

## Legal & Legislative Update

By Michael J. Gross, Esq. & Steven M. Dalton, Esq.

### DEP Coastal Centers

DEP is publishing proposed rules that will, in some cases, mitigate the impacts of the expiration of the CAFRA “coastal centers”. The coastal centers, not including those within the barrier islands, expired February 7, 2005. The new proposal is intended to provide limited relief to the center expirations. The proposal calls for re-establishment of expired coastal centers for municipalities that had a pre-petition meeting with the Office of Smart Growth (“OSG”) prior to the date of the proposed rule change. Other municipalities may also extend center designation by (1) submitting a resolution requesting a pre-petition meeting with the OSG within 30 days after the date of the proposed rule change, (2) having a meeting with the OSG by October 15, 2005, and (3) obtaining a determination of completeness by March 15, 2006. Any re-established center under the proposal will expire on March 15, 2007. Developments in re-established centers would be permitted to use the impervious and vegetative cover percentages under the CAFRA regulations that were in effect prior to expiration of the centers if a CAFRA application was filed with DEP prior to February 7, 2005 and the application is determined to be complete for final review prior to March 15, 2006. Other development projects for which a CAFRA application is submitted to DEP after February 6, 2005 may benefit from the rule only if it is located entirely within the coastal center and entirely outside of environmentally-significant areas and critical environmental sites, such as wetlands and C-1 buffer areas

### **TAKING CLAIMS STANDARDS CLARIFIED**

#### Lingle v. Chevron

The United States Supreme Court issued a May 2005 decision regarding the standards courts should apply when evaluating a taking claim, providing clarification to property owners seeking just compensation from the government under the Fifth Amendment of the Constitution.

Private property shall not be taken for public use without just compensation. The standard taking case involves a direct physical invasion of public property by the government. The Court has also recognized “regulatory takings”, in which government regulation of private property is so onerous that it is the equivalent of a direct appropriation or ouster. These types of regulatory actions are “functionally equivalent to the classic taking in which government directly appropriates physical property or ousts the owner from his domain.” The focus of a regulatory taking is the severity of the burden the government imposes upon private property rights.

The Court confirmed the use of three tests to determine whether a compensable regulatory taking occurs: (1) the regulation results in a physical invasions of property; (2) the regulation exacts a “total taking” by depriving the private owner “of all economically beneficial use” of property; and (3) the regulation restricts the use of property to a degree, but does not constitute a “total taking”. In the context of this third scenario, courts should evaluate various factors, set forth in Penn Central Transportation Co. v. New York City, such as the economic impact of the

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regulation; the extent to which the regulation interferes with distinct investment backed expectations; and the character of the governmental action, such as whether it amounts to a physical invasion of property or merely affects property interests.

The Court also affirmed the standards established under its Nollan and Dolan decisions applicable to land use exactions in which the government demands the dedication of an easement for public access as a condition of a development permit. Nollan permits such exactions provided an “essential nexus” exists between the required dedication and the interest the government seeks to protect. Additionally, under Dolan, even where such a nexus exists, the Takings Clause requires that there be a “rough proportionality” between the exaction and the proposed development. Specifically, the government “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”

The Court declared that the “substantially advances” language of its decision in Agins v. City of Tiburon is not a workable taking test. The Court in Agins stated that application of general zoning to a particular property affects a taking if it “does not substantially advance legitimate state interests.” That language had been applied as a separate taking test. It was relied on by Chevron in challenging a Hawaii statute that limited the rent oil companies may charge to gasoline dealer tenants that lease company-owned service stations. Unlike the established taking tests, the “substantially advances” formula does not focus on the severity of the burden on the property owner and does not help in identifying regulations that are functionally comparable to government invasion of private property. Thus, the test is unworkable.

Additionally, the question of whether a regulation is valid is separate and apart from the question of whether a regulation affects a taking. “The Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. No amount of compensation can authorize the regulation that does not advance some valid public purpose.” While the “substantially advances” analysis is of no consequence in the context of a takings claim, the Court confirmed that the “substantially advances” formula may continue to be used by property owners to challenge a regulation based on a due process violation.

## **“SEGMENTED” PROJECT REQUIRES NJPDES PERMIT**

### **SJC Builders v. DEP**

The Appellate Division affirmed DEP’s determination that SJC Builders was required to obtain a New Jersey Pollutant Discharge Elimination System (“NJPDES”) Permit in connection with its proposed development located in Randolph Township.

NJPDES permits are required pursuant to the Water Pollution Control Act and DEP’s regulations for the discharge of pollutants to surface and ground water. A NJPDES permit is not required for a septic system, unless the septic system is used for more than one property or discharges 2,000 gallons or more sewage per day. SJC tried to avoid the NJPDES permit requirement in connection with a proposed 31 unit development by subdividing the property into 8 lots, with several units on each lot that would utilize a shared septic system. Each shared septic system would discharge less than 2,000 gallons per day, but the combined discharge from all 31 units would equal 6,200 gallons per day. Each group of units would be governed by a separate condominium association responsible for the operation, upkeep and maintenance of the combined septic system. A master property owner’s association would govern the entire development and be responsible for the stormwater management system.

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SJC challenged DEP's requirement for a NJPDES permit. DEP required SJC to apply for a NJPDES permit because the total design flow to property was greater than 2,000 gallons per day. The Appellate Division agreed with DEP. Although DEP's septic regulations do not define property, the Court agreed that DEP's "working definition" of property applied to SJC's development proposal. The "working definition" included a combined area of two or more contiguous lots "where, for any part of each of those lots, there is shared pecuniary, possessory or other substantial common interest by one or more persons." Moreover, the Court interpreted DEP's "working definition" as consistent with the definition of "property" under the NJPDES regulations, which includes contiguous areas "under the control of the owner or operator." The Court rationalized that the condominium plan of development proposed by SJC, in which the master property owner's association would govern the entire development and be responsible for the stormwater management system, represents a form of "control" for purposes of the definition of property.

It appears the Court was concerned that SJC's development plan would create a loophole in the context of DEP's NJPDES requirements, as projects could be "segmented" to fall below the 2,000 gallon discharge threshold and avoid the NJPDES permit requirement. However, the Court's rejection of SJC's argument that DEP's "working definition" of property cannot be used absent specific regulations promulgated to implement same is troubling and could be used by DEP in an attempt to justify ad-hoc decision-making in other contexts. DEP asserted that it proposed rules to adopt a definition of property as part of the septic regulations to correct this deficiency, but publication of the rule proposal was not located.

## **REDEVELOPMENT AREAS**

### **Jersey Urban Renewal v. City of Asbury Park and Asbury Partners**

A municipality's establishment of pre-conditions applicable to submission of local development applications for properties located within a redevelopment area approved under the Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 et seq. ("LRHL"), does not violate the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. ("MLUL").

This matter involved plaintiff Jersey Urban Renewal, LLC's application to the Asbury Park Planning Board for site plan approval for the proposed renovation of its apartment building. The building was located within an area of Asbury Park subject to the City's redevelopment plan. Defendant-intervenor, Asbury Partners, LLC was the designated "redevelopment master developer" under that plan.

The master redeveloper, along with Asbury Park, argued that before plaintiff could proceed with its site plan application it was required to obtain (1) status as a subsequent developer, (2) approval of the Technical Review Committee ("TRC") and (3) approval of the Mayor and City Council. The Appellate Division agreed. The redevelopment plan established the standards applicable to all properties within the redevelopment area and acted as the zoning ordinance for that part of Asbury Park. The plan specifically required that all construction projects within the redevelopment area receive comments from the TRC prior to submission to the Mayor and City Council. Following approval, an application may be submitted to the Planning Board for preliminary and final site plan approval. Additionally, the plan provides that projects within the redevelopment zone are to be accomplished through the master developer, defendant-intervenor Asbury Partners.

The plaintiff's proposed building renovation and conversion from apartment units to condominiums in this case constituted a development and/or redevelopment as defined under the LRHL. The Court rejected the contention that requiring compliance with the procedural requirements of the redevelopment plan as a prerequisite for planning board jurisdiction violated MLUL. Both the MLUL and the LRHL confer jurisdiction with municipal planning boards over site plan applications. But the procedural requirements of the plan did not strip the planning

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board of its jurisdiction. Moreover, the City’s plan was consistent with the purposes of the LRHL, which permits the adoption of a plan through a municipal redevelopment agency with only one redevelopment entity authorized to implement the redevelopment plan. The Court equated the pre-conditions established under the plan to development standards imposed by typical zoning ordinances. Thus, the procedural requirements of the plan did not “improperly interfere with the planning board’s jurisdiction.”

The Court contrasted its recent decision in Britwood Urban Renewal, LLC v. City of Asbury Park, in which it held that the LRHL did not permit the City to require contributions for off-site infrastructure costs on an owner of property located within the redevelopment zone who sought approval to undertake renovations to an existing building and obtained final site plan approval. Such contributions are limited by statute to redevelopers, and the property owner in Britwood was not a “redeveloper” as defined by statute.

## **DENIAL OF SUBDIVISION REVERSED**

### **Sellick v. Borough of Bradley Beach**

An ordinance that lacks any substantive standards improperly grants a municipality with arbitrary enforcement powers in violation of the MLUL.

Plaintiff submitted an application to subdivide her existing residential property into three lots. The application met the municipality’s frontage and width requirements, and no variances were required. But the Borough denied the application relying on a “catch-all” parking ordinance governing off-street parking.

The Appellate Division reversed the denial of subdivision approval, finding that the “catch-all” parking ordinance was standardless and improperly granted the Board with unfettered discretion. The “catch-all” provision applied “as specified by the Borough Planning Board.” The Court found that the Ordinance lacked standards, was vague and attempted to “improperly imbue the Board with the arbitrary power to dictate parking requirements on an ad hoc basis.” By failing to include any standards in the “catch-all” provision, the municipality “failed to give its citizens notice of what is expected” and transferred its police power to the Board. As the Board relied on the standardless ordinance to deny the application, its action was arbitrary and capricious.

## **VACATION OF PUBLIC STREETS**

### **GDT, LLC v. Township of Bordentown**

In this case, the Appellate Division held that member of the public do not have a right to demand that a municipality take action to vacate public streets. The vacation of public streets is a discretionary act of a public body.

Plaintiff filed suit to force the Bordentown Township Committee to vacate two paper streets running through plaintiff’s property. Plaintiff’s local development approval, for operation of a convenience store with gas pumps, was conditioned upon the vacation of the two paper streets running through its property. Vacation of the paper streets was required to consolidate the property into a single parcel for development.

The Township Committee refused Plaintiffs’ request to vacate the paper streets, asserting it was considering conversion of the area to open space. The Court confirmed that vacation of public streets is a discretionary function of local government, to be achieved by adoption of an ordinance, based upon the best interests of the public. It is important that property owners seeking site plan or subdivision approval understand the limitations of conditional approvals in this context.

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## HACKENSACK MEADOWLANDS DISTRICT

### Infinity Broadcasting Corporation v. New Jersey Meadowlands Commission

The Appellate Division declined a request to consider a taking claim involving the New Jersey Meadowlands Commission, finding such claims are required to be filed as an action in lieu of prerogative writs in the Law Division.

The case involved plaintiffs' appeal from resolutions adopted by the Meadowlands Commission amending a redevelopment agreement with a third-party that related to a portion of the Hackensack Meadowlands District. The plaintiffs owned property within the District bordering the redevelopment area. They complained that the proposed project would interfere with broadcasts from their radio station tower operated on the property. Among other arguments, plaintiffs asserted the resolution violated basic principles of land use, and that the Commission's action constituted a taking of their property because the Commission failed to ensure the absence of inference with the radio signals.

As the Meadowlands Commission is a State agency, plaintiffs filed an appeal with the Appellate Division, but sought a remand to the Law Division for development of a record and decision. The Appellate Division agreed that "consideration of the land use and taking issues would be inappropriate on the record." While the Commission is a State agency, it exercises land use authority on a local basis and, therefore, its actions must be challenged in a proceeding in lieu of prerogative writs filed in the Law Division.

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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