

Legal & Legislative Update

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INVERSE CONDEMNATION

Mansoldo v. New Jersey

This case involves the question of valuation of land in the context of a regulatory taking by a State agency. When a State regulation denies a property owner all economically beneficial use of his property, the State is required to pay just compensation, and not just the value of the property's permitted use as parkland, open space or other minimal uses.

This case involved the Department of Environmental Protection's ("DEP") regulation of Plaintiff Mansaldo's property under the Flood Hazard Area Control Act. The property was located in the Hackensack River floodway and Plaintiff sought to subdivide the property and construct two single-family homes, a permitted use under the zoning code. Mansaldo was required to apply for a stream encroachment permit because the proposed construction required the placement of fill in the floodway. The application was denied and Mansaldo applied to DEP for a hardship waiver. The waiver was also denied, with DEP finding that Mansaldo had not pursued alternative permitted uses for the property such as a parking lot, park or open space.

Mansaldo appealed the decision, and an Administrative Law Judge ("ALJ") found that Mansaldo was unable to sell the property, there was no need for a parking use in the area, and the municipality was not interested in purchasing the property for open space or for use as a park, the only permitted uses under the regulations. Mansaldo's administrative appeal of the waiver decision was denied.

Mansaldo filed a complaint in the Law Division arguing DEP's regulations resulted in an inverse condemnation of the property. The trial court held that DEP's regulations "denied Mansaldo all economically viable use of his land", but concluded the State was required to compensate Mansaldo only for the property's permitted use as a parkland, open space or a parking lot, even though the ALJ had found those uses to be valueless. The Appellate Division found that the measure of valuing the property was not the prohibited use as building lots, but rather the value for the permitted use as parkland, open space or a parking lot.

The Supreme Court reversed and remanded the case for a further proceeding on valuation of the property. The Court examined the constitutional tests and standards for regulatory takings. Where a governmental regulation of property "goes too far, it will be recognized as a taking." This has been described through case law as being a denial of all economically beneficial or productive use of the land unless background principles of the State's property and nuisance law would restrict the owner's intended use of the land.

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If a regulation does not deny all economically beneficial use, then the Court must apply what is known as the underlying Penn Central standards to determine whether the regulatory taking is compensable. These standards are fact-sensitive and vary on a case-by-case basis. Then include a 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.

The Supreme Court found that the lower courts' failed to properly apply the applicable established regulatory takings law and, therefore, remanded the case. The Court noted that "consideration of legitimate state interests have no bearing on whether the DEP regulations effected a taking or what compensation is due. Rather, the cornerstone inquiry in this circumstance is whether the DEP regulation denies all economically beneficial or productive use of the land."

On remand, the trial court must determine whether the regulation denies all economically beneficial use and effects a taking, and should conduct a factual inquiry and not rely on the findings of the ALJ. If the regulation denies all economically beneficial use, the State is required to pay just compensation unless the intended use of the property is precluded under nuisance principles. If all economically beneficial use is not denied, then the Court must use Penn Central practice to determine whether there is a compensable taking.

The decision is important in its recognition that not only the State's interest in enacting and enforcing public purpose regulations should be taken into account in consideration of whether a compensable taking has occurred.

TOWNSHIP PROFESSIONAL FEES

Wynfield Corp. v. Killam Associates

This case involves the payment of Township professional fees for services performed in connection with review of development applications. The remedy for disputing such fees is governed by the Municipal Land Use Law, N.J.S.A. 40:55D-53.2, which does not permit the billing of secretarial fees as "professional fees" or as "out of pocket" expenses.

Plaintiff Wynfield Corporation was building an 11 unit subdivision in Hamburg Borough. Killam Associates was hired as an engineering firm by the Borough to review plans for the subdivision and perform periodic site inspections. Killam's fees were deducted from escrow accounts established by Wynfield pursuant to N.J.S.A. 40:55D-53.2 for payment to professionals for services rendered to municipalities.

Killam identified charges for "secretarial personnel" in its schedule of fees. A series of lawsuits challenging the fees ensued. Plaintiff argued that secretaries were not "professionals" for purposes of N.J.S.A. 40:55D-53.2(a). Defendant argued that secretarial expenses were properly billed as a professional out-of-pocket expense as they included "normal and typical expenses incurred in processing applications and inspecting improvements." The trial court held that the defendant was not authorized under the statute to separately bill for secretarial time, but was permitted to bill developers for project coordination and travel time provided such charges were substantiated. The Court also declined the invoices for duplicate site map preparation or billing inquiries.

The trial court authorized Plaintiff to initiate a class-wide discovery to review the Defendants' billing practices with respect to other developers. The information obtained through discovery revealed that the billing practices utilized in Plaintiff's case were similar to the Defendant's billing practices for more than 350 projects between 1995

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and 2001. Plaintiff filed for class certification, but a different trial judge denied the Plaintiff's request and dismissed all remaining counts of the Plaintiff's complaint.

The Appellate Division agreed with the trial court's refusal to allow Plaintiff to bring a class action against Defendant. The Court noted that the statute at N.J.S.A. 40:55D-53.2(a) sets forth the procedure developer must follow in the event of a billing dispute with a municipal professional. The statute does not create a right-of-action directly against a municipality's engineer or professional, and only entitles the developer to pursue an appeal against a municipality to obtain a credit to be applied against the escrow account established with the Borough.

The Court also agreed that it was improper for a municipal professional to separately bill for secretarial time as "professional fees". Under the statute, application review and inspection charges are limited only to professional charges for review of applications, review and preparation of documents and inspections of developments under construction and review by outside consultants in limited circumstances. Only "out-of-pocket" expenses of such professionals or consultants including normal and typical expenses incurred in processing applications and inspecting improvements shall be added to such charges. "Professional services" are defined as services requiring "knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction" performed by a person "authorized by law to practice in a recognized professional whose practice is regulated by law." The trial court found that secretarial fees did not constitute professional charges, and also that outside professionals are precluded under the statute from charging for staff support and overhead because it is expected that these costs are built into the professional's billing rate. Additionally, the court found that secretarial fees are not "out-of-pocket" expenses, but rather constitute generalized overhead costs. "Labor cost" of the staff of a professional are not reimbursable expenses." They are not out-of-pocket expenses, akin to postage and copying charges. The Court also found that the statute requires outside professionals' bills to be sufficiently specific with information identifying the personnel performing the service, the date the service was performed, the hours spent on a quarterly basis and the hourly rate and expenses incurred, in order to make professionals retained by municipalities more accountable to the developers who pay the bills.

In disputing fees charged by the municipality for its professionals in the review of a development application, developers must adhere to the requirements and procedures of the MLUL. Developers should obtain copies of the backup data or invoices from municipalities professional charges against an established escrow account to ensure that professional fees are being properly billed in accordance with limitations of the statute and do not include non-reimbursable charges such as secretarial costs or other staff support or overhead costs.

REDEVELOPMENT AREAS

ERETC, LLC v. City of Perth Amboy.

This case involved the review of a municipality's declaration under the Local Redevelopment and Housing Law N.J.S.A. 40A:12A-1 ("LRHL") that an area "was in need of redevelopment." The Appellate Division remanded this case to the Planning Board based on the inadequate substantiation of statutory criteria for designating an area as in need of redevelopment under the LRHL.

The case involved a designation of various properties as being in need of redevelopment by the City of Perth Amboy. Plaintiff ERETc's property, a light manufacturing building, was one of the properties declared as in need of redevelopment. The City Planner conducted a study which was presented to the Planning Board which purportedly provided an analysis of the statutory criteria. The City Planner prepared a second report at the direction

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of the Planning Board which concluded that all of the proposed properties, including ERETC's were in need of redevelopment. The Planning Board and City Council voted to adopt the recommendations of the City Planner.

The Court applied a deferential standard of review, examining whether the decision was supported by substantial evidence. The Court concluded that the City Planner failed to "undertake an analysis of the statutory criteria as it applied to each of the properties in the designated area." Additionally, the conclusions reached by the Planner "were conclusory and failed to include any evidence to support his determination that the buildings were substandard, unsafe, unsanitary, dilapidated or obsolescent." The Planner failed to conduct an interior examination of the buildings, did not review applications for building permits, did not review occupancy rates or the number of people employed in the area, failed to determine whether the properties were "properly utilized" or "fully productive" or potentially useful and valuable for contributing to and serving the public health, safety and welfare." The failure to sufficiently investigate the properties prior to designating them as areas of need of redevelopment resulted in reversal.

Shelton v. City of Trenton

In a more recent decision in which the court applied ERETC, Plaintiffs challenged actions by the Planning Board and City Council of the City of Trenton expanding and amending the Champale Redevelopment Area. Shelton's property was adjacent to the redevelopment area. The redevelopment area consisted of an old industrial property and the redevelopment plan was adopted in April 1997.

The redevelopment plan was put on hold for several years to allow other projects to proceed. In 2004, the City Council and Planning Board took up the effort to consider expansion and amendment of the redevelopment plan. One of these proposals was to expand the plan to include the Shelton property. The City Planner looked at various redevelopment criteria under the LRHL to determine whether the area was in need of redevelopment. The criteria included a review of the condition of existing buildings and the "generality of the area", whether there is a proper utilization of the area and whether it is fully productive, the discontinuance of the use of buildings, whether a property is unlikely to be privately developed based on location and other factors, whether the area based on various factors is detrimental to the safety, health, morals or welfare of the community and whether the assessed value of the area has been materially depreciated. The Board voted to declare the Shelton property in need of redevelopment and passed the motion to expand the redevelopment area to include the Shelton property. No resolution was memorialized, but a report was prepared for the City Council. The report did not contain any specific analysis of the Planning Board's reasoning and was not signed by any Planning Board members. The City Council voted to adopt the Planning Board's recommendation for expansion of the redevelopment area but there was no "discussion" of whether the expanded study area qualifies as an area in need of redevelopment."

The City Council adopted an ordinance amending the redevelopment plan consistent with the Planning Board's recommendations. Shelton challenged the action.

The Court noted that redeveloped designations are entitled to a presumption of validity and is not for court's to "second guess" a municipal redevelopment action unless there is evidence that the action was arbitrary, capricious and not supported by substantial evidence.

Shelton challenged the action arguing that under the LHRL, municipalities are required to make specific findings of fact in order to establish that an area is in need of redevelopment and the Planning Board and City Council failed to do so in relying on an expert report that did not adequately establish that the Shelton property was an area in need

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of redevelopment under the statutory criteria set forth in N.J.S.A. 40A:12A-5. The statute requires a governing body to use certain statutory conditions to demonstrate that an area is in need of redevelopment. The Court focused on the following factors: “the generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent or possess any of such characteristics or lacking in light, air, or space, as to be conducive to unwholesome living or working conditions”; “a growing lack or total lack of proper utilization of area caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.”

The court found that the investigation by the City’s Planner “was inadequate and resulted in unsubstantiated net opinions.” The report gave “general and vague description of the expanded neighborhood.” Additionally, the Planner acknowledged it conducted only “a windshield survey” to determine the status of the property. The court concluded the “testimony and report lacked the necessary detail and facts to support the determination reached by the Planning Board and City Council.” There was little or no deliberation on the part of the Planning Board and City Council to confirm these opinions. The court therefore reversed the decision that the Shelton property was an area in need of redevelopment.

These cases demonstrate that there has to be a sufficiently detailed study of the property in accordance with the statutory criteria of the LRHL in order to declare a property in need of redevelopment under the statute.

PERFECTING SUBDIVISION APPROVAL

Scarfi v. Westwood Planning Board

Failure to perfect a subdivision by the filing of a subdivision deed or plat in a timely manner will result in the expiration of the subdivision approval regardless of whether the right to subdivide is granted by resolution of approval from the planning board or court order. In this case, Plaintiff challenged the denial of an application for minor subdivision approval and obtained a court order declaring that the minor subdivision plan was approved subject to standard conditions. The plaintiff failed to submit a proposed form of subdivision deed to the planning board for more than 16 months. The planning board refused to sign and return the deed and litigation ensued. The MLUL provides for 190 days to perfect a subdivision approval. The court rejected plaintiff’s arguments that the 190 day timeframe under the MLUL does not apply to approvals granted by court order, but only to minor subdivision approval granted by planning boards. The court disagreed, finding that the only way to perfect a minor subdivision, whether by planning board resolution or court order, is to file a deed or a plat. Failure to do so within the timeframe specified under the MLUL will result in an expiration of approval. The court stated the judgment was the equivalent of a resolution of approval and activated the 190-day timeframe.

This decision demonstrates the importance of taking action to perfect a subdivision approval in a timely manner.

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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