

# Supreme Court Boosts Municipal Reimbursements for Trash Collection

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**T**he New Jersey Supreme Court recently gave community associations a major, albeit unintentional, victory in obtaining reimbursement for trash collection from municipalities which insist that associations forego dumpster collection and haul their trash to the street for curbside collection. The Court held, in *Berk Cohen Associates at Rustic Village, LLC v. Borough of Clayton*,<sup>1</sup> that where a municipality requires curbside collection of trash but curbside collection in a qualified multiple dwelling community would cause health or safety problems in the particular situation, the municipality must instead pay the community reimbursement for the service.

## **Municipal Services Act Requires Services or Reimbursement**

Most condominium associations, homeowner associations and cooperatives in New Jersey qualify for municipal services pursuant to the Condominium Services, or Municipal Services, Act.<sup>2</sup> The Act, adopted in 1989 and amended in 1993, requires each municipality to remove ice, snow and other obstructions, pay for the electricity for street lights, and collect and dispose of leaves, recyclables and solid waste for qualified private communities, “in the same fashion” as the municipality provides such services along public streets. Alternatively, the municipality may pay the community reimbursement for the services in an amount equal to what

the services would cost the municipality.<sup>3</sup>

A “qualified private community” is a residential condominium, cooperative, fee simple community or horizontal property regime where the costs of maintaining the roads and providing essential services are paid for by a non-profit entity comprised exclusively of unit owners and the residents do not receive any tax abatement or exemption related to the community’s construction.<sup>4</sup> The Municipal Services Act expressly excludes from this definition apartment buildings and garden apartment complexes which rent to tenants.<sup>5</sup> However, in 2001, the New Jersey Legislature adopted a statute<sup>6</sup> requiring municipalities to collect solid waste from multiple dwellings, defined as apart-

CONTINUES ON PAGE 26.

ment complexes of five or more units, “in the same manner as provided to the residents ... who live along public roads and streets,” or pay reimbursement,<sup>7</sup> similar to the scheme in the Municipal Services Act.

### Some Towns Have Resisted Reimbursement

A number of municipalities which provide curbside collection of solid waste along public streets have taken the position that they need not collect trash from private property entitled to such service unless the private communities put the trash curbside for collection. Many developments which utilize dumpsters are loathe to agree to place their trash curbside each week because of the poor appearance and health issues created by leaving the trash out. Moving the trash to the public street for retrieval also may violate the land development approval for such a community. However, several municipalities have refused to pay reimbursement instead, even where dumpster collection is more efficient and safer, arguing that because they have offered trash collection to the same extent as provided along public streets and the private community refused to comply, they have no other obligation.

*Berk Cohen Associates* provides possible relief to common interest ownership associations that find themselves in such a situation, although the lawsuit was brought under the 2001 statute pertaining to apartment complexes.<sup>8</sup> Rustic Village Apartments consists of 500 garden apartments and utilizes dumpsters for collection of its trash. The Borough of Clayton collects trash curbside along public streets. When the apartment complex sought reimbursement for its dumpster collection, the Borough declined but offered to pick up the complex’ trash once a week provided that Rustic Village transported its 500 tenants’ trash to the public street each week.

The apartment complex attempted to comply for two weeks, but the effort resulted in an unsightly accumulation of garbage, bags broken into by animals, trash strewn across the street, and swarms of bees, causing the police chief to order it to desist. The Borough refused to provide dumpster service and took the position that it need not pay reimbursement because it was willing to collect the trash in the same manner as it does along public streets. The apartment owner therefore sued the Borough, claiming that the refusal to pay reimbursement was an unconstitutional denial of equal protection.

### Payment Required Where Service Not Feasible

The Borough argued that it met its statutory obligation. The Supreme Court found that the municipal garbage collection scheme, requiring all residents to abide by curbside pick-up, facially adhered to the guarantees of equal protection. However, the Court concluded that the manner in which the Borough implemented its policy was unreasonable because by requiring curbside collection for the apartment complex, the Borough was undermining public safety, health and welfare, which solid waste collection is intended to achieve. Thus, the Court decided that the statutory alternative of providing curbside pick-up was not available in this case.

In a 2000 decision,<sup>9</sup> the Appellate Division of Superior Court had held that when a municipality is excused under the Municipal Services Act from actually providing a service because the private street does not meet municipal specifications,<sup>10</sup> the municipality must pay reimbursement instead. The determination not to provide the service does not excuse the municipality from complying with the statute’s alternative. The Supreme Court ratified that holding several years later.<sup>11</sup> In *Berk Cohen*, the Court adopted similar reasoning. It said that where the method used for trash pick-up along public streets is not feasible or practical in an apartment complex, the municipality cannot simply refuse to comply with the statute. Rather, the municipality has to pay reimbursement instead of providing the service.

### Decision Applicable to Community Associations

Because the statute involved in *Berk Cohen*<sup>12</sup> and the Municipal Services Act<sup>13</sup> are similar with respect to solid waste collection and disposal, the principle applied in *Berk Cohen* presumably also applies to the Municipal Services Act. Where a municipality provides curbside trash collection along public streets, it cannot require qualified private communities which otherwise use trash dumpsters to haul their garbage to the public streets for curbside collection if such a method would create safety or health hazards. In such a situation, the municipality may, of course, provide dumpster collection,<sup>14</sup> but if it refuses to do so, it must pay the association reimbursement.

Thus, in a municipality which provides curbside public garbage collection, an association which utilizes dumpsters now may

rely on *Berk Cohen* to obtain reimbursement for trash collection where hauling the association’s trash to the street would create health or safety problems. Municipalities cannot escape their statutory obligation to pay reimbursement because performance of the service would be impractical or impossible. ■

### (Endnotes)

1. N.J. –, 2009 W.L. 1803288 (N.J., June 23, 2009).
2. *N.J.S.A.* 40:67-23.2, *et seq.*
3. *N.J.S.A.* 40:67-23.3a; *N.J.S.A.* 40:67-23.5a.
4. *N.J.S.A.* 40:67-23.2e.
5. *N.J.S.A.* 40:67-23.2e.
6. *N.J.S.A.* 40:66-1.2, *et seq.*
7. *N.J.S.A.* 40:66-1.2; *N.J.S.A.* 40:66-1.3a.
8. *N.J.S.A.* 40:66-1.2, *et seq.*
9. *Briarglen II Condominium Association, Inc. v. Township of Freehold*, 330 N.J. Super. 345, 354-55 (App. Div.), cert. denied, 165 N.J. 489 (2000).
10. *N.J.S.A.* 40:67-23.3b.
11. *In Ramapo River Reserve Homeowners Association, Inc. v. Borough of Oakland*, 186 N.J. 439 (2006), the Court overruled *Briarglen II*’s broad holding that a municipality could not ever delegate to a developer the municipality’s obligation to provide services. However, the Court expressly approved the *Briarglen II* holding that the municipality had to pay reimbursement if it did not provide the service at all. *Id.* at 449.
12. *N.J.S.A.* 40:66-1.2, *et seq.*
13. *N.J.S.A.* 40:67-23.2, *et seq.*
14. *N.J.S.A.* 40:66-1b states that a municipality may refuse to enter private property to remove solid waste dumpsters. This statute is superseded by *N.J.S.A.* 40:66-1.2, *et seq.* and *N.J.S.A.* 40:67.23.2, *et seq.* to the extent they contradict *N.J.S.A.* 40:66-1, but *N.J.S.A.* 40:66-1b implies that a municipality may voluntarily remove solid waste from private dumpsters.