Bulletin Board
Voice of the Central Jersey Shore Building Industry March/April 2006

Legal & Legislative Update

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SUPREME COURT RESTRICTS THIRD-PARTY APPEALS OF WETLANDS PERMITS

In companion decisions dated January 11, 2006, the Supreme Court narrowly defined the rights of third-parties objecting to permits issued by DEP, helping to insulate developers from often unwarranted and frivolous third-party appeals.

I/M/O Freshwater Wetlands GP General Permits

Accepting arguments in a "friend-of-the-court" brief submitted on behalf of New Jersey Builders Association by Ronald P. Heksch and Paul H. Schneider of Giordano, Halleran & Ciesla, the Supreme Court rejected the claim that property owners neighboring a development site have a right to appeal a permit issued by DEP based solely on their status as neighboring property owners. The Court found that the due process rights of third-party objectors are adequately protected by the procedures established under the wetlands permit review process that provide third parties with an opportunity to submit comments on an application.

Maramark Builders obtained wetlands permits for a residential development in Livingston. The wetlands permitting process involved an extensive review by DEP that included substantial participation by the neighboring property owner objectors. During that process, the neighboring property owners raised the issue that the proposed development would result in run-off and flooding of their property.

DEP considered the issues raised by the objectors and reviewed expert reports submitted on their behalf. DEP also considered various submissions by environmental advocacy groups objecting to the proposed development and other submissions. Taking all of this information into consideration, DEP issued the wetlands permits for the project.

A community organization, Preserve Old Northfield and neighboring property owners requested that DEP grant an adjudicatory hearing to challenge the permits. DEP denied the third-party hearing request based on a lack of a statutory or constitutional property rights. The Appellate Division upheld the DEP Commissioner's decision.

The Administrative Procedure Act ("APA") grants a "person who has a particularized property interest" the right to contest an agency permit decision through an administrative hearing. The objectors argued that their concerns about flooding constituted a "particularized property interest" that afforded a constitutional right to a hearing under the APA. The Court disagreed, noting that the objectors' concern about flooding impacts from the project were "speculative. Such "speculative concerns" do not create a "particularized property interest" that would create a constitutional right to a hearing.

Moreover, the Court confirmed existing decisions establishing that "third party objectors' due process rights may be satisfied by an agency's review process, even absent trial-type procedures." The neighboring property owners had the opportunity to and did participate in the extensive DEP review that led to issuance of a permit. Moreover, the objector's concerns were addressed in a trial-like proceeding before the Planning Board, and common law remedies exist for damage caused by flooding.

In Re NJPDES Permit

In the companion case, the Supreme Court again found that a third-party objector did not have a right to a hearing to contest DEP's permit decision. This case involved a challenge to DEP's issuance of a NJPDES permit for Asbury Park's wastewater treatment facility. Unlike the Freshwater Wetlands Protection Act involved in the companion case, the Water Pollution Control Act ("WPCA") does establish third-party rights to a hearing when a person can establish that "a dispute about adjudicative facts that affects the permit decision" exists. The Court found that the objector did not satisfy the statutory criteria for the grant of the hearing, as all of the objections constituted policy disputes rather than factual disputes that could be resolved through a trial-like hearing.

These decisions are an important confirmation of existing law governing third-party appeals from permits issued by DEP, and should help the limit of number of such appeals that are filed reducing the likelihood that developers will be forced to incur the expense of defending what are often unjustified and frivolous actions designed to delay development.

DEP ABANDONS WATER QUALITY MANAGEMENT PLAN AMENDMENTS

DEP published notice on its website that it will not pursue its October 17, 2005 proposals to amend most Water Quality Management Plans in New Jersey. These proposals would have severely limited potential for developments located in planning areas 3, 4, and 5 under the State Plan to be served by central sewer, and developments throughout the State where sewage disposal is provided by septic systems. SBA thanks its members for voicing their opposition to the proposed amendments.

SIGN LAW VIOLATES MLUL

New York SNSA Limited Partnership v. Edison

The Municipal Land Use Law ("MLUL") does not confer authority upon municipalities to expand the notice requirements of the MLUL by requiring that notice of development applications be posted by signs on the property where the development will occur.

The Appellate Division affirmed a lower court's decision that invalidated an ordinance adopted by the Township of Edison that required applicants for development approvals to give notice exceeding the notice required under the MLUL. The Edison Ordinance required applicants to post a sign containing information about the proposed development on the lot where the development would occur. Additionally, the ordinance required that notice be given to property owners within 300 feet of the development site, as opposed to 200 feet required under the MLUL.

A municipality's authority to regulate land use through zoning is limited to the power delegated to it in the MLUL. This includes not only express powers, but necessary incidental powers. But the Court held that the

notice provisions under the MLUL constitute specific mandatory requirements, and not the minimum required notice that may be expanded by a municipality. "There is no ambiguity and no implication of a grant of authority to alter these precisely drafted notice requirements".

The 200 foot notice rule creates "a bright line rule that is easily understood and applied," facilitating compliance and enforcement. Expanding or restricting the notice requirements established under the MLUL "would change the balance of the rights and responsibilities struck by the Legislature."

As noted by the Court, this decision will help advance the goals of the MLUL to "simplify, expedite and standardize procedures for approval by local boards, limit the potential for harassment of applicants, and bring consistency, statewide uniformity and predictability to the approval process." Allowing municipalities to alter the notice requirements of the MLUL would create unnecessary confusion and likely result in increased instances of ineffective notice.

SBA has been actively opposing a similar ordinance adopted on February 1, 2006 by Millstone Township, which requires that signs be posted as part of the notice for applications before the Planning Board and Zoning Board of Adjustment. SBA had notified Millstone of the Edison decision and has requested that the Township repeal the Ordinance.

PERFORMANCE GUARANTEES

Talcott Fromkin v. Freehold Township

This law division case involved a dispute over a performance guarantee for maintenance of a detention basin. The developer posted performance guarantees in 1991 and 1992. In 2002, the Township adopted resolutions releasing the performance guarantees, but requiring that approximately $83,000.00 be posted for detention basin maintenance fees. The Township refused to release the detention basin maintenance escrow in 2005, and the developer filed a complaint challenging the Township's deduction of the detention basin maintenance from the performance guarantees.

The Township was authorized by ordinance to require the developer to post a maintenance bond for a 10-year period. Talcott Fromkin argued that the ordinance exceeded Freehold's authority under the MLUL, which only provides municipalities with authority to collect maintenance guarantees for a period of two years.

The Court contrasted the case of Builders League of South Jersey v. Burlington Township. In that case, a municipal ordinance required that all developers post maintenance escrows for all improvements. The Ordinance at issue in this case only applies where a developer voluntarily dedicates a facility to the municipality rather than arranging for private maintenance through a homeowner's association. Here, the developer dedicated the detention basin to the Township. The Court held that the Ordinance was valid as the Township is lawfully permitted to require a maintenance bond on a voluntarily dedicated and accepted basin for a reasonable amount of time. The Judge found the ten-year requirement was reasonable, but did not provide guidance on what period of time for a maintenance escrow would be unreasonable.

This decision emphasizes the importance of conducting a cost/benefit analysis of dedication of facilities to municipalities as opposed to creation of a homeowner's association.

SITE REMEDIATION – LEGISLATIVE ACTION

The Legislature recently enacted several laws relating to site remediation activities. S-2851 permits DEP to replace a person responsible and performing a site remediation with a municipality when the property is condemned pursuant to the Eminent Domain Act, notwithstanding concerns raised by various opponents to the law, including NJBA, that the procedure will result in additional costs and delays in connection with ongoing remediation. S-2612 provides responsible parties who have settled with the State or who have received a no further action letter from the State with protection from contribution suits with respect to matters relating to the subject of the settlement or the no further action letter. S-2907 authorized redevelopment agreements for reimbursement of remediation costs for projects that have already begun.

CONSISTENCY WITH MASTER PLAN

Children's Seashore House v. City of Atlantic City

The Appellate Division upheld a decision declaring an amendment to Atlantic City's Zoning ordinance invalid as illegal spot zoning.

Plaintiff's property was zoned as RM-3 (Multi family medium rise apartment residential). The beachfront three acre lot was located adjacent to a 277 unit condominium known as the Warwick. Development of Plaintiff's property was expected to affect some ocean views of residents of the Warwick.

In March 2004, the City Council adopted an Ordinance changing the zoning for Plaintiff's property from RM-3 to RM-2. The change in zoning reduced the permissible building height on the property from 100 to 40 feet and significantly reduced the density and development potential of the property. The Council found that the zoning amendment was consistent with the Master Plan objectives of accommodating and controlling development pressures on the waterfront property. However, the City's master plan never suggested modifying the zoning on Plaintiff's property to eliminate the mid- rise residential use.

Plaintiff challenged the Ordinance as reverse spot zoning. Reverse spot zoning is defined as "a land use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones." The Court noted that under the MLUL, Atlantic City's Zoning ordinance is required to be substantially consistent with its Master Plan. The Master Plan identified Plaintiff's property as one of the two blocks within the City where mid-rise development would be permitted to accommodate development pressures along the waterfront and satisfy a recognized housing need. The Court found that Plaintiff overcame the presumption of validity typically afforded to zoning enactments by demonstrating that the amendment was arbitrary, capricious and unreasonable. The Court conferred less deference to City Council action because the RM-3 Ordinance applied only to two blocks within the City, the Warwick property, and Plaintiff's property, and only Plaintiff's property remained undeveloped. Moreover, there was nothing in the record to reflect that the zoning change was justified based on some public need for the zoning change, but was just a response to complaints from neighboring residents of the Warwick.

REZONING CHALLENGE

County Concrete Corporation v. Roxbury

This case demonstrates the difficulty in challenging a Township's rezoning action.

Here, the Appellate Division upheld the dismissal of a complaint challenging Roxbury Township's rezoning of Plaintiff's property from industrial to open space or rural residential with a three acre minimum lot requirement. The Court found that the Ordinance was a reasonable response to considerations of the changing character within the Township, the amount of available vacant land, and the number and intensity of industrial uses in the district. These concerns, and environmental concerns, were recognized in the Township's Master Plan Reexamination Report. Based on these considerations, the Township determined that continued heavy industrial use was no longer appropriate, but rather open space and environmental protection should be promoted.

The Court concluded that it was appropriate for the Township to focus on potential future needs and to amend its zoning plan if it anticipates that the original zoning plan would not meet those future needs. It is also appropriate to take into consideration changed circumstances. The Court suggested that Plaintiffs were not without recourse, and could pursue a federal takings claim if the zoning resulted in the property being unusable.

VACATION OF PUBLIC STREET

Elberon Voters & Property Owner's Association v. Long Branch & Park Avenue Estates

In this case, the Appellate Division reiterated the standards applicable to the vacation of public streets by a municipality. Plaintiffs' challenged a preliminary site plan and subdivision approval issued to Park Avenue Estates and a related decision by the City Council of the City of Long Branch to vacate a road in connection with the approved development. The Court affirmed the City Council's decision to vacate the road. Plaintiffs argued that vacation of the road was improper because the Council took action for a private rather than a public purpose. However, the road at issue had never become a public street, as there was no evidence of intent by the municipality to dedicate and accept the roadway. Even had the roadway been a public street, the Council's action would have been proper. A public street may be vacated if the governing body finds that the public interest would be better served by releasing the street. A determination of the governing body will be upheld when it serves the general public interest, even if the action is based in part on advancement of private considerations.

This confirmation of the ability of municipalities to vacate public roadways in connection with a private development should help developers overcome challenges from objectors, particularly in light of the widespread negative response to the Supreme Court's decision in Kelo.

EXPERT TESTIMONY – SUBDIVISION DENIAL

Cangiano v. Township of Bernard

A planning board is not bound by the testimony of its own expert or an applicant's expert testimony. The Appellate Division upheld denial of plaintiff's application for preliminary subdivision approval for twelve lots. The board denied the application based on the finding that the applicant failed to meet the requirements of a tree removal ordinance and threatened and endangered species and noise provisions of an Environmental Impact Assessment Ordinance. With respect to the endangered and threatened species issue, the Board considered testimony of a biologist for the plaintiff and experts for the opponents. The Board also considered testimony on the issue from its own expert, but rejected that testimony to the extent that it was based on information from the plaintiff's expert who acknowledged deficiencies in his study of endangered species. It is not improper for the Planning Board to reject the opinion of its own expert. Rather, a board is free to accept or reject the opinions of experts, including its own, where it has a sufficient basis to question the testimony.

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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