IN THE MATTER OF)
WARREN TOWNSHIP)

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING
DOCKET NO. 96-804

OPINION

On August 30, 1996, Warren Township filed a Motion for Reconsideration with the Council on Affordable Housing (COAH) seeking reconsideration of COAH's interpretation of the effect of the Permit Extension Act (PEA) on a municipality's ability to collect development fees. The motion was served on the Bellemead Development Corporation and Smith Street Properties, two developers affected by the motion. However, it is not known if these are the only two developers affected. Bellemead filed a brief in opposition to the motion and Smith Street Properties sent a letter relying on Bellemead's brief.

BACKGROUND

On March 2, 1992, COAH approved Warren Township's mandatory development fee ordinance. In conformance with N.J.A.C. 5:93-8, the ordinance imposes a one percent fee on non-residential development (N.J.A.C. 5:93-8.11), imposes a one-half percent fee on residential development (N.J.A.C. 5:93-8.10) and exempts all developments that have received preliminary or final approval prior to the imposition of a development fee unless the developer seeks a substantial change in approval (N.J.A.C. 5:93-8.12(d)).

On March 12, 1992, Warren Township adopted its mandatory development fee ordinances as Section 15-5.4 of the Revised General Ordinances of the Township of Warren. Consistent with N.J.A.C. 5:93-8.12(d) the approved ordinance stated:

> Developments that have received preliminary or final approval prior to the imposition of a development fee shall be exempt from development fees unless the developer seeks a substantial change in the approval.

In October 1995, Warren wrote a letter to COAH requesting clarification as to this exemption. COAH responded by letter dated November 2, 1995 stating that the exemption applied to developments if approval had not expired prior to the imposition of a development fee.

At its December 5, 1995 COAH meeting, COAH reiterated its long standing policy that development fee ordinances are a type of zoning change and the protections offered by the Municipal Land Use Law (MLUL) in N.J.S.A. 40:55-49 (effect of preliminary approval) and N.J.S.A. 40:55d-52 (effect of final approval of a site plan or major subdivision) applied to development fees.[1]

At its July 10, 1996 meeting, COAH provided further interpretation that had arisen as part of its administration of municipal requests for the retention of development fees collected prior to the Holmdel decision. COAH stated that the PEA, N.J.S.A. 40:55D-130 et seq., preserves preliminary and final approvals and extends immunization for development fees. N.J.S.A. 40:55D-131 states:

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[1]Presumably as a result of this advice, Warren changed the wording of its ordinance, since the version of Section 15-5.4d.5 appearing in the Revised Ordinance Supplement, dated June 1996 states:

> Developments that have received preliminary or final approval for which the statutory protection period pursuant to N.J.S.A. 40:55D-49 and/or N.J.S.A. 40:55D-52 has not expired prior to the imposition of a development fee are exempt from the payment of a development fee hereunder unless the developer seeks a major change in the approval.

The legislature finds and determines that:

a. There exists a state of economic emergency in the State of New Jersey, which began on January 1, 1989, and is anticipated to extend at least through December 31, 1996, which has drastically affected various segments of the New Jersey economy, but none as severely as the state's banking, real estate and construction sectors.

The PEA at N.J.S.A. 40:55D-133(a) further states:

For any government approval which expired or is scheduled to expire during the economic emergency, that approval is automatically extended until December 31, 1996, except as otherwise provided hereunder. Nothing in this act shall prohibit the granting of such additional extensions as are provided by law when the extension granted by this act shall expire.

It is important to note that the term "approval" as used in the PEA is broadly defined at N.J.S.A. 40:55D-132 and includes "...preliminary and final approval pursuant to the Municipal Land Use Law..." as well as:

> ...any municipal or county approval or permit granted under the general authority conferred by State law, or any other government authorization of any development application or any permit related thereto whether that authorization is in the form of a permit, approval, license, certification, waiver, letter of interpretation, agreement or any other executive or administrative decision which allows a development to proceed.

Therefore, COAH held that any approval extended pursuant to the PEA is exempt from the imposition or collection of fees pursuant to N.J.A.C. 593-8.12(d). COAH offered the following question and answer at its July 10, 1996 COAH meeting to clarify the point:

> Q. A developer received subdivision approvals for a project prior to the adoption of a development fee ordinance. Currently the approvals for this development are subject to the Permit Extension Act. May a municipality impose and collect fees if the project is constructed while the Permit Extension Act is in place?

A. No. The Permit Extension Act preserves the approvals from changes in the terms and conditions that existed at the time of the approvals. Therefore, no fees may be imposed or collected on any units in such a development while the Permit Extension Act is in place.

On July 29, 1996, Warren collected a fee from Bellemead for a project which was granted preliminary site plan approval on August 7, 1989. Although Bellemead's project was approved before the adoption of its development fee ordinance, Warren required payment of a development fee before issuing Bellemead a building permit. Bellemead paid $74,457.97 "under protest" and its protest has prompted this motion. Therefore, the following chronology is a summation of the events relevant to this motion:

August 7, 1989	Preliminary approval for Bellemead project
March 2, 1992	COAH approves Warren's development fee ordinance.
March 12, 1992	Warren adopts development fee ordinance.
August 7, 1992	Permit Extension Act is effective.
July 29, 1996	Bellemead pays $62,147 in fees (under protest) for the subject project.
August 13, 1996	Bellemead pays $12,310 in fees (under protest) for the subject project.
August 30, 1996	COAH receives Warren's motion for reconsideration.

WARREN'S POSITION

In Warren's brief in support of its motion for reconsideration, Warren argues that the PEA does not apply to the imposition of development fees. Warren argues that it was the intent of the Legislature in the PEA to prevent the wholesale abandonment of approvals such as preliminary and final site plan approvals. By extending the terms and conditions of these approvals, the Legislature was hoping to prevent the waste of public and private resources that were impaired

during the period it declared to be an economic emergency. Warren argues that the imposition of a developer fee on a project does not affect the approvals granted by the municipality. Rather, the developer fee is "simply a cost measure imposed on the developer." Warren analogizes the developer fee to building permit fees, sewerage connection fees and special assessments which may be imposed upon a developer by a municipality at any time during the course of construction and which the township states are not affected by the PEA.

Warren also argues that allowing the PEA to extend a developer's immunization from the municipal imposition of development fees frustrates a municipality's ability to produce low and moderate income housing. Warren cites Holmdel Builders Association v. Township of Holmdel, 121 N.J. 550 (1990), as approving development fees as a reasonable exercise of the municipal police power. Warren submits with its brief a certification of John Chadwick, P.P., who certifies that if COAH does not reconsider its position on the application of the PEA to Warren's development fee ordinance, the township will be forced to return approximately $163,000 of collected development fees to developers. Warren states that this return would frustrate the rights, powers and duties of the township to act upon its constitutional obligation to provide affordable housing.

Warren further argues that the granting of preliminary site plan approval by the municipality does not protect a developer from a subsequent imposition by the municipality of development fees under the terms of the MLUL at N.J.S.A. 40:55D-49(a):

> That the general terms and conditions on which preliminary approval was granted shall not be changed, including, but not limited to use requirements; layout and design standards for streets, curbs and sidewalks; lot size; yard dimensions and offtract improvements;...except that nothing herein shall be construed to prevent the municipality from modifying by ordinances such general terms and conditions of preliminary approval as it relates to public health and safety;...[N.J.S.A. 40:55D-49(a)].

Warren makes two arguments based upon the wording of N.J.S.A. 40:55D-49(a). Warren argues that the imposition of developer fees does not fall within the "general terms and conditions" upon which preliminary site plan approval is granted. Also, Warren states that a developer fee ordinance is a regulation related "to public health and safety" and therefore falls outside the immunization provided by N.J.S.A. 40:55D-49(a). Finally, Warren argues that a developer fee ordinance must be considered a "State regulation" and that courts have held that a developer is not exempt from changes in state regulation by reason of the protections of N.J.S.A. 40:55D-49(a), see M. Alfieri Co. v. State, DEPE, 269 N.J. Super. 545 (App. Div. 1994) aff'd o.b., 138 N.J. 642 (1995) and Ocean Acres, Inc. v. State, 168 N.J. Super. 597 (App. Div.), certif. denied, 81 N.J. 352 (1979). Therefore, Warren argues that the underlying premise of COAH applying the PEA to protect developers "has been removed" and that developers are not exempt from the payment of a developer fee.

DEVELOPERS' ARGUMENT

The Bellemead Development Corporation submitted a brief in opposition to Warren's motion for reconsideration and Bellemead's brief is also relied upon by another developer, Smith Street Properties. The developers argue that Warren's collection of a development fee under the facts presented is barred by the plain language of Warren's Ordinance, Section 15-5.4d.5, which is quoted above. Bellemead notes that it received its preliminary site plan approval on August 7, 1989 and that Warren adopted its development fee ordinance on March 12, 1992; as such it is exempt from the imposition of development fees by the express terms of Warren's ordinance. Further, Bellemead argues that the plain meaning of the PEA requires the Act to be applied to the preliminary site plan approval granted by Warren to Bellemead on August 7, 1989. Therefore, the protections provided by the preliminary site plan approval under the MLUL must also be continued by the PEA.

Bellemead also argues that COAH cannot approve Warren's motion because it is contrary to COAH's own regulations, particularly N.J.A.C. 593-8.12(d). Therefore, argues Bellemead,

even if the PEA would not nullify the assessment of development fees, N.J.A.C. 5:93-8.12(d) would.

Bellemead states that the implementation of a development fee upon its project would "wipe out the intent embodied in. N.J.S.A. 40:55D-49(a) designed to enable the developer to reasonably calculate its investments." Tennis Club Associates v.Planning Board of the Township of Teaneck, 252 N.J. Super. 422,433-434 (App. Div. 1993). Bellemead cites the Tennis Club case as refuting Warren's argument that development fees are only "cost related". Bellemead states that the impact of the changes imposed by Teaneck, from which the Tennis Club held the developer was immunized, were primarily cost related. Therefore, Bellemead argues that the Tennis Club case supports its position that the MLUL immunizes it from the imposition of development fees during that period of immunization provided by N.J.S.A. 40:55d-49(a).

Finally, Bellemead refutes Warren's argument that development fees fall under the MLUL exemption for health and safety rules. Bellemead points out that Warren can cite no authority under either case or statutory law for this position and that it should therefore be rejected.

DECISION

It is the decision of the New Jersey Council on Affordable Housing (COAH) that the PEA protects Bellemead from Warren's imposition of development fees for its project for which it received preliminary approval on August 7, 1989. Therefore, Warren must return the development fees collected from Bellemead on July 29, 1996 and August 13, 1996.

In Holmdel Builders Ass'n, the New Jersey Supreme Court upheld mandatory municipal development fee ordinances for affordable housing as a valid exercise of the municipal police powers and as authorized under the MLUL and the Fair Housing Act. In doing so the Supreme Court analogized the development fee ordinances with mandatory set-asides, which it had previusly recognized as a valid municipal zoning technique for affordable housing in Southern

Burlington County NAACP v. Mount Laurel Township, 92 N.J. 158 (1983). See Holmdel Builders Assn., supra at 584. The Supreme Court used the similarities between mandatory set-asides and the development fee ordinances, which it stated "we cannot over-stress", to refute arguments that mandatory development fee ordinances were a tax. Rather, the court viewed the mandatory development fee ordinance, as it did mandatory set-asides, as a form of inclusionary zoning:" they are regulatory measures, not taxes." Holmdel Builders Association, supra 584, 585.

From this discussion of the Holmdel Builders Assn. case, it should be clear that development fee ordinances are not "cost measures" as contended by Warren but rather are "a form of inclusionary zoning" and, therefore, precisely the kind of "general terms and conditions on which preliminary approval" is granted and which falls squarely within the provisions of N.J.S.A. 40:55D-49(a). COAH's rules at N.J.A.C. 5:93-8.12(d) require that municipal development fee ordinances immunize developments that have been granted preliminary or final site plan approval from the municipal mandatory imposition of development fees. Warren has complied with COAH's regulation in its municipal development fee ordinance.

In the case of Bellemead, Warren granted preliminary site plan approval on August 7, 1989. Under the provisions of N.J.S.A.40:55D-49(a) the general terms and conditions upon which this preliminary approval was granted cannot be changed for at least three years. Therefore, when Warren adopted its development fee ordinance on March 12, 1992 Bellemead's project fell within the exemption provided in the MLUL and in Warren's ordinance. However, according to COAH's long-standing interpretation of its regulations, once the period of immunization provided in the MLUL expired, i.e. three years after August 7, 1989 for Bellemead (unless Warren further extended the protections provided in the preliminary site plan approval), Bellemead's project would have been subject to Warren's development fee ordinance.

However, the New Jersey Legislature enacted the PEA, N.J.S.A. 40:55D-130, which extends until December 31, 1996 "any government approval" scheduled to expire between January 1, 1989 and December 31, 1996. It is also important to recognize that the term

"approval" is very broadly defined at N.J.S.A. 40:55D-132 and includes "preliminary and final approval pursuant to the municipal land use law...."Therefore, the protections granted by Warren pursuant to the MLUL upon preliminary site plan approval of Bellemead's development on August 7, 1989 were extended by the plain meaning and specific terms of the PEA. This is a legislative directive and neither Warren Township nor COAH can vary from its clear provisions and language.

Therefore, given the clear direction from the Legislature in the PEA, COAH is barred from granting the relief sought by Warren Township in its motion for reconsideration. All fees collected from Bellemead and other Warren developers in contravention of N.J.S.A. 40:55D-130 must, therefore, be returned. Further, interest must be paid on the returned fees pursuant to N.J.A.C. 5:93-8.14.

Renee Reiss, Council Secretary

DATED: DECEMBER 4, 1996