

ZONING—VARIANCE—PUBLIC HOUSING HELD SPECIAL REASON FOR GRANTING VARIANCE—*DeSimone v. Greater Englewood Housing Corp. No. 1*, 56 N.J. 428, 267 A.2d 31 (1970).

In a suit against the city of Englewood, New Jersey to enforce a zoning regulation, plaintiffs, taxpayer-residents of that city, challenged the action of the city government relating to a proposed housing project.¹ Plaintiffs specifically objected to the granting of a variance permitting low income public housing to be erected in a section zoned for one family dwellings. In holding that the city's action was proper under the applicable state statute,² the court may have allowed municipal integrity respecting zoning to be undermined.

Primarily a residential community adjacent to New York City, Englewood is divided into four wards with the bulk of the lower income population in the fourth ward. The proposed site of the contested housing project is in the second ward which is zoned for one family dwellings. Designed to provide low and/or moderate income families with safe, sanitary housing, the project is to receive state and federal funding; a condition to receiving federal assistance is that for every project built within the ghetto area, one must be constructed outside the ghetto.³ It was the city government's granting of a use variance per-

¹ *DeSimone v. Greater Englewood Housing Corp. No. 1*, 56 N.J. 428, 267 A.2d 31 (1970).

² N.J. STAT. ANN. § 40:55-39 (Supp. 1970) reads in part:

The board of adjustment shall have the power to:

c. Where by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or by reason of exceptional topographic conditions, or by reason of other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under the act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the owner of such property, to authorize, upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship; provided, however, that no variance shall be granted under this paragraph to allow a structure or use in a district restricted against such structure or use.

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. If such recommendation shall be approved by the governing body or board of public works then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use.

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. (emphasis added).

³ 56 N.J. at 437, 267 A.2d at 35-36 (concurrently, there is also an uncontested proposed project for the fourth ward).

mitting the construction of the housing project in the city's second ward that provoked the present suit.

With the coagulation of property owners into hamlets, towns and cities, there came a necessity for land use control. Whatever the feeling of early settlers, unrestricted freedom to use one's land is today a rather frivolous concept at best.⁴ Zoning, as we know it now, is a relatively new concept in our legal history, and in New Jersey had its birth and development with the first enabling statutes and matured with the adoption of the 1947 constitution.⁵ The power to zone is an inherent element in the police power of the state⁶ and redounds from the sovereign to the municipality.⁷

The nature of zoning implies a definite rigidity and uniformity which, because of its restrictive nature, often amounted to a taking of private property. This confiscatory result led to various methods of relief, one of which is the variance. As the term suggests, a variance is the allowance of a nonconforming use in a district ordinarily zoned to exclude such uses. However simple the concept, judicial interpretations have been quite pandoric.

Originally, variances were allowed only where there was proof that enforcement of the zoning regulation would cause property owners such a hardship as to amount to a loss of use.⁸ This hardship must have inhered to the land and not been merely a product of the landowner's fancy.⁹ As late as 1956 in *Moriarty v. Pozner*,¹⁰ the variance was found

⁴ J. BEUSCHER & R. WRIGHT, *CASES AND MATERIALS ON LAND USE 1* (1969):

What is a permissible control or diminution of this "absolute right" [*i.e.*, use of one's land] has admittedly broadened in concept down through the centuries, as emerging conditions of industrialization, population growth and urban concentration have created new necessities by directly affecting the public interest. But . . . public controls on the private use of land have been with us to some degree almost from the beginnings of civilized man.

⁵ See F. ROMANO, *ZONING AND PLANNING LAW IN NEW JERSEY 17-18* (1953).

⁶ *Schmidt v. Board of Adj.*, 9 N.J. 405, 414, 88 A.2d 607, 611 (1952):

The police power does not have its genesis in a written constitution. It is an indispensable attribute of our society, possessed by the state sovereignties before the adoption of the Federal Constitution.

⁷ F. ROMANO, *supra* note 5, at 9 (Supp. 1962):

The power to zone is an exercise of the police power which the State has granted to all municipalities

⁸ See *Moriarty v. Pozner*, 21 N.J. 199, 210-11, 121 A.2d 527, 533 (1956).

⁹ E. BASSETT, *ZONING 124* (1940).

¹⁰ 21 N.J. at 210-11, 121 A.2d at 533:

A "variance" presupposes the reasonableness of the zone regulation as a whole. . . . A "variance" is a relaxation of the general rule of the ordinance to alleviate conditions peculiar to a particular property, and thus to permit a use to which it is adapted and avoid an undue invasion of the right of private property by compelling conformance to an unsuitable permissible use, a burden upon the individual landowner that would be disproportionate to the common need.

to be inextricably dependent upon a hardship evoked by the relationship between the particular property and the restrictive zoning ordinance.

However, under paragraph (d) of N.J. STAT. ANN. § 40:55-39 (Supp. 1970), a municipality is empowered to grant a variance when "special reasons" exist. The New Jersey Supreme Court had occasion to rule on the import of this statutory provision in the two *Ward v. Scott*¹¹ cases. The first *Scott* decision involved the issuance of a variance to allow construction of a commercial shopping center and parking facility on a plot which extended into a residential area. The court remanded the matter to the local zoning board after finding that the existence of commercial buildings in proximity did not constitute a special reason within the meaning of the statute.¹² However, the court noted that where special reasons are shown, the board of adjustment may recommend issuance of a variance to the local legislative body for approval without regard to the rigid requirements of paragraph (c),¹³ meaning that there need be no showing of undue hardship, a heretofore unsettled issue.¹⁴

Justice Heher in his dissent stated that the majority's opinion was open to speculation in that there was confusion as to whether the court's decision was based on the granting of a variance or relief for a special exception.¹⁵ He argued for the traditional concept of a variance, *i.e.*, a remedial tool which should be invoked to relieve the property owner from the restrictive effect of the zoning ordinance on the proposed use of his land.¹⁶ In the second *Scott* case Justice Heher, again dissenting, advocated that the hardship criterion being applied to paragraph (c) of the statute should likewise apply to paragraph (d). The majority disagreed:

¹¹ These two cases involved the review of the same variance grant. In the first *Ward v. Scott*, 11 N.J. 117, 93 A.2d 385 (1952), the supreme court remanded to the board of adjustment for further consideration. In the second *Ward v. Scott*, 16 N.J. 16, 105 A.2d 851 (1954), the court upheld the board's recommendation for a variance.

¹² 11 N.J. at 128, 93 A.2d at 390.

¹³ See note 2 *supra*.

¹⁴ 11 N.J. at 122, 93 A.2d at 387.

¹⁵ *Id.* at 132-33, 93 A.2d at 392-93. See 101 C.J.S. *Zoning* § 273 (1958):

"Exceptions" or "special exceptions" are distinguished from "variance" in that the latter permits the use of property in a manner forbidden by the zoning law while "exception" relates to a use permitted by the law, and in that an exception ordinarily need not be based on a showing of hardship.

¹⁶ Justice Heher emphasized:

[A] "variance" is generally the mode of safeguarding the individual lot owner against the invasion of his fundamental right of private property which would ensue from adherence to the strict letter of the zoning regulation

11 N.J. at 137, 93 A.2d at 395.

[W]e held that subsection (d) of *N.J.S.A. 40:55-39* constitutionally vested authority in the governing body to grant variances, upon the recommendation of the board of adjustment, "in particular cases and for special reasons" in accordance with the explicit statutory terms and without reference to the hardship requirement in subsection (c)¹⁷

Although the *Scott* cases seemingly laid to rest the hardship requirement for variances pursuant to section (d) of the statute, there has been authority to the contrary.¹⁸

Subsequent decisions further elaborated on the need to prove hardship. In *Andrews v. Ocean Twp. Board of Adjustment*,¹⁹ the supreme court held that as well as a showing of special reasons in order to grant a variance under paragraph (d), there must be an affirmative finding that the negative criteria of the omnibus clause are met. That clause reads:

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.²⁰

One authority, in commenting on the case, stated that the court actually found that three criteria had to be satisfied, the third being that the special reasons advanced must rest within one of the expressed purposes of zoning.²¹

In *Wajdengart v. Broadway-Thirty-Third Corp.*,²² the appellate division more explicitly specified what constituted special reasons by stating that they may be found among the factors embodied in N.J. STAT. ANN. § 40:55-32 (1967).²³ One such factor is the promotion of

¹⁷ 16 N.J. at 18, 105 A.2d at 852.

¹⁸ See *Bern v. Fair Lawn*, 65 N.J. Super. 435, 447, 168 A.2d 52, 59 (App. Div. 1961) (undue hardship still remains an appropriate factor for the consideration of granting a (d) variance).

¹⁹ 30 N.J. 245, 152 A.2d 580 (1959) (involving a variance to construct a parochial school in a residential area).

²⁰ N.J. STAT. ANN. § 40:55-39(d) (Supp. 1970).

²¹ 2 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, ch. 38, at 22 (1966).

²² 66 N.J. Super. 346, 169 A.2d 178 (App. Div. 1961).

²³ *Id.* at 352, 169 A.2d at 181. The pertinent part of that statute provides:

Such regulations shall be in accordance with a comprehensive plan and designed for one or more of the following purposes: . . . promote health, morals or the general welfare Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout such municipality.

the "general welfare," a general term which has been seized upon as the reason for granting a variance.²⁴

Originally, promotion of the general welfare was a less than significant factor:

It [general welfare] obviously cannot mean that merely because a zoning board believes the activities of a particular organization are for the general welfare of the community . . . it may lawfully, for that reason only and without basis in any peculiar relation between such activities and the nature and location of the specific plot, grant it special dispensation from the ordinance restrictions²⁵

However, its importance increased until, standing alone, it became a sufficient reason to grant a paragraph (d) variance.²⁶

The earlier applications of this principle had to do with obtaining a variance for parochial schools.²⁷ The doctrine was further extended in *Yahnel v. Board of Adjustment of Jamesburg*,²⁸ where the court, upon a showing of land suitability²⁹ and lack of detriment to surrounding property, upheld a (d) variance to allow the erection of a wire center in a residential zone by a telephone company, finding that it would promote the general welfare. Again in *Kunzler v. Hoffman*,³⁰ the New Jersey Supreme Court upheld a (d) variance to allow construction of a private mental hospital in a residential zone as being beneficial to the public and not posing any real or substantial threat to adjoining residences.

In deciding whose welfare is to be considered, the court has defined the term to include not only the surrounding area of the use location, but also the entire municipality and even neighboring municipalities as well.³¹ In *Kunzler* the court emphasized that a municipality may look beyond the borders of its own territory and recognize regional needs of the state.³²

²⁴ E.g., *Kohl v. Mayor and Council of Fair Lawn*, 50 N.J. 268, 234 A.2d 385 (1967) (involving the denial of a paragraph (d) variance for the enlargement of a milk dairy).

²⁵ *Skaf v. Zoning Bd. of Adj.*, 35 N.J. Super. 215, 224, 113 A.2d 843, 847 (App. Div. 1955).

²⁶ *Burton v. Montclair*, 40 N.J. 1, 190 A.2d 377 (1963); *Black v. Montclair*, 34 N.J. 105, 167 A.2d 388 (1961); *Andrews v. Ocean Twp. Bd. of Adj.*, 30 N.J. 245, 152 A.2d 580 (1959).

²⁷ See cases cited note 26 *supra*.

²⁸ 79 N.J. Super. 509, 192 A.2d 177 (App. Div. 1963).

²⁹ *Id.* at 518, 192 A.2d at 180 (note that suitability rather than unsuitability for use of land is discussed).

³⁰ 48 N.J. 277, 225 A.2d 321 (1966).

³¹ *Andrews v. Ocean Twp. Bd. of Adj.*, 30 N.J. 245, 251, 152 A.2d 580, 583 (1959); *Yahnel v. Board of Adj.*, 79 N.J. Super. 509, 520, 192 A.2d 177, 184 (1963).

³² 48 N.J. at 288, 225 A.2d at 327:

DeSimone comes at the crest of such decisions emphasizing promotion of the general welfare:

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.³³

Concededly each zoning case must be decided on its own merits.³⁴ In *DeSimone* the court found the negative criteria of the omnibus clause fully satisfied while also finding that the promotion of the general welfare was inherent in the purpose of the proposed use. Perhaps what motivates the adjustment board to recommend a variance under paragraph (d) is not a relevant factor so long as the requirements of the statute are not circumvented.³⁵ In short, if it is found by the court that the board acted neither arbitrarily nor capriciously and without abuse of discretionary authority, its finding should stand.³⁶ The court's past trend in upholding variances granted under paragraph (d) can logically be said to support the New Jersey Supreme Court's finding in *DeSimone*, so the actual holding does not in and of itself constitute a reversal or erratic deviation. What does give it a singular quality is the factor that may have prompted the decision.

The actual effect federal aid had on the decision of the court is speculative, but it obviously was of some influence. As pointed out in the opinion, the applicable federal regulation stipulates that in order to qualify for funding, there must be a showing that for every such project constructed within the ghetto area one must be built without, on a one to one basis; and, further, the board of adjustment

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.

³³ *DeSimone v. Greater Englewood Housing Corp.* No. 1, 56 N.J. at 442, 267 A.2d at 38-39.

³⁴ *Andrews v. Ocean Twp. Bd. of Adj.*, 30 N.J. at 251, 152 A.2d at 583:

In the nature of the subject, a precise formula is not feasible. Each case must turn upon its own circumstances.

³⁵ *Housing Authority v. Richardson*, 196 So. 2d 489, 492 (Fla. Dist. Ct. App. 1967):

A good zoning ordinance may be the product of questionable or poor motives. . . . Thus, a general rule has emerged . . . that the motives of a governing body of a municipal corporation in adopting an ordinance legislative in character will not be the subject of judicial inquiry.

³⁶ *Ward v. Scott*, 16 N.J. at 21, 105 A.2d at 854.

frankly admitted that without such federal subsidies the project would fail.³⁷ The possibility of such federal influence is significant. The essence of zoning, as so aptly stated by Justice Heher, is uniform division according to the characteristics of the land and its suitability for use into uniform districts.³⁸ The power to zone has inured logically and certainly to the municipalities from the state via legislative enabling statutes. The federal regulation here is not violative of this concept on its face, but its *effect can be*, as in the case at bar. Englewood, in order to take advantage of federal aid, had to grant a variance, and this would be the inevitable course of any such community seeking like aid. Thus, federal regulations having a laudable intent such as racial integration may lead to the subversion of local zoning ordinances.

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³⁷ 56 N.J. at 437, 267 A.2d at 36.

³⁸ Ward v. Scott, 16 N.J. at 24, 105 A.2d at 856 (dissenting opinion).