

NJ Court Rules Incomplete Development Application Not Protected by Time of Application Rule



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The New Jersey Legislature amended the Municipal Land Use Law (MLUL) in 2011 to replace the former “time of decision rule” with what is commonly referred to as the “time of application rule” (the TOA Rule). N.J.S.A. 40:55D-10.5. The TOA Rule provides that development regulations in effect on the date of submission of an application shall govern the review of the application, notwithstanding the subsequent adoption of a new zoning ordinance by the municipality. But must the application be “complete” upon submission to trigger the protections of the TOA Rule? On June 20, the New Jersey Supreme Court in *Dunbar Homes, Inc. v. Zoning Board of Adjustment of Franklin Township* ruled that the

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answer is “yes.” The effect of the *Dunbar* decision is that the determination of whether a submitted development application receives the benefit of the TOA Rule is now left to the discretion of municipal officials and boards — an outcome the TOA Rule was intended to avoid.

Background

Dunbar involved a 276-unit garden apartment complex owned by Dunbar Homes, Inc. in the general business zone (GB-Zone) of Franklin Township. Dunbar sought approval to develop an additional 55 apartments, which at the time was a permitted conditional use in the GB-Zone. As such, construction of the apartments required submitting an application for site plan approval and a deviation from a conditional use standard (or “d(3)”) variance.

On May 23, 2013, the municipality introduced an ordinance that eliminated garden apartments as a permitted conditional use in the GB-Zone. The ordinance was adopted on July 16, 2013, and became effective on August 5, 2013. One day before the new ordinance was adopted, Dunbar submitted an application for site plan approval and a (d) (3) variance. On August 7, 2013, two days after the ordinance went into effect, the zoning officer notified Dunbar that its application was incomplete pursuant to the new ordinance and provided a list of items needed for completeness. In addition, Dunbar was told it had to apply for a use variance because garden apartments were no longer permitted in the GB-Zone.

On appeal to the zoning board, Dunbar argued that its application was complete upon submission and was therefore protected under the TOA Rule. Dunbar proffered expert testimony that, while the application lacked some items in the checklist ordinance, the application was still sufficient to receive the benefit of the TOA Rule. The zoning board denied the appeal.

Dunbar filed suit, and the trial court reversed the board’s decision, finding that Dunbar submitted enough information to provide for a meaningful review of the application and therefore was protected by the TOA Rule. The municipality appealed the lower court’s decision, and the Appellate Division reversed. The New Jersey Supreme Court ultimately took up the question of whether an incomplete application triggers the TOA Rule’s protections.

New Jersey Supreme Court Ruling

Before the adoption of the TOA Rule, the time of decision rule was the governing law in New Jersey. That rule required zoning boards and reviewing courts to apply the ordinance in effect at the time of their decision. Under the old rule, municipalities were free to block a proposed development by amending zoning ordinances after an application had been filed, even in direct response to the application. In order to prevent municipalities from responding to development applications by changing their ordinances to frustrate a project, the TOA Rule was enacted.

In *Dunbar*, however, the court held that an application for development must contain the required information and documents listed in the municipal ordinance to benefit from the TOA Rule's protections. This means that an application is incomplete upon submission if it lacks any of the documentation required by the ordinance. The court reasoned that the terms used in the TOA Rule are to be construed in accordance with the definitions of the MLUL. Therefore, the term "application for development" in the TOA Rule must be interpreted to mean "the application form and all accompanying documents required by ordinance." N.J.S.A. 40:55D-3. In the court's view, this definition provides a clear and objective standard for advancing the MLUL's goal of statewide consistency and uniformity in land use decisions.

The court went on to indicate that municipalities must be given discretion in making determinations as to the precise contents of an application for development. However, the court did indicate the need for some practical limitations on these determinations based on an application's failure to include all of the required materials.

First, an application is not "incomplete" based on a municipality's requiring a "correction of any information found to be in error and submission of additional information". N.J.S.A. 40:55D-3. Second, if the information that is required by the ordinance is not pertinent, the applicant may request a waiver. *Id.* Submission of an application will provisionally trigger the TOA Rule if a waiver request for one or more items accompanies all other required materials. If the board grants the waiver, the application will be deemed complete (in which case the TOA Rule would be triggered). On the other hand, if the board denies the waiver, its decision will be subject to review (and presumably the application would not have the protection of the TOA Rule).

In applying the above analysis to *Dunbar's* application, the court explained that the municipal ordinance contained a list of the information and materials required for site

plan and variance applications. Dunbar was notified that its application did not include “all accompanying documents required by ordinance” and was thus “incomplete.” The court further noted that, because the application was incomplete and no waiver was sought by Dunbar, the application could not benefit from the TOA Rule. The court concluded that Dunbar’s application was properly subjected to the new zoning ordinance that prohibited the proposed garden apartment use.

Implications

While the court’s opinion relies on the legislative intent of the MLUL to promote statewide consistency and uniformity, it essentially ignores the TOA Rule’s legislative history, which included removing the word “complete” from the final text of the 2011 bill so as not to make the triggering of the TOA Rule contingent on the filing of a “complete” application for development. A legislative remedy is clearly needed to carry out the original intent of the TOA Rule.

Until that happens, in light of *Dunbar*, developers will be faced with the ongoing struggle with municipalities over whether or not their filed applications are complete and can receive the benefits of the TOA Rule. Accordingly, extra diligence is required to ensure all the information set forth on the adopted municipal checklist is provided or that specific submission waivers are sought for any items not included. However, even then, a municipality can deny the waiver request, making the application “incomplete” and subject to any new zoning regulations. A developer’s only recourse is to appeal the waiver denial in hopes of eventually gaining the protections of the TOA Rule. Given the uncertainty that now surrounds the application of the TOA Rule, developers are advised to consult with their legal counsel.