

TIME'S UP! THE IMPORTANCE OF FILING A TIMELY LAND USE BOARD APPEAL

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Any interested party to a land development application has the right to challenge a local land use board's decision in the Law Division of the New Jersey Superior Court by filing an "Action in Lieu of Prerogative Writs." However, the time in which to file the appeal is not unlimited.[1] In fact, the challenging party only has forty-five (45) days to file the appeal, so time is of the essence.[2] The appeal period does not begin to run when the board votes on the application.[3] Rather, the time in which to appeal a board's decision starts with the publication of the notice of the decision in the official newspaper of the municipality.[4] Once the notice is published, then the forty-five (45) day appeal period begins to run.[5] In certain cases, both the applicant and the board may publish a notice of decision. When this occurs, the first publication date determines the appeal period.[6]

A recent unpublished Appellate Division decision, entitled Nelson v. Sirois, serves as a crucial reminder to applicants and attorneys alike that the appeal period is strictly enforced by the courts.[7] On September 12, 2022, the Middletown Township Zoning Board of Adjustment ("Board") granted the applicant "bulk variance" approval, or an approval permitting an applicant to deviate from the standards set forth in the municipal zoning ordinance, to renovate and expand their existing home.[8] The application was met with opposition by neighbors ("Plaintiffs") living nearby.[9] The Board eventually adopted the Resolution on November 28, 2022.[10] Both the applicant and the Board arranged for publication of the notice of decision.[11] The applicant first published a notice in the Asbury Park Press on December 2, 2022, and the Board published a notice in the Two River Times on December 8, 2022.[12]

Upon inquiry by the office manager employed by Plaintiffs' attorney, the Board Secretary confirmed that the Board arranged to publish the notice on December 8, 2022.[13] On December 22, 2022, however, the Board Secretary sent affidavits of publication for both of the

published notices to the office manager. [14] Based on the earlier publication date, the appeal period expired on January 16, 2023. On January 20, 2023, Plaintiffs filed a Complaint in Lieu of Prerogative Writs appealing the Board's approval.[15] The applicant and the Board, aware of the appeal period established by Rule 4:69-6, asserted as an affirmative defense that the appeal was untimely.[16] In response, Plaintiffs filed a motion to enlarge the appeal period.[17] The trial court ruled that Plaintiffs' complaint was four days too late because the first notice published on December 2, 2022 started the appeal period and Plaintiffs were aware of this publication.[18]



Plaintiffs also argued that the appeal period should have been enlarged because an "important rather than private interest" or "novel constitutional question" existed.[19] Instead, the court found that Plaintiffs' case was no different than any other land use application.[20] Importantly, the trial court found that Plaintiffs missed the filing deadline because Plaintiffs' attorney delegated responsibility to the office manager, who was not licensed to practice law.[21] The office manager in turn was not aware that the appeal period was determined by the applicant's published notice, not the Board's notice. [22] That the office manager was unaware did not provide a sufficient reason to extend the appeal period. [23]

Plaintiffs subsequently appealed the dismissal of the complaint to the Appellate Division.[24] The Appellate Division gives great deference to the trial court's decision upon review of a motion to enlarge the complaint filing period, as there must have been an abuse of discretion, which occurs where the decision has no rational explanation and inexplicably departs from established policies.[25] The Appellate Division explained that the trial court is only permitted to expand the appeal period "when it perceives a clear potential for injustice." [26]

Ultimately, the Appellate Division affirmed the trial court, agreeing that Section 10(i) of the Municipal Land Use Law ("MLUL") establishes that the first publication of the notice of decision starts the appeal period.[27] The Appellate Division also undertook an analysis of Plaintiffs' argument that the appeal period should be expanded pursuant to Rule 4:69-6(c) "where it is manifest that the interest of justice so requires." [28] A court may only apply this exception in three instances. [29] First, the exception may apply to "important and novel constitutional questions." [30] Second, the exception may apply to "informal or ex parte determinations of legal questions by administrative officials." [31] Finally, the exception may apply to "important public rather than private interests which require adjudication or clarification." [32] The Appellate Division quickly dismissed any possibility of the exceptions applying. [33] Plaintiffs could not articulate any public interests at stake other than their own private interests, as Plaintiffs actually admitted that they had a "desire to maintain their quiet enjoyment of their homes and objected to viewing a massive modern home nearby." [34] In turn, Plaintiffs were not permitted to expand the appeal period, and the court dismissed the complaint. [35]

In the vast majority of cases, none of the three exceptions to enlarge the appeal period will apply. The Nelson court spoke to the interests of an objecting party. While this case may be comforting to developers, it also serves as an important reminder to all parties involved in land use development and litigation. Development opportunities often benefit more than just the developer, as residents and municipalities alike receive benefits. However, from

the standpoint of enlarging an appeal period, if the facts had been reversed and an applicant sought to enlarge the appeal period after receiving a denial from a land use board, it would not be surprising for the court to argue that only the private interests of the developer were at stake. Applicants and objectors must be cognizant of when the first notice of decision is published and when the complaint must be filed. Having a plan in place to challenge a board's decision is paramount in taking the first step to successful land use litigation. If the statutory timeframe is missed an unsatisfied party will be barred from seeking further review of the Board's decision on a particular development application.

References:

[1] See Rule 4:69-6(b)(3); [2] Id.; [3] Id.; [4] N.J.S.A. 40:55D-10(i); [5] Id.; Rule 4:69-6(b)(3); [6] N.J.S.A. 40:55D-10(i); [7] Nelson v. Sirois, Docket No. A-0845-23; [8] Id. at 2; [9] Id.; [10] Id. at 3; [11] Id.; [12] Id.; [13] Id. at 4; [14] Id.; [15] Id.; [16] Id.; [17] Id.; [18] Id. at 5-6; [19] Id. at 6; [20] Id.; [21] Id. at 6-7; [22] Id. at 7; [23] Id.; [24] Id. at 8; [25] Id. at 8 (citing Reilly v. Brice, 109 N.J. 555, 560 (1988)); Kornbleuth v. Westover, 241 N.J. 289, 302 (2020)); [26] Id. at 8 (citing Hopewell Valley Citizens' Grp., Inc. v. Berwind Prop. Grp. Dev. Co., 204 N.J. 569, 578 (2011); Reilly, 109 N.J. at 560); [27] Id. at 10; [28] Id.; [29] Id. at 10-11 (citing Bo. of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 152 (2001); [30] Id. at 11 (citing Bo. of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 152 (2001); [31] Id.; [32] Id.; [33] Id. at 12.; [34] Id.; [35] Id.

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