

FINDINGS OF FACT/CONCLUSIONS OF LAW

L 253-03
Cangiano v. Planning Board
Of the Township of Bernards
& The Township of Bernards

This is a matter in lieu of prerogative writs brought pursuant to R.4:69-6, seeking to invalidate the actions of defendant Bernards Township Planning Board (hereinafter, "Planning Board") in denying Plaintiff Salvatore Cangiano's (hereinafter, "Plaintiff") application for preliminary subdivision approval to subdivide certain real property into twelve lots.

Background

Plaintiff filed an application for preliminary subdivision approval with variances, exceptions and waivers, on August 16, 2000.

Plaintiff is the owner of vacant land known as Lots 1, 5, 21, 22 and 23 in Block 122 on the tax map of the Township of Bernards. Defendant Planning Board of the Township of Bernards is the duly constituted Planning Board of the Township, organized pursuant to Municipal Land Use Law N.J.S.A. 40:55D-1 *et seq.*

On or about August 16, 2000, Plaintiff filed an application for preliminary major subdivision approval of the above referenced property, with certain variances and exceptions.

Throughout the review process, Plaintiff received various approvals and permits from the New Jersey Department of Environmental Protection.

Public hearings on the application were held on January 22, 2002, February 19, 2002, March 19, 2002, April 16, 2002, May 21, 2002, July 11, 2002, August 6, 2002, September 17, 2002, November 14, 2002 and December 16, 2002.

During the hearings, Plaintiff presented testimony from a civil engineer, professional planner, an environmental consultant and certified wildlife biologist.

On or about December 16, 2002, a motion was made to approve the application. This motion failed for lack of a second. A motion was made to deny the application and was seconded and approved by a vote of 4 in favor and 2 against.

The decision of the Planning Board is reflected in a resolution adopted March 4, 2003. The Planning Board determined that the Plaintiff had not complied with the Ordinance provisions related to tree removal and further that the Plaintiff had failed to present adequate information as required by the Ordinance in connection with an environmental impact assessment.

Plaintiff asserts that Defendant Planning Board's denial of his subdivision application was arbitrary, capricious, unreasonable and contrary to the evidence and testimony presented over the course of 10 public hearings between 1/22/02 - 12/16/02. Moreover, Plaintiff alleges that the Planning Board failed to apply the Township's Land Development Ordinance to Plaintiff's subdivision application.

Plaintiff submitted an application to the Planning Board for preliminary major subdivision of the 185.175 acre property into twelve lots. The initial application requested a submission waiver from section 21-54.4(A)(24) which requires that every application for subdivision include a tree identification plan showing all existing six foot, six inches caliper trees within limited disturbance areas and 30 ft. beyond. Plaintiff

argues that he relied upon the Planning Board's professional consultants and the Planning Board's past practices and submitted a modified tree identification plan for the road, public utility areas and three representative lots.

Additionally, as required by municipal land development ordinance, Plaintiff submitted an environment impact assessment and supplement and presented further evidence through the expert testimony of David Krueger.

The question presented to the Court is whether there is sufficient credible evidence in the record below to support the Planning Board's findings and decisions. Kramer v. Bd. Of Adjust., Sea Girt, 45 N.J. 268, 285 (1965). It is well settled that decisions of municipal agencies are presumptively correct. In order for Plaintiff to prevail, he must establish clearly and convincingly that the Planning Board's actions were a clear abuse of discretion and that the Planning Board acted in an arbitrary, capricious and unreasonable manner. *Id.* (see also Lang v. Zoning Board of Adjustment, 160 N.J. 41 (1999); Ward v. Scott 16 N.J. 16 (1954); Cobble Close Farm v. Bd. Of Adjustment, Middletown Twp., 10 N.J. 442 (1952); Rexon v. Bd. Of Adjustment, Haddonfield, 10 N.J. 1 (1952).

In the matter at bar, the Planning Board determined that Plaintiff's application did not comply with the ordinance provisions related to tree removal and failed to satisfy requirements of the environmental impact assessment. (Planning Board Resolution date March 4, 2003)

Tree Removal

Code of Township of Bernards, Section 21-54.4a(24) requires an applicant to:

- show the location of the existing tree canopy

- label areas to be removed and to be preserved
- show location of individual trees with a diameter at breast height (DBH) equal to or greater than 6 inches
- identify by size or species within the limit of disturbance plus 30 ft. beyond the limit of disturbance
- provide a list of all trees to be removed and a list of replacement trees

Section 21-45.3 requires the applicant to submit to the Planning Board an application for a tree removal permit. The ordinance is specific in its requirements. Pursuant to the ordinance, the applicant must submit plans for tree removal, preservation and mitigation.

This Plaintiff did not do. Nonetheless, he asserts that during the May, July and November public hearings, Plaintiff and the Planning Board's professional consultants provided expert testimony supporting Plaintiff's compliance with the tree removal ordinance.

Initially, the applicant requested a waiver or exception from the requirement of the ordinance to submit a tree identification plan and application for tree removal permit. (January 22, 2002 hearing, transcript p.4 L 24 – p.5 L 8)

During the November 14, 2002 hearing, the position was clarified with Plaintiff's attorney indicating that Plaintiff was requesting a deferment and that the decision concerning tree removal be determined "administratively" (i.e. by the Planning Board engineer's office).

There was some discussion that subdivision plans do not show specific improvements but provide "typical" locations for improvements (May hearing, p.21, L1-

15), and therefore it may be necessary to defer the requirements to show tree disturbance on individual lots at the preliminary stage until the time of actual lot development (May 29-30 L 17-20 & L 1-5). Moreover, Township engineer Peter Messina agreed a deferment would make sense and told the Planning Board that at the time of the actual disturbance, a tree removal plan is provided (July transcript p. 116 L 19-22).

However, the Ordinance in question quite clearly provides that the applicant is required to provide a list of all trees to be removed and provide a list of replacement trees. Accordingly, the Planning Board's reliance on the requirement of the ordinance and Plaintiff's failure to satisfy the requirements can hardly be said to be arbitrary, capricious or against the weight of the evidence presented.

Whether or not Mr. Messina confirmed that Plaintiff was not requesting a waiver or that he felt the Plaintiff had satisfied the requirements is of no moment. Plaintiff readily asserts that he requested a deferment from showing which trees would be removed. Accordingly, Plaintiff did not meet the requirements of the ordinance at the time of his application.

The Planning Board determined that it would not grant a waiver or deferment. The Planning Board further determined that it could not delegate authority for the review and approval of an essential element of the plan. The court notes that the record is clear that the site in question is environmentally sensitive, and this factor was a strong consideration in the Planning Board's determination.

Plaintiff ultimately argued that he did not require a waiver or exception because his application had been deemed complete. However, during the course of the November

2002 hearing, information was provided to the Planning Board that the tree removal issue was not addressed at time of completeness.

The code in question clearly requires submission of the tree removal information to be made to the Planning Board. Here the Planning Board denied Plaintiff's request for a deferment and for the issue to be determined administratively at a later time.

The Planning Board's determination not to permit a wavier or to deferment was within its discretion.

The Planning Board relied upon the provisions contained in the ordinance. Consistent with the opinions set forth in Pizzo Martin Group v. Township of Randolph, 137 N.J. 216 (1994), the Planning Board acted appropriately in doing so.

Nothing submitted to this court or appearing in the record reflects any authority for the Planning Board engineer or administrative staff to approve tree removal or tree protective provisions. Moreover, the Planning Board acted appropriately in denying the application where, as here, fundamental elements of the plan were not submitted. In Field v. Franklin Township, 190 N.J. Super 326 (App. Div. 1983), the court determined "If an applicant fails to provide sufficient information on the fundamental elements of his plan, preliminary approval should be denied." Id. at 333

This court finds nothing arbitrary, capricious or unreasonable in the Planning Board's conclusion that Plaintiff failed to provide the specific tree removal information required by the ordinance.

Plaintiff also argues that his approach to tree removal was conducted in the same manner as the Planning Board had handled subdivisions since the inception of the ordinance.

First, there has been no evidence in support of this assertion submitted by Plaintiff. Second, Plaintiff has failed to cite to any authority to support the proposition that it is arbitrary or capricious of the Planning Board to refuse to grant him an exception or deferment.

Environmental Impact Assessment

Plaintiff also argues that the resolution denying Plaintiff's application states that the Planning Board determined deficiencies in the environmental impact submissions. Plaintiff submitted an environmental impact assessment which covered all ordinance requirements, he filed a supplemental report and presented expert testimony.

During the September hearing, Cosgrove commented that Plaintiff had satisfied the requirements of the environmental impact ordinance.

Based upon these arguments, Plaintiff claims the Planning Board's denial of his application was arbitrary/capricious.

The ordinance in question, Code of the Township of Bernard, Section 21-54.6m requires the submission of an environmental impact assessment (EIA). Pursuant to the requirements of this ordinance, the assessment must include, among other things, noise characteristics and levels, impact/evaluation of aquatic and terrestrial wildlife and a discussion of alternatives to the proposed project.

In furtherance of Plaintiff's EIA, the Planning Board heard testimony from Kenneth Scarletti, a certified wildlife biologist and wetlands scientist. Mr. Scarletti had been hired to assess the suitability of the property as a breeding habitat for the red-shouldered hawk and potential habitat for wood turtles.

Mr. Scarletti offered the opinion that his six hour walk of the site (12 hours including Mr. Krueger's walk) was sufficient to give the site an adequate inspection. He further testified that he found red-tailed hawks on the site. The presence of red-tailed hawks on the site makes it unlikely that a red-shouldered hawk would establish a nest on the site, according to Mr. Scarletti.

Scarletti testified that he had reviewed 180 acres in six hours while 6 inches of snow covered the ground. The Planning Board rejected this testimony because they were skeptical that Scarletti could cover 32 acres an hour. They further rejected the testimony because Scarletti told them that he could not say that red-shouldered hawks and wood turtles were not on the site and that although the NJDEP protocol is to look for red-shouldered hawks in breeding season, he did not follow this protocol because he was asked to do the inspection in January and the breeding season does not start until March.

Clearly the Planning Board had serious questions regarding the reliability of Scarletti's testimony. Simply because one is qualified to provide expert testimony does not mean that a Board is required to accept that testimony as an reliable and accurate opinion. Here, Scarletti conceded that he had not followed protocol of the NJDEP. Moreover, his claim to have walked a site at the pace of 32 acres an hours caused not unreasonable skepticism among Board members, and the Planning Board specifically rejected the extent of the investigation as unreliable.

Moreover, the Planning Board properly determined that Plaintiff had failed to address the issue of noise levels, although this is a specific topic required to be contained in the assessment, by virtue of the ordinance. Testimony was presented by an objector who produced as expert, Sharon Carpenter. Ms. Carpenter testified as to the level of

decibels – her reading was 76 decibels. She further testified that the NJ Dept. of Transportation requires mitigation over a level of 66 decibels. Plaintiff offered no rebuttal or direct evidence on this issue.

The facts in this case are readily distinguishable from the case cited by Plaintiff in support of the proposition that the Planning Board was unreasonable in rejecting the testimony of its own expert.

In Sprint v. Borough of Upper Saddle River Zoning Board of Adjustment, 353 N.J. Super 575 (App. Div.) cert. Denied 174 N.J. 543 (2002), the Court found that a Board's rejection of its experts' testimony regarding the issue of sufficiency of cellular coverage in the municipality was unreasonable because the expert had based his opinion on sufficient information.

Here that is not the case. Plaintiff's expert conceded certain deficiencies in his inspection including a time of the year which would not be conducive to making a determination as to whether the wood turtle or red-shouldered hawk were present on the site. This Court does not find that the Planning Board acted unreasonably in rejecting Scarlett's testimony as well as its own experts' opinions, to the extent they were based upon the investigation Scarlett had conducted. In addition, the Board heard testimony of other experts presented by objectors which contradicted the Plaintiff's experts. In the Sprint matter, three experts were presented and each expert's opinion was consistent with the others.

In the instant matter the Board had sufficient basis upon which to reject, or at the very least question, the expert testimony of Plaintiff's experts and the statements of Mr. Cosgrove which were based upon those expert's opinions.

The Planning Board is not required to accept the testimony of its own experts or Plaintiff's experts. "A Board is free to accept or to reject the opinions of a planner proffered by an applicant or objector. Hawrylo v. Board of Adjustment 249 N.J. Super 568, 579 (App. Div. 1991); see also: EL Shaer v. Planning Board of Township of Lawrence, 249 N.J. Super 323 (App. Div. 1991) where the court held that the Board is not bound by expert testimony. Id. At 329.

Accordingly, the court rejects Plaintiff's argument that the Board acted in an arbitrary, capricious or unreasonable manner in rejecting the testimony of expert witnesses, whether the Board's, Plaintiff's or the objector's witness. The Board heard conflicting expert testimony and determined that the EIA submissions were not adequate.

Conclusion

For all of the foregoing reasons, the Court finds that the Board's actions were not unreasonable, arbitrary or capricious and Plaintiff's complaint is dismissed.