Bulletin Board

Voice of the Central Jersey Shore Building Community September/October 2007

# Legal & Legislative Update

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## COURT AFFIRMS INVALIDATION OF JACKSON TREE ORDINANCE

The Appellate Division affirmed Judge Serpentelli's ruling that Jackson Township's Tree Removal Ordinance is invalid. Paul H. Schneider, Esq. of Giordano Halleran & Ciesla, P.C. challenged the Ordinance on behalf of SBACNJ.

The Ordinance was adopted by the Township to regulate and control the removal of trees within the Township and delegated authority to the Township Forester and the Shade Tree Commission. It was supposed to correct deficiencies in an earlier tree save ordinance that was successfully challenged by SBACNJ. The Ordinance required that trees removed from privately owned lands within the Township, with limited exceptions, must be replanted on the same site on a one to one basis or a payment must be made to a tree escrow fund for the planting of trees on public properties. The lawsuit contended, among other things, that the Ordinance is ultra vires, void, unlawful and unenforceable as it fails to provide clear standards for compliance and unreasonably discriminates against smaller lots and new developments.

The Appellate Division agreed with Judge Serpentelli that that payment to an escrow fund for planting of trees and shrubs only on public properties "does not bear a real and substantial relationship to the purposes of the Ordinance" of preventing soil erosion, dust, deteriorating property values and the suitability of land on the sites from which the trees were removed. The court also agreed that provisions of the Ordinance were vague.

Should the Township propose a new tree ordinance, SBACNJ will offer to work with the Township to develop standards that are fair and reasonable.

## STATE STATUTE PREEMPTS LOCAL TDR ORDINANCE

BLSJ v. Township of Franklin

A municipality may not create a Transfer of Development Rights ("TDR") program that conflicts with the State Transfer of Development Rights Act.

The Builders League of South Jersey ("BLSJ") challenged an ordinance adopted by the Township of Franklin that established a TDR zoning program. BLSJ argued the ordinance conflicted with the TDR Act, N.J.S.A. 40:55D-137 to 163. The Act requires that municipalities adhere to specific requirements prior to the adoption of a TDR ordinance. Among other things, the proposed ordinance must be approved by the County Planning Board, or by the Office of Smart Growth absent county approval.

The court disagreed with the Township's argument that the ordinance did not establish a TDR program because it was voluntary in nature. The ordinance established sending and receiving zones, and called for studies of topography and critical habitat, restrictions on future development, density bonuses and municipal authority to enforce development restrictions. Therefore, the court found that the ordinance "established a *de facto* TDR program."

In establishing a TDR program, the Township was required but failed to create the program in accordance with the State Act. A municipality is "not free to pick and to choose the elements of the TDR program that it likes and disregard the provisions that it finds burdensome." Here, Franklin Township failed to conduct several advance studies required under the Act, such as a real estate market analysis and infrastructure studies. The Township also failed to obtain county or Office of Smart Growth approval. Therefore, the ordinance was found invalid.

**"BLIGHTED" PROPERTIES**

Gallenthin Realty Development v. Borough of Paulsboro

The New Jersey Supreme Court recently took action to interpret and define the scope of "blighted" under the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-5(e). In invalidating the Borough of Paulsboro's redevelopment plan, the Court held that for a property to be designated as "in need of redevelopment" on the basis that it is "blighted", there must be some finding more than a determination that the property is "not fully productive."

The Court concluded that permitting a municipality to condemn property as "blighted" based solely on a determination that the property is not being used optimally or is "not fully productive" is overly broad and would result in a situation in which "most property in the state would be eligible for redevelopment." The Court concluded that to substantiate a "blighted" designation, there must be evidence that the property "has become stagnant because of issues of title, diversity of ownership, or other similar conditions." Failure to utilize a property in a fully productive manner alone will not substantiate a "blight" determination.

The decision has already had an impact in the context of the review of redevelopment plans statewide as evidenced in other recent decisions such as HJB Associates, Inc. v. Belmar; Citizens in Action v. Mt. Holly. It's significance, however, lies in its confirmation that the Constitution and LRHL authorize municipalities to designate property "in need of redevelopment" and subject to eminent domain and that the redevelopment of blighted areas constitutes a valid public purpose and use for the taking of private property.

**DEP DUNE POLICY ELICITS DIFFERING EXAMPLES OF JUDICIAL DEFERENCE**

Vogel v. DEP

The judiciary's trend of "punting" on challenges involving decisions made by DEP through the guise of judicial deference continued in this case. In an example of extreme

deference, the Appellate Division in Vogel v. DEP rubber-stamped DEP's denial of an application for a CAFRA permit for a single family home under DEP's dune policy. The Court conducted little to no analysis of the case and demonstrated an alarming lack of independence in accepting DEP's decision.

Despite acknowledging that the parcel was flat, was not surrounded by "dunes topography" and had an east to west slope that ran perpendicular to the beach, the Court deferred to DEP's decision that the property constituted a regulated "dune" and upheld the denial. The acknowledgement that the so-called "dune" was perpendicular to the beach is particularly troubling because a dune as defined in DEP's regulations at N.J.A.C. 7:7E-3.16(a) is "generally parallel" to the beach. Deference was given even through a reasonable argument could be made that DEP acted in contrast to its own regulations and interpreted common words in contrast to their general, everyday meaning.

Moreover, there was no discussion in the decision of the fact that the property was not an oceanfront parcel, but was separated from the beach by another existing dwelling. Likewise, there was no discussion of how the so-called dune on the property, being flat and running perpendicular to the ocean, would serve the functions of a dune that DEP's regulatory provisions were intended to protect and promote. With the extremely unscientific and non-technical nature of DEP's definition of dune and the way it implements its dune policy on a case-by-case basis, the court's deference to the technical expertise of the agency is unwarranted, and a decision that the denial was arbitrary, capricious and unreasonable could have been reasonably supported.

Seigel v. DEP

However, in Seigel, a separate Appellate panel reversed DEP's denial of an application to construct a second single family home on an existing lot under the dune policy.

Like Vogel, this case involved a "relatively" flat beachfront parcel. A man-made dune existing along the eastern, shoreline border of the property. DEP denied Seigel's application to build a second home on the large lot to accommodate an ailing family member, consistent with the prevalence of surrounding development. The denial was based on a determination that the flat portion of the lot was a dune.

Here, the Appellate Division conducted a meaningful and in depth review of the facts and expert testimony presented by both parties, and disagreed with DEP's determination that the flat portion of the property was a dune. While recognizing the typical deference afforded to agency decision making and interpretation of its own rules, the court correctly confirmed that its role is not to "simply act as a rubber stamp of approval for the agency's decision."

CAFRA was intended to strike a balance between environmental and economic concerns, and DEP must consider these "competing policy considerations" in reviewing each CAFRA application. In this context, DEP's dune rule applicable to single family homes applies "if it [is] located on a continuous or nearly continuous mound of ridge or sand with relatively steep

waterward and landward slopes located immediately landward of and adjacent to the beach and subject to erosion and overtopping from high tides and waves during major coastal storms."

DEP argued that the use of the term "relatively steep" in its regulations allows for a determination that only a portion of a site need have a steep slope, and other seemingly flat areas can constitute a "dune". The court disagreed, questioning in dicta whether the regulation was unconstitutionally vague based on the definition's failure to adequately define what dune slopes must be steep in relation to. It concluded the "lack of definitive standards" of the dune rule makes it "fundamentally unfair" and insufficient "to provide the public at large with meaningful guidance and predictability." The court interpreted the dune regulation to mean that dune slopes "must abruptly incline and decline respectively compared with the rest of the subject property or with the other properties in the area immediately adjacent to the subject property." This interpretation strikes the appropriate "environmental economic" balance required under CAFRA by sufficiently protecting primary frontal dunes while accommodating development on secondary, tertiary or non-dune structures.

Here, the site contained a sharp "primary frontal dune" on the eastern boundary of the property, and then was basically flat with a gradual declining slope moving west away from the frontal dune. The gradual decline was not "relatively steep" compared to the primary frontal dune on the property or compared to surrounding properties and, therefore, was not a "dune" under DEP's regulations.

The court also recognized the "fundamental unfairness" that DEP's denial would have. DEP failed to consider the fact that "no practicable or feasible alternative" existed in a non-dune area as required under DEP's regulations. DEP's suggestion to expand the existing home rather than construct a second home to accommodate the plaintiff's ailing mother was not a feasible alternative because any reconstruction would be limited by other DEP regulations such as a limitation on reconstruction within the existing footprint of development. Additionally, DEP's casual suggestion to "purchase another property" was not realistically feasible. DEP also failed to consider, as required, the potential adverse impact of the proposed development on "the natural functioning of the beach and dune system". The court opined that DEP's determination that the proposed development would have negative environmental impacts was essentially a conclusory, net opinion. "We are hard pressed to understand how the erection of this modest home could have a significant adverse impact beyond what has already occurred."

This decision is a breath of fresh air in terms of judicial review of DEP decision making. The court appropriately considered the competing policies of CAFRA, considered the expert testimony of <u>both</u> parties, and conducted a meaningful review of DEP's interpretation of its own rules and its decision making process. The recognition that DEP must do more that make net, conclusory opinions in the decision making process, must consider the competing statutory objectives of CAFRA, must consider issues of "fundamental fairness" and must not ignore portions of its regulations that provide a potential avenue of relief to applicants will hopefully help spur a shift in DEP's application review process. If not, the decision should prove to be useful in challenging DEP decisions until such a change in administrative review of applications

occurs and will hopefully cause other reviewing courts to do more than just "rubber stamp" DEP decisions.

**COAH RULEMAKING**

The Supreme Court recently denied COAH's petition that sought review of the Appellate Division's January 25, 2007 decision invalidating provisions of COAH's third-round rules including its growth share methodology. The Court stated that the rules "frustrate rather than further, a realistic opportunity for the production of affordable housing", and directed COAH to adopt new regulations "in conformance" with the decision and complete the rulemaking process within six (6) months. The Appellate Division, however, extended the deadline to adopt regulations to December 31, 2006.

**REDEVELOPMENT AUTHORITY**

Weeden v. City of Trenton

The Appellate Division held that a local zoning board of adjustment has authority to grant a variance from underlying or overlay zoning in a redevelopment area.

The case involved a redevelopment plan adopted by the Trenton City Council pursuant to the Local Redevelopment Housing Law ("LRHL") N.J.S.A. 40A:12A-1, *et seq.* In 2004, JAT Developers, LLC applied to the Zoning Board of Adjustment for a use variance for the construction of a fast food restaurant with a drive through window. The Zoning Board approved the variance, finding that it was consistent with the redevelopment plan. The decision was affirmed by the City Council.

Plaintiffs challenged the variance, arguing that the Board had no jurisdiction pursuant to the LRHL to grant variances from the requirements of the redevelopment plan.

The LRHL provides that a redevelopment plan must indicate whether it supercedes the local zoning within the redevelopment area or constitutes overlay zoning. In this case, the redevelopment plan constituted overlay zoning, and thus became part of the zoning for the redevelopment area. The Court concluded that the LRHL gives municipal planning boards authority in reviewing plans for project redevelopment areas similar to its normal functions in reviewing plans under the MLUL. It is consistent with the MLUL that the zoning board should hear applications for exceptions to a redevelopment plan requirement of the type that would ordinarily constitute a use variance.

The decision did not address whether the authority to grant a waiver exists in the context of a designated redeveloper who has covenanted with the municipality to carry out a redevelopment plan. The decision is limited solely to non-redeveloper owners of property in redevelopment areas where a developer has not been designated to complete all of the redevelopment. Additionally, the decision appears to be limited to redevelopment plans that

constitute overlay zoning. The Court concluded that failure to allow the variance relief would mean that "property owners would be unable to obtain even the most minor exception to the requirements of the redevelopment plan without applying to the governing body for a plan amendment." This would be contrary to the LRHL which "was intended to expedite redevelopment of blighted areas, not to handcuff potential development by denying exceptions where needed to make development possible."

**AUTOMATIC APPROVALS**

Hess v. Burlington County Planning Board

Where a county planning board purposefully delays review of an application and fails to act upon the application within thirty (30) days, the applicant is entitled to automatic approval of its submission pursuant to the N.J.S.A. 40:27-6.7. A county planning board has thirty (30) days to review an application for site plan approval. If it fails to act within that timeframe, the application is deemed approved. The thirty (30) days may be expanded upon consent of the parties, or where significant issues of public safety are presented. However, in this case, no such issues were raised and, to the extent they existed, the Board "should have taken definitive action and denied plaintiff's application within thirty (30) days of its filing."

The decision represents an important affirmation of the deemer provisions of statutes governing review of land use approvals.