

Quarter Notes



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THE DEVELOPER'S ANCIENT REMEDY FOR POST-APPROVAL DELAYS

A client recently faced an extreme example of a problem developers commonly confront: a land use application was approved by the planning or zoning board, but the developer waits painfully for the various municipal departments to approve plan revisions. As a review, the Municipal Land Use Law currently has provisions requiring review of applications after they are submitted to the municipality within certain timeframes. See N.J.S.A. 40:55D-10.3 (45-day period to declare if application is complete), N.J.S.A. 40:55D-76 (granting a board 120 days to render a decision). However, the law is silent as to the time a municipality must complete its post-approval reviews prior to the issuance of a zoning permit, a legal prerequisite to a building permit.

In the case of our client, they waited over ten months for the local police department to review the approved plans and issue a review memorandum. Faced with a potential loss of financing, and after a clear written record demanding review, our client directed us to file a lawsuit seeking the review of the plans in lieu of the prerogative writ of mandamus. While in some municipalities the post-resolution of approval review process has been truncated, in others it is still an exhaustingly long process.

Mandamus is an ancient remedy for government inaction. "A writ of mandamus is an order given by a court to a government official 'that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result.'" In the Matter of a Resolution of the State Commission of Investigation, Adopted June 4, 1982, and Proceedings Thereon, 108 N.J. 35, 45, n.7 (1987). Mandamus is an extraordinary remedy, and "is usually appropriate only where the right to performance of a ministerial duty is clear and certain." In the Matter of the Failure by the Dept. of Banking and Ins. to Transmit a Proposed Dental Fee Schedule to the OAL for Publication in the New Jersey Register, 336 N.J. Super. 253, 262 (App. Div. 2001), *see also* Loigman v. Middletown, 297 N.J. Super. 287, 299, 300 (App. Div. 1997).

It is long-held that those requesting this extraordinary remedy "must be without any other specific and legal remedy." *E.g. Marbury v. Madison*, 5 U.S. 137, 169 (1803). Justice Marshall, in that historic and seminal decision, set forth the principle that continues to guide courts in matters of government inaction.

Lord Mansfield, in 3d Burrows 1266, in the case of the King v. Baker, et al. states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise (more specifically if it be in a matter of public concern, or attended with profit) and a person is kept out of the possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case he says, "*this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.*"

Id. at 168-169 (emphasis added).

In the zoning context, precedent exists for the issuance of writs of mandamus when municipal officials fail to perform ministerial duties within a reasonable period. When zoning ordinances were first established in the 1920's and 1930's, there were a multitude of reported decisions ordering the issuance of zoning and building permits where the local official delayed or refused the issuance of those permits for varied reasons. *E.g. Holdsworth v. Hague*, 9 N.J. Misc. 715, 716 (N.J. Sup. Ct. 1931). In Holdsworth, the City of Jersey City sought to hold up a permit until the local zoning ordinance was revised. *Id.* "It is not within the contemplation of the cases cited that property owners should be held up indefinitely in the lawful use of their property, and at the same time be obliged to pay taxes thereon to the city while the latter contemplates the passage of an ordinance that may by possibility affect such property." *Id.*

The suit seeking mandamus is considered on an expedited basis. Rule 4:69-2 allows for an application for summary judgment, supported by affidavit and briefs, any time after the complaint is filed.

How long is too long to review revised plans? Within days of serving the municipality and the police department, the suit was dismissed after the municipality produced a memorandum from the police department approving our client's plans. If this extraordinary remedy is to be considered by a developer, it should be noted that the Court would likely undertake a fact-sensitive analysis of the reasonableness of the delay. Developers should keep this in mind, and be sure to create a record of requests for review of revised plans leading up to the issuance of a zoning permit. Of course, developers also have to consider the effect a lawsuit will have on their ability to conduct business in the municipality moving forward.