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Parry the Arbitrary

What to do when local governments unfairly block development projects.

By Roy Goldberg

It's a developer's nightmare scenario: The project that promises to prove hugely successful runs into a stone wall of intransigence from local land-use officials.

The developer understands that local governments may enact and enforce reasonable regulations that prevent an owner from using his land in such a way that it causes injury to others, or which restrict economic uses of property to different zones. But if that developer can persuade a court that the local officials have acted in an arbitrary and capricious manner, it can overturn the negative decision.

However, merely reciting the oft-invoked mantra "arbitrary and capricious" is not enough. It is one thing to claim that an agency act or omission is arbitrary and capricious, but quite another to convince a court. This article looks at cases where developers have been successful in challenging local land decisions as arbitrary and capricious.

Local officials involved in zoning and planning decisions are, of course, not immune from politics. This often means they are susceptible to neighborhood or other community opposition to a development project. However, courts have repeatedly held that if the local land-use officials allow community opposition to dictate their decision, the actions may be vacated as arbitrary and capricious.

In March of this year, a state appeals court in New York ruled that a local board of zoning appeals acted arbitrarily and capriciously in refusing to grant a variance so that a developer could construct 22 dwelling units on a 37,000 square-foot parcel (the zoning laws required that the square footage be 46,000 feet or more).

Although the board was required by statute to apply and consider a series of "factors" in determining whether to grant the variance, the board improperly ignored this legislative imperative and instead rendered its decision entirely on the community opposition to the proposed development.

The court emphasized that while the board enjoyed broad discretion in applying the specified factors that the law required it to apply in deciding whether to grant the variance, the board could not refuse to consider any of the specified factors in making its decision. *W.K.J. Young Group v. Zoning Board of Appeals of Village of Lancaster, 2005 WL 628571 (N.Y.A.D. 4 Dept.), 2005 N.Y. Slip Op. 02005 (4th Dept. March 18, 2005).*

Similarly, a local planning commission in Tennessee was found to have engaged in arbitrary and capricious conduct last December when it refused to approve the second and third phases of a subdivision development. The commission tried to justify its denial by claiming that the developer failed to meet certain commission-imposed conditions on the development of the property.

However, the record of the commission meetings contained no indication that the agency had in fact conditioned its approval on anything other than compliance with its staff's technical recommendations regarding the plats that had been submitted (and it was undisputed that the developer had so complied).

The court ruled that the record made it clear that community opposition was the sole basis for the planning commission's decision not to approve the continued development. *B&B Enterprises of Wilson Co. v. City of Lebanon, No. M2003-00267-COA-R3-CV, 2004 WL 2916141 (Tenn. App. Dec. 16, 2004).*

Yet another case involved a developer's attempt to create an affordable housing community in North Carolina. When the preliminary plat was first considered, some members of the planning board and a prospective neighbor expressed concerns regarding increased traffic outside the development. The city council subsequently held proceedings in which the application was refused. The court held that the proceedings failed to "bear any of the hallmarks of a 'fair trial.' " Rather, the entire process was designed to provide comment and opinion, not to produce evidence or resolve factual issues.

Additionally, the council failed to make findings of fact "with sufficient specificity to inform the parties, as well as the court, what induced its decision." The council merely stated that it had considered the public health, safety, and welfare, and had expressed its "concerns" regarding density and traffic issues. Such an informal resolution and basis for the denial rendered the decision invalid. *Guilford Financial Services, LLC v. City of Brevard, 150 N.C. App. 1, 563 S.E.2d 27 (2002).*

Pursuit of an Ulterior Motive

"Arbitrary and capricious" challenges also may succeed where the developer can show that an agency action was motivated by an ulterior purpose. For example, after a New Hampshire municipality tried in vain to acquire a property so that it could remain undeveloped as "open space," it rezoned the land to place it within a "conservation zone," and then denied the owner's subdivision plan for the property as inconsistent with the zoning.

The state supreme court held that the zoning change was unlawful. In attempting to purchase the property, the city had refused to offer more than a value based on the city's intended use of the land as an open space. However, the property owner was entitled to receive a fair price based on the land's highest and best use.

The court pointed out that "arbitrary and unreasonable" restrictions that substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking, requiring the payment of just compensation, and also noted that it was plain that the city was attempting to obtain for the public the benefit of having the land remain undeveloped as open space without paying for that benefit. The uses permitted were "so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the land," and they therefore prevented the land owner from enjoying "any worthwhile rights or benefits in the land." *Burrows v. Keene, 121 N.H. 590, 432 A.2d 15 (N.H. 1981).*

Governments are famous for taking a long time to act on land-use applications. However, if they take too long, their decisions may be overturned by the court. In 2002, the Montana Supreme Court ruled that a city acted arbitrarily and capriciously in denying a subdivision application.

After receiving a preliminary plat application for a proposed subdivision, the county planning board recommended approval of the subdivision, subject to 18 conditions. However, the city failed to act on the application within the required 60 days. The developer obtained a writ of mandamus compelling the city to act, and the city conditionally approved the application, subject to 26 conditions. The developer then sued, alleging that the city failed to act within the mandatory 60 days, that imposition of some conditions were an abuse of discretion, and that its due process rights were violated.

The trial court ordered the city to review and approve, conditionally approve, or deny the application within 30 days. The city then denied the application without written findings. The developer then filed an amended complaint, alleging constitutional violations and requesting damages and approval of its application. The trial court concluded that the city acted arbitrarily, capriciously, and unlawfully, finding that its "conscience was shocked by the City Council's disregard for the laws of our state." The court ordered the city to conditionally approve the preliminary plat application, subject to the original 18 conditions. *Kiely Constr., L.L.C. v. City of Red Lodge, 312 Mont. 52, 57 P.3d 836 (2002).*

Two months ago, a Rhode Island state court held that a local zoning board of review acted in an arbitrary and capricious manner when it denied a request for two variances necessary to construct a proposed single-family dwelling on a vacant lot. The court faulted the board for "dragging of its feet" in ruling on the application.

The land owner had submitted his application on Feb. 18, 2004; however, the board did not receive a recommendation from the planning commission until May 2, 2004. Despite the law's requirement that the board make an immediate request to the planning commission for a recommendation, and that the recommendation be returned within 30 days of that request, more than 70 days elapsed between the land owner's submission and the board's receipt of the recommendation. The board finally rendered a decision on July 7, 2004.

Because the board allowed five months to lapse between the submission of the land owner's application and a decision, the court found that the procedure was fundamentally flawed. Moreover, the lack of expediency was "merely the first in a series of errors." The court was "appalled at the progression" of the case and found that the delay combined with other "procedural flaws and errors of law [had] plagued the board's review of the [landowner's] application from start to finish." *Dulude v. Town of Coventry Zoning Board of Review, NO. KC 04-0742, 2005 WL 704884 (R.I.Super. March 25, 2005)*

Irrelevant Demands

Finally, the local land-use officials may act arbitrarily and capriciously if they require developers to undertake activities or prepare plans that are unnecessary to the project at issue. For example, a New York state court held that a town planning board acted arbitrarily and capriciously in requiring a developer to prepare an additional plan for development of a lot that he did not then intend to subdivide or develop.

The developer had offered a plan that subdivided the tract into nine lots. However, the developer had no plans to develop the largest lot and, accordingly, the plan showed no planned development on that lot. The court held that while the board had the authority to require the developer to amend his plan, it was required to act on the plan that was before it.

The board therefore acted improperly in requiring the developer to prepare an additional plan for the development of a lot that he did not then intend to subdivide or develop. The board could not force an individual to develop, or to plan to develop, lands that the individual has chosen not to develop. *Viscio v. Town of Guilderland Planning Bd, 138 A.D.2d 795, 525 N.Y.S.2d 439 (1988).*

These and other cases demonstrate that developers subject to unwarranted interference by government officials may be able to obtain the necessary relief, and have their projects completed, if they are able to prove to the reviewing court that the agency acted in an arbitrary and capricious manner.

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