

Appellate Court Overturns Ruling that Invalidated Rezoning; Reaffirms Governing Body's Role in Adopting Ordinances

Editor's Note: In a much-discussed ruling, on July 3, 2007 the Appellate Division reversed a law court decision and sustained a governing body's authority to perform its legislative function by adopting a rezoning ordinance without any restrictions. The trial judge had erred in ruling that the ordinance was invalid because an expert witness was not used by the Township Council. In this penetrating analysis, Alan Zublatt, attorney for the concerned residents in this controversial case, and his co-counsel, Susan B. Stocker, offer a unique insider's perspective on the key issues involved.

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In this recent decision, the Appellate Division broke no new legal ground.

The decision, however, is noteworthy because the Court reaffirmed and clarified the legislative function performed by a Township Council when adopting a zoning ordinance and the proper legal analysis to be applied when the validity of the ordinance is challenged. In addition, the Court revisited the factors to be considered when determining what constitutes inverse spot zoning.

In Riya Finnegan, LLC v. Township Council of South Brunswick, a property owner brought suit against the South Brunswick Township Council and Planning Board after the Township Council adopted a zoning ordinance that would rezone the plaintiff's property from Neighborhood Commercial (C 1) to Office Park (OP), preventing the plaintiff from developing the property with retail stores and a drive-through drugstore.

Following the plaintiff's filing of a site plan application for the proposed retail/office development, neighboring residents strongly urged the Township Council to rezone the plaintiff's property to permit only office development, citing overdevelopment and increased traffic as their main concerns.

The Township Council, in accordance with N.J.S.A. 40:55D-64, referred the issue to the Planning Board for its report and recommendation.

The Planning Board recommended rezoning of the plaintiff's property to OP and following a public comment session on the proposed ordinance before the Township Council, the Township Council voted unanimously to pass Ordinance 15-05, which rezoned plaintiff's property.

In its resolution in support of Ordinance 15-05, the Township Council found that although the rezoning was inconsistent with the Master Plan for the land use and development of South Brunswick, the rezoning would be more in keeping with the general comprehensive plan of this area of the township as a transition area from intense use to residential use.

The Township Council also noted that rezoning would protect the health, safety and welfare of the community from overdevelopment of uses that are too intense for that area of the township.

Thereafter, the plaintiff filed a lawsuit against the Township Council and the Planning Board challenging the rezoning ordinance arguing that it was inconsistent with the Master Plan, was arbitrary, capricious and unreasonable and constituted spot zoning.

Following a trial in Middlesex County Superior Court, the trial court held that the rezoning ordinance was arbitrary, capricious and unreasonable because there was no expert testimony offered to support the Township Council's action. The trial court next determined that the Township Council's rezoning ordinance constituted inverse spot zoning because the new OP zone would only affect the plaintiff's property.

The trial court found that the Township Council had no reason to visit the rezoning issue on its own impetus and had only considered the issue after residents objected to the plaintiff's proposed development. The trial court invalidated the rezoning ordinance and remanded the matter to the Planning Board to consider the plaintiff's site plan application.

On appeal, the Appellate Division disagreed and reversed the trial court. The Appellate Division found that the trial court had misconstrued the proper standard of review for legislative hearings before a Township Council when the Council is enacting a zoning ordinance.

LEGISLATIVE vs. QUASI-JUDICIAL, ADJUDICATORY ACTION

The Appellate Division carefully explained that the enactment of, or amendment to, a zoning ordinance is a legislative act.

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Within that context, the Township Council is entitled, as a duly elected policy-making body, to consider the views of its constituency to formulate municipal policy, including zoning regulations. The trial court had insisted that the Township Council had not supported its finding that the ordinance was enacted to protect the health, safety and welfare of the Township's residents and motorists because the Township lacked supporting expert testimony and had instead, largely relied upon the statements of Township residents.

The Appellate Division found that the trial court had applied an incorrect standard of review to the Township Council's decision. Planning boards and boards of adjustment perform an adjudicatory function when reviewing site plan and variance applications.

These boards are required to create a record to support their decisions and findings with expert testimony. Here, however, the Township Council was performing a strictly legislative function and was required only to set forth its reasons for establishing zoning ordinances that would reflect municipal policy. It was not required to support its decision with expert testimony.

The legislative role performed by a township council is also statutorily recognized in the MLUL. Pursuant to N.J.S.A. 40:55D-62a, a municipal governing body may adopt a zoning ordinance that is inconsistent with the municipality's Master Plan by a majority vote of the full governing body.

The governing body must set forth its reasons in a resolution and recorded minutes when adopting the zoning ordinance. Even when inconsistent with the Master Plan, expert testimony is not required to support the legislative decision of the governing body.

THE ISSUE OF SPOT ZONING

The Appellate Division also rejected the trial court's finding that the rezoning ordinance constituted inverse spot zoning.

The test for determining whether a municipality has engaged in spot zoning is:

- (1) whether the zoning ordinance is made with the purpose or effect of furthering a comprehensive scheme calculated to achieve statutory objectives, or
- (2) whether it is designed merely to relieve a lot or lots from the burden of a general regulation, *Palisades Props, Inc. v. Brunetti*, 44 N.J. 117, 134 (1965).

The Appellate Division determined that the Township Council's resolution gave several reasons for the rezoning of the plaintiff's property, and acknowledged that while

inconsistent with the Master Plan, the ordinance would permit less intense development in an area that already contained substantial commercial development.

In addition, the sine qua non or essential condition of spot zoning is whether the ordinance will affect only one lot. Thus, it is proper to the question whether that ordinance was enacted solely to restrict the use of one particular property and accord it less favorable treatment than neighboring properties. Such action is legally impermissible. The Appellate Division, however, noted that the municipality had not engaged in spot zoning.

Importantly, the Appellate Division advised that the analysis must be fact sensitive and, that here, the plaintiff's almost 13-acre property was much larger than any other property in the C-1 district; under the C-1 zoning provisions, it could be developed into a large shopping center that would intensify commercial development in an area that already contained substantial commercial development.

Thus, although only the plaintiff's property would be affected by the zone change, the size of the property and the potential for overly intense development was a determining factor here.

In conclusion, although the decision in *Riya* neither creates new zoning law nor extends existing zoning law, it is important because it clearly reaffirms and clarifies the legislative role of a township council when adopting a zoning ordinance and the correct legal test to be utilized when assessing whether the ordinance is legally valid.

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