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## Does zoning supersede land use law?

By Howard D. Geneslaw and Michele B. McGlyn

**F**or years now, land use attorneys have advised both developers and municipalities that, to the extent local ordinances vary, the definitions of terms explicitly defined by the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D, the local ordinances are *ultra vires* and exceed the scope of their enabling statute. That advice was grounded in the existing case law and basic tenets of statutory construction of enabling legislation.

Although there had been no definitive Supreme Court ruling on the issue, there were a number of Law Division and Appellate

Division cases, and even a District Court decision, supporting this advice. This year, a unanimous New Jersey Supreme Court ruling on August 5, 2003, has turned that advice on its head.

The findings in *Rumson Estates, Inc. v. Mayor and Council of Borough of Fair Haven*, 177 N.J. 338 (2003), has land use attorneys scratching their heads in disbelief. In that case, the New Jersey Supreme Court ruled there is nothing preventing a municipality from redefining the term "floor area ratio" specifically, and any non-mandatory term generally, despite the fact that the MLUL sets forth a conflicting definition.

The appealing developer, Rumson Estates, owned property in the Borough of Fair Haven and sought to subdivide the property into three lots and build three houses. Relying on the floor area ratio pertinent to the zone in which the property was located (.40), Rumson Estates would have been able to build three homes of about 3,600 square feet each.

But there was a hitch. The local ordinance provides a cap on the permissible floor area of single-family homes in the district, requiring the developer to limit the size of each house to 2,600 square feet.

Procedurally, Rumson Estates sought subdivision approval from the Fair Haven Planning Board and a variance to exceed the cap on floor area. The variance was denied and Rumson Estates filed a Complaint in Lieu of Prerogative Writs in the Law Division. Plaintiff challenged the cap, arguing to the Law Division, the Appellate Division, and, finally, the Supreme Court, that the MLUL allows municipalities to regulate floor area ratio exclusively as a proportion of total lot area, and that the local cap skews the MLUL definition of "lot" and, thereby, the MLUL definition of "floor area ratio".

The MLUL definitions at issue are the following, which appear in N.J.S.A. 40:55D-4:

"Lot" means a designated parcel, tract, or area of land established by a plat or otherwise as permitted by law and to be used, developed, or built upon as a unit.

"Floor area ratio" means the sum of the area of all floors or buildings or structures compared to the total area of the site.

Rumson Estates relied on the Appellate Division's decision in *Manalapan Builders Alliance, Inc. v. Township Committee of the Township of Manalapan*, 256 N.J. Super. 295 (App. Div. 1992), which is squarely on point and held that Manalapan's omnibus ordinance was void and *ultra vires* because it redefined floor area ratio as the aggregate area of a lot after extracting out certain land features.

The MLUL definition hinges on the gross area of the lot and not the net area after deducting environmentally sensitive land.

In the *Manalapan Builders* decision, Judge King affirmed the trial court opinion that the ordinance was "beyond the local legislative power." Despite the salutary goal of protecting environmentally sensitive land, the MLUL "does not allow municipalities to alter definitions of terms in the statute to control development or promote environmental protection."

Judge King cited the District Court's decision in *Crow-New Jersey 32 Ltd. Partnership v. Clinton Township*, 718 F. Supp. 378 (D.N.J. 1989), which likewise held that "by defining 'floor area ratio' in the ordinance differently than it is defined in the enabling legislation, the township has clearly gone beyond its statutory grant of power."

### Altering definitions

The New Jersey Supreme Court disagreed outright with these holdings, stating (with a few unclear exceptions) the defined terms in the MLUL are solely meant to be employed in reading the MLUL itself, and that municipalities are not "straight-jacketed" into those definitions provided without power to alter them as needed to serve recognized goals of the MLUL. *Rumson Estates*, 177 N.J. at 353-354.

The court said, "...[W]e think the Court in *Manalapan Builders* went astray..."; adding that "[T]o the extent that *Manalapan Builders* reached a different conclusion, it is disapproved."

The court relied heavily on N.J.S.A. 40:55D-65b to empower municipalities to "utilize caps, floor area ratios, lot area calculations and other creative definitions. N.J.S.A. 40:55D-65b permits a zoning ordinance to regulate the bulk, height, number of stories, orientation, and size of buildings and other structures; lot sizes and dimensions; and, for these purposes, may specify floor area ratios and other ratios and regulatory techniques governing the intensity of land use and the provision of adequate light and air, including, but not limited to, the potential for utilization of renewable energy."

The Appellate Court in *Manalapan Builders* specifically rejected defendant's argument that this section of the MLUL allowed for deviation of the MLUL's floor area ratio definition. After citing to the above language, the Appellate Division declared: "[n]owhere, however, does the MLUL allow municipalities to change the definition of terms in the statute in order to control development or promote environmental protection." *Manalapan Builders*, 256 N.J. Super at 304. It's almost as if the two courts were reading different statutes.

Bad advice aside, the Supreme Court's departure from existing precedent and its rationale for the *Rumson Estates* holding should be significant - even troubling - to land use attorneys, real estate developers and other practitioners on several levels.

Although New Jersey Courts have always recognized the importance of liberally construing

the powers of municipal corporations, that power has historically been kept in check by also limiting municipal power to the provisions of the relevant enabling legislation.

In *Sussex Woodlands Inc. v. Mayor and Council of the Township of West Milford*, 109 N.J. Super. 432, 437 (Law Div. 1970), the court said, "Equally established is the requirement that an ordinance be enacted pursuant to a legislative grant..." In *Stoker v. Town of Irvington*, 71 N.J. Super. 370, 378 (Law Div. 1961), the court said, "[T]heir powers (municipalities) are circumscribed by the provisions of the statute and they can act only in the manner therein described."

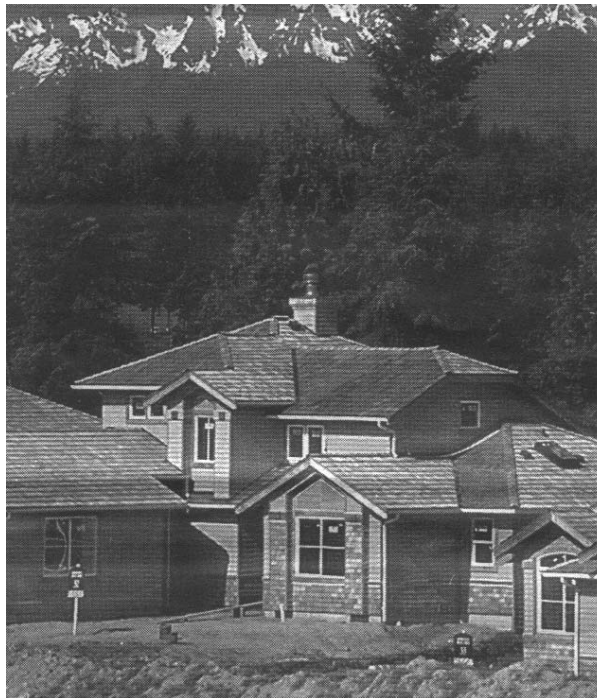
*Gatto Design & Development Corp. v. Township of Colts Neck*, 316 N.J. Super. 110, 120 (App. Div. 1998), held that "Colts Neck's requirement that developer's post performance guarantees 'accepted and approved by the governing body' prior to deeming the developer's application complete is clearly outside the scope of its authority under requirements of the enabling statute."

And, in *Lakewood Residents Ass'n v. Congregation Zichron Schneur*, 239 N.J. Super. 89, 93 (Law Div. 1989), the court said the power to zone is broad, but the municipality must use the power within the limits of the legislative delegation of the MLUL and the standards that accompany that authorization.

### Warning

In the 1952 case presented by *Magnolia Development Co., Inc. v. Coles, Mayor et al.*, 10 N.J. 223, the New Jersey Supreme Court discussed off-site improvements as a condition of subdivision approval prior to any provision for such in the enabling statute. The Court wisely warned:

"But the constitutional mandate for the liberal construction of the powers of municipal corporations constitutes no warrant for their imposing conditions on the operation of a statute where the legislature has not, as it has not here, authorized, either expressly or by implication, the imposition of such conditions."



To permit a municipality to impose conditions outside the statute on the exercise of its statutory powers would inevitably result in the subversion of those powers to purposes never contemplated by the legislature under the most liberal of constructions.

These statutes, while granting much power to a municipality in the development or land within its boundaries, also contain many provisions for protecting the property owner. They do not constitute an authorization for a municipality to exercise the powers therein conferred without compliance with the provisions and procedures therein described.

The New Jersey Supreme Court in *Rumson Estates* radically departs from this historic constraint on municipal power and grants unbridled deference to municipal corporations to solve existing land use problems creatively and without regard for the fact that their empowerment is a creature of statute with specific and exclusive purposes.

In *Rumson Estates*, the Supreme Court appears undaunted by the fact that elected officials specifically voted to include and define terms when passing the MLUL, which terms are now subject to municipal disregard and abandonment. The Court is satisfied that the deviant ordinance classifications in Fair Haven and Atlantic Highlands are "rational approaches to discernible problems." *Rumson Estates*, 177 N.J. at 331.

## Legislative intent

The overriding purpose behind the enactment of the MLUL was to standardize and streamline the development process. See *Accardi v. Mayor and Council of N. Wildwood*, 145 N.J. Super. 532, 546 (Law Div. 1976). The sponsor's statement to the MLUL specifically lists as number two among the highlights of the law the intent of: "[i]ncreasing and enlarging more than 50 fold the number and scope of definition of the terminology employed". This clearly indicates that another purpose of the law was "specific standards for all municipal agencies to observe when exercising land use control."

In *Rumson Estates*, the Supreme Court holds that the language preceding the definition section of the MLUL should be interpreted to strictly mean that, when a defined term is used in the MLUL, it will have a specified meaning and that the language does not mean that municipalities cannot "alter the definitions to serve recognized goals of the MLUL."

The court either did not consider, or rejected, what would seem to be a reasonable interpretation of the definitions section of the MLUL, given the sponsors' statement: Specifically selected terms were included and defined within the MLUL for the stated purpose of "outlining specific standards for all municipalities to observe when exercising land use control."

It should be noted that the MLUL does not define every land use term appearing within it, but only selected terms. For example, the term "accessory use" is employed by the statute, but is not defined by it.

This suggests that the legislature intentionally left certain terms open to municipal definition and chose to define other terms, which were to be used in a uniform manner throughout the state. Certainly, the goals and priorities of municipal land use control have changed drastically since the enactment of the MLUL in 1975.

It may be true that removing certain definitions from the statute – and thereby leaving them for municipal governing bodies to define in a manner conducive to local objectives such as environmental protection and housing diversification – would be a "rational way to solve discernible problems." If so, one must wonder whether those definitions in the MLUL should be repealed rather than judicially invalidated.

At issue here is the question of what means are available to municipalities to regulate the size of buildings pursuant of the MLUL. Floor area ratio is certainly one such available tool. A fair interpretation of the implications of the MLUL (as an enabling statute) would be that, when the tool of floor area ratio is employed by a municipality to regulate building size, the legislature intended the definition of "floor area ratio" provided by the MLUL to apply.

This interpretation would be more consistent with the stated purpose of standardizing municipal controls over land use. It restricts municipalities to a uniform practice of controlling land density and making adequate provision for light and air by tying the permissible size of buildings to the area of the surrounding lot on which the building is located.

Municipalities would be free to develop other creative bulk and density controls that do not involve deviations from statutorily defined terms.

A cap on building size, however, does not reflect a relationship between density and lot size. It is inconsistent with the regulatory tool of floor area ratio.

Furthermore, the cap technique would singularly affect certain owners of larger lots because only those property owners, absent a subdivision, would be prohibited from building out to the otherwise permitted floor area ratio applicable to the zoning district.

## Primacy

Curiously, *Rumson Estates* recognized that, "*Manalapan Builders* was not entirely wrong in its approach to the statute. There are some terms in the MLUL that are entitled to primacy...". The court, however, gave no explanation of the distinction between terms entitled to primacy and terms which can be altered by municipal ordinances.

The court simply stated, "if a term used in the MLUL is mandatory, no alteration of it would be permitted." This begs the question, "which of the enumerated terms are mandatory terms?" Other than "interested party", no answer is provided. This part of the decision will undoubtedly create conflict between municipal agents and developers until such time as there is further guidance from the courts or, more appropriately, the legislature.

## Conclusion

While municipalities have been enacting ordinance provisions that vary the statutory definitions provided by the MLUL for years, most authorities viewed this as a questionable practice. (See William M. Cox, *Zoning and Land Administration* (2003), §34-7.5 at 736.)

The New Jersey Supreme Court's recent decision in *Rumson Estates*, affirming the municipal practice altering statutory terms, may provide the municipality of Fair Haven with an effective means to cap the "monster homes" phenomenon locally.

In doing so, it also raises practical questions about the variability of statutorily defined terms in other contexts and theoretical questions about the very purpose of enabling legislation and judicial revision of such legislation.

For ease of definition, this article focused on the facts of *Rumson Estates*. The published decision is a consolidation of *Rumson Estates* and *Ferraro Builders v. Borough of Atlantic Highlands Planning Board*.

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