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Keeping the Focus on 'Final Approvals' Under MLUL

OP-ED: The Highlands Coalition does not oppose affordable housing.

By **Elliott Ruga** | January 29, 2018

Land is scarce in this small, densely populated state. Rightfully, we have passed municipal land use laws to make sure that any development of this precious resource is calculated and in the public interest.

I was deeply disappointed to see the misleading focus on affordable housing in the recent article, "Court to Decide Highlands Act Exemption Case" (Jan. 15, 2018), which discusses *N.J. Highlands Coalition v. N.J. Dept. of Environmental Protection*. Let me be clear: We at the Highlands Coalition are not opponents of affordable housing. To call Bi-County's proposed development in this case "affordable housing," though, is disingenuous. Bi-County proposes 204 units, of which only 16—roughly 8 percent—would be affordable.

As the New Jersey Supreme Court stated in the original *Mt. Laurel* litigation, "Builders may not be able to build just where they want—our parks, farms, and conservation areas are not a land bank for housing speculators." The Highlands is an environmentally sensitive region that supplies drinking water to 70 percent of the state's population. State legislators recognized its value and need for protection when they passed the Highlands Act in 2004.

None of this, though, concerns the issue the court will be deciding. The single question of law before the court is whether the final site plan approval Bi-County received from the Borough of Oakland Planning Board in 2007 qualifies as a "final approval" under the New Jersey Municipal Land Use Law (MLUL). Bi-County does not dispute receiving a final approval in its briefing ("No one in this case disputes that Respondent Bi-County's project received a conditional final site plan approval from the Borough Planning Board in 2007…"). The Appellate Division, though, did dispute this and erroneously rule that the 2007 approval was *not* a final approval.

If the court does not fix the error of the Appellate Division, then the consequences will be felt throughout the state's development world and on every municipality. The purpose of the MLUL is to "require consistency, uniformity, and predictability" in the planning process. Processes as varied as zoning protections and tax assessments rely on the finality of aptly called final approvals. For example, developers are protected against zoning requirements changes for two years following the date of final approval. The right to challenge a planning board's final approval is limited to 45 days after the approval is issued. If final approvals can

somehow become not final retroactively, how will anyone know when their relevant windows of opportunity and protection open and close?

Additionally, final approvals have relevance in tax court. Courts have consistently found that a final approval with conditions does qualify as a final approval and meaningfully impact the value of the property, which in turn affects property taxes and a property's qualification for a tax freeze. As our tax court has held, "The economic reality is not whether each and every condition of final site plan approval has been satisfied, but the perception in the marketplace that a protected right has been conferred on the property, and that there is a value attributed to that right." Good luck litigating valuations in an environment where developers, land owners and courts are unsure if a "final approval" is actually final or not.

The court can avoid opening this Pandora's box by simply overturning the Appellate Division and holding that the final site plan approval Bi-County received from the Oakland Planning Board in 2007 is, in fact, a final approval. If so, then Bi-County will not be able to claim a three-year exemption to the Highlands Act to build its overwhelmingly market-rate housing development.

The Highlands Act intended to organize a more cohesive approach to development in one of New Jersey's most environmentally significant regions. The court's enabling zombie permits on a 30-year-old project that traces its origin back to 1987 defeats the purpose of the law. It also undermines the required consistency, uniformity and predictability of the MLUL for the entire state of New Jersey.

The Supreme Court recognized that this was an issue of great importance to the public by virtue of its granting certification and agreeing to hear the case. To suggest that the case is about anything other than the definition of final approval under the state's municipal land use law does a disservice to the readers and the public.

Ruga is policy director of the New Jersey Highlands Coalition in Boonton, which is involved in the litigation discussed in this commentary.