June 25, 2018

New Jersey Supreme Court Upholds Appellate Division Decision on "Time of Application" Rule

On June 20, the Supreme Court of New Jersey, in *Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Township of Franklin*, unanimously affirmed the Appellate Division and ruled that to trigger and gain the protections of the "time of application" rule, an applicant must submit an "application for development," which is defined in the Municipal Land Use Law (MLUL) to be "the application form and all accompanying documents required by ordinance for approval." N.J.S.A. 40:55D-3. Although an application need not be deemed complete, all checklist and/or ordinance submission requirements must be submitted with the application.

The "time of application" rule, N.J.S.A. 40:55D-10.5, provides that the regulations in effect on the date of submission of an "application for development" govern the review of that application. In other words, any change in regulations after the date of submission of an application for development has no effect on the pending application. The time of application rule replaced the then-existing "time of decision" rule, which required boards and reviewing courts to apply the regulations existing at the time of the land use application decision. The time of decision rule permitted municipalities to change the land use ordinances after an application was filed, prior to the land use decision being made.

At issue in *Dunbar Homes* was whether the applicant's submission constituted an "application for development." Franklin Township introduced an ordinance to modify the zoning on property Dunbar owned that would change multifamily from a conditional use to a non-permitted use. After receiving the notice of the proposed zone change, Dunbar filed a multifamily development application with the Zoning Board for a conditional use variance under N.J.S.A. 40:55D-70(d)(3) one day before the Township adopted the ordinance.

The zoning officer declared the application incomplete because the applicant failed to submit all application materials required by the checklist. Missing from the applicant's materials were the correct application fee, the required number of copies of the plan set and drainage report, and a sealed survey of the subject property. The matter was appealed to the Law Division on whether the applicant was protected by the time of application rule. The Law Division held that Dunbar submitted sufficient documentation for the Zoning Board to perform a substantive review of the application and that the time of application rule applied. The Appellate Division reversed the Law Division's decision, holding that based upon the MLUL definition for "application for development," submission of the application form and all accompanying documents required by ordinance for approval are necessary for the time of application rule to apply to protect the application from a change in regulations after the application is filed. Essentially, the Appellate Division held that though the application does not need to be deemed complete, the application needs to be complete.

The case was appealed to the Supreme Court and several interested parties participated as *amicus curiae*, including the New Jersey State Bar Association, NAIOP New Jersey Chapter, and the League of Municipalities.

The Supreme Court unanimously affirmed the Appellate Division and ruled that to benefit from the protection of the time of application rule, an applicant must submit the required information and documents listed in the ordinance or the checklist adopted pursuant to the ordinance. The Court agreed with the Appellate Division that the Law Division's "meaningful review" standard was "fatally imprecise."

The Court noted the following limits to determinations of whether an "application for development" was submitted: (1) an application is not rendered "incomplete" because a municipality requires "correction of any information found to be in error and submission of additional information not specified in the ordinance or any revisions to the accompanying documents"

pursuant to N.J.S.A. 40:55D-10.3; and (2) the applicant may seek waivers from the checklist and/or submission requirements if the information required is not pertinent. In the event waivers are requested and the remaining required materials are submitted at the same time, the applicant's submission provisionally triggers the time of application rule. If the waivers are denied, the application is deemed incomplete (and not protected by the time of application rule). That denial of the waivers is subject to review under the "arbitrary, capricious, and unreasonable" standard. The Court does not explicitly state the impact a waiver request decision has on the applicant's ability to gain the protection of the time of application rule.

The Court's decision is significant in its impact on developers. The decision makes the municipality the gatekeeper for determining whether an application is protected under the time of application rule—the proverbial fox guarding the hen house. Each municipality is permitted to determine the precise contents of an "application for development" through the ordinances and checklists the municipality adopts. There is no set standard of what qualifies as an "application for development" across all municipalities. Additionally, an applicant must effectively submit a complete application as determined by the appropriate local official, a determination that will be viewed under an "arbitrary, capricious, or unreasonable" standard by a court.

Though the decision is disappointing to developers and applicant attorneys, the underlying protection of the time of application rule remains—municipalities will not be able to change the zoning of a pending application to stop a project.

This alert is only meant as a summary of the case and is not intended as legal advice. Any inquiries concerning the *Dunbar* case or time of application rule should be directed to any of Day Pitney's land use attorneys listed in the sidebar.

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