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ZONING AND LAND USE PLANNING

Joining ‘Necessary Parties’ Crucial to Article 78 Actions

Joinder rules serve important policy interests by protecting against multiple lawsuits and inconsistent judgments and by guaranteeing that absent parties at risk of prejudice will not be “embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard.”¹ Accordingly, CPLR 1001(a) provides for the necessary joinder of parties, declaring that “[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.”

Petitioners in Article 78 proceedings who seek to challenge a local government’s zoning or land use decision must pay particular attention to the joinder rules, because failing to join all necessary parties can result in such a proceeding being dismissed. By the same token, respondents also must carefully analyze whether all necessary parties have been joined, because a respondent may be able to have an Article 78 proceeding dismissed where a petitioner has not followed the joinder rules.

In recent years, the New York Court of Appeals has issued a number of important joinder decisions. These opinions provide a roadmap for parties (and the courts) to follow to determine who must be joined and the impact of a failure to join a necessary party.

Special Use Permit

Five years ago, the Court decided *Matter of Headriver, LLC v. Town Board of the Town of Riverhead*.² The case involved Headriver, LLC, a contract vendee for a parcel of real property located in Riverhead, New York, on which it intended to build and operate a Lowes Home Center. Because the property fronted on a county road, Headriver was required to apply to the Riverhead town

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board to obtain a special use permit. As required, the board referred the application to the Suffolk County Planning Commission for its recommendation. After reviewing the application, the commission recommended that the special use permit be denied. To override

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the commission’s recommendation, General Municipal Law §239-m required that a super majority vote be obtained by the board.

After a public hearing, the board voted 3-2 to grant the special use permit. Because the statutory super-majority requirement was not satisfied, the permit was denied. Headriver brought an Article 78 proceeding claiming that the board’s determination was arbitrary and capricious because the record established that Headriver met every criterion of the town code. The town board moved to dismiss the petition for failure to include the commission as a necessary party and for failure to state facts sufficient to grant the relief requested.

After Supreme Court denied the motion, a

divided Appellate Division affirmed, concluding that because the commission’s decision could be overridden by a super-majority vote, the commission was not a necessary party. The Appellate Division did not reach the merits of the board’s argument that its actions could not be considered arbitrary and capricious because General Municipal Law §239-m mandated the denial notwithstanding that a majority of the board had voted to approve the application. The Appellate Division granted leave to appeal and the dispute reached the Court of Appeals.

The Court affirmed. It explained that a super-majority of the town board could have voted to override the planning commission’s determination and approve the proposed action, but did not do so. As a result, the Court continued, the town was compelled to disapprove the project, and its action was the final agency action reviewable in an Article 78 proceeding—the determination of the planning commission was “merely advisory.” Accordingly, because the commission was not a necessary party, the Court upheld the denial of the town board’s motion to dismiss the petition.

Variance Challenged

The following month, the Court decided *Matter of Emmett v. Town of Edmeston*.³ This case arose when the petitioners brought an Article 78 proceeding challenging the grant of a variance by the Town of Edmeston Zoning Board of Appeals. However, the petitioners failed to join the zoning board. Their petition was dismissed, and the Court affirmed.

The Court decided that the zoning board was a “necessary party” to the proceeding under CPLR 1001. It referred to CPLR 1003, which allows for the dismissal of an action for nonjoinder of a party who should be joined under Section 1001, and concluded that the petitioners’ failure to name the zoning board was a fatal defect that required that their petition be dismissed.

Factors To Consider

CPLR 1001(b) was at the heart of the next Court of Appeals decision on joinder: *Matter of Red Hook/Gowanus Chamber of Commerce v.*

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*New York City Board of Standards and Appeals.*⁴ That section provides that when a necessary party has not been made a party and is subject to the jurisdiction of the court, the court shall order that party summoned. Section 1001(b) continues by stating that if jurisdiction over that party can be obtained only by the party's consent or appearance, the court, when justice requires, may allow the action to proceed without that party being joined. In determining whether to allow the action to proceed, Section 1001(b) states that the court shall consider:

- (1) whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
- (2) the prejudice that may accrue from the nonjoinder to the defendant or to the person not joined;
- (3) whether and by whom prejudice might have been avoided or may in the future be avoided;
- (4) the feasibility of a protective provision by order of the court or in the judgment; and
- (5) whether an effective judgment may be rendered in the absence of the person who is not joined.

In this case, the petitioner was a nonprofit organization composed of 85 local business owners in the Red Hook and Gowanus neighborhoods of Brooklyn. In 2000, 160 Imlay Street Real Estate LLC, through a predecessor entity, acquired a 220,000 square-foot warehouse and manufacturing facility in Red Hook. Claiming that it could not find a sufficient number of commercial tenants, Imlay applied to the New York City Board of Standards and Appeals ("BSA") for a variance to permit conversion of the building from industrial to residential use. The petitioner appeared and opposed the variance, but the BSA granted Imlay a hardship variance.

Under the New York City administrative code, the petitioner had 30 days in which to challenge the decision. On the 30th day, it filed its Article 78 petition naming only the BSA and the city as respondents, omitting Imlay.

Three weeks later, the city moved to dismiss the petition on the ground that the petitioner had failed to name a necessary party within the statute of limitations period. The petitioner cross-moved to amend its petition to add Imlay as a respondent. The trial court denied the city's motion to dismiss and granted the petitioner's motion to file an amended petition, adding Imlay as an additional party. The Appellate Division reversed, finding that the petitioner's "failure to adequately explain why it did not include the landowner, who was subject to the jurisdiction of the court, as a respondent in a timely manner, despite being aware of its identity, precludes it from proceeding in the landowner's absence."

The Court of Appeals reversed. It acknowledged that Imlay was a necessary party and should have been joined in the proceeding at its inception. Having invested significant resources in pursuing its plan to convert the commercial space to luxury apartments, the developer "might be inequitably affected by a judgment" overturning the variance that permitted residential conversion, the Court declared.

The Court then found that it was error for the Appellate Division to rule that the fact that the petitioner had offered no adequate explanation for its failure to name Imlay prior to expiration of the statute of limitations was as a matter of law determinative.

The Court noted that both the petitioner and the landowner had assumed that jurisdiction over Imlay could only have been obtained by consent or appearance, and it assumed the same thing. The Court then explained that when a necessary party can be joined only by consent or appearance, a court must engage in the CPLR 1001(b) analysis to determine whether to allow the case to proceed without that party. Though CPLR 1001(b) protects the absent party who might be inequitably affected by a judgment in the action, it also treats dismissal for failure to join a necessary party as a last resort. Thus, the Court found, under the statute a court has the discretion to allow a case to continue in the absence of a party, as justice requires. To assist in reaching this decision, the Court noted that the legislature set forth five factors a court must consider. Of those five factors, it stated, no single one was determinative, and although it stated that a court need not separately set forth its reasoning as to each factor, the statute required it to consider all five.

The Court concluded that because the trial court had granted the petitioner's motion to amend and join Imlay, it had not reached the CPLR 1001(b) question whether the action should proceed in Imlay's absence. Having not reached that question, the trial court had no occasion to address the discretionary factors, nor did it. The Court of Appeals added that the Appellate Division, similarly, gave no indication that it had considered the CPLR 1001(b) factors.

As a result, the Court found it "prudent to reverse and remit this case to the trial court to review the existing record and do what the statute says." The Court concluded by observing that although "an unexplained expired statute of limitations" was a "very strong indication that an action should be dismissed," it was "a factor in, not preclusion of, the requisite analysis."

It should be noted that the Court noted the question of whether Imlay, by virtue of the lapsed statute of limitations, was subject to, or beyond, the "jurisdiction" of the court as the term was used in CPLR 1001. It did not answer that question in this case because it found that that issue had not been timely, or seriously, raised. However, it did decide that question last summer, in *Windy Ridge Farm v. Assessor of the Town of Shandaken*.⁵

Proceeding Dismissed

Central to the appeal in *Windy Ridge Farm* was the petitioners' claim that the Appellate Division had erred in failing to apply the discretionary factors enumerated in *Matter of Red Hook* before dismissing the action for failure to join necessary parties Ulster County and the Ontario Central School District. The Court of Appeals found that the Appellate Division had reached the correct result.

The Court noted that in *Red Hook*, it

explicitly had not answered the question whether a necessary party by virtue of the lapsed statute of limitations was subject to, or beyond, the jurisdiction of the court under CPLR 1001. It answered that question in *Windy Ridge Farm* and found that the county and the district were subject to the jurisdiction of the court.

The Court then explained that when a necessary party was "subject to the jurisdiction of the court"—as it concluded that the county and the school district were—the statute directed that the court "order [that party] summoned." The Court pointed out that the statute did "not provide for consideration of the discretionary factors." It then stated that in most cases, therefore, the court would be required to join the necessary parties and remit for further proceedings. Here, however, following the motion to dismiss for failure to join the county and school district as necessary parties, the petitioners filed an amended petition naming as additional respondents the county and school district. They, in turn, moved to dismiss on statute of limitations grounds, and established their right to dismissal of the amended petition against them due to the expiration of the applicable limitations period. Thus, under these circumstances, the Court concluded, the case had been properly dismissed due to the petitioners' failure to join necessary parties.

Conclusion

The Court's recent decisions on joinder make it clear that an Article 78 proceeding may be dismissed if one or more necessary parties was not named as a party to the proceeding prior to the expiration of the applicable limitations period. Petitioners and respondents in these matters should carefully analyze whether all necessary parties have been joined, and make appropriate motions in the event they decide that a necessary party has, in fact, not been joined.

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1. *First Natl. Bank of Amsterdam v. Shuler*, 153 N.Y. 163 (1897).

2. 2 N.Y.3d 766 (2004).

3. 2 N.Y.3d 817 (2004).

4. 5 N.Y.3d 452 (2005).

5. 11 N.Y.3d 725 (2008).