New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 250—NO. 104
WEDNESDAY, NOVEMBER 27, 2013

ZONING AND LAND USE PLANNING

Default Approval Of Subdivision Applications

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New York State law and local government statutes contain a plethora of deadlines that municipalities must meet when considering zoning-related applications from developers or other property owners. Under state law,[1] when a local government fails to issue a decision on a land use application within the required time, the aggrieved party's only remedy is to compel a decision by commencing a mandamus action under Article 78—except in one situation. The sole exception is the "default" approval of subdivision applications.[2]

The Law

Town Law §276(5) provides, for example, that where a town planning board is the lead agency under the New York State Environmental Quality Review Act (SEQRA)[3] and it determines that preparation of an environmental impact statement (EIS) on a "preliminary plat" (i.e., the drawing showing the layout of a proposed subdivision) is not required, it must hold a public hearing within 62 days after receiving a complete preliminary plat and it must make its decision within 62 days after the close of the public hearing. Town Law §276(5) contains similar deadlines where a town planning board determines that an EIS is required and where a town planning board is not the lead agency. Town Law §276(6) also has deadlines for approval of a "final plat" (i.e., the drawing showing the layout of a proposed subdivision with the modifications, if any, required by the planning board at the time it approved the preliminary plat).

Town Law §276(8) provides for the "default" approval of a preliminary or final plat where these deadlines are missed. Specifically, it states that the time periods within which a planning board must take action on a preliminary plat or a final plat are "specifically intended to provide the planning board and the public adequate time for review and to minimize delays in the processing of subdivision applications." Section 276(8) provides that the deadlines may be extended "only by mutual consent of the owner and the planning board." Then, it declares, if a planning board "fails to take action on a preliminary plat or a final plat within the time prescribed therefor after completion of all requirements under [SEQRA], or within such extended period as may have been established by the mutual consent of the owner and the planning board, such preliminary or final plat shall be deemed granted approval."

Where there has been a default approval of a preliminary or final plat, Section 276(8) states that the certificate of the town clerk as to the date of submission of the preliminary or final plat and the failure of the planning board to take action within the prescribed time "shall be issued on demand" and shall be sufficient in lieu of any other evidence of approval.

Operation of Law

Over the years, numerous courts have enforced default approvals. Consider, for example, the decision issued nearly 35 years ago by the Appellate Division, Third Department, in *Matter of Pekar v. Town of Veteran Planning Board*.[4]

In that case, the petitioner filed a subdivision plan with the planning board of the upstate Town of Veteran on July 23, 1975. On Sept. 22, the petitioner made a demand by letter that the town clerk issue a certificate indicating that the plan had been approved because the board had failed to act within 45 days (the deadline at the time) of the petitioner's submission of the plan. The planning board disapproved the plan on Sept. 30 and the town clerk refused to issue the certificate the petitioner had requested. The petitioner then initiated an Article 78 proceeding.

The court granted the petitioner's application and directed the town clerk to issue a certificate for the final plat plan of the petitioner's subdivision stating that the subdivision was deemed approved. The planning board appealed.

The Third Department affirmed. It pointed out that the planning board had not held a public hearing within 45 days of the petitioner's submission of her final plat plan to the board. It then observed that the very purpose of Section 276 was to "avoid administrative delay," and it concluded that the planning board's failure to act within the required timeframe "resulted in approval by operation of law."

Coordination With SEQRA

Since the state subdivision statutes require that a planning board comply with the provisions of SEQRA, it is important to keep in mind that the statutory approval deadlines are affected by the SEQRA review process. In one recent case, *Matter of Center of Deposit v. Village of Deposit*,[5] the owner of a parcel of real property located in the upstate Village of Deposit that contained two vacant buildings—a three-story building that formerly was a school and a smaller metal building—filed an application with the village's planning board in August 2009 to subdivide the property into two lots, with each of the new lots to contain one of the buildings. On Oct. 28, 2009, the planning board held a public hearing and, in conjunction with its review under SEQRA, issued a positive declaration of environmental significance and required the property owner to submit a draft EIS.

The property owner then went to court to overturn the board's positive declaration. The Third Department reversed the board's determination and remitted the matter to the board for further proceedings. On March 9, 2012, the board ultimately issued a negative

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declaration of environmental significance. Following public meetings and a public hearing held on March 28, 2012, the board denied the property owner's subdivision application. The property owner then commenced an Article 78 proceeding, arguing that the board's denial of the subdivision application had been untimely, resulting in a default approval of the application.

The Third Department rejected the property owner's argument that because the board had held a public hearing on the application in October 2009, it lacked any authority to conduct additional hearings, and the time within which the board was required to issue a determination on the subdivision application had begun to run when the Third Department had set aside the initial positive declaration. The court noted that, pursuant to Village Law §7-728(6)(c), the time periods for review of a plat begin upon the filing of a negative declaration. It then explained that a public hearing on the subdivision application had to follow the filing of the negative declaration.

Thus, it found, the hearing held in October 2009—prior to the issuance of the negative declaration—could not satisfy the hearing requirement under the Village Law, and the board had 62 days after the issuance of the negative declaration in March 2012 to hold a public hearing, and an additional 62 days after the hearing to render a decision on the application. Inasmuch as the board had met those deadlines, the property owner was not entitled to a default approval of its application, the Third Department concluded.

Another noteworthy SEQRA case was *Matter of Benison Corp. v. Davis*,[6] which reached the Third Department after the planning board of the Town of Marbletown, acting as lead agency for purposes of SEQRA, required various pieces of information on a number of environmental concerns and recommended that the petitioner prepare an updated "drawdown" study for six test wells pursuant to a Department of Environmental Conservation (DEC) "level one protocol." The petitioner objected to the request for an updated drawdown study and that it be conducted pursuant to the DEC level one protocol, moved to withdraw its previous consent to waive all required time frames, and demanded that the town clerk enter a default approval of its application pursuant to Town Law §276(8). The town clerk refused and the petitioner went to court. The Supreme Court dismissed the petition, and the Third Department affirmed.

In its decision, the appellate court explained that the town board had never issued a negative declaration concerning the proposed action or a notice of completion for a draft EIS. Therefore, the Third Department found, the petitioner's preliminary plat application "remained incomplete." Because it was incomplete, the time periods for a public hearing were never triggered, and the petitioner "was simply not entitled to default approval."

Referrals

The process of a local municipality referring a subdivision application to a county planning authority under the General Municipal Law (GML) also can affect the default approval process, as the property owners discovered in *Matter of King v. Chmielewski*.[7]

This case arose on Sept. 2, 1987, when the owners of a parcel of land in the Town of Coeymans submitted an application to the town planning board to subdivide their property into four residential building plots. The property owners were notified at the meeting that because their property abutted a county highway, the application had to be submitted to the county planning board under GML §239-n. The next day, Sept. 17, the town planning board sent the petitioners' application to the county planning board.

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On Oct. 21, 1987, the town planning board received the county planning board's recommended objection to the property owners' application, and on Nov. 4, 1987 it voted to deny their application. Meanwhile, on Nov. 4, the property owners applied to the town clerk for approval of their application by default, due to the town planning board's failure to act within 45 days of the Sept. 16 hearing; the town clerk denied that request.

The property owners filed an Article 78 proceeding to annul the town planning board's determination, or to compel the town clerk to issue a certificate of approval by default. The Supreme Court ruled against them and they appealed.

The Appellate Division affirmed, finding, among other things, that the town clerk was not required to issue a default certification because the 45-day period set forth in the Town Law had been tolled. The action reached the New York Court of Appeals.

The court affirmed, but for a different reason. It explained that, as a general rule, time limitations created by statute were not tolled in the absence of statutory authority. It found no statutory authority in the town law for tolling or suspending the time period in which the town planning board had to act on the property owners' subdivision application. Indeed, the court said, there was a "legislative mandate for speedy administrative action" and a planning board's failure to act within the "tightly prescribed time limits" resulted in approval by operation of law.

The court nevertheless agreed with the Appellate Division's conclusion that there was no approval by default, reasoning that the statutory period did not start with the submission of the property owners' application to the town planning board, but rather with the conclusion of the county referral process. It observed that since Section 239-n explicitly required the town planning board to refer the application to the county planning board for its review, the town planning board was "powerless to act on the application" until it received the county board's recommendation or until 30 days had expired with no response.

Thus, the court concluded, the period for the town planning board to act had not begun to run until Oct. 21, 1987, when the town planning board had received the county planning board's recommendation. Measured from that date, the Nov. 4 denial was "well within the statutory period," and the property owners' demand for a default certification therefore had been properly rejected, the court ruled.

Conclusion

The provision for a "default" approval of subdivision applications contained in Town Law §276 and corresponding provisions in the Village Law and General City Law can be a powerful tool for developers and property owners in the right circumstances. This is not to suggest that every subdivision application will be decided on the strict time lines provided by state or local law—as noted above, there are reasons that can delay when the time begins to run, and parties may consent to delay. However, the unique subdivision default provision certainly can help speed the review process along by requiring municipalities to remain attentive to these applications throughout the process.

1. See Town Law §276(8), Village Law §7-728(8), and General City Law §32(8).
2. At the local level, statutes may provide for default approvals in the case of a board's failure to act in a timely manner in connection with other forms of land use applications.
3. Environmental Conservation Law (ECL) §8-0101 et seq.; 6 NYCRR Part 617.
4. 58 A.D.2d 703 (3d Dept. 1977).
5. 108 A.D.3d 851 (3d Dept. 2013).
6. 51 A.D.3d 1197 (3d Dept. 2008).
7. 76 N.Y.2d 182 (1990).

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