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# Smart Bargaining Or Illegal Exactions?

## Developers seeking approval cannot pay for things the statutes don't permit

**By Thomas Jay Hall**

Mayor DiLascio of Lyndhurst negotiated a deal whereby EnCap Golf Holdings, LLC, agreed to provide a $37 million dollar school plus additional public benefits to the Township. See *The (Newark) Star-Ledger,* Nov. 27, 2006. While the full extent of the "quid pro quo" is unclear, it appears that EnCap received permission to build 250 more condos.

If the facts are true, the story is appalling. Roughly speaking, if all EnCap got was 250 condos, it paid the town $160,000 for each unit, for just the right to build (never mind land costs or installation of infrastructure). Whether that was a good deal from a business sense is a question which EnCap could answer, and presumably it was. From the perspective of the land use bar, such a deal looks blatantly illegal.

The Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., contains standards for municipalities to assess developers for those municipal improvements that are reasonably necessitated by the development, such as improvements to local roads, sewer systems, water supply and drainage systems. There are well-thought out formulas to deal with those issues. But there is no statutory authorization to levy any contributions for schools, fire stations, community recreation facilities and the like.

In 1988, the Appellate Division declared that payments for unauthorized "public benefits" were illegal, and any approvals granted because of these types of payments were null and void. See *Nunziato v. Planning Board of the Borough of Edgewater*, 225 N.J. Super 124 (1988). The court overturned a site plan and variance grant made by the Planning Board of Edgewater Borough. The applicant was willing to make a substantial contribution to the Borough's affordable housing fund, but at the time, there was neither statutory authorization nor any municipal ordinance providing for a formulaic assessment. At the time, the request to make a payment, and the offer to make such a payment, was done through negotiation. The agreement to make the payment was entered into by the applicant to induce the Planning Board to grant approval. The Appellate Division was appalled at the prospect of buying and selling approvals and reasoned that such action could not be other than arbitrary and capricious.

The court concluded that such action was grossly inimical to the goals of sound land use regulation and had to be set aside. In the words of the court, "Without legislated standards the possibilities for abuse in such negotiations between an applicant and a regulatory body, no matter how worthy the cause, are unlimited."

Since *Nunziato*, there has been lots of discussion in the legislature about modifying the law and creating "impact fees." Nothing of a general nature has been enacted, other than the ability of towns to assess lower-income housing fees, and in the Highlands, up to $15,000 per unit of impact fees. The frequent requests made to developers seeking approvals for almost anything —

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fire trucks, classrooms or a school, community centers — cannot legally be made, nor can a developer respond to those requests affirmatively.

So there is no statutory authorization for Lyndhurst to assess (or obtain) a new school, new public facilities or anything else not authorized by the statute. Another Appellate Division case, if applied in this case, would permit EnCap to get the benefit of the bargain without having to pay the price.

In *Township of Marlboro v. Planning Board of the Twp of Holmdel*, 279 N.J. Super. 638 (App. Div. 1995), the Appellate Division revisited the question. A developer in Holmdel, during the course of Planning Board deliberations, agreed to provide funding for fire equipment and a recreation center. The adjacent township of Marlboro, feeling that the development would impact the quality of life in Marlboro, sued on the basis of *Nunziato*. Surprisingly, the Appellate Division, finding that both parties had been working in good faith, upheld the grant of Planning Board approval, but barred the developer from making the contributions for the fire trucks and the community recreation.

There clearly is a desire on the part of municipalities to have a developer pay for things the statutes don't permit. Many a time, when I have been before a planning board, it's pretty clear that the path to approval would be dramatically eased if the fire company's request for equipment to deal with a fire on the project could be answered by giving a new truck to the company. If my client could respond to the loud citizen comments about school overcrowding by giving a new school or contributing to school expansion, approvals would be easier. After all, goes the thinking, these "contributions" are for the public good.

In the absence of any statutory authorization and clear legal standards, these "requests" amount to an invitation to participate in illegal buying and selling of approvals.

Once the developer starts down that slippery slope, where's the end? A fire truck in town A, then a fire truck and school costs in town B, then a new school in town C? This distorts the municipal approval process, favors the developer with deeper pockets, puts a higher price tag on the ultimate product and opens the door wider for corruption of the more conventional sort.

If a town indicates that approval of a project is contingent on addressing municipal needs, what stops them from asking for more than the project can afford, or deferring approval of necessary public investments until a deep-pocket developer comes along? More darkly, since there are no standards, what prevents "back room" deals that favor one developer over another, one type of municipal need over another, one municipal administration over a challenger?

Land-use policy in New Jersey has never been so distorted and bizarre as it has been in recent years. A very large part of the problem has been the state's historic dependency on the local property tax to fund the lion's share of educational costs, coupled with our fondness for home rule. If every application for development is evaluated, not on its merits, not on how it fosters regional benefits, but on how it affects the local treasury or how the existing residents feel about it, we would not see family housing (school costs) or retail or commercial (traffic). We might see senior housing, or really high-end office. But where are the balanced community and workforce housing?

The mayor of Washington Township (Mercer County) wrote an Op-Ed piece in the *Trenton Times* on Feb. 3, 2007, saying he is planning to use eminent domain to erase years of effort on the part of applicants and the planning board of his municipality in putting together an award-winning Town Center development. Why? The State of New Jersey has reneged on a long-standing commitment to construct a by-pass around the proposed Town Center, has defunded the schools, which were built in response to the planning, and has not met any of the financial commitments which were promised. The mayor indicated that he wanted no more awards — just the cash needed to make the project work. Otherwise, he felt that he had no choice but to use very substantial public funds to buy the land on which there had been full planning board approvals after more than a decade of effort, since open space does not create school costs or create more traffic.

What we have seen out of Trenton in the last year is dreadful. Chaos in the Legislature and disarray in land-use policy, with the Governor's Economic Development Plan calling for rapid economic development to grow New Jersey out of its structural deficit, while other state agencies are strangling the economic life out of New Jersey. The Department of Environmental Protection calls for more stringent floodplain rules and the Highlands Council promulgates a plan which amounts to sharp restrictions on future growth in the Highlands Planning area. Higher property taxes due to flat-funding of schools; less state support of needed infrastructure; a pitiful excuse for real property tax relief. We really need comprehensive reform of land-use policy, or we can continue to see stagnation in the kind of growth we need to meet the present and future needs of our citizens. Illegal exactions for Lyndhurst schools don't help meet the overall need; and without real reform of property taxes, investments in school aid and transportation, and reforms in land-use policy, we can expect the picture to get grimmer still. ■