

## Legal & Legislative Update

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

### **BUILDER LAWSUIT PROTECTION ERODED**

#### **Greczyn v. Colgate-Palmolive**

The New Jersey Supreme Court unanimously held that a builder or architect may be subject to liability more than ten years after the completion of work if a lawsuit using a fictitious defendant name is filed within the ten year timeframe.

New Jersey's statute of repose provides that actions to recover damages from builders and architects must be filed within ten years of the completion of the services or construction performed by the architect or builder. N.J.S.A. 2A:14-1.1. At issue in this case was whether the statute of repose is subject to New Jersey's rule governing fictitious party practice. R. 4:26-4. Under that rule litigant's may bring a lawsuit against a defendant whose true name is not known by using a fictitious name.

Plaintiff was injured when she fell on a staircase in the Colgate-Palmolive office center in March, 1999. She filed suit in October 2000 against the property owner. The lawsuit also named numerous fictitious defendants, including the designers of the staircase where she fell.

Kling Lindquist designed the staircase and was involved in its renovation and construction. That work was completed nearly ten years prior to the plaintiff's complaint being filed. The plaintiff was permitted to amend her complaint after the ten year period elapsed to name Kling Lindquist as a party. The Appellate Division affirmed another trial judge's dismissal of the claim against Kling Lindquist based on the ten year statute of repose.

The Supreme Court reversed, finding that the statute of repose did not preclude use of the fictitious party practice. The intent of the statute of repose was to limit the time within which a cause of action may be brought against an architect or builder to ten years from substantial completion of construction. While claims brought after the ten year period are barred, the complaint in this case was filed within the ten year period using the fictitious party practice rule. The Court found that permitting use of the fictitious party rule to preserve claims against builders and architects does not violate the intent of the underlying statute of repose.

The Court rejected the claim that its interpretation of the rules would result in builders and architects being subject to potential claims for unlimited periods of time, because timely claims relying on the fictitious party

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are only valid if the claimant is diligent in its identification of the unnamed defendant(s). Basically, the only information that may be lacking is the name of the defendant.

While the potential for abuse exists, the impact of this decision on builders and architects should be limited. The decision does not extend to injuries sustained or lawsuits filed after the ten year statute of repose. Additionally, the Court stressed that the fictitious party practice is limited to those situations when a plaintiff is aware of an injury within ten years of completion of the work and brings a timely and properly pleaded claim, but merely does not know the name of the defendant. Presumably, it is a rare set of facts when a plaintiff is able to gather sufficient information to make a claim prior to expiration of the statute of repose, but is unable to determine the name of the builder or architect who performed the work.

## **FWPA PREEMPTION**

### **New York Life Insurance Co. v. Township of Clinton**

The State has exclusive jurisdiction and authority to regulate freshwater wetlands under the Freshwater Wetlands Protection Act (“FWPA”). However, in this case, the Law Division held that a Township of Clinton Zoning Ordinance that affected a parcel containing wetlands and other environmental features was not preempted by the FWPA.

The Township of Clinton adopted an ordinance that severely reduced the development potential of property owned by New York Life Insurance Co. The ordinance required that environmental features such as wetlands, wetland transition areas, stream corridors, and other features be excluded from the total property area for purposes of calculating the “floor area ratio”. The site included a large portion of “excludable land”.

The court rejected New York Life’s argument that the Ordinance was preempted by the FWPA. Recognizing that the intent of the Ordinance is “to protect certain critical environmental resources such as wetlands and limit encroachment on those areas”, the court held that the Ordinance was not preempted under the FWPA as it “does not say what can and cannot be done within the wetland areas” and thus “does not regulate wetlands development.”

The court concluded that the intent of the Ordinance was not to regulate the wetlands, and the ordinance only had a “tangential effect” upon wetlands. Rather, the focus of the Ordinance was to create density consequences based on the existence of wetlands and other environmental features. The court also concluded that the reduced density under the Ordinance enhances the objectives of the FWPA.

The court’s finding that the Ordinance was intended to protect critical environmental features such as wetlands, but was not intended to regulate wetlands is counterintuitive, and opens the door to piecemeal, inconsistent regulation of wetlands that the FWPA was intended to prevent. The Ordinance does not preclude development in wetlands. But, it seems clear that the Ordinance is designed to regulate impacts to wetlands by limiting the density of development. These are concerns that the FWPA was enacted to, and does, address by precluding regulated activities in wetlands and buffer areas, establishing the size of buffer areas, and defining those instances where regulated activities may take place within wetlands and transition areas upon issuance of a permit from DEP. According to this decision, those protections are not sufficient, and may be supplemented by local ordinances having a “tangential effect” on wetlands. But rather than being “tangential”, the effect of

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this Ordinance, and presumably others like it to come, is to strip DEP of its regulatory authority over wetlands by eliminating potential development.

## **ZONING OFFICER MAY WITHHOLD BUILDING PERMITS AGAINST DIRECTION OF BOARD OF ADJUSTMENT**

### **KLD Properties v. Abballe**

Where a Board of Adjustment oversteps its authority, a local construction official/zoning officer may refuse to grant building permits for a project.

This case involved KLD's property located in Borough of Emerson. KLD obtained a use variance from the Emerson Board of Adjustment (the "Board") for a mixed commercial and residential development, as well as variances. The approval was conditioned upon, among other things, site plan approval from the Bergen County Planning Board. While County approval was pending, KLD obtained authorizations from the Board extending the time to commence the approved project. The extensions were necessary because the Borough's zoning ordinance provides for expiration of variances if construction does not commence within one year from the date of publication of an approval.

KLD sought the issuance of building permits when it obtained conditional approval from the County Planning Board. The construction code official was directed by the Township governing body not to issue the permits because construction had not commenced within one (1) year of the Board's publication of the variances. On appeal by KLD, the Board of Adjustment took the position that it had "implicit authority" to grant the extensions of time on the use variances, and directed the zoning officer to issue the building permits. The zoning officer, Abballe, refused to comply with the Board's directive.

There is no express provision under the Municipal Land Use Law ("MLUL") for the extension of a durational limitation of a variance. Likewise, the Emerson Code did not contain an express provision for the extension of the one year limitation on the duration of variance approvals. By contrast, the MLUL grants planning boards specific authority to extend various subdivision and site plan approvals.

Finding the Board lacked express statutory authority to grant the variance extensions, the Court rejected KLD's argument that the Board had inherent authority to grant the extensions. The Court was concerned that finding such authority would improperly erode the powers of the Township governing body. The one year time period was intended to permit a "fresh look" at projects involving variances. Additionally, the Court found that KLD's rights were not jeopardized because it could file a new application after expiration of the variance. The Court also relied on adoption of the Permit Extension Act, which affected variances, as evidence that the Board of Adjustment lacked inherent authority to extend variance approvals.

The court raised, but did not address, the issue of the validity of durational limitations under the MLUL, as durational limitations are not expressly permitted under the MLUL. However, the court not did not explain its acquiescing in the apparent inherent authority of the governing body to limit the duration of the use variance, but rejecting the inherent authority of the Board to extend the use variance.

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The court also found that it was not improper for the zoning officer to refuse direction of the Board of Adjustment to issue the building permits. A construction official may not refuse to follow the direction of the Board of Adjustment based on a disagreement with the Board's decision on policy grounds. However, where a Board of Adjustment exceeds its powers, the decisions of the Board are void, and not entitled to enforcement. Therefore, as the Court found that the Board lacked authority to issue the variance extensions, the refusal of the construction official to issue the building permits was found to be appropriate.

## **CONSERVATION RESTRICTION REQUIREMENT DECLARED UNREASONABLE**

### **Moore Realty, Inc. v. Town of Hackettstown**

A requirement in a local approval for a conservation restriction is unenforceable when the subject property bears no relationship to the environmental concerns that the restriction requirement is intended to address.

This case involved Moore Realty's 3-lot subdivision application. The applicable zoning for the property was R-12.5 single family, which permitted single family residential dwellings on a minimum of 12,500 square foot lots. The Hackettstown Zoning Code contains a provision that requires the preservation of natural features and protection and preservation of "critical areas" as undeveloped open space. The Code also requires that environmentally-critical areas be delineated on subdivision plans, and development be designed to protect and prevent disturbance of those areas during construction and use of the property.

The Board's engineer recommended that a conservation easement be required in connection with approval of the subdivision for preservation of an area of mature trees on the property, and to preclude development on an area containing 12% slopes. However, the engineer acknowledged that property did not contain "critical" slopes (15%), no changes in the existing grade were proposed and there were no critical environmental areas.

The Board approved the subdivision application conditioned on placement of a conservation restriction on the property. Moore Realty challenged the conservation restriction requirement, and the trial court affirmed the condition as a reasonable exercise of the Board's authority under the MLUL and the Code.

The Appellate Division reversed finding that the "conservation easement constituted an arbitrary and unreasonable use of [the Board's] authority under circumstances when the conditions necessary to create the easement did not exist." The Court stressed that the application proposed no changes in grade, contained no steep slopes, required no variances and contained no critical environmental areas. Additionally, the Code did not give the Board express authority to require the conservation restriction.

The Board's concern for drainage problems from the possible future subdivision of the property was an insufficient and unreasonable basis upon which to impose the conservation restriction, and unnecessarily encumbered the property. If the property were subdivided at some future time, the issues could be addressed then. Thus, the Court reversed and remanded directing the lower Court to remove the conservation restriction requirement.

While not addressed in the decision, the removal of the conservation easement requirement is consistent with the United States Supreme Court's decision of Dolan v. City of Tigard. Dolan addressed the issue of

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whether a dedication demanded by the government as a condition of a development permit runs afoul of the Takings Clause. The Dolan case provides that there must be “proportionality” between an exaction and a proposed development, and the government “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” Consistent with Dolan, the court’s holding affirms that the restriction requirement was invalid because there was no relation between the conservation restriction requirement and the proposed development as the site did not contain steep slopes, did not contain critical natural areas, and no grade changes were proposed.

## **REDEVELOPMENT AGENCY MEETINGS**

### **Deegan v. Perth Amboy Redevelopment Agency**

This case involved an action challenging the Perth Amboy Redevelopment Agency’s (“PARA”) resolution approving a redevelopment agreement with Kings Plaza LLC for a mixed residential/commercial project within an approved redevelopment area. Plaintiff claimed that PARA violated the Open Public Meeting Act when it adopted the resolution because of improper notice, and because of conflicts of interest involving the members of PARA. The Appellate Division rejected these arguments.

A municipal redevelopment agency is not “a municipal agency” subject to restrictions of the MLUL for voting purposes. N.J.S.A. 40:55D-5. The procedural requirements of the MLUL, N.J.S.A. 40:55D-10.2, do not apply to a redevelopment agency, which are subject to the Local Redevelopment and Housing Law. The Local Redevelopment and Housing Law does not require that members of the redevelopment agency absent from a prior meeting to certify that they have read a transcript of that meeting. Additionally, the Redevelopment Law does not require an evidentiary hearing or opportunity for public comment before the agency may approve a redevelopment project. The only procedural prerequisite for approval is compliance with the Open Public Meeting Act by giving adequate notice of the time, date and location of a meeting. If the redevelopment agency elects to conduct a hearing regarding a proposed redevelopment project, it does not result in imputed applicability of the procedural requirements of the MLUL.

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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