



NJ Legislature Strikes Compromise over Development in Highlands and Smart Growth Areas

Two controversial bills, the Highlands Water Protection and Planning Act, S-1 (the "Act") and the Smart Growth Law, P.L. 2004, c. 89 (the "SGL"), will affect the availability and permitting processes of development opportunities in certain areas of the state. Signed into law by Governor McGreevey on August 10, 2004, the Act establishes a comprehensive, long-term approach to the protection and preservation of drinking water and natural resources in the New Jersey Highlands Region, the source of drinking water for over half the residents of the state. The SGL, enacted by Governor McGreevey on July 9, 2004 as compromise legislation to offset the harsh impact of the Act, is an outgrowth of the McGreevey Administration's policy to encourage redevelopment in previously developed areas by establishing an expedited permitting process for projects in designated geographic "smart growth areas." Pursuant to Executive Order No. 140 recently signed on November 5, 2004, the SGL has effectively been placed on hold until rules governing the qualification and registration of qualified professionals who will conduct expedited permit reviews are established and approved.

HIGHLANDS ACT

The Act applies to the New Jersey Highlands region and covers approximately 800,000 acres in portions of the counties of Hunterdon, Somerset, Morris, Warren, Sussex, Passaic and Bergen (see the NJDEP map of the Highlands Area attached above as a PDF). The Highlands region is divided into two geographic areas under the Act: the "preservation area" and the "planning area." The preservation area is approximately 400,000 acres where development will be significantly limited, if not effectively prohibited. The remaining acreage is the planning area, portions of which the State Planning Commission will designate as centers in which development will be encouraged.

Highlands Council

The Act establishes a Highlands Water Protection and Planning Council ("Highlands Council") to be comprised of 15 members including a minimum of eight elected officials, at least five of whom must be municipal officials from the Highlands region. The other seven members, five of whom are appointed by the Governor and two of whom

are recommended by the Senate President and Speaker of the Assembly, must have expertise in environmental, land use or economic development matters.

After consultation with various State and local agencies and government, the Highlands Council must adopt a regional master plan for the Highlands Region ("Highlands Master Plan"). The Highlands Master Plan's goal is "to protect and enhance the significant values of the resources" in the Highlands Region. Within 9 to 15 months after adopting the Highlands Master Plan, counties and municipalities located wholly or partially within a preservation area must revise their development regulations and master plans to be consistent with the Highlands Master Plan. Thereafter, local governments should administer the Act using their revised laws; however, the Highlands Council retains the right to review and modify, if necessary, any local governmental approval, rejection, or approval with conditions.

While a county or municipality located wholly within a planning area need not revise its existing development regulations, the Act provides financial incentives to do so. Also, the Highlands Council must identify portions of the planning area as "receiving areas" for development under the recently enacted State Transfer of Development Rights Act, N.J.S.A. 40:55D-137 *et seq.* Under these provisions municipalities in the planning area have some concern that over-development will result from attempts to offset the harsh development restrictions in the preservation area.

Statutory Environmental Standards for Major Development in a Preservation Area

All "major Highlands development" in the preservation area must obtain a Highlands Preservation Area approval from the New Jersey Department of Environmental Protection ("DEP"). "Major Highlands development" is (1) any non-residential development in the preservation area, (2) any residential development in the preservation area that requires an environmental land use or water permit or that results in disturbance of one acre or more or a cumulative increase in impervious surface by one-quarter acre or more, (3) any activity in the preservation area that results in the disturbance of one-quarter acre or more of forested area or that results in a cumulative increase in impervious surface by one-quarter acre or more on a lot, or (4) any capital or other project of a State entity or local government unit that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more or a cumulative increase in impervious surface by one-quarter acre or more. The term does not include agricultural or horticultural activities.

Effective upon enactment, the following requirements for a Highlands Preservation Area approval demonstrate the Act's prohibitive effect on preservation area development: (1) 300-foot buffer adjacent to any Highlands open waters, (2) non-degradation of any Highlands open waters, (3) permit under the Water Quality Management Act, N.J.S.A. 58:1A-1 *et seq.*, for any diversion of more than 50,000 gallons per day, (4) zero net fill requirement for flood hazard areas, (5) application of antidegradation provisions of the surface water quality standards and the

stormwater regulations applicable to category one waters to all Highlands open waters, (6) prohibition on impervious surfaces of more than 3% of the lot, (7) prohibition on development on steep slopes with a grade of 20% or greater, and (8) prohibition on development that disturbs upland forested areas.

Within 270 days of enactment, DEP must promulgate rules and regulations anticipated to be more stringent than the statutory standards. All preservation area projects are subject to the statutory and impending regulatory standards unless they fall within one of seventeen exemptions including construction of a single family dwelling for one's own use, a major Highlands development that received either a Municipal Land Use Law approval or certain DEP permits prior to March 29, 2004, improvement to an existing single family home or place of worship, routine State maintenance of transportation or infrastructure systems, routine maintenance of public utility systems, mining activities for facilities existing on June 7, 2004, site remediation activities, and certain *Mount Laurel* projects.

Dim Prospects of Overturning a Determination by a Local Government and Unconstitutional Takings Claims

Developers in the Highlands Region face dim hopes of overturning an adverse local government determination under a revised master plan approved by the Highlands Council. Such plans carry "a strong presumption of validity," and a court "shall give extraordinary deference to the local government unit." A developer, therefore, has the burden to prove by clear and convincing evidence that the local government's adverse determination was arbitrary, capricious, or unreasonable.

Challenging denial of a Highlands Preservation Area approval on grounds that it constitutes an unconstitutional taking of property without just compensation is also possible. The likelihood of a successful challenge, however, is uncertain. Courts have held that a government entity does not commit an unconstitutional taking if after a permit denial the property still maintains some economically viable use; such use need not be the one which will yield the highest economic value to the owner.

SMART GROWTH LAW

The SGL acts largely to offset the Act's development prohibitions in much of the open space remaining in the State under the Act. The SGL promotes this goal through several key features.

Expedited Permit Process

The SGL's expedited permit process applies to "permits" for activities to be undertaken in "smart growth areas." Such permits include most "permits and approvals" issued by the DEP, except those issued pursuant to the Coastal Area Facilities Review Act, N.J.S.A. 13:19-1 *et seq.*, the Air Pollution Control Act, N.J.S.A. 26:2C-1 *et seq.*, the Solid Waste Management Act, N.J.S.A. 13:1E-1 *et seq.*, and the Radiation Protection Act, N.J.S.A. 26:2D-1 *et seq.* While the SGL provides no additional guidance, "approvals" could be interpreted to include site remediation approvals, such as workplan approvals and No Further Action Letters. The SGL also applies to any permits and approvals issued by New Jersey's Department of Transportation ("DOT") and Department of Community Affairs ("DCA").

The SGL defines a "smart growth area" as any of the following: Planning Area 1 (Metropolitan) and Planning Area 2 (Suburban) of the State Development and Redevelopment Plan ("State Plan"); a designated center or a designated growth center in a State-endorsed plan; a smart growth area and planning area designated in a master plan adopted by the New Jersey Meadowlands Commission; a growth area designated in the comprehensive management plan adopted by the Pinelands Commission; an urban enterprise zone; an area determined to be in need of redevelopment by the DCA; or similar areas designated by DEP. Accordingly, an applicant for a permit for a project to be undertaken in any of the listed areas has an option to request expedited review of the permit application.

The SGL establishes a Division of Smart Growth ("Division") within each of the DEP, DOT, and DCA. The director of the respective Divisions is responsible for taking action on permits for which an applicant has requested expedited review. The SGL provides an ambitious timeframe of 45 days for expedited review of most technically complete permits. The Division must notify an applicant within 20 days after filing the application if it lacks a submission identified on a checklist. If an application is determined to be administratively complete or if no notice of incompleteness is issued within 20 days, the application is deemed complete for purposes of commencing technical review. If an application is determined to be technically complete, or if no notice of technical deficiency is issued within 45 days of the application's filing, the application is deemed technically complete. The Division must take action on a technically complete application within 45 days. This time period may be extended for a 30-day period only upon mutual consent of the applicant and the agency. Except for a New Jersey Pollutant Discharge Elimination System permit, if the Division fails to take action on a permit application within 45 days, the application is deemed approved.

Significantly, the SGL provides no threshold for project size to expand an agency's allowable review period. For example, an agency must act on an application for a waterfront development permit for a 20-acre project within the same amount of time it must act on a 2-acre project – i.e. within 45 days.

Expedited Appeal Process

To help expedite permits for projects in Smart Growth Areas, the SGL also provides an expedited appeal process in the event the applicant challenges a determination of incomplete application, a denial of a permit application, or the terms or conditions of an approved permit. For this purpose the SGL establishes within the Office of Administrative Law ("OAL") a Smart Growth Unit to be staffed by administrative law judges ("ALJs") having expertise in matters relating to the appeal.

The timeframes for the expedited appeal process, equally as ambitious as the timeframe for the permitting process, depend upon which issue above forms the basis for appeal. Within 15 days of a Division's receipt of the applicant's expedited appeal request, the Division must transmit the administrative record to OAL. If the applicant is challenging the Division's determination of incompleteness, the parties must file briefs within 15 days after the case is filed with OAL, and the ALJ must issue a decision within 30 days after submission of the briefs. If the applicant is challenging a permit denial for a project in a Smart Growth Area or any terms or conditions of an approved permit, the ALJ must establish an expedited briefing schedule, and any hearings shall be concluded within 45 days after the ALJ receives the case. The ALJ must issue a decision within 45 days after the record is closed. That decision is binding and not subject to further appeal.

Alternatively, an applicant also retains the right to challenge an administrative action pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, which provides an initial hearing and opportunity for judicial review. While an expedited appeal has advantages, applicants should carefully consider it; an unfavorable result under the expedited appeal process will be left without recourse.

Qualification and Registration of a Certifying Professional

The expedited permit review requires that an application include a certification from a "qualified and registered" professional providing that the application is complete and that any statutory and regulatory requirements have been satisfied. By November 8, 2004, DEP, DOT and DCA were to have filed with OAL for publication a notice of pre-proposal to elicit views of interested parties concerning rules for the program for qualification and registration of professionals and rules to implement other SGL provisions. The public comment period will last 90 days, and within 120 days of the close of public comment, DEP, DOT and DCA will have to file their own rules. This process will effectively stall implementation of the SGL expedited permitting process.

Smart Growth Ombudsman

The SGL also establishes in the DCA a Smart Growth Ombudsman whom the Governor appoints. The Ombudsman reports to the Governor. On July 16, 2004, Governor McGreevey appointed Susan Bass Levin, Commissioner of DCA, to this position.

The Ombudsman facilitates the SGL's policies. The Ombudsman has authority to review any new State agency rules

or regulations, as they pertain to Smart Growth Areas, to determine whether they are consistent with the State Plan. If the Ombudsman determines that certain rules are inconsistent with the State Plan, the Ombudsman must return the rules to the proposing agency with recommended amendments. Proposed rules cannot be published in the New Jersey Register unless and until the Ombudsman, effectively having veto power with respect to any proposed rules that impact upon development in a smart growth area, determines that they are consistent with the State Plan. The Ombudsman has no authority, however, to review regulations promulgated by the Pinelands Commission, Highlands Council, or New Jersey Meadowlands Commission. At an applicant's request, the Ombudsman may participate in the permit application and review process to ensure that the Divisions within the relevant agencies are complying with statutory timeframes.

CONCLUSION

The long-term effects of the Act and the SGL are unclear especially since regulations will not be promulgated for many months. A consensus believes that the Act will curtail significantly development in the Highlands. Less certainty surrounds the SGL's intended counterbalance effect since under the SGL, providing only procedural mandates, it is difficult to predict whether permit applications will be processed under the expedited timeframe and, if not, whether courts will require agencies to issue automatic approvals. Also, the SGL is currently "on hold" pursuant to Executive Order No. 140. How the Act and the SGL are carried out will have to be monitored closely, especially if any future development project wishes to be viable

The Highlands Region consists of all that area within the boundaries of the following municipalities:

Bergen County	Morris County	Passaic County	Warren County
Mahwah and Oakland	Boonton Town	Bloomington	Allamuchy
	Boonton Township	Pompton Lakes	Alpha
Hunterdon County	Butler	Ringwood	Belvidere
Alexandria	Chester Boro	Wanaque	Franklin
Bethlehem	Chester Township	West Milford	Frelinghuysen
Bloomsbury	Denville		Greenwich
Califon	Dover	Somerset County	Hackettstown
Clinton Town	Hanover	Bedminster	Harmony
Clinton Township	Harding	Bernards	Hope
Glen Gardner	Jefferson	Bernardsville, Far Hills and Peapack-Gladstone	Independence
Hampton	Kinnelon		Liberty

High Bridge	Mendham Boro	Sussex County	Lopatcong
Holland	Mendham Township	Byram	Mansfield
Lebanon Boro	Mine Hill	Franklin	Oxford
Lebanon Township	Montville	Green	Phillipsburg
Milford, Tewksbury, and Union	Morris Plains	Hamburg	Pohatcong
	Morris Township	Hardyston	Washington Boro
	Morristown	Hopatcong	Washington Township
	Mount Arlington	Ogdensburg	White
	Mount Olive	Sparta	
	Mountain Lakes	Stanhope	
	Netcong	Vernon	
	Parsippany-Troy Hills		
	Pequannock		
	Randolph, Riverdale		
	Rockaway Borough		
	Rockaway Township		
	Roxbury, Victory Gardens		
	Washington		
	Wharton		

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