PUBLIC HOUSING IN ITSELF JUSTIFIES USE VARIANCE

An Englewood, New Jersey, Baptist Church formed a corporation for the purpose of constructing public housing in the city of Englewood. The corporation planned to build low to medium income apartments to provide relocation housing for residents displaced by clearing and rehabilitation in the fourth ward of the city, an area characterized as a ghetto. The only feasible location within the city was in the second ward, a middle class residential area. Upon application by the corporation, the city board of adjustment granted size and use variances which were required because apartment construction conflicted with the zoning classification of the area. Residents within the second ward brought five actions challenging the variances, the ground lease, and the action of the planning board approving the site. The trial court found for the defendants; the Supreme Court of New Jersey affirmed in *DeSimone v. Greater Englewood Housing Corporation.*[1]

The primary holding of the case, that, as a matter of law, a properly demonstrated need for public housing justifies granting of variances,[2] is based on New Jersey statute § 40:55-39, which reads:

> 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.[3] (Emphasis added) [Hereinafter referred to as "d" or "special reasons" variance.]

The broadest construction of this statute before *DeSimone* is contained in *Ward v. Scott,*[4] which upheld the constitutionality of the statute. The applicant for the variance in *Ward* wanted to have off-street parking for a commercial building in a residential area. The court held that an applicant for a variance did not have to show hardship,[5] or undue burden on him and the conduct of his business

1. 56 N.J. 428, 267 A.2d 31 (1970).
2. *Id.* at 434, 267 A.2d at 37.
3. N.J. STAT. ANN. § 40:55-39 (Supp. 1971).
4. 11 N.J. 117, 93 A.2d 385 (1952).
5. *Id.* at 122, 93 A.2d at 387.

because of the zoning ordinance. Instead, the applicant need only show good cause for granting of a variance, and the board of adjustment will consider whether that cause is sufficient to allow the variance. Consequently, hardship, or burden on the applicant, is not the sole criterion for granting variances. This case set New Jersey apart from other states on the issue of zoning variances; court decisions[6] and statutes[7] in other states often specifically require an affirmative showing of hardship as the principal factor to be considered in administrative determination of whether to grant variances.

After *Ward,* the New Jersey courts retreated somewhat from their liberalization of the factors to be considered in granting variances.[8] A return to the *Ward* position came in *Andrews v. Ocean Township Board of Adjustment,*[9] in which the court held that hardship was not the sole reason for allowing variances, and permitted a church-operated parochial school with living facilities for teachers in a residential

6. *See, e.g.,* Kappadahl v. Alcan Pacific Co., 222 Cal. App. 2d 626, 35 Cal. Rptr. 354 (1963) (driveway in residential subdivision to rest home in different subdivision; variance granted on grounds of hardship); Parson v. Board of Zoning Appeals, 140 Conn. 290, 99 A.2d 149 (1953) (basement and two floors of building for doctor's office in area zoned for single-family residences; hardship variance granted); Searles v. Darling, 46 Del. 263, 83 A.2d 96 (1951) (apartment house in residential zone; evidence failed to show hardship); Lovely v. Zoning Bd. of Appeals, 259 A.2d 666 (Me. 1969) (grocery store in agricultural zone; evidence held not to sustain burden of proof of hardship); Gelinas v. City of Portsmouth, 97 N.H. 248, 85 A.2d 896 (1952) (gas station in residential zone; granted on adequate showing of hardship); Brown v. Fraser, 467 P.2d 464 (Okla. 1970) (residence on less than minimum size lot; denied, no hardship); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (narrow holding was that failure to provide for apartments in a township was unconstitutional; hardship discussed); Sylvester v. Zoning Bd. of Adjustment, 398 Pa. 216, 157 A.2d 174 (1959) (apartments in area zoned for one- and two-family dwellings, denied because hardship not shown); Tavares v. Zoning Bd. of Review, 103 R.I. 186, 235 A.2d 883 (1967) (change of use from residential to commercial; held beyond power of zoning board of review); Bartlett v. City of Corpus Christi, 359 S.W.2d 122 (Tex. Civ. App. 1962) (food processing plant in area zoned for light industry; fact issue precluded summary judgment for city in suit to restrain; hardship discussed); Azalea Corp. v. City of Richmond, 201 Va. 636, 112 S.E.2d 862 (1960) (driveways across land in city to provide access to land in county; held arbitrary and unreasonable to refuse the variance).

7. *See, e.g.,* DEL. CODE ANN. tit. 22, § 327(a)(3) (Supp. 1970); ME. REV. STAT. ANN. tit. 30, § 4954(2)(A) (Supp. 1970); PA. STAT. ANN. tit. 53, § 10912 (Supp. 1971).

8. *See, e.g.,* Moriarty v. Pozner, 21 N.J. 199, 121 A.2d 527 (1956), *overruled in* Black v. Town of Montclair, 34 N.J. 105, 167 A.2d 388 (1961); Cunningham, *Control of Land Use in New Jersey by Means of Zoning,* 14 RUTGERS L. REV. 37, 87 (1959).

9. 30 N.J. 245, 152 A.2d 580 (1959).

area.[10] Since *Andrews,* there has been no substantial change in New Jersey court treatment of "d" variances, whether denied or granted by the appropriate administrative body.[11] This is not to say that the courts have always upheld the actions of administrative bodies whether they denied or granted variances, but that the courts of New Jersey have not returned to their position of granting variances only when the applicant demonstrates hardship.

DeSimone represents more than a repetition of the holdings and reasoning in *Andrews* and *Ward.* Prior to *DeSimone* no New Jersey court held that specific factors such as "social goals" and policy *per se* were sufficient to qualify as "special reasons." *DeSimone* involved public housing, a "social goal," and the court held public housing to be a sufficient "special reason" to justify a variance, as a matter of law.[12] The court did not hold that a need for public housing was sufficient as a matter of *fact,* in terms of this case and its particular facts alone; it held that a need for public housing was sufficient as a matter of *law.* An identified "social goal" has thus been defined as legally sufficient to satisfy the terms of the statute; a "social goal" is a "special reason." In other states, an applicant for a variance must show hardship to himself which has occurred because of the zoning ordinance;[13] nowhere are specific criteria held as a matter of law sufficient to constitute hardship so as to allow the variance.

On reading the opinion in *DeSimone,* one is struck by the characterization of the arguments of the plaintiffs as "frivolous"[14] and "harassment."[15] Although courts will often make the position and arguments of the non-prevailing party appear naive and ill-founded, they do not very often characterize them as harshly as they did here. This characterization seems to indicate the court's concern for New Jersey's housing problems and its dislike of objections to the housing project.

The *DeSimone* court did not emphasize the fact that the Englewood project involved relocation housing, perhaps because that aspect of the project was not questioned. However, the findings of the trial

10. *Id.* at 248-49, 152 A.2d at 583.
11. *See, e.g.,* Kunzler v. Hoffman, 48 N.J. 277, 225 A.2d 321 (1966); Mullin v. Zoning Bd. of Adjustment, 85 N.J. Super. 180, 204 A.2d 225 (App. Div. 1964); Miller v. Board of Adjustment, 67 N.J. Super. 460, 171 A.2d 8 (App. Div. 1961).
12. 56 N.J. at 442, 267 A.2d at 38.
13. *See* note 6 *supra.*
14. 56 N.J. at 439, 267 A.2d at 36.
15. *Id.* at 444, 267 A.2d at 39.

court and the board of adjustment showed that without this relocation housing in the second ward, the city would not be able to clear and rehabilitate its fourth ward ghetto.[16] In view of this fact finding and the court's broad holding, the relocation argument becomes critical: without relocation housing, there would be no housing project for Englewood because the city could not clear and rehabilitate its fourth ward ghetto without providing housing for persons displaced by the project. The facts of the Englewood situation[17] thus lend themselves very well to the court's broad holding.

DeSimone is, moreover, a departure from a 1945 New Jersey Supreme Court decision, *Potts v. Board of Adjustment,*[18] which might be construed as authority against the court's decision in *DeSimone. Potts* held, *inter alia,* that need for public housing was not sufficient to allow a variance to be granted, although the plaintiff had alleged a "need" for public housing.[19] However, *Potts* can be distinguished from *DeSimone* because the plaintiff in *Potts* requested a variance permitting a single-family dwelling; there was no large-scale public housing project involved. The cases are also distinguishable because the statute involved in *Potts* is a different, although similar, part of the statute on which *DeSimone* is based;[20] it allows variances to be granted for "special exceptions." In addition, the broad holding was not necessary to the decision in *Potts. DeSimone* does not mention *Potts,* although plaintiffs in *DeSimone* cited *Potts* in their brief and attempted to get the court to apply that holding to the facts here.[21]

In analyzing *DeSimone* one should consider *Bern v. Borough of Fair Lawn,*[22] which dealt with the location of car-washing stations in an

16. Brief for Defendant-Respondent Greater Englewood Housing Corporation at 5, DeSimone v. Greater Englewood Housing Corporation, 56 N.J. 428, 267 A.2d 31 (1970).

17. 56 N.J. at 435, 267 A.2d at 37.

18. 133 N.J.L. 230, 43 A.2d 850 (App. Div. 1945). Two other jurisdictions, in cases decided about the same time, agreed with *Potts*: Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P.2d 542 (1946); County Comm'r v. Ward, 186 Md. 330, 46 A.2d 684 (1945).

19. 133 N.J.L. at 234-35, 43 A.2d at 855.

20. N.J. STAT. ANN. § 40:55-39(b) (Supp. 1971):

> b. Hear and decide, in accordance with the provisions of any such ordinance, requests for special exceptions or for interpretation of the map or for decisions upon other special questions upon which such board is authorized by any such ordinance to pass.

21. Brief for Plaintiff-Appellant at 7, DeSimone v. Greater Englewood Housing Corporation, 56 N.J. 428, 267 A.2d 31 (1970).

22. 65 N.J. Super. 435, 168 A.2d 52 (App. Div. 1960).

area zoned for business uses. The *Bern* court held that it was beyond the competence of the board of adjustment to declare that the car-washing stations had to be located more than 1,000 feet from churches and theatres.[23] The court also held that for a variance to be granted, the "negative criteria" of the statute had to be satisfied:[24]

> 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.[25]

In other words, an applicant for a variance has to show a "special reason," *and* that the variance will not impair the intent and purpose of the zoning ordinance and will not be a detriment to the public good. In *DeSimone,* the plaintiffs argued that the defendants had not satisfied the conditions of city ordinances relating to the zoning plan, that the physical layout of the project site was not particularly conducive to public housing, and that technical details as to utilities had not been resolved in the final plat of the project area;[26] however, these arguments were rejected by the court as harassment.[27] As to the utilities, a recent New York case[28] held that a showing that no adequate sewage facilities were available was sufficient to deny the granting of a variance. From these considerations, and the treatment of plaintiffs' arguments, one may conclude that the New Jersey Supreme Court was extremely concerned with the public policy favoring construction of public housing in areas where needed. In view of the broad holding in *DeSimone,* and the New Jersey "special reasons" statute as interpreted by its courts, one may look for more New Jersey decisions holding specific, factually-based goals sufficient by themselves to justify "special reasons" variances, as public housing was in *DeSimone.*

New Jersey is still alone in its "special reasons" statutory provision, and the New Jersey Supreme Court seems to have taken judicial notice of the need for public housing; this is more than other state courts have done at this point. When findings like those in Engle-

23. *Id.* at 450, 451, 168 A.2d at 61, 62.

24. *Id.* at 447, 168 A.2d at 59.

25. N.J. STAT. ANN. § 40:55-39 (Supp. 1971).

26. Brief for Plaintiff-Appellant at 7, DeSimone v. Greater Englewood Housing Corporation, 56 N.J. 428, 267 A.2d 31 (1970).

27. 56 N.J. at 444, 267 A.2d at 39.

28. Carnet Realty, Inc., v. Barnett, 33 App. Div. 2d 772, 307 N.Y.S.2d (1969).

wood are made,[29] the New Jersey Supreme Court will not hesitate to allow housing to proceed despite technical difficulties. The court prefers to resolve cases involving public needs in favor of the proponent authority unless there is clear abuse of discretion by that authority.[30] The power of city boards of adjustment[31] is thus given strong authority when they are backed up by such courts as the New Jersey Supreme Court.

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29. 56 N.J. at 434, 267 A.2d at 37.

30. *E.g.*, Tzeses v. Board of Trustees, 22 N.J. Super. 45, 91 A.2d 588 (App. Div. 1952).

31. *See, e.g.*, Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60, 66.