January 14, 2019

New Jersey Appellate Court Rules Hoboken May Not Retroactively Apply Municipal Ordinances to Invalidate Prior Land Use Approval

The New Jersey Appellate Division has determined that the City of Hoboken cannot retroactively apply municipal land use ordinances to effectively revoke prior land use approvals.

The City of Hoboken (Hoboken) Planning Board granted Shipyard Associates, LP (Shipyard Associates) approval for a residential development consisting of high-rise residential buildings along the Hudson River along with several indoor tennis courts to be built on a pier extending into the Hudson River. Prior to completion of the development, Shipyard Associates proposed to build two additional high-rise buildings on the pier instead of the previously approved indoor tennis courts. As part of a multifaceted strategy by Hoboken and other intervenors to block the additional high-rise buildings, Hoboken convinced the Planning Board to refuse to schedule a hearing for the Shipyard Associates application. This refusal resulted in litigation heard by the Appellate Division. In *Shipyard Assocs., L.P. v Hoboken Planning Bd.*, Nos. A-4504-14, A-4637-14, A-4763-14 (App. Div. Aug. 2, 2017), *certif. denied*, 232 N.J. 106, 133, 148 (2018), the Appellate Division determined that the Planning Board's unlawful refusal to hear the application resulted in automatic approval of the preliminary and final subdivision application for the new high-rise buildings effective as of 2012, when the refusal occurred.

In late 2013, while the litigation regarding refusal to hear the Shipyard Associates application was pending, Hoboken enacted two municipal ordinances prohibiting construction of high-rise buildings on waterfront piers. The ordinances permitted only limited uses where residential construction was previously permitted and, if applied retroactively to the Shipyard Associates project, would effectively invalidate the automatic 2012 land use approval.

Shipyard Associates brought action to prevent Hoboken from enforcing the ordinances to prevent the Shipyard Associates project. In *Shipyard Associates, LP v. City of Hoboken and Fund for a Better Waterfront and Hudson Tea Buildings Condominium Association, Inc.*, Docket No. A-1085-17T3 (Decided January 7, 2019), Hoboken argued that state statute *N.J.S.A.* 40:55D-49(a) authorizes a municipality to retroactively apply municipal ordinances to land use approvals if done in the interest of public health and safety. *N.J.S.A.* 40:55D-49(a) provides that the general terms and conditions of a preliminary approval shall not be changed, "…*except that nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health and safety*…." The Appellate Division disagreed with Hoboken's reliance on *N.J.S.A.* 40:55D-49(a), noting the use of the term "modifying" in *N.J.S.A.* 40:55D-49(a) indicates that a "change, revision or tweak" to the general terms of an approval may be permissible under certain circumstances for health and public safety purposes, but not a complete change of the permitted uses in a zone resulting in the revocation of a prior approval as a whole. With respect to the Shipyard Associates project, the Appellate Division held that the application of the two ordinances would effectively constitute a complete revocation of Shipyard Associates' 2012 approval. The Appellate Division reasoned this result would be in direct conflict with the plain wording of

N.J.S.A 40:55D-52(a), which provides that the zoning requirements applicable to a preliminary approval shall not be changed for two years after the date on which the resolution of final approval is adopted.

This case has not been approved for publication; thus, its use in other cases is currently limited. However, the Appellate Division's ruling demonstrates recognition of the important protection against zoning changes afforded to developers under *N.J.S.A* 40:55D-52(a) and provides a degree of comfort that municipalities may not use the public health and safety exception in *N.J.S.A.* 40:55D-49(a) to erode such protection and retroactively apply land use ordinances to nullify a prior land use approval.

Should you have any questions concerning this decision or land use issues in general, please contact any of the attorneys listed in the sidebar.

Authors

Jennifer L. Solberg

Partner

Parsippany, NJ | (973) 966-8056

jsolberg@daypitney.com

Katharine A. Coffey

Partner

Parsippany, NJ | (973) 966-8323

kcoffey@daypitney.com

Peter J. Wolfson

Partner

Parsippany, NJ | (973) 966-8298

pwolfson@daypitney.com