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Land Use Solutions

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IN THIS ISSUE

A New Day Dawns in Trenton—Real Estate Industries Looking Forward to Sunshine

As we continue efforts to crawl out from under the negative economic conditions that have plagued the real estate development community for years, we place considerable hope in the policies brought to the table by newly-elected Governor Chris Christie.

Governor Christie certainly got off to a good start with his first set of executive orders, especially those that seek to reduce new regulations and cut red tape. No industry can operate in an environment of constantly changing rules, and that is precisely what the development industry has faced in recent years, in addition to confronting an economy in tatters.

The past year has already brought us some very positive legislative developments, such as the law allowing for conversion of age-restricted developments into communities that can welcome families with children, and the law further extending the relief offered by the Permit Extension Act. Those bills were signed into law by the prior administration, and it is hoped that the new governor continues to sign bills aimed at assisting builders in their efforts to succeed despite the current economic conditions.

We will almost certainly be seeing substantial changes in the "Mount Laurel world" quite soon, as both the Legislature and Governor Christie are pursuing policies to eliminate the Council on Affordable Housing and replace it with a system of constitutional compliance that may or may not sufficiently combat municipal exclusionary efforts. Time will tell.

In this—our annual newsletter timed for release at the Atlantic Builders Convention—we summarize the legal developments of greatest interest to the real estate industries, with special attention paid to suggested ways in which to best cope with the current negative economic conditions. We hope you find this issue informative and helpful and, as always, we welcome your questions and comments as we all march forward in the Christie era.

– Thomas F. Carroll, III

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Editor, 2010 Special Builders Issue

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Hill Wallack LLP is a Master Sponsor of the New Jersey Builders Association. To receive further information about any of the articles contained in this issue, you may contact the authors directly at (609) 924-0808 or by e-mail at info@hillwallack.com.

Important New Law Allows for Conversion of Age-Restricted Developments

by Thomas F. Carroll, III, Esq.

After considerable legislative wrangling and a conditional veto by Governor Jon Corzine, the new law allowing for conversion of certain age-restricted developments became effective on July 2, 2009.

Most approved age-restricted developments are eligible for conversion under the law. The law recognizes that we have an over-supply of age-restricted housing, and further recognizes that allowing for conversion of age-restricted developments will provide an economic boost in these most difficult economic times, as construction of developments for families may now take place. This article summarizes the new law, and provides guidance as to how developers and builders can seek to take advantage of the law.

Which Developments Are Eligible for Conversion?

The new law applies to age-restricted developments, i.e., those developments approved under provisions essentially limiting occupancy to those who are 55 years of age or older. Upon conversion, that age restriction would be lifted, and the housing units in such developments could be marketed to families and other buyers of any age.

Any age-restricted development that received preliminary or final approval prior to the effective date of the act, i.e., prior to July 2, 2009, is eligible for conversion. Applications to convert the development may be submitted until August 1, 2011, although the act also provides that approving boards (e.g., planning boards or boards of adjustment) may extend that application window for an additional 24 months.

The act further provides that applications for conversions may be submitted only for those age-restricted developments in which no units have been sold, and no deposits are being held. Thus, partially sold age-restricted developments are not eligible for conversion under the bill (although there may be ways to do so outside of the ambit of the bill).

What's in It for Builders?

Prominent housing economists have concluded that there is a "glut" of approved age-restricted developments in New Jersey. In certain areas of the state, it is envisioned that it will be decades before there is a housing demand able to absorb the already approved age-restricted developments throughout New Jersey. On the other hand, economists envision that the market for non-age-restricted housing will be much stronger, and will rebound much sooner.

Thus, the new law allows builders to substitute viable developments for the age-restricted developments that would otherwise have little or no value for decades. The law also allows for a straightforward conversion application process, and expedited litigation procedures should the same be necessary, so that eligible developments can be converted quickly.

What's in It for Towns?

Most importantly, the act provides that 20 percent of the total number of units must be made affordable to low and moderate income households, thereby assisting municipalities in meeting their *Mt. Laurel*/COAH obligations. The act further provides that resultant low and moderate income units are to "automatically" be eligible for credits toward the municipality's COAH obligation. Moreover, the act specifies that municipalities will incur no "growth share" fair share obligation as the result of the construction of the market rate or lower income units in converted developments (to the extent that the "growth share" concept remains viable).

The 55+ conversion law also allows municipalities to provide for "preferences" for the lower income units, e.g., preferences for up to 50% of the lower income units for those who already live or work in a given town. Such preferences, while often desired by municipalities, have always been viewed as legally suspect, but the new law at least provides for a statutory basis for such preferences.

How Does the Conversion Process Work?

To seek conversion of an age-restricted approval, the applicant must file an application with the board that approved the development initially, requesting that the approval be amended. The new law specifies that the non-age-restricted developments sought per such conversion applications are to be considered applications for permitted uses, thereby eliminating the need to ask for "use variances."

Documentation supporting the following is to be submitted in support of a conversion application: (1) satisfaction of the RSIS parking standards; (2) revision of recreational and other amenities as needed to meet the needs of the converted development; (3) adequacy of the water supply to handle the needs of the converted development; and (4) adequacy of the sanitary sewer systems to handle the needs of the converted development.

If additional water, sewer treatment systems or parking are required to meet the needs of the converted development, and such additional water, sewer or parking cannot be

continued on page 10

'In certain areas of the state, it is envisioned that it will be decades before there is a housing demand able to absorb the already approved age-restricted developments. … On the other hand, economists envision that the market for non-age-restricted housing will be much stronger, and will rebound much sooner.'

'Green' Initiatives by State and Local Government Present Unique Development Opportunities

by Henry T. Chou, Esq.

We all recognize that life in the 21st Century will come with dramatic changes in the way we live and consume natural resources. In addition to our quest to find environmentally-conscious alternative forms of energy, we are gradually developing a culture for conserving energy. Despite the worst global recession in a lifetime, both the public and private sectors recognize that change is inevitable and are implementing new policies and innovations that will both benefit the environment and our standard of life.

In New Jersey, the State and municipal governments are ahead of the curve and have been busy passing legislation that will both spur development and encourage "green" building techniques.

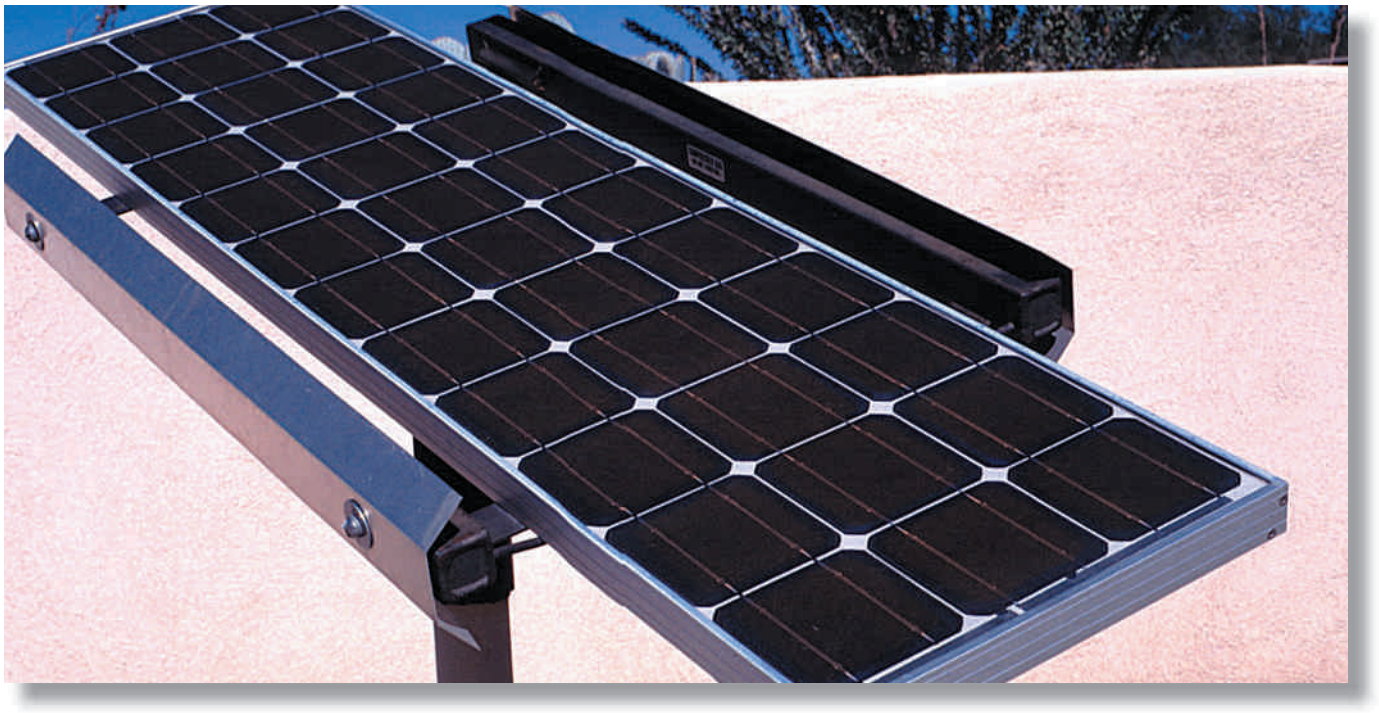
'The ability to adopt a "Green Buildings and Environmental Sustainability Element" of a municipal master plan gives planning boards the ability to brainstorm and consider new technologies as they become available.'

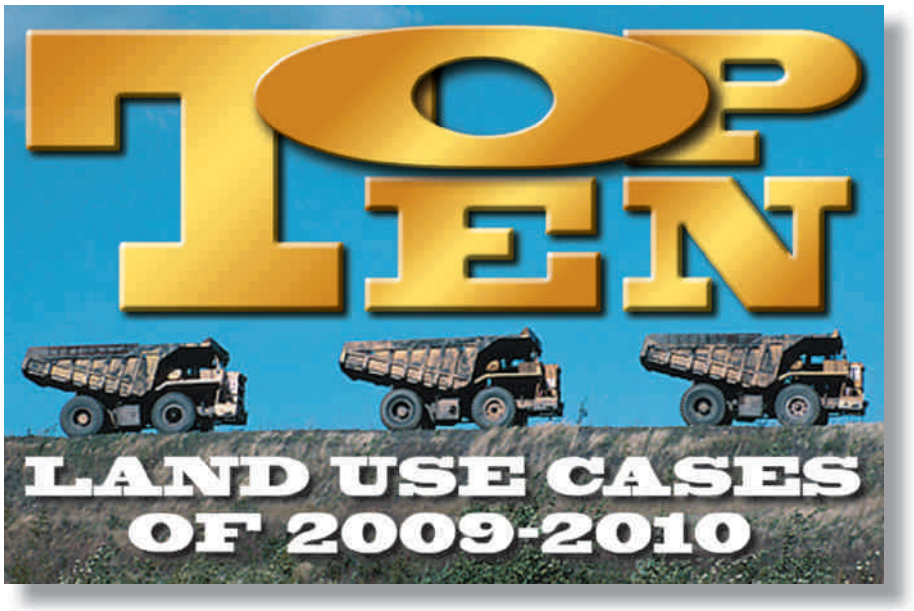
New 'Green' Initiatives by State Government

Since all local land use regulation powers are derived from the Municipal Land Use Law (MLUL), the Legislature was quick to realize that it must amend the MLUL to give local planning boards the ability to begin long term planning for "green" development. Thus, among the first steps taken by the Legislature in 2008 was to amend the MLUL to give planning boards the ability to adopt a "Green Buildings and Environmental Sustainability Element" of a municipal master plan. While general in nature, this measure gives planning boards the ability to brainstorm and consider new technologies as they become available.

The State was also quick to pick up on consumer interest in residential solar energy when, in early 2009, the Legislature passed a bill that requires builders of new residential developments of 25 units or more to offer solar panel systems where "technically feasible." Additionally, it passed a bill allowing property owners in commercial zoning districts to install and operate renewable energy facilities such as solar panel fields and wind farms on tracts of 20 acres or more. The farming community in New Jersey

continued on page 11





by Michael J. Lipari, Esq.

This article summarizes ten of the most significant decisions issued since last year's Atlantic Builders Convention.

Utilities Reimbursements—
In the Matter of Centex Homes, L.L.C.

The Appellate Division ruled against the New Jersey Board of Public Utilities (BPU), invalidating regulations designed to prevent public utilities from allegedly "subsidizing" new service extensions in areas not designated for growth under the State Planning Act. The court emphasized that the State Planning Act itself, as well as BPU executive orders encouraging compliance with the State Planning Act, cannot be considered "enabling legislation" to allow BPU to make land use decisions. The decision essentially removed an additional hurdle for developers with land located in non-growth areas, and reimbursement for extending utilities in such "non-growth areas" is once again available.

Open Space—
New Jersey Shore Builders Association v. Township of Jackson

The New Jersey Supreme Court held in this case that municipalities did not have the authority under the MLUL to promulgate ordinances that conditioned development approvals on a developer's setting aside land to be used for open space or recreational facilities, or to pay an assessment in lieu of such a setaside. The Court suggested that a proper way for municipalities to encourage open space or areas used for public purposes may be through the use of planned development zoning powers.

'The decision essentially removed an additional hurdle for developers with land located in non-growth areas, and reimbursement for extending utilities in such "non-growth areas" is once again available.'

Tree Removal—
New Jersey Shore Builders Association v. Township of Jackson

In this matter, the New Jersey Supreme Court ruled that a tree removal ordinance was an environmental regulation and not subject to the limits contained in the MLUL. The ordinance included a tree-replacement fee, an escrow fund and required planting of trees on public property when replanting at the original location was not feasible. It was upheld as a valid exercise of the Township's police power.

Affordable Housing—
Homes of Hope, Inc. v. Eastampton Township Land Use Planning Board

Affordable housing advocates were pleased with the Appellate Division ruling that extended the "inherently beneficial use" variance status to a 100 percent affordable housing development that was not part of the Township's COAH compliance plan. Inherently beneficial uses such as hospitals, schools, and now affordable housing units, presumptively satisfy the "positive criteria" required when seeking a use variance.

Prior to this ruling, developers of proposed affordable housing units had to demonstrate that the site was specially suited for the proposed use, which is not always easy to establish. Applicants under this decision must still satisfy the "negative criteria" set forth in the variance statute (essentially whether there is substantial detriment to the neighborhood or master plan).

continued on page 12

Navigating Through the Redevelopment Obstacle Course

by Kenneth E. Meiser, Esq.

'Acquiring redevelopment approvals has become challenging as the courts provide objectors with more and more avenues of attack. ... However, lessons have been learned to increase the chances of success in future redevelopment cases.'

It has been almost three years since the New Jersey Supreme Court issued its controversial redevelopment decision in *Gallenthin v. Paulsboro.* Many judges throughout the state have interpreted the decision as an order to take a very skeptical look at designations of areas in need of redevelopment. As a result, numerous designations have been vacated or sent back to the municipal planning board for reconsideration. However, lessons have been learned to increase the chances of success in future redevelopment cases.

Preparing Area in Need of Redevelopment Studies

Most municipalities contract a planning consultant to prepare a redevelopment study. Unless the planner has the funding to do a thorough study of the potential redevelopment area, taking into consideration all the factors the courts have demanded, the odds are stacked against redevelopment success if the study is challenged. The planner in *Gallenthin* wrote three paragraphs to justify classifying the subject property as "in need of redevelopment." Today, there are numerous factors that have been articulated in court decisions —some of which are complex—that should be considered as background to a proper redevelopment designation. Relevant evidence may include housing code inspections, proof of tax reductions, tax appeals and tax delinquencies. The police chief, fire chief, tax assessor and structural engineer may weigh in on whether and why an area qualifies as "blighted."

A planner, before finalizing an "area in need" report, should be questioned by friendly counsel as intensively as if the planner were testifying that day as a key witness in a major trial. The planner's testimony about his or her report before the planning board is the time the case is most likely to be won or lost. The planner's report should be submitted to the planning

continued on page 13

Building in 'Developed' Communities

by Stephen M. Eisdorfer, Esq.

Over the next several years, some of the most attractive opportunities for building housing will be in communities that are already largely developed.

These communities have public water and sewer and existing public amenities that would support the construction of multi-family housing, including mid-rise apartment buildings. Public policy—as reflected in the State Development and Redevelopment Plan (State Plan)—favors this type of development because it avoids what has been labeled "suburban sprawl" and minimizes the impact on sensitive environmental resources.

Nonetheless, local opposition—both from elected officials and organized neighbors—has historically made these projects difficult. New tools are now available that may enable builders to overcome this opposition.

Answering Objections to Multi-Family Housing

The principal objections to multi-family housing in developed communities are traffic, parking, appearance, and the impact on the public schools. A builder must address the first two of these objections by sound engineering and showing the project complies with the uniform statewide Residential Site Improvement Standards (RSIS). The third—visual impact—can often be overcome by good design.

The final objection—impact on the public schools—is the most difficult because it does not depend on the particular facts of your project. It is a generic objection to all new residential development. Municipal officials often estimate the number of additional public school children as high as two per dwelling unit and estimate alleged "costs of development" to the town accordingly.

A builder may legitimately insist that, in reviewing a development application, a zoning board or planning board is forbidden from even considering the impact of a project on the public schools. Fifty years ago, the New Jersey Supreme Court held that a local board cannot grant or deny an application because of the number of children who might occupy the housing units or attend the local public schools. The Supreme Court has never deviated from this legal principle.

Where the builder chooses to address the issue, a recent study commissioned by the Office of Smart Growth provides compelling data to allay the fears of municipal officials. This report, entitled "Who Lives in New Jersey Housing? A Quick Guide to New Jersey Residential Demographic Multipliers," demonstrates that the impact on the schools of multi-family development is much lower than commonly thought.

For example, two-bedroom units in multi-family buildings typically send only 13 children to the public schools for every 100 units. The impact is even lower for premium-priced condominium units. Moreover, for housing built in the immediate

continued on page 14

'…(L)ocal opposition—both from elected officials and organized neighbors—has historically made these projects difficult. New tools are now available that may enable builders to overcome this opposition.'

Court Rules That Realty Transfer Fee Does Not Apply To Nominal Transfers to Related Entities

by Michael J. Lipari, Esq.

'The New Jersey Tax Court recently held that transfers of unencumbered property between related entities for consideration of less than $100 are exempt from the Real Estate Transfer Fee.'

Transfers of real estate, especially those typically associated with single-asset entities, may be exempt from the often onerous Realty Transfer Fee (RTF). The New Jersey Tax Court recently granted summary judgment in favor of the buyers and sellers of real estate and held that transfers of unencumbered property between related entities for consideration of less than $100 are exempt from the RTF. The court rejected the Division of Taxation's position that the grantor should be taxed based upon the benefit conveyed to the grantee, finding that rationale contrary to the express language of the statute.

In *Mack-Cali Realty, LP v. Clerk of Bergen County,* plaintiff Mack-Cali transferred two separate properties to two separate LLC's in which Mack-Cali was the sole member. Each of the two unencumbered properties was transferred for consideration of $10.00. The deeds were presented to the Clerk of Bergen County for filing, but promptly returned for failure to pay a realty transfer fee based upon the Clerk's opinion that consideration was derived from the assessed valuation of the properties. Mack-Cali and its two LLC's filed suit against the Clerk of Bergen County and the Division of Taxation alleging that the RTF statute exempts transactions under $100.

The court held that transfers of real estate for consideration of less than $100 are excluded from the RTF pursuant to the express statutory language. The RTF statute defines consideration in terms of "the actual amount of money and the monetary value of any other thing of value constituting the entire compensation paid or to be paid for the transfer of title… including the remaining amount of any prior mortgage…." In other words, consideration is comprised of elements that are directly given to the seller as part of the exchange, plus encumbrances.

The Division further argued that one of its regulations explicitly subjects transfers of real estate between related entities to the RTF based upon the assessed value. The Tax Court was not persuaded and held that, even if the regulation was not adopted after the attempted filing of the deed, the regulation was contrary to the express language of the RTF statute. Since the properties were unencumbered and sold for $10.00, the RTF did not apply.

In a down economy, it is typical that individuals or entities owning more than one tract of real estate will protect against creditors by forming single asset entities that would not be subject to liability beyond the entity assets. The recent Tax Court ruling in *Mack-Cali* provides another incentive to seek these protections without being subjected to burdensome taxation. ■

Preparation for Confrontational Land Use Application Hearings

by Donald R. Daines, Esq.

Whether it involves a ten lot single family subdivision, or 300,000 square feet of commercial/ retail space, NIMBY's ("Not In My BackYard") have become more organized and sophisticated, especially with the increased use of the Internet with its mass e-mailing capability, forums, websites, etc. No matter what the proposed development entails, there inevitably seems to be an organization called "SAVE (*fill-in the blank*)" that opposes it. From High Point to Cape May, there are local, single-issue groups in each municipality as well as larger statewide organizations dedicated to opposing anything and everything.

Dealing With Objectors

Often viewing themselves to be the "Minutemen" of protecting the "public" interest, these groups zealously work to know as much about the proposed development as the developer. Even though many members may have just recently moved to the community, they adopt an attitude of "Now that I'm aboard ship, let's pull up the plank so that no one else comes aboard."

The worst thing a developer can do is to underestimate these objector groups. The second worst thing is to treat them with contempt, disrespect or hostility. The challenge throughout the hearings and proceedings is to stay focused on the merits of the application and make certain that the record being created before the planning board or the zoning board of adjustment contains the substantial credible evidence needed to support an approval of the application.

It is important to remember that the individual members of the local land use boards are volunteers—private citizens fulfilling their civic commitment to serve the community. At least two nights a month, these resident volunteers work late into the night listening to testimony; looking at exhibits; reviewing reports and memoranda about engineering, traffic, environmental, storm water management, etc.

The approval and hearing process can be very frustrating, time-consuming and expensive even without opposition. But with so many organized objectors, there can be four hours of cross-examination for every one hour of direct testimony. Although the Municipal Land Use Law empowers the chairman to exclude "irrelevant, immaterial or unduly repetitious evidence," this power is rarely exercised for fear of the board appearing to be too partial to the developer or insensitive to the objector's arguments.

The number of objectors and objectors groups will only increase as developments are proposed in the "growth areas" where there already

continued on page 15

'NIMBY's ("Not In My BackYard") have become more organized and sophisticated, especially with the increased use of the Internet with its mass e-mailing capability, forums, websites, etc.'

Important New Law Allows for Conversion of Age-Restricted Developments *(continued from page 3)*

provided, the number of units is to be reduced. If additional parking is required and the impervious coverage is increased by more than one percent, the storm water system calculations and improvements will have to be revised accordingly.

The act provides that applications for conversion "shall be approved" if the requirements of the bill are satisfied and "the conversion can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance…" The precise meaning and import of the latter language is somewhat unclear, and future applications for conversion will help in defining its contours. However, the legislative intent of the bill is to allow for the elimination of the age-restriction limitation and its replacement with a development available to all, including families with children. It is therefore not envisioned that courts will allow the denial of conversion applications simply because families with children will now be allowed to occupy the converted housing units.

Additional Requirements

The bill further provides that a converted development "shall also conform to any requirements for, and limitations on, size and square footage imposed pursuant to a preliminary approval." However, the act also states that "any floor plans of the dwelling units may be revised without requiring any further approving board approval or review."

The previously approved subdivision or site plan layout may be "reasonably revised" per the bill, in order to accommodate any additional parking, recreation and other amenities, infrastructure enhancements, a need to reduce the number of dwelling units, height requirements, a "revision to dwelling footprints that do not modify square footage of the development or the individual buildings," or a need to construct the lower income units as attached housing. The bill further allows for the construction of the lower income units in a separate section under certain circumstances, and a separate management entity if required.

The bill also states that the "size, height, floor area ratio, number of bedrooms and total square footage of buildings established as part of a preliminary or final approval for an age-restricted development shall not be increased, but may be decreased," although the number of bedrooms for the lower income units may be increased within the footprint to meet state regulatory requirements for such units.

Expedited Approval Process

Reviewing boards have a period of 30 days following the submission of a conversion application to decide whether an application is "complete," i.e., whether documentation concerning the four issues noted above has been provided. If a board fails to make any completeness determination within that 30 day period, the application will be deemed complete.

The reviewing boards will then have a period of 60 days within which to decide whether to approve a conversion application, unless that time period is extended with the consent of the applicant. Conversion applicants are not to be charged application fees, although reasonable escrow fees may be charged. Boards must then issue resolutions memorializing their approvals or denials within the time set forth in the Municipal Land Use Law, i.e., within 45 days.

Expedited Judicial Proceedings

Appeals contesting boards' denials of conversion applications, or appeals contesting denials with unacceptable conditions, must be filed within 30 days. Those appeals are, per the law, to be heard "in a summary manner." Such appeals (complaints to be filed with the courts) are to include copies of the plans and reports that were filed with the reviewing board, along with a transcript of the proceedings and any other items filed with the board.

A court hearing such appeals shall consider the reasonableness of any adverse board decision and, upon finding that a conversion should have been approved, the court is to instruct the board to approve the converted development, along with any reasonable conditions of approval the court deems necessary.

Conclusion

Like most legislation, the law providing for the conversion of age-restricted developments is not perfect. It does, however, provide builders with an additional way to convert an age-restricted development and replace a largely unmarketable product with a product that can be sold. The new law does provide resistant municipalities with ways in which they can seek to frustrate the conversion of age-restricted developments, and great care at the outset must be taken to ensure that a conversion application meets the statutory criteria, thus maximizing the prospects of a successful conversion. ■

'Green' Initiatives . . . cont. *(continued from page 4)*

also stands to benefit from a new law passed in January 2010 that allows biomass, solar and wind energy facilities as accessory uses on farms, creating a scenario where farms can generate much of their own energy needs and sell any excess energy back.

Not to be outdone by the private sector, the State also passed a new law in early 2010 that creates a Solar Wind and Energy Commission for the purpose of investigating the benefits of using alternative energy facilities on State-owned property. The Commission is charged with researching the feasibility, financial implications and projected energy and financial savings to the State resulting from the use of solar and wind facilities, and will issue a report on their findings within one year.

Municipal 'Green' Ordinances

Many municipalities have begun adopting ordinances that provide incentives for builders who offer "green" construction design and elements. Among the better incentives are those that allow increased densities, larger building envelopes and increased floor area ratios for green buildings. Other ordinances allow relaxation of bulk standards so that green buildings do not have to fully confirm to ordinance requirements, which offers a significant benefit insofar as variances can be avoided.

Municipalities are considering a myriad of new policies on green development and the incentives and standards, so developers should inquire about initiatives in the towns they are interested in. Unfortunately, due to New Jersey's "home rule" tradition, there is no uniformity or consistency among the initiatives in New Jersey's 566 municipalities, so developers must do their due diligence to determine the incentives available in each town.

Other Measures on the Backburner

Due to the economic crisis, several green initiatives that were under consideration by the Legislature during the past two years were never adopted, likely due to concerns that they would increase state budget deficits. Among the legislative measures that were introduced and deliberated upon, but never adopted, were bills providing tax credits for LEED-certified buildings and low-interest loans for high performance green buildings. In light of the current economic situation, it is financially and politically infeasible to establish state-funded tax credit and low-interest loan programs.

Additionally, newly proposed "green" building regulations were scrapped, apparently due to concerns that the new requirements would generate additional costs and deter the private sector from undertaking new development. For instance, the Legislature considered, but did not pass, legislation that would have incorporated new green design requirements into the UCC Energy Subcode, required builders to incorporate green elements into development of affordable housing, and allowed municipalities to require solar energy elements as a condition of site plan or subdivision approval. While these bills likely did not gain traction for fear they would impose additional up-front investment costs, they are likely to find new life in better economic times.

Conclusion

The recent passage of green legislation and ordinances is an attempt to adapt to a changing environmental, economic and political climate. It is clear that new green standards will result in savings over time through energy savings and greater protection of our natural resources. Thus, as the economy begins to improve, we should anticipate even more governmental initiatives to encourage green building. ■

Top Ten . . . cont. *(continued from page 5)*

Aesthetic Conditions—
Darst v. Blairstown Township Zoning Board of Adjustment

Although a land use board typically may not impose aesthetic conditions on a site plan, the imposition of such conditions on a site plan of a bifurcated variance application was upheld by the Appellate Division because the use variance previously granted was based upon "special reasons" that included certain positive aesthetic factors relating to the specific placement of self-storage containers on the property.

Therefore, it was not improper for the board to require that the owner install landscaping, pave certain areas, and use a specific brand of storage containers that were more aesthetically pleasing.

Notice to Tenants—
GF Princeton, LLC v. Ewing Township Planning Board

The MLUL requires that an applicant for a land use approval provide notice of any public hearing to property owners within 200 feet of the subject property. However, in a matter that has since been granted certification by the New Jersey Supreme Court, the Appellate Division held that some applicants may have to provide notice to tenants if the circumstances surrounding the tenancy reflect a "substantial interest" in the application.

This ruling was based upon "administrative due process and basic fairness," not the MLUL, which led the court to impose a duty upon the applicant to give notice to interested parties despite the absence of any express statutory authority. **Hill Wallack LLP** has filed a "friend of the court" brief with the Supreme Court on behalf of the New Jersey Builders Association and NAIOP New Jersey Chapter, Inc., urging that the Appellate Division decision be reversed.

Variances—
Shri Sai Voorhees, LLC v. Township of Voorhees

The MLUL states that only the board of adjustment shall have the power to "grant a variance to allow departure from regulations… to permit…a height of a principal structure which exceeds by ten feet or 10 percent the maximum height permitted in the district for a principal structure." The trial court in *Shri Sai* analyzed both the language of the statute as well as the history surrounding the enacting legislation and concluded that a request to erect a principal structure equal to or beyond 10 percent higher than the maximum zoned height requires a special reasons "d" variance, which may only be granted by a zoning board of adjustment.

The court vacated the site plan approval and the developer was required to start anew in front of the proper board—the zoning board of adjustment.

Site Approval Conditions—
Najduch v. Township of Independence Planning Board

The Appellate Division held that a planning board has jurisdiction to grant site-plan approval for a development only when that project is a permitted use in the zoning district. A planning board cannot condition such an approval on the applicant later obtaining a use variance or a change in zoning to allow the non-permitted use. The planning board's preliminary approval of a strip mall project with said condition was invalidated by the court.

Abandonment—
Berkeley Square Association Inc. v. Zoning Board of Adjustment of the City of Trenton

The Appellate Division ruled that a challenger must overcome the inherent presumption that a property owner did not abandon a prior existing nonconforming use. Once a property owner satisfies its burden of proving the existence of a nonconforming use at the time of a rezoning, an objector to the issuance of permits for rehabilitation of the building has the burden of persuasion on the issue of abandonment before the property owner may meet its burden of persuasion as to continuation of the nonconforming use.

Settlement Hearings—
Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Board

The court upheld the validity of *Whispering Woods*-type settlement hearings, which allow land use boards to settle prerogative writ cases with developers, and found that such settlements are not contrary to the MLUL. Local residents challenged the approval of the settlement agreement and argued that the developer was using the agreement to circumvent a density variance that arose due to a rezoning after the residents' challenge was filed. The court rejected this notion and held that the approval period was tolled as a result of the challenge, and was therefore still protected from the subsequent rezoning. ■

…the Redevelopment Obstacle Course cont. *(continued from page 6)*

board only after the planner and attorney are convinced that it will withstand judicial scrutiny if attacked.

Alternatives in Confronting Objectors

Based on recent experience, there is likely to be one or more objectors whose goal is to defeat or interminably delay the redevelopment process. The absence of any objector before the planning board, however, offers little reassurance to the developer. The courts have specified the detailed notice that must be given at all stages of the process, starting with the planning board hearing. Yet even with the most detailed notice possible, there is still a likelihood that a property owner who did not appear to object at the planning board hearing will be permitted to challenge the condemnation of his property.

The better the notice, however, the more likely it is that the municipality or the redeveloper can determine when any court challenge will occur. Most redevelopers would prefer that challenges be brought within 45 days of designation of the plan by the municipality, if they are to be brought at all, so that the redeveloper and town know if the project passes judicial muster sooner rather than later.

Site Conditions & Settlements

It is not critical that the objector's property itself be in need of redevelopment. As long as the area itself is in need of redevelopment, the condition of the objector's property is irrelevant if the site is necessary for the effective redevelopment of the area.

Many objectors are willing to permit their property to be condemned, but only at an exorbitant price. One scenario is to make the objector, in essence, a minority partner. This means offering a high price to be paid out over the course of the redevelopment rather than up-front before the developer receives any revenues. The payment to the owner could be pegged to the success of the redevelopment.

Is Redevelopment Necessary?

If tax abatement is not critical to the project, another option is to seek high density conventional zoning that permits the same development as the redevelopment plan, but does not require contiguous properties. It may be possible to use conventional zoning and "build around" an objector's property. For example, a casino owner in Atlantic City was able to build a casino around an obstinate property owner. Courts today are generally more comfortable affirming zoning ordinances than a redevelopment designation.

Condemnation of certain properties outside the redevelopment process may also be possible. New Jersey law permits condemnation for road improvements, parking garages by parking authorities and low and moderate income housing, among other purposes, without the need to prove the area in need of development criteria.

The Role of the Redeveloper

A designated redeveloper can play an important role in the process, by participating in hearings before the court and planning board. The redeveloper's planner and counsel can fill any gaps left by the municipal planner, address recent developments in the law, and help rebut an objector's case.

Judicial Review

If the municipal planner produces substantial evidence in favor of the redevelopment and the objector produces substantial evidence against the redevelopment, the redevelopment should be approved by a reviewing court. Municipalities are entitled to a presumption of validity.

Under *Gallenthin,* the municipality must show substantial evidence to justify its designation. If the municipality demonstrates substantial evidence in favor of the designation under the statutory redevelopment criteria, and the objector demonstrates substantial evidence to the contrary, the municipality should prevail.

Conclusion

Acquiring redevelopment approvals has become challenging as the courts provide objectors with more and more avenues of attack. In addition to the municipality and redevelopment authority, the redeveloper can play a crucial role in obtaining approvals. Through expert testimony and legal arguments, the redeveloper can supplement the municipal planner's report and help rebut an objector's testimony. In some cases, it may be possible to circumvent the entire redevelopment process through creative use of conventional zoning. **Hill Wallack LLP** stands ready to provide legal assistance in such redevelopment matters. ■

Building in 'Developed' Communities cont. *(continued from page 7)*

vicinity of rail stations, the figure is lower still.

Benefits to Inclusionary Projects

For inclusionary projects—i.e., projects that include a proportion of low and moderate income units—the builder has additional selling points in developed communities. The low and moderate income units satisfy a portion of the municipality's constitutional fair share housing obligation.

In addition, the municipality may well be eligible for any of a variety of bonus credits against that housing obligation. These bonus credits may include credit for one additional unit for each unit of family rental housing, one-third of an additional unit for housing near transit facilities, or one-third of an additional unit for housing in an area designated by the municipality under the Local Housing and Redevelopment Law as a "redevelopment area" or a "rehabilitation area."

Obtaining Zoning Relief

Where municipal officials adamantly refuse to permit construction of multi-family housing, it is often useful to explore the availability of relief through exclusionary zoning litigation. Developed communities commonly assume that they have nothing to fear from exclusionary zoning litigation. They are convinced that they have no housing obligation, that they met any housing obligation long ago, or that their housing obligation will be reduced to nothing because they have no remaining vacant land.

In fact, all of these assumptions may be mere wishful thinking. Under regulations adopted in 2008, the Council on Affordable Housing has assigned housing obligations to all municipalities, even those that are fully developed. It has even assigned new housing obligations to Camden, Jersey City, Paterson, and Newark.

For fully developed municipalities that are confident that they met any housing obligation long ago, investigation may well demonstrate that their stock of public or federally subsidized low income housing was constructed prior to 1980. Indeed, very little public housing or federally subsidized low income housing has been constructed since that date.

Municipalities, however, are entitled to credit against their constitutional fair share housing obligations only for housing constructed after 1980. They receive no credit for older housing.

Finally, while municipalities that lack vacant land are entitled to reduce the amount of housing for which they must plan, the constitutional obligation does not disappear. Municipalities must make every effort to take advantage of development or redevelopment opportunities as they arise to satisfy that unmet obligation. For example, when the Garden State Racetrack ceased functioning and the property became available for redevelopment, the New Jersey Supreme Court held that Cherry Hill was obligated by the New Jersey Constitution to assure that the redevelopment provided for low and moderate income housing.

In practice, a builder or property owner who can assemble a site for development or redevelopment in a developed municipality is entitled to rezoning for inclusionary development that maximizes the opportunities for the provision of low and moderate income housing. Where public water and sewer are available, this may well mean multi-family housing, and, in suitable circumstances, even a mid-rise or high rise project.

In suitable cases, this right can be enforced through exclusionary zoning litigation.

Applying for Use Variances

Even in developed municipalities that have met their constitutional fair share housing obligations, a builder can apply for a use variance to construct affordable housing. A recent decision by the Appellate Division of Superior Court held that such projects are deemed "inherently beneficial" uses even where the municipality has met its constitutional fair share housing obligation.

Local zoning boards are required to give very favorable treatment to "inherently beneficial uses." They must grant use variances unless there are substantial negative impacts that cannot be mitigated through reasonable conditions.

While the recent appellate decision dealt with a project that was entirely low and moderate income housing, there are both precedents and forceful arguments for extending the same favorable treatment for use variances for inclusionary projects in developed municipalities.

Each of these strategies has pitfalls. The builder who wishes to make use of them will require sophisticated legal guidance. ■

Preparation for Confrontational Land Use Application Hearings cont. *(continued from page 9)*

exist high-density developments such as multi-family condominiums. Too often, the goal of the objectors is to merely delay and prolong the process through filibuster techniques or "releasing rabbits," which is the practice of raising a question or an issue that really has no significance to the merits of the application, but will consume everyone's time and effort chasing, arguing and discussing.

The 'Seven P's'

One of the best ways to counter the objectors is by following the "Principle of the Seven P's"—Proper Prior Planning Prevents Piteous Poor Performance. Because land development involves a multitude of issues, including environmental, traffic, architecture, zoning, planning, endangered species, historic preservation, storm water, etc., it is critical that the presentation of the application to the board be organized, rehearsed and focused on the merits. The board members greatly appreciate a structured, concise and comprehensive presentation, which means that the direct testimony of each expert must be prepared in advance of the first hearing.

It is useful to require each expert to prepare his or her own testimony outline at least a month before the first hearing. Testimony outlines enable the experts and the attorney to coordinate the experts' interrelated presentations. The experts can determine which exhibits can be shared among them, and help the attorney handling the application organize the presentation as far as the sequence of witnesses, exhibits and topics is concerned. It is also a way of encouraging a busy expert to focus on the particular project and prepare well in advance of the hearings.

Making the Required Record

In a hotly contested application, it must be remembered that the "real audience" is often not even sitting in the hearing room. He or she is wearing a black robe and sitting in a courthouse, and will only read the transcripts and exhibits introduced during the hearing. Therefore, it is important that the record before the board be organized, easy to follow and complete. Using the testimony outlines as guides for the questions to be asked during direct examination helps structure and control the presentation.

During cross-examination, it is important that the experts "stay on task." The obligation of any witness is to truthfully answer the specific question asked. Experts sometimes have a tendency to want to "teach" or persuade during cross-examination. For example, a question might be, "What color was the car?" The complete answer would be "Red." However, in a desire to be "more complete" or "helpful," the witness is often tempted to add information not sought by the question, such as, "The car was red and I think there were four people including the driver. One had long hair, so I think it was a girl, and the left rear tire appeared low, and it was a convertible."

Preparing each witness for cross-examination is as important as preparing them for direct testimony. The duration of cross-examination is greatly shortened by answering only the question asked.

Objectors often retain their own professionals and experts to rebut those of the applicant. If requested by the applicant, many boards will require the objector to submit written reports in advance of the objector's case. Knowing when, and when not to, cross-examine the objector's witnesses is important. Frequently, it is not necessary to cross-examine an objector's expert, and the temptation to do so must be avoided where that is the preferred strategic course.

Retaining a Public Relations Expert

It is sometimes wise for an applicant to retain a public relations expert to help present the proposed project to the community in a favorable light. Too often, opposition is based upon a lack of accurate information. Knowing that the proposed development will be a permanent addition to the community, a good PR campaign can induce grassroots supporters of the project to attend the hearings and speak during the public comment portion.

While the applicant's presentation to the board is informative, persuasive and intended to address the legal requirements for an approval, helping the community see the benefits of the proposed development is another tremendous, cost-effective tool available to the developer.

A well-organized presentation fulfills many purposes. The attorney serving as the "quarterback" for the application presentation assures that the record is clear and complete, so that it can be used to defend an approval or potentially reverse a denial. ■

'COAH World' in State of Flux

by Thomas F. Carroll, III, Esq.

On February 9, 2010, Governor Chris Christie issued Executive Order No. 12 (EO 12), staying most proceedings of the Council on Affordable Housing (COAH) for 90 days, and creating a task force charged with devising a way to replace the COAH process. Legal proceedings seeking an injunction against EO 12 were immediately instituted, and, on February 19, 2010, the Appellate Division issued an order enjoining the halting of COAH proceedings. Thus, COAH proceedings may continue apace, at least for the time being.

The work of the five-member "Housing Opportunity Task Force" (Task Force) created by EO 12 was not affected by that injunction action, and the Task Force will evaluate the efficacy of the current laws governing implementation of the *Mt. Laurel* doctrine, and assess "the continued existence of COAH." The Task Force is to report to the Governor and DCA Commissioner within 90 days. It is likely that the Appellate Division will issue an opinion more conclusively resolving all issues raised by EO 12 between the time this issue goes to press and the beginning of the Atlantic Builders Convention (ABC).

There are also efforts underway in the Legislature to come up with legislation replacing the current COAH process. That effort began with a bill introduced by Senators Lesniak and Bateman, which has been labeled S-1. Hearings have been conducted, and other bills and amendments will no doubt be forthcoming. It remains to be seen what will result from the legislative process.

Lastly, we await the Appellate Division's opinion deciding the 24 appeals brought in opposition to COAH's "third round" rules. Those appeals were orally argued on December 1, 2009, and a decision is expected shortly (perhaps even before the ABC).

The "COAH world" is rapidly changing, and those with interests in land should closely monitor the implications of EO 12, the proposed legislation, and the upcoming opinion deciding the appeals contesting COAH's rules. Material changes are likely to occur prior to the ABC and, if so, they will surely be a topic of discussion at ABC seminars.

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