In the Zone

A newsletter of the Real Estate Department and the Zoning and Land Use Practice Group

Fox Rothschild LLP
ATTORNEYS AT LAW

December 2014

New Jersey Supreme Court Implements Complex Business Litigation Program

By John Grossman

In a move designed to address the needs of the business community, the New Jersey Supreme Court (Supreme Court) recently approved the statewide implementation of the Complex Business Litigation Program (the Program) for the handling of complex business, commercial and construction cases. The court's order authorizing implementation of the Program was entered on November 13, 2014, and is effective for cases filed on and after January 1, 2015.

The "Working Group," which reported to the Supreme Court and recommended implementation of the Program, sought to address, by the Program's establishment, the business community's goals of certainty, finality, timeliness and a cost-effective means of addressing business disputes. The intentions here are good. To the extent that those involved in the business of real estate become involved in complex litigation, the Program is intended to benefit their needs. The highlights are as follows:

- A judge has been appointed in each vicinage to handle these cases and to receive, over time, extensive specialized training in all areas relating to business litigation. Each such judge will handle cases from beginning to end and will be expected to issue a minimum of two written opinions per year for the purpose of developing a body of case law on issues relating to business litigation.
- The amount in controversy must be at least $200,000 for inclusion in the Program, though the court may determine in a particular case that a lesser amount in controversy warrants inclusion. On motions, parties may seek to opt into the Program because a particular case warrants inclusion, notwithstanding the failure to meet the monetary threshold, or to opt out on the basis that the case does not meet the eligibility criteria.
- On the filing of their initial pleadings, parties will designate that the matter is either "complex commercial" or "complex construction," as those terms are defined under the Supreme Court's order.
- The Program encompasses both jury and non-jury matters. The cases are not part of the mandatory civil mediation and arbitration programs, though it is likely that participation in those will be encouraged by the sitting judge.
- Matters not included in the Program are those handled by General Equity (such as foreclosures and those seeking injunctive relief, though there are exceptions) and those primarily involving consumers, labor organizations, personal injury, condemnation, and in which the government is a party.

By this move, the Supreme Court has recognized the need to streamline and expedite service to litigants in complex business-related cases. The move, which constitutes an expansion of a pilot program previously in place in two counties, is encouraging.

Author

John Grossman
609.572.2322
215.299.3805
jgrossman@foxrothschild.com

Pennsylvania Commonwealth Court Finds Municipality-Wide Exclusion of Billboards Unconstitutional

By Jennifer L. Wunder

In *Appeal of the Bartkowski Investment Group, Inc. From the Decision of the Zoning Hearing Board of Haverford Township, Dated March 1, 2012*, (27 C.D. 2014, December 8, 2014), the Pennsylvania Commonwealth Court found Section 182-701.B of the Haverford Zoning Ordinance (ZO) unconstitutional for excluding billboards from the entire municipality, where Haverford Township (Haverford) did not prove a substantial relationship between the exclusion and the public health, safety, morality or general welfare. The court also held that, although the trial court did not err in denying Bartkowski Investment Group, Inc. (BIG) the proposed billboards, the trial court should have proceeded under section 1006-A of the Municipalities Planning Code (MPC) and considered whether alternative relief can and should be granted to BIG with respect to the proposed sites. Section 1006-A provides that, if the court finds an ordinance to be unconstitutional, it may order the proposed use approved as to all elements, or as to some elements.

BIG filed applications with the Haverford Zoning Hearing Board (ZHB) seeking approval to construct several billboards

In This Issue:

in Haverford. The applications raised substantive validity challenges to the ZO based upon the alleged municipality-wide exclusion of billboards. The ZHB conducted numerous hearings on the applications, hearing testimony regarding traffic and safety concerns related to the proposed billboards and sites, the impact of the proposed billboards on historic and aesthetic values and the ramifications of structural problems with the proposed billboards.

The ZHB denied BIG's substantive validity challenge, relying greatly on the testimony of the witnesses. The ZHB held that the ZO prohibits "billboards" but does not prohibit all non-accessory outdoor advertising signs, which BIG must establish in order to prevail. The ZHB also concluded that even if the ZO did improperly exclude billboards, Haverford demonstrated that health and safety concerns support the prohibition of the proposed billboards.

BIG appealed to the trial court, which affirmed the ZHB decision "to the extent that the billboards proposed were not suitable for the proposed sites."

BIG then appealed to the Commonwealth Court, which analyzed two issues, 1) whether the Zoning Ordinance is unconstitutionally exclusionary as to billboards, and if so, 2) whether and to what extent BIG is entitled to judicial relief.

Exclusionary Ordinance Issue

The court first discussed the burden-shifting framework for challenging the validity of a zoning ordinance. The challenger must initially demonstrate total exclusion of an otherwise legitimate use. If this is accomplished, the burden then shifts to the municipality to show that the total exclusion bears a substantial relationship to the public health, safety, morality or general welfare. Such a showing will save the ordinance.

In analyzing the present ordinance, the Commonwealth Court recognized that, "since billboards are not objectionable per se, a blanket prohibition on billboards without justification cannot pass constitutional muster." The court noted that, because the ZO totally excludes billboards as a permitted use, the burden shifted to Haverford to save the ZO from a finding of unconstitutionality by showing that the total exclusion of billboards bears a substantial relationship to the public health, safety, morality or welfare.

The Commonwealth Court determined that Haverford did not meet this burden, and thus the trial court erred to this extent, because:

1. Haverford failed to present any evidence that *no billboard* would be suitable at *any site* within Haverford, and;
2. The ZHB upheld the validity of the ZO based on evidence relating solely to the *proposed* billboards at the *proposed* locations.

The Court explained that, when courts examine an ordinance that fails to permit a lawful use throughout a municipality, the municipality must present evidence supporting the ban of the use *throughout* the municipality, and not simply rely upon evidence demonstrating that health, safety and general welfare concerns support a ban on *particular* proposed sites. Therefore, the court found the ZO unconstitutional for totally excluding billboards from the entire municipality with no proof of a substantial relationship between the exclusion and the public health, safety, morality or general welfare.

Judicial Relief Issue

In examining the relief owed BIG, the court distilled several principles from the language of Section 1006-A of the MPC and preceeding case law. First, Section 1006-A gives broad, discretionary powers to the trial court to fashion appropriate relief to the successful challenger of a ZO. Second, while a trial court may conduct a review using all evaluative tools available, a trial court's failure to utilize one or all of the options does not, in itself, constitute an abuse of discretion. The court also recognized that the paramount concern of the General Assembly expressed in Section 1006-A, as interpreted by the courts, is to seek to provide a successful challenger with some measure of relief. Finally, the court noted that a challenger's failure to expressly request relief under Section 1006-A could lead to a waiver.

The trial court acknowledged that the ZO is exclusionary but, rather than proceed as directed under Section 1006-A, which allows the trial court to grant relief that is less than, or an alternative to, the original use sought, the trial court went no further than considering and rejecting the proposed billboards. The court thus held that the trial court erred in failing to consider BIG's request for judicial relief under Section 1006-A of the MPC and remanded this matter to the trial court for this determination.

The decision in *Appeal of BIG* demonstrates the court's willingness to provide a successful challenger of an unconstitutional zoning ordinance with some form of relief for its proposed use, either by approval as requested, or approval as to some elements of the proposed use or development. The appropriate relief is determined by the trial court through the examination of evidence provided at the ZHB hearing or at a subsequent hearing if needed. Challengers should be sure to always include an express request for relief under Section 1006-A of the MPC in their appeal to avoid potential waiver.

Author

Jennifer L. Wunder
215.918.3570
jwunder@foxrothschild.com

Affordable Housing and the *Mount Laurel* Doctrine in New Jersey: Solving the Geometry of Chaos

By Henry L. Kent-Smith and Thomas Daniel McCloskey

In the November issue of *In the Zone*, we published an article discussing the failure of the Council on Affordable Housing (COAH) to adopt the third iteration of the Third Round Rules. That article referenced the Supreme Court's Order of March 14, 2014 (March 14th Order), which expressly directed that COAH adopt the proposed rules before October 22, 2014, for publication in the *New Jersey Register* for the November 17 edition – or else. Because the Third Round Rules were neither adopted nor published as the court explicitly ordered, presently there are no administrative rules governing COAH, nor quantifying municipal affordable housing obligations.

In light of where we now find ourselves in this unending, unproductive and counterclockwise loop of executive-legislative-judicial paralysis on the issue, one cannot help but pause and reflect on observations made some 18 years ago by Harvard University Louis D. Brandeis Professor of Law, Charles M. Haar, in his 1996 book, *Suburbs Under Siege: Race, Space and Audacious Judges.* In his analysis of the social and political forces in play that ultimately yielded the New Jersey Supreme Court's seminal *Mount Laurel* I decision in 1975 and its follow-on 1983 decision fashioning the "builders remedy" in *Mount Laurel* II, Professor Haar made what can very well be characterized as prescient observations and, perhaps, timely guidance in one of his concluding chapters. In "*Chapter XI: The Last Recourse: Why Judges Intervene,*" he wrote, in pertinent part:

> *The Mount Laurel litigations bring to the fore the residual role of the courts in the checks-and-balances system of a constitutional democracy. Local governments, ordinarily endowed with total discretion in the exercise of zoning powers, are found to be seriously and chronically in constitutional default. In such a state of affairs, whatever a court's adherence to the separation of powers as usually enunciated or whatever the loyalty to the conventional divisions of powers among the levels of government as typically argued, the strict rules of judicial insulation become inapposite.*
>
> *Reordering of Government Behavior*
>
> *To modify a phrase from the philosopher David Hume, it is both appropriate and necessary for the court to fashion judicial remedies to remove local exclusionary regulatory ordinances. By appropriate, I mean that the court is neither overstepping its authority nor improperly impinging on the prerogatives of the other two branches of government. By necessary, I mean that, without judicial intervention, the problem will remain with us for the foreseeable future . . .*
>
> *Any charge that the Mount Laurel courts are expansionist is fundamentally contrived; the court is performing the function it has been assigned under the constitution or a statute. Courts by law must hear the claims of illegality put forth by plaintiffs and the responses by defendants and then make a determination. Once the claims of a builder or a public interest group regarding a Mount Laurel exclusionary zoning ordinance are proven, failure to provide appropriate relief from defendants' on-going wrongful conduct and practices would render nugatory the original determination of liability and eventually serve to undermine the role of the judiciary in guaranteeing a lawful society. . .*
>
> *But the mere fact that it is appropriate for the court to fashion judicial remedies may not be enough to support intervention. One must also ask whether intervention is necessary. . .*

It is often said that the "past is prologue." Professor Haar's defense of the activist role the New Jersey Supreme Court played in fashioning the *Mount Laurel* Doctrine and enforcing it through the "builders remedy" rings even louder today. Fifteen years have passed since New Jersey last had valid rules governing the calculation of affordable housing obligation and the means by which to ensure that affordable housing is delivered to those most in need. The time has finally come once again for the Supreme Court to act.

Come January 6, 2015, the repercussions of COAH's failure to discharge its administrative duties will be squarely before the New Jersey Supreme Court. The Fair Share Housing Center (FSHC) has filed a motion to enforce litigants' rights seeking relief in the form of a framework whereby litigants may challenge municipal zoning ordinances on the basis that they fail to provide for a realistic opportunity for the municipality's fair share of the regional affordable housing need. The framework would include a uniform determination of statewide need, the appointment of specific judges to handle affordable housing litigation, and the adjudication of this issue in the Law Division.

In its March 14th Order, the Supreme Court specifically permitted motions in aid of litigants' rights to lift the protections provided to municipalities in accordance with the Fair Housing Act, N.J.S.A. 52:27D-313, and thereby allow the commencement of "builders remedy" challenges against specific municipalities.The FSHC motion is the direct result of the Supreme Court's procedural retention of jurisdiction in the March 14th Order.

Strangely, COAH responded to the FSHC motion by simply stating that there has been no violation by COAH of the March 14th Order because, in sum and substance, it gave its best effort, though concededly deadlocked and failed, and, therefore, no aid in support of litigant's rights is available or appropriate. COAH provided no response to the procedural recommendations of FSHC, but simply stated that it acted within the timeframe of the March 14th Order and should, therefore, be exonerated from any further action or consequence despite the fact that the order clearly and unequivocally directed that:

> *The Council **shall adopt** the proposed Third Round Rules on or before October 22, 2014, and transmit the adopted Third Round Rules to the OAL to permit publication of the adoption*

*notice in the November 17, 2014, edition of the New Jersey Register." * * **

and that:

*" . . . in the event that the Council does not adopt Third Round Rules by November 17, 2014, then this Court will entertain applications for relief in the form of a motion in aid of litigants' rights, including but not limited to a request to lift the protection provided to municipalities through N.J.S.A. 52:27D-313 and, if such a request is granted, actions may be commenced on a case-by-case basis before the Law Division or in the form of builders remedy" challenges; * * ** (Emphasis added).

Other litigants in this case have responded to the FSHC motion and have either supported it (e.g., the New Jersey Builders Association) or opposed the requested relief and instead recommend alternative relief (e.g., the League of Municipalities and other municipal litigants). The Supreme Court has scheduled oral argument on the FSHC motion for January 6, 2015.

The motion argument and subsequent decision by the Supreme Court will test the court's resolve when faced with action and, worse yet, inaction by an agency of the executive branch which, in this instance, has clearly violated the directives contained specifically in the court's March 14th Order. COAH has utterly failed to adopt statutorily-mandated and constitutionally acceptable regulations.The Supreme Court long ago promised that in such instances it would act decisively:

No one should assume that our exercise of comity today signals a weakening of our resolve to enforce the constitutional rights of New Jersey's lower income citizens. The constitutional obligation has not changed; the judiciary's ultimate duty to enforce it has not changed.

Hills Development Co. v Bernards Twp. 103 NJ 1, 65 (1986).

Any further or continued inaction by the court to enforce its orders of September 26, 2013, and March 14, 2014, would be akin to aiding and abetting the interminable failure by New Jersey's executive and legislative branches over the last 15 years to implement, and for the judicial branch to enforce, the constitutional obligations imposed by *Mount Laurel* I and *Mount Laurel* II, which all three branches of government are sworn and duty-bound to uphold.

Regardless of the outcome, it is clear that this issue has reached a constitutional crisis. In deciding *Mount Laurel* II eight years later to rectify the legislative, executive and municipal foot-dragging that resulted in the aftermath of *Mount Laurel* I, the court clearly meant what it said by fashioning the "builders remedy." With respect to the March 14th Order, after 31 years of the same interstitial wrangling, the time has arrived to see if the court does now what it stated it would do in this instance.

How the Supreme Court addresses this crisis will determine much of the future of affordable housing in New Jersey. Stay tuned for what is sure to be an interesting 2015 ahead.

Authors

Henry L. Kent-Smith
609.896.4584
hkent-smith@foxrothschild.com

Thomas Daniel McCloskey
609.896.4578
tmccloskey@foxrothschild.com

Transactions

Carrie Nase-Poust represented a client before the Franconia Township Zoning Hearing Board requesting several variances to allow the expansion of an existing building. The proposed project contemplates a 34,500 square foot addition to an existing building, as well as the construction of additional parking spaces and modification to a storm water basin. In connection with the project, the Franconia Township Zoning Hearing Board granted variances to the rear yard setback and parking requirements.

Carrie Nase-Poust represented a client before the West Conshohocken Borough Zoning Hearing Board in obtaining variances to allow the construction of a rock wall climbing facility. The West Conshohocken Borough Zoning Hearing Board granted a use variance to allow the rock wall climbing facility to be constructed in the Limited Industrial zoning district. In addition, variances were granted to exceed the permitted building height and to provide less parking than required.

Fox Rothschild LLP
ATTORNEYS AT LAW