

Legal/Legislative

by Michael J. Gross, Esq. and Steven M. Dalton, Esq. Michael J. Gross is a Partner and Chair, Steven M. Dalton is a Partner of Giordano, Halleran & Ciesla, P.C., Red Bank

APPELLATE DIVISION UPHOLDS DEP WAIVER RULE

In a major victory for the New Jersey Builders Association, the Appellate Division of New Jersey Superior Court rejected an appeal brought by over two dozen self-styled “environmental” groups and unanimously upheld the Department of Environmental Protection’s (“DEP”) controversial “waiver rule”. These rules allow DEP to relax or waive strict compliance with its regulations.

Adopting the legal arguments made by Paul H. Schneider and Afyfa H. Ellington of Giordano, Halleran & Ciesla, P.C., the Appellate Division held that DEP has the authority to adopt and implement the waiver rule. The Court held that notwithstanding “the absence of an express legislative grant or prohibition”, State agencies have “inherent authority... to waive their regulatory requirements through regulations... which establish appropriate standards for the exercise of the agency’s waiver decision-making, while still honoring requirements imposed by statutes or federal law.” Similarly, the Court disagreed with the appellants that DEP cannot adopt a “blanket” waiver rule that applies to virtually all programs administered by DEP. The Court stated “appellants point to no authority that DEP cannot cut across intramural boundaries by adopting department-wide rules to deal with overlapping concerns or subjects.” Finally, the Court also rejected claims that the rules lack adequate standards.

As an unexpected bonus to home builders, the Court agreed with the appellants that “guidance” documents and forms posted on DEP’s website

after formal adoption of the waiver rule are unenforceable because they are de facto rules promulgated by DEP without following the notice and comment requirements of the Administrative Procedure Act. Yet the Court rejected appellants’ claim that this deficiency is fatal to the DEP’s implementation of the waiver rule. The Court emphasized “there are sufficient substantive standards in the waiver rules for applicants to submit, and the decision-maker to evaluate, waiver applications.” DEP relies upon similar guidance documents in a wide variety of the programs it implements, often to the chagrin of developers and others in the regulated community because the guidance may impose requirements and restrictions not found in the text of the rules. This decision provides a basis for the business community to challenge these guidance documents in other situations.

SUPREME COURT BARS DEP FROM WARRANTLESS RESIDENTIAL INSPECTIONS

In an April 4, 2013 decision, the Supreme Court of New Jersey ruled that the constitution prohibits the DEP from conducting warrantless inspections of residential property without the consent of the homeowner. Under both the federal and New Jersey constitutions, nonconsensual warrantless searches are generally prohibited. The warrant requirement applies not only in the traditional criminal law enforcement context, but also to regulatory compliance inspections by administrative agency personnel. One long-recognized



Michael Gross



Steve Dalton

exception to the warrant requirement applies to administrative inspections of the commercial premises of a closely regulated business. Under this exception, DEP may generally conduct nonconsensual warrantless inspections of businesses whose activities are heavily regulated by DEP permits.

In DEP v. Huber, the Supreme Court of New Jersey considered whether the warrant exception applies to residential property regulated by a freshwater wetlands permit and a DEP mandated conservation easement recorded in the property’s chain of title. The Hubers allegedly filled wetlands protected by the easement in order to create additional lawn area and other improvements. The New Jersey Supreme Court decided that the warrantless administrative inspection exception is limited to commercial premises, and that a DEP inspector denied access to residential property subject to a freshwater wetlands permit must secure a warrant or court order before entering and inspecting.

DEP ENFORCEMENT DEP v. Kings Lake

DEP has authority under the Water Pollution Control Act (Act), N.J.S.A. 58:10A-1 et seq., and the New Jersey Pollutant Discharge Elimination System (“NJPDES”) regulations, N.J.A.C. 7:14A-1 et seq., to issue penalty assessments for violations of certified Soil Erosion and Sediment Control (“SESC”) Plans and its jurisdictional authority is not pre-empted by the authority of the local soil conservation district and affected municipalities under the SESC Act.

Kings Lake obtained a NJPDES General Permit for stormwater discharge related to construction activities from DEP for a development in Gloucester County. Kings Lake also obtained SESC certification from the local soil conservation district along with an authorization to discharge. Violations of the certified plan were asserted by the local district, but the violations were corrected and no penalties were assessed. Thereafter, DEP issued an AONOCAPA and assessed penalties for violation of the Act and the NJPDES regulations. Kings Lake challenged the AONOCAPA arguing that DEP’s jurisdiction was pre-empted by the enforcement authority of the local soil conservation district under the SESC Act, N.J.S.A. 4:24-39.

The Appellate Division held that notwithstanding enforcement authority under the SESC Act, DEP had independent authority to assess penalties under the Act and NJPDES regulations. The court contrasted case law where violations related solely to the SESC Act. Here, the King Lake actions involved violations of the NJPDES General Permit related to stormwater controls from construction activities that were within DEP’s jurisdiction under the NJPDES Program. While DEP coordinates administration of NJPDES general permitting for construction activities with the local soil conservation districts, the SESC certification does not constitute the approval of the NJPDES Permit. DEP approves the NJPDES permits, and the Permit specifically

requires compliance with the Act. The application for the permit includes a certification acknowledging the potential for civil and criminal penalties under the Act. Therefore, DEP is not precluded from issuing penalties under the Act even though the district did not issue a penalty assessment. This case acts as a warning for developers to be vigilant in implementation of SESC plan conditions to avoid potential costly enforcement actions involving DEP.

Docs #1206694-v1



A Note from NJBA’s President



Robert J. Fallone

NJBA, however, has not yet penetrated the remodeler market. It is clear that remodeling will help shape the future of housing in New Jersey and NJBA must be available to educate and service the remodeling industry.

To address this, I have convened a Remodeler’s Working Group that will develop programs that focus specifically on the needs of remodelers, with the goal of recruiting and retaining more remodelers. John Kirkenir will lead this initiative.

My second priority requires specific legislative action. Several months ago I assembled a taskforce to develop the framework of a Green Zoning Bill. Under the Green Zoning Bill, municipalities will be required to create a menu of options for land owners that provide density bonuses based on how much open space is set aside. The more open space that is set aside, the more workforce homes a landowner can build. This will lead to more compact and environmentally conscious development that reduces the strain on municipal resources while maximizing environmental

protection. We will bring this sound approach to land use to the Legislature. The Green Zoning Bill will not only drive economic activity in New Jersey but will also protect its fragile environment.

I look forward to working with Carol Ann Short, Esq., our new Acting CEO, NJBA’s Officers, and staff as well as all of you on these on these and other initiatives throughout my term as President. We look forward to an outstanding year as the market continues to improve.

Robert J. Fallone
President
New Jersey Builders Association

