

# SHOPPING CENTERS

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## Lowering the Density Level An analysis of Grubbs v. Slothower

In January of 2007, the New Jersey Appellate Division in Grubbs v. Slothower, 389 N.J. Super. 377 (App. Div. 2007) decided a case of first impression relating to density variances. Specifically, the Court was presented with the issue of whether “a municipal zoning board of adjustment should apply the same standards of review for density variances, N.J.S.A. 40:55D-70d(5), as it does for use variances” under N.J.S.A. 40:55D-70d(1) and the seminal case of Medici v. BPR Co., 107 N.J. 1 (1987). The Grubbs holding creates a new standard of review for density variances which is less stringent than the standard of review for use variances.

In Grubbs, the Plaintiffs, William and Deborah Grubbs, submitted an application for development seeking permission to subdivide their single, existing conforming lot (the “existing lot”) in Rahway, New Jersey, into three new non-conforming lots and to construct two new one-family homes on two of the new lots, maintaining the existing one-family home on the third. The existing lot measures 90.5 feet by 152.07 feet and consists of 14,117 s/f. Furthermore, the existing lot is located in the R-2 zone that permits single-family dwellings with minimum lot sizes of 50 by 100 feet and minimum area sizes of 5000 s/f.

Upon submitting their application, Rahway’s Administrative Officer deemed it complete and referred the application to the Board of Adjustment (the “Board”) based on the need for a density variance pursuant to N.J.S.A. 40:55D-70d(5). After a hearing before the Board, the application was denied by a vote of three to three with one abstention. The Board’s memorializing resolution specifically noted that despite being asked by the applicant to relax the standards of review for density variances to the level of those implemented in floor area ratio cases, the Board could not do so because no reported case had extended the relaxed standards of review for floor area ratio cases established in the cases of Coventry Square Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994) and Randolph Town



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Center v. Twp. of Randolph, 324 N.J. Super. 412 (App. Div. 1999) to density cases. Grubbs at 381.

The trial court remanded the application to the Rahway Planning Board stating that



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to opine on the novel issue presented during the Board hearings when Plaintiffs requested that the Board scrutinize the application with the more relaxed standards of review imposed on conditional use

from one or more conditions of the ordinance.” Coventry Square at 297-298.

Similarly, in Randolph Town Center, the Appellate Division held that a less stringent standard of review applied to floor area ratio variances under N.J.S.A. 40:55D-70(d)(4). Following the reasoning of the Supreme Court in Coventry Square, the Appellate Division in Randolph Town Center emphasized that an applicant seeking relief from the floor area ratio requirements of a municipal ordinance should not be subject to the heightened level of scrutiny imposed on applications for prohibited uses.

More recently, in Grasso v. Borough of Spring Lake, 375 N.J. Super. 41 (App. Div. 2004), the less stringent stan-

associated with a proposed use with greater density than permitted by the ordinance.” Id. at 389. In other words, a successful applicant would be able to show that despite the proposed increase in density beyond the zone’s restrictions, and, thus, the increased intensity in the use of the site, the project nonetheless served one or more of the purposes of zoning and was consistent with the overall goals of the MLUL.

Being a case of first impression, the Grubbs Court proffered a hypothetical as to factors could be considered in reviewing a density variance. As stated in Grubbs, “it might be shown that the project promoted a more desirable visual environment through development of otherwise underdeveloped or vacant property, or, a successful applicant might demonstrate that the project’s construction with the requested density variance better promotes the character of the neighborhood or better preserves property values in the adjacent community.” Based on the above analysis, the Appellate Division in Grubbs remanded the application back to the Board for consideration consistent with its opinion.

The holding in Grubbs, and earlier in Coventry Square, Randolph Town Center, and Grasso, clearly demonstrate that court’s are expanding the interpretation of the standards of review under N.J.S.A. 40:55D-70(d) that were initially enunciated in the seminal Medici case. One thing is clear, the standards of review for a use variance remain undisturbed. However, all of the subsequent cases create less stringent standards of review for variances sought under the other subsections of the statute. These cases provide guidance to both applicants and local land use boards when confronting applications that require board of adjustment approval but are not the standard use variance case.

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the Board lacked jurisdiction to hear the matter because the application was really for major subdivision approval with ancillary bulk and area variances. The trial court’s reasoning stemmed from its view that “[t]he intensity of the use of the subject lot, without the proposed subdivision, for two proposed one-family dwellings and one existing family dwelling, where presumably more people would reside and thereby intensify the use of the land, is not at issue.” In summary, the trial court asserted that a density variance was not required in conjunction with the application but only whether subdivision approval should be granted. The Appellate Division reversed the trial court’s ruling that a density variance was not required based on the fact that the application would have resulted in three non-conforming lots upon which three dwelling units were proposed. The existing lot consisted of 14,117 s/f and according to the Rahway Ordinance would only permit 2.8 dwelling units, not 3 as the Plaintiffs sought to develop. Therefore, the Appellate Division reversed the trial court decision remanding the application back to the Planning Board.

More significantly, the Appellate Division was compelled

variances and floor area ratio variances by the Coventry Square and Randolph Town Center cases. The Appellate Division commenced its analysis by noting that in Coventry Square the Supreme Court held that “[b]ecause a conditional use by definition is not a prohibited use in the zone, the Court concluded ‘the stringent special reasons standards for a commercial-use variance... summarized in Medici did not apply.’” Grubbs at 386 (citing, Coventry Square, *supra* at 287). The policy reasons behind the lower standards of review set forth in Coventry Square relate to the issue that in the case of a prohibited use, the municipality has made it clear that the use should not be allowed within the zone district and therefore special reasons must be demonstrated to overcome the municipality’s determination. On the other hand, when it comes to a conditional use variance the underlying municipal decision is quite different. In such cases, the municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied. Accordingly, the standard of proof is less onerous as an applicant “need only justify the municipality’s continued permission for a use notwithstanding a deviation

dard enunciated in Coventry Square was extended to height variances under N.J.S.A. 40:55D-70(d)(6). Once again, the court held that the strict standard imposed on an applicant seeking to introduce a prohibit use to a certain zone district should not apply.

After a thorough examination of above-mentioned precedent cases dealing with N.J.S.A. 40:55D-70(d), the Appellate Division in Grubbs held that “Coventry Square’s relaxed standard of review should be applied to variance applications seeking deviations from the density requirements in a particular zone.” Id. at 388. The analysis of the Court in Grubbs led with the premise that a “density variance seeks a departure from certain regulations applicable to a use the municipality has chosen to permit, not prohibit, in the zone.” Thus, relief by way of a variance from a municipality’s density requirements an applicant “need not demonstrate that the property is particularly suited to more intensive development in order to prove special reasons under the MLUL (Municipal Land Use Law).”

Rather, Grubbs directs local land use boards to focus on whether the applicant’s proofs demonstrate that “the site will accommodate the problems