



Resolution Compliance The Board Attorney's Perspective

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Board attorneys are routinely asked what the board can do if it discovers an applicant is not complying with the terms of a resolution of approval. The board usually asks whether it can require the non-compliant applicant to appear before it and we, unfortunately, have to explain that enforcement is not the function of the board.

It is well-settled that hearings conducted before a Zoning Board of Adjustment are quasi-judicial proceedings.¹ A board deciding whether to approve a land use application is most similar to a court wherein there are rules of practice and an arbiter of the facts, and, ultimately a decision on the law. Like a court, a board is required to have jurisdiction to hear a case. Whether a board has such jurisdiction is dictated by the Municipal Land Use Law (MLUL). Of note, the powers of a board of adjustment “stem directly from the statute and may not in any way be circumscribed, altered or extended by the municipal governing body.”²

Like a Court, a board can retain jurisdiction over certain aspects of the approval. A board also has the power to craft reasonable conditions to meet the needs of the approval and mitigate any detriment associated with the proposal. The board could even include a condition of approval that precludes the issuance of a building permit or certificate of occupancy until certain conditions are satisfied. For instance, a condition of approval could provide “Prior to the issuance of a final certificate of occupancy, the Applicant shall install five (5) arbor vitae having a planting height of no less than 6' at planting.”

Cox 2-8.2 provides “...it should be emphasized that the boards are quasi-judicial bodies and are not involved with the enforcement of the ordinance. The enforcement

of the ordinance falls to the zoning officer, construction official, municipal attorney and governing body. Cox & Koenig, Section 2-8. Section 18 of the MLUL provides that the “proper local authorities of the municipality or an interested party” may institute any appropriate action, specifically, Section 18 provides as follows:

In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, **may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises.** (emphasis added)

Chapter 49 of Title 40 provides the authority for a governing body to establish penalties for ordinance violations. Specifically, *N.J.S.A. 40:49-5* sets forth the penalties and fines as follows:

The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, by one or more of the following: imprisonment in the county jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding 90 days; or by a fine not exceeding \$2,000; or by a period of community service not exceeding 90 days.

The governing body may prescribe that for the violation of any particular ordinance at least a minimum penalty shall be imposed which shall consist of a fine

which may be fixed at an amount not exceeding \$100.

The governing body may prescribe that for the violation of an ordinance pertaining to unlawful solid waste disposal at least a minimum penalty shall be imposed which shall consist of a fine which may be fixed at an amount not exceeding \$2,500 or a maximum penalty by a fine not exceeding \$10,000.

Almost all municipalities hire zoning officers to enforce their zoning ordinances and the conditions of land use approvals. It is generally expected that zoning officials will take action to enforce both. An applicant aggrieved by an action of the zoning official has three options under the law. The applicant could (1) file an appeal pursuant to *N.J.S.A. 40:55D-72*, (2) seek an interpretation pursuant to *N.J.S.A. 40:55D-70(b)* and/or (3) seek variance relief pursuant to *N.J.S.A. 40:55D-70(c)* or (d). Of course, the applicant could also simply comply with the ordinance requirements.

The Legislature has deemed the enforcement of zoning so important that *N.J.S.A. 40:55D-18* allows the municipality, as well as any interested party, to take action. Neighbors can and have taken action to enforce zoning violations when the zoning department seems unwilling. Even competitors have brought enforcement actions.³

If compliance cannot be obtained easily, the zoning officer or enforcement official can, and often will, file a municipal Court complaint to encourage, if not require, compliance. Alternatively, the zoning officer or enforcement official could issue a ticket every day during which a use/structure contravenes the requirements of the resolution or the zoning ordinance. However, if the fines are not substantial enough, an applicant, may simply accept the fines as a cost of doing business. For example, imagine an

illegal parking lot being used for beach parking. If the operator is earning \$25 per vehicle, per day, a daily fine of \$100 certainly will not alter this behavior.

As a practice tip, be aware that not all municipalities have amended their ordinance to these higher penalties.

In short, only the governing body, through its zoning officer or enforcement official, can enforce ordinance requirements and conditions of approval. The board simply cannot involve itself with enforcement directly. Indeed, if a board member were to file a complaint, they would then be precluded from hearing the matter if it returns to the board. As any board attorney can tell you, the board knows when its conditions are not being enforced and will often raise the issue at a meeting. The board spends significant time on each application and if conditions of approval are continually being ignored, the board chairperson can express concern to the township administrator about enforcement in general, but that is as far as the board can go.

The Well Written Condition

The goal of all zoning enforcement is compliance not punishment. Conditions should be carefully crafted with an eye toward enforcement. They should be clear, concise, and enforceable. Specificity is important. Zoning officers are not at the board hearings and cannot read the board’s mind. If the board wants a 5-foot-tall, white, board-on-board fence, same should be stated in a condition of approval. For example, if the board requires additional landscaping, the condition of approval should be specific as to the number and type of plantings, as well as the species, and a minimum height at the time of planting. The board should also address what happens if the plantings fail. Occasionally mother nature fools all of us.

Another potential solution to enforcement issues is for the board to retain jurisdiction for a limited period of time over a specific aspect of the application. For example, the board could retain jurisdiction over landscaping to ensure that the trees that are planted thrive and, if they do not, they must be replaced. Notwithstanding, even retaining jurisdiction does not give the board the supervision, it merely provides a right to the neighbor or the zoning officer to raise a concern which would be reviewed by the board.

Ensuring that any conditions of approval are detailed enough to be clearly enforced can certainly help with making sure that said conditions are actually enforced by the designated municipal official. It is a good practice to ascertain whether the applicant will stipulate to certain conditions of approval because if stipulated to, it is less likely that said conditions can be validly challenged as being unreasonable after the fact. As a matter of practice, a board attorney may wish to repeat the stipulated to conditions in advance of the board's deliberation and vote to ensure that there is no disagreement as to whether the conditions were agreed upon by the applicant.

Additionally, a good board attorney will tend to include certain standard conditions of approval in all resolutions which include, but are not limited to, the following:

1. Any and all outstanding escrow fees shall be paid in full and the escrow account shall be replenished to the level required by ordinance within 30 days of the adoption of a resolution, within 30 days of written notice that a deficiency exists in the escrow account, prior to signing the site plan and/or subdivision plat, prior to the issuance of a zoning permit, prior to the issuance of construction permits,

and prior to the issuance of a temporary and/or permanent certificate of occupancy, completion or compliance (whichever is applicable);

2. The applicant shall construct the proposed improvements in strict compliance with the documentary and testimonial evidence submitted to the board, including, but not limited to, any plans submitted or presented as part of the application, any exhibits introduced into evidence, and any statements made during the course of the hearing;
3. The applicant shall ensure that the property remains orderly during and after construction (i.e., building materials are appropriately stored, construction debris is timely removed);
4. Any conditions of approval stipulated to by the applicant are incorporated herein even if not specifically stated;
5. The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, to the extent same are not inconsistent with the terms and conditions set forth herein.⁴

Certain conditions arise from the facts of the case. Certain conditions of approval are appropriate in affordable housing cases, as well. In *Fair Share Hous. Ctr., Inc. v. Zoning Bd. of City of Hoboken*⁵ the Appellate Division found the following conditions to be valid:

6. The applicant shall be responsible for obtaining any other approvals or permits from other governmental agencies, as may be required by law, including but not limited to the municipality's and state's affordable housing regulations; and the applicant shall comply with any requirements or conditions of such approvals or permits.

7. The applicant must comply with the Development Fee Ordinance of the City of Hoboken, if applicable, which Ordinance is intended to generate revenue to facilitate the provision of affordable housing.

Final Thoughts

The wise board attorney educates its board, works with the zoning staff and drafts easily understood conditions of approval, which make it easier for the appropriate municipal employee to enforce said conditions. ■

Endnotes

1. *Cent. 25, LLC v. Zoning Bd. of City of Union City*, 460 N.J. Super. 446, 464 (App. Div. 2019) the powers of a board of adjustment "stem directly from the statute (R.S. 40:55-39), and may not in any way be circumscribed, altered or extended by the municipal governing body."
2. *Apple Chevrolet, Inc. v. Fair Lawn Borough*, 231 N.J. Super. 91, 96 (App. Div. 1989) (R.S. 40:55-39) replaced by NJS 40:55D-70.
3. *DePetro v. Twp. of Wayne Plan. Bd.*, 367 N.J. Super. 161, 172 (App. Div. 2004) a competitor may be particularly well equipped to frame the challenge and to provide the background that will illuminate its merits and faults
4. Mr. Galvin prefers to use a condition that provides: "The Applicant shall obtain any and all other approvals required by law."
5. *Fair Share Hous. Ctr., Inc. v. Zoning Bd. of City of Hoboken*, 441 N.J. Super. 483, 501 (App. Div. 2015)