

By Howard D. Geneslaw of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C.

Board's Consultants Need Not Always Be Under Oath

A recent appellate decision in New Jersey permits a planning board or zoning board's professionals to offer certain statements concerning an application for development without being under oath. As a result, it is less likely that a board's action will be overturned where the board's professionals have not been properly sworn.



Howard D. Geneslaw

The case, *Kyriacou v. Lavin*, A-1163-04T3, arose in Holdmel Township following a series of four public hearings before the zoning board of adjustment. Plaintiffs were objectors who opposed a variance, due to insufficient road frontage, sought by the contract purchasers of the adjacent property. The board granted the variance, and plaintiffs appealed, claiming that the variance should be set aside because the board engineer gave unsworn testimony. The trial court agreed and reversed the board's decision. On appeal, the Appellate Division disagreed and upheld the grant of the variance.

The legal issue centered on the provision in the

Municipal Land Use Law, N.J.S.A. 40:55D-12d., which provides as follows:

"The testimony of all witnesses relating to an application for development shall be taken under oath or affirmation by the presiding officer, and the right of cross-examination shall be permitted to all interested parties through their attorneys, if represented, or directly, if not represented, subject to the discretion of the presiding officer and to reasonable limitations as to time and number of witnesses."

Anyone who has attended a planning board or zoning board meeting in New Jersey will recall that the applicant's design professionals, as well as members of the public offering statements in support of or in opposition to an application, are always sworn before being permitted to testify. However, this is rarely the case for the board's own professionals.

In determining that the variance should be upheld, the Appellate Division closely scrutinized the nature of the statements made by the board's engineer, concluding ultimately that they were not "testimony" and therefore did not have to be given under oath. The statements involved NJDEP procedures and

requirements, a description of the source of information supplied to the board, and "ruminations about the issues infusing the application before the Board." They also involved questions of the applicant's design professionals.

The line between statements which constitute "testimony", and those which do not, clearly is a fine one which will be scrutinized on a case-by-case basis. Thus, the better practice to ensure that an approval will not be susceptible to successful challenge on the basis that unsworn testimony was taken would be to ensure that all statements made by the board's design professionals are under oath.

How can an applicant ensure that testimony is taken under oath? Here are several suggestions:

- Some boards swear in their professionals at the start of each application (although that procedure is the exception rather than the rule). Where that procedure is followed, there should be no concerns about testimony being under oath. Checking with the board attorney or chairman beforehand may serve as a reminder that this constitutes a good practice.

- Check the board's contract with its design professionals.

In a procedure approved by the *Kyriacou* court, a board can specify in its annual contract with each of its professionals that all testimony offered throughout the year shall be deemed to be under oath.

- If statements approach or cross the line and become testimony, request of the Chairman or board attorney that the board's professional be sworn. Such requests are almost always granted, since the board has as strong an interest as does the applicant in ensuring that its decision is supportable and will be upheld should there be an appeal.

In view of the many substantive reasons which can result in challenges to development approvals, such challenges based on a failure to take testimony under oath can be easily avoided by ensuring that all statements to a planning board or zoning board are made under oath.

Howard D. Geneslaw is a Director at the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., which has offices in Newark, New York, Philadelphia and Trenton. His practice focuses on issues relating to land development throughout the New Jersey/New York area. ■