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ZONING AND LAND USE PLANNING

Exhaustion of Remedies Is Often Key to Seeking Relief

By
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In New York, it is well settled that the doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is available, relief must be sought by exhausting this remedy before courts will act. The New York Court of Appeals has observed that "hornbook law" provides that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." This principle, the court added, furthers the goals of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with administrators' efforts to develop a coordinated, consistent, and legally enforceable scheme of regulation, and affording administrators the opportunity, in advance of possible judicial review, to prepare a record reflective of their "expertise and judgment."[1]

This general rule also is supported by statutory law. Pursuant to CPLR 7801(1), an Article 78 proceeding may not be used to challenge a determination that can be adequately reviewed by administrative or judicial appeal. As applied to administrative determinations, Section 7801(1) requires one who objects to the act of an administrative agency to first exhaust available administrative remedies before being permitted to litigate in the courts.

The exhaustion rule is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, when resort to an administrative remedy would be futile, or when its pursuit would cause irreparable injury.

This column discusses the general rule of exhaustion of remedies in the context of land use and zoning law, as well as the significant exceptions to the rule.

Application of the Rule

A recent decision by the Appellate Department, Second Department, illustrated the basic application of the rule.

In *Matter of LaRocca v. Department of Planning, Environment, and Development of Town of Brookhaven,*[2] the building department of the Long Island town of Brookhaven denied an application for a building permit. The applicant went to court, seeking review of the denial of his application. The building department and the other respondents moved to dismiss the petition on the ground that the applicant had failed to exhaust his administrative remedies.

The Supreme Court, Suffolk County, dismissed the proceeding based on the applicant's failure to exhaust administrative remedies, and he appealed to the Second Department.

The appellate court affirmed. In its decision, it explained that the

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applicant had not pursued an available administrative remedy— an appeal to the town's board of zoning appeals— prior to seeking judicial intervention. Given the applicant's failure to establish that any exception to the exhaustion doctrine was applicable, the Second Department determined that the Supreme Court had properly granted the motion to dismiss.

Futility

The Appellate Division, Third Department, issued a decision several years ago that highlighted and explored the "futility" exception to the exhaustion of remedies doctrine.

In *Subdivisions v. Town of Sullivan,*[3] J.B. Quarry, applied for a mining permit for an 80-acre property located on a road in the upstate town of Sullivan. Litigation ensued, and J.B. Quarry and other parties filed an action seeking a declaration that they were entitled to nonconforming use status for the property and, therefore, that the town's zoning regulations governing mining operations were void as against them.

The town and the other defendants moved to dismiss, asserting that the plaintiffs had failed to exhaust their administrative remedies. The Supreme Court, Madison County, denied the motions to dismiss, concluding that the plaintiffs had demonstrated an exception to the exhaustion requirement.

The dispute reached the Third Department, where the defendants again contended that the underlying declaratory judgment action should be dismissed based on the plaintiffs' failure to exhaust their administrative remedies. Specifically, they contended that the plaintiffs only had to apply for a "[c]ertificate of [n]on-conformity," submit the proof they deemed appropriate to the town's zoning enforcement officer, and await his or her decision as to their entitlement to a "relaxation" of the town's zoning law. Should a favorable decision not be forthcoming, the defendants continued, the plaintiffs then could appeal to the zoning board of appeals. That procedure, the defendants asserted, afforded the plaintiffs a viable avenue of administrative relief—an avenue that they could not short circuit by prematurely commencing an action for declaratory judgment.

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The Third Department was not persuaded by this argument. It decided that it was "abundantly clear" that requiring the plaintiffs to pursue the administrative remedy suggested by the defendants "would be an exercise in futility, thereby demonstrating a recognized exception to the exhaustion requirement."

The appellate court explained that, throughout the course of the litigation, the defendants had "consistently demonstrated their opposition to plaintiffs' desired use of the subject parcel" and, moreover, had "thwarted each and every attempt that plaintiffs have made to engage in mining operations thereon."

Under these circumstances, the Third Department concluded, even assuming that a valid administrative review process existed, it was "readily apparent" that the plaintiffs were "unlikely to receive an unbiased evaluation from defendants."

Permitted Use

Another exception to the exhaustion of remedies doctrine in the land use context occurs where a property owner challenges a local government's decision that a certain use of specific property is not a permitted use.

Matter of BBJ Associates v. Zoning Board of Appeals of Town of Kent[4] arose after BBJ Associates, the owner an 88-acre parcel of land straddling the border between the towns of Kent and Carmel in Putnam County, decided to build a multifamily senior citizens' development on an 80-acre portion of the property located in Carmel and adjacent to property it owned in Kent. As part of this plan, BBJ sought to build an access road running through the two towns that would connect the

development with State Route 52. The proposed road would traverse eight acres located in Kent that were zoned for commercial and single-family residential use.

Kent's building inspector decided that the "entranceway is an accessory use to a principal use and we do not have a principal use." The town's planning board refused to continue any site plan review until "the issue raised" by the building inspector was resolved.

Kent's zoning board raised the question of whether the proposed town road was a driveway prohibited by the town's zoning code. In response, BBJ argued that the "entranceway" or "access road" was not a principal use, an accessory use, or a driveway but, rather, was an "infrastructure improvement" pursuant to the town's zoning code and it asked the zoning board to reverse the building inspector and "permit" construction of the proposed road.

At a special meeting, the zoning board agreed that the proposed "entranceway" or access road was an infrastructure improvement. It concluded, however, that because the proposed town road would be constructed in areas of the town zoned for commercial use and for single-family residential use— not multi-family housing— it was not a permitted use.

BBJ brought an Article 78 proceeding, challenging the zoning board's determination that the access road was not a permitted use. The Supreme Court, Putnam County, granted the petition in its entirety.

The case reached the Second Department, which found the controversy ripe for judicial review. It explained that the requirement that a landowner must seek a variance to exhaust administrative remedies was applicable to controversies over whether zoning regulations were confiscatory and, therefore, unconstitutional as applied to a landowner's property. The appellate court explained, however, that the exhaustion of remedies doctrine generally was "not applicable to controversies over whether a use is permitted as of right."

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Legal Duty

Another notable exception to the exhaustion of remedies rule was highlighted in an Article 78 proceeding in the Third Department, *Matter of Milnarik v. Rogers,*[5] in which the petitioners sought to require the zoning board of appeals of the Village of Lake Placid to hear and determine their administrative appeal, which sought to challenge the issuance of a certificate of occupancy to other property owners.

The zoning board of appeals moved to dismiss the petition, contending that the petitioners had failed to exhaust their administrative remedies. The Supreme Court, Essex County, granted the motion, and the petitioners appealed to the Third Department.

The appellate court reversed, explaining that exhaustion of remedies had "no application" where the purpose of the judicial proceeding was "to compel the performance of a legal duty."

Conclusion

Property owners, developers, and other interested parties often turn to the courts to resolve land use and zoning disputes before they have exhausted all of their administrative remedies. Unless an exception to the general rule applies, they will find the courts unwilling to hear their complaints.

1. *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52 (1978).
2. See, *Matter of LaRocca v. Department of Planning, Environment, and Development of Town of Brookhaven*, 125 AD3d 659 (2d Dept. 2015).
3. See, *Subdivisions, Inc. v. Town of Sullivan*, 86 AD3d 830 (3d Dept. 2011).
4. See, *Matter of BBJ Associates v. Zoning Board of Appeals of Town of Kent*, 65 AD3d 154 (2d Dept. 2009).
5. See, *Matter of Milnarik v. Rogers*, 298 AD2d 637 (3d Dept. 2002).

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