

Legal & Legislative Update

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SUBDIVISION APPROVAL

Landmark Land v. Hazlet Township

It is improper for a planning board to deny subdivision approval that meets the requirements of the ordinance based on speculation about future development impacts. In this case, Landmark Land challenged Hazlet Township's denial of its application for subdivision approval for a right of way and drainage easement on its property to access and serve an adjacent development located in Holmdel Township. The Holmdel Planning Board approved a 12 lot subdivision on the adjoining parcel.

The Appellate Division agreed with the trial court that the Planning Board improperly denied Landmark's subdivision application. An applicant for subdivision approval is entitled to approval under the MLUL if the application meets all of the requirements of the governing subdivision and zoning ordinances. N.J.S.A. 40:55D-48. A planning board is required to address public health and welfare issues in the context of a subdivision application, but its decision must turn on whether the preliminary subdivision conforms with the municipal ordinance which, on its own, is viewed as advancing the public welfare. The Board's denial "was not based on any specific failure to meet Hazlet's stated subdivision or zoning ordinance standards." The application did not seek any newly created deviations from the Township's ordinances. Additionally, the application would result in two non-conforming lots being brought into conformity and an elimination of one entire non-conforming lot.

The Court concluded that the Planning Board's denial was based on improper speculation about future development of an adjacent parcel. The Board expressed a concern that the development would result in an adjacent parcel having triple frontage because a paper roadway adjacent to the parcel would be developed in the future. "Such sheer speculation is not a sufficient ground to deny approval." The Court also found that the Board's concerns about traffic impacts were speculative. This was highlighted by the fact that the Monmouth County Planning Board granted conditional final approval for access to the adjacent county roadway.

Objectors commonly assert that a proposed development should be denied based on concerns of cumulative impact. For a court to consider cumulative impacts in connection with future development, there must be more than mere hypothetical or speculative conjecture that the future development will actually take place for the potential cumulative impacts to be considered by the Board.

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CONDEMNATION

Passaic v. Shennett

Developers working with municipalities on redevelopment projects that involve condemnation must be concerned that the municipalities adhere to all of the procedural requirements for proper condemnation. In a recent decision, the Appellate Division voided a judgment of condemnation because the City failed to strictly adhere to applicable procedures in connection with its condemnation claims. In the condemnation action, the City alleged the subject property was abandoned, even though taxes on the parcel were paid in full. The Court found that the City failed to give required pre-condemnation notice, did not attempt personal service of the condemnation complaint and failed to give alternative service, failed to serve notice of the Commissioner's hearings, and contracted to sell the parcel to an entity owned by a former City Council member at four times the amount of the award of just compensation. Though the case involves an extreme set of facts, it highlights the importance for developers that municipalities adhere to the procedural requirements involving condemnation actions.

ZONING DISPUTE/SETTLEMENTS

North Brunswick Residents v. Edgewood Properties

Time constraints often push developers to take action without first securing necessary approvals, permits or other documents. Doing so, however, can often have the opposite intended affect and result in complications, delays or penalties.

Though this case does not involve a rush to action by a developer, it exemplifies the need to ensure that the terms of an agreement related to a development are reduced to writing. The case involved litigation involving a zoning change to increase density. The zoning change was challenged by a citizens group and Edgewood Properties intervened in the case. Edgewood engaged in settlement discussions with the plaintiff, a non-profit residents' group. The attorneys for the parties had settlement discussions and discussed the terms of settlement, but an agreement was never reduced to writing. The plaintiff's attorney later made additional settlement demands that resulted in a dispute as to whether the parties had reached a binding settlement.

The case wound up in the Appellate Division, where it was not decided until almost a year and a half after the settlement discussions between the parties. The Court concluded there was a lack of sufficient evidence to enforce the settlement between the parties, and remanded the matter for further hearings to determine whether a settlement occurred. Though formalizing the settlement in writing may have extended the negotiation process, the time invested would have been well worth it to avoid the delays and assumed costs associated with the resulting litigation.

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DREDGE AND FILL PERMITS

NAHB v. USACOE

In the ongoing battle over United States Army Corp of Engineers' ("ACOE") regulation of "incidental fallback" of dredge material, the United States District Court for the District of Columbia granted NAHB's motion challenging the "Tulloch II" rule declaring it invalid under the Clean Water Act ("CWA"). The Tulloch rule concerns the ACOE's regulation of "incidental fallback" of dredged materials into waters regulated under the CWA. Under the "Tulloch Rule", ACOE defined the discharge of dredge material as any addition of dredge material into regulated waters including redeposit of dredge material or incidental fallback. That approach was previously invalidated. But, in 2001, ACOE and the EPA finalized the "Tulloch II" rule that revived the issue. Tulloch II established a presumption that the use of "mechanized earth moving equipment" to conduct activities such as land clearing and digging channels in regulated waters results in a discharge of dredged materials unless there is "project specific evidence that the activity results in only incidental fallback." "Incidental fallback" was defined as "the redeposit of small volumes of dredged material that is incidental to excavation activities in waters of the United States when such material falls back to substantially the same place as the initial removal".

The district court invalidated the rule finding that the volume of material redeposited is irrelevant in determining whether fallback constitutes a regulated "addition of any pollutant to navigatable waters from any point source" under the CWA. The court distinguished between incidental fallback and regulated redeposit based on the time the material is held before being dropped back to earth and the distance between where the material is collected and the place where it is dropped. The court also found that the rule improperly included a volume requirement and improperly failed to reference the amount of time that material is held before it is dropped. Material that is deposited some distance away from the location of the initial activity or that is held for long periods of time before redeposit is more likely to be regulated under the CWA. The court found that the agencies failed to appropriately distinguish between unregulated incidental fallback and regulated redeposits of dredged materials.

Additionally, the court found that it was improper for the agency to shift the burden to persons performing unregulated activities involving mechanized earth moving equipment to establish that the activities were not regulated.

This decision confirms that incidental fallback is exempt from regulation under the CWA, as it is not considered the discharge of dredged material. It should negate the need to obtain a CWA Permit from ACOE for the use of construction equipment in regulated waters such as wetlands unless the activity involves the actual dredge and fill of wetlands or regulated waters.

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STATUTE OF LIMITATIONS

Gregory v. Borough of Avalon

Even if the 45-day limitations period for challenging a municipality's resolution of approval has expired, the issuance of subsequent related approvals may provide objectors with an opportunity to challenge the earlier approval.

In this case, the Appellate Division enlarged the limitations period to permit the challenge of municipal resolutions even though the plaintiffs' action was untimely. Under the Court Rules, a prerogative writ action challenging a municipal approval must be brought within 45 days of publication of notice of decision. However, the limitations period may be enlarged by the courts in the "interest of justice". R. 4:69-6. A court may raise the issue on its own accord to avoid dismissal even if the issue is not raised by the parties.

Here, Dilbet, Inc. entered into agreements with the Borough of Avalon authorizing Dilbet to maintain existing privately-owned structures that encroached on public property. The structures were associated with an existing beachfront motel. The agreements were specifically authorized by resolutions adopted by the Borough governing body. Approximately 6 months later, the Borough Planning Board granted Dilbet's application for site plan approval and variances to expand the motel. The Board relied, in part, on the agreements between Dilbet and the Borough in issuing its approval.

The plaintiffs filed an action challenging both the site plan approval and the earlier resolutions that authorized the agreements that were entered into between Dilbet and the Borough. The site plan challenge was timely. The trial court dismissed the claim regarding the agreements as untimely and denied the challenge of the site plan approval.

In reversing the trial court, the Appellate Division explained that courts must balance the public and private interests in favor of expansion of the 45-day rule against the need for finality in considering whether the "interest of justice" warrants an enlargement of the limitation period. The Court concluded that enlargement was warranted because the agreement between Dilbet and the Borough "involved significant public interests and the resolutions authorizing their execution were closely related to the land use approvals". The Court concluded that the public interest was invoked because the resolutions authorizing the agreements that were entered into between Dilbet and the Borough pertained to a private property owner's encroachments on the public property. Even minor encroachments such as those involved in this case would invoke the public interests. Additionally, the Court found that the issue of whether a municipality is required to adopt an ordinance to authorize private use of public property rather than resolution invokes the public interest.

The Court also concluded that Dilbet suffered no prejudice in the enlargement of the limitations period, as the issues in defending the approval and the resolutions authorizing the encroachments are related.

The decision is flawed for several reasons. It seems apparent that Dilbet was severely prejudiced by the plaintiffs' delay in challenging the resolutions that authorized the agreements with the Borough. The Court failed to consider the likelihood that Dilbet could have redesigned its project or changed or withdrawn its site plan application for the facility expansion if the issue concerning the discrepancy of the encroachment of the existing facilities on public property was not resolved through the agreements entered into with the Borough,

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or if those agreements had been challenged within 45 days of publication of the resolutions of authorization. Dilbet invested the time and expense associated with proceeding with the application in reliance on the reasonable assumption that the agreements were valid and not subject to challenge.

Additionally, the characterization of the agreements as involving a “significant public interest” is unpersuasive. The encroachments that were addressed in the agreements involved existing private facilities that had been in existence for a long period of time in connection with a motel facility that has been in existence since the 1960s. These facilities were obviously not such a burden on the public interest in maintaining public property as the record does not mention any objections to the encroachments during the 40-year history of the motel. The agreements appear to merely memorialize the public’s long-standing acquiescence in the existence of these facilities, while providing additional protections to the municipality through the provision of the indemnification provisions in the agreements.

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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