Bulletin Board

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Legal & Legislative Update

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

DEP FLOOD HAZARD RULES

DEP published the adopted Flood Hazard Area Control Act rules in the November 5, 2007 *New Jersey Register*. The rules constitute a complete overhaul of the prior Stream Encroachment Permit regulations and contain significantly-enhanced regulatory provisions. SBACNJ encourages its members to review the new rules to evaluate their potential applicability.

SOIL REMEDIATION STANDARDS PROPOSAL

NAIOP has reported that it has been informed by the Governor's office that the Soil Remediation Standards proposal will not be adopted. However, DEP has not taken action yet to withdraw the proposal. In May 2007, DEP proposed soil cleanup standards and some amendments to the Technical Oversight rules governing whether the standards would apply to approved cleanups. Up to now, all remediation cases have been assessed by SRP under "soil cleanup criteria" guidance.

Various groups including NJBA have opposed the proposed standards, which fail to provide any specific incentives for redevelopment sites in designated "growth areas." For many sites, the conservative methodologies used to develop the proposed standards will discourage remediation and redevelopment by increasing costs. Additionally, the proposed SRP rules fail to provide any clear support for Brownfield redevelopment.

USE VARIANCE DENIAL

Mocco v. Jersey City

The Appellate Division reversed the decisions of the Jersey City Zoning Board and trial court that granted a use variance to Brunswick 9 Associates, LLC. The use variance was granted to permit a mid-rise residential apartment building on a lot zoned for townhouses with a maximum of three dwelling units. The lot was an old industrial site that was rezoned for townhouse development in 2001. In its resolution of approval, the Board concluded that the property "may have been improperly zoned" R-2 at the time of the adoption of the zoning ordinance in 2001. In reviewing whether the use variance satisfied the "positive" and "negative" criteria of the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-70, the Appellate Division held that "a board may not grant a variance to correct what its members perceive to be an error in the zoning ordinance." A board's determination that a lot is improperly zoned "is not a basis for a board of adjustment to grant a use variance" and a board "cannot grant a variance to correct the zoning

scheme." Since the resolution confirmed that the board concluded that the property was improperly zoned and should have been zoned as a redevelopment area, it reversed the grant of the use variance.

This case demonstrates the challenges that developers face in securing development approvals even on sites that appear to be appropriate for redevelopment based on lack of use and support of the municipality and its planners.

DEP ENFORCEMENT ACTIONS

In two separate opinions, the Appellate Division upheld DEP penalties for violations in the absence of any physical environmental harm. DEP v. Town & Country Developers is a decision that should act as a warning to developers not to construct sewer lines prior to obtaining Treatment Works Approval ("TWA") from DEP. The Appellate Division upheld a $604,000.00 penalty against Town & Country Developers ("T&C") for construction and operation of sewer lines without a TWA. The case involved the legal issue of whether DEP's calculated penalty was appropriate. The court rejected T&C's arguments that the violation was "minor" pursuant to the Grace Period Law and, alternatively, that the penalty amount was calculated incorrectly. The court disagreed that T&C's obtaining an after-the-fact TWA ameliorated the "harm" that occurred, as the sewer line was constructed and put into operation prior to permitting and the penalty provisions are designed to deter construction without approval to protect public health and safety.

In DEP v. Reiff and Sweeney & Sons, the Appellate Division upheld a $15,000.00 penalty associated with the operation of underground storage tanks ("UST") at a gas station. DEP issued the penalties for shipment of fuel to a UST that had an expired UST registration. There was no evidence of any environmental harm associated with the UST's or the fuel deliveries. Like the Town and Country decision, the court rejected the argument that the violation was "minor" under the Grace Period Law.

DEP has been aggressively pursuing penalties for violations that do not involve any physical environmental harm. As reflected in these two decisions, the courts have been receptive to DEP's enforcement approach.

NOTICE OF APPLICATIONS - CONDO ASSOCIATION

Kratz v. City of Hoboken

The MLUL does not require that notice of an application be provided to individual condominium unit owners, and notice is sufficient if it is provided to the condo association.

This case involved an application for subdivision, site plan and variance approval for a mixed use residential and commercial building. The applicant, Tattoli, obtained a 200 foot property

owners list from the municipality and gave notice based on the list. Newspaper notice was also provided. The board granted approval as memorialized in a resolution dated June 21, 2005.

Kratz, a Hoboken property owner, challenged the approval. The trial court affirmed the approval, and the decision was upheld by the Appellate Division. Among the various issues addressed, the court rejected Kratz' argument that there was improper notice of the hearing. Kratz argued that notice was improper because notice was not provided to individual condominium owners, but only to a condominium association. The MLUL specifically provides that the requirement to provide notice of a hearing to property owners within 200 feet of the property "shall be deemed satisfied by notice to the condominium association, in the case of any unit owner whose unit has a unit above or below it." N.J.S.A. 40:55D-12(b). Therefore, the court concluded "individual notice need not be given to the owners of each condominium unit." Since notice was given to the condominium associations within 200 feet of the property, the required notice was satisfied.

The court also rejected the argument that the notice was deficient under Hoboken's City Code as "the Hoboken Ordinance cannot require more notice than is required by the State under the MLUL." A contrary conclusion would undermine the goal of the uniformity of procedures of MLUL.

This decision should help to provide clarity with respect to the notice requirements of the MLUL in the context of condominium associations.

GDP REQUIREMENTS

Audubon Society v. Millville

The Appellate Division affirmed General Development Plan ("GDP") approval granted by the Millville Planning Board to Millville 1350, LLC. The GDP consisted of 1,340 acres, of which 930 acres would be preserved as deed restricted open space. The GDP proposed the construction of 950 detached, age-restricted homes clustered on 239 acres with an 18-hole golf course and a clubhouse on 170 acres. The Board and the lower court found that Millville satisfied the applicable MLUL requirement that the planned development "not have an unreasonably adverse impact."

The Appellate Division reviewed the standard by which a planning board evaluates a GDP. Under the MLUL, the GDP must be found to "not have an unreasonably adverse impact upon the area in which it is proposed to be established." N.J.S.A. 40:55D-45d. A GDP affords a developer protection from zoning changes for a period not to exceed twenty (20) years from the date of final approval of the first section of the planned development, and the planned development must be developed in accordance with the GDP approval. N.J.S.A. 40:55D-45.1a and 1b. A municipality may establish ordinances to allow a planning board to grant general development plan approval for the "basic scheme of a planned development and setting forth any

variations from the ordinary standards for preliminary and final approval." N.J.S.A. 40:55D-39c(1). The GDP may include various permissive elements, such as environmental and stormwater plans, etc.

Under Millville's ordinance, "the entire GDP process is intended to be general in nature and to provide the flexibility desirable to promote mutual agreement between a developer and a planning board regarding the basic scheme of a planned development, and that such matters should be considered in a general way, from the standpoint of probable feasibility, with more detailed presentation deferred until the subsequent applications for preliminary site plan and subdivision approvals." The MLUL supports the flexibility provided in the Millville ordinance. The GDP provisions of the MLUL "were designed to provide for general considerations and flexibility, so long as they were sufficient to satisfy the local planning board that the proposed development complied with local zoning requirements and would not cause an unreasonably adverse impact on the area."

The court agreed that the Board appropriately considered the various elements of the plan's development in a general manner, and there was a sufficient record supporting the Board's decision that the proposed development would not result in an unreasonable adverse impact upon the area, notwithstanding the confirmed existence of six (6) threatened and endangered species on the property, as well as other environmentally sensitive areas.

The court also rejected the argument that it was improper for the Board to condition GDP approval on future submission of stormwater management, turf management and habitat conservation plans. At the GDP stage, all that is required is general type of information sufficient to establish that no unreasonably adverse impact on the area will occur. Detailed engineering and other specifically detailed information should not be required until later subdivision or site plan review occurs.

CAFRA DEED RESTRICTIONS

Petrunis, Inc. v. DEP

CAFRA requires that developments adjacent to coastal waters establish by deed restriction public access to the waterfront to the maximum extent practicable. N.J.A.C. 7:7E-8.11. In this case, Petrunis challenged a permit condition that required the recording of a deed restriction for future public access that was included in a coastal general permit for remediation on an industrial property. The Administrative Law Judge upheld the condition, which did not require that public access be created, but required the recording of a deed restriction to establish notice that any future development of the property would require the creation of a public access area.

While the deed restriction requirement and decision is arguably consistent with the requirements of the rules, the practical effect of such a deed notice is questionable at best. Any future development regulated pursuant to CAFRA would have to go through the CAFRA permitting process and comply with the substantive provisions of DEP's Coastal Zone

Management Regulations. If at that time the regulations still require the establishment of a deed restriction for public access to the waterfront, which they presumably will, then DEP would be in a position to impose the deed restriction requirement. Any applicant would already be on notice, based on the existence of the requirements in the regulations. Thus, the permit condition requiring a deed notice today for some speculative future development is completely unnecessary.