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When Government Fails to Act

Courts May Offer Relief to Some Developers

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Zoning & Land Use

When developers or other property owners seek to build on or improve real estate, they typically face a host of governmental reviews, approvals, and permit applications. The process can be difficult and costly in the best of circumstances. It also can be quite time consuming—even where applicable statutes or regulations set forth specific deadlines within which public officials' action must be completed. Where delays stretch beyond statutory or regulatory mandates or otherwise seem to be inordinately lengthy, private parties may take a variety of steps to try to help speed things along.

Approval By Default

In certain instances, parties may be able to assert that an application has been approved by default pursuant to state laws such as Village Law §7-728 and Town Law §276(8), which govern subdivision approval,[1] or by local law. Courts seem somewhat reluctant, however, to find approval-by-default in other instances.

For example, in *Nyack Hospital v. Village of Nyack Planning Board*,[2] the plaintiff hospital alleged that it had submitted an application for site plan approval to the village's planning board and that the board had granted preliminary site plan approval.

The hospital contended that although it had not received final site plan approval, such final site plan approval had been automatically granted by operation of Village Law §7-725-a(8), which provides that boards "shall make a decision" on an application within 62 days after a public hearing or after the application is filed if there is no hearing. Supreme Court, Westchester County, rejected that argument, and the hospital appealed.

The Appellate Division, Second Department, refused to accept the hospital's contention that approval-by-default governed in this case. It noted that although default provisions are included in the Village and Town Law provisions governing subdivision approval, the sections of the Village and Town Law governing site plan approval do not contain such provisions. It then ruled that the failure of the Legislature to include an approval-by-default provision in those sections was a "strong indication that such exclusion was intended."

The appellate court also distinguished this case from *Matter of Biondi v. Rocco*,[3] where the local town ordinance specifically provided that "failure to render [a] decision shall be considered an approval of the site development plan." Finding that the Code of the Village of Nyack did not contain a default provision, the Second Department rejected the hospital's appeal.[4]

Mandamus

Traditionally, mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought. The long established law is that while mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it will not be awarded to compel an act with respect to which a governmental officer may exercise judgment or discretion.[5] In many instances, property owners facing governmental delays go to court seeking to compel officials to act. The facts and the nature of the relief they seek often will determine whether they will be successful.

For example, in *Matter of Milnarik v. Rogers*,[6] the petitioners sought an order compelling the Zoning Board of Appeals of the Village of Lake Placid to hear and determine their administrative appeal seeking to challenge the issuance of a certificate of occupancy to two property owners. Among other things, the petitioners argued that the zoning board of appeals had "failed and refused to schedule a hearing or otherwise consider petitioners' administrative appeal." The Third Department found that their petition adequately sought relief under

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CPLR 7803 in the nature of mandamus to compel. Importantly, the appellate court did not rule that the appeal had to be decided in favor of the petitioners, only that a decision had to be rendered.

The Third Department reached a different result in *Matter of Inn at Hunter, Inc. v. Village of Hunter.*[7] The petitioner in this case proposed to build a condominium development on its property in the Village of Hunter in Greene County, and applied for water and sewer permits for future service to the proposed development. After a public hearing, the village denied the application. The petitioner then commenced a proceeding seeking an order of mandamus compelling the village to grant its permit application. It argued that it was entitled to have a permit for future water and sewer service to its proposed development because the system had adequate capacity and, thus, the granting of such a permit was a ministerial act.

The Third Department disagreed. It found that a municipality has discretion to reject an application to access water and sewer service upon a finding that the proposed connection, because of excessive demands on the system or otherwise, would present problems related to the sewer system or the public health of the municipality. Thus, it concluded, because of such discretion, mandamus was not an available remedy.

Similarly, in *Matter of Wolff v. Town/Village of Harrison*,[8] the petitioner filed an application with the town/village board of the of Harrison to change the zoning of a certain parcel of real property from zone classification B (two-family residential) to zone classification MF (multi-family residential). Nearly three years later, the board had still not reached a determination on the application and the petitioner commenced an article 78 proceeding, in the nature of mandamus, to compel the board to make a determination either granting or denying his application. Supreme Court, Westchester County, granted the petition, and the board appealed.

The Second Department pointed out that the amendment of a zoning ordinance is a purely legislative function. It added that the applicable statute vested in the board broad legislative power, in its discretion, to amend its zoning ordinance and did not require it to consider and vote upon every application for a zoning change. Accordingly, the appellate court found that mandamus did not lie here and the proceeding had to be dismissed.

Use Permit

The Fourth Department decided, in *Matter of Custom Topsoil, Inc. v. City of Buffalo*,[9] that the petitioner was not entitled to a writ of mandamus requiring the issuance of a use permit. In this case, the petitioner had applied for a use permit allowing it to engage in rock, stone, and concrete crushing operations on a site in the City of Buffalo.

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The Fourth Department found that the issuance of the use permit under the Buffalo City Code could not be characterized as a ministerial or nondiscretionary act on the part of city officials. "Concrete crushing is not among the listed permitted uses of property in an M2 zone," the appellate court observed. Because the petitioner failed to demonstrate that it had a "clear legal right, as a ministerial matter," to a use permit authorizing it to carry out crushing operations at the site, its petition had to be dismissed.

Statute Of Limitations

Importantly, even where petitioners are entitled to seek a writ of mandamus following government delay, they must make certain that they do not delay too long.

In *Matter of the Application of Lowe's Home Centers, Inc. v. Venditto*,[10] Lowe's Home Centers, Inc. sought to compel the Oyster Bay Town Board to make a written determination concerning the adequacy of a Draft Environmental Impact Statement ("DEIS") that Lowe's had submitted. The dispute arose from the efforts of Lowe's to construct a 136,999 square foot home improvement retail store with an adjoining 31,709 square foot outdoor garden center in a Light Industrial District in Syosset. In support of its petition for mandamus, Lowe's contended that, from the time the environmental review had begun, the board had neglected to follow the procedure set forth in the State Environmental Quality Review Act ("SEQRA"). In this regard, Lowe's alleged that the board had ignored mandatory time frames in issuing a positive declaration that the proposal would have a potentially significant impact on the environment more than 45 days after it had submitted the Environmental Assessment Form[11] and in issuing a final scope for the DEIS more than 84 days beyond the time set forth in SEQRA. The board maintained, among other things, that the proceeding was untimely.

Supreme Court, Nassau County, found that the proceeding did not have to be dismissed. It noted that a proceeding in the nature of mandamus to compel is subject to a limitations period of four months, which begins to run when a demand for action is made and refused. Indeed, it continued, absent a formal rejection of a demand, the statutory limitations period does not begin to run.[12] The court then found that because Lowe's had made a formal demand that the board make a determination with respect to the adequacy of its DEIS by way of its attorney's letter dated Dec. 4, 2006, the proceeding it commenced on Dec. 29, 2006 was timely.

1. See, e.g., *Matter of M.K.A. Realty, Inc. v. Gervasi*, 17 A.D.3d 597 (2d Dept. 2005).
2. 231 A.D.2d 617 (2d Dept. 1996).
3. 173 A.D.2d 700 (2nd Dept. 1991).
4. Cf. *Matter of Tinker Street Cinema v. Town of Woodstock Planning Board*, 256 A.D.2d 970 (3rd Dept. 1998) (Town of Woodstock Zoning Law provision that site plan application shall be considered approved if no decision rendered within 45 days of receipt of completed application did not apply where application had not been completed).
5. See, e.g., *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984).
6. 298 A.D.2d 637 (3rd Dept. 2002).
7. 35 A.D.3d 1072 (3rd Dept. 2006).
8. 30 A.D.3d 432 (2d Dept. 2006).
9. 12 A.D.3d 1168 (4th Dept. 2004).
10. 15 Misc.3d 1108A (Sup. Ct., Nassau Co. 2007).
11. See 6 NYCRR 617.9(a)(2).
12. See, e.g., *Adams v. City of N.Y.*, 271 A.D.2d 341 (1st Dept. 2000).