

January 3, 2024

## Failure to Timely Join Applicants Shuts Objectors Out of Court

In deciding *53-55 E. Kinney, LLC v. The City of Newark Central Planning Board*, Docket No. A-4022-21 (Dec. 26, 2023, App. Div. 2023), the New Jersey Appellate Division found in favor of a planning board and developer, reaffirming three key principles for actions in lieu of prerogative writs challenging an approval of a land use application: (1) an applicant is a necessary indispensable party and should therefore be timely joined to the action; (2) the 45-day statute of limitations is important to maintain the finality of government actions and should not lightly be enlarged; and (3) a plaintiff has a high burden of proof when seeking to enlarge the 45-day limitations period.

AC and J Restoration Group Corp. (the developer) submitted an application for preliminary and final site plan approval (the application) to the City of Newark Central Planning Board (the board). The application sought variances as part of the development of its property on Mulberry Street in Newark (the property) as a nine-story, mixed-use building with retail space, community space and residential space. On August 17, 2020, after holding a hearing on the application with supporting testimony from a variety of professionals, the board approved the application; this approval was subsequently memorialized in a resolution.

On November 16, 2020, 45 days after notice of the approval was published in the newspaper, and therefore on the last day of the time to appeal, objector-plaintiffs (objector-plaintiffs) challenged the application's approval in an action in lieu of prerogative writs. Significantly, objector-plaintiffs named the board as a defendant but failed to name the developer. Objector-plaintiffs later sent an e-mail copy of the complaint to the board's attorney and copied the developer's attorney, but still did not attempt to join the developer as a party.

After months of dormancy in the action, the developer moved to intervene as a defendant and to dismiss the complaint for objector-plaintiffs' failure to timely join the developer as a necessary party. The trial court initially granted the developer's motion to intervene but denied the motion to dismiss, permitting objector-plaintiffs to attempt to remedy the issue. Accordingly, objector-plaintiffs moved to amend their complaint and enlarge the 45-day time limit within which a plaintiff must file an action in lieu of prerogative writs challenging the actions of a government body under Court Rule 4:69-6(b)(3). The developer cross-moved, again seeking to dismiss the complaint with prejudice. The trial court ultimately denied the motion to enlarge the 45-day time limit and granted the motion to dismiss.

On appeal before the Appellate Division, objector-plaintiffs argued, just as they had before the trial court, that the 45-day time limit should have been enlarged in the interest of justice as the proposed development would supposedly harm the public interest by providing insufficient parking, impacting the available parking in the area. In response, the developer emphasized objector-plaintiffs' failure to timely join the developer as a party even though, as the successful applicant, the developer was a necessary indispensable party to any actions challenging the application's approval. *Stokes v. Lawrence Twp.*, 111 N.J. Super. 134 (1970).

The Appellate Division was clear in its decision: The applicant is, unquestionably, a necessary indispensable party in an action in lieu of prerogative writs challenging the approval of a land use application. Objector-plaintiffs' failure to add the developer until after the 45-day time limit had lapsed (a full year later) made the action untimely absent a valid reason to enlarge the 45-day time limit.

While recognizing that there are limited exceptions in which it is appropriate to extend the 45-day limitations period, the Appellate Division went on to firmly reject the objector-plaintiffs' argument that the circumstances here fell into any of those exceptions. Specifically, while Rule 4:69-6(c) allows the 45-day time limit to be enlarged "in the interest of justice," the Appellate Division was not impressed by objector-plaintiffs' argument that the application presents a matter of public

importance due to the anticipated impact of the development on parking in the general area of the property. The Appellate Division quoted the trial court in noting that "[a] residential/commercial development project in an urban or suburban community is almost certain to raise issues concerning parking and the number of required spaces." Parking concerns of this nature, which are commonplace in most development applications, simply do not qualify as a matter of public importance sufficient to permit enlargement of the limitations period.

Further, the Appellate Division was unconvinced by objector-plaintiffs' arguments that the 45-day time limit should be enlarged because the complaint was timely filed against the board, and the developer was copied in a subsequent e-mail. The developer was an indispensable necessary party, and objector-plaintiffs could not overcome their initial failure to timely join it. The Appellate Division concluded its analysis by observing that the objector-plaintiffs' request to extend the limitations period would unquestionably serve to prejudice the developer.

Amid a statewide trend of objectors filing challenges of increasingly creative—and often dubious—claims in an attempt to halt or delay local development, *53-55 E. Kinney, LLC* reaffirms protections for the benefit of successful developers. The case serves to highlight that applicants must be included as parties in these challenges so they can protect their approval, and that these actions must be timely filed "to give an essential measure of repose to actions taken against public bodies." *Tri-State Ship Repair & Dry Dock Co. v. City of Perth Amboy*, 349 N.J. Super. 418, 424 (App. Div. 2002). *Kinney* also reminds both objectors and trial courts that the 45-day time limit to file actions challenging application approvals should not be enlarged unless a plaintiff can meet the very high burden of showing an enlargement is necessary in the "interest of justice," and that "interest of justice" does not include the commonplace impact of the development on the community. Overall, the decision strengthens New Jersey case law ensuring developers have rights in actions in lieu of prerogative writs challenging land use application approvals.

Should you have any questions concerning this decision or land use litigation in general, please contact the authors of this alert or any member of the Day Pitney real estate litigation team.

## Authors



**Erin Hodgson**  
Senior Associate

Parsippany, NJ | (973) 966-8157  
ehodgson@daypitney.com



**C. John DeSimone III**  
Partner

Parsippany, NJ | (973) 966-8299  
cjdesimone@daypitney.com



**Stephen R. Catanzaro**  
Partner

Parsippany, NJ | (973) 966-8205  
scatanzaro@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



**Craig M. Gianetti**  
**Partner**

Parsippany, NJ | (973) 966-8053  
cgianetti@daypitney.com