

**Flood Ordinances and the New Jersey Supreme Court's Reaffirmation of Vested Final Approval Rights in Shipyard Associates, LP v the City of Hoboken**

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The New Jersey Supreme Court's decision issued on May 5, 2020 in Shipyard Associates, LP v. City of Hoboken, 242 N.J. 23 (2020) is notable because it affirms the statutory protections for approved development that are afforded by the Municipal Land Use Law (MLUL). The decision extends these protections to prevent flood ordinances from being retroactively changed to undo final land use approvals. The decision prevented the City of Hoboken (Hoboken) from applying a flood ordinance to Shipyard's site plan application for a residential development on a waterfront pier that was granted vested final approval before the flood ordinance amendments were adopted. While the decision solidifies the Supreme Court's adherence to the clear language of the MLUL that vests approved development with protections against subsequent changes in zoning, it also provides insight into how municipalities can avoid legal challenges to flood ordinances.

At first glance, the Shipyard decision may raise concern about a municipality's ability to enforce a flood ordinance. However, a closer examination reveals that the Court issued its decision based upon a narrow issue and the unusual facts involved in that

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case. The decision interpreted the MLUL's statutory language to prevent retroactive application of a flood ordinance to vested final approval rights. The Court's decision last year was issued approximately six and a half years after a trial court first granted Shipyard's claim for automatic final approval of its site plan application that the Hoboken Planning Board denied without prejudice due to then-pending litigation instituted by Hoboken. As a result of the Board's failure to decide the application, the court



found that Shipyard's vested final approval was automatically effective by operation of law in July 2012.

The Supreme Court considered Hoboken's unprecedented campaign to oppose the proposed development on a waterfront pier, which resulted in multiple lawsuits that spanned a decade. Hoboken's opposition to the project began in 2011 and was initially based upon generalized concerns about blocked views and health and safety in connection

with the New Jersey Department of Environmental Protection's grant of a Waterfront Development Permit for the project. After Shipyard had been successful in court against Hoboken, in late 2013 Hoboken introduced two ordinance amendments that would prevent construction of Shipyard's project. The first was an amendment to its zoning ordinance and the other was an amendment to its flood ordinance. Both ordinances prevented Shipyard's proposed residential development on the pier. The project was the only project proposed on a pier in Hoboken. In early 2014, these ordinance amendments became effective around the same time that a trial court granted Shipyard final site plan approval for its project as of July 2012, when the Hoboken Planning Board did not lawfully decide and, instead, denied without prejudice Shipyard's complete site plan application based on Hoboken's pending lawsuit.

The Court's decision is reasonable given that Shipyard had obtained various other outside governmental approvals for the project, which had determined the project to be safe. Shipyard obtained approvals from the Army Corps of Engineers and the Federal Emergency Management Agency (FEMA) to construct the project, as well as other approvals.

Under these facts and the plain language of the ordinance amendments, the Supreme Court framed the issue narrowly: "were the ordinances at issue zoning ordinances subject to the MLUL, and if so, were they exempt from N.J.S.A. 40:55D-52(a) because they relate to public health and safety." N.J.S.A. 40:55D-52(a) provides protection for site plan applications that are granted final approval from changes in "zoning requirements" for two years after the approval is granted. The statute does not contain a health and safety exception. Hoboken and other



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parties had argued that the flood ordinance was not a “zoning” ordinance, but a health and safety ordinance that they claimed was not subject to statute’s protections and could be enforced even after a project had been approved. The Court held otherwise and found that the amendment to its flood ordinance altered the zoning for the project and Hoboken’s other amendment was a plainly a zoning ordinance.

The Court was persuaded that Hoboken’s ordinance amendments were zoning amendments by the dramatic impact they had on the project and agreed with the appellate court that the ordinance “fundamentally changes the zoning of land where the project was to be built.” Before the ordinance amendments, Shipyard could build a residential development on the pier and there was no restriction as to whether the use was seaward of the mean high tide. After the ordinances were effective, only water-based uses, like a port facility, or open space and recreational uses were allowed seaward of the mean high tide line on Shipyard’s property, which prevented the project. The Court found both the zoning and flood ordinances to be “zoning” ordinances that became effective during Shipyard’s two-year period of insulation pursuant to N.J.S.A. 40:55D-52(a) and that the period of protection was tolled.

Does the Shipyard decision affect the viability of flood ordinances in general? No. As the Court stated, the decision does not address the viability of Hoboken’s flood ordinance, but rather that it could not be retroactively applied to Shipyard’s project based upon the language of the MLUL. The difficulty with the decision is that there are some flood requirements that directly relate to zoning. Section N.J.S.A. 40:55D-38 of the MLUL allows

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municipalities to regulate flooding. Municipalities are also encouraged by the New Jersey Flood Hazard Area Act, N.J.S.A. 58:16A-62, and FEMA’s rules, 44 CFR 60.1(e), to adopt more restrictive flood requirements.

If a municipality seeks to apply new flood ordinances retroactively to projects that received site plan or subdivision approvals, the MLUL only allows retroactive application of changes to an ordinance for a project that received preliminary (and not final) site plan approval and only if those ordinance changes “relate to public health and safety.” To fit within that “health and safety” exception for preliminary approvals in the MLUL, a municipal flood ordinance should place less emphasis on restricting or prohibiting the type of use on property to regulate flood prone areas, which

## Land Use Element Must Now Address Climate Change

On February 4, 2021 Governor Murphy signed into law assembly bill number 2785. This now requires that the land use plan element of a municipal master plan include an assessment of climate change related hazards. This assessment would consider environmental effects associated with climate change and extreme weather-related events including, but not limited to, temperature, drought, and sea-level rise. This assessment would contain measures to mitigate reasonably anticipated natural hazards, including, but not limited to, coastal storms, shoreline erosion, flooding, storm surge, and wind, following best management practices recommended by the Federal Emergency Management Agency (FEMA).

This law expands on the requirements of what a land use plan element must address and apply to any land use plan element adopted after February 4, 2021.

The law also requires the Department of Environmental Protection to provide technical assistance to a municipality preparing a climate change-related hazard vulnerability assessment required by the law when requested.

Rutgers has online tools to aid in the creation of climate change compliant land use plan elements. NJ Adapt is a suite of online tools designed to provide data to planners, decision-makers, practitioners, and others addressing climate change in New Jersey.



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occurred in the Shipyard decision. Instead, municipal flood ordinances should focus on regulating the construction of buildings and building materials in flood zones so that uses vulnerable to floods can be protected against flood damage at the time of construction. While flood ordinances do invade on typical zoning requirements, by regulating, e.g. building heights and the elevations of structures, these regulations can survive scrutiny if they are part of a comprehensive and integrated flood ordinance that is enforced independent of the use on a property. By doing so, it is possible that subsequent amendments to a municipality's flood ordinance can be retroactively applied to a project that received only preliminary approval.