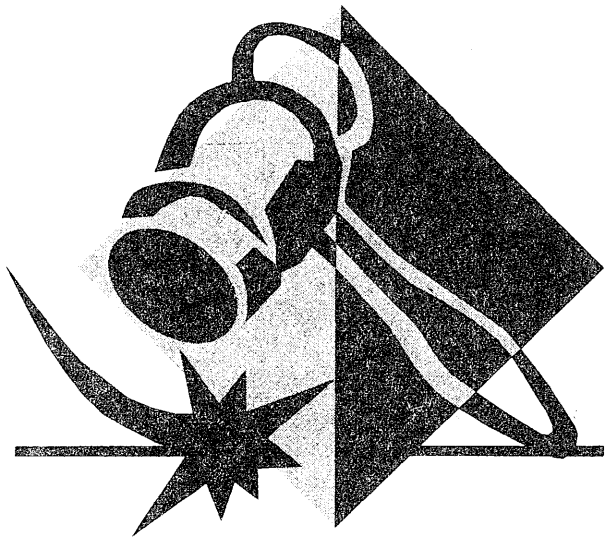
New Jersey Institute of Municipal Attorneys



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CONSIDERING RECONSIDERATION

By Jonathan E. Drill and Joseph E. Novak[1]

May a Board of Adjustment reconsider its 4-2 vote in favor of a "d" variance which resulted in denial of the variance so as to allow a seventh member of the Board the opportunity to read a transcript of the hearing, deliberate and vote on the application? That was the question before the Law Division for consideration in M & M Machine Shop v. Raritan Township Board of Adjustment, Docket No. HNT-L-654-95 P.W., and Peter and Mary Whitney v. Raritan Township Board of Adjustment, Docket No. HNT-L-655-95 P.W., a consolidated litigation which was recently settled by the private parties with the approval of the Board and the Court. The authors will review the facts of the case and the applicable law and will then present their opinions on the issues involved.

M & M Machine Shop illegally operated for over 20 years a metal fabrication business in a detached garage behind a residence located on a lot situated in a residential zone. Peter and Mary Whitney, residents located approximately one-half mile away but on the same street, had been aware of this illegal operation for some time but had not contested or complained about the use as they could not hear or see it from their property. As a result of an unrelated dispute between the parties, Whitney notified the Township Zoning Officer of the operation and, as a result, a municipal court summons was issued. M & M Machine Shop plead guilty, paid a fine and, at the suggestion of the municipal court judge, applied to the Board of Adjustment for a "d" variance to allow it to properly establish the metal fabrication operation.

After a year of stalling and at the prodding of the Board, M & M finally noticed for a hearing and presented its case. Whitney appeared and presented an opposition case. Only six (6)

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[1] Mr. Drill represents the Raritan Township Board of Adjustment and Mr. Novak represents the Township of Raritan. Both attorneys were involved in the defense of the Board in the litigation discussed in this article. Mr. Drill, whose land use practice consists primarily of representing municipal planning boards and boards of adjustment, is associated with Stickel, Koenig & Sullivan, Cedar Grove, New Jersey. Mr. Novak, a partner in Novak & Novak, Clinton, New Jersey, has a varied municipal law practice.

Board members were present the night of the hearing, but due to the fact that the application had been pending for such a long time, the Board directed M & M to proceed. At the conclusion of M & M's and Whitney's cases, the Board Chairman offered M & M the option of continuing the matter to the Board's next regularly scheduled meeting to give Board members who were not present during the hearing the opportunity to read a transcript of the hearing pursuant to N.J.S.A. 40:55D-10.2. This would have given M & M the possibility of having a full compliment of Board members to deliberate and vote on the application.

M & M, through its owner, announced that it did not want to continue the matter to the next meeting and that it wanted the Board to deliberate and vote that night. The Board then deliberated and voted 4-2 to grant the variance which resulted in denial of the variance as five (5) affirmative votes are required to grant a "d" variance pursuant to N.J.S.A. 40:55D- 70d. A memorializing resolution to that effect was subsequently adopted. The two members who voted against the variance explained that, although they believed that the negative criteria had been satisfied, and despite the fact that they felt bad for M & M, they could not find that the applicant had proved the special reasons which it claimed existed. The resolution so stated.

The next morning the applicant's attorney filed an application for reconsideration supported by an affidavit of M & M's owner stating that he had made a mistake in not accepting the offer for the continuance due to the fact that the hour was late, he had been tired, he had not understood the significance of what was being offered, and he had been confused and uncertain as to what would or would not have to occur at the continued hearing. M & M's owner stated that he was under the erroneous belief that a continuance would involve and necessitate all his witnesses, all neighbors, and the objectors having to return to testify. Citing a passage in

Bressman v. Gash, 131 N.J. 517, 527 (1993), quoting Hackensack v. Winner, 82 N.J. 1, 32-33 (1980), M & M argued that our courts have recognized the "elimination of confusion and uncertainty" as grounds for granting reconsideration.

The Board attorney issued an opinion advising the Board that a board of adjustment or planning

board in New Jersey has inherent authority to reconsider a matter but may exercise that authority only where the factual or legal circumstances have changed since the first decision was rendered, where "good" or "just" "cause" warrants reconsideration, or where fraud or illegality has been alleged to have occurred during the hearing process. The attorney's opinion was based primarily on two Appellate Division decisions, Allied Realty v. Upper Saddle River, 221 N.J. Super. 407, 413-414 (App. Div. 1987), certif. den. 110 N.J. 304 (1987) and Soussa v. Denville Township Planning Board., 238 N.J. Super. 66, 68 (App. Div. 1990), holding that "changed circumstances" or other "good" or "just" "cause" may warrant reconsideration of a decision by a local board.

The Board attorney's opinion also cited Morton v. Clark Tp., 202 N.J. Super. 84, 89-98 (Law Div. 1968), affirmed on the opinion below, 108 N.J. Super. 74 (App. Div. 1969), and stressed that, in the absence of changed circumstances, other "good" or "just" "cause", fraud or illegality, the law in New Jersey is that a Board has no authority to review its own decision solely for the purpose of reconsidering the evidence presented at the hearing and/or reconsidering the vote. As the Morton court held, to permit reconsideration for a purpose other than change in circumstances, "good" or "just" "cause," fraud or illegality, would lead to a lack of finality to the proceedings and would subject the result to "changes at the whim of the Board members or due to influence exerted upon them of other undesirable elements tending to uncertainty and impermanence." Id. at 98.

The Board attorney further advised that the reference in the case law which the applicant's attorney cited in support of the contention that the applicant's "confusion" and "uncertainty" warranted reconsideration was misplaced. The passage in Bressman containing the quote from the Hackensack case which was cited by the applicant in support of reconsideration was a general statement that various judicial rules "such as res judicata, collateral estoppel, the entire controversy doctrine and the like" have an "important place" in administrative decision making for the purpose of providing "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and

expenses; elimination of conflicts, confusion and uncertainty; and basic fairness." Significantly, the reference to "elimination of conflicts, confusion and uncertainty" was not cited as grounds for reopening a matter. The reference was to grounds for abstaining from making a decision in the first place.

The issue before the Hackensack Court was whether one administrative agency (the Public Employment Relations Commission "PERC"), which had concurrent jurisdiction over a matter with another agency (the Civil Service Commission), should have abstained from exercising its jurisdiction in the first place (and deciding the matter) in order to avoid the resulting confusion and uncertainty which would arise if the other agency also decided the matter but came to a different decision. The Court ruled that PERC should have never decided the matter in the first instance due to the possibility of the creation of conflicts, confusion and uncertainty.

The Board attorney concluded his advice to the Board by stating that the issue that the Board had to decide was whether there were any reasons which would constitute "good" or "just" "cause" warranting reconsideration, for the applicant did not assert that there was a change in circumstances or any fraud or illegality involved.

The reconsideration application was set down for consideration and vote at the Board's next regularly scheduled meeting.[2] After hearing from M & M and Whitney at this next meeting, the Board voted 4-2[3] to: reconsider the application; allow (not mandate) any Board members who had missed the initial

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[2] The applicant was directed to provide notice of the reconsideration application to all property owners within 200 feet of the property and to publish notice in the newspaper. The reasoning behind this was that, as the underlying variance application required notice pursuant to N.J.S.A. 40:55D-12, it would be prudent to notice the reconsideration application, especially in light of the participation by the neighboring objector.

[3] The same four (4) members who voted in favor of the variance voted in favor of reconsideration and the same two (2) members who voted against the variance voted against the variance voted against reconsideration. The reason that only six (6) members voted on the reconsideration issue was due to the Board attorney rendering an opinion that only those members who were present during the variance haring would be qualified to vote on the reconsideration issue. While there is no case law or statutory authority directly on the issue, the New Jersey Court Rules which have been applied by our courts to procedural questions in land use cases support this conclusion. Rule 4:42-2 provides in relevant part: "to the extent possible, applications for reconsideration shall be made to the trail judge who entered the order." Similarly, Rule 2:8-1(c) provides that motion for reconsideration in the Appellate

hearing the opportunity to read a transcript; and set the "d" variance application down for redeliberation and re-vote at a subsequent regularly scheduled meeting, notice for which the applicant would provide pursuant to N.J.S.A. 40:55D-12. A resolution to this effect was subsequently adopted.

The Board determined that the following three reasons constituted "good" or "just" "cause" warranting reconsideration:

1. At the time of the initial deliberation and vote on the "d" variance application, the hour was late, the Board was rushed, and members did not have adequate time to reflect and deliberate on the application. Further, the majority of members who voted in favor of the variance did not have a good feel or grasp of what "special reasons" were (as the majority included some newer members of the Board) which hindered their ability to articulate their position to and perhaps persuade those Board members who were either opposed to the variance or were looking for special reasons to justify the variance.

2. M & M's principal was confused, did not understand what it was which he was being asked to decide concerning the continuance offer, and made an excusable mistake in declining the continuance offer. M & M's principal was under the mistaken impression that to request the continuance would involve and necessitate all his witnesses, all neighbors, and the objectors having to return. M & M's principal did not want to inconvenience these individuals and, primarily based on these thoughts, declined the continuance offer as a result.

3. The applicant's attorney also made a mistake which should not be permitted to be visited

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Division "shall be decided by the judge who decided the original matter."

While the granting of a "d" variance requires an enhanced majority (at least 5 votes) pursuant to N.J.S.A. 40:55D-70d, the vote on the question of whether to reconsider is not governed by a statutory requirement mandating anything more than a simple majority of those members present and qualified to vote. In this case, the number of votes necessary for reconsideration could have been as few as three (3) if four (4) qualified members were present or as many as four (4) (as was the case here) if all six (6) qualified members were present for the reconsideration vote.

on his client. The attorney's mistake was not seeing that M & M's principal was confused and did not understand what was happening. Had the attorney asked for a brief recess to confer with his client, the entire situation most likely would have been avoided.

At the time of the rescheduled redeliberation and re-vote, two (2) Board members who had missed the initial hearing read the hearing transcript, signed certification to that effect pursuant to N.J.S.A. 40:55D-10.2, and participated in the redeliberations and re-vote.[4] The Board voted 5-2[5] to grant the "d" variance. The five (5) members who voted in favor of the variance this time around found special reasons to exist but specifically found that these special reasons were different than those urged by the applicant during the initial hearing. A resolution to this effect was subsequently adopted.

All three (3) resolution were than mailed to the parties and notice of their adoption was published in the newspaper.[6]

Prerogative writ appeals followed. On the same day both Whitney and M & M filed complaints. Whitney challenged the Board's actions in determining to reconsider its initial decision and then granting

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[4] One of the four (4) members who had initially voted in favor of the variance and who had also voted in favor of reconsideration was absent for the redeliberation and re-vote. In any event, as this individual was the second alternate member of the Board, he would not have been eligible to vote after the redeliberation in any event pursuant to N.J.S.A. 40:55D-69.

[5] The same two (2) members who initially voted against the variance and voted against reconsideration voted against the variance the second time.

[6] Rule 4:69-6(b)(3) creates a 45 day limitation period within which to file a prerogative writ appeal, triggered by mailing the resolution and publishing notice of adoption. A strong argument can be made that a prerogative write action that is filed before the mailing of the resolution and the publication of the notice of adoption should be dismissed without prejudice as premature. See, County Chevrolet v. North Brunswick Planning Board, 190 N.J. Super. 376 (Appl Div. 1983). Thus, while three (3) separate resolutions had been adopted by the Board, each one within 45 days of the Board's action at issue, the resolutions had been incidentally not mailed to the parties and notice of each resolution's adoption had been intentionally not published to stall the filing of any prerogative actions until the entire matter had been completed. The Board attorney wanted to stall the filing of any prerogative actions to avoid the potential loss of the Board's jurisdiction over the reconsideration application as well was to avoid the loss of the Boar's jurisdiction to reopen the matter. The loss of jurisdiction arguably would have occurred as soon as a prerogative writ action was filed as the ordinary effect of filing an appeal is to deprive the tribunal below of jurisdiction to act further in the matter unless directed to do so by the reviewing court. See, Sturdivant v. General Brass & Machine Corp., 115 N.J. Super. 224, 227 (App. Div. 1971), certif. den. 59 N.J. 363 (1971).

the "d" variance. M & M challenged the Board's initial denial of the "d" variance just in case Whitney prevailed in its challenge to reconsideration or the grant of the variance. Cross motions for summary judgment were filed and the issue was fully briefed but the court never decided the issue as M & M and Whitney reached a settlement which was approved by the Board pursuant to a consent order of settlement and remand entered by the court.

The issue that the court would have had to have decided was not whether the Board had to reconsider the variance application under the circumstances presented if it did not want to but, rather, whether the court sitting in review should preclude reconsideration where the Board wanted to and did vote to reconsider the application. See, Bressman v. Gash, 131 N.J. at 526. In essence, the court would have had to have determined whether the Board's vote for reconsideration was merely for the purpose of having a second vote with an additional Board member present in an attempt to affect the outcome of the decision, contrary to Morton, 108 N.J. Super. at 98, or whether the Board's vote for reconsideration was truly based on "good" or "just" "cause", in accordance with Allied Realty, 221 N.J. Super. at 413-414 and Soussa, 238 N.J. Super. at 68.

This case appears to be one of first impression in New Jersey in that, while "good" or "just" "cause" have been held to constitute grounds for reconsideration in the Appellant Division (Allied Realty and Soussa decisions), these phrases are not defined in those opinions or in any other cases involving reconsideration that have been decided on grounds of "good" or "just" "cause". The authors believe that, had the court decided the issue, the Board's reconsideration decision would have been sustained as there was sufficient evidence in the record to support the reasonableness of the decision and the decision, based on the evidence and the unique circumstances present in this case, was not arbitrary or capricious or an abuse of the considerable discretion vested in the Board.

As a starting point, Black's Law Dictionary (5th Ed.) defines "good cause" as a "substantial reason" and "one that affords a legal excuse." See, State v. Schlanger, 203 N.J. Super. 289, 294 (Law Div. 1985)

noting that "good cause" has been interpreted to mean "a legally sufficient ground or reason" or "a substantial reason." Black's explains that the meaning of the words, however, depends upon the circumstances of the individual case and a finding of "good cause" lies largely in the discretion of the body to which the determination is committed.

It is well settled law in New Jersey that discretionary acts may not be overturned without a showing of a clear abuse of that discretion. See, Kramer v. Sea Girt Board of Adjustment, 45 N.J. 268, 296-297 (1965), holding that "even when doubt is entertained as to the wisdom of the action, or some part of it, there can be no judicial declaration of invalidity in the absence of a clear abuse of discretion..." Boards of Adjustment "because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion." Id. at 296; Medici v. BPR Co., 107 N.J. 1, 23 (1987); Burbridge v. Mine Hill Twp. Board of Adj., 117 N..J. 376, 385 (1990). Black's Law Dictionary defines an abuse of discretion as taking an action or failing to take an action that no conscientious person acting reasonably could perform or refuse to perform.

In this case, the Board found that due to the late hour, the Board was rushed to judgment and members felt that they did not have adequate time to reflect and consider the application. Further compounding this problem was the fact that some of the newer members of the Board, by their own admission, did not have a good feel or grasp of the "special reasons" concept which hindered their ability to articulate their positions to and perhaps persuade those members who were either opposed to the variance or were looking for special reasons to grant the variance. The combination of these factors is a substantial reason which must constitute "good cause" warranting reconsideration in this matter as these factors go to the essence of the Board's statutory duty to hear and decide the variance case before it, both as to the positive criteria and the negative criteria set forth in N.J.S.A. 40:55D-70d.

In addition to the Board's deliberation problems, the Board found that M & M's principal had made an excusable mistake in asking that the deliberations and vote take place that evening. The Board found that

the principal was confused, did not understand what it was which he was being asked to decide concerning the continuance offer, and was under the mistaken impression that to request the continuance would involve and necessitate all his witnesses, all neighbors, and the objectors having to return.

Our Supreme Court held in O'Connor v. Abraham Altus, 67 N.J. 106, 129 (1975), that there was "good cause" to set aside a default judgment where there were complexities and confusion surrounding the issues of service, coverage, representation, and liability theories. In Bergen-Eastern Corp. v. Koss, 178 N.J. Super. 42 (App. Div. 1981), certif. den. 88 N.J. 499 (1981), the court found excusable neglect warranting vacation of a judgment where an aged widow did not "appreciate" the import of service of a tax foreclosure complaint. In accordance with the reasoning employed in the O'Connor and Bergen-Eastern decisions, the applicant's confusion and failure to understand the procedure in this case should constitute "good cause" warranting reconsideration.

The Board also found that the applicant's attorney had made an excusable mistake in not recognizing that the applicant's principal did not understand what was happening and that the attorney's mistake should not be visited upon the applicant. Had the attorney requested a brief recess and conferred with the principal, this entire situation most likely would have been avoided. The attorney's mistake is thus another substantial reason which should constitute "good cause" warranting reconsideration.

Allied Realty and Soussa do not limit reconsideration to "good cause" grounds. Reconsideration may also be warranted for "just cause" under those two Appellate Decisions. Black's Law Dictionary defines "just cause" as "a cause outside legal cause" but "which must be based on reasonable grounds" and for which "there must be a fair and honest cause or reason, regulated by good faith." Whereas "good cause" is a legally based remedy which must be founded on a "substantial" reason, "just cause" is an equitable based remedy based on fairness and "good faith." Black's explains that good faith "encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage...." If the applicant's principal's confusion and state of mind, which led to his excusable mistake

in declining the continuance offer, do not constitute "good cause" warranting reconsideration, they certainly must constitute "just cause" to warrant reconsideration.

The Board observed first hand the applicant's principal's demeanor the night of the initial hearing. The Board believed that the principal was truly confused and failed to comprehend the continuance offer and the significance and risk of proceeding without the continuance. The Board found that the applicant operated in good faith, honestly believing, without malice or intent to seek an unconscionable advantage, that requesting the continuance would involve all sorts of inconveniences to witnesses, neighbors and objectors. Had the principal accepted the Board's continuance offer in the first instance, a subsequent hearing would have been necessary which, in essence, was precisely what occurred upon reconsideration. Thus, reconsideration as a result of the applicant's confusion is fair and just.

As importantly, the Board witnessed its own performance that night. The Board believed that it did not function as well as it could or should have due to the late hour and the inexperience of a number of its new members. Thus, reconsideration as a result of the Board's performance is fair and just.

Where a Board finds that these sorts of deficiencies (which only the Board can fully appreciate) constitute "good cause" or "just cause" warranting reconsideration, the authors believe that a court would defer to the Board and affirm its findings and reconsideration decision.

In any event, the authors do not believe that the objector in this case would have been able to meet his burden of proving that the decision to reconsider was the sort of action that no conscientious person acting reasonably would have chosen. As such, the authors believe that the court would have affirmed the Board's exercise of discretion.

The true lessons to be learned here, however, are not the nuances of the law governing reconsideration. The lesson for applicants' counsel is to avoid, if possible, "d" variance votes without having a full compliment of seven (7) members present (unless the decision to proceed with such vote is requested by the client with full knowledge of the ramifications or the Board is unwilling to postpone the vote to a later

date to allow for a full compliment of board members). The lesson for Board counsel is to lay out on the record waivers of offers for continuances with specific questioning of the applicant as to his/her understanding of the risks of proceeding to a "d" variance vote in the absence of seven (7) members.