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Recent Court Decisions Limit Powers of Local Land Use Authorities

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Recent New Jersey court decisions have indicated a trend that the New Jersey courts will take a narrow view of the limited powers of the local land use authorities as set forth in the Municipal Land Use Law (“MLUL”) and reaffirm the basic standard of fairness under which developers cannot be responsible for paying more than their fair share of off-site improvements. It is important for New Jersey developers and builders to find out if the New Jersey Supreme Court will continue this trend when it renders its decision in the consolidated appeals of *New Jersey Shore Builders Association v. Township of Jackson* and *Builders League of South Jersey v. Egg Harbor Township*, 401 N.J. Super. 152 (App. Div. 2008), which revisits the issue of whether municipalities can require developers to set aside land for open space or recreational facilities, or to make payments in lieu of those set-asides, as a condition of development approval. The New Jersey Supreme Court granted certification on November 14, 2008, and the consolidated appeals were argued before the New Jersey Supreme Court on March 9.

In *New Jersey Shore Builders*

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Association and Builders League of South Jersey, the Appellate Division invalidated a longstanding municipal practice of requiring developers to set aside land for open space as a condition of development approval or to make payments in lieu of those set-asides as conditions of approval. In unanimously striking down ordinances in two municipalities that required such exactions, the Appellate Division held that the MLUL (i) only permits municipalities to condition development approvals on contribution to open space and recreational facilities in the specific context of planned developments, but not general subdivision or site plan review, and (ii) limits off-site contributions to water, sewer, drainage and street improvements.

The municipalities conceded that the MLUL did not provide any express authority to require the challenged exactions but argued they had implied authority pursuant to the provisions in the MLUL that provide for open space set-asides as a condition of a planned development application and the general purposes of the MLUL, which make recreation and open space important considerations in land-use planning. The Appellate Division recognized that a municipality’s zoning power is limited to the power delegated to local governments in the MLUL and found that the “unspecified language” of the MLUL’s general purposes section cannot “override its specific and targeted

provisions of the statute” that limit the set-aside for open space and recreation to planned developments.

The Appellate Division also addressed the requirement for off-site contributions in lieu of on-site set asides and noted that the only section of the MLUL that addresses off-site, or off-tract, contributions is N.J.S.A. 40:55D-42, which is titled “Contribution for off-tract water, sewer, drainage, and street improvements.” There was no dispute that this provision permits off-tract contributions for development approvals, but the Appellate Division held that the contributions are limited only to off-tract improvements for “water, sewer, drainage, and street improvements.” The court found that N.J.S.A. 40:55D-42 limits a municipality’s authority to require contributions for off-site improvements to those specifically enumerated in the statute. Accordingly, a municipality may not condition a development approval on contributions for off-site improvements for common open space and recreational areas that are not listed in the statute.

In *Toll Brothers, Inc. and Laurel Creek, L.P. v. Board of Chosen Freeholders of the County of Burlington and the Planning Board of the County of Burlington* (194 N.J. 223 2008), the Supreme Court also addressed the limits of local governmental entities involved in approving development projects throughout New Jersey. The questions presented on appeal were (1) whether, by way of a developer’s agreement, a developer can contract to pay more than its pro-rata share for off-tract improvements, which payments could not be imposed by resolution under the MLUL; (2) whether conditions regarding

off-tract improvements must be satisfied even when the scope of the developer's project materially changes; and (3) whether a developer's agreement immunizes such conditions from a changed-circumstances analysis. The Supreme Court answered each of these questions in the negative. The Supreme Court unanimously agreed with the developer that a developer agreement is not "an independent contractual source of obligation," rather it is "an ancillary instrument, tethered to the conditions of approval, and exists solely as a tool for the implementation of the resolution establishing the conditions. Accordingly, if the resolution establishing the conditions remains in effect, the developer's agreement can be enforced. However, if the resolution changes the developer's agreement enjoys no such independent status and therefore must be renegotiated."

In addition to addressing the scope of developer agreements, the Supreme Court addressed the issue of what can be required of a developer with regard to off-tract improvements. The Supreme Court directly addressed the scope of N.J.S.A. 40:55D-42, stating that this statute "provides the

boundaries of a public entity's power with respect to off-tract improvements" and a developer cannot be required to pay more than its pro-rata share of the cost of off-tract improvements enumerated in the statute. The Supreme Court found that "[t]he standard remains clear — under the MLUL there must be causal nexus between the conditions imposed and the needs created by the development, and the apportionment of costs must be fair and equitable." The Supreme Court recognized that the requirement of a pro-rata share "protects a developer from paying a disproportionate share of the cost of improvements that also benefit other persons." The decision clarifies that "voluntary" agreements to pay for improvements beyond the developer's respective pro rata share is unlawful in New Jersey. The Supreme Court observed that "[i]n addition to the problem of compulsion, so-called voluntary contributions are not much different than a pay-to-play system, where developers are rewarded for their 'philanthropic' gifts."

The decision in *Toll Brothers* was important because it set the stage for the issues in the *New Jersey Shore Builders*

Association and *Builders League of South Jersey* cases to address whether the challenged provisions of the MLUL should be strictly limited to those improvements specifically enumerated in the statute or whether such language should be liberally construed to encompass the broad general purposes of the MLUL. Both decisions were significant for the New Jersey development community because the courts strictly interpreted the provisions of the MLUL and viewed the authority granted to the municipalities pursuant the MLUL in a narrow fashion. The decisions provided a strong reminder that local land use authorities have limited powers as set forth in the MLUL and reaffirmed a basic standard of fairness under which developers cannot be responsible for paying more than their fair share of off-site improvements. Based upon the Supreme Court's reasoning in *Toll Brothers*, it is anticipated that the Supreme Court will continue the trend and uphold the limits in local land use authorities when it renders its decision in the consolidated appeals of *New Jersey Shore Builders Association* and *Builders League of South Jersey* cases. ■