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## DEVELOPERS NOT REQUIRED TO CONTRIBUTE TO OPEN SPACE

On June 25, 2009, the New Jersey Supreme Court unanimously upheld the Appellate Division's decision in New Jersey Shore Builders Association v. Township of Jackson and Builders League of South Jersey v. Egg Harbor Township, 401 N.J. Super. 152 (App. Div. 2008), which concluded that the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1 to -163 does not empower municipal governments to require developers to set aside land for common open space or recreational areas and facilities, or to make payments in lieu of those set-asides, except with regard to applications for planned developments as defined in the MLUL. The Appellate Division's decision considered ordinances enacted by Jackson Township and Egg Harbor Township, which required developers to set aside land for recreation or open space or to make a payment in lieu of a set-aside.

In upholding the Appellate Division's decision, the Supreme Court stated that the ordinances promulgated by Jackson and Egg Harbor would greatly expand the power the MLUL vested in them to create open space. The court found that while the goal "is certainly a laudable one" the ordinances are *ultra vires* as the plain wording of the MLUL does not allow municipalities to achieve their goals in a manner that the Legislature has not permitted.

There is a strong presumption that this decision can be applied retroactively. See, Stafford v. Stafford Zoning Bd., 154 N.J. 62, 73 (1998). Accordingly, a developer that previously made a payment in lieu of setting aside lands for recreation or open space in connection with a conventional development may be entitled to a refund. Additionally, any developer that is required to provide open space or recreational area set-asides, or payments in lieu thereof, as a condition of approval may be entitled to have its approval amended to strike the illegal condition.

For further information on this important decision or to determine if you are eligible for a refund, please contact Frank J. Petrino, Esq. at 609.989.5029 or by e-mail at [fpetrino@sternslaw.com](mailto:fpetrino@sternslaw.com) or Todd D. Greene, Esq. at 609.989.5023 or by e-mail at [tgreene@sternslaw.com](mailto:tgreene@sternslaw.com).