

New Jersey Law Journal

A Publication of American Lawyer Media, L.P.

VOL. CXLV – NO. 1

OCTOBER 7, 1996

ESTABLISHED 1878

REAL ESTATE

Turf War Simmers Over Control of Zoning

By Bruce D. Greenberg

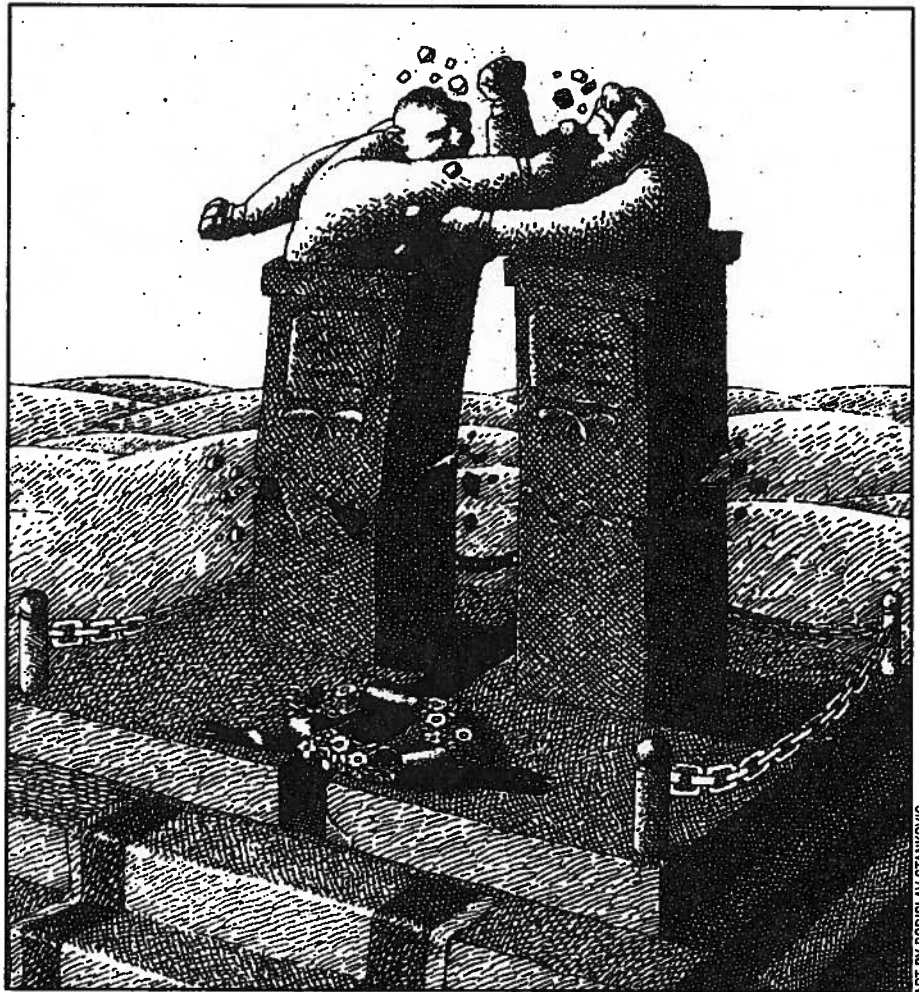
One of the purposes of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., was to eliminate disputes over which municipal agency — the governing body, planning board, or zoning board of adjustment — is to hear a particular development application. Experience has taught, however, that the MLUL has not achieved that laudable goal. One recent case, *Vidal v. Lisanti Foods, Inc.*, 292 N.J. Super. 555 (App. Div. 1996), which reversed use variances because they amounted to a rezoning — the exclusive province of the governing body — is but the latest evidence of that.

Vidal involved two applicants who were contract purchasers of about 17.8 acres of a 19.4-acre tract of land in East Hanover. The tract was located in the PB-1 and PB-2 zones, whose purpose was to provide a transitional buffer between industrial and residential uses. Permitted uses in the PB-1 and PB-2 zones included single-family homes, banks, municipal facilities and professional and business offices. The tract in question included all of the only PB-2 zone in the municipality and all of one of the PB-1 zones.

One applicant, Lisanti Foods, a nationwide distributor of pizza products, sought to build a 130,000-square-foot office-warehouse/distribution center that would serve as its national headquarters. The other applicant, Maier's, a commercial bakery, wished to build a 9,000-square foot facility, to be used as a warehouse distribution center, offices and a retail outlet for thrift goods. Both of those applications required use variances.

The board of adjustment granted the use variances. The

The author is of counsel with Goldstein, Till & Lite in Newark. He represented the plaintiffs in North Bergen Action Group v. North Bergen Planning Tp. Bd., 122 N.J. 567 (1991), which is discussed in this article.



ART BY BORISLAV STANKOVIC

board noted that the need for a transitional zone had been essentially eliminated, since two of the three homes that had existed on or near the subject property were to be demolished and the final home would stand on a much larger lot following the development. 292 N.J. Super. at 559.

Zoning Scheme 'Badly Askew'

Both the Township of East Hanover and one of its residents filed prerogative writ appeals with the Law Division. That court noted that "the whole zoning district, in effect, is gobbled up by

REAL ESTATE

Turf War Simmers Over Control of Zoning

these variance approvals." *Id.* at 560. Nonetheless, characterizing the zoning scheme — which had not been updated for more than six years, in violation of N.J.S.A. 40:55D-89 — as "badly askew" in light of the reduced or non-existent need for transition zones, the trial court upheld the use variances. *Id.* at 561. Since the zones in question were "somewhat artificial and anomalous ... [and] small [in] absolute size," the court did not view the variances as the equivalent of a rezoning. *Id.* at 560.

The Appellate Division reversed and overturned the use variances. The court labelled the board's view that the zoning was no longer appropriate "an arrogation of the power to rezone." *Id.* at 564. That ruling was reinforced by the fact that the use variances altered the permitted uses in nearly the entire PB-1 and PB-2 zones. *Id.* The court concluded that characteristics of the site and appropriateness of the existing zoning "would be appropriate for the governing body to consider in determining whether to continue the current zoning but do not provide a basis for the Board to grant use variances." *Id.* at 565.

Vidal was the most recent of a series of cases foreshadowed over 20 years ago by *AMG Associates v. Springfield Tp.*, 65 N.J. 101 (1974). *AMG* observed that a variance application that "involves or affects a large tract or a substantial area comprising several tracts" may be "beyond the intended scope of the variance procedure" and might instead "indicate the need for rezoning by the municipality." *Id.* at 110 n.3.

Four years after *AMG*, the Appellate Division warned about the problem even more specifically. In *Dover Tp. v. Dover Tp. Bd. of Adj.*, 158 N.J. Super. 401 (App. Div. 1978), the municipality itself (as in *Vidal*) sued the board of adjustment, asserting that the board had exceeded its powers by granting a developer the right to develop an 81-acre tract under the provisions applicable to a cluster development zone rather than those applicable to such a project in the rural zone where the property was located. In an opinion by Judge Sylvia Pressler, the Appellate Division reversed the lower court's grant of summary judgment in favor of the board.

Distribution of Powers

Judge Pressler made clear the statutory distribution of powers between the governing body and the municipal boards. "It is the governing body's ultimate responsibility to establish, by the adoption of its zoning ordinances and amendments thereto, the essential land use character of the municipality. This it does by the geographical delineation of its districts and, uniformly within each district, the delineation of the uses permitted therein and the limitation schedules applicable thereto in terms of lot size, lot coverage, height restrictions and the like." *Id.* at 411-12.

In contrast, the board of adjustment's powers are limited to "a specific piece of property," since the board's variance power is "intended to accommodate [only] individual situations which,

for a statutorily stated reason, require relief from the restrictions and regulations otherwise uniformly applicable to the district as a whole." *Id.* at 412. That avoids "the potential which the board's action might otherwise have for substantially affecting the essential land use scheme of the entire district itself and perhaps that of the entire municipality as well." *Id.*

The court summarized some of the factors to be weighed in determining whether a variance would constitute a rezoning:

The basic inquiry in each case must be whether the impact of the requested variance will be to substantially alter the character of the district as that character has been prescribed by the zoning ordinance. That inquiry requires analysis and evaluation of such factors as the size of the tract itself; the size of the tract in relationship to the size and character both of the district in which it is located and the municipality as a whole; the number of parcels into which it is anticipated that the tract will be subdivided if subdivision is part of the plan, and the nature, degree and extent of the variation from district regulations which is sought.

Id. at 412-13.

The court remanded the matter for consideration of those factors.

Two subsequent Appellate Division opinions found that municipal boards — in one case a board of adjustment and in the other a planning board — had exceeded their jurisdiction and engaged in improper rezoning by granting major variances. *Feiler v. Fort Lee Bd. of Adj.*, 240 N.J. Super. 250 (App. Div. 1990) (board had found tract improperly zoned for two-family detached homes and permitted variance to construct high-density residential towers; approval also affected entire zone); *Chesterbrooke Limited Partnership v. Chester Tp. Planning Bd.*, 237 N.J. Super. 118 (App. Div.), cert. denied, 118 N.J. 234 (1989) (improper to grant "flexible c" variance on 570-acre parcel that would have allowed numerous deviations from ordinance requirements). As those cases and *Vidal* demonstrate, the issue of when a variance shades into a rezoning is still very much alive.

Which Forum?

Though the variance vs. rezoning question has generated the most reported cases, the question of the proper forum for a particular development application has appeared in other contexts as well. For many years, there was a controversy about whether a planning board or a board of adjustment had jurisdiction over height variances. See *North Bergen Action Group v. North Bergen Tp. Planning Bd.*, 122 N.J. 567 (1991) (lower courts held that board of adjustment had exclusive jurisdiction); *Commercial*

Turf War Simmers Over Control of Zoning

Realty & Resources Corp. v. First Atlantic Properties Co., 122 N.J. 546 (1991) (Appellate Division held that planning board had power to grant height variance).

The Supreme Court in *North Bergen Action Group and Commercial Realty* ruled that height variances fell under N.J.S.A. 40:55D-70(c) and therefore could be granted by a planning board. Shortly after those decisions, the Legislature amended the MLUL to provide that height variances for projects that exceed the permitted height by more than 10 feet or 10 percent of the permitted height must go to the board of adjustment. L. 1991, c. 256 (amending N.J.S.A. 40:55D-70(d)).

The Legislature did not heed the Appellate Division's suggestion that another jurisdictional ambiguity be clarified by legislation. In *Jordan Developers v. Brigantine Planning Bd.*, 256 N.J. Super. 676 (App. Div. 1992), a developer asked the planning board to extend certain approvals that had been granted by the municipal board of adjustment. The planning board declined to do so and the courts upheld that decision.

Though the parties had not raised the issue, the Appellate Division suggested that the developer might have gone to the wrong board with the extension request. The court observed that though the board of adjustment had granted the original approvals, no statute expressly granted that board the power to extend approvals, though N.J.S.A. 40:55D-76(b) might be read to do so by implication. *Id.* at 682. In contrast, N.J.S.A. 40:55D-52(a) expressly authorizes a planning board to grant an extension of an approval. *Id.* at 681-82.

The court cited the policy of the MLUL in favor of "one-stop shopping" for approvals, and stated, without deciding, that "it seems best to seek relief by way of tolling or extension of the approval period from the board that granted the development approvals." *Id.* at 681-82. The opinion concluded with a call for

"statutory rectification." *Id.* at 682. But none has been forthcoming. Thus, a developer's dilemma about whom to apply to for an extension of certain approvals (and an objector's ability to contest such extensions based on lack of jurisdiction) remains to be addressed by the courts.

Still another, more unusual jurisdictional issue was presented by *Cronin v. Chesterfield Tp. Comm.*, 239 N.J. Super. 611 (App. Div. 1990). There, the township ordinance required anyone seeking to remove soil to obtain a soil removal permit from the township committee. The property owner, who had been in the business of excavation and soil removal pursuant to an agreement with the prior owner of the property even before a zoning ordinance was adopted, sought such a permit. However, excavation and soil removal had been prohibited in the zone by the intervening zoning ordinance. There was, therefore, a question of whether the property owner had a nonconforming use that pre-existed the zoning ordinance, so as to allow him to obtain such a soil removal permit.

The township committee determined that the property owner had a pre-existing nonconforming use and granted the permit. That decision was reversed by the Law Division, whose opinion was then affirmed by the Appellate Division. The Appellate Division held that N.J.S.A. 40:55D-68 authorized the board of adjustment alone to determine whether a nonconforming use pre-existed a zoning ordinance. 239 N.J. Super. at 618. Since the township committee had no jurisdiction to make that decision itself, the soil removal permit that had been issued was vacated.

In numerous contexts, developers face a choice of whether to proceed with a development application before the governing body, the planning board or the board of adjustment. Great care must be taken in making that decision, since an erroneous choice will result in a decision that is easily voidable for lack of jurisdiction. ■