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## SHOPPING CENTERS

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### When an ordinance amendment threatens project

Developers know the story all too well. You spend

time and resources finalizing a development concept that mostly conforms

to the municipality's current ordinance. Then, the municipality adopts an amendment that drastically increases the number of variances required for your proposed project. Knowing that the effective date of the ordinance is looming, you may be tempted to file your application and attempt to secure approvals before the ordinance officially becomes effective.

Unfortunately, that tactic would not provide you with the approvals necessary to construct your project. The time of decision rule provides that an agency must apply the law in effect at the time of its decision rather than the law in effect when the issues were presented. Furthermore, in *Willoughby v. Planning Board of Deptford*, 306 N.J. Super. 266 (App. Div. 1997), the Appellate Division found that when a municipal governing body

proposes an amendment to the zoning ordinance, a planning board should



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not grant approvals under an existing zoning ordinance before the proposed amendment takes effect.

In a recently published decision, *Maragliano v. Land Use Board of Wantage*, the New Jersey Appellate Division reaffirmed the concept that developers cannot usurp the restrictions of a new ordinance by obtaining approvals after the enactment of the amendment but before its effective date. In that case, the Township Council voted on June 26th to amend the zoning code to increase the minimum lot size requirement. The effective date of the ordinance was August 15th. Four days after the vote, but weeks before the effective date, the Applicant submitted an application to subdivide a parcel into four lots. The Applicant requested variances in accordance with the existing ordinance, but did not account for variances that would be necessary un-

der the adopted, but not yet effective, ordinance. The Land Use Board voted to grant subdivision approval and the requested variances on August 12th, just prior to the effective date of the amended ordinance. The Board memorialized its decision on November 25th.

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The Appellate Division determined that the Board should have reviewed the Application pursuant to the new, soon-to-be-effective zoning ordinance. The Court reiterated that the Land Use Board was subordinate to the municipal governing body and, as such, that the Land Use Board must act to carry out the municipality's goals expressed through the enacted ordinances. Therefore, the Court held that the Board erred by approving the disputed application after the governing body had enacted an amended ordinance.

The effective date of the ordinance was not relevant to determine the law under which the application should have been reviewed.

The Appellate Division also rejected the Applicant's argument that its subdivision approval was insulated from zoning amendments for two years pursuant to N.J.S.A. 40:55D-52(a) because the Board did not memorialize its resolution of approval until months after the ordinance went into effect. The Court also found that the Applicant was not protected by equitable considerations because the Applicant filed the application after the governing body had enacted the amendment.

The *Maragliano* decision does not represent a dramatic shift in the application of the time of decision rule. However, it is a reminder to proceed with caution

when faced with a possible zoning amendment. In view of the rule of law established in *Willoughby* and *Maragliano*, developers must be aware that land use ordinances, unlike other municipal ordinances, essentially become effective when enacted or even when proposed. Although counterintuitive, and some would say illogical and unfair, attempts to obtain approvals under the existing law could expose the applicant to litigation or shake the foundation upon which any approvals are granted. Therefore, although time consuming and costly, developers should resist the urge to beat the effective date of the ordinance. It is likely already too late.

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