

GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

**FREE DOWNLOAD
LESSON PLAN AND EVALUATION**

GREEN LIGHT – PITCHING THE PLANNING AND ZONING BOARDS

With

Russ Cherkos, Esq.

And featuring

Robert Ramsey, Senior Instructor

Program description

No big project or new construction can begin until you have complied with the applicable local zoning ordinances. This 1.5 credit CLE will provide you with advice on how you can persuade the planning and zoning boards that your client's project will benefit the community.

I. Introduction

- **Russ Cherkos, Esq.**
 - **Over 30 years as a planning board attorney (political appointment)**
 - **1 year appointment**
 - **Know the land use law**
 - **Assist the board members to make a decision consistent with the law**
 - **609-971-1010**
 - **rcherkos@dmmlawfirm.com**

II. Land Use Laws

- **Zoning law, N.J.S.A. 40:55D-1 to 129**
- **Municipalities cannot enact laws whenever they want to**
- **Need enabling legislation**
- **Law states what type of ordinances can be passed by the town**
- **Planning board function is to act on applications submitted to them**
- **Land use law allows municipalities to adopt ordinances in two areas: 1) subdivisions; 2) site plans (required to regulate development other than single or two family development)**
- **An attorney's starting point is the ordinance that regulates the type of development, as well as the zoning ordinance (permitted use in the zone)**
- **If use is permitted in the zone, then planning board application; if not, then zoning board of adjustment (use/variance).**
- **Planning and zoning boards each have ancillary jurisdiction**
 - **What board for what relief?**
 - **Used to bifurcate application in the past if both board were involved**
 - **Now, boards can hear the other's issue if they are part of same application**
- **Not common to have a zoning and planning board attorney as the same attorney – possible ethics issue? appearance of impropriety?**
 - **Permissible to have a combined board – so should not have a conflict for attorney to represent when there are two separate boards**
 - **Land use board attorney may not be municipal attorney – statutory**
- **Zoning boards should make decisions without political ideology being involved in the decision making process – however, political appointments/elected officials, and members live in community – attorney for board must make members make decisions based on the law**
- **Planning boards are part of political machine; mayor or his/her designee is on the board – should only deny an application only in unique circumstances**

- **Purpose of planning boards is to adopt land preservation laws/open space issues**
- **Vast majority of applications do not have people coming to board meetings – sometimes objectors will retain counsel**
 - **Try to maintain decorum in the hearing (board attorney’s job to assist chairman)**
 - **Objector’s attorney can also present evidence and cross examine application experts/witnesses**

III. Hypothetical: Wawa wants to build a new store

- **Town with a major highway**
- **Apartment complex on a particular road, but over time has become run down, half-vacant, etc. - Owned by closely held corporation**
- **Town gets application by Wawa to build in residential area**
- **Some commercial uses in the area**
- **Lots of traffic**
- **What is process to represent Wawa:**
 - 1) **Look at property and get copy of zoning ordinance and see what uses are permitted – see if use/variance case is possible – difficult to attain – need 5 out of 7 members to get vote for variance relief**
 - 2) **As an attorney, you cannot testify – need evidence – need people to testify at the hearing: engineer, professional planner, real estate expert, traffic expert**
 - **Must establish that this property is particularly suited for the use you propose – establish that current use is not appropriate (rateables is not to be considered by the board)**
 - **Planner: should go to property; review master plan; most engineering firms have planners; written report as well as testimony**
 - **Engineer: need to get the concept that engineer believes will work before the board; draws commercial site plan; since need site plan approval; possible fees of \$60-80K for plans; applicant is responsible for costs; get engineer involved in the process from the beginning; find out who town knows and respects; several months to draft site plan**
 - **Traffic consultant: internal circulation (how cars go around property); parking requirement – do you need a waiver; existing conditions in the area; address off site traffic concerns (not appropriate to deny application but will need to address it with board)**
 - 3) **What is in the neighborhood? Is there some commercial use in the residential area? More use of highways increase commercial uses even though originally residential area.**

- 4) **Master Plan – part of proof process is that application is not inconsistent with master plan – positive criterion (special reason that you want to “violate” terms of the ordinance – advancement of the purposes of the zoning; need for proposed use, no substantial detriment to master plan);**
- 5) **Outside agency approvals may be required depending on the type of application, i.e. DEP for gas tanks, and where the development is located**
- 6) **May want to bifurcate application process to see if you can even get use/variance (zoning board) before you spend the money for the engineer to do a full work up**
- 7) **In this case, need zoning board approval initially. Call witnesses to testify that in their opinion; planner will give board the law – reviewed master plan, and looked at existing ordinance and existing conditions, and in his opinion will not conflict with master plan**
 - **Zoning board attorney just to insure that there is no mistake being made – prevent members from asking questions that are not appropriate under the law**
 - **Is this adversarial with board members?? Not supposed to be – but does happen**
 - **Each application is open to the public – anyone who speaks will be under oath and can cross-examine other witnesses**
 - **If objectors retain counsel, try to elicit negative information from applicant’s experts**
 - **Zoning board attorney then becomes like a judge with the board as the jury when there are objectors; does not advocate for a position**
- 8) **Need 5 members out of 7 for the use variance to be approved; don’t go forward with less than a full board**
- 9) **Must advocate for your client to board; do a summation similar to a jury summation**
- 10) **After zoning board approves, engineer does full site plan – then return to zoning board of adjustment with full plan**
 - **Planning board does not have any jurisdiction to consider any aspect of the site plan if it were in conjunction with a zoning board action granting a use variance.**
 - **Appropriate landscaping and lighting**
 - **Meet with objectors and see what issues they have and show them your plan – you can make changes to site plan (i.e. dumpsters, lighting, certain height fence, etc.) – head off objections to tailor plan to meet people’s needs**
- 11) **If zoning application is approved, objector can appeal to local governing body – if the ordinance provides for that. Any other appeal goes to Law Division (prerogative writ), similar to**

municipal appeal – on the record. Presumption of correctness in the zoning board – unless unreasonable. Zoning board attorney handles appeal. Settlement negotiations are possible – applicant may have revised site plan and may request a remand of the application to return to board. Planning board appeal goes directly to Law Division.

12) After get use variance and have final site plan approval. Presentation before board to get final approval – objectors can appear and speak again.

13) Appeal period expires 45 days after each approval (when you get the vote). Adopt written resolution and publication within 45 days. Appeal must be within 45 days of publication.

14) Significant involvement with various agencies regarding compliance with conditions. During course of construction municipal engineer is going to oversee project.

15) If there are changes to the site plan during construction, minor matters can be addressed with a “field change” by municipal engineer. If the board engineer is not comfortable signing off, must go back to the board.

16) After approval, must comply with conditions of approval before you begin digging. No permits will be authorized without complying with conditions. Every step in improvements is overseen by municipal engineer. If something comes up, you may need to get whatever outside agency approvals to address certain issues.

IV. Interaction between County and Local Planning/Zoning Boards

- **There is no county zoning board**
- **County planning board has jurisdiction over anything occurring on county road; unless significant issue of access to roadway pretty much rubber stamp.**

V. Advice to an advocate:

- **Look at property – can gain important information that would not otherwise have been obvious from just paper work and maps**
- **Learning curve to really understand the law**
- **Be sure professionals/experts are prepared to answer questions of the board**
- **Smaller applications are flat fee; larger applications are on an hourly basis**