The Failure to Preserve the *Status Quo* as a Bar to Appellate Review in Zoning Disputes

BY
JOSHUA J. GRAUER, ESQ.
AND
ANTHONY P. LUISI, ESQ. *

In the field of zoning litigation, there are strong parallels between the doctrines of vested rights, explained below, and of mootness. Based partly on equitable estoppel principles, the vested rights doctrine provides that a party granted a zoning approval can, in certain instances, be legally protected from a post-approval change in zoning laws which would render the approval a legal nullity. In such event, the rights acquired pursuant to a prior zoning law are held to have vested where, in reliance upon the approval granted under the earlier zoning law, a party has undertaken substantial construction and incurred substantial expenditures in reliance thereon before the zoning law change.[1]

Mootness arises where a legal challenge to a zoning approval is precluded by reason of changed circumstances deemed to render the controversy academic. Similar to the doctrine of vested rights, the doctrine of mootness can also be seen as effectively resulting in the creation or vesting of permanent rights under a zoning approval. In such situations, there is a substantive change in the *status quo* in reliance upon an approval, but without the need to satisfy the vigorous legal requirements of "substantial

* Joshua J. Grauer is a partner in the law firm of Cuddy & Feder LLP and is the chairman of the litigation group. Mr. Grauer has been practicing with Cuddy & Feder LLP for 31 years in its White Plains office. Mr. Grauer has extensive trial court and appellate court experience in all aspects of commercial litigation, including real estate, land use and zoning cases, as well as a wide variety of commercial disputes.

Anthony P. Luisi is an associate in the law firm of Cuddy & Feder LLP and practices in the litigation practice group, with a focus on real estate and land use related matters. Cuddy & Feder LLP represented the prevailing property owners in the *Sherman* case cited herein.

construction" and "substantial expenditures." Permanent rights premised upon the mootness doctrine can even arise despite ongoing litigation of claims in opposition to the approval. Specifically, this can occur where a challenger files an Article 78 proceeding seeking to overturn a zoning approval *without* simultaneously taking the necessary steps to preserve the *status quo* during the pendency of the litigation.

In exploring this topic, the writers discuss a recent decision of the Appellate Division, Second Department, *Sherman v. Planning Board of Scarsdale* ("*Sherman*").[2] There, the objectants sought to vacate a two-lot subdivision approval granted by the Planning Board of the Village of Scarsdale. Although the objectants filed an Article 78 proceeding in the Supreme Court, Westchester County, they failed to seek a preliminary injunction at either the Supreme Court or Appellate level. As a result of the failure of the opposing parties to seek an injunction or stay during the pendency of the litigation, the objectants were ultimately foreclosed from appellate review of the alleged merits of their unsuccessful Article 78 proceeding.

This Article serves, in part, as a reminder to counsel representing a petitioner in an Article 78 proceeding challenging a zoning approval of the importance of preserving the *status quo* throughout the litigation. In particular, if the terms of the challenged approval require irreversible steps in furtherance thereof, a motion to enjoin those steps pending the outcome of the litigation would be well advised. Where a client is unwilling or unable to post the bond which will likely be required in connection with an injunction or stay, counsel can now cite the March 8, 2011 holding of the Appellate Division, Second Department, in *Sherman* in explaining why an injunction is critical.

How a Change in Circumstances Pending Appeal, Which Cannot Be Reversed Without Substantial Hardship, Can Render a Challenge to a Zoning Approval Moot

The referenced decision of the Appellate Division, Second Department, illustrates the vital importance of seeking a preliminary injunction pending a challenge to a zoning approval. The decision further exposes the potential dire consequences for a party challenging an approval who fails to preserve the *status quo* pending the outcome of all litigation.

In *Sherman*,[3] the petitioners (referred to herein as the "Neighbors") commenced an Article 78 proceeding challenging a two-lot residential subdivision approval granted in connection with real property owned by residents of the Village of Scarsdale (referred to herein as the "Property Owners"). The subject property was situated immediately next-door to the Neighbors' home.

The Zoning History

The Property Owners' residential property consisted of approximately 34,831 square feet (0.80 acres), a majority of which was located in the Village's A-3 Residential Zoning District, and the remaining portion of which was situated in the A-2a Residential Zoning District. The Property Owners proposed that a portion of their property, measuring 10,673 square feet, would become one separate buildable lot,

with the balance of their property to be, upon subdivision approval, a second buildable lot. Accordingly, prior to applying to the Planning Board for a two-lot subdivision approval, the Property Owners wrote to the Building Inspector to request a determination as to whether the pertinent portion of their property would be "declared a building lot in zone A-3" in the event the Planning Board was to grant subdivision approval. This determination was vital for the Property Owners' plans, because the proposed new lot would need to be situated in the A-3 Residential Zoning District to meet the minimum lot size and frontage requirements of the Zoning Code.

In his response, the Building Inspector determined that, based upon his review of the Code, the proposed new lot "would be considered to be in an A-3 Zoning District (minimum 10,000 square feet lot area) upon the proper filing and approval of a new subdivision."

Thereafter, based upon the Building Inspector's determination, the Property Owners filed their application for subdivision approval with the Planning Board. After two public hearings, during which the Neighbors appeared in response to public notice, the Planning Board unanimously resolved to approve the Property Owners' application and grant the subdivision approval, subject only to certain conditions set forth in the Planning Board's resolution, including, as relevant herein:

4. Prior to the signature of the subdivision plat by the Clerk of the Board, ***the existing house and pool shall be removed*** (emphasis added).
5. Prior to the signature of the subdivision plat by the Clerk of the Board, the applicant shall pay an amount approved by the Village Board of Trustees in lieu of land dedicated to park, playground or recreation purposes for the net increase of one lot.

The proposed new property line between the two subdivided lots crossed through the Property Owners' then-existing home. Accordingly, in order for all set back conditions and other zoning requirements to be satisfied, the existing house and pool needed to be removed. To reiterate, as a result of the necessary placement of the proposed new property line, complete demolition of the Property Owners' house and pool was needed to create the necessary building space for construction of the two new homes to be situated on the new subdivided lots and was a condition precedent to signature and filing of the subdivision plat.

Following the Planning Board's approval, the Neighbors promptly commenced their Article 78 proceeding seeking to vacate the Planning Board's subdivision approval. In their Article 78 petition, the Neighbors argued, among other claims, that the Planning Board's resolution approving the subdivision of the subject property was allegedly "made in violation of lawful procedure, affected by errors of law, arbitrary and capricious, an abuse of discretion, in excess of its jurisdictional authority and not otherwise supported by substantial evidence in the record."

Despite litigating extensively, however, the Neighbors never sought to enjoin the

demolition of the Property Owners' residence and pool, which was mandated by Condition #4 of the Planning Board's resolution. Instead, they sat back, notwithstanding their full knowledge and notice of the required conditions that the Planning Board had imposed. Accordingly, there being no injunction in place, let alone applied for, the Property Owners proceeded to preserve their subdivision approval by complying with all required conditions, including the demolition of their home and swimming pool. Within the statutory time period,[4] the Property Owners completely demolished their home and pool and paid a large recreation fee to the Village as required by Condition #5 of the Planning Board's resolution. The final, signed subdivision plat was thereafter duly filed in the Westchester County Clerk's Office after obtaining the approval of the Westchester County Department of Health.

The Article 78 Proceeding

By motion of Cuddy & Feder LLP, attorneys for the Property Owners, and by separate motion of Wayne Essanason, Esq., attorney for the Village of Scarsdale and Building Inspector, the Property Owners and Village Respondents sought to dismiss the Neighbors' Article 78 proceeding for, *inter alia*, failure to exhaust administrative remedies. On behalf of the Property Owners, counsel argued that the gravamen of the Neighbors' Article 78 proceeding was really their disagreement with the Building Inspector's earlier determination, preceding the subdivision application, that the site could accommodate two lots in conformance with the Village Code. Accordingly, the Motion to Dismiss urged that, as a matter of law, the Article 78 Petition failed to state a claim because any and all objections to the Building Inspector's determination had to be filed first with the Zoning Board of Appeals. Simply stated, an Article 78 proceeding challenging the Planning Board's reliance upon the prior determination of the Building Inspector was, regardless of how denominated, in reality a disagreement with the Building Inspector's interpretation of the Zoning Ordinance. Hence, that claim was commenced long after the expiration of the applicable statute of limitations period. In any event, in the first instance, counsel for property owners asserted that any such claim had to be pursued by appeal to Scarsdale's Zoning Board of Appeals—not after a Planning Board's Resolution of Subdivision Approval.

By Decision and Order, dated October 13, 2009, the Honorable Gerald E. Loehr agreed with Respondents on all points, and dismissed the Neighbors' Article 78 proceeding in its entirety. The Court concluded that the Neighbors had improperly failed to first appeal the determination of the Building Inspector to the Zoning Board of Appeals and were required to do so. In so holding, the Supreme Court observed, in pertinent part, that:

> Having failed to appeal the Building Inspector's ruling or request an interpretive ruling from the Scarsdale Zoning Board of Appeals, Petitioners have failed to exhaust their administrative remedies, mandating dismissal of this proceeding.

In addition, the Supreme Court also dismissed the Neighbors' challenge to the subdivision approval pursuant to the New York State Environmental Quality Review Act ("SEQRA"), recognizing that:

> The Building Inspector's interpretative ruling, which the Planning Board relied upon in approving the two lot subdivision, was logical, reasonable and mitigated the amount of land disturbance necessary to effectuate the subdivision.

Throughout the Article 78 proceeding, the Owners progressed with the steps needed to obtain the Planning Board Chairman's signature of the approved plat but had not yet obtained a demolition permit for the required demolition of their home and pool, respectively.

The Appeal

Undeterred, following dismissal of their Article 78 proceeding, the Neighbors filed a notice of appeal. They eventually perfected their appeal by filing the full record, together with an appellate brief and, ultimately, a reply brief as well. In so proceeding, the Neighbors asserted a variety of legal arguments in support of their claim that the Planning Board's resolution granting subdivision approval was "made in violation of lawful procedure, affected by errors of law, arbitrary and capricious, an abuse of discretion, in excess of its jurisdictional authority and not otherwise supported by substantial evidence in the record."

During the time that the Neighbors noticed and perfected their appeal of the dismissal of their Article 78 proceeding, the Owners home and pool were demolished and plat filed. As is apparent, the Neighbors never applied to either the Supreme Court or the Appellate Division, Second Department, for any injunctive relief to stay the Property Owners from proceeding with the required demolition, which occurred in plain view immediately next-door to their residence, nor did they enjoin payment of the Property Owners' recreation fees as required by the Planning Board's resolution. Thus, while the Neighbors continued to prosecute the appeal of their unsuccessful Article 78 proceeding, with no stay or injunction in place, the Property Owners completed the mandatory, irreversible demolition of their house and the removal of their swimming pool, all at significant expense.

After the Property Owners demolished their home and pool as required by the Planning Board's subdivision approval, it appeared to the writers that their clients could potentially face irreparable hardship and loss if the Appellate Division even considered the objections that the Neighbors had raised and which the Supreme Court had already rejected. Based on this view, property owner's counsel filed with the Appellate Division a motion to dismiss the Neighbors' appeal on the ground that the Neighbors' legal challenge to the subdivision approval had been rendered moot and academic as a matter of law as a result of: 1) the intervening demolition of the Property Owners' home and swimming pool during the pendency of the litigation, and 2) the Neighbors' failure to ever seek a stay or injunction from either the Supreme Court or Appellate Division. Property owner's counsel thus posited that the Neighbors had irretrievably lost their

rights to appeal the dismissal of their Article 78 proceeding or to otherwise challenge the Planning Board's subdivision approval.

After property owners filed their motion with the Appellate Division and the Neighbors filed their opposition papers, the Appellate Division ordered that the motion be held in abeyance pending oral arguments on the Neighbors' underlying appeal. The Appellate Division referred owner's motion to the full appellate panel for consideration. In short, they kept the Owners and their lawyers on "pins and needles."

At oral argument before the Appellate Division, at which Joshua J. Grauer, Esq. of Cuddy & Feder LLP appeared on behalf of the Property Owners, the Appellate Division focused its inquiry almost *entirely* on the Neighbors' failure to ever seek to enjoin the Property Owners from demolishing their home and swimming pool in furtherance of and as required by the Planning Board's subdivision approval. In effect, the Appellate Division questioned how the Neighbors could in good conscience ask the Court to then consider the requested nullification of the two-lot subdivision approval in light of the completed demolition of the former home and pool by the Property Owners. The substantive issues the Neighbors raised on appeal were barely even addressed during oral argument before the Appellate Division panel.

It thus came as no great surprise when the Appellate Division handed down its Decision and Order, dated March 8, 2011, as reported at 82 A.D.3d 899, 918 N.Y.S.2d 878 (2d Dep't 2011), which succinctly declared, in pertinent part, as follows:

> It is undisputed that during the pendency of this appeal, the Gelboims obtained approval and filing of the final plat for their subdivision by, among other things, effecting the demolition of the existing house and pool on the subject property, at significant personal expense. The appellants failed to move in the Supreme Court for a preliminary injunction to enjoin the Gelboims from undertaking the steps needed to obtain final plat approval. In addition, the appellants failed to move in this Court for a preliminary injunction to preserve the status quo pending the determination of this appeal. ***Consequently, the appellants failed to preserve their rights pending appellate review, and the appeal must be dismissed as academic***[5] (emphasis added).

In dismissing the Neighbors' appeal as academic, the Appellate Division relied in part on the Court of Appeals decision in *Dreikhausen v. Zoning Board of Appeals of City of Long Beach*.[6] In *Dreikhausen*, after the Zoning Board of Appeals granted a use variance for the development of waterfront commercially-zoned property into 20 residential condominiums, the petitioners in that case commenced an Article 78 proceeding challenging the grant of the use variance.

Despite recognizing as a conceptual matter that even where a project has been substantially completed, "relief remains at least theoretically available" because "[s]imply put, structures changing the use of property most often can be destroyed," the New York Court of Appeals in *Dreikhausen* affirmed the dismissal of the Article 78 proceeding on the ground that the appeal was rendered moot and academic as a result of the petitioners' failure to preserve their rights pending appellate review by not seeking a

preliminary injunction against the ongoing construction. Observing that the developer had already fully constructed 12 of the 20 condominium units, with the remaining eight units in various stages of completion and with the offering plans on file with the Attorney General's Office, all in accordance with the challenged use variance and unchallenged building permits, the *Dreikhausen* Court held that there had "been substantial completion of the project" during the pendency of the litigation.[7] Therefore, the Court affirmed the dismissal of the petitioners' appeal as academic and moot.

Here, the Appellate Division in *Sherman* likewise dismissed the Neighbors' appeal without even entertaining their underlying substantive legal arguments, including review of their SEQRA claims and of the Supreme Court's holding that the Neighbors' Article 78 challenge was precluded because they had failed to first exhaust their administrative remedies.

It is thus clear that in cases of this nature the failure to seek the maintenance of the *status quo* through an application for an injunction — as bonded in accordance with the requirements of the Civil Practice Law and Rules[8] — may likely result in the Appellate Division's dismissal of the appeal without even entertaining the substantive merits of the appeal.

It is hypothetically possible that had construction commenced but not necessarily reached the stage of "substantial construction" or "substantial expenditures" (*e.g.* the benchmark of "vested rights"), a court could nevertheless have barred judicial review due to mootness alone. In the case at bar, however, only demotion was undertaken. The Property Owners did not commence any construction let alone "substantial construction" of the two new homes to be built. Consequently, the Property Owners did not yet acquire "vested rights" in their subdivision approval such that they would have been legally protected from a post-approval change in the zoning laws rendering their subdivision approval of no further force or effect. Nonetheless, the Appellate Division held that the changed circumstances arising between the date of the Planning Board's subdivision approval and the date of the Appellate Division's hearing of the Neighbors' appea—a period of nearly two years—sufficed as a matter of law to bar the Neighbors from substantive consideration of their challenge to the subdivision approval because the entire dispute had become moot and academic as a matter of law.

The Appellate Division plainly recognized that during this nearly two-year period, the Neighbors had never sought any injunction or stay, and the Property Owners had effected "the demolition of the existing house and pool on the subject property." Under such circumstances, the Appellate Division recognized that if the Neighbors prevailed, the Property Owners "would suffer substantial prejudice."[9] Therefore, to protect the Property Owners, the Appellate Division rejected the Neighbors' efforts to appeal the dismissal of their Article 78 proceeding altogether, and dismissed the appeal as academic without any consideration of the substance or merits of the appeal.

Exceptions to the Mootness Doctrine

As raised by the Neighbors in the *Sherman* case, but not addressed expressly in the *Sherman* decision, New York courts have recognized certain factors that can weigh

against a finding that a party's failure to seek injunctive relief or otherwise preserve the *status quo* to prevent construction from commencing or continuing renders the pending litigation moot or academic, even where construction is substantially complete. Among such factors or exceptions is where a party proceeds with the subject construction project in bad faith and without authority.[10]

While an "unseemly race to completion" evidencing a bad faith intent to purposefully moot a challenger's lawsuit may suffice to excuse the challenger's failure to stay the ongoing construction during the pendency of the litigation, the New York Court of Appeals has recognized that there is nothing "unseemly" or improper about a property owner or developer moving forward expeditiously with the construction of an approved project.[11] In this regard, as the Court of Appeals has observed, "after obtaining the approvals necessary to commence construction, the property owner and developer have every business incentive to complete the building as quickly as possible so as to profit from their investment and avoid paying interest on construction loans."[12] Even if there is a "race to completion," it "cannot be determinative"[13] of the mootness inquiry.

Thus, even where a property owner or developer "races to complete" the subject project, a New York court will still consider as the chief factor in its evaluation of a claim of mootness whether the challenger sought injunctive relief to preserve the *status quo* to prevent the commencement or continuation of approved construction pending the determination of the litigation or appeal.[14]

Conclusion

Upon filing an Article 78 proceeding challenging a zoning approval, where a petitioner is on notice that the respondent-property owner or developer will be taking intervening steps involving a change in the *status quo* and an expenditure of funds in furtherance of the challenged zoning approval, the petitioner's admission ticket to substantive Appellate Division review may depend upon a showing that the petitioner has sought to enjoin the change in circumstances before it occurred by applying to the Supreme Court or, at the very least, by motion to the Appellate Division, for an injunction to preserve the *status quo*. Absent such application, consistent with the title of this article, a failure to preserve the *status quo* will likely bar appellate review of the dismissal of an Article 78 proceeding.

Endnotes

1. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 665 N.E.2d 1061, 643 N.Y.S.2d 21 (1996).
2. 82 A.D.3d 899, 918 N.Y.S.2d 878 (2d Dept. 2011).
3. *Id.*
4. N.Y. Village Law § 7-728(7)(c).
5. *Sherman*, 82 A.D.3d at 899, 918 N.Y.S.2d at 878-79 (2d Dept. 2011).
6. 98 N.Y.2d 165, 774 N.E.2d 193, 746 N.Y.S.2d 429 (2002).
7. *Id.* at 174.

8. N.Y. C.P.L.R. § 5519.

9. *Sherman*, 82 A.D.3d at 899, 918 N.Y.S.2d at 879 (2d Dept. 2011).

10. New York courts have recognized additional factors that may weigh against a finding of mootness, including the existence of novel issues or issues of public interest likely to repeat but evade judicial review, *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 409 N.E.2d 876, 431 N.Y.S.2d 400 (1980), as well as where the challenged construction can be readily undone, (*i.e.*, the pre-existing *status quo* restored) without undue hardship. *Dreikhausen*, 98 N.Y.2d at 173.

11. *Citineighbors Coalition of Historic Carnegie Hill ex rel. Kazickas v. N.Y. City Landmarks Preservation Comm'n,* 2 N.Y.3d 727, 729, 811 N.E.2d 2, 778 N.Y.S.2d 740 (2004).

12. *Id.*

13. *Dreikhausen*, 98 N.Y.2d at 172.

14. *Id.* at 173.