THE BENEFITS OF FILING A COMPLETE LAND USE APPLICATION

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There is an old saying: "the devil is in the details." This quote couldn't ring more true than when you are preparing to file a land use development application before a Planning Board or Zoning Board of Adjustment. Your client may press you to file the application with all due speed, but you may want to put the brakes on and ensure that your site engineer and other professionals have addressed all of the items set forth in the municipality's checklist. The quote rings even louder when you have a development application that may cause public outcry or become the center of a political football game right before an election. By ensuring that the application when submitted has addressed all of the items on the checklist, or alternatively, the appropriate waivers are requested, you can protect your client against potential delays by the applicable board in acting on the completed development application, and perhaps, more importantly, protect against any future zone change that might adversely affect it.

The concept of a "complete" application has been addressed by statute and by recent case law. N.J.S.A. 40:55D-10.3 authorizes a municipality to adopt a checklist of items by ordinance setting forth all submission requirements needed to file a complete application. Once the application is submitted, the Board has 45 days to confirm that the application is complete or incomplete.[1] If any checklist items are missing, the Board must notify the applicant, in writing, within that 45-day period. As to any deficiencies at that time, the applicant may choose to submit the missing items or request waivers. Since waivers are entirely within the control of the Board, an applicant maintains the most control over its application by submitting all checklist items. If all those items are submitted, the Board has no discretion to deny completeness. Though a Board may ask for additional information not on the checklist, it may not deny a completeness certification based on its request for that additional information.[2] Importantly, if the Board fails to advise the applicant of any missing items within the 45-day period, the application is deemed complete as a matter of law.[3] There are two critical reasons an applicant should seek to secure a completeness determination: (1) once deemed complete, the Board must then take action on the application within the time frame proscribed by statute; and (2) it locks in the ordinances and regulations applicable to the application (the "Time of Application" Rule).

First, a completed application puts the Board on the clock for acting on the application. Though different sections of the Municipal Land Use Law ("MLUL") govern different types of applications and the times in which a Board must act, all contain a similar automatic approval provision. For example, N.J.S.A. 40:55D-46(c) provides that a Planning Board application concerning a parcel larger than 10 acres or more than 10 dwelling units must be acted upon within 95 days of the application being deemed complete. However, if the same application also requires a "d" variance pursuant to N.J.S.A. 40:55D-70, the Zoning Board has 120 days to act on the completed application. Failure to take action within the proscribed statutory time period renders the application automatically approved.[4]

Importantly, automatic approval does not require any bad faith on the part of the Board as the reason for not acting within the statutorily mandated period. In Amerada Hess Corp. v. Burlington County Planning Board, 195 N.J. 616 (2008), the New Jersey Supreme Court affirmed the lower court's conclusion that once anapplication is complete, one of the following must occur: (1) approval; (2) denial; (3) an agreement for an

extension of time to act; or (4) automatic approval.[5]

Since Amerada Hess, other excuses have also been rejected, as the permitted exceptions are narrow. For example, the Appellate Division determined that the Board could not delay a hearing due to related pending litigation in the Law Division concerning a developer's agreement, nor could the Board deny an application "without prejudice" where the purpose of that denial is to give itself more time to consider the application.[6]

Second, the "Time of Application" Rule, set forth in N.J.S.A. 40:55D-10.5 provides that, in most cases, the land use ordinance in effect on the date a complete application is submitted, regardless of any later changes, is what applies to the application. This replaced the former "Time of Decision" Rule which permitted a municipality to adopt an ordinance changing the standards, even in the middle of an application proceeding. Dunbar Homes, Inc. v. Zoning Board of Adjustment of the Township of Franklin, 233 N.J. 546 (2018), illustrates the importance of the "Time of Application" Rule. There, one day after Dunbar submitted an application seeking approval for an apartment project, the Township changed its ordinance which made garden apartments a prohibited use.[7] The Board determined the application was incomplete and told Dunbar it would need a use variance instead of a conditional use permit, making approval of its application less likely. Dunbar protested that since its application was submitted prior to the ordinance change, it was entitled to protection from the "Time of Application" Rule.[8]

In ruling in favor of the Board, the New Jersey Supreme Court interpreted the term "application for development" in the statute to refer to a "complete" application rather than an application which substantively provided the relevant information but with certain checklist items absent.[9] Thus a "complete" application is necessary in order to trigger the protection of the "Time of Application" Rule. In sum, a thorough review of a municipality's checklist at the onset is worthwhile to ensure that all of the documents required are submitted with the initial filing. Especially if the application is controversial, a complete application will receive protection of the "Time of Application" Rule, preventing a municipality from changing the zoning regulations to frustrate an application. It also will ensure the Board does not unreasonably delay considering the application by routinely returning it for missing information. Even though it may be preferable to work with the Board to resolve the Board's concerns and settle on a proposal that is acceptable to everyone, a completed application provides the automatic approval option if those differences cannot be resolved or the Board is recalcitrant. However, none of these protections are available if the developer does not take it upon itself to file a complete application from the get-go. In sum, the initial steps of the application process should not be rushed and every effort should be made to submit all the documents required by the municipality's checklist.

References:

[1]Ibid.; [2]Amerada Hess Corp. v. Burlington County Planning Board, 195 N.J. 616, 639 (2008).; [3] N.J.S.A. 40:55D-10.3.; [4] N.J.S.A. 40:55D-73.; [5]Amerada Hess Corp., supra 195 N.J. 616. See alsoBright and Varick Urban Renewal Company, LLC v. Jersey City Planning Board, A-2040-14T1, 2017 WL 1739669, (App. Div. May 4, 2017) (affirming grant of automatic approval where the Planning Board failed to take action on an 87-unit residential project within the 95-day statutory period and finding that the Planning Board's decision to table the application based on the alleged ambiguity did not change the "completed" status of the application or toll the approval period.); [6]Shipyard Associates, L.P. v. Hoboken Planning Board, A-4637-14T3, 2017 WL 3271976 (App. Div. August 2, 2017).; [7]Dunbar Homes, Inc., supra, 233 N.J. 546.; [8]Ibid.; [9] Id. at 561.

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