New Jersey Law Journal

VOL. CLXXXIV– NO.11 – INDEX 868 JUNE 12, 2006 ESTABLISHED 1878

Real Estate & Title Insurance

Curing the Chaos

Recent court decisions may contribute to the planning confusion in New Jersey

By Andrew R. Davis

Benjamin Franklin remarked that New Jersey is like a keg tapped at both ends, referring to our location between New York and Philadelphia. While our geographic fate is immutable, the land use and planning challenges we face are much more daunting than ole Ben might have imagined 200 years ago. With 566 municipalities, 21 counties, three regional zoning and planning agencies, a State Development and Redevelopment Plan, and a panoply of environmental regulations that affect land use, it seems that planning chaos reigns in the Garden State.

What do these circumstances portend for planning in the 21st century, and what effect are our courts having on this state of affairs? Are the courts contributing to or countering the chaos? Several recent appellate decisions and one case currently under consideration by the New Jersey Supreme Court suggest that the judiciary is not palliative to this problem. Before examining these cases, it is important to better define the terms "planning" and "chaos" in the context of land use.

In a recent article entitled "Good Planning and Land Use," March 27, 2006, [183 N.J.L.J. 1144], Thomas Jay Hall called planning "a tool for thinking about the future consequences of present actions." New Jersey law defines the practice of professional planning as: "the administration, advising, consulting or performance of professional work in the development of master plans…and other services intended primarily to guide governmental policy for the assurance of the orderly and coordinated development of municipal, county, regional and metropolitan land areas, and the State or portions thereof." N.J.S.A. 45:14A-2(c). New Jersey is actually one of only two states in the nation (in addition to the Commonwealth of Puerto Rico) that has legislatively defined or regulated planning as a professional activity. Juergensmeyer and Roberts, *Land Use Planning and Development Regulation Law*, West Group, 2003.

According to Juergensmeyer and Roberts, the result of the planning process is a comprehensive plan, which is "an official public document preferably (but often not) adopted as law by the local government as a policy guide to decisions about the physical development of the community." For planning to be rational, the process must be future-oriented, continuous, cognizant of present and projected conditions, fair and open to the public, and comprehensive.

Land uses that grow out of a comprehensive planning process are generally thought to be of greater benefit to the public than development that occurs randomly. The premise is that an informed, thoughtful planning process — one that considers needs, resources and long-term effects of development patterns — will foster growth that is sensible, ration-al and sustainable. Land uses occurring randomly or arbitrarily are more likely to become problematic, simply because they lack forethought and consideration of context. In short, planning is better than chaos.

Master plans are primarily implemented in New Jersey through the enactment and enforcement of zoning ordinances. The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (MLUL), delegates this responsibility to municipalities. Yet the process is hardly as simple as that. A regulatory jambalaya affects whether and to what extent master plans ever get implemented. Here's the recipe.

Start with the MLUL as a base. Add in regional planning and zoning by the Meadowlands, Pinelands and Highlands commissions. Douse with CAFRA and

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COAH rules. Kick it up a notch with wetlands, water allocation permits and stormwater regulations. Add a dash of brownfield and site remediation standards, and flavor with State Plan designations. Simmer; then serve with BPU and DOT smart growth rules.

Some recent cases that have the potential to contribute to the planning chaos are: *In the Matter of Stormwater Management Rules*, A-3847-03T3, approved for publication by the Appellate Division on April 12, 2006, which takes the novel approach that the Department of Environmental Protection can regulate land use for reasons unrelated to environmental protection; *Bailes v. Township of East Brunswick*, 380 N.J. Super. 336 (App. Div 2005), and *New Jersey Farm Bureau, Inc. v. E. Amwell Township and Planning Board*, 380 N.J. Super. 325 (App. Div. 2005), which respectively throw out and uphold downzoning ordinances; and *Mount Laurel v. Mipro Homes, LLC*, 379 N.J. Super. 358 (App. Div. 2005), cert. granted 186 N.J. 241 (2006), which equates discrimination against families with school-aged children with open space planning. A closer look at the implications of these cases is warranted.

In the *Matter of Stormwater Management Rules* involves a challenge to DEP's authority to create 300-foot buffers on Category One (C-1) waterbodies and their tributaries. C-1 waterbodies are defined as those designated by the DEP deserving of protection from measurable changes in their water quality characteristics because of their "clarity, color, scenic setting, other characteristics or aesthetic value, exceptional ecological significance, exceptional recreational significance, exceptional water supply significance, or exceptional fisheries resources." N.J.A.C. 7:9B-1.4

Nominally an environmental regulation, its effect on land use is enormous. Vast amounts of property are precluded from development because the buffer applies to lands adjacent to C-1 waterbodies and any stream that leads to the C-1 waterway. The Appellate Divison upheld DEP's authority, citing the Stormwater Management Act, N.J.S.A. 40:55D-93 to -99, DEP's general enabling statute, N.J.S.A. 13:1D-9, the Water Pollution Control Act, N.J.S.A. 58:10A-1 to -35, and the Water Quality Planning Act, N.J.S.A. 58:11A-1 to -16.

This result is not really surprising, because courts generally attach strong presumptions of validity to legislative and regulatory actions. See, *Pheasant Bridge Corp. v. Twp. of Warren*, 169 N.J. 282, 289 (2001), cert. denied, 535 U.S. 1077 (2002), and *In Matter of Freshwater Wetlands Protection Act Rules*, 180 N.J. 478, 488-489 (2004). But the *Stormwater Rules* case breaks new ground in its perception of DEP as land use fashionista. The Court concludes its opinion with the novel proposition that "DEP may impose a buffer to avoid development-related impacts on water quality unrelated to stormwater…*or for reasons altogether unrelated to protecting water quality, such as, for instance, recreation and aesthetics.*" (Emphasis added.)

If DEP's regulatory authority really goes this far, then the practice of comprehensive land use planning is an exercise in futility. Environmental protection goals can and should be considered in the comprehensive planning process. Courts should not blithely sanction crude, massive development moratoria under the broad-based banner of environment protection. This type of decision contributes to planning chaos.

In *Bailes v. Township of East Brunswick*, decided Sept. 22, 2005, the Appellate Division invalidated a "dramatic" downzoning of property (from one dwelling unit per acre to one per six acres) in a maturely developed suburb bisected by the Turnpike. The Court reached its conclusion essentially by agreeing with the opinion of the property owner's planning expert and disagreeing with the town planner. In an apparent act of judicial schizophrenia, this same panel, on the same day, issued *New Jersey Farm Bureau, Inc. v. E. Amwell Township and Planning Board*, which upheld an apparently "less dramatic" downzoning ordinance (from one unit per three acres to one per 10 acres), but in a more rural setting. It is difficult to reconcile these two decisions or discern a meaningful rule of law from them. Regardless of whether one agrees with these results (six acre zoning in East Brunswick does seem like a bit of a stretch), the Court's breezy invalidation of a duly adopted ordinance is unusual, and thus contributory to planning chaos.

Invalidating a law by supporting one witness's view of its reasonableness over another's is a process recently frowned up by the United States Supreme Court in *Lingle v. Chevron*, 125 S. Ct. 2074, 2085 (2005) (characterizing as "remarkable, to say the least" a district court's invalidation of a Hawaii law regulating gas station rents by finding that one expert was more persuasive than the other in his determination that Hawaii's chosen regulatory strategy would not actually achieve its objectives). The *Bailes* Court's decision is perhaps even more "remarkable" because, as a reviewing body and not a trial court, it has only paper to rely on in evaluating credibility.

Condemning residentially zoned land for the purpose of keeping school-aged children — and their perceived drain on the public fisc — out of town is at issue in the *Mipro* case. Labeling such a taking as one in furtherance of "open space preservation" in the absence of support from a bona fide plan is not a legitimate exercise of eminent domain authority. Good planning is not merely procedural, it is substantive. If land is not suitable for residential development, that conclusion should be reached after a meaningful analysis — and most certainly, it should not be zoned for residential use.

Yet, merely going through the motions of planning, and putting all owners of residentially zoned land on notice that their property might be taken when they file for development permits, is a scenario the Chief Justice openly pondered at the May 1 *Mipro* oral argument. If the Court goes down this path and issues a decision that sanctions such a process, it will reduce comprehensive planning to nothing more than a farce. Stating to your intended victim that you are about to put a bullet through his head makes the act of doing so no less criminal than remaining silent as you pull the trigger. Lack of surprise does not equate to good land use planning. Notice is not the issue; a fair, open, substantive and professional planning process is. For a more detailed discussion of the legal and policy implications of *Mipro*, see A. Davis, "Mt. Laurel's

New Legacy?" Sept. 26, 2005, [181 N.J.L.J. 1222].

If anything is to be learned from these cases, it is that the courts cannot and will not end the planning chaos that exists in New Jersey. Courts should carefully scrutinize regulations that stifle development and trample on private property rights under the guise of "environmental protection." Judges should focus on resolving disputes between parties, and should not use litigation as a means to implement what they may personally believe is good public policy. Curing the chaos is a task best left to the legislative branch of government. Perhaps it is time to consider adoption of serious laws that mandate implementation of balanced, regional or statewide land use plans. Until that happens, the judiciary should at least acknowledge, respect and reinforce the legitimacy of comprehensive planning. After all, it's better than chaos. ■