MOVING TOWARDS CONSISTENCY

Amendments to the Municipal Land Use Law, N.J.S.A. 40:55d-53, Bond Requirements

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During his last day in office, Governor Christie signed into law Assembly Bill 1425/Senate Bill 3233, which implement major reforms to the requirements for performance and other bonds posted in connection with municipal land use approvals under the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq. ("MLUL"). The amendments were intended to bring greater consistency in calculating performance bonds under N.J.S.A. 40:55D-53 and to introduce other modifications to the development process to address practices that resulted in cost and delay and to codify useful practices. Rather than viewing these amendments as either pro-municipality or pro-developer, the amendments should be viewed as an effort to create consistency such that a developer working in multiple municipalities is not faced with disparate bonding requirements in each municipality and has the ability to anticipate its costs relative to guarantees and inspection fees.

The amendments make clear that only improvements required to be dedicated, as enumerated in the statute, may be subject to a performance bond requirement and only if required by a duly adopted ordinance. These dedicated improvements include, among other items, streets, curbs, sidewalks, street lighting, street trees, water mains, and drainage structures. The dedication requirement may be set forth in an approval, developer's agreement, ordinance or regulation. Perimeter landscape buffers required by ordinance, approval or developer's agreement also may be required to be bonded as distinguished from other landscaping included in a project, such as parking lot landscaping or foundation plantings.

In addition to the clarification regarding the improvements as to which performance bonds may be required, a new guarantee, referred to as the "safety and stabilization guarantee," ("SSG") has been introduced. This new guarantee is, in part, a codification of the restoration bond that land use boards or officials often require to be posted prior to site disturbance but as to which there was no statutory authority. The SSG may be posted separately or as a line item under the performance bond. This guarantee is intended to provide the municipality with a source of funds to protect the public from unsafe or unstable conditions. Funds may be used, for example, to re-seed an area that has been cleared to protect against erosion or to fence or gate an unfinished road or an incomplete detention basin, without requiring the municipality to use municipal funds to do so. The guarantee amount is calculated as a percentage of the bonded improvements. The municipality has recourse to these funds only if all work on the project has stopped for a period of at least sixty (60) consecutive days and a notice is provided which does not result in work recommencing within thirty (30) days following the notice.

The amendments also introduce a "temporary certificate of occupancy guarantee" ("TCOG"). The TCOG must be posted with the municipality, if required by an ordinance adopted by the municipality, at the time a temporary certificate of occupancy is sought. The guarantee is equal to 120% of the cost of only those items which are not completed and completion of which will be required to obtain a permanent certificate of occupancy. When these improvements are completed and the permanent certificate of occupancy is issued, the TCO will be released by the officer or employee authorized by ordinance to do so, without the need for further process.

The new law makes changes with regard to maintenance guarantees under N.J.S.A. 40:55D-53.a.(2), a guarantee which may be required by ordinance and is posted at the time of release of the performance guarantee. The maintenance guarantee continues to be calculated at 15% of the performance guarantee. Maintenance guarantees also may include 15% of the cost of certain components of private storm water management facilities, including basins, inflow and water quality structures within the basin and outflow pipes and structures, even though these items, as private improvements, would not be included in the performance bond amount upon which the 15% maintenance guarantee is calculated. Maintenance guarantees now expire automatically at the end of two years.

Finally, the amendments make changes

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to the inspection fee provisions set forth at N.J.S.A. 40:55D-53.h. While inspection fees are still calculated at five (5%) percent of the cost of both the dedicated site improvements that are the subject of the performance guarantee and private site improvements for which no performance guarantee is required, the amendments alter the process for replenishing the inspection escrow. Historically, when the five (5%) percent escrow was depleted, a municipality would simply demand additional funds to replenish the escrow without explanation or justification and work on a project could be stopped until additional funds were deposited. Under the amendments, a municipality will have to send a request to the developer seeking additional funds, signed by the municipal engineer, setting forth the basis for the request including the items or undertakings that require inspection, estimates of the time required and the estimated cost of those inspections. The amendments also eliminate the provision that allowed inspections to cease where sufficient funds were not on deposit.

While the new law, by its terms, took effect immediately, there are many questions regarding what this means in practice. The new law requires municipalities to adopt an ordinance prior to requiring any of the guarantees. As of the effective date of the amendments, municipalities can only require new performance guarantees calculated upon the cost those improvements specified in the amended act. Since performance guarantees are not among the "general terms and conditions" protected under vesting provisions of the MLUL, the applicability of the new law to any particular project is not affected by the date of Board approval. While replacing existing guarantees may raise practical difficulties, it appears clear that the amount of any existing performance guarantees should be adjusted at the time of any renewal and guarantees for future phases of a development of a multi-phased project should be calculated under the new law notwithstanding that a different law applied to earlier phases. Particular circumstances may require negotiation with the municipality to reach a workable accommodation that balances the cost differential between guarantees required under the prior law and that under the amendments against the cost of fighting over the proper application of the new amendments. Further, a municipality arguing against applicability of the amendments to a project approved prior to the effective date of the amendments may be hard pressed to claim a right to require either the SSG or TCOG. Therefore, a cooperative effort by all parties will be required to work through the period of adjustment to the amendments.

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several such matters were filed and remain pending, including in municipalities with pre-2007 blight designations and/or redevelopment plans.

Mount Laurel to the rescue?

Some of the proposed settlements in these *Mount Laurel* compliance proceedings rely, in part, on redevelopment projects with affordable housing set-asides. The Redevelopment Law has always provided that a redevelopment plan adopted thereunder "may include the provision of affordable housing in accordance with the 'Fair Housing Act.'" What has changed is the renewed pressure on municipalities to meet their *Mount Laurel* obligations, which has resulted in an increasing number of redevelopment plans that provide for affordable housing.

In at least one pending *Mount Laurel* compliance proceeding, there is a proposal to seize properties by eminent domain citing to both the Redevelopment Law and the Fair Housing Act to facilitate a proposed for-profit transit oriented development. Property owners have challenged the blight designation, to which the municipality has responded by claiming that the power of eminent domain is appropriate under the Fair Housing Act because the proposed development includes an affordable housing set aside. In doing so, the municipality is attempting to shift the court's focus from (a) whether the area in question satisfies the blight criteria in the Redevelopment Law, to (b) whether the project should proceed due to the affordable housing set-aside. But the Fair Housing Act does not provide the power of eminent domain for an inclusionary development and prohibits the transfer of condemned lands to a for-profit developer.

Should a municipality be permitted to shield a local redevelopment project subject to a challenge under the Redevelopment Law with a cloak of "*Mount Laurel* compliance" in order to be able to take property by eminent domain under the Fair Housing Act? How the courts will respond to such efforts remains to be seen, yet judicial scrutiny concerning municipal determinations that areas are "in need of redevelopment" should properly be focused on whether those areas satisfy the statutory criteria of the Redevelopment Law, not whether those municipalities can or should provide otherwise needed affordable housing in such areas. Regardless of the judicial reaction, the next unknown will likely be if and how the Legislature and Governor will respond.