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Legal & Legislative Update

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WETLANDS GENERAL PERMIT APPLICATIONS

The Appellate Division, in two recent decisions, examined the issue of the fact finding that the New Jersey Department of Environmental Protection ("DEP") is required to make in the context of issuance of Freshwater Wetlands General Permit ("GP") authorizations. Although the cases involved similar fact patters, the Appellate Division panels split on whether DEP conducted sufficient fact finding to support the issuance of GP authorizations and, more importantly, appear to reach different decisions on whether DEP is required to specifically state in the authorization all findings of fact on which an authorization is based.

Margaret Caski Living Trust v. DEP and Charles Noreika

In this case, the Appellate Division affirmed DEP's issuance of a GP 11 authorization to Charles Noreika for property in Plumsted Township. Before obtaining the GP 11 authorization, Noreika obtained subdivision approval from Plumsted Township for five (5) lots. The GP 11 authorized the construction of a stormwater outfall in and discharge of stormwater to wetlands located on a parcel located across the street from the Noreika site owned by Caski.

Caski opposed Noreika's GP11 application, but no public hearing was held on the application. The permit was issued in January 2003 and notice of issuance was published in the DEP Bulletin. Caski did not appeal issuance of the permit within the required time frame, but was granted leave to appeal out of time and challenge the permit.

Caski argued that the discharge from the subdivision would adversely impact the wetlands on her property, and that the authorization lacked findings of fact and any legal basis for its issuance required under the FWPA and DEP's regulations. She also argued that the application failed to provide a statement detailing potential adverse environmental impacts as required under the FWPA.

The Court rejected Caski's arguments. Specifically, the Court found that the permit contained findings of fact to support issuance of the authorization. It specifically referred to a statement in the authorization that "the authorized activity involves the disturbance of 0.01 acres of wetlands and/or state open waters for the construction of a storm water outfall structure" in connection with the approved subdivision. It also referred to the fact that it was relying on information from Noreika's engineer. The approved plan was attached to the GP 11 authorization. That plan was revised by Noreika in the application process to respond to comments from the Caski's consultant. Thus, the Court rejected the argument that the decision to issue the GP 11 authorization was void of any fact finding.

Additionally, the report submitted in support of the application contained technical data concerning the stormwater discharge. DEP had numerous reports and data regarding the application that were submitted by Noreika in response to requests by DEP. "The reports suggest that NJDEP was diligent in evaluating the application" and its "decision to issue the GP11 was carefully and thoroughly thought out. The Court also pointed to the fact that there was one site visit with field notes to ensure compliance with DEP's regulations.

The Court also rejected the argument that the authorization should be rescinded because it did not contain explicit conditions addressing increased volume of pollutants in the stormwater. The Court concluded these conditions for issuance of the GP11 authorization were resolved by modifications to the proposed retention basin that were included in the subdivision plan. Therefore, there was simply no need to specifically address those issues in the permit because they were, in effect, moot.

Caski also argued that she was entitled to an administrative hearing despite failing to submit a hearing request within the required timeframe after issuance of the GP 11 authorization. The Court rejected this claim. Caski's request for a hearing that was submitted when the permit application was filed, before the determination on a permit or general permit authorization was rendered by DEP, was invalid. A third-party cannot request "cannot request a hearing from a decision that has not been made." Third party opponents must adhere to the procedural requirements of DEP's rules when challenging a permit decision. This prevents opponents from filing a blanket hearing request on an application before any decision on a permit is made.

In re Authorization for Freshwater Wetlands General Permits

In a decision that it is likely to result in further delays in connection with the DEP wetlands permitting process, the Appellate Division remanded a GP 6 authorization issued by DEP to fill isolated wetlands for failure to meet the required findings under the FWPA.

This case involved similar facts to those involved in Caski. DEP issued a GP 6 authorization to Maramark Builders to fill 0.98 acres of freshwater wetlands in connection with an 11 unit subdivision. DEP also issued a Letter of Interpretation ("LOI") for the property. The applications for the GP and LOI were made in February 2001. The GP authorization was ultimately issued more than 2-years later in May 2003 . The LOI was issued in August 2001. The applications were the subject of extensive scrutiny and public comment, which resulted in DEP's scrutinizing the site "far more than is customary." This exhaustive review included, among other things, review of "an onslaught" of opposition materials, the submission of several revised applications, and three site inspections, two of which included a supervisory level DEP staff member.

Appellants Preserve Old Northfield ("POND") challenged the LOI and GP 6 authorization on the basis that they contained no findings of fact or analysis of the materials submitted by POND and the various objectors on the issue of whether the wetlands on the property were "isolated". POND argued that credible evidence existed to show wetlands were not isolated, but were part of an "inland tributary system". It further argued that the DEP was required to specify findings of fact to support the conclusion that the wetlands were isolated, but failed to do so.

The Appellate Division agreed with POND "that the necessary findings of facts are absent from both the LOI and the GP 6." The Court held that DEP is required under the FWPA to make findings that the issuance of the permit is consistent with the requirements of the FWPA. It determined that in this case, despite the exhaustive application process that took place, there was no "reasonable factual record" stating the grounds upon which DEP issued the GP 6 that the Court could review to determine if issuance of the GP 6 authorization was justified.

DEP argued that the FWPA and its implementing regulations do not require DEP to specifically respond to public comments on an application for an LOI or GP authorization, but only to consider public comments. DEP argued it is not required to make findings of record to support the approvals. The Court rejected this argument with respect to the GP 6 because the affected parties and the public must be assured that the policy concerns associated with the FWPA are met in the context of DEP's decision making.

Additionally, notwithstanding the typical deference typically afforded by courts to the expertise of the agency, the court concluded that "the record here contained an abundance of factual material which could easily support a contrary determination" to the determination made by DEP. The court disagreed with the apparent conclusion of DEP that there was not a hydrologic interconnection between wetlands on the property. Moreover, the Court had difficulty accepting DEP's determination based on it own review of the 1986 Freshwater Wetlands Maps "which seems to show the wetlands on the subject on the subject property as part of as part of an inland tributary system." The Court also expressed the "nagging concern" over the timing of DEP's three onsite inspections, which occurred during summer months. Thus, the Court remanded the matter to DEP for additional fact finding and suggested that an additional onsite inspection take place during a wet season.

This is a classic example of a court stepping in the shoes of an agency and deciding that it is in a better position to make decisions concerning technical matters than the agency, notwithstanding the statement of typical deference owed by courts to an agency's decision. This is particularly troubling in light of the extensive and exhaustive review that appears to have been conducted by DEP given the active participation of numerous opponents in the application process. DEP took more than two years to issue the general permit, and required updated public notices to be sent for even technical revisions of the application such as changing block and lot information. Despite this, the Court decided more is required. This is certain to further delay an already slow DEP application review process and burden an overworked and understaffed agency.

The Caski and In re FWPA Permits decisions were rendered little more than a month apart. Given the similarity of the facts of each case with respect to the permit review process conducted by DEP, the split in decisions is troubling, and likely to cause confusion. It appears from the recitation of the facts in each case that more "fact finding" was done by DEP in the context of the In re FWPA Permits application than in the application involving Caski, yet the In re FWPA Permits Court decided the record was not sufficient to support DEP's determination. It remains to be seen how DEP will alter its GP application review process in response to these decisions, but it is anticipated that the process will be further slowed if the In re FWPA Permits decision is adhered to by DEP going forward.

FAST TRACK LAW STALLED

By Executive Order No. 140, the Governor took action to delay the issuance of expedited permits pursuant to the so-called "Fast Track" or "Smart Growth" law signed into law July 9, 2004. The law is intended to streamline the state permitting process for development in "smart growth" areas, including Planning Area 1, Planning Area 2, a designated center, or a designated growth center in an endorsed plan, as well as other areas.

EO 140 provides that no expedited permit shall be issued until after DEP, DOT and DCA adopt rules in accordance with the Administrative Procedures Act to establish the professional qualification program required under the law and implement other provisions of the law. The agencies are required to publish notice of a pre-proposal with a 90-day public comment period and thereafter, within 120-days of the close of the public comment period on the pre-proposal, publish proposed rules. DEP published pre-proposal notice on November 10, 2004. Comments may be submitted until March 20, 2005.

On December 13. 2004, a bill (S-2157, A-3650) was introduced in the legislature to repeal the law entirely.

VESTED RIGHTS – SUBDIVISION APPROVAL EXTENSIONS

Taft v. Upper Freehold and David Perlman

In this case, the Appellate Division held that planning boards have authority under the Municipal Land Use Law ("MLUL") to grant multiple extensions of preliminary subdivision approvals, extending the vested rights against zoning changes that are secured through preliminary subdivision approval.

Defendant Perlman obtained conditional preliminary major subdivision approval from the Upper Freehold Planning Board in 1989 for a 56 unit subdivision, with a one-acre lot size under the applicable zoning. The approval was valid for three years, and was automatically extended through December 31, 1996 by legislation. Thereafter, Perlman obtained four extensions of the preliminary subdivision approval.

Taft filed an action to invalidate the fourth extension and sought to impose the requirements of a 1996 zoning ordinance for minimum lot size of two acres. In September 2000, the trial court invalided both the third and fourth extensions, and Perlman appealed. Shortly after the appeal, Perlman submitted an application for final major subdivision approval, which was approved by the Board along with a retroactive fifth extension of the preliminary subdivision approval. The resolution granting final major subdivision approval was adopted on April 24, 2001. Taft filed a second complaint seeking to have the fifth extension and the final major subdivision approval invalidated, and seeking application of the 1996 zoning ordinance.

The first action challenging the third and fourth extensions of the preliminary subdivision approval was ultimately resolved in favor or Perlman on appeal. Thereafter, the trial court dismissed Taft's second action challenging the fifth extension and grant of final subdivision approval.

The issue on appeal with respect to dismissal of the second complaint involved whether the fifth extension could be and was properly granted under the MLUL, N.J.S.A. 40:55D-49(d). Taft argued that the MLUL only contemplates a single extension. However, the court confirmed that multiple extensions are permitted pursuant to N.J.S.A. 40:55D-49(d). The legislative history to the MLUL refers to discretionary "extensions" of vested rights for preliminary approval of a major subdivision or site plan. Additionally, the Court found that the Board considered the necessary factors under the MLUL for the grant of the fifth extension. Thus, not only was the Board permitted under the MLUL to issue the fifth extension, it followed the proper procedures in issuing the extension.

As the extension was valid, Perlman was not required to meet the 2 acre zoning that was adopted after the preliminary major subdivision approval was approved and during the period of vested rights. "The very purpose of a preliminary approval is to protect developers against changes in zoning and design standards."

The decision is important in its recognition of the ability of developers to obtain protection from changes in zoning through vested rights secured through multiple extensions of preliminary subdivision approval.

SUBDIVISION APPROVAL VALID DESPITE ERRORS BY BOARD

DeMaria v. JEB Brook and Township of Neptune

In an October 2003 decision approved and released for publication in August 2004, the Superior Court of Monmouth County, Law Division, held that a site plan approval issued to JEB Brook was valid and withstood plaintiffs' challenge despite significant procedural and substantive errors in violation of the MLUL committed by the Neptune Planning Board.

JEB Brook was the contract purchaser of a 19-acre lot in Neptune Township. It sought site plan approval for 192 rental units in nine separate buildings. Plaintiffs were two of numerous objectors to the proposed development. The proposed development was out of character with the surrounding area given the number of units and height of buildings proposed, but complied with the applicable zoning.

In review of the record, the court concluded that there were numerous procedural errors with respect to the hearing conducted by the Neptune Planning Board. The Board failed to swear in its planners and professionals as witnesses to obtain testimony despite the requirement for same under the MLUL. There were conflicting changes in the rules governing the various hearings on the application concerning testimony by objectors. The court found that the procedural defects resulted in confusion by the objectors and participants. But, the objectors were not denied an opportunity to be heard. The Board did elicit testimony from the objectors, although procedures for doing so varied from hearing to hearing.

The Court concluded "not all errors mandate a reversal." "It is only when the error has the potential to impact a fair result should reversal be required." Here, JEB Brook's application satisfied applicable zoning and site plan ordinance and, therefore, the Board was not in a position to deny the application.

While this decision is factually specific, it confirms that the procedural missteps of a planning board under the MLUL do not require the mandatory reversal of a site plan approval. Rather, a court will consider other factors in the context of a board's errors, such as the degree of fault of the applicant and whether substantial justice was achieved notwithstanding the board's errors.

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