

## By Howard Geneslaw of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. NJ Court Decision Narrows “Particular Suitability” as Ground to Support Use Variance

A recent decision of New Jersey’s Appellate Division reversed the grant of a use variance that would have allowed a fast-food restaurant. The facts of the case are not unusual, but the Court’s strict application of what constitutes “particular suitability” will make it substantially more difficult for commercial applicants to obtain use variances, particularly where the use in question is expressly prohibited by the zoning ordinance.



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The case arose after a developer secured approval from the Saddle Brook Planning Board in 2002 for development of a strip center consisting of four buildings. It intended to lease one of these buildings to Grillco Two, LLC, for use as a Wendy’s restaurant. However, the zoning ordinance prohibited “fast-food restaurants” in every zoning district, even though three existing fast-food restaurants all operated as legal nonconforming uses. Thus, Grillco needed a use variance for the proposed Wendy’s.

The Zoning Board of Adjustment held a public hearing which extended for 19 meetings over a 3½ year period. The other buildings in the strip center were by then occupied by a variety of commercial uses, including a Chinese restaurant and a Krauser’s convenience store, each of which sell food for take-out.

The applicant presented

planning testimony to the effect that a special reason which justifies the grant of a use variance is the blurring over time between “fast-food restaurants” and other types of restaurants, to the point that no land use distinction remains between them. The applicant’s planner also testified that the “symbiotic relationship” between the strip mall design and the fast-food use, and the complimentary nature of the proposed fast-food restaurant with the surrounding development, each constituted additional special reasons.

The objector’s planning expert testified that the site in question was not particularly suitable for fast-food use. He also testified that the uses were not complimentary in the sense that patrons of the strip center were not likely to spend a significant period of time shopping and then go to lunch, that the fast-food restaurant would not result in an upgrade in commercial development in the area, and that the grant of a use variance would be contrary to the intent of the zoning ordinance since it expressly prohibited fast-food restaurants. The Board of Adjustment’s own planner similarly concluded that the applicant failed to show special reasons, noting that the site was suitable for other commercial uses and did not exhibit any characteristics which made it particularly suitable for a fast-food restaurant.

Despite this testimony, the Board of Adjustment nevertheless granted the use variance, on the basis that the proposed fast-food restaurant was “particularly

fitted to the particular location” and would advance the general welfare. It further found that there was no substantial distinction between Wendy’s and a traditional restaurant (such a restaurant would not require a use variance), noting that the Wendy’s would have a lower parking demand than would a traditional restaurant. The Board of Adjustment also found that the applicant’s burden to present an “enhanced quality of proof” as required by the Medici case was reduced based on the municipality’s failure to re-examine its master plan within the 6-year period required by the Municipal Land Use Law. Indeed, it concluded that the proposed Wendy’s was consistent with the Master Plan’s goals and objectives.

The objector appealed to the Superior Court, which affirmed the grant of the use variance. The objector again appealed, arguing that Grillco failed to meet its burden of proof in support of a use variance. The Appellate Division, in a published decision, ruled that Grillco’s evidence was insufficient to satisfy the required special reasons, and therefore invalidated the approval. The case, *Saddle Brook Realty v. Township of Saddle Brook Zoning Board of Adjustment*, has not been appealed.

The Appellate Division flatly rejected all of Grillco’s arguments. For example, the fact that Wendy’s may fit within the scheme of the shopping center did not support a finding that the property is particularly suitable for a fast-food restaurant. Stated differently, the property’s suitability for a

fast-food restaurant was not found to be distinguishable, when compared to other property in the municipality. The lower parking demand of a fast-food restaurant similarly did not establish particular suitability, since that characteristic would apply to any site on which a Wendy’s might be proposed. The Court concluded that Grillco’s evidence, at best, established that a fast-food restaurant “would be a convenience to some customers of the existing retail stores.”

Finally, noting that the zoning ordinance did not merely omit fast-food restaurants as a permitted use, but instead expressly prohibited them, the Court concluded that the grant of a use variance despite the express prohibition resulted in a usurpation of the Township’s power to zone.

Although the Court’s decision does not announce a new rule of law, it does strictly and narrowly construe “particular suitability.” Applicants relying on particular suitability in support of a use variance will have a more difficult time proving their case, particularly where the zoning ordinance expressly prohibits the use in question (as opposed to circumstances where the use is simply not mentioned).

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