March 14, 2022

Appellate Division Says Denial of a Land Use Application Must Rest on Competent Evidence in the Record Rather Than on Unproven Concerns of Residents and Board Members

On March 10, 2022, the Superior Court of New Jersey, Appellate Division affirmed the reversal of a denied site plan application based upon to the board's reasons for the denial not being supported in the record. The decision, *15 High Street, LLC v. Borough of Helmetta Planning Board (acting as a Zoning Board of Adjustment)*, No. A-1490-20 (App. Div. Mar. 10, 2022), reinforces the proposition that boards must root their findings in substantiated proofs rather than unsupported allegations and that proof of adverse impacts to the zone plan or the public will often require expert testimony.

The property developer applied for preliminary and final site plan approval along with use, density and bulk variances to develop 70 age-restricted apartments in the Borough. At two public hearings in 2019, the developer offered "extensive expert testimony" from licensed professionals in support of its application. By contrast, the board presented no contradictory expert testimony. The board only obtained a letter from the Borough engineer, which took no position on the application. However, several board members and local residents expressed concerns about the developer's proposal at the hearings. These concerns centered on the alleged dangers that an increase in traffic might have on pedestrians where the property lacked a sidewalk and guardrails. Board members were also concerned that the proposed density was five times the permitted density in the zone.

Although the board conceded the developer had satisfied the "positive criteria" necessary under the Municipal Land Use Law to obtain a use variance because senior citizen congregate housing is an "inherently beneficial use," the board denied the application. The resolution of denial focused on the alleged pedestrian safety and density concerns raised by residents and board members. According to the board, these issues prevented the developer from establishing the "negative criteria" needed to obtain a use variance because they would supposedly cause "substantial detriment to the public good." The resolution stated this conclusion was based on "testimony provided by members of the public" and on the fact that the proposed density would result in excessive lot coverage due to parking requirements and exacerbate the traffic safety concerns. The resolution did not cite any professional testimony other than the testimony of the developer's engineer, who mentioned that the proposed density would prevent full compliance with stormwater regulations.

The Law Division in Middlesex County agreed with the developer that the board's denial was arbitrary and capricious because there was not "substantial evidence" in the record to support the board's findings. While the board cited the unsubstantiated concerns of residents on the pedestrian safety issue, the record actually showed the developer's traffic expert had testified that the development would not change the level of service at the property. The developer also stated on the record that it would comply if the board required installation of sidewalks or widening of the road. And while the board concluded the density would cause parking and lot coverage problems, the developer's traffic expert testified that the application exceeded the parking requirements of the Residential Site Improvement Standards. Any negative impacts as to density and lot coverage were "mitigated through the site design," according to the developer's planner.

None of these points were refuted by contradictory expert testimony. Rather, the court found that the board's findings simply "reacted" to the unsubstantiated complaints of nearby residents and board members. The developer used proof to demonstrate the variance could be granted without "substantial detriment to the public good," and the record showed that these proofs were "unrebutted." The board merely concluded that safety and density problems would arise from the development but did not explain how the record supported this conclusion. By contrast, the developer used professional

testimony to show that any such safety or density problems would be mitigated. The board offered no explanation as to why it disagreed with these professionals.

The Appellate Division affirmed, holding that a board must base its rejection of an applicant's expert testimony "on contrary expert testimony rather than bare allegations or unsubstantiated beliefs." A board must base its decision on substantiated proofs, and simply "relying on comments and concerns from board members or local residents" is insufficient. Accordingly, relying on nonexpert testimony from board members or residents against the weight of an applicant's expert testimony "renders a board's decision arbitrary, capricious, and unreasonable."

Should you have any questions concerning this decision or land use matters in general, please contact the authors of this alert or any of the Day Pitney real estate team.

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