Non-Residential Builders Get Exemption from 2.5% Affordable Housing Fee

Client Advisories

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S.2299/A.4048, entitled the "New Jersey Economic Stimulus Act of 2009", has been passed by the Senate and Assembly and awaits the Governor's signature. Once signed into law, it will have a substantial impact on the requirement to pay the "Statewide Non-Residential Development Fee" imposed on July 17, 2008. Some projects will be exempt from payment of the 2.5% Statewide fee, while others will be entitled to a partial or complete refund of previously paid fees.

Background Regarding Non-Residential Development Fees

Since the 1990 New Jersey Supreme Court decision in Holmdel Builders Association v. Holmdel Township, COAH has had the authority to approve municipal ordinances imposing development fees on non-residential projects. COAH originally authorized a 1% fee, calculated on the equalized assessed value of the development. COAH's third round rules permit a 3% fee to be assessed against non-residential projects. N.J.A.C. 5:97-8.3(d). These rules also authorize an alternative "in lieu" fee which varies between $145,903 and $180,267 per affordable housing unit required but not being constructed on-site.

The State Legislature reacted to these new COAH fees by adopting the Statewide Non-Residential Development Fee Act on July 17, 2008. In that legislation, also commonly known as "A-500", the Legislature replaced the COAH-authorized development fees and in lieu fees with a 2.5% fee, payable at the time of issuance of the permanent certificate of occupancy. See N.J.S.A. 40:55D-8.4.

New Jersey Economic Stimulus Act of 2009

The New Jersey Economic Stimulus Act of 2009 (the "Act") temporarily eliminates the requirement to pay the 2.5% Statewide Non-Residential Development Fee and in some cases requires the refund of previously paid fees. The Act states that this change is necessary because "it is indisputable that the charging of fees at high levels dissuades commerce from locating within a state or municipality or locality and halts non-residential and

residential development, and these ill effects directly increase the overall cost of housing, and could impede the constitutional obligation to provide for a realistic opportunity for housing for families at all income levels." (Section 36, amending N.J.S.A. 40:55D-8.2). The Act does not effect the ability of municipalities in the case of a residential development project to impose either on site inclusionary housing or residential development fees.

The exemption from payment of the Statewide 2.5% fee applies to any non-residential project for which a preliminary and/or final site plan approval has been issued prior to July 1, 2010, provided that a construction permit for the building is issued prior to January 1, 2013. There is, however, one limitation on the exemption: it does not protect a development from a financial or other contribution that the developer made or committed to make prior to the effective date of the Act, July 17, 2008. The concept of a "prior commitment" is defined as involving either a contribution: 1) which has already been transferred to the municipality; or 2) one the developer is obligated to make via a written agreement with a municipality, such as a developer's agreement or 3) one where the developer's obligation is contained in a condition of a municipal land use approval. Thus, where a shopping center received final site plan approval prior to July 17, 2008 and that approval was conditioned on payment of a 2% fee pursuant to municipal ordinance, the builder would be relieved of the 2.5% Statewide fee but subject to the 2% municipal fee.

The limitation on the exemption poses some significant questions. Perhaps most significantly, is the status of the obligation when the municipal resolution of approval or developer's agreement is less than clear regarding the nature of the developer's "prior commitment". For example, many local approvals merely require that a developer "comply with COAH". The ultimate determination of the exemption could be fact sensitive and members of Archer's Land Use Group are available to review your project approvals to determine the extent that the exemption would apply.

The refund provision of the bill works by requiring the return of any fees which were paid and exceed any "prior commitment". Thus, in the preceding example, if a developer had paid the 2% fee, he would not be entitled to any refund, while a developer that had paid the 2.5% fee, would only be responsible for the "prior commitment" and thus would be entitled to a refund of 0.5%. If however, the development did not have a "prior commitment" to pay a development fee, but was required and did in fact pay the Statewide 2.5% fee, he would be entitled to a full refund of the 2.5% fee.

The Act imposes a 120 day time limit for submission of a claim for refund, the 120 days running from the effective date of the Act, in other words the date of signature by Governor Corzine. If submitted on a timely basis, refund claims are required to be paid within 30 days of receipt by the municipality.

For more information, contact Robert W. Bucknam, Chair of Archer's Land Use, Environmental Permitting and Compliance Group, at (856) 354-3025, rbucknam@archerlaw.com and/or Guliet D. Hirsch, a Partner in the Group, at (908) 788-4305, ghirsch@archerlaw.com.

Advice should be attained from a qualified attorney licensed to practice in the jurisdiction where that advice is sought.

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