

Development Applications Must Include All Checklist Items to Receive Protection from Changes in Development Regulations, New Jersey Supreme Court Rules

Howard D. Geneslaw

In a recent opinion, the New Jersey Supreme Court ruled that to receive protection from changes in development regulations under the “time of application” rule, a development application must comply with the definition of “application for development” in the Municipal Land Use Law. The author of this article discusses the decision and its implications.

The New Jersey Supreme Court, in a recent unanimous opinion, ruled that to receive protection from changes in development regulations under the “time of application” rule, a development application must comply with the definition of “application for development” in the Municipal Land Use Law (“MLUL”), meaning that it must include all of the items required by the submission checklist which the municipality has adopted by ordinance. The case, *Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Township of Franklin, et al.*, marks the first time the court has interpreted the “time of application” rule. Its decision will impact the review of development applications throughout the state.

Background

The MLUL’s “time of application” rule, set forth at N.J.S.A. 40:55D-10.5, provides that the “development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development.” It has the effect of locking in the zoning requirements as of the date the application is filed. This reversed the longstanding “time of decision” rule whereby municipalities could change the development regulations at any time prior to the approval of an application for development, even where the change was enacted during a public hearing process

*Howard D. Geneslaw is a director in the Real Property Department at Gibbons P.C. He argued the *Dunbar Homes* case in the New Jersey Supreme Court for *amicus curiae* New Jersey State Bar Association, and was the lead author of its brief. He was assisted in authoring the brief by Gibbons attorneys Cameron W. MacLeod of the Real Property Department and Michael D. DeLoreto of the Government & Regulatory Affairs Department. Mr. Geneslaw may be reached at hgeneslaw@gibbonslaw.com.

specifically for the purpose of derailing a pending development application. Thus, the “time of application” rule provides developers and property owners with certainty as to the development regulations which govern their projects. The question presented to the New Jersey Supreme Court centered on what an applicant must submit in order to constitute an “application for development” which triggers the protection of the “time of application” rule.

Dunbar Homes

In *Dunbar Homes*, plaintiff filed an application seeking a conditional use variance pursuant to N.J.S.A. 40:55D-70(d)(3) and site plan approval to construct garden apartments. A conditional use variance was required because the applicant could not meet the minimum lot size requirement. Dunbar Homes’ initial submission was missing documents explicitly required by the Township’s Zoning and Subdivision Ordinance (the “Ordinance”) which sets forth the application requirements for such an application. The day after submission of the application, the Township adopted an ordinance (which had been previously introduced, following a comprehensive Township-wide review of the Ordinance) which deleted garden apartments as a conditional use and rendered them a non-permitted use in the zoning district in which Dunbar Homes’ property was located (the “Ordinance Amendment”). In fact, it was the introduction of this ordinance which caused Dunbar Homes to quickly prepare an application for development in order to file it before the Ordinance Amendment was enacted, and thereby seek to avail itself of the protection afforded by the “time of application” rule and proceed under the development regulations as they existed prior to the Ordinance Amendment.

Two days after the Ordinance Amendment took effect, the Township’s Zoning Officer notified Dunbar Homes that (i) its application was not complete, and (ii) pursuant to the Ordinance Amendment, the project no longer required merely a conditional use variance, but now required a d(1) use variance, governed by the more stringent standards set forth in N.J.S.A. 40:55D-70(d)(1). Dunbar Homes appealed the Zoning Officer’s determination to the Zoning Board of Adjustment. After a hearing, during which Dunbar Homes introduced expert testimony concerning the legislative history of the “time of application” rule in support of its position that its application was adequate to trigger protection from the Ordinance Amendment, the Zoning Board of Adjustment affirmed the Zoning Officer’s determination that the application was incomplete and that it was not afforded protection under the “time of application” rule.

Trial Court Decision

Dunbar Homes filed a complaint in lieu of prerogative writ challenging the Zoning Board of Adjustment’s review and affirmation of the Zoning Officer’s decision. The trial court reversed the Zoning Board’s determination. Finding that the application checklists had not been adopted by ordinance, the trial judge applied a standard whereby the “time of application” rule would apply when the materials submitted were sufficient to allow the board to commence a “meaningful review.” The trial judge concluded that the applicant’s submission was sufficient to meet this standard, and held that the “time of application” rule applied to protect the project from the Ordinance Amendment.

Appellate Division Decision

The Township appealed, arguing that the trial court (i) erred by applying the “time of application” rule to Dunbar Homes’ submission because the application as submitted failed to include all documents required by the Ordinance, and (ii) erred in finding that the application checklists were not adopted by ordinance. The Appellate Division reversed the trial court’s decision, finding the trial court’s “meaningful review” standard to be “fatally imprecise.” It declared in a 2017 published decision¹ that the MLUL definition of “application for development” in N.J.S.A. 40:55D-3 is the benchmark for this inquiry, and dictates that submission of “the application form and all accompanying documents required by ordinance for approval”—i.e., the “documents [which] are specifically required by the” applicable Ordinance—constitute the threshold to trigger the “time of application” rule. The court stressed that a municipal zoning officer’s determination that a submission falls short of an “application for development,” as defined in N.J.S.A. 40:55D-3, remains subject to review under the arbitrary, capricious, and unreasonable standard. Here, because Dunbar Homes’ application omitted documents explicitly required by the Ordinance, the Zoning Board’s determination that the “time of application” rule did not apply to the application was not arbitrary, capricious, or unreasonable. Finally, the Appellate Division did not find it necessary to decide whether the application checklists were adopted by ordinance.

New Jersey Supreme Court Decision

Dunbar Homes petitioned the New Jersey Supreme Court to review the Appellate Division’s decision, and the court agreed to do so.

Due to the significance of the issue, six parties sought and were granted status as *amicus curiae*.

Aligned with the plaintiff Dunbar Homes in seeking reversal of the Appellate Division’s decision were:

- the New Jersey Builders Association;
- NAIOP New Jersey Chapter;
- the International Council of Shopping Centers; and
- the New Jersey State Bar Association.

Aligned with defendants the Zoning Board of Adjustment of Franklin Township and Franklin Township itself in seeking affirmation of the Appellate Division’s decision were:

- the New Jersey State League of Municipalities; and
- the New Jersey Institute of Local Government Attorneys.

The New Jersey Supreme Court concurred with the Appellate Division’s conclusion that the trial court’s “meaningful review” standard was “fatally imprecise.” It found that the application requirements set forth in the Ordinance for the type of application in question functioned as a checklist, and ruled that an applicant must submit all of the information and documents so set forth in order to be afforded protection under the “time of application” rule. In this instance, the applicant had not submitted certain of those items and did not request submission waivers. Although not addressed in detail in the court’s opinion, Dunbar Homes contended that the Township relied on an administrative checklist, so there

was a dispute as to whether there existed an applicable checklist adopted by ordinance. In any event, the court ruled that the Zoning Officer properly determined the application to be “incomplete” and that the protection of the “time of application” rule therefore did not apply. Hence, Dunbar Homes needed the more stringent d(1) variance to authorize a use not permitted in the zone, rather than the more lenient d(3) variance to authorize deviation from one of the conditions applicable to a conditional use.

However, the court added two caveats which it described as “important practical limits to Board determinations based on an applicant’s failure to include all required materials,” as follows:

- (1) “[A]n 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 in the accompanying documents’ ” pursuant to N.J.S.A. 40:55D-10.3. Presumably this means that the “time of application” rule would still apply where the application is complete and the reviewing board seeks more information, although the court did not explicitly say so.
- (2) The applicant may seek submission waivers from information or documents specified in the checklist adopted by ordinance, in which case “[t]he applicant’s submission will provisionally trigger the [“time of application” rule] if a waiver request for one or more items accompanies all other required materials.” If the waiver is granted, the

application will be deemed complete (which should mean that the “time of application” rule will apply, although the court did not explicitly say so), but if the waiver is denied, that decision will be subject to review under the arbitrary, capricious and unreasonable standard (and presumably the “time of application” rule will not apply, although the court did not explicitly say that either).

The court’s acknowledgment that requests for submission waivers will not preclude reliance on the “time of application” rule is important because the MLUL does not specifically address that situation. However, the practical result is that where an application for development seeks one or more submission waivers, the determination as to whether the “time of application” rule applies ends up being vested in the municipal employee or board responsible for acting on waiver requests, which potentially allows denial of a waiver request as a means to block a project by depriving it of the protection afforded by the “time of application” rule. As the court noted, such a denial is subject to review under the arbitrary, capricious and unreasonable standard. That is a small comfort to applicants, since the New Jersey Supreme Court’s decision essentially allows an unelected person or board to derail an application for development through denial of a submission waiver. In some respects, this arguably is worse than the ordinance changes which were permitted under the prior “time of decision” rule, because they at least ensured some level of accountability since an ordinance change can be implemented only after a public hearing, whereas denial of a waiver request does not require a public hearing.

Takeaways

The New Jersey Supreme Court's decision in *Dunbar Homes* provides clarity concerning what must be submitted to receive the protection from changes in development regulations afforded by the "time of application" rule. Its opinion relies on legislative intent that the MLUL provide for uniformity and predictability in land use decisions. In doing so, the court gave much less weight to the legislative intent of the "time of application" rule itself and the fact that the adopted version references an "application for development," not a "*complete* application for development" as earlier versions of the legislation had done. The legislative history of the "time of application" rule reveals that an application for development need not be deemed "complete" to be afforded protection from changes in development regulations, which the trial and appellate courts recognized. However, given the court's ruling that to receive protection, an application must include all of the items required by the submission checklist which the municipality has adopted by ordinance, the application must *be complete* (or accompanied by submission waiver requests) even if not yet officially *determined to be complete* by the Zoning Officer. This is a technical but important distinction, because the "time of application" rule was intended to protect developers from changes in development regulations, irrespective of whether the application was officially deemed complete or contained each and every checklist specified on the checklist adopted by ordinance.

By effectively requiring the submission of a complete application, subject to a municipality's discretionary action to approve or deny waiver requests, the court's decision substantially diminishes the protections from changes in development regulations which applicants thought it provided. Thus, the ultimate solution may be legislative if the goal is to provide the protection of the "time of application" rule to applications for development which do not include all of the information and documents required by checklist. Meanwhile, applicants would be well served to carefully review the municipality's ordinance and checklists and to submit all required items in the specified quantities. Where there are disconnects between the municipal ordinance and the checklists, applicants should comply with both the ordinance and the checklists as closely as possible, to avoid any issues regarding completeness. If any items cannot be submitted, waiver requests setting forth written justification in support of granting them should accompany the application. Finally, applicants may wish to return to the practice some employed prior to enactment of the "time of application" rule of monitoring public notices and meeting agendas to see if any zoning changes are in the works.

NOTE:

¹*Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Township of Franklin*, 448 N.J. Super. 583, 154 A.3d 710 (App. Div. 2017), certification granted, 233 N.J. 127, 182 A.3d 1290 (2017) and judgment aff'd, 2018 WL 3041000 (N.J. 2018).