Bulletin Board
Voice of the Central Jersey Shore Building Industry July/August 2007

Legal & Legislative Update

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

COURT INVALIDATES JACKSON OPEN SPACE ORDINANCE

New Jersey Shore Builders Association v. Township of Jackson

Accepting arguments made by Paul H. Schneider, Esq. of Giordano Halleran & Ciesla on behalf of SBACNJ, Superior Court Judge Serpentelli invalidated Jackson Township's Open Space and Recreation Fee ordinances. In invalidating the ordinances, Judge Serpentelli found that municipalities have no authority to mandate set asides for on-site open space or off-site payments in lieu of the set asides except for planned unit developments, planned unit residential developments or residential clusters. Additionally, municipalities have no authority to include in a zoning, subdivision or site plan ordinance a requirement to dedicate recreation space on-site or contribute to the provision of off-site recreation facilities.

The Jackson ordinances, 06-03 and 02-06, required homebuilders to dedicate land on-site for common open space, and to construct a variety of recreational facilities on-site. Alternatively, a developer was required to satisfy the ordinance requirements through payment of an off-site contribution. The ordinance established standards and criteria for the amount of open space/recreational area required and the types of on-site recreational facilities required in connection with a development. The ordinance also established formulas for calculating the amount of any contribution fee for payment in lieu of on-site provision of open space.

SBACNJ challenged the ordinances as they applied to those portions of the Township located outside of the Pinelands Area. In reviewing SBACNJ's challenge, Judge Serpentelli determined that only a development housing 120,000 people could provide for all of the recreational facilities required by the ordinance on-site. All other developments would require that some portion of the recreational facilities required by the ordinance be constructed off-site. The Township conceded that no parcel of land in the Township could accommodate a development of 120,000 people as currently zoned. Thus, "the effect of the ordinance, as applied, is to require a developer to pay a contribution fee in lieu of all or a portion of the on-site recreational requirements since they cannot be provided within the development." Therefore the court addressed the issue of whether a municipality "has authority to require developers to make off-site contributions for recreational improvements" or "to mandate on-site set asides for recreation space."

The Court agreed with SBACNJ that, except for planned unit developments, planned unit residential developments and residential clusters, there is no authority under the MLUL for municipalities "to require on-site set-asides of areas devoted to open space" unless the municipality provides compensation for the set aside. Provisions of the MLUL containing general, unspecified and permissive language do not establish a specific right to require an on-site dedication of open space. N.J.S.A. 40:55D-2(c)(g); N.J.S.A. 40:55D-65(a). The more specific language of the MLUL concerning open space at 40:55D-65(c) clearly only applies in context of planned unit developments.

With respect to the recreation provisions of the ordinance, Judge Serpentelli found that N.J.S.A. 40:55D-42 does not provide authority to require developers to contribute to off-site recreational facilities. N.J.S.A. 40:55D-42 is limited to off-site contributions for street improvements, water, sewerage and drainage facilities and related easements. There is "an absence of statutory authority" and "simply nothing in the MLUL" to require "that a developer dedicate recreation space on-site or contribute to the provision of off-site recreational

facilities." Citing Township of Marlboro v. Holmdel and NJ Builders v. Township of Bernard's, Judge Serpentelli found that the requirement for off-site contributions constitutes an "illegal exaction". "Jackson was without authorization under the MLUL to impose on-site or off-site exactions for recreational facilities" and application of the Ordinance to any residential development in the Township would result in an "unlawful" exaction.

Judge Serpentelli also rejected the argument that the ordinance was valid under the general police power of the municipality. "Ordinances which are intended as land use regulations but cannot find a legal basis within the MLUL [cannot] be justified by the general authority of a municipality to act on behalf of the public health, safety and general welfare." "A municipality is limited in its authority to regulate the use of land through zoning" and "may not invoke its general police power to justify adoptions of regulations clearly related to land use control."

According to the court's opinion, the decision has statewide significance as many municipalities have adopted ordinances requiring developers to make contributions for recreational facilities or open space to obtain land use approvals. In recognition of this fact, a case involving a similar ordinance entitled Builders League of South Jersey v. Egg Harbor Township, was decided on May 11, 2007. In that decision, Superior Court Judge Armstrong upheld Egg Harbor Township's ordinance that requires developers to provide for recreational facilities and open space within a proposed development or make an off-tract in lieu payment, concluding that the ordinance was valid under the MLUL and applicable case law.

Judge Serpentelli's decision is an important recognition of the constraints on municipalities under the MLUL in imposing open space and recreational requirements. Given the pervasiveness of such ordinances statewide, and the conflicting decision of Judge Armstrong, an appeal will undoubtedly be filed and it remains to be seen whether Judge Serpentelli's decision it will have lasting effect.

STATE AFFORDABLE HOUSING OBLIGATIONS

New Jersey Builders Association v. New Jersey Meadowlands Commission

In a May 21, 2007 decision, the Appellate Division held that the State agencies that have planning and zoning responsibility have a constitutional obligation to provide a realistic opportunity for the creation of low and moderate income housing. The case involved a lawsuit brought by NJBA against the Meadowlands Commission and the N.J. Sports and Exposition Authority. The Commission has zoning and development responsibility for approximately 21,000 acres located in 14 municipalities. The Court held that "the Commission has a constitutional responsibility to plan and zone for affordable housing . . . based on the obligations of its constituent municipalities under the Mt. Laurel doctrine and the FHA as administered by COAH." Further, the Court held that when "the State entrusts one its agencies with the complete control over the planning and zoning of a vast amount of land", the Agency is required to take "affirmative steps to ensure adequate affordable housing."

While the Court recognized that the Authority is charged with responsibility of developing approximately 700 acres of land in the Meadowlands District including the Xanadu Project, which will generate approximately 20,000 construction jobs and the same number of permanent jobs, the Court exempted the Authority from affordable housing obligations based on its enabling legislation and the smaller size of the area it controls (700 acres) as compared to the 21,000 acres controlled by the Meadowlands Commission.

Because COAH's third-round rules were recently invalidated, the Court required the Commission to proceed with rulemaking after COAH's third-round rules are revised. Until that time, the Commission's interim rule dealing with affordable housing remains in effect.

This decision has statewide significance with respect to its finding that State agencies with zoning and planning responsibility have a constitutional obligation to affirmatively plan in a manner to ensure the actual construction of low and moderate incoming housing.

DEP RULE PROPOSALS

DEP recently announced three major rule proposals that will have a significant impact on development: revised Water Quality Management Planning ("WQMP") Rules; Category One Waterbody standards; and Soil Remediation Standards. The Water Quality Management Planning Rules and Category One ("C-1") Waterbody Rules were published in the May 21, 2007 *New Jersey Register*. A public hearing for the C-1 rule proposal is scheduled for June 28, 2007. Public hearings for the WQMP rule proposal are scheduled for June 8, June 11 and June 15, 2007. The public comment period for each is scheduled to close July 20, 2007. The Soil Remediation Standards proposal was released May 7, 2007. Public hearings are scheduled for June 7, 2007 and the public comment period is scheduled to close on July 6, 2007. With respect to the C-1 Water Rule, the proposal would designate more than 900 miles of new C-1 waters, including portions of the Toms River. SBACNJ encourages its members to review these rule proposals and submit comments to DEP.

ACCESS RIGHTS

Klumpp v. Avalon

This case involves access rights to a parcel landlocked because of a street vacation. The Appellate Division reversed the dismissal of a beachfront property owner's complaint seeking access to its property for the construction of a single-family home. The Borough adopted ordinances in the 1960s that led to the construction of dunes along the shore front including the plaintiff's property, and which vacated a portion of the public street that provided access to the plaintiff's property. As a result of this action, plaintiff's property was landlocked.

Plaintiff filed an action in 2003 asserting a right of act access to the property. The complaint was filed after DEP denied an application for a CAFRA Permit to build a single-family dwelling on the property based in part on a determination that plaintiff failed to establish that it had the ability to access the site.

In reversing the trial court's dismissal of the complaint, the Appellate Division confirmed that the purchaser of a parcel on which lots and streets are delineated acquires an implied private right-of-way over the streets. "Property owners are entitled to a perpetual and indefeasible right of private access to their land" that "is not affected by a municipality's vacation of the public right-of-way." The plaintiff was reasonable to assume that one of the benefits of ownership of the property "was convenient access to it over the network of public streets."

Although the public roadway was vacated in the 1960s, the plaintiffs complaint was not untimely. A one year statute of limitations is created for actions challenging the vacation of a public street, but that one year timeframe does not apply to a person owing land that abuts the street for which public rights have been

vacated. Thus, there is no limitation for such owners, who have a perpetual and infeasible right of public access.

The decision is important confirmation of private property owners' rights of access to parcels that are land-locked based on a municipality's vacation of a public roadway.

ADMINISTRATIVE APPEALS

Gloucester County Improvement Authority v. NJDEP

In a decision that could affect how developers respond to a notice of violation ("NOV") issued by DEP, the Appellate Division held that a person who receives a NOV that orders a cessation of operations is entitled to an administrative hearing to challenge the NOV.

This case involved a solid waste facility regulated under the Solid Waste Management Act ("SWMA"). The County Improvement Authority received a NOV from DEP for violations of permits to operate a landfill and demolition materials recovery facility. The NOV ordered the Authority to "immediately cease operation" of the facility until a permit was obtained from DEP and to provide DEP with an explanation of corrective measures within a specified timeframe.

The Authority filed a request for a hearing with DEP. DEP denied the request asserting that a NOV cannot be appealed through an adjudicatory hearing. The Authority appealed to the Appellate Division. On appeal, DEP argued that the denial of the NOV was not a final agency action. The Authority argued that the NOV constituted an "order of abatement" requiring immediate compliance that established a right to an administrative hearing.

The SWMA establishes that a person who receives an order from DEP to abate a violation of the SWMA has a right to a hearing. N.J.S.A. 13:1E-9(c). The Appellate Division concluded that the NOV was an "order of abatement", rather than a mere notification or warning of a potential violation. The NOV required Authority to "immediately cease operation" until a permit was obtained from DEP. It also stated that DEP "has determined that a violation has occurred and that DEP may issue penalties against the Authority." The Court equated the NOV to an injunction. "DEP may not issue a notice that appears on its face to be an administrative order that compels the recipient to take immediate action, but then, if the order is subject to a judicial challenge, take the position that it is a mere warning issued as a courtesy to direct parties to assist them in their efforts to remain in compliance".

Many statutes that govern DEP's regulatory programs applicable to developers contain language similar to the SWMA and establish a right to a hearing upon receipt of an order of abatement. Thus, while the decision recognizes a right to a hearing that may be desirable and provide an opportunity for expedited relief in some circumstances, the decision raises the concern that a developer who receives a NOV that includes an order requiring cessation of operations will have to request an adjudicatory hearing to challenge the NOV in order to preserve its rights to challenge a subsequent penalty assessment issued by DEP. It remains to be seen how this practice will affect developers efforts to cooperate with DEP to correct violations asserted in a NOV without subsequent enforcement, and whether DEP will modify its practice to proceed directly to enforcement actions and penalty assessments.

ADJUDICATORY HEARING DEADLINES

D.R. Horton, Inc. v. NJDEP

As DEP approvals become more difficult to obtain, and DEP enforcement actions are more frequently issued, the adjudicatory hearing process to challenge permit denials and penalty assessments has become a familiar part of the development process. A DEP permit denial or penalty assessment must be challenged within a specified number of days. In a 2006 decision, the Appellate Division confirmed that the "substantial compliance" doctrine applies to these deadlines. If a hearing request is submitted late, it may still be accepted provided "substantial compliance" with the time limitation can be established. This requires proof that reasonable steps were taken to meet the deadline, but for reasons beyond the applicant's control, timely notice is not provided. The courts will take into consideration whether DEP is prejudiced by the failure to meet the deadline.

WETLANDS PREEMPTION

Taft v. Upper Freehold and Oak Tree Development

The regulation of freshwater wetlands is solely within the purview of DEP. In this case, an adjacent property owner challenged a subdivision approval granted to Oak Tree on the grounds that the Board failed to consider evidence concerning the need to reclassify wetlands on the property and establish a 150-foot buffer based on the presence of Coopers Hawk, a State threatened species.

The Appellate Division confirmed established law that "all laws and ordinances which attempt to regulate freshwater wetlands are preempted by State law." Moreover, the Board appropriately conditioned the subdivision approval on DEP's addressing the freshwater wetlands issue in a letter of interpretation. Notwithstanding DEP's acknowledgement of receipt of information concerning the Cooper's hawk allegations, it took no action to reclassify the wetlands on the property.

This decision is an important acknowledgement of the limitations on municipalities in considering freshwater wetlands in the context of the local approval process.

Michael J. Gross – mgross@ghclaw.com - 732-219-5486
Steven M. Dalton – sdalton@ghclaw.com – 732-219-5486

This article was previously published in the **Bulletin Board, The Voice of the Central Jersey Shore Building Industry**, and is reprinted here with permission.