

NJ courts and INVERSE REVERSE spot zoning



By Andrew T. Fede

Introduction

One commentator calls spot zoning “an ‘epithet,’ rather than a term having any real or substantive meaning.” D. Frizell, *Land Use Law* (36 N.J. Practice) §23.23(4) at 781 (2005).

In three recent decisions, property owners and developers successfully challenged as reverse or inverse spot zoning *ad hoc* retaliatory zoning ordinances that violated the requirements of the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.* (MLUL). These cases suggest the courts can use the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) burden “shifting” approach to give reverse spot zoning a more precise meaning.

Reverse spot zoning basics

A plaintiff may overcome the presumption of validity in favor of a zoning ordinance “through an affirmative showing that the ordinance in whole or in application to any particular property is clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of the [zoning] statute.” *Pheasant Bridge Corp. v. Township of Warren*, 169 N.J. 282 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002). An ordinance is reverse or inverse spot zoning if it “arbitrarily singles out a particular parcel for different less favorable treatment than the neighboring ones ...” *Manalapan Realty v. Township Committee*, 272 N.J. Super. 1, 13-14 (App. Div. 1994), *aff’d*, 140 N.J. 366 (1995). Reverse spot zoning differs from spot zoning, which arbitrarily bestows a more favorable treatment on a rezoned parcel. W. Cox, *New Jersey Zoning & Land Use Administration* §34-8.2(a) at 773 (2006); Frizell, *supra*, §23.23(4) at 781-782.

Both types of spot zoning are contrary to the MLUL provision stating that the planning and zoning process begins with the master plan, which the planning board adopts. N.J.S.A. 40:55D-28. The master plan’s land use and housing plan elements are to form the basis for the zoning ordinance that the municipality’s governing body adopts, which generally must be substantially consistent with these master plan elements.

The New Jersey Supreme Court invalidated reverse spot zoning ordinances in two leading cases decided in

1974. In the initial case, the plaintiff's property was included in a portion of a residential zoning district rezoned to permit retail uses. *Petlin Assoc. v. Tp. of Dover*, 64 N.J. 327 (1974). After the plaintiff filed its plans to build a department store, the municipality twice changed the zoning ordinance in the area including the plaintiff's property, thus prohibiting the proposed retail use. Justice Mark A. Sullivan wrote, "[t]he record demonstrates that no real consideration was given to how the property would fit into an integrated and comprehensive zone plan, but rather that the various enactments were designed to affect only the use of plaintiff's property, i.e., inverse spot zoning."

The court extended this theory three months later to invalidate a zoning ordinance that abolished a municipality's entire garden apartment zoning district. *Odabash v. Mayor and Coun. Dumont*, 65 N.J. 115 (1974). The ordinance turned the plaintiffs' property into a down-zoned island surrounded by garden apartments, which apparently were made into nonconforming uses. The Supreme Court affirmed the Appellate Division's finding that the ordinance was "reverse spot zoning."

"[W]hen an ordinance amendment changes use restrictions applicable to an area, and there had been a predominant utilization of the immediate area for the formerly permitted and now prohibited use, the amendment may well be invalid, as arbitrary and unreasonable, as applied to parcels which had not previously been so used."

The court added that "the test of invalidity is not necessarily the complete unusability of the property involved for the now permitted uses, but rather whether, in view of the extent of the now prohibited uses in the close vicinity of the parcel, its value will be substantially depreciated and its marketability greatly impaired if the prohibited uses are not allowed." Also see *Rolfe v. Borough of Emerson*, 141 N.J. Super. 341 (Law Div. 1976), wherein Judge Sylvia B. Pressler invalidated as inverse spot zoning a revision that applied to properties including property that the plaintiff proposed to use for a school bus business.

Not all zoning ordinance revisions that appear to be aimed at stopping a proposed development are reverse spot zoning. In *Manalapan Realty*, the township's governing body adopted a zoning ordinance amendment in response to local opposition to the plaintiff's proposed Home Depot store. The amendment prohibited in the township's C-1 regional commercial shopping center district retail stores "engaged in the sale of lumber or building materials or storing, displaying or selling materials outside a completely enclosed building." The proposed store's site was in a zoning district that was made up of only two tracts of nearly 100 acres of land.

The Appellate Division's majority opinion by Judge Stephen Skillman held that the ordinance "plainly" was not reverse spot zoning, without distinguishing or discussing the *Petlin*, *Odabash*, or *Rolfe* decisions. The court stated that the ordinance affected more than one tract, and that "the uses which this amendment excludes from the C-1 district are also excluded from every other district in Manalapan, with the possible exception of the C-3 highway districts," in which lumber yards were permitted. The court concluded that the amendment "does not impose an arbitrary, unique burden

on one tract of land." The reverse spot zoning issue was not before the Supreme Court, which nevertheless stated: "The decision not to permit the sale of 'building materials' can serve valid zoning purposes and 'cannot categorically be adjudged an arbitrary and unreasonable exercise of the zoning power.'"

Recent cases

Three recent reverse spot zoning cases provide some guidance in distinguishing *Manalapan Realty* from the *Petlin*, *Odabash*, and *Rolfe* decisions. In an unreported *per curiam* opinion, Judges Dorothea O'C. Wefing, who was on the panel in *Manalapan*, and Edith K. Payne affirmed the lower court's summary judgment order invalidating an amendment to Atlantic City's zoning ordinance. *The Children's Seashore House v. Atlantic City*, 2005 WL 1875385 (App. Div. 2005). That revision changed the plaintiff's property's zoning from RM-3 (Multi-Family Medium Rise Residential) to RM-2 (Multi-Family Low Rise Residential). This reduced the permitted building height from 100 to 40 feet and restricted the permitted density.

The plaintiff's property was one of two adjacent 2.94 acre parcels in the RM-3 zoning district. The other parcel was improved with a nine-story, 277-unit residential condominium complex known as the Warwick. The city's 1987 master plan designated these two blocks as an area to be developed with "mid-rise residential" uses. Neither that master plan nor a 2003 revision called for a change in this designation. In 1995, the city's planning board approved a site plan on the plaintiff's property for a retirement complex with 238 units and two eight-story buildings.

In January 2004, the city council began the process that rezoned the plaintiff's property. Representatives of the Warwick spoke at the public hearing in favor of the ordinance. Just two weeks before down-zoning the plaintiff's property, the city rezoned property three blocks away to permit a 22-story high density residential complex.

The Appellate Division reviewed the ordinance in its "site-specific context, which is somewhat more restricted a focus than would be the case if the change in zoning had more general applicability." The court expressed its concern that the city adopted the ordinance to benefit the occupants of the Warwick, who apparently did not want their ocean views blocked by the construction of the previously permitted mid-rise structure on the plaintiff's property. The court also stated that once the plaintiff "offered sufficient evidence of arbitrary conduct to overcome the presumption of validity" in favor of the ordinance, the city had the burden "to provide some justification for its actions." Because the city advanced no evidence of changed circumstances to justify the "unique burden" that the city imposed on the plaintiff's property, the court held the city's "burden was not met."

In *Riya Finnegan, LLC v. Township Council*, 386 N.J. Super. 255 (Law Div. 2006), Judge James P. Hurley rejected the municipality's evidence offered in an attempt to explain a targeted zoning ordinance amendment. The municipality rezoned the plaintiff's property from C-1 Commercial/Professional to OP Office Park in response to the plaintiff's pending development application for a

drive-thru pharmacy with other retail and office uses, which residential neighbors opposed. In effect, this zoning change prohibited the proposed retail use. The court found this change inconsistent with the 2001 master plan, rejected the governing body's contentions asserted in its resolution explaining the inconsistency, and held that the ordinance was inverse spot zoning. Judge Hurley also invalidated the ordinance under the arbitrary, capricious and unreasonable standard of substantive due process.

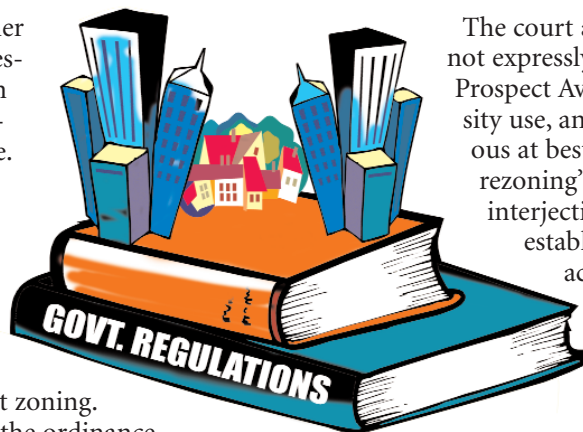
Judge Jonathan N. Harris went a step further when he invalidated a portion of the city's comprehensive rezoning ordinance in *PC Air Rights v. Mayor and Council of the City of Hackensack*, 2006 WL 2035669 (Law Div. 2006). The city's 2001 master plan included a portion of the property that the plaintiff proposed to develop within a corridor in which high density high-rise residential development was to be permitted. The city's zoning ordinance included the plaintiff's property within a high-density R-3 zoning district that was consistent with this land use plan. Many surrounding properties were developed with high-rise residential structures.

The plaintiff filed a site plan application seeking approval to build a multi-story residential apartment tower and parking garage. While that application was pending, the city approved a comprehensive rezoning ordinance, allegedly pursuant to the 2001 master plan. The ordinance rezoned other properties in the city, but it singled out the R-3 portion of the plaintiff's property and two other properties for inclusion in an R-2 zoning district without changing the zoning of the other properties in the R-3 zoning district corridor. Only one and two-family residences are permitted in the R-2 zoning district.

The court found that:

"[N]o real consideration was given to how the property in question would fit into an integrated and comprehensive zone plan, but rather that the enactment was designed to affect only the use of plaintiff's and two neighboring properties, thereby constituting reverse spot zoning. Although the change in zoning classification that affects plaintiff is part of a comprehensive reordering of Hackensack's zoning scheme, which reverberates throughout the municipality, the elimination of the high density R-3 zoning for the subject is irrational."

Judge Harris noted the "predominant use pattern in the immediate vicinity of the property, and for many blocks both north and south along Prospect Avenue is for high density, high-rise residential use." Thus, the court concluded that the "newly-minted low moderate density R-2 designation for the [plaintiff's property] is not supported by a shred of planning logic, and indeed is palpably inconsistent with the preservation of the high density R-3 designation immediately across Prospect Avenue to the west."



The court also found that "the 2001 Master Plan does not expressly address the down zoning of plaintiff's Prospect Avenue property into a substantially lower density use, and the land use plan element map is ambiguous at best." Judge Harris concluded that the "peculiar rezoning" of the property "is a classic example of interjecting a discordant use designation into an established area without a rational basis. This action deserves censure and disapproval by the court."

Motives and burdens

"Courts generally will not inquire into the legislative motive to impugn a facially valid ordinance, but will consider evidence about the legislative purpose when the reasonableness of the enactment is not apparent on its face." *Gallo v. Mayor and Tp. Council*, 328 N.J. Super. 117 (App. Div. 2000). "Moreover, if a particular ordinance serves two purposes — one lawful and one unlawful — a court should not inquire into which purpose the municipality intended the ordinance to serve. The presence of a lawful purpose will be sufficient."

Indeed, courts will uphold an ordinance "if any state of facts may reasonably be conceived to justify" its adoption. *Quick Chek Food Stores v. Springfield Twp.*, 83 N.J. 438 (1980). Even if a court cannot ascertain an ordinance's actual purpose, it will sustain the enactment of "it has any conceivable rational purpose. [citations omitted]." *Matter of C.V.S. Pharmacy Wayne*, 116 N.J. 490 (1989), cert. denied, 493 U.S. 1045, 110 S. Ct. 841, 107 L. Ed. 2d 836 (1990).

A plaintiff may meet the initial or *prima facie* burden and impugn the reasonableness of an ordinance on a reverse spot zoning claim by establishing that the ordinance: (1) prohibits a previously permitted use of all or part of the plaintiff's property, and (2) either (a) does not apply this new restriction to other properties previously developed with the now-prohibited use or to properties as to which the master plan or the zoning ordinance continue to permit the newly prohibited use, or (b) applies the new restriction to create a down-zoned island in a sea of previously developed property, even if the revision renders those developed properties to be nonconforming.

If a plaintiff makes this initial showing, the burden shifts to the municipality to show evidence explaining why it adopted the zoning change. Thus, as in *Children's Seashore House*, the court may invalidate the ordinance on a summary judgment motion if the municipality fails to move forward with evidence of any valid reason supporting the rezoning of the plaintiff's property. *Mogull v. CB Commercial Real Estate*, 162 N.J. 449 (2000).

Even if the municipality satisfies this initial burden of production, *Riya Finnegan, LLC* shows how courts may consider all of the circumstances, including the plaintiff's *prima facie* case, and infer that a municipality's reasons are merely a pretext for some other invalid reason and that no lawful purpose exists to save the ordinance. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). If the plaintiff produces direct evidence that the municipality considered an improper purpose, the courts

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may impose the ultimate burden of proof on the municipality. See *Myers v. AT&T*, 380 N.J. Super. 443 (App. Div.), cert. denied, 186 N.J. 244 (2005).

For example, Cox cites *Riggs v. Long Beach Twp.*, 109 N.J. 601 (1988) in his discussion of reverse spot zoning. Although the court's opinion does not refer to this theory, it invalidated a zoning ordinance amendment that "was adopted for the specific purpose of depressing the value of land which the township was interested in acquiring," obviously an improper purpose, and the court "focused ... on the fact that there was no valid municipal reason for the ordinance change as to this particular parcel." Cox, *supra* §34-8.2 at 773; *Howell Properties v. Tp. of Brick*, 347 N.J. Super. 573 (App. Div.) (invalidating street vacation ordinance that land-locked property in another municipality to prevent construction of low income housing), cert. denied, 174 N.J. 192 (2002).

The plaintiff did not carry this burden in *Manalapan Realty*. The appellate courts held either that the plaintiff did not satisfy

the *prima facie* case requirements or the municipality established that the ordinance prohibiting businesses selling lumber or building materials or storing, displaying, or selling materials outside a completely enclosed building advanced some valid municipal purpose beyond the obvious goal of excluding from the municipality the big box retailer. Also see B. Denning & R. Lary, "Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine," 37 *Urban Lawyer* 907 (2005) (discussing ordinances designed to stop big box store developments).

The *PC Air Rights* decision shows how these principles apply even if the plaintiff's property is rezoned by a comprehensive ordinance making many other zoning classification or boundary line changes, some of which are recommended by a master plan or revision. A municipality cannot bury a reverse spot zoning district boundary change under the cover of a more comprehensive zoning ordinance revision. ©