

# Time To Curtail the 'Time of Decision' Rule

The "time of decision" rule (TOD) states that the law in effect at the time a court issues its opinion, rather than the law as of the filing of the complaint or some other date, governs that ruling. The purpose of the rule is to apply current rather than outdated law to the resolution of suits.

In the municipal land use context, at least two recurring scenarios have demonstrated that TOD is a mixed blessing. First, municipalities that have fought and lost development-related litigation have responded by simply amending their ordinances in their favor even while they appeal, so that the appellate courts must apply the amended ordinance. This change of rules in the middle of the game, after a development applicant has bested the municipality — usually overcoming a presumption of validity in the process — would be regarded as unfair except for TOD.

Second, in cases where municipalities never considered a particular type of use worth regulating or banning until a development applicant actually sought to build it, TOD has allowed hastily enacted or amended ordinances to impede or bar those uses. This has occurred even as the courts have recognized that the ordinance resulted directly from the particular application at issue.

Sometimes it is painfully obvious what the municipality is doing, as in *Crecca v. Nucera*, 52 N.J. Super. 279 (App. Div. 1958), in which a governing body convened a special Saturday session four days after the plaintiff sought a building permit. The lawmakers wanted to frustrate the devel-

oper's plan to build a bowling alley, which previously had not been prohibited. But as long as the ordinance purported to be of general application — and therefore not impermissible "spot zoning" — TOD has applied the new ordinance, to the detriment of the applicant.

By

BRUCE D. GREENBERG

Opinions such as that of Judge Sylvia Pressler in *Urban Farms, Inc. v. Franklin Lakes*, 179 N.J. Super. 203 (App. Div.), cert. denied, 87 N.J. 428 (1981), have held out hope that the courts would ameliorate the harshness of TOD in such circumstances. However, the promise of *Urban Farms* has not been fulfilled.

## 20-Year Saga

In 1992, the Supreme Court of New Jersey upheld the application of TOD in favor of a municipality in circumstances that cried out for the contrary result, which the trial judge had reached. *Lake Shore Estates, Inc. v. Denville*, 127 N.J. 394 (1992). That case presented a nearly 20-year saga in which one municipal ordinance had been held unconstitutional and a second had been enacted one day before the plaintiff filed the new development application directed by the court.

In a perceptive dissent, Justice

TOD "is a rule of reason and justice. There comes a time when government can no longer change the rules for land-use applicants." The majority, however, upheld the decision below applying TOD against the developer despite the circumstances.

In the two most recent cases that presented possible TOD issues, the Supreme Court declined to address them. In *Pizzo Martin Group v. Randolph Tp.*, 137 N.J. 216, 234-36 (1994), the Court left it to the planning board and lower courts to determine whether a subdivision application would have met the requirements of the prior ordinance before deciding whether TOD should then apply in favor of a new ordinance. Most recently, in *Coventry Square v. Westwood Zoning Bd. of Adj.*, 138 N.J. 285 (1994), a conditional use variance case, the Court noted that the municipality had amended its ordinance to make apartments a prohibited use, rather than a conditional use. However, the Court stated that "[a]ny issues raised by those amendments are not before us and we do not address them." *Id.* at 301.

Post-litigation amendments and hurried enactment or amendment of ordinances in the face of pending development applications for uses until then permitted constitute "crisis zoning." Basing ordinance adoption policy on the effect of particular unwanted applications is the antithesis of the sound overall planning that the Supreme Court has repeatedly emphasized is now the basis of land use law. See, e.g., *Kaufmann v. Planning Bd. for Warren Tp.*, 110 N.J. 551, 557 (1988). Instead, it has all the vices of the indiscriminate use of variances in lieu of a properly thought-out ordinance, which the Supreme Court has long condemned.

N.J. 1 (1987); *Wilson v. Mountainside*, 42 N.J. 426, 443 (1964).

## The Power to Undo a Loss

Allowing a municipality unilaterally to change the rules of the game in its favor after it has lost a suit presents perhaps the only circumstance in which a defeated party is given the power to undo its loss. Not only does the municipality gain protection going forward, as would any litigant that changes its behavior in response to an adverse court decision, it gets retroactive benefit from the new or amended ordinance, thus snatching victory from the would-be developer who prevailed under the existing ordinance.

Courts have justified that result by noting the apparent anomaly in applying an outdated ordinance. But there are other instances in which new enactments are not applied to the detriment of property owners. For example, the doctrine of pre-existing, nonconforming uses has long existed to "grandfather" uses no longer permitted because of rezoning.

The line is not to be drawn based on whether the use exists. In *Tre-marco Corp. v. Garzio*, 32 N.J. 448 (1960), an analogous case involving a municipality's attempted revocation of a building permit, the Supreme Court rejected the idea that only actual construction could constitute detriment sufficient to create rights in a developer. Instead, the Court held that "fairness to both the public and the individual property owner" was the basis of the decision. Similarly, instead of mechanically applying TOD to an ordinance enacted or amended

The author is a partner with Greenbaum, Rowe, Smith, Ravin &

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In response to an adverse judicial ruling or an unwanted pending development application, courts should make fairness in the particular circumstances the determining factor.

Another reason given for applying TOD in favor of a municipality is that the new action of the governing body is "presumed" to be in the public interest. Yet it is difficult to endorse such a presumption when the ordinance is amended after — and plainly in response to — a loss in court.

## Realistic Assessment

Even when the municipality reacts not to a litigation loss, but to a pending application, it is hard to accept the "public interest" idea in cases involving an "inherently beneficial use," or one that was previously permitted. Instead, just as courts doubt jurors' professions of impartiality when they run counter to human nature — see, e.g., *State v. Deatore*, 70 N.J. 100, 105-06 (1976) — courts should realistically assess whether belated ordinance amend-

ments reflect the public interest, or merely a desire to reverse an adverse court ruling or belatedly keep out a disfavored use. After all, if there were a legitimate public interest in regulating or prohibiting a particular use, why would the municipality have allowed the use to go unregulated, thus requiring "crisis zoning" when an applicant stepped forward seeking to construct that previously permitted use?

The case in which an inherently beneficial use is belatedly forbidden by TOD, in the name of "the public interest," is especially hard to swallow. For example, in *Sica v. Wall Tp. Bd. of Adj.*, 127 N.J. 152 (1992), the plaintiff sought to construct a head-injury treatment and rehabilitation center that the Supreme Court ultimately found inherently beneficial. The municipality hamstrung the plaintiff by hurriedly amending its zoning ordinance to bar hospitals and nursing homes after subdivision approval for the project had already been granted. The plaintiff was left to run the tortuous course of seeking a use variance, which the Supreme Court ultimately ordered to be issued.

Reasonable people may argue that

there are reasons for permitting municipalities to block, even belatedly, bowling alleys or other "noxious uses" — the characterization may be in the eye of the beholder — on grounds of "the public interest." It is indefensible, however, to use TOD to validate municipal attempts to exclude uses that themselves clearly serve the public interest.

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There is precedent for more discriminating application of TOD in appropriate cases. In *Kruvant v. Mayor and Council of Cedar Grove*, 82 N.J. 435 (1980), the Court refused to apply TOD in favor of the municipality after it had repeatedly amended its ordinance and those amendments had repeatedly been invalidated. In *Southern Burlington Cty. NAACP v. Mount Laurel*, 92 N.J. 158 (1983), the Court held that presumptive validity would attach only once in the face of an exclusionary zoning challenge. The Court's fairness rationale

— "It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face" — would seem to apply equally to any party who overcomes a heavy presumption and demonstrates the invalidity of a challenged municipal ordinance.

Even if the courts do not go that far in a non-*Mount Laurel* context, there should still be some reward for the "private attorney general" who wins a decision declaring the invalidity of the ordinance, just as litigants who establish new rules of law that otherwise will be applied only prospectively are normally afforded the benefit of those new rules. The current reflexive application of TOD gives municipalities no incentive to plan, since the courts will uphold their "crisis zoning" even after they have lost litigation to a development applicant with a disfavored use.

Courts may evaluate a governing body's purpose in adopting or amending an ordinance. In *Riggs v. Long Beach Tp.*, 109 N.J. 601 (1988), the Supreme Court saw through the municipality's professed purpose and voided an ordinance since its true purpose was to reduce the value of the plaintiff's land, which the township had decided to condemn. That same fair and realistic view should be applied in TOD cases to ensure that the rights of would-be developers and the public interest are both protected. ■