Bulletin Board
Voice of the Central Jersey Shore Building Industry January/February 2006

Legal & Legislative Update

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COURT INVALIDATES JACKSON TREE ORDINANCE

A New Jersey Superior Court ruled that Jackson Township's Tree Removal Ordinance is invalid. Paul H. Schneider, Esq. of Giordano Halleran & Ciesla, P.C. challenged the Ordinance on behalf of SBA. The Ordinance was adopted by the Township to regulate and control the removal of trees within the Township and delegated authority to the Township Forester and the Shade Tree Commission. It was supposed to correct deficiencies in an earlier tree save ordinance that was successfully challenged by SBA. The Ordinance required that trees removed from privately owned lands within the Township, with limited exceptions, must be replanted on the same site on a one to one basis or a payment must be made to a tree escrow fund for the planting of trees on public properties. The lawsuit contended, among other things, that the Ordinance is ultra vires, void, unlawful and unenforceable as it fails to provide clear standards for compliance and unreasonably discriminates against smaller lots and new developments.

In invalidating the Ordinance, Judge Serpentelli ruled in a December 1, 2005 letter opinion that payment to an escrow fund for planting of trees and shrubs only on public properties "does not bear a real and substantial relationship to the purposes of the Ordinance" of preventing soil erosion, dust, deteriorating property values and the suitability of land on the sites from which the trees were removed. The opinion did not address the question of whether a municipality can ever require a landowner to replace any trees removed on private property. Additionally, Judge Serpentelli ruled that the "Ordinance clearly fails to meet the well established standards of precision and is therefore void for vagueness."

Should the Township adopt a new tree ordinance, SBA will offer to work with the Township to develop standards that are fair and reasonable.

WATER QUALITY MANAGEMENT PLAN AMENDMENTS

On October 17, 2005, DEP proposed two amendments to most Water Quality Management Plans ("WQMPs") in New Jersey. Subject to certain exceptions, the proposed amendments would (1) preclude most new residential development projects of more than three lots (assuming 4-bedroom homes) serviced by septic without first amending the applicable WQMP, and (2) remove from existing sewer service areas land outside of Planning Areas 1 and 2 under the State Development and Redevelopment Plan ("State Plan") unless the sewer facilities serving the land is in the ground and in operation. DEP also proposes to preclude site specific amendments to WQMPs unless the site is located in an area with a current Wastewater Management Plan ("WMP"). These proposals would severely limit potential for developments located in planning areas 3, 4, and 5 under the State Plan to be served by central sewer, and developments throughout the State where sewage disposal is provided by septic systems. Unless extended, the public comment period on the proposal expires December 15, 2005, and the proposal could take effect anytime after December 15th.

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COASTAL PERMIT PROGRAM RULES AMENDMENTS

On November 7, 2005, DEP proposed to amend its Coastal Permit Program Rules applicable to CAFRA, Waterfront Development and coastal wetlands permit applications. The proposed amendments would among other things formalize the process for coastal jurisdictional determinations, revise several existing general permits and permits by rule, and establish several new general permits including a general permit for the development of three or fewer single family homes. Under the existing rules, a general permit exists for construction of only one single family home. The proposed amendments would place several new restrictions on activities at sites along manmade lagoons. The public comment period on this proposal expires January 6, 2005 and SBA encourages its members to review the proposal and submit comments to DEP.

HIGHLANDS ACT

OFP, LLC v. State of New Jersey

A Morris County Law Division Judge upheld the Highlands Act as constitutional, dismissing Plaintiff's taking claim and a claim that retroactive application of the Act violates due process and equal protection.

Plaintiff obtained preliminary and major subdivision approval for 26 lots on a 90 acre parcel in the Township of Washington, Morris County, in December 13, 1999. Plaintiff secured various DEP approvals, but did not obtain a potable water supply permit until May 14, 2004, after the March 29, 2004 effective date of the Highlands Act. The project did not qualify for an exemption from the Act.

With respect to the taking claim, the Court concluded that the Act serves a substantial public purpose and that implementation of the Act did not excessively interfere with the Plaintiff's property rights because it did not substantially prohibit all economically beneficial or productive uses of the property. The Court held that "the public purposes of the Highlands Act outweigh individual property rights where, as here, the legislation provides protection to property owners through an administrative process to lessen the effect of land restrictions." The Court noted that the Act permits DEP to issue waivers and includes other mechanisms to avoid hardships that may result in a taking on a case-by-case basis, and Plaintiff may "mitigate the severity of the restrictions" through these processes. The Court held "on the balance, the public purposes served outweigh the impairment of individual property rights in the determination that the Act as adopted is constitutional under taking principles."

The Court found that there was no due process and equal protection violation in retroactive application of the Act, concluding that Plaintiff's right to use its property in the most profitable manner is not a "fundamental right" akin to the right to derive any beneficial use of the property.

The Court also agreed with the State that Plaintiff's constitutional and manifest injustice claims as applied to its property were not ripe for review because the Plaintiff did not submit an application for development of the property to DEP or apply for a hardship waiver. The Court rejected Plaintiff's argument that attempts to exhaust administrative remedies would be futile because the procedures for those remedies have not yet been finalized by DEP regulations implementing the Act. While the Court recognized that Plaintiff may be delayed by the lack of specificity regarding administrative remedies, it nonetheless concluded that certain remedies are available under the Act and DEP's Phase I regulations, and a time frame for more detailed regulations exists.

Based on this decision, property owners who attempt to challenge the restrictions of the Highlands Act on an as-applied basis will be forced to pursue exhaustion of a myriad of all so-called remedies even though, as acknowledged by the Court, DEP has not "procedurally developed" those remedies.

BUILDER'S REMEDY - MEADOWLANDS REGION

Tomu Development Co., Inc. v. NJMC

Municipalities are required to satisfy their constitutional obligation to provide realistic opportunities for their fair share of low and moderate housing even when State agencies control land use in the municipality.

Plaintiff brought a builder's remedy lawsuit to construct 840 units, including 140 affordable rental housing units, within Carlstadt and East Rutherford in Bergen County on the basis that the Townships engaged in exclusionary zoning in violation of the Constitution as interpreted under Mt. Laurel and the Fair Housing Act. The Townships argued they had no obligation or authority to comply with Mt. Laurel because Plaintiff's property is subject to the zoning authority of the New Jersey Meadowlands Commission ("NJMC"). The Court found Plaintiff was entitled to a builder's remedy holding that the municipalities "failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders, and that the NJMC has implicitly fostered the long standing municipal failures through its benign neglect of housing needs of the poor."

The Court found that neither Carlstadt, East Rutherford nor NJMC "took any meaningful steps to provide reasonable opportunities for low and moderate income housing." While NJMC did not have a duty to provide affordable housing opportunities, "it aided and abetted the municipalities turning blind eyes to the plight of the poor, in direct violation of the municipalities' affirmative obligations under the Mt. Laurel doctrine."

The Court invalided East Rutherford's and Carlstadt's land use regulations and ordered the municipalities to prepare comprehensive plans to address their Mt. Laurel obligations. The Court noted that " in the absence of Court intervention, low and moderate income housing would remain as illusory today as it has since the inception of the NJMC and its predecessor agency more than three decades ago."

The Townships have publicly stated they will appeal this decision, asserting that the property is not suited for development. However, by recognizing that municipalities may not avoid Mt. Laurel housing obligations "by hiding in plain sight" of State agencies, even where the municipality lacks land use control given State agency authority, and that State agencies such as NJMC must take responsibility to avoid the perpetuation of exclusionary housing, this decision should encourage development in areas suited for growth in the Meadowlands Region.

DOWN ZONING

In two reported decisions released the same date, an Appellate Division Panel invalidated one down zoning ordinance, but upheld another.

Bailes v. Township of East Brunswick

In Bailes, East Brunswick down zoned from one unit per acre to one unit per six acres with cluster options. The Court invalidated the Ordinance as applied to plaintiffs' properties finding the down zoning did not address the stated purposes of the Ordinance and failed to reasonably consider existing developments surrounding the plaintiffs' properties.

The Municipal Land Use Law ("MLUL") requires that a zoning ordinance be made with reasonable consideration for the character of each district "to encourage the most appropriate use of the land." Additionally, the restrictions of an ordinance must have a "real and substantial relation" to purposes sought to be accomplished by the ordinance.

The Court found that as applied to the plaintiffs' properties, the limitation on development of one unit per six acres was not required to serve the stated goals of environmental protection, farmland preservation and conservation of open space. State regulations adequately protect environmentally sensitive areas. Additionally, development techniques can be implemented to assure protection of environmentally sensitive areas, such as aquifers.

The Court found that certain residential development poses less risk of pollution of an aquifer than many agricultural activities". Additionally, the Court agreed that "down zoning is not an effective method of preserving agriculture in an urban fringe area such as East Brunswick".

With respect to the stated goal of open space preservation, the Court found that "a municipality may not compel private property to be devoted to preservation for open space by restrictive zoning that is not justified by environmental constraints or other legitimate reasons."

The Court also looked at each of the plaintiffs' properties independently to determine whether the down zoning was reasonable as applied to each specific parcel. In this context, the Court placed great weight on the character of surrounding development. Where properties are surrounded by existing small lot residential development, the Court found the down zoning to six acres to be "patently arbitrary" and "draconian".

This decision is notable in its recognition that environmental constraints are not alone sufficient to justify a down zoning since DEP's statutes and regulations already address environmental concerns, and the character of surrounding areas must be taken into consideration.

New Jersey Farm Bureau, Inc. v. Township of East Amwell

In Farm Bureau, the Court upheld an East Amwell Township Ordinance that down zoned property within an agricultural district from three to ten acres, with certain lot averaging and cluster additions.

The Court found that the overall character of the Township was predominately rural. Plaintiffs' properties were located in areas designated as PA4-Rural under the State Plan. The down zoning from three to ten acres was intended to preserve farmland and maintain the rural character of the area.

The Court found that the rezoning was reasonably related to the stated objective of encouraging agricultural uses and preserving farmland. While the ten acre minimum zoning with options for cluster development may result in smaller farms than traditionally preferred, it is intended to result in more modernized innovative farming options and was found to be rationally related to the goal of preservation of agricultural land.

The Court agreed that references in the State Plan to accommodation of growth in PA 4 area do not mandate a "proactive requirement to create centers or pockets of high density development." The Court further stated that "accommodation in the State Plan cannot in fairness be interpreted to mean that a community such as East Amwell has an obligation to identify places where pockets of development will be created but rather must be seen as a goal of ensuring that such development as does occur consistent with historical development trends is not foreclosed.

The Court also rejected the argument that the down zoning constituted "exclusionary rezoning" in violation of East Amwell's obligations under Mount Laurel I. However, the Court noted that East Amwell discharged its obligation to provide its fair share of low and moderate income housing opportunities. The Court further stated that the Mount Laurel obligation only exists in "growth areas" and does not extend to areas where growth is discouraged under the State Plan.

VACATION OF PUBLIC STREET

Elberon Voters & Property Owner's Association v. City of Long Branch & Park Avenue Estates, LLC

In this case, the Appellate Division reiterated the standards applicable to the vacation of public streets by a municipality. Plaintiffs' challenged a preliminary site plan and subdivision approval issued to Park Avenue Estates and a related decision by the City Council of the City of Long Branch to vacate a road in connection with the approved development. The Court affirmed the City Council's decision to vacate the road. Plaintiffs argued that vacation of the road was improper because the Council took action for a private rather than a public purpose. However, the road at issue had never become a public street, as there was no evidence of intent by the municipality to dedicate and accept the roadway. Even had the roadway been a public street, the Council's action would have been proper. A public street may be vacated if the governing body finds that the public interest would be better served by releasing the street. A determination of the governing body will be upheld when it serves the general public interest, even if the action is based in part on advancement of private considerations.

This confirmation of the ability of municipalities to vacate public roadways in connection with a private development should help developers overcome challenges from objectors, particularly in light of the widespread negative response to the Supreme Court's decision in Kelo.

EXPERT TESTIMONY – SUBDIVISION DENIAL

Cangiano v. Township of Bernards

A planning board is not bound by the testimony of its own expert or an applicant's expert testimony. The Appellate Division upheld denial of plaintiff's application for preliminary subdivision approval for twelve lots. The board denied the application based on the finding that the applicant failed to meet the requirements of a tree removal ordinance and threatened and endangered species and noise provisions of an Environmental Impact Assessment Ordinance. With respect to the endangered and threatened species issued, the Board considered testimony of a biologist for the plaintiff and experts for the opponents. The Board also considered testimony on the issue from its own expert, but rejected that testimony to the extent that it was based on information from the plaintiff's expert who acknowledged deficiencies in his study of endangered species. It is not improper for the Planning Board to reject the opinion of its own expert. Rather, a board is free to accept or reject the opinions of experts, including its own, where it has a sufficient basis to question the testimony.

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