NJ High Court Boosts Towns In Enviro Zoning Fights

By **Martin Bricketto**

Law360, New York (January 22, 2015) -- A New Jersey Supreme Court decision on Thursday that backed a municipality's ability to designate property as environmentally sensitive to restrict higher-density development could empower more towns to make such zoning changes and make it tougher for landowners to fight them, attorneys said.

Upending a 2013 appellate decision, the court in a unanimous opinion from Justice Jaynee LaVecchia ruled against Thomas and Carol Griepenburg and backed zoning changes that Ocean Township implemented in 2006.

The municipality had “downzoned” roughly 31 acres of the Griepenburgs’ property, which was mostly undeveloped woodlands, to require minimum lot sizes of 20 acres for development as part of broader smart-growth plans. The Griepenburgs’ land was included in an environmental conservation district even though it contained no wetlands, floodplains, or threatened or endangered species, according to court documents.

The justices held that the appellate court **took too narrow of a view** of the township's planning goals in ruling for the Griepenburgs, saying the inclusion of the property in the environmental conservation district had to be measured against the actual objectives behind the ordinances.

Attorneys say the ruling is likely to bolster the enforcement of ordinances from towns that follow a comprehensive planning process and might encourage more municipalities to consider such measures.

Meryl A.G. Gonchar, co-chair of the redevelopment and land use department of Greenbaum Rowe Smith & Davis LLP, said that similarly minded municipalities could see the decision as a kind of carte blanche to rezone properties in a way that kills development possibilities.

Jurisprudence in the state seemed to stand for the proposition that, if a town wants to designate a property as environmentally sensitive, the property should be environmentally sensitive, Gonchar added.

“It's like they've created a separate category of 'near' environmentally sensitive,” she said.

The decision also suggests that towns will be rewarded for comprehensive planning, according to William F. Harrison of Genova Burns Giantomasi Webster LLC.

“I think one of the messages that this is sending to municipalities is that, if you're going to do a major rezoning like this, you should look at it holistically and come up with an overall rationale,” Harrison said.

In its ruling, the high court court suggested that focusing on the absence of environmentally protected features in the Griepenburgs' property would miss the ordinance's broader planning goals, noting that they were aimed at creating a developed town center surrounded by a green-zone buffer.

The ordinances at issue were "a legitimate exercise of the municipality's power to zone property consistent with its Master Plan and Municipal Land Use Law goals," and the couple failed to overcome a presumption of validity for the measures, according to the court.

"The plan had the additional benefit of protecting a sensitive coastal ecosystem through the preservation of undisturbed, contiguous, forested uplands, of which plaintiffs' property is an integral and connected part," the opinion said.

The case attracted the interest of the New Jersey Builders Association, which argued as an amicus participant that Ocean Township had pushed the idea of environmental zoning too far.

"I think from a property owners' perspective, it's a continuation of an unfortunate line of judicial and legislative decisions in recent years," said Richard J. Hoff Jr. of Bisgaier Hoff, who represented the group. "This case is particularly blatant in its assertion that private property owners can be forced to bear the public interest of open space and environmental conservation without compensation."

Meanwhile, the New Jersey Sierra Club said the rezoning didn't represent a taking of the property because the Griepenburgs still had use of the land.

"The Supreme Court once again confirmed the right of a municipality to zone land for conservation purposes," Jeff Tittel, the chapter's director, said in a statement. "The court in the past has said that open space is the highest and best use of the land. They are allowing towns to zone accordingly."

An attorney for Ocean Township, Gregory P. McGuckin of Dasti Murphy McGuckin Ulaky Cherkos & Connors, said the decision makes clear that the municipality has been going about the zoning changes in the right way. An attorney for the Griepenburgs could not be reached for comment.

The court also took a hard line on property owners first exhausting administrative remedies through a variance before challenging an ordinance in court.

The Griepenburgs argued that they didn't have to seek a variance before suing over an ordinance's impact, and they relied on the court's decision in 2001 in Pheasant Bridge Corp. v. Township of Warren to back their position. In that case, the justices struck down an ordinance as applied to a plaintiff's property without requiring an attempt at variance relief, but the court on Thursday appeared to clip the potential reach of that case.

"Despite our conclusion in that case, Pheasant Bridge should not be read to suggest that a landowner challenging an ordinance as applied to his or her property is excused from first exhausting administrative remedies," the opinion said.

An exception would be when a landowner can show that process would be futile, but the trial court in sinking the Griepenburgs' inverse condemnation claim said it wasn't clear a variance application would have no chance of success in their case.

“In the absence of clear evidence that administrative relief is foreclosed to plaintiffs, exhaustion of such relief is the remedy that is best,” the opinion said. “Thereafter, an inverse condemnation action will be the appropriate vehicle for relief to plaintiffs if their application for a variance is for naught.”

Still, one concern is that court decisions have made clear that use variances aren't appropriate for applications of a particular scale, which instead require a rezoning, according to Harrison.

A proposal by the Griepenburgs to develop the property based on the prior zoning could fall within that latter process, which would be a decision for the town's governing body and not the zoning board, Harrison said. The likelihood of the township again changing the zoning of the area seems slim and raises the question of whether pursuing either the variance process or a rezoning would indeed be futile for the couple, according to Harrison.

Generally, Thursday's decision won't put property owners at ease, according to Thomas J. Trautner Jr. of Wolff & Samson PC.

“It's certainly not comforting to property owners to say that you're going to have to potentially go through the expensive proposition of pursuing site plan approval with variances only to get denied before you go to court to challenge the zoning as applied,” Trautner said.

The Griepenburgs are represented by Peter H. Wegener and Rui O. Santos of Bathgate Wegener & Wolf PC.

Ocean Township is represented by Gregory P. McGuckin and Christopher J. Dasti of Dasti Murphy McGuckin Ulaky Cherkos & Connors.

The case is Griepenburg et al. v. Township of Ocean, et al., case number 073290, in the Supreme Court of New Jersey.