



---

---

**MEMORANDUM**

---

---

**TO:** Members of the Senate Environment Committee  
**FROM:** Alida Kass, Chief Counsel  
**SUBJECT:** NJCJI Opposition to Senate Bill 1150  
**DATE:** January 23, 2015

---

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's largest employers, small businesses, and leading trade associations advocating for a fair and predictable civil justice system in New Jersey. On behalf of our members, **we respectfully oppose S-1150.**

We take no position on the environmental policy objectives of the bill. We are opposing this legislation because of our broader concerns for fairness and predictability in the law. Even recognizing the desire to improve the environment for economically depressed communities, this bill would not achieve that objective in a workable, efficient, effective, or predictable fashion.

The bill would establish a process by which a municipality could be designated by DEP as a "burdened community." Before any permit could be issued in a "burdened community," the applicant would be subject to a series of obstacles, many of which appear to apply to permit renewals for existing projects, as well as applications for new permits.

The bill would authorize DEP to deny a permit application, notwithstanding any other law, upon a finding that the cumulative effect of the permit at issue together with other existing conditions, constitute an unreasonable risk to the health of the residents.

As applied to new applications, this sort of grant of discretionary authority would generate significant uncertainty, and it would discourage the sort of investment that would be necessary to bring a project to the point at which that discretionary determination is made. Because the list of permits and licenses covered by the bill includes permits routinely required for most commercial activity, it would have the unfortunate effect of discouraging desirable investment in economically challenged communities.

As applied to applications for renewals, however, this discretionary power to deny existing permits could also be a constitutional taking, given a business owner's reasonable and distinct investment-backed expectations. The New Jersey rule as set forth in *Morris County Land v. Parsippany-Troy Hills*, holds that a taking occurs when "... the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or *which are economically infeasible.*"

Restrictions have also been held to be takings when they do not permit “an economically efficient operator to obtain a ‘just and reasonable’ return on his investment.” (*Hutton Park Gardens v. West Orange Town Council*, 1975) In circumstances where significant investments have already been made in reliance on existing law, denying that business the license necessary to continue operations could run afoul of that standard.

Of even greater concern, the bill would also subject both new and renewing permit applications to an entirely discretionary veto by the local governing body. The DEP would be prohibited from granting the permit absent a resolution expressly approving the project. Unlike the discretionary authority granted to the DEP to deny a permit, there are no standards that would apply to the local decision on whether to pass the resolution. A proposed or existing use could meet all requirements under existing law; could have been determined by the DEP not to present an undue cumulative risk to local health; and yet be denied a permit - for any reason at all.

There are a number of problems with this approach. As a practical matter, the prospect of being denied a permit based on no criteria whatsoever would significantly discourage investment in burdened communities.

There are also significant legal concerns. The delegation of discretionary veto authority to a municipality is not the general legislative authority typically granted to municipalities. Rather, it is more analogous to the administrative power which is more typically granted to agencies. In that context, the courts have consistently held that to be constitutional, the delegated power must include adequate standards to guide the exercise of discretion and permit judicial review. See, e.g. *Matter of Egg Harbor Associates* (1983).

The courts have also consistently objected to the exercise of completely discretionary power over permits and licenses by municipalities. As the New Jersey Supreme Court explained in *Weiner v. Borough of Stratford* (1954):

The fundamental rules that a municipal legislative body ... must set a standard or prescribe a rule to govern in all cases coming within the operation of the ordinance and not leave its application or enforcement to ungoverned discretion, caprice or whim are fully applicable to the administration and enforcement of ordinances requiring licenses or permits and imposing license or permit fees or taxes... Ungoverned discretion in officials ... makes possible, if not probable, abusive discrimination in violation of the constitutional guaranty of due process and equal protection of the law.

In short, while this bill is intended as a means of improving the environment in economically challenged areas, it would create a legal structure of dubious constitutionality and would generate significant unpredictability in the law.

**The New Jersey Civil Justice Institute respectfully requests that you vote no on S-1150.**