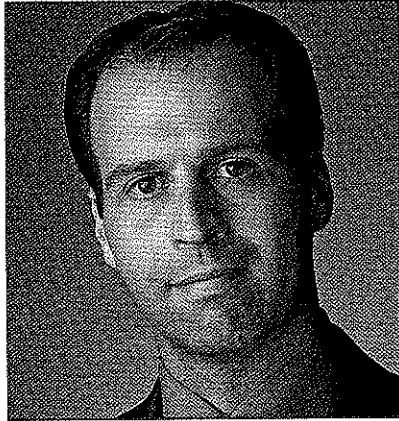


A Delicate Balance

The oft-used Wall Street aphorism, "every market hates uncertainty," comes to mind in light of the climate for development in New Jersey. Developers and the State are struggling to find the balance between enacting proper regulation to provide affordable housing, protect the environment, and safeguard constitutional rights and encouraging economic expansion.



"Key legislative and regulatory changes are causing a great deal of uncertainty for the New Jersey real estate market."

As a result, key legislative and regulatory changes are causing uncertainty for the New Jersey market. These drastic changes, and even the mere prospect thereof, have created doubt for developers that may be a roadblock on the path to economic expansion.

One area in which this trend can be seen is the uncertainty developers face in understanding a project's affordable housing requirement. The Council on Affordable Housing (COAH) issued its latest requirements for increased mandatory affordable housing on December 20, 2004. However, on January 25, 2007, as a result of the New Jersey Appellate Division case, *In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95* by the New Jersey Council on Affordable Housing, 390 N.J. Super. 1, (App. Div. 2007), many provisions set forth by the Third Round Rules were reversed.

After the Court granted COAH additional extensions, COAH now has until February 2008 to revise the methodology by which the Third Round Rules are implemented. Developers trying to predict the COAH requirement for both residential and commercial projects are left guessing.

In addition, with the Third Round Rules void, municipalities face the predicament of how to handle projects in progress. Some municipalities still insist on applying the Third Round Rules, while others are applying the old rules but reserving the right to extract additional charges or affordable units. The uncertainty not only creates problems for pending projects, but sends troubling warning signals to developers deciding whether to take on particular projects.

Perhaps the greatest area of uncertainty is environmental regulation and permitting and the timing for such permits. One example of a recent set of regulations creating

uncertainty are the "Grace Period" Rules, made effective by the New Jersey Department of Environmental Protection on September 18, 2006. The rules transform the process for review and approval of site remediation reports and establish fines for non-compliance. Countless new, small changes in the site remediation process and internal working of the NJDEP have created more paperwork and ambiguity and hampered NJDEP's ability to review submissions.

Further, NJDEP's proposal to replace existing Flood Hazard Area Control Act Rules (N.J.A.C. 7:13) with new rules has led to confusion and uncertainty for many proposed developments. The rules are intended to increase the scope of restricted land adjacent to regulated waters. Their ambiguity lies in the confusing application of the "grandfathering" provisions. If the rules are adopted as proposed, retroactive application to ongoing projects is a risk. And as with COAH, the vagueness of the requirements may discourage potential projects.

Another area is the Local Redevelopment and Housing Law (N.J.S.A. 40A:12A-1 et. seq.), specifically use of eminent domain. The recent State Supreme Court decision, *Callenthin Realty Development, Inc. v. Borough of Paulsboro*, pending legislative proposals to amend the LRHL and the need to reconcile the two are all contributing to this confusion.

As commented by many, the Supreme Court in *Callenthin* narrowed the definition of the word "blighted" to limit the ability of developers to seize private land for development purposes. Meanwhile, in the legislature, Senate and Assembly bills to amend the LRHL, both still under consideration, aim to significantly alter existing law in hopes of protecting private citizens against eminent domain abuse. The potential consequences of this ruling and pending legislation on redevelopment projects aside, the ambiguity will affect both ongoing projects and the viability of future redevelopment.

Uncertainty is clearly an obstacle developers face in New Jersey. The State needs to enact well thought-out legislative initiatives balancing the need to protect citizens with the desire to stimulate economic development. It is impossible to quantify the number of projects that never come to fruition. However, the current rate of economic expansion in New Jersey shows this market does, indeed, hate uncertainty. —**EGU**

The views expressed in this article are those of the author and not of Real Estate Media or its publications.

Evan S. Glanz is general counsel for J.G. Petrucci & Co., Asbury. He can be reached at eglanz@jgpetrucci.com.