industrial facilities, and housing for a broad range of needs, including lower income, middle-income and high-income housing. What we have, apparently, is a judiciary that is willing to go along with whatever the public sentiment of the moment seems to be with respect to any specific development.

Planning Testimony Is Irrelevant

The concerns of the development community were heightened by a decision approved for publication on May 25, 2001. In *F.M. Kirby v. Township Committee of the Township of Bedminster*, 341 N.J. Super. 276 (June 23, 2000), a substantial land area (131 acres) was changed from one dwelling unit per three acres to one dwelling unit per 10 acres. At the trial level, the plaintiff offered professional planning testimony that indicated that the zoning was unnecessary and inconsistent with other zoning in the area; provided testimony of a real-estate appraiser who determined that there was a substantial diminution of value in the property; attacked the change in zoning as being improperly motivated by fiscal issues; and suggested there was no reason to change the existing ordinance to a more restrictive one.

The court appointed a planning expert who reviewed the ordinance and suggested that although the municipality was free to adopt whatever zoning it wished, a five- or six-acre zoning was more appropriate. The trial court found that the planning testimony of all of the planners was largely irrelevant, and that if the governing body shaped an ordinance designed to meet a legitimate governmental objective, that was acceptable.

One of the problems that the land development community faces in this case is the utter dismissal given by the court of any of the economic arguments. Although the Appellate Division indicated that it did not particularly believe the appraisal offered by the plaintiff, it indicated that it was largely irrelevant whether or not there was any diminution of value. The court cited the 1992 case of *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 129 N.J. 121 (1992), for the proposition that even very substantial diminution of value does not constitute a taking, if the ordinances are otherwise reasonable. (In *Bernardsville Quarry*, it appears that 90 percent of the value of the property was reduced by the municipal action.)

Is There Any Hope?

"But wait," you ask, "hasn't our Supreme Court of the United States just acted in a case involving 'takings?' Doesn't this mean anything in New Jersey?"

It is true that the Supreme Court, in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (June 28, 2001), did consider a case involving someone who claimed that his property had been "taken by the state of Rhode Island" because of a wetlands regulation. The building community has gotten excited about *Palazzolo*, but it may not be, in the end, a very meaningful case.

The case dealt with some procedural issues, including the ripeness concept, and whether the fact that Mr. Palazzolo acquired title to the property after the regulations concerning wetlands took affect would bar his claim.

More and more, attorneys will tell clients 'never mind what happens in the long run. If you've got an opportunity to develop today, take it.'

The Court ruled with Palazzolo on both counts, indicating that his claim had ripened and that the mere fact that he may have acquired the property after the state regulations took effect was of no legal significance.

However, Palazzolo did not win the case. He won a remand back to the trial court for more fact-finding as to whether or not his entire development tract had been so diminished in value that he had suffered a taking. Since it is entirely possible that subsequent fact-finding will demonstrate that Palazzolo may have suffered some diminution in value of the property, but that no taking has occurred, it is very premature for the landowning community to be cheering about *Palazzolo*.

A New Jersey case that gives a little cheer to the development community was handed down by the New Jersey Supreme Court, on Aug. 2, 2001. *Pheasant Bridge Corporation v. Township of Warren*, 777 A.2d 334 (2001), offers a glimmer of hope that once in a while, our courts will find that a zoning ordinance is, in fact, arbitrary, capricious and unreasonable.

The ordinance that the plaintiff in *Pheasant Bridge* complained about was designed to protect "sensitive environmental areas." In fact, the plaintiff's land had little, if any, environmentally sensitive areas.

Despite this, while the trial court had invalidated the ordinance as having very little relationship between the ends sought by the ordinance and the means used by the ordinance to achieve those ends, the Appellate Division had, on the basis of *Manalapan Realty* and the long-standing rationale of support of municipal actions, upheld the ordinance.

In reviewing the actual ordinance and the land in question, the Supreme Court concluded that, as was stated in *Homebuilders League of South Jersey vs. Township of Berlin*, 81 N.J. 127 (1979), "the purposes sought to be accomplished by a zoning ordinance must justify the restrictions placed on the use of one's land, and the means used to obtain the ends must be reasonably related to those ends." In *Pheasant Bridge*, Warren Township's ordinance failed the "means-end" test.

The plaintiff pointed to the lot immediately south and contiguous to his property as having essentially identical physical characteristics, yet the contiguous property was zoned to allow development at the one-and-one-half acre density that previously applied to the plaintiff's property. There are no environmentally sensitive lands on the site except a "depth-to-water-table" issue, and even that was resolved by the fact that the plaintiff actually had public sewer capacity available.

Despite all the Court's traditional deference to municipalities, in this case, the Court said that the town had gone too far. In doing so, however, the Court was unable or unwilling to grant any credence to the plaintiff's suggestion that the municipal action had amounted to a temporary taking of the plaintiff's property without compensation.

Where Does This Leave Us?

A review of how the courts have proceeded in terms of supporting municipal government leads one to the conclusion that, unless the municipal government makes a terrible blunder in drafting its ordinances, doesn't meet the procedural requirements set forth in the Municipal Land Use Law or has failed to meet the affordable housing requirements set forth under *Mt. Laurel*, then it will enjoy judicial support for whatever zoning ordinance it adopts. It no longer seems to make any difference whether or not traditional long-term comprehensive planning, which looks at an overall balance of needs and resources and proposes a long-term plan for the development of the community, is respected.

It no longer seems to matter whether or not property values, especially those values sought to be enjoyed by landowners with large holdings that had been zoned in a particular manner over a long period of time, are met. (See the language in *Kirby v. Township of Bedminster*.) All that seems to matter is that if the municipality comes up with even a debatable rationale for its legislative acts, and it has met its affordable housing requirements and the procedural requirements in the MLUL, that municipal action will enjoy judicial support.

If you are an attorney advising landowners about their rights, then one of the things you are going to be saying is "never mind what happens in the long run. If you've got an opportunity to develop today, take it." This short-sighted approach isn't good for business, and I doubt it's really good for the public interest in the long run. ■

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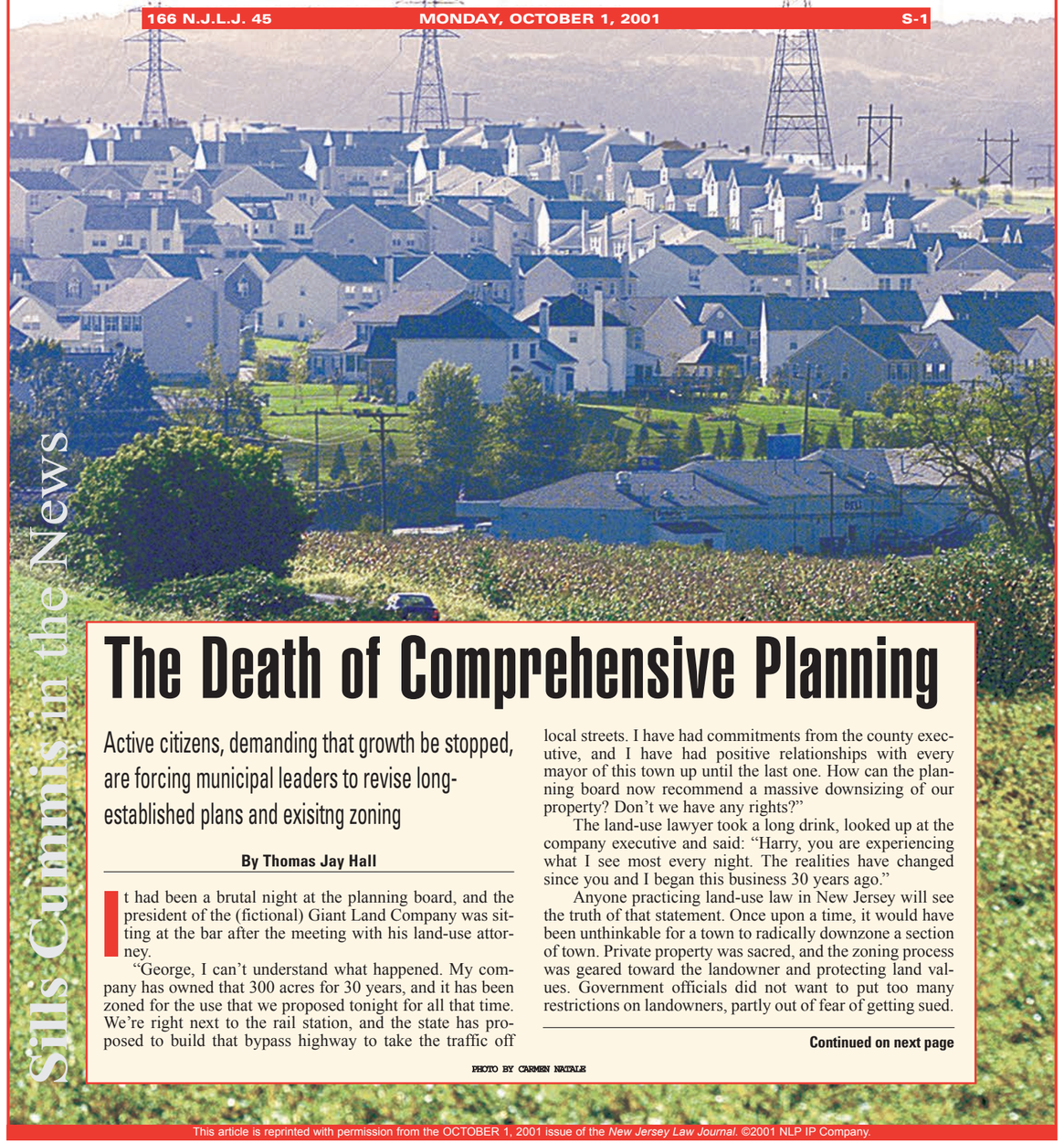

Sills Cummis in the News

The Death of Comprehensive Planning

Active citizens, demanding that growth be stopped, are forcing municipal leaders to revise long-established plans and exisitng zoning

By Thomas Jay Hall

It had been a brutal night at the planning board, and the president of the (fictional) Giant Land Company was sitting at the bar after the meeting with his land-use attorney.

"George, I can't understand what happened. My company has owned that 300 acres for 30 years, and it has been zoned for the use that we proposed tonight for all that time. We're right next to the rail station, and the state has proposed to build that bypass highway to take the traffic off local streets. I have had commitments from the county executive, and I have had positive relationships with every mayor of this town up until the last one. How can the planning board now recommend a massive downsizing of our property? Don't we have any rights?"

The land-use lawyer took a long drink, looked up at the company executive and said: "Harry, you are experiencing what I see most every night. The realities have changed since you and I began this business 30 years ago."

Anyone practicing land-use law in New Jersey will see the truth of that statement. Once upon a time, it would have been unthinkable for a town to radically downzone a section of town. Private property was sacred, and the zoning process was geared toward the landowner and protecting land values. Government officials did not want to put too many restrictions on landowners, partly out of fear of getting sued.

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PHOTO BY CARMEN NATALE

The Death of Comprehensive Planning

Continued from preceding page

The courts were willing to uphold zoning restrictions, but only if they were based on careful thinking and comprehensive planning. And local realtors and business leaders formed the core of the planning process.

Smart landowners would hold on to substantial undeveloped land while properties around the parcel changed from farms to factories or, in suburbia, from farms to housing developments. As market demand for development went forward, unbuilt land just became more valuable, and, sooner or later, the owner could come up with a proposal that would yield substantial profits.

But times have changed. Suburban voters no longer accept the proposition that growth — even tax-paying growth — is desirable. And as we have seen in central New Jersey, with the Merrill Lynch complex in Hopewell and the proposed Sarnoff development in West Windsor, voters have instructed their political leaders to "just say no!" Almost every proposal — even those in conformance with long-established plans and existing zoning — is attacked by active citizens.

Municipal leaders, facing angry constituents who demand that growth be stopped, are responding by revising their longstanding comprehensive plans and reducing potential yields, changing zoning from high-density to low-density, and eliminating traffic-generating uses where possible.

It's not just the local officials, either. The Pinelands Commission, facing what it termed unacceptable levels of growth, has just voted to reduce "growth areas." In the original Pinelands Management Plan these areas were to serve as ways of accommodating growth deflected from the central portion of the Pines and as sites where Pineland Development credits could be used. This latest action was done without any revision to the Pinelands Management Plan, despite the fact that critics pointed out that the major reason why the Pinelands Commission had been successful in defending its very large lot zoning was due to the courts' reliance on the management plan.

The Two Different Worlds

In the early days, zoning was approved as a concept that permitted municipalities to separate different kinds of land uses, one from the other. *Euclid v. Ambler Realty Co.*, 272 N.J. 369 (1926). At the same time, courts were very concerned about the notion of "over regulation," since they were concerned about the possibility of having governmental regulation go too far and become a "taking of property without compensation." *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

Although the seeds of the problem may have been sown in *Euclid*, for nearly three-quarters of a century two quite different concepts of land-use regulation were apparent. The first, a business-based model, held that it was appropriate for government to provide some regulation of land uses, the primary rationale being to secure and promote property value. For instance, having a smoky factory immediately adjacent to a high-end residential complex would help neither, and, thus, the use of zoning to segregate these land uses seemed perfectly appropriate.

When businessmen sat down to talk about potential property transactions, they would talk about the zoning and discuss the appropriate "yield" on the property in the context of the zoning. Land-use regulation was understood as being a relatively benign way of ensuring stability in land uses and land values.

Although the seeds of the problem may have been sown in *Euclid*, for nearly three-quarters of a century two quite different concepts of land-use regulation were apparent.

The other side of the coin was that popular government implies the ability of "the people" to use government to make changes in the way they lead their lives. In every other context of life when people want to see government do things differently, they contact their elected representatives and either convince them to do what they want or replace them. In the name of popular will, government in America has provided Social Security, changed the civil rights laws, invested massively in highways and public transportation and created a panoply of laws designed to protect and enhance the environment.

Land use is no exception. As roads have become more crowded and open space turned into housing developments, citizens first began to grumble and then took action. With some timidity at first, but then with increasing boldness, local governments began to "downzone" residential properties so the yield for development of residential uses was decreased and, further, began to apply the same logic to other uses that were considered high-traffic generators.

Commercial facilities, such as strip malls and shopping centers, were attacked as "visual blight" and unnecessary intrusions into public tranquility. But the big tax-paying office complexes and industrial uses were seen as "sacred" up until recently. Now, even those uses are attacked as being unacceptable traffic generators, and local governments are being asked by active citizens to change the zoning to limit the size and extent of such facilities.

There clearly has been a collision of two different worlds. The question that needs to be answered is: What's the law in New Jersey, and what can a land-use attorney provide to his client in the way of guidance in these turbulent times?

Shift in New Jersey Law

One does not have to go too far back to find a case that illustrates the problem quite nicely. In June 1995, our Supreme Court handed down *Manalapan Realty, L.P. v. Township Committee of the Township of Manalapan*, 140 N.J. 366 (1995).

The facts of this case are pretty clear: The operator of a regional mall, known as the "Manalapan Mall," decided to upgrade the facilities to bring in different kinds of shoppers and different kinds of uses, and entered into a plan to wholly renovate the mall with free-standing facilities, such as a Home Depot, a Target Store and a large regional grocery store. These kinds of shopping centers have been known in the business as "power centers" and are oriented toward meeting the perceived needs of automobile-oriented shoppers. The developer went to the planning officials and the planning board and received an opinion that the first of the elements, the Home Depot, was a permitted retail use under the existing ordinance and that the facility could be constructed.

For whatever reason, the local neighbors took offense to the development of the Home Depot and demanded that the governing body change the zoning. The governing body did so, less than a month after the planning board's staff had advised the board and the applicant that the existing zoning permitted the use.

The new ordinance forbade the use. The planning board followed the new ordinance and denied the application and the applicant appealed. The trial court, which lived in the first world of stability and value, held that the amendments to the ordinance were arbitrary, capricious, unreasonable and did not bear a rational relationship to the stated purpose of a comprehensive master plan, and struck down the ordinance amendment. The Appellate Division reversed the trial court, and the Supreme Court upheld the Appellate Division.

In enunciating its view, the Court upheld the general power of the municipality to enact amendments to ordinances — even in response to objections to a proposed use of land — as long as the amendment is consistent with municipal land-use law. The Court upheld the right of the governing body to decide which types of stores it will allow as permitted uses within its commercial district, as long as "no fundamental right is involved," and cited to a 1955 case, *Pierro v. Baxendale*, 20 N.J. 17 (1955).

In *Baxendale*, which was oriented toward preservation of community values by barring motels in a residential district, the Court held that one of the purposes of zoning was "to protect the public welfare by upholding property value." The *Baxendale* Court cited *Fisher v. Bedminster*, 11 N.J. 194 (1952), which upheld a five-acre zoning requirement, resting the holding on the primary ground that there was "ample justification for the ordinance in preserving the character of the community, maintaining the value of the property therein, and devoting the land throughout the Township for its most appropriate use."

It is quite fascinating to recognize how pliable the law has been; the early zoning cases stressed the "property value preservation" theory while the later cases are stressing the right of the governing body to act, legislatively, as their constituents desire.

Any Possible Zoning Ordinance

Those of us who have been working in land use have looked through the municipal land-use law for any help we can provide our clients, with one device being *Mt. Laurel* litigation (which permits the award of a builder's remedy where a municipality has not met its affordable housing obligation), and another being the use of a general development plan authorized under N.J.S.A. 40:55D-45 et seq. In a recent case involving both of these elements, it appears that land-use lawyers cannot blithely assume a level of protection without paying a lot of attention to facts and circumstances.

In *Mt. Olive Complex v. Township of Mt. Olive*, 340 N.J. Super. 511 (June 4, 2001), the court reviewed the saga of an experienced developer who assembled more than 1,000 acres of land in Mt. Olive Township, and secured approval for a planned-unit development in that area. In addition, as a result of *Mt. Laurel* litigation against the township, the developer was given an opportunity to construct additional residential housing with a 40-unit set aside for affordable housing, within section two of its planned-unit development. Their overall approval on the site called for commercial and industrial development and 3,063 mixed residential units. They had constructed section one of the planned-unit development, consisting of 45 single-family dwelling units, 150 townhouses and 636 apartment units.

This case illustrates a number of things, including the fact that zoning, by itself, doesn't solve all problems. The basic reason why development never went forward on the balance of the development was the lack of sewers. The town and the developer had, early on, decided the best way to approach the problem was to put in a large treatment plant. The new plant was to service 2,200 homes in the Budd Lake area (which had septic problems) as well as the more than 2,000 units that were remaining in the planned-unit development. The sewers never got built.

Three things of consequence happened between the time that the township got a settlement with the Public Advocate and the Morris County Fair Housing Council (approved by the trial court on Aug. 2, 1985) and the action of the Appellate Division in 2001.

First, the Department of Environmental Protection issued a Discharge Allocation Certificate to the developer for a 1.55 million gallon-per-day sewer plant discharging to the south branch of the Raritan River. The conditions that were attached were so strict that it appeared the costs were far in excess of any gain that would be achieved in the development, and the township refused to go ahead and support with public funds this kind of high-cost, highly sophisticated sewerage plant.

Second, the Council on Affordable Housing reduced the township's fair share from 500 units to 227 units.

Third, the New Jersey State Development Plan, in reviewing the township's development patterns, placed almost all of the township into Planning Area 5, an environmentally sensitive planning area. The state plan, thus, excluded most of the developer's property from development.

Thereafter, the township re-examined its master plan and downzoned much of the property to permit only one dwelling unit per five acres.

The trial court found much of what the township did acceptable, but invalidated the five-acre zoning as "just tremendous overkill" and the two-acre zoning as "a substantial overkill." The trial court found that the motivation of the township was to slow down growth because of perceived "over-development."

The Appellate Division found that the township had received substantive certification from the Council on Affordable Housing; there was no merit to the developer's argument that the township was bound by the original fair share allocation; the developer had delayed too long in enforcing its rights under the consent judgment; the planned-unit development approvals had expired; and the township had every right to adopt whatever zoning the local legislature found to be appropriate, so long as the ordinances were based on some credible reasoning.

The Appellate Court, citing *Manalapan Realty and Bow and Arrow Manor v. Township of West Orange*, 63 N.J. 335 (1973), noted that it has long been established that

> it is common place in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the Court to rewrite or annul a particular zoning scheme, duly adopted by a governing body, merely because the Court would have done it differently, or because of the preponderance of the weight of the expert testimony adduced at trial is at variance with the local legislative judgment. If the latter is at least debatable, it is to be sustained.

This case is a clear indication that if a developer has rights that have vested under a particular set of approvals (in this case, long-term vesting under planned-unit development approvals), he had better exercise those rights before they expire. Otherwise, the municipality is very much free to change the zoning to meet what it perceives to be the conditions in existence at the time. And, even though COAH regulations seem to indicate otherwise, this court said that if the municipality has met its affordable housing obligations, it is going to be OK to change the zoning, even for an entity that had agreed to build *Mt. Laurel* housing in the past.

The court never batted an eyelash about the motivation of the township governing body. The mere fact that there was a desire to slow down growth or to accede to popular will to eliminate development didn't seem to bother the court one iota — the court stated that the local legislature is free to adopt any possible zoning ordinance.

What bothered a lot of people in reviewing this decision was the portion of the court's decision involving the State Development and Redevelopment Plan. The court indicated that it was perfectly fine for Mt. Olive Township to rest a portion of its planning decisions on the New Jersey State Plan designations, but also made it clear that this was a voluntary act on the part of the local government. Of course, this means that should a municipality seek to use the state plan to downzone property and to make development less possible, that will be acceptable. But if the state plan is cited as a reason to have more intense development in metropolitan and suburban communities, the municipalities are free to reject the state plan.

This case, coupled with the apparent willingness of courts to permit local governments to adopt zoning that meets the public concerns of the moment seem to make a mockery of the whole notion of comprehensive planning. Comprehensive planning needs to be very long-term based and provide for necessary public and private investments in infrastructure, educational, commercial and