

## The Waiver Rule

We write to let you know about an important decision from the Appellate Division that will impact New Jersey developers and other businesses.

On March 21, 2013, the Appellate Division rejected a challenge to the so-called Waiver Rule (N.J.A.C. 7:1B-1.1, et seq.), which allows the New Jersey Department of Environmental Protection ("DEP") to waive certain environmental regulations on a case-by-case basis. On behalf of our client, the New Jersey Business and Industry Association ("NJBIA"), which appeared in the case as an amicus curiae or friend of the court, Porzio argued that the Waiver Rule represents a common sense and measured approach to regulation that balances the need to protect the environment with the need to allow businesses and developers to, in appropriate circumstances, get out from under the web of environmental regulations that often unreasonably hamper growth. In its decision, the Appellate Division appears to have agreed.

The history of the Waiver Rule is not long. On January 20, 2010, Governor Christie issued Executive Order No. 2, which sought to better leverage New Jersey's "enormously valuable assets" by, among other things, "establishing 'Common Sense Principles' for State rules and regulations that will give this State the opportunity to energize and encourage a competitive economy to benefit businesses and ordinary citizens." One of these "Common Sense Principles" required State agencies to "[a]dopt rules for 'waivers' which recognize that rules can be conflicting or unduly burdensome," and further required these agencies to "adopt regulations that allow for waivers from the strict compliance with agency regulations," provided that "such waivers shall not be inconsistent with the core missions of the agency."

Although it did not identify Executive Order No. 2 as the source of its authority to do so, shortly after Governor Christie issued the Order, the DEP began developing rules and regulations designed to address the concerns regarding the impact of excessive regulation on New Jersey's economy. The result was the Waiver Rule, which was only adopted after the DEP solicited public comments to the proposed Waiver Rule through an open public comment period, during which DEP received comments from more than 500 interested parties, and during a public hearing.

Notwithstanding its name, the Waiver Rule is not a blanket waiver of all regulations. Instead, a waiver will only be available when one of four criteria are met: (1) a public emergency has been formally declared; (2) conflicting rules between Federal and State agencies or between State agencies are adversely impacting a project or preventing an activity from proceeding; (3) a net environmental benefit would be achieved; and/or (4) undue hardship is being imposed by the rule requirements. N.J.A.C. 7:1B-2.1. Moreover, the Waiver Rule identifies 13 rules and requirements that cannot be waived under any circumstances. A group of Appellants, led by the American Littoral Society Association of New Jersey challenged the Waiver Rule on several grounds. Today, the Appellate Division rejected that challenge.

First, the court held that the Waiver Rule was a proper exercise of the DEP's rule-making authority. Specifically, the court held: "[T]he power to promulgate a regulation implies the incidental authority to suspend or waive its application on certain limited, well-defined circumstances provided such exemption does not circumvent any legislative enactment or purpose, or federal law, is consistent with

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### AUTHOR

**Peter J. Gallagher, Esq.**  
Associate  
973-889-4147  
[pjgallagher@pbnlaw.com](mailto:pjgallagher@pbnlaw.com)



### REAL ESTATE ATTORNEYS

**Bonnie Reid Berkow**  
**Lawrence A. Calli**  
**C. John DeSimone, III**  
**Peter J. Gallagher**  
**Douglas R. Henshaw**  
**Katharine A. Muscalino**  
**Martin A. Newmark**  
**Jonathan M. Prince**  
**Gregory S. Ricciardi**  
**Michael L. Rich**  
**Barbara Ann Schwartz**  
**Karen E. Schwimmer**  
**John R. Wagner**  
**Steven R. Wagner**  
**Peter J. Wolfson**

the agency's statutory core mission and objectives, is accomplished through a properly adopted regulation pursuant to the [Administrative Procedures Act], and establishes appropriate and clear standards for the exercise of agency discretion..." Second, the court held that the Waiver Rule satisfied all of the caveats set forth above -- it was limited in its application, was based on well-defined standards, and was not inconsistent with the DEP's core mission.

The court did agree with Appellants that certain "guidance documents" posted by the DEP on its website in connection with the Waiver Rule were improper. The court held that these documents went beyond "merely facilitating administrative implementation of the rules...and actually, to some extent, announce[d] new substantive requirements." As a result, they amounted to the DEP effectively announcing new rules without following the procedures set forth in the Administrative Procedures Act. Accordingly, the "guidance" documents were struck down. But, the court was crystal clear that even though these documents on the DEP website were not proper, this did not in any way change its conclusion that the Waiver Rule was proper and enforceable.