

Harmonizing Land Use and Redevelopment

Grant of land use variance did not trample municipalities' redevelopment authority

By Anne S. Babineau and Steven J. Tripp

The Appellate Division recently affirmed the grant of a variance by the Trenton Zoning Board of Adjustment from a use requirement of a redevelopment plan. *Weeden v. City Council of City of Trenton*, 391 N.J. Super. 214 (App. Div. 2007) (Judges Susan Reisner, George Seltzer and Christine Miniman).

Initially, the decision seemed to be most significant because it is out of step with the long-held belief that such variances from a redevelopment plan were not available from a zoning board of adjustment. However, when read more closely, the decision is another example of the courts' fairly consistent pattern of harmonizing the provisions of the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. (LRHL), and the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (MLUL). The decision confirms that there is an avenue to seek redress from redevelopment plan provisions, while at the same time respects the authority and discretion of municipalities to promote redevelopment.

Weeden arises in the context of the Roebing Complex Redevelopment Area Plan, which was adopted as an overlay zoning district by the Trenton City Council in 1991. The particular lot in question was described by the zoning board in its resolution as "triangular in shape and isolated," bounded on all three sides by public rights-of-way and located near an arena complex. The redevelopment plan allowed restaurants, but prohibited "drive-in restaurants." The applicant, JAT Properties, LLC, sought to construct a combined Taco Bell and Long John Silver Restaurant, which included a drive-through window. The presence of the drive-through window rendered the use a "drive-in restaurant," thus requiring a use variance. The zoning board granted the use variance, concluding that "the property is uniquely situated and the use proposed is particularly suited for the property." In so concluding, the zoning board made findings, based on facts in the record, that the proposed use was consistent with the redevelopment plan and would further its purposes. Significantly, the zoning board accepted the applicant's testimony that the restaurant would not be economically viable without a drive-through window.

The objectors appealed the zoning board's grant of the use variance to the City Council, which unanimously affirmed the use variance. In the prerogative writ action challenging the use variance, the attorney for the objectors argued that the zoning board could not grant variances from a redevelopment plan, and that the relief could only be sought by request-

Babineau and Tripp, of Wilentz, Goldman & Spitzer of Woodbridge, were speakers at the Land Use Institute sponsored by ICLE where Babineau addressed Weeden, the case discussed in this article. The firm served as counsel to DKM on an earlier phase of the Roebing Complex Redevelopment Project, a matter discussed in the article.

ing an amendment to the redevelopment plan from the governing body.

The Law Division upheld the board's decision. The court rejected the objector's argument, held that the zoning board had jurisdiction, and found that there was substantial evidence in the record to satisfy the statutory criteria for a use variance. The court also noted that the proposed use was particularly suited to the location, furthered the purposes of the plan and would not harm the public good.

The Appellate Division affirmed, finding that the board had jurisdiction to hear the variance application. The court specifically noted that it was not deciding whether "a redeveloper, which has covenanted with a municipality to carry out the redevelopment plan, may obtain a waiver or variance from the provisions of the plan." The court also noted that its decision addressed only a redevelopment plan as overlay zoning, although certain aspects of the court's rationale may arguably apply to a redevelopment plan that superseded existing zoning.

It appeared significant to both reviewing courts that the city planners had recommended the variances approval, the Trenton Landmarks Commission for Historic Preservation approved the application, and the City Council had twice passed unanimous resolutions approving the board's decision. It appeared equally significant that the redevelopment plan specifically allowed restaurants, and that the use variance was required only because of the drive-through window.

The Appellate Division, noting the applicant's un rebutted testimony that the restaurant was not economically viable without the drive-through window, suggested that if the variance had not been available, the redevelopment plan would not have been implemented:

On this record, the choice facing the City is not between JAT's project and the more upscale establishment the objectors would prefer to see in their neighborhood. The choice is between JAT's project and the status quo, which is an undeveloped lot. Allowing the applicant to apply to the Zoning Board for a use variance serves the purpose of the LRHL by permitting an exception where it would serve the goals of the Redevelopment Plan.

The presence of these factors distinguishes *Weeden* from cases such as *Saddle Brook Realty v. Board of Adjustment*, 388 N.J. Super. 67 (App. Div. 2006), in which the court took a much narrower view of particular site suitability. There, the zone permitted restaurants, but not fast-food restaurants. The Zoning Board of Adjustment granted a use variance and the trial court affirmed. The Appellate Division reversed, finding that the proofs did not demonstrate that the proposed location "is a more suitable location for a fast food restaurant than any other location in the Saddle Brook commercial district, which is a prerequisite for finding that there are special reasons justifying a variance." The court specifically found that, at best, the applicant had demonstrated that the use was a good fit and would be a convenience to some of the customers of the existing retail stores. This contrasts sharply with *Weeden*, where furthering the purposes of the rede-

velopment plan was a substantial factor in demonstrating "special reasons" by virtue of particular site suitability.

This interplay between the LRHL and the MLUL was also the focus of the Appellate Division, when it reconciled the purposes of the two statutes. The court said the LRHL's purpose was to expedite redevelopment of blighted areas and the MLUL's purpose was to encourage

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municipal action to guide appropriate and beneficial development of New Jersey land. The MLUL does not specifically allow zoning boards to grant variances from redevelopment plans, and the LRHL does not mention variances. However, the purposes of the two statutes are not at odds and there is no tension between the adoption of a redevelopment plan and the

zoning board's grant of use variances.

As noted above, *Weeden* is but one in a series of cases in which the courts have struggled with the need to reconcile the LRHL and the MLUL. Where there is a way of achieving redevelopment objectives and meeting the requirements of the MLUL, the court has shown that it will require municipalities to do both. In *Britwood Urban Renewal, LLC v. City of Asbury Park*, 376 N.J. Super. 552, 567 (App. Div. 2005), the court implied that if Asbury Park had an Off Tract Improvement Ordinance in place, it would have been willing to consider imposing a proportionate amount of the redeveloper's infrastructure costs on a private property owner who benefited from the redeveloper's improvements, provided it could be shown that the private party contributed to the need for the improvements. Consistently, in *Jersey Urban Renewal, LLC v. City of Asbury Park*, 377 N.J. Super. 232 (App. Div. 2005), the court sustained Asbury Park's requirement that a private property owner comply with certain procedural requirements of the redevelopment plan as a prerequisite for planning board jurisdiction over its site plan application. It rejected a claim that such requirements "abridged" the planning board's legislative authority, stating that "...the Plan simply imposes upon plaintiff certain redevelopment criteria, not unlike development standards that are imposed by typical zoning ordinances.

Although *Weeden* does break new ground in finding zoning board of adjustment jurisdiction for the grant of a variance from use restrictions in a redevelopment plan, the decision itself is consistent with the courts' ongoing efforts to reconcile the MLUL and LRHL in a manner that achieves the objectives of both statutes. ■

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