Bulletin Board
Voice of the Central Jersey Shore Building Industry March/April 2007

Legal & Legislative Update

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

COURT INVALIDATES COAH RULES

On January 25, 2007, the Appellate Division invalidated provisions of Council on Affordable Housing's ("COAH") third-round rules including the present growth share methodology used by COAH for determining municipal prospective affordable housing obligations. The Court stated that the rules "frustrate rather than further, a realistic opportunity for the production of affordable housing." The Court also invalidated the regulation that permitted municipalities to meet up to 50% of their affordable housing obligation with age-restricted housing and held that Mount Laurel requires municipalities to provide incentives to developers to satisfy affordable housing obligations. The Court has put a stay on all issues relating to substantive certification before COAH. The Court also put a stay on the filing of builder's remedy suits against any municipality with an application for substantive certification affected by the decision. COAH must adopt new regulations "in conformance" with the decision and complete the rulemaking process within six (6) months.

The Court invalidated COAH's *present* growth share methodology of 1 affordable housing unit for every 8 market rate units and 1 affordable housing unit for every 25 jobs generated by nonresidential development as it violates the Mount Laurel Doctrine and the Fair Housing Act ("FHA"). However, the Court noted that a revised growth share method which adequately addresses regional need may be permissible.

The Mount Laurel Doctrine and FHA require a match between housing need and allocation of that need to municipalities in growth areas. The Court held that the present growth share does not allocate regional unmet housing need among municipalities in the region based upon vacant developable land in growth areas and thus is violative of the Mount Laurel Doctrine and FHA. The Court noted the COAH growth share rules were adopted without any projection from the State Planning Commission that there exists sufficient vacant developable land in the State's planning areas to meet the regional need. The Court noted that a growth share methodology without considering such information is violative of the Mount Laurel Doctrine and the FHA. If there is a significant mismatch between need and remaining vacant developable land, then COAH would have to change the growth share ratio or devise a different methodology.

The Court held that a growth share approach that permits municipalities to discourage or retard development is violative of the Mount Laurel Doctrine and the FHA. Under the current growth share approach, a municipality may adopt measures to discourage or retard residential and non-residential development by downsizing. As a result, the current growth share approach violates the Mount Laurel doctrine and the FHA. The Court noted that any growth share approach must place some check on municipal discretion.

GIORDANO, HALLERAN & CIESLA
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

125 Half Mile Road, Red Bank, NJ 07701 • (732) 741-3900
441 East State St., Trenton, NJ 08608 • (609) 695-3900
www.ghclaw.com

The Court also found that the Mount Laurel doctrine and the FHA require municipalities to provide developers with incentives to build affordable housing. In prior rounds, municipalities were permitted to provide a density bonus to developers that would provide onsite affordable housing. The third round rule discourages development because it makes development more expensive and less predictable. The rules allow municipalities in growth areas to discourage development of any kind by zoning selected areas for uncompensated inclusionary development or by negotiating fees with no standards. The Court found that a rule that relies on developers to incur the uncompensated expense of providing affordable housing is unlikely to result in zoning that provides a realistic opportunity for affordable housing needs to be met. The Mount Laurel doctrine requires a municipality to provide incentives to developers to construct affordable housing.

The Court invalidated N.J.A.C. 5:94-4.19, which allowed municipalities to meet up to 50% of their affordable housing obligation with age-restricted housing. The Court held that the provision discriminates against low and moderate income households with children and constitute exclusionary zoning violative of the Mount Laurel Doctrine. The Court left the prior 25 percent cap in place until COAH takes further action.

The Court rejected the "filtering" concept that reduces the affordable housing obligation by 59,156 units because "filtering" lacks support in the record. The Court said that COAH offered no data that housing became more affordable between 1999 and 2004 and no data that housing prices had declined from 2004 to 2006. If COAH finds that the conditions for filtering exist with supportable data, the Court would defer to COAH.

The decision creates many questions regarding how municipalities and COAH will respond to the decision. The practical implications will likely vary on case-by-case, municipality-by-municipality basis. COAH's deadline for petition the Supreme Court for review of the Appellate Division decision was February 13, 2007. COAH is expected to request review of at least a portion of the Appellate Division's decision.

FRESHWATER WETLANDS

Doyal v. NJDEP

Freshwater wetlands that discharge to tidal rivers or streams do not qualify for a general permit 6 authorization under the Freshwater Wetlands Protection Act ("FWPA").

This case involved property containing freshwater wetlands in West Cape May that discharged to a tidal stream, Cape Island Creek. The property owner applied for, but was denied an application for a General Permit No. 6 authorization to fill the wetlands on the property for a single-family home. DEP denied the application on the basis that the wetlands were part of the surface water tributary system discharging into the tidal waterbody.

The Appellant argued that the prohibition under the FWPA against issuance of a general permit to fill wetlands that are part of a surface water tributary system applies only to wetlands that are connected to inland rivers and streams, and does not apply to wetlands that are connected to tidal waterways.

The Appellate Division affirmed the denial of the general permit application on the grounds that the FWPA "prohibits issuance of a general permit for a regulated activity on any wetlands that discharge into a river or stream, regardless of whether it is non-tidal or tidal". The Court concluded that the word "inland" used in the FWPA refers only to lakes and ponds, and was not intended to modify the words "river or stream" used in the statute. The Court also referenced the fact that the Army Corps of Engineers did not authorize the issuance of a

Nationwide Permit authorization for the discharge of the dredged or fill material into a tidal waterway. Thus, DEP could not authorize a general permit under the FWPA for regulated activities in wetlands that discharge into tidal waterways because doing so would be inconsistent with the Clean Water Act.

VARIANCE STANDARDS

Grubbs v. Slothower

The standard that boards of adjustment must apply in reviewing applications for density variances is less stringent than the standard they must apply for use variance applications. In reviewing a decision involving the denial of a density variance, the Appellate Division held that the standard of review for use variances is more stringent than for density variances because a use variance involves an activity that is prohibited in the zone. A density variance involves a permissible use. Therefore, the "stringent" special reasons standard that require an "enhanced quality of proof" for use variances is not applicable to density variances.

The Court concluded that a "relaxed standard of review" should be applied to density variance applications because density variances are only seeking a modification of regulations applicable to a permitted use in a zone, similar to conditional use variance applications. This differs from variance applications that seek authorization for a prohibited use, in which case the stricter "special reasons" standard of review should apply.

The Court held that zoning boards would still need to address the "positive criteria" and "negative criteria" of the MLUL, but should focus on whether "the site will accommodate the problems associated with a proposed use with a greater density than permitted by the ordinance." An applicant for a density variance "must show that despite the proposed increase in density above the zone's restriction and the increased intensity in the use of the site, the project nonetheless serves one or more of the purposes of zoning and is consistent with the overall goals of the MLUL." This may include evidence that a project "promotes a more desirable, visual environment through development of otherwise underdeveloped or vacant property" or "promotes the character of the neighborhood or better preserves property values in the adjacent community."

To address the negative criteria, an applicant must "demonstrate that the increase in density would not have a more detrimental affect on the neighborhood than construction of the project in a manner consistent with the zone's restrictions." Minimal density increases are not likely to create a substantial detriment in nearby properties.

This decision is important in its recognition that applicant's for a density variance for a permissible use face a lesser burden than applicant's seeking approval of a prohibited use.

SIGN ORDINANCE

Passfield Properties v. West Caldwell

Municipalities have broad discretion in imposing differing design conditions on similarly zoned properties. This case involves a municipal ordinance that required signs in commercial shopping centers to be uniform in color. Passfield challenged the ordinance after an application of one of its commercial tenants was denied based on the color of the proposed sign. Passfield argued the ordinance violated the MLUL, N.J.S.A. 40:55D-62a, on

the grounds that it permitted different color signs in different shopping centers throughout the municipality and thus was not uniform throughout the municipality for similar types of uses.

The Appellate Division affirmed dismissal of the complaint in favor of the Township. The Appellate Division relied on Rumson Estates v. Mayor of Fair Haven, which upheld two municipal ordinances against challenges based on the MLUL uniformity requirements and held that "uniformity is not absolute and rational regulations based on different conditions within a zone are permissible so long as similarly situated property is treated the same." The Court concluded that the requirement that signs within a particular shopping center have the same restrictions on height and color served the purpose of creating attractive, visually pleasing uniformity and "was reasonably related to at least one of the principles of zoning under the MLUL." Additionally, the ordinance was intended to achieve diversity throughout the municipality by creating some differences in height and color restrictions between different shopping centers. Therefore, the ordinance was reasonable.

HIGHLANDS EXEMPTIONS

I/M/O Highlands Applicability Determination

The Appellate Division reversed DEP's denial of an application for exemption from the Highlands Act for a single family residential structure. The property owner obtained minor subdivision approval to create a third lot out of two (2) master lots to construct a home for their daughter. The subdivision approval was issued and memorialized prior to the effective date of the Act, but the final plat was not recorded prior to the Act's effective date.

The Highlands Act exempts major Highlands development involving "the construction of a single family dwelling, for an individual's own use or the use of an immediate family member, on a lot owned by the individual on the date of enactment" of the Act. DEP denied the exemption request finding that the exemption only applied if the final plat was filed with the County Clerk prior to the effective date of the Act.

The Appellate Division reversed, finding that under the MLUL the lot is recreated by minor subdivision by the Planning Board's memorialization of final approval of subdivision. N.J.S.A. 40:55D-47(a). While a subdivision approval may expire if a subdivision plat is not filed within specified timeframes, a lot "has some reality at the time of approval". This is further evidenced by the fact that the MLUL affords protections from zoning changes tied to the date of subdivision approval. N.J.S.A. 40:55D-47(a).

In the context of allowing exemptions under the Act, the Legislature specifically provided that the exemption would only apply if a lot was "in existence" prior to the effective date of the Act. In contrast, the exemption that claimants sought only required that they own the lot prior to the effective date of the Act. The Court interpreted this distinction in language as indicative of legislative intent that the exemption applies even if the lot was not created through filing of a subdivision plat prior to the effective date of the Act.

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.