To: New Jersey Law Revision Commission  
From: Samuel M. Silver  
Re: Leases of Public Property to Private Persons - Local Land and Building Law  
Date: July 08, 2019

MEMORANDUM

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

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.

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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

2 Id.  
3 In this Memorandum, N.J.S. 40A:12-14 may be referred to as §14.  
4 In this Memorandum, N.J.S. 40A:12-24 may be referred to as §24.  
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.

**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. A fallow piece of property may be leased to: a public person; a public body; a nonprofit corporation; or a housing corporation. The authority for these types of transactions is set forth in two statutory provisions contained with the LLBL. Although both statutes were enacted on the same day as the original legislation, July 1, 1971, they are distinct from one another.

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. 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. Historically, this statute was one of the first statutes to mandate public bidding when a governmental unit proposed to lease its property to a private person. 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. 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. Conspicuously absent from this statute, however, is any express language that requires the governmental unit to engage in the public bidding process.

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6 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(b).
9 N.J.S. 40A:12-14(c).
10 N.J.S. 40A:12-14(c).
13 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.
14 Sellitto, 284 N.J. Super. at 285.
15 Id.
16 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.
17 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 could eventually result in litigation.

Analysis

In *Sellitto v. Borough of Spring Lake Heights*18, 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.19

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.20 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.21 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.22 The plaintiff appealed the decision of the trial court.23

The appellate panel 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…”24 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,

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

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19 Id.
20 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 Memorandum because they exceed the scope of the instant discussion.
21 Id. at 286.
22 Id. at 284.
23 Id.
24 Id. at 285.
the highest rent for land or buildings not presently needed for public use before leasing the property.\textsuperscript{25}

The Court observed that the instant 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.”\textsuperscript{26} The answer, according to the Court, lay within the case law interpreting the LLBL and the Local Public Contracts Law (LPCL).\textsuperscript{27}

The underlying purpose of the LPCL is to foster openness in local government activities.\textsuperscript{28} In addition, the LPCL was enacted to “… secure competition, which in turn, works to protect the public against chicanery and fraud in public office.”\textsuperscript{29} In order to achieve the purposes of the Act, the LPCL envisions, with certain exceptions, a system of competitive bidding;\textsuperscript{30} the purpose of which is to obtain the best economic result for the public entity and ultimately for the taxpayer.\textsuperscript{31}

In \textit{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.\textsuperscript{32} 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.”\textsuperscript{33}

The holding of the Supreme Court in \textit{Wasserman}, gave the \textit{Sellitto} Court pause to question the purpose of N.J.S. 40A:24. The \textit{Sellitto} Court said, “if N.J.S. 40:60-42 has been replaced by §14, we cannot ascertain what purpose the current §24 serves.”\textsuperscript{34} 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….”\textsuperscript{35} 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.”\textsuperscript{36}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 286-287.
\item Id. at 287.
\item N.J.S. 40A:11-1 to 11-49.
\item \url{https://clerkshq.com/Content/NJClerks-Reference/books/NJ_ClerksC08.htm} (last visited May 2, 2019).
\item \textit{Sellitto}, 284 N.J. Super. 287.
\item \textit{Wasserman’s Inc. v. Middletown Twp.}, 137 N.J. 238, 243 (1994).
\item See \textit{Sellitto}, 284 N.J. Super. 288.
\item Id.
\item Id.
\item Id. at 289.
\end{enumerate}
\end{footnotesize}
Conclusion

Staff seeks authorization to conduct additional research and outreach to ascertain whether a modification to the statute, perhaps involving the repeal of N.J.S. 40A:12-24, would serve to clarify the LLBL and eliminate any confusion regarding the necessity for public bidding when a government unit proposes to lease idle property to a private person.