Facing the Tougher Questions

How Recent Decisions Regarding the Statewide Non-Residential Development Fee Act Will Affect Your Client

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New Jersey Gov. Jon Corzine signed the Statewide Non-residential Development Fee Act into law on July 17, 2008, creating a uniform system for the collection of development fees to fund the creation of affordable housing. By signing the act, the governor voided all municipal ordinances that otherwise imposed development fees or payment in lieu fees on non-residential developers.

The act might not be considered the most exciting affordable housing topic, but to this day, questions from clients about how to navigate the act arise frequently.

The act imposes a fee on all construction resulting in non-residential development, as follows:

(i) A fee equal to 2.5% of the equalized assessed value of the land and improvements, for all new non-residential construction on an unimproved lot or lots; or
(ii) A fee equal to 2.5% of the increase in equalized assessed value, of the additions to existing structures to be used for non-residential purposes.

Pursuant to the act, the required fee must be collected by the municipality where the project is located before a certificate of occupancy is issued. But for a few exceptions, all non-residential development projects in New Jersey are potentially subject to the payment of a required fee. An over-simplified list of these exemptions includes:

(i) non-residential construction connected with houses of worship, property used for tax exempt educational purposes and the relocation of an on-site improvement to a non-profit hospital or a nursing home facility;
(ii) parking lots and parking structures;
(iii) non-residential development which is an amenity to be made available to the public (i.e. community centers);
(iv) projects that are located within a specifically delineated urban transit hub;
(v) projects that are located within an eligible municipality (defined as a municipality receiving state aid) when the majority of the project is located within a half-mile radius of the midpoint of a platform area for a light rail system; and
(vi) projects determined by the New Jersey Transit Corporation to be consistent with a transit village plan.

In 2023, if your client is sophisticated, it is probable that they are generally aware of the foregoing. That being said, it is also probable that your client imagines that because you work in the area of land use, you will be knowledgeable regarding:

- how to negotiate the appropriate fee where non-residential development is situated on real property that has been previously developed with a building, structure, or other improvement;
- what is supposed to happen if the non-residential development is subject to an exemption under the Long Term Tax Exemption Law (LTTEL); and
- the respective roles of the municipality versus the director of the division of taxation in the event of an appeal of the calculation of imposition of a fee under the act.

Fortunately, because you read *New Jersey Lawyer* and there are some recent tax court decisions that address some of these questions, you can sound knowledgeable and provide your client with practical guidance.

Valuing Previous Developed Property

The basic rule provides that whenever non-residential development is situated on real property that has been previously developed with a building, structure, or other improvement, the typical 2.5% fee is reduced by the equalized assessed value of the land and improvements on the property where the non-residential development is situated, as determined by the tax assessor of the municipality at the time the developer or owner, including any previous owners, first sought approval for a construction permit including but not limited to: (1) demolition permits pursuant to the state Uniform Construction Code; or (2) approvals under the Municipal Land Use Law. If this calculation results in a negative number, the non-residential development fee shall be zero.

In *Glenpointe Association IV, LLC v. Twp. of Teaneck,*[1] on appeal from the director of taxation, the court addressed whether a property was *improved* for purposes of the act. The subject property involved the development of vacant land into a 350-room 13-story hotel. However, prior to development of the hotel the property was listed on the municipal tax records as vacant land and assessed at $732,000, with the entire amount allocated to the land and $0 for the improvements. Although the property was only assessed a land value, prior to the construction of the hotel project, the property was improved with a parking lot, curbing, sewer lines, storm drainage lines and structures, signage, transformers, and a bus shelter.

In calculating the non-residential development fee, the developer took the position that the pre-existing paved parking lot had a certain value and that along with the land value should be deducted when determining the fee. In opposition, the township asserted that no deduction for prior equalized assessed value of the land should be taken because the construction of the hotel constituted new non-residential construction on what was essentially a vacant unimproved lot. The township claimed that whatever parking lot improvements existed on the property were *de minimis* in nature and should be disregarded.

In deciding the case, the court noted that the Legislature did not establish a threshold for the level or quantum of improvements that must be present to qualify as an improvement under the act. The court found that for the purposes of the act, the subject property was improved, and therefore the equalized assessed value of the pre-existing improvements and land associated therewith were properly deducted in calculating the fee.

The moral of the story is that when calculating the non-residential development fee, do not assume that the tax assessment records of the municipality are definitive as to whether a property is *improved* for purposes of act. There could be many reasons,

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Unless a non-residential development falls under one of the exceptions enumerated in the act, do not assume that a property is exempt from the fee imposed by the act simply because it is exempt from real estate taxation pursuant to another state statute.

explained or unexplained why the municipal tax rolls do not reflect a property as improved. It could be that an improvement was made to a property after the tax records were certified for a given tax year, or that the assessor considered an improvement to be of *de minimis* value. When calculating the non-residential development fee, make sure you undertake an independent evaluation as to whether to argue that property has pre-existing improvements.

Non-Residential Development Subject to an Exemption

Unless a non-residential development falls under one of the exceptions enumerated in the act, do not assume that a property is exempt from the fee imposed by the act simply because it is exempt from real estate taxation pursuant to another state statute. In *Erez Holdings Urban Renewal, LLC v. Director, Division of Taxation,*[2] a developer asserted that because the improvements of the development were exempt under the LTTEL, the non-residential development fee should be calculated by attributing a value of zero to the improvements. The court held that for purposes of the act, the equalized assessed value of a property is required to be determined under the laws governing local property taxation, and that such laws have no provision requiring the assessor to allocate or attribute $0 to the equalized assessed value of the improvements of properties which are subject to the LTTEL, and that no such mandate is provided in the LTTEL. It is important to note that under New Jersey's property tax scheme, even properties which are exempt from conventional taxes are required to be assessed at full and fair value. A property which receives a tax exemption is not carried on the tax records at a value of zero. Therefore, the equalized assessed value of an exempt property must be factored when calculating the non-residential development fee.

The Role of a Municipality Following an Appeal to the Director of the Division of Taxation

Your client is probably aware that in the event of a dispute over the amount of the required fee, the developer may pay the proposed fee under protest, at which point the local code enforcement official is required to issue the certificate of occupancy (provided that the construction is otherwise eligible for a certificate of occupancy). In the event the developer wishes to challenge the calculation of the required fee, the developer can file a challenge with the director—who is required to decide within 45 days receiving the challenge. The developer may thereafter appeal any determination by the director to the New Jersey Tax Court in accordance with the State Tax Uniform Procedure Law within 90 days of the date of the determination by the director of the division of taxation.

The act is silent regarding the role of a municipality when a developer files an appeal to challenge the calculation of the fee. The issue was brought to the forefront in *National Winter Activity Center v. Director, Division of Taxation,*[3] where the court held that when a municipality is authorized to impose fees under *N.J.S.A.* 52:27D-329.2, any appeal to the director or tax court of the municipality's decision must include the municipality as a named party. *National Winter Activity Center* concerned an appeal of the denial of a property owner's application for an exemption from payment of the fee. A formal protest was filed with the director which was denied. A timely challenge of the director's decision was made by filing an action with the tax court. The appeal to the tax court named the director as the sole defendant. In a pre-trial conference, the court instructed the director to advise the township of the litigation and invite it to file a motion. The township filed a motion to intervene pursuant to *R.* 4:33-1, claiming that it had a legitimate interest in the subject of the underlying action. In opposition to the township's motion, the property owner claimed that the township's position was identical to that of the director's and therefore its interests were adequately represented.

The court recognized that the act contains no provision to include or notify a local municipality of a pending tax court appeal of the director's final determination in non-residential development fee matters. The court noted also that although there was no authority, by statute or case law, in some cases the local municipality was included as a defendant in litigation and in others it was not. The court determined the township

had a legitimate interest in the subject of the litigation because it is authorized to use fees for the purposes of the Fair Housing Act. Further, the court reasoned that any ruling on the ultimate issue in the case would be binding on the township by virtue of the doctrine of collateral estoppel. Accordingly, if the township were denied participation in the litigation, it would be impeded from protecting its interests in the future.

The court also determined that the township's interest could not be adequately represented by the director because the township, provided it complied with the applicable statutory requirements, (1) is the ultimate user of the non-residential development fees, (2) the township is in control of much of the evidence needed to support the imposition of the fee (e.g., property record cards and the calculations used by the assessor to determine the assessed value of properties situated within the municipality), and (3) in cases where the director rules against the municipality the director would not be able to represent the municipality on an appeal.

The Takeaway

Helping your client determine whether it is subject to the non-residential development fee and the amount of such fee, if applicable, requires that you do more than fill in the blanks on the State of New Jersey Non-Residential Development Fee Certification/Exemption form. That being said, recent tax court precedent suggests that courts will employ a common-sense approach, e.g. narrowly construing the act to disfavor creative approaches to avoid paying any fee, but also remaining open to recognizing deductions for prior uses of the property. Accordingly, in order to give your client the best possible advice, you will need to have a firm understanding of how a municipality has previously assessed improvements for local tax purposes (which could be different from how the value of a property is applied for purposes of calculating the fee). Notwithstanding the act being silent, municipalities will be treated as an indispensable party to any challenge regarding the applicability or calculation of the non-residential development fee – something to keep in mind when advising your client whether to compromise or appeal. ■

Endnotes

1. 2019 WL 3037556 (Tax Ct., decided July 10, 2019)
2. 32 N.J. Tax 471 (Tax Ct. 2022)
3. 32 N.J. Tax 12 (Tax Ct. 2020)