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# Reaffirming Deference Owed to Municipal Planning Boards, Appellate Division Rejects Challenge to Liquor Store Approval

In a win for the developer, 95 Tenafly LLC (95 Tenafly), on June 28 the Appellate Division reversed the trial court's decision vacating the Tenafly Planning Board's (the Board) approval of a site plan application by 95 Tenafly to build a Bottle King liquor store. (*Concerned Citizens of Tenafly, Inc. v. Borough of Tenafly Planning Bd.*, No. A-1989-21, 2023 WL 4229288 (N.J. Sup. Ct. App. Div. Jun. 28, 2023). The Appellate Division rejected the trial court's decision, which had come down on the side of a group challenging the application's approval—the Concerned Citizens of Tenafly (the Concerned Citizens Group).) The Appellate Division rejected the lower court's findings concerning the Board's supposed lack of jurisdiction to hear the application as well as other findings relative to variances for parking spaces and signage.

As challenges to development applications by small groups of objectors become increasingly common, the Appellate Division's decision rejecting the findings of the trial court and arguments of the Concerned Citizens Group served to reaffirm the deference owed to a Board's findings in the absence of any arbitrary, unreasonable or capricious determinations.

The Board had granted preliminary and final site plan approval, including several variances and exceptions, such as a variance approving 55 parking spaces and five front-yard parking spaces, variances related to free-standing and building signage, and exceptions for the location of a dumpster facing the street as well as an exception allowing parking spaces 9.5 feet wide. The Board denied 95 Tenafly's requested variances for a flagpole height of 50 feet and a flag area of 216 square feet. The Board further imposed several conditions on the approval, including a requirement that 95 Tenafly return to the Planning Board to amend its plan if the police department were to find traffic and safety problems related to the left-hand turns into the site. The Board also prohibited gatherings for wine tastings (but not sampling wine within the store without invitation) and distribution of wine and spirits (but not making deliveries).

Shortly thereafter, the Concerned Citizens Group filed an action in lieu of prerogative writs, challenging the Board's approval of the Bottle King site plan application. The complaint alleged 19 issues with the plan and its approval, including issues with notice and proofs. After hearing oral argument on March 4, 2022, the trial court found that the Board's granting of 95 Tenafly's application was "arbitrary, unreasonable and capricious," and it vacated the approvals.

In reviewing the trial court's decision, the Appellate Division reversed in part and affirmed in part, rejecting much of the trial court's reasoning as being unsupported by the record.

In particular, the Appellate Division noted the trial court's finding—that the proposed flagpole was a principal use, not an accessory use, of the property, requiring Zoning Board of Adjustment approval instead of Planning Board approval—was not supported by either the record or common sense. The Appellate Division went on to reject each reason set forth by the trial court for vacating the approvals, finding again and again that the Board had proper jurisdiction and made determinations properly supported by the record. For instance, the Appellate Division found the notices provided by 95 Tenafly were adequate under the Municipal Land Use Law (MLUL), and it rejected arguments that notices must precisely describe each variance and waiver sought by an applicant. Public notice that 95 Tenafly sought to construct a retail liquor store sufficiently informed the public as to the nature of the application.

The Appellate Division further rejected the trial court's interpretation of Tenafly's land development regulations, reaffirming that the Board's knowledge of its local municipal circumstances should be accorded deference. The trial court had also agreed with the Concerned Citizen Group's argument that the Board improperly ignored the Group's experts' testimony. The Appellate Division disagreed, finding the Board had made appropriate and detailed findings showing 95 Tenafly had provided

sufficient proof, satisfying the criteria for variances, including by giving greater weight to 95 Tenafly's traffic engineer and planner expert testimony than to the Concerned Citizen Group's expert's testimony. The Appellate Division also rejected the Concerned Citizen Group's one issue raised on appeal related to an alleged conflict of interest because of the former mayor's influence on the proceedings, noting the mayor recused himself from the decision-making process.

The Appellate Division's decision is another in a string of judicial decisions that have rejected manufactured challenges to development approvals, reaffirming the deference the courts must show to local planning boards that have properly followed the MLUL in approving development projects. Considering each allegation from the Concerned Citizens Group in turn, the Appellate Division rejected the trial court's finding that the approvals had been arbitrary, unreasonable and capricious, and it reinstated the Board's decision.

Should you have any questions concerning this decision or land use litigation in general, please contact the authors of this alert or any of the Day Pitney Real Estate Litigation team.

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