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New Jersey Appellate Division Upholds Decision on Electric Vehicle Parking Credits During Concept Review Phase

On February 20, the Appellate Division of New Jersey, in *Sackman Enter., Inc. v. Mayor & Council of the Borough of Belmar*, unanimously affirmed that the trial court and the Borough of Belmar (the Borough) were correct in rejecting Sackman's (the Developer) concept plan as inconsistent with the Borough's redevelopment plan. The Appellate Division concluded that electric vehicle (EV) credits are to be applied when determining a concept plan's consistency with a redevelopment plan. The Appellate Division also concluded that when applying EV credits to the total number of calculated spaces and the number includes a decimal, the calculation must be rounded up to the next whole parking space. However, if the rounded-up EV credit reduces the total required parking by more than the 10 percent limit set forth in the EV statute, N.J.S.A. 40:55D-66.20(e), a developer's plan would conflict with the statute.

The Developer owns property within the Seaport Village Redevelopment Area and sought to develop a waterfront neighborhood into a downtown space with mixed-use properties. At issue in *Sackman* was whether the Developer's concept plans to the Borough were consistent with the Seaport Village Redevelopment Plan (the Redevelopment Plan). Specifically, the Developer attempted to include EV parking spaces to meet the on-site parking requirements and waive the floor area ratio (FAR) requirement. Under N.J.S.A. 40:55D-66.20, a single EV parking space is counted as two parking spaces. The Developer submitted a series of revised concept plans, which were all rejected by the Borough for failing to meet the FAR requirement or, alternatively, the on-site parking requirements. The Developer filed suit challenging the denial of its concept plan. The trial court agreed with the Borough's denial. The trial court stated that the Developer failed to comply with the FAR requirement, or the parking requirements set forth in the Redevelopment Plan, and held that the Developer's proposed EV credits exceeded the 10 percent maximum credit allowed per site plan.

The Appellate Division reviewed three issues involving EV parking credits under N.J.S.A. 40:55D-66.20. The first issue involved whether a redevelopment agency considering a concept plan can apply EV credits when determining parking requirements at the concept plan consistency review phase. The courts have yet to interpret the EV statute to determine when a prospective redeveloper may utilize the EV credits. The operative language in N.J.S.A. 40:55D-66.20(a) states, "as a condition of preliminary site plan approval, for each application involving … a mixed use development, a developer or owner shall prepare at least fifteen percent of a development plan's parking spaces as 'Make Ready,' with at least one-third of those spaces including electric vehicle supply equipment." The Appellate Division found that the statute's reference to "a condition of preliminary site plan approval" permits prospective redevelopers to apply the statute in order to reach the preliminary site plan approval stage. The Appellate Division further found that if the statute was meant to limit developers to apply EV credits at the time of preliminary site plan approval, the statute would not have used conditional language and instead would have stated it was inapplicable prior to preliminary site plan approval.

The second issue the Appellate Division reviewed involved interpreting N.J.S.A. 40:55D-66.20(f), which states, "all parking space calculations for electric vehicle supply equipment and Make-Ready equipment pursuant to this section shall be rounded up to the next full parking space." The issue in *Sackman* involved rounding up or down the decimal for the EV credit. The Borough's interpretation is when a calculation of the EV credit results in a number with a decimal that is less than 0.5 and therefore closer to the lesser whole number than the greater whole number, the calculation should be rounded down to the closer whole number. In contrast, the Developer interpreted the statute to mean when the EV credit number includes a decimal, the calculation must be rounded up to the next whole parking space to account for the partial space under the calculation. The Appellate Division reviewed the plain language of the statute and found it does not include any conditional

language for a scenario where a calculation resulting in a decimal number should be rounded down, and thus the Borough's mathematical practice of rounding down a number to the nearest whole number when a resulting decimal is anything less than 0.5 is incorrect.

Finally, the Appellate Division reviewed the effect rounding up has as it applies to an EV parking space calculation that would exceed the 10 percent maximum. According to N.J.S.A. 40:55D-66.20(e), "a parking space prepared with electric vehicle supply equipment or Make-Ready equipment pursuant to this section shall count as at least two parking spaces for the purpose of complying with a minimum parking space requirement. This subsection shall result in a reduction of no more than 10 percent of the total required parking."

In *Sackman*, the Developer was required to have 84 total parking spaces. The Developer argued that because the EV statute rounded up to the next full parking space, it permitted the Developer to include nine EV spaces in its plan. However, the Borough argued that the Developer's use of nine EV credits would reduce the total parking requirement by more than the 10 percent credit maximum and thus violates N.J.S.A. 40:55D-66.20(f). The Appellate Division held that "when submitting a concept plan for a consistency determination with a municipality's redevelopment plan, the prospective redeveloper must comply with all applicable sections of the MLUL [Municipal Land Use Law]." The Appellate Division further stated that the EV statute does not provide any instruction as to the approach reviewing municipalities or courts should take when rounding up an EV credit would exceed the 10 percent limitation. However, the Appellate Division stated that "absent such language, prospective redevelopers must create concept plans that avoid any conflict within the statute." As applied to *Sackman*, the Appellate Division held that the Developer's rounding up to the next full parking space would exceed the 10 percent credit maximum and, as such, would not be consistent with the Redevelopment Plan. The Appellate Division concluded that the Borough and the trial court were correct in rejecting the Developer's concept plan as inconsistent.

Though the Appellate Division's decision was disappointing to the Developer, the court provided clear interpretations of the language contained in N.J.S.A. 40:55D-66.20.

This alert is only meant as a summary of the case and is not intended as legal advice. Any inquiries concerning the *Sackman* case or application of the EV statute should be directed to any of Day Pitney's land use attorneys listed in the sidebar.

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