

By Geneslaw, Lottinville & Tuvel of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. Redevelopment: Exception allowing the record to be supplemented in an action in lieu of prerogative writ

A recent New Jersey Appellate Division decision, *ERETC, L.L.C., v. City of Perth Amboy*, 381 N.J. Super. 268 (App. Div. 2005), has not unexpectedly held that “redevelopment designations, like all municipal actions, are vested with a presumption of validity.” *ERETC* followed precedent and held that courts will not “second guess” a municipal redevelopment action if the decision is “supported by substantial evidence.” It was also not wholly unexpected that in *ERETC* the landowner who challenged the redevelopment designation prevailed.

What causes some pause, however, is the degree to which the reviewing court in *ERETC* entertained additional expert opinion testimony and supplemental evidence in its review. A prerogative writ appeal is limited to a review of the record below. No new evidence is introduced because the standard of review by the court is limited to a determination of whether the municipal action is reasonably justified based on the facts the municipality had before it. A court will thus not “second guess” or substitute its judgment for that of the municipality.

The court in *ERETC* entertained expert opinion testimony from both the property owner and the municipality in order to shed light on the sparse factual and very conclusory opinion testimony at the municipal level. The court allowed the introduction of new evidence in an effort to determine whether the municipal action was reasonable. The court concluded that the municipal action was not justified by the record.

In retrospect, this procedure should not have been a surprise. In 1967 the New Jersey Supreme Court carved out an exception to the general rule limiting the introduction of new evidence in prerogative writ actions. In *Lyons v. City of Camden*, 48 N.J. 524, 530 (1967) the Supreme Court observed that in redevelopment situations the plaintiff



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landowners face the loss of their property “if the declaration of blight is sustained” by the trial court. Due to the severity of that outcome, the Court held, “we are of the opinion that they should be given an opportunity to present to the Law Division any additional pertinent evidence they may have to show that the inclusion of their section...in the area declared blighted is not supported by evidence.” Hence, the prerogative writ review “is not confined to the record made below.” Notably, in *Lyons*, the door to supplemental testimony was opened by the municipalities refusal to allow the participating property owner the opportunity to cross-examine the municipal experts who testified in favor of the blight declaration.

The decision in *Lyons* nearly forty years earlier was revisited in *Concerned Citizens of Princeton v. Mayor and Council of Borough of Princeton*, 370 N.J. Super. 429 (App. Div. 2004). There, both sides supplemented the record below with opposing certifications addressing the Concerned Citizens’ allegations that the Borough “failed to conduct a good faith investigation into the true and factual status of the subject property.” The Appellate Division found that a municipality could supplement the record along with the objectors “to respond to allegations... that the Borough had not engaged in open and good faith discussions.” Note however that all of the supplemental information submitted by Princeton was already public information that

detailed ten years of municipal discussion regarding the factual basis for designating the area in need of redevelopment.

While Concerned Citizens of Princeton represents an expansion of *Lyons* insofar as both parties were “not confined to the record made below,” it also issues a caution. The court in Concerned Citizens of Princeton honed in on the fact that a property owner who challenges the designation of their property will not be given the option to supplement the record if the property owner fails to appear and participate at the municipal level. Concerned Citizens of Princeton cautioned that it was not the Supreme Court’s intention in *Lyons* “to authorize persons opposed to a determination of blight to withhold evidence available to them or to make no effort to obtain and to submit evidence in support of their position at the Planning Board hearing” and that *Lyons* “should not be read to sanction a willful failure to prepare for the Planning Board hearing in the expectation of obtaining a full de novo trial.”

While the *Lyons* property owner was given insufficient opportunity to participate at the municipal level, and was therefore allowed to supplement the record on appeal, the plaintiffs in Concerned Citizens of Princeton did not appear at the municipal level and thereby opened the door to municipal opportunity to buttress support for its action. In *ERETC*, the failing was a municipal one. The municipal planner failed to

“undertake an analysis of the statutory criteria as it applied to each of the properties.” The record below was thus conclusory and rendered the Court unable to judge the reasonableness of the municipality’s decision, opening the door to supplemental testimony from the objectors.

The rulings in *Lyons*, Concerned Citizens of Princeton and *ERETC* provide excellent guidance for both municipalities and property owners. The municipal lesson is that the record below must be thorough, based on specific facts and supported by the analysis of experts. The history of municipal efforts leading up to redevelopment should also be placed in the forefront. Likewise, the property owner should take every opportunity to participate, to both question the conclusions reached by the municipal professionals and to provide opposing expert opinion. Courts will not reward the failure to participate and a property owner must present as complete a case as possible before the municipality reaches its decision.

The presumption of the validity afforded by the Courts to municipal redevelopment decisions is grounded in the need for stability in the public process. Municipal government must do its share to maintain that presumption by fairly presenting the basis of its actions on the public record. At the same time, property owners can best protect their property rights by fully participating at the municipal level, thereby lending balance and the opportunity for full consideration of all the facts.

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