NJ Supreme Court Settles Proof Debate for Conditional Use Variances

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The New Jersey Supreme Court has finally settled the question concerning the burden of proof for an applicant to obtain approval of a conditional use variance. On July 23, 2013, the court decided TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of Twp. of East Brunswick (A-124-11), which addressed the issue of the quality of proofs an applicant must demonstrate to satisfy the negative criteria for the grant of a conditional use variance. The court held that the enhanced quality of proofs standard attributable to use variance cases has no application at all in the evaluation of an application seeking conditional use variance relief.

The facts of TSI East Brunswick, LLC involved a tract of land along Route 18 in East Brunswick Township and located within the municipality’s General Highway Commercial (HC-2) District. The owner, New Vornado, proposed to convert a vacant building on the property into a LA Fitness health club. Because a for-profit health club facility was classified as a conditional use in the HC-2 Zone, New Vornado was required to comply with relevant conditions established by the ordinance, including that the boundary of the lot on which the use was to be placed had to be located more than 500 feet from any residence. While the proposed LA Fitness building was approximately 1,200 feet from the closest residence, the edge of New Vornado’s property was within 500 feet of some homes in a small residential neighborhood situated on the other side of Route 18. Consequently, New Vornado was required to seek a conditional use variance from the East Brunswick Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70(d). The owner of a New York Sports Club across the street from New Vornado’s site objected to the application.

The Zoning Board granted New Vornado’s application finding that the proposed health club facility’s impact on nearby residences was insubstantial and the use did not substantially impair the Township zoning ordinance or zone plan. The New York Sports Club owner brought a prerogative writs action. The trial court upheld the Zoning Board’s decision. On appeal to the Appellate Division, the New York Sports Club objector argued that the Zoning Board had erred by not requiring New Vornado to prove the negative criteria by the enhanced quality of proofs standard established in Medici v. BPR Co., 107 N.J. 1 (1987) for use variance applications. The Appellate Division affirmed the trial court’s decision without directly addressing the quality of proofs issue. The court granted New York Sports Club’s petition for certification on the limited issue of whether an applicant for a conditional use variance must prove the negative criteria by the Medici standard.

The Medici decision established that zoning boards, in the context of a use variance, must address the positive and negative criteria found in N.J.S.A. 40:55D-70(d) and required that the negative criteria be demonstrated through an “enhanced quality of proof” defined as “reconciling the proposed use with the zoning ordinance’s omission of the use from those permitted in the zone district.” This requirement came from the court’s recognition that use variances are by their very nature inconsistent with the municipality’s zoning policy embodied in its adopted zoning ordinance and master plan. In Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994), the court determined that the burden of proof required for a use variance was too onerous for a conditional use variance and fixed a less stringent standard for conditional use variance relief cases. However, because of the particular issues that were raised, the Coventry Square decision only addressed the positive...
criteria and, although describing the negative criteria test in the conditional use variance case as being “similar” to the relaxed standard applied to the positive criteria, it did not expressly delineate the proper test. As a result, the matter of the quality of proofs for a conditional use variance to meet the negative criteria of the statute became a subject of debate in the land-use community for the past two decades, with one school of thought arguing Medici’s enhanced quality of proof still applied in the conditional use context while others advocated that the less-stringent proof standard of Coventry Square had application for both the positive and negative criteria. This lack of clarity gave rise to conflicting Appellate Division decisions.

In TSI East Brunswick, LLC, the court determined the Medici enhanced quality of proofs standard was inappropriate for evaluating an application for a conditional use variance. The court’s reasoning was based upon the fact that use variances and conditional use variances are fundamentally different. The former proceeds from the assumption that the use is prohibited, whereas the latter proceeds from the assumption that the use, if it complies with certain conditions, is permitted. The court stated that the inability of an applicant to comply with one of the conditions of the conditional use does not convert the use into a prohibited one.

Centered on this clear distinction between the two types of variances, the court went on to explain that for a conditional use variance, a zoning board must focus on the specific project at a specific site to find whether granting relief from one of the conditions can be reconciled with the reason the municipality imposed that condition in the zone. On the other hand, for a use variance, a zoning board must focus on the proposed prohibited use itself at the site to determine whether granting relief for the use can be reconciled with the municipality’s zoning ordinance. The court concluded the conditional use variance analysis was based on an entirely different premise from that of a use variance and therefore if the Medici standard were to be applied in the conditional use framework, it would effectively eradicate the distinction that a municipality drew when it designated the use as conditional. In applying its holding to the particular facts at hand, the court found the Zoning Board properly evaluated New Vornado’s conditional use application and upheld the approval.

With the TSI East Brunswick, LLC decision, there is now a bright-line rule as to quality of proofs that apply to conditional use variance applications. There is no longer any doubt that the Medici enhanced standard has no place in the conditional use variance context. Instead, such applications are to be judged solely by the relaxed standard of Coventry Square as to satisfaction of both the positive and negative criteria. Questions concerning this article may be directed to the author.