Bulletin Board

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Legal & Legislative Update

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C-1 WATER BUFFER UPHELD

In re Matter of Stormwater Rules

The Appellate Division upheld the 300-foot "no-build" provision of DEP's Stormwater Management rules. The rule allows DEP to establish 300-foot buffers on both sides of C-1 waters. NJBA challenged the "no-build" rule on the basis that it regulates land development generally without regard to water quality impacts that may be associated with stormwater runoff, and is without statutory authority. The Court concluded that notwithstanding a lack of express statutory authority to establish the 300-foot "no-build" zone, such as the express authority that exists for transition area buffers under the Freshwater Wetlands Protection Act, DEP has implied authority under various statutory provisions to support establishment of the buffer. The Court also concluded that development within 300-feet of C-1 waters may negatively impact C-1 waters even if a development is designed so that there is no stormwater discharge to the C-1 water. "DEP may impose a buffer to avoid development-related impacts on water quality unrelated to stormwater."

This decision is another example of the courts granting DEP almost unlimited discretionary regulatory authority to curtail development. The Court's recognition that no specific statutory authority exists for the 300-foot no build zone and that the rule, which is part of the Stormwater Management rules, requires the establishment of a buffer even when stormwater from a development will not discharge to the adjacent stream, belies the Court's decision. NJBA is considering whether to petition the Supreme Court for review of the decision.

TIMING OF CHALLENGE OF APPROVALS

Broadhurst v. Holland Township Planning Board and Blumberg

An applicant must strictly comply with the publication requirements of the MLUL in order to invoke the 45-day limitation period for challenges to approvals. In this case, plaintiff filed an action 415 days after the Board's adoption of a memorializing resolution for preliminary major subdivision approval, but 41 days after publication of notice of final major subdivision approval. The Appellate Division allowed the case to proceed.

Under the MLUL, the 45-day time period to institute a legal action challenging a planning board's decision runs from the date of publication of notice of approval. The Board adopted a memorializing resolution following its grant of preliminary approval. The plaintiff was aware of the Board's adoption of the memorializing resolution, but the Board did not publish notice of its action. The fact that plaintiff had actual notice of the Board's decision did not negate the need for publication.

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The Court rejected arguments that the defendant's publication of notice of a subsequent application that referenced the Board's grant of preliminary subdivision approval was the functional equivalent of the required notice. Although the notice on the subsequent application referenced the grant of preliminary approval, the contents of the notice did not meet the statutory requirements. The failure to strictly adhere to the statutory criteria for contents of notice was a critical defect and, thus, failed to trigger the statutory appeal period.

An applicant may raise a plaintiff's delay in the filing of an action as an affirmative equitable defense. An applicant must establish the plaintiff had actual knowledge of the planning board's decision and waited an unreasonable amount of time to file its action. A court will look at the knowledge, experience and resources of the plaintiff, and balance the burden imposed on the applicant by the delay in the filing of the action against the right of an objector to seek judicial review. Here, because the defendant was represented by counsel in connection with its applications for subdivision approval and sought to develop a large tract for commercial purposes, the Court placed the burden of strict adherence to the statutory notice requirements on the defendant despite the plaintiff's protracted delay.

This case demonstrates the importance of strictly adhering to the statutory notice requirements of the MLUL and completing notice in a timely manner. Failure to do so extends the opportunity for objectors to challenge an approval.

REDEVELOPMENT AREAS

<u>First Montclair Partner v. Herod</u>

A planning board is not governed by local zoning ordinances in considering a redevelopment project.

Under the Local Redevelopment and Housing Law ("LRHL"), municipal governing bodies are authorized to implement redevelopment plans to improve blighted areas. Community redevelopment should be advanced "by the simplification of procedures and the elimination of the obstacles created by the complex of preexisting local regulations."

In this case, the Planning Board approved Herod's application for site plan and variances in a redevelopment area which was challenged by plaintiff, First Montclair Partner. The challenge was dismissed and plaintiff appealed arguing that the approval was inconsistent with a local zoning ordinance governing height limitations.

The Court held that while a local ordinance may provide guidance concerning the intent of the redevelopment, "it does not control". In this case, the Planning Board did not intend to adhere to the zoning ordinance's definition of "story". "The Planning Board was entitled to adopt a contrary view of what constitutes a 'story' than that expressed in other local regulations."

There is no specific indication that the Planning Board's redevelopment plan contained a contrary definition of a story, and the decision implies that none existed. Thus, the decision stands for the proposition that a planning board can essentially ignore defined terms under a local ordinance in the context of a redevelopment plan, provided that the board in considering an application under the redevelopment plan developed a sufficient record to justify that it was aware of and intended to take action contrary to the meaning of the terms as defined under a local ordinance.

HOMEOWNERS ASSOCIATION – MUNICIPAL SERVICES

Ramapo River Reserve HOA v. Borough of Oakland and Baker Residential

The New Jersey Supreme Court held that a municipality may utilize a developer's agreement to shift its obligation to provide municipal services or to reimburse a homeowners association ("HOA") that undertakes required municipal services.

The Municipal Services Act ("Act") requires a municipality to either provide certain municipal services or to reimburse the cost of certain services to a HOA. The mandatory services include snow and ice removal, garbage and recycling collection, and leaf pickup.

Baker was the developer of the Ramapo River Reserve PUD. The Declaration of Restrictive Covenants for the HOA provided that the HOA was responsible for snow and ice removal from the roadways within the PUD. In an action regarding responsibility for these services, the Borough sought a ruling that Baker was responsible for the Borough's costs of snow and ice removal within the PUD pursuant to a developer's agreement. Both the trial court and Appellate Division held in favor of Baker finding that allowing the Borough to shift the cost of snow and ice removal to the developer would result in the developer passing along those costs to the residents through the sale price of the unit and causing the residents to "pay double for services" because they would be paying municipal taxes and HOA fees.

The case in Briarglen II recognizes that members of HOAs should not be subject to the equivalent of double taxation, once by the municipality and again by the HOA for municipal services. However, the Court rejected the finding that Briarglen II precludes a municipality from entering into a developer's agreement to delegate its obligations under the Act to the developer. Developer's agreements are authorized under the MLUL, and the Court attempted to harmonize the provisions that the MLUL and the Act.

The Court focused on the "gap" of time between construction of a phased PUD development and the amount of tax revenues generated over time to allow a municipality to pay for services associated with the development. To "bridge this gap" the Court held a municipality may "delegate to a developer the obligation to provide or pay for the municipal services under [the Act]". To balance this with the municipality's obligation under the Act, the delegation "must terminate once the developer is required to terminate its control of the executive board of the HOA" pursuant to the time provisions of the Planned Real Estate Development Full Disclosure Act ("PREDFDA"). Under PREDFDA, a developer is required to turn over control of the Board after 75% of the lots are sold.

In dissent, Justice Albin opined that the Court's decision would place an "unfair burden of double taxation" on HOA residents, which is exactly what the Act was established to prevent. The dissent concluded that nothing in PREDFDA or the Act "indicates that the Legislature intended to lessen a municipality's obligations to provide services to a taxpayer under the Act until residents in a qualified private community achieve 75% ownership and gain control of the homeowners' association." The dissent, citing to a brief filed by NJBA, states "the resolution achieved by the majority completely undercuts the homeowner protectionist policy that animates the Act" and "ignores the fact that it may take years in a large subdivision before control is transferred from the developer to the homeowners." Moreover, it was never established that tax revenues are not sufficient to cover the costs required under the Act until a PUD is 75% sold.

As noted in the dissent, the Court's decision will ultimately have the effect of raising the cost of housing as developers are forced to pass the cost of municipal shifted services to new purchasers. Additionally, the decision will result in homeowner association members being "doubly taxed" for services in contravention of the Act. The dissent urged the Legislature to take action to address the Court's decision.

HOMEOWNERS ASSOCIATIONS – RESTRICTIONS

Twin Rivers v. Twin River HOA

In a decision that has reportedly been appealed to the Supreme Court, the Appellate Division held that HOA's ban on political signs violates it members' constitutional rights.

Twin Rivers is a PUD consisting of approximately 2,700 units and 10,000 people. The Twin Rivers HOA was created "to make reasonable rules and regulations for the conduct of its members." The HOA restrictions precluded the placement of political signs on lawns. A group of residents challenged the restriction, among other things, as a violation of the New Jersey Constitution's guaranty of freedom of expression arguing the HOA was a "quasi-municipal" entity.

Recognizing the large number of people living within community associations nationally and in New Jersey, the Court rejected the defendant HOA's argument that it was a private entity not subject to the Constitutional guaranty of freedom of expression. The Court noted that while private property owners may impose reasonable restrictions on the time, place and manner of speech, the right to freedom of expression on private property does exist in certain circumstances.

The Court concluded that HOAs have supplanted the role of towns and villages, much like shopping centers have become the functional equivalents of downtown business districts. The Court reasoned that "the fundamental rights exercises, including free speech, must be protected as fully as they always have been, even where modern societal developments have created new relationship or have changed old ones."

The Court rejected the HOA's argument that failure to invite the public onto the HOA property precluded application of constitutional and free speech protections. A person who accepts the HOA's "invitation to purchase or rent property" should not be forced to relinquish its constitutional rights. Moreover, "even where there has been no invitation to the public, our jurisprudence clearly allows access to private property to exercise constitutionally guarantied rights."

The decision is being appealed and it remains to be seen what impact it will have on community associations. Should the decision stand, existing homeowners associations, and developers creating homeowners associations, will need to review their rules and regulations to evaluate whether they are subject to challenge under constitutional standards.

STATE PLAN

In Re New Jersey State Planning Commission Resolutions

This decision involved the question of whether designation of areas as villages or town centers under the New Jersey State Development and Redevelopment Plan ("State Plan") is a flexible, discretionary guideline or a mandatory requirement having the force and effect of an administrative regulation.

The State Plan identifies areas for growth, development and redevelopment through the designation of centers. The Sierra Club challenged the Commission's approval of four Sussex County center and village designations on the basis that they violated State Plan criteria, the Commission's regulations, and would have an adverse impacts on natural resources and environmental conditions.

The Court noted that the State Planning Act requires the Commission to balance the goals of development and the conservation of resources. The State Plan is required to protect natural resources and promote development and redevelopment consistent with sound planning. The Commission is not precluded from designating an area as center just because there may be some impairment or environmentally-sensitive areas.

Contrary to the Sierra Club's arguments, the Court confirmed that the State Plan has no regulatory effect, but is a policy guide to help coordinate planning and further the goal of planning consistency. The Court acknowledged that the criteria for designating centers are to be applied flexibly as a general guide. Accordingly, the Court found the Commission acted appropriately taking into consideration various factors, including environmental restraints, and applying its criteria flexibly.

BOARD MEMBER IMMUNITY

Dotzel v. Ashbridge

Board Members who act on land development applications are entitled to quasi-judicial immunity from suits brought against them as individuals relating to their decision on applications. The Third Circuit Court of Appeals applied quasi-judicial immunity in this case. The Dotzel's, whose application was denied by the Board, alleged the decision was not based on the evidence before the Board, but was based on improper motives and personal bias. Quasi-judicial immunity attaches when a Board member acts within its official capacity and when the action is "functionally comparable to that of a judge." The Court looked to the need of Board members to decide the facts, apply law and resolve disputes free from political influence. It also stressed the fact that land development applications are adversarial in nature and are subject to appellate review. Accordingly, the role of a Board member is quasi-judicial in nature, and Board members are entitled to immunity when facts support application of the immunity.

UNSWORN TESTIMONY

Kyriacou v. Lavin and Holmdel Township

A Board's acceptance of unsworn testimony is not necessarily improper. The Appellate Division reversed a trial court decision that invalidated a variance on the basis that the Board accepted unsworn testimony from the Board's engineer.

The MLUL requires that testimony of all witnesses related to an application before a Board be taken under oath. The Court noted that not all errors of a Board require reversal of a Board's decision. Here, the Court held that statements made by the Board's engineer did not constitute testimony as to any fact within the personal knowledge of the engineer and the engineer was not a fact witness. Comments of the Board's engineer ranged from explanatory information to questions posed to the defendants' experts. Moreover, the plaintiffs failed to demonstrate that they were prejudiced in any way by the failure of the Board to take sworn testimony from its engineers.

This decision confirms that not all procedural defects under the MLUL justify reversal of a Board's approval of a land development application. Decisions of this nature should help to deter legal challenges based solely on inconsequential procedural technicalities.

ZONING BOARD OF ADJUSTMENT

Perth Amboy v. Zoning Board of Perth Amboy and Medina

This case involved the question of whether the Governing Body of a municipality has standing to challenge the action of the Zoning Board of Adjustment of the municipality. Defendants Medina obtained approval from the Zoning Board of Adjustment of a single lot into two lots. The Governing Body challenged the Board's action on the grounds that it engaged in rezoning and usurped the Governing Body contrary to the MLUL.

The action was dismissed. The Court noted that the Governing Body may challenge the grant of a variance only when it would have a substantial impact on the municipal zoning plan. Factors the Court looks at to determine whether the impact would be substantial include the size of the tract, its relationship to the size and character of the municipality, and the nature of the request for the variance. In this case, the Court observed that the size of the lot involved and the nature of their request for the variance demonstrated only a minimal variation from the zoning plan without any substantial effect.

As elected officials change, political divisions often arise among the various instrumentalities of a municipality. This case should help property owners avoid or overcome disputes stemming from political infighting within a municipality.

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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