

# Genova, Burns & Vernoia

NEWS ALERT

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## New COAH Fee Exemptions for Non-Residential Development

This alert is to advise developers of non-residential projects of legislation which will exempt projects meeting specified criteria from paying the 2.5% affordable housing fee.

The Statewide Non-residential Development Fee Act ("the Act") took effect on July 17, 2008. The Act imposed a 2.5% fee on non-residential development. This fee is based on the equalized assessed value of the land and improvements for all new construction. The Act specifically exempted certain structures including, among others, places of worship and educational institutions which are tax-exempt, parking lots, public amenities, non-profit hospitals and nursing homes. The Act also exempted non-residential developments that received a Certificate of Occupancy by July 17, 2008 from payment of the fee.

As a result of current economic conditions, final legislative approval was given on June 25, 2009 to legislation which would have the effect of temporarily suspending the 2.5% developer's fee. The New Jersey Economic Stimulus Act ("the Stimulus Act") (S-2299 sponsored by Senator Lesniak and A-4048 sponsored by Speaker Joseph Roberts and Assemblymen Coutinho, Diegnan and Wisniewski) propose six major changes to the Act.

The first four changes in the legislation propose the establishment of four (4) additional exemptions from paying the 2.5% fee. The first of these exemptions is for non-residential developments that receive preliminary or final site plan approval prior to July 1, 2010. The second exemption is for non-residential developments that are referred to a "planning board by the State, a governing body, or other public agency" prior to July 1, 2010. The third exemption is for non-residential developments that receive site plan approval from the New Jersey Meadowlands Commission prior to July 1, 2010. The fourth exemption is for "[i]ndividual buildings within a nonresidential phased development that received either preliminary or final approval prior to July 1, 2010." For each of these exemptions, the Stimulus Act requires that the developer obtain a construction permit by January 1, 2013.

The fifth change that the Stimulus Act proposes is a refund to any non-residential developer who paid the 2.5% fee pursuant to the Act. A developer is entitled to have any fee paid pursuant to the Act refunded if either (1) the development received preliminary or final site plan approval prior to July 17, 2008 or (2) the development was referred to a planning board, governing body, or other public agency prior to July 17, 2008.

In order to be reimbursed, the developer will need to submit a

written claim to the entity to which the fee was paid within 120 days of the effective date of the legislation. If the municipality has already spent or committed any fees collected pursuant to the Act, the municipality will be reimbursed by the State for any fees it is required to return to any developer.

These reimbursement provisions do not apply to developers' fees which were paid pursuant to municipal ordinances that were in effect prior to the Act. The Stimulus Act states that refunds "represent the difference between moneys committed prior to July 17, 2008 and moneys paid on or after that date."

Developers that might have paid a fee that was the product of both State and municipal laws will only be eligible to have the fee which was pursuant to the Statewide Non-residential Development Fee Act refunded to them.

The final change proposed is to eliminate the municipal affordable housing obligation that would otherwise be generated by non-residential development for developments that are exempted from the 2.5% fee if there are insufficient State funds available to the municipality to pay for such housing.

The process for obtaining site plan approval for any project can be lengthy. Given the requirement that site plan approval be obtained prior to July 1, 2010 in order for a development to be exempt from the 2.5% fee, it is our strong recommendation that non-residential developers begin the process for obtaining site plan approval as soon as possible. Non-residential developers who have already paid the fee pursuant to the Act should apply for reimbursement as soon as the new legislation takes effect so there will be no issue of meeting the 120 day requirement.

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