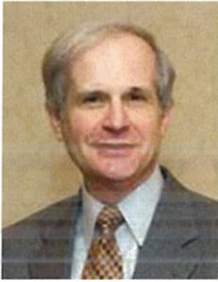


Legal/Legislative



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"GAP PERIOD" COUNTS IN CALCULATING MUNICIPAL FAIR SHARE OBLIGATION

In a victory for developers and affordable housing proponents, the New Jersey Supreme Court in a January 2017 decision held that municipalities have an obligation to satisfy unmet affordable housing obligations arising from 1999 through 2015, the so-called "gap period." The Court held that "the need of presently existing low- and moderate-income households formed during the gap period must be captured and included in setting affordable housing obligations for towns..." as there is no basis "that supports disregarding the constitutional obligation to address pent-up affordable housing need for low and moderate income households" that formed during the gap period.

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This gap-period need will be captured in a redefined "present need," which previously only included the calculation of overcrowded and deficient housing units but was expanded by the Court to include the gap-period need component. A contrary result would have inequitably allowed municipalities to write-off affordable housing units that were not previously addressed due to passage of time. Further developments are possible, as the Court welcomed legislative or executive action. Until then, the gap-period will need to be addressed in municipal affordable housing plans.

BUILDERS REMEDY LITIGATION – "TIME OF FILING" RULE

Hollyview Dev. Corp. v. Upper Deerfield

Developers pursuing builders remedy suits under the Mount Laurel doctrine should take care to actively pursue such actions if they intend to take advantage of benefits of the "time of filing" rule. The "time of filing" rule, recognized by earlier decisions, provides that courts will look to the zoning ordinances in effect at the time the developer initially filed its lawsuit, and disregard subsequent municipal actions to achieve compliance after the lawsuit was filed, in evaluating whether a municipality is compliant with its affordable housing obligations.

In an unpublished 2016 decision, the Appellate Division rejected the automatic application of the time of filing rule, and instead looked at the particular facts of the case to determine that application of the time of filing rule was

inappropriate. The builders remedy suit was filed in 1998 and the developer apparently did little to actively pursue the case. Hollyview filed a motion for summary judgment in 2013, claiming that the Township was not compliant with its affordable housing obligations when the case was filed in 1998. The Township argued it took various actions since 1998 to provide for affordable housing and that its actions were not a result of the Hollyview suit.

The court stressed the time-of-filing rule is appropriately applied when a municipality takes action to comply with its affordable housing obligations in direct response to a developers suit. However, where a developer "sits on its hands", and cannot demonstrate that municipal action was taken in response to its suit, the court would not apply the time of filing rule. The court noted the builders remedy is "a reward for the plaintiff who has 'endured intensive litigation and succeeded in vindicating the Mount Laurel right in the interest of the public.'" Given the 15 year delay in the present matter, the court concluded that evaluation of the Township's compliance with affordable housing obligations should be conducted under the time of decision rule, rather than at the time of filing of the suit.

Hollyview, though not precedential, is instructive on the handling of builders remedy suits and likely will be used by municipalities and builders remedy opponents to argue against automatic application of the time-of-filing rule.

Legal/Legislative *Continued*

WHEN IT COMES TO REMEDIATION, ALMOST IS NOT GOOD ENOUGH

NJDEP vs. Hood Finishing Products, Inc.

There are times when partial compliance with regulatory requirements is sufficient to establish good faith and avoid an enforcement action and the penalties that often go hand-in-hand with enforcement. Such is not always the case, however, in the context of remedial actions under the New Jersey Department of Environmental Protection ("DEP") Site Remediation Program. In an unpublished decision captioned NJDEP vs. Hood Finishing Products, Inc., the Court upheld a \$40,500 penalty assessment against Hood Finishing, which took certain steps to comply with remediation obligations under the Industrial Site Recovery Act ("ISRA") through a filing of a General Information Notice ("GIN"), but failed for nearly 10 years to implement and complete remediation at the site that was the subject of the ISRA case after it ceased its leasehold operations.

ISRA requires notification of the closure of an industrial establishment and completion of remediation as a condition of closing. Environmental remedial statutes, including ISRA, impose joint and several liability on property owners and their tenant operators. In a landlord/tenant scenario, both parties are responsible to the State for ISRA compliance, though parties may seek a determination of responsibility from DEP and DEP will look to the parties' lease documents to assign primary responsibility. Here, Hood ceased operations and claims to have filed the GIN with DEP in 2003, but did nothing else. The property owner, Berry-Somerset, LLC, notified DEP of the tenant's cessation of operations by filing a GIN and Preliminary Assessment report in 2004. Berry-Somerset later sold the property without having completed remediation to address environmental conditions that existed.

In response to a petition filed by the purchaser of the property in 2011, DEP determined that Hood and Berry-Somerset were jointly and severally liable, though Hood was primarily responsible for discharges that occurred during its period of operation, and the enforcement action and penalty assessment that was the subject of the court's decision was only assessed against the former tenant operator, Hood Finishing. Hood later hired an LSRP and conducted remediation in 2013, but its late compliance efforts were not enough to avoid enforcement and the penalty assessment.

This decision demonstrates the importance for parties engaged in industrial operations to take timely action to assure that ISRA is complied with to avoid added costs associated with enforcement actions for failure to timely comply. Property owners with tenant operators who are subject to ISRA or who engage in uses that may have some environmental concerns, but whose operations are not subject to ISRA, should ensure that their lease documents clearly establish responsibility for compliance with ISRA and/or addressing environmental concerns. Landlords should implement protocols and measures in their lease documents to ensure environmental compliance by tenant operators in a timely manner, and establish rights to take independent action and recovery costs from the tenant operator if the land owner must take independent action to address environmental concerns. Developers acquiring parcels with current or prior industrial operations should carefully evaluate ISRA compliance during the due diligence process.

WQMP

DEP adopted amendments to its Water Quality Management Planning ("WQMP") rules on October 6, 2016, effective November 7, 2016. The amended rules re-establish DEP's authority to grant amendments of County Water Quality Management Plans and Wastewater Management

Plans on a site specific basis and eliminate provisions of the 2008 version of the rules that mandated the withdrawal of wastewater services areas if the county or municipality with planning authority failed to submit or update water quality / wastewater management plans by required regulatory timeframes. Under DEP's 2008 WQMP rules, site specific amendments could not be processed if the applicable water quality / wastewater management plan was not current. Subsequent legislation allowed site specific amendments to be processed provided the applicable planning agency adopted or updated a wastewater service area map. That concern is eliminated under the current rules, and interested parties may seek and obtain site specific amendments on a project specific basis.

The amended rules include provisions for habitat suitability determinations ("HSD") and habitat impact assessments ("HIA"). HSD's allow an applicant to demonstrate that the exclusion of land from a sewer service area based on designation as an environmentally sensitive area because of designation as threatened or endangered species habitat was erroneous, and the land in question should be included in the sewer service area. The HIA process gives an applicant a mechanism to demonstrate the proposed project will avoid or appropriately minimize or mitigate impacts to protected species habitat, and to include the site in the sewer service area notwithstanding the existence of such habitat. These regulatory provisions will no doubt prove to be useful tools in addressing sewer service for proposed projects given the prevalence of protected species habitat mapped throughout the State under DEP's Landscape Project mapping.

