In the Zone

Fox Rothschild LLP
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Presented by the Zoning and Land Use Practice Group

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Chairmen's Message

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In New Jersey, major residential real estate developers historically have made business decisions in accommodating a municipality's demand that they contribute funds dedicated for off-tract recreational open space. On May 11, 2007, the Atlantic County, New Jersey Assignment Judge upheld the validity of two Ordinances previously enacted in Egg Harbor Township, requiring that those payments be made, and at significantly increased levels. For more on this subject, please review the article below, written by John Grossman, a partner in our Atlantic City office. This case represents another blow to the development community. The cost of developing housing in New Jersey continues to increase as a result of the court's upholding recreation and other type of exactions. These decisions directly conflict with the State's policy of providing affordable housing. New Jersey continues to condone policies that increase the cost of housing and make New Jersey a challenging place to live and work. The development community must continue to challenge all regulations which do little to advance health, safety or the public good, and are essentially disguised taxes on the development industry.

In this Issue:

Be Alert for Off-Tract Recreational Assessments

by John L. Grossman, Esq

It may have just become more expensive to develop residential neighborhoods in New Jersey. In a recent decision which is pending approval for publication, an Atlantic County Judge has upheld the validity of two ordinances enacted in Egg Harbor Township, New Jersey, which not only increased the required acreage for recreational open space in a major residential development, but also provided for increased in lieu payments which may be used by the Township for park and recreation purposes anywhere within the Township.[1] While developers historically have made business decisions to make similar payments, they now are faced with decisional law supporting the validity of those payments, and at increased levels.[2]

The case, *Builders League of South Jersey v. Egg Harbor Township, et al.*, remains pending in the Law Division in Atlantic County, New Jersey. The issues left to be determined concern only the validity of the amount of the *in lieu* contributions, which currently stand at $5,600.00 per lot.

The decision, rendered on May 11, 2007, came in response to a Motion for Summary Judgment filed by the Builders League, and a Cross-Motion for Summary Judgment filed by the Township. The Builders League sought to invalidate the Ordinances on the basis that they are *ultra vires* and unconstitutional. The Township sought to dismiss all Counts of the Builders League Complaint, except those challenging the validity of amount of the *in lieu* contributions; as noted, those issues have been preserved for further consideration.

In brief, the Ordinances allow the Township, as a condition of a development approval, to require a developer to either provide the required recreational open space within its development or, in the Township's discretion, to require payment of the *in lieu* fees, calculated on a per lot basis, to be allocated to the Township's general parks and recreation budget if the recreation needs of the proposed development and the Township would be better served. The Ordinances provide an exception to the above for developments in the Township's Regional Growth Areas. In those areas, the developer, rather than the Township, has the option to pay the off-tract assessment.[3]

The Builders League presented three essential arguments: (1) that these off-tract assessments are nothing more than impact fees intended to address the general recreation needs of the Township at large, thereby rendering them *ultra vires* and unlawful; it contended that those costs should be the responsibility of the Township, rather than of individual developers; (2) that even if the Court were to conclude that the Township had the general authority to impose the recreational requirements established by these Ordinances, the Township had failed to establish an essential nexus or perform an individualized assessment necessary to establish that a rough proportionality existed between the requirements of the Ordinances and the realistic recreational needs of the residential developments

[1] The first ordinance, No. 41 of 2004, was amended by the second ordinance, No. 60 of 2004, after review by and negotiation with the Pinelands Commission. For purposes of this Article, they will be collectively referred to as the "Ordinances."

[2] A contrary decision was recently rendered recently in a Law Division case in Ocean County, New Jersey, entitled *New Jersey Shore Builders Association v. Township of Jackson*.

[3] This exception came as the result of review by and input from the New Jersey Pinelands Commission, which was concerned that developers might not be able to maximize permitted densities; as a result, Ordinance 60 was enacted to provide this exception.

impacted by the terms of the Ordinances; and (3) that there is no statutory authority under the Municipal Law Use Law ("MLUL") for the imposition of the assessments; while there is statutory authority in the MLUL for municipalities to require *pro rata* contributions from developers, that authority is limited to street, water, sewer and/or drainage improvements necessitated by the developer's specific project.

The Court rejected each of those arguments. After an exhaustive statutory analysis, the Court found ample authority in numerous provisions of the MLUL authorizing a municipality to impose reasonable recreation and open space requirements in conjunction with major residential developments. The Court reasoned that the Builders League arguments, which equated the *in lieu* contributions to an imposition upon developers of the Township's responsibility to fund recreational facilities for all Township residents, ignored the fact that the thrust of the Ordinances was to address the increased recreational and open space needs necessitated by new residential development in the Township. It was not impressed by the fact that those contributions may be used by Township residents other than those individuals whose residential development generated the contributions in the first place. The Court believed that simply because an *in lieu* contribution may be used for off tract recreation facilities does not lessen the impact upon recreational and open space needs generated by new residential development.

The Court also reviewed pertinent elements of the Pinelands Protection Act and the New Jersey Administrative Law regulations implementing the Act's Comprehensive Management Plan, finding the Ordinances to be consistent with them. It also found that the Pinelands Commission's review and certification of the Ordinances (after the exception was carved out in Ordinance No. 60) did not conflict with any provisions of the MLUL, which itself provides ample authority for municipal zoning ordinances to impose recreational and open space requirements on major residential developments in non-Pinelands areas. As the Court stated:

> As to a developer's option to make an in lieu contribution for recreational needs when developing property in the Pinelands Regional Growth Area, such option does not offend any provision of the MLUL. A developer in the Township's RGA zones cannot be required by the Township to make an in lieu contribution. Rather, whether to do so is at the option of the developer. That the in lieu contribution will be utilized for off-tract recreational development is of no moment. The Pinelands Commission has certified Ordinance 60 in full recognition of the fact that a developer has the option to either provide on-site recreational amenities or make an in lieu contribution. In fact, Ordinance 60 which amended Ordinance 41, to provide the developer with the option of determining to make an in lieu contribution in the RGA districts apparently resulted after various discussions between the Township and the Pinelands Commission staff. The Commission staff expressed concern that Ordinance 41 could negatively impact a developer's ability to achieve the maximum densities permitted by the Township's Zoning Ordinance.

The Court also rejected the Builders League arguments on nexus and found the requirements to be proportional. Noting that the *in lieu* contributions are fixed and predictable, rather than being established by a negotiated, bargained for amount tantamount to a *quid pro quo* for development approvals, the Court distinguished them from assessments found to be offensive in other cases.

The Court has not yet been presented with notification one way or another as to whether the Builders League will appeal this decision. If the decision is neither appealed nor reversed, it bodes ominously for major residential developments, not only in the Township of Egg Harbor, but also in other areas where recreational and open space needs are at issue.

For more information, please contact John Grossman at 609.572.2322 or at jgrossman@foxrothschild.com.

Recent Court Decision

Burgoyne v. Pinecrest Community Association
____ A.2D ___ (2007); WL 1346663
(Pa. Super.); filed May 9, 2007

by Herbert K. Sudfeld, Jr., Esq.

This case involves a number of procedural issues but also sets the standard by which a court is to evaluate the actions of a Community Association Board of Directors as being within the authority granted to the Board by the Uniform Planned Community Act, 68 Pa.C.S.A. § 1501 et seq. Here the Superior Court determined that 68 Pa.C.S.A. § 5303 of the Act governed the standard of review of decisions made by the Board. Section 5303 states:

> … In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties, including duties as members of any committee of the board upon which they may serve, in good faith; in a manner they reasonably believe to be in the best interests of the association; and with care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances. […].

The Court found that the case of *Lyman v. Boonin*, 535 Pa. 397, 635 A.2d 1029 (1993) holding that judicial relief from the acts of condominium governing bodies must be based upon fraud, bad faith, or self dealing, did not apply as the Court noted that the Supreme Court stated therein that the above rule was applicable in situation *not* covered by the Uniform Condominium Act. Since the Superior Court found that Section 5303 of the Act governed the standard, Lyman was deemed inapplicable.

For more information, please contact Herbert Sudfeld at 215.918.3507 or at hsudfeld@foxrothschild.com.

Condo Corner\New Jersey

by John P. Kaplan, Esq.

The New Jersey Appellate Division, in an unpublished decision, upheld a the Superior Court's findings in *Golomb v. Warwick Condominium Association, Inc.*, 2007 WL 1215083. This action, initiated by former owners of condominium units in the Warwick Condominium, and therefore former members of the Defendant Warwick Condominium Association, decided the Defendant's liability to reimburse the Plaintiffs from insurance proceeds to repair storm damage recovered after Plaintiffs had sold their units. Initially, after being denied coverage, the Defendant authorized three special assessments to all unit owners to repair the damage. After the suit was filed, pursuant to the condominium's bylaws, the Board of Trustees appointed an insurance trustee, that in-turn, issued a report recommending that the proceeds be held in a reserve account for future use.

N.J.S.A. 46:8B-24(a) states that unit owners directly affected by damage or destruction of any improvements on the condominium property shall be assessed on an equitable basis for any deficiency and shall share in any excess of insurance proceeds. Not surprisingly, both the Superior Court and Appellate Division found these insurance proceeds to be in excess, and the Court ordered the Defendant liable the Plaintiffs.

However, citing N.J.S.A. 46:8B-24(c), which authorizes the master deed or the by-lays to "make other and different provisions covering the eventualities set forth in paragraph (a)" cited above, the Court noted that a condominium association may be able to provided that insurance proceeds need not be used to repair a covered loss. In the absence of such a provision, the Court stated that a condominium association is not permitted to appropriate the insurance proceeds for purposes other than reimbursing those who had funded the repair of the covered losses by way of assessment.

If not already stated, and a developer or condominium association so desires, the master deed or by-laws of a condominium association should clearly state that any insurance proceeds, or those in excess of the cost of repairs or replacement, shall be deposited in the reserve account for future use.

For more information, please contact John Kaplan at 609.572.2272 or at jkaplan@foxrothschild.com.

Condo Corner\Pennsylvania

by Carrie B. Nase, Esq.

When all of the land is gone, how will developers provide homes to those individuals who desire to be homeowners? Developers are turning to existing buildings they can convert into condominiums, such as vacant warehouses or occupied apartment buildings. If a developer converts an existing apartment building into condominiums, there is a specific procedure they must follow under the Pennsylvania Condominium Act. The developer is required to give the existing tenants notice at least one year prior to the date they intend to convert the apartments to condominiums thereby requiring the tenants to vacate the premises. At least thirty days prior to giving the tenants notice of the conversion, the developer is required to have a meeting with the tenants and explain to them their rights as a tenant during the conversion. For example, under the Pennsylvania Condominium Act, the developer shall offer to convey each unit to the tenant who leases that unit for a period of six months following the date of the conversion notice. If the tenant fails to purchase the unit during this time period, the developer may offer to sell the unit to a third party; provided, however, the developer may not offer the unit for sale on terms more favorable than the terms offered to the tenant.

If you are interested in learning more about condominium conversions, please contact Carrie B. Nase at 215.918.3615 or at cnase@foxrothschild.com.

Environmental Corner

Bucks County Redevelopment Authority Updating Its County-Wide Brownfield Inventory

by M. Joel Bolstein, Esq.

The Bucks County Redevelopment Authority (BCRDA) has been a national leader with regard to reclaiming old industrial sites, referred to as brownfields. In 1997, it received one of the first brownfield pilot grants to identify sites for assessments and remediation in the five communities comprising the Lower Bucks Enterprise Zone (Bristol Borough, Bristol Township, Bensalem Township, Tullytown Borough and Morrisville Borough). Several years ago, the BCRDA implemented a program to inventory brownfield sites throughout Bucks County. BCRDA's brownfield inventory currently lists more than 225 sites located throughout 20 townships and 17 boroughs. Recently, the U.S. EPA awarded BCRDA an additional $200,000 to update and extend the scope of the brownfield inventory to include smaller sites contaminated with petroleum products, such as former service stations. As part of the new inventory effort, the BCRDA is asking municipalities and property owners to help identify sites that have been vacant or underused and represent good opportunities for redevelopment. In analyzing whether sites are good candidates for inclusion on the brownfield inventory, the BCRDA considers whether the property is privately owned, and if so, whether the owner is willing to have the property included on the list and would be willing to provide access to the BCRDA to conduct an assessment. Other considerations include the size of the property, its proximity to major highways, availability of rail service, availability of public transportation, and the known or unknown condition of the property. After the BCRDA compiles the new inventory, it will score and rank the sites based on their redevelopment potential. A portion of the U.S. EPA brownfield grant will be used to perform Phase I and Phase II assessments on up to 10 sites with the highest scores. If the sites are vacant or blighted, the BCRDA will work with the local municipalities to get access to perform the assessments. If the sites are privately owned, the BCRDA will contact the property owners to request access. No assessment will be performed if the property owner doesn't consent to having the BCRDA perform the assessment.

Fox Rothschild serves as the outside environmental solicitor to the BCRDA and is assisting with the preparation of the new brownfield inventory. If you would like further information about the BCRDA's brownfield program or the preparation of the brownfield inventory, or if you have a site that you think should be considered for inclusion on the brownfield inventory, please contact Joel Bolstein at 215.918.3555 or at jbolstein@foxrothschild.com. Additional information can be found on the BCRDA's website, http://www.bcrda.com.

Legislative Update\Pennsylvania

Proposed Amendment to Pennsylvania Municipalities Code

by David H. Comer, Esq.

House Bill No. 299, introduced February 7, 2007, and referred to Committee on Local Government that same day, proposes to amend Section 609(b) of the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. § 10609(b), further providing for the enactment of zoning ordinances. Currently, the MPC prescribes certain notice requirements before a municipality votes on the enactment of a zoning ordinance amendment. Additional requirements apply when the proposed amendment involves a zoning map change. To that end, Section 609(b)(2) of the MPC currently states that "[a] good faith effort and substantial compliance shall satisfy the requirements of this subsection." House Bill No. 299 proposes to eliminate the foregoing language and replace it with the following: "No proposed amendment involving a zoning map change, to which the notice requirements of this clause apply, shall be valid unless the municipality complied with the notice requirements of this clause. The burden of proving compliance shall be on the municipality." We will keep you posted as to any developments regarding this proposed amendment.

For more information, please contact Dave Comer at 215.661.9476 or at dcomer@foxrothschild.com.

Legislative Update\New Jersey

Will The MLUL Go Green?

by Jeffrey M. Hall, Esq.

The "Green" movement is rapidly permeating land development and use in New Jersey with the next step potentially being a change to New Jersey's Municipal Land Use Law and municipal ordinances. This article will provide a brief overview of this development.

According to the U.S. Census Bureau, the United States is rapidly approaching a population of 300,000,000 people with New Jersey approaching 9,000,000. This growth puts increasing demands on natural and man-made resources resulting in the specter of demand outstripping supply. This phenomenon, along with global warming, has caught the Legislative eye. Thus, there is a trend toward new and renewable sources of energy and recyclable building materials and, hence, environmentally- friendlier buildings.

In response, a Washington, DC based non-profit program known as the U.S. Green Buildings Council was established. The Council is comprised of more than 9,000 organizations from every sector of the building industry. Its stated purpose: to transform the building marketplace to sustainability. This organization developed a rating system for environmentally friendly buildings known as "LEED" or "Leadership in Energy and Environmental Design." The LEED program is a roadmap for measuring and documenting success for every building type and phase of a building

lifecycle in a variety of areas such as: sustainable sites, energy and atmosphere, water efficiency, indoor environmental quality, and materials and resources.

The New Jersey Legislature has taken note. On July 28, 2006, Senators Karcher, Singer and Smith introduced S2150 which authorizes municipal planning boards to adopt green buildings and an environmental sustainability plan element to their master plans. A master plan is a municipality's land development planning document which includes several elements including land use, transportation circulation, historic preservation and conservation of natural resources. This legislation would create an entirely separate element for green building and environmental sustainability.

A companion Bill, A-4212, has been introduced in the Assembly. This bill was assigned to the Assembly's Environmental Committee. It is expected to be soon heard by the full Assembly. The proposed legislation reads as follows: "(15) A green buildings and environmental sustainability plan element, which shall provide for, encourage, and promote the efficient use of natural resources; consider the impact of buildings on the local, regional and global environment; allow ecosystems to function naturally; conserve and reuse water; treat storm water on-site; and optimize climatic conditions through site orientation and design."

The Green revolution will continue apace. Next month we will talk about municipalities' efforts to adopt ordinances mandating sustainable building standards.

For more information, please contact Jeff Hall at 609.895.6755 or at jhall@foxrothschild.com.

Update

The Vesting Provisions of the MPC Might Save Developers Money

by Andrew W. Bonekemper, Esq.

By remembering to check the status of ordinances at the time a development plan was filed, a developer may be able to save anywhere from a little extra work to hundreds of thousands of dollars on its development. Under Section 508(4)(i) of the Municipalities Planning Code ("MPC"), from the time an application for subdivision and land development is filed, no change or amendment in the zoning, subdivision or other governing ordinance shall affect the decision on such application adversely to the applicant, and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans ***as they stood at the time the application was duly filed***. Although it is commonly remembered that a plan is vested under the Zoning Ordinance and SALDO as of the date it is filed, developers should not overlook the "other governing ordinance" provision of Section 508.

In *Board of Commissioners of South Whitehall Township v. Toll Brothers, Inc.*, the Commonwealth Court held that a developer was vested against an increase in the sewer and water tapping fees that occurred after its plan was filed. The "other governing ordinance" language has been found to apply to certain fee schedules and fire code provisions. At a time when the market is tight, the vesting provisions of Section 508 might be able to save a developer significant expense.

For more information, please contact Drew Bonekemper at 215.661.9412 or at dbonekemper@foxrothschild.com.

Recent Approvals:

- Obtained approval from the Ambler Borough Council in **Ambler Borough, Montgomery County**, to amend their redevelopment overlay district to allow transportation oriented development in their industrial zoning district, subject to certain conditions. We also obtained, on the same night that we obtained approval of the zoning text amendment, conditional use approval to then allow Main Street Development Group to construct 58 townhouse units on a property zoned industrial and adjacent to the SEPTA train station. We are now working to secure the remaining land use approvals for the client to commence construction.
- Obtained front and side yard variances, as well as a variance to expand a non-conforming building more than 25%, from the Upper Gwynedd Township Zoning Hearing Board in **Upper Gwynedd Township, Montgomery County**, to allow the construction of an addition to a non-conforming office building.
- Obtained a variance from the maximum building height from the Whitemarsh Township Zoning Hearing Board in **Whitemarsh Township, Montgomery County**, to allow an elementary school to enclose a courtyard.
- Obtained variances from the maximum number of permitted signs and sign area limitations from the Pottstown Borough Zoning Hearing Board in **Pottstown Borough, Montgomery County**, to allow the installation of various wall signs, pole signs and pedestrian directional signs on two properties.
- Obtained a variance from the Warwick Township Zoning Hearing Board in **Warwick Township, Bucks County**, to allow a freestanding sign to be located off-site on a property not owned by camp/conference center advertised on the sign.
- Obtained a variance from the Whitpain Township Zoning Hearing Board in **Whitpain Township, Montgomery County**, to allow the expansion of a parking lot onto an adjacent parcel under separate ownership.
- Obtained several use variances from the Philadelphia Zoning Board of Adjustments in the **City of Philadelphia** to permit a client to proceed with a mixed-use, residential, office and retail project in the "Brewerytown" section of Philadelphia. The parcel is zoned G-2 (General Industrial), a category which does not permit the requested uses. The variance was issued after a demonstration of the benefits to the local neighborhood and testimony in support by the local residents association and the district City Councilperson.

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