

Legal & Legislative Update

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CROSS BORDER SEWER CONNECTIONS

P & H Clinton Partnership v. Township of Clinton, et al

Generally, a municipality may exclude another municipality and its residents from connecting to and using its sewer infrastructure. However, the Appellate Division held that a municipality may force another municipality to connect to its sewer system by establishing “compelling circumstances” that warrant disturbance of the general rule.

This case involved a complaint filed by P & H Clinton Partnership (“P&H”) to compel the Readington Lebanon Sewerage Authority (“RLSA”) to permit access to its sewer system to accommodate an affordable housing development known as Windy Acres in Clinton Township. The RLSA provides sewer service to Reading Township and Lebanon Borough. P&H was precluded from pursuing other sewer options for the project because the Department of Environmental Protection (“DEP”) classified a nearby waterway as a Category 1 water.

The Appellate Division held that “a court may order one municipality or regional sewerage authority to provide sewer access to an affordable housing development in another municipality based upon a showing of ‘compelling circumstances’”. “Compelling circumstances” may exist if a municipality is unable to meet its Mount Laurel obligation without the particular development that is seeking the sewer connection. The Court noted that generally municipalities have no duty to provide public utilities for the benefit of non-residents. However, exceptions exist where a municipality cannot satisfy its affordable housing obligation without access to the sewer system in another municipality that has excess capacity. This is consistent with the concept that the provision of affordable housing is based on regional responsibility. This duty exists only for projects where affordable housing will actually be constructed. Where other options exist that would allow a municipality to satisfy its affordable housing obligation, compelling circumstances do not exist to allow access to a neighboring municipality’s sewer service or other utilities.

The availability of public sewer is often critical to the viability of a proposed project. For affordable housing projects, this case may prove to be a useful tool in broadening the scope of options for public sewer.

FEDERAL WETLANDS JURISDICTION

Rapanos v. United States

This case involved the United States Supreme Court’s review of what constitutes regulated “navigable waters” under the Clean Water Act (“CWA”). In a plurality decision, the Court narrowly interpreted the scope of

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the Act to limit “navigable waters” to only “relatively permanent” streams, rivers and lakes, and not the more expansive interpretation of any “hydrologically connected” water. However, Justice Kennedy, concurring in the judgment, issued a separate opinion with a broader interpretation of what constitutes “navigable waters”. Under Justice Kennedy’s interpretation, navigable waters include waters or wetlands that possess a “significant nexus” to waters that are navigable in fact.

The case involved consolidated cases from Michigan, each involving wetlands that were located near ditches or man-made drains and eventually emptied into traditional navigable waters. In one, the property owners backfilled 54 acres of wetlands without an Army Corps of Engineers (“ACOE”) permit. The nearest body of navigable water was 11 to 20 miles away from the wetlands. In the other, the property owners were denied an ACOE permit to fill wetlands.

The plurality decision held that “only those wetlands with a continuous surface connection to bodies that are waters off the United States in their own right so that there is no clear demarcation between waters and wetlands, are ‘adjacent to’ such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to waters of the United States . . . lack the necessary connection to covered waters.”

Under Justice Kennedy’s interpretation, a “significant nexus” exists if wetlands have the effect of “restoring and maintaining the chemical, physical and biological integrity” of the associated navigable waters. A “significant nexus” exists where the wetlands “either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical and biological integrity of other covered waters, more readily understood as navigable.” A mere “hydrologic connection” may not in all cases suffice to establish a “significant nexus”. Therefore, Justice Kennedy agreed with the majority that the decisions finding ACOE jurisdiction should be vacated and remanded for further consideration.

While the plurality decision is important in its recognition of the limitations of CWA jurisdiction, the facts intensive nature of the “significant nexus” test is likely to lead to unpredictable permit decisions and costly disputes concerning ACOE jurisdiction.

WATER ALLOCATION PERMITS

Hovnanian v. DEP

In this decision, the Appellate Division reversed a decision of former DEP Commission Campbell that denied a water allocation permit for a 288-unit townhouse, affordable housing development in West Milford and an extension of a treatment works approval that was necessary to preserve a pre-existing Highlands Act exemption. The Court remanded the matter to DEP for further decision as it determined DEP’s denial of the water allocation permit was based on an incomplete record. The record reflected that the DEP Commissioner participated in and relied upon private discussions with opponents to the project without providing the applicant and developer an opportunity to participate and/or respond.

Additionally, the record reflected that the DEP Commissioner’s decision was not supported by expert determinations of DEP’s own staff. The Court noted that “although the Commissioner has the authority to reject an incorrect recommendation of an inferior staff member, he cannot arbitrarily ignore his staff’s recommendations if doing so would contravene the evidence in the record.” However, the Court remanded the matter for further proceedings finding it was not unreasonable for the Commissioner to request additional information and testing before making a final decision on the water allocation permit application.

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The decision is important in its recognition that substance, not politics, should dictate DEP's decision-making process. The DEP Commissioner does not have wholesale authority to completely ignore the findings of the hands-on case managers and staff that recommend permit issuance.

RSIS

Buben and Rodden v. Sea Isle City and Freda

This case involved challenges by a neighboring property owner to a grant of preliminary approval for a three-lot subdivision on various grounds including failure to comply with the procedures of the Residential Site Improvement Standards ("RSIS") and failure to apply DEP's Stormwater Management regulations. It is instructive with respect to the procedures and criteria that must be met in connection with waivers and de minimis exceptions under the RSIS.

The application required the extension of an existing dead-end street to provide access to the three proposed lots. The applicant sought a de minimis exception and/or waiver of the RSIS to exceed the permitted cartway width requirements of the street extension and to eliminate a requirement for a cul-de-sac. The application also sought to eliminate the requirement for sidewalks on the opposite side of the street where no houses would be constructed.

The RSIS, at N.J.A.C. 5:21-3.1, permits de minimis exceptions that are: (1) consistent with the intent of the Site Improvement Act; (2) reasonable, limited and not unduly burdensome; (3) meet the needs of the public health and safety; and (4) take into consideration the existing infrastructure and possible surrounding development.

The Board approved the application and granted the RSIS waivers to exceed the cartway width and eliminate the cul-de-sac. The approval was conditioned on compliance with any and all other applicable laws, approvals and regulations. The Board's decision was affirmed by the trial court and the neighbors appealed.

The Appellate Division found that the Board satisfied the criteria necessary for the grant of a de minimis exception with respect to the cartway width issue for extension of the roadway. It was not necessary for the Board to classify the road for purposes of considering the applicant's cartway waiver request. The failure of the Board to forward a copy of the Resolution of approval within thirty (30) days of its adoption, though technically non-compliant with the RSIS "is not fatal to its substantive grant of the exception".

However, the Court disagreed that the cul-de-sac waiver was properly considered as a de minimis exception. A de minimis exception under the RSIS differs from a waiver. An exception may be granted if the design deviation is de minimis and conformance with the RSIS standards is impractical given the nature of the property, or would impose undue hardship on the applicant. N.J.A.C. 5:21-3.1(a). A Board may grant a de minimis exception, but may not grant a waiver. Rather, it must refer waivers to the Site Improvement Advisory Board. N.J.A.C. 5:21-3.2. The Court found that the Board treated the cul-de-sac issue as a waiver, although it called its action a de minimis exception. The Board did not have the authority to preempt DCA's waiver procedure through issuance of a de minimis exception. The Court therefore modified the resolution of approval to provide for DCA's disposition of the cul-de-sac waiver as a condition of approval.

With respect to the sidewalk issue, the Board did not make any specific finding as to whether the elimination of sidewalks constituted a de minimis exception or a waiver. Since the issue is not specifically addressed, the Court remanded the issue to the Board.

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The Court rejected the Appellant's arguments concerning the Stormwater regulations. The approval was conditioned upon compliance with the new regulations. It was not improper for the Board to defer review of the plan to determine compliance with the Stormwater regulations, as compliance with the RSIS can be satisfied either before the planning board issues preliminary or final approval. N.J.A.C. 5:21-1.7(a). Additionally, the Court found that the general condition that the development comply with all of the necessary approvals, including all environmental standards pertaining to Stormwater Management, was sufficient to satisfy any future requirement to comply with the Stormwater Management regulations.

ZONING BOARD POWERS

North Brunswick v. Zoning Board of Adjustment and Kaplan

In this case the Appellate Division upheld a trial court's decision that reversed the North Brunswick Zoning Board of Adjustment's ("ZBA") grant of use and bulk variances to Kaplan for an apartment building. The municipal governing body has the power to establish land use character for the municipality through zoning. The ZBA's powers are limited to granting variances to accommodate individual situations where relief from the zoning ordinance is warranted. The municipal governing body may "sue to protect the integrity of its own legislatively conferred powers", such as when ZBA attempts to usurp zoning through issuance of the use variance.

To determine whether a municipal governing body has standing to sue, the Court must consider whether the requested variance would "substantially alter the character of the district as set forth in the applicable zoning ordinance." The factors a court will consider include: the size of the tract; the size of the tract relative to the size and character of the zoning district in which it is located and of the municipality as a whole; the number of lots that will be subdivided; and the nature and extent of the variances.

Even if the property in question makes up only a small part of the municipality and of the applicable zone, a Board may be found to have usurped its zoning power "when the proofs demonstrate that the grant of a variance substantially alters the municipality's zone plan". Here, the property was rezoned by the Township approximately one year before the ZBA issued the use variance. Additionally, the purpose of the rezoning was to eliminate multi-family dwellings, which was contrary to the use variance which allowed Kaplan to construct an apartment building. The Court found that the Board's action thus blatantly rejected the Township's zoning plan and improperly arrogated to itself the power to substitute its idea of an appropriate zone plan."

Though the grant of variances was reversed, this case illustrates the limitations on the authority of zoning board's in the context of applicable zoning.

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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