

## **Zoning and Planning**

### **Introduction**

For more than five decades, New Jersey's Supreme Court has been looked to by courts across the nation for how best to accommodate the many interests that come into competition (some might say clash) when real estate is developed. Given New Jersey's status as the most densely populated state in the United States, the potential for objectors to any land use application isn't small. Most disputes are resolved before local planning and zoning boards, yet many find their way to the Superior Court where trial judges attempt to apply the law as fairly as possible. When the losing party appeals, some of those decisions find their way to our state's highest court.

The authority to regulate land use is encompassed within Article III of the New Jersey Constitution entitled "Distribution of the Powers of the Government." That portion of the state constitution provides that the "powers of the government shall be "divided among three distinct branches, the legislative, executive and judicial."

As noted in *New Jersey Zoning and Land Use Administration*, by Cox and Koenig, "the legislature, is authorized, by Article IV, Section VI, paragraph 2, to delegate some of its power to the municipalities. Therefore, "municipalities may enact general laws under which municipalities, other than

counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State."

In 1975, the legislature delegated some of its power to regulate land use to the municipalities. The intent and purpose of the Municipal Land Use Law ("MLUL"), was to "encourage municipal action to guide the appropriate use or development of all lands within the State, in a manner that will promote the health, safety, morals and general welfare." N.J.S.A. 40:55D-2 (a).

The exercise of municipal land use authority is delegated to the planning board, the governing body and the zoning board of adjustment.

The list of cases cited herein, provide an overview of the depth and breadth of the issues that have been decided.

In **Ward v. Scott**, 11 N.J. 117 (1952), the Town Council granted a variance to a construction company pursuant to the recommendation of the Board of Adjustment. The plaintiff, a neighbor, appealed the grant of the variance to the Law Division. On appeal, the Law Division judge held the defendant board was justified in finding that special circumstances supported the variance and that not granting it would cause undue hardship. The appeal

that followed by the plaintiff, George Ward, was certified to the Court on its own motion

The Court focused on whether the board of adjustment made adequate findings within R.S. 40:55-39(d). Holding that the only special reason embodied in the resolution was "the proximity of other commercial buildings to the defendant's company," the Court considered this reason, standing alone, to be insufficient. In reaching this conclusion, the Court noted, "the opinion of the Law Division suggests there were accompanying considerations that were sufficient to establish special reasons which further the underlying policies in the act. However, none of those considerations were mentioned in the Board's resolution and there were no administrative findings thereon." *Id.* at 128. The Court reversed and remanded for reconsideration of the grant of the zoning variance to the defendant construction company.

In **Kramer v. Bd. of Adjustment**, 45 N.J. 68 (1965), the Borough of Sea Girt granted a variance to permit the construction of a hotel in a residential zone. Plaintiffs raised several procedural deficiencies: (1) the Board of Adjustment lacked jurisdiction because neither the date fixed for the first hearing nor the notice given conformed to the requirements of N.J.S.A. 40:55-44; (2) the application for a variance was barred by the doctrine of res judicata; (3) the vote by the Board was void by not rendering a decision within 90 days

from the date of the applicant's application; and (4) the Board of Adjustment and the governing body were disqualified from passing on the application because they had prejudged the matter.

The Court upheld the rulings as to notice and hearing, found no prejudice, rejected appellants' res judicata claims and claims of bias and noted, "our examination of the evidence adduced at the various hearings reveals substantial facts adequate to support the detailed findings of the Board of Adjustment and the acceptance by the governing body of the recommendation of a variance. We find no substantial basis for a judicial conclusion that the personnel of the Board of Adjustment or the governing body failed to apply a conscientious judgment to the facts presented in deciding whether the variance should be recommended and granted."

In **Kirsch Holding Co. v. Manalapan**, 59 N.J. 241 (1971) two seashore resort communities enacted zoning legislation limiting dwelling rentals to "families." The ordinances were enacted to address seasonal rentals to groups of young unrelated adults.

On appeal, by the property owners, the Superior Court, Law Division upheld the zoning ordinance provisions. On appeal, the Superior Court, Appellate Division, held that zoning ordinances limiting rentals of any

dwellings to a "family" and excluding "group rentals," were legally unreasonable and therefore invalid.

On petition for certification, the Court held that substantive due process demanded that zoning regulations, like all police power legislation, must be reasonably exercised; the regulation must not be unreasonable, arbitrary or capricious; the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not to exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.

Applying these standards, the Court held: **(1)** zoning ordinances limiting rentals of any dwelling to a "family" and excluding "group rentals" are legally unreasonable and are therefore invalid; and **(2)** the municipal restriction of property rights as against the problem sought to be dealt with deprives plaintiffs of their property without due process.

In **Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp.**, 67 N.J. 151, 187 (1975) (hereinafter **Mount Laurel I**), an action was brought against the township of Mount Laurel on the ground that the land use regulations of the township unlawfully excluded low and moderate-income families. Justice Hall, writing for the majority, held "as a developing

municipality, Mount Laurel must, by its land use regulations, make realistically possible, the opportunity for an appropriate variety and choice of housing for all categories of people who desire to live there, of course including those of low and moderate income.”

Unfortunately, despite the decision in Mount Laurel I, “eight years later the town of Mount Laurel remained afflicted with blatantly exclusionary zoning ordinances, forcing the New Jersey Supreme Court to revisit the issues in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (hereinafter referred to as Mount Laurel II).” Kirk Addes, *The Fate of Affordable Housing Legislation In New Jersey Christie’s Proposed S-1 Legislation Threatens To Undo the New Jersey Supreme Court Decisions in Mount Laurel I and Mount Laurel II*, 36 Seton Hall Legis. J. 82 (2011).

In **Mount Laurel II**, 92 N.J. 158 (1983), Chief Justice Wilentz expanded upon the original Mount Laurel decision, which outlined a doctrine requiring that municipalities’ land use regulations provide for low and moderate-income housing. While the Mount Laurel decision prohibited economic discrimination against the poor by the state and municipalities in the exercise of their land use powers, the decision in Mount Laurel II, set forth specific requirements that every town in New Jersey must provide its “fair share” of the regional need for low and moderate income housing.

The decision in *Mount Laurel II* set forth the critical, yet previously unstated principle, that all people, including those society deems “poor,” have a right to live anywhere and that municipalities cannot manipulate zoning regulations to preclude people from residing in an area solely because of economic status. Moreover, the Chief Justice recognized and understood that society was strengthened when persons from all socio-economic backgrounds could reside together.

In ***Home Builders League v. Berlin***, 81 N.J. 127 (1979), the Voorhees Township Zoning Ordinance imposed minimum floor area requirements for residential dwellings irrespective of the number of occupants living in the home and unrelated to any other factor, such as frontage or lot size. To support the floor Ordinance, the Township argued that the minima would (1) promote health and safety, (2) maintain the nature of residential neighborhoods; and (3) conserve property values.

The trial judge made factual findings that minimum floor area requirements are not per se related to public health, safety or morals.

The Township appealed and, before the case was heard in the Appellate Division, the Court granted direct certification on its own motion.

The Court held: **(1)** the Township zoning ordinance prescribes minimum floor areas for residences which are unrelated to legitimate zoning

purposes; (2) the ordinance appears to be directed solely toward economic segregation; and (3) in the absence of proofs showing a connection between the minima and legitimate purposes of zoning (public health, safety and welfare), such as would be established by an occupancy relationship, the provisions must fail.

In **Medici v. BPR Company**, 101 N.J. 1 (1987), the Court reaffirmed the holding in *Kohl v. Mayor of Fair Lawn*, 50 N.J. 268 (1967) "that if the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must find that the use promotes the general welfare."

In light of the 1985 amendments to the Municipal Land Use Law, N.J.S.A. 40:55D-1 to 112a, set forth in N.J.S.A. 40:55D-89 (requiring periodic review by the governing body of master plans and zoning ordinances and establishing a presumption of unreasonableness for ordinances not so reviewed) and N.J.S.A. 40:55D-70.1 (requiring annual review reports by boards of adjustment of variance requests and recommendations of ordinance revisions), the Court deemed it appropriate to require an enhanced quality of proof, as well as clear and specific findings by the board of adjustment, that the grant of a use variance is not inconsistent with the intent of the master plan and the zoning ordinance.



Applying the enhanced quality of proof, the Court held that findings by the Board must reconcile the grant of a use variance with the ordinance's continued omission of the proposed use from those permitted in the zone, and thereby provide a more substantive basis for the typical determination that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

In **PRB Enterprises, Inc., v. S. Brunswick Planning Board**, 105 N.J. 1 (1987), PRB Enterprises applied to the Planning Board of South Brunswick for preliminary and final site plan approval for a WAWA convenience store known as "five corners." The premises are located in the C-1 district where neighborhood retail sales of goods and services are permitted. The parties concede that the proposed convenience store falls within that description.

At issue is the preamble or purpose section of the zoning ordinance which states "the intent of the C-1 Zone District is to permit the delivery of low traffic generating retail and professional services, which directly benefit the residents of the surrounding neighborhood." *Id.* at 228

The Planning Board concluded that the proposed WAWA was not low traffic generating and denied site plan approval. On appeal to the Law Division, the trial judge reversed the decision of the Planning Board and granted plaintiff preliminary and final site plan approval to permit

construction of WAWA store. On appeal from the Law Division, the Appellate Division held that the preamble improperly delegated zoning authority to the Board, declined to give effect to the Purpose Clause, and ordered the Board to grant site plan approval.

An appeal from the Appellate Division followed. The Court held: **(1)** the restrictions contained in the Purpose clause are unenforceable; **(2)** the Purpose clause diverts to the Planning Board the power to determine whether or not certain uses are permitted in the C-1 zone. This delegation is inconsistent with the MLUL; **(3)** while a site plan review affords a planning board wide discretion to insure compliance with the site plan ordinance, it was never intended to include the legislative or quasi-judicial power to prohibit a permitted use; and **(4)** the ordinance cannot be construed as establishing neighborhood retail stores as a conditional use in the zone; it is evidence that the municipality has impermissibly delegated its zoning authority to the Planning Board.

In **Riggs v. Long Beach Township**, 109 N.J. 601 (1988), the voters of Long Beach Township approved a referendum for the acquisition of public open-space property. At that time, appellants' property was unimproved, was zoned R-50 and allowed residential lots of five thousand square feet, with a minimum width of fifty feet.

In 1977 the appellants prepared an application to subdivide the property into four lots. In a letter, dated December 14, 1977, the township attorney advised the appellants that the 1976 referendum intended to acquire their property, that the property would be appraised within thirty days, and if the Township could not acquire the property through contract, it would take the property through the exercise of eminent domain.

The Law Division held that the ordinance was undeniably unreasonable and the Appellate Division reversed the judgment of the Law Division. The Court granted certification and held that an ordinance enacted solely to reduce a municipality's cost of acquisition of the land affected by the ordinance does not fulfill a valid zoning purpose.

The Court held that a zoning ordinance must satisfy certain objective criteria. **First**, the ordinance must advance one of the purposes of the Municipal Land Use Law as set forth in N.J.S.A. 40:55D-2. **Second**, the ordinance must be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements. **Third**, the ordinance must comport with constitutional constraints on the zoning power, including those pertaining to due process, equal protection and the prohibition against confiscation. **Fourth**, the

ordinance must be adopted in accordance with statutory and municipal procedural requirements.

In **Sica v. Board of Adjustment**, 127 N.J. 152 (1992), the applicant, a neurophysiologist, proposed a forty-bed "head trauma" residential-rehabilitation center for which he received a certificate of need from the New Jersey Department of Health.

The applicant applied to the Zoning Board for both a use variance and site plan approval. At the conclusion of the hearings, the Board concluded that the evidence did not satisfy Medici's enhanced standard of proof, that the variance could not be "granted without substantial detriment to the public good," and that it would "substantially impair the intent and the purpose of the zone plan and zoning ordinance."

The Law Division reversed, finding that the center was an inherently beneficial use and that it satisfied all the criteria for a use variance. Moreover, assuming Medici applied, the trial court held that the evidence satisfied the requirement for enhanced proof.

In reversing, the Appellate Division assumed the proposed use was inherently beneficial. However, the Appellate Division found that, measured against Medici's enhanced standard, the applicant had failed to demonstrate

that the proposed use was not inconsistent with the zoning ordinance and master plan.

On appeal to the Supreme Court, the Court held that an “inherently beneficial use” satisfies the positive criteria without more, and that in cases of inherently beneficial uses, the negative criteria will be satisfied if a balance of the positive and negative criteria tips in favor of the variance sought.

In **Wyzkowski v. Rizas**, 132 N.J. 509 (1993), the mayor of Neptune Township in 1989 filed an application with the Neptune Township Planning Board to develop a vacant lot in the Ocean Grove section of the Township. The property was located in the Historic District-Commercial Zone and met the zone's lot-size requirements. Plaintiffs were nearby property owners.

The application proposed a three-story building comprised of eleven residential units and one office space. At the hearing, plaintiffs argued that the HD-C Zone required a principal use that is commercial and permitted only residential uses that were accessory to the principal use. Plaintiffs challenged the Board's jurisdiction.

The Law Division found no error in the proceedings except on the issue of defendant's right to bring the application to the Board. The court held that defendant was barred from presenting the application because he had participated in the appointment of certain of its professional experts. Because

the defendant was no longer a member of the governing body, the court remanded the application to the Board for a new hearing.

The Appellate Division affirmed. The Court held that the building official, who participated in a quasi-judicial capacity in the approval of the mayor's application, should have been disqualified because he held salaried positions achieved by the mayor's appointment or with his involvement.

In **Coventry Square, Inc. v. Westwood ZBA**, 138 N.J. 285 (1994), the applicant, Westwood Development Associates (Associates) planned to build an apartment complex in a zone in which the apartments were a conditional use. The apartment complex would meet all but two of the bulk specifications of the zone. Associates requested design waivers for the deviations from parking standards, and a variance from the rear-yard and aggregate-side-yard setback requirements. The witnesses testified that the site was well suited for apartments, which would serve an appropriate transitional use between the single-family residences to the north and west of the lot and more industrial uses to its south and east.

The Board granted the variances and design waivers and made fact-findings in support of the statutory special reasons standard. Coventry, an apartment complex located near Associates' proposed site, filed an action in lieu of prerogative writ challenging the validity of the Board's resolution.

On appeal, the Court held:

1. Generally, courts have treated a conditional use that does not comply with all of the conditions of the ordinance as if it were a prohibited use, imposing on the applicant the same burden of proving special reasons as would be applicable to use variances. That standard is inappropriate and does not adequately reflect the significant differences between prohibited uses and conditional uses that do not comply with one or more of the conditions imposed by ordinance.

A conditional-use applicant's inability to comply with some of the ordinance's conditions need not materially affect the appropriateness of the site for the conditional use.

2. A conditional-use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems.

3. Respecting the first prong of the negative criteria: that the variance can be granted without substantial detriment to the public good, the focus is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance. The second prong of the negative criteria; that the variance will not substantially

impair the intent and purpose of the plan and zoning ordinance, the board of adjustment must be satisfied that the grant of the conditional-use variance is in accord with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district.

4. The record supports the grant of a conditional-use variance from the aggregate-side-yard and rear-yard setback requirements for Associates' apartment complex. The proofs satisfy the special-reasons standard by demonstrating that the apartment use is suited to the proposed site despite its failure to comply with those conditions.

In addition, the record sustained the Board's conclusion that the negative criteria were satisfied with respect to both variances. Moreover, the Board did not act arbitrarily or capriciously in granting the requested design waivers.

In **Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington**, the Court considered (1) whether, by way of a developer's agreement, a developer can contract to pay more than its pro rata share for off-tract improvements; (2) whether conditions regarding off-tract improvements must be satisfied even when the scope of the developer's project materially changes; and (3) whether a developer's agreement immunizes such conditions from a changed circumstance analysis.



Toll Brothers filed multiple legal actions seeking legal actions against the local and county authorities and the other developer and sought a declaratory judgment invalidating the developer's agreement or, in the alternative, a declaration that the conditions of approval should be modified to reflect the changes in the original scheme.

The trial judge granted summary judgment to all defendants, finding the terms of the developer's agreements clear and unambiguous and rejecting as a violation of contract law Toll Brothers' argument that it should be allowed to move before the County Planning Board to demonstrate that there was a change in circumstances. The Appellate Division affirmed.

The Court held: **(1)** a developer cannot be compelled to shoulder more than its pro rata share of the cost of off-tract improvements; and **(2)** when a reduction in the scope of a proposed development affects the need for off-tract improvement, the developer is entitled to the opportunity to demonstrate that a recalculation of its contribution is warranted, and the existence of a developer's agreement is of no consequence to that entitlement.

In **New Jersey Shore Builders Association v. the Township of Jackson**, 199 N.J. 38 (2009), the Court considered the validity of a municipal tree removal ordinance requiring a property owner to either replace any tree that is removed or pay into a fund dedicated to planting trees and shrubs on

public property. The ordinance permits residential developers to clear a certain percentage of the property without tree replacement.

In April 2004, the New Jersey Shore Builders Association filed a complaint challenging the 2003 Township's tree removal ordinance. The trial court declared the ordinance invalid. The judge held that the township "failed to establish any nexus between the planting of trees on public property and the prevention of soil erosion, dust, deteriorating property values and the suitability of land on the sites from which the trees were removed."

On appeal, the Appellate Division affirmed the trial judge's reasons.

The Court held: **(1)** ordinances enacted pursuant to the police power are presumptively valid; **(2)** the Township's tree removal ordinance is a valid exercise of police power; **(3)** based on the record at trial, on its face, the ordinance specifically recognizes that the removal of trees on any property affects the "health, safety and general well-being of the inhabitants"; **(4)** the experts established at trial that replanting on public property plainly contributes to oxygen production on public property, habitat and the biomass as a whole; **(5)** an ordinance must not be perfect in order to pass muster.

In **Grippenburg v. Township of Ocean**, 220 N.J. 239 (2015), property owners challenged ordinances that rezoned much of their 34 acres from

residential and commercial uses to an Environmental Conservation ("EC") district thereby restricting the future development of their property.

The trial court dismissed plaintiffs' complaint and held: (1) the ordinances were a valid exercise of the municipal zoning power and were not arbitrary and capricious; and (2) plaintiffs' as-applied inverse condemnation claim was premature because plaintiffs had not exhausted their administrative remedies by seeking a variance.

The Appellate Division reversed, holding that the ordinances were invalid as applied to plaintiff's property. **The Court reversed** the appellate court's reversal of the trial court's grant of summary judgment to the township **and held: (1)** plaintiffs have not overcome the ordinances' presumption of validity; **(2)** the inclusion of plaintiff's property in the EC district rationally relates to the town's comprehensive smart growth development plan which includes the additional benefit of protecting a sensitive coastal ecosystem through the preservation of undisturbed contiguous, uplands, of which plaintiff's property is an integral and protected part; **(3)** plaintiffs should pursue a variance; and **(4)** if the variance is denied, the plaintiffs may pursue an inverse condemnation claim.