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New Jersey Municipal Land Use Law: Constitutional Origin, Judicial Parameters

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INTRODUCTION

There is no question that the laws that govern land use are vital to the structure, organization, and cohesiveness of a community. Land use laws can dictate the character and layout of a given area and also outline the role of government balanced against the rights of developers and residents. The application and interpretation of these laws are ultimately left to the judiciary, and it is through judicial opinion and case law that one may truly understand land use laws. This Article will examine Municipal Land Use Laws (MLUL) in the State of New Jersey by analyzing the boundaries and parameters the judiciary has set in its interpretation of the New Jersey MLUL. By way of said examination, this article may serve as a cautionary tale for both governmental and nongovernmental actors in avoidance of judicial intervention with regard to the most common and basic land use issues presented in the state at the local, municipal level. Foremost, however, a look into the federal-state-local regulatory interplay is an important starting point in understanding what authority local municipalities have with regard to land use laws.

I
CONSTITUTIONAL ORIGIN

Article VI, Clause 2 of the United States Constitution, commonly known as the Supremacy Clause, establishes that the Constitution and all federal laws are the supreme law of the land.[1] Therefore, the analysis of land use laws, like any other, starts at the federal level with an exploration of the U.S. Constitution.

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1 U.S. CONST. art. VI, cl. 2.

Article IV, Section 3, Clause 2, commonly known as the Property Clause, of the U.S. Constitution states, "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[2]

Article IV gives direct insight with regard to federal power over federally owned lands, and the Fifth Amendment prohibits the federal government from taking private property for public use, stating, "nor shall private property be taken for public use, without just compensation."[3]

Article I, Section 8, Clause 3, commonly known as the Commerce Clause, allows the government to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[4] The Commerce Clause gives the federal government broad power with regard to regulating private land, to the extent that the private land falls within the scope of Congress' authority under the Commerce Clause.

Therefore, we know that federally owned land is controlled by the federal government, that the federal government cannot "take" private land without just compensation, and further, that the federal government can control private land insomuch as it falls within the crosshairs of the Commerce Clause. Indeed, nothing else in the U.S. Constitution explicitly references authority over land. Consequently, figuring out states' legislative power with regard to private land becomes somewhat of a process of elimination, that ends with the catchall Tenth Amendment.

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[5] In essence, if the U.S. Constitution does not explicitly reserve or prohibit a right one way or another, the right belongs to the State. The power vested in the states by the Tenth Amendment is commonly known as a State's "police power." The definition of "police power" has origins

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2 U.S. CONST. art. IV, § 3, cl. 2.

3 U.S. CONST. amend. V.

4 U.S. CONST. art. I, § 8, cl. 3.

5 U.S. CONST. amend. X.

dating back to 1851, derived from the court's holding in *Commonwealth v. Alger*:

> [T]he police power [is] the power vested in the [state] legislature by the [U.S.] constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.[6]

The police powers of a state are not finite or enumerated, but rather, they must fall within the scope of protecting the health, safety, and general welfare of the public.[7] Over the course of the past century and a half, courts have been charged with the duty of determining the edges and ceiling of states' police powers. Accordingly, by way of judicial determination, among the police powers vested in a state, is the power to regulate land use. Again, this inclusion dates back to *Alger*:

> Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the [state] . . . .[8]

Since *Alger*, courts have consistently upheld and solidified the inclusion of land use regulation under the umbrella of police power.[9]

In *Berman v. Parker*, the United States Supreme Court also ultimately held that the determination of particular uses of a parcel of land definitively fell within permissible exercise of police power.[10] In so holding, the Court noted the broad brushstroke of the application of police power:

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6 Commonwealth v. Alger, 61 Mass. 53, 85 (7 Cush.) (1851).

7 *Id.*; *see also* Berman v. Parker, 348 U.S. 26, 32–33 (1954).

8 *Alger*, 61 Mass. at 85.

9 Griepenburg v. Twp. of Ocean, 220 N.J. 239, 252, 105 A.3d 1082, 1090 (N.J. 2015) (citing Rumson Estates, Inc. v. Mayor of Fair Haven, 177 N.J. 338, 349, 828 A.2d 317, 323–24 (N.J. 2003); Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 20, 364 A.2d 1016, 1023–24 (N.J. 1976) (appeal dismissed and cert. denied sub nom.)).

10 *Berman*, 348 U.S. at 32−33.

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary.[11]

Now that we are in the catchall basin of the Tenth Amendment—wherein we broadly defined the states' police powers, and we have further determined that among those police powers is specifically the power of land use regulation—we must look to individual state constitutions to determine how states have retained and /or delegated the power of land use regulation. Pertinent to the discussion of this Article, we look specifically to the New Jersey State Constitution, which provides:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.[12]

In fact, the legislature of the State of New Jersey, in exercising its aforementioned state constitutional authority, did enact laws under which the regulation of local land use is delegated to municipalities. These laws are commonly known as the Municipal Land Use Laws (MLUL), and are found at *N.J.S.A.* 40:55D-1 et. seq.

The MLUL is *the* substantive authority for all zoning and planning with regard to municipalities in the State of New Jersey. However, in order to completely understand the full breadth and limitations of the New Jersey MLUL, legislative language is not enough—one must examine judicial application and interpretation.

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11 *Id.* (citation omitted); *accord* Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911), Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424 (1952).

12 N.J. CONST. art. IV, § 6, para. 2.

II
JUDICIAL PARAMETERS

A. Invalidity

1. Invalidity: Health, Safety, Morals, and General Welfare

The MLUL is "a comprehensive statute that allows municipalities to adopt ordinances to regulate land development 'in a manner which will promote the public health, safety, morals and general welfare' using uniform and efficient procedures."[13] This language is derived directly from the statute itself, wherein one of the enumerated primary goals of MLUL is to "encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare[.]"[14]

Moreover, this language is also clearly attached to the statute and the interpretation thereof through the judicial recognition that land use laws fall under the broad category of police powers; courts have consistently held that land use laws *must* promote the public health, safety, morals or general welfare to be constitutionally valid *because* land use regulation is a police power.[15] This requirement effectively reigns in the otherwise unbounded constitutional delegation of power with regard to a municipality's land use regulatory authority. "It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. (The last term seems broad enough to encompass the others.) *Conversely, a zoning enactment which is contrary to the general welfare is invalid*."[16]

Interestingly, the litmus test for compliance with the aforementioned requirement is not limited to the municipality's health, safety, morals or general welfare, but rather, extends to also include that of the state.[17]

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13 *Rumson Estates*, 177 N.J. at 349, 828 A.2d at 323−24 (citing Levin v. Twp. of Parsippany–Troy Hills, 82 N.J. 174, 178–79, 411 A.2d 704, 706 (N.J. 1980)).

14 N.J. STAT. ANN. § 40:55D-2(a) (2017).

15 *See* S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel I*), 67 N.J. 151, 174, 336 A.2d 713, 725 (N.J. 1975).

16 *Id.* at 175, 336 A.2d at 725 (emphasis added).

17 *See* Duffcon Concrete Prods., Inc. v. Borough of Cresskill, 1 N.J. 509, 513, 64 A.2d 347, 350 (N.J. 1949); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 247–49, 104 A.2d 441, 446–47 (N.J. 1954); Roman Catholic Diocese of Newark v. Borough of Ho-

> [I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, *the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded* and must be recognized and served.[18]

Indeed, it is imperative that a municipality's land use laws foremost are enacted to promote both local and state public health, safety, morals, or general welfare in order to survive initial constitutional scrutiny and potential invalidation.

2. Invalidity: Strict Adherence to the Mandates of MLUL

It is clear that land use regulation falls within the scope of the state's police power delegated to municipalities, and that an ordinance can be invalidated for failure to promote the public health, safety, morals, or general welfare. In addition, however, courts have further restricted municipalities' implementation of land use ordinances by requiring that such ordinances be adopted strictly in accordance with MLUL, the enabling statute.[19]

In *New Jersey Shore Builders Ass'n v. Township of Jackson*, the New Jersey Supreme Court, in affirming the appellate division's decision, found that the municipalities lacked authority to promulgate the specific ordinances in question, as the MLUL conferred no such authority to them.[20] Specifically, the court found that the municipal ordinances, which required the developers to set aside open space, were not contemplated by the MLUL for the specific type of development in question.[21] In reaching this conclusion, the court relied on the fact that the MLUL *did* contemplate and explicitly

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Ho-Kus, 42 N.J. 556, 573–74 202 A.2d 161, 170 (N.J. 1964); Kunzler v. Hoffman, 48 N.J. 277, 288, 225 A.2d 321, 327 (N.J. 1966).

18 *Mount Laurel I*, 67 N.J. at 177, 336 A.2d at 726 (emphasis added) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

19 *See* N.J. Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 449, 454, 972 A.2d 1151, 1154 (N.J. 2009) ("municipalities must exercise their powers relating to zoning and land use in a manner that will strictly conform with that statute's provisions."). *See also* Toll Bros., Inc. v. Bd. of Chosen Freeholders, 194 N.J. 223, 243, 944 A.2d 1, 12 (2008); Avalon Home & Land Owners Ass'n v. Borough of Avalon, 111 N.J. 205, 212, 543 A.2d 950, 954 (N.J. 1988); N.J. Builders Ass'n v. Mayor of Bernards Twp., 108 N.J. 223, 237–38, 528 A.2d 555, 562 (N.J. 1987).

20 *N.J. Shore Builders*, 199 N.J. at 454, 972 A.2d at 1154.

21 *Id.* at 452, 972 A.2d at 1152–53.

authorize promulgations of ordinances related to open space requirements in other types of developments, namely, Planned Unit Development (PUD).[22] In short, the court found that because the MLUL did not authorize an open space requirement for the developments at issue but did for other types of developments, the legislature did not intend for the requirement to be applied.[23] Consequently, the lack of explicit MLUL authorization rendered the municipalities' ordinances invalid.[24] The court held that "[t]he MLUL is a carefully constructed and comprehensive framework governing the powers of municipalities relating to land use and development. As we have previously held, municipalities must exercise their powers relating to zoning and land use in a manner that will strictly conform with that statute's provisions."[25]

Indeed, to the extent that a municipality enacts a land use ordinance that surpasses the specific confines of the MLUL, courts will invalidate the ordinance, thus, voiding the actions related thereto:

> A municipality, in exercising the zoning powers delegated to it, must act within such delegated powers [within the MLUL] and cannot go beyond them, and where a statute sets forth the procedure to be followed, no governing body or subdivision thereof can adopt any other method of procedure. . . . *When a statutory power is exercised in a manner that could not have been within the contemplation of and produces a result that could not have been foreseen by the Legislature, such exercise of powers must be restrained within proper bounds by being held void*.[26]

Furthermore, courts have held that a municipality cannot divorce itself from its obligation under MLUL and conflicting municipal ordinances cannot usurp the authority of MLUL.[27] In *Nouhan v. Board of Adjustment of City of Clifton*, plaintiff-Nouhan, who resided near the pub at issue, sued after exhausting appropriate avenues before the Board of Adjustment, because the intervener-pub owner was operating a restaurant that essentially turned into a nightclub

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22 *Id.* at 452, 972 A.2d at 1152.

23 *Id.* at 452–53, 972 A.2d at 1153.

24 *Id.*, 972 A.2d at 1152–53.

25 *Id.* at 452, 972 A.2d at 1153.

26 Pop Realty Corp. v. Bd. of Adjustment of Springfield Twp., 176 N.J. Super. 441, 452, 423 A.2d 688, 694 (N.J. Super. Ct. Law Div. 1980) (emphasis added) (citations omitted).

27 *See* Nouhan v. Bd. of Adjustment of Clifton, 392 N.J.Super. 283, 290, 920 A.2d 700, 704 (N.J. Super. Ct. App. Div. 2007).

during evenings and weekends.[28] The restaurant had an entertainment license, which the municipality's legislative body granted, that allowed operation as a nightclub; however, the city-zoning ordinance relative to the location of the restaurant did not allow for such use.[29] Essentially, the zoning ordinance prohibited operation of the nightclub, yet the municipality granted a licensing permit for said operation.[30] Of particular note, the Board denied plaintiff relief by deferring to the permitting authority;[31] the court found this to be improper given the fact that the issue fell within the zoning authority given to the Board through the MLUL.[32] The court held that, although the municipality had the power to license and regulate nightclubs by way of their permitting authority, "the issuance of a license to a regulated business does not authorize a use of land that is not permitted under the zoning ordinance."[33] Therefore, the court remanded to the Board, holding that the Board of Adjustment erred (as did the lower court) in finding that the issue at hand should be resolved as a permitting issue and not as a zoning issue.[34] Furthermore, the court held that the Board was required to hear and decide the case due to its exclusive obligation to do so under MLUL, stating:

> The MLUL confers authority upon the board of adjustment to "[h]ear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance [.]" The board of adjustment is also authorized to interpret the zoning ordinance. These powers of a board of adjustment are exclusive. Therefore, the board of adjustment must hear and decide any claim that a zoning officer has misinterpreted or failed to enforce the municipal zoning ordinance.[35]

In short, the court found that when a land use or zoning issue is involved, the permitting authority cannot usurp and replace the power of the MLUL and, further, that the Board of Adjustment must hear and decide the case because it is *required* to by MLUL.

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28 *Id.* at 289, 920 A.2d at 704.

29 *Id.* at 287–88, 920 A.2d at 702–03.

30 *Id.* at 289, 920 A.2d at 703–04.

31 *Id.*

32 *Id.* at 291, 920 A.2d at 705.

33 *Id.* at 292, 920 A.2d at 705.

34 *Id.* at 294, 920 A.2d at 707.

35 *Id.* at 291, 920 A.2d at 705 (citations omitted).

It is abundantly clear that an ordinance can be invalidated if it fails to strictly adhere to the confines of MLUL, and it should be simultaneously noted that courts have generally construed the MLUL in favor of the municipality while balancing the developers' constitutional rights and legitimate interests:

> Whenever reasonably possible, the MLUL should be construed in favor of the governmental authority so as to protect the public and not to frustrate the purpose of the enactment. . . . [However,] the rule that all statutory interpretation should be reasonably construed favorably toward governmental authority should not be applied so strictly as to impinge on the legitimate interests of developers. They are entitled to procedural due process and substantive fairness.[36]

3. Invalidity: Riggs *Four-Part Test*

The New Jersey Supreme Court utilized a four-part validity test in the 1988 case *Riggs v. Long Beach Township*, proscribing four distinct requirements that must be satisfied for a municipal land use ordinance to be valid.[37] The ordinance (or amendment) must (1) advance one of the general statutory purposes of the MLUL; (2) be consistent with the Master Plan; (3) comply with constitutional constraints; and (4) adhere to procedural requirements.[38]

a. Ordinance Must Satisfy at Least One of the Purposes of MLUL

In *Riggs*, the property owner applied to subdivide the property in question into four sub-lots.[39] In response, the Township rejected the application and advised that it intended to acquire the property through contract or eminent domain.[40] The Township did neither and, instead, subsequently adopted a Master Plan which included the property owner's lots as designated public open space.[41] Thereafter, despite the Master Plan, the Township amended the zoning ordinance relevant to the property owner's four lots, wherein subdividing as planned would still be permissible.[42] The Township, which still wanted to acquire the property, engaged in extensive negotiations with the property owner, which included a battle of conflicting

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36 Gunthner v. Planning Bd. of Bay Head, 335 N.J.Super. 452, 463, 762 A.2d 710, 716 (N.J. Super Ct. Law Div. 2000) (citations omitted).

37 Riggs v. Twp. of Long Beach, 109 N.J. 601, 611–12, 538 A.2d 808, 813 (N.J. 1988).

38 *Id.*

39 *Id.* at 604, 538 A.2d at 809.

40 *Id.* at 604–05, 538 A.2d at 809.

41 *Id.* at 605, 538 A.2d at 809.

42 *Id.*

appraisals.[43] When negotiations fell through, the Township—after instituting an unsuccessful suit against the property owner for specific performance of an alleged agreement to sale—again amended the relevant zoning ordinance such that the property owner could only subdivide the lot into two subsections, rather than the desired four.[44]

The property owner filed suit, alleging that the sole purpose of the rezoning was to diminish the property value so that the Township could lower the market value and acquire the property at a lower price via eminent domain.[45] The trial court found in favor of the property owner.[46] However, the appellate division reversed, finding that the rezoning was supported by purposes stated in the Master Plan, namely, "'protecting the natural resources and amenities of the Township [along] the bayshore and oceanfront,' and maintaining the 'single family-oriented low density character of the community by upgrading minimum lot sizes where possible and limiting multi-family housing development.' (quoting the Master Plan)."[47] The appellate division found that, in a situation where property is intended to be acquired by the Township and will likely be developed prior to such acquisition, "a zoning ordinance restricting development to the lowest possible density has a valid purpose because the restriction to low-density development facilitates acquisition of the property and establishment of the public use."[48]

The New Jersey Supreme Court rejected the appellate division's reasoning, reversed, and invalidated the ordinance.[49] The court did so primarily based on the Township's failure to satisfy the first criterion of the above referenced four-part test, which requires the zoning ordinance be enacted pursuant to one of the fifteen general purposes listed in *N.J.S.A.* 40:55D-2.[50] Although two listed statutory purposes *are* providing open space and, also, promoting the public health, safety, morals, and general welfare, the court found that "[a]n ordinance enacted solely to reduce the municipality's cost of

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43 *Id.* at 605, 538 A.2d at 810.

44 *Id.* at 606, 538 A.2d at 810.

45 *Id.* at 607, 538 A.2d at 810.

46 *Id.* at 610, 538 A.2d at 812.

47 *Id.*

48 *Id.*

49 *Id.* at 617, 538 A.2d at 815–16.

50 *Id.* at 612, 538 A.2d at 813.

acquisition of the land affected by the ordinance, however, does not fulfill a valid zoning purpose."[51]

In discussing the requirement that a valid purpose under *N.J.S.A.* 40:55D-2 is satisfied, the court distinguished between the actual purpose of the ordinance, which is dependent on objective factors, and the motive for enacting the ordinance, which involves subjective consideration.[52] The court stated:

> In determining whether the ordinance was adopted for an unlawful purpose, we distinguish between the purpose of the ordinance and the motives of those who enacted it. . . . Although the distinction between motive and purpose can be fuzzy, "motive" ordinarily addresses the subjective considerations that move a legislator, and "purpose" speaks to the goals to be achieved. The determination of "purpose" depends on objective factors . . . .
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> . . . If, however, the ordinance has but one purpose and that purpose is unlawful, courts may declare the ordinance invalid. Hence, when a party challenging an ordinance asserts that it was adopted for the improper purpose of depressing the value of the property in a condemnation proceeding, the court may seek to ascertain the municipality's true purpose in enacting the ordinance. This inquiry should be limited to an evaluation of the objective facts surrounding the adoption of the ordinance.[53]

The court found that although the Township's arguable *motive* in rezoning may have been to secure open space, its actual *purpose*—namely, "depressing the value of property that the municipality seeks to acquire through condemnation"—was not a listed permissible statutory purpose.[54] Therefore, the court concluded that the ordinance was unlawful and rendered it invalid.[55]

b. Ordinance Must Be Consistent with the Master Plan

N.J.S.A. 40:55D-5 defines the Master Plan as "a composite of one or more written or graphic proposals for the development of the municipality as set forth in and adopted pursuant to [N.J.S.A. 40:55D-28],"[56] which sets forth requirements for the preparation, contents, and modification of the Master Plan. *N.J.S.A.* 40:55D-28(a) provides that "[t]he planning board may prepare and, after public hearing,

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51 *Id.*

52 *Id.* at 613, 538 A.2d at 813–14.

53 *Id*. (citation omitted).

54 *Id.* at 612, 538 A.2d at 813.

55 *Id.* at 617, 538 A.2d at 815–16.

56 N.J. STAT. ANN. § 40:55D-5 (2017).

adopt or amend a [M]aster [P]lan or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare."[57] Furthermore, *N.J.S.A.* 40:55D-28(b) requires that the Master Plan "comprise a report or statement and land use and development proposals, with maps, diagrams and text, presenting, at least the following elements (1) and (2) and, where appropriate, the following elements (3) through (16)."[58] Essentially, *N.J.S.A.* 40:55D-28(b) lists sixteen different elements for inclusion in the Master Plan, however, only two are not discretionary and are mandatorily required, namely: (1) a statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based; and (2) a land use plan element.[59]

Consistency between an enacted ordinance and the Master Plan is the second criterion of the *Riggs* four-part test.[60] This requirement is derived from the statutory requirement under *N.J.S.A.* 40:55D-62(a) which states that "all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the [M]aster [P]lan or designed to effectuate such plan elements."[61] The statute goes on to provide for an exception, which permits the governing body to adopt an ordinance or amendment that is inconsistent with the land use and housing plan elements of the Master Plan if there is a majority vote in favor of it, provided that the governing body sets forth the reasons for the inconsistency "in a resolution and recorded in its minutes."[62]

Although the first part of *N.J.S.A.* 40:55D-62(a) is seemingly straightforward, the New Jersey Supreme Court has taken pause with regard to what "substantially consistent" actually means in application. In the 1995 New Jersey Supreme Court case *Manalapan Realty, L.P. v. Township Committee of the Township of Manalapan*, the plaintiff-appellant-shopping center owner applied for site plan approval to expand the existing commercial-retail space to include a

57 *Id.* § 40:55D-28(a).

58 *Id.* § 40:55D-28(b).

59 *See id.*

60 *Riggs*, 109 N.J. at 611, 538 A.2d at 813.

61 N.J. STAT. ANN. § 40:55D-62(a) (2017).

62 *Id.*

Home Depot.[63] Under the then-existing zoning ordinance, the Home Depot was a permitted retail store.[64] After significant public opposition to the store, the Township adopted two amendments to the zoning ordinance, which defined retail stores to exclude any establishment that sold building materials, thereby precluding the proposed expansion by the plaintiff-appellant.[65] The Board found the adoption of the amendments to be consistent with the Master Plan.[66] Plaintiff-appellant then initiated suit to challenge the validity of the amended ordinances.[67] The trial court found that the amendments were invalid, and that expanding the site to include a Home Depot was a permissible use under the previous ordinance, which was to be reinstated as a result of the court's invalidation of the amendments.[68] The Township appealed, and the appellate division reversed, finding the amendments were properly adopted and consistent with the Master Plan.[69] The plaintiff-appellant argued that the Master Plan, which was adopted two months before the enactment of the amendments and while the site approval application was pending, failed to address and reject the Home Depot as a permissible use.[70] The Township argued that "because the Master Plan is expressed in general terms it is of limited relevance in determining whether Home Depot is a permitted use."[71] The New Jersey Supreme Court found in favor of the Township, holding that because the Master Plan did not overtly disapprove of the Home Depot application, and because *N.J.S.A.* 40:55D-65(a) "authorized the Township through its zoning ordinance to '[l]imit and restrict buildings and structures . . . according to their type and the nature and extent of their use,'" the amendments were consistent with the Master Plan and therefore, were valid.[72]

The court in *Manalapan Realty* further acknowledged that *N.J.S.A.* 40:55D-62(a) required ordinances and amendments to be

63 Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 372, 658 A.2d 1230, 1233 (N.J. 1995).

64 *Id.* at 373, 658 A.2d at 1234.

65 *Id.* at 373–74, 658 A.2d at 1233–34.

66 *Id.* at 374, 658 A.2d at 1234.

67 *Id.*

68 *Id.* at 374–75, 658 A.2d at 1234–35.

69 *Id.* at 375–76, 658 A.2d at 1235.

70 *Id.* 379–80, 658 A.2d at 1237.

71 *Id.*

72 *Id.* at 383, 658 A.2d at 1239.

"substantially consistent" with the Master Plan and concluded that the plain meaning of the phrase actually allows for some inconsistency between adopted ordinances and the Master Plan.[73] In the court's own words:

> The Legislature has not defined what is meant by "substantially consistent" with a Master Plan. "When construing legislation, in the absence of a specific definition, we give words their ordinary and well-understood meanings. . . ." The only interpretation of "substantially consistent" that will not defeat the objective of the MLUL is to give these words their plain meaning. Substantial means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real, or, having real existence, not imaginary[;] firmly based, a substantial argument." Thus, the concept of "substantially consistent" permits some inconsistency, provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan.[74]

The court found that the ordinance did not so undermine and distort the Master Plan and relied on that conclusion in its position that the amendments were, in fact, valid.[75]

The New Jersey Supreme Court has further taken this relaxed interpretation of "substantially consistent," and coupled it with the second part of *N.J.S.A.* 40:55D-62(a) which provides for an exception to the consistency requirement; the court has concluded that, ultimately and plainly, a governing body may not make its decision to adhere to or deviate from the Master Plan "arbitrarily."[76]

c. Ordinance Must Comport with Constitutional Constraints

The third criterion of the *Riggs* test is that "the ordinance must comport with constitutional constraints on the zoning power, namely, those pertaining to due process, equal protection, and the prohibition against confiscation."[77]

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73 *Id.* at 382–84, 658 A.2d at 1239–40.

74 *Id.* (citations omitted).

75 *Id.* at 384–85, 658 A.2d at 1239–40.

76 Riya Finnegan LLC v. Twp. Council of S. Brunswick, 197 N.J. 184, 189, 962 A.2d 484, 493 (N.J. 2008).

77 Riggs v. Twp. of Long Beach, 109 N.J. 601, 611–12, 538 A.2d 808, 813 (N.J. 1988) (citations omitted); *see also* Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 81 N.J. 127, 405 A.2d 381 (N.J. 1979) (discussing due process); S. Burlington Cty. NAACP v. Twp. of Mount Laurel (*Mount Laurel II*), 92 N.J. 158, 208–09, 456 A.2d 390, 415 (N.J. 1983) (discussing due process and equal protection); AMG Assocs. v. Twp. of Springfield,

i. Due Process

In *Berger v. State of New Jersey*, the court sought to determine whether a zoning ordinance limiting the area in question to single family dwellings required a group home for special needs pre-school children, located in the area, to cease operations.[78] The property was deeded by gift to the New Jersey State Department of Institutions and Agencies ("the State") for the aforementioned exclusive use, namely the care of special needs children under the age of nine.[79] The deed specified that if the property was not used in this proscribed way, it would revert to the grantor, and, further, that the conveyance would be subject to the local Borough's zoning ordinances.[80] The State entered into an agreement with the Borough providing that no more than twelve children would reside on the property at any one time and that the structure would conform to the aesthetics of the neighboring area.[81] The plaintiffs owned property near the site and initiated suit to prevent the State's proposed use of the property on the grounds that, "first . . . the intended use . . . would constitute a clear violation of the negative reciprocal covenants contained in deeds of record establishing a neighborhood scheme of single family residences, and second . . . the proposed use would contravene [the Borough's] zoning ordinance restricting the area to single family dwellings."[82] With regard to the second grounds for challenge, the court found that the ordinance's definition of "family" was excessively narrow, and as such, violated due process.[83] The court acknowledged the State's interest in allowing municipalities to zone freely, but held that an ordinance that is overly restrictive on property rights denies owners of their property without due process, and is thus impermissible.[84] The court stated:

> [W]hile municipalities are free to zone in such a way as will best attain these values, and to prohibit from such areas any use which threatens to erode such values or destroy the residential character of the area, all restrictions must, at the same time, satisfy the demands

65 N.J. 101, 111–12, 319 A.2d 705, 710 (N.J. 1974) (discussing prohibition against confiscation).

78 Berger v. New Jersey, 71 N.J. 206, 210, 364 A.2d 993, 995 (1976).

79 *Id.* at 210–11, 364 A.2d at 995.

80 *Id.*

81 *Id.*

82 *Id.* at 212, 364 A.2d at 996.

83 *Id.* at 224, 364 A.2d at 1002.

84 *Id.* at 224–25, 364 A.2d at 1003.

> of due process. Substantive due process requires that zoning regulations be reasonably exercised; they may be neither unreasonable, arbitrary nor capricious. The means chosen must have a real and substantial relation to the end sought to be achieved. Moreover, the regulation must be reasonably designed to resolve the problem without imposing unnecessary and excessive restrictions on the use of private property.[85]

Consequently, to the extent that an ordinance is unreasonably over-restrictive such that property rights are denied, it runs the risk of invalidation as a violation of due process.[86]

ii. Equal Protection

With regard to equal protection, it is well settled that zoning ordinances proscribing use restrictions must be "general and uniform in the particular district."[87] Furthermore, equal protection principles of land use mandate that:

> equality of right forbidding arbitrary discrimination between persons similarly circumstanced . . . [and] [a]rbitrary discrimination in the purported exercise of the [police] power would violate the essence of the constitutional authority and the cited enabling statute and infringe the substance of due process and work a denial of the equal protection of the laws.[88]

Perhaps no set of cases illustrate the judiciary's determination to protect due process and equal protection better than *Mount Laurel I* and *Mount Laurel II*, which set forth the famous *Mount Laurel* doctrine.

In *Mount Laurel I*, the township of Mount Laurel had a general zoning ordinance that zoned land within the township as mostly industrial or residential.[89] Of the industrially-zoned land, industrial uses occupied only approximately 2.5%, with the remainder

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85 *Id.* at 223–24, 364 A.2d at 1002 (citation omitted).

86 *Id.* at 223, 364 A.2d at 1002; *see also* Gabe Collins Realty, Inc. v. Margate City, 112 N.J. Super. 341, 350, 271 A.2d 430, 434 (N.J. Super. Ct. App. Div. 1970); Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 81 N.J. 127, 137–38, 405 A.2d 381, 387 (N.J. 1979).

87 Schmidt v. Bd. of Adjustment, 9 N.J. 405, 418, 88 A.2d 607, 613 (N.J. 1952) (citing Brandon v. Bd. Of Comm'rs, 124 N.J.L. 135, 141, 11 A.2d 304, 308 (N.J. 1940); Murphy, Inc. v. Town of Westport, 40 A.2d 177, 182 (Conn. 1944); Miller v. Bd. of Public Works, 234 P. 381 (Cal. 1925), *writ of error dismissed*, 273 U.S. 781 (1927); Pacific Palisades Ass'n v. City of Huntington Beach, 237 P. 538 (Cal. 1925)).

88 *Schmidt*, 9 N.J. at 418, 88 A.2d at 613.

89 *Mount Laurel I*, 67 N.J. at 161–64, 336 A.2d at 718–20.

unoccupied.[90] Of the residentially-zoned land, all districts were restricted to single-family, detached dwellings, with a one house limit per lot; under the general ordinance, attached townhouses, apartments, and mobile homes were prohibited anywhere in the township.[91] Further, each residential district had relatively substantial minimum lot area and minimum dwelling floor area requirements.[92] Additionally, in the industrial and residential districts, four PUD projects were to be constructed that would be comprised of multi-family medium and high-rise apartments and attached townhouses embodying approximately 10,000 residential sale/rental housing units.[93] The units, however, would only be within the financial reach of persons with a medium to upper income and restrictions were in place on the number of bedrooms and children permissible in each unit.[94]

The *Mount Laurel I* court found that the record proved, in whole, that with regard to the general zoning ordinances and the details of the PUD developments, the township "acted affirmatively to control development and to attract a selective [namely a middle- and upper-income] type of [population] growth."[95] The court further noted that the motivation for this ordinance was to keep local property taxes down "without regard for non-fiscal considerations with respect to *people*, either within or without its boundaries."[96] The underlying logic behind this, the court recognized, was "the fewer the school children, the lower the tax rate," because New Jersey's tax structure imposes the cost of primary and secondary education on local real estate.[97] The court went on to note that Mount Laurel's actions and motivations are not unique to the township:

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90 *Id.* at 162–63, 336 A.2d at 719.

91 *Id.* at 163, 336 A.2d at 719.

92 *Id.* at 164–65, 336 A.2d at 719–20.

93 *Id.* at 167, 336 A.2d at 721. Planned unit development (PUD) is a land development whose placement and type is determined through an agreement between the developer and the municipality, outside of the normal scheme of local zoning and planning legislation, while still remaining within the confines of state enabling statutes and local implementing ordinances. *Id.* at 166, 336 A.2d at 720–21.

94 *Id.* at 167, 336 A.2d at 721.

95 *Id.* at 170, 336 A.2d at 722–23 (quoting S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 119 N.J.Super. 164, 168, 290 A.2d 465, 467 (N.J. Super. Ct. Law Div. 1972)).

96 *Id.*, 336 A.2d at 723 (emphasis in original).

97 *Id.* at 171, 336 A.2d at 723.

> This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing.[98]

In its legal analysis, the court noted that the power to zone is a police power, and, as such, must promote general welfare.[99] Housing, which is a basic human need, is a prime consideration in assessing the general welfare of citizens.[100] As a police power, zoning ordinances "must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws."[101] Here, the court required a broader interpretation of the general welfare, and such constitutional protections so as to include the "presumptive obligation on the part of developing municipalities at least to afford the opportunity by land use regulations for appropriate housing for all."[102] In the court's words:

> We have spoken of [the municipalities' obligation to provide appropriate housing for all through land use regulations] as "presumptive." The term has two aspects, procedural and substantive. Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not . . . afford[ed] the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action. The substantive aspect of "presumptive" relates to

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98 *Id.*

99 *Id.* at 174–75, 336 A.2d at 725.

100 *Id.* at 178, 336 A.2d at 727 ("This brings us to the relation of housing to the concept of general welfare just discussed and the result in terms of land use regulation which that relationship mandates. There cannot be the slightest doubt that shelter, along with food, are the most basic human needs. 'The question of whether a citizenry has adequate and sufficient housing is certainly one of the prime considerations in assessing the general health and welfare of that body.'").

101 *Id.* at 174, 336 A.2d at 725; *see also* N.J. CONST. art. I, para. 1; Robinson v. Cahill, 62 N.J. 473, 482, 490–92, 303 A.2d 273, 277 (N.J. 1973); Wash. Nat'l Ins. Co. v. Bd. of Review of N.J. Unemployment Compensation Comm'n, 1 N.J. 545, 553–54, 64 A.2d 443, 447 (N.J. 1949)).

102 *Mount Laurel I*, 67 N.J. at 180, 336 A.2d at 728.

> the specifics, on the one hand, of what municipal land use regulation provisions, or the absence thereof, will evidence invalidity and shift the burden of proof and, on the other hand, of what bases and considerations will carry the municipality's burden and sustain what it has done or failed to do.[103]

The court found that Mount Laurel's general "zoning ordinance [was] presumptively contrary to the general welfare," and therefore, a facial showing of a due process and equal protection violation had been established.[104] The burden then shifted to the municipality to show valid prevailing reasons to overcome the presumption, and the court found that the municipality failed to meet its burden.[105] The court then, with the earlier noted foundational assertion that Mount Laurel was not unique in its pattern of exclusionary land use regulation, went a step further.[106] In what is commonly known as the *Mount Laurel* doctrine, the court set forth the requirement that every developing municipality must affirmatively "afford the opportunity for decent and adequate low and moderate income housing," which "extends at least to the municipality's fair share of the present and prospective regional need therefore."[107]

Eight years later, the details of this affirmative obligation became the subject of *Mount Laurel II*, in which the New Jersey Supreme Court responded to "widespread non-compliance with the [equal protection and due process] constitutional mandate[s]" of *Mount Laurel I*.[108] The court in *Mount Laurel II* emphasized the constitutional basis for the *Mount Laurel* doctrine:

> [T]hose regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing . . . violate the state constitutional requirements of substantive due process and equal protection. . . . [This] doctrine does not arise from some theoretical analysis of our Constitution, but rather from underlying concepts of fundamental fairness in the exercise of governmental power. The basis for the constitutional obligation is simple: the State controls the use of land, *all* of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the

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103 *Id.* at 180–81, 336 A.2d at 728 (citations omitted).

104 *Id.* at 185, 336 A.2d at 730.

105 *Id.* at 185–91, 336 A.2d at 730–33.

106 *Id.* at 188, 336 A.2d at 732.

107 *Id.*

108 *Mount Laurel II*, 92 N.J. at 199, 456 A.2d at 410.

> State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.[109]

The court in *Mount Laurel II* sought primarily to ensure that the constitutional protections envisioned by *Mount Laurel I* would be appropriately adhered to, and additionally, sought to "put some steel" to the *Mount Laurel* doctrine.[110]

By way of deciding the issues in the consolidated cases before it,[111] the *Mount Laurel II* court most notably "put some steel" to the *Mount Laurel* doctrine by providing a multidimensional holding, which included the finding that the affirmative obligation to provide low income housing is no longer limited to developing municipalities, but rather, extends to every municipality, any portion of which falls within the "growth area," as so designated by the State Development Guide Plan.[112] The court also discussed at length what would constitute a municipality's "fair share" of the regional need for low-income housing, and further mandated that the municipality must provide low-income housing opportunities that are the "substantial equivalent of [that] fair share."[113]

In order to be in compliance with the *Mount Laurel* doctrine, the court held, municipalities must first eliminate all zoning and subdivision restrictions and requirements that do not serve as a protection of health and safety, and rather, act as "barriers to construction of their fair share of low[] income housing."[114] However,

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109 *Id.* at 208–09, 456 A.2d at 415.

110 *Id.* at 200, 456 A.2d at 410.

111 Mount Laurel II is a consolidation of six cases: Southern Burlington Cty N.A.A.C.P. v. Twp. of Mount Laurel, 161 N.J.Super. 317, 391 A.2d 935 (N.J. Super. Ct. Law Div. 1978); Urban League of Essex Co. v. Twp. of Mahwah, 207 N.J.Super 169, 504 A.2d 66 (N.J. Super Ct. Law Div. 1979); Glenview Dev. Co. v. Franklin Twp., 164 N.J.Super. 563, 397 A.2d 384 (N.J. Super. Ct. Law Div. 1978); Caputo v. Twp. of Chester, Docket No. L-42857-74 (Law Div. Oct. 4, 1978) (unreported); Urban League of Greater New Brunswick v. Mayor of Borough of Carteret, 142 N.J.Super. 11, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1976), *rev'd* Urban League of Greater New Brunswick v. Mayor of Borough of Carteret, 170 N.J.Super. 461, 406 A.2d 1322 (N.J. Super. Ct. App. Div.1979); Round Valley, Inc. v. Twp. of Clinton, Docket No. L-29710-74 (Feb. 24, 1978) (unreported) *rev'd* Round Valley, Inc. v. Twp. of Clinton, 173 N.J. Super. 45, 413 A.2d 356 (N.J. Super. Ct. App. Div. 1980).

112 *Mount Laurel II*, 92 N.J. at 215, 456 A.2d at 418.

113 *Id*. at 216, 456 A.2d at 419.

114 *Id.* at 258–59, 456 A.2d at 441.

if removing these barriers does little, in practical application, to afford a realistic opportunity for construction of low-income housing, then the municipality is also required to take further affirmative measures, namely: "(1) encouraging or requiring the use of available state or federal housing subsidies, and (2) providing incentives for or requiring private developers to set aside a portion of their developments for lower income housing."[115]

The court also provided remedies if a municipality fails to adhere to the *Mount Laurel* doctrine.[116] Said remedies include but are not limited to: (1) builders' remedies; (2) requiring revision of the zoning ordinance at issue; and (3) in cases of noncompliance with an order of revision, the trial court has a right to force the municipality's pen stroke of approval by ordering "that particular applications to construct housing that includes lower income units be approved by the municipality, or any officer, board, agency, authority (independent or otherwise) or division thereof."[117]

The New Jersey Supreme Court, in setting forth the *Mount Laurel* doctrine and aggressively refining it in *Mount Laurel II*, makes it abundantly clear that the judiciary will go to great lengths—including supplanting a municipality's vested authority to approve individual construction applications—in the name of equal protection and due process, as applied to land use.

iii. Prohibition Against Confiscation

In *AMG Associates v. Springfield Township,* the Township enacted a zoning ordinance dividing a strip of lots into two types of zoning: the front of the lots facing the main street were zoned for business purposes, and the back of the lots, which faced side streets, were zoned for residential uses, resulting in "split lots."[118] The plaintiff's property dimensions were such that, as a result of the split, the back portion of his lot was completely unusable for residential purposes, and consequently, a use variance was sought to use that portion of the lot for business purposes.[119] The variance application before the Board of Adjustment received almost no push back; a full hearing

115 *Id.* at 262, 456 A.2d at 443.

116 *Id.* at 285–86, 456 A.2d at 455.

117 *Id.*

118 AMG Assocs. v. Twp. of Springfield, 65 N.J. 101, 103, 319 A.2d 705, 707 (N.J. 1974).

119 *Id.* at 104, 319 A.2d at 706.

was held and the Township offered no major opposition.[120] The Board recommended to the Township Committee that the variance be granted, but the Committee refused, indicating that, "unusability was not considered to be a sufficient use variance ground."[121] The plaintiff initiated suit, the appellate division ruled in favor of the Township, and the plaintiff appealed to the New Jersey Supreme Court.[122] The court reversed, holding that:

> . . . in the split lot situation, an owner cannot validly be deprived of all reasonable utilization, for the benefit of another private landowner, of that portion of his land (beyond a *de minimis* situation) which otherwise, by reason of inability to meet the requirements of the zone in which it is situate, is practically unusable, yet remains subject to the burden of taxation.[123]

Consequently, if a municipal zoning ordinance reduces a property to "idleness by restraint against all reasonable use," the ordinance is "invalid as confiscatory and amounting to a taking without compensation."[124]

d. Ordinance Must Adhere to Procedural Requirements

The last requirement of the *Riggs* four-part test is compliance with the MLUL and local municipal procedural requirements.[125] Procedural requirements listed in MLUL include, for example, a public notice of a hearing on adoption, revision or amendment to the Master Plan,[126] a majority voting requirement for nonconformity with the Master Plan,[127] and procedural requirements for preliminary major subdivision approval.[128]

B. Presumption of Validity and Burden of Proof

1. Presumption of Validity

It is important to note that New Jersey courts have recognized that, generally, a municipality's ordinances must be liberally construed in

120 *Id.* at 107, 319 A.2d at 708.
121 *Id.* at 108, 319 A.2d at 708.
122 *Id.* at 111–12, 319 A.2d at 710.
123 *Id.*, 319 A.2d at 710–11.
124 *Id.* at 112, 319 A.2d at 711.
125 Riggs v. Twp. of Long Beach, 109 N.J. 601, 611, 538 A.2d 808, 813 (N.J. 1988).
126 N.J. STAT. ANN. § 40:55D-13(1) (2017).
127 *Id.* § 40:55D-62(a).
128 *Id.* § 40:55D-48.

the municipality's favor.[129] Although the avenues of invalidation have been discussed at length above, it is necessary to also note that land use ordinances are afforded a presumption of validity; this presumption, however, can be overcome by an "affirmative showing that the ordinance is arbitrary or unreasonable."[130]

In *Bow & Arrow Manor v. Town of West Orange*, the property owner was operating commercial enterprises as a permissible non-conforming use, and challenged the rezoning ordinance that would limit the property to residential use.[131] At issue was whether the owner's property was properly rezoned as residential or if it should have been commercially zoned.[132] The court found that deference must be given to the municipality in its position to consider the property residentially zoned.[133] The court noted that because the area in question "is a fairly disputable area where commercial influences converge with residential ones . . . [t]he legislative judgment could reasonably go either way."[134] The court stated:

> It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless [sic] an ordinance is seen in whole or in application to any particular property *to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute*. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. *It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently* or because the preponderance of the weight of the expert testimony adduced at

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129 Rumson Estates, Inc. v. Mayor of Fair Haven, 177 N.J. 338, 350, 828 A.2d 317, 325 (N.J. 2003).

130 Taxpayers Ass'n v. Weymouth Twp., 80 N.J. 6, 20, 364 A.2d 1016, 1024 (N.J. 1976). Courts have consistently held that this presumption can be overcome. *See, e.g.*, Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 350, 307 A.2d 563, 567 (N.J. 1973); Harvard Enters. v. Bd. of Adjustment of Madison, 56 N.J. 362, 368, 266 A.2d 588, 591 (1970); Vickers v. Twp. Comm. of Gloucester, 37 N.J. 232, 256, 181 A.2d 129, 134 (N.J. 1962); Ward v. Twp. of Montgomery, 28 N.J. 529, 539, 147 A.2d 248, 253 (N.J. 1959); Bellings v. Twp. of Denville, 96 N.J. Super. 351, 356, 233 A.2d 73, 76 (N.J. Super. Ct. App. Div. 1967).

131 *Bow & Arrow Manor, Inc.*, 63 N.J. at 339, 307 A.2d at 565.

132 *Id.* at 344–45, 307 A.2d at 567–68.

133 *Id.* at 343, 307 A.2d at 567.

134 *Id.* at 345, 307 A.2d at 568.

> a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained.[135]

In giving deference to legislative judgment, affording a presumption of validity to the rezoning ordinance, and absent a finding that the ordinance was arbitrary and capricious, which would have overcome that presumption, the court found that the zoning ordinance enacted by the Town of West Orange was valid.[136]

2. Burden of Proof

To overcome the aforementioned presumption of validity, the party challenging the ordinance carries the burden of proof and must show that the ordinance "'in whole or in application to any particular property' is 'clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.'"[137] In this regard, courts have again allowed for a broad interpretation in favor of the municipality as to what constitutes a "reasonable" ordinance, setting forth a standard by which the challenging party must show that absolutely *no* reason exists for the ordinance.[138] In *Zilinksy v. Zoning Board of Adjustment of Verona*, the court made this clear, stating:

> A mere difference of opinion as to how an ordinance will work will not lead to a conclusion of invalidity; "no discernible reason" [for the ordinance] is the requisite standard. . . . "[an ordinance] having some reasonable basis is not invalid merely because it is not made with mathematical nicety . . . [a]nd the [ordinance] must be upheld if any set of facts can reasonably be conceived to support it."[139]

In further refining what would render an ordinance "arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute," the New Jersey Supreme Court has held that courts should look to the relationship between the means and the ends of the ordinance:

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135 *Id.* at 343, 307 A.2d at 567 (emphasis added) (citing Kozesnik v. Montgomery Twp., 24 N.J. 154, 167, 131 A.2d 1,8 (N.J. 1957), *and* Vickers v. Twp. Comm. of Gloucester Twp., 37 N.J. 232, 242, 181 A.2d 129, 134 (N.J. 1962), *cert. den. and app. dism.*, 371 U.S. 233 (1963)).

136 *Id.* at 350, 307 A.2d at 571.

137 Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 289, 777 A.2d 334, 338–39 (N.J. 2001) (quoting *Bow & Arrow Manor, Inc.*, 63 N.J. at 342, 307 A.2d at 567).

138 *Id.* at 290, 777 A.2d at 339.

139 Zilinsky v. Zoning Bd. of Adjustment, 105 N.J. 363, 369, 521 A.2d 841, 844 (N.J. 1987) (quoting David v. Vesta Co., 45 N.J. 301, 315, 212 A.2d 345, 352 (1965)).

> [T]he means selected must have real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.[140]

In assessing the relationship between the means and the ends, courts require an examination of the reasonableness in light of the totality of the circumstances.[141] Again, the burden is on the challenging party to show that the municipality has failed to act in accordance with this required standard.[142] Further, absent a finding that the ordinance is unreasonable on its face, to meet the burden of proof and overcome the presumption of validity, the challenging party may make a showing "by extrinsic evidence of sufficient weight clearly establishing [the ordinance's] unreasonableness."[143]

C. Immunity

1. Immunity from MLUL: Municipality

Two major questions posited in *Hills of Troy Neighborhood Association v. Township of Parsippany-Troy Hills* were (1) whether a municipality is exempt from its own local land use ordinances, and (2) whether such immunity, if afforded, carries over to private companies hired by the municipality.[144]

First, the *Hills* court assessed whether the municipality had the authority to construct a communications tower without obtaining zoning approvals as required by MLUL and, specifically, the related municipal ordinances.[145] The plaintiff sought an injunction preventing the Township from constructing a municipal communications and telecommunications tower at the local police headquarters.[146] The plaintiff argued that the proposed tower construction did not comply

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140 *Pheasant Bridge Corp.*, 169 N.J. at 290, 777 A.2d at 339 (quoting Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251, 281 A.2d 513, 518 (N.J. 1971)).

141 *Id.* at 290, 777 A.2d 334 at 339.

142 Riggs v. Twp. of Long Beach, 109 N.J. 601, 611, 538 A.2d 808, 812 (1988); *see also* LaRue v. Twp. of East Brunswick, 68 N.J. Super. 435, 454, 172 A.2d 691, 701 (N.J. Super. Ct. App. Div. 1961).

143 Bellington v. Twp of East Windsor, 32 N.J. Super. 243, 248, 108 A.2d 179, 182 (N.J. Super. Ct. App. Div. 1954).

144 Hills of Troy Neighborhood Ass'n v. Twp. of Parsippany-Troy Hills, 392 N.J. Super. 593, 597, 921 A.2d 1169, 1171 (N.J. Super. Ct. Law Div. 2005).

145 *Id.*

146 *Id*. at 597–98, 921 A.2d at 1170–72.

with the relevant municipal ordinance that imposed height restrictions and also required a certain distance be maintained between communications towers and residential areas.[147] The Township countered that other locations had been explored and were not feasible for construction of the proposed tower.[148] The Township also countered that the proposed height of the tower was necessary because a shorter tower, which was being used in the interim, was wholly inadequate and unreliable.[149] Moreover, the Township asserted that the proposed tower was necessary to carry out the public purpose of "reliable and vital police, fire, emergency and municipal services and communications."[150]

In addressing the question of whether a municipality should be granted immunity from its own land use ordinances in order to carry out a public purpose, the *Hills* court ultimately held that the municipality is *not* restrained by the local prohibitive ordinance, and because the municipality was serving a public need, the municipal authority to do so could not be circumvented by the local ordinance.[151] The court explained that "[t]he need of a public building in a certain location ought to be determined by the . . . municipal authority, and its determination on the question of necessary or desirable location cannot be interfered with by a local zoning ordinance."[152]

The court cautioned, however, that a municipality's power to avoid compliance with local ordinances must be "reasonably exercised in response to the public need."[153] Furthermore, the court, in exempting the municipality from the purview of local ordinances requiring zoning approvals, still required review of the municipality's proposed action.[154] The court stated:

> That review is not in the nature of satisfying the positive and negative criteria for a use variance, rendering exemption from

147 *Id*. at 599, 921 A.2d at 1171–72.

148 *Id.*, 921 A.2d at 1172.

149 *Id.*

150 *Id.*

151 *Id.* at 608–10, 921 A.2d at 1178–79.

152 *Id.* at 600, 921 A.2d at 1172 (quoting Thornton v. Village of Ridgewood, 17 N.J. 499, 513, 111 A.2d 899, 906 (N.J. 1955)).

153 *Id.* at 601, 921 A.2d at 1173 (quoting Aviation Servs., Inc. v. Bd. of Adjustment, 20 N.J. 275, 285, 119 A.2d 761, 767 (N.J. 1956)).

154 *Id.* at 603–04, 921 A.2d at 1175.

> zoning regulation meaningless. Instead, our developed case law . . . requires a municipality to act reasonably in this regard by focusing on such factors as the kind of function or land use involved, the extent of the public interest to be served, the deviation from a municipality's zone plan and the impact on surrounding properties. In this context, the consideration of alternative sites is necessary as it minimizes the deviation from the zone plan and impact upon surrounding properties. Further, that analysis is not complete unless the municipality has afforded the public a meaningful opportunity to be heard on these factors . . . .[155]

2. Immunity from MLUL: Private Enterprises Hired by Municipality

Next, the court in *Hills* turned to the question of whether immunity, if afforded, carries over to private companies hired by the municipality, as the Township had assigned construction of the proposed tower to two private enterprises, Sprint and Omnipoint.[156] The plaintiff asserted that, as private companies, Sprint and Omnipoint were not exempt from the ordinances even if the municipality was exempt, and, as such, had to apply for appropriate variance approvals.[157] The plaintiff argued that because the two companies were private companies, the construction would advance their private financial interest and the construction, consequently, was not for a public purpose.[158] The court rejected this position.[159] In so doing, the court set forth required considerations to assess whether a private enterprise, engaged in work at the behest of the municipality, is promoting the municipality's public purpose.[160] To be considered are: (1) the reasons why the municipality entered into a partnership with a private enterprise; (2) the type of public interest to be served thereby at the particular location; (3) the nature of the private enterprise; and (4) weighing the same against the private benefits obtained.[161] If, after such examination, the public interest outweighs any other interest, the private company is also exempt from the local ordinance.[162] The *Hills* court noted that, "[m]unicipalities will always have the power to contract with private enterprises on municipal land projects and as long as those agreements are for an overriding public

155 *Id.*
156 *Id.* at 598, 921 A.2d at 1174–75.
157 *Id.* at 599, 921 A.2d at 1172.
158 *Id.* at 606, 921 A.2d at 1176.
159 *Id.* at 609–10, 921 A.2d at 1178–79.
160 *Id.* at 608–09, 921 A.2d at 1178.
161 *Id.*
162 *Id.* at 609, 921 A.2d at 1178.

purpose, zoning exemptions exercised reasonably should apply to the private companies."[163]

The court in *Aviation Services, Inc. v. Board of Adjustment*, also emphasized the importance of a property's usage for public purpose/ need as the prime factor in assessing whether a private company is immune from local land use ordinances.[164] In *Aviation Services,* the Town of Morristown acquired land within the boundary of the Township of Hanover, and thereafter entered into an agreement with the federal government to develop the property for airport services.[165] Hanover Township subsequently enacted a zoning ordinance that incorporated the land into a residential zone and effectively excluded airports within the zone.[166] Plaintiff-lessee, a private corporation and a party to a lease with Morristown, operated its aviation business out of a building in the airport.[167] Morristown, an intervener, argued that "the airport operation constitute[d] an essential governmental function serving the public need and by virtue of its nature is immune to the zoning power of Hanover Township."[168] Hanover Township argued that the use of the airport was "proprietary," and, as such, the airport should not be afforded any immunity insomuch as it should be treated as a private corporation.[169]

The court first acknowledged that airport operation has long been recognized as serving a public need.[170] The court then looked to relevant statutory language, which provided that a municipality (Morristown, in this case) could acquire and lease property for the operation of an airport.[171] Comprehensively, Morristown prevailed against the Hanover ordinance because the court found that (1) airports serve a public purpose and are a governmental function; (2) the relevant statutes indicate that a municipality has authority to acquire and lease property for the operation of an airport, inside or outside its borders; (3) the U.S. government contracted with the

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163 *Id.*

164 Aviation Servs., Inc. v. Bd. of Adjustment, 20 N.J. 284, 289, 119 A.2d 764, 766–67 (N.J. 1956).

165 *Id.* at 275, 278, 119 A.2d at 761, 763.

166 *Id.*

167 *Id.*

168 *Id.* at 280, 119 A.2d at 764.

169 *Id.*

170 *Id.* at 280–81, 119 A.2d at 764–65.

171 *Id.* at 283, 119 A.2d at 765.

municipality specifically to operate an airport (thereby activating eminent domain authority); and (4) the legislative intent of relevant statutory language would be controverted and frustrated by the local ordinance if the airport was not immune.[172] The court cautioned that "[i]f the purposes sought to be achieved are to be thwarted by zoning plans which arbitrarily exclude airport uses from an entire municipal domain, the progress envisioned by the Legislature and stimulated by this statute may go unrecognized."[173]

Thus, the Plaintiff-lessee, a private enterprise, prevailed against Hanover and was immune from the Hanover ordinance by virtue of Morristown's immunity and rights enumerated above. Specifically, Morristown had a right to act as a lessor of property used as an airport—a public need—which immunized the private enterprise, the lessee of the property.

3. Immunity from MLUL: Superior Governmental Authority

The court in *Aviation Services* also peripherally addressed the role of the federal government in the case, insomuch as there was a "bestowal of the power of eminent domain [to Morristown] to subserve the [airport] program."[174] In analyzing this aspect of the case, the court made an important and often-cited finding that, "where the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary."[175] In *Aviation Services*, as well as subsequent cases that cited the aforementioned language, a superior government is afforded a presumptive exemption from local municipal land use ordinances unless there is express statutory language surrendering that immunity.[176] However, as illustrated below, not all courts have required express statutory

172 *Id.* at 284, 289, 119 A.2d at 764, 766–67.

173 *Id.* at 283, 119 A.2d at 766.

174 *Id.*

175 *Id.* at 282, 119 A.2d at 765; *see* Town of Bloomfield v. N.J. Highway Auth., 18 N.J. 237, 249, 113 A.2d 658, 665 (N.J. 1955) (absent a legislative provision to the contrary, the State Highway Authority was not subject to the municipal zoning ordinance). *See also* Mayor of Kearny v. Clark, 213 N.J. Super. 152, 155, 516 A.2d 1126, 1127 (N.J. Super. Ct. App. Div. 1986) (holding county was immune to Kearny's zoning ordinances related to the construction of a jail).

176 *Aviation Servs., Inc.*, 20 N.J. at 282, 119 A.2d at 765; *see also* sources cited *supra* note 175.

language to overcome the aforementioned presumption of immunity but, rather, have looked to legislative intent to do so.

The 1972 case, *Rutgers v. Piluso*, was such a case, where the New Jersey Supreme Court took a slightly different approach from the court in *Aviation Services*.[177] The issue in *Piluso* was whether Rutgers, a state university, was exempt from a municipality's local zoning ordinance that affected one of Rutgers' campuses.[178] The relevant municipal zoning ordinance allowed for an unlimited number of dormitory housing units for unmarried students but limited the number of units available to students who were married and had families.[179] Having reached the permissible limit for family units, Rutgers sought to build additional family housing units to accommodate the students and their families.[180] The municipality's Board of Adjustment denied Rutgers' application on the grounds of the restriction in the aforementioned ordinance and denied Rutgers' subsequent application for a variance to allow for the construction of the housing units.[181] Rutgers accordingly initiated suit.[182]

The court found that "municipal zoning regulation of state university property can, and in the case before us certainly would, very materially interfere with the development and growth of the institution, for the benefit of all the people of the state, as planned and felt necessary by the educational authorities."[183] Moreover, the court found that the ultimate test in granting immunity is the determination of legislative intent, while considering the totality of the facts and circumstances relevant to the case at bar.[184] Indeed the court made sure to emphasize that no formula existed or should exist in this regard:

> [Legislative] intent, rarely specifically expressed, is to be divined from a consideration of many factors, with a value judgment reached on an overall evaluation. . . . The most obvious and common [factors] include the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the

177 Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697 (N.J. 1972).

178 *Id.* at 146, 286 A.2d at 698.

179 *Id.* at 147, 286 A.2d at 699.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.* at 150, 286 A.2d at 701.

184 *Id.* at 152–53, 286 A.2d at 702–03.

> effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests. . . . In some instances one factor will be more influential than another or may be so significant as to completely overshadow all others. . . . The point is that there is no precise formula or set of criteria which will determine every case mechanically and automatically.[185]

In examining the totality of the aforementioned factors, the court ultimately sided with the state university, finding that it was exempt from the relevant municipal ordinance.[186] Unlike *Aviation Services,* which presumed immunity absent express legislative language otherwise, the starting point in *Piluso* for determining whether superior governments are immune from local municipal land use ordinances was legislative intent (without the requirement for express language), determined by an analysis of the factors set forth above.[187]

In the 1982 case, *United Building & Construction Trades Council v. Mayor of Camden,* the New Jersey Supreme Court utilized a slight variation from both the 1972 *Piluso* approach and the 1956 *Aviation Services* approach to superior governmental immunity against local municipal land use ordinances.[188] In *United Building*, the court relied on the concept of federal preemption in drawing the conclusion that a local ordinance will be preempted if the state legislature intended, either expressly *or impliedly*, to be exclusive in the field.[189] Further, the court also noted that liberal construction in favor of the local municipality must be afforded, and that the legislative intention to supersede must be clearly present.[190]

Although it is clear that variations exist with regard to the way the New Jersey Supreme Court has addressed immunity of superior governments against local municipal ordinances, the general rule is consistent: a governmental authority superior to a municipality is afforded immunity with regard to local municipal land use ordinances, but this immunity is not unrestricted—it is subject to express legislative language or implied legislative intent.

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185 *Id.*

186 *Id.* at 158, 286 A.2d at 705.

187 *Id.* at 151–52 n.4, 286 A.2d 702; *see also* Aviation Servs. v. Bd. of Adjustment, 20 N.J. 275, 282, 119 A.2d 761, 765 (N.J. 1956).

188 United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 343, 443 A.2d 148, 161 (N.J. 1982), *rev'd on other grounds*, 465 U.S. 208 (1984).

189 *Id.*; *see also* Rumson Estates, Inc. v. Mayor of Fair Haven, 177 N.J. 338, 828 A.2d 317 (N.J. 2003).

190 *United Bldg. & Constr. Trades Council*, 88 N.J. at 343, 443 A.2d at 161.

CONCLUSION

It is evident that the MLUL provides ample framework for municipalities to set forth comprehensive municipal land use ordinances. Those ordinances, in turn, are the prescription for conduct related to local land use for both governmental and nongovernmental actors. However, at the most preliminary stage of scrutiny, these ordinances must serve the general welfare as an exercise of police power, and must strictly comply with the MLUL.

Furthermore, municipal land use ordinances must satisfy all four criteria of the *Riggs* test. Ordinances are presumed valid, and that presumption is overcome by a showing that the ordinance or the conduct related thereto is arbitrary, capricious, or unreasonable. The burden of proof for such a showing is on the challenger. Additionally, immunity from municipal ordinances is afforded in limited situations. Municipalities are immune to ordinances if their conduct is promoting a public purpose in a governmental function. Private enterprises are immune if they are contracted with the municipality to do work in furtherance of the aforementioned public purpose or if they are a lessee in a lease with the municipality and that lease is immune by virtue of its promotion of a specified public purpose. Lastly, superior governments, i.e., the state or the federal government, are immune from municipal ordinances absent express or implied legislative intent which would waive that immunity. These mandates, set forth by the judiciary in its interpretation of the MLUL, illuminate the foundational parameters, limitations, and reach of New Jersey local land use laws.