The Transition from Time of Decision to Time of Application

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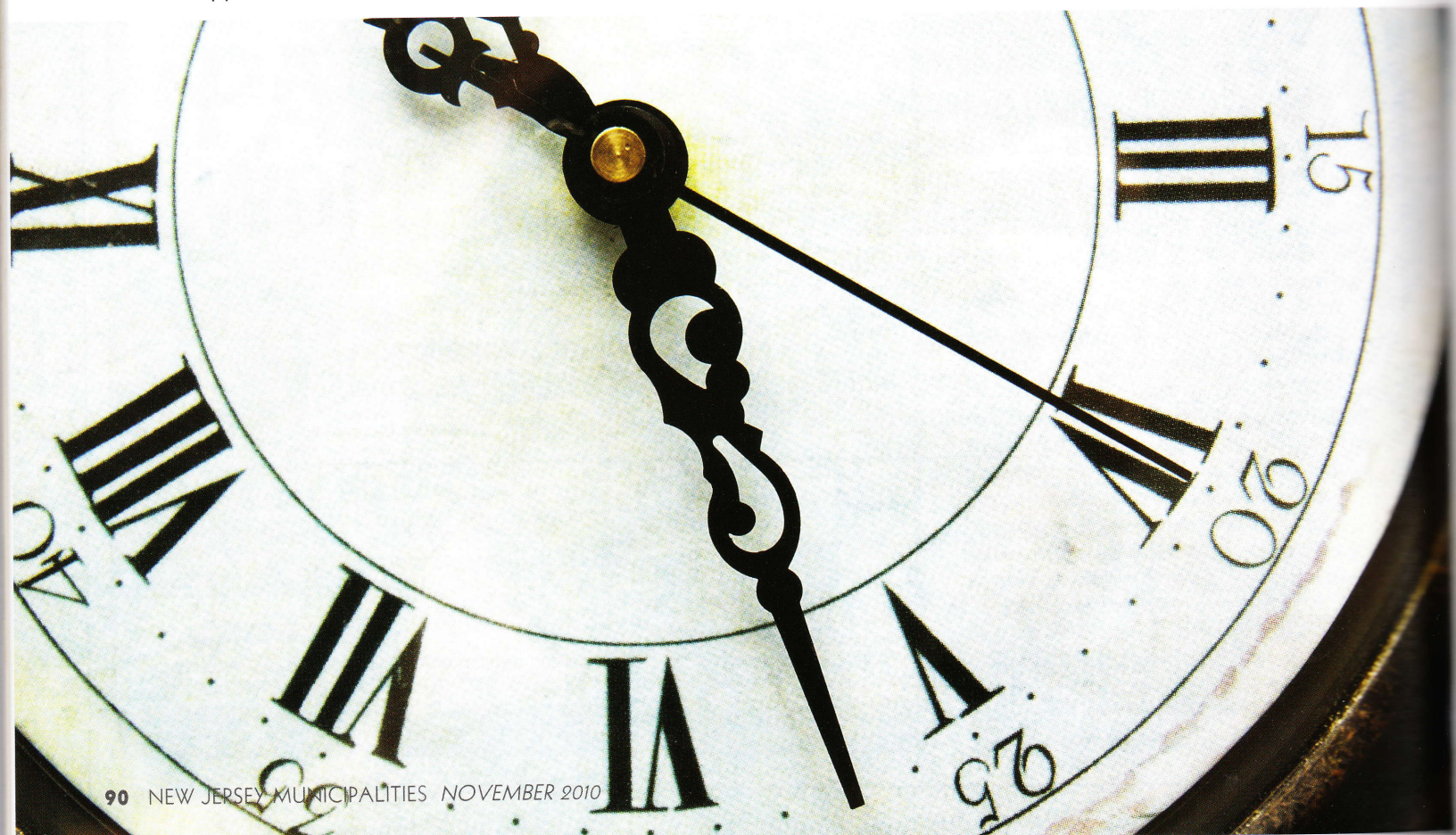
Municipal agencies are about to face a significant change in the law. The comment, and within article, is prompted by the adoption of P.L. 2010, c. 9, which amends the Municipal Land Use Law to establish N.J.S.A. 40:55D-10.5, effective May 5, 2011. The Act provides:

> Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application for development and any decision made with regard to that application for development. Any provisions of an ordinance, except those relating to health and public safety, that are adopted subsequent to the date of submission of an application for development, shall not be applicable to that application for development.

THE TIME OF APPLICATION RULE, WHILE SIMPLE IN ITS STATEMENT, WILL BE MUCH MORE COMPLEX IN ITS APPLICATION.

This special interest legislation is designed to overturn the "time of decision" rule with reference to review of development applications, and serves to jettison a long line of judicial precedent serving to protect the public good.

The "time of decision" rule was created by the courts. It came from judicial respect for the legislative branch. It permits application of enactments adopted during the



course of legal proceedings to those proceedings. The rule is of general application. It was first set forth by the United States Supreme Court in 1801.[i] It first appeared in New Jersey in 1946.[ii] The rule is heavily influenced by the doctrine of separation of powers guaranteed in the constitution. In the context of development applications, the rule results in municipal land use agencies applying the law in existence at the time of their decision. The rule is not without limitation. It is subject to three types of exceptions based upon vested rights, and the requirement for reasonableness.

The first recognized exception is based upon "substantial reliance." Here, to gain the exception, and insulate a developer from changes in the law, there have to be hard costs of construction. In its simplest terms, substantial reliance means actual construction or the equivalent; something beyond the soft costs for development.[iii] For example, in one early case a developer successfully obtained site plan approval, the ordinance subsequently changed to prohibit the development, and the construction official denied a construction permit. The denial was sustained, since there were no vested rights based upon substantial reliance.[iv]

In the passage of the Municipal Land Use Law in 1975, the development community sought to obtain greater vested rights. As a result, the statute granted "statutorily vested rights" to approvals for preliminary and final site plans and subdivisions for various terms of years. Thus, the second exception was created. These statutorily vested rights contain exclusions for enactments to protect public health and safety.

The third exception is an outgrowth of the second. It was determined by the courts that if a municipal reviewing agency improperly denied an application for development, and the ordinance then changed, it would be inequitable to apply the new law.[v] In such a case, an application for development that should have been approved based on the ordinance existing at the time of decision is protected against later adopted ordinances. The third exception to the rule is known as "equitable vested rights."

Municipalities are permitted to amend and apply ordinances during the course of development applications, even if the development itself was the cause for adoption.[vi] The rule recognizes that zoning ordinances, being of general application, cannot fully anticipate the imagination of those looking at the written word with focus on a specific site. Of course, the ordinance change is always subject to challenge based upon reasonableness.[vii] This ability to protect the public good has come under repeated criticism from the development community based upon claimed abuses; some real, but others exaggerated. It is a result of those criticisms that the "time of decision" rule is now to be replaced with the "time of application" rule set forth in N.J.S.A. 40:55D-10.5.

The time of application rule, while simple in its statement, will be much more complex in its application. The very first question is, what constitutes the "submission" of an application for development? May a developer submit a letter entitled "Application for Development," and be protected from later changes in ordinance? Does the statute contemplate an application for development that is complete? And, if not, where is the line to be drawn? The underlying statute gives some guidance.

The term "Application for Development" is defined by N.J.S.A. 40:55D-3 to mean "the application form and all accompanying documents required by ordinance for approval." Thus, more than a simple letter would be required. N.J.S.A. 40:55D-10.3 requires a determination of completeness of an application for development to be made within 45 days of "submission." The statute, therefore, contemplates submission of the application for development to be made prior to the declaration of completeness. One might suspect some future court decision would hold that if a submitted application is found to be complete, it is to be adjudged based upon ordinances in effect at the time of that initial submission.

What cannot be foretold is how courts will view equitable exceptions to the "time of application" rule. For instance, let us assume a developer, aware an ordinance is about to change, engages in a race of diligence in an effort to defeat the public good by submitting an application for development prior to the completion of the lengthy process required for initiating policy, drafting, introduction, planning board review, enhanced notice or master plan amendment, final adoption, and filing the ordinance with the county. It may very well be that the equitable exceptions created by the courts for developers under the "time of decision" rule may now be available to municipalities, and the public at large, under the "time of application" rule.

Additional considerations will exist. What ordinance is to apply when an application is found to be incomplete? There is nothing in the statute preventing a declaration of incompleteness to require resubmission of the application for development. Even if the incompleteness letter requests discrete submissions, when was "submission" of the application for development made? Consistent with the above stated logic with reference to complete applications, it would appear the resubmission date could be construed to be the date of submission.

The next issue will arise when a developer makes changes to an application for development following completeness, and the start of a hearing. N.J.S.A. 40:55D-46b and 48b, provide that if a municipal agency requires substantial changes in the layout of improvements proposed by the developer, "the amended application shall be submitted and proceeded upon, as in the case of the original application for development." The clear purpose of the provision is to afford public notice of any substantial revisions. This requirement to submit anew will now take on a wider dimension.

Under the "time of decision" rule, a development application is subject to any intervening ordinance, and making of modifications during the course of application is common. Under the "time of application" rule, the submission of substantial revisions could have significant consequences. The new rule is bound to create some interesting dynamics. If substantial changes are required to the plan, a developer will have to make the choice to risk denial by not amending the plan, or amend the plan and be subject to any intervening ordinance. One positive result from this dynamic is that the consultants to developers that prepare and submit plans will be forced to be more complete and accurate in initial submissions, as the submission of later corrections may now create liabilities.

Lastly, there have been circumstances where municipalities have amended an ordinance in order to make clear the ordinance permitted the pending application for development. The "time of application" rule will no longer permit such assistance to developers after May 5, 2011.

One thing that should be clear from the above discussion is that there is likely to be much litigation over the meaning and impact of the "time of application" rule, much in the same way there has been over the meaning and impact of the "time of decision" rule. One would hope and expect that throughout this transition, and reversal of long standing judicial precedent, that the public good will somehow be protected from excess. ▲

1. *United States v. The Peggy*, 1 Cranch (U.S.) 103, 2 L.Ed. 49 (1801).
2. *Westinghouse Electric Corp. v. United Electrical*, 139 N.J.Eq. 97 (E & A 1946)
3. *Danadio v. Cunningham*, 58 N.J. 309 (1971)
4. *Crecca v. Nucera*, 52 N.J.Super. 279 (App.Div. 1958)
5. *S.T.C. Corp. v. Planning Bd. of Twp. of Hillsborough*, 194 N.J.Super. 333 (App.Div. 1984)
6. See for example, *Lake Shore Estates v. Denville Tp.*, 255 N.J.Super. 580 (App.Div. 1991) aff'd o.b. 127 N.J. 394 (1992)
7. *Odabash v. Mayor & Council of Dumont*, 65 N.J. 115 (1974)