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## LAND USE & PLANNING

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### Home Sweet Home: Residential Site Plan Immunity

Municipalities must be content with the power to enact legitimate zoning ordinances

A number of New Jersey communities have enacted ordinances requiring planning board approval for otherwise zoning-compliant detached single-family homes and duplexes based upon topography, vegetation, drainage, lighting, landscaping, screening, driveway and parking space location, and for the protection and conservation of soil from erosion. Some waterfront communities, for example, require approval for oceanfront homes to protect against beach and dune degradation. N.J.S.A. 40:55D-37a is the sole source of municipal authority to enact ordinances requiring site plan approval, but in granting this power obscurely provides “that subdivision or individual lot applications for detached one- or two-dwelling-unit buildings shall be exempt from such site plan review and approval.” This 1975 enactment, unlike the Municipal Plan-

ning Act (“MPA”) which preceded it, provides homage for single family homes and duplexes not part of a larger development. See *Lionel’s Appliance Center, Inc. vs. Planning Board of the Township of Dover*, 156 N.J. Super. 257 (Law Div. 1978).

This article focuses upon the validity of municipal ordinances which require planning board approval for site plan aspects of individual single-family homes or duplexes, whether enacted under a municipality’s general police power or by means of municipal zoning authority.

#### What Does ‘Site Plan’ Mean

It is fundamental that the MLUL is the sole repository of a municipality’s power to enact land use controls. *Estate of Neuberger vs. Township of Middletown*, 215 N.J. Super. 375, 383-84 (App. Div. 1987). Land use controls include “site plan” powers which the MLUL defines as:

‘Site plan’ means a development plan of one or more lots on which is shown (1)

the existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, drainage, flood plains, marshes and waterways, (2) the location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping, structures and signs, lighting, screening devices and (3) any other information that may be reasonably required in order to make an informed determination pursuant to an ordinance requiring review and approval of site plans by the planning board adopted pursuant to [N.J.S.A. 40:55D-37]. *N.J.S.A. 40:55D-7*.

*N.J.S.A. 40:55D-38* sets forth the mandatory contents of site plan ordinances. These requirements include provisions for building layout other than for setback purposes, water supply, drainage, sewerage, flooding and for the protection and conservation of soil from erosion. *N.J.S.A. 40:55D-39* provides for the additional discretionary contents of a site plan ordinance, while *N.J.S.A.*

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40:55D-41 requires that site plan ordinances contain ascertainable standards.

In contrast, the MLUL permits zoning ordinances to “[r]egulate the bulk, height, number of stories, orientation and size of buildings and other structures, the percentage of lot or development area that may be occupied by structures, lot sizes and dimensions, and...floor area ratios... and regulatory techniques governing the intensity of land use and the provision of adequate light and air,” and to provide “adequate physical improvements including but not limited to, off-street parking and loading areas.” *N.J.S.A.* 40:55D-65b, d.

### The MLUL’s Site Plan Exemption

*Sova Place v. Planning Board of Moonachie*, 2004 WL 3563347 (Law Div.), affirmed at 2005 WL 2674986 (App. Div.), is the only decision which makes the slightest reference to the site plan exemption in *N.J.S.A.* 40:55D-37a.

*Sova Place* involved a challenge to the denial of a two-lot residential subdivision application. The planning board insisted upon full site plan proofs because a storm water drainage easement which the board considered rendered the parcel unsuitable under its site plan ordinance because a home could only be 19 or 20 feet wide. In vacating the ordinance, the Court held:

In the context of a minor subdivision application where single-family residential use is permitted and contemplated, this does not mean that the developer must present a fully engineered site plan conforming to the municipality’s site plan review ordinance authorized by *N.J.S.A.* 40:55D-38, -39 and -41. To require this level of proof would run afoul of

*N.J.S.A.* 40:55D-37(a). [emphasis added]

Thus far, the application of the substantive differences between a site plan ordinance and a zoning ordinance has only occurred in the context of a land use board’s authority under *N.J.S.A.* 40:55D-51(b) to grant “waivers” of or “exceptions” from site plan ordinances. Deviations from zoning ordinances require proof of the variance criterion set out at *N.J.S.A.* 40:55D-70 which, unlike site plan criteria, cannot merely be waived or excepted by a Planning or Zoning Board. See *Millburn Courtyard Associates, LLC vs. Planning Board of the Township of Millburn*, 2006 WL 1413698 (N.J. Super. L.), *aff’d.*, 2007 WL 1518429 (N.J. Super. A.D.) (setting forth the required analysis to determine whether an ordinance contains site plan requirements which can be waived or instead zoning requirements which require a variance).

### Municipal Attempts To Subvert the Exemption

Since the MLUL’s site plan exemption is rather straightforward, under the guise of the “general welfare” some municipalities have attempted an end-run around it by enacting the same kind of ordinance under their general police rather than under their zoning power. This transparency ought not be tolerated.

Article III of the New Jersey Constitution grants authority to regulate land use and environmental matters which Article IV, Section 6, paragraph 2 empowers the legislature to delegate to municipalities. The legislature has acted under that authority by enacting the MLUL. As Justice Garibaldi summarized in *Paruszewski vs. Township of Elsinboro*, 154 N.J. 45, 53-4 (1998):

Because [zoning and planning

boards] are ... ‘creature[s] of statute[s] [they] may exercise **only** those powers granted by statute.’ [original emphasis] [citations omitted]

This presents the question of whether a municipality under a general police power enactment may vest its planning board with site plan jurisdiction which the MLUL prohibits. There are several reasons why it may not.

First, an ordinance enacted under a municipality’s general police power which permits what the MLUL prohibits is subversive. While a municipality may enact an ordinance under its general police power even though it may also be enacted under its zoning authority, the enactment may not be subversive of its zoning authority under the MLUL. *Larson vs. Mayor and Counsel of Borough of Spring Lake Heights*, 99 N.J. Super. 365, 371 (Law Div. 1968).

Second, a planning board’s powers are derivative of *N.J.S.A.* 40:55D-25, -34 and -60, which do not vest it with the power to grant approvals required under a general police power ordinance. At the very most, other than its specifically delegated statutory functions, a planning board may only “[p]erform such other advisory duties as are assigned to it by ordinance or resolution of the governing body for the aid and assistance of the governing body or other agencies or officers,” [emphasis added] *N.J.S.A.* 40:55D-25(b)(3). In short, nothing in the MLUL permits a municipality to vest a planning with the authority to grant any form of relief under a general police power ordinance.

Thus, in *Barsel vs. Woodbridge Tp. Bd. Adj.*, 189 N.J. Super. 75 (App. Div.), *certif. den.*, 94 N.J. 542 (1983), the court declared that a zoning board lacked jurisdiction to approve parking on unpaved portion of public right of way because its

authority under *N.J.S.A.* 40:55D-34 extends only to mapped streets not yet in existence. And in *Apple Chevrolet vs Fair Lawn Bor.*, 231 N.J. Super. 91 (App. Div. 1989), Judge King held the zoning board was without jurisdiction to entertain a variance request based upon a general police power enactment because its authority stems directly from the MLUL “and may not in any way be circumscribed, altered or extended by the municipal governing body.”

Lastly, unlike municipal ordinances passed under the general

police power authority of *N.J.S.A.* 40:48-1, zoning ordinances have quite different enactment requirements. See *N.T. Hegeman vs. Mayor and Council of Borough of River Edge*, 6 N.J. Super. 495, 502 (Law Div. 1950) (“The statute sanctioning the adoption of zoning ordinances by municipalities specifies several particular legal requirements which such ordinances, and the amendments thereto, must meet and satisfy before becoming legally sufficient and effective.”). Thus, to be valid, zoning ordinances — as distinct from

general police power ordinances — must be adopted in accordance with the requirements of the MLUL.

### Conclusion

Unless an unlikely MLUL amendment deprives individual, detached single-family homes and duplexes of the site plan immunity they have long, somewhat unwittingly enjoyed, municipalities must be content with the power to enact legitimate zoning ordinances governing traditional use and bulk requirements. ■