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# Legal & Legislative Update

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## MUNICIPALITY MAY ENFORCE CODE VIOLATIONS AGAINST BUILDER AFTER CO IS ISSUED AND TITLE TRANSFERRED

**DKM Residential Properties Corp. v. Twp. of Montgomery**

In an unanimous decision, the Supreme Court held that a municipal construction official may issue citations under the Uniform Construction Code Act ("UCC") against a developer for construction code violations after a Certificate of Occupancy ("CO") has been issued and property conveyed. The Supreme Court reversed an Appellate Division decision, which had found that no such authority existed under the UCC. That decision was previously detailed in the Bulletin Board, and the facts of this matter are summarized here.

The Township of Montgomery brought enforcement actions against DKM for UCC violations concerning the installation of the exterior finish system at a residential subdivision. At the time the actions were brought, COs had been issued and all of the homes were sold.

DKM challenged the NOVs. The trial court found the Township had authority under the UCC to issue a NOV to a builder after a CO issues. The Appellate Division reversed, holding neither the UCC nor its regulations authorized the Township's enforcement action against DKM after DKM transferred the subject property.

On appeal to the Supreme Court, both the New Jersey Builders Association ("NJBA") and New Jersey League of Municipalities appeared as *amicus curiae*. The Court relied on the public health, safety and welfare provisions of the UCC to reverse the Appellate Division decision. The Court acknowledged that the UCC does not expressly address the question of whether a developer may be cited for a violation after a CO has been issued. But, the Court interpreted the UCC and implementing regulations to permit the issuance of a NOV and penalties against a developer for code violations after a CO has issued. The Department of Community Affairs may issue penalties to a developer for violations involving property the developer no longer owns or controls, provided the NOV is not time-barred. The limitations period on such actions is typically 10-years. The municipal enforcing agency's powers stem from those of the DCA, and are similar in nature. Thus, the municipal enforcing agency has the authority to bring enforcement actions against a developer for code violations after a CO issues and the property is transferred.

This decision should not impact the majority of developers that adhere to normal high quality construction standards. However, the decision is likely to result in an increase in municipal enforcement proceedings years after a municipality certifies compliance with applicable codes, rules and regulations through issuance of a CO and after a developer transfers title to the property.

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## FEE SHIFTING ORDINANCE INVALIDATED

### Cerebral Palsy Center v. Fair Lawn

In a suit joined by NJBA, the Appellate Division agreed that fee shifting provisions of local ordinances are "fundamentally inconsistent with the MLUL and are invalid."

This case involved the provisions of the Fair Lawn Ordinance establishing the position of public advocate. The advocate had authority to appear before the planning board and zoning board and other agencies in matters of "substantial public importance." The advocate reviews applications to determine whether further involvement is necessary and, the hourly cost of the expense for that review is to be paid by the applicant. The public advocate is also authorized to employ expert witnesses in connection with its services, again at the cost and expense of the applicant.

The Cerebral Palsy Center, a non-profit corporation, sought use and bulk variances to expand its facility. The public advocate participated and retained traffic and other experts. The costs associated with the public advocate's review of the application exceeded $16,000.00, and the Board required the Center to deposit this amount in escrow. The Center challenged the "fee shifting" provision of the Ordinance, resulting in an increase of the advocate's fees to more than 20,000.00, and its appeal of the trial court's decision upholding the ordinance was joined by NJBA.

The Appellate Division held the fee shifting provisions of the Ordinance which makes the applicant responsible not only for fees incurred by the Board, but also for fees of the public advocate and its experts, was "fundamentally-inconsistent" with the MLUL and invalid. The MLUL allows a board to charge an applicant for its "reasonable and necessary" professional review and inspection fees associated with the application. N.J.S.A. 40:55D-53.2. The fees must be "based upon a schedule established by resolution." The statute allows a board to charge an application for fees associated with review by an "outside consultant", but only when the application is beyond the scope and expertise of the professionals normally utilized by the board. Additionally, the municipality is responsible for the outside professionals' time and expenses for becoming familiar with an application or project.

The MLUL does not expressly authorize Fair Lawn's fee shifting ordinance. Additionally, the Court rejected the argument that Fair Lawn's shifting of costs associated with review of an application by outside professionals could be implied by the MLUL. The Court recognized that the Legislature was concerned with the need to control municipal professional fees and intended to place limits on the amount of required escrow deposits. The "fee shifting technique adopted by Fair Lawn can serve only to increase the cost of applying for land use approvals within the municipality while the purpose behind the statute was to limit and control those expenses. The Ordinance is thus fundamentally at odds with the statute."

This decision should help limit costs associated with applications for local approvals, and may have the result of streamlining the local review process if a Township's ability to pass along the costs for reviews by outside professionals not typically used or employed by the Township is limited.

## NATURAL RESOURCE DAMAGES

On January 20, 2005, an amendment to New Jersey's Spill Compensation and Control Act ("Spill Act") was signed into law providing important protections to developers, including redevelopers, of contaminated sites. The new amendments provide exemptions to certain developers from Natural Resource Damages ("NRD") claims and from the requirement to remediate contamination that has migrated to other properties. The law also revised the statute of limitation for remediation of contaminated sites or closure of sanitary landfills conducted by the State of New Jersey.

The exemptions extend to developers not responsible for causing contamination that would result in NRD. Specifically, the law provides protection against claims for NRD to persons who acquired contaminated property after January 5, 1998 if the discharge occurred prior to the person's acquisition of the property and the person is not in any way responsible for the discharge, or a corporate successor to a person responsible for the discharge, and the person has not expressly assumed liability or payment of compensation for damages to a loss of natural resources. The law also provides protection against liability for discharges of hazardous substances that have migrated to other properties if the factors described above are met, and the person can demonstrate through a remedial investigation or through reliance on a no further action letter issued by DEP that the off-site contamination originates from more than one source, and that remediation of the contamination will be beneficial to public health or the environment. Additionally, the protection is lost if the person voluntarily assumes liability for cleanup and removal costs for the off-site contamination.

The issue of NRD has become an important consideration in the development and redevelopment of contaminated sites. NRD refers to the "value" of damage to, or loss of, natural resources. Claims for NRD can range into the millions of dollars. Recently, the State of New Jersey, through the Department of Environmental Protection ("DEP"), increased its efforts to seek NRD. As a result, development of contaminated properties has been hampered by the prospect of the assessment of NRD. This newly enacted law should promote property development and redevelopment by limiting liability exposure to NRD claims.

**CONSTRUCTION ACTIVITY STORMWATER GENERAL PERMIT**

DEP is undertaking an enforcement initiative regarding its Construction Activity Stormwater General Permit ("Stormwater GP") Program. The Stormwater General Permit regulates stormwater runoff from construction sites. Developers who engage in construction activities, including clearing, grading, and excavation, are required to obtain a Stormwater GP authorization for (1) construction activities that will disturb one acre or more of land or (2) construction activities that will disturb less than one acre of land, but are part of a larger plan of development for sale.

DEP intends to immediately commence site inspections, independently and with local Soil Conservation Districts ("SCD"), to enforce compliance with the Stormwater GP. These inspections may be unannounced.

In order to avoid enforcement actions and potential monetary penalties, SBA urges all of its members with projects that involve disturbance of more than one acre to submit an application for a Stormwater GP authorization. Applications should be submitted in the form of a Request for Authorization to the applicable SCD. If a Stormwater GP authorization has already been obtained, members are encouraged to take steps to ensure compliance with approved Soil Erosion and Sediment Control Plans and Construction Site Waste Control components of Stormwater Prevention Plans, and conduct routine compliance inspections.

**CAFRA COASTAL CENTERS EXPIRE**

DEP's CAFRA coastal centers expired February 7, 2005. NJBA filed a petition with DEP seeking a five-year extension of the coastal centers to February 7, 2010. This extension request recognized the important role of coastal centers in accommodating growth. The coastal center designation permitted developments with 50 to 90% impervious cover. Without the coastal center designation, many sites are limited to 3 to 5% impervious cover. The extension request was also based on the reality that very few towns have obtained center designations due in part to the lengthy delays experienced in the formal State Development and Redevelopment Plan center designation and plan endorsement process. The request also recognized the significant public input involved in DEP's adoption of the interim coastal centers, and the requirement that CAFRA be closely coordinated with the State Plan. Notwithstanding this request, DEP allowed the coastal centers to expire. The petition was denied by DEP on February 7, 2005.

At the present time, Bills (A-3742, S- 2323) have been introduced to extend the coastal centers. To date, the legislature has not acted on the bills.

## COAH RULES CHALLENGE

NJBA has filed suit challenging the third round rules recently adopted by the Council on Affordable Housing ("COAH"). COAH adopted its "growth share rules", effective December 20, 2004, to govern the third-round of affordable housing obligations from 2004 to 2014. NJBA is challenging the rules on the basis that they are constitutionally, legally and procedurally deficient, and have the effect of encouraging discriminatory zoning.

## CONDEMNATION – BROWNFIELDS SITES

### NL Industries, Inc. v. Sayreville Economic and Redevelopment Agency

The Appellate Division recently resolved the question of whether the Supreme Court's decision in Suydam concerning the valuation of contaminated property in condemnation actions extends to "brownfield" sites. In Suydam, the Supreme Court held "contaminated property that is the subject of condemnation is to be valued as if it has been remediated" and "the condemnation valuation scheme excludes evidence of contamination." The appraisal amount should be deposited into a trust account with the Court. The Court's decision in Suydam is intended to prevent a condemning agency from realizing a windfall by deducting remediation costs from property valuation even when a property owner continues to pay costs of the remediation of the property.

The Court also held it is appropriate to permit the escrow of a portion of the condemnation award sufficient to cover clean up costs until the exact amount of cleanup costs is determined. Once determined, the escrow may be disbursed, with any surplus funds paid to the condemnee. The Court contemplated "trial-type" hearings to resolve disputes over the anticipated cost of the remediation.

In this case, the contaminated site was a "brownfield" that was designated for redevelopment, and a redevelopment plan for the area was adopted by ordinance designating the Sayreville Economic and Redevelopment Agency ("SERA") as the municipality's redevelopment agency. The Appellate Division, over the objection of SERA, held that Suydam does apply to condemnation for redevelopment of a brownfield site. Suydam was intended to apply to any eminent domain action, "regardless of the public purpose for which private property is being acquired." The Suydam opinion referred to "Brownfield and Contaminated Site Remediation Act" without any indication that redevelopment of a brownfield site would require a different valuation approach with respect to property acquisition.

This case confirms that the method for valuation of property in condemnation actions should be uniformly applied regardless of the purpose for the condemnation. Separating environmental issues from the property valuation phase should help expedite condemnation proceedings. However, there is a concern that the "trial-type" hearing required by Suydam to determine anticipated remediation costs may tie-up funds in escrow and delay the redevelopment of brownfields sites.

## SETTLEMENT OF ZONING DISPUTES

### Tanis & Sons, Inc. v. Borough of Fair Lawn, et al.

This case involved Scholastic Bus Company's application for a use variance and site plan approval for a proposed school bus parking lot and maintenance facility on property in the Borough of Fair Lawn. The application was opposed by Tanis & Sons, Inc., which operates a cement plant on an adjoining lot. Tanis asserted the bus depot use would interfere with access to its property.

Scholastic challenged the Board's denial of the application. The litigation was ultimately resolved though a negotiated settlement agreement between Scholastic and the Board. Scholastic agreed to 25 conditions that the Board voted to impose, and also agreed to acquire an easement over an adjoining lot that would enable all of its vehicles, except large buses, to obtain direct access to River Road. This was expected to result in significant traffic improvements. Scholastic also agreed to close another bus depot located at a different site in Fair Lawn and to limit the number of buses and vans to be parked at the new location to no more than seventy-five.

The Board conducted hearings concerning the proposed settlement. Tanis participated at the hearings. The Board voted unanimously to approve the settlement. The approval was memorialized by Resolution and the parties entered into a Stipulation of Settlement dismissing the suit.

Tanis challenged the settlement and the variances and site plan approval granted by the Board to implement the settlement, but the complaint was dismissed and the Appellate Division affirmed. The trial court did not lack jurisdiction to approve the settlement. Settlements between a municipal body and private entity must be conditioned upon a public hearing on the agreed upon plan, as if a new application were presented to a Board. The settlement "must lead to a further official action by the public body."

The Court found that the proper procedures were followed by Fair Lawn. After notifying the Court of the settlement, the Board conducted additional proceedings to obtain public comment and determine whether to approve the proposal. Scholastic presented evidence regarding the proposed changes in its application and Tanis was afforded an opportunity for cross-examination of witnesses. Tanis also presented expert witnesses. Tanis' right to judicial review of the settlement was preserved by its right to bring in an action in lieu of prerogative writ challenging the Board's determination. Tanis took advantage of that right and the trial court reviewed the Board's resolution. Thus, the court rejected the claim that the settlement process followed by Fair Lawn was procedurally deficient.

This case approves the procedure that must be followed to implement a settlement between a local body and private party involving a land use decision**.**



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