July 11, 2022

# Day Pitney Prevails in Overturning Zoning Board Denial of a Use Variance Application

Day Pitney successfully represented a developer in overturning a zoning board's denial of its use variance and density variance application, which sought to develop a townhome development in a single-family residential zone. The case, decided in New Jersey Superior Court, Law Division, was *Ferris Farms of East Brunswick LLC v. East Brunswick Zoning Board of Adjustment*. The trial court agreed that the applicant had presented overwhelming expert testimony in support of the use variance and density variance, none of which was contradicted by other experts, including the Board's experts. The team represented Ferris Farms of East Brunswick, LLC and was led by Day Pitney Real Estate Partner Craig M. Gianetti with the assistance of Associate Amanda M. Kronemeyer.

"This victory demonstrates the importance of creating a robust record in support of a variance application before a local board. It is also a caution for local boards that a denial that is rendered in spite of credible, uncontroverted expert testimony is ripe for challenge," Gianetti noted.

The case arose out of the developer's bifurcated use variance and density variance application on the now-closed Ferris Farms nursery in East Brunswick. The property is located in the R-1 single-family residential zone, which permitted one-acre lots. The developer proposed to remove the nonconforming nursery and develop a multifamily townhouse development in the single-family residential zone.

Contrary to a traditional use variance application, the application was proposing a residential use in a residential zone. The type of residential unit type was not permitted (townhomes as opposed to single-family homes). As a result, the developer also required a density variance for seeking more total units than permitted in the zone. The applicant originally proposed a 50-unit townhouse development, but over the course of several hearings on the application, the developer amended the application to reduce the development to 36 townhouses and then to 30 townhouses.

The court agreed with the developer that the Zoning Board's decision denying the requested use and density variances was arbitrary, capricious, and unreasonable, and not based upon substantial evidence in the record. The developer presented expert testimony from a civil engineer, professional planner, traffic engineer, and real estate expert. No contradictory expert testimony was presented by the Board professionals or objectors. In fact, the Board professionals even acknowledged some of the points raised by the developer's experts.

The 43-page decision was rendered by Judge McCloskey in the Middlesex County Law Division. This decision comes on the heels of the Appellate Division affirming a recent decision by Judge McCloskey in *15 High Street, LLC v. Boro. of Helmetta Planning Board* (2022 WL 710788), 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." Read Day Pitney's Alert on the decision here.

# Key Contacts




## Craig M. Gianetti

Partner

Parsippany, NJ | (973) 966-8053

cgianetti@daypitney.com