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Time of Application Rule Does Not Apply to Bar a Permitted Use

In a case of first impression, the New Jersey Superior Court, Appellate Division, in *Jai Sai Ram, LLC v. The Planning/Zoning Board of the Borough of South Toms River et al*, Docket No. A-2075-014T2, a decision issued on July 27, 2016, which has been approved for publication and will therefore be precedential, held that the Time of Application Rule does not apply to bar a permitted use or require an applicant to re-file a development application in order to avail itself of more recent and more favorable zoning. The Time of Application Rule (N.J.S.A. 40:55D-10.5) was enacted to statutorily repeal the common law Time of Decision Rule. Pursuant to the Time of Decision Rule, a decision concerning a land use application would be based on the municipal ordinance as it existed at the time the application or appeal was being decided (as opposed to the time the application was made). The Time of Decision Rule therefore permitted municipalities to effectively nullify a providently filed challenge to a zoning or planning denial by changing the applicable municipal ordinances while the challenge was being litigated, or even while an application was pending. In such cases, the ordinance in effect at the time of the decision on the application, rather than at the time the application was made, governed the application. The legislature enacted the Time of Application Rule because it was "concerned about situations where a developer would spend time and money pursuing an application, only to have a municipality change the zoning to the developer's detriment while the application was pending."

In the *Jai Sai Ram* case, the applicant applied for a use variance for a gas station and convenience store at a time when neither was a permitted use in the zone. The defendant Planning/Zoning Board granted the application. Following the approval, the plaintiff, Jai Sai Ram, LLC, an objector, challenged the grant of a use variance by filing a complaint in lieu of prerogative writs with the Law Division. The Law Division affirmed the Board's approval, and plaintiff appealed the Law Division's decision to the Appellate Division. While the appeal was pending in the Appellate Division, the municipality amended its zoning ordinance to specifically designate gas stations with accompanying convenience stores as permitted uses in the respective zone. The plaintiff argued that under the Time of Application Rule, the use in question was a non-permitted use, and therefore, the Appellate Division had to apply the zoning regimen in existence at the time the application was made, rather than the new permissive zoning regimen.

The Appellate Division concluded that "while the literal terms of the statute could be construed to prevent a favorable land use amendment from applying to a pending application, that reading would be completely contrary to its purpose." The Court concluded that the Time of Application Rule "does not apply where the local zoning is amended to specifically permit the use which is the subject of a variance application." In so doing, the Court reasoned that "the variance is no longer necessary, and it would be absurd, as well as contrary to the Legislature's purpose, to hold the applicant to the less favorable standards of the pre-existing ordinance." Moreover, the Appellate Division concluded that the appeal became moot by virtue of the amendment specifically permitting the use.

The import of this decision is significant in that the Time of Application Rule cannot be turned on its head to prohibit a requested use which is later made conforming by municipal action during the pendency of the application process or subsequent litigation. It also clarifies that an applicant need not re-file its application in order to qualify for more favorable zoning adopted after the original application had been filed.

Authors



Christopher John Stracco
Of Counsel

Parsippany, NJ | (973) 966-8220

cstracco@daypitney.com



Craig M. Gianetti
Partner

Parsippany, NJ | (973) 966-8053

cgianetti@daypitney.com



Katharine A. Coffey
Partner

Parsippany, NJ | (973) 966-8323

kcoffey@daypitney.com