

Cities and Towns Are No Longer Just Gatekeepers

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The cities are reviving. It may not matter whether the rejuvenation results from public policy, as outlined by Tom Hall, or from uncoordinated suburban resistance to more houses and cars, or from a change in the economic climate. The trend is nonetheless emerging, and it is affecting real estate development in New Jersey.

However, for lawyers, development in cities will not simply follow suburban models. Different knowledge and different procedures are required since urban projects frequently involve far more than straight forward planning board applications for development approvals.

In the more complex urban environment, government functions as for more than a gatekeeper, or a regulator whose job is to say yes or no to projects proposed by the private sector. Rather, the richly textured relationship between the private sector and an urban government encompasses wide ranging interactions over project subsidies, tax abatements, infrastructure contribution, development timing and design criteria. The model for this interaction partakes of a joint business venture, or a contractual understanding, than of the request for approval which is the suburban model.

This article explores some of the tools used to create these many layered relationships between cities and developers. We begin with the Local Redevelopment Law and Housing Law, N.J.S.A. 40A:12A-1, et seq., the basic authority for this "management" rather than "permit" approach to development described above. We then describe some of the other techniques — parking authorities, business improvement districts, and urban enterprise zones which real estate lawyers will now encounter as they become involved in cities.

Local Housing and Redevelopment Law

The Local Redevelopment and Housing Law ("LRHL"), N.J.S.A. 40A:12A-1, et seq., was adopted in 1992, but is largely based on the 1949 Blighted Areas Act. While a full explanation of this critical statute would exceed the limitation of this article, its key points can be readily summarized.

Selection of a redevelopment area for investigation by the Planning Board and approval by the governing body, following a public hearing by the Planning Board, N.J.S.A. 40A:12A-5 and 6. Usually, a planning consultant or in-house city planner works on this mapping effort in which the area to be redeveloped is designated.

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The criteria for designating such areas are extremely broad. They can include some sound properties, and they can be vacant, non-slum areas, even encompassing the site of the present Bridgewater Mall. *Forbes v. Village of South Orange*, 312 N.J. Super. 519 (App. Div.), certif. denied, 156 N.J. 411 (1998); *Levin v. Township Committee of Bridgewater Township*, 57 N.J. 506, app. dissm., 404 U.S. 803 (1971). But there must be some condition requiring public assistance to private development. *Winters v. Township of Voorhees*, 320 N.J. Super. 150 (L. Div. 1998); *Spruce Manor Enterprises v. Borough of Bellmawr*, 315 N.J. Super. 286 (L. Div. 1998).

Next comes the formulation of a redevelopment plan, which is a kind of combined mini-master plan and zoning ordinance for the redevelopment area. N.J.S.A. 40A:12A-6 and 7. Again, planners are the primary authors.

The plan need only include an outline of the actual redevelopment. *Bryant v. City of Atlantic City*, 309 N.J. 596, 617 (App. Div. 1998). However, it must be adopted in the form of an ordinance by the governing body after review by the Planning Board. N.J.S.A. 40A:12A-7a, e and f.

Next comes the critical implementation stage involving the private-public joint venture -- the designation of a redeveloper and the formulation of a redevelopment agreement. See N.J.S.A. 40A:12A-8 and 9 for some of the items that can be included in an agreement.

When it comes to this agreement, forget everything you read about the evils of contract zoning. See e.g., *Midtown Properties v. Madison Twp.*, 68 N.J. Super. 197 (L. Div. 1961), aff'd 70 N.J. Super. 471 (App. Div. 1963), (zoning settlement order which provided for automatic changes in zoning voided as contract zoning); *Warner v. Sutton*, 274 N.J. 464 (App. Div. 1994).

Bluntly, a redevelopment agreement is a zoning contract. The agreements, such as ones the writers of this article just negotiated in Long Branch, New Jersey, explicitly spell out the exact number of dwelling units or square footage of commercial or office space to be constructed. In return, the municipality typically agrees that it will not change the zoning/redevelopment ordinance standards so long as the redeveloper commences construction within a reasonable time period. N.J.S.A. 40A:12A-9.

Forget, also, the zoning precept about dealing with land rather than people. *ML Plainsboro v. Plainsboro*, 316 N.J. Super. 200, 205-206 (App. Div. 1998). Instead, a city is free to choose any particular developer or group of developers as the designated redeveloper for an area -- and such choice may be made with or without requests for proposals or other competitive processes. *Bryant, supra*, 309 N.J. Super. at 624. Thus, the redevelopment opportunity is made available to a specific entrepreneur, not to the land itself or even to its current owners.

And forget what you thought you knew about needing to tie up the land before you formulate a project. In a redevelopment area, the municipality may acquire property by eminent domain and turn it over to a private redevelopment upon such terms as the municipality deems appropriate -- even for no consideration whatsoever. N.J.S.A. 40A:12A-8c and g; *Bryant, supra*, at 624. So the town can get title forcibly to create a developable parcel even if a private lot owner refuses to cooperate with the project.

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See Buchsbaum and Goldman, *When to Redevelop*, 155 *N.J.L.J.* 1151 (1999). In fact, the terms for land acquisition and its being provide to the redevelop constitute a key element on the agreement.

Other items specifically negotiated in a redevelopment contract are:

- Specific development approval and construction timetables. These will include a timetable for planning board approval-- such approval is required, see N.J.S.A. 40A:12A-13-- as well as for other approvals along with the actual commencement and completion of construction. Since the County has a financial (see next bullet) stake in actual construction, it will not be satisfied with the mere obtaining of approvals for construction.
- The amount of money to be contributed to the project by way of subsidy from the municipality and equity from the developer.
- Infrastructure improvements to be included, whether to be publically financed or privately constructed. These contributions are critical since the heart of the zoning contract is not only construction of the development itself, but also construction of the infrastructure improvements that are necessary to make the project successful.
- Long and short term tax abatements. Unlike ordinary development, improvements in redevelopment areas can get the benefit of either a five year tax abatement, N.J.S.A. 40A:21-1, et seq., or the longer, up to thirty-five year, tax abatement provided in the Long Term Tax Abatement law, N.J.S.A. 40A:20-1, et seq. These tax abatements can be the critical part of redevelopment agreements since they counteract the impact of typically high city taxes on new development.
- Responsibility for non-construction costs, such as relocation, demolition and environmental clean-up. Under N.J.S.A. 20:4-1, et seq., the Uniform Relocation Law, the municipality is ultimately responsible for ensuring that relocation payments are made to businesses and residents displaced by development. These sums are beyond just compensation required as a result of condemnation. The developer and the municipality must decide how these monies are to be paid. Similarly, any demolition and clean up costs must be addressed in an agreement which may provide that the developer, or the municipality, or some combination will bear the cost. See Bryant, supra, in which it was held that the developer's agreement to clean up the "H" tract in Atlantic City constituted substantial consideration for the City's disposition of land to the developer without direction consideration.
- Amount of state funds or other general monies to be contributed to the project. For example, the Long Branch redevelopment agreements have been contingent upon a significant amount of state funding being contributed to the project budget.
- Design criteria for development of the project. Again, since the model for redevelopment is a joint venture or management of a project, rather than simple permit approvals, the City has every right to

demand construction of a certain type of quality. This demand is further justified since the City is contributing money and land to the project. For this reason, heightened design scrutiny will be negotiated in many redevelopment agreements.

- Other items typical of real estate contracts such as default clauses, cure periods, procedures for amendment of the agreement and the like.

The above demonstrates that the legal environment for redevelopment differs quite markedly from the suburban model of permit approvals. Instead, the model is cooperation and joint management, not simply the wresting of approvals from an unwilling suburban planning board that has already, in its view, approved too much development. What makes the redevelopment process so exciting is the sense of creation of something new that has wide spread public support. It's the kind of excitement that lawyers will experience more and more frequently as our cities regain their vibrancy and our older suburban areas try to reinvent themselves.

Parking Authorities

Parking is an asset crucial to the vitality of any downtown area and particularly crucial to the redevelopment efforts currently underway. A governing body of a municipality has a broad array of concerns that place demands on the governing body. These concerns include police protection, fire protection, taxes, recreation, business, roads, sewers, infrastructure, capital improvements and parking. Not surprisingly, parking is not the primary focus of most governing bodies of municipalities in and around the state.

Parking is crucial to a vital thriving municipality. The New Jersey Legislature has recognized that a parking authority is a key tool in the economic and social revitalization of towns and cities. The New Jersey Supreme Court vigorously and unequivocally backed the Legislature in the creation of parking authorities. It recognized that "[t]he parking problem confronting urban municipalities in New Jersey and elsewhere is a serious one." *DeLorenzo v. City of Hackensack*, 9 N.J. 379, 384 (1952). The New Jersey Supreme Court recognized in the face of a broad based constitutional and statutory challenge that parking authorities were a viable method to address crucial parking issues in downtowns. See, *Broadway National Bank v. Parking Authority of City of Bayonne*, 40 N.J. 227, 236 (1963).]

Focus

Perhaps most significantly, a parking authority takes responsibility for parking from the governing body, which as noted above, has many broad and diverse concerns with which to deal. The creation of a parking authority vests power and responsibility for parking in a board which is focused on parking issues. The parking authority may then take parking issues which are complex and long term and address their constituent elements such as facilities, staffing, enforcement, income, budget, planning, rate setting, revenue collection, maintenance and expansion.

Flexibility

The Legislature has also seen fit to give broad powers to a parking authority. It is a flexibility that is not generally available to municipal government. See, *Camden Plaza Parking v. City of Camden*, 16 N.J. 150, 156 (1954) (the Court noted that "the only statutory authority whereby municipally-owned lands may be leased to private persons to construct and operate a public off-street parking facility is that which is given a parking authority created under the parking authority law of 1948"). A municipality without a parking authority does not have that power or flexibility. There are other powers available to a parking authority which also provide greater flexibility than that given to a municipality. See N.J.S.A. 40:11A-6. Those powers provide not only flexibility, but the capacity to deal in innovative ways with complex parking issues that will arise in the course of the major redevelopment efforts.

Debt

A parking authority provides the advantage of issuing debt without burdening the taxpayers of the municipality. It is a method of causing users to pay for needed parking facilities through a revenue system rather than a tax structure. This is indeed a contemporary concept but its roots go back to the same post-war era. See, *DeLorenzo, supra*, 9 N.J. at 385. The Parking Authority Law specifically provides that a parking authority can issue debt "which shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction." N.J.S.A. 40:11(a-9). While a parking authority often requires the guarantee of a municipality to support the issuance of debt at reasonable market rates, the Legislature has specifically provided that such guarantee shall be attributable to gross debt but not the net debt of the municipality. Thus a guarantee does not adversely impact the ability of Morristown to issue necessary debt. See, N.J.S.A. 40:11A-22(2).

Better Coordination and Control of Parking Resources and Facilities

Because of the parking authority's unique ability to focus on parking issues and its greater independence, it is in a position to better effectuate coordination and control over the myriad issues affecting parking systems.

A parking authority provides the ability to coordinate short and long-term goals, address shared parking concerns and facilitate public-private partnerships on parking issues.

Shared parking is a concept by which parking spaces can be used to serve two or more individual land uses without conflict or encroachment. Shared parking is particularly useful where there are variations in the peak accumulation of parked vehicles as the result of different activity patterns of adjacent or nearby land uses by hour, by day or by season. For example, office would have a peak demand in the range of 9:00 a.m. to 5:00 p.m. This blends or complements residential development where the peak demand is in the range of 7:00 p.m. to 8:00 a.m. If each use were to require 250 parking spaces, instead of a capital outlay to support 500 spaces, a properly regulated facility of approximately 300 spaces could easily meet demand for both office and residential uses. The effect is to save approximately \$750,000 for a surface facility or in excess of \$2 million for a structured facility. In addition, there will be substantial savings in

operations, maintenance and enforcement for a 300 space facility versus a 500 space facility.

Another application for shared parking is relationships among land use activities that result in peoples' attraction to two or more land uses on a single trip to a given area or development. For example, individuals going to a downtown area for dinner and shopping or dinner and a movie. Both of the patterns described above are particularly applicable to urban areas such as Morristown. In any shared parking context it is crucial that control be centralized and that management and enforcement are effective, flexible and focused.

It should be noted that pursuant to N.J.S.A. 40A:5A-5 Local Finance Board approval is required before a municipality can create a parking authority.

Special Improvement Districts ("SID")

It is well documented that the dramatic growth of suburban malls, office parks and freeway access has resulted in diminishing commercial and business activity in downtown areas. Many downtown districts suffered economically. The New Jersey Legislature devised the SID legislation to reverse this trend and revitalize urban areas. In so doing, the Legislature gave municipalities broad discretion to cooperate with local merchants, proprietors, and commercial property owners.

SIDs are self-help programs created by municipalities and local businesses. They aim at increasing business activity in municipalities by having local businesses finance improvements and programs. Typically, funding an SID involves a special property assessment within a designated commercial area. The assessments are paid by the commercial property owners. The revenues collected from such assessments are allocated for the improvement of the downtown areas to attract business. Funds collected from these assessments are used to improve street lighting, replace sidewalks, increase parking, improve landscaping, and provide for improved crosswalks. The funds are also used for less tangible, but equally important programs, such as downtown management, business reinvestment and retention and advertising, promotion and enhancement of the image of downtown.

Importantly, special improvement districts are not public bodies. The New Jersey Supreme Court has stated "SIDs are an attempt to achieve privately what municipal government has struggled unsuccessfully to do alone." *Second Roc- Jersey Associates v. Town of Morristown*, 158 N.J. 581 (1999). See also *Gonzalez v. Borough of Freehold* (A-3476-92 T2, June 30, 1994) ("The district management corporation * * * is not a public body"). However, the Legislature has provided significant oversight authority to the municipal governing body, as follows: (i) the right to create or eliminate Special Improvement Districts. See N.J.S.A. 40:56-68; (ii) one member of the governing body shall serve as a member of the Board of Trustees of the District Management Corporation. N.J.S.A. 40:56-68; (iii) the municipality shall review the assessments on the properties within the Special Improvement District annually. N.J.S.A. 40:56-80; (iv) the municipality shall approve the budget of the District Management Corporation annually. N.J.S.A. 40:56-84; (v) the municipality shall review an audit of books of the District Management Corporation which shall be submitted annually. N.J.S.A. 40:56-88; and (vi) the municipality shall review the annual report prepared for the municipality by the District Management Corporation. N.J.S.A. 40:56-89. Thus, there are significant

and comprehensive statutory oversight provisions which provide significant safeguards to a municipality without over-regulating or micro-managing what should be policy decisions left to the governing bodies of SIDs.

One of the many attractive features of SID programs is focused management of the downtown. An SID can tailor the improvements in the area to its unique needs. The governing body of an SID, typically a nonprofit corporation formed by the business community, formulates the policy and budget decisions for the program. Individual managers of SIDs then implement these policies on a day-to-day basis. The manager can focus on the long and short-term improvements necessary for the city's economic growth. Also, the manager provides a unified voice for the various business interests.

Thus, an SID functions much like the management of an office park or a shopping mall, where tenants within the offices or mall fund the upkeep of the common areas, while the managing group oversees the specific improvements needed to attract business.

The New Jersey Supreme Court has ruled that the SID legislation gives municipalities broad regulatory authority when establishing and implementing an SID. In some areas, this power was broader than that which municipalities previously enjoyed. Significantly, the SID legislation empowered municipalities to restrict veteran street peddlers from selling their merchandise within SIDs. *Fanelli v. City of Trenton*, 135 N.J. 582 (1994). Prior to the SID statute, many towns had tried unsuccessfully to prevent peddlers from interfering with local merchants. Now, if a municipality establishes an SID, it can manage the downtown business district in favor of local businesses.

A more recent ruling upholding the Morristown SID follows the theme of municipal empowerment developed in the Supreme Court's previous rulings. *Second Roc- Jersey Associates*, *supra*, 158 N.J. 581. The innovative and cost-effective strategy employed by Morristown of relying on the real property tax assessment to raise revenue for its SID was deemed reasonable and constitutional by the Court. Morristown's success demonstrates the extent of control given to municipalities by the SID legislation. Based on the *Fanelli* and *Second Roc-Jersey* decisions, it is clear that a Special Improvement District or a municipality acting pursuant to the Special Improvement District legislation will be given the maximum flexibility and deference in effectuating the powers granted pursuant to the Special Improvement District legislation. SIDs have tremendous potential to serve downtown revitalization and redevelopment efforts.

Urban Enterprise Zones

The New Jersey Urban Enterprise Program is another incentive for development in urban areas. The program was created to stimulate economic development and job creation in designated zones. Businesses located in the zones are eligible for benefits such as reduced sales tax, sales tax exemptions for building materials, equipment and supplies invested or used at certified sites, and subsidized unemployment insurance costs. In addition, consumers in such areas pay only three percent sales tax as compared to the regular six percent state sales tax. The cumulative effect of these benefits is they provide a major incentive for businesses to locate in the urban enterprise zones.

Other Programs

Various other programs are worth considering in the context of redevelopment projects. These include the Urban Home Ownership Recovery Program (UHORP). UHORP encourages economic diversity by helping developers construct projects that contain a mix of market-rate, moderate-income and low-income units. The Downtown Living program is intended to attract all income groups to cities as part of urban revitalization strategy. The program provides low-interest loans to commercial and non-profit developers seeking to build market-rate rentals in centers. The Hazardous Discharge Site Remediation Loan and Grant Program is available to qualified municipalities and private property owners to investigate and clean up hazardous waste sites. The goal of the program is to return brownfields sites to productive economic use and return them to the tax rolls. Upstairs-Downtown is a smaller scale program that offers reduced rate loans for small business owners and investors to purchase and fix up smaller commercial properties in downtown areas with retail on the first floor and up to four apartments on upper floors.

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The next wave of development and redevelopment is already taking place in the cities, suburban centers and other downtown areas of New Jersey. This trend is strong and, absent a change in overall economic conditions, is likely to continue and expand well into the future. There are numerous resources and programs available to developers and municipalities to take advantage of this growing area of opportunity. The new frontier will change the practice of real estate law as it alters the face of urban New Jersey.