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Legal/Legislative

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GOVERNOR SIGNS AUTOMATIC VARIANCE BILL FOR SANDY REBUILDING

Governor Christie has signed the so-called "Automatic Variance" law to make it easier to raise buildings to the new FEMA base elevations. The law applies to the rebuilding of a structure destroyed or damaged by Superstorm Sandy, as well as to existing structures that survived Sandy. Effective immediately a structure of the same vertical and horizontal dimensions as existed immediately prior to the storm (October 28, 2012) may be raised to the new FEMA base flood elevations plus an additional three feet, or to any higher elevation that may be required by the DEP's Flood Hazard Control Act rules, notwithstanding any contrary law limiting such elevation. No waiver or variance may be required. The law also authorizes construction of a staircase needed to reach the new elevation. This new law only addresses the elevation (height) issue. A building is exempt (and will not need a variance from) any requirement that would be violated by virtue of elevating the building to the designated levels.

A house or other building that was not damaged but that the owner wants to elevate, or a house that was damaged and is being repaired, may be elevated even if elevating the house would otherwise violate some development regulation. For example, if the structure currently does not meet bulk or use standards, you can still elevate the building, and add a stairway that may increase the nonconformance. Similarly, you can rebuild at a higher elevation a conforming building that was damaged or destroyed. The law is somewhat ambiguous regarding reconstruction of a nonconforming building that was destroyed or that is being torn down and rebuilt.

Finally, the law does not apply in any situation where the "exact" pre-Sandy "vertical and horizontal dimensions" of the structure have been or will be altered and where this alteration creates or exacerbates the extent of noncompliance resulting from the new building elevation. While this is also somewhat ambiguous, it is likely that a bigger footprint would increases the extent of a nonconformance associated with the raised elevation; the same or smaller footprint but with a larger structure above it might expand the nonconformance as well.

SEWER CAPACITY RESERVATION AGREEMENTS

Readington Realty Holdings v. Readington

The availability of sewer and water is often a threshold development issue. In this case, the Appellate Division rejected a property owner's attempt to secure sewer rights that were previously contractually allocated to another developer but were unused.

Plaintiff's parcel was located in Readington Township and served by the Readington -Lebanon Sewerage Authority ("RLSA"). Readington had a 939,000 gpd share of the available treatment capacity of RLSA. To fund its share of the RLSA capacity, the Township, pursuant to a Sewer Allocation Ordinance, entered into sewer treatment plant expansion and sewer allocation agreements with property owners charging a fee of roughly $19 per gallon, and non-refundable user fees for owners of undeveloped parcels. The user charge is required even if the capacity is never used. Plaintiffs sought roughly 12,000 gpd capacity for commercial redevelopment. It requested that the Township terminate sewer allocation agreements with other property owners and recapture unused capacity from stalled projects. The Ordinance gave the Township discretion to terminate agreements for projects that did not seek development approval within two years of approval of the allocation, or where construction had not commenced within two years after receipt of preliminary approval. The Township also had authority to extend agreements for good cause.

The Township overcommitted its allotted capacity, and no capacity was available for plaintiff. It did not take action to reallocate sewer capacity as requested by plaintiff. Plaintiff filed suit asserting facial and as applied challenges to the Township Sewer Allocation Ordinance. With respect to the facial challenge, plaintiff asserted that the Ordinance lacked standards to guide the municipality in determining when to exercise discretion to reacquire sewer allocation rights. The court determined that sufficient standards existed in the Ordinance "to insure the fair and reasonable exercise" of that discretion, and termination of agreements should only be considered "when there is no good cause for delay and the capacity is needed for other projects ready to proceed..." The court suggested that the Ordinance be improved through inclusion of more specific guidance and standards, but upheld dismissal of the facial challenge.

The court also rejected the as applied challenge. Plaintiff's development plan was speculative and plaintiff failed to establish that the Township's action was arbitrary. "The Township and Sewer Advisory Committee's decision to refrain from considering recapture of sewer rights held under contract by owners who had paid significant sums to acquire them and were paying significant sums to keep them cannot be deemed unreasonable."

The court also noted that sewer agreements enjoy protection under the Permit Extension Act. The Legislature's determination that sewer allocation agreements should be extended in times of economic downturn was a factor in the court's decision.

The development process often spans multiple years and can be affected by economic cycles. This decision is important in its recognition of contractual rights and its protection of the investment backed expectations of developers.

SPILL ACT CLAIM SUBJECT TO STATUTE OF LIMITATIONS

Morristown Associates v. Grant Oil Co.

The Appellate Division of the New Jersey Superior Court has decided that private claims for contribution pursuant to the New Jersey Spill Compensation and Control Act (Spill Act) are subject to a statute of limitations. In the case of Morristown Associates v. Grant Oil Company, the plaintiff argued that because the Spill Act states that the "only defenses" which may be raised by a Spill Act defendant are the statutory defenses listed in the Spill Act itself, and because a statute of limitations is not one of those defenses, there is no statute of limitations applicable to a Spill Act contribution claim. The Appellate Division rejected that argument, ruling that the general six-year statute of limitations for damage to property applies to a private claim for contribution pursuant to the Spill Act. The Court also decided that the recognized "discovery rule" may extend the time limitation based on when the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have the basis for an actionable claim.

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