

Legal & Legislative Update

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PROPOSED PUBLIC ACCESS RULE

SBACNJ encourages its members to comment on DEP's proposal to revamp its Coastal Public Access Rules. The proposed rule prohibits development that adversely affects or limits "public trust rights" to tidal waterways with very limited exceptions. To be approved, developments will be required to provide onsite, permanent, unobstructed public access to tidal waters and their shores, including visual and physical access. Perpendicular access and linear access must be provided in most cases. The proposal also applies to single-family homes and duplexes adjacent to the Atlantic Ocean, Sandy Hook and Raritan or Delaware Bay if the site includes a beach or if beach and dune maintenance is proposed. Certain deed restriction requirements are also applicable under the proposed rule. The proposed rules also place onerous mandates on municipalities, requiring municipalities to establish public access points an average of every 1/4 mile and not farther apart than 3/8 mile regardless of whether there are existing public access points to satisfy public demand; requiring the creation of public restroom facilities an average of every 1/2 mile and never more than 5/8 of a mile apart, as well as within 1/4 mile of every municipal boundary; and requiring increased public parking to accommodate beach capacity of all beaches within the municipality. Written comments must be submitted to DEP by January 5, 2007.

PETITION TO RECLASSIFY TOMS RIVER AS CATEGORY ONE WATER

A petition was filed by various environmental groups with DEP on November 1, 2006 to reclassify the Toms River and its tributaries as a Category One ("C-1") water. Roughly 230 miles of the Toms River are already classified as C-1 or PL, the highest level of protection. The petition would apply to an additional 158 miles of the remaining portions of the Toms River and associated tributaries including Mirey Run, Doves Mill Branch, Union Branch and Wrangle Brook. The petitioners assert that the waters are of exceptional ecological significance and in-stream water quality, and are important in connection with threatened and endangered species habitat and recreational opportunities. They assert that the Toms River is a potential future drinking water supply and is important to the health of the Barnegat Bay.

The petitioners assert that the portions of the Toms River that are presently C-1 and PL will be degraded by waters that run through segments that are classified as C-2. However, there is no explanation as to why this would be a concern for downstream segments of the Toms River and its tributaries. Additionally, there is no data or study presented in connection with the petition to support the conclusion that the water quality of C-1 portions of the Toms River has been or will be negatively affected by a continuation of the C-2 classification for the remaining portions of the Toms River or by development along the Toms River in accordance with applicable DEP regulations. Additionally, the petition presented no evidence that existing buffer limitations under DEP's

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freshwater wetlands programs and other regulatory programs are insufficient to protect water quality, species habitat and recreational opportunities.

According to the petition, 40% of the Toms River watershed is already permanently protected open space or unavailable for development. The petition if granted would result in the creation of an additional 1,630 acres of C-1 water buffer areas. The proposed reclassification would have a severe negative impact on development opportunities and the creation of housing opportunities in the area.

AMBUSH ACQUISITIONS

Mt. Laurel Township v. MiPro Homes LLC

In a 6-1 decision, the Supreme Court decided that municipalities are allowed to condemn property for open space to prevent development. Municipalities may undertake such “ambush acquisitions” even after a project has been approved by the municipality and construction has commenced consistent with the municipality’s master plan. The Court stated that the motive of limiting development is not improper. Additionally, the Court held the property would be valued at its fair market value prior to the filing of the declaration of taking.

The facts of this case and the lower court decisions were reported in the November/December 2003 and November/December 2005 editions of the Bulletin Board. MiPro obtained approvals for a 23-lot subdivision on a 16-acre parcel in Mt. Laurel Township. After MiPro obtained initial approvals for the development, the Township adopted a resolution authorizing an application for Open Space Preservation Funding to the Burlington County Board of Chosen Freeholders. In April 2002, the Township Council introduced an ordinance authorizing the acquisition of MiPro’s property. The ordinance contained a determination made by the Township Council that the property was “under severe development pressure” and “has been made the subject of a major residential subdivision application.” Mt. Laurel instituted a condemnation action.

The lower court recognized that municipalities have broad powers of discretion in exercising the authority to condemn property. However, “a condemnation may be set aside when a public body condemns for an authorized purpose, but is motivated by an ulterior, disguised purpose which is not authorized by law.” Such action on the part of a municipality constitutes bad faith. The lower court held that when the real purpose of condemnation is to prevent a proposed development, the condemnation is for an invalid purpose and may be set aside.

The lower court concluded that Mt. Laurel’s real purpose in condemning the property was to prevent MiPro’s residential development, contrary to the stated public purpose of taking the property for passive open space. The Township failed to demonstrate any real need for more open space. Moreover, the statutes relied on by Mt. Laurel did not justify the taking. Those statutes, while establishing a strong public policy encouraging the acquisition and preservation of lands by municipalities, merely act as funding mechanisms to assist municipalities in advancing those policies. The lower court stated that “those laws do not in any way supercede the Municipal Land Use Law and the Eminent Domain Act of 1971. Condemnation cannot replace zoning and planning.”

The lower court also contrasted another decision upholding condemnation where a municipality included an open space and recreational element in its Master Plan which identified the property in question as a potential

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open-space acquisition site. Here, no such plan existed and Mt. Laurel had not conducted any study to evaluate whether a need for open space or recreational areas existed.

The Appellate Division reversed, holding that a municipality has statutory authority to condemn property for open space and that the selection of properties for open space acquisition in order to stop planned residential developments is not an improper use of the power of eminent domain. The court recited several statutes that allow a municipality to use eminent domain to acquire land for open space preservation. It rejected MiPro's argument that this power is limited to instances where a municipality has a plan to put the land to active recreational use. The court recognized conservation of land for open space as a public use, and a plan for active use of the land is not required to demonstrate a "need" for the acquisition. "Open space acquisition may serve the public interest not only by setting aside land for potential future recreational uses but also by preventing development."

The Appellate Division also rejected the argument that condemnation of the site for open space preservation was impermissible under the statutory authority relied on by Mt. Laurel and the court because the property was not included in an area designated for open space under the Township's master plan. The court held that even though the master plan did not identify the site for open space, Mt. Laurel had authority to condemn the site for open space because it obtained Green Acres funding for the acquisition. The Green Acres funding process "reflects a finding by the Green Acres Program that the MiPro site is suitable for open space acquisition."

The court also concluded that the Township's motive of stopping the MiPro development did not constitute fraud, bad faith, or manifest abuse. Concerns that "residential development would aggravate traffic congestion and pollution problems in the municipality and impose added stress on its school system and other municipal services" are valid public policy considerations according to the Court. The court also stated that a different result may have been reached if the proposed development was not a single family residential development, but a development that implicated other significant public interests such as a multi-family affordable housing development or assisted living facility.

In dissent, Justice Rivera-Soto opined that use of eminent domain to stop development is an improper exercise of the power of eminent domain and that the Court's valuation of the taking was also improper. Judge Rivera-Soto found that "the Township's transparent after the fact explanation of its policy basis for the condemnation of MiPro's property simply does not withstand serious scrutiny." The taking was a political decision to stop development made in response to public opposition. He argued that "a Judge's individualized and idiosyncratic view of what is or is not socially redeeming has no place in determining whether the sovereigns exercise of the power of eminent domain is proper." The Township failed to establish that it did not act in bad faith, unreasonably or arbitrarily or capriciously in condemning the property to stop development.

Judge Rivera-Soto also argued that the property should be valued to include MiPro's development costs and acquisition costs and the profit MiPro could have realized from the development, unless the Township could demonstrate that MiPro was unable or unwilling to complete the development.

This decision allows townships to utilize condemnation solely as an anti-development tool. Townships may use open space condemnation to target and stop development, although they would be required to pay compensation, but not lost profits, for the taking.

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ACCEPTANCE OF DEDICATED STREETS

Hertz v. Nowacki, et al.

In this case, plaintiff sought a declaration that a dirt path leading to plaintiff's property was a public road and compelling the Borough of Lincoln Park to grade, gravel, upgrade, maintain and properly improve the dirt path. The dirt path was an extension of an existing paved public roadway. It cut across several defendants' properties prior to reaching the plaintiff's property.

The courts held that the dirt path road is not a public street because there was never "a dedication of the land for this use and acceptance of the dedication by the public entity". There was no evidence that Lincoln Park ever accepted any dedication of the dirt path for public use. A municipality may accept the dedication of a roadway by ordinance or other "official conduct which manifests an intent to treat the land in question as dedicated to the public use."

Here, the Borough never paved or made any kind of improvement to the dirt path in question and therefore did not manifest an intent to accept a dedication of the path. The court found that the fact that the path was identified as part of an existing paved roadway on the Borough's tax map and tax records "does not constitute an acceptance of a dedication or impose a duty on the municipality to maintain the path." There is no evidence that the pathway was used by the public and, therefore, there is no evidence of the "existence of a public road by prescription".

This case demonstrates the difficulty of establishing public ownership of roadways without some official action on the part of the municipality.

TAKINGS/PINELANDS

Petrella v. Pinelands Commission

In this case, the Appellate Division upheld the Pinelands Commission's denial of the plaintiff's application for a waiver of strict compliance from the requirements of the Comprehensive Management Plan ("CMP"). The requirements of the CMP may be waived as necessary to alleviate extraordinary hardship or to satisfy a compelling public need, where the waiver is consistent with the purposes of the Pinelands Act, and would not result in substantial impairment of Pinelands resources. Plaintiff was denied an application for development of a single family home on a 12 acre parcel because the application failed to include 24 acres of contiguous undeveloped property that were owned by third parties.

To obtain a waiver from the CMP based on extraordinary hardship, "all property in common ownership" at any point in time on or after July 14, 1981 must be included as part of the application. Contiguous lots under common ownership after the effective date of the act are treated as one overall parcel for purposes of development "to avoid fragmentation of the Pinelands and to prevent unintended adverse effects upon the environmental resources of the Pinelands and of developments that deviate from the standards of the CMP". The plaintiff's application was denied because it failed to include the contiguous parcels that were under common ownership after the effective date of the act. The Court recognized that but for the common ownership issue, plaintiff would have been permitted to proceed with the development. However, this "unfortunate" set of circumstances did not rise to the level of an "extraordinary hardship" for purposes of the waiver provisions.

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The Court denied the plaintiff's takings claim, finding that the requirement to join the contiguous parcels did not constitute an exaction. Additionally, the Court found that the plaintiff "failed to demonstrate that the property is incapable of having a minimum beneficial use, particularly in light of the possibility that appellant could use the property in the Upper Township Density Transfer Program authorized under the CMP". In making this finding, the Court seems to have failed to address the Supreme Court's 2006 Mansoldo v. New Jersey takings decision requires that the court must use the Penn Central factors to determine whether there is a compensable taking when it is determined that the regulation does not deny all economically beneficial use. The Penn Central factors include review of the economic impact of the regulation of the claimant, the extent to which regulation has interfered with a distinct investment backed expectation, and the character of the governmental action. It does not appear that the Appellate Division conducted such review in this case, notwithstanding the Court's recent direction regarding this issue.

Environmental regulations that require applicants to take into consideration contiguous properties that were under common ownership at one point in time are particularly harsh with respect to individual property owners and smaller developments. DEP's CAFRA regulations contain similar provisions for purposes of determining what constitutes a regulated "development". The decision may make it more difficult for property owners to challenge the application of such provisions in other contexts.

MLUL CHECKLISTS

Fulton's Landing, Inc. v. Sayreville

A municipality may not require that an applicant for subdivision approval acquire off-site property rights as a jurisdictional checklist item for purposes of application review.

The Municipal Land Use Law ("MLUL") provides that an application for subdivision approval shall be deemed complete for review if the application is not certified by the Board as complete within forty-five (45) days of submission unless the Board provides notice that the application is deficient or if the application "lacks information indicated on a checklist adopted by Ordinance and provided to the applicant". N.J.S.A. 40:55D-10.3

The dispute in this case involved the question of whether Fulton's Landing's application for subdivision approval was deficient because Fulton failed to obtain off-site easements from an adjoining property owner to permit road connections sought by the municipality. The Board failed to take action on the application contending that the easement requirement was a checklist requirement and the application was not complete for review. Fulton argued that it could not be compelled to obtain property rights from an unwilling seller, and the application was deemed approved because the Board failed to take action within the 95 day review period under the MLUL.

The purpose of checklists is to "avoid *ad hoc* Board requirements of which an applicant had no fair, advance notice." "A municipal agency may not declare an application incomplete because the applicant has failed to supply information that is not required in the checklist." The Court agreed that Sayreville's requirement that Fulton secure off-site easements for purposes of declaring the application for subdivision approval complete for review was inconsistent with the purpose of the MLUL checklist provision "of providing certainty as to the requirements for a land use application." Accepting the Board's position "would be contrary to the MLUL's intent, since if such were the case, Fulton could not predict with any certainty what off-site requirements would be imposed upon it as a condition for consideration of its preliminary site development application." As a private developer has no power to condemn property, "the MLUL does not obligate a developer to acquire rights to non-owned property or needed off-site improvements." Therefore, the Court reversed the finding that the application

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was incomplete and remanded to the Board for consideration of the application within the statutory limits of the MLUL.

The Court denied Fulton’s request that the application be deemed approved based on the default provisions of the MLUL. N.J.S.A. 40:55D-48c. “Automatic approval should not be granted except upon a showing of bad faith or inattention by a Municipal Board.” The Court determined that the Board did not act in bad faith in failing to act on the application. Rather, its inaction was based on “an understandable misconception of the law.”

This information is not to be construed as legal advice. If you have any questions please do not hesitate to contact any of the following attorneys:

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