

that the construction was unlawful because the developers did not satisfy a preconstruction condition requirement to obtain an EPA wetlands map revision or waiver for the construction of the sewer lines through mapped wetlands. The Commissioner, in overturning the ALJ decision, took the position that the TWA's became null and void on the date that construction began. DEP's position on the potable water supply permits was that they had expired because only some of the homes were connected to the public water supply and the permits contained a condition requiring that the approved lines be fully placed into service prior to the stated expiration date of the permits.

The Appellate Division rejected the DEP Commissioner's decision on review. There was only limited discussion regarding the continuing validity of the municipal approvals, and the court found that the developers maintained the validity of their municipal approvals as of the March 29, 2004 effective date of the Act. The dispute mainly involved the question of the continued validity of the DEP approvals. The DEP Commissioner's decision that the TWA's for the projects were null and void because of a failure to satisfy pre-construction conditions was erroneous. While violations may have occurred, they did not cause the TWA's to expire. The Court analyzed due process considerations in the context of revocation of approvals by DEP. DEP did not follow such procedures in this case and even if it had and the TWA's were formally revoked, the revocation would not necessarily have meant that the TWA's ceased to exist as of the date of the alleged violation, particularly in this case where the alleged violations were of a technical nature without adverse environmental impacts. Thus, the TWA's were in place for the projects as of the effective date of the Act. Moreover, the developers substantially relied on those approvals in expending millions of dollars for construction of utilities and infrastructure.

It was not necessary for the court to address the potable water supply permit issue because the finding that the TWA's were valid was enough to overturn denial of the exemptions. The ALJ had rejected DEP's argument that the potable water supply permits had expired because the authorized lines were only partially placed into service. BSDW permits typically state the approval is valid for three years and the authorized structures must be placed into service prior to the stated expiration date of the permit. The underlying ALJ decision may provide a basis for testing this condition in the future.

There has been a considerable amount of speculation about the future of the Highlands Act under the Christie Administration. Those opposed to the Act have expressed hopes that the Legislature will provide relief from the Act's overly proscriptive limits on development, while the environmental lobby has been vigorously attempting to block any changes to the Act and has criticized the Administration for its recent appointments to the Highlands Council. Recent court decisions on the Act, including a decision upholding the Council's transfer of development rights program, seem to further diminish what limited potential there is for development within the Highlands Region. In the face of this potentially changing landscape, it is a certainty that the further removed we become from the effective date of the Act, the less likely the grandfather exemption will be applicable. But Lakeside Manor makes clear that the grandfather exemption remains viable. During these difficult economic times when development projects have stalled, developers should take action to maintain the validity of approvals so that potential Highlands Act exemption rights are not lost.

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