An Overview of Recent Land Use Guidance and Legislation in New Jersey in Response to COVID-19

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In the midst of the ongoing COVID-19 public health emergency, New Jersey-based builders, developers, contractors, municipal entities, and other industry shareholders and interested parties should be aware of recently issued land use guidance and legislative action that will undoubtedly have a broad-based impact going forward. The following is a summary of several developments in that regard.

DCA Issues Guidance Regarding Construction Inspections During COVID-19 Pandemic

New Jersey's Department of Community Affairs (DCA) has issued temporary modifications to its rules concerning inspections for construction projects permitted to continue under Governor Phil Murphy's Executive Order 122, which is summarized in this recent **Client Alert**.

The guidance was issued to establish safe workplace conditions for local enforcing agency personnel (municipal construction code and subcode officials) in compliance with the social distancing orders established by several of the Governor's previous Executive Orders, including Executive Orders 107 and 108.

For construction located in a jurisdiction where the local enforcing agency's (LEA) office remains open, the following provisions apply:

- Work-from-Home. DCA is encouraging that LEAs (typically the local construction code and subcode officials) permit work-from-home arrangements (e.g., plan review and administrative actions) and the "use of electronic communication to the greatest extent possible." Local enforcing agencies are encouraged to utilize video conferencing whenever feasible to conduct inspections.

- Prioritization of Inspections. Construction offices are to prioritize inspections necessary for the health and welfare of the public.
- Inspections of New Construction and Exterior of Existing Buildings. All required inspections for new construction and any work on the exterior or outside of any occupied building should be performed as usual.
- Rough Inspections for New Additions. Rough inspections for new additions should be performed, provided no entry to the occupied home or building is required or that appropriate social distancing is in effect.
- Reporting of Construction Activity. Contractors may report construction activity, such as rough inspections, in existing occupied buildings with photos or other documentation for the time being.
- Minor Work. Any work that is considered "Minor Work" under existing DCA Regulations now only require a final inspection and such inspections may be deferred to a later date provided that contractors report the construction activity as set forth in the prior bullet point. This includes inspections of replacement items such as a residential heater, air conditioner and/or water heaters.

For construction located in a jurisdiction where the LEA's office has closed and inspections cannot take place, construction may continue without inspections subject to the following provisions:

- Certificates of Continued Occupancy Required After Re-Opening of LEA Office. Notwithstanding emergency work in accordance with existing DCA regulations, if a permit was issued prior to the closure of the construction office and inspections have been deferred, then upon the re-opening of the construction office, a Certificate of Continued Occupancy (CCO) inspection must take place. The CCO will ensure that the construction was properly completed in adherence to applicable codes and that future violations will not issue to the property owner.
- Documentation and Oversight by Design Professionals of Projects. For any work completed while inspections were unavailable, a report describing the work that was completed during that time must be kept, with the design professional or firm associated with the project overseeing, approving, and documenting the portions of the project where no inspections were performed. Licensed/registered tradesmen shall document the process of their work in accordance with the inspection procedures of the Uniform Construction Code (UCC). Before, during and after photographs and/or video shall be included in the documentation.
- CCO Inspection of Areas Not Visible. Because construction is being completed without inspections of, for example, all plumbing and electrical work within the walls, the CCO inspection shall be limited to those portions of a building that are visible. The uncovering of completed work may only be required upon probable cause necessitating the inspection and only if there is reason to believe that a life-safety violation exists. Further, documentation provided by the owner that does not demonstrate compliance is not sufficient to constitute probable cause.
- Initial Certificate of Occupancy. If the building under construction had never obtained a certificate of occupancy prior to the closure of the LEA office, then instead of the eventual CCO issued by the LEA,

the owner/contractor should contact the DCA to obtain a Temporary Certificate of Occupancy (TCO). Thereafter, the policies set forth above may be followed with a Certificate of Occupancy being issued by the LEA, rather than a CCO.

- Plan Review for New Construction. If a LEA office is closed, plan review may be placed on hold unless the project is critical to combating COVID-19.

The key takeaway for builders and contractors that are continuing construction during these uncertain times is to document as best as possible – and photograph before, during, and after – all work that is performed. Project owners should also ensure that their design professionals are overseeing all aspects of the construction.

NJ Legislature Amends Open Public Meetings Act in Response to COVID-19 Pandemic

Although it is critical that every level of government remain functional during the current state of emergency, current social distancing protocols have prevented routine functioning and required the implementation of new procedures. One such issue arises from the requirement to hold public, in person, meetings pursuant to the New Jersey Open Public Meetings Act (OPMA) – often referred to as the "Sunshine Law".

Pursuant to OPMA, there is a requirement for municipal governing bodies (including municipal councils and committees and planning and zoning boards) to hold open meetings which the public can attend and, at the discretion of the governing body, provide comment on issues ranging from routine matters (paying municipal bills) to critical concerns (the welfare of citizens and businesses). Often, matters undertaken by a public body require a public hearing during which the public's ability to be heard is mandatory (such as the adoption of an ordinance or an application for site plan or subdivision approval).

In response to the COVID-19 pandemic and current state of emergency, Governor Phil Murphy recently signed legislation (**A3850**) amending OPMA in order to address New Jersey's constitutional due process mandates and applicable laws, while still abiding by recommended safety protocols related to social distancing.

In accordance with OPMA as now amended, during states of emergency declared by any level of government applicable, public bodies in New Jersey may conduct meetings electronically without violating OPMA. With regard to the required 48-hour notice, the law now states, "[t]o the extent practicable, a public body providing only electronic notice of a meeting pursuant to this subsection [1b of the Act] shall limit public business discussed or effectuated thereat to matters necessary for the continuing operation of government and which relate to the applicable emergency declaration." This will enable governments to pay bills and address immediate health and safety concerns.

Additionally, OPMA now permits the New Jersey Department of Community Affairs (DCA) (and to the extent dealing with any board of education, the State Board of Education) to enact rules and regulations. These rules and regulations would be effective upon filing with the Office of Administrative Law, thus

initially circumventing many of the process requirements of the Administrative Procedures Act (APA) during the COVID-19 crisis for a period of emergency not to exceed 18 months. Although such rules and regulations will initially be effective upon filing, adoption, amendment or re-adoption following the state of emergency will require conformance with APA requirements for administrative agency rules and regulations.

DCA has issued a guidance document to municipalities (see section below) related to remote public meetings, which summarizes OPMA and provides information related to various available technology platforms, with the intention of ensuring public participation and the satisfaction of due process requirements during this exceptional time, notably the "notice and opportunity to be heard" required for any hearings.

DCA Issues Guidance for Planning Boards and Zoning Boards of Adjustment During COVID-19 Pandemic

The DCA issued guidance for Planning Board and Zoning Board of Adjustment hearings during the COVID-19 pandemic. While the Governor previously signed into law amendments to the OPMA which permit public meetings to be held by electronic or telephonic means on electronic notice (see previous section), those amendments limit the actions that may be undertaken by public bodies to items related to the ongoing public health emergency.

The DCA's new guidance now provides a roadmap for boards to follow "to ensure continuity of Land Use application procedures while New Jersey's Executive Order 103 and Executive Order 107 are in effect."

Provisions of the guidance are as follows:

- Meetings and Hearings May be Held Virtually. Boards can hold their meetings virtually in accordance with the DCA's prior **Guidance for Remote Public Meetings**
- Public Notice. Public notices that must be sent pursuant to the Municipal Land Use Law (MLUL) must set forth the conference call access or web-meeting access information. Dial-in information should be provided to individuals without computer access or mobile device. The notice should also identify the websites on which plans are posted, contact information for the Board Secretary, and all available means of achieving public access to all documents and the meeting itself. The notice should state that individuals lacking the resources or know-how for technological access should contact the Board Secretary for accessing the plans and the meeting.
- MLUL Requirements and Deadlines Remain in Effect. All procedural requirements and deadlines found in the MLUL remain in effect. This means that deadlines for plan review and hearing of an application remain in place. As an editorial aside, many municipalities are requesting, and applicants are granting, extensions of these deadlines. Notably, planning and zoning boards must continue to meet at least monthly, even if by virtual or telephonic meetings.
- Submission and Posting of Plans. Plans must still be on file with the Board Secretary at least ten (10) days prior to the hearing, however such plans may now be submitted electronically and the Board Secretary may make them available to the public on the municipality's website or other electronic

service available to the public and free of charge.

- Availability of Plans to Public. Members of the public may contact the Board Secretary to receive a hard copy of the plans and application materials by mail or via an exchange site such as a drop/pick up box by appointment at a secure, public location such as a police station or at the municipal building, subject to any standard fees or charges.
- Contact Information for Board Secretary. The local unit should also publicly post, and post online, a phone number and email for the Board Secretary.
- Applicant Exhibits. Applicants should provide copies of their exhibits for the hearing at least two days in advance of the meeting. The exhibits should be posted for the Board and public access prior to and during the video meeting. It is recommended in the guidance document that concurrent introduction and discussion of exhibits take place "to ensure adequate information sharing and clear labeling for Board and public participation in the session."
- Public Comment. The public must be permitted access to provide comments on the application and to cross-examine witnesses. At the beginning of a hearing, the Board Chair should announce a standard limit on public comment (e.g. time limit, length or number of text comments) for each individual. Cross-examination of witnesses by the public may require relaxing the standard limit, but the Chair should limit redundant comments and questions "to ensure orderly remote public participation." The Board Chair should encourage members of the public to advise in advance of any intention to undertake cross-examination to ensure technological needs are accommodated.
- Record of Meetings. Minutes of the meetings must be kept and made available to the public. All hearings must be recorded and made available. The guidance document further provides that a court reporter should be retained to keep a record of the entire proceeding.

While the guidelines issued above are directed at the boards, applicants should likewise be cognizant of them to ensure that their hearings are compliant. Further, applicants should discuss with their attorneys the risks of proceeding with an application under the format allowed by this guidance.

For minor, non-controversial applications, this guidance document provides a framework for development applications to continue to be heard to prevent a backlog of applications once this crisis is over. For other applications, it may be advisable to carry until such time that in-person hearings can once again be held. These decisions should be made on a case-by-case basis in consultation with the applicant's attorney.

We will continue to monitor developments impacting land use issues and New Jersey's building industry and will keep you informed accordingly. If you have any questions, please contact the following co-authors of this Alert:

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