

**As published in the July 23, 2003 issue of the New York Law Journal**

**Stop-Work Orders  
Often Used by Officials, But Costly for Developers  
By John M. Armentano**

Builders, developers, and other property owners typically obtain the required approvals and permits before beginning construction. That does not necessarily mean, however, that municipalities will take no further interest in their projects. Indeed, local officials have a powerful tool that they are not unwilling to use: the stop-work order. As its name implies, a stop-work order, once issued, suspends all building activities.

Various provisions of law authorize governments to issue stop-work orders upon a determination that construction does not comport with state or local building codes or the permits obtained by the property owner. For example, the Great Neck village code, an all-encompassing authorization for the issuance of stop-work orders, permits the village's building inspector to stop work whenever the inspector has reasonable grounds to believe that the work is "being prosecuted in violation of the provisions of the State Building Construction Code or other applicable laws, codes or regulations, or not in conformity with the provisions of the application, plans or specification on the basis of which a permit was issued, or in an unsafe and dangerous manner."<sup>1</sup> Local governments also derive the power to issue a stop-work order from various provisions of state law.<sup>2</sup>

**Challenging the Order**

When a stop-work order is issued, the builder or contractor must stop work. But there is a process for challenging these orders.

Typically, a challenge to a stop-work order must be brought before the local zoning board of appeals,<sup>3</sup> which has the authority, granted by state law, to "hear and decide appeals from and review any order, requirement, decision or determination" made by an administrative official.<sup>4</sup>

Interestingly, the filing of an application to review a stop-work order automatically results in a stay of the order as a matter of law. The stay is immediate and remains in effect unless the municipality can demonstrate that there is a real danger to public health or safety if work does not stop. If the stay does remain in effect, the applicant may resume construction -- but at its own peril. If the zoning board or a court rejects its challenge to the stop-work order, it may have to remove or alter the building.<sup>5</sup>

Failing to challenge a stop-work order before a zoning board amounts to the failure to pursue an administrative remedy, and can doom any chance the party has of overturning the order.<sup>6</sup> That is because the rule requiring property owners to appeal a stop-work order to the zoning board of appeals is not merely a procedural technicality, but goes to the jurisdiction of zoning boards and courts. Simply put, under New York law, an interpretation of a zoning regulation, as that regulation applies to a specific parcel of property, is first to be made by the

local zoning board of appeals.<sup>7</sup>

In Miller v. Price,<sup>8</sup> property owners in Southold, on the East End of Long Island, purchased a steel sculpture of a heron bird, about 40 feet tall, intending to place it on the beach on their property.

Without obtaining a building permit, they constructed a platform upon which the sculpture would be mounted. The town's building inspector issued a stop-work order based on his conclusion that the property owners were "constructing an accessory structure without first obtaining a building permit."

In defiance of the order, the property owners nevertheless completed the platform and placed the sculpture on it.

Thereafter, the building inspector issued appearance tickets to the property owners. In response, they filed suit, alleging that the town and its building inspector had no jurisdiction over the sculpture and no authority to issue the stop-work order. The property owners also moved for a preliminary injunction and temporary restraining order prohibiting the town from taking any further measures, including civil or criminal proceedings, in connection with the erection and maintenance of the sculpture.

The court rejected the property owners' complaint, pointing out that the Southold Town Code provided them with an administrative remedy to challenge the stop-work order.

Under the code (and under state law), the zoning board of appeals has the power "to hear and decide appeals from and review any order, requirement, decision or determination made by the building inspector." The court concluded that because the property owners did not avail themselves of this administrative remedy, they were barred from seeking judicial review of the stop-work order -- or of the basis for that order.

## **Deference**

Certainly, a party can have the courts review a decision by a zoning board of appeals upholding a stop-work order. It is important to keep in mind, however, that a zoning board's interpretation of its zoning code is entitled to judicial deference and will be upheld unless it is irrational or unreasonable,<sup>9</sup> even if a contrary interpretation is also rational.<sup>10</sup>

This rule is illustrated by the decision by the Appellate Division, Third Department, in Slimrod Ventures v. Grzyb.<sup>11</sup>

In that case, the Supervisor of the Town of Amsterdam issued a stop-work order with respect to the construction of a connector road between Slimrod Ventures' parking lot and a K-Mart parking lot. Slimrod appealed the stop-work order to the Amsterdam zoning board of appeals, which determined that a building permit and site plan review were required. Montgomery County Supreme Court annulled the zoning board's determination, and the town

appealed.

The Third Department reversed, holding that a zoning board's decision should be annulled where it is "irrational or unreasonable." The court found "no basis" to disturb the zoning board's determination and no support for the Supreme Court's imposition of its own interpretation of the scope of the town's zoning ordinance. Such subjects were left to the sound discretion of the local zoning board of appeals, subject only to the admonition that the decision must not be irrational or unreasonable. Moreover, the court refused to find that it was arbitrary and capricious for the town to require further review before the roadway could be built.

### **Timing**

There also is a timing issue on appeals of zoning board decisions relating to stop-work orders that should not be neglected: an appeal of a decision of a zoning board of appeals must be taken within 30 days. That does not necessarily seem to be an overly burdensome requirement, but the period can begin to run even before a party is aware that the zoning board has issued a decision.

Several years ago, Edward Platzman sought a variance from a local ordinance from the Town of Orangetown that would have allowed him to maintain two separate kitchens in his single family home. The zoning board of appeals denied the application on September 8, 1999. Nearly two months later, on November 5, Mr. Platzman filed a notice of petition and verified petition pursuant to article 78 seeking to vacate the zoning board's denial of the variance.

The zoning board filed a motion to dismiss, claiming that Mr. Platzman had failed to commence the article 78 proceeding within 30 days after the decision had been filed in the town clerk's office. In response, Mr. Platzman asserted that in August 1999 he had had two telephone conversations with a clerk about the status of the zoning board's decision and that she had told him that the decision would be mailed out once ready. He also argued that neither he nor his attorney had ever received notice of the decision and that the zoning board had not mailed the decision to him within five days after it had been rendered, as required by Town Law §267-a.

The court rejected his position. According to the court, it was incumbent on Mr. Platzman "to diligently inquire as to the status of the decision." The court said that even if a copy of the decision had not been sent or, if it had been sent, had been lost in the mail, it did not have the authority to extend the statute of limitations.<sup>12</sup>

Thus, a party awaiting a decision by a zoning board with respect to its challenge to a stop-work order should make certain that it regularly seeks information as to the status of the decision. Otherwise, it may have little practical opportunity to seek to overturn a negative decision in court.

### **Negotiations Preferable**

The practical difficulties of challenging a stop-work order, especially where there is a

marginal or questionable violation of the building permit, the approved plans, or applicable code, suggest that it is in a developer's best interests to try to discuss and resolve the government's concerns at an early stage in the process.

Failing to do so will put the developer face-to-face with its arch enemies: delay and carrying charges. In the area of stop-work orders, the government holds most of the cards.

1 Code of the Village of Great Neck, NY, Ch. 70 §70.13 (2003); see, also, Code of the Village of Westbury, NY, Ch. 79, §79.17 (2003); Code of the Town of Hempstead, NY, Ch. 86, §86-17 (2003).

2 See, e.g., Town Law §261; Village Law §7-700.

3 In some instances, a municipality's code does not contain an administrative procedure for review of stop-work orders. In such a case, an article 78 proceeding is appropriate. See, e.g., *Social Spirits, Inc. v. Town of Colonie*, 74 A.D.2d 933 (3d Dep't 1980).

4 See Town Law §267(2).

5 The stay also applies to the local government. See, e.g., *People v. Fells*, 133 Misc.2d 341 (Dutchess Co. Justice Ct. May 27, 1986).

6 See, e.g., *Jordan's Partner's v. Goehringer*, 204 A.D.2d 453 (2d Dep't 1994).

7 See, e.g., *Fishman v. Schmidt*, 61 N.Y.2d 823 (1984).

8 11/6/2000 NYLJ 35, col. 5.

9 See, e.g., *Richard Dudyshyn Contracting Co. v. Zoning Bd. of Appeals of Town of Mt. Pleasant*, 255 A.D.2d 445 (2d Dep't 1998).

10 See, e.g., *Brock v. Zoning Bd. of Appeals of Town of Queensbury*, 237 A.D.2d 670 (3d Dep't 1997).

11 254 A.D.2d 678 (3d Dep't 1998).

12 *Matter of Platzman v. Munno*, 184 Misc.2d 201 (Sup. Ct. Rockland Co. 2000).

John M. Armentano, a partner with the Long Island law firm of Farrell Fritz, P.C., represents local governments and developers in zoning, land use, and environmental matters, including litigation. He may be reached at [jarmentano@farrellfritz.com](mailto:jarmentano@farrellfritz.com). Ana Maria Vizzo, a summer associate at the firm, assisted in the preparation of this column.