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Downzoning Ordinances: Limiting Development and Preserving Open Space

By David R. Pierce

Downzoning of lands at the municipal level, as a way of limiting development and preserving open space and agricultural land, has been taking place in New Jersey for years. Downzoning is the practice of increasing the required lot size for the development of a single family home or, in other words, reducing the density of development permitted under the existing zoning ordinances. These zoning ordinances are typically "hot button" issues that often spawn litigation regarding their validity under the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq.). Most downzoning litigation does not involve a challenge to the validity of the ordinance as a whole (although that certainly does occur), but in most instances involves a challenge to the validity of the ordinance as applied to one or more specific parcels of property. While a zoning ordinance may be valid in general terms, that does not preclude a judicial determination that the ordinance in question is not valid as applied to a specific and distinct parcel of property.

Pierce is chair of the Real Estate, Land Use and Environmental practice at Lindabury, McCormick, Estabrook & Cooper in Westfield. He has served as a chairman of the Joint Environmental Committee of the Union County Alliance, Linden Industrial Association and Union County Chamber of Commerce.

New Jersey law on this issue began to coalesce with the case of *Bow & Arrow Manor v. Town of West Orange*, 63 N.J. 335 (1973), in which the New Jersey Supreme Court found that although zoning ordinance changes regarding the uses permitted in various zones were valid in general, they were nevertheless invalid as applied to specific properties that were the subject of the lawsuit. Fourteen years later, in *Zilinsky v. Zoning Bd. of Adj. of Verona*, 105 N.J. 363 (1987), the New Jersey Supreme Court sustained the validity of an ordinance imposing off-street parking requirements in a residential zone and, more particularly, the requirement that one of the two required off-street parking spaces had to be provided in a garage. While these two cases did not directly deal with downzoning issues, the legal principles developed in the cases, regarding whether or not a zoning ordinance provision was sustainable, formed the foundation for the later review of zoning ordinances involving downzoning.

In *Riggs v. Long Beach Township*, 109 N.J. 601 (1988), the New Jersey Supreme Court invalidated a zoning ordinance that changed the permitted density from 1 unit per 5,000 square feet to 1 unit per 10,000 square feet. The court reasoned that the zoning ordinance was enacted for the purpose of depressing the value of the plaintiff's land so that the municipality could acquire it cheaply. In doing so, the court developed a four-part test for analyzing the validity of a zoning ordinance that is challenged:

1. The ordinance must advance one of the purposes of the Municipal Land Use Law as set forth in N.J.S.A. 40:55D-2;
2. The ordinance must be "substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements";
3. The ordinance must comport with constitutional constraints on the zoning power, including those

pertaining to due process …, equal protection … and the prohibition against confiscation; and

4. The ordinance must be adopted in accordance with statutory and municipal procedural requirements.

In evaluating the validity of a zoning ordinance, courts will examine the relationship between the means and ends of the ordinance: the means selected must "have real and substantial relation to the object sought to be attained and … must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated." *Pheasant Bridge Corp. v. Township of Warren*, 169 N.J. 282, 290 (2001) (citations omitted).

In *New Jersey Farm Bureau v. Township of East Amwell*, 380 N.J. Super 325 (App. Div. 2005), the Appellate Division sustained a zoning ordinance that increased the minimum lot size for single family residential development from 3 acres to 10 acres. The ordinance permitted a density bonus for lot size averaging, which permitted one house for every 6.7 acres provided that 75 percent of the overall property was restricted to agricultural use. The trial court, as affirmed by the Appellate Division, specifically found that the 10-acre minimum lot size was rationally related to the stated goal of preserving agriculture. The key to this finding was the revelation that agriculture consisted of many different types of operations and was not limited to large feed lots, dairy operations or endless fields of crops. It was also noted that the land in question was located in an area that had been designated as PA-4 lands under the State Plan, the Rural Planning Area, and the ordinance being challenged was found to be consistent with that document.

Other cases have reached different conclusions. In *Bailes v. Township of East Brunswick*, 380 N.J. Super. 336 (App. Div. 2005), downzoning from one-acre density to six-acre density was invalidated by the Appellate Division. In *Griepenburg v. Township of Ocean*, 220 N.J. 239 (2015), the Supreme Court upheld a substantial downzoning because it was intended to preserve a contiguous tract of sensitive coastal uplands to protect coastal habitat and ecosystems and because, among other things, it was consistent with the State Plan's recent designation of the area in question as a PA-5 Environmentally Sensitive Area and with the Municipal Land Use Law's goal of protecting and conserving natural resources.

In a recent, unreported opinion, Superior Court Judge Buchsbaum in Somerset County invalidated rezoning by the Township of Branchburg that substantially reduced the density permitted on the former Merck animal research and experimentation farm campus from one house every acre, to one house every six acres. This reduced the development potential of the Merck property from 150 houses to 30. The goal sought to be achieved through this zoning change was the preservation of farmland and open space. The ordinance in question provided a cluster option allowing lots as small as one acre while requiring a substantial area of lands to be set aside as open space, but did not provide any density bonus for such cluster development. In addition, the cluster option was not mandatory and did not require that the lands set aside be used for agriculture.

Of great significance to the court was the fact that the lands in question were located in State Planning Area Two, an area designated as a suburban growth area, and that the area was also identified as a growth management area by the Somerset County Master Plan. The property itself is located within a growth corridor between Routes 202 and 22.

In his analysis, Judge Buchsbaum only considered the first prong of the four-prong analysis created by the Supreme Court in *Riggs*, namely, whether the ordinance advanced the purposes of the Municipal Land Use Law. As the court noted, New Jersey's courts are not compelled to strictly apply the legitimate goals analysis when reviewing the validity of a zoning ordinance but may, and often do, review the ordinance against the specific situation of the property in question and determine whether the ordinance restrictions were reasonably tailored to meet the enunciated Municipal Land Use Law goal.

A critical factor in the court's analysis in *Merck* was the fact that the stated goal of the zoning ordinance was in conflict with the regional planning goals for the area which involved growth, not the preservation of open space or farmland. The 80 percent reduction in the development yield of the property led the court to conclude that the zoning ordinance was contrary to the regional planning goals and rendered the property useless for the purposes of those regional planning goals and objectives. Drawing upon the *Mount Laurel* line of cases, the judge relied upon the principle that the New Jersey Constitution requires, when examining the satisfaction of the general welfare test, not just consideration of the local welfare, but also consideration of the regional general welfare.

Although the trial court acknowledged that municipal ordinances are not required to be consistent with the State Plan, the court found the Branchburg ordinance to be invalid because it frustrated the state and regional planning for the area. In doing so, the court set up a new approach to the review of downzoning ordinances that are applicable to areas designated as a growth area in regional plans. Ordinarily, the municipal zoning ordinance is presumed to be valid, and it is the burden of the objecting party to demonstrate that it is invalid. Based upon this decision, when a municipality downzones an area that is identified as a growth area in regional planning, the municipality will have the burden to "justify that downzoning as fairly reconciling regional and local goals and as being rationally related to permissible ends." Thus, the municipality seeking to downzone lands identified as growth lands in a regional plan will have a much greater hurdle to overcome and can no longer rely upon the presumption of validity.

Of course, as only a trial court opinion, the *Merck* case is not binding precedent except in Somerset County, and is likely to be appealed, so we can only wait and see the outcome in higher courts. If affirmed by the Appellate Division, the Merck holding would become precedential and impose new obligations upon any municipality with lands in regional growth areas and offer new protections to the owners of such lands against alleged arbitrary downzoning.■