

THE HIGHLANDS INITIATIVE

By Murray A. Bevan, Esq.

The "Highlands Water Protection and Planning Act" would substantially change land development and land use regulations in Northwest New Jersey. The area affected is known as the Highlands Region. The initiative is moving quickly through the legislative process and the legislation is complex and ever changing.

Our Government Affairs and Land Use, Planning and Zoning Departments have been actively engaged in the discussions and deliberations concerning the affects this precedent setting initiative will have on our clients and their land use. We have been participants in public and private discussions where substantive changes to the legislation have resulted.

The following is an overview of the Highlands initiative and how it has come to fruition.

In September of 2003, Governor McGreevey created the Highlands Task Force (the "Task Force") to examine the State's drinking water supply within the Highlands and propose methods to increase preservation of open space and natural resources, and to increase farm land preservation within the region.

The New Jersey Highlands is a 1,250 square mile area that stretches across the Northern

Western part of the State. The Highlands region is almost 800,000 acres in size and extends from Phillipsburg, New Jersey in the Southwest to Mahwah, New Jersey in the Northeast. Portions of the Highlands fall within seven (7) counties (Hunterdon, Somerset, Sussex, Warren, Morris, Passaic and Bergen) and ninety (90) municipalities.

The Task Force, which concluded that population growth within the Highlands region is increasing at a rate nearly fifty (50%) percent faster than the state wide rate, supported a regional approach to controlling future development and rejected the notion of continuing to rely on the current system of Local Land Use Planning.

The Task Force recommended to the Governor and Legislature that they take the following steps:

- 1. Identify a preservation area in the Highlands.**
- 2. Enhance environmental protections in the preservation area.**
- 3. Create a Highlands drinking water protection and Regional Planning Council.**
- 4. Enhance the land preservation program in the Highlands.**

5. Mobilize state agencies into concerted action to protect the Highlands.

6. Collaborate with the other Highlands' states; and

7. Take immediate action on these recommendations.

In response to the Task Force's report, legislation was introduced to substantively change the way development occurs in the Highlands. The Legislation (S-1, Smith; A-2635, McKeon) is entitled, "**The Highlands Water Protection & Planning Act**" and establishes a comprehensive approach to the protection, preservation and future development of the natural resources, drinking water and land within the New Jersey Highlands region. The legislature is "fast tracking" review of S-1/A-2635, and has convened joint meetings of the Senate Environment Committee and the Assembly Environment and Solid Waste Committee to consider the initiative. The language of the Legislation introduced in the Senate and the Assembly is identical and the consideration and approval process will run concurrently in both houses.

This Legislation has been the subject of much controversy over the past several months

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PLANNING WITH STORM-WATER REGULATIONS

By Michael S. Selvaggi, Esq.

Land development in New Jersey was radically impacted on February 2, 2004. It was on that day that the New Jersey Department of Environmental Protection's (DEP) new storm-water regulations took effect. These regulations will dramatically alter future land use decisions to be made by both developers and municipalities.

The regulations are intended to address non-point source pollution. This is pollution caused by storm water running off parking lots, roads, buildings, and even farmland. Although the DEP asserts that the regulations are designed to protect the environment, most land use experts in the State agree that they are ultimately being relied upon to channel economic growth back into the urban areas while discouraging it in the rural areas, particularly northwest New Jersey.

In the future, all development must be designed to minimize storm-water runoff.

Additionally, all storm water must ultimately be recharged back into the ground. Unfortunately, any storm water that may contain high levels of pollutants cannot be recharged directly into the soil without first being treated.

The regulations also prohibit the discharge of *any* storm water or the construction of any encroachments or structures within 300 feet of the bank of any Category One waterway. Category One waterways are selected water-courses that the DEP has identified which it believes are of exceptional value requiring the maximum level of protection from development. The DEP claims that over 6,000 miles of waterways will be designated as Category One. Unfortunately, only about one-half of those waterways have already been identified, leaving another 3,000 still yet to be designated.

While the regulations will undoubtedly have a significant impact on developers in New

Jersey, they will also impose strict obligations upon municipalities in New Jersey. Each municipality is required to establish storm-water plans identifying waterways within its borders as well as ponds and wetlands. After identifying these environmentally sensitive areas, municipalities must adopt ordinances by February 2006 which fulfill the DEP's storm-water management goals and establish guidelines for the maintenance of storm-water management systems in the municipality. Thereafter, municipalities will determine, during the approval process, whether a proposed development satisfies the storm-water regulations.

Obviously, the regulations will have a tremendous impact on developers and public officials alike. Both groups should give careful thought and retain competent legal advice when trying to navigate the rivers of issues generated by the new storm-water regulations. ♦

THE LANDSCAPE PROJECT

By Michael S. Selvaggi, Esq.

Despite New Jersey's enactment of strict land use regulations and the creation of an aggressive open space acquisition program (Green Acres), the State believes too much wildlife continues to be lost to development. The N.J. Department of Environmental Protection (NJDEP) feels residential and business development is the root of this problem by dividing large, contiguous blocks of forest, grassland and wetlands into small interspersed patches. Although these fragmented areas are suitable habitats to many species, NJDEP is concerned that some of the most imperiled species cannot survive in these environments.

In response to this dilemma, the N.J. Division of Fish and Wildlife's Endangered and Nongame Species Program (ENSP) established the Landscape Project in 1994. The Landscape Project employs a pro-active, ecosystem-level approach to protect New Jersey's imperiled

wildlife and their habitats. It aims to provide proper planning tools to be used before proposed development, resource extraction, or conservation measure actions are taken. And it hopes these pro-active measures will reduce the time and money spent on resolving imperiled species issues.

The Landscape Project has developed critical habitat maps to be used by individuals at all levels. The ENSP uses a comprehensive database that combines the names of imperiled wildlife and their location, with land use and land cover data, to identify and map areas of critical importance for endangered species. The maps are divided into ecologically similar "landscape regions" as follows: Skylands Region (Sussex, Warren, Hunterdon, Passaic, Morris and Somerset); Piedmont Plains Region (Burlington, Gloucester, Mercer, Middlesex, Monmouth and Salem); Pinelands Region

(Atlantic, Ocean, Burlington, Camden and Gloucester); Coastal Region (Monmouth, Ocean and Atlantic); and Delaware Bay Region (Cape May, Atlantic, and Cumberland).

The goal of the Landscape Project is to prioritize land parcels for purchase through conservation acquisitions, to guide land managers and land owners of already-conserved areas on how to protect imperiled species, to guide regulators and planners at the state, county and local levels, and to provide citizens with conservation tools. NJDEP is prepared to require future development to abide by the Landscape Project to ensure that appropriate measures are taken to protect endangered and threatened species.

For additional information on the Landscape Project, please contact Michael Selvaggi, Esq. at Courter, Kobert and Cohen, 1001 Rt. 517, Hackettstown, NJ 07840, (908)-852-2600. ♦

THE ATTORNEY, CLIENT, AND AUTHORITY TO BIND

By Jason P. Gratt, Esq.

In the northern region of the State of New Jersey, it is the common practice of both the buyer and the seller of residential real estate to retain legal counsel to negotiate and conclude the sale and purchase of residential real property. Most times, the process is commenced by signing a form Contract of Sale, which is given to the parties by a real estate broker. These Broker Contracts are subject to an attorney review clause, which allows both the buyers and the sellers to have an attorney review the Broker Contract.

During the review period, counsel for the parties will usually propose amendments to the Broker Contract until an acceptable form of contract is agreed upon between counsel. To this end, sellers and buyers must make it clear to their counsel that either (1) counsel is fully permitted to act on their behalf, or (2) any and all amendments to the Broker Contract must be approved by them. Otherwise, serious issues regarding the attorney's authority to bind the buyer/seller can arise. In New Jersey, absent express authority, the determining factor with regard to the aforementioned will hinge upon whether the client's actions appeared to give the attorney the "apparent authority" to bind the client to a given contract.

The Appellate Division of the Superior Court of New Jersey recently addressed this issue and clarified some misconceptions pertinent to the doctrine of apparent authority in the matter of

Busciglio v. DellaFave. In *Busciglio*, the sellers (a mother and son) and the buyer signed a typical Broker's Contract and, thereafter, various amendments were exchanged between their counsel. After the attorneys agreed upon an acceptable form of contract and signed it on behalf of their clients, one of the sellers (the son) directed his counsel not to go through with the transaction. There existed no writing between the sellers and their attorney which gave the attorney the express authority to bind the sellers to the amended contract. Based upon the son's refusal to continue with the transaction, the buyer sued the sellers in order to enforce the contract as agreed upon through counsel. The trial court agreed with the buyer and entered judgment in her favor.

The Appellate Division found that the trial court had misapplied the doctrine of apparent authority by focusing on the attorney's conduct rather than on the conduct of the seller. The Appellate Division continued by declaring that an issue of fact was created by the son's actions, and that a hearing was required to determine if the son's conduct had given his attorney the apparent authority to bind him to the contract. In essence, the Appellate Division found that the trial court must determine whether or not the son's conduct would have clearly and convincingly led others to believe that his attorney could bind him to the amended contract without his prior approval.

As can be seen, sellers, buyers, and attorneys alike should work from the outset of the residential real estate transaction to establish and define exactly what role the client expects his attorney to undertake in the process. There are several ways to avoid a situation like that which occurred in *Busciglio*. The most practical means to remove this problem would be by a written agreement in the form of a retainer agreement, which sets forth the scope of the attorney's representation, or in the real estate sales contract itself. Also, an attorney may seek to have his client sign a power of attorney appointing him as attorney-in-fact, which grants the attorney the express authority to act on behalf of the client. Even a simple letter from counsel to client or client to counsel can remove this potentially devastating problem.

Whether the authority of the attorney to act on the client's behalf for purposes of forming the final contract is in writing or not, all parties involved in a residential real estate transaction should, at the outset, clearly and unambiguously convey their thoughts regarding the transaction and each of the parties' roles. As is apparent from a review of the situation that occurred in *Busciglio*, any failure to do so has the potential to lead to costly litigation and, more importantly, a heart-wrenching experience for the unsuccessful party. ❖

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and at least two sets of amendments have been offered by the Legislative sponsors. The first set of amendments were offered on April 22, 2004 and the most recent amendments were put forward on May 10, 2004.

The joint committees met on Monday, May 17, 2004 and the Assembly version of the legislation was released from the Assembly Environment and Solid Waste Committee. The measure was stalled in the Senate Environment Committee over concerns raised by South Jersey legislators that the Highlands Initiative may result in large cuts in funding preservation efforts in the southern part of the State. It is expected,

however, that a compromise will be reached and the legislation sent on to the full Senate for a vote. The Governor has indicated that it is his intention to sign the legislation into law by July 1, 2004.

As is the case with any Legislation with such a sweeping impact, the political stakes for the Highland's Act are quite high. Political compromises and old fashioned "political horse" trading may continue to slow the progress of this legislation. However, we believe the Governor will meet his deadline of signing this Legislation into law by July 1, 2004.

It should be noted that the Legislation and

proposed amendments are fluid and are subject to change throughout the remaining month or two of the consideration and approval process. We will continue to monitor the legislation and provide our analysis and copies of the amendments as they become made available.

In addition, should the legislation be enacted, Courter, Kobert & Cohen, P.C. will provide a series of in-house training and information seminars explaining the practical impact.

Please contact our office if you have any questions, or wish to meet and discuss the legislation and its impact. ❖

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PEOPLE IN THE NEWS

JEFFREY A. GUTH has completed the inaugural class of Leadership, sponsored by the Warren County Regional Chamber of Commerce. Mr. Guth recently presented programs on "Small Business Law" through the Skylands Small Business Development Center and "Take Our Sons and Daughters to Work Day" hosted by the Northampton County Bar Association. He also served as Co-Chair of "Arts Fair 2004" for the Pen Argyl area PTA.

MURRAY BEVAN was recently named to a Department of Health & Senior Services work group that is considering new regulations for Hospital-Based services.

MICHAEL S. SELVAGGI has been nominated to serve another two years as the Warren County Trustee to the New Jersey State Bar Association. On April 14, 2004 he co-chaired the State Bar Association's Judicial Administration Committee's forum on Electronic Filing in the Federal Courts.

EDWARD S. NAGORSKY has been reappointed Adjunct Professor of Business Law at Centenary College.

SANDY GALACIO will serve as Chairperson of the Warren County Bar Association's Legislative and Intergovernmental Relations Committee.

HOWARD A. VEX was recently designated Labor Counsel for Blair Academy and Special Counsel for the Township of Lopatcong.

LAUREN SWEENEY has joined the firm's Litigation and Land Use Departments. Ms. Sweeney was admitted to the New Jersey and New York bar in 2002. Ms. Sweeney received her law degree from Fordham School of Law in 2002. She is a member of the New Jersey State Bar Association Young Lawyers Division. Prior to joining the firm, she focused her practice on litigation, land use and real estate at the firm of Porzio, Bromberg & Newman, P.C.

AMANDA MULVANEY has joined the firm as a summer associate. Ms. Mulvaney is a 3rd year law student at Rutgers University Law School and will be graduating in May 2005.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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