



NEW JERSEY LAW REVISION COMMISSION

Draft Final Report Regarding Proposed Changes to the Local Land and Building Law – Lease of County or Municipal Property pursuant to N.J.S. 40A:12-14 *et seq.*

December 09, 2019

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.
Please consult the New Jersey statutes in order to determine the law of the State.

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Executive Summary

A municipal land use attorney contacted the Commission after reviewing the Local Lands and Buildings Law (“LLBL”). He advised Staff that the LLBL contains two separate statutes¹ that each permit a governmental unit to lease, to private persons, public property “not needed for public use.”²

The two statutes, N.J.S. 40A:12-14³ and N.J.S. 40A:12-24⁴, are not consistent with one another regarding the leasing of real property and the necessity for compliance with the Local Public Contracts Law (“LPCL”).⁵

The following pages contain recommendations to modify the LLBL and unify N.J.S. 40A:12-14 and N.J.S. 40A:12-24 into a single statute⁶ that has also been simplified and reorganized into three subsections.

Statutes

N.J.S. 40A:12-14

Any county or municipality may lease any real property, capital improvement or personal property not needed for public use as set forth in the resolution or ordinance authorizing the lease, other than county or municipal real property otherwise dedicated or restricted pursuant to law, and except as otherwise provided by law, all such leases shall be made in the manner provided by this section.

(a) In the case of a lease to a private person, except for a lease to a private person for a public purpose as provided in ... (C. 40A:12–15), said lease shall be made to the highest bidder by open public bidding at auction or by submission of sealed bids.

[***]

N.J.S. 40A:12-24

Every county or municipality may lease for fixed and upon prescribed terms and for private purposes any of the land or buildings or any part thereof not presently needed for public use to the person who will pay the highest rent therefor. The use

¹ N.J.S. 40A:12-14 *et seq.* and N.J.S. 40A:12-24.

² *Id.*

³ In this Report, N.J.S. 40A:12-14 may be referred to as §14.

⁴ In this Report, N.J.S. 40A:12-24 may be referred to as §24.

⁵ See discussion of *Sellitto v. Borough of Spring Lake Heights*, 284 N.J. Super. 277, 285 (App. Div. 1995), *infra*.

⁶ See Appendix *infra*.

by the lessee shall be of such character as not to be detrimental to the building or the use of the building or the use of the unleased part of the building.

Background

The New Jersey Local Lands and Buildings Law (“LLBL”) permits any county, or any municipality, to lease any real property or capital improvement not needed for public use to non-governmental entity.⁷ A fallow piece of property may be leased to: a public person⁸; a public body⁹; a nonprofit corporation¹⁰; or a housing corporation.¹¹ The authority for these types of transactions is set forth in two statutory provisions contained within the LLBL.¹² Although both statutes were enacted on the same day as the original legislation, July 1, 1971, they are distinct from one another.¹³

When read in a serial manner, N.J.S. 40A:12-14 is the first statute in the LLBL that addresses the leasing of county or municipal real property to a person.¹⁴ At the time of its enactment, this statute was deemed by the Legislature to be a “new provision” because it did not originate from any prior statute.¹⁵ This statute was one of the first to mandate public bidding when a governmental unit proposed to lease its property to a private person.¹⁶ This, however, is not the only statute that addresses this type of governmental transaction.

As noted above, within the LLBL, there is a second statute regarding the lease of public lands for private purpose. This provision, N.J.S. 40A:12-24, sets forth a governmental unit’s authority to rent lands and buildings not needed for public use.¹⁷ The origin of this statute can be traced to R.S. 40:60-42, which in turn had its origins in the Home Rule Act of 1917.¹⁸ Absent from this statute, however, is any express language that requires the governmental unit to engage in the public bidding process.

⁷ N.J.S. 40A:12-14 *et seq.* and N.J.S. 40A:12-24. *See generally* N.J.S. 40A:12-14(a) (providing a governing body with the authority to also lease the personal property owned by the governmental unit to a private person).

⁸ N.J.S. 40A:12-14(a). *See also* N.J.S. 40A:12-24.

⁹ N.J.S. 40A:12-14(b).

¹⁰ N.J.S. 40A:12-14(c).

¹¹ N.J.S. 40A:12-14(c).

¹² *See* N.J.S. 40A:12-14 *et seq.* *See also* N.J.S. 40A:12-24.

¹³ *Sellitto v. Borough of Spring Lake Heights*, 284 N.J. Super. 277, 285 (App. Div. 1995).

¹⁴ N.J.S. 40A:12-14 also permits a county or municipality to lease a capital improvements or personal property to a private person, a public body, non-profit corporation or association for a public purpose, or a housing corporation. *Compare with* N.J.S. 40A:12-24 which contains no provision(s) for the lease of capital improvements or personal property.

¹⁵ *Sellitto*, 284 N.J. Super. at 285.

¹⁶ *Id.*

¹⁷ N.J.S. 40A:12-24 permits a county or municipality to rent “any portion” of its land or buildings that are not presently needed for public use. *Compare with* N.J.S. 40A:12-14 which makes no provision for the lease of a portion of the real property, capital improvement or personal property by a person.

¹⁸ *Sellitto*, 284 N.J. Super. at 285.

The confusion created by having two different statutes dealing with the same subject matter in two different ways impairs statutory interpretation and compliance, and could eventually result in litigation.

Analysis

In *Sellitto v. Borough of Spring Lake Heights*¹⁹, a residential property owner sought injunctive relief to restrain the governmental unit from leasing municipal property, adjacent to his land, to a cellular telephone communications facility.²⁰

The plaintiff's complaint alleged that the lease was null and void because it did not comply with the competitive bidding requirements set forth in the LLBL.²¹ The defendant argued that N.J.S. 40A:12-24 allows a municipality to dispense with the public bidding requirement when leasing property to a private person.²² The defendant further contended that if the Legislature had intended otherwise, then N.J.S. 40A:12-24 would contain express language regarding public bidding much like the language found in N.J.S. 40A:12-14. The trial court denied the plaintiffs' applications and concluded that N.J.S. 40A:12-24 permitted the lease to be executed without the necessity of public bidding.²³ The plaintiff appealed the decision of the trial court.²⁴

The Appellate Division was confronted with, "two statutory provisions which were arguably controlling, both of which were contained within the LLBL and which were enacted on the same day..."²⁵ The primary focus of both litigants was on the interpretation of the phrase, "to the person who will pay the highest rent therefor," contained in N.J.S. 40A:24. The Court, however, chose to recast the issue.

The "real question," according to the Appellate Division, was whether N.J.S. 40A:12-14 or N.J.S. 40A:12-40(a) controls these types of transactions. In the absence of any legislative history, the Court struggled to comprehend the rationale for the existence of two contradictory statutory sections within the same Act. The Court observed that,

...on the same day and within the same bill[, the Legislature]: (1) enacted a new provision (§14) which set forth in considerable detail the procedures which had to be followed by a municipality when it leased its public lands for a private purpose; and, (2) retained an older source provision (§24) which merely required the

¹⁹ *Sellitto v. Borough of Spring Lake Heights*, 284 N.J. Super. 277 (App. Div. 1995).

²⁰ *Id.*

²¹ *Id.* at 281-282. The plaintiff also alleged, among other things, that the borough failed to adhere to its own zoning ordinances by allowing a non-permitted use to be constructed in a residential zone. A discussion of these arguments has been omitted from this Report because they exceed the scope of the instant discussion.

²² *Id.* at 286.

²³ *Id.* at 284.

²⁴ *Id.*

²⁵ *Id.* at 285.

municipality to find the person willing to pay the highest rent for land or buildings not presently needed for public use before leasing the property.²⁶

The Court observed that the conundrum therefore was, "...not a question... of the more general statute yielding to the more specific; nor [was] it a question of the older statute yielding to the more recent."²⁷ The answer, according to the Court, lay within the case law interpreting the LLBL and the Local Public Contracts Law (LPCL).²⁸

The underlying purpose of the LPCL is to foster openness in local government activities.²⁹ In addition, the LPCL was enacted to "... secure competition, which in turn, works to protect the public against chicanery and fraud in public office.³⁰ In order to achieve the purposes of the Act, the LPCL envisions, with certain exceptions, a system of competitive bidding;³¹ the purpose of which is to obtain the best economic result for the public entity and ultimately for the taxpayer.³²

In *Wasserman's Inc. v. Middletown Twp.*, the New Jersey Supreme Court considered whether N.J.S. 40A:12-14 should be applied retroactively to leases executed before July 1, 1971. During its examination of this issue, the Court noted that N.J.S. 40A:12-14 specifically replaced N.J.S. 40:60-42.³³ It should be noted that in its decision, the Supreme Court never mentioned N.J.S. 40A:12-24, despite the fact that the language in that statute is identical to N.J.S. 40:60-42, which the Court said that N.J.S. 40A:12-14 "replaced."³⁴

The holding of the Supreme Court in *Wasserman*, gave the *Sellitto* Court pause to question the purpose of N.J.S. 40A:24. The *Sellitto* Court said, "if N.J.S. 40:60-42 has been replaced by §14, we cannot ascertain what purpose the current §24 serves."³⁵ Ultimately, the Court concluded that, "...§14 prevails over §24. Otherwise no public bidding would be required for leasing public land and buildings not presently needed...."³⁶ In passing upon the viability of N.J.S. 40A:12-24, the court stated, "[w]e cannot reconcile why the Legislature would adopt a statute with conflicting language."³⁷

²⁶ *Id.* at 286-287.

²⁷ *Id.* at 287.

²⁸ N.J.S. 40A:11-1 to 11-49.

²⁹ *Id.* See *Closter Service Stations, Inc. v. Commissioners of Village of Ridgefield Park*, 99 N.J. Super. 69, 73 (App. Div. 1968) (noting that the Local Public Contracts Law "guard[s] against favoritism, improvidence, extravagance, and corruption." (citing *Hillside Township v. Sternin*, 25 N.J. 317 (1957)); and see, *Bodies by Lembo, Inc. v. County of Middlesex*, 286 N.J. Super. 298 (App. Div. 1996).

³⁰ *Closter Service Stations, Inc. v. Commissioners of Village of Ridgefield Park*, 99 N.J. Super. 69, 73 (App. Div. 1968).

³¹ https://clerkshq.com/Content/NJClerks-Reference/books/NJ_ClerksC08.htm (last visited May 2, 2019).

³² *Sellitto*, 284 N.J. Super. 287.

³³ *Wasserman's Inc. v. Middletown Twp.*, 137 N.J. 238, 243 (1994).

³⁴ See *Sellitto*, 284 N.J. Super. 288.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 289.

Outreach

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These stakeholders included: New Jersey State League of Municipalities; the New Jersey Association of Counties; the Local Government Law Section of the New Jersey State Bar Association; the New Jersey Institute of Local Government Attorneys; a Municipal Attorney; several private practitioners; and each of the 21 County Councils.

In response to this outreach, one stakeholder opined that, “an elimination of 40A:12-24 makes sense while incorporating the salient provisions with regard to the process to follow in public and private transactions into one statutory section.”³⁸ He continued that, “...it appears to me that the statutory change is appropriate and would eliminate potential confusion between the two statutes.”³⁹

No objection was received to the proposed modifications included in this Report.

Conclusion

The proposed revisions, contained in the attached *Appendix*, are designed to enhance the clarity and legislative purpose of the LLBL. In addition, the modifications eliminate any confusion regarding the necessity for public bidding when a government unit proposes to lease idle property to a private person.

³⁸ Electronic Mail from Theodore E. Baker, Cumberland County Counsel, to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission *1 (Nov. 01, 2019) (on file with the NJLRC).

³⁹ *Id.*

Appendix

The proposed modifications to **N.J.S. 40A:12-14, leasing of county or municipal real property, capital improvements or personal property**, (shown with ~~strikethrough~~, underlining and [brackets]⁴⁰), follow:

a. Any county or municipality may lease any real property, capital improvement or personal property or any part thereof not presently needed for public use, as set forth in the resolution or ordinance authorizing the lease, other than county or municipal real property otherwise dedicated or restricted pursuant to law, and except as otherwise provided by law, all such leases shall be made in the manner provided by this section provided that the lease:

(1) is authorized either by a resolution or an ordinance;

(2) does not include real property that has either been dedicated or restricted pursuant to law; and,

(3) is made in the manner provided by this section, except as otherwise provided by law.

b. (a) In the case of a lease to a private person for private purposes, except for a lease to a private person for a public purpose as provided in subsection (j) of section 15 of P.L.1971, c. 199 (C.40A:12-15) or for agricultural or horticultural use as provided in section 2 of P.L.2006, c. 52 (C.40A:12-14.1), said the lease shall be made to the highest bidder by open public bidding at auction or by submission of sealed bids.

(1) Advertisement of the method of bidding shall be published in a newspaper circulating in the municipality or municipalities in which the leasehold is situated by two insertions at least once a week during two consecutive weeks; the lease publication to be not earlier than seven days prior to the letting of the lease.

(2) The governing body may, bBy resolution, the governing body:

(i) may fix a minimum rental with the reservation of the right to reject all bids where the highest bid is not accepted. Notice of such reservation shall be included in the advertisement of the letting of the lease and public notice thereof shall be given of the time of the letting of the lease;

(ii) Such resolution may may provide that upon the completion of the bidding, the highest bid may be accepted, or all of the bids may be rejected;

⁴⁰ Brackets indicate a term, or terms, whose removal from the statute should be discussed.

(iii) ~~It shall also~~ set out the conditions, restrictions and limitations upon the tenancy subject to the lease; including that the use by the lessee shall be of such character as to not be detrimental to:

(A) the real property, capital improvement, or personal property; or,

(B) the use of the unleased portion thereof.

(3) Acceptance or rejection of the bid or bids shall be made not later than at the second regular meeting of the governing body following the completion of the bidding, and, if the governing body shall not so accept such highest bid, or reject all bids, said bids shall be deemed to have been rejected. Any such award may be adjourned at the time advertised for not more than one week without re-advertising.

(4) ~~¶The lease publication to be not~~ shall not occur earlier than seven days prior to the ~~letting of the lease~~ opening of bids.

c. The bidding requirements of this section shall not apply to a county or municipal lease:

(1) to a person for a public purpose as provided in subsection (j) of section 15 of P.L.1971, c. 199 (C.40A:12-15);

(2) for agricultural or horticultural use as provided in section 2 of P.L.2006, c. 52 (C.40A:12-14.1);

~~(b)~~ (3) ~~In the case of a lease to a public body;~~ ~~¶The~~ lease may be upon such terms and conditions and for nominal or other consideration as the governing body of the county or municipality shall approve by ordinance or resolution.

~~(e)~~ (4) ~~In the case of a lease to a nonprofit corporation or association for a public purpose;~~ ~~¶The~~ lease shall be authorized by resolution, in the case of a county, or by ordinance, in the case of a municipality, and may be for nominal or other consideration. ~~Said authorization~~ The resolution or ordinance shall include:

(i) the nominal or other consideration for the lease;

(ii) the name of the corporation or corporations who shall be the lessees;

(iii) the public purpose served by the lessee;

(iv) the number of persons benefiting from the public purpose served by the lessee, whether within or without the municipality in which the leasehold is located;

(v) the term of the lease, and the officer, employee or agency responsible for enforcement of the conditions of the lease;

~~(vi) Said ordinance or resolution shall also require any nonprofit corporation holding a lease for a public purpose pursuant to this section, to the requirement that the lessee annually submit a report to the officer, employee or agency designated by the governing body, setting out~~ forth:

(A) the use to which the leasehold was put during each year,

(B) the activities of the lessee undertaken in furtherance of the public purpose for which the leasehold was granted;

(C) the approximate value or cost, if any, of such activities in furtherance of such purpose; and,

(D) an affirmation of the continued tax-exempt status of the nonprofit corporation pursuant to both State and federal law.

~~(d) (5) In the case of a lease to a housing corporation or resident first-time homebuyer for the public purposes, and pursuant to the provisions of P.L.1983, c. 335 (C.55:18-1 et seq.);~~ In such case, the lease shall be authorized by ordinance by a municipality.

Credits: L.1971, c. 199, § 14, eff. July 1, 1971. Amended by L.1983, c. 335, § 11, eff. Sept. 2, 1983; L.1983, c. 440, § 1, eff. Jan. 9, 1984; L.1984, c. 27, § 1, eff. April 11, 1984; L.2006, c. 52, § 1, eff. July 20, 2006.

Comments

• Section a.

The language set forth in section a. has been simplified to make it easier to understand. This section has also been modified to permit a county or municipality to lease “any part” of the vicinage’s real property, personal property or a capital improvement that is not needed for public use. This language was derived from N.J.S. 40A:12-24. *See treatment of this statute infra.* Finally, the temporal qualifier “presently”, also derived from N.J.S. 40A:12-24 has been incorporated into this statutory section.

• Section b.

As set forth in this section, the term “private person” is not defined in this title and is vague. The term private person has been eliminated from the statute. This term has been replaced and recast to allow the lease of public property to a person for private purposes. This language parallels the original statutory language of this section that allowed a lease to a private person for a public purpose. *Compare* N.J.S. 40A:12-14(c)(1).

The exceptions to the public bidding requirement, originally set forth in this section, have been moved to the newly created section c. *See* discussion of section c. *infra.*

The language concerning the advertisement of the method of bidding now appears in subsection (b)(1).

The contents of the resolution of the governing body are set forth in subsection (b)(2)(i) through (iii).

As originally set forth in the statute, a county or municipality shall impose conditions, restrictions and limitations subsection upon the tenancy subject to the lease. *See* N.J.S. 40A:12-14(a). Language from N.J.S. 40A:12-24 has been incorporated into N.J.S. 40A:(b)(2)(iii) to require the governing body to restrict the usage of the property to one which is neither detrimental to the property or the unused portion thereof.

The provisions concerning the acceptance or rejection of the bid, or bids, is now set forth in N.J.S. 40A:12-14(b)(3). Except for a typographical error, the language in this section remains unchanged.

The “lease publication” portion of this section has been relocated into a newly created section, N.J.S. 40A:12-14(b)(4). so that it appears after the section that addresses the acceptance of the bids and the awarding of the lease.

• **Section c.**

This newly drafted section consolidates those leasehold arrangements that are not subject to either the open public bidding or sealed bid requirements of this title. The current contents of this section are derived as follows:

- N.J.S. 40A:12-14(c)(1) was moved from N.J.S. 40A:12-14(a), as originally drafted;
- N.J.S. 40A:12-14(c)(2) was moved from N.J.S. 40A:12-14(a), as originally drafted;
- N.J.S. 40A:12-14(c)(3) was originally entitled N.J.S. 40A:12-14(b);
- N.J.S. 40A:12-14(c)(4) was originally entitled N.J.S. 40A:12-14(c); and,
- N.J.S. 40A:12-14(c)(5) was originally entitled N.J.S. 40A:12-14(d).

40A:12-24. Rental of lands and buildings or portions thereof not needed for public use; portions of buildings; rental

~~Every county or municipality may lease for fixed and upon prescribed terms and for private purposes any of the land or buildings or any part thereof not presently needed for public use to the person who will pay the highest rent therefor. The use by the lessee shall be of such character as not to be detrimental to the building or the use of the building or the use of the unleased part of the building.~~

Credits: L.1971, c. 199, § 24, eff. July 1, 1971.

Comments

The language of this statute directly contradicts the provisions set forth in N.J.S. 40A:12-14. *See Sellitto v. Borough of Spring Lake Heights*, 284 N.J. Super. 277, 288 (App. Div. 1995) (holding that in order to preserve the public bidding requirements of the local public contracts law in the context of the leasing of public lands and buildings §14 must prevail over §24).

A portion of the language from the first sentence of this statute has been incorporated into N.J.S. 40A:12-14. The provisions concerning a governmental unit’s lease of all or “any part” of public property “not presently needed for public use...” have been incorporated into N.J.S. 40A:12-14(a).

In addition, the prohibition of any use of the property in a manner that is detrimental to the building or the unleased portion thereof has been incorporated into N.J.S. 40A:12-14(b)(2)(iii). *See* discussion of conditions, restrictions and limitations, Comments to N.J.S. 40A:12-14, section b. *supra*.