

Legal & Legislative Update

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

PROPOSED STREAM ENCROACHMENT REGULATIONS

The DEP, in its first major land use regulatory initiative under the Corzine Administration, has proposed to radically revise the Stream Encroachment Rules. The three most troublesome provisions are as follows:

1. The grandfather provision only applies to those projects that have a valid stream encroachment, CAFRA or waterfront development permit or an application for one of those permits that was deemed complete for review prior to the adoption of these new regulations, or a project that has a final valid municipal construction permit. This departs from prior statutes and regulations that grandfathered projects that have a valid municipal preliminary approval, in addition to, in some cases, another DEP Land Use approval.
2. The rules establish riparian zones from 50 to 300 feet within which it will be very difficult, if not impossible, to obtain approvals for construction-related activities involving removal of vegetation.
3. There will no longer be approvals granted for 20% net fill in the flood hazard area. Rather, there will still be a maximum of 20% fill allowed. You must achieve zero net fill proposed in order to obtain a DEP approval. You will be permitted to fill up to 20%, but must compensate for it. This may be very difficult to accomplish.

These three revisions alone will have a drastic impact on the ability of development to proceed in an orderly fashion in the State of New Jersey, especially as it relates to redevelopment.

STORMWATER MANAGEMENT RULES

The Supreme Court denied NJBA's request to review the decision of the Appellate Division approving the 300-foot buffer provision of DEP's Stormwater Management Rules applicable on both sides of C-1 waters. NJBA challenged the 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 denial lets stand the Appellate Division's determination that the 300-foot buffer provision was valid notwithstanding a lack of express statutory authority to establish the buffers. The Appellate Division found that DEP has implied authority under various statutory provisions to support establishment of the buffer. It also concluded that the buffer has valid stormwater protection purposes regardless of whether a development is designed so that there is no stormwater discharge to the C-1 water.

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

In effect, the court's have granted DEP almost unlimited discretionary regulatory authority to curtail development.

WETLAND PREEMPTION

Toll Brothers, Inc. v. Lebanon Township

The State has exclusive jurisdiction to regulate wetlands pursuant to the Freshwater Wetlands Protection Act ("FWPA"). This case, involving Lebanon Township Planning Board's denial of subdivision approval for a 38-foot lot residential development based on environmental concerns including threatened and endangered species and wetlands, examines that jurisdiction.

Toll Brothers purchased the property, designing its project to account for DEP and United States Division of Wildlife Service ("USFWS") buffers for wetlands associated with threatened bog turtle habitat. Buffer areas of up to 300' were incorporated into the plan and a total of forty-one acres were proposed to be dedicated as open space bog turtle habitat. Toll also designed its storm water management system to protect the bog turtle habitat consistent with DEP's best management practices providing for among other things, removal of 80% total suspended solids from stormwater discharge.

The Board's environmental consultant found that the failure to treat the remaining 20% of total suspended solids could impact and degrade bog turtle habitat. Additionally, the Board found that septic systems could negatively impact the habitat. The Board's consultant recommended that the Board hire a hydrologist to review Toll's storm water management plan to determine if it would result in significant detriment to bog turtle habitat, and recommended that buffer areas that were limited to 150 feet be increased to 300 feet.

The Board denied Toll's application, concluding there were too many unresolved environmental issues that may substantively affect the design and layout of the application. The Board accepted the opinion of its environmental expert that a 300-foot buffer should be provided for all endangered species habitat, not just portions of it as proposed by Toll. The Board also found that Toll failed to address the impacts of the storm water management system on bog turtle habitat.

The trial court affirmed the denial finding that the Planning Board is not required to grant conditional approval and major unresolved issues exist with respect to the proposed site plan. The trial court also found that the denial was appropriate because DEP and USFWS approval "has the potential to impact the lot configuration because the official 150' buffers may well be imposed." The court found that if "the Board exceeded its jurisdiction on certain environmental issues, the error was harmless because conditional approval was not warranted."

Toll appealed arguing that the Board exceeded its authority in exercising jurisdiction over endangered species habitat and/or wrongfully denied a conditional approval subject to actions by DEP and USFWS as all conditions of the ordinance were met. While the Appellate Division affirmed the denial on other grounds, it agreed that the Board exceeded its authority with respect to the wetland and species issues. If a proposed subdivision complies with the local ordinance and MLUL, the Planning Board is required to grant preliminary approval. On the other hand, conditional preliminary subdivision approval is discretionary under the MLUL. A municipality may grant conditional approval for a development that requires approvals from other governmental agencies.

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

With respect to the wetlands issue, the Court concluded the Board “exceeded its authority and should have deferred to the expertise of other agencies.” The Court agreed that DEP and USFWS have exclusive jurisdiction in regulating wetlands and endangered species and that the buffer imposed by the Court is inconsistent with and exceeds that buffer required by the relevant agencies. Toll obtained a Letter of Interpretation from DEP that established that a 150’ buffer around wetlands considered bog turtle habitat and acknowledged the requirement to obtain a DEP permit, which would have involved the submission of applications to USFWS in the event of any impact to federally threatened or endangered species or habitat. A referral to USFWS was made by DEP, and it was determined that the 150’ buffer was appropriate for certain portions of property. Thus, the Board should have issued conditional approval as the regulation of freshwater wetlands is preempted by the FWPA.

While the denial was affirmed on other grounds, this decision is important in its recognition that the Board exceeded its jurisdiction and should have deferred to the jurisdiction of DEP and USFWS.

USE VARIANCES

Marotta v. Union City

In this case, the Appellate Division confirmed the Union City Zoning Board of Adjustment’s grant of use and bulk variances for a 100 unit, 15-story apartment building in an industrial, light impact zone. The Court examined various factors in determining whether the use variance would serve the general welfare as required under the MLUL and whether the positive and negative criteria of the MLUL were met. The Court placed emphasis on factors such as expenditures to improve the neighborhood, the provision of temporary construction jobs, the elimination of old, vacant industrial buildings, the improvement of standard rental housing and the satisfaction of a need for new housing. The Court also focused on the fact that the municipality is a designated growth area under the State Plan and the proposed “use” would also meet the State’s planning objectives of concentrating housing populations in urban areas with public infrastructure and public transportation. The Court looked at the potential for an increase in real estate values from the project and the fact that the municipality has “very little vacant land on which to build.” Other factors included: availability of public transportation; availability of municipal services; the use of the New York City skyline and Meadowlands; improvement of the neighborhood through removal of two vacant, old industrial buildings. In reviewing the negative criteria, the Court determined that no facts established any negative impact on the zone plan and Zoning Ordinance and there was no evidence of substantial impairment of the zone plan.

This case is a good example of the facts that courts examine in reviewing a challenge to a use variance.

RESIDENTIAL SITE IMPROVEMENT STANDARDS

Builders League of South Jersey v. Egg Harbor Township

This case involved a challenge by the Builders League of South Jersey (“BLSJ”) to an Ordinance adopted by Egg Harbor Township that requires a 35-foot front yard set back for garages having front facing entry ways. The Ordinance amended a prior requirement for a 25-foot setback. The Ordinance applied to attached garages, even though the front-yard set back for houses remained 25 feet.

The BLSJ argued that the Ordinance violated the Residential Site Improvement Standards (“RSIS”) and that the Ordinance was intended to regulate off-street parking. Municipal regulation of off-street parking is pre-empted by the RSIS.

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 denied BLSJ's motion for summary judgment. In doing so, it recognized Supreme Court case law that acknowledges the RSIS as superseding any municipal zoning ordinances regulations of site improvement standards, without limiting the municipal zoning power. This conflict is recognized in the Department of Community Affairs's RSIS regulations which provide that the RSIS shall not limit municipal authority to enforce requirements concerning lot sizes and dimensions, among other things. N.J.A.C. 5:21-1.5(d).

The RSIS establishes residential site improvement standards for street and parking and establishes a number of parking spaces required per dwelling unit. BLSJ argued that by increasing the set back for front entry garages by 10 feet, the Township impermissibly exceeded the number of required parking spaces per dwelling unit required by the RSIS. The Court acknowledged that the Township's intent in adopting the Ordinance was to address concerns about off-street parking. However, it also accepted that the Resolution was also intended to address design concerns, and found that the Ordinance was not an obstacle to the intent and purposes of the RSIS. The RSIS was not intended to limit, in any way, the zoning power of any municipality. The Court determined that the "front, side and rear yard set backs are zoning bulk requirements not site improvement standards" and the RSIS "establishes residential parking site improvement standards and does not establish set-back requirements." The "RSIS is not intended to eliminate or minimize the municipality's authority to establish set backs." The Court concluded that "accepting BLSJ's position would serve to virtually eliminate a municipality's exercise of its zoning powers to establish appropriate setbacks in zoning districts", contrary to MLUL. The Court concluded that the fact that the Ordinance will have the effect of creating additional parking spaces does not make the Ordinance an invalid exercise of the municipal's zoning power to set bulk requirements.

It appears that the Ordinance clearly conflicts with the RSIS and the true purpose of the Ordinance, based on the statements made by the Board members was to create additional off-street parking.

HISTORIC PRESERVATION

Leo v. Union Township

In this case, the Appellate Division sided with a property owner who sought relief from historic preservation requirements imposed by the Township. The owner's subdivision approval was conditioned upon the relocation and restoration of a pre-revolutionary war structure. Two years after subdivision approval, the owner submitted an application for relief from the condition on the basis that the structure was beyond restoration and could not be moved. The Board denied the request, and both the trial court and Appellate Division agreed that the denial was arbitrary and capricious. It was undisputed that the house was in total disrepair with widespread rotting and could not be rehabilitated. The record established that the structure was on the verge of collapse. The undisputed evidence established that the property owner could not comply with the Board's requirement to relocate and restore the structure. Since the condition could not met, the denial of the request for relief was overturned.

While factually-specific, this case is useful in its recognition of the need for balancing of preservation with practical considerations.

CONFORMING APPLICATIONS

Alpine Three, LLC v. Borough of Alpine.

It is improper for a planning board to deny approval for a project that is consistent with applicable zoning merely based on concerns about the ability of the applicant to secure other approvals.

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

This case involved a dispute about the ability to connect a seven-unit subdivision to an off-site sanitary sewer system. The plaintiff's application called for use of a septic system. On-site conditions, including the existence of an active spring, running water bordering the property, and standing water throughout the site, were not favorable for on-site septic systems. In connection with settlement negotiations between Alpine and the Borough involving a builder's remedy lawsuit, the parties contemplated utilization of either an on-site or an off-site septic system to accommodate the development. But, the settlement agreement ultimately was silent on the issue of sewage disposal.

Plaintiff submitted a conforming application to the Board with no variances or design waivers. Alpine's plan called for connection to off-site sewer in a neighboring municipality. The Board denied the application concluding that while it complied with applicable zoning "the property could not safely be developed as proposed, due to naturally existing conditions" and that an off-site system would be required and may not be approved by the Borough, County Planning Board, or DEP.

Alpine challenged the decision and the Appellate Division affirmed the trial court's finding that the denial was arbitrary, capricious and unreasonable. While acknowledging the deference typically afforded the decisions of local land use boards involving discretionary decisions, the Court noted that planning boards lack authority to deny approval of an application that conforms with the zoning ordinance and that does not request variances or design waivers and that meets standards prescribed by local ordinances. While the Board may impose appropriate conditions on approval, including a requirement to obtain other necessary approvals, "it had no authority to deny the site plan because those items were not obtained in advance."

It is becoming ever more difficult to obtain State approvals because of environmental constraints. Boards may be inclined to seize upon these constraints to deny approval. The appropriate course of action is to issue conditional approval.

Suburban Real Estate Development v. Edison

In this case, the courts again confirmed that a Planning Board may not deny an application for subdivision approval that meets all of the applicable zoning and that requires no variances. Here, the Edison Township Planning Board denied the plaintiff's application for subdivision approval, even though the Planning Board found that it was consistent with all applicable zoning requirements. The Board expressed concern that the subdivision would result in overuse of an already heavily traveled roadway.

The trial court reversed the decision and the Appellate Division affirmed the reversal. "A Planning Board does not have the power to prohibit a permitted use merely because it is of the view that a proposed development is an 'overuse' of property." The Planning Board's authority "is limited to determining whether the plan conforms with the municipality's zoning and the site plan ordinances".

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

It may not “prohibit a use otherwise permitted by the municipality in its zoning and site plan ordinances”. Additionally, the Planning Board “does not have authority to deny a development application because of off-site traffic conditions”.

This case is another good example of the limitations on the authority of local boards in reviewing conforming applications.

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:

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.

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