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Tax Court Upholds Non-Residential Development Fee on Property Subject to the Long-Term Tax Exemption Law

New Jersey's Non-Residential Development Fee (NRDF) is a required contribution by non-residential developers toward a municipality's affordable housing trust fund. The amount and calculation of the NRDF is set forth in N.J.S.A. 40:55D-8.1 *et seq*. (L. 2008, c. 46), and the calculation and resulting NRDF are reported by the developer and the assessor on Form N-RDF.

The New Jersey Tax Court's reported decision on February 1 in *EREZ Holdings Urban Renewal, LLC v. Director, Division of Taxation* addresses two issues: (1) whether the equalized assessed value of an exempt property's improvements (part of the starting point for the NRDF calculation) should be $0, and (2) whether the value of the parking lot improvement in that case should have been specifically deducted from the calculation of the fee. Broadly speaking, the NRDF is calculated by applying a 2.5 percent rate to the equalized assessed value of the subject property, minus permitted deductions as set forth on Form N-RDF.

The subject property in *EREZ* was vacant and previously owned by the municipality, and therefore it was previously exempt from taxation. The taxpayer's completed project (a 60,000-square-foot office building with associated improvements) was also partially exempt from taxation under the Long-Term Tax Exemption Law (LTTEL) (N.J.S.A. 40A:20.1 *et seq*.) and therefore, upon project completion, the improvements constructed were exempt from real property taxation. The LTTEL agreement contained no discussion on the calculation of the NRDF for the project. The taxpayer's rationale for the starting point of a $0 equalized assessed improvement value for the NRDF was that the improvements were exempt pursuant to the LTTEL. While the municipality concluded that the improvements for the project were, in fact, exempt from real property taxation, it also determined a total equalized assessed value of the subject property to be $12,651,600 (allocated $10,515,600 to the improvements and $2,136,000 to the land) as the starting point for the calculation of the NRDF.

The New Jersey Tax Court in *EREZ* rejected the taxpayer's position due to the long-standing governing legal authority (N.J.A.C. 18:12-3.1 and N.J.A.C. 18:12-3.1(b)(2)) that even exempt properties are required to be assessed, but the tax rate is merely not applied to the assessment. In this regard, the tax court noted, "There is undoubtedly value in the improvements, and the tax exemption does not obliterate that value. A tax exemption does not strip a property of its value. Rather it simply relieves a taxpayer from an obligation of paying the tax owed," citing the court's prior decision in *City of Hackensack v. County of Bergen*, 30 N.J. Tax 240, 252 (Tax Ct. 2017). Indeed, exempt properties carry assessments on the tax rolls, as do any other properties, but taxes are not levied unless there are nonexempt portions, which happens in some cases (N.J.S.A. 54:4-3.6). The court went further and noted that the properties which are exempt from the NRDF are those that are specifically exempted under the NRDF statute (N.J.S.A. 40:55D-8.4(b)), such as those used by religious entities or for educational purposes. In short, in the court's view, had the NRDF statute intended to exempt improvements for properties under an LTTEL exemption, then it would have exempted them.

As to the parking lot issue, parking improvements are a specific deduction from the equalized assessment in the NRDF calculus under N.J.S.A. 40:55D-8.4(b)(1). However, it appears from the court's decision that the taxpayer only first raised the issue before the tax court (as opposed to its initial appeal to the director of the Division of Taxation). While the tax court permitted proofs on the amount of the deduction for the parking garage, it concluded that the taxpayer failed to persuade the court that the amount exempted from the NRDF for the parking lot should be the amount that it claimed ($3,407,000). The tax court therefore affirmed the director's determination, which permitted no exemption for the equalized assessment of the improvements for the project, and the taxpayer's parking lot deduction value was not accepted.

In sum, developers should not assume that there will be a whole or partial exemption from the NRDF because their projects are exempt from taxation under the LTTEL or pursuant to some other PILOT program or statute. That is clearly not the case. It is possible, although not certain, that an agreement as to the calculation of the NRDF can be addressed in the context of LTTEL or PILOT documents. Moreover, all deductions permitted from the equalized assessed value, such as for parking lots, should be set forth on Form N-RDF, and if denied by the assessor, they should be raised on any initial appeal to the director to avoid the prospect of the tax court ultimately not being persuaded by proofs presented after the fact.

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