be provided for only by amending the ordinance.

Moreover, the above finding indicates that the Board never even considered whether there was a regional need for housing; its assessment of the negative criteria was limited by the illegal intent and purpose of the plan which it attempted to follow. Its reasoning is aptly summarized by the Appellate Division:

> [G]iven 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.'
>
> [Slip opinion at 2.]

Yet the effect that a variance will have on the "intent and purpose of a zone plan" is irrelevant when that plan is exclusionary in character. Nothing in the statutory language suggests that the variance procedure should be used as a way of maintaining an illegal zoning scheme; it should be read as referring to a plan designed in accordance with the zoning purposes enumerated in N.J.S.A. 40:55-32.

Both the Appellate Division and today's majority rule out any possibility of a (d) variance for multi-family housing in municipalities which are exclusionary. But the variance procedure should not permit or require communities to blindly follow zoning plans which were adopted without a realistic appraisal of regional needs, and which still fail to provide for the general welfare of the region. Today's

decision clearly contravenes our holding in Kunzler v. Hoffman, supra, that variance decisions should be made on the basis of regional needs. See ante at (slip opinion at 13, Pashman, J., dissenting).

Nowhere has the local board indicated that it considered the standards embodied in N.J.S.A. 40:55-32 in deciding plaintiff's variance request. But these standards are critical to the constitutionality of the statute. In Ward v. Scott, 11 N.J. 117 (1952), the Court upheld the variance provisions of the zoning statute against a challenge that the Legislature has failed to provide adequate standards to guide local officials in ruling upon variances. In commenting upon the standards specifically related to the variance sections, Justice Jacobs stated:

> ... the Legislature has not in any sense granted uncontrolled power to the administrative agency. It expressly set forth in R.S. 40:55-32 the proper zoning purposes to be achieved including the lessening of congestion, the securing of safety from fire, panic and other dangers, the providing of adequate light and the prevention of overcrowding, the avoidance of undue concentration of population, and the promotion of health, morals or general welfare. * * *
> [A]ccordingly, it wisely adopted the policy expressed in R.S. 40:55-39 which enables individual variances consistent with the public interest and the purposes of the zone plan and zoning ordinance.
>
> [11 N.J. at 125-26.]

Today's decision encourages local zoning boards to dispense with specific reasons for denying variances, and will inevitably result in all variance denials being based upon the magic incantation that the variance would "substantially impair the intent and purpose of the zone plan." This excessive discretion of local officials defeats the fact that zoning is intended to further the goals which the Legislature has enumerated in N.J.S.A. 40:55-32 and which the Court reiterated in Ward v. Scott, supra. Included among those purposes are "the promotion of health, morals or general welfare." The majority forgets that even though the means available for meeting the "general welfare" are broad, that term is not devoid of meaning. As Justice Proctor stated in Kohl, supra:

> While our courts have recognized that the determinations of the local governing bodies are not to be viewed with a general feeling of suspicion and are not to be overturned unless arbitrary or unreasonable, they have consistently required that local zoning action comply with the statutory requirements. See Andrews v. Ocean Twp. Board of Adjustment, 30 N.J. 245, 249 (1959).
>
> * * *
>
> No more specific standards for special reasons have been given by our courts beyond those general standards of [N.J.S.A. 40:55-32]. Because of the nature of the subject no precise formula is feasible and each case therefore must turn on its own circumstances. Andrews, supra at 251. However, the lack of a precise formula does not mean that carte blanche has been given to local governing bodies in finding special reasons for the grant of variances.
>
> [50 N.J. at 275-76; emphasis added.]

Yet, today's majority does precisely what we were warned against in Kohl, supra; it gives "carte blanche" to the local governing body in assessing the negative criteria under the statute.

I would hold that where, as in this case, a variance is sought for a use which has been found to substantially further the general welfare of the region, a municipality must demonstrate unique or special circumstances which would justify denying the variance request. My proposal is hardly novel. In Mt. Laurel the Court concluded that Mt. Laurel's zoning ordinance was "presumptively contrary

to the general welfare and outside the intended scope of the zoning power." 67 N.J. at 185. We concluded that "[a] facial showing of invalidity is thus established, shifting to the municipality the burden of establishing valid superseding reasons for its action and non-action." Id. We deal here with a facet of the same problem -- the municipality, through its variance decision, has failed to provide anywhere for meeting the needs of the general welfare.

Unless there are convincing, specific reasons which justify its denial of plaintiff's request, Demarest's decision to deny the variance would constitute an abuse of power. Discretion which has been accorded to local planning officials should not be used as a means of ignoring the problems of exclusionary zoning. Rather, where a community fails to provide for multi-family housing anywhere within its municipal boundaries, a court should require strict adherence to the statutory purposes of the zoning power embodied within N.J.S.A. 40:55-32.

III

THE (d) VARIANCE AS A REMEDIAL MEASURE

Little has been accomplished since our decision in Mt. Laurel; the Court still has not provided adequate remedies for the problems of exclusionary zoning. See Oakwood at Madison v. Tp. of Madison, supra (slip opinion at 8-9)(Pashman, J., concurring and dissenting). In Oakwood at Madison v. Tp. of Madison, supra, I outlined the dilatory tactics which communities continue to utilize in thwarting judicial efforts to eliminate exclusionary planning techniques, id. at (slip opinion at 12-22)(Pashman, J., concurring and dissenting), and listed cases documenting the ability of municipality's to avoid their duty to zone for low or middle income residents. Id. at (slip opinion at 21). The majority hinders efforts to implement its own decision in Mt. Laurel. Municipalities must be required to follow concrete guidelines in determining variance applications if we are to be at all successful in providing housing for low and moderate income persons.

Often variance procedures are one of the only ways that a developer can obtain permission to build multi-family housing. Consequently, there is a very real need for judicial guidance to prevent abuses of the variance power. A report prepared by the

New Jersey County and Municipal Government Study Commission reviewed local housing regulations in the 27 municipalities which contained over 40% of the multi-family units authorized in the State during the period 1965 to 1972. Only four of these municipalities, all older and highly developed, had a formal multi-family zone. Housing & Suburbs: Fiscal and Social Impact of the Multi-family Development 112 (1974). Significantly, the remaining 23 communities, located in rural and suburban areas, relied upon the use variance, the special exception variance, or zoning amendments to provide multi-family housing. Id. The study outlined the danger inherent in a system which is subject to the uncontrolled discretion of local officials in granting variances. The Commission noted that variances tend to be based upon "the desire to use the planning process as a means of controlling social issues and promoting the suburban self-image, both of which are external to the formal legal planning process." Id. at 113-114.

Although (d) variances should not be substituted for a requirement that municipalities create multi-family zones, they should be available for persons wishing to develop land for multi-family housing in communities which persistently refuse to zone for low and moderate income housing. The (d) variance should offer potential builders an assurance that they will be able to actually develop the land. Litigants who have

succeeded in striking down exclusionary ordinances have often found that the new plan does not re-zone their property to permit multi-family housing. See Hyson, "The Problem of Relief in Developer-Initiated Exclusionary Zoning Litigation," 12 Urban L.Ann. 21, 28-30 (1976) noting that "[n]o developer will initiate a challenge if its only effect will be to make someone else's land available for high density development." [3]

The role of the local governing body in the companion case, Pascack Ass'n, Limited v. Mayor & Council of Washington Tp., slip opinion, demonstrates the need for remedies which provide specific relief. Partly because the zoning ordinance "failed to make any provision for multi-family or rental-type housing," the trial court struck down the local zoning plan. Pascack Ass'n,

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3

I noted in Oakwood at Madison v. Tp. of Madison, supra, the experience of land developers in three landmark Pennsylvania cases, two of which never were able to utilize their victories in striking down exclusionary ordinances as a way of building multi-family housing. Id. at 18-19, referring to Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (Sup.Ct. 1970) and National Land and Investment Co. v. Easttown Tp. Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (Sup.Ct. 1965). The third landmark case, Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (Sup. Ct. 1970), resulted in a subdivision approval for the requested development more than two years after the land developer had "won his victory" in the Pennsylvania Supreme Court.

Limited v. Mayor & Council of Washington Tp., 131 N.J. Super. 195, 197 (Law Div. 1974). Although the township amended its zoning ordinance to allow multi-family housing, the practical effect of restrictions within the amendment made development of multi-family housing impossible. Nearly 27 of the 34 acres rezoned for multi-family housing consisted of land which had already been committed to uses which foreclosed multi-family development. Additionally, the amendment imposed restrictions involving lot size, unit density, minimum floor areas, and bedroom and bathroom limitations.

Although not addressing itself specifically to the situation in Washington Township, the Court in Oakwood at Madison v. Madison Tp., supra, recognized the necessity of some form of specific relief other than a judicial order to rezone:

> A consideration pertinent to the interests of justice in this situation, however, is that corporate plaintiffs have borne the stress and expense of this public-interest litigation, albeit for private purposes, for six years and have prevailed in two trials and on this extended appeal, yet stand in danger of having won but a pyrrhic victory. A mere invalidation of the ordinance, if followed only by more zoning for multi-family or lower income housing elsewhere in the township, could well leave corporate plaintiffs unable to execute their project. There is a respectable point of view that in such circumstances a successful litigant like the corporate plaintiffs should be awarded specific relief.
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> [Slip opinion at 91.]

Though in Oakwood at Madison v. Madison Tp., supra, the Court indicated its willingness to impose strong measures to insure a plaintiff the right to build multi-family housing, it ignored a simpler, yet equally effective solution. By requiring municipalities to strictly adhere to the variance procedure in the future, the Court might save future plaintiffs the time, expense, and delay of going to court to obtain what the variance procedure intended in the first place. Unfortunately, the Court today nullifies that possibility by allowing municipalities, in the exercise of their "discretion," to summarily reject variances.

Perhaps the overriding reason for the majority's decision today is the fear that the (d) variance will become an instrument for undesirable change; developers will succeed in convincing courts that any use which slightly benefits the general welfare deserves a variance, even though it would be more appropriately put somewhere else. See ante at (slip opinion at 20-21). In fact, the majority cites one commentator for the proposition that

> [g]ranting such variances 'largely on the basis of the absence of negative findings, would result in arbitrary changes in the use of land, precluding serious planning for services, facilities, traffic circulation and other community needs.' Mallach, "Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation," 6 Rutgers-Camden L.J. 653, 659 (1975).

The majority's fear of the (d) variance is the consequence of its own failure to adequately define the negative criteria in the statute. In the instant case, the majority upholds the local board's conclusion that the negative criteria are sufficiently offended, even though no possible adverse effects upon the community have been proven and the board's findings are no more than a recital of the negative criteria. Nevertheless, the majority argues that these same criteria would be ineffective in preventing "arbitrary changes in the use of land, precluding serious planning for services, facilities, traffic circulation and other community needs." The criteria themselves cannot account for the haphazard conclusions; rather, it is the majority's disparate treatment of those standards which cause the contradictory results.

The majority goes a long way today toward negating the effectiveness of the (d) variance by substituting the discretion of local officials for the limitations inherent in the legislation. As a result of today's decision, it is unlikely that the negative criteria will have any uniform meaning but will instead depend on the whim of each local planning board. Unfortunately, the definition which a board will accord those criteria is likely to depend, in large part, on whether it is being confronted with a request for low or middle income housing.

IV

CONCLUSION

Today's decision by the Court will neither further the legislative intent in enacting the (d) variance nor provide any remedy for exclusionary zoning. Instead, it merely reinforces the unbridled power which is currently exercised by local governing bodies — including the ability to pass exclusionary zoning measures and to needlessly restrict housing development. Contrary to the expressed purpose of zoning and the (d) variance, the majority today legitimates planning decisions based on exclusionary principles, and relegates the zoning purposes which the Legislature specifically enacted within N.J.S.A. 40:55-32 to secondary importance.

I would reverse the judgment of the Appellate Division and require the local board to grant plaintiff's variance.