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Interpreting the Economic Stimulus Act: How To Be Sure You Receive ALL of Your Refund

By Andrea Tompkins Wright and Henry Kent-Smith

On July 27, 2009, Governor Jon Corzine signed into law the New Jersey Economic Stimulus Act of 2009, P.L. 2009, c. 90. In addition to other initiatives, the Stimulus Act places a moratorium on the 2.5 percent affordable housing fee, previously required of all nonresidential developers pursuant to the Non-Residential Development Fee Act (NRDF Act). Additionally, the Stimulus Act provides some property developers with the right to a refund of previously paid fees.

The Stimulus Act appears clear as to who is entitled to a refund. In fact, under the plain terms of the Stimulus Act, many developers will be entitled to a refund of all fees paid between July 17, 2008, and July 24, 2009. The New Jersey Department of Community Affairs, however, recently published a "Non-Residential Development Fee Claim Form" and a "NRDF Moratorium FAQ" sheet to municipalities, which is not only inconsistent with the Stimulus Act but in fact may deprive many developers of the refund to which they are entitled.

In order to determine whether a developer is entitled to a refund and the amount of such refund, one must merely look to the plain language of the Stimulus Act. Specifically, Section 39 of the Act provides for three separate situations in which a developer is entitled to a refund:

a. A developer of a property that received preliminary site plan approval …, or final approval …prior to July 17, 2008, and that was subject to the payment of a nonresidential development fee prior to the enactment of [the Stimulus Act], shall be entitled to a return of any monies paid that represent the difference between monies committed prior to July 17, 2008, and monies paid on or after that date.

b. A developer of a non-residential project that, prior to July 17, 2008, has been referred to a planning board by the State, a governing body or other public agency for review pursuant to Section 22 of P.L.1975, c.291 (C. 40:55D-31) and that was subject to the payment of a nonresidential development fee prior to the enactment of [the Stimulus Act], shall be entitled to a return of any monies paid that represent the difference between monies committee prior to July 17, 2008, and monies paid on or after that date.

…

d. A developer of a non-residential project that paid a fee imposed pursuant to [the NRDF Act], subsequent to July 17, 2008, but prior to the effective date of [the Stimulus Act], shall be entitled to the return of those monies paid…

These situations are not mutually exclusive, and the Stimulus Act states that a refund may be claimed pursuant to any one of these situations.

Section 39(d) entitles a developer to a refund of all monies paid for affordable housing, provided that (1) such payment was made between July 17, 2008, and July 27, 2009, and (2) the payment was

made pursuant to the NRDF Act. Many developers will fall under this provision and are thus entitled to full refunds of all fees paid between July 17, 2008, and July 27, 2009.

DCA, however, wholly ignores this provision and appears to only advise municipalities to give refunds based on Section 39 (a) and (b), which allows municipalities to withhold whatever fees were "committed" prior to July 17, 2008.

What is more, DCA, through the Claim Form and the FAQ, appears to advise municipalities that when refunding monies to developers for the NRDF Act fee, the municipality may retain the original affordable housing fee (usually 2 percent) based on that municipality's ordinance. This is also inconsistent with the Stimulus Act. If a developer claims a refund under Sections 39(a) or (b), the municipality is only permitted to retain whatever fee was "committed" prior to July 17, 2008. Nowhere does it permit the retention of the ordinance fee in and of itself.

A developer "commits" moneys if and only if: "(1) the contribution has been transferred...," (2) "the developer has obligated itself to make a contribution as set forth in a written agreement with the municipality…" or (3) "the developer's obligation to make a contribution is set forth as a condition in a land use approval …."

What happens when land use approvals require that a developer "comply with COAH" or state that a developer is "responsible for an affordable housing fee?" Whether this is considered a "prior commitment" to pay the 2 percent ordinance fee has yet to be determined, but certainly the mere existence of a COAH fee ordinance at the time a land use approval is received is not sufficient.

While much of this may seem like semantics, the effect on developers is significant.

Consider, for example, a developer approved in January 2008 that, when applying for construction permits in January 2009, paid an NRDF Act fee of $250,000 - one-half of the 2.5 percent fee based on an estimated equalized assessed value of the development of $20 million. Under the plain terms of the Stimulus Act, Section 39(d), this developer appears to be entitled to a full refund of the $250,000 paid, regardless of whether there existed a COAH fee ordinance at the time of approval. According to the DCA and to many municipalities now reviewing refund requests, however, if the COAH fee ordinance authorizes a 2 percent fee, the developer will only be paid $50,000. In other words, this developer may lose use of $200,000 simply because the DCA and the municipality may be interpreting the Stimulus Act incorrectly.

For more information on this issue or for assistance with your NRDF Act refund claim under the New Jersey Stimulus Act, please contact Andrea Tompkins Wright at 609.844.3033 or awright@foxrothschild.com or Henry Kent-Smith at 609.896.4584 or hkent-smith@foxrothschild.com.

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