Fairness Finally Arrives—Sensible Approach To Land Use Applications

Legal Alert

May 4, 2011

A new era in land use procedures begins on May 5, 2011. On that date a new section of the Municipal Land Use Law (MLUL) becomes effective (N.J.S.A. 40:55D-10.5). The new law grants applications for development protection against regulation, including ordinance, changes once the application has been submitted to the planning board or zoning board of adjustment.

Traditionally, land use applications were subject to ordinance amendments until the application was approved and obtained vested rights under the MLUL. This result was mandated by the judicially-created "time of decision" rule, which provided that the approving board must decide an application for development in accordance with the ordinances in effect at the time of the decision, rather than at the time of application. Under this rule, pending applications were subject to new ordinances (or ordinance amendments) enacted during the review process after the application was submitted, and in most cases, the applicant spent a substantial amount of time and money proceeding on a path that eventually could lead to nowhere. In addition, the courts held that a municipality could adopt an ordinance in direct response to an application, or to public objection to an application, and the new ordinance would control the application.

The time of decision rule made land use applications unpredictable and expensive. Early in the preliminary approval process, an applicant is required to submit plans that are virtually fully engineered, which under the time of decision rule, required a redesign and/or new variances and waivers to comply with new ordinances adopted after the application was submitted.

Under the new "time of application" statute, the development regulations in effect on the date the application for development is submitted govern the application's review and the board's decision. Ordinances and/or regulations adopted after the application is filed will not apply to pending development applications. The statute does not require that the application be determined complete to benefit from the protection against changes, but only be submitted.

The only exception to the new time of application rule is a newly-adopted ordinance relating to health and public safety. This exception tracks existing language in the MLUL, which creates a health/safety exception to the applicant's vested rights on preliminary approval of a development application.

The time of application statute streamlines and rationalizes the development process, since applicants will know the rules governing the application at the time they submit. The municipality will no longer be allowed to change the rules in the middle of the process. The new law should assure developers that they will not waste the extensive time, effort and money that goes into preparing, submitting, and processing a development application.

The time of decision rule has also historically applied to judicial determinations when a land use approval is challenged in court. Under the time of decision rule, the court must apply the municipal rules in effect when the court renders its decision. The new time of application statute should modify this rule, so that the court decides land use appeals in accordance with the ordinances in effect at the time the original application was submitted.

The statute does not address the circumstance in which an application was submitted before May 5, 2011, and is pending before a planning board or zoning board on May 5, 2011. The open question is whether applications pending on May 5, 2011 are governed by: 1.) the ordinances in effect when they were submitted, or 2.) the ordinances in effect on May 5, 2011, or whether the municipality can continue to apply ordinances adopted after May 5, 2011. There is a strong argument that even though a development application was filed prior to May 5, 2011, once the statute takes effect, pending applications should be governed by the ordinances that were in effect at the time the application was submitted.

If you have questions about the information contained in this alert, contact a member of the Real Estate and Land Use Practice Group at Flaster Greenberg PC.

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