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Smart Growth Regulations Are Deemed Invalid

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builders who intend to build in
less developed areas.

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On December 30, 2009, the New Jersey Appellate Division, in *In the Matter of Centex Homes, LLC Petition for Extension of Services*, 2010 WL 698708, ruled that the New Jersey Board of Public Utilities' (the "BPU") Main Extension Rules (also known as the "smart growth" regulations), which prohibit utilities from reimbursing developers for extensions of utility service in non-smart growth areas, exceed the BPU's statutory authority and are, therefore, invalid. The Appellate Division's decision has significant implications for

builders in New Jersey who intend to build in less developed areas.

In August 2006, Centex Homes, LLC, a national developer, began constructing a 555-unit, age-restricted residential development in Howell Township known as Colts Neck Crossing. The development approvals for the Colts Neck Crossing project had been obtained by Centex's predecessor-in-title in 2004, but were subsequently revoked by Howell Township in 2005, resulting in litigation. The parties reached a settlement agreement in July 2006 and Centex acquired the project site that same month. Centex began developing the project in August 2006.

In March 2005, the BPU's newly adopted Main Extension Rules, N.J.A.C. 14:3-8.1 et seq., became effective. The Main Extensions Rules prohibited public utilities from paying for or financially

contributing to the cost of utility extensions to developments located in areas "not designated for growth," as delineated by the New Jersey State Planning Commission State Plan Policy Map.

The New Jersey State Planning Act, N.J.S.A. 52:18A-196 et seq., directs the State Planning Commission to prepare, adopt and readopt the New Jersey State Plan, to "provide a coordinated, integrated and comprehensive plan for growth, development, renewal and conservation of the State and its regions and which shall identify areas for growth, agriculture, open space conservation and other appropriate designations." The principles set forth in the State Planning Act and the state plan have collectively come to be known as "smart growth."

The state plan also includes the state plan policy map, which is intended to provide an organizing framework for implementation of the principles set forth in the state plan. The state plan policy map divides New Jersey into five distinct "planning areas," each of which has different development and conservation goals.

The BPU integrated the state plan and the state plan policy map into the Main Extension Rules. Under the Main Extension Rules, utilities could effectively only pay for or financially contribute to extensions of utility service to

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developments located in Planning Area 1 (Metropolitan Planning Area), Planning Area 2 (Suburban Planning Area) or a “designated center” under the state plan, unless one of the narrow (and at times subjective) exemptions contained in the rules applied.

The Colts Neck Crossing project site was located adjacent to Earle Naval Weapons Station, near major highways and within two miles of the Borough of Farmingdale, a “center” identified in the state plan. Further, the site was also located within a sewer service area and located adjacent to Howell’s “Highway Development Zone.” Additionally, the Colts Neck Crossing project had received all necessary municipal permits and New Jersey Department of Environmental Protection permits, including wetlands, sewer and water permits. Despite the development surrounding the project site, the project site was classified as being within Planning Area 4B (rural/environmentally sensitive planning area) pursuant to the state plan policy map.

When Centex began construction, it was informed by the relevant public utilities that BPU’s Main Extension Regulations prohibited them from paying for or financially contributing to the costs of utility extensions to the project. The total cost of constructing such extensions was estimated as approximately \$8 million. In November 2006, Centex petitioned the BPU to order the applicable utilities to construct and pay for utility extensions to the Colts Neck Crossing project. In November 2007, the BPU issued an order rejecting Centex’s petition. Although the project had received all necessary municipal and state land use approvals, the BPU rejected Centex’s petition because the Colts Neck Crossing project was located in an area “not designated for growth.” The BPU also rejected Centex’s exemption requests. Centex appealed the BPU’s decision to the Appellate Division.

On appeal, Centex’s main arguments were that the Main Extension Regulations were invalid because: (i) they violated

N.J.S.A. 48:2-27, the BPU’s enabling statute and were, therefore, ultra vires because the enabling statute requires the BPU to order the extension of utility service where the extension is reasonable and practicable (a financial consideration), where it will furnish sufficient business to justify the extension and where the financial condition of the utility reasonably warrants the expenditure and (ii) they effectively gave the state plan and smart growth principles regulatory effect in contravention of established law. The BPU, on the other hand, argued that the Main Extension Rules were a valid exercise of the BPU’s authority under N.J.S.A. 48:2-27 and the determination of whether a utility extension is “reasonable and practical” is not just a financial consideration, but also takes into account the environmental impact of the extension pursuant to the BPU’s mandate to “conserve and preserve” the environment under N.J.S.A. 48:2-23. The BPU also argued that the State Planning Act and certain executive orders which encouraged compliance with the State Planning Act authorized the BPU to incorporate smart growth principles and the state plan into the Main Extension Rules.

In considering these arguments, the court noted that while the BPU does have broad power to regulate utilities, the BPU’s authority must be stated in the BPU’s enabling legislation or, if expressed in a general statutory provision, the authority must identify its intent to delegate additional or incidental powers to the BPU. The court stated that many years of case law has held that the BPU’s jurisdiction to order service extensions is circumscribed by the plain language of N.J.S.A. 48:2-27, which has been interpreted to require the BPU to order utility extensions that are financially reasonable and practical without consideration of environmental factors. The court also noted that no statute granted specific or incidental powers to the BPU to prohibit utilities from constructing financially viable extensions

of service at their own expense for land use or environmental reasons. Contrary to the BPU’s position, N.J.S.A. 48:2-23 did not diminish the BPU’s mandate to order reimbursement for financially viable extensions of service under N.J.S.A. 48:2-27.

The court also emphasized that the State Planning Act and executive orders encouraging compliance with the State Planning Act cannot be considered enabling legislation which authorize the BPU to make land use decisions in exercising its statutory authority. Further, there was no statutory authority for the proposition that the state plan be worked into the BPU’s regulations. Neither the language of the BPU’s enabling statutes nor the State Planning Act demonstrates a legislative intent that the state plan be integrated into the BPU’s Main Extension Rules. Therefore, the court determined that the BPU’s Main Extension Rules exceeded the BPU’s rule-making authority and were invalid.

The Appellate Division’s decision to invalidate the BPU’s Main Extension Rules has far-reaching implications for development in New Jersey. Builders who wish to construct development outside “smart growth” areas, as identified on the state policy map, will be eligible for refunds based on 10 times the annual first year utility revenues derived from service extensions. While the BPU works to revise the Main Extension Rules, the BPU has directed utilities to process all utility extension applications received after December 30, 2009, as though the extensions are being constructed in a “designated growth area” under the current Main Extension Rules. Therefore, for the timing being, the utility extension cost refund formulas applicable to development in designated growth areas under current rules will apply to all utility extensions, regardless of location, until the BPU adopts revised regulations. The BPU is also considering whether to give retroactive application to the *Centex* decision. ■