LEGAL & LEGISLATIVE

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JACKSON PROPOSED OPEN-SPACE ORDINANCE

SBACNJ and Builders League of South Jersey have won final victory in their case challenging municipal recreation and open space fees. SBACNJ was represented by Paul H. Schneider, Esq. of Giordano, Halleran & Ciesla, P.C.

The Supreme Court affirmed the June 23, 2008 decision of the Appellate Division of Superior Court ruling that municipalities lack authority to require exactions from developers in the form of land set asides for common open space or recreational areas and facilities, other than in "planned development" as defined in the

Municipal Land Use Law. The Court also ruled that municipalities may not require developers to pay fees in lieu of the set-aside in any development, including "planned development". The MLUL specifically limits contributions for off-site improvements to a developer's pro rata share of the cost of street improvements, water, sewerage and drainage facilities and related easements.

While the decision involved SBACNJ's challenge to Jackson Township's open space and recreation fee ordinance, and BLSJ's challenge to a similar ordinance in Egg Harbor Township, it has statewide applicability.

By confirming that municipalities lack authority under the MLUL to require developers to contribute to off-site recreational facilities in lieu of the provision of on-site land dedication, the decision should help developers reduce development costs

AGE RESTRICTED HOUSING

The Governor signed into law S2577 authorizing the conversion of certain age-restricted projects to non-age restricted developments with municipal planning or zoning board approval. Several requirements must be met. Preliminary or final approval must have been received prior to July 2, 2009. There must be a flat 20% affordable housing set-aside. Additionally, the developer cannot hold a deposit for, or have conveyed, any unit within the development. Water, sewer, parking and stormwater issues must be addressed as necessary.

A conversion application must be filed by July 31, 2011, unless the deadline is extended by a municipal planning or zoning board. The municipality may consider, among other things, whether conversion would be detrimental to the public good. An applicant may appeal the decision of the municipal board within thirty days of receipt of the memorializing resolution. The law gives the courts the authority to consider the reasonableness of the decision of the approving board.

ZONING PERMITS

K-Land No. 54, LLC v. North Brunswick

While the remedy for denial of a zoning permit is appeal to the Board of Adjustment, an exception does exist where it is beyond dispute that the proposed use is permitted within the zone. In this case, K-Land requested that the Township issue a zoning permit for a proposed commercial development plan consisting of an approximately 180,000 square feet of floor space. The sole question of the zoning permit application was whether the proposed use constituted a permitted use under the applicable zoning. The zoning officer responded nearly 20 days later stating that a zoning permit application is not applicable to the request, but acknowledging that the proposed use a permitted use. K-Land filed suit and the Court issued an Order compelling issuance of zoning permit by the municipality.

Under the MLUL, a municipality may require a zoning permit to be issued as a condition precedent to the construction of a building or structure. N.J.S.A. 40:55D-18. The MLUL requires the zoning officer to act on a request for a zoning permit within 10 days of a receipt, otherwise the permit is deemed to be approved. Denial of a zoning permit is appealable to the Board of Adjustment.

The zoning officer did not expressly deny the request for a zoning permit. Therefore, K-Land was not required to file an appeal with the Board of Adjustment. The Appellate Division held that K-Land had the right to pursue an action in lieu of prerogative writs without first appealing to the Board as such an action would cause useless delay and been futile. The requirement for exhaustion of administrative remedies may be dispensed with where the interest of justice requires. Since there was no dispute that plaintiff's proposal was a permitted use within the applicable zone, as acknowledged by the zoning officer, there was no factual question that would warrant exhaustion of administrative remedies. Thus, where it is beyond dispute that a use is permitted within a zone, the applicant for a zoning permit is not required to exhaust administrative remedies. Since the zoning officer found that the Plaintiff's use was not prohibited, it should have issued a zoning permit. Accordingly, the Court found the failure to do so to be arbitrary, capricious and unreasonable.