NEW JERSEY LAWYER

Volume 12, Number 37 The Weekly Newspaper September 22, 2003 $5

After *D.L. Holdings*

Plan approvals may expire when local zoning changes

By Howard D. Geneslaw

In the years since the New Jersey Supreme Court decided *Palatine v. Planning Bd. of Tp. of Montville*, 133 N.J. 546, which pertained to the rights conferred by the grant of preliminary site plan (and, implicitly, preliminary subdivision) approval, questions have arisen regarding expiration of protection periods. Land use practitioners understood it to mean that only the statutory protection from subsequent zone changes expires, not the approval itself.

It was thought, based on seemingly clear and unambiguous language in *Palatine I*, that the approval remained valid and enforceable after the statutory protective period expired, thereby allowing a developer to proceed with the approved project, so long as the zoning remained unchanged.

However, in a substantial departure from this accepted understanding, the New Jersey Supreme Court this year, in *D.L. Real Estate Holdings, L.L.C. v. Point Pleasant Beach Planning Board*, 176 N.J. 126, disapproved its own earlier language and held a municipal ordinance, under which preliminary approval expires if the developer does not submit for final approval within a specified period of time, is valid and well within the authority conferred by the enabling legislation.

To understand the significance of *D.L.* and the technical, but determinative, distinction it draws, one must consider both the relevant statutory language, and the holding of *Palatine I.*

Protective Period

The Municipal Land Use Law (MLUL) sets forth certain rights that accrue to a developer upon the grant of preliminary subdivision and site plan approval. These include protection from ordinance changes unrelated to public health and safety in the "general terms and conditions on which preliminary approval was granted." N.J.S.A. 40:55D-49a.

This effectively protects the developer for three years from zoning changes that, for example, prohibit the approved use or alter the minimum lot dimensions or building setbacks. Accordingly, the statutory protective period confers significant and valuable vested rights in the developer.

The developer is entitled to final approval provided that (a) all conditions of preliminary approval have been met, and (b) the application for final approval conforms to the standards established by ordinance for final approval.

The MLUL also provides for the extension of preliminary approval for at least one year each, but not to exceed a total extension of two years. Therefore, a developer may be entitled to up to five years of protection from zoning changes following preliminary approval.

The statutory language at issue in both *Palatine I* and *D.L.* is set forth in N.J.S.A. 40:55D-49b, which says "the applicant may submit for final approval on or before the expiration date of preliminary approval the whole or a section or sections of the preliminary subdivision plat or site plan, as the case may be." In *Palatine I*, the question was whether the grant of preliminary approval, followed by construction of only a part of the project, conferred protection to the developer from zoning changes that entitled it to final approval, despite expiration of the statutory protective period.

Palatine I

Palatine I involved a proposed 65,000-square-foot, two-story office building consisting of two wings that were to be connected by a central core. The planning board granted preliminary approval and two extensions. When it granted the second extension, the board warned no further ones could be requested. During the period of the second extension, the developer sought and obtained a construction permit that stated, "If construction does not commence within one year of date of issuance, or if construction ceases for a period of six months, this permit is void."

The developer then built the first wing of the building and poured a concrete slab for the foundation of the second wing. However, due to the condition of the real estate market, the developer did not build the second wing.

Meanwhile, the township amended its zoning ordinance to substantially reduce the size of construction the developer could build on the property.

Upon completion of the first wing, the developer applied for a certificate of occupancy for the first wing only, and for final site plan approval for the entire complex. The board approved the final site plan and the issuance of a certificate of occupancy for the first wing and the core only, but denied final site plan approval for the second wing, saying the project would have to comply with the intervening zoning amendment, since the final extension was no longer in effect.

The developer commenced an action in lieu of prerogative writs seeking a declaratory judgement that it was entitled to final site plan approval for the entire project and that it could complete the second wing at its leisure and in accordance with the original zoning requirements.

Protected or not?

The question to the Supreme Court was whether preliminary site plan approval protected the developer from the intervening zoning amendment. The court considered the analysis set forth in the Cox treatise (William M. Cox of the New Jersey Zoning and Land Use Administration regarding the related subject of the rights conferred by final site plan approval.)

It reads: "There is a common misapprehension that a site plan 'expires' at the end of the two-year period set forth in N.J.S. 40:55D-52a. The statute does not so provide; the site plan is given protection, or vested rights, against a change in zoning for said period, but if at the expiration of the two years, there has been no change in zoning, the site plan continues to be in full force and effect until such time as the developer determines to proceed with the development."

The court reviewed the Cox language and explained that if "there has been a change in the zoning, the final site plan approval will not insulate the site plan from the application of the new zoning laws after the two-year period of protection expires."

The court concluded the same reasoning should apply to preliminary approval, subject to the differing statutory period of protection: "The approval itself is valid indefinitely, but its effect of insulating the holder from changes in the zoning laws is limited to the specified term of years. If the applicable zoning laws have not changed, the holder of preliminary approval may continue past the five-year period without obtaining further approvals. However, if the zoning laws have changed, then after the five-year period of protection has elapsed, the municipality may enforce those new regulations against the holder of preliminary approval."

On this basis, the court concluded that when the developer applied for final approval for the proposed second wing, "it was no longer protected by the preliminary site plan approval from changes in the applicable zoning laws."

Following this ruling in *Palatine I*, most land use practitioners advised clients that both preliminary and final approval remained valid indefinitely, but that the statutory protection from zoning changes expired in accordance with the statutory time periods applicable to preliminary and final approval, respectively.

What if ...

Palatine I did not address whether the result would be the same if a developer – in a municipality that requires final approval *prior to* commencement of construction – failed to obtain final approval before the protective period applicable to preliminary approval had expired.

Nevertheless, *Palatine I* was interpreted by land use practitioners to mean the approval itself would remain valid, unless the zoning changed – irrespective of whether the municipality authorized construction on preliminary or final approval. Left unresolved, however, was what effect municipal ordinances containing a sunset

provision terminating the approval would have and whether such ordinances were *ultra vires.*

Cox interpreted *Palatine I* narrowly, concluding that in municipalities requiring final approval *prior to* commencement of construction, preliminary approval would lapse upon termination of the statutory protective period, even in absence of a municipal ordinance so providing: "[I]n those municipalities which improperly by ordinance permit the holder of a preliminary site plan approval to obtain building permits, even after the last period of extension has elapsed, the preliminary approval itself may not lapse. What has ended is the developer's protection from the non-safety-related ordinance changes. The developer may still build in accordance with the approval unless and until the project has become impermissible in some regard because of zoning law change.

"In those municipalities that require final approval prior to issuance of building permits, however, failure to obtain final approval within three years after obtaining preliminary approval, or within the period of any valid extensions approved by the board thereafter, would result in the lapse of the preliminary approval and, therefore, the inability of the developer to obtain a final approval because an application for same was not submitted within the time (three years plus periods of valid extensions) required by the statute."

D.L. Decision

The Supreme Court adopted this view in *D.L.*, at least when a municipal ordinance requires submission of an application for final approval prior to expiration of preliminary approval. The *D.L.* court characterized the language in *Palatine I*, declaring that approvals remain valid indefinitely as *dicta*, and expressly disapproved that language to the extent it supports a conclusion that a municipality may not require a developer to file for final approval within the statutory time period applicable to preliminary approval.

D.L. involved the grant of preliminary subdivision approval in September 1994 for a 14-lot subdivision. The municipal ordinance provided that final approval required submission of a final plat within three years from preliminary approval, subject to any extensions granted. Some four years later, without seeking any further approvals or extensions, the applicant sold the property to D.L. Real Estate Holdings.

One year after acquiring the property, D.L. applied for final subdivision approval. The planning board, based on the requirement to submit a final plat within three years of preliminary approval, denied the application. D.L. filed an action in lieu of prerogative writs.

The trial court dismissed the complaint, finding the ordinance was not inconsistent with the MLUL and that it protected the municipality from revival of dormant applications. The Appellate Division reversed, relying on *Palatine I* and finding the MLUL does not limit the duration of preliminary approval and that the ordinance was inconsistent with it. The Supreme Court, in an opinion by Justice Jaynee LaVecchia, reversed the Appellate Division, thereby upholding the planning board's denial.

The court's analysis centered on the liberal construction of legislative delegations of authority in favor of municipalities that the New Jersey constitution guarantees.

For example, the court pointed out that *Ramsey Associates, Inc. v. Bd. of Adjustment of Bor. of Bernardsville*, 119 N.J. Super. 131, a pre-MLUL decision, upheld a municipal requirement that a new application for a building permit or variance be filed if construction does not commence within the time specified in the ordinance. The *D.L.* court was not at all troubled by the lack of any affirmative provision in the MLUL authorizing municipalites to terminate preliminary approval if not perfected within a specified time. To the contrary, it found such a provision "well within the borough's express and fairly implied delegated authority."

Expiration date

The *D.L.* court also found use of the phrase "expiration date" in the N.J.S.A. 40:55D-49b to be persuasive, surmising the legislature "may well have intended that preliminary approval have a specified time period that 'expires' upon the conclusion of the three years plus two one-year extensions."

Thus, the court found the ordinance was not inconsistent with the MLUL, which "does not confer on preliminary approval a 'right' to perpetual life absent an adverse zoning change, thereby preventing a municipality from setting a time limit for final approval submission." Finally, the court concluded the ordinance "tracks the same protections expressly afforded to a developer under the statute's conferral of rights" and "[n]othing in the MLUL requires a municipality to go further."

In dissent, Justice Peter Verniero, joined by Justices Virginia A. Long and Barry T. Albin, argued muncipalities cannot place a limit on the duration of approval in the absence of an express grant of statutory authority. In support of this conclusion, the dissent focused on one of the principal statutory objectives of the MLUL – statewide uniformity of regulation and the extent to which the majority's opinion undermined that objective since each municipality would be free to impose its own local time limitations so long as they did not diminish the rights expressly provided by the MLUL.

The dissent also pointed out municipalities already have the ability to effectively terminate an approval by simply changing the applicable zoning requirements so the project could not proceed following expiration of the statutory protective period unless it is brought into comformity with the zoning changes.

According to the dissent, the borough's failure to change the zoning ordinance after the grant of preliminary approval and prior to the submission of D.L.'s application for final approval created a presumption that it was satisfied with the development in the area. It also amounted to the type of arbitrariness that the MLUL prohibits, since the only reason for rescission of the approval was the deadline had passed, not any expressed view that the project was no longer appropriate or that it was inconsistent with the zoning ordinance or master plan.

Implications

Although the *D.L.* court characterized as *dicta* its conclusion in *Palatine I* that only the statutory protective period expires, not the approvals themselves, the widely held belief among practitioners in the intervening decade embraced this as a well-established rule of law.

So, too, did the Appellate Division, both in *D.L.* and in *Builders League of South Jersey v. Burlington County Planning Bd.*, 353 N.J. Super. 4, which held a limit on the duration of approvals granted by a county planning board was *ultra vires* since authority to impose such a restriction was not among the specific powers delegated to county planning boards in the County Planning Act.

In reaching this conclusion, the Appellate Divison explained, "Because the MLUL does not allow municipal approvals to expire, this provides additional suport for our conclusion that, absent explicit authority, the County Planning Act does not give county planning boards the right to place expirations in its approvals." Although *D.L.* does not reference or expressly disapprove *Builders League*, clearly its validity is now in serious question.

Finally, the court did not address the situation, when an ordinance provides for expiration of final approval upon the expiration of MLUL's two-year statutory protective period and any extensions.

Any number of municipalities have adopted ordinances that require commencement of construction within a specified period following initial approval, typically within the two-year protective period, plus any extensions. Although not specifically addressed by the court, it would seem based on the liberal construction in favor of the municipality given in *D.L.*, together with the approving reference to *Ramsey Associates* (which upheld such limits on variances and building permits), that such ordinance limitations on final approval ultimately also will be upheld.

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The holding in *D.L.* is perhaps not entirely suprising based on a close reading of N.J.S.A. 40:55D-49b, and in view of *Ramsey Associates* and *Sun Oil Co. v. Bor. of Bradley Beach*, 136 N.J.L. 307, a decision not cited in *D.L.*, in which a time limit for commencement of construction was held to be reasonable.

What is surprising, however, is that the court spoke as broadly as it did in *Palatine I* only to effectively reverse itself in *D.L.* The result is that any number of developers may find themselves with projects having approvals that they thought were valid indefinitely, but may now find have expired under municipal ordinances, even if no change in the applicable zoning regulations has occurred.

D.L. represents a substantial departure from what many – perhaps most – land use practitioners believed to be the well-established law following *Palatine I.* In its wake, developers would be well-advised to review the ordinances in every municipality where they do business – particularly those that require final approval prior to issuance of construction permits – both before they secure approvals and as those approvals are nearing the end of their statutory protective periods. Municipalities may view *D.L.* as a sword that empowers them to effectively halt projects that are no longer subject to statutory protection although, as the dissent in *D.L.* points out, they have always been able to do so simply by changing the applicable zoning requirements.

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