

You May Be Entitled To A Refund From Your Utility Company If You Were Required To Pay For An Extension Of Utility Lines To Your Property

By: Donna M. Jennings, Esq.

July 2012



Good news for those parties who were forced to pay a utility to extend utility service to homes located in an area not designated for smart growth. You may be entitled to a refund. On June 22, 2012, the Appellate Division reversed the Board of Public Utilities' (BPU or the Board) Final Decision to confine the benefit of the Court's original decision in In re Centex Homes, LLC, 411 N.J. Super. 244 (App. Div. 2009) to only eighteen developers and homeowners who had not yet completed the utility extension process or who had applied for the exemption from the 2005 Main Extension Rules. In doing so the BPU denied hundreds of other developers and homeowners the benefits of the original Centex decision – having the utility bear the cost of the extension of utility service to homeowners.

In The Matter of the Board's Main Extension Rules N.J.A.C. 14:3-8.1, the Appellate Division ruled that “affording the Centex decision complete retroactive effect by applying it to all cases, even those in which developers or homeowners in non-smart growth areas have already paid for the extension of utility service, is the only way to rectify the inequity created by the invalidated Main Extension Rules.” In reaching its decision, the Appellate Division concluded that the Centex decision merely restored the regulatory scheme prior to the adoption of the 2005 Main Extension Rules and therefore the decision cannot be deemed a new rule of law. Because Centex is not a new rule of law, it is fully retroactive.

In its 2009 decision in Centex, the Appellate Division invalidated as *ultra vires* the 2005 BPU

regulations known as the 2005 Main Extension Rules, N.J.A.C. 14:3-8.1 to 8.13. The 2005 Main Extension Rules required a developer or homeowner in portions of the State not designated for growth according to the New Jersey State Planning Commission State Plan Policy Map to cover the cost to extend utility lines to new homes while utility companies were required to pay for the extension of utility lines in “smart growth” areas. The Appellate Division also held that the BPU lacked statutory authority to consider environmental or land use factors when determining whether a utility should reimburse a developer or homeowner for the utility extension. In fact, the Court noted that since 1911 the only factors the BPU is permitted to consider in determining whether a utility is required to pay for extensions of utility service are if: (1) the service extension was reasonable and practicable; (2) the extension would furnish sufficient business to justify the extension; and (3) the financial condition of the utility company reasonably warranted the expenditures involved in making and operating the extension.

Although the Appellate Division invalidated the 2005 Main Extension Rules in Centex, the Court did not address whether the Centex decision was entitled to any retroactive effect. The matter was simply remanded to the BPU for further proceedings.

On October 22, 2010, the BPU issued its Final Decision on remand giving Centex pipeline retroactivity but confining the benefit of Centex only to applicants who had sought an exemption from the 2005 Main Extension Rules, as well as to any applicant who was in the process of obtaining an extension of service but had not, prior to December 30, 2009 (1) entered into a Main Extension Agreement; (2) paid a deposit; or (3) commenced physical installation of

You May Be Entitled To A Refund From Your Utility Company If You Were Required To Pay For An Extension Of Utility Lines To Your Property

By: Donna M. Jennings, Esq.

the service extension. Only eighteen matters fell within these parameters and so the BPU ordered a refund for only those applicants. The BPU refused to apply Centex to any other parties.

In reversing the BPU's Final Decision in its June 2012 decision, the Appellate Division created an opportunity for reimbursement of the costs to extend utility services to private property. The Court held that the 2005 Main Extension Rules were an "extreme departure from existing law." Ever since 1911, the utilities reimbursed developers the costs of extending utility service over time using revenue generated from the extensions, regardless of the location of the extension. Although partially in effect for five years and fully in effect for three years, the 2005 Main Extension Rules were deemed *ultra vires* and invalidated. The Appellate Division found that this "four-year hiatus . . . does not constitute an appreciable break from nearly a century of law" requiring utilities to reimburse applicants for the costs of financially viable extensions anywhere in the State. The Court also rejected the BPU's argument that complete retroactivity would complicate the calculation of money to be reimbursed.

The Appellate Division instructed the BPU to propose and adopt a rule to address, at minimum, the following: 1) the timing of submissions of refund requests; 2) the procedures for submitting a refund request to a utility; 3) the maximum number of years during which the utility will be permitted to incrementally refund the full cost of the service extension; and 4) the method of calculating the reimbursement rate, e.g., five times the estimated first year revenue derived from the connection, or ten times the estimated first year revenue, with subsequent payments continuing until the entire deposit is repaid.

Finally, the court allows the BPU to consider whether the proposed rule should include a method for determining whether a developer has already passed on the cost of the service extension to the homeowner and, if so, the consequences of having done so. It shall be interesting to see what mechanism the BPU proposes and whether or not it will be deemed consistent with the Centex decision.

If you or your client are one of the estimated 440 parties affected by the invalid 2005 Main Extension Rules, please stay tuned to take advantage of what may be an opportunity for reimbursement of the cost to extend utility service. Our office will continue to monitor the BPU rulemaking process which is to specify how applicants may process refunds to those so entitled under the Appellate Division's recent decision.



¹ For further information, please contact Donna M. Jennings at 732-855-6039 or djennings@wilentz.com.



Donna M. Jennings, Esq.
Land Use / Redevelopment Team
phone: 732.855.6039
email: djennings@wilentz.com

This article is for informational purposes only, does not constitute legal advice, and may not be reasonably relied upon as such. You should consult a qualified attorney for independent legal advice with regard to any particular set of facts.