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ZONING AND LAND USE PLAINNING

Timing for Appealing a Building Permit Decision

By **Anthony S. Guardino**
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When a local government official or a municipal department denies a property owner's application for a building permit or other administrative determination, the applicant has 60 days from the date the denial is filed to appeal that decision to the zoning board of appeals (ZBA). *See, e.g.,* Town Law 267-a(5)(b). These are the typical situations that lead to the filing of variance applications with ZBAs.

The 60-day rule also applies to a neighbor or third-party opposing the decision to grant a property owner's application. However, in these instances, the calculation of the 60 days can be more complicated than for the applicant itself.

The 'Pansa' Decision

The leading decision setting forth the distinction, *Matter of Pansa v. Damiano*, 14 N.Y.2d 356 (1964), was issued by the New York Court of Appeals nearly six decades ago.

The case involved Alexander and Ruth Pansa, who owned a home in a residential zone in the City of Utica. A neighboring property was commercially zoned. On Sept. 21, 1962, the commercial property owner applied to the Utica buildings commissioner for a permit for a structure described on the plans as a "warehouse." The permit was issued that day.

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About three days later, the Pansas saw that an old building at the rear of the commercial property near their home was being razed. On Sept. 26, 1962, the Pansas made inquiries and were told at the buildings department that a permit had been issued to the commercial property owner to erect a new structure. On Oct. 9, 1962, after several meetings among the parties and representatives of the buildings department, the city's corporation counsel's office, and the city's planning commission, the Pansas and the commercial property owner attended a specially called meeting of the planning commission. The Pansas asked the commission to revoke the permit. They later asserted that they were told at the end of the meeting by an assistant corporation counsel "that a written decision would be rendered and submitted" to them and that the losing party could then appeal to the ZBA.

On Oct. 24, 1962, the Pansas received by mail from the buildings department a letter accompanied by a copy of an opinion from the planning commission upholding the issuance of the permit. That day, the Pansas appealed to the ZBA, which subsequently dismissed the Pansas' appeal as untimely.

The dispute reached the Court of Appeals, where the city argued that the zoning ordinance, which at that time called for an appeal to be taken "within thirty (30) days of the date of the decision," meant within 30 days from the issuance of the permit (i.e., Sept. 21). The Court conceded that this position "might in some fact situations be permissible." In particular, the Court continued, "[a]s applied to an applicant denied a permit the proposed construction might be fair and sensible."

The court ruled, however, that "on these facts" it was "unreasonable and undesirable" to adopt that view because, strictly applied, "it might prevent any appeal at all since the neighbors might not learn till long afterward of the issuance of a building permit."

According to the court, a neighbor "who demands revocation of a permit issued to another is in no position to appeal or at least should not be required to take [an] appeal until [the neighbor's] demand for revocation has been rejected with some formality and finality" in a decision of which the neighbor "has had notice."

The court concluded by observing that this presupposed that objections were put forth "within a reasonable time and without laches."

The 60-day rule also applies to a neighbor or third-party opposing the decision to grant a property owner's application. However, in these instances, the calculation of the 60 days can be more complicated than for the applicant itself.

Applying 'Pansa'

Numerous courts have relied on and applied the holding in Pansa over the years. For example, in July, the Supreme Court, Ontario County, issued its decision in *Matter of Castronova v. Town of Canadice Zoning Board of Appeals*, 79 Misc. 3d 1224(A) (Sup. Ct. Ontario Co. 2023).

In this case, a property owner applied for a building permit in late 2021 to construct a pole barn on property in the upstate Town of Canadice. The code enforcement officer (CEO) issued the building permit on Nov. 9, 2021, and excavation began at the end of Dec. 2021.

Neighbors observed the beginning stages of the construction but stated that they believed the property owner was constructing a one-story garage. The neighbors said that they first discovered that the structure was a two-story pole barn when the trusses for the roof and a second floor of the barn were added on Feb. 3, 2022.

The neighbors filed a complaint with the CEO on Feb. 6, 2022, asserting violations of the town's zoning code.

The CEO upheld the issuance of the building permit on Feb. 8, 2022 and the neighbors filed an appeal with the ZBA on Feb. 25, 2022. The ZBA decided that the building permit was invalid and had to be revoked.

The property owner went to court, arguing that the neighbors' appeal to the ZBA was untimely because, under Town Law §267-a(5)(b), the neighbors had to file their appeal within 60 days of the Nov. 9, 2021, issuance of the building permit yet they actually appealed on February 6, 2022.

The court found that the neighbors' appeal was timely. The court said that it was "not persuaded" that the issuance of the building permit on Nov. 9, 2021, began the 60-day limitations period set forth in Town Law §267-a(5)(b) and in the town's zoning code.

The court explained that although the property owner was correct that the issuance of a building permit ordinarily started the 60-day clock, that rule only was reasonable as applied to an applicant who was denied a building permit.

The court then declared that where an individual challenged a building permit issued to another person, the 60-day period in which to appeal to a ZBA "begins to run when the individual's objections are formally rejected by the official charged with enforcing the zoning code."

Here, the court reasoned, the neighbors learned about the height of the barn and believed that the structure was in violation of the zoning code on or about Feb. 3, 2023. The court noted that the neighbors filed their complaint with the CEO only a few days later.

The operative "determination" that began the 60-day clock was the CEO's decision on Feb. 8, 2022, and the neighbors' appeal to the ZBA, filed 17 days later, "was timely," the court concluded. *See, also, Matter of Iacone v. Building Department of Oyster Bay Cove Village*, 32 A.D.3d 1026 (2d Dep't 2006) (neighbors demonstrated they first learned of "sports court" permit on May 4, 2005, and could not reasonably be charged with actual or constructive knowledge earlier than that; July 1, 2005 appeal to village board of appeals held timely); *Matter of Farina v. Zoning Board of Appeals of City of New Rochelle*, 294 A.D.2d 499 (2d Dept. 2002) (building permit issued in December

1999; neighbors learned of development in early March 2000; appeal to ZBA on March 27, 2000, heldtimely).

Filing Required

Still another possible reason that an otherwise arguably untimely objection may be found to be timely is where a local requirement for a decision granting a permit is not followed.

For instance, in *Matter of Corrales v. Zoning Board of Appeals of Village of Dobbs Ferry*, 164 A.D.3d 582 (2d Dep't 2018), a building inspector determined in November 2012 that a property owner's proposed use was zoning-compliant, but that decision was not "filed" anywhere at that time, in contravention to a requirement in the village code. Nearly two years later, on August 20, 2014, after other rulings involving this property, neighboring property owners appealed to the ZBA.

The ZBA determined that the neighbors' appeal was untimely, and that the appeal period set forth in the village code had begun to run in November 2012, when the building inspector forwarded the property owner's application to the planning board – even though that act had not been disclosed to the public.

Still another possible reason that an otherwise arguably untimely objection may be found to be timely is where a local requirement for a decision granting a permit is not followed.

The Supreme Court, Westchester County, disagreed with the ZBA. It emphasized that it was "undisputed" that any determination of the building inspector in November 2012 that the property owner's proposed use was zoning-compliant had not been "filed" anywhere at that time.

The Appellate Division, Second Department, affirmed, agreeing with the trial court's conclusion that the ZBA's determination in this respect was contrary to the plain language of the village code. *Cf. Matter of Highway Displays, Inc. v. Zoning Board of Appeals of Town of Wappinger*, 32 A.D.2d 668 (2d Dep't 1969) (fact that neighbors' appeal was started on "unofficial form" was of no consequence or materiality since the proceeding and its object were communicated to property owner and concerned local officials).

Laches

As the Court of Appeals pointed out in *Pansa*, laches can bar an otherwise timely appeal to a ZBA.

The Appellate Division, Third Department, relied on laches in its decision in *Matter of Clarke v. Town of Sand Lake Zoning Board of Appeals*, 52 A.D.3d 997 (3d Dept. 2008). Here, a town planning board approved construction of a home on June 8, 2006; the town's code enforcement officer issued a building permit on June 9, 2006; excavation began on July 14, 2006; and the town issued a certificate of occupancy on October 20, 2006. Soon thereafter, a neighbor appealed to the town's ZBA, challenging the issuance of the building permit and the certificate of occupancy.

The dispute reached the Third Department, which found that although the neighbor was not on notice when the permit was issued on June 9, 2006, she lived next door and was aware that construction was taking place, at least by July 14, 2006. The court then ruled that her appeal to the ZBA was untimely.

On the other hand, the court found that the neighbor's challenge to the certificate of occupancy, which was taken soon after that document was filed, was timely. Nevertheless, the court held that the neighbor's challenge to the certificate of occupancy was "barred by the doctrine of laches."

As the court pointed out, the neighbor "was aware that excavation and construction were occurring on the neighboring property in July 2006" and she acknowledged that she had been informed of the impending plans for a new house as early as May 2006. "Despite this knowledge prior to and during the construction," the court said, the neighbor "did not appeal to the ZBA or seek a preliminary injunction until late October 2006—after the house was complete, the certificate of occupancy was issued and the [property owners] had moved in."

Accordingly, the court concluded, because the neighbor "delayed in seeking to protect her interests and offered no reason for not acting sooner, the doctrine of laches should be invoked to bar this proceeding."