DON'T PUNT: LAND USE BOARDS CANNOT DELEGATE TO SKIRT THE TOA RULE

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It is no secret that developers often find themselves at odds with municipalities or certain concerned citizens who oppose a development project. Prior to 2010, municipalities that were particularly opposed to certain development were able to adopt ordinances to thwart an application after it was filed, for example, by prohibiting the developer's intended use in the zone. Then known as the "time of decision" rule, this standard required a land use board to apply the law as it existed at the time an application was decided. As recognized by our Supreme Court, this rule effectively "allowed municipalities to change . . . land-use ordinances after an application had been filed, even in direct response to an application."[1]

In 2010, the Legislature recognized that the ability of municipalities to frustrate an application after it was filed led to unfair results and so adopted the Time of Application ("TOA") Rule.[2] The new rule provides that "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."[3] Essentially, a land use board must apply the law in effect at the time a *completed* application is filed, regardless of whether a change in law occurs before the land use board votes. To be entitled to protection of the TOA Rule, "[a]n application for development shall be complete for purposes of commencing the applicable time period for action by a municipal agency, when so certified by the municipal agency or its authorized committee or designee."[4] Today, the TOA Rule is well-accepted as precluding a municipality from shifting the goalposts once the game has already started.

However, one question remains: what happens in circumstances when a municipality directs a developer to another municipal department *before* a developer can file an application to the land use board? The Appellate Division recently answered that question, clarifying that the TOA Rule applies to protect developers in that situation as well.

At the end of 2024, the Appellate Division examined a case where another municipal endorsement was required before an application could be filed before the local planning board.[5] In that case, Hoboken created the City's Cannabis Review Board ("CRB"). Two years later, the City made obtaining the CRB's endorsement a requirement before a cannabis retailer could submit an application to the Hoboken Planning Board for site plan approval. To obtain its endorsement, an applicant was required to submit a series of documents and fees for CRB review. A cannabis retailer, known as Blue Violets, looking to open a shop in Hoboken followed this process and submitted a complete application to the CRB, which was subsequently scheduled for a hearing.

Before the CRB hearing on Blue Violets' endorsement application, the City adopted an ordinance prohibiting cannabis retailers from operating within 600 feet of a school. Blue Violets' location was approximately 200 feet from a school, and therefore would be precluded by this new ordinance if it were deemed applicable to Blue Violets' application. After receiving the CRB endorsement, and one day after the new ordinance took effect, Blue Violets filed its application with the Planning Board without seeking a variance from the newly-adopted ordinance concerning the facility's distance from a school. Blue Violets' initial application before the Planning Board was deemed incomplete. In fact, it was almost two-and-a-half months after the City adopted the new ordinance before its application was deemed

complete. After the Planning Board application was deemed complete, it was scheduled for a hearing.

At the hearing, an objector asserted Blue Violets required a variance from the 600-foot requirement of the new ordinance. It argued that because the CRB is a local advisory board with no legal authority to approve an application and had less robust application and review requirements, Blue Violets' application could not benefit from the TOA Rule. The objector also argued that because Blue Violets could not meet the distance requirement, the Planning Board lacked jurisdiction since a "d(3)" conditional use variance was now required. The Planning Board disagreed and voted to approve the application at the conclusion of the hearing. In its resolution, the Planning Board found that Blue Violets began the required approval process by submitting a complete application to the CRB before the adoption of the school proximity ordinance, and therefore, the application was protected by the TOA Rule.

Hearing the case on appeal, the Appellate Division ruled in favor of Blue Violets and the Planning Board. It considered the unfairness that the TOA Rule was intended to prevent: "to stop the practice that permitted municipalities to change zoning ordinances as a means of rejecting development applications, because the changed ordinance would no longer be applicable to the already submitted application."[6] In particular, the Appellate Division expressed concern for the time and money spent by a developer to pursue an application only for the municipality to change the zoning regulation.[7] Thus, the court was determined to "follow the spirit of the law" in applying the TOA rule to a pre-Planning Board application.[8]

The Appellate Division found that the CRB was an "arm" of the Planning Board created by Hoboken ordinance with the responsibility of reviewing cannabis site plan applications. Because an endorsement by the CRB was required by the Hoboken ordinance prior to filing a Planning Board application, the application filed before the CRB was an "application for development" filed before a "municipal agency" pursuant to the Municipal Land Use Law ("MLUL"), N.J.S.A. 40:55D-1, et. seq., which triggered the TOA Rule.

In this decision, the Appellate Division blocked municipalities from escaping from the TOA Rule by delegating review authority from a Planning Board to other municipal agencies who might not otherwise be deemed to be "municipal agencies" that are reviewing "applications for development" within the meaning of the MLUL. By finding that these applications are subject to the TOA Rule, the Appellate Division ensured that protections intended for developers remain in place and that their investment in an otherwise contentious project cannot be made subject to new roadblocks invented by a municipality to slow down the approval process.

References:

[1] Dunbar Homes, Inc. v. Zoning Board of Adj. of Franklin, 233 N.J. 546, 560 (App. Div. 2018) (internal citations and quotations omitted); [2] Ibid.; [3] N.J.S.A. 40:55D-10.5; [4] N.J.S.A. 40:55D-10.3; [5] Hoboken for Responsible Cannabis, Inc. v. City of Hoboken Planning Board, ___ N.J. Super. ___ (App. Div. 2024); [6] Id. (slip op. at 23); [7] Id. (slip op. at 25-26); [8] Id. (slip op. at 27) (citing Jai Sai Ram, LLC, v. Planning/Zoning Bd., 446 N.J. Super. 338, 345 (App. Div. 2016)).

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