

## THE CONTINUED VITALITY OF THE TIME OF DECISION RULE IN NEW JERSEY LAND USE LAW

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The time of decision rule is a rule of retroactivity that stands for the proposition that whatever statute or ordinance is in effect at the time the tribunal's decision is made is the one that will govern the decision. The rule has always been controversial; despite efforts to either limit or abolish the rule altogether, however, so far it remains alive and well.

In the context of land-use law, the time of decision rule provides that "the zoning ordinance in effect at the time the case is ultimately decided" is the one that controls. Dinizo v. Planning Bd. of the Town of Westfield, 312 *N.J. Super.* 225, 230 (Law Div. 1998); see also Timber Prop., Inc. v. Chester Tp., 205 *N.J. Super.* 273, 277 (Law Div. 1984)(stating that "[a] municipality possesses continuing authority to amend its zoning ordinance and ordinarily a zoning change applies to property for which there is a pending application for approval of a particular use"). The rule applies equally to municipal boards considering pending applications as to trial and appellate courts reviewing those decisions. See generally Riggs v. Township of Long Beach, 101 *N.J.* 515 (1986). Significantly, this is so even if the ordinance is amended in direct response to a pending application. Eastampton Center, LLC v. Planning Bd. of Township of Eastampton, 354 *N.J. Super.* 171, 196-97 (App. Div. 2002); Manalapan Realty, L.P. v. Township Comm. of the Tp. of Manalapan, 140 *N.J.* 366, 378-79 (1995); Pizzo Mantin Grp. v. Township of Randolph, 137 *N.J.* 216, 235 (1994); Burcam Corp. v. Planning Bd. of the Tp. of Medford, 168 *N.J. Super.* 508, 512 (App. Div. 1979); Crecca v. Nucera, 52 *N.J. Super.* 279, 284-85 (App. Div. 1958).

The rule serves two purposes: it ensures that current legislative policy will be effectuated, and it prevents courts from ruling on moot questions. Riggs, 101 *N.J.* at 520-21. As the court explained in Timber Properties, "any zoning amendment presumably serves 'to preserve the desirable characteristics of the community through zoning,' and the exemption of a property owner from a zoning amendment simply because an application had been filed under a prior ordinance would undermine the objectives sought to be achieved by the new ordinance." Timber Prop., 205 *N.J. Super.* at 277 (citation omitted)(holding that "[a]ny other rule would severely burden municipal authorities properly concerned with legitimate zoning protection for the public at large as against the operations of land developers who naturally may be more concerned with immediate profits than with the general public welfare subserved by salutary zoning.").

Application of the rule is not automatic, however. Rather, "a court must take into account equitable considerations, and the outcome depends upon a balance of the equities between the developer on the one hand and the public on the other." Eastampton, 354 *N.J. Super.* at 197. As the Court explained in Tremarco Corp. v. Garzio, 32 *N.J.* 448 (1960), "[t]he ultimate objective is fairness to both the public and the individual property owner." Id. at 457. The Court stated: "[A] balance must be struck between the interests of the permittee and the right and duty of the municipality through planning and the implementation of that scheme through zoning 'to make, ordain and establish all manner of wholesome and reasonable laws, not repugnant to the Constitution, as may be deemed to be for the good and welfare of the commonwealth, and all the subjects of same.'" Ibid. (quoted in Eastampton, 354 *N.J. Super.* at 198). Thus the time of decision rule will not be applied (and the applicant/developer made subject to changed zoning) when the landowners' right have vested, for example, whether through a court judgment, official municipal action, or the application of equitable estoppel.

The question of whether and when rights vest is the dominant issue in time-of-

decision cases. The courts have held that plaintiffs' rights never vested and thus plaintiffs were not protected from the changes in zoning. Where plaintiff was originally denied a permit for a permitted use (usually because the plan did not comply with code requirements), then was again denied a permit on re-application because in the interim the municipality had passed an ordinance prohibiting the proposed use, see Sun Oil Co. v. City of Clifton, 16 *N.J. Super.* 265 (App. Div. 1951), Crecca v. Nucera, 52 *N.J. Super.* at 282; or where plaintiff, having received site plan approval but facing near-certain court challenges, proceeded with its development before the objectors' time to appeal the decision and seek a stay had expired, Donadio v. Cunningham, 58 *N.J.* at 312, 313; or where plaintiffs had submitted their development plans for conceptual review and received strong encouragement from the municipal planning board — but no approvals — only for the municipality to then change the zoning to prohibit their proposed use, see Timber Properties, 205 *N.J. Super.* at 276, 281. See also Lizak v. Faria, 96 *N.J.* 482 (1984). On the other hand, where plaintiff was wrongly denied site plan approval, the court did hold that plaintiff was protected from a subsequent zoning change passed during the pendency of plaintiff's appeal, on the theory that had the board correctly granted site plan approval to the plaintiff, plaintiff would have been protected under the MLUL from such zoning changes. See Dinizo, 312 *N.J. Super.* at 231.

In the 1980s and early 1990s, the courts issued three significant decisions about the time of decision rule: Kruvant v. Mayor and Council of Cedar Grove Tp., 82 *N.J.* 435 (1980), Urban Farms, Inc. v. Borough of Franklin Lakes, 179 *N.J. Super.* 203 (App. Div.), certif. denied, 87 *N.J.* 428 (1981), and Lake Shore Estates, Inc. v. Denville Tp. Planning Bd., 255 *N.J. Super.* 580 (App. Div. 1991), aff'd o.b., 127 *N.J.* 394 (1992).

In Kruvant, “a developer twice successfully challenged the validity of zoning ordinances which prevented construction of a garden apartment complex on his property.” Timber Prop., 205 *N.J. Super.* at 279. After each challenge, the municipality amended its ordinance to prohibit the developer's proposed use. Kruvant, 82 *N.J.* at 445. “When the municipality attempted a third rezoning of the developer's property during the pendency of litigation challenging the second rezoning and in violation of a court order establishing a deadline for any rezoning,” the court refused to apply the time of decision rule, concluding that “the equities warrant and judicial integrity justifies' ignoring the most recent zoning amendment in determining the propriety of the developer's project.” Timber Prop., 205 *N.J. Super.* at 279. The court found that plaintiffs would have been entitled to a variance under the original zoning ordinance, and that because the negative criteria for the variance had been satisfied, “the primary purpose of the time of decision rule, namely the public policy of furthering the general welfare exemplified by current zoning, will not be adversely affected.” Kruvant, 82 *N.J.* at 445.

In view of the extended proceedings, the unquestioned propriety of the trial court's 90-day restriction, and the property owners' satisfaction of the requirements for a variance, the equities warrant and judicial integrity justifies the inapplicability of the time of decision rule. The Township has had more than enough opportunity to amend its ordinance.

[ibid.]

In Urban Farms, plaintiff had applied in 1972 for permission to build a nursing home, which at the time was a permitted conditional use in the municipality. Urban Farm, 179 *N.J. Super.* at 207. The application was approved, on the condition that plaintiff obtain a certificate of need from the State within one year. Id. at 209. Because of a state-imposed moratorium on the construction of nursing homes, plaintiff had to wait nearly four years

before obtaining the certificate, but the planning board nevertheless recommended to the town's mayor and governing body that plaintiff's application be approved. The mayor and council, however, "rejected the recommendation and disapproved the application." Ibid. Plaintiff then obtained an injunction directing defendants to issue to plaintiff "a building permit subject to specified conditions." Id. at 207. The township appealed the decision; while the appeal was pending, the municipality amended its zoning ordinance "to eliminate nursing homes as a permitted or conditionally permitted use anywhere within its borders." Ibid. The Appellate Division held that plaintiff's rights had vested prior to the amendment of the zoning ordinance and thus plaintiff was entitled to the building permit.

The court specifically found that "the record is overwhelmingly supportive of the conclusion that the proposed use meets the negative criteria of both the [original] ordinance itself and the enabling legislation pursuant to which the special exception was sought." Id. at 210 (adding that there was "no question as to the exceptional suitability of the site for the proposed use and its minimal intrusion on the neighboring residential uses.") The court also found that "[e]ven more compelling . . . than its compliance with the negative criteria is the compliance by the proposed use with the affirmative criterion of the ordinance, namely, its reasonable necessity for the convenience of the community." Ibid. (noting that a nursing home "comes within the inherently beneficial category, particularly where, as here, a certificate of need has been granted and more than a third of its beds have been committed to Medicaid recipients, *i.e.*, indigents." Id. at 212).

The court continued:

Having determined that [plaintiff], on the basis of the record and the board of adjustment's evaluation thereof, was, as a matter of law, entitled to approval of its special exception application, we address the question of the efficacy of the borough's attempt to zone out nursing homes during the pendency of its appeal from Judge Petrella's judgment in favor of the applicant. The technique employed by the borough in its effort to achieve legislatively what it was unable to achieve by judicial action was an ordinance amendment simply eliminating nursing homes as a permitted conditional use and leaving the balance of the conditional use provisions of the ordinance as originally enacted. We are satisfied that that legislative action is invalid in respect of this developer's proposed use.

[Id. at 214-15.]

As the court explained,

Although not heretofore articulated, there is a significant synthesizing theme binding these decisions together. *In each of them the retroactivity principle was applied either to permit a municipality, as in Donadio, to rectify its zoning ordinance in order to perfect a legislative policy decision therein expressed by it but imperfectly so, or to permit a municipality to give initial legislative consideration to serious and substantial land-use planning concerns theretofore unaddressed by its ordinance . . . .* When these concerns are involved, the public interest clearly justifies protection by way of the municipal opportunity to amend its ordinance after and in response to an adverse judgment. But we do not regard either of these public-interest

rationales to be implicated or relevant in the situation now before us.

We do not regard the issuance of a building permit as a *sine qua non* to the applicability of the substantial reliance doctrine. Rather, we are of the view that its applicability requires a weighing of such factors as the *nature, extent, and degree of the public interest to be served by the ordinance amendment* on the one hand, and, on the other hand, the *nature, extent and degree of the developer's reliance on the state of the ordinance under which he has proceeded, the extent to which his undertaking has been at any point approved or encouraged by official municipal action, and the extent to which, under the circumstances and as objectively determined, he should have been aware that the municipality would be likely to change the ordinance prior to actual commencement of construction*. These are the factors constituting the developer's special equities, and if they outweigh the public interest concerns, they should also operate to bar postjudgment retroactivity of a zoning ordinance amendment.

....

We make one final comment. While we recognize that there are circumstances in which the municipality is appropriately permitted to effect a retroactive postjudgment amendment of its zoning ordinance in specific response to that judgment, nevertheless the potential anomaly of this technique is both apparent and troublesome, *particularly where the purpose of the amendment is neither to fill a serious gap in the original ordinance nor to properly reenact a provision thereof adjudicated ineffective either for procedural or substantive reasons*. It appears to us to be wholly antithetical to both the integrity and the legitimacy of the judicial process for a municipality to submit its land-use action to the scrutiny and review of the court, to participate in the litigation in apparent good faith, to thus impose upon the financial resources of the court, the developer and its own taxpayers, and then, when the decision is adverse to it, to be free to render the entire proceeding a charade and the judgment of the court a nullity by recourse to a legislative action which was available to it from the beginning. We are of the view that while a municipality should not be precluded from so doing where the public interest requires and where there are no countervailing equities, nevertheless it should, in these circumstances, *bear the burden of proving that its legislative abrogation of the court's judgment does indeed genuinely serve the public interest*.

[Id. at 221-23 (emphasis added).]

In Lake Shore Estates, however, the Appellate Division sought to temper its decision in Urban Farm. There, plaintiff-developer had applied to the Denville Township Planning

Board for sketch plat approval for a proposed subdivision in “an area of Denville characterized by steep and rugged topography sloping toward a lake.” Id. at 582. The Board approved the initial sketch plat, but denied two subsequent applications for preliminary major subdivision approval and variance relief from a recently passed steep slope ordinance. Ibid. The trial court ultimately nullified the Board’s denial on the grounds that the steep slope ordinance was unconstitutional. Id. at 584.

Plaintiff re-applied for preliminary major subdivision approval. Ibid. The day before, however, Denville had adopted “a modified version of the steep slope ordinance[.]” whose constitutionality plaintiff once again challenged in court. Ibid. Denville also rezoned plaintiff’s and other property to increase the minimum lot size from one to two acres. Ibid. Plaintiff sought a determination in court that neither the steep slope nor the two-acre zoning ordinance be applied to its pending application. Ibid. The trial court agreed, and remanded the matter to the Board, holding that “the plaintiff should not have to cope with changing rules which are, in part at least, a response to successful litigation brought by the plaintiff.” Ibid. (the Appellate Division noted with respect to this holding that (1) the trial judge “relied on what he deemed to be the ‘broad spirit and principle’ of cases such as Kruvant . . . and Urban Farms . . .[.]” and (2) “the trial judge incorrectly extended the special equities exception far beyond its limited reach.” Id. at 585, 588 (citations omitted)).

On remand, the Board once again denied plaintiff’s application, which called for cluster development, because the Board felt that for safety and others reasons cluster development was not an appropriate use of plaintiff’s property. Id. at 586-87. This time the trial court upheld the Board’s decision regarding cluster development, but granted plaintiff leave to submit a new “development proposal to the Board, still immune from compliance with Denville’s 1986 steep slope and two-acre zoning ordinances.” Id. at 588. This is the final order that was appealed.

In holding that the time of decision rule should have been applied, the Appellate Division wrote:

In Urban Farms, we made clear, as did the Kruvant Court, that a zoning ordinance amendment responsive to a court’s judgment is not automatically entitled to a time of decision effect. We pointed out that it “. . . should not be accorded such effect where doing so would undermine existing special equities *without accomplishing any offsetting service to the public interest in the zoning sense,*” and that “*considerations of patent advantage to the public have always constituted the jurisprudential core of that doctrine.*” . . .

. . . .

Here, there was no vesting of rights giving rise to a justified reliance. Neither was there any basis for a justifiable reliance upon past municipal approvals. Except for an initial sketch plat approval long before its first application for subdivision approval, Lake Shore has not had its application approved or encouraged by the Board, despite the changing makeup of the Board over the years. Lake Shore was well aware that Denville would adopt a revised steep slope ordinance after the original steep slope ordinance was declared unconstitutional by the trial judge. Indeed, the trial judge recognized that possibility before it occurred.

The local legislators have consistently recognized that the steep topographic area of Denville, which is the subject of Lake Shore's persistent efforts to develop, *warrants careful zoning control in the public interest*. Since its adoption of the initial steep slope ordinance, even though it was struck down, *Denville has made clear its desire to address the special environmental and other zoning problems which arise in connection with intensive development of this area of its community*.

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We are satisfied that neither the Denville Municipal Council nor its Planning Board have engaged in the kind of contumacious subversion of an existing order contemplated by the Supreme Court in Kruvant as a basis for exception to the time of decision rule. There is substantial support in the record for the legitimacy of consistent municipal efforts to address the problems of the steep slope area.

On the other side of the balance, we note that most of the expenditures incurred by Lake Shore for planning and design work have been in connection with its preparations for cluster development of the site. However, there was never an entitlement as of right to cluster development whatever zoning ordinance was deemed applicable. Thus, to the extent based upon such cluster development, those expenditures should not have been weighed when balancing the developer's burdens against the public interest for the purpose of time of decision analysis. Moreover, the property of Lake Shore is not being zoned into inutility. There simply may not be an ability to achieve the same level of profitable development intensity which it would prefer.

[Id. at 589-91 (citations omitted)(emphasis added).]

The court concluded that "the trial judge erred in making an Urban Farms analysis which prohibited the Board from requiring Lake Shore to comply with the 1986 steep slope and two-acre zoning ordinances[.]" and that "[a]ny further subdivision applications by Lake Shore" would have to be made "in compliance with those ordinances." Id. at 591. The court also noted that it had neither "judicially reviewed [nor] sanctioned the ordinances." Ibid.

There have, however, been calls over the years to abolish the doctrine altogether. See, e.g., Dinizo, 312 *N.J. Super.* at 231-32 (stating that "the time has come in zoning case where the 'time of the decision rule' must be reevaluated"); Lake Shore Estates, 127 *N.J.* at 394, 398 (O'Hern, J. dissenting) (arguing that "[t]here comes a time when government can no longer change the rules for land-use applicants"); Carl S. Bisgaier and Yvonne Marcuse, "Vesting and the Time of Decision Rule," 188-NOV *N.J. Law.* 13, 14-16 (1997)(asserting that "the rule contradicts the reasonable expectation that the law should be orderly, fair, and accessible" and that "the rule offends common sense, given the extremely expensive and risky nature of the development business and its dependence on market timing," and adding that given the "[s]ignificant thought and energy [that] goes into the adoption of a land use ordinance and master plan[.] . . . it is hard to understand how any municipality could be caught off guard by the filing of a compliant land use

application.”). A bill was even introduced in before the New Jersey State Legislature during the 2000-2001 session that would limit the application of the time of decision rule.<sup>1</sup>

Nevertheless, the courts continue to apply to the time of decision rule willingly when the balance of the equities supports that application. See Eastampton Center, LLC v. Planning Bd. of the Twp. of Eastampton, 354 N.J. Super. 171 (App. Div. 2002); Della Monica v. McDonald’s Corp., No. A-2464-99T1 (App. Div. Jan. 28, 2003), slip op. at 41-42. In Eastampton, plaintiff’s property was rezoned during the pendency of litigation challenging the municipality’s determination that plaintiff’s development application was incomplete. The rezoning, which was part of an ongoing, long-term reexamination of the municipality’s master plan, eliminated residential uses from the zone in which plaintiff’s property was located. The court willingly held that under the time of decision rule, the new zoning should govern plaintiff’s application:

Consideration of the equities in the case before us, and a fair balancing thereof, satisfies us that the scales are tipped substantially in favor of the municipality and the public interest — an interest in development consistent with the Master Plan and the new zoning ordinance enacted to implement that plan.

.....

We are impressed by the absence of any special equities or reliance on the part of the developer in this case, and therefore conclude that the public interest justifies application of the time of decision rule.

[Eastampton, 354 N.J. Super. at 199-201.]

In Della Monica, the court also applied the time of decision rule, holding (unfortunately with no discussion or analysis) that a recently adopted ordinance was valid and operated to render moot certain of the variances defendant had previously sought and been denied. Della Monica, slip op. at 41-42. But see Toll Bros., Inc. v. Planning Bd. of Tp. of Pohatcong, No. 359 N.J. Super. 448 (App. Div. 2003) (refusing to apply a recently enacted zoning ordinance to plaintiffs’ application on the basis, not that the equities barred its application, but that N.J.S.A. 40:55D-49(b) protects an application from zoning changes passed after the applicant has submitted its application for final subdivision approval but before the municipality has deemed the application complete).

As the courts have stated, the “jurisprudential core” of the time of decision rule is “considerations of patent advantage to the public.” In deciding whether to give a retroactive effect to a change in zoning, the courts will carefully balance the equities, with

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<sup>1</sup> As amended and reported by the Senate Community and Urban Affairs Committee, A-3366/S-1099 would “modify the ‘time of decision’ rule . . . [by] essentially bifurcat[ing] municipal land use applications depending on whether the application fully conforms with the development regulations in effect on the date that the application is deemed complete.” Senate Community and Urban Affairs Committee Statement to A-3366, dated June 11, 2001. The review of fully conforming applications would be governed for one year by the laws in effect on the date the application was deemed complete; non-conforming applications, however, would be subject to any changes in the law while they were pending. The bill was reported without recommendation by the Senate Community and Urban Affairs Committee on June 11, 2001.

the emphasis always on what will best serve the public interest. This reflects the courts' recognition that zoning decisions are presumptively valid and designed to further the public interest and general welfare of the municipality's residents, as well as the courts' recognition of the ultimate need to act in the best interests of the public. Although not absolute, the rule provides a measure of protection to municipalities by allowing them to respond to changing circumstances and considerations and to address unanticipated consequences of existing zoning. Moreover, efforts to date to limit the reach of the time of the decision rule or to abolish it altogether have not succeeded. Whether this will continue into the future cannot be predicted. For now, however, the time of decision rule remains alive and well in New Jersey.