NJ High Court Could Give Towns More Ammo In Zoning Battles

By Martin Bricketto

Law360, New York (November 07, 2014, 3:41 PM ET) -- The New Jersey Supreme Court on Wednesday will consider when towns are justified in designating property as environmentally sensitive in order to prevent higher-density development, in a case that some attorneys say could make it harder for landowners to challenge radical zoning decisions.

That's if the justices overturn **a 2013 appellate ruling** in Thomas and Carol Griepenburg's suit against Ocean Township, which "downzoned" their 31-acre property in 2006 to require minimum lot sizes of 20 acres for development as part of broader smart growth plans. A trial court had ruled for the municipality.

The property's inclusion in an environmental conservation zone barred the couple from further developing the land, which contained no wetlands, floodplains, or threatened or endangered species, according to court documents. Apart from their home, the property was mostly undeveloped woodlands.

"Nobody questions that there are legitimate environmental goals, but you don't want to undermine individual property interests that are equally valid," said Meryl A.G. Gonchar, co-chair of the redevelopment and land use department of Greenbaum Rowe Smith & Davis LLP.

The Supreme Court's **decision to take up the case** has left some land use attorneys and other stakeholders wondering if towns might end up with more ammunition to justify such zoning decisions at the expense of property owners.

That possibility has attracted the interest of amicus participants like the New Jersey Builders Association, which argued in its April 24 brief that Ocean had pushed the idea of environmental zoning too far.

"Stated simply, a New Jersey municipality cannot zone for the purpose of creating or preserving open space on private property without adherence to the clear provisions of the [Municipal Land Use Law] and compensation to that private property owner," the brief said.

The Appellate Division had rejected Ocean Township's attempt to justify the change based on the property's environmentally sensitive designation under the State Development & Redevelopment Plan, which the township had sought and secured from the State Planning Commission. The appeals court said the density restrictions were unreasonable in light of nearby residential development and "the absence of any significant environmental constraints upon development."

The municipality had failed to show that the downzoning served the stated purpose of the zoning measures, the court found.

“While the rezoning of the subject property for lower-density development will result in preservation of a greater amount of open space, Ocean may not compel private property to be devoted to preservation for open space by restrictive zoning that is not justified by environmental constraints or other legitimate reasons,” the unpublished opinion said. “Instead, Ocean must acquire any properties that it deems necessary for open space preservation by payment of fair market value to the owners.”

The appellate ruling followed most practitioners' understanding of the current law, according to Kevin J. Moore of Sills Cummis & Gross PC.

"Zoning ordinances are given a strong presumption of validity and must only meet a 'rational relationship test,'" Moore said. “However, there is a further standard that provides protection and guidance to property owners. The means selected by the ordinance have to have a real and substantial relationship to the objective. The concern would be, as someone who represents developers, that this could signal a retreat from this doctrine to some degree or another.”

According to Moore, a full or even partial retreat from that doctrine would mean property owners and developers would have less security in the current zoning of properties and fewer protections when it comes to such extreme downzoning.

How the court views the interplay between the State Plan designation and the local ordinance could prove important, attorneys also suggested.

One key precedent is the Appellate Division's 2001 decision in Mount Olive Complex v. Township of Mount Olive, which indicates that the State Plan can't be used in and of itself to justify a rezoning of the property, according to William F. Harrison of Genova Burns Giantomasi Webster LLC, who is a former policy director and chief counsel with the New Jersey Office of Smart Growth.

“If the Supreme Court was to go and in effect reverse that prior Appellate Division decision and say, 'Yes, you can rely on the State Plan,' that would give towns considerably more flexibility than they currently have in justifying downzoning,” Harrison said.

However, such a ruling wouldn't automatically allow a town to impose 20-acre zoning, according to Harrison.

“I think there still needs to be local justification as to the specific zoning density you're coming up with,” he said.

The State Plan and local zoning changes at issue came amid Ocean's efforts to concentrate new development in a town center and slow development outside of that area, which involved labeling the Griepenburg's property and others as environmentally sensitive, according to court documents. The couple's land had been zoned for residential and commercial.

The case generally presents a collision between two competing notions: that municipalities should be able to pursue a smart-growth planning process that focuses future development in a town center, and that property owners need protection from aggressive downzoning, which can act like a form of condemnation, according to Thomas J. Trautner Jr. of Wolff &

Samson PC.

Among other potential rulings, the Supreme Court could back the ability of towns to downzone in the name of smart growth and preserving the environmental sensitivity of a region even if a specific property that's within that area and subject to the zoning change doesn't have characteristics like wetlands, Trautner said.

“The practical impact would make it substantially more difficult for property owners to appeal from downzoning because the process of working with the State Planning Commission, etc., would arguably insulate the township from traditional arguments that it is inappropriate to downzone a property in the name of preserving the environment unless the property to be downzoned is, in fact, host to significant environmental constraints,” he said.

Trautner suggested that he ultimately expected the justices to try to strike a balance without overturning the apple cart on the basic analysis that courts undertake in such cases.

“I would be surprised if the Supreme Court did anything to change the standard of review of the ordinance, and I think the Supreme Court is going to be cautious to not do anything to undermine the idea that courts should zealously protect property owners' rights from unlawful taking by municipalities and not overempower municipalities to engage in inverse condemnation or outright condemnation,” he said.

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