Bulletin Board

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# Legal & Legislative Update

*By Michael J. Gross, Esq. and Steven M. Dalton, Esq.*

## DOWN ZONING ORDINANCE INVALIDATED

**Woolwich Landowners Association v. Woolwich**

The Court affirmed the invalidation of amendments to the Township of Woolwich zoning ordinance that changed density and bulk standards and that increased open space requirements applicable to residential subdivisions. The amendments were overturned on the basis that the municipality failed to satisfy the personal notice requirements of the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-62.1.

The proposed ordinance amendments resulted in a down zoning within residential zones by increasing bulk and density requirements. The amendments were adopted without the provision of personal notice pursuant to N.J.S.A. 40:55D-62.1. Plaintiffs challenged the ordinance on various grounds including the notice issue.

A governing body is required to provide notice to property owners when it reviews its Master Plan, N.J.S.A. 40:55D-13, and to property owners within the district when it proposes a classification or boundary change. N.J.S.A. 40:55D-62.1. Personal notice must be given to all property owners within the district if the municipality seeks to change the classification or boundaries of a zoning district.

The proposed amendments did not affect the boundaries of the zoning districts, but the Appellate Division found that the changes affected the classification or uses permitted within the zoning district and, therefore, notice was required. Changes to authorized uses or uses that may be permitted under certain conditions "has the capacity to fundamentally alter the character of a zoning district." The court also found that changes to density, bulk and height standards may be considered changes to the classification of a zoning district as they can effect a substantive change of future development within the zone. "The type of notice to be provided on the occasion of a proposed amendment to the zoning ordinance should focus on the substantive effect of the amendment."

In this case, the proposed changes to density requirements resulted in a down-zoning that constituted a "fundamental alteration of the character of this zoning district." The court recognized that the requirements for personal notice would create some "uncertainty" with respect to the municipal zoning and planning process because the notice requires a determination of whether the change is "substantial". But where zoning changes "dramatically alter" the intensity of use and future development, personal notice is required.

Given the prevalence of down-zoning ordinances, the case affords important procedural protections.

**WETLANDS RULE PROPOSAL**

DEP's published proposed amendments to its Freshwater Wetlands rules in September, 2007. The proposal contains several changes to the existing regulatory program that will increase costs and complicate the permitting process. Among other things, the amendments would allow municipalities and counties to require a Letter of Interpretation from DEP as an approval or application completeness condition, notwithstanding the lack of any authority under the MLUL and the conflict such delegation of authority raises in the context of the State's exclusive jurisdiction over freshwater wetlands. Limits are proposed on many General Permits, including new mitigation requirements. The proposal includes enhanced requirements with respect to cultural resources. Additionally, a permit modification must be obtained for each conveyance of the property covered by the permit.

The public comment period on the proposed amendments closes on November 3, 2007, and public hearings are scheduled for October 4, October 11 and October 16, 2007. SBACNJ encourages its members to review the rule proposal and submit comments to DEP.

**HIGHLANDS**

**OFP, LLC v. New Jersey**

On August 10, 2007, three years from the effective date of the Highlands Water Protection and Planning Act, the Appellate Division upheld the constitutionality of the Act in the context of a regulatory takings claim.

OFP obtained municipal approvals and a potable water supply permit from DEP prior to August 10, 2004, the effective date of the Act. However, OFP's application for the DEP potable water supply permit was not complete prior to March 29, 2004, the date that the Act was introduced in the Legislature. Therefore, OFP did not qualify for a "grandfather" exemption based on prior approvals under the Act.

OFP argued that the Act affected an unconstitutional taking of its property without compensation. OFP also challenged the Act on the grounds that retroactive application of the Act to its subdivision approval violated the equal protection and due process clause of the United States and New Jersey constitutions. The court dismissed OFP's complaint, finding it failed to exhaust administrative remedies because it did not pursue a hardship waiver, as provided under the Act. It also disagreed with OFP's due process and equal protection claims.

The Appellate Division affirmed the trial court decision regarding the validity of the Act. The court conducted a regulatory takings analysis based on the United States Supreme Court's Palazzolo v. Rhode Island decision and associated case law, reciting the standard that a

determination of whether a regulation denies all economically beneficial and productive use of land and constitutes a taking "depends on a complex of factors including the regulation's economic effect on the land owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." In order for a court to determine whether a regulation "has gone too far", there must be a final agency action applying the regulation to the land in question. Additionally, exhaustion of available administrative remedies is a prerequisite to maintaining a takings claim. "Only when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred."

The Act contains a procedure for determining whether a taking has occurred. N.J.S.A. 13:20-33(a). DEP's regulations allow DEP to waive a provision of its Highlands permit review program to avoid the taking of property without just compensation. N.J.A.C. 7:38-6.8. The court concluded OFP failed to follow the required procedures to apply for a hardship waiver. Though OFP submitted letter to DEP in an effort to discuss its claims, the letters did not follow the required regulatory procedures for a hardship waiver application. Had the request been filed, the fact that OFP had secured all but one of the required approvals for development of the property prior to implementation of the Act would have bolstered the hardship claim.

The court also rejected OFP's due process and equal protection claims. It relied on the decision of Nobrega to evaluate whether there was a rational basis for the retroactive application; or whether retroactive application would constitute manifest injustice. The court found that there was a rational basis for the limited retroactive application of the Act. It relied on legislative findings concerning the rate of development within the Highlands Region. It also found that application of the Act to OFP did not result in manifest injustice. The court found that the loss of expected profits from a development does not constitute "manifest injustice". Issues concerning economic impact of the Act "must be presented to DEP in support of an application for a hardship waiver". The court in *dicta* stated that the manifest injustice doctrine would have greater application in the context of a more far-reaching retroactivity provision.

The failure to exhaust administrative remedies provided the court with an easy opportunity to reject the challenge the Act. Troubling, however, is the court's deference to the Legislature with respect to the retroactivity issue.

**SPOT ZONING**

Finnegan v. South Brunswick

In a case demonstrating the difficulty in proving "spot zoning", the Appellate Division reversed the trial court and upheld an ordinance that rezoned the plaintiff's property from a commercial development district to an office development district.

Finnegan filed an application for site plan approval for a drive-through pharmacy for commercially zoned property. In response to concerns raised by opponents, the Township

Council rezoned the property from commercial to office/professional use. The Township Council relied on the "concerns raised by the area residents" in support of the rezoning, despite acknowledging that the rezoning was inconsistent with the Master Plan.

Although the rezoning affected only plaintiff's property and was inconsistent with the Township's Master Plan, the court found the action did not constitute spot zoning. An ordinance constitutes "inverse spot zoning" where it is intended to negatively affect only a specific piece of land, instead of applying generally to implement a comprehensive land use scheme. The Court cited Manalapan Realty in support of the position that a municipality is permitted to rezone a property in response to a particular application provided the "rezoning complies with the MLUL." The rezoning may not "arbitrarily target a particular parcel for different, less favorable treatment than the neighboring ones." Although the zoning ordinance was in conflict with the Master Plan, the court concluded the municipality was not required to present expert testimony to support the rezoning and was permitted to rely on lay testimony as the basis for its action.

This decision appears to conflict with prior cases that reject actions of the Zoning Board that do not rely on expert testimony.

## NATURAL RESOURCE DAMAGES

### DEP v. ExxonMobil

In a case involving a natural resource damages ("NRD") claim by DEP against Exxon Mobil and other parties, Superior Court Judge Mary Jacobson ruled in favor of the defendants and dismissed the State's NRD claim. The State based its calculation of NRD on a formula that it uses in a litigation context that has not gone through the rule-making process of the Administrative Procedures Act. Judge Jacobson held that in the absence of adopting the formula as a rule, the State was required to submit scientific evidence to support the calculation of the monetary value of NRD assessed under the formula. The State failed to do so and, instead, relied on certain assumptions in the context of the formula regarding the extent of the groundwater contamination and on the monetary value of potable water during the years that contamination occurred. Because the State failed to submit evidence to scientifically support its calculation of NRD, the court dismissed its claim.

DEP has commonly used its settlement or litigation formula for NRD claims, and the decision should be relevant in many pending NRD cases. It will be interesting to see whether DEP follows the court's recommendation and proceeds to rule making with respect to its methodology for calculating NRD claims or if it challenges the decision through an appeal.

## DECLARATORY JUDGMENTS

NL Industries v. DEP

The Appellate Division confirmed the right of developers to bring a declaratory judgment action against DEP in the Superior Court, Chancery Division prior to a final decision by DEP as opposed to awaiting a final agency action and then challenging it in the Appellate Division.

This case involved the remediation of a contaminated parcel for redevelopment by NL Industries that started in 1988. The parcel was designated as a redevelopment area in 1996. However, remediation efforts stalled based on disputes with the redevelopment agency and DEP, and the redevelopment agency sought to take over the remediation.

NL Industries filed a declaratory judgment action in 2004 seeking a declaration under the Brownfields Act that it could not be removed as a responsible party for remediation purposes until it was declared to be in default of its obligations by DEP and given an opportunity to cure, and that any such removal would violate its rights under an Administrative Consent Order executed with DEP.

DEP argued that the declaratory judgment action was premature because no final decision had been made by DEP and because the litigation should have been brought in the Appellate Division as a challenge to an agency action. The Appellate Division disagreed finding that DEP had not made a final decision or taken final action as to whether to enter into a Memorandum of Agreement to allow the redevelopment agency to proceed with the remediation of the site. The lack of an agency decision supported NL's declaratory judgment action under the Declaratory Judgment Act, which permits a party to seek a declaration of rights under a written agreement or statute "to afford litigants relief from uncertainty and insecurity". Here, there was a dispute of more than three years regarding whether DEP and the redevelopment agency had the right to take over the remediation absent a default by NL. Additionally, the takeover of the remediation was estimated by the redevelopment agency at a significantly higher cost than NL's proposed remediation, which costs it would seek to recover from NL. Therefore, NL "had a sufficient stake to warrant declaratory relief." Thus the Court found that NL properly invoked declaratory judgment jurisdiction of the trial court.

Given the delays often associated with DEP's oversight of contaminated parcels, the option of an alternative forum of relief to enforce rights under a statute or agreement could prove to be useful in minimizing costs and delays associated with redevelopment projects.