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ZONING AND LAND USE PLANNING

Statutes of Limitations In Zoning Referral Cases

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Section 239-m N.Y. General Municipal Law requires the referral of certain proposed city, town, and village planning and zoning actions to a county planning agency or regional planning council. The proposed actions that must be referred range from the very broad, such as the adoption or amendment of a comprehensive plan,[1] zoning ordinance, or local law, to the much narrower and more property specific, such as the issuance of special use permits, the approval of site plans, and the granting of use or area variances.[2]

In many instances, however, the required referral by the city, town, or village body responsible for final action is never made. Parties opposing a zoning change may seek to rely on the absence of a required referral as a basis for seeking to overturn the decision. But how long do such parties have to bring actions on that ground?

Appellate courts in New York are divided on this issue. Generally speaking, the Appellate Division, Second Department, views the absence of a referral to be a jurisdictional defect to which no statute of limitations applies. By contrast, the Appellate Division, Third Department, has ruled that the failure to refer is subject to the statute of limitations that otherwise governs an Article 78 proceeding seeking review of the underlying action. Whether one rule or the other applies can have significant practical implications. For one thing, if there is no statute of limitations, a challenge theoretically can be brought to a zoning decision even after a building has been constructed.

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Jurisdictional Defect

For an explanation of the reasoning behind the Second Department's standard, consider the decision it issued a few years ago in *Matter of Eastport Alliance v. Lofaro*.[3] The case arose when the Town of Southampton's planning board modified and approved a site plan submitted to it by landowner H.T.L., LLC, and granted H.T.L. a wetland permit allowing it to build and operate a catering hall on waterfront property. A civic association and several residents who lived near the property commenced an Article 78 proceeding to review the planning board's determinations. Among other things, they alleged that it had failed to refer H.T.L.'s applications to the Suffolk County Planning Commission as it had been required to do.

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The Second Department ob-served that Suffolk County's Ad-ministrative Code required that the planning board refer land use applications such as H.T.L.'s to the planning commission for review and recommendation.[4] It then ruled that where, as in this case, the required referral had never been made, the planning board "was without jurisdiction" to approve the applications. Moreover, it held, where a local land use agency acted without jurisdiction in approving or denying a site plan, special permit, or other land use application, a challenge to such an administrative action, as ultra vires, was "not subject" to the 30-day limitations period applicable to review of the site plan, special permit, or other land use determination. It then concluded that the planning board's approval was "null and void."

More recently, the Second Department decided *Matter of Hampshire Mgt. Co., No. 20, LLC v. Feiner*.[5] In that case, Hampshire Management Co., No. 20, LLC, sought to set aside a resolution of the Town of Greenburgh town board that approved an amended site plan on condition that an electrical transformer be relocated either to the location on the original approved site plan or to another suitable location approved by the town board. The town board moved to dismiss the proceeding as time barred by the 30-day statute of limitations of Town Law §274-a. Supreme Court, Westchester County, granted the motion and dismissed the petition.

Hampshire appealed, contending that the statute of limitations was inapplicable because the town board had acted without jurisdiction. Citing to, among other cases, *Matter of Eastport Alliance*, the Second Department agreed with that statement of the law, but

made clear that "it is a jurisdictional defect itself which renders agency action void and tolls the statute of limitations, not merely an allegation of such a defect." In this case, the court found that Hampshire had failed to establish a jurisdictional defect and, therefore, concluded that the Supreme Court had properly dismissed the proceeding, as Hampshire's petition had not been timely filed under Town Law §274-a.[6]

Third Department's View

The Third Department has taken a difference view of the issue. For example, in *Stankavich v. Town of Duanesburg Planning Bd.*,[7] the planning board of the upstate Town of Duanesburg granted a special use permit to Southwestern Bell Mobile Systems, doing business as Cellular One, which allowed it to construct a 250-foot cellular telephone tower and a utility building on property in the town. The planning board's decision was filed in the town clerk's office on Sept. 25, 1996. It subsequently issued another special use permit to Cellular One in accordance with a revised site plan showing a free-standing tower in place of the original tower with support cables. This decision was filed on Nov. 1, 1996. Cellular One then proceeded to construct the tower and began operations on Dec. 31, 1996.

On April 11, 1997, an Article 78 proceeding was filed seeking to declare the special use permits invalid due to the planning board's failure to comply with General Municipal Law §239-m. The planning board moved to dismiss the petition on the ground that it was barred by the 30-day statute of limitations in Town Law §274-b(9). The Supreme Court, Schenectady County, granted the motion, finding the petition to be time-barred, and the petitioners appealed.

The Third Department declared that the petitioners' argument that the planning board's granting of the special use permits was jurisdictionally defective and subject to collateral attack was "not without merit." However, it continued, the Third Department said that it did not necessarily follow that the statute of limitations defense was negated "in light of this apparent jurisdictional defect." According to the Third Department, every action had to be commenced within the time specified in the CPLR or other applicable statute, and if no limitation was specified, it had to be commenced within six years of the accrual of the cause of action.

In this case, the Third Department explained, the petitioners were seeking to annul the special use permits on the ground that the planning board lacked jurisdiction due to its failure to comply with General Municipal Law §239-m. It then ruled that, because the petitioners' challenge had not sought to test the constitutionality or validity of the zoning ordinance but only had questioned the procedure followed by the planning board in granting the permits and, in essence, had claimed that the planning board had acted illegally, this matter "could have been resolved" in an Article 78 proceeding. Consequently, the Third Department held, the 30 day period of limitations in Town Law §274-b(9) governed and, because the proceeding had not been commenced within 30 days of the filing of the planning board's decision, the Supreme Court's dismissal of the petition as time-barred was proper.[8]

Conclusion

Interestingly, at the end of its decision in *Stankavich*, the Third Department offered what could be considered a practical basis for its decision. The appellate court observed that because the petitioners had commenced their proceeding after Cellular One had constructed its facility and had failed to safeguard their interests by promptly seeking an injunction, it "would, in any event have found this proceeding barred by laches." The Third Department seemed to recognize the inherent unfairness of allowing an unlimited period of time, especially where a project had been constructed before the petitioners had commenced their proceeding, to challenge zoning decisions for failure to comply with General Municipal Law §239-m. As a matter of fairness, that would seem to be the least that courts should do.

In light of the differences of opinion between the courts in the Second and Third departments, it is clear that this issue is ripe for consideration by the Court of Appeals.

1. See Town Law §272-a; Village Law §7-722.

2. The referral requirement applies only where the subject real property is within 500 feet of the boundary of any city, village or town; the boundary of any existing or proposed county or state park or any other recreation area; the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road, or highway; the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or the boundary of a farm operation in an agricultural district.

3. 13 A.D.3d 527 (2d Dept. 2004).

4. See Suffolk County Charter §C14-8(A)(2); Suffolk County Administrative Code §A14-22(A)(6); §A14-24(A)(6); cf. General Municipal Law §239-m.

5. 52 A.D.3d 714 (2d Dept. 2008).

6. Cf. *Johnston v. Town Bd. of Town of Brookhaven*, 11 Misc. 3d 1092(A) (Sup. Ct. Suffolk Co. 2006) (claim that town board failed to comply with General Municipal Law §239-m referral provisions in failing to refer to the county its approval of rezoning application was "not a mere procedural irregularity" but rather was "a jurisdictional defect involving the validity of a legislative act" that was reviewable in a declaratory judgment action. Notwithstanding that it was a jurisdictional defect, court concluded in dicta that "the six-year statute of limitations set forth in CPLR 213 applie[d]," although it found that the town had properly referred the zoning change application pursuant to General Municipal Law §239-m).

7. 246 A.D.2d 891 (3rd Dept. 1998).

8. See, also, *Matter of Smith v. Town of Plattekill*, 13 A.D.3d 695 (3rd Dept. 2004) (challenge based on General Municipal Law §239-m defect is subject to statute of limitations); *Fiume v. Chadwick*, 16 Misc. 3d 906 (Sup. Ct. Broome Co. 2007) (jurisdictional defects do not prevent the running of the statute of limitations).

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