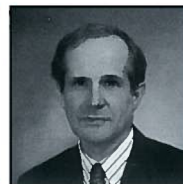




LEGAL & LEGISLATIVE

By Michael J. Gross, Esq., Steven M. Dalton, Esq.

Michael J. Gross is a partner and chair and Steven M. Dalton is a partner of the Environmental Department of Giordano, Halleran & Ciesla, P.C., Middletown.



SPOT ZONING

Finnegan v. South Brunswick

The Supreme Court held that the rezoning of Finnegan's parcel in response to neighboring property owner's assertions regarding traffic and pollution impacts was impermissible spot zoning.

The subject parcel was included in a neighborhood commercial zone in the municipality's 2001 Master Plan. Finnegan sought approvals to develop the property consistent with the applicable zoning. The Township Council rezoned the property in 2005, "inconsistent with the Master Plan", in response to the neighboring property owners' objections. Only the Plaintiff's parcel was rezoned.

A municipality's zoning ordinance must be "substantially consistent" with the master plan. N.J.S.A. 40:55D-62(a). A municipality may adopt an inconsistent ordinance only upon resolution of the governing body detailing the reasons for the inconsistency. However, where the action is based on citizen testimony, merely meeting this procedural requirement is not sufficient, and the Council must ensure that the testimony is "grounded in facts" and does not constitute mere "baseless demands".

The Court found that the Council did not sufficiently justify its decision to act in a manner that was inconsistent with its master plan and the decision was arbitrary, capricious and unreasonable. There was a "failure to point to any support for the concerns expressed by the neighboring residents". Furthermore, "one can always argue that development brings more traffic and that a commercial establishment brings more congestion and more intensive use of the nearby local roadways", but relying on such unsubstantiated concerns may make it "impossible for any undeveloped parcel to be utilized." The Court also found that the neighbor's concerns were

"generic complaints"; there was no analysis of whether the rezoning would mitigate the alleged concerns. The Council also failed to explain why the alternative zoning was appropriate.

The Court held that the action constituted inverse spot zoning. A finding of spot zoning depends on "whether the particular provision of the zoning ordinance is made with the purpose or effect of furthering a comprehensive scheme or whether it is designed merely to relieve a lot or lots from the burden of a general regulation." The focus of the analysis "is on the arbitrary nature of the decision rather than simply upon whether a particular parcel has received beneficial or detrimental treatment." Applying these standards, the Court concluded that inverse spot zoning occurred.

The decision is an important clarification of the limitations on municipalities under the MLUL in adopting zoning changes that conflict with previously approved master plans.

PUBLIC ACCESS

Bubis v. Kassiri

While an owner of private waterfront property that is not devoted to public use cannot limit the public's right to use land below the mean high water mark, "the public trust doctrine does not extend" to portions of property upland of the mean high water mark.

In this case, Plaintiff was cited for trespass for placing a beach chair and umbrella on the upland portion of the Defendant's property. With respect to public trust lands below the mean high water line, private property owners may limit public uses of those areas if the private property owner assumes responsibility for public safety in the area. Otherwise, private property owners may not limit the public's use of that property.

However, the court concluded that the

Plaintiff did not have a right of public access to the privately held upland sand area. The property was not used for commercial purposes. A publicly owned beach existed adjacent to the property. While the upland beach was sometimes used for overflow from the public beach, no fee was ever charged. "If property owners use the land solely for their private enjoyment, the government may not create a right of public access without payment of just compensation."

Public access is a critical issue for development of waterfront parcels. This case is an important recognition of property rights and the limitations of the public trust doctrine.

TIME OF DECISION RULE

Maragliano v. Wantage Township

The Appellate Division reversed a subdivision approval finding that the approval was inconsistent with a new zoning ordinance adopted by the Township Council. The Court applied the time of decision rule, which provides that the board will apply the law in effect at the time of its decision rather than the law in effect when the application was filed. A municipality may change its ordinance after an application is filed, and the applicant is subject to the amended ordinance. In this case, subdivision approval was granted after the ordinance was adopted, but three days prior to its effective date. The court found that the Board improperly rushed the application process to avoid the new ordinance, which would have required variances. The Court also found that the defendant could not have relied on the zoning of the prior ordinance because the application was filed after the new ordinance was adopted.

This decision highlights the harsh nature of the time of decision rule, which can make the local development approval process somewhat of a moving target.