

STATEMENT OF MATTER INVOLVED

This case concerns a parcel of commercial property located in Hamilton Township, which is surrounded by single family residential development, and is in close proximity to a grammar school. The Respondent, Levin Properties, L.P. (hereinafter referred to as "Levin" or "Plaintiff"), filed an application with the Petitioner Hamilton Township Planning Board (hereinafter "the Planning Board" or "Defendant"), to develop a 201,612 square foot shopping center with 931 parking spaces on the subject property in December 2003.

After two public hearings, attended by numerous local residents and state and local representatives, the Planning Board voted to deny the application for several reasons, including concerns over drainage on the site, traffic ingress and egress, impact on the community, and failure to meet ordinance requirements. On the issue of traffic, in particular, the Planning Board was concerned about the increase of traffic on the surrounding community that would occur from the proposed development. Levin appealed the Planning Board's decision to the Superior Court, where Petitioner Save Hamilton Open Space (hereinafter referred to as "SHOS" or "Intervenor"), intervened in the matter to

support the Planning Board's decision to deny the application. The Honorable Linda R. Feinberg, A.J.S.C., reversed the Planning Board's decision. The judgment was affirmed by the Appellate Division.¹

ERRORS COMPLAINED OF

Certification should be granted because the Appeal "presents a question of general public importance which has not been but should be settled by the Supreme Court." See R. 2:12-4. The question of general public importance is whether local municipal planning boards have the statutory authority to deny proposed applications due to off-site traffic impacts that a proposed development may cause. This issue has been heard in the Appellate Division in dozens of cases, although the primary case cited for this proposition is Dunkin' Donuts of N.J., Inc. v. Township of N. Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984), a more than twenty year old case, with the Appellate Division determining that local municipal planning boards do not have this authority. However, the Supreme Court has not decided this issue. As further explained, granting certification will further the interests of justice by clarifying this important issue

¹ The Appellate Division did reverse the Trial Court's Judgment solely on the Planning Board's denial of a sign variance.

which will have an impact on all local planning board decisions.

QUESTION PRESENTED

1. Do local municipal planning boards have the statutory authority to deny proposed applications due to off-site traffic impacts that a proposed development may cause?

PROCEDURAL HISTORY

Petitioner SHOS hereby adopts the Procedural History contained in the Petitioner Planning Board's Brief. In addition, on or about August 9, 2004, Petitioner SHOS filed a Motion to Intervene in this matter. This Motion was granted without argument on August 27, 2004. Da56.

STATEMENT OF FACTS

Petitioner SHOS hereby adopts the Statement of Facts contained in the Petitioner Planning Board's Brief.

SHOS is a New Jersey not for profit corporation, which consists of Hamilton Township residents and homeowners, many of whom own property located within 200 feet of the proposed project. See Da64. Levin seeks to develop a 201,612 square foot shopping center with 931 parking spaces

on the subject property. See T3 6:11-16.² Levin filed an application with the Board in connection with a preliminary and final site plan approval, variance relief from the setback requirement for a freestanding sign and façade signage, and waiver of checklist item #24 - utility profiles. See Da41. The Planning Board conducted public hearings on March 25, 2004 and May 6, 2004. See T3 4:25-5:1. During the course of the hearing process, members of SHOS attended both hearings and made objections on the record. See Da32-38. Dozens of community members, including local representatives, attended the hearings and objected to the proposed development. See *id.* Many of local residents were concerned about traffic issues. Id. The proposed development was in a largely residential area and many of the individuals who lived adjacent to the development were concerned about the increase of traffic caused by the proposed shopping center. Id. In addition, many expressed traffic safety concerns because an elementary school was located near the proposed development. Id.

² Consistent with the Petitioner Planning Board's Brief, "T1" will represent the transcript of the March 25, 2004 public hearing before the Planning Board; "T2" will represent the transcript of the May 6, 2004 public hearing before the Planning Board; and, "T3" will represent the transcript of the February 18, 2005 oral argument before the Honorable Linda R. Feinberg, A.J.S.C.

Dennis Hudacsko, a professional licensed planner in the State of New Jersey, testified at a planning board hearing on behalf of SHOS. Da37. Mr. Hudacsko also expressed concern regarding the impact the development would have on traffic in the surrounding community. Id.

On June 10, 2004, the Planning Board denied Levin's application for preliminary and final site plan approval, variance relief from the setback requirement for a freestanding sign and façade signage, and waiver of checklist item #24 - utility profiles. See Da41.

LEGAL ARGUMENT AS TO REASONS FOR CERTIFICATION

I. CERTIFICATION SHOULD BE GRANTED IN ORDER TO REVERSE THE APPELLATE DIVISION'S HOLDING THAT LOCAL PLANNING BOARDS DO NOT HAVE THE STATUTORY AUTHORITY TO DENY AN APPLICATION BASED UPON OFF-SITE TRAFFIC CONCERNS

In its denial of Levin's application, one of the Planning Board's biggest concerns was the proposed development's impact on the ingress and egress of traffic onto the site. Da40. In addition, it was clear from the testimony of many residents who live in the surrounding community that the proposed development would have a serious and deleterious impact to the off-site traffic in the area. Da31-40. For example, there was great concern on the increased traffic due to the proximity of an elementary school. Id.

However, the Appellate Division has ruled that off-site traffic impacts cannot be a basis for denial of site plan applications. Dunkin' Donuts of N.J., Inc. v. Township of N. Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984) (citing Lionel's Application Center, Inc. v. Citta, 156 N.J. Super. 257, 268-69 (Law Div. 1978)). The Trial Court itself in this case concluded that the Planning Board was limited to consider whether the applicant properly addressed ingress and egress to the site despite the substantial public concern. Da183. This twenty year old ruling has effectively tied local planning boards' hands at preventing development that will have a disastrous effect on local traffic.

In Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145 (1938), the Supreme Court evaluated the power of a planning board involving traffic concerns. This Court stated in that case "[t]he supervisory power bestowed upon the planning board may be exerted to protect the community against unnecessary traffic risks." Id. at 161.

Since that case, the State Legislature enacted the Municipal Land Use Law ("MLUL") that governs the powers of local planning boards. See N.J.S.A. 40:55D-1, et. seq. One of the stated intents and purposes of the MLUL is "to encourage municipal action to guide the appropriate use or

development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare." N.J.S.A. 40:55D-2(a). Another purpose of the MLUL is "[t]o encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight." N.J.S.A. 40:55D-2(h).

Despite this language in the MLUL, the Appellate Division concluded over twenty years ago (reiterating several times since) that the local planning boards have no statutory authority to deny an application which could substantially affect off-site traffic as long as ingress and egress to the site itself is sufficient. See Dunkin' Donuts of N.J., Inc, supra, 193 N.J. Super. at 515(citing Lionel's Application Center, Inc, supra, 156 N.J. at 268-69). The Appellate Division's basis for this conclusion is N.J.S.A. 40:55D-7 and N.J.S.A. 40:55D-41(b). The term "site plan" is defined at N.J.S.A. 40:55D-7 as:

a development plan of one or more lots on which is shown (1) the existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, drainage, flood plains, marshes and waterways, (2) the location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping, structures and signs, lighting,

screening devices, and (3) **any other information that may be reasonably required in order to make an informed determination** pursuant to an ordinance requiring review and approval of site plans by the planning board adopted pursuant to article 6 of this act.

Id. (emphasis added).

N.J.S.A. 40:55D-41(b) states that "an ordinance requiring site plan review. . . shall include and shall be limited to. . . standards and requirements relating to. . . [s]afe and efficient vehicular and pedestrian circulation, parking and loading."

The Appellate Division has concluded, based upon these statutes, that a local planning board only has the authority to review the ingress and egress and vehicular circulation of traffic on a proposed development, and not any traffic impacts a proposed development may cause off-site. In addition, the Appellate Division has concluded that "the authority to prohibit or limit uses generating traffic into already congested streets or streets with a high rate of accidents is an exercise of the zoning power vested in the municipal governing body." See Dunkin' Donuts, supra, 193 N.J. Super. at 515.

However, it is apparent that the statutory authority in the MLUL is broader than what the Appellate Division has determined in its evaluation. In addition, the governing

body does not have the power to review every site plan to determine local traffic impacts, but a planning board can readily assume this task.

Over twenty years of the Dunkin' Donuts decision has predictably resulted in traffic havoc throughout New Jersey. For example, Route One, which used to be an easy commute between Trenton and New Brunswick is now a commuter's nightmare. This is largely due to the inability of planning boards to evaluate the cumulative impacts of successive land use approvals. Also, Route 130 in the Hamilton Township area, where numerous shopping center approvals, coupled with the Washington Township Town Center has developed into a large traffic problem.

N.J.S.A. 40:55D-7 states that a planning board may take into consideration "any other information that may be reasonably required in order to make an informed determination." In addition, it is difficult to see how a determination of "efficient vehicular circulation" can exclude an evaluation of the impact of traffic on the streets surrounding a proposed development.

Furthermore, one of the MLUL's stated purposes is "[t]o encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities. . .which result

in congestion or blight." N.J.S.A. 40:55D-2(h). The Appellate Division's refusal to allow planning boards to consider how a proposed application will impact traffic within the immediate community is at odds with this purpose as it forces the planning board to approve proposed developments which have in all too many cases resulted in traffic congestion and blight.

Finally, to allow this kind of approval process to exist in a bubble, without giving the local planning boards the power to look at a proposed development in the context of the surrounding impacts, is inconsistent with responsible urban planning, the main purpose behind the MLUL. N.J.S.A. 40:55D-2(a). It is also inconsistent with principles of smart growth and the State plan. Indeed, the State plan encourages development that corresponds with present and anticipated public facilities, reduces sprawl, and represents "sound planning." See New Jersey State Development and Redevelopment Plan at <http://www.nj.gov/dca/osg/plan/stateplan.shtml>. Planning boards offer the most efficient and practical means of regulating traffic impacts, thereby preserving quality of life for all of us.

CONCLUSION

Therefore, for the reasons stated above,
Intervenor SHOS respectfully request that this Court grant
Intervenor's Petition for Certification.

Respectfully Submitted,

STUART J. LIEBERMAN
MARA EPSTEIN
On the Brief

Dated: August 10, 2006

CERTIFICATION PURSUANT TO R. 2:12-7(a)

Pursuant to R. 2:12-7(a), I hereby certify that this
Petition for Certification presents a substantial question
and is filed in good faith and not for purposes of delay.

Dated: August 10, 2006

STUART J. LIEBERMAN