1-1-1968

The New Jersey Estoppel Statute in Subdivision Control Administration

Leo M. Romero
University of New Mexico - School of Law

THE NEW JERSEY ESTOPPEL STATUTE IN SUBDIVISION CONTROL ADMINISTRATION

Subdivision control statutes allow a municipality to supervise the subdivision of land in the public interest. As part of the subdivision approval process, state enabling acts authorize municipalities to require the developer to install paved streets, drainage and sewage facilities, water supplies, and other improvements that are necessary to the development. While emphasizing the necessity of protecting the public by requiring these necessary improvements, courts and legislatures have neglected to give the developer the assurance of certainty that these requirements, once imposed, will not later be changed. This assurance is necessary, as the developer must be able to rely on the extent of his development costs when estimating his development expenses.

Quality residential development requires a substantial initial investment. Such an outlay of capital may be discouraged when the requirements imposed by the municipality are subject to change after development has started, and necessitate an additional outlay. If the governing body can change its approval at will to impose new requirements on the developer, any reliance on municipal approvals will be discouraged. Even a political change can be a sufficient threat of uncertainty to discourage a developer. This uncertainty cannot but work to the detriment of the quality of housing in general.[1]

Some definite assurance against change in the requirements for subdivisions should be offered to the developer once the municipality has approved his plan for development. Since the developer's plan must meet the municipality's approval, why should he not be able to rely on this approval for a reasonable period of time and be protected against subsequent requirements, either added or changed by the approving body? Although the courts traditionally have been reluctant to protect the developer against changes in governmental requirements which are made in the public interest, land development itself is charged with this same strong public interest. The layout and design of residential areas is more likely to be of high quality when the developer is certain of the requirements and costs of subdivision. If he must absorb the additional costs of new municipal building regula-

1. Krasnowiecki, *Legal Aspects of Planned Unit Residential Development*, in URBAN LAND INSTITUTE, Technical Bulletin No. 52, at 56-58 (1965).

tions, having already begun construction of his original approved plan, he may have to sacrifice quality materials and solid structure to meet those requirements.

In most states, no statutes provide any kind of assurance to the developer, and in these states the courts are reluctant to protect the developer unless he has made substantial expenditures on the faith that local requirements would not change. The developer can hardly be encouraged by such a basis for protection. Furthermore, since the issue of whether an expenditure is substantial or insubstantial is determined on an *ad hoc* basis in each case, the developer is surely discouraged from laying out a heavy investment on the mere chance that the court might find it to be a substantial expenditure, worthy of relief.[2]

Although a few states have statutory provisions designed to offer assurance against changes in the public requirements, this assurance is inadequate. In Connecticut and Massachusetts, the developer is protected from change only after the subdivision has been finally platted.[3] To obtain this protection under the Massachusetts statute, the subdivider must show that by reason of the subdivision he has changed his position or made expenditures in reliance upon final approval.[4] This statute, therefore, "exposes the developer to all of the uncertainties that presently exist under a similar test applied by the courts without benefit of statute."[5]

The Connecticut statute affords somewhat more protection than does the Massachusetts act. When a developer's plan is approved, he does not have to conform to changes in local ordinances "until a period of three years has elapsed from the date of approval of such subdivision plan."[6] This assurance, although it continues for three

2. *Id.*, at 57.

3. Conn. Gen. Stat. § 8-26a(1966); Mass. Ann. Laws ch. 41, § 81U (1966).

4. Mass. Ann. Laws ch. 41, § 81DD (1966): "The modification, amendment or recision of the approval of a plan shall not entitle any person to damages, unless and to the extent that he shall have changed his position or made expenditures in reliance upon such approval."

5. Krasnowiecki, *supra* note 1, at 57.

6. Conn. Gen. Stat. § 8-26a (1966): "Notwithstanding the provisions of any general or special act or local ordinance, when a change in the subdivision regulations is adopted by the planning commission of any town, city, or borough . . . no subdivision plan for residential property which has been approved, prior to the effective date of such change . . . shall be required to conform to such change until a period of three years has elapsed from the date of approval of such subdivision plan."

years, is too short for the larger project.[7] Assurance is admittedly necessary at this final stage, but protection against change is most valuable at the preliminary planning stage. At this point, the developer should be encouraged to design his plat under existing municipal requirements, and encouraged to make sustantial expenditures on site planning and architectural design on a firm basis.

In order to provide the developer with assurance at the preliminary planning stage, the New Jersey legislature provided a two-step subdivision approval procedure in the Municipal Planning Act of 1953.[8]

> The governing body or the planning board, as the case may be, may tentatively approve a plat showing new streets or roads or the subdivision of land along a mapped street. This tentative approval shall confer upon the applicant the following rights for a three-year period from the date of the tentative approval:
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> 1. That the general terms and conditions upon which the tentative approval was granted will not be changed.
> 2. That the said applicant may submit on or before the expiration date the whole or part or parts of said plat for final approval.

Under the New Jersey estoppel statute, a municipality cannot amend its zoning ordinance to affect a subdivision that has been granted tentative approval. In *Hilton Acres v. Klein*,[9] the Supreme Court of New Jersey concluded that the zoning ordinance was a general term or condition of tentative approval, statutorily protected for three years from the date of tentative approval with respect to the particular development.

However, the effect of the assurance against changes in public requirements afforded by the estoppel statute was vitiated to a large extent in two other cases. In *Levin v. Livingston Tp.*[10] and in *Pennyton Homes, Inc. v. Planning Board of Stanhope*,[11] the Supreme Court of New Jersey read the estoppel statute in connection with a provision[12] authorizing the imposition of subdivision improvements at the final approval stage and concluded that these improvements were *not* general terms and conditions of tentative approval statutorily protected for three years.

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7. Krasnowiecki, *supra* note 1 at 57.
8. N.J. Rev. Stat. § 40:55-1.18 (Supp. 1965).
9. 35 N.J. 570, 174 A.2d 465 (1961).
10. 35 N.J. 500, 173 A.2d 391 (1961).
11. 41 N.J. 578, 197 A.2d 870 (1964).
12. N.J. Rev. Stat. § 40:55-1.21 (Supp. 1965): "Before final approval of plats

In *Levin* the New Jersey Supreme Court construed the estoppel statute most favorably to municipalities. They found that an amended ordinance calling for streets to be paved with bituminous concrete instead of penetration macadam (the material required when the developer acquired tentative approval) was an improvement rather than a general term or condition of tentative approval. They then held that the municipality was not estopped from requiring the developer to comply with the amended ordinance in those plats which had not been granted final approval, although the plats had been given tentative approval.

In *Pennyton Homes* the municipality, having granted tentative approval to one of the developer's subdivisions, amended its ordinance to increase the paving width to thirty-four feet and to compel the installation of sidewalks on both sides of the right-of-way. After citing *Levin* with approval, the Supreme Court of New Jersey made the same distinction between the general terms and conditions of tentative approval in the estoppel statute and improvements imposed at the final approval stage. They concluded that the "statutory development, the arrangement of the sections, and the language used all indicate sufficiently a legislative decision that the improvements to be required of the developer—a different category of items, broadly speaking, than general terms and conditions—were not to be definitely determined as of the date of tentative approval."[13]

It can be argued that the reasoning used by the court in support of its determination of the legislative intent may just as easily have supported the contrary result.[14] However, the distinction between general terms and conditions, on one hand, and improvements, on the other, leaves the developer vulnerable to a considerable number of ordinance

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the governing body may require, in accordance with the standards adopted by ordinance, the installation, or the furnishing of a performance guarantee in lieu thereof, of any or all of the following improvements it may deem necessary or appropriate: street grading, pavement, gutters, curbs, sidewalks, street lighting, shade trees, surveyor's monuments, water mains, culverts, storm sewers or other means of sewage disposal, drainage structures, and such other subdivision improvements as the municipal governing body may find necessary in the public interest."

13. 41 N.J. at 584, 197 A.2d at 873.

14. In *Pennyton Homes,* the court cited the following in support of its determination of the legislative intent: "Authority to compel the installation of improvements was introduced into the scheme by the somewhat extensive amendments of the original act (1930) made by L. 1948, ch. 464, § 5, in substantially the same form as the present N.J.S.A. 40:55-1.21. Significantly, this was not an amendment of the general conditions section of the law, R.S. 40:55-13, but of R.S.

changes after he has secured tentative approval. The court recognized this problem when it added that although its construction might make advance ascertainment of a developer's complete costs uncertain, the legislature seems to have intended that he should not be entitled to complete assurance, for another section of the statute states that he may *not* validly sell a lot, or agree to sell a lot, prior to final approval.[15] The court quickly added, however, that the developer could protect himself by obtaining final approval promptly after tentative approval and furnishing a performance bond based on the ordinance requirements at that time.

It is questionable whether the result in *Levin* and *Pennyton Homes* is in accordance with the intent of the legislature, but it is clear that the result does not give the developer the adequate assurance he needs. Even in *Pennyton Homes* the court admitted that its construction does not allow a developer to ascertain his costs in advance. To distinguish between "terms and conditions" and "improvements" on an *ad hoc* basis, leaves a measure of uncertainty which tends to discourage good detailed planning. In order to give a developer the assurance he needs for a cohesive, well-planned residential subdivision, a two-step procedure, similar to the New Jersey estoppel statute, is needed. In addition, such a statute should be extended to include all of the improvements which presently can be imposed at the final approval stage. While this approach would require the municipality to assure itself that all necessary improvements are made a part of the tentative approval, no reason is apparent why such a change would limit the protection of the public interest in proper subdivision. Final approval would then be conditioned on adequate assurance from the developer that the required improvements have been installed, or that he has been bonded to provide them.

40:55-14, which originally dealt with planning board approval as a prerequisite to the filing of a subdivision plat.

"The two-step procedure permitting tentative and final approval came into being with the 1953 Planning Act, which repealed the entire former law as amended. The provision authorizing tentative approval and specifying the rights conferred thereby, previously quoted, is found in the procedural section, N.J.S.A. 40:44-1.18, which was adapted from R.S. 40:55-12 in the prior act. The first mention of improvements in the statute does not occur until N.J.S.A. 40:55-1.21 and that section commences with the words: 'Before *final approval* of plats the governing body may require . . .' " 41 N.J. at 583, 584, 197 A.2d at 873. Cf Cunningham, *Control of Land Use in New Jersey Under the 1953 Planning Statutes,* 15 RUTGERS L. REV. 1 (1960) for a comparison with the earlier planning acts.

15. N.J. Rev. Stat. § 40:55-1.23 (Supp. 1965).

It is not clear under the New Jersey statute whether *final* approval offers any assurance against ordinance changes, and, if it does, to what extent. The statute provides only that final approval is a necessary condition precedent to recording the plat[16] and to sale of the land;[17] it is silent concerning any protection afforded the developer on final approval. However, two cases have implied a period of protection following final approval. In *Levin* the Supreme Court of New Jersey intimated that final approval is a bar to changes in terms and conditions or improvement requirements, but added that the effectiveness of final approval as a bar to such changes is limited to a reasonable period.[18] The case of *U.S. Home & Development Corp. v. LaMura* raised the same question in relation to tentative approval. This case involved an increase of minimum lot sizes and dimensions after the developer had been granted final approval. However, the statutory three-year period following tentative approval had not yet expired. The municipality argued that if final approval was granted within three years, the developer lost the protection afforded by tentative approval. The court agreed with the municipality that the three year period of immunity should terminate upon receipt of final approval. But the Superior Court allowed the developer a second period of protection. Citing *Levin,* it held that "at the minimum, the developer is entitled to a reasonable time after grant of final approval to execute his development plan before the municipality may disrupt it. . ." by changing the terms and conditions of approval.[19]

Subdivision control statutes should balance the interests of the public and the developer. It is not too much to ask of a municipality that tentative *and* final approval provide the developer with a fixed period of protection against ordinance changes. Thus, tentative approval would permit the developer to make plans and investment decisions at an early stage, and final approval would enable him to execute his development plan with assurance that the municipal requirements underlying final approval of his plat would not change.

16. N.J. REV. STAT. §§ 40:55-1.14, 40:55-1.17 (Supp. 1965); Lake Intervale Homes, Inc. v. Parsippany-Troy Hills, 28 N.J. 423, 433-34, 147 A.2d 28, 34 (1958).

17. N.J. REV. STAT. § 40:55-1.123 (Supp. 1965); Lake Intervale Homes, Inc. v. Parsippany-Troy Hills, 28 N.J. 423, 433-34, 147 A.2d 28, 34 (1958).

18. 35 N.J. 500, 519, 173 A.2d 391, 402 (1961). It is interesting that the court said that final approval protected the developer against changes in "improvements" while it denied that protection if the developer only had tentative approval.

19. 89 N.J. Super. 254, 262, 214 A.2d 538, 542 (App. Div. 1965).

The municipality's interest in making desirable changes would not be sacrificed entirely. It would be bound by its own ordinance only for a definite period of time and only by certain developers who had been granted tentative or final approval by the municipality itself. A two-step subdivision approval framework which provides for protection against ordinance changes for a fixed period at both stages could best balance the interests of the developer and municipality.

Leo M. Romero