

# ASSEMBLY, No. 3443

## STATE OF NEW JERSEY 213th LEGISLATURE

INTRODUCED NOVEMBER 13, 2008

**Sponsored by:**

**Assemblyman HERB CONAWAY, JR.**

**District 7 (Burlington and Camden)**

**SYNOPSIS**

Authorizes set-asides, and fees in-lieu thereof, for open space and recreation purposes as conditions to approvals under the MLUL.

**CURRENT VERSION OF TEXT**

As introduced.



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2

1 AN ACT authorizing cluster development, set-asides for open space  
2 and recreation purposes, the option to negotiate fees in-lieu of  
3 set-asides, and amending and supplementing P.L.1975, c.291.

4  
5 **BE IT ENACTED** by the Senate and General Assembly of the State  
6 of New Jersey:

7  
8 1. Section 3 of P.L.1975, c.291 (C.40:55D-3) is amended to read  
9 as follows:

10 3. For the purposes of this act, unless the context clearly  
11 indicates a different meaning:

12 The term "shall" indicates a mandatory requirement, and the term  
13 "may" indicates a permissive action.

14 "Administrative officer" means the clerk of the municipality,  
15 unless a different municipal official or officials are designated by  
16 ordinance or statute.

17 "Agricultural land" means "farmland" as defined pursuant to  
18 section 3 of P.L.1999, c.152 (C.13:8C-3).

19 "Applicant" means a developer submitting an application for  
20 development.

21 "Application for development" means the application form and  
22 all accompanying documents required by ordinance for approval of  
23 a subdivision plat, site plan, planned development, conditional use,  
24 zoning variance or direction of the issuance of a permit pursuant to  
25 section 25 or section 27 of P.L.1975, c.291 (C.40:55D-34 or  
26 C.40:55D-36).

27 "Approving authority" means the planning board of the  
28 municipality, unless a different agency is designated by ordinance  
29 when acting pursuant to the authority of P.L.1975, c.291  
30 (C.40:55D-1 et seq.).

31 "Board of adjustment" means the board established pursuant to  
32 section 56 of P.L.1975, c.291 (C.40:55D-69).

33 "Building" means a combination of materials to form a  
34 construction adapted to permanent, temporary, or continuous  
35 occupancy and having a roof.

36 "Cable television company" means a cable television company as  
37 defined pursuant to section 3 of P.L.1972, c.186 (C.48:5A-3).

38 "Capital improvement" means a governmental acquisition of real  
39 property or major construction project.

40 "Circulation" means systems, structures and physical  
41 improvements for the movement of people, goods, water, air,  
42 sewage or power by such means as streets, highways, railways,  
43 waterways, towers, airways, pipes and conduits, and the handling of  
44 people and goods by such means as terminals, stations, warehouses,  
45 and other storage buildings or transshipment points.

**EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**

1       “Cluster development” means a development technique based on  
2 the residential density or development intensity for the tract which  
3 allows the lot sizes for dwellings to be reduced or floor area ratios  
4 to be increased so that individual segments of the tract have higher  
5 densities or intensities, provided that other portions of the tract are  
6 dedicated for common open space, public open space, or both, so  
7 that the gross density or intensity limitation of the entire tract is not  
8 exceeded.

9       "Common open space" means an open space area within or  
10 related to a site designated as a development, and designed and  
11 intended for the use or enjoyment of residents and owners of the  
12 development. Common open space may contain such  
13 complementary structures and improvements as are necessary and  
14 appropriate for the use or enjoyment of residents and owners of the  
15 development.

16       "Conditional use" means a use permitted in a particular zoning  
17 district only upon a showing that such use in a specified location  
18 will comply with the conditions and standards for the location or  
19 operation of such use as contained in the zoning ordinance, and  
20 upon the issuance of an authorization therefor by the planning  
21 board.

22       "Conventional" means development other than planned  
23 development.

24       "County agriculture development board" or "CADB" means a  
25 county agriculture development board established by a county  
26 pursuant to the provisions of section 7 of P.L.1983, c.32 (C.4:1C-  
27 14).

28       "County master plan" means a composite of the master plan for  
29 the physical development of the county in which the municipality is  
30 located, with the accompanying maps, plats, charts and descriptive  
31 and explanatory matter adopted by the county planning board  
32 pursuant to R.S.40:27-2 and R.S.40:27-4.

33       "County planning board" means the county planning board, as  
34 defined in section 1 of P.L.1968, c.285 (C.40:27-6.1), of the county  
35 in which the land or development is located.

36 (cf: P.L.2004, c.2, s.32)

37

38       2. (New section) a. The governing body, by ordinance, may  
39 adopt regulations requiring a developer, as a condition for approval  
40 of a subdivision or site plan, to set aside a minimum percentage of  
41 the total area of the subdivision or site plan for open space  
42 purposes, for recreational purposes, and for the development of  
43 recreational opportunities attributable to the construction or  
44 improvements within the subdivision or development. The  
45 ordinance shall allow a developer to negotiate a fee with the  
46 planning board, in lieu of setting aside land for open space and  
47 recreational purposes and developing recreational opportunities,  
48 representing the developer's reasonable and necessary contribution

1 to the provision of open space and recreational opportunities  
2 attributable to the construction or improvements within the  
3 subdivision or development. The ordinance may establish  
4 thresholds limiting imposition of the provisions of this section to  
5 certain districts, or to applications for development exceeding a  
6 certain size, or establishing different requirements for different  
7 types of districts, or for applications for development of different  
8 sizes.

9 b. The regulations shall establish fair and reasonable standards  
10 to determine the minimum percentages of land to be set aside for  
11 open space and recreational purposes and the proportionate or pro-  
12 rata amount of the cost of such facilities that shall be borne by a  
13 developer who determines to negotiate an agreement establishing a  
14 fee in lieu of setting aside land for those purposes. The regulations  
15 shall set forth criteria to be utilized to determine appropriate  
16 locations for open space and recreational opportunities and the  
17 types of recreational opportunities to be provided.

18 c. The ordinance shall authorize the planning board to utilize the  
19 technique of cluster development. The ordinance shall require that  
20 prior to the approval of an application for development utilizing  
21 cluster development, the planning board shall find similar facts and  
22 conclusions as required by section 33 of P.L.1975, c.291  
23 (C.40:55D-45) that are otherwise applicable to planned  
24 developments.

25 d. Revenues derived pursuant to this section shall be deposited  
26 into an account in a "Municipal Open Space, Recreation, and  
27 Farmland and Historic Preservation Trust Fund" created by the  
28 municipality, and shall be used exclusively for the acquisition of  
29 lands for recreation and conservation purposes; development of  
30 lands acquired for recreation and conservation purposes; and  
31 maintenance of lands acquired for recreation and conservation  
32 purposes. Any interest or other income earned on monies deposited  
33 into the municipal trust fund shall be credited to the fund to be used  
34 for the same purposes as the principal.

35 e. Whenever an approval of a subdivision or site plan contains a  
36 condition for the set aside of public open space in accordance with  
37 an ordinance adopted pursuant to this section, the determination of  
38 just compensation for the public open space pursuant to section 32  
39 of P.L.1975, c.291 (C.40:55D-44) shall be adjusted to reflect the  
40 developer's obligation under the ordinance.

41

42 3. Section 31 of P.L.1975, c.291 (C.40:55D-43) is amended to  
43 read as follows:

44 31. a. An ordinance pursuant to this article permitting planned  
45 unit development, planned unit residential development or  
46 residential cluster, or an ordinance authorizing cluster development  
47 pursuant to section 2 of P.L. , c. (C. ) (pending before the  
48 Legislature as this bill) may provide that the municipality or other

1 governmental agency may, at any time and from time to time,  
2 accept the dedication of land or any interest therein for public use  
3 and maintenance, but the ordinance shall not require, as a condition  
4 of the approval of a planned development, subdivision, or site plan  
5 that land proposed to be set aside for common open space be  
6 dedicated or made available to public use.

7 An ordinance pursuant to this article providing for planned unit  
8 development, planned unit residential development, or residential  
9 cluster or an ordinance authorizing cluster development pursuant to  
10 section 2 of P.L. , c. (C. ) (pending before the Legislature as  
11 this bill) shall require that the developer provide for an organization  
12 for the ownership and maintenance of any open space for the  
13 benefit of owners or residents of the development, if said open  
14 space is not dedicated to the municipality or other governmental  
15 agency. Such organization shall not be dissolved and shall not  
16 dispose of any open space, by sale or otherwise, except to an  
17 organization conceived and established to own and maintain the  
18 open space for the benefit of such development, and thereafter such  
19 organization shall not be dissolved or dispose of any of its open  
20 space without first offering to dedicate the same to the municipality  
21 or municipalities wherein the land is located.

22 b. In the event that such organization shall fail to maintain the  
23 open space in reasonable order and condition, the municipal body or  
24 officer designated by ordinance to administer this subsection may  
25 serve written notice upon such organization or upon the owners of  
26 the development setting forth the manner in which the organization  
27 has failed to maintain the open space in reasonable condition, and  
28 said notice shall include a demand that such deficiencies of  
29 maintenance be cured within 35 days thereof, and shall state the  
30 date and place of a hearing thereon which shall be held within 15  
31 days of the notice. At such hearing, the designated municipal body  
32 or officer, as the case may be, may modify the terms of the original  
33 notice as to deficiencies and may give a reasonable extension of  
34 time not to exceed 65 days within which they shall be cured. If the  
35 deficiencies set forth in the original notice or in the modification  
36 thereof shall not be cured within said 35 days or any permitted  
37 extension thereof, the municipality, in order to preserve the open  
38 space and maintain the same for a period of 1 year may enter upon  
39 and maintain such land. Said entry and maintenance shall not vest  
40 in the public any rights to use the open space except when the same  
41 is voluntarily dedicated to the public by the owners. Before the  
42 expiration of said year, the designated municipal body or officer, as  
43 the case may be, shall, upon its initiative or upon the request of the  
44 organization theretofore responsible for the maintenance of the  
45 open space, call a public hearing upon 15 days written notice to  
46 such organization and to the owners of the development, to be held  
47 by such municipal body or officer, at which hearing such  
48 organization and the owners of the development shall show cause

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1 why such maintenance by the municipality shall not, at the election  
2 of the municipality, continue for a succeeding year. If the  
3 designated municipal body or officer, as the case may be, shall  
4 determine that such organization is ready and able to maintain said  
5 open space in reasonable condition, the municipality shall cease to  
6 maintain said open space at the end of said year. If the municipal  
7 body or officer, as the case may be, shall determine such  
8 organization is not ready and able to maintain said open space in a  
9 reasonable condition, the municipality may, in its discretion,  
10 continue to maintain said open space during the next succeeding  
11 year, subject to a similar hearing and determination, in each year  
12 thereafter. The decision of the municipal body or officer in any  
13 such case shall constitute a final administrative decision subject to  
14 judicial review.

15 If a municipal body or officer is not designated by ordinance to  
16 administer this subsection, the governing body shall have the same  
17 powers and be subject to the same restrictions as provided in this  
18 subsection.

19 c. The cost of such maintenance by the municipality shall be  
20 assessed pro rata against the properties within the development that  
21 have a right of enjoyment of the open space in accordance with  
22 assessed value at the time of imposition of the lien, and shall  
23 become a lien and tax on said properties and be added to and be a  
24 part of the taxes to be levied and assessed thereon, and enforced and  
25 collected with interest by the same officers and in the same manner  
26 as other taxes.

27 (cf: P.L.1975, c.291, s.31)

28

29 4. Section 52 of P.L.1975, c.291 (C.40:55D-65) is amended to  
30 read as follows:

31 52. A zoning ordinance may:

32 a. Limit and restrict buildings and structures to specified  
33 districts and regulate buildings and structures according to their  
34 type and the nature and extent of their use, and regulate the nature  
35 and extent of the use of land for trade, industry, residence, open  
36 space or other purposes.

37 b. Regulate the bulk, height, number of stories, orientation, and  
38 size of buildings and the other structures; the percentage of lot or  
39 development area that may be occupied by structures; lot sizes and  
40 dimensions; and for these purposes may specify floor area ratios  
41 and other ratios and regulatory techniques governing the intensity  
42 of land use and the provision of adequate light and air, including,  
43 but not limited to the potential for utilization of renewable energy  
44 sources.

45 c. Provide districts for planned developments and for cluster  
46 development; provided that an ordinance providing for approval of  
47 subdivisions and site plans by the planning board has been adopted  
48 and incorporates therein the provisions for such planned

1 developments or cluster development in a manner consistent with  
2 article 6 of P.L.1975, c.291 (C.40:55D-37 et seq.) and section 2 of  
3 P.L. , c. (C. ) (pending before the Legislature as this bill).  
4 The zoning ordinance shall establish standards governing the type  
5 and density, or intensity of land use, in a planned development and  
6 in districts in which cluster development is authorized. Said  
7 standards shall take into account that the density, or intensity of  
8 land use, otherwise allowable may not be appropriate for a planned  
9 development or for the use of cluster development. The standards  
10 may vary the type and density, or intensity of land use, otherwise  
11 applicable to the land within a planned development or district in  
12 which cluster development is authorized in consideration of the  
13 amount, location and proposed use of open space; the location and  
14 physical characteristics of the site of the proposed planned  
15 development or the proposed subdivision or other proposed  
16 development; and the location, design and type of dwelling units  
17 and other uses. Such standards may provide for the clustering of  
18 development between noncontiguous parcels and may, in order to  
19 encourage the flexibility of density, intensity of land uses, design  
20 and type, authorize a deviation in various clusters from the density,  
21 or intensity of use, established for an entire planned development or  
22 district in which cluster development is authorized. The standards  
23 and criteria by which the design, bulk and location of buildings are  
24 to be evaluated shall be set forth in the zoning ordinance and all  
25 standards and criteria for any feature of a planned development  
26 shall be set forth in such ordinance with sufficient certainty to  
27 provide reasonable criteria by which specific proposals for planned  
28 development and applications for development utilizing cluster  
29 development can be evaluated.

30 d. Establish, for particular uses or classes of uses, reasonable  
31 standards of performance and standards for the provision of  
32 adequate physical improvements including, but not limited to, off-  
33 street parking and loading areas, marginal access roads and  
34 roadways, other circulation facilities and water, sewerage and  
35 drainage facilities; provided that section 41 of P.L.1975, c.291  
36 (C.40:55D-53) shall apply to such improvements.

37 e. Designate and regulate areas subject to flooding (1) pursuant  
38 to P.L.1972, c.185 (C.58:16A-55 et seq.) or (2) as otherwise  
39 necessary in the absence of appropriate flood hazard area  
40 designations pursuant to P.L.1962, c.19 (C.58:16A-50 et seq.) or  
41 floodway regulations pursuant to P.L.1972, c.185 or minimum  
42 standards for local flood fringe area regulation pursuant to  
43 P.L.1972, c.185.

44 f. Provide for conditional uses pursuant to section 54 of  
45 P.L.1975, c.291 (C.40:55D-67).

46 g. Provide for senior citizen community housing.

47 h. Require as a condition for any approval which is required  
48 pursuant to such ordinance and the provisions of this chapter, that

1 no taxes or assessments for local improvements are due or  
2 delinquent on the property for which any application is made.

3 i. Provide for historic preservation pursuant to section 5 of  
4 P.L.1991, c.199 (C.40:55D-65.1).

5 j. Provide for sending and receiving zones for a development  
6 transfer program established pursuant to P.L.2004, c.2 (C.40:55D-  
7 137 et al.).

8 (cf: P.L.2004, c.2, s.39)

9

10 5. This act shall take effect immediately.

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12

13

### STATEMENT

14

15 This bill authorizes municipalities to condition development  
16 approvals on a developer's setting aside land to be used for open  
17 space or recreational areas and facilities, or to pay an assessment in  
18 lieu of the set-aside. The bill has been prepared in response to a  
19 recent New Jersey court decision, *New Jersey Shore Builders*  
20 *Association v. Township of Jackson* 401 *N.J. Super.* 152 (App. Div.  
21 2008), which held that current law does not empower municipalities  
22 to require developers to set aside land for common open space or  
23 recreational areas and facilities, except with regard to applications  
24 for planned developments.

25 Although recognizing that "the construction of additional homes,  
26 whether qualifying as planned developments or otherwise, increases  
27 a municipality's open space and recreational needs" and that  
28 "maintaining common open space and recreational areas are  
29 important goals of the" Municipal Land Use Law, the court  
30 concluded that the "Legislature has chosen to limit a municipality's  
31 authority to obtain set-asides for common open space and  
32 recreational areas to planned developments, and to limit off-site  
33 contributions to water, sewer, drainage and street improvements."  
34 [401 *N.J. Super.* 171-172].

35 Under the bill, a municipality would be allowed to adopt an  
36 ordinance allowing its planning board to condition subdivision or  
37 site plan approvals upon the setting aside of property for open space  
38 and for recreation purposes. The ordinance would enable the  
39 planning board and a developer to negotiate a fee in lieu of setting  
40 aside land. The bill would afford municipalities discretion, in  
41 adopting their ordinances, to address the needs of their localities so  
42 long as they are fair and reasonable and establish consistent criteria.  
43 An ordinance permitted under this bill would authorize planning  
44 boards to utilize clustering techniques, similar to current provisions  
45 for planned developments.

46 The bill specifies that any fee revenues derived from fees in lieu  
47 of set-asides permitted under the bill would be deposited into an  
48 account in a "Municipal Open Space, Recreation, and Farmland

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- 1 and Historic Preservation Trust Fund" created by the municipality,
- 2 and dedicated for recreation and conservation purposes.