

2017 Appellate Ruling Interprets "Time of Application" Rule: Appeal is Pending

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A case of first impression, *Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Township of Franklin*, was decided by the Appellate Division of the New Jersey Supreme Court and approved for publication February 14, 2017.

The opinion interprets New Jersey's "Time of Application Rule," the purpose of which is to insulate applications, upon filing, from newly enacted intervening ordinances designed to alter or prevent a project. Based on the Rule, the ordinances in effect at the time of application control, as opposed to those in effect at the time of decision on the application.

The Appellate ruling in *Dunbar* establishes, for the first time, what an "application" is for purposes of satisfying the Rule. The holding is that although an application need not be deemed statutorily "complete" to trigger the protection of the Rule, the application must be submitted on the municipal application form with "all accompanying documents required by ordinance for approval," relying on the statutory definition of "application" under New Jersey law.

There has been a divergence of views on what constitutes an "application" for purposes of the Rule, ranging from a statutorily complete application to a minimalist filing. The trial court found that the application should have enough information so that a meaningful review could commence, however the Appellate Division did not agree. The opinion strikes a balance between the competing views, utilizing a clear statutory definition. Submission of the required documents is not the same thing as a complete application. As an example, a site plan could be submitted but not be complete because it is missing detail, such as topography.

What the opinion does not address is the treatment of requests for completion waivers, and their impact on the time of filing of the application for purposes of the Rule. If a waiver is sought, then all application documents will not have been submitted, so the Rule would not apply unless waivers are granted. This naturally leads to a possibility of litigation over the reasonableness of a denial of requests for completion waivers. Although not addressed in the opinion, it seems logical that the reversal of an unreasonably denied request for a waiver would result in the triggering of the Rule as of the filing date of the application. The opinion states that it is based upon common sense, however developers will need to carefully consider their strategy in the face of applications for controversial projects that may elicit a push for ordinance changes to adversely affect or deny them.

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Many ordinances require the submission of reports such as traffic studies, environmental impact statements and drainage studies that require a long lead time for preparation. Developers typically ask for waivers for these items. However, in a complex application it is difficult to perceive a circumstance where a denial of a waiver request for such reports would be deemed unreasonable by a court. Accordingly, those types of reports should be confidentially initiated and prepared well in advance, so that when news of a pending application breaks, the filing requirements of the ordinance can be timely satisfied and the protection of the Rule invoked before a reactive ordinance is passed. The request for completion waivers will clearly put a project at risk of a successfully imposed change in zoning, site plan or subdivision ordinance.

Developers need to look carefully at the application requirements in the ordinance, including checklists and reports, early in the process and before going public with an application to understand what the submission requirements are in order to be prepared to obtain the protection of the Rule.

The *Dunbar* case has been appealed to the Supreme Court of New Jersey with certification granted July 20, 2017, and the appeal is pending. The outcome is worth watching, as the Court could move the application definition in a more or less restrictive direction.