



Agenda Date: 02/11/09
Agenda Item: 9B

State of New Jersey
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu

IN THE MATTER OF TPB MEDFORD
PROPERTY LLC, MEDFORD HOLDINGS
LLC, BRICK ASSETS LLC, AND ORLEANS
AT JENNINGS MILL LLC PETITION FOR
EXEMPTION FROM MAIN EXTENSION
RULES N.J.A.C. 14:3-8.1 ET SEQ.
PURSUANT TO N.J.A.C. 14:3-8.8

ORDER APPROVING EXEMPTION
Docket No: EO08100931

(SERVICE LIST ATTACHED)

BY THE BOARD

By this Order, the Board of Public Utilities (Board) considers a joint request by TPB Medford Property LLC, Medford Holdings LLC, Brick Assets LLC, and Orleans at Jennings Mill LLC ("Petitioners") for a determination that these properties are de facto located in a designated smart growth area and Main Extension Rule deposits are subject to partial refund. Petitioners also requested consideration of an exemption from the Main Extension Rules, N.J.A.C. 14:3-8.1 et seq. ("Main Extension Rules") pursuant to N.J.A.C. 14:3-8.8(b)(1)¹. This section of the Rules provides for an exemption from the cost limits on extensions of service in areas not designated for growth for a project that will provide a significant public good. As set forth below, because of the Board's determination herein, the Board will not address Petitioners' significant public good exemption request at this time.

FACTUAL BACKGROUND

Petitioners state that they are constructing three separate housing developments (Projects) in the same geographic area of Medford Township, Burlington County. Petitioner TPB Medford Property LLC is building a 176 unit residential development consisting of 156 detached single family units, and 20 twin homes units. Petitioners Medford Holdings LLC and Brick Assets LLC, are building a 257 unit residential development consisting of 227 single family detached units and 30 twin home units. Petitioner Orleans at Jennings Mill LLC is building a 96 unit

¹ Petitioners initially filed for an exemption pursuant to N.J.A.C. 14:3-8.8(a)(6). Effective May 19, 2008, the Board amended its Main Extension Regulations and moved the relevant exemption from N.J.A.C. 14:3-8.8(a)(6) to N.J.A.C. 14:3-8.8(b)(1).

development consisting of 86 single family detached units and 10 twin units. The Petitioners' total development will constitute 529 housing units.

The Projects are nearly adjacent to each other and are all located in Planning Area 3 under the State Development and Redevelopment Plan ("SDRP") and are therefore in an area not designated for growth according to the Main Extension Rules (N.J.A.C. 14:3-8.2). Pursuant to N.J.A.C. 14:3-8.6, each developer would be required to pay the full cost to extend utility service.

On August 15, 2007 pursuant to N.J.A.C. 14:3-8.8, Petitioners filed a petition requesting that the Board determine that Petitioners' Projects are exempt from the requirements to pay for costs of extensions to serve developments in areas not designated for growth. In letters dated October 17, 2007, November 5, 2007, March 31, 2008 and May 7, 2008, the Director of the Department of Community Affairs Office of Smart Growth ("DCA OSG"), Benjamin Spinelli, advised that the "properties in question, previously located in Planning Area 3 (PA3), have been, through the Cross Acceptance process, designated as Planning Area 2 (PA2)." The March 31, 2008 letter then goes on to state, "the development of lands located in PA2, an area designated for growth, is consistent with the Goals and Policies of the SDRP thus the Office of Smart Growth feels the extension of utility service to the properties is appropriate." The Cross Acceptance process is the "process of comparing planning policies among government levels with the purpose of obtaining consistency between municipal, county, regional, and State plans and the State Development and Redevelopment Plan." N.J.A.C. 5:85-1.4. The Cross Acceptance Process is an "open and thorough dialog that involves not only governments but the public at-large as well." N.J.A.C. 5:85-1.6(c). This Cross Acceptance process results in recommendations to change the SDRP. N.J.A.C. 5:85-4.6(c)

The costs of extending utility service to the Projects are:

Wyngate at Medford a/k/a Medford Holdings, 257 units, PSE&G electric \$633,655.41 and PSE&G gas \$440,331.45 (plus \$300.00 street opening permit).

Petitioners estimates for Orleans at Jennings a/k/a Wildflowers, 96 units are PSE&G gas \$75,000.00 and electric \$131,740.00 and Heritage at Medford TPB Medford LLC, 176 units, are PSE&G gas \$138,013.00 and electric \$241,523.00.

The Board notes that the cost of extensions of cable television providers is governed by N.J.S.A. 48:5A-28(h)² and that cable television providers are not governed by the Main Extension Rules. Petitioners state that Verizon New Jersey is providing for services over its FIOS fiber optic cable which is not governed by the Main Extension Rules.

Petitioners have advised the Board that construction has begun, under protest, to parts of the above project. Wyngate has constructed a small section where their permits and financial commitments were lapsing, Orleans has done some land improvement and no construction has begun on Heritage.

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

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.

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. Where a project is not in a designated growth area, a utility may only contribute to the cost of the project if the builder meets one of a number of limited exemptions at N.J.A.C. 14:3-8.8. Pursuant to N.J.A.C. 14:3-8.2, a “Designated growth area” is:

an area depicted on the New Jersey State Planning Commission State Plan Policy Map as:

1. Planning Area 1 (Metropolitan Planning Area, or PA-1);
2. Planning Area 2 (Suburban Planning Area, or PA-2);
3. A designated center;
4. An area identified for growth as a result of a petition for municipal plan endorsement that has been approved by the State Planning Commission pursuant to N.J.A.C. 5:85-7;
5. A smart growth area and planning area designated in a master plan adopted by the New Jersey Meadowlands Commission pursuant to subsection (l) of section 6 of N.J.S.A. 13:17-6; or
6. A Pinelands Regional Growth Area, Pinelands Village or Pinelands Town, as designated in the Comprehensive Management Plan prepared and adopted by the Pinelands Commission pursuant to section 7 of the Pinelands Protection Act, N.J.S.A. 13:18A-8.

The State Planning Commission (“SPC”) is to “revise and readopt at least every three years” the SDRP. N.J.S.A. 52:18A-199. The last SPC cross acceptance process ended with the adoption of the current State Plan in 2001. The SPC has not completed the Plan since then, but is working toward that goal and anticipates completion this year.

DISCUSSION

Concurrent with the consideration of this petition, the Board has proposed amending its Main Extension Rules at N.J.A.C. 14:3-8.1A.³ The rule proposal provides for the Board to issue a suspension order where the Board has received a letter from the Director of the DCA OSG, stating 1) the address, block and lot of the property and 2) that the Director of DCA OSG has recommended or will recommend to the SPC that the subject property be redesignated as a growth area.

Additionally the proposed rule amendment requires a Petitioner who has received a rule suspension order to notify the Board and the utilities involved, within sixty (60) days of the re-

³ The proposed rule will be published in the New Jersey Register on April 6, 2009. At the time the Board executed this Order, a copy of the proposed rule is also available at the Board’s website at <http://nj.gov/bpu/pdf/rules/smartgrowth.pdf>

adoption of the SDRP and State Plan Policy Map ("Map"), of the adopted state plan designation of the area covered by the smart growth suspension order. If the property subject to the suspension order is located in an area designated for growth in the readopted state plan, the Board will issue a summary order closing the matter. If the property subject to the suspension order is not located in an area designated for growth in the readopted SDRP, the holder of the smart growth suspension order may, within 60 days after the SDRP is readopted, either: pay the utility the cost of the extension or apply for an exemption pursuant to N.J.A.C. 14:3-8.8.

The proposed rule amendment is intended to allow the Board to consider petitions for Main Extensions during the pendency of the final adoption of the SDRP and Map. Pursuant to N.J.A.C. 14:1-1.2, the Board may "relax or permit deviations from [its] rules" for good cause shown. The Board has reviewed the Petition and FINDS that the unique situation presented here provides an appropriate basis for the Board to relax its current rule and allow this petition to be reviewed in light of the Board's proposed rule.

Therefore, the Board will consider the within application in light of the proposed rule amendments. Here, the DCA OSG has stated that the petitioners' property has been vetted through the cross acceptance process and will be recommended for redesignation as a growth area.

On October 17, 2007 Benjamin Spinelli, Executive Director forwarded a letter to the Board regarding the project ("OSG Letter"). The OSG Letter indicated that "the properties in question, currently located in Fringe Planning Area (PA3), have been, through the cross acceptance process, proposed for designation as Suburban Planning Area (PA2)." The OSG Letter goes on to point out that the change in planning area from PA3 to PA2 has "not yet been approved by the State Planning Commission" but expected the change to "take place in the coming months." The DCA OSG Letter was provided to the Petitioners on November 20, 2007. Subsequent letters were received on November 5, 2007, March 31, 2008 and May 7, 2008.

By statute, the SPC is to "revise and readopt at least every three years" the State Development and Redevelopment Plan. (N.J.S.A. 52:18A-199) But, as noted above, the last SPC cross acceptance process ended with the adoption of the current State Development and Redevelopment Plan in 2001. According to the DCA OSG, if the cross acceptance process was completed and the updated SDRP was adopted by the SPC, petitioners property would likely be in an area designated for growth. Were the plan amended as will be recommended, Petitioners would not have had to seek relief from the Board's Main Extension Rules. The Board FINDS that the four letters received by the Board from DCA OSG, as described above, satisfy the requirements of proposed N.J.A.C. 14:3-8.1A(d).

This OSG Letter indicated that the properties where the Projects are to be built are recommended to become an area designated for growth. The change from PA3 to PA2 is, however, contingent on SPC approval. The proposed rule N.J.A.C. 14:3-8.1A(g) provides for the repayment of funds if the properties are not designated for growth in the readopted State Plan. Proposed N.J.A.C. 14:3-8.1A(i) requires that if a property is not designated for growth, any deposits held by the utility shall be applied to the cost of the extension.

The Board hereby ORDERS that N.J.A.C. 14:3-8.6 shall be suspended as applied to the property described in the Petition, pending the final adoption of the SDRP and Map by the SPC.

While the suspension order is in effect, for purposes of the Board's Main Extension Rules, the property shall be classified as being in an area designated for growth, the proposed PA2.

Petitioner shall comply with all requirements of proposed N.J.A.C. 14:3-8.1A. If the subject property is *not* included in the final SDRP and Map adopted by the SPC, then, within 60 days of the adoption of the new SDRP and Map the costs of distribution must be recalculated as if the property was in an area not designated for growth. Petitioner shall pay that recalculated amount to the utility minus any money previously paid to the utility including but not limited to the deposit required by N.J.A.C. 14:3-8.9 and 8.10 or apply for an exemption pursuant to N.J.A.C. 14:3-8.8.

The Board FINDS that the criteria set out in the Main Extension Rules at N.J.A.C. 14:3-8.6 for a project located in a non-smart growth planning area are suspended for this Petitioners' property as a result of the written recommendation by Benjamin Spinelli, Director of the DCA-OSG that the Petitioners' property is recommended for re-designation to a PA2, an area designated for growth. Specifically, the Board FINDS as follows: (1) the main extension exemption rules are suspended as set forth herein and a final decision on the exemption petition is suspended pending the final adoption of the SDRP and Map; (2) Petitioners' property is to be treated as Planning Area 2 pending the action of the SPC; (3) if the Petitioners' property is not re-designated Planning Area 2 as a result of the SPC's re-adoption of the SDRP and Map and remains a non-growth Planning Area 3, the Petitioners must pay the full costs for the main line utility extensions to the utility companies involved or Petitioner may reapply for an exemption pursuant to N.J.A.C. 14:3-8.8, (4) suspension of the rules is warranted to allow progress while awaiting re-adoption of the SDRP and Map by the SPC; (5) the Director of the DCA OSG has confirmed in writing that this property has been reviewed during Cross Acceptance and will be recommended as a Planning Area 2, an area designated for growth, and is consistent with smart growth; and (6) the Board takes judicial notice of the policy, procedure and recommendations of its sister State agency, the DCA OSG, recommending these areas as designated areas for growth.

Therefore, the Board hereby ORDERS that Petitioners be given a temporary suspension order of N.J.A.C. 14:3-8.6 for Petitioners' property located in Medford, Burlington County, New Jersey, contingent upon the SPC adopting a new SDRP and Map. The Board further ORDERS, that Petitioners provide to the Board within 60 calendar days of the re-adoption of the SDRP and Map by the SPC notice of whether the property subject to the suspension order is located in an area designated for growth or whether the property subject to the suspension order is located in an area not designated for growth. Consistent with proposed N.J.A.C. 14:3-8.1A(e)(3) the distribution of costs of extending electric and gas service to this project during the time the suspension order is in effect shall be governed by the requirements at N.J.A.C. 14:3-8.7 for extensions that serve a designated growth area. If the Petitioners' property is *not* included in the SPC's readopted SDRP and Map then the costs of distribution must be recalculated as if the property was in an area not designated for growth consistent with proposed N.J.A.C. 14:3-8.1A(f)(2). As this property will be treated as being designated for growth pending the adoption of the SDRP and Map by the SPC, the Board will not consider Petitioners public good exemption request at this time.

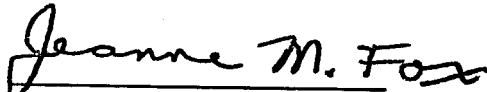
Consistent with proposed N.J.A.C. 14:3-8.1A(g), any outstanding amount shall be paid by Petitioners to the utilities within 60 days of the SPC's adoption of the SDRP and Map unless Petitioners file an exemption request (or requests that the Board consider its previously filed public good exemption request). If Petitioners' property is in an area re-designated for growth, the Board will issue an order closing this matter, in accordance with N.J.A.C. 14:3-8.1A(f)(1).

The issuance of this suspension order shall not, by itself, constitute grounds for reliance, or for an exemption from any requirement of the Main Extension Rules at N.J.A.C. 14:3-8.8.

Petitioners shall otherwise comply with proposed N.J.A.C. 14:3-8.1A. If proposed N.J.A.C. 14:3-8.1A is adopted prior to the final adoption of the SDRP by the SPC, the language of the Rule as adopted shall govern this petition and the Petitioners shall comply with all requirements therein.

DATED: 3/23/09

BOARD OF PUBLIC UTILITIES
BY:


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PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

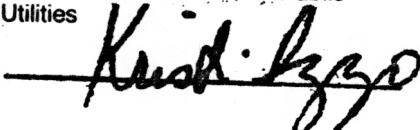

NICHOLAS ASSELTA
COMMISSIONER


ELIZABETH RANDALL
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
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Docket No. EO08100931

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