3 NJ Cases Weigh Anti-Discrimination Law And Land Use

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Law360 (December 10, 2019, 5:31 PM EST) -- From the *Mount Laurel* doctrine to the sale of residential homes, discrimination disputes over land development and real estate transactions have shaped New Jersey's long history of land use and real estate law.

In fact, the U.S. Supreme Court case of *Village of Euclid v. Ambler Realty* in 1928, which heralded the modern practice of land use and zoning, involved claims over whether a zoning ordinance violated the equal protection and due process clauses of the U.S. Constitution.

Real estate professionals and practitioners should be aware of how federal and state anti-discrimination laws can affect land use applications and real estate transactions.

Several recent decisions from the U.S. District Court for the District of New Jersey, the New Jersey Supreme Court and the New Jersey Appellate Division have offered guidance on the interplay between land use development applications, real estate purchase and sale contracts and federal and state anti-discrimination laws.

Federal Land Use Update

In *Blake Gardens LLC v. New Jersey*, decided on Oct. 9, the District of New Jersey resolved the issue of whether requiring zoning board approval for a use variance to permit the construction of housing for Alzheimer's patients in a single-family residential zone violated the federal Fair Housing Act.

In 2017, Blake Gardens LLC, a builder of community housing for persons with Alzheimer's disease, applied for a permit to construct a 6,062 square foot Alzheimer's home consisting of 16 bedrooms in an area zoned for single-family residential use in Freehold, New Jersey. In support of its permit application, Blake Gardens stated that the persons who were to reside at the housing "will all have head injuries as that term is defined under New Jersey law."

Prior to 2015, New Jersey considered Alzheimer's housing the same as housing for persons with head injuries. This is significant because the Municipal Land Use Law provides that housing for persons with head injuries is permitted in residential zones. [1]

In 2015, however, the Legislature enacted Public Law 2015 Chapter 125, which amended the MLUL to provide that "housing for persons with head injuries" did not include Alzheimer's housing and that "people with head injuries" did not include people living with Alzheimer's.

In doing so, the Legislature abrogated the statutory exemption that Alzheimer's homes were permitted in residential zones. The practical effect of the 2015 amendment was that most applications to construct Alzheimer's housing in a residential zone would require a use variance — the most difficult to obtain, costly and sparingly granted variance in New Jersey.

The Freehold zoning officer rejected Blake Garden's application, citing the 2015 amendment, and informed Blake Gardens that it would need to obtain a use variance before being issued a construction permit. Instead of appealing the denial of its application with the Freehold Zoning Board, Blake Gardens filed a complaint alleging that the 2015 amendment violated the federal Fair Housing Act.

The FHA prohibits discrimination in housing based on a person's disability or handicap, and invalidates any state law that runs afoul of the FHA's remedial requirements. To establish discrimination under the FHA, a plaintiff alleging housing discrimination must establish either (1) intentional disparate treatment of a person based on their disability or (2) disparate impact on such persons as a result of an otherwise neutral policy that does not necessarily carry discriminatory intent.

The district court found that Blake Gardens established disparate treatment because the 2015 amendment does not allow community residences for individuals with Alzheimer's disease, where it allows similar homes for individuals with head injuries and other conditions.

After the court determined that Blake Gardens established disparate treatment, New Jersey was required to establish that it had a legitimate government interest in the 2015 amendment and that there was no viable, less discriminatory alternative to advancing its interest. In an effort to meet that obligation, New Jersey cited the results of a study that described the various challenges facing persons living with Alzheimer's, which was published after the 2015 amendment.

However, the district court found that argument unconvincing, remarking that the cited study did not conclude that Alzheimer's housing should not be situated in a residential zone. The court also noted that New Jersey did not establish that there was no less discriminatory alternative to the 2015 amendment, placing emphasis that the practical effect of the 2015 amendment was that in most circumstances, Alzheimer's housing would require a use variance in order to be constructed in a residential zone.

As most developers and land use practitioners are aware, use variances are difficult to obtain. Even when successful, a use variance often requires a great deal of time and money, and in the context of a residential area, will likely face significant opposition from members of the community. The district court thus concluded that the 2015 amendment was facially invalid under the FHA.

New Jersey Supreme Court Real Estate Update

On the state level, the New Jersey Supreme Court recently granted certification in *Oasis Therapeutic Centers Inc. v. Wade*, agreeing to resolve a dispute over whether objectors' efforts to prevent the purchase of property to construct a group home for people with autism violated the New Jersey Law Against Discrimination.

The case involved a bid by Oasis Therapeutic Centers to purchase property in Middletown, New Jersey, with the intent to construct a group home for autistic individuals, as it had successfully done elsewhere in Monmouth County previously. The purchase of the property was contingent on Oasis obtaining a $600,000 grant from the Monmouth Conservation Foundation, or MCF.

A select committee at MCF approved the grant subject to the full approval of the foundation. The grant was ultimately delayed, however, when a MCF board member, who apparently lived near the property, raised concerns about a possible nexus between autistic individuals and mass shootings.

Opposition to Oasis' purchase and development of the property increased from there. Objectors gathered signatures opposing the proposed development, wrote the property owner letters opposing the project, and according to the Appellate Division "cobbled together a sham offer to induce the property owner to back out of his commitment to sell."
The deal eventually fell through.

A few months later, however, the property owner and Oasis again contracted to purchase the property, but this time without the contingency to obtain a grant from the MCF. The objectors' efforts to thwart the new contract involved an offer to donate $250,000 to Oasis if it terminated the contract. After Oasis rejected what it thought was a "bribe," the objectors offered $250,000 to the property owner to terminate the matter, which was similarly rejected. Closing on the property took place in July 2015.

The Appellate Division described the objectors' subsequent actions as devolving from "churlish to destructive." Graffiti was found depicting "snakes and fire covering approximately 600-700 square feet" on a shared driveway at the property. The named defendant-objector admitted to the defacing. A month later, the objectors allowed their "very aggressive goat" onto Oasis' property, which then head-butted one of Oasis' members.

Oasis' complaint also alleged that the objectors dumped "hundreds of pounds of horse manure" on the property. Later, the objectors constructed a fence across the shared driveway and a local attorney attempted to persuade the tax assessor that Oasis should be paying property taxes, falsely claiming that no autistic individuals resided at the site.

The objectors ultimately filed a quiet title action over the shared driveway in chancery court, and Oasis counterclaimed alleging, among other things, that the objectors violated the LAD. After the LAD claims were severed and Oasis filed an amended complaint in the Law Division, the objector-defendants moved to dismiss Oasis' complaint for failure to state a claim. The motion judge granted the objector-defendants' motion.

The Appellate Division reversed. Judge Clarkson S. Fisher, Jr., writing for the panel, concluded that the LAD prohibits a third party from attempting to prevent a person from selling property because of the prospective purchaser's or proposed resident's protected status, which includes autism. The panel also concluded that the LAD prohibits objectors from targeting and tormenting Oasis because Oasis was providing a residence for autistic persons.

The court also held that the *Noerr-Pennington* doctrine, which prevents lawsuits against people raising public policy matters to government agencies, was inapplicable because the objector-defendants never petitioned any government agency, but instead focused their conduct at nongovernmental individuals and entities.

The New Jersey Supreme Court granted certification on Oct. 10.

New Jersey Appellate Division Land Use Update

Most recently, in *Van Ess v. Totowa Board Of Adjustment*, decided on Oct. 28, the New Jersey Appellate Division affirmed the denial of a variance to an individual who claimed that the Americans with Disabilities Act and the Fair Housing Amendments Act preempted state and municipal zoning regulations and mandated that he be granted a variance to permit an additional parking area to accommodate his disability.

The case involved Cornelius Van Ess, a retired police officer and Vietnam veteran who is totally and permanently disabled as a result of injuries he suffered during his law enforcement career and military service. Van Ess received notice from the Totowa zoning department, directing him to correct an oversized 540 square foot asphalt parking area on his front lawn. Van Ess applied to the Totowa Board of Adjustment for a variance in response.

During the variance application hearing, Van Ess testified about the extent of his disabilities. He informed the board that he used a "roller" to walk long distances, needed a cane for shorter walks, and has difficulty navigating stairs. Van Ess stated that he constructed the oversized driveway to accommodate his impaired mobility, remarking that the expanded asphalt area makes it easier for him to enter and exit his home. A professional planner testified that any variances related to the oversized driveway should be granted due to Van Ess' disabilities and that there was no other location at the property that could accommodate a similar-sized driveway to suit his needs.

The board denied Van Ess' variance application. The board concluded that if an attached, two-car garage had not been previously demolished, then Van Ess could have utilized the garage to access the living area of his home. The board also reasoned that he did not need all of the additional driveway area, and determined that Van Ess was using his disability as a pretext to add additional parking for other residents of the home. Ultimately, the board determined that Van Ess requested accommodation for an oversized driveway under the ADA and FHAA was unreasonable based on the record developed at the hearing.

Van Ess appealed the board's denial to the Superior Court. The trial judge affirmed the board's determination, reasoning that while Van Ess was disabled, there was no basis to overturn the board's conclusion that Van Ess' requested accommodation was unreasonable and did not satisfy the zoning criteria necessary to grant a variance for the expanded driveway. The Appellate Division affirmed the trial court's order in a short opinion, concluding that the record did not reveal intentional discrimination or discriminatory impact on Van Ess and found no evidence that Totowa refused to make a reasonable accommodation.

Takeaway

As the foregoing cases demonstrate, federal and state anti-discrimination laws broadly apply to real estate transactions in New Jersey, spanning the purchase, sale, development and use of property in the state, and in ways that may not seem obvious. Anyone involved in a real estate transaction, from developers to tenants, should be fully aware of their obligations and rights under state and federal anti-discrimination laws.

More specifically, *Blake Gardens* illustrates that federal law offers a powerful tool in land development that might not be immediately apparent in a practice area dominated by state and local laws, rules and custom. However, the *Van Ess* case serves as a reminder that mere incantations of anti-discrimination laws cannot surmount a factual record that does not support such claims.

While *Oasis Therapeutic Centers* is pending before the New Jersey Supreme Court, the Appellate Division's judgment demonstrates that land development objections, which often elicit passionate and heated debate, are nonetheless subject to remedial statues seeking to curb discrimination in New Jersey.

[1] N.J.S.A. 40:55D-66.1.