

PROCEEDURAL HISTORY

The Board is an agency in, but not of the Department of Treasury. See N.J.S.A. 48:2-1. The Board is charged with the “general supervision and regulation of and jurisdiction and control over all public utilities as defined in this section and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title” See In re N.J. Am. Water Co., 169 N.J. 181, 187 (2001) citing N.J.S.A. 48:2-13(a). In so doing, the Board must ensure that any public utility “furnish[es] safe, adequate and proper service, including furnishing and performance of service in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State, and including furnishing and performance of service in a manner which preserves and protects the water quality of a public water supply, and to maintain its property and equipment in such condition as to enable it to do so.” In granting this authority, the Legislature “intended to delegate the widest range of regulatory power over utilities to the [Board].” Bd. of Pub. Utils. v. Valley Rd. Sewerage Co. (In Re Valley Rd. Sewerage Co.), 154 N.J. 224, 235 (1998). This authority “extends beyond powers expressly granted by statute to include incidental powers that the agency needs to fulfill its statutory mandate.” Ibid.

The Board’s jurisdiction over utility extensions can be found at N.J.S.A. 48:2-27, which provides that the Board “may ...require any public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities where in the judgment of the board, the extension is reasonable and practicable and will furnish sufficient business to justify the construction ... and when the financial condition of the public utility reasonably warrants the original expenditure” Pursuant to N.J.S.A. 48:2-13, -16, -23 and -27, the Board adopted rules concerning the extension of service at N.J.A.C. 14:3-8.1 et seq.

On January 31, 2002, Former Governor McGreevey issued Executive Order No. 4 (“EO 4”), which created the Office of the Governor, Smart Growth Policy Council “[t]o ensure that State agencies incorporate the principles of smart growth and the State Plan into their functional plans and regulations.” In furtherance of these principals, Former Governor McGreevey issued Executive Order No. 38 on October 25, 2002 (“EO 38”), which recognizes the importance of smart growth principals, including the public policy goals of “preventing endless sprawl, while avoiding the degradation of natural and agricultural resources, the impairment of environmental quality, increases in local property taxes, and the overburdening of local transportation systems and other infrastructure, as well as the important role state agencies play in redevelopment. Specifically, EO 38 directs that “State agencies and the Office of Administrative Law shall develop and implement a system that will give priority to applications and appeals involving development and redevelopment in areas designated for smart growth.”

Pursuant to the policy goals of this State, EO 4 and 38 and the Legislature’s statutory mandate to issue orders in a manner that tend to ‘conserve and preserve’ the environment and provide utility extensions that are reasonable, the Board amended its Extension of Service Rules N.J.A.C. 14:3-8.1 et seq. (“Main Extension Rules”) on November 16, 2004. These amendments ensure that the Board’s regulations governing extensions of service reflected the State of New Jersey’s Smart Growth policies. These rules were subsequently published in the New Jersey Register on December 20, 2004 at 36 N.J.R. 5928. The Main Extension Rules became operative on March 20, 2005.

LEGAL ANALYSIS

THE BOARD'S MAIN EXTENSION RULES ARE CONSISTENT WITH N.J.S.A. 48:2-27

Petitioner argues that the Board must grant an extension where the preconditions set forth in N.J.S.A. 48:2-27 have been met. Hilton New Jersey Corporation v. Atlantic City Elec. Co., 205 N.J. Super. 217 (App. Div. 1985). The Petitioner therefore argues that the Court's holding in Hilton precludes the Board's Main Extension Rules.

Petitioner's argument is without merit as it incorrectly applies the regulations within the statutory scheme. As noted above, N.J.S.A. 48:2-27 requires construction and maintenance of any "reasonable extension" where the extension is (1) "reasonable and practicable"; (2) that the financial condition of the utility reasonably warrants the expenditure; and (3) that the extension of service will furnish sufficient business to justify the extensions.

Petitioner's position that the Main Extension Rules are inconsistent with N.J.S.A. 48:2-27 is based on Petitioner's misapplication of what is "reasonable and practicable". The Petitioner asserts that "reasonable extension" and "reasonable and practicable" are met merely through a utilities' willingness to extend the main. The utilities' willingness to extend service is tied to the other statutory factors, their financial stability as well as their ability to recover the cost of construction through rateables. For example, JCP&L states in their May 1, 2002 letter, "We will continue to fulfill our obligation to supply the electrical needs of our service area according to law." It further states that amongst other things, success is tied to "the ability to get rates to enable the Company to remain financially sound." As such, any utility that is obligated to provide service in its service area, that is financial able and will recoup its investment will express a willingness to extend service mains. Under the Petitioners logic, fulfilling these latter two statutory requirements would automatically make a project reasonable and practicable, thus fulfilling the final statutory requirement.

Such a result would be inconsistent with statutory canons in this State. See State v. Reynolds, 124 N.J. 559, 564 (1991) (holding that "[a] construction that will render any part of a statute inoperative, superfluous, or meaningless, is to be avoided"). Here, the statutory language is clearly conjunctive, "reasonable and practicable and will furnish sufficient ..." (emphasis added) requiring separate assessments by the Board.

Therefore, the examination of the Main Extension Rules focuses on whether the project constitutes a "reasonable extension" and whether the extension is "reasonable and practicable" as required by N.J.S.A. 48:2-27. In exercising its authority to determine whether an extension is reasonable, the Board must consider other language within its enabling statutes, including N.J.S.A. 48:2-23 which requires that it act "in a manner that tends to conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of this State." See Pine Belt Chevrolet v. Jersey Cent. Power & Light Co., 132 N.J. 564, 579 (1993) (noting in relevant part that "all parts of the statute must be read together so that each part is consistent with the whole"). In reviewing the environmental reasonableness of extensions, the Board must also consider all relevant legal authority, including its enabling statute, the New Jersey State Planning Act, N.J.S.A. 52:18A-196, et seq., EO 4 and EO 38.

"Administrative agencies possess the ability to be flexible and responsive to changing conditions. This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy." In re Public Serv. Elec. & Gas Company's Rate Unbundling, 167 N.J. 377, 385 (2001) (internal citations omitted). The Board's Main

Extension Rules address the reasonableness of an extension request as well as the procedure for application, payments and refunds.

After reviewing the petition, the Board FINDS that N.J.A.C. 14:3-8.1 et seq. is consistent with its obligation to order extensions where they are reasonable and practicable pursuant to N.J.S.A. 48:2-27.

As stated above, the enabling statute of this Board as well as subsequent land use legislation and Executive Orders set forth a policy encouraging Smart Growth in this State. In amending its regulations, the Board has determined through rulemaking that smart growth concerns are of vital concern when assessing whether an extension is "reasonable and practicable". Therefore, the Board has determined that an extension is "reasonable and practicable" if it complies with the Main Extension Rules.

PETITIONER IS ENTITLED TO AN EXEMPTION FROM THE EXTENSION REGULATIONS PURSUANT TO N.J.A.C. 14:3-8.8(A)(4) AS TO VERIZON ONLY

Petitioner argues that they are exempt from the Extension Regulations pursuant to N.J.A.C. 14:3-8.8(a)(4), which provides that "[i]f construction of an extension, or the installation of any temporary service, has begun prior to March 20, 2005, or if a regulated entity has committed in writing to pay for or financially support the extension, prior to March 20, 2005, the extension shall be exempt."

Petitioner does not dispute that extensions were not constructed prior to March 20, 2005. However, Petitioner argues that due to delays caused by Howell Township, it was unable to begin construction of the extensions prior to March 20, 2005. Specifically, Petitioner argues that in settling its dispute with Howell, the "Final Major Site Plan and Subdivision that was approved on August 5, 2004" was given full effect. Petitioner further suggests NJAW agreed to provide service to the site in 2002 and that JCP&L and Verizon agreed to provide service and pole relocation on the site in 2003. Agreements were later signed by Petitioner with JCP&L on December 21, 2006, NJAW on September 6, 2006 and NJNG on August 21, 2007.

Petitioner's argument that but for the delay by Howell, it would have been in compliance with the regulations is without merit. Petitioner's correspondence demonstrates that it, or its predecessors, was in contact with the utilities during the planning stage of this project, prior to any dispute. Moreover, Petitioner's dispute did not prevent it from obtaining commitments in writing to pay for or financially support the extension of service prior to March 20, 2005. In fact, Verizon committed to the extensions in writing in 2002, prior to final site approval and Petitioner's dispute with Howell. The final cost estimate of this commitment was set forth in a letter from Verizon on January 5, 2007.

Where actual construction of the extension has not begun prior to March 20, 2005, N.J.A.C. 13:4-8.8(a)(4), requires a commitment "in writing to pay for or financially support the extension." A review of documents submitted by Petitioner show that only Verizon, in its May 10, 2002 letter, made such a commitment, "telephone cable and associated plant required to serve the project will be placed at no expense to the developer". No such commitment in writing is evident on behalf of JCP&L, NJAW or NJNG.

To the extent Verizon New Jersey is providing its extension as to telephone services over copper lines, the Board FINDS that Petitioner has met the criteria for exemption pursuant to N.J.A.C. 14:3-8.8(a)(4) as to Verizon and therefore, the Board FINDS that the extension of

telephone services is a Reasonable Extension and is Reasonable and Practicable. To the extent Verizon New Jersey is providing its extension as a cable television operator, the cost of this extension is governed by N.J.S.A. 48:5A-28(h).² The Board further FINDS that the Petitioner has not met the criteria for Exemption pursuant to N.J.A.C. 14:3-8.8(a)(4) as to JCP&L, NJNG and NJAW.

No information has been presented to the Board to suggest that this expenditure is not reasonably warranted or that the extension will not furnish sufficient business to justify the extensions. Additionally, Verizon's May 10, 2002 letter and January 7, 2007 cost estimate as well as the size and scope of the project demonstrate that the remaining two statutory criteria at N.J.S.A. 48:2-27 have been met, namely, that the financial condition of the utility reasonably warrants the expenditure; and that the extension of service will furnish sufficient business to justify the extensions.

PETITIONER IS NOT ENTITLED TO AN EXEMPTION FROM THE EXTENSION REGULATIONS PURSUANT TO N.J.A.C. 14:3-8.8(A)(6)

The Petitioner submits that it is exempt from the requirements for the costs of the extensions pursuant to N.J.A.C. 14:3-8.8(a)(6), because the project will provide a significant public good, as described in N.J.A.C. 14:3-8.8(h). N.J.A.C. 14:3-8.8(h) provides that to obtain an exemption based on significant public good, a person must demonstrate to the Board that all of the following criteria are met: (1) the project or activity served by the extension would provide a significant benefit to the public or to the environment; (2) the projects is consistent with smart growth, or that the benefit of the project outweighs the benefits of smart growth; and (3) there is no practicable alternative means of providing the benefit while still complying with this subchapter. In assessing criterion two (2), the Board must consult with the Office of Smart Growth and other State agencies.

The following steps were taken by Board Staff and are part of the record that the Board has reviewed.

Board staff met with the Petitioner and was given a detailed final major subdivision and site plan map for the development. This map shows existing zoning, developed lots and the plans for the Petitioner's development.

Board staff located the building site on the State's "Smart Growth Locator" web tool. See <http://sgl.state.nj.us/>. Based on information obtained from the "Smart Growth Locator" the State Development and Redevelopment Plan designated the Site as Planning Area 4B, Rural/Environmentally Sensitive. The Site in an area not designated for growth as defined in the Board's Main Extension Rules at N.J.A.C. 14:3-8.2. An analysis of this map shows the closest area designated for growth is the Borough of Farmingdale.

Board staff has also reviewed aerial photographs obtained from the "Smart Growth Locator". The aerial photographs show the site as largely undeveloped, with several small built areas surrounding the Site.

² The Board notes that pursuant to N.J.S.A. 48:5A-28(h)(2) cable television operators, including telecommunication service providers that have obtained a system-wide franchise, are exempt from the Board's rules at N.J.A.C. 14:3-8.1 et seq. Verizon New Jersey received a system-wide franchise by Board Order on December 15, 2006.

A site inspection of the Project was conducted by Board staff on November 2, 2007. Certain observations and photographs were taken during this inspection and submitted to the Board. This information was transmitted to the Petitioner on November 7, 2007.

Pursuant to N.J.A.C. 14:3-8.8(h)(2), Board staff consulted with the Office of Smart Growth ("OSG"). On January 31, 2007 Eileen Swan, Executive Director forwarded a letter to the Board regarding the project ("OSG Assessment"). The OSG Assessment was provided to the Petitioner on October 15, 2007. Petitioner was given an opportunity to respond to the OSG Assessment and submitted a letter to the Board dated October 17, 2007 taking issue with several items in the OSG Assessment ("Petitioner Response Letter"). On November 5, 2007, the Board received a letter from the Office of Smart Growth in response to Petitioner Response Letter ("OSG Reply Letter"). This letter was forwarded to Petitioner on November 5, 2007. Petitioner submitted a letter to the Board dated November 6, 2007. ("Petitioner Reply Letter")

A discussion of each criterion in N.J.A.C. 14:3-8.8(h) follows.

1 Whether the Project or Activity Served by the Extension will Provide a Significant Benefit to the Public or to the Environment

Petitioner argues that the "[P]roject will benefit the public by creating [72] affordable housing [units] and creating jobs. The [P]roject will simultaneously benefit Howell by helping it achieve its affordable housing obligations ...and provide the township with tax revenue."

While the creation of affordable housing units, jobs and municipal tax revenue are certainly in the public interest, the public benefit of this Project is unlike previous projects that the Board has recognized as constituting a public good for purposes of the Main Extension Rules. See I/M/O O.C.E.A.N. Inc. Petition for Exemption from Smart Growth Rules N.J.A.C. 14:3-8.8(a)(5) (September 27, 2006) (non-docketed matter) (finding that the public good is served by a child care facility for low income parents on a college campus outweighs the negative impact of smart growth goals) and See I/M/O United Communities Petition for Exemption from Smart Growth Rules N.J.A.C. 14:3-8.8(a)(6) (August 1, 2007) (non-docketed matter) (finding a benefit in having adequate and highly efficient Energy Star housing located on the grounds of the McGuire Air Force Base and Fort Dix joint military that will be located near occupants' employment centers).

The 72 affordable units asserted as a public good make up less than 1/8th of the 555 total units served by the extensions at issue. Additionally, these units are not located in close proximity or are otherwise easily accessible to employment centers. Cf. I/M/O O.C.E.A.N. Inc. and I/M/O United Communities, supra. "Consistent with the State Plan, [Council on Affordable Housing] regulations generally disfavor inclusionary development in rural areas outside of centers." Mount Olive Complex v. Township of Mount Olive, 340 N.J. Super. 511, 540 (App. Div. 2001).

Finally, the units included in this project are required under New Jersey Counsel on Affordable Housing (COAH) regulations at N.J.A.C. 5:94-1.1 et seq. This project would not continue if these units were not included in the Project. The Board FINDS that a Project meeting its COAH housing obligations does not constitute a significant benefit to the public or the environment. Recognizing fulfillment of such an obligation as a public good under the Main Extension Rules would render the rules meaningless, as each new major residential development creates a similar COAH obligation.

2. Whether the Project is Consistent with Smart Growth, or that the Benefit of the Project Outweighs the Benefits of Smart Growth. In Making this Determination, the Board will Consult with the Office of Smart Growth and other State agencies

OFFICE OF SMART GROWTH

The Office of Smart Growth evaluated Petitioner's development plans for the Colts Neck Project and concluded that this site is not a desirable location for a large scale residential development. This area is designated as Planning Area 4B – Rural Environmentally Sensitive. The OAG Assessment further stated that "a development of this magnitude at this location is not consistent with the smart growth policy goals of the State Plan."

The OSG Assessment notes that this Project is within a largely undeveloped area with only scattered residential and commercial development. There are "several small-scale residential neighborhoods near the site. Additionally, there are agricultural operations, two golf courses and the Naval Weapons Station Earle in close proximity."

The OSG Assessment further indicated that "The area is not served by mass transit, public transportation nor is it near major roadways." Residents will be auto dependent and it is far from commercial services of a town.

In the OSG Reply Letter, the Office of Smart Growth concluded that the "issues Centex Homes raises do not change the initial finding that new development on Route 33 outside of areas encouraged for growth under the State Plan is inconsistent with smart growth principals." It goes on to note that the State Plan's objective for Planning Area 4B (Rural/Environmentally Sensitive) is to "balance development with the preservation of natural resources and environmentally sensitive features though a center-based form of development." And that any "development or redevelopment is to occur in a compact style in targeted areas (the "Centers") that can accommodate the growth while surrounding lands (the "Environs") are protected as large contiguous tracks."

PETITIONER

Petitioner asserts that the Project is consistent with the principles of smart growth because significant open space, farmland and natural resources will be preserved on the building site and because both market rate and affordable housing will be provided. The Petitioner further asserts that the Project will create jobs and tax revenue.

Petitioner states that the site is two miles from the Borough of Farmingdale (which is a designated growth area) and a new shopping center was built "west" of the site and that some retail may be included in the site, and therefore it is suitable for large scale residential development.

The Petitioner Response Letter states that the "impression given [by the OSG Assessment] that the property is located at some remote location is entirely false." Petitioner argues that Route 33 is a "major state highway" and that the Parkway and Route 195 are minutes away and that "public transportation sponsored by Monmouth County" traverses Route 33.

The Petitioner Reply Letter argues that the analysis by the Office of Smart Growth generally discusses Planning Area 4B rather than focus on the conditions at Colts Neck Crossing.

Petitioner further argues that pre-existing services were in proximity to the site which only required extension into the Project. The Petitioner further points out that sewer permits were given by NJDEP and the municipality for the project.

BOARD ANALYSIS

The Board analyzed the aerial photo of the site and Board Staff visited the site on November 2, 2007. The site itself is as OSG states, largely undeveloped, and large forested areas have been cleared. There are some agricultural and light industrial uses near the site, but with the exception of a gas station and a hub cap shop, there are no retail or other services immediately adjacent to the site. There are also fairly large tracts of undeveloped land to the south and west of the site.

Route 33 is under the State's jurisdiction and is classified as a "principal arterial" by the New Jersey Department of Transportation. I-195 and the Parkway are both approximately 5 miles from the site. There is no NJTransit rail service near the site. Board Staff interviewed Monmouth County's Department of Transportation staff on October 29, 2007 and found that there are no regularly scheduled bus routes operated by the County in this area. The only County sponsored public transportation is by reservation only and exclusively for the elderly and persons with disabilities. While there is NJTransit bus service on Route 33, there is no bus signage or bus shelter at or near the entrance of the Project.

The Board concurs with the OSG Assessment and notes that large scale residential development such as this project when located at least two (2) miles from a designated growth area, in an environmentally sensitive area, with limited mass transit is not consistent with the principals of smart growth as articulated in the State's Development and Redevelopment Plan. The State Plan notes that outside of Centers Planning Area 4B is "highly vulnerable to damage of many sorts from new development...including fragmentation of landscapes, degradation of aquifers and potable water, habitat destruction, extinction of plant and animal species and destruction of other irreplaceable resources which are vital for the preservation of the ecological integrity of New Jersey's natural resources." It goes on to note that because these areas are by definition more sensitive to disturbance than other Planning Areas, new development here "has the potential to destroy the very characteristics that define the area." According to the State Plan, development in Planning Area 4B "should be guided into Centers to preserve open space, farmland and natural resources and to preserve or improve community character, increase opportunities for reasonably priced housing and strengthen beneficial economic development opportunities."

In summary, a review of the information provided by OSG, the Final Site Plans submitted by Petitioner and the aerial maps, photographs and observations made by Board staff reflect that prior to the development of the Project, this site was a rural, environmentally sensitive area. This development is not in a "Center". It has fragmented the site with a gated community that requires automobiles to access commercial and retail businesses. For all of the reasons set forth herein, the Board FINDS that this project is inconsistent with the principals of smart growth and the State Plan.

3. Whether there is a Practicable Alternative Means of Providing the Benefit While Still Complying with this Subchapter

Petitioner argues that there is no practicable alternative means of Centex to provide the benefits of the Project without receiving an exemption pursuant to N.J.A.C. 14:3-8.6(c) because requiring

Petitioner to pay the entire cost of extending necessary utilities to the Project will impose upon Centex an extreme and unfair financial burden given the financial burden of providing 72 units of affordable housing.

The Board FINDS that because affordable housing can and should be provided in areas designated for growth, there is a practicable alternative means of providing the benefit while still complying with the rules. The regulatory burden of affordable housing does not preclude building in a manner consistent with Smart Growth. On this point the Board is moved by the words of the New Jersey Supreme Court in the landmark Mount Laurel case:

The Constitution of the State of New Jersey does not require bad planning. It does not require suburban spread. It does not require rural municipalities to encourage large scale housing developments. It does not require wasteful extension of roads and needless construction of sewer and water facilities for the out-migration of people from the cities and the suburbs. There is nothing in our Constitution that says that we cannot satisfy our constitutional obligation to provide lower income housing and, at the same time, plan the future of the state intelligently.

S. Burlington County NAACP v. Mt. Laurel, 92 N.J. 158, 238 (1938)

As noted above, any finding to the contrary would make the Main Extension Rules moot.

In summary, the Board finds that the Petitioner has failed to meet its burden as to each of the three separate criterion set forth in N.J.A.C. 14:3-8.8(a)(6) and is not entitled to an exemption. Therefore, the Board FINDS that the Extension is not a "reasonable extension" nor is it "reasonable and practicable" pursuant to N.J.S.A. 48:2-27. As such, the Board need not evaluate whether this expenditure is reasonably warranted or whether the extension will furnish sufficient business to justify the extensions.

CONCLUSION

The Board FINDS that Petitioner has not met its burden under the Main Extension Rules N.J.A.C. 14:3-8.8(a)(4) as to JCP&L, NJNG and NJAW nor under N.J.A.C. 14:3-8.8(a)(6) as to JCP&L, NJNG, Verizon, and NJAW. As such, it would not be reasonable and practicable for the Board to Order an Extension of Service. The Board FINDS that Petitioner has met its burden under the Main Extension Rules N.J.A.C. 14:3-8.8(a)(4) as to Verizon.

Therefore, the Board HEREBY REJECTS AND DENIES the exemption from the Main Extension Rules pursuant to N.J.A.C. 14:3-8.8(a)(4) and (6) for an extension of electric, natural gas and water service and pursuant to N.J.A.C. 14:3-8.8(a)(6) for an extension of telephone service to the Colts Neck Crossing housing project to be built by Centex Homes in Howell New Jersey.

The Board HEREBY ORDERS that the distribution of costs for the extension of electric, natural gas and water service shall be governed by the requirements at N.J.A.C. 14:3-8.6 for extensions that serve an area not designated for growth.

Therefore, the Board HEREBY GRANTS the exemption from the Main Extension Rules pursuant to N.J.A.C. 14:3-8.8(a)(4) for an extension of telephone services by Verizon.

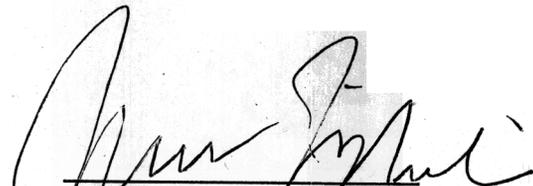
The Board HEREBY ORDERS that the distribution of costs of extending telephone service to the Colts Neck Crossing housing project to be built by Centex Homes in Howell New Jersey shall be governed by the requirements at N.J.A.C. 14:3-8.7 for extensions that serve a designated growth area.

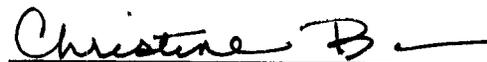
DATED: 11/30/07

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER

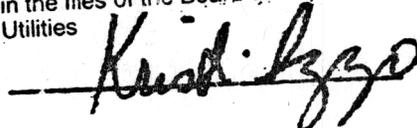

JOSEPH L. FIORDALISO
COMMISSIONER


CHRISTINE V. BATOR
COMMISSIONER

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public
Utilities



IN THE MATTER OF CENTEX HOMES, LLC PETITION FOR EXTENSION OF SERVICE
AND/OR FOR EXEMPTION FROM MAIN EXTENSION RULES N.J.A.C. 14:3-8.1 ET SEQ.
PURSUANT TO N.J.S.A. 48:2-27 AND N.J.A.C.14:3-8.8(a)(4) OR (a)(6)

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