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BPU ORDERS UTILITIES TO ISSUE REFUNDS TO HOMEBUILDERS FOR EXTENSIONS OF SERVICE TO PROJECTS LOCATED IN "NON GROWTH" AREAS MADE BETWEEN MARCH 20, 2005 AND DECEMBER 20, 2009

In 2005, the New Jersey Board of Public Utilities (BPU) adopted the Main Extension Rules (Rules) to "ensure that its programs reflected State smart growth policy goals." However, in so doing, the

BPU completely changed a reimbursement system that had worked well for over 95 years by restricting the established way in which regulated utilities could reimburse homebuilders

for new utility extensions. With the 2005 change, the BPU restricted reimbursements to only those developments located in NJ State Plan "smart-growth" areas, whereas in "non-growth" areas utility companies were prohibited from paying for or financially assisting in the extension of utility lines. As a result, developers and homeowners were forced to bear the full cost of such extensions. Ironically, the Rules came into full effect on January 1, 2007 - after the real estate sector of the economy had

begun its unprecedented decline. By January 1, 2007 the U.S. was in a recession and homebuilders were in crisis mode due to a steep decline in both sales volume and sales prices. At this time of crisis, when reimbursement of the costs to extend service could have been helped to mitigate operating losses, the regulations prohibited reimbursement to homebuilders whose projects were located in "non-growth" areas.

"The BPU ordered the utilities to 'expeditiously issue refunds' for utility extensions installed in 'non-growth areas'."

In 2006 Centex Homes LLC filed a petition requesting that four utilities regulated by the BPU construct and pay for utility extensions for a project to be constructed in Howell Township. The BPU denied Centex's petition finding that the project was located in a "non-growth" area and that accordingly

Continued on page 21

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[Printable Version](#)
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[Printable Version](#)
- December 2010
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Continued...

BPU Orders Utilities to Issue Refunds to Homebuilders (from page 6)

“the utilities were not permitted to pay or financially support the extension.” Centex appealed and the Appellate Division ruled that the BPU did not have the statutory authority to consider either land use or environmental factors in determining whether or not to reimburse an applicant for the costs of a utility extension. In *re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009)* the Court stated that the only considerations for determining if a utility must reimburse the costs of a utility extension were those the three factors originally set forth in the BPU’s enabling statute, i.e., whether: (1) the service extension was reasonable and practicable; (2) the extension would furnish sufficient business to justify the extension; and (3) the financial condition of the utility company reasonably warranted the expenditures involved in making and operating the extension.

Although the Appellate Court held that the Rules were invalid and *ultra vires*, it failed to provide any guidance as to how its decision should be implemented. Not surprisingly, on October 22, 2010, the BPU issued its Final Decision, retroactively applying Centex to only eighteen developers (who had applications in the “pipeline” and had not yet completed the utility extension process or who had applied for an exemption from the Rules), leaving hundreds of other developers and homeowners to be denied the benefit of the Centex decision. As a result a number of parties, including the New Jersey

Builders Association (NJBA), challenged BPU’s Final Decision and filed suit, asking the New Jersey courts to apply full retroactive effect to Appellate Court’s 2009 decision that invalidated the Rules.

In 2012, the court agreed and struck down BPU’s attempts to limit the retroactive application of the Centex ruling, holding that to make the decision retroactive to all cases (for developments in both “smart-growth” and “non-growth” areas) was the only way to “rectify the inequity” created by the invalidated Rules in *re Board’s Main Extension Rules N.J.A.C. 14:3-8.1 et seq., 426 N.J. Super. 538 (App. Div. 2012)*.

Finally on July 19, 2013, the BPU responded to the numerous and strenuous complaints (NJBA’s included) reacting to BPU’s proposed rulemaking and delay in implementing the court ordered “full retroactivity.” BPU ordered (and thereby allowed) the utilities to “not wait for the outcome of the rulemaking proceeding” and to “expeditiously issue refunds” for those utility extensions installed in “non-growth areas,” thereby returning the BPU reimbursement process to the scope intended by the Legislature.

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[Printable Version](#)
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- [December 2010](#)