

OPEN SPACE IN NJ

RECENT NJ COURT DECISIONS AND
IMPLICATIONS

Overriding Principles of NJ Law

- The STATE is the Absolute Sovereign
- Municipalities are the “children of the state.”
- A municipality is only permitted to undertake activities that have been “authorized” by the State.
- Municipalities are considered to be a “limited government.”
- The Federal government is also considered to be a government of limited jurisdiction.

Overriding Principles of NJ Law continued

- There is no inherent power in a NJ municipality to zone. Zoning is authorized by the Municipal Land Use Law. (MLUL)
- The MLUL is a specific authorizing statute. Most cases interpreting the MLUL have defined the powers narrowly.
- Municipal Land Use Ordinances that go beyond the powers and activities specifically authorized by the Municipal Land Use Law (MLUL) are typically found to be invalid.

NJ Law Continued

- Municipalities have a broad police power to protect the general health and welfare of the citizens. (N.J.S.A. 40:48-2)
- Municipal ordinances based upon the general ability to protect the “public health safety and welfare” are usually presumed valid.
- The “health, safety and welfare” power is very broad.

Hint

- Every municipal ordinance should specifically state the authorization on which it is based. (This principal is often forgotten by many municipal attorneys)
- Every municipal ordinance should state a purpose and make findings

Open Space Ordinance Case

New Jersey Shore Builders Association v. Township of Jackson 199 NJ 449(2009)

Per curiam decision.

Affirmed an Appellate Division case – 401 N.J.Super. 152 (App.Div. 2008)

- Jackson Ordinance
All residential developments must provide 12.5 acres of land for recreational purposes per 1000 residents.

Developer may make a contribution in lieu of the requirement by contributing to off tract recreational improvements

- Companion Challenge to Egg Harbor Township Ordinance
Residential developers should set aside ½ acre for recreational and open space per 100 residents

Allowed contributions in lieu of set asides

NJ Shore Builders Assoc. v Township of Jackson

Holding- Municipalities lack the jurisdiction under the MLUL to adopt ordinances that require developers to provide open space or recreational area set-asides or payments in lieu thereof, as a condition of approval.

NJ Shore Builder's Assoc v Township of Jackson

Ruling based upon MLUL

“In the enactment of zoning laws, a municipal government may only advance an authorized purpose in a manner permitted by the legislature.”

MLUL only authorizes open space provisions for “planned developments.” There is no grant of authority for other development applications.

The MLUL defines a “Planned development” as “a planned unit development, planned unit residential development, residential cluster, planned commercial development and planned unit industrial development.” NJSA 40:55D-6

Jackson Twp. Open Space continued

MLUL does not permit land proposed to be set aside for common open space to be dedicated or made available for public use.

MLUL statute permits contributions for off site improvements only for water, sewage, drainage and street improvements.

Open Space Holding (continued)

- Dicta versus ruling
 - 1) Court frowned upon use of the land use law to convert private land to public use.
 - 2) Distinguished “common land” from “public land.”
 - 3) Court found that there are other adequate means to acquire lands for public use

Tree Ordinance Case

- **NJ Shore Builder's Association v Township of Jackson**
 - 199 NJ 38 (2009)
- Ruling reversed an earlier Appellate Division case
- Ordinance required a property owner to either replace any tree that is removed or pay into a fund dedicated to planting trees and shrubs on public property.
- Similar to "No Net Loss" statute for state lands.
- Approximately 200 NJ municipalities have adopted some form of a Tree Removal Ordinance.

Tree Ordinance (continued)

Ordinance was based on the “police power.”

Municipalities have the power and authority to enact ordinances in support of the police power.

As long as the ordinance is not unreasonable, arbitrary, or capricious and that the means selected have a rational basis to a legitimate stated objective.

Burdon of proof is on the party seeking to overturn the ordinance. ”

Tree Ordinance Case

- Ordinance is a valid exercise of police power.
- Although the ordinance touched on the uses of land, it is not a planning or zoning initiative, Instead it is a generic environmental regulation
- Findings of ordinance
 - Removal of trees affects the health, safety and well-being of the residents.
 - Trees are an important ecological resource

Tree Ordinance Case

Concept of “rationally related” to purpose and intent.

“Ordinance need not be perfect.”

Tree Ordinance continued

- Ordinance was found to be vague.
 - 1) Failed to define when removal is for a useful or beneficial purpose
 - 2) Failed to provide standards for use of the escrow fund.
- Ordinance was returned to municipality to correct
- Court ruling emphasizes the importance of defining key terms in ordinances.
- It is also important to monitor implementation of

Alternatives

- Official map statute- N.J.S.A. 40:55D-44. Specifically cited by Court in Open Space case.
 - “If the master plan or the official map provides for the reservation ofpublic areas within the proposed development, before approving a subdivision or site plan, the planning board may further require that such... area be shown on the plat in locations and sizes suitable to their intended uses. The planning board may reserve the location and extent of the such areas on the plat for a period of 1 year after the approval of the final plat and within such further time as may be agreed to by the developer. Unless during such period or extension thereof the municipality shall have entered into a contract to purchase or institute condemnation proceedings according to law for a fee or lesser interest in the land comprising such...areas, the developer shall not be bound by such reservations shown on the plat and may proceed to use such land for private use in accordance with applicable

Alternatives continued

- Developer's Agreements?
- Change the MLUL?
- Purchase.
- Tax Lien Foreclosure
- Cluster development

Some words of advice

- Don't merely copy other town's ordinances.
- Always specify the source of the power or the authority. (You can specify multiple powers.)
- Always specify the purpose and intent.
- Don't be afraid to question and challenge your municipal attorney.
- Provide "due process" in the form of a hearing or ability to challenge or obtain a waiver.

Advice continued

- If using the MLUL or Zoning Power-Do not overreach! Stay within the boundaries of the MLUL.
- If using the MLUL, stay within the application type.
- If using police power, avoid having review done by a MLUL Board.

Advice continued

- Use the police power.
- Specify a “purpose and intent”
- Make “Findings”
- Show how the exercise of police power is rationally related to the goal.
- Don’t limit impact to MLUL categories.
- Be flexible and negotiate and compromise if possible.s

“Time of Decision Rule.”

- Provides that the rules in effect at the time of decision shall apply.
- Allows a municipality to change regulations after an application has been submitted
- The rule is now an endangered species.
- Reminder- Every municipality should regularly review its environmental and land use regulations