

Real Estate Title Insurance & Construction Law

200 Feet Is Not Enough

Basic fairness requires additional notice of applications for development

By Howard D. Geneslaw

Land use practitioners in New Jersey must pay close attention to public notice requirements, since the courts have long held that notice is a jurisdictional requirement. If the applicant fails to serve notice as required by law, any land use approval granted will, if challenged, likely be overturned. Accordingly, this necessitates a consistent, uniform set of notice requirements. The Municipal Land Use Law (MLUL) contains just such a framework and, in most instances, the courts have held firm in limiting notice to that which expressly is required by statute. There have, however, been certain court decisions that require notice in situations where the MLUL does not expressly require it (e.g., certification of a nonconforming use). A recent unpublished decision of the

Appellate Division, *GF Princeton, LLC v. Ewing Township Planning Board*, 2009 WL 2045170 (N.J. Super. Ct. App. Div. July 16, 2009), is the latest to go beyond the four corners of the MLUL.

By way of background, the MLUL establishes the basic parameters for notice of public hearings concerning major subdivisions, major site plans and variances, by requiring that notice be served on owners of property within 200 feet of the subject property and be published in the municipality's designated official newspaper. Service of notice is also required on public utilities that have registered to receive such public notices, and in certain situations, on the clerk of adjacent municipalities, the county planning board, the Commissioner of Transportation and the State Planning Commission.

In *GF Princeton*, decided on July 16, the Appellate Division held that notice could be required "as a matter of administrative due process and basic fairness" to a party not appearing on the certified list of property owners and not otherwise entitled to notice under the MLUL. Both sides are petitioning to the New Jersey Supreme

Court for certification.

The subject property in *GF Princeton* was a 45.7-acre tract owned by Herring Land Group in Ewing Township. In 1985, Herring's predecessor leased a 16.3-acre portion of the tract, for 75 years, to GF Princeton's predecessor in title, and GF Princeton ultimately became the tenant. The following year, the lease was amended to provide the tenant with an ownership interest in two office buildings, parking and other improvements within the demised premises. An improvements deed and a memorandum of lease were recorded.

Some years later, Herring entered into a contract for the sale of 4.8 acres of the property. The contract was contingent upon the seller obtaining subdivision approval and upon the buyer obtaining site plan approval for the construction of an extended-stay hotel. Applications were filed with the Ewing Township Planning Board to create (i) the 4.8-acre lot which buyer was to acquire; (ii) an 18.3-acre lot containing the 16.3-acre premises previously leased to GF Princeton; and (iii) a vacant remainder lot. The applications to the planning board required variances, including one for lot width with respect to the lot containing GF Princeton's demised premises.

The planning board held a public hearing and approved the applications in a single meeting. A condition of approval required that applicants establish a cross access easement between the hotel lot and

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the lot containing GF Princeton's demised premises. Because GF Princeton was a tenant of the subject property, rather than an owner of property within 200 feet of the subject property, it did not appear on the certified list of property owners and, therefore, was not served notice of the hearing.

GF Princeton filed a complaint in lieu of prerogative writs seeking to set aside the planning board's approval. The complaint alleged, among other things, that (i) a portion of GF Princeton's property was necessary for development of the hotel, to which GF Princeton did not consent; (ii) the easement was located within GF Princeton's demised premises; and (iii) GF Princeton possessed a "sufficient property interest" in the property to be subdivided and developed so as to be entitled to notice of the applications to the planning board. The trial court dismissed the portions of the complaint containing these allegations, upheld the grant of subdivision and site plan approval, and remanded for further proceedings with respect to signage variances (which applicant later withdrew).

On appeal, the Appellate Division held that GF Princeton's consent was not required to the development applications, but that it was entitled to notice of the public hearing. Accordingly, the Appellate Division vacated the approvals and remanded to the planning board for a new hearing, on notice to GF Princeton.

The court began its analysis with the premise that "[n]otice of an application for a land use approval or other governmental permit may be required either by express statutory mandate or as a matter of administrative due process and basic fairness."

The court described as a "significant consideration" in its analysis concerning notice "the substantiality of that party's interest in the action that approval would authorize." Although the record did not allow the court to determine whether the access easement required as a condition of approval would interfere with GF Princeton's use of its leasehold estate, the court concluded that the "close relationship" between GF Princeton's property rights, under its lease and the improvements deed, with the fee owner's contract of sale and the need for site plan approval "underscores the substantiality of [GF] Princeton's interest in

the applications for subdivision and site plan approval." Additionally, the court also gave weight to the fact that the public hearing before the planning board constituted GF Princeton's only opportunity pursuant to the MLUL for presentation of opposition to the grant of the approvals.

Finally, the court concluded with a discussion of the reasons why it rejected the applicant's and planning board's contention that notice was limited to only owners of property within 200 feet in accordance with the MLUL in N.J.S.A. 40:55D-12b. It explained that "[t]he interest of owners of properties located within 200 feet of a property which is the subject of an application for a land use approval is less direct and substantial than the interest that [GF] Princeton has in the subject property as a result of its seventy-five-year lease and ownership of substantial improvements," yet those within 200 feet are entitled to notice by statute. The court characterized "[GF] Princeton's interest in the applications for the subdivision of the property on which its office buildings and ancillary improvements are located[,] and site plan approval for a hotel that seems to contemplate some use of the leased property and associated easement," as being "so direct and substantial that [GF] Princeton was entitled, as a matter of administrative due process and basic fairness, to individual notice of the application even in the absence of an express statutory requirement."

In addition to the lack of notice, the court also found important the applicant's failure to disclose to the planning board GF Princeton's leasehold interest or to provide it with a copy of the lease or amendment to the lease. Similarly, the testimony presented at the public hearing did not disclose GF Princeton's interest. These omissions, according to the court, were significant, because had full disclosure occurred, the planning board might have required that the applicant give notice to GF Princeton, or might have imposed conditions relative to protecting that interest.

Interestingly, the *GF Princeton* opinion does not reconcile *New York SMSA Limited Partnership v. Township Council of the Township of Edison*, 382 N.J. Super. 541 (App. Div. 2006). That decision involved a municipal ordinance which expanded the MLUL notice procedures by requiring that

applicants for major subdivisions, major site plans and variances both (i) serve notice of the hearing on owners of property within 300 feet of the subject property, and (ii) post a notice of the hearing on the subject property. The *New York SMSA* Court concluded that "the authority to enhance the scope and method of notice specified in N.J.S.A. 40:55D-12 is not expressly delegated, fairly implied or reasonably incident to the powers the Legislature conferred through the [MLUL]."

In its analysis, the *New York SMSA* Court commented that "[g]iven the Legislature's efforts to provide detailed guidance concerning service of notice in the context of condominiums, homeowners' associations, partnerships, public utilities and neighboring municipalities, it is unreasonable to assume that the Legislature intended to allow individual municipalities to fashion rules that would inject new confusion." Yet some would say that is exactly what the Appellate Division has done in *GF Princeton*. The panel in *New York SMSA* consisted of Judges Fall, Parker and Grall, with Judge Grall authoring the opinion. Judge Grall was also a member of the *GF Princeton* panel, along with Judges Skillman and Graves. The opinion was per curiam.

To the extent *New York SMSA* and *GF Princeton* can be reconciled, the lesson seems to be that municipalities cannot exceed the notice requirements set forth in the MLUL because the need for uniformity precludes an expansion, but in specific cases, particular parties having significant property interests may, as a matter of administrative due process and basic fairness, have a right to personal notice. While this dichotomy fully protects private property interests, it leaves a host of unanswered questions concerning how an applicant determines when a property interest of a tenant, a right conferred by an easement or some other interest in real estate rises to the level of requiring notice, how an applicant for development approvals determines the existence, nature and extent of that interest, and how the applicant determines on whom and at what address to serve notice. Applicants would do well to provide notice if there is any doubt as to whether administrative due process and basic fairness requires it. ■