ML - Wenonah

5-21-75

Segal Construction v. Wenonah

Re findgs & conclus. vs

In lieu of prerogative writ

pgs. 12

MM0000580

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

DRB-

MM0000580

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY
DOCKET NO. L-34423-71 P.W.

SEGAL CONSTRUCTION COMPANY :
:
Plaintiff :
: CIVIL ACTION
v. :
: IN LIEU OF PREROGATIVE WRIT
ZONING BOARD OF ADJUSTMENT, :
BOROUGH OF WENONAH, NEW :
JERSEY . : FINDINGS AND CONCLUSIONS
:
Defendant :
:
and :
:
MAYOR AND BOROUGH COUNCIL :
OF BOROUGH OF WENONAH :
:
Intervenors :

DECIDED: MAY 21, 1975

Mr. Frank H. Wisniewski of Archer, Greiner & Read
Attorney for Plaintiff

Mr. Donald A. Smith Jr. of Boakes, Lindsay & Smith
Attorney for Defendant

Mr. David J. Strout
Attorney for Intervenors

This is an action in lieu of prerogative writ wherein plaintiff, Segal Construction Company [hereinafter Segal], applied for a use variance from the defendant, Zoning Board of Adjustment of the Borough of Wenonah [hereinafter Zoning Board]. Segal produced several witnesses and ten exhibits at the hearing, in an attempt to persuade the Zoning Board to recommend a variance, so that Segal could develop 340 condominium units on a 41 acre tract which was zoned R-1 residential - single-family dwellings. The pertinent parts of the Wenonah Zoning Ordinance are as follows:

> 72-9. Use regulations in R-1 Residence Districts.
> A building may be erected or used, and a lot may be used or occupied, for any of the following purposes, and no other:
>
> A. Single-family detached dwelling.
>
> ***
>
> 72-24. Prohibited uses.
>
> ***
>
> C. Multiple dwellings, except on conversion in accordance with §72-26, are prohibited. [1]

The ordinance, then, clearly prohibits a condominum, or multiple dwelling, within the said tract. Furthermore, the ordinance has withstood an attack upon its constitutionality in this court as a joined issue in this action. This supplemental opinion will therefore deal solely with the action taken by the Zoning Board, in its refusal to recommend a use variance to the Mayor and Borough Council of Wenonah.

The Zoning Board is statutorily empowered to recommend variances.[2] Its discretionary power is expressly delimited by and confined within the same statute. N.J.S.A. 40:55-39 deals with the authority of the Zoning Board and provides in pertinent part:

> The board of adjustment shall have the power to:
> d. Recommend in particular cases and for special reasons to the governing body of the municipality the granting of a variance to allow a structure or use in a district restricted against such structure or use. Whereupon the governing body or board of public works may, by resolution, approve or disapprove such recommendation (emphasis added).
>
> ***
>
> No relief may be granted or action taken under the terms of this section unless such 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.

In the case at bar, a hearing was held before the Zoning Board, and after presentation of witnesses and exhibits, a motion unanimously carried which denied Segal's proposed plan on the basis that:

> the proposed change is not consistent with the spirit, purpose and intent of the Zoning Ordinance, and that such Zoning Ordinance does not permit the construction of condominium units or apartment units, neither have recent considerations of borough residents, or action of the governing body indicated a desire for a zoning change.
>
> Applicant has failed to prove that its situation is a particular case or a unique problem, or that there were special reasons for a favorable determination; applicant has failed to show an unnecessary or unjust interference with his property rights (emphasis added).[3]

At the hearing, Segal contended that special reasons existed which should have justified a recommendation of the requested

variance. Plaintiff attempted to show through witnesses at the hearing that the unusual topographic conditions of the tract in question would not permit of maximum utilization if only the permitted use were allowed. The tract is of 41 acres, with the northerly portion sloping off into a ravine and a river. Thus, it would be difficult to develop as one family residences, since the maximum subdivision, accounting for development in the ravine, would be 101 individual lots, but realistically the ravine is undevelopable, and the number would be correspondingly smaller.

Plaintiff's experts testified that in building the condominiums, the "cluster design" planned, would facilitate construction with a minimum amount of erosion (rain water run-off during building), while if single family dwellings were constructed on miminum sized lots, the tract would develop more water run-off as the lots were being developed. This was said to be true because the cluster buildings could be constructed piecemeal, with consideration given to protecting the sloping ground on the non-construction sites. If the individual lots were developed, there would be no comprehensive planning or employment to protect against this possibility.

The cluster design would also permit open spaces between the completed buildings, and undeveloped land (such as the ravine mentioned), to allow for active and passive recreation. The total undeveloped or undisturbed land would approximate 70 percent of the tract, an impliedly greater percentage than if single family dwellings were constructed, with

roads, sidewalks, structures, and driveways, in a "shotgun" layout, rather than in a clustered plan.

It was submitted, then, that the propsed plan would be ecologically and aesthetically a better utilization of the tract, than would the permitted uses, namely, it would make maximum use of the buildable area, while leaving most of the tract, its vegetation and topography, untouched.

It was also argued that the Borough would be able to take advantage of a higher tax revenue if the proposed condominium were constructed. Additionally, other municipal services would be affected little if at all: since the condominiums would be internally managed, items such as paving, lighting, snow removal, trash and garbage collection would be handled within the units. The requirements of police and fire protection, and sewer and water services were estimated as consuming less, or at most a minimal amount more, than would single family residences.

Plaintiff, therefore, seeks a determination that the denial by the Zoning Board was "arbitrary, unreasonable, discriminatory, oppressive, unlawful and against the weight of the evidence presented."

The court has had the benefit of the record of the evidence submitted to the Zoning Board, briefs and arguments of counsel, and the exhibits produced, and makes the following findings:

The Zoning Board made no express findings of fact which resulted in the conclusion already referred to. However, the findings

that we make here may be reasonably inferred from the transcript of that hearing, remarks by Board members and citizens, and the final action taken by the Board. Notwithstanding the arguments by plaintiff putting forth environmental, ecological and economic benefit to the Borough, it is specifically found that the main thrust of Segal's petition for a variance is clearly economic benefit to the developer. The fact that the permitted use of the tract could not fully utilize the entire tract because of its unusual topographical setting is not a special reason for a variance. It is well settled law in New Jersey, that a variance for a non-conforming use which would prove more profitable to the landowner, is not itself a sufficient reason for granting or recommending such a variance. See e.g. Protomastro v. Bd. of Adjustment of City of Hoboken, 3 N. J. 494, 501 (1950); Berdan v. City of Paterson, 1 N.J. 199, 205 (1948). Furthermore, it is found from the record that the multi-family dwelling units would create additional burdens on the school system and the traffic flow within the borough.

We also specifically find that Wenonah is a tiny borough of approximately 660 acres, of which only 109 acres have not been developed. The tract in question is the only substantial tract available for multi-family construction. It is a modest community, with 731 single family dwellings valued at between $25,000 to $35,000. It is not a live-in/work-in community as a vast majority of the residents do not work in the borough, leaving it effectively a residential borough only.

It passed its present zoning ordinance in order to remain a bedroom community, with no industry and a very small commercial district, without the hustle and bustle of modern day surburbia. Furthermore, the Borough has consistently attempted to avoid undue concentration of population by zoning for single family dwellings throughout. This is evidenced by an unsuccessful attempt to amend the ordinance which would have allowed for multiple family dwellings such as the condominium under consideration here,[4] as well as the opposition to plaintiff's request here, shown by citizens who attended the Zoning Board meeting. Any proposal, such as Segal's, which attempts to show that it is a better plan for the community, loses whatever merit it may have had when contrasted with the undisputed negative attitude of the Borough itself. Furthermore, if the land can be reasonably utilized as a permitted use, the special reason argued is clearly lacking. See Dolan v. DeCupua, 16 N.J. 599, 610 (1954).

Secondly, we find that there is no showing that Segal's position is that of a particular case. The entire Borough is zoned the same throughout with respect to permitted structures. Segal stands in the same status as any other land owner within the Borough, and there is no sustainable argument to the contrary. Plaintiff has not shown that the restrictions imposed by the ordinance are extraordinarily burdensome as to his individual property; a prerequisite for the granting of such a variance:

> Paragraph d is operative only where the applicant's plight is "owing to special conditions," that is, to circumstances

uniquely touching his land as distinguished from conditions that affect the whole neighborhood.

Ackerman v. Board of Commissioners, 1 N. J. Super. 69, 76 (App. Div. 1948). See also Leimann v. Board of Adjustment, Cranford Tp., 9 N.J. 336, 340 (1952); Brandon v. Montclair, 124 N.J.L. 135, 150 (1940). And there are decisions which indicate that if one purchases land with knowledge of the zoning restriction, he has created his own hardship, and cannot be relieved thereby with a variance based on hardship. See e.g., Leimann v. Boardof Adjustment, Cranford Tp., 9N.J. 336, 342 (1952); Home Builders Assn. of Northern N. J. v. Paramus Bor., 7 N.J. 335, 343 (1951).

In addition to the above arguments which would sustain the conclusion of the Zoning Board, we are especially mindful of the explicit restrictions against this very type of development contained in the Borough Ordinance, and the confines of N.J.S.A. 40:55-39 (d), within which the Zoning Board must function. The Zoning Board is mandated to refuse variances which would be substantially detrimental to the public good and would substantially impair the intent and purpose of the zone plan and zoning ordinance.

There being no special reasons or a particular case existing, the Zoning Board's decision will stand as well founded on the evidence presented and the facts existing. The decision shows no arbitrariness, and is in fact supportive of the general zoning plan of the Borough. It was the express conclusion of the Zoning Board that such a variance was "not consistent with the spirit, purpose and intent" of the zoning plan. "The power [of the Zoning Board] must be exercised

consonant with the duty laid upon the local board to protect the integrity of the general scheme from substantial impairment." Leimann v. Board of Adjustment, Cranford Tp., 9 N. J. 336, 340 (1952). Were we to set aside the denial of the Zoning Board, we would be contradicting the presumptive correctness of that decision. See e.g., Mischiara v Bd. of Adjustment of Piscataway Tp., 77 N.J. Super. 288, 292 (Law Div. 1962); Miller v. Boonton Tp. Bd. of Adjustment, 67 N.J. Super. 460, 469 (App. Div. 1961). But, conceding that we may in special cases reverse such decisions, were we to do so here, we would be vastly disturbing the obvious purpose and intent of the zoning plan, and moreover, the expressed wishes and concerns of the citizens of Wenonah. The intent and purpose, as well as the spirit, of the zoning plan would be unduly impaired by the proposed use, and would work substantial detriment to the public good.

But our decision rests not only on the ground that the Zoning Board exercised its discretion in a permissable manner, it is our opinion that the Zoning Board was not even empowered or authorized to recommend such a variance. As was said in Leimann, supra, at 341-42: "The variance in the circumstances here has the effect not simply of substantially impairing the intent and purpose of the ... zoning ordinance; the [proposed grant] ... virtually shatters, if indeed it does not wholly nullify, the general scheme of the zone." In the Leimann case, a variance was granted to permit construction of garden apartments in a residentially zoned area limited to single family dwellings. On prerogative writ proceedings the variance was affirmed through the heirarchy of courts, until struck down by the Supreme Court. Justice

Brennan declared that "A grant of variance which has the effect of frustrating the general scheme and is tantamount to an usurpation of the legislative power reserved to the governing body of the municipality to amend or revise the plan ... cannot be sustained." Leimann, supra, at 340. Justice Brennan was stating a principal of zoning law which can be found elsewhere, which says generally that a zoning board may not allow a variance for a use which is expressly prohibited, the only remedy of the applicant being legislative action. Such a variance would realistically be an amendment to the zoning ordinance, in the guise of a variance. 2 Yokely, Zoning Law and Practice, 116, §14-2 (3rd ed. 1965) and cases cited therein; Anno., 168 A.L.R. 21 (h) (1946) and cases cited therein. This rule has been expressed in other New Jersey decision, all basically following Justice Heher's opinion in Brandon v. Montclair, 124 N.J.L. 135 (1940):

> If the difficulty is common to lands in the vicinity, by reason of arbitrary zoning, and is therefore of general rather than particular application, the remedy lies with the local legislative body or in the judicial process.

Brandon, supra. at 150. Justice Heher explained difference:

> the essential distinction between local legislative zoning power and the authority to make individual variations from regulations ...[is that] [t]he one is a legislative act, valid if not in contravention of constitutional limitations; the other is a quasi-judicial function grounded in discretion, reviewable on certiorari.

Brandon, supra, at 149. See also Schoelpple v. Woodbridge Twp., 60 N. J. Super. 146, 152 (App. Div. 1960); Grimley v. Ridgewood, 45 N.J. Super. 574, 583 (App. Div. 1957); Keller v. Westfield, 39 N. J. Super 430, 435 (App. Div. 1956); Beck v. Board of Adjustment of East Orange,

15 N. J. Super. 554, 563 (App. Div. 1951).

In the case at bar the evidence disclosed that the property can reasonably be used for residential purposes in conformity with the zoning plan. See Dolan v. DeCupua, 16 N. J. 599, 610 (1954). The plaintiff knew of the zoning restrictions when planning the development. See Id. And there has been a finding that the zoning regulation is constitutional in its exclusions of uses. See Id. "The zoning act does not contemplate variations which would frustrate the general regulations and impair the overall scheme which is set up for the general welfare of ... the entire community." Id. at 611. Furthermore, the granting of such a use variance would work such a substantial detriment to the zoning plan, that it would be tantamount to an amendment to the ordinance, and an usurpation of the legislative powers of the Borough. See Leimann, supra, at 340.

For these reasons, the decision of the Zoning Board to deny a variance, on the conclusions that "the proposed change is not consistent with the spirit, purpose and intent of the Zoning Ordinance," and that Segal failed to prove that his situation was "a particular case or a unique problem" is hereby affirmed.

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1. §72-26. Conversion of dwelling to two-or more family use.
The Board of Adjustment may authorize the conversion of any dwelling existing at the effective date of this ordinance into a dwelling for two (2) or more families, subject to the following requirements .... (emphasis added).

2. N.J.S.A. 40:55-39 (d), set out fully in text. Although not explicitly stated in the moving papers or in the briefs, we assume that this application is for a section "(d)" variance, since section "(c)" relates only to appeals before the board, and expressly disallows variances which would "allow a structure or use in a district restricted against such structure or use."

3. Transcript of hearing before Wenonah Zoning Board of Adjustment, p. 184.

4. This was rejected by an overwhelming 77 percent negative response.