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Judicial Attitudes Toward Multiple-Family Dwellings: A Reappraisal

free from government intrusion. To hold otherwise is to violate any reasonable interpretation of the sanctions of the fourth amendment.

To argue that an individual, absent temporarily from his home, can without his knowledge or consent, have his constitutional rights vicariously waived by a member of his family is to subjugate an individual's personal constitutional rights to the control of another. Likewise, to base such an argument on the third party's right of possession and control of the premises is to deflect attention from the real issue. The fourth amendment defines an individual's right and only the individual should be allowed to waive it.

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JUDICIAL ATTITUDES TOWARD MULTIPLE-FAMILY DWELLINGS: A REAPPRAISAL

The desire of owners of single-family residences[1] to exclude multiple-family residences from their midst has been a source of continual litigation in the courts.[2] Originally, the courts tended to favor the owners of single-family residences.[3] However, the later cases reveal a

[1]The term "single-family dwelling" is usually defined by the zoning ordinance, which often requires judicial interpretation. *See, e.g.,* Robertson v. Western Baptist Hospital, 267 S.W.2d 395 (Ky. 1954) (residence for about twenty nurses a "one family dwelling" within meaning of ordinance).

[2]There are usually three deviations from zoning ordinances which give rise to litigation: the amendment, the variance, and the special exception.

Amendments to zoning ordinances generally arise in three situations: 1) where existing ordinances have been found inadequate because of conditions which have developed since the original ordinance was passed; 2) where the parcel was originally undeveloped and subsequent development necessitates a zoning change; or 3) where circumstances affecting a relatively small parcel have changed (often claims of spot zoning arise here). *See* 1 RATHKOPF, THE LAW OF ZONING AND PLANNING ch. 27-1 to -42 (1969). The courts usually subject amendments to the same or similar tests used when the validity of new zoning ordinances is questioned. *See* Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).

Variances and special exceptions are both similar in that they are administered by a local board of adjustment. Variances allow a use which is prohibited by the zoning ordinance while special exceptions are uses permitted by the ordinance. *See* RATHKOPF, THE LAW OF ZONING AND PLANNING 54-3 (1969). *Compare* VA. CODE ANN. § 15.1-495 (1964) *with* N.J. STAT. ANN. § 40:55-39 (1967) (statutes governing the granting of variances and special exceptions). In litigation involving variances and special exceptions, the party contesting the validity of the board of adjustment's actions must establish that the board acted "capriciously" and "arbitrarily." *See* Koch v. City of Toledo, 37 F.2d 336 (6th Cir. 1930); Cameo Park Homes, Inc. v. Planning and Zoning Commission of Stratford, 150 Conn. 672, 192 A.2d 886 (1963).

[3]*See, e.g.,* Koch v. City of Toledo, 37 F.2d 336 (6th Cir. 1930); DeLano v. City of Tulsa, 26 F.2d 640 (8th Cir. 1928), *cert. denied,* 278 U.S. 654 (1929); Donovan v. City of Santa Monica, 88 Cal. App. 2d 386, 199 P.2d 51 (Dist. Ct. App. 1948);

trend toward a balancing of opposing interests in the courts.[4] The recent case of *DeSimone v. Greater Englewood Housing Corp. No. 1*[5] adds a new facet to this developing trend.

In *DeSimone* the defendant, Greater Englewood Housing Corp. No. 1 (hereinafter referred to as GEHC), was incorporated under a New Jersey statute[6] that recognized the existence of substandard housing as detrimental to the public welfare.[7] The purpose of GEHC was to "aid in clearance and reconstruction of blighted areas in the predominantly black Fourth Ward of the city . . . ."[8] In order to comply with federal regulations, it was necessary for GEHC to construct relocation housing outside the predominantly black area.[9] The site selected was a tract located in a predominantly white single-family residence zone.[10] Several residents protested the planned construction.

GEHC applied for a zoning variance under an unusual New Jersey statute which permits variances for "special reasons" in "particular cases".[11] The variance was recommended by the Board of Adjustment

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City of Bismarck v. Hughes, 53 N.D. 838, 208 N.W. 711 (1926); Kindergan v. Borough of River Edge, 137 N.J.L. 296, 59 A.2d 857 (1948); Cahn v. Guion, 27 Ohio App. 147, 160 N.E. 868 (1927); *cf.* In re Jennings' Estate, 330 Pa. 154, 198 A. 621 (1938) (fraternity house excluded from single-family residence zone).

[4]City of Phoenix v. Burke, 9 Ariz. App. 395, 452 P.2d 722 (1969); Marta v. Sullivan, 256 A.2d 736 (Del. 1969); Metropolitan Dade County v. Pierce, 236 So. 2d 202 (Fla. 1970); Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1962); Marcus v. Montgomery County Council, 235 Md. 535, 201 A.2d 777 (1964); Pederson v. Township of Harrison, 21 Mich. App. 535, 175 N.W.2d 817 (1970); Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969); Methodist Home for Aged Fund v. Lawson, 61 Misc. 2d 184, 305 N.Y.S.2d 192 (1969); Appeal of Kit-Mar Builders, Inc., — Pa. —, 268 A.2d 765 (1970).

[5]56 N.J. 428, 267 A.2d 31 (1970) [hereinafter referred to as *DeSimone*].

[6]N.J. STAT. ANN. § 55:16-1 *et seq.* (1967). The pertinent statute reads in part:

> It is hereby declared that there is a severe housing shortage in the State; that there are places in many municipalities of the State where dwellings lack proper sanitary facilities and are in need of major repairs or unfit for residential use; that these conditions are detrimental to the health, safety, morals welfare and reasonable comfort of the people of the State....

N.J. STAT. ANN. § 55:16-2 (1967).

[7]*DeSimone*, 267 A.2d at 33.

[8]*Id.*

[9]267 A.2d at 33. The opinion did not specify which federal regulation compelled GEHC to construct relocation housing outside the racially impacted area.

[10]*Id.*

[11]The pertinent subsection of this statute reads in part:

> [The board of adjustment shall have the power to] [r]ecommend 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. Where-

and granted by the governing body of the city.[12] Several residents of the Second Ward attacked in Superior Court the validity of the actions of the legislative and administrative bodies of the city. The court entered judgment for the defendant, GEHC. The case was appealed to the New Jersey Supreme Court which affirmed the decision of the lower court.[13]

In affirming the lower court decision the supreme court noted the purpose of GEHC, which it gleaned from the incorporation statute,[14] the conclusions of the Board of Adjustment and the findings of the city council.[15] The court surmised that the purpose of constructing the relocation housing was to alleviate over-crowded, unsafe and unsanitary housing and that such a purpose was consonant with promo-

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upon the governing body or board of public works may, by resolution, approve or disapprove such recommendation.

N.J. STAT. ANN. § 40:55-39(d) (Supp. 1970-71). For a brief discussion of the statute see R. ANDERSON, AMERICAN LAW OF ZONING § 14.15 (1968).

Most other variance statutes require the applicant for the change to establish an undue hardship to him because of the present zoning ordinance. *E.g.*, ALA. CODE tit. 37, § 781 (Supp. 1969); ALASKA STAT. § 29.10.234(3) (1962); ARIZ. REV. STAT. ANN. §§ 9-465(C)(3), 11-807(B)(2) (1956); ARK. STAT. ANN. § 19-2829(2) (1968); CAL. GOV'T. CODE § 65906 (West 1966); COLO. REV. STAT. ANN. §§ 106-2-17(2)(c), 139-60-7(4) (1963); CONN. GEN. STAT. ANN. § 8-6(3) (1958); DEL. CODE ANN. tit. 22, § 327(a)(3), tit. 9, § 2617(3) (1953); FLA. STAT. ANN. § 176.14(3) (1966); GA. CODE ANN. §§ 69-824(2), -1211(3) (1967); ILL. ANN. STAT. ch. 24, § 11-13-4 (Smith-Hurd 1962); ch. 34, § 3154 (Smith-Hurd Supp. 1970); IND. ANN. STAT. § 53-778(4) (1960); IOWA CODE ANN. §§ 358 A. 15(3), 414.12(3) (1949); KAN. STAT. ANN. § 19-2934(b) (1964); LA. REV. STAT. § 33.140.32(3) (Supp. 1970); ME. REV. STAT. ANN. tit. 30 § 4954(2)(A) (1964); MD. ANN. CODE art. 66B, §§ 7(g)(3), 22(g)(3) (1957); MASS. ANN. LAWS ch. 40A, § 15(3) (1966); MICH. STAT. ANN. §§ 5.2935, 5.2961(23), 5.2963(23) (1969); MINN. STAT. ANN. §§ 396.10 (1968), 462.22 (1963); MO. ANN. STAT. §§ 64.120(1)(3), 64.281(1)(3), 64.660(1)(3) (1966); § 89.090(1)(3) (1952); MONT. REV. CODES ANN. §§ 11-2707(5) (1968); 16-4103 (1967); NEB. REV. STAT. § 14-411 (1962), § 19.910(3) (Supp. 1969); NEV. REV. STAT. § 278.300(1)(c) (1967); N.H. REV. STAT. ANN. § 31:72 (III) (1955); N.J. STAT. ANN. § 40:55-39(d) (Supp. 1970-71); N.Y. TOWN LAW § 267(5) (McKinney Supp. 1970-71); N.Y. GEN. CITY LAW § 81(4) (McKinney 1968); N.C. GEN. STAT. §§ 153-266.17, 160-178 (Supp. 1969); N.D. CENT. CODE § 11-33-11 (1960); N.D. CENT. CODE § 40-47-09 (1968); OHIO REV. CODE ANN. §§ 519.14(B), 303.14(B) (1964); OKLA. STAT. ANN. tit. 11, § 407(3) (Supp. 1970-71); tit. 19 § 865 (1962); PA. STAT. ANN. tit. 53, §§ 14759, 25057, 67007 (1957); tit. 53, § 10912 (Supp. 1970); R.I. GEN. LAWS ANN. § 45-24-19(c) (1956); S.C. CODE ANN. §§ 14-375(2), 47-1009(3) (1962); S.D. CODE § 11-4-17(3) (1967); TENN. CODE ANN. §§ 13-707(3), 13-409(3) (1955); TEX. REV. CIV. STAT. art. 1011g(3) (1963); UTAH CODE ANN. §§ 10-9-12(3), 17-27-16(3) (1962); VA. CODE ANN. § 15.1-495(b) (1964); WASH. REV. CODE § 36.70.810(2) (1963); W.VA. CODE ANN. § 8-24-55(4) (1969); WIS. STAT. ANN. §§ 59.99(7)(c), 62.23(7)(e)(7) (1957); WYO. STAT. ANN. § 18-288(c) (1957); § 15.1-89(e)(3) (1965). Hawaii, Idaho, Kentucky, Mississippi, and Oregon either do not sanction use variances or relegate the standards for granting them to the local governments.

[12] *DeSimone*, 267 A.2d at 33.

[13] 267 A.2d at 41.

[14] N.J. STAT. ANN. § 55:16-1 *et seq.* (1967).

[15] 267 A.2d at 37-38.

tion of health, morals and general welfare of the public.[16] Inasmuch as the promotion of health, morals and general welfare is defined by statute to be within the "special reasons" required by the pertinent variance statute,[17] the court concluded that the purpose of GEHC satisfied the "special reasons" requirement.

The statute under which GEHC applied for its variance also had a negative criterion that "[n]o relief may be granted . . . 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 . . . ."[18] Relying primarily on the minimal detriment to the adjacent land owners, the court concluded that this criterion had been satisfied.[19]

The novelty of *DeSimone* becomes more apparent when the case is viewed in the context of the trend developing in recent cases.[20] This trend is not readily discernible until the later cases[21] are viewed against the background of earlier judicial antipathy toward multiple-family dwellings.[22]

The courts' first wide-spread experiences with multiple-family dwellings were during the mid-nineteenth century.[23] These experiences often involved the violation of fire and health regulations by tenement owners.[24] It has been suggested that the judiciary developed a

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[16]267 A.2d at 38.

[17]267 A.2d at 37, citing N.J. STAT. ANN. § 40:55-32 (1967).

[18]N.J. STAT. ANN. § 40:55-39 (1967).

[19]267 A.2d at 35-36.

[20]Note 4 *supra.*

[21]*Id.*

[22]Note 3 *supra.*

[23]*E.g.*, Miller v. Benton, 55 Conn. 529, 13 A. 678 (1887); Commonwealth v. Quinlan, 153 Mass. 483, 27 N.E. 8 (1891); Commonwealth v. Cogan, 107 Mass. (11 Browne) 212 (1871); Commonwealth v. Welch, 84 Mass. (2 Allen) 510 (1861); Rose v. King, 49 Ohio St. 213, 30 N.E. 267 (1892); Singer v. City of Philadelphia, 112 Pa. 410, 4 A. 28 (1886).

[24]Borough of Stamford v. Studwell, 60 Conn. 85, 21 A. 101 (1891) (building repaired after fire did not constitute a new building or addition and thus was not required to comply with fire ordinance); Fire Dep't of City of New York v. Chapman, 10 Daly 377 (Sup. Ct. 1882) (failure to install fire escape); Langdon v. Fire Dep't of City of New York, 17 Wend. 234 (1837) (violation of ordinance requiring fire wall); Rose v. King, 49 Ohio St. 213, 30 N.E. 267 (1892) (tenant allowed to recover from landlord for injuries resulting from lack of fire escape which was required by law); Singer v. City of Philadelphia, 112 Pa. 410, 4 A. 28 (1866) (insufficient yard space as required by ordinance); Brice's Appeal, 89 Pa. 85 (1879) (insufficient open space attached to building as required by ordinance).

In addition, early proceedings involving multiple-family dwellings often involved conditions adverse to public morals. Commonwealth v. Welch, 84 Mass. (2 Allen) 510 (1861) (liquor sold illegally in tenement), *see* People v. Hulett, 61 Hun. 620, 15 N.Y.S. 630 (Sup. Ct. 1891) (maintenance of prostitution and other forms of vice in bawdy house).

distaste for multiple-family dwellings as a result of their experiences during this period.[25] This distaste carried over into the twentieth century.[26] During the early part of the twentieth century judicial opposition to multiple-family dwellings in single-family dwelling areas was common[27] but by no means unanimous.[28]

Village of Euclid v. Ambler Realty Company[29] declared comprehensive zoning plans constitutional if such were based on a valid exercise of the police power. *Euclid* eliminated many earlier constitutional objections[30] to exclusion of multiple-family dwellings from single-family dwelling areas by means of zoning. The often quoted[31] *Euclid* opinion provided, by way of dictum, new ammunition for those determined to exclude multiple-family dwellings from single-family residence areas. The opinion embraced the concept that apartments were parasitic in nature,[32] which some later cases adopted.[33] The cases,

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[25]Babcock and Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1041-44 (1963).

[26]*See* Kitching v. Brown, 180 N.Y. 414, 73 N.E. 241 (1905); *see also* State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910).

[27]Note 3 *supra*. Other forms of exclusion were also achieved by municipal ordinances. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brick making prohibited within designated area); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (livery stables prohibited within designated area).

[28]There were several chinks in the judicial armor protecting single-family residence areas. Some cases voided restrictions on multiple-family dwellings on the basis of invalid exercise of the police power. *See* Calvo v. City of New Orleans, 136 La. 480, 67 So. 338 (1915); Fitzhugh v. City of Jackson, 132 Miss. 585, 97 So. 190 (1923); State v. McKelvey, 301 Mo. 1, 256 S.W. 474 (1923). Other cases held that zoning restrictions were invalid because of constitutional objections. *See, e.g.*, State *ex rel.* Lachtman v. Houghton, 134 Minn. 226, 158 N.W. 1017 (1916). Other cases held that zoning should only prohibit a landowner from injuring others. *See* Willison v. Cooke, 54 Colo. 320, 130 P. 828 (1913); People *ex rel.* Friend v. City of Chicago, 261 Ill. 16, 103 N.E. 609 (1913).

[29]272 U.S. 365 (1926).

[30]*See, e.g.*, State *ex rel.* Lachtman v. Houghton, 134 Minn. 226, 158 N.W. 1017 (1916).

[31]"Practically every zoning brief can be improved by including a quotation from ... *Euclid v. Ambler Realty Co.*, 272 U.S. 364 ... because this case is widely recognized as fundamental to zoning law." C. CRAWFORD, STRATEGY AND TACTICS IN MUNICIPAL ZONING 137 (1969).

[32]The Supreme Court in *Village of Euclid v. Ambler Realty Company* states as follows:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free cir-

however, were careful to elaborate police power arguments so as to comply with the constitutional requirements established in *Euclid*.[34]

The years after World War II saw a large expansion in apartment construction[35] and continued opposition to multiple-family dwellings by owners of single-family residences.[36] The early post-war cases, prior to the mid-nineteen sixties, generally reflect this continued opposition to multiple-family dwellings.[37]

The courts continued to substantiate their decisions with police power arguments.[38] Typical of the early post-war cases was *Ralph Peck Holding Corp. v. Burns*[39] which relied on the problems resulting from the undue concentration of population which an apartment would

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> culation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until finally, the residential character of the neighborhood and its desirability of detached residence are utterly destroyed.

272 U.S. at 394.

[33]*See, e.g.*, Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958).

[34]Note 3 *supra*.

[35]In 1960 there were 1.3 million housing structures started. Of these, 1 million were one unit structures and 237 thousand were three or more unit structures. In 1969 an estimated 1.5 million housing structures were started. Of these, 811 thousand were single unit structures and 640 thousand were structures with three or more units. BUREAU OF THE CENSUS, DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1970). *See generally*, G. NEUTZE, THE SUBURBAN APARTMENT BOOM (1968).

[36]A discussion of the post-war apartment boom suggested several reasons, or rationalizations, used by owners of single-family dwellings in attempting to exclude multiple-family dwellings from their midst. Among these were that apartments create a tax burden on owners of single-family residences; apartments cut off air and light, apartments will be tomorrow's slums; apartments destroy the character of the community; apartments reduce existing property values. It has also been suggested that the real motivating force behind exclusion of multiple-family dwellings has been a desire to exclude minority groups or lower classes. Babcock and Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1062 (1963). For a short discussion of "snob zoning" see R. ANDERSON, AMERICAN LAW OF ZONING § 7.29 (1968).

[37]*E.g.*, Tucker v. City of Atlanta, 211 Ga. 157, 84 S.E.2d 362 (1954); Gregory v. City of Wheaton, 23 Ill. 2d 402, 178 N.E.2d 358 (1961); Shadynook Improvement Ass'n, Inc. v. Molloy, 232 Md. 265, 192 A.2d 502 (1963); Cohen v. City of Lynn, 333 Mass. 699, 132 N.E.2d 664 (1956); Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958); Kindergan v. Borough of River Edge, 137 N.J.L. 296, 59 A.2d 857 (1948); Ralph Peck Holding Corp. v. Burns, 16 Misc. 2d 256, 181 N.Y.S.2d 737 (1958); Andress v. City of Philadelphia, 410 Pa. 77, 188 A.2d 709 (1963).

[38]*Id.*

[39]16 Misc. 2d 256, 181 N.Y.S.2d 737 (1958).

cause.[40] The court noted that among these problems were lack of recreational facilities,[41] great distances from public transportation,[42] and inadequate parking facilities.[43] Other cases in this period before the mid-nineteen sixties employed such problems as the deleterious effect of apartments[44] and traffic congestion[45] in substantiating exclusion of multiple-family dwellings from single-family residence areas.

While the early post-war cases generally reflect the desire of single-family residence owners to exclude multiple-family dwellings from their midst, there were indications of the new trend to come.[46] Some cases during this period held that the lack of adverse effect to neighboring residents is conducive, but not determinative, to allowing changes for the construction of multiple-family dwellings.[47] Similarly, where a multiple-family dwelling had existed for several years as an illegal non-conforming use and there was no apparent decrease in neighboring property values, a court declared the dwelling to be a legal non-conforming use.[48] These cases[49] indicate a willingness by the courts involved to depart from a mechanical exclusion of multiple-family dwellings from single-family residence areas when a police power objection to the multiple-family dwelling exists.

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[40]181 N.Y.S.2d at 738.

[41]*Id.*

[42]181 N.Y.S.2d at 739.

[43]*Id.*

[44]Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958).

[45]Cameo Park Homes, Inc. v. Town of Stratford, 150 Conn. 672, 192 A.2d 886 (1963). *But see* Glen Rock Realty Co. v. Borough of Glen Rock, 80 N.J. Super. 79, 192 A.2d 865, 869 (1963) (dictum) (mere increase in traffic that does not exceed hazardous level insufficient reason to deny zoning change).

[46]Cases cited note 47 *infra*. In 1963 it was noted:

> [I]n recent months a few small clouds have appeared on the zoning horizon which may forecast more serious judicial scrutiny of traditional attitudes toward multiple-family development.

Babcock and Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1086 (1963).

[47]Pringle v. City of Chicago, 404 Ill. 473, 89 N.E.2d 365 (1949); *cf.* Quilici v Village of Mount Prospect, 399 Ill. 418, 78 N.E.2d 240 (1948); Metropolitan Life Ins. Co. v. City of Chicago, 402 Ill. 581, 84 N.E.2d 825 (1949).

[48]Westfield v. City of Chicago, 26 Ill. 2d 526, 187 N.E.2d 208 (1963). The plaintiff had operated the multiple-family dwelling as an illegal nonconforming use for several years before she was required to restore the premises to single-family use by city authorities. Plaintiff sought a declaratory judgment to have her property declared a legal nonconforming use. In granting judgment for the plaintiff, the court relied on the economic detriment to the plaintiff if required to restore the premises to a single-family use and on the apparent lack of decrease of neighboring property values during the years the premises was operated as a multiple-family residence. The court equated the lack of decrease of neighboring property values with a lack of detriment to the public.

[49]Notes 47 and 28 *supra*.

The presently developing trend, however, first appearing in the mid-nineteen sixties, is characterized by a judicial balancing of the competing interests of the parties involved in the litigation.[50] In order to achieve a balancing of interests, some courts have found it necessary to allow themselves greater latitude in which to operate within the police power framework.[51] In *Pederson v. Township of Harrison*[52] the court held the police power objections to a proposed multiple-family dwelling were anticipatory in nature and did not bear the necessary real and substantial relationship to public health, safety, morals or general welfare.[53] The courts have also held that communities have other powers besides zoning with which to solve police power problems.[54] By insuring that police power objections are real, and not merely possible,[55] and by forcing communities to use alternate means to solve their police power problems,[56] the courts have allowed themselves greater latitude in which to balance the interests of the parties to the litigation.

There are three usually distinct parties, whose interests are considered by the courts: the proponent of the multiple-family dwelling, the opponent of the multiple-family dwelling, and the general public. In *City of Phoenix v. Burke*[57] the court adopted the trial court's findings of fact that: the value of the property would increase if the proposed apartments were constructed; many nearby parcels were actually used for multiple-family and commericial uses; a city water filtration plant was near the property in question; the property fronted on a

[50]Note 4 *supra*. There are, of course, many cases which uphold exclusion of multiple-family residences from single-family residence zones. *See* Chatham Corp. v. Beltram, 252 Md. 578, 251 A.2d 1 (1969); Style-Rite Homes, Inc. v. Town of Chili, 54 Misc. 2d 866, 283 N.Y.S.2d 623 (1967); O'Neill v. Philadelphia County, 434 Pa. 331, 254 A.2d 912 (1969); Barbone v. City of Warwick, 264 A.2d 921 (R.I. 1970); *see also* Carlson v. City of Bellevue, 73 Wash. 2d 41, 435 P.2d 957 (1968) (service station not permitted in single-family residence zone).

[51]Pederson v. Township of Harrison, 21 Mich. App. 535, 175 N.W.2d 817 (1970); Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969); Appeal of Kit-Mar Builders, Inc., — Pa. —, 268 A.2d 765 (1970).

[52]21 Mich. App. 535, 175 N.W.2d 817 (1970).

[53]175 N.W.2d at 819.

[54]Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969); Appeal of Kit-Mar Builders, Inc., — Pa. —, 268 A.2d 765 (1970).

[55]Pederson v. Township of Harrison, 21 Mich. App. 535, 175 N.W.2d 817 (1970).

[56]Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969); Appeal of Kit-Mar Builders, Inc. — Pa. —, 268 A.2d 765 (1970).

[57]9 Ariz. App. 535, 452 P.2d 722 (1969).

major collector street; and there was no opposition to the requested zoning by the adjacent property owners.[58] Here the competing interests were those of the proponent of the project and the general public. The proponent's interests were largely economic: the increased value of the property if the zoning were changed and the inability of the proponent to obtain a mortgage under the present zoning restrictions.[59] The city's objection was based on its contention that the present zoning afforded a reasonable use of the property and that the zoning ordinance provided for adequate multiple-family potential in other areas.[60] The court stated that while none of the proponent's contentions alone would be sufficient to cause the present zoning to be deemed unreasonable, an aggregate of indicia approach permitted the Arizona appellate court to sustain the lower court's finding that the zoning restriction was unreasonable.[61] Hence, the interests of the proponent outweighed the minimal objections presented by the city representing the general public.

Westwood Forest Estates, Inc. v. Village of South Nyack[62] is similar to *City of Phoenix v. Burke*[63] in that the interests of the proponent of an apartment project were weighed against the interests of the general public. In *Westwood Forest* the township objected to a proposed apartment building on the grounds that the sewage from the apartment would pollute the Hudson River. The pollution was due to an inadequate treatment plant. The court ruled in favor of the apartment project stating that since all members of the community contributed to the pollution, it would be unfair to make the proponent bear the burden alone by not granting him a zoning change. The court further reasoned that the township could use alternate means to solve the pollution problem.[64] Thus, although the interests of the public were strong, the existence of alternate solutions established the proponent's interest as the prime consideration.

In *Methodist Home for the Aged Fund v. Lawson*[65] the plaintiff wanted to expand a privately owned nursing home by adding two more floors to the already existing two-floor structure. The court noted the mixed zoning character of the neighborhood. In arriving at its decision,

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[58]452 P.2d at 725.
[59]*Id.*
[60]*Id.* at 723.
[61]*Id.* at 725.
[62]23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969).
[63]9 Ariz. App. 535, 452 P.2d 722 (1969).
[64]297 N.Y.S.2d at 133.
[65]61 Misc. 2d 184, 305 N.Y.S.2d 192 (1969).

the court reasoned tha tany detriment to the neighbors would be minimal in light of the benefit which would accrue to the public by allowing the zoning change.[66] The court, however, found it necessary to establish that an economic hardship would result to the proponent if the change were denied.[67] Here there was a balancing of interests between the proponent and the opponent of the addition. In allowing the zoning change it is clear that the court felt that the proponent's interests outweighed those of the opponent. The case is unusual in that the public interests were in accord with those of the proponent's; however, the proponent's interests proved to be crucial.[68]

In all of the above cases where a zoning change was allowed it was the proponent's interest which proved to be controlling. In *DeSimone* a zoning change was allowed where the public's interest was deemed to be controlling. By establishing the public's interest as a reason for allowing construction of multiple-family dwellings in restricted zones, *DeSimone* adds a new facet to the developing trend.

The impact of *DeSimone* has both practical and abstract aspects. Its practical aspect is its relevance to the zoning problems involved in urban renewal and public housing projects.[69] If the developer of the project is able to rely solely on the public benefit of the project in obtaining zoning changes, it follows that under *DeSimone* zoning ordinances will be less of a restriction on such projects. If, however, the developer is required to rely on his own interests in dealing with zoning problems, he subjects himself to the usual pitfalls of zoning litigation.[70]

The impact of *DeSimone* on urban renewal and public housing zoning problems may be limited because of the uniqueness of the statute under which the litigation was fought. However, the abstract

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[66]305 N.Y.S.2d at 196.

[67]*Id.*

[68]*Id.*

[69]Urban renewal has generally been regarded as within the police power of the state. Berman v. Parker, 348 U.S. 26 (1954); *see also* Sabaugh v. City of Dearborn, 16 Mich. App. 182, 167 N.W.2d 826 (1969) (city had authority to purchase apartments in Florida to house its senior citizens). Urban renewal projects must conform with the master plan of the community. Romeo v. Cranston Redevelopment Agency, 254 A.2d 426 (R.I. 1969); *cf.* United Oil Company, Inc. v. City of Stratford, 158 Conn. 364, 260 A.2d 596 (1969); Jacobs v. City of New York, 54 Misc. 2d 46, 281 N.Y.S.2d 867 (1966).

[70]In *O'Niell v. Philadelphia County*, 434 Pa. 331, 254 A.2d 12 (1969), the proponent wanted to increase the number of stories of his already existing apartment house. Even though he was able to establish an economic detriment, the zoning change was denied. *Compare O'Niell with* Methodist Home for the Aged Fund v. Lawson, 61 Misc. 2d 184, 305 N.Y.S.2d 192 (1969).