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Towns Can't Link Development Permits to Open-Space Preservation

By Mary Pat Gallagher
 New Jersey Law Journal
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Local governments cannot require builders to set aside land for open space and recreation in return for development approval, since the N.J. Municipal Land Use Law does not give them that power, the state Supreme Court held Thursday.



Judge Michael Winkelstein
 Image: Carmen Natale/NJLJ

Though the goal of creating open space is a "laudable one, we cannot interpret the plain wording of the MLUL to authorize them to achieve it in a manner that the Legislature has not permitted," said the Court in a unanimous, per curiam opinion in [New Jersey Shore Builders Association v. Township of Jackson](#), A-51/52-2008

The justices upheld an appeals court decision that struck down Jackson Township and Egg Harbor ordinances requiring developers to set aside land or make a monetary payment. The Court wrote only a brief opinion, saying it was affirming for substantially the reasons expressed in the June 23, 2008, opinion by Appellate Division Judge [Michael Winkelstein](#).

Although preserving open space is one of the enumerated purposes of the MLUL, the law limits "the manner in which municipalities may demand that it be made available," stated the Court.

The Court found it significant that the MLUL says municipalities can demand open space be set aside as part of a Planned Unit Development but does not mention the power elsewhere. "Had the Legislature intended to create the broader power that the municipalities suggest is vested in them, it would not have limited its authorization to the PUD context as it did," stated the Court.

Municipalities do have some power under the MLUL to create or encourage preservation of open space, said the Court. They can use their master plans to designate areas for that purpose but must pay just compensation to the land owner.

The Court also pointed out that even in the PUD context, municipalities are not authorized to accept payments in lieu of land for open space.

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The case involved consolidated appeals from a pair of trial court rulings in May 2007 that reached contrary conclusions on the issue.

Ocean County Assignment Judge Eugene Serpentelli held that set-aside laws adopted by Jackson Township were ultra vires, granting a motion for summary judgment by the New Jersey Shore Builders Association.

A 2003 Jackson ordinance mandated that at least 10 percent to 40 percent of any tract of land proposed for development be set aside for open space, with at least half the acreage suitable for recreational use. A 2006 amendment required a recreational set-aside of 12.5 acres for every 1,000 projected residents, with a payment in lieu option for developers who could not do so or obtained planning board approval.

Atlantic County Superior Court Judge Valerie Armstrong came down the other way in a challenge to an Egg Harbor ordinance by the Builders League of South Jersey.

Prior to 2004, Egg Harbor required a one-half-acre open-space and recreational-use set-aside for every 1,000 anticipated residents but provided the option to pay money instead.

That changed in 2004 when Egg Harbor stopped letting developers choose. At the same time, the town increased the set-aside per dwelling unit. Armstrong upheld the revised law.

The Appellate Division affirmed Serpentelli and reversed Armstrong, rejecting arguments by Jackson and Egg Harbor that they had implied statutory authority to impose set-asides.

The Court's stance on set-asides contrasts with its ruling last month that local governments can make developers pay for removing trees. In *New Jersey Shore Builders Association v. Township of Jackson*, A-83-2007, the Court said that the general police power justified a Jackson ordinance that requires a property owner to replace removed trees or pay into a fund dedicated to planting trees and shrubs on public property, subject to certain exceptions.

Jackson's lawyer in both cases, Kevin Starkey of Starkey Kelly Bauer Kenneally & Cunningham in Brick, says municipalities are going to have to look to the Legislature for more options to preserve open space.

William Kearns Jr., general counsel for the New Jersey League of Municipalities, says "we will be in touch with appropriate legislators to see if we can't get this changed." The decision elevates developer profits over the public interest in quality of life, in his view.

Susan Kraham of Columbia University's Environmental Law Clinic, who represents the Sierra Club's New Jersey Chapter and the Association of New Jersey Environmental Commissions, both amici, sees the Court's rulings on set-asides and tree removal as recognizing a local role in preserving open space and ecological resources though, as to set asides, the Court "drew a fairly bright line where we don't see one."

Paul Schneider, counsel for the New Jersey Shore Builders Association, says of the set-aside ruling, "I'm delighted that the Supreme Court said that the statute means what it says." The fees that the municipalities sought to impose were "taxes through the back door" that "could only make it more difficult to provide the public with reasonably priced housing." Schneider is with Giordano Halleran & Ciesla in Middletown.

Somers Point solo Tara Garry, who represents Egg Harbor, and Richard Hoff Jr. of Flaster/Greenberg in Cherry Hill, for the Builders League of South Jersey, did not return calls.

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