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No Short Cuts for Zoning Boards

Land use boards that fail to adhere to the rules face judicial reversal

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Serving on a Planning Board or Zoning Board is certainly an honorable and respectable thing to do. It takes many hours to fill these important responsibilities. And for good reason, courts are likely to defer to the decisions of these boards.

It has historically been recognized that those who serve on boards and live in the communities where the projects will be developed are in a unique position to make decisions about whether site plan applications or subdivision applications, or the like, should be approved. For this reason, it is only when these agencies act in an arbitrary, capricious or unreasonable manner that they are likely to find themselves at the losing end of an appeal filed in the Superior Court.

Perhaps it is because of this longstanding, and likely appropriate deference, that some recent decisions, both at the trial and appellate levels, have sought to reverse land use boards on the basis that their findings were without, in certain cases, factual, and in other cases, legal, merit. Perhaps the courts are commenting that land use boards might be best served by taking a more careful look at the manner in which they approach some of the more controversial kinds of cases that they are forced to confront in our modern society in which a plethora of environmental regulations and numerous other restrictions complicate the land use landscape.

Take for example the *House of Fire Christian Church v. Zoning Board of Adjustment of the City of Clifton* decision, which was decided by the Appellate Division in August 2005. A church had sought judicial review of a Zoning Board of Adjustment decision to deny its application for a conditional use permit to construct a church in a residential neighborhood. The trial court had held that the city violated the Religious Land Use and Institutional Persons Act, also known as RLUIPA. On appeal, the court reversed in part and affirmed in part, and found that a determination of the RLUIPA claim was not yet ripe for adjudication.

In 2001, the church purchased a piece of property located within a single family residential zone that permits a house of worship of a conditional use. The church applied to the Zoning Board for a variance so it could demolish an existing single family residence and construct a new church in its place. Five separate days of hearing were held between January and October 2002 and ultimately the Zoning Board denied the church's application. The church had proposed a two-story building with a total area of 4,992 square feet. This included a sanctuary on the main level with 70 seats to accommodate the congregation as well as room for growth. Sunday school and a fellowship hall were also included in the plans.

The church sought variance relief from the minimum lot size and the minimum lot width. The ordinance required 20,000 square feet as a minimum lot size and 100 square feet for lot width. The church had a minimum lot size of 17,325 square feet and the lot was 70 feet wide. In short, the request sought was fairly unexceptional, the type frequently granted by land use boards.

After the second board hearing, two events occurred that affected the application. Initially, the city planner increased the number of required parking spaces from 18 to 35. The basis for this was a determination that the Sunday school fellowship hall required more spaces than originally anticipated.

In addition, on May 7, 2002, the city adopted an amendment to a municipal ordinance that changed the minimum

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rear setback requirement for houses of worship from 10 feet to 35 feet.

The balance of the hearings focused on these newly created deficiencies. Ultimately, the zoning board on appeal denied the application. This resulted in a lawsuit being filed in the law division.

To obtain a conditional use variance, an applicant has the burden of showing both positive and negative criteria. Generally, to satisfy the positive criteria the applicant must establish special reasons, specifically that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use. Satisfaction of the negative criteria requires that, in addition to proving that the variance can be granted without substantial detriment to the public good, an applicant must demonstrate with an enhanced quality of proof that the variance sought is not inconsistent with the intent and purpose of the master plan and the zoning ordinance.

However, when the proposed use is inherently beneficial, then the applicant's burden is reduced. A balance of the positive and negative criteria is required. In this case, all of the parties agreed that construction of the church is an inherently beneficial use of the land.

New Jersey courts have also ruled the following procedure is appropriate when balancing the positive and negative criteria. First, the board should identify the public interest at stake. Second, the board should identify the detrimental effect that will ensue from the granting of the variance. Third, in certain situations, the board may reduce the detrimental effect by imposing reasonable conditions on use. And finally, the board should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

During the hearing, the church's planning expert testified as to the positive and negative criteria. She generally stated that the issuance of the variance will not result in the substantial detriment to the public good. The proposed use is highly compatible with the existing and surrounding uses.

She added that the granting of the variance will not result in substantial impact on the adjoining residential neighborhood. She testified that houses of worship are compatible with residential neighborhoods. And she noted that this is the case in the Clifton municipal ordinance which provides that houses of worship are permitted in residential zones.

The planner concluded that the proposed use is inherently beneficial, there will be no detrimental effects from the granting of the variance and any minor impacts can be reduced or eliminated through the imposition of reasonable conditions, such as redesigning the driveway location and implementing other minor restrictions.

The objectors also retained an expert who concluded that the surrounding properties would be adversely affected by the overwhelming physical presence of the facility on a small site. Of great concern was the church's noncompliance with the newly adopted 35-foot rear setback requirements. The expert testified that rear yard areas are universally intended to provide for light, air and open space, and areas for quiet passive recreation and that this would be infringed upon by the failure to meet the 35-foot setback requirement. He also testified about problems concerning the topography of the land, safety and traffic congestion. He concluded that the church's undersized lot could not appropriately accommodate the proposed structure.

The Appellate Court observed that it was not clear from the resolution or from its limited discussion before voting to deny the application, whether in fact the zoning board engaged in the appropriate balancing of the positive and negative criteria for inherently beneficial uses, especially with respect to considering whether reasonable conditions could be imposed on the proposed use of land. The court observed that the key to sound municipal decision making is a clear statement of reasons for the granting or denial of a variance. Indeed, the trial court found that it was not at all clear whether the board was considering the conditional use application, the site plan or both.

While the Appellate Court agreed that the plaintiff is entitled to a new hearing, it did not agree that the amended ordinance, with regard to the setback requirements, was invalid or void. The court observed that zoning ordinances are presumptively valid and that that presumption may only be overcome by sufficient proof that the decision was arbitrary, capricious or unreasonable.

The court observed that a municipality may change a zoning ordinance during the pendancy of the site plan application. "This is so even if the ordinance is amended in direct response to a particular application."

The Appellate Court held that it was convinced that the trial court erred by shifting the burden of persuasion to the city as to the RLUIPA issue. The Appellate Division held that there had been no demonstration of a substantial burden, and thus the Trial Court's determination as to RLUIPA had to be reversed.

In *Kostesic v. Town of Guttenburg Joint Planning and Zoning Board*, a case decided in June 2006, a reoccurring question relating to the relationship between a board member and an applicant become pivotal to the case. The applicant had requested certain approvals to develop a project in Guttenburg. The plaintiff came forward with some proof that after the applicant had obtained approval from the land use board, one of the board members had drinks with the applicant at a local restaurant on the same night. The plaintiff claimed that there had been favoritism and sought a reversal of the decision.

The trial court found that there were procedural infirmities in the planning and dismissed the case. On appeal, the court reversed.

The court found that while the local government ethics law does not provide a friendship as a basis for asserting a conflict, it does state that a conflict exists to the extent that a "personal involvement" might reasonably impair a board member's objectivity. In this case, the court concluded that enough evidence existed for the court to hold a hearing to determine the credibility of the parties

involved. On the one hand, the meeting might have been an improper chance encounter for which no relief would be appropriate. On the other hand, the meeting might have been cajoled by the fact that there was a true friendship between the applicant and the board member, such that recusal would have been appropriate. In that case, the court held that a reversal of the board decision would be appropriate.

In addition, the plaintiff had also asserted that the decision of the board should be reversed because the resolution of approval failed to provide a recitation of fact finding. The Appellate Court found that a resolution of approval must provide a recitation of facts and law applicable to the approval.

This is a common issue confronted by land use boards, occasioned by the inevitable fact that in many small towns, many people are friends, including coincidently, applicants and members of land use boards. However, this case is special in that it stands for the proposition that a friendship alone could establish a sufficient lack of objectivity such that reversal is appropriate when the board member failed to recuse him or herself.

Spot zoning is something that objectors frequently allege occurs by governing bodies. But spot zoning challenges are very difficult to sustain. Thus, the case *Riya Finnegan, LLC. v. Township Council of South Brunswick* is all the more unusual. The Law Division decided this case in February 2006. The trial court found that a municipal decision to change a zone from neighborhood commercial to office park which had the effect of preventing an applicant's retail development was spot zoning and was arbitrary, capricious and unreasonable.

The plaintiff had appeared before the planning board in January 2005. The application for development was for a modern pharmacy with a drive-thru window as well as a retail building containing second-story office space. They also proposed a 9,000 square foot office building. The property is located in a C1 zone which would have permitted this use.

The planning board ultimately issued a memorandum to the township council recommending that the property be rezoned from C1 to OP. That change would block the proposed development because the OP zone does not permit retail sales and services, restaurants or packaged goods. Furthermore, the bulk requirements of the zones vary which would have provided yet another impediment for the project. The basis for this recommendation would have included increased traffic, environmental issues, and the need for less intensive use of the area to protect residents that reside within that community.

The plaintiff alleged that the action constituted spot zoning and was arbitrary, capricious and unreasonable.

While the original C1 designation was consistent with the master plan, the new ordinance, which had been adopted by the governing body, specifically the OP ordinance, was inconsistent with the master plan. Under state law, where such an inconsistency occurs, the planning board is required to submit a report to the governing body within 35 days, identifying inconsistencies with the proposed ordinance and the master plan and giving recommendations concerning the inconsistencies. If the board failed to submit the report, the governing body is not bound by the voting requirements of the statute concerning the planning board recommendation addressing the inconsistency.

The court found that the substantive basis upon which the ordinance was adopted was arbitrary and unreasonable. It stated that this conduct can be concluded from a lack of support of its decision in the record. It stated that there was no expert testimony concerning the traffic concerns nor was there expert testimony in support of the ordinance change before the planning board.

Furthermore, no professional planner testified before the planning board of the township council to support the change in the ordinance. There was no testimony with regard to the need or lack thereof for retail outlets.

Furthermore, the court made the unusual determination that the change in zoning of the plaintiff's property amounted to spot zoning. Neither the council nor the planning board offered any evidence — other than lay evidence by objectors — that the zone furthered the comprehensive plan of the township. The master plan did not make any recommendation concerning change in zoning for the plaintiff's property, but rather contained detailed studies supporting the conclusion that the property should be zoned C1.

Then, the court concluded that the record demonstrates that the ordinance was enacted to affect only the use of the plaintiff's property. It was the objecting residents who proposed the zoning change. The township council had no reason to revisit rezoning the property prior to the objections. Indeed, the mayor even acknowledged that the change in zoning left the municipality open to the lawsuit.

On May 22, 2006, the Appellate Court reversed a zoning board decision due to another conflict in the case of *Haggerty v. Red Bank Borough Zoning Board of Adjustment.* The Trial Court had upheld a zoning board decision granting a D variance and other approvals to construct condominiums and townhouses. However, citing an impermissible conflict of interest on the part of the board's chairperson, the decision was reversed.

The acting chairperson's father, a retired judge, served as "of counsel" to the law firm representing the applicant. The trial court found that this status did not provide the acting chairperson with an interest in the application. Furthermore, there was no evidence that the father of the chairperson would gain financially if the approval went forward. There was no evidence demonstrated that there would be nonfinancial gain in the event that the application was granted. Overall, the court found that the circumstances cannot be reasonably interpreted to show that they have the likely capacity to tempt the acting chairperson with regard to her sworn public duty.

In reversing that decision, the court stated that the "governing principles are well known." While no prior decision had addressed the "of counsel" relationship in the context of an alleged conflict of interest, the Appeals Court was satisfied that a

person in an "of counsel" relationship with a law firm has a sufficient stake in the financial liability of the firm to impute to such individual any disqualification of the firm arising from the client representation by partners or associates. The court concluded that without a doubt, the chairperson was an immediate family member to her father, who had an "of counsel" relationship with the attorney for the applicant. The conflict was therefore neither remote nor speculative. In addition, the fact that she is an adult living an independent life does not sever her family ties and thereby eliminate the conflict.

As a result of the fact that the chairperson was an immediate family member of an "of counsel" attorney for the applicant, the court found that the approval had to be reversed due to the failure of that chairperson to recuse herself.

In the case of *Clayton Holding Company v. Board of Adjustment of the Township of Union*, decided in June 2006, the Appeals Court upheld a lower court's determination, reversing a zoning board resolution granting a height variance to construct a billboard along Route 22. The zoning board had accepted the applicant's position that a higher board than permitted would be consistent with the purposes of zoning by reducing clutter. In other words, a billboard that was higher than other billboards would allow motorists to read all of the billboards on the road because the higher one would not cover up the lower ones. Both the trial court and the Appellate Court reversed the resolution of approval finding that there was no basis in the record to support the resolution. The Appellate Court held that the applicant failed to demonstrate that the proposed billboard would not offend the purposes of the height limitation, the other billboard standards contained in the ordinances, or the intent and purpose of the zone plan.

Finally, in *Gagnon v. Mayor and Council of the Borough of Point Pleasant Beach*, the Appeals Court reversed a lower court decision granting a use variance to expand a parking lot in Point Pleasant which would increase the number of cars parked on a nonconforming parcel in a residential zone from 25 to 47 parking spaces. The Appellate Court went over the various tests necessary in order to approve a use variance and it found that many of the requirements had not been satisfied. Specifically, it found that the sole "special reason" identified by the board was that the expanded parking lot would promote a desirable visual environment through creative development techniques and good civil design and arrangement. The Court held that while aesthetic improvement is relied upon as a basis for a variance authorizing expansion of a nonconforming use, the phrase refers to the overall visual compatibility of the use, expansions done on aesthetic considerations are generally only granted when the expansion is "minor."

In this case, the proposed expansion nearly doubled the number of cars that could be parked in this residential zone. Accordingly, the court found that the requested relief was not minor and the board erred in concluding that aesthetic improvement constituted a "special reason" for expansion of the lot.

The applicant also argued that increased parking potential is a "special reason" thereby justifying granting of the variance. However, after review, there was a question by the Appeals Court as to whether the board even considered the additional parking spaces to constitute a "special reason." One of the board members questioned whether the roughly 22, 21, or 20 additional cars are going to make "that much of an impact." Another member indicated that the granting of the variance is a "very small step" in easing the parking problems in this part of the municipality. The more common resolution did not conclude that the providing of the additional spaces constituted a "special reason" justifying the issuance of a use variance.

Furthermore, the board held that the expansion of the lot did not satisfy the negative criteria. Specifically the issuance of the variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purposes of the zone plan and zoning ordinance. The property in question is located in an area with substantial land use restrictions.

The proposed lot is inconsistent with many of those restrictions. Chief among them: that only 35 percent of the lot can be used for the intended purpose, whereby, the proposed parking lot constituted a 100 percent usage.

Again, this decision reminds us that D variances are to be the exception, not the rule. Applications for D variances that are granted without the requisite findings of required criteria are subject to reversal.

In sum, the judicial road, with regard to zoning and planning boards as of late, has been slightly bumpy. If one were to make a blanket statement about these recent decisions, it might be that short cuts cannot be taken. Boards must be mindful of the required conditions upon which various approvals for site plan and variance relief may be granted and resolutions approving these applications must provide complete renditions of both factual and legal findings demonstrating that each required element has been satisfied. Short cuts may ultimately end up in reversals. ■