

New Jersey Court Rejects Automatic Application of "Time Filing" Rule In Builder's Remedy Litigation

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Developers who bring builder's remedy lawsuits under New Jersey's *Mount Laurel* doctrine often cite the so-called "time of filing" rule. The contention is that in determining whether a municipality is compliant with its affordable housing obligations, the court must base its decision on the zoning ordinances in effect at the time the developer initially filed its lawsuit, and disregard actions the municipality may have taken to achieve compliance after the lawsuit was filed. The time of filing rule finds support in earlier cases such as *Toll Brothers, Inc. vs. Township of West Windsor*, and *Mt. Olive Complex v. Township of Mt. Olive*.

In a December 14, 2016 decision, the Appellate Division of Superior Court rejected the automatic application of the time of filing rule. In *Hollyview Development Corporation I vs. Township of Upper Deerfield*, the developer filed its lawsuit in 1998. For several years, Hollyview did little to actively pursue the case. In 2013, Hollyview filed a motion for summary judgment, relying, in part, on the claim that the Township was not compliant with its affordable housing obligations back in 1998, when the case was filed. The Township claimed that in deciding the motion, the court should consider what the Township had done in the interim to provide affordable housing. Hollyview was unable to show that the Township had taken these actions as a result of Hollyview's lawsuit.

While not rejecting the time of filing rule, the Appellate Division noted that the concept is particularly applicable in a situation where the developer's lawsuit is what prompted the municipality to revise its ordinances and come into compliance with its affordable housing obligations. The court held that in a situation where a developer allowed its builder's remedy lawsuit to remain dormant, and cannot show that its lawsuit is what prompted the changes made by the municipality in the years after the lawsuit was filed, the court would not apply the time of filing rule. As the court stated, "[a]lthough the availability of a builder's remedy does not depend on the intensity of the litigation, . . . the remedy is nonetheless a reward for the plaintiff who has 'endured intensive litigation and succeeded in vindicating the *Mount Laurel* right in the interest of the public.'" In Hollyview's situation, the court concluded "it would be unreasonable to measure the Township's compliance according to the state of affairs that existed over fifteen years before the summary judgment decision." Given the facts of the Hollyview case, the court would "consider only whether the Township complied with its Mount Laurel obligations as of the time of [the court's] decision."

While issued as an "unpublished" decision and, therefore, technically not precedential, the *Hollyview*

decision could make it more difficult for a builder's remedy plaintiff to invoke the time of filing rule in some cases.

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