MM - Demarest

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Forbe Associates v. Demarest

Opinion, Supreme Court

pg. 31

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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.

Argued May 25, 1976 - Decided March 23, 1977

On certification to the Superior Court, Appellate Division.

Mr. Elliot W. Urdang argued the cause for appellant (Messrs. Dorfman & Urdang, attorneys).

Mr. Marvin Olick argued the cause for respondents (Messrs. Gruen, Sorkow & Sorkow, attorneys).

The opinion of the Court was delivered by CONFORD, P.J.A.D. (temporarily assigned).

Plaintiff, a developer, was unsuccessful in the Law Division in seeking adjudications that (a) the denial by the Demarest Borough board of adjustment of a recommendation of a "d." variance (N.J.S.A. 40:55-39d.) for

erection of a garden apartment house in a restricted single-family residence district was illegal as arbitrary and unreasonable; and (b) that the zoning ordinance of the borough was invalid by reason of its absolute prohibition of multi-family-residential buildings. The Appellate Division affirmed the trial court judgment for defendants. We granted certification, 69 N.J. 74 (1975), and heard argument in this case and in Pascack Association v Mayor and Council of Washington (decided this day) together, similar questions being implicated. We affirm.

The Borough of Demarest is situated in northeast Bergen County in an area known as the Northern Valley. It is located within a few miles from, and is within easy commutation distance of, New York City and principal cities of northern New Jersey. It comprises approximately 1,345 acres. The borough's first zoning ordinance was adopted in 1941 and contained no provision for multi-family housing. With only a few minor changes it remained intact until 1966 when a new master plan and the present zoning ordinance were enacted, substantially upgrading minimum lot requirements.

Under the present ordinance, there are five single-family residential zones in the town with minimum lot sizes ranging from 10,000 square feet to 40,000 square feet. These residential zones account for 1,338 acres; the remaining

seven acres are zoned as one single commercial district. This "business district" is of the neighborhood variety, consisting of a row of stores and a bank.

It is not disputed that Demarest can be characterized as a developed or almost completely developed municipality. Of the total 1,345 acres in the borough, 35.5 acres are privately owned vacant residential land, 34.0 more privately held acres are underdeveloped and may be subdivided, and 228.5 acres are taken up by a privately owned school and an operating golf course. Hence, excluding the school and golf course areas as unavailable, Demarest is 97.5% developed. The area developed with single-family homes consists of about 1400 lots, about 550 being lots of from a quarter to a half acre and the remainder from a half acre to an acre.

Plaintiff's property is a vacant parcel of approximately 8.15 acres situated between County Road and Piermont Road, both county roads. It is located in a BB residential zone requiring single-family development on minimum 30,000 square foot lots. It is a heavily wooded tract of relatively uniform topography, and municipal and public utilities are available. Plaintiff proposes to build a 120 unit garden apartment development. It would consist of five separate buildings, colonial styled of brick veneer,

one building each facing County and Piermont Roads, the other three facing the interior of the property. Setbacks would vary from 50 to 120 feet. The net building coverage (deducting land to be dedicated) would be 16.5%. The proposed project would consist of 80 one-bedroom and 40 two-bedroom units, allegedly in the middle to moderate income range. Parking would be available for 185 automobiles.

I

The Validity of the Zoning Ordinance

At the trial in the Law Division it was agreed that the record before the board of adjustment on the variance application would be stipulated as relevant to the issue of validity of the ordinance as well. However, in view of our conclusions on matters of law in our opinion in the companion Pascack Association case, supra, it will not be necessary fully to analyze either the testimony before the board of adjustment or that newly adduced before the Law Division for purposes of the present point.

There is no essential difference between the facts here and those in Pascack Association in respect of the contention of invalidity advanced in both cases. That position was that in view of the essentiality of housing for all categories of people and families and the current

shortage of multi-family housing in and around the environs and regions of Washington and Demarest, respectively, it is mandatory that every municipality in those regions, regardless of the nature and extent of its current development, provide by its zoning ordinance the opportunity for some degree of multi-family residential development. We rejected that contention in Pascack Association. We held that the reasonableness of exclusion by zoning of multi-family housing depended upon the nature and extent of development in the municipality. There, where the historical development of a small municipality over a period of time was one almost of total devotion to the provision of a homogeneous single-family residence community to satisfy the needs and desires of people most of whose household heads had occupations elsewhere, we concluded that there was nothing invidious in a zoning or general welfare sense about such development. We further held that it was not mandatory that any part of the small amount of vacant land left in the municipality be zoned for multi-family housing as against the municipal legislative judgment that the best interests of the municipality would be served by preserving its character and stabilizing its development as a single-family residential community.

We took notice of our intervening decision in So. Burl. Cty. N.A.A.C.P. v Tp. of Mt. Laurel, 67 N.J. 151, app. dism. and cert. den., 423 U.S. 803 (1975) ("Mount Laurel", hereinafter), see also Oakwood at Madison, Inc. et al. v The Township of Madison, _____ N.J. _____ (1976), and held that case not authority for a different result. We pointed out that the gravamen of Mount Laurel was the fundamental illegality of zoning in a developing municipality, with sizable available areas of developable land, which denied to low and moderate income families the opportunity of obtaining new housing there. Washington Township was not of the character so delineated.

We acknowledged in Pascack Association the serious current shortage of housing in Bergen County and elsewhere in the state and recommended legislative attention to the problem, possibly by creation of regional or state zoning agencies, functioning under corrective standards. But a sociological crisis not meeting the peculiar dimensions of the exigency which compelled our attention in Mount Laurel was not regarded as the appropriate occasion for imposing upon the judiciary "the role of an ad hoc super zoning legislature *** " for every municipality in the State. Pascack Association v Mayor and Council of Washington, supra, slip opinion p. 23.

As noted above, we perceive no significant difference between the factual situations in Washington Township and Demarest Borough in relation to the application of the foregoing principles. Demarest is less than 2½ square miles in area, with a 1970 population of 5,133 (as revised from an original incorrect census figure of 6,282). As cogently pointed out by a planning expert who testified for the township, virtually all of Demarest's housing has been built in response to regional needs and demands for precisely the kind of housing which eventuated. There is no industry and little commerce in Demarest. Thus local activities of the latter kinds have generated no correlative need for local housing, cf. Mount Laurel, 67 N.J. at 187, and an important and necessary regional purpose has been served in providing suitable housing in a desired environment for those whose industrial, commercial and professional activities elsewhere have benefitted the social order. How best to use the few isolated parcels of vacant land remaining in Demarest is a matter for the local governmental bodies unless and until the Legislature expressly ordains any specific disposition (within constitutional limitations). The Demarest ordinance is not invalid on the grounds advanced by plaintiff.

II

Application for the Variance

A considerably more complex question is presented by the denial of a recommendation for a variance for plaintiff's project.[1] It comprehends several sub-issues: (a) Is the alleged regional need for multi-family housing a proper "special reason" for granting a d. variance (N.J.S.A. 40:55-39d.) in a single-family district on "general welfare" grounds? (b) If it is, is it a use "inherently" serving the general welfare, so as not to require a showing that the public welfare benefit is peculiarly dependent upon the location of the site of the variance, see Kohl v Mayor and Council of Fair Lawn, 50 N.J. 268, 279-280 (1967)? (c) If it is not such an "inherently" beneficial use, is there the required showing specified in (b) supra? (d) In any case, is a denial of variance by the board of adjustment on the grounds which it advanced so arbitrary, capricious or unreasonable as to require the court to mandate a recommendation for variance?

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1. Under the statute, the board can only recommend a d. variance. The governing body is required to accept or reject the recommendation. N.J.S.A. 40:55-39d.

The Municipal Land Use Law (L. 1975, c. 291), which became effective subsequent to the municipal actions herein, permits the board to grant a d. variance by a two-thirds vote of its entire membership, N.J.S.A. 40:55D-57d. Such action may be appealed to the governing body, N.J.S.A. 40:55D-8a.

A more extended survey of the proofs before the board of adjustment, to which a reviewing court is confined in resolution of the issues, see Reinauer Realty Corp. v Paramus, 34 N.J. 406, 416-417 (1961), is necessary at this point.

The property in question has access to two parallel roads, Pierpont Road on the east and County Road on the west. Surrounding property to north, east and west is zoned, like the subject tract, for minimum 30,000 square foot lots. Land to the south is zoned for minimum 22,500 square foot lots, also single-family. Surrounding the tract are a number of single-family homes, considerable vacant land, some owned by the town, and two old houses the nature of whose use was disputed. Plaintiff's expert thought they contained, respectively, three and five families. The zoning officer disputed this as to one of the houses.

A professional planner named Moore testified for plaintiff that there was a need for multi-family rental housing in Demarest and the region as a whole. There are only 39 housing units in two-family houses (2.1%) and 28 units in apartment houses (1.6%) in Demarest. The neighboring boroughs of Alpine, Closter, Cresskill and Haworth were described as of similar characteristics. Ninety-four per cent

of all residential units in eleven homogeneous municipalities in the northeast quadrant of Bergen County were single-family; of all the land therein 88% was zoned for single family, 2% for two-family and none for multi-family. However, using what the Bergen County Planning Board denominates as the Northern Valley sector (15 towns inclusive of Demarest) 76% of the housing units are one-family and 24% multi-family. The latter figure compares with 41% in the State, 38% in Bergen County and 3.7% in Demarest. Citing figures compiled by the Bergen County Planning Board, Moore said there was an annual need for 5,113 new housing units in the county, yet only 2,344 permits were issued in 1969 and 1,732 in 1970.

Moore was of the view that every municipality should have some land zoned multi-family residential and that Demarest should have from 10% to 25% of residential units of that character. There is a particular area need for rental apartments for the elderly, single persons and young marrieds. The instant project would attract those kinds of tenants. Moore was of the view that the tract was physically well suited for the proposed project; that its location on two travel arteries, as well as near stores and a proposed recreational complex, made it excellent for multi-family use; that it would be visually shielded from nearby residences; and that public utilities would be available. He did not believe the project

would impair the zone scheme and plan because the plan itself was deficient in failing to provide for multi-family housing.

Plaintiff produced a real estate expert, Stewart, who estimated that the one-bedroom apartment in plaintiff's project would rent for $275 monthly and the two-bedroom for $325, requiring incomes of $14,000 and $16,900 respectively. He corroborated Moore as to shortage of apartments in eastern Bergen County. Stewart said the erection of the project would not lower the value of surrounding property for single-family development by more than 3% or 4%.

An objecting neighbor offered a witness, Berliner, an architect with some planning experience, who gave the opinion that the subject property was unsuitable for garden apartments. He concluded it failed to meet several planning principles: (1) that the project have roughly the same density as the surrounding area; (2) that it have the same activity level; (3) that it create the least offense to surrounding neighbors; and (4) that a suitable buffer zone be created. Berliner disputed Moore's view that good planning called for every municipality to have a percentage of land zoned for multi-family housing and cited the Regional Plan Association's suggestion that there should be regional diversity, with some municipalities maintaining unique characteristics, rather than every municipality providing various kinds or densities of

housing. If there is a need in Demarest itself for multi-family housing, its location should be based on a careful, exhaustive study rather than be determined by variances on an ad hoc basis. The instant application would be spot zoning.

Berliner felt the project would have major adverse impact on the immediately surrounding area, with a gradually lesser effect on more distant sectors. It would have a major negative effect on the master plan of the borough. However, somewhat ambivalently, Berliner would not say that this single project would alter the established character of Demarest as a whole.

A neighboring resident, one Press, testified he had investigated rental apartments in the area and their cost. One-bedroom apartments in nearby Tenafly rent for from $295 to $375 per month. Two-bedroom apartments in Oradell rented for $500 per month. On a comparable square foot rental basis the proposed Demarest apartments would rent for $350 (one bedroom) and $393 (two bedroom). Since the Demarest site was more attractive than the others, a $50 premium factor could be added. Press examined records indicating that 37% of the homes sold in Demarest in 1972 were sold for $45,000 or less. He estimated that carrying charges on a $40,000 home in Demarest,

after a $7,000 down payment, not including heat, repairs and maintenance, would be approximately $350 per month. He thus concluded that it could be less expensive for some families to carry a single family house than live in such a two-bedroom apartment as projected by plaintiff.

The attorney for the Demarest Planning Board was permitted, over vigorous objection by plaintiff, to offer in evidence a resolution of that body opposing the variance application. The planning board felt the variance would be substantially detrimental to the public good and to the intent and purpose of the master plan and ordinance. It would interfere with the planned population of the borough and thwart orderly growth; it would violate the neighborhood scheme to the detriment of nearby home owners who had relied on the ordinance and master plan; it would effectively make it impossible to prevent multi-family developments on other vacant lots in the borough.[2]

In denying a recommendation for the requested variance the board of adjustment made findings of fact, inter alia, (1)

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2. We consider the admissibility of the resolution in IIB. hereof.

that multi-family dwelling units would be found in nearby municipalities which "supply the needs of the general area and the borough of Demarest"; and (2) that the borough "is essentially a low-density, single-family home community which is virtually totally developed with a relatively small amount of privately owned land available for development; the Borough has little commercial use and has sufficient housing for persons working within the Borough". The board's conclusions were:

> (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.
>
> (b) The special reasons advanced by the Appellant to the effect that the municipality has an obligation to furnish a balance in housing for its citizens, has not been proven to the satisfaction of the Board and is based solely on the naked, unsupported testimony of Appellant's Planner. Further, the alleged needs of those who cannot afford one family dwellings, or those who do not desire same, will not necessarily be met by the proposed development.
>
> (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.

(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.

Of the findings of fact mentioned above, the one that needs of "the general area" for multi-family dwelling units are supplied by nearby municipalities is not supported by substantial evidence if the "general area" is taken as a reasonably large housing market region inclusive of Demarest. Indeed, the evidence is to the contrary. But 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.

Of the conclusions of the board set forth above, (c) is irrelevant. The variance grant serves a zoning function distinct from that of amendment of the ordinance, and the mere failure of the governing body to amend to provide for multi-family dwellings is not necessarily a good reason for denial of a variance. We find the other conclusions of the board supported by substantial evidence.

The Law Division judge was of the view that there were special reasons which would properly have grounded the grant of a d. variance but that the discretionary determination of the board contra should not be set aside. The Appellate Division concluded there were no special reasons which would have justified a variance and that no board of adjustment could with propriety conclude that the variance would not substantially impair the intent and purpose of the zone plan and ordinance. It was thought that if the zone plan was outmoded rectification should properly be by amendment or revision of the ordinance, not by variance, citing Kramer v Bd. of Adjust., Sea Girt, 45 N.J. 268, 290 (1965).

A. "Special Reasons"

We first confront the question whether a regional need for and shortage of multi-family rental housing is a "special reason" for a recommendation of a use therefor contrary to a restriction of the district to single-family residences on minimum 30,000 square foot lots.[2] Plaintiff

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2. There was no proof and there is no argument that this tract is not developable for residences on such lots or that the lot size is unreasonable.

urges that construction of apartment houses anywhere in the Demarest region serves the general welfare and thus legitimizes a variance therefor under the rationale expressed in one of our recent decisions as follows:

> The pertinent section of the zoning enabling act, N.J.S.A. 40:55-39(d) authorizes the grant of a use variance upon an affirmative finding of "special reasons" "in particular cases", together with the negative findings, applicable in all zoning relief situations, 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."
>
> It is long settled law in this state that this unique provision does not require that the particular premises cannot feasibly be used for a permitted use or that other hardship exists. "Special reasons" is a flexible concept; broadly speaking, it may be defined by the purposes of zoning set forth in N.J.S.A. 40:55-32, which specifically include promotion of "health, morals or the general welfare." Ward v Scott, 11 N.J. 117 (1952). So variances have been approved for many public and semi-public uses because they significantly further the general welfare. See, e.g., Andrews v Board of Adjustment of the Township of Ocean, 30 N.J. 245 (1959) (parochial school in residential zone); Black v Montclair, 34 N.J. 105 (1961) (additional parochial school building in residential zone); Burton v Montclair, 40 N.J. 1 (1963) (private school in residential zones); Yahnel v Board of Adjustment of Jamesburg, 79 N.J. Super. 509 (App. Div. 1963), cert. den. 41 N.J. 116 (1963) (telephone equipment building in residential zone); Kunzler v Hoffman, 48 N.J. 277 (1966) (private hospital for emotionally disturbed in residential zone). Compare Kohl v Mayor and Council of Borough of Fair Lawn, 50 N.J. 268 (1967); Mahler v Board of Adjustment of Borough of Fair Lawn, 94 N.J. Super. 173 (App. Div. 1967), aff'd o.b. 55 N.J. 1 (1969).

DeSimone v Greater Englewood Housing Corp. No. 1, 56 N.J. 428, 440 (1970) (upholding a variance for a semi-public low income housing project outside a ghetto area.)

However, an important qualification of this principle had been laid down by the court in Kohl v Mayor and Council of Borough of Fair Lawn, supra (50 N.J. 268). This was that since almost all legal uses of property serve the "general welfare" in some degree, the mere showing that the use for which a d. variance was sought would serve the general welfare (in that case, the enlargement of a non-conforming milk processing plant in a residential district) would not suffice as an affirmative "special reasons" basis for a variance. Only if the use was one which "inherently" served the general welfare,[3] such as a school or a hospital, would the use per se constitute a proper special reason for a variance. 50 N.J. at 279. If not of that consequence, there would have to be a showing and finding "that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought." Ibid.

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3. The issue was anticipated in Mahler v Borough of Fair Lawn, 94 N.J. Super. 173, 184 (App. Div. 1967) aff'd o.b. 55 N.J. 1 (1969), where the court drew a distinction between "uses of an institutional dimension" and others, which, while serving the general welfare in a general sense, were not as vital to the public interest as the former.

In support of his determination for the court in Kohl, and reflecting light on its true meaning, Justice Proctor cited Mocco v Job, 56 N.J. Super. 468, 477 (App. Div. 1959) and Cunningham, "Control of Land Use in New Jersey by Means of Zoning", 14 Rutgers L. Rev. 37, 93, n. 261 (1959), the latter commenting favorably on Judge Price's holding in Mocco v Job, supra, that for a valid d. variance it must be shown and found that "the particular site *** must be the location for the variance" sought in order to promote the general welfare. (emphasis added). Thus, in Kohl, the court said that there was "no showing that the promotion of the general welfare could be accomplished only by an expansion of [the milk processing plant] at its present location." 50 N.J. at 280.

In the present case there was neither proof nor findings that unless the plaintiff's project is erected at the particular site for which the variance is sought the general welfare inherent in provision of more multi-family housing will not be attained. Thus, applying the Kohl-Mocco rationale, the inquiry turns to whether provision of small middle-income apartment units in Demarest is "inherently" in service of the general welfare so as to warrant a d. variance ipso facto without regard to location of the use.

The question is a difficult one to resolve.

We begin with the enjoinder, repeated as recently as Kohl, that "[v]ariances to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning." 50 N.J. at 275. In Andrews v Ocean Twp. Board of Adjustment, 30 N.J. 245, 253 (1959), the case originating the doctrine that a special reasons variance could be grounded in the general welfare without more, and without showing hardship to the applicant, Justice Hall, dissenting, expressed fear of a resulting "almost untrammeled discretion in the local administrative agencies to grant a use variance under so-called standards so broad that almost every variance allowed will have to be sustained." Id. at 257. It was his view that if a use "of a public or semi-public nature" is wanted by a community and it is thought it should be allowed at a location appropriate to the nature of the use, this should not be effected by variance but by special exception.[4]

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4. The breadth and amorphousness of our "special reasons" d. variance under the Andrews doctrine has drawn authoritative criticism. See 5 Williams, American Land Planning Law (1975), § 149.18-149.19, pp. 84-188; Cunningham, "Control of Land Use in New Jersey by Means of Zoning", 14 Rutgers L. Rev. 37, 93-94 (1959).

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Justice Hall gave renewed expression to the foregoing views in a context relevant to the instant case when he stated, in the course of his opinion for the court in Mount Laurel, that "(*** considerable numbers of privately built apartments have been constructed in recent years in

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4. cont'd.

The New Jersey County and Municipal Government Study Commission has commented adversely on the use of the variance procedure for construction of multi-family units in suburban areas. In a study of such variances from 1965-1972 the Ninth Report of the Municipal Commission noted that "the use of variances in this way obviates the goal of pre-planning the appropriate use[s] for each district. Furthermore, by its nature it makes impossible the intelligent anticipation of development needed to plan for service provision and a balanced community." Housing & Suburbs: Fiscal and Social Impact of Multifamily Development, Ninth Report 113. (1974).

The decision in Brunetti v Mayor, Coun. Tp. of Madison, 130 N.J. Super. 164 (Law Div. 1974), upholding a variance for construction of garden apartments on the grounds that such housing constitutes a special reason within the scope of N.J.S.A. 40:55-39d. has been criticized as "subverting rational land use planning" so as to "inevitably result in even greater misplanning in New Jersey suburbs." Mallach, "Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation", 6 Rutgers-Camden L.J. 653, 658, 676 (1975). Granting 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." Id. at 659. To the same effect, Mytelka, "The Mount Laurel Case: Where to Now?", 98 N.J.L.J. 513, 522 (1975). See also Mytelka and Mytelka, "Exclusionary Zoning: A Consideration of Remedies", 7 Seton Hall L. Rev. 1, 11 (1975), rejecting the special use exception for low and moderate income housing as a remedy for exclusionary zoning because of its potential for abuse.

municipalities throughout the state, not allowed by ordinance, by the use variance procedure. N.J.S.A. 40:35-39d. ***)." 67 N.J. at 181, n. 12. He went on to say: "While the special exception method, N.J.S.A 40:55-39b., is frequently appropriate for the handling of such uses, it would indeed be the rare case where proper 'special reasons' could be found to validly support a subsection (d) variance for such privately built housing *** ". (emphasis added). Id. at 181-182. The animadversion to "privately built housing" in the foregoing excerpt may have been intended by way of contrast to the quasi-public housing project involved in DeSimone v Greater Englewood Housing Corp. No. 1, supra, and held by Justice Hall there to warrant a d. variance in a single-family residential district.

Moreover, the fact that the monition as to d. variances for apartment houses in single-family districts is incorporated into the Mount Laurel opinion would appear to undermine to some degree the heavy reliance upon the general philosophy of Mount Laurel by plaintiff in asserting the thesis that multi-family housing is so inherently for the general welfare as to qualify as an affirmative special

reason for a d. variance.[5]

Withal, however, after having said what is set forth above, one is hard put to respond to the insistence that if "adequate housing of all categories of people is *** an absolute essential in promotion of the general welfare required in all local land use regulation", as stated in Mount Laurel, 67 N.J. at 179 (whether or not the statement constituted a strict holding, as to which see our opinion in Pascack Association v Mayor and Council of Washington, supra, slip opinion, pp. 17, 20), a variance to provide additional rental housing in a region which plainly needs it is "inherently" for the general welfare, in the Kohl sense of the concept.

We propose to leave definitive resolution of this knotty problem to a future case which will compel it; the instant one does not. For reasons which follow, we conclude that even if the provision of multi-family housing in Demarest is inherently for the general welfare, so as to affirmatively

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5. The Appellate Division, in addition to the case sub judice, reversed the grant of a d. variance for an apartment house in a single-family district in Jennet Realty Co., Inc. v Ardlin, Inc., 112 N.J. Super. 79 (App. Div. 1970), certif. den. 57 N.J. 436 (1971), and affirmed a denial in Segal Const. Co. v Zoning Bd. of Adj. Wenonah, 134 N.J. Super. 421 (App. Div.), certif. den. 68 N.J. 496 (1975), and Nigito v Borough of Closter, 142 N.J. Super. 1 (App. Div. 1976). Denial of a variance for senior citizen housing was upheld in Leon N. Weiner & Associates Inc. v Housing Authority of Borough of Glassboro, _____ N.J. Super. _____ (App. Div. 1976).

authorize a d. variance if the negative criteria of N.J.S.A. 40:55-39 were met,[6] the decision of the board of adjustment to deny the variance should be upheld. That determination was based on a finding that the grant would substantially impair the intent and purpose of the zone plan and zoning ordinance, and also, impliedly, that the zoning benefits would not outweigh the zoning harms consequent upon a variance. We cannot find these determinations to be arbitrary or without substantial support by evidence in the record.

As was stated in Mahler v Borough of Fair Lawn, supra (94 N.J. Super. at 185-186), an Appellate Division opinion we adopted in affirming in that case (55 N.J. 1):

> Our cases recognize that there is an area of special discretion reposed in the local agencies within which, in many situations, either the grant or denial of a (d) variance would be judicially sustained. The board of adjustment weighs the facts and the zoning considerations, pro and con, and will be sustained if its decision comports with the statutory criteria and is founded in adequate evidence. See Rain or Shine Box Lunch Co. v Newark Board of Adjustment, 53 N.J. Super. 252, 259 (App. Div. 1958); Yahnel v Board of Adjustment, Jamesburg, supra, 79 N.J. Super., at p. 519.

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6. These negative criteria are that the variance will be "without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." N.J.S.A. 40:55-39.

It is apparent that in many, if not most, cases the decision of a board of adjustment on a contested d. variance application is an amalgam of resolution of fact and exercise of discretion. It was put this way in Yahnel v Bd. of Adjust. of Jamesburg, supra (79 N.J. Super. at 519):

> *** the statutory rationale of the function of the board of adjustment is that its determinations that there are special reasons for a grant of variance and no substantial detriment to the public good or impairment of the zone plan, etc., in such grant represent a discretionary weighing function by the board wherein the zoning benefits from the variance are balanced against the zoning harms. If on adequate proofs the board without arbitrariness concludes that the harms, if any, are not substantial, and impliedly determines that the benefits preponderate, the variance stands.

A similar expression in the context of the review of a denial of a variance is found in Rain or Shine Box Lunch Co. v Newark Bd. of Adjust., 53 N.J. Super. 252, 259 (App. Div. 1958). Accord: Shell Oil Co. v Zoning Bd. Adj. Shrewsbury, 64 N.J. 334 (1974), reversing on dissent in 127 N.J. Super. 60, 62 (App. Div. 1974).

Having in mind that in the administration of the law on this subject there is always a particular concern over the judicial overruling of a denial of a variance, as distinguished from a grant, for the reasons expressed in the Kohl case, supra, and quoted above, and see Cummins v Bd. of

Adjustment of Bor. of Leonia, 39 N.J. Super. 452, 460, 461 (App. Div.), certif. den. 21 N.J. 550 (1956), the foregoing principles dictate an affirmance of the concordant determinations of the Law and Appellate Divisions not to disturb the denial of a recommendation for a variance by the board of adjustment. We have already found that the conclusion that the grant would substantially affect the zone scheme and plan adversely is supported by substantial evidence. We add that the implied, discretionary determination that whatever zoning benefits might accrue from the variance sought are outweighed by the zoning harm envisaged by the board cannot, on this record, be adjudged arbitrary or capricious.

B. The Admission of the Resolution of the Planning Board

Plaintiff has assailed the acceptance in evidence by the board of adjustment of the disapproving resolution submitted by the planning board as an unwarranted interference by the latter with the independence of the board of adjustment. We regard this characterization as unfounded. The board of adjustment was not obligated to give the recommendation of the planning board any more weight than it rationally warranted — and there is nothing before us to indicate that it did.

The statutory place occupied by planning boards in New Jersey planning and zoning law[7] would seem to give them a status fully justifying respectful attention to their views by a board of adjustment passing on an application for a variance - particularly a d. use variance. Planning boards are generally empowered to prepare, adopt and amend a master plan for the physical development of the municipality, N.J.S.A. 40:55-1.10, and recommend boundaries or regulations for inclusion in the zoning ordinance. N.J.S.A. 40:55-33. Recommendations of the planning board must be solicited prior to approval of subdivisions or plats, N.J.S.A. 40:55-1.14; adoption or amendment of an official map, N.J.S.A. 40:55-1.35, N.J.S.A. 40:55-1.37; adoption of a zoning ordinance, N.J.S.A. 40:55-33; or amendment and modification thereof. N.J.S.A. 40:55-35.

Under certain circumstances, certain matters within the cognizance of the board of adjustment may be referred to the planning board for review. N.J.S.A. 40:55-1.13 provides in pertinent part:

> The governing body may by ordinance provide for the reference of any other matter or class of matters to the planning board before final action thereon by any municipal public body or municipal officer

7. The Municipal Land Use Law (L. 1975, c. 291) contains substantial revisions of previous provisions concerning powers, duties and functions of planning boards. Since the new law became effective subsequent to the proceedings below, we have not considered it in relation to this controversy.

> having final authority thereon, with or without the provision that final action thereon shall not be taken until the planning board has submitted its report, or until a specified period of time has elapsed without such report having been made.

In Kozesnik v Montgomery Twp., 24 N.J. 154 (1957) the Supreme Court upheld the validity of an ordinance delegating permit applications for quarry excavations to the planning board. Apparently contending that the quarry permit was in the nature of a special exception, plaintiffs argued that the approval of the permit was solely within the province of the board of adjustment. Rejecting this argument, the court not only found the referral to be statutorily authorized, N.J.S.A. 40:55-1.13, but also that the planning board was the "singularly appropriate agency since the matters thus referred are cognate to the purposes of municipal planning, N.J.S.A. 40:55-1.12." 24 N.J. at 178-179. But see Saddle River Country Day School v Saddle River, 51 N.J. Super. 589, 603 (App. Div. 1958), aff'd o.b. 29 N.J. 48 (1959).

The question of the impact of a proposed project on its surroundings and on the municipal plan and zoning ordinance seems clearly to be within the broad and general subject of planning and hence within the cognizance of a planning board. Indeed, when that question arises within the

context of a requested zoning amendment, N.J.S.A. 40:55-35 specifically recognizes the expertise of the planning board. Arguably, when the question arises in the course of a variance proceeding, the expertise of the planning board is no less, yet the matter is committed to the jurisdiction of the board of adjustment, N.J.S.A. 40:55-39, absent an ordinance referring the same to the planning board. N.J.S.A. 40:55-1.13.

In the instant case, there is no such ordinance specifically pertaining to subsection (d) variances, although with respect to special uses the board of adjustment is instructed to inform all concerned official bodies of the applications for comment.[8]

Even absent an enabling ordinance permitting the planning board to submit its recommendations on a subsection (d) variance, it is plainly inferable that the last paragraph of the state enabling legislation, N.J.S.A. 40:55-1.13, gives the planning board the power to so act:

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8. Demarest Ordinance No. 319, § 4.4, provides that the board of adjustment shall inform such official bodies as may be concerned of the receipt of a special use application and each such official body, board or commission "may submit, prior to or at the public hearing, any facts, opinions, recommendations or other pleading on the subject matter as it may desire."

> The planning board shall have full power and authority to make such investigations, maps and reports and recommendations in connection therewith relating to the planning and physical development of the municipality as it deems desirable.

Ostensibly, this provision gives the planning board the power to make such recommendations as the one at issue in the form of the contested resolution.

This court recognized the appropriateness of a planning board expressing its non-binding opinion on the impact of a variance on the planning scheme in Loechner v Campoli, 49 N.J. 504 (1967). Plaintiff, who owned several adjacent tracts of land, petitioned the board of adjustment for a variance to build on a substandard lot before applying to the planning board for subdivision approval. In holding that the plaintiff must first have obtained subdivision approval which the planning board could have granted subject to approval of the variance, the court stated (49 N.J. at 512):

> The planning board may, with its approval express its non-binding opinion as to whether the variance would be conducive to or detrimental to the planning scheme because of the undersize of a lot.

It is commonplace for boards of adjustment and courts to give consideration to reports of planning agencies such as

master and regional planners as background material in zoning and planning cases. So long as reasonable notice of the submission of such materials is afforded an opponent, with an opportunity to meet any adverse impact therefrom, there can be no fair complaint concerning the use of such aids to informed adjudication. These observations are pertinent to the present subject. Plaintiff does not dispute the accuracy of any facts stated in the planning board resolution. It was aware of the resolution long before it was admitted in evidence. It has not been deprived of a fair opportunity to respond to its substance. We find no error. Cf. Metropolitan Bd. of Zon. App. v Standard Life Ins. Co., 251 N.E. 2d 60 (Ct. App. Ind. 1969).

Judgment affirmed.

Justice Schreiber concurs in the judgment of the court.