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Court of Appeals Revisits Mootness Rules in Long Beach Case

The mootness doctrine, which is of constitutional dimension and relates to a court's subject matter jurisdiction, forbids courts from passing on "academic, hypothetical, moot, or otherwise abstract questions."[1] Claims of mootness often arise in zoning and land use planning disputes that challenge the approval of new development projects. In evaluating mootness claims, courts have found several factors to be significant. One of the most important factors is a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation.[2]

A challenge also might be dismissed as moot where construction has been completed on the project at issue. In one case, for example,[3] property owners brought an action against a neighbor who had modified an existing boathouse and had constructed a garage with a guesthouse above it. The action alleged that he had violated certain zoning regulations. The trial court dismissed the complaint, and the property owners appealed. The Appellate Division, Third Department, ruled that "[t]he completion of the improvements which are the subject of this appeal and which plaintiffs seek to have demolished render this appeal moot."

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Opposing Factors

There also are numerous factors that weigh against a mootness determination, including whether a party proceeded in bad faith and without authority.[4] Additionally, courts have retained jurisdiction notwithstanding a mootness claim in instances where they have determined that novel issues or public interests such as environmental concerns warrant continuing review,[5] or where a challenged modification can be readily undone without undue hardship.[6]

Recently, the New York Court of Appeals applied these rules in a zoning dispute arising in Long Beach. The Court's unanimous decision, by Chief Judge Judith Kaye, in *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*[7] should serve as a reminder to litigants to take all appropriate action, including seeking preliminary injunctive relief — on a timely basis — to avoid dismissal based on a finding of mootness.

The case centered on a commercial waterfront property located in an otherwise residentially zoned neighborhood on Reynolds Channel in Long Beach. In 1999, Keystone Design and Construction Corporation entered into a contract to purchase the site, which was used for a marina, for $2.4 million with the intention of developing condominiums. Keystone applied to the Zoning Board of Appeals of the City of Long Beach for a use variance, proposing to build 23 semi-attached condominium units and 35 boat slips on the property. That application was denied, and Keystone reapplied for a use variance, reducing the proposed number of condominiums to 20.

Use Variance Sought

After a hearing, the board for a second time denied the use variance, based on Keystone's failure to submit sufficient financial proof of need for the variance and concern that the extra boat slips could lead to over-commercialization of the property. Following that decision, Keystone's successor, Bay Club of Long Beach, Inc., sought a use variance based on a scaled-back proposal of 20 condominiums and 20 boat slips.

This time, the board granted the variance. It found that Bay Club had introduced sufficient evidence of its need for a use variance in that the proposed project would bring the site more into harmony with the essential residential character of the neighborhood; Bay Club was unable to realize a reasonable return

from commercial uses of the property, as evidenced by the prior owner's bankruptcy and difficulty selling the property; Bay Club's hardship — as the owner of the only commercially zoned property in the area — was unique; and Bay Club's hardship was not self-created because, regardless of ownership, the site could not be used for commercial purposes.

Four owners of neighboring single-family homes thereafter filed an Article 78 proceeding in Supreme Court, Nassau County, challenging the board's grant of the variance as illegal, arbitrary, capricious and unsupported by substantial evidence in the record, and further contending that Bay Club had failed to prove any of the statutory factors required for a use variance. The petitioners requested no preliminary injunctive relief.

The trial court dismissed the petition, determining that the board had acted within its discretion in granting the variance based on Bay Club's unchallenged proof of need. By this time, work at the site was underway, with the marina torn down, the bulkhead repaired, utilities reconfigured, foundation permits issued and pouring of foundations for the condominiums begun.

The petitioners first sought injunctive relief in conjunction with their appeal to the Appellate Division, Second Department, after learning that Long Beach was about to issue building permits for the condominiums. In their order to show cause, the petitioners acknowledged that Bay Club already had begun pouring the foundations pursuant to previously granted permits, and that further building permits were about to be issued.

The petitioners resisted posting any undertaking, arguing that Bay Club should have included the foreseeable costs of delay in its purchase price and that they should not have to bear large undertaking costs both because of the merit of their position and because "it is not at all clear whether they could or would do it" if required by the court. Accordingly, they requested that the undertaking, if imposed at all, be "as low as possible." The Second Department denied the petitioners' requests for a temporary restraining order and preliminary injunction.

A divided Second Department affirmed the trial court, but did not address mootness. By the time the Court of Appeals granted leave to appeal, a dozen of the units had been fully constructed, with the remaining eight in various stages of completion, and the offering literature was on file with the Attorney General. The Court denied the petitioners' request for a stay pending appeal, but granted a calendar preference.

Court of Appeals Ruling

Before the Court of Appeals, the petitioners sought demolition of the units and argued that their appeal remained justiciable given that they promptly had filed an Article 78 proceeding and sought preliminary injunctive relief from the Appellate Division prior to actual construction. In response, Bay Club contended that the board's decision to grant the variance had been rendered unreviewable by substantial completion of the project.

Failed to Seek Order

In its decision, the Court emphasized that the petitioners had failed to seek a temporary restraining order or preliminary injunctive relief at any time during which the matter was pending before Supreme Court. "They did not contest the issuance of building permits, or a residential use, but protested that the proposed use was too intensive," the Court continued. The Court said that the petitioners' "half-hearted request" for injunctive relief was made only after the Supreme Court's decision upholding the variance, and "now there has been substantial completion of the project." Under these circumstances, it concluded, the appeal had to be dismissed as moot.

The Court's decision suggests that it is important for parties challenging a zoning decision to seek preliminary injunctive relief at the Supreme Court level. Failure to do so may mean that objections will be dismissed as moot.

It also is important to recognize that mootness is not the only doctrine that can bar a party from challenging a zoning board's decision. A claim asserted following unreasonable delay may be barred by the equitable doctrine of laches.[8] In addition, the doctrine of vested rights, partly grounded in equitable estoppel principles, may entitle a property owner to continue a non-conforming use where the owner made substantial expenditures prior to amendment of applicable zoning laws.[9]

(1) *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713-14 (1980).

(2) See, e.g., *Imperial Improvements, LLC v. Town of Wappinger Zoning Board of Appeals*, 290 A.D.2d 507 (2d Dept. 2002); *Naselli v. Gribuski*, 206 A.D.2d 838 (4th Dept. 1994); *Stockdale v. Hughes*, 189 A.D.2d 1065 (3d Dept. 1993).

(3) *Ughetta v. Barile*, 210 A.D.2d 562 (3d Dept. 1994).

(4) See, e.g., *Parkview Assoc. v. City of New York*, 71 N.Y.2d 274 (1988) (municipal equitable estoppel case, invalidity of building permit readily discoverable); *Uciechowski v. Ehrlich*, 221 A.D.2d 866 (2d Dept. 1998) (earthen berms constructed in violation of town official's directive).

(5) See, e.g., *Friends of Pine Bush v. Planning Bd. of City of Albany*, 86 A.D.2d 246 (3d Dept. 1982), aff'd, 59 N.Y.2d 849 (1983); *Vitiello v. City of Yonkers*, 255 A.D.2d 506 (2d Dept. 1988).

(6) See, e.g., *Michalak v. Zoning Bd. of Appeals of Town of Pomfret*, 286 A.D.2d 906 (4th Dept. 2001).

(7) __ N.Y.2d __, 2002 N.Y. Lexis 1554 (June 6, 2002).

(8) See, e.g., *Sheerin v. New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 N.Y.2d 488 (1979).

(9) See, e.g., *Ellington Constr. Corp. v. Zoning Bd. of Appeals of Inc. Vil. of New Hempstead*, 77 N.Y.2d 114 (1990).