

IN PRACTICE

LAND USE

Legislature Revises the Time of Decision Rule for Land Development Applications

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On May 5, Gov. Chris Christie signed into law An Act Concerning the Review and Approval of Applications for Development and Supplementing P.L. 1975, c.291 (c.40:55D-1 et seq.), P.L. 2010, ch. 9, (Chapter 9). This act, which is effective on May 5, 2011, modifies the controversial “time of decision” rule. It will require land use boards and the courts to review applications for development in accordance with the municipal land use regulations that were in effect when the application was filed, instead of any regulations that may be adopted after the application’s filing date.

Under the time of decision rule, the most recent municipal ordinance controls a land use board’s review of a development application. A municipality may therefore change its zoning ordinance after an application has been filed, while the application is pending before a board, and even after a building permit has been issued, as long as the applicant has not substantially relied upon the building permit. This is

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so even where the municipality amends its zoning ordinance in direct response to the application. *Burcam Corp. v. Planning Bd. Tp. of Medford*, 168 N.J. Super. 508, 512 (App. Div. 1979). The rule also applies when the courts review a local land use board’s decision on an application for development. The courts traced this rule back to a pre-municipal land use law decision of the old Supreme Court, *Rohrs v. Zabriskie*, 102 N.J.L. 473 (Sup. Ct. 1926). See David J. Frizell, New Jersey Practice Series, Volume 36, *Land Use Law*, 22.9 (3d ed. 2005).

The New Jersey Supreme Court reaffirmed this rule in *Manalapan Realty v. Township Committee*, 140 N.J. 366 (1995). The Court upheld zoning ordinance amendments that the municipality adopted while an application was pending for site plan approval that included a Home Depot store. The Court held that a zoning ordinance amendment is a legislative act that may be adopted in response to objections to a proposed use of land as long as the amendment is consistent with the Municipal Land Use Law. Consequently, the court concluded that “even if Home Depot was a permitted use under the prior ordinance, the Township was free to change the ordinance in direct response to [the] site-

plan application that included Home Depot as an anchor tenant.” The Appellate Division also applied this rule to invalidate a board’s vote approving an application before a new zoning ordinance’s effective date, when the board’s memorializing resolution was adopted after the ordinance went into effect. *Maragliano v. Land Use Bd.*, 403 N.J. Super. 80 (App. Div. 2008), cert. denied, 197 N.J. 476 (2009).

Therefore, a municipal governing body could adopt a zoning ordinance that it determined was necessary because a development application has called to its attention the legitimate need for the zoning ordinance amendment, and even if the proposed development no longer will be a permitted use. The courts recognized two exceptions to the rule. One applied if the applicant had acquired a vested right, and the other if the municipality was equitably estopped from enforcing the ordinance.

Critics of the rule have for a number of years been calling for reform legislation adopting a time of application rule. A bill to modify the rule, known as *S-1099* and *A-3366*, was introduced in March 2000. As originally proposed, the bill would have applied to all development applications when they were deemed to be complete. A revised ver-

sion of the bill was reported by the Senate Community and Urban Affairs Committee on June 11, 2001. The revised bill made two major changes: (1) it would have applied the time of application rule only to applications that fully conformed with all zoning regulations that were in effect when the application was deemed complete, and (2) it would have taken effect on the first day of the sixth year after its enactment, or on the effective date of an ordinance amending a municipality's zoning ordinance following the next master plan revision following the enactment of the statute.

Chapter 9 will be broader in its effect than the earlier bill would have been. Section 1 states:

Notwithstanding any provision of law to the contrary, those 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. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.

Section 2 adds that the "act shall take effect one year next following enactment."

Accordingly, beginning May 5, 2011, developers will be protected from changes in development regulations that are adopted after an application for development has been submitted, and before the application is deemed complete pursuant to N.J.S.A. 40:55D-10.3. The new act affords municipalities one year to revise and update their land development regulations. The bill was sponsored by members of both parties in both

houses. But the legislators were divided; the vote in the Senate was 26 in favor, eight against and five not voting. In the Assembly, the vote was: 51 in favor, 14 against, four not voting, and 11 abstentions. The development community, including the New Jersey Builders Association, supported this law, contending that it will provide substantial cost savings and greater predictability and efficiency to the land development process. Others, including the New Jersey State League of Municipalities and environmental and planning advocates, contended that the concerns of local residents and others will not be adequately protected by the new rule.

The statute's text suggests several issues that the courts may need to decide. First, it does not appear that the statute is intended to affect the review of applications that are not defined as applications for development under N.J.S.A. 40:55D-3, such as appeals or requests for interpretation under N.J.S.A. 40:55D-70(a) and (b).

Second, Chapter 9 contains an exception for ordinances relating to public health and public safety, an exception that also was included in the 2000/2001 bill. The courts may consult the decision in *Rohrs* in defining the scope this exception. The plaintiff in that case sought permission to build a five-story apartment building in a zone in the municipality that did not permit this development. The plaintiff unsuccessfully applied to the board of adjustment for variance relief.

The municipal governing body then amended the local building code to prohibit the construction of apartment houses of more than three stories unless the building was "of fireproof construction." The plaintiff's proposed building did not satisfy this requirement.

The plaintiff challenged this ordinance. She argued that even if the ordinance was a valid attempt to prevent "a threat to the public safety," it should not apply to her proposed building because the ordinance "was not passed until af-

ter the conclusion of the hearing before the board of adjustment and its action thereon." The Supreme Court rejected this contention. Although the court noted that the new ordinance would not have "a retroactive effect" to buildings "in the course of erection," the court nevertheless found that the ordinance "is clearly applicable where the process of construction has not yet begun."

Third, the courts will have to decide how to treat applications for development that are granted under the new rule. For example, if a municipality adopts a new land development ordinance after a development application is filed but before the board approves the application, will the courts later consider that approved use or structure as if it were a permitted use or structure, a use or structure permitted by a variance, or a non-conforming use or structure?

Although uses or structures that are permitted by a variance share some of the characteristics of nonconforming uses or structures that are permitted by N.J.S.A. 40:55D-68, nonconforming uses are to be "reduced to conformity as quickly as is compatible with justice." *Belleville v. Parrillo's Inc.*, 83 N.J. 309, 315 (1980). Courts thus permit municipalities to place limits on nonconforming uses. These include limits on the enlargement, extension, intensification, and expansion of nonconforming uses or structures, and "limits on the duration of nonconforming uses through abandonment or discontinuance." Those limitations do not apply to uses or structures permitted by variances. For example, structures housing uses that were approved by a variance may be rebuilt even after they are totally destroyed. *Industrial Lessors, Inc. v. City of Garfield*, 119 N.J. Super. 181 (App. Div.), cert. denied, 61 N.J. 160 (1972); W. Cox, *New Jersey Zoning and Land Use Administration*, Section 13-1 (2010).

Land use boards and the courts will address these and other questions as they apply the new time of application rule. ■