

New Jersey Law Journal

VOL. CXCII - NO.12 - INDEX 968

JUNE 23, 2008

ESTABLISHED 1878

Real Estate Title Insurance & Construction Law

New Jersey's Municipal Services Act Becomes an Adult

Only act in the union that requires municipalities to provide services to private communities

By David Byrne

Earlier this year New Jersey's Municipal Services Act (the "Act"), N.J.S.A. 40:67-23.2 et seq., became an adult, turning 18. When it was born it was a one-of-a kind piece of legislation. It remains an only child today. New Jersey remains the only state in the union with such a statute. The act provides, at its core, that a municipality must either provide certain services to a private community or reimburse that particular private community (known as a "qualified private community") the cost of those services; said services including ice and snow removal, collection of trash or recyclables, and the lighting of roads. See, N.J.S.A. 40:67-23.3. Only private communities deemed "qualified" are entitled to the benefits of the act.

The legislature intended with the Act to "help eliminate double payment

Byrne is a Shareholder and Co-Chair of Stark & Stark's Community Associations group in Lawrenceville

for some services which the residents of qualified private communities now pay through property taxes and fees to their associations." Legislative Fiscal Estimate Statement to S. 2869 (April 18, 1989). The legislature's intention was later expressed, in 1998, by the Appellate Court being "to relieve condominium owners of the burden of paying twice for municipal services." *Stonehill Property Owners Association, Inc. v. Township of Vernon*, 312 N.J. Super. 68 (App. Div. 1998). The act has been interpreted in that light over its 18-year life.

Prior to the Act's effective date, New Jersey's municipalities reacted to the state's unfunded mandate, by labeling it unconstitutional, and seeking to invalidate it. See *New Jersey State League of Municipalities v. State of New Jersey*, 257 N.J. Super. 509 (App. Div. 1992); appeal dismissed 133 N.J. 419. The league contended that the act was "underinclusive," and thus unconstitutional, as it excluded "apartment complexes from the class of benefited forms of property ownership, without distinguishing between condominium owners who live in their units and those who rent their units to others." Essentially, according to the league, owners that rent are similarly situated to apartment owners and in turn, the act unreasonably excluded apartment owners. In rejecting the league's arguments, the Appellate Court ruled that there was a reasonable basis for the legislature's decision to exclude apartment owners from the act's "mandatory"

benefits. In the end, the legislature could have "reasonably decided that condo owners as a group suffer most from the evil of double taxation."

Once validated, New Jersey's qualified private communities and its municipalities began a statewide jousting over the true scope of the Act, and each's rights and obligations pursuant to it. One joust occurred in the Township of Vernon. See *Stonehill*, 312 N.J. Super. at 71. Here, Great Gorge Village, a community consisting of six separate condominium communities, was forced to sue Vernon as Vernon had neither provided the statutory services nor reimbursed for them. Vernon argued not that it need not comply with the Act, but instead that the Act was more limited in scope than that contended by the community. Vernon believed that its reimbursement duty was limited by the clause in the statute: "in the same fashion as the municipality provides these services on [its] public roads and streets." The Appellate Court agreed, finding that a municipality may make reimbursement so that it can provide "the services 'in the same fashion' as those services are provided on the public roads and streets." In this instance, since Vernon's roads outside of the community "were less difficult to plow" such that "on average the municipal roads can be plowed more efficiently on a less costly basis," Vernon was not permitted to limit reimbursement to those amounts incurred with respect to normal, ordinary township roads.

Importantly, the Appellate Court also let stand the trial court's decision that 6.38 miles worth of roads were, in fact, roads, and not driveways and parking lots (which would not be subject to service or reimbursement) as contended by Vernon, as they were "used as a basic way to facilitate vehicular traffic." The Appellate Court also let stand the trial court's ruling that the language of the act did not include "street sweeping," despite the inclusion in N.J.S.A. 40:67-23.3a (1) of language compelling a municipalities' removal of "other obstructions from the roads and streets."

Two years later, the Appellate Court addressed another longstanding dispute by and between private communities and their municipalities. See *Briarglen II Condominium Association, Inc. v. Township of Freehold*, 330 N.J. Super. 345 (App. Div. 2000). Throughout the 1990s many municipalities continued their attempts to limit the scope of the Act. For years, Freehold utilized development agreements in relation to qualified private communities by which a developer of such a community would be required to provide snow and ice removal services in that community until "acceptance" of the roads. Of course, Freehold along with other municipalities used such agreements in relation to residential communities that were not qualified private communities. As was often the case, and as was certainly the case for *Briarglen II Condominium*, those developers simply delegated their snow and ice removal service (for instance) obligations onto the qualified private communities they were creating. Freehold itself, though, decided when the roads in question would be "accepted," such that until Freehold decided said roads met municipal standards, Freehold had essentially insulated itself from the obligations of the Act.

According to Freehold, this insulation was supported by an express provision of the Act; namely N.J.S.A. 40:67-23.3b, which limits the circumstances under which a municipality can be made to operate municipally owned or leased equipment within a qualified private community and 23.3a (the Act's key provision) which begins "Except as otherwise provided in subsection b. of this section." Freehold contended that the

correct interpretation of subsection (a) and (b) was that a municipality need not provide services or reimbursement "until either the roads meet all municipal standards, except for width." *Briarglen II* argued of course that the limitation of subsection (b) applied only to a municipality's provision of services, not to its reimbursement obligations.

To resolve this statutory interpretation problem, the Appellate Court consulted the legislature's intent when creating the act; that is, to "help eliminate double payment for some services." This legislative intent, together with the "canons of statutory construction," compelled an interpretation by which a municipality is not freed from its reimbursement obligation with respect to roads that have not been accepted for public use or do not "meet municipal standards." The court next addressed Freehold's attempt to "pass" its duty under the Act "to a developer by means of the developer's agreement." The court rejected Freehold's attempted delegation as the "legislative purpose would be frustrated if municipalities were permitted to contract away their statutory duty to either provide or reimburse qualified private communities for the enumerate services."

Of particular interest and concern to lawyers representing developers, municipalities and private communities is the Supreme Court's decision, six years after *Briarglen II*, validating the Borough of Oakland's attempt to shift its financial liabilities under the Act to a residential developer pursuant to a development agreement and an indemnification clause set forth therein. See *Ramapo River Reserve Homeowners Association, Inc. v. Borough of Oakland*, 186 N.J. 439 (2006). *Ramapo River Reserve* is a large homeowners association with respect to which Oakland had neither provided the services contemplated by the act, nor reimbursed the association therefore. Prior to the sale of the first home within this community, Oakland and Baker Residential, LP ("Baker"), entered into a development agreement by which Baker was required, until "such time as" it completed "all of the roadways, and the Borough has accepted the same [Baker] shall be responsible to maintain said roads and keep same free of all snow and other debris." This development agreement pro-

vided further that Baker was obligated to "defend, save, indemnify and hold harmless the Borough ... from any all claims, actions ... charges, debts ... and counsel fees ... from the ... performance of the terms hereof ..." By 2002, this association's patience with Oakland had expired and thus it filed a suit seeking damages associated with municipal services not provided, and an order compelling Oakland to comply with the act going forward. Oakland filed an answer thereto, denying liability under that act, together with a third-party complaint against Baker seeking Baker's payment of any damages to be paid by Oakland to this association, as contemplated by the development agreement.

On competing motions for summary judgment, the trial court ruled that Oakland had in fact violated the Act vis-a-vis this association as it had neither provided snow/ice removal services to the association nor reimbursed the association for its costs incurred to provide those services to its residents itself. Oakland in turn sought summary judgment against Baker for the amount Oakland was obligated to pay the association pursuant to the act. Baker filed a cross-motion seeking an order invalidating the relevant portion of the development agreement. The trial court, later affirmed by the Appellate Court, granted Baker's motion, invalidating that portion of the development agreement by which Baker could have been obligated to perform Oakland's obligations under the Act. Both decisions were largely based on the holding of *Briarglen II*.

In considering the Appellate Court's opinion, in reversing it, the Supreme Court discussed how *Briarglen II* did not adopt "a blanket prohibition against a municipality delegating any of its service obligations under the [Act] to a developer pursuant to a valid development agreement entered into pursuant to the Municipal Land Use Law." Instead, *Briarglen II*, according to the Supreme Court, did not focus on the "period between the time when some, but not all, of the units have been sold, and the time when enough units have been sold so as to generate sufficient tax revenues to cover the costs of the municipally-provided services."

The Supreme Court was conflicted by the interplay between the Act and New

Jersey's Municipal Land Use Law (the "MLUL"), in relation to municipal services, qualified private communities and the rights of municipalities. To resolve this conflict, the Supreme Court considered the economic realities "of municipalities caught in the whipsaw of lagging property tax revenues in the face of increased demand for municipal services" and the legislature's "overarching concerns in the overlapping areas of municipal land use regulation and municipal services." It is New Jersey's Planned Real Estate Development Full Disclosure Act ("PREDFDA") that "provides the proper tipping point for analysis." Pursuant to PREDFDA, a developer's control of an association terminates 60 days after that developer conveys 75 percent of that communities lots. N.J.S.A. 45:22A-47a (3). The Supreme Court held that a municipality, via a written development agreement, can in fact delegate to a developer "the obligation to provide or pay for the municipal services

enumerated in the Act." This allowable delegation, however, must be limited "to the specific municipal services enumerated in the [Act]" and that said "delegation must terminate once the developer is required to terminate its control of" the qualified private community's board.

The Supreme Court though made it clear that each qualified private community, from the outset, must still receive the enumerated services or reimbursement for them, regardless of any delegation. This decision simply authorizes municipalities to limit its exposure to these costs via written development agreements. In fact, the Supreme Court reiterated that Oakland "had the statutory obligation to provide or pay for roadway snow and ice removal services" to this association. Since though Oakland's obligations under the Act could be delegated until "the developer must terminate its control of the" association's board, Oakland may very well have been due damages from

Baker (the amounts paid to this association to compensate it for Oakland's violation of the Act).

The Supreme Court in *Rampo River Reserve* did not alter the proper balance between the qualified private communities, developers and municipalities in relation to municipal services and the Act. These communities, while in development should continue to press municipalities for services and/or reimbursement. Municipalities can essentially seek to include in development agreements clauses by which a qualified private community's developer must provide the services enumerated in the Act, or pay that municipality sums sufficient to cover the cost. Developers can oppose any attempt to include such a clause in a development agreement, during the initial planning board review process, or hope to reach the 75 percent sales figure so as to cut off its obligations set forth in any development agreement imposed upon it. ■