New York Law Journal
Real Estate Update
Wednesday, July 26, 2006
ALM

Statute of Limitations

Court Confuses Four-Month Rule in Zoning Cases

BY JOHN M. ARMENTANO

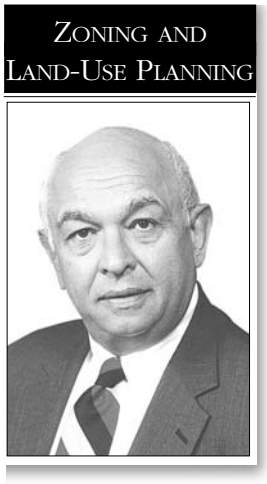
An article 78 proceeding brought to review a determination by a governmental body or officer must be commenced "within four months after the determination to be reviewed becomes final and binding upon the petitioner."[1] The New York Court of Appeals has held that the four-month time period begins to run when the petitioner has "suffered a concrete injury not amenable to further administrative review and corrective action."[2]

The concept of "concrete injury" in a zoning case was explored by the Court almost two decades ago. In *Matter of Save the Pine Bush, Inc. v. City of Albany*,[3] the Court held that a proceeding alleging violations of the State Environmental Quality Review Act ("SEQRA") in the enactment of legislation must be commenced within four months "of the date of enactment of the ordinance." In essence, the Court found in *Save the Pine Bush* that, in the context of a rezoning, i.e., a legislative act, concrete injury is inflicted when the rezoning is enacted. There has been some doubt, however, as to the continuing validity of that rule, given the Court's subsequent opinion in 2003 in *Stop-the-Barge v. Cahill*,[4] where it held that the statute of limitations runs from the end of the SEQRA process.

The Court has reaffirmed the *Save the Pine Bush* standard. Earlier this month, in *Matter of Eadie v. Town Board of the Town of North Greenbush*,[5] the Court held that an article 78 proceeding brought to challenge a zoning change must be commenced within four months of the time the change is adopted. Property owners and practitioners must pay particular attention to this decision, however, because of the dictum to the effect that such might not always be the case. When in doubt, it is better to bring an action as early as possible. The only risk is that it might be premature. To sue too late, however, risks dismissal on statute of limitations grounds before a hearing on the merits and a possible malpractice claim.

Rezoning Requested

Matter of Eadie arose in September 2003, when the Town of North Greenbush released a Draft



Generic Environmental Impact Statement ("DGEIS"), prepared pursuant to SEQRA, to address a proposed areawide rezoning of many parcels of land located near the intersection of Routes 4 and 43. The rezoning had been requested by landowners, including John and Thomas Gallogly, who wanted to build retail stores on their property. Retail development was not permitted by the then-existing zoning.

The DGEIS was a document of more than 200 pages with lengthy appendices. One section of the document discussed traffic; interestingly, that section said that an "access management plan"[6] would be needed, but described only in general terms what the plan would contain.

After public hearings and written comments, the town adopted a Final Generic Environmental Impact Statement ("FGEIS") on March 25, 2004. Responding to comments urging the development of an access management plan, the town included such a plan in the FGEIS, proposing to construct several access roads and other improvements, and describing proposed allocations of costs and sources of funding for this construction. The FGEIS did not specify the timing of the proposed improvements.

After another comment period, the town took the last step in the SEQRA process by adopting a Findings Statement on April 28, 2004. The Findings Statement approved a project that included the rezoning of a number of parcels. It described proposed "mitigation measures," including those contained in its access management plan, but said that "[t]he timing of the improvements" was beyond the scope of the FGEIS, and noted that it could not "logistically or accurately determine at this time which parcels will be developed and when."

About a week later, on May 4, 2004, the town board held a public hearing on the proposed zoning change. At the hearing, a number of opponents of the change presented a protest petition pursuant to Town Law §265(1) seeking to require a three-quarters vote of the town board to approve the rezoning. The town determined that the protest petition was invalid and, on May 13, 2004, the town board passed the rezoning by a vote of three to two.

On September 10, 2004—more than four months after the SEQRA process was completed but fewer than four months after the rezoning was enacted—some property owners who opposed the rezoning began a proceeding under article 78 against the town board, the town planning board, and the Galloglys. The petitioners alleged, among other things, that the rezoning violated SEQRA.

Supreme Court, Rensselaer County, rejected the town board's contention that the SEQRA claims were barred by the statute of limitations, granted the article 78 petition, and annulled the rezoning. The Appellate Division, Third Department, reversed and dismissed the petition, holding that the petitioners' SEQRA claims were barred by the statute of limitations, calculated from the time the Findings Statement was filed. The Court of Appeals granted leave to appeal.

The 'Stop-the-Barge' Decision

The petitioners in *Matter of Eadie* relied in large measure on the *Stop-the-Barge* case. *Stop-the-Barge* arose in the fall of 1996, when New York City Energy ("NYCE") submitted an Environmental Assessment Statement to the New York City Department of Environmental Protection ("DEP") to obtain permits to install a power generator on a floating barge in Brooklyn. It is significant that the governmental action involved in *Stop-the-Barge* was not a legislative act. Rather, it seemed to be administrative in nature.

The barge was to be anchored on the west side of the Wallabout Channel at the Brooklyn Navy Yard. Upon receipt of the statement, DEP became the lead agency for purposes of conducting a coordinated environmental review of the project pursuant to SEQRA. In September 1997, DEP issued the first of three conditioned negative declarations (a "CND"), concluding that the project posed no significant adverse impact to the environment and therefore required no environmental impact statement. Following subsequent project modifications, DEP issued two revised CNDs, the last on Jan. 10, 2000. On Jan. 19, 2000, the declaration was published for a 30-day

John M. Armentano, *a partner with the Long Island law firm of Farrell Fritz, represents local governments and developers in zoning, land use, and environmental matters, including litigation. He can be reached at jarmentano@farrellfritz.com.*

public comment period as required by 6 NYCRR 617.7(d)(1)(iv). The declaration became final on Feb. 18, 2000, thereby concluding SEQRA review of the proposed project.

Simultaneously, when NYCE further modified the proposal in 1999, NYCE applied to the New York State Department of Environmental Conservation ("DEC") for an air permit pursuant to the Environmental Conservation Law. DEC determined that the impacts of air emissions from the proposed facility would not contravene the standards imposed by the Environmental Protection Agency and on Aug. 9, 2000 tentatively approved an air permit for the facility. Following this tentative determination, DEC issued a public notice stating that it would accept public comment for a 30-day period, to end on Sept. 8, 2000. Given public opposition to the proposal, DEC held a legislative hearing on Dec. 12, 2000. Parties opposed to the proposal submitted extensive written objections to the proposal on grounds of inadequate SEQRA review. DEC determined that an adjudicatory hearing was unnecessary and, on Dec. 18, 2000, issued an air permit for NYCE's facility.

On Feb. 20, 2001—one year after the CND had become final, and two months after the air permit had been issued—an article 78 proceeding was commenced contending that the DEP's issuance of the CND was arbitrary and capricious in violation of SEQRA. Among other things, the DEP argued that the challenge to the CND—issued on Jan. 10, 2000—was time barred because the action was not brought within four months after the CND was issued.

The trial court dismissed the action as time barred, and the Appellate Division upheld dismissal of the suit against the DEP, holding that the issuance of the CND was a final agency action triggering the statute of limitations.

On appeal to the Court of Appeals, the DEP and NYCE argued that the period of limitations began to run when the CND was issued, or at the latest, when the 30-day comment period after issuance of the declaration was complete. The Court agreed with the DEP, NYCE, and the Appellate Division and held that the challenge to the DEP's determination of no adverse impact had to be brought within four months of the CND, which concluded the SEQRA process, not within four months of the later issuance of the air permit.

Distinguishing Factors

In *Matter of Eadie*, the Court found that *Stop-the-Barge* did not control the challenge to the North Greenbush rezoning for two reasons. First, the Court pointed out, *Stop-the-Barge* did not involve "the enactment of legislation," as was involved in *Save the Pine Bush*—and as also was involved in *Matter of Eadie*. In addition, the Court emphasized that in *Stop-the-Barge* the completion of the SEQRA process was the last action taken by the agency whose determination the petitioners challenged. "Any injury to the petitioner that DEP inflicted [in *Stop-the-Barge*] was concrete when the CND was issued," the Court pointed out. "It did not depend on the future passage of legislation, and it was not subject to review or corrective action by DEP."

As the Court explained, the petitioners in *Matter of Eadie* suffered no concrete injury until the town board approved the rezoning. Until that happened, their injury was only a possibility; they would have suffered no injury at all if they had succeeded in defeating the rezoning through a valid protest petition, or by persuading one more member of the town board to vote their way.

Accordingly, the Court reaffirmed the holding of *Save the Pine Bush*, making it clear that, in an action to annul a zoning change, the statute of limitations requires that an article 78 proceeding be commenced within four months of the time the change is adopted.

Clearly this area of the law cries out for specific statutory amendment to avoid ambush and unintended traps. Of course, the stakes are very high, particularlly in light of the malpractice risks that will be involved in suing too late and in being dismissed on the basis of the statute of limitations.

Although this statement seems like a bright line rule, the Court immediately retreated and pointed out that it is important to keep in mind that the decision in *Matter of Eadie* does not necessarily mean that in every case where a SEQRA process precedes a rezoning, the statute of limitations runs from the enactment of the rezoning. In some cases, it actually may be the SEQRA process, not the rezoning, that inflicts the injury of which the petitioner complains. For example, suppose that in *Matter of Eadie*, the Galloglys or others had contended that mitigation measures required by the FGEIS and adopted in the Findings Statement had unlawfully burdened their right to develop their property. In that hypothetical case, the injury complained of would not be a consequence of the rezoning, but of the SEQRA process, and a party complaining of the injury should not wait until the enactment of zoning changes before bringing a proceeding—doing so at that point might be too late.

Conclusion

Certainly, the Court in *Matter of Eadie* clarified the status of *Save the Pine Bush* and of the need to examine the underlying act involved before determining when the SEQRA process is concluded to the extent that a zoning decision is ripe for challenge. *Matter of Eadie* raises other issues, however, by gratuitously positing the hypothetical described above at the very end of the opinion. Not only does this destroy any bright line statute of limitations rule in zoning cases, but it also adds to an already confused area of law.

Matter of Eadie, *Save the Pine Bush*, and *Stop-the-Barge* begin the analysis. Critical to the issue is the underlying action being considered by the lead agency and whether more of a substantive nature must be done involving SEQRA. When in doubt, and there will be moments of doubt, parties should begin an article 78 proceeding. If such an action is premature, the papers can be shelved and one can wait until the appropriate time to start it again—if, of course, it has not become final and the four months have not lapsed since the first filing. In other words, even if the action is dismissed as premature, if the matter becomes final before the decision dismissing it on prematurity grounds is made and if over four months have elapsed within that period of time, the petitioner may not be in a position to proceed because the statute will have elapsed. Another danger is commencing an action too late in the first instance so that it is time barred because it should have been begun earlier. That will not happen if a party sues as early as possible, at the first possible chance of finality, and again at the next possible triggering point. Yes, two actions may have to be brought—one in connection with the Findings Statement and one at the conclusion of the underlying action. They will both be assigned to the same justice, who will then rule accordingly as to which is ripe and which should be dismissed.

Clearly this area of the law cries out for specific statutory amendment to avoid ambush and unintended traps. Of course, the stakes are very high, particularly in light of the malpractice risks that will be involved in suing too late and in being dismissed on the basis of the statute of limitations. As set forth above, this area is very treacherous and a specific statutory amendment should be considered by the legislature to cover all SEQRA matters. For example, a statute could be drafted indicating that a SEQRA action will be deemed final and a challenge timely if made within four months of the later of the finding statement, a positive declaration, or a negative declaration, unless the underlying action has a shorter statute of limitations, in which case the shorter statute also will apply to the SEQRA determination. Such a statute would provide clear guidance to all parties.

.....

1. CPLR 217(1).
2. *City of New York v. Grand Lafayette Props. LLC*, 6 N.Y.3d 540, 548 (2006); see also *Matter of Best Payphones Inc. v. Dept. of Info. Tech. & Telecom. of City of N.Y.*, 5 N.Y.3d 30, 34 (2005).
3. 70 N.Y.2d 193 (1987).
4. 1 N.Y.3d 218 (2003).
5. 2006 N.Y. Slip Op. 05236 (July 5, 2006).
6. "Access management" involves planning for the entry and exit of traffic on major roads in such a way as to keep interference with traffic flow to a minimum.