

Builders League of South Jersey v. Borough of Haddonfield, Not Reported in Atl. Rptr....

2021 WL 806933

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of New **Jersey**, Appellate Division.

**BUILDERS LEAGUE OF SOUTH
JERSEY**, Plaintiff-Respondent,

v.

BOROUGH OF HADDONFIELD,

Defendant-Appellant.

DOCKET NO. A-5588-18

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Argued February 1, 2021

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Decided March 3, 2021

On appeal from the Superior Court of New **Jersey**, Law
Division, Camden County, Docket No. L-4632-17.

Attorneys and Law Firms

[Mario A. Iavicoli](#) argued the cause for appellant.

[Richard J. Hoff Jr.](#), argued the cause for respondent (Bisgaier
Hoff, LLC, attorneys; [Richard J. Hoff Jr.](#) and Danielle Novak
Kinback, on the brief).

[Michael G. Sinkevich](#) argued the cause for amici curiae New
Jersey Future, Association of New **Jersey** Environmental
Commissions, The Watershed Institute, and Sustainable
Jersey (Lieberman Blecher & Sinkevich, PC, attorneys;
[Michael G. Sinkevich](#), of counsel and on the brief; C. Michael
Gan, on the brief).

Before Judges [Rothstadt](#) and [Mayer](#).

Opinion

PER CURIAM

*1 Defendant **Borough** of **Haddonfield** (**Haddonfield**)
appeals from the following orders: a May 2, 2018 order
denying **Haddonfield's** first motion for summary judgment
or transferring the matter to the New **Jersey** Department

of Environmental Protection (DEP) in the alternative; a
February 8, 2019 order denying **Haddonfield's** second
motion for summary judgment or transferring the matter to the
DEP; a July 10, 2019 order granting the summary judgment
to plaintiff **Builders League** of **South Jersey** (BLSJ)¹ and
denying **Haddonfield's** cross-motion for reconsideration;
and an August 2, 2019 denying **Haddonfield's** request for a
stay.²

This appeal involves the BLSJ's challenge to **Haddonfield's**
adoption of Ordinance § 135-92 (Ordinance), governing
stormwater management in the municipality. The BLSJ
claimed the Ordinance was invalid because it subjected new
home construction, including single-family and two-family
homes, to a review process contrary to State statutory and
regulatory authority. The New **Jersey** Future, Association
of New **Jersey** Environmental Commissions, the Watershed
Institute, and Sustainable New **Jersey**, participating as amici
curiae on appeal, join in **Haddonfield's** arguments supporting
the validity of the Ordinance. We affirm the February 8, 2019
and July 10, 2019 orders for the reasons expressed by Judge
Deborah Silverman Katz.

The parties are familiar with the fact-findings in Judge
Silverman Katz's written and oral decisions, specifically
her forty-three-page, comprehensive written opinion dated
February 8, 2019. We provide some brief background
on various statutory and regulatory provisions governing
stormwater management within the State.

The New **Jersey** Constitution authorizes the Legislature
to regulate land use. [N.J. Const. Art. IV, § 6, ¶ 2](#). The
Legislature delegated its authority to regulate land use to
municipalities under the Municipal Land Use Law (MLUL),
[N.J.S.A. 40:55D-1](#) to [-136](#). Municipalities are required to
strictly conform to the MLUL. See [N.J. Shore Builders Ass'n
v. Twp. of Jackson](#), 199 N.J. 449, 452 (2009).

The MLUL authorized the DEP to adopt regulations
governing municipal stormwater management plans. [N.J.S.A.
40:55D-93](#) and [-99](#). Each municipality must adopt a
stormwater ordinance in compliance with the DEP's
regulations. [N.J.A.C. 7:8-4.1](#) to [-4.6](#).³

The DEP's stormwater regulations applied to “major
developments,” which were defined as follows:

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*2 [A]ny “development” that provides for ultimately disturbing one or more acres of land or increasing impervious surface by one-quarter acre or more. Disturbance for the purpose of this rule is the placement of impervious surface or exposure and/or movement of soil or bedrock clearing, cutting, or removing vegetation. Projects undertaken by any government agency which otherwise meet the definition of “major development” but which do not require approval under the Municipal Land Use Law, [N.J.S.A. 40:55D-1 et seq.](#), are also considered “major development.”

[[N.J.A.C. 7:8-1.2 \(2020\).](#)]

A “development” is defined as:

[T]he division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or structure, any mining excavation or landfill, and any use or change in the use of any building or other structure, or land or extension of use of land, for which permission is required under the Municipal Land Use Law, [N.J.S.A.-1 et seq.](#)

[[Ibid.](#)]

In 1993, the Legislature amended the MLUL by enacting the Site Improvement Standards Act (Act), [N.J.S.A. 40:55D-40.1 to -40.7](#), to “replace the ‘multiplicity of standards for ... site improvements’ that existed throughout the State with ‘a uniform set of technical site improvement standards for land development.’ ” [Northgate Condo. Ass'n, Inc. v. Borough of Hillsdale Planning Bd.](#), 214 N.J. 120, 143 (2013) (citing [N.J.S.A. 40:55D-40.2](#)). The Act and subsequently adopted standards were intended to “reduce housing costs by facilitating the approval process for new residential developments” and establish “a uniform set of technical site improvement standards for streets, roads, parking facilities, sidewalks, drainage structures, and utilities.” [N.J. State League of Muns. v. Dep't of Cmty. Affs.](#), 158 N.J. 211, 217-18 (1999).

In accordance with the Act, the New [Jersey](#) Department of Community Affairs implemented regulations, known as the Residential Site Improvement Standards (RSIS). See [N.J.A.C. 5:21-1.1 to -8.1](#). The RSIS applied to “site improvements carried out or intended to be carried out or

required to be carried out in connection with any application for residential subdivision, site plan approval, or variance before any planning board or zoning board of adjustment” [N.J.A.C. 5:21-1.5](#). The standards pertaining to stormwater management are set forth at [N.J.A.C. 5:21-7.1 to -7.9](#). Like the MLUL and the DEP regulations, the RSIS only applies to “major developments.”

Significantly, “[t]he RSIS governs all residential site improvements in the State, superseding any contrary requirements that might be found in municipal ordinances.” [Northgate Condominium Ass'n, Inc.](#), 214 N.J. at 143-44 (citing [N.J.A.C. 5:21-1.5\(a\)-\(b\)](#)). The MLUL expressly provides the RSIS “shall supersede any site improvement standards incorporated within the development ordinances of any municipality” [N.J.S.A. 40:55D-40.5](#).

The DEP's Model Ordinance offers guidance to municipalities adopting stormwater management ordinances. The Model Ordinance states:

(1) This ordinance shall be applicable to all site plans and subdivision for the following major developments that require preliminary or final site plan or subdivision review:

(a) Non-residential major developments; and

(b) Aspects of residential major developments that are not pre-empted by the Residential Site Improvement Standards at [N.J.A.C. 5:21](#).

(2) This ordinance shall also be applicable to all major developments undertaken by [insert name of municipality].

*3 [(emphasis added).]

In contrast, [Haddonfield's](#) Ordinance reads:

(a) This section shall be applicable to all site plans or subdivisions that require site plan review and the following:

[1] Nonresidential developments; and

[2] Aspects of residential developments that are not preempted by the Residential Site Improvement Standards at [N.J.A.C. 5:21](#).

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(b) This section shall also be applicable to all projects undertaken by the **Borough of Haddonfield**.

(c) All new homes and commercial buildings requiring a building permit issued by the **Borough of Haddonfield**.

Unlike the Model Ordinance, **Haddonfield's** Ordinance applied to “all new homes and commercial buildings” and was not limited to “major developments.”

The BLSJ asserted that the Ordinance, contrary to the MLUL and the RSIS, required stormwater plans be reviewed by a municipal official who “shall consult the engineer retained by the **Borough**, the Planning Board and/or Zoning Board (as appropriate) to determine if all of the checklist requirements have been satisfied and to determine if the project meets the standards set forth in this section.” **Haddonfield's** requirements for stormwater review were extensive and included the following information to be reviewed by a “municipal official” prior to all new home construction: a topographic base map; environmental site analysis; project description and site plan(s); land use planning and source control plan; stormwater management facilities map; calculations; and maintenance and repair plan.

Because the MLUL provides “detached one or two dwelling-unit buildings shall be exempt from ... site plan review and approval,” **N.J.S.A. 40:55D-37(a)**, **Haddonfield** avoided use of the word “site plan review and approval” in the Ordinance. Absent the Ordinance, a permit to construct a single-family or two-family home would issue if, after review by the municipal construction official, the permit applicant complied with the municipal zoning provisions and applicable construction codes, including a proper drainage plan and elevation to minimize flooding. See **N.J.S.A. 52:27D-130** and -131(a); **N.J.A.C. 5:23-2.15A(b)3**.iv. Under the Ordinance, an individual seeking to build a single-family or two-family home in **Haddonfield** had to undergo a review by a municipal engineer, in addition to the construction official, and post a bond for engineering professional review fees.

The BLSJ argued the Ordinance required submission and examination of items traditionally associated with site plan review and approval. Therefore, the BLSJ asserted the Ordinance was ultra vires **Haddonfield's** authority and contrary to the MLUL, the RSIS, and the Model Ordinance.

In December 2017, the BLSJ filed an action in lieu of prerogative writs, challenging the Ordinance. Shortly after filing its answer, **Haddonfield** moved for summary judgment or, in the alternative, a transfer of the matter to the DEP. The BLSJ opposed the motion. Because the case was in the early stage of the litigation, Judge Silverman Katz denied **Haddonfield's** motion without prejudice, finding “there was a material dispute of fact as to the authority of [**Haddonfield**] to enact the Ordinance in its present form.” In the event **Haddonfield** renewed its motion for summary judgment at the conclusion of discovery, the judge invited **Haddonfield** to provide specific legal authority for transferring the matter to the DEP.

*4 After discovery, **Haddonfield** renewed its motion for summary judgment. The BLSJ again filed opposition. After hearing oral argument, Judge Silverman Katz denied summary judgment in a February 8, 2019 order. The judge set forth detailed findings of fact and comprehensive conclusions of law in a written decision attached to the order denying **Haddonfield's** motion.

Judge Silverman Katz concluded the Ordinance was invalid. She found the Ordinance, essentially, imposed site plan review for the construction of single-family and two-family homes contrary to **N.J.S.A. 40:55D-37(a)**. While the term “site plan review” was not contained in the Ordinance, the judge held the “distinction between the type of site plan review prohibited by the MLUL and the site plan review mandated by the Ordinance” was “a distinction without a difference.” Judge Silverman Katz found “[t]he plain reading [of the Ordinance] indicates that the site plan review ... is performed by the Planning Board, the Zoning Board, or their designees, the very review from which the MLUL expressly exempts one- and two-unit dwellings.” Because the Ordinance contravened the MLUL exemption for site plan review and approval of single-family and two-family homes, the judge concluded the Ordinance was “unreasonable and therefore invalid.”

Judge Silverman Katz also rejected **Haddonfield's** argument it had the authority to adopt an ordinance imposing stricter requirements than the Model Ordinance. The judge found the Ordinance invalid because “a municipal ordinance is nevertheless limited by the enabling legislation, in this case, the MLUL.” She concluded “[t]he MLUL is violated if the

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RSIS is violated,” citing N.J.A.C. 5:21-1.9(a)⁴ and Northgate Condominium Association, Inc. v. Borough of Hillsdale Planning Board. The judge explained the RSIS imposes stormwater management limited to “major developments,” N.J.A.C. 5:21-7.1(a), but the Ordinance compelled all residential developments, including single-family and two-family homes, to comply with its stormwater management requirements.

Additionally, Judge Silverman Katz rebuffed **Haddonfield's** contention that stormwater management within the municipality had to be accomplished through adoption of an ordinance rather than another mechanism. She found stormwater discharge could be accomplished by amending **Haddonfield's** existing zoning laws. In addition, the judge noted several neighboring municipalities “adopted stormwater ordinances that comply with the RSIS and the DEP Model Ordinance.” Judge Silverman Katz further concluded “the common law theories of trespass and nuisance provide[d] yet another alternative by which [**Haddonfield**] may regulate stormwater discharge.”

Based on the judge's rejection of **Haddonfield's** motion for summary judgment, on May 10, 2019, the BLSJ moved for summary judgment. **Haddonfield** cross-moved for reconsideration of its motion for summary judgment. The motions were argued on June 7, 2019. Judge Silverman Katz granted the BLSJ's motion for summary judgment, denied **Haddonfield's** cross-motion for reconsideration, and issued a July 10, 2019 order memorializing her decisions.

*5 **Haddonfield** moved to stay the trial court's order pending appeal. In an August 2, 2019 order and accompanying written decision, Judge Silverman Katz denied the stay request.

On appeal, **Haddonfield** argues the judge erred in finding the Ordinance invalid as contrary to, and inconsistent with, statutory and regulatory laws of this State. It also contends the judge erred in adjudicating the BLSJ's challenge to the Ordinance as an action in lieu of prerogative writs in the Superior Court of New **Jersey** instead of transferring the matter to the DEP. We disagree with **Haddonfield's** arguments for the comprehensive reasons expressed by Judge Silverman Katz in her February 8, 2019 written decision

and June 7, 2019 oral decision. We add only the following comments.

Our standard of review from a trial court's determination regarding the validity of a municipal ordinance is well-settled. “[W]hen reviewing the decision of a trial court that has reviewed municipal action, we are bound by the same standards as the trial court.” Fallone Props., L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 562 (App. Div. 2004). While ordinances are presumed valid and reasonable, “[t]he presumption may be overcome ... by a clear showing that the local ordinance is arbitrary and unreasonable.” Quick Chek Food Stores v. Springfield Twp., 83 N.J. 438, 447 (1980) (quoting Hudson Circle Servicerter, Inc. v. Kearny, 70 N.J. 289, 298-99 (1976)). An ordinance may also be declared “invalid if in enacting the ordinance the municipality has not complied with the requirements of [a] statute.” Riggs v. Long Beach Twp., 109 N.J. 601, 611 (1988) (citing Taxpayer Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 21 (1976)).

Our Supreme Court has “recognized that one of the purposes for the enactment of the MLUL was the Legislature's intention to create ‘statewide uniformity of process and practices in the areas of zoning and land use.’” Northgate Condominium Ass'n, Inc., 214 N.J. at 137 (quoting Rumson Estates, Inc. v. Mayor & Council of Fair Haven, 177 N.J. 338, 356 (2003)). “[T]o effectuate the legislative intent to create statewide uniformity ... the requirements established in the MLUL are to be applied strictly.” Ibid. (citing Manalapan Holding Co. v. Manalapan Planning Bd., 92 N.J. 466, 482 (1983)). “The presumption of the validity of local legislative action is constrained by the obvious understanding that ‘[a] statute has supremacy over an ordinance,’ and ‘a local municipality is but a creature of the State, capable of exercising only those powers granted by the Legislature.’” Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 489 (App. Div. 2019) (internal citations omitted). Thus, “[a] municipality's power to effectuate planning schemes ... must be exercised in strict conformity with the delegating enactments—the MLUL.” New Jersey Shore Builders Ass'n, 401 N.J. Super. at 161

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(quoting [Toll Bros., Inc. v. Bd. of Chosen Freeholders, Cnty. of Burlington](#), 194 N.J. 223, 243 (2008)).

We agree with Judge Silverman Katz that **Haddonfield's** Ordinance conflicted with the pronouncements in the MLUL and the RSIS by applying stormwater review to single-family and two-family homes. Nothing in the DEP's stormwater management regulations allowed **Haddonfield** to violate the MLUL or the RSIS by adopting an ordinance imposing stricter requirements than the requirements under the enabling legislation. In fact, during the comment period prior to the DEP's adoption of stormwater management regulations, the agency explained “[a] single-family dwelling on a single-family lot would not be subject to the requirements of [the regulations] unless it falls under the definition of ‘major development.’ ” Because the Ordinance exceeded **Haddonfield's** authority under the MLUL, Judge Silverman Katz properly concluded the Ordinance was invalid.

*6 We next consider **Haddonfield's** contention the judge erred in declining to transfer the action to the DEP for adjudication based on the agency's special expertise. We again agree with Judge Silverman Katz that **Haddonfield's** argument is flawed. Although the DEP issued a municipal

storm sewer system permit, triggering **Haddonfield's** requirement to adopt a stormwater management ordinance, the DEP did not prepare or adopt the Ordinance. The DEP was established to “adopt regulations to protect the public safety with respect to storm water detention facilities,” not to determine the validity of municipal ordinances. [N.J.S.A. 40:55D-95.1](#). The BLSJ's challenge was not directed to the validity of a regulation or any act by the DEP. Rather, the BLSJ argued the Ordinance was inconsistent with State law. See [Alexander's Dept. Stores of New Jersey, Inc. v. Borough of Paramus](#), 125 N.J. 100, 103 (1991) (holding a party could not be barred “from bringing suit in the Law Division challenging municipal actions not directly related to [agency] proceedings themselves”). A challenge to the validity of the Ordinance by way of an action in lieu of prerogative writs is squarely within the purview of the Law Division of the Superior Court. Thus, no transfer to the DEP was required to adjudicate that issue.

Affirmed.

All Citations

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Footnotes

- 1 The BLSJ is a trade organization whose members are involved in the construction of single-family and two-family homes in **South Jersey**.
- 2 **Haddonfield's** notice of appeal listed all four orders. However, its merits brief addressed only the February 8, 2019 and July 10, 2019 summary judgment orders. **Haddonfield** failed to brief issues related to denial of its motions for reconsideration and a stay. Thus, we deem these issues waived. See [Midland Funding LLC v. Thiel](#), 446 N.J. Super. 537, 542 n.1 (App. Div. 2016).
- 3 The DEP promulgated a Model Municipal Stormwater Control Ordinance (Model Ordinance) to guide municipalities in enacting local stormwater management ordinances.
- 4 N.J.A.C. 5:21-1.9(a) of the RSIS provides:
Where any site improvement is required to meet any part of these rules pursuant to the requirements of any ordinance adopted pursuant to [N.J.S.A. 40:55D-37](#), ... then any failure of any person to construct such site improvements in accordance with the requirements of these rules shall constitute a violation of the Municipal Land Use Law