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VIA E-MAIL AND U.S. MAIL

The Honorable Jon S. Corzine  
Office of the Governor of the State of New Jersey  
P.O. Box 001  
Trenton, New Jersey 08625

Subject: Permit Extension Act of 2008

Dear Governor Corzine:

On behalf of New Jersey Environmental Federation and the Sierra Club, New Jersey Chapter, we are writing to you regarding a provision of the recently passed Permit Extension Act (the "Act") known as the "Dracula Clause." In this clause, the Act explicitly attempts to revive government approvals that have expired since the beginning of 2007. The retroactive nature of this clause has the potential to upset reasonable economic expectations, interfere with sound planning, result in anomalous outcomes breeding confusion and litigation, and could be illegal. We respectfully request that you conditionally veto the Act to eliminate the retroactive effect of the Dracula Clause.

As the Act makes clear, businesses and individuals generally adjust their investment decisions in accordance with the law. Thus, after governmental approvals expire, adjacent landowners may make investments in reliance upon the expiration of the prior approvals. In general, retroactively reviving expired approvals will reward those who did not adjust their approaches after the approval expired and punish those who did make prompt adjustments. This result runs counter to the express purpose of the Act. To make New Jersey's economy responsive to external changes, businesses should be encouraged to make prompt adjustments in response to those changes. Because the Act does exactly the opposite and punishes the prompt while rewarding the sluggish, it is bad economic policy.

For example, a developer whose property is adjacent to a site that previously received governmental approvals to construct a sewage treatment works may hesitate to invest in residential development on its property. After the governmental approvals authorizing construction of the treatment works expire, however, the developer may be encouraged, and may even take steps, to develop its property in a manner that may be incompatible with the previously permitted use on the adjacent property. In this example,

legislatively reviving the approval to construct the treatment works would reduce the value of the adjacent property and any proposed development and thwart the reasonable expectations of the owner and the investors. The impact to reasonable expectations would be even more extreme if the municipality had rezoned the site to prohibit its use as a sewage treatment works.

The Act will also interfere with sound planning and take away powers that are currently granted to municipalities. For example, pursuant to the Municipal Land Use Law, municipalities may approve general development plans, which grant immunity from zoning changes for up to 20 years. N.J.S.A. § 40:55D-45.1. However, after a general development plan expires, the land is then subject to any zoning changes that may have occurred during the term of the approval. As currently written, the legislature's attempt to retroactively revive plan approvals could conflict with duly enacted municipal ordinances and any subsequent development efforts undertaken in reliance on the expiration of the general development plan and any amended or new ordinances. At a minimum, the legislature is sowing confusion and may, instead of promoting municipal redevelopment and stimulus efforts, only further impair the ability of towns to respond to changing economic circumstances. Once again, the retroactive effect of the Act serves to decrease the adaptability of New Jersey's economy and interferes with the reasonable expectations of municipalities formed when approvals were initially granted and upon which they have detrimentally relied.

In addition to the troublesome practical consequences of the Dracula Clause, the legality of the provision is also questionable and requires a thorough analysis before it is enacted. Retroactive laws profoundly affect individuals who have acted in reliance on the present state of the law. *Edgewater Inv. Assoc. v. Borough of Edgewater*, 103 N.J. 227, 239 (1986). The retroactive application of a law is invalid if an affected party is prejudiced by their reliance on a law that is later modified through the retroactive application of legislation. *Id.* Furthermore, substantive due process rights are violated if the consequences of a party's reliance "are so deleterious and irrevocable that it would be unfair to apply the statute retroactively." *Id.* (citing *Gibbons v. Gibbons*, 86 N.J. 515, 523-24 (N.J. Sup. Ct. 1981)).

The critical question to be answered when determining the permissibility of retroactive laws is "whether a party has changed his [or her] position in reliance upon the existing law, or whether the retrospective act gives effect to or defeats the reasonable expectations of parties. *Phillips v. Curiale*, 128 N.J. 608, 621 (1991). The factors that must be considered are: "(1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modified or abrogates the asserted right, and (3) the nature of the right the statute alters." *Id.* (citing Hochman, 73 HARV. L. REV. 692, 697 (1960)). Essentially, "one must examine what it is that is being taken away and weigh that loss against the social gain being achieved." *Berkley Condominium Ass'n v. Berkley Condominium Residences, Inc.*, 185 N.J. Super. 313, 320 (Ch. Div. 1982). Here,

although the law claims to provide an economic stimulus, it is unclear how rewarding inaction provides such a stimulus. Thus, the social gain is unclear, while the Dracula Clause clearly upsets the reasonable expectations of both private parties and municipalities.

Finally, to the extent that the retroactive revival of expired approvals is regarded by the courts as a grant of a new approval, it is likely to raise procedural due process and separation of powers concerns. Procedural due process rights are implicated if an individual suffers final deprivation of a property or other interest to which she was entitled. *Nicoletta v. North Jersey Dist. Water Supply Commission*, 77 N.J. 145, 154-55 (1978). Because statutes generally require individualized notice to adjacent landowners and an opportunity to comment when the approvals that would be granted by the Act are given, there are no cases evaluating whether removal of these rights would violate due process requirements. However, some decisions suggest that interested parties other than those to whom an approval is granted may nonetheless have protected interests. For example, the biological father of an adult child was entitled to notice and an opportunity to be heard before that child could be adopted. *In the Matter of the Adoption of an Adult by V.A.*, 294 N.J. Super. 400, 406 (Ch. Div. 1996). The Act makes no provision for individual notice to nearby property owners regarding the grant or renewal of expired approvals and they also have no opportunity to be heard. Thus, the deprivation of these rights by the Dracula Clause may be unconstitutional.

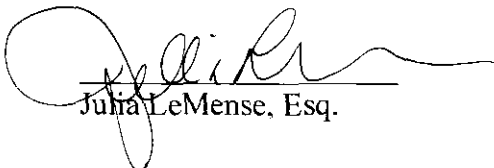
Turning to the separation of powers issue, with respect to State approvals, administrative agencies within the Executive Branch typically grant new approvals after quasi-judicial action. In contrast, here the revival of the expired approval, which is effectively a renewal, requires no quasi-judicial action by the Executive Branch. Thus, the legislature is attempting to carry out an executive act, thereby encroaching upon the powers of the executive.

We therefore respectfully request that you mitigate the most pernicious effects of the Act by using the conditional veto to eliminate the Dracula Clause. Thank you for your consideration.

Yours sincerely,



Richard Webster, Esq.



Julia LeMense, Esq.