

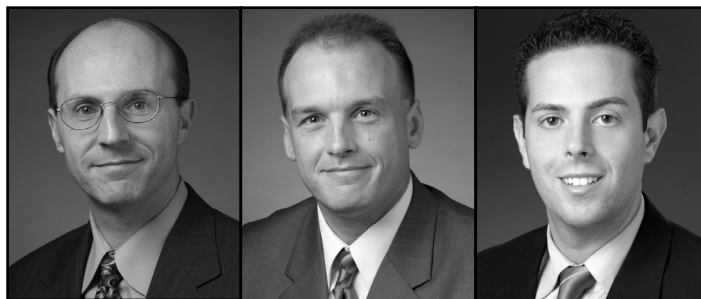
By Geneslaw, Elward & Tuvel of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C.

NJ Court suspends zoning and orders remedies aimed at creating opportunity

A New Jersey judge has entered an order eviscerating the existing zoning ordinances of two New Jersey municipalities. The basis for the order was the Court's finding that each municipality had failed to comply with the Court's prior order, entered in the context of an affordable housing case, directing each municipality to revamp their respective zoning schemes so as to provide an adequate opportunity for the development of affordable housing.

In a written opinion issued in the case of *Tomu Development, Inc. v. Borough of Carlsdat, et al*, venued in Bergen County (not yet approved for publication), the Honorable Jonathan N. Harris rendered a decision on May 19, 2006, setting forth a number of unprecedented remedies aimed at ensuring that the municipal zoning schemes of the Boroughs of East Rutherford and Carlsdat comply with the municipalities' obligation under the New Jersey Constitution to provide zoning schemes that permit a reasonable opportunity for the development of affordable housing.

The Court had previously determined that each municipality's zoning scheme was invalid under the New Jersey Constitution because the existing schemes did not permit a reasonable opportunity for the development of affordable housing. As a result, the Court awarded a builder's remedy judicially approving the Plaintiff developer's project



Howard D. Geneslaw Michael V. Elward Jason R. Tuvel

that included a portion of the proposed housing to be earmarked for the development of affordable housing units. In addition, the Court previously ordered the municipalities to amend their respective zoning codes by February 28, 2006 to provide for a reasonable opportunity for the development of low and moderate income housing. Judge Harris found that the municipalities failed to comply with the Court's prior order compelling each municipality to amend its zoning code to provide for reasonable opportunities for the development of affordable housing. The Court found that each municipality's revised ordinance failed to ensure adequate opportunities for the development of low and moderate income housing in violation of the Court's prior order. As a result of these violations, the Court ordered a number of unprecedented remedies.

The remedies ordered include the appointment of an independent judicial officer to serve as a monitor, a provision that no development take place without the approval of the monitor, and declaratory relief invalidating

the zoning ordinances of both municipalities. Although denominated as a monitor in the order, the judicial officer is also charged with the affirmative duty of enacting new development "rules" for each municipality that will provide reasonable opportunities for the creation of low and moderate income housing. The existing zoning is advisory only. Under the order, each municipality is to adopt the monitor's rules as its zoning code. If a municipality fails to adopt the scheme, the order provides that the monitor's proposal shall serve as the municipal zoning scheme in any event. The propriety of a judicial officer engaging in legislative actions such as proposing a zoning scheme will surely be raised on appeal.

Additional powers of the monitor appointed by the Court include acting in the place of the respective municipalities with respect to applications for development within the jurisdiction of the New Jersey Meadowlands Commission and advocating before the commission for the creation of affordable housing within the respective municipalities. The

New Jersey Meadowlands Commission is a regional approving authority created by statute that possesses jurisdiction over large tracts of land within both municipalities. Accordingly, the reach of the remedies ordered by the Court appear to be limited by this fact. Nonetheless, the remedies are far reaching, represent a moratorium on development and even apply retroactively to projects that received approval under the old zoning but have not yet been constructed.

The Court recognized the uniqueness and unprecedented nature of the remedies ordered. In his written decision the judge remarked "... I must reluctantly employ drastic steps to fulfill the judiciary's duty to vouchsafe fidelity to constitutional norms." Undoubtedly, the *Tomu* case will result in an appellate determination and perhaps review by the New Jersey State Supreme Court, as to the lawful scope of remedies a Court may order upon a finding that a municipality has failed to achieve its state constitutional obligation to provide reasonable opportunities for affordable housing.

Howard D. Geneslaw, Director, and Michael V. Elward and Jason R. Tuvel, Associates, are with the Real Property and Environmental Group at the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., which has offices in Newark, New York, Philadelphia and Trenton. ■