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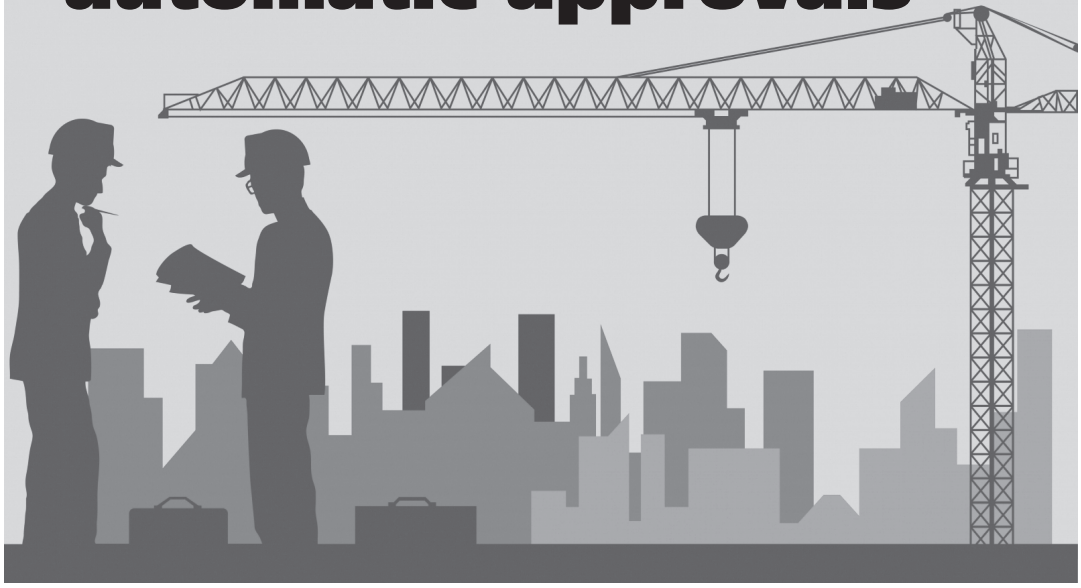
LAND USE LAW

Pros and cons of automatic approvals



By Donna M. Jennings

As land use practitioners, we are under constant pressure to expedite a client's development application through the maze of various local, county, and state agencies to secure an approval — albeit usually slightly modified from the original submission — so that the project can ultimately be built in a timely fashion. Although most statutes have strict timetables for approval decisions, your client is often forced to consent to never-ending extensions after the agency responds that it simply doesn't have enough time to review your client's application. Certainly, in this economy, with financing rapidly evaporating, timing becomes even more critical. If too much time passes, your client risks losing valuable financing.

On the flip side, we now are dealing with government employees who have the distinction of remaining in a reduced work pool but with an increased workload so that, in some areas, the review process has slowed to a snail's pace. For the land use practitioner this situation can create quite a dilemma: trying to meet the client's timeline while gently pressuring the reviewing agency or agencies to review the client's application in a timely manner. Unfortunately, gentle pressure doesn't always work, so you may have to resort to politely advising the reviewing agency or its agents that your client will not be granting it any time extensions to review the application. In some instances, the reviewing agency may already be well beyond the timetable set forth in the pertinent statute and, at that point, you must weigh the pros and cons of declaring your client's entitlement to an automatic approval.

History shows courts are reluctant to enforce the automatic approval provisions.

It is important to note that most — if not all — of the statutes related to land development contain specific time limits in which the reviewing agency must act upon a particular application. For example: under N.J.S.A. 40:55D-46, 45 days for municipal review of site plan application for 10 acres or less, 95 days for municipal review of site plan application for more than 10 acres; under N.J.S.A. 40:55D-48, 45 days for municipal review of minor subdivision application; 95 days for municipal review of major subdivision application; under N.J.S.A. 40:55D-67, 95 days for municipal review of application for conditional use; and under N.J.S.A. 40:55D-73, 120 days for municipal board of adjustment review of application for development.

Unless an extension is granted, failure to act within the statutory timeframe "shall" result in a default approval. For example: N.J.S.A. 40:55D-48, using mandatory language.

Despite the clear language in these statutes, however, the courts have often overturned the grant of automatic approval. For example, in *Manalapan Holding Co. v. Planning Bd. of Hamilton*, a developer seeking major subdivision approval was granted an automatic approval by the Appellate Division when the township planning board failed to act on its application within the 95-day statutory limit set forth in N.J.S.A. 40:55D-48. The township planning board argued it had extended the 95-day statutory period because it routinely

deferred action on development applications until after it received notice the application had received approval from the county planning board. Although the Supreme Court found the township planning board had no authority under the Municipal Land Use Law to unilaterally extend the 95-day review period, it reversed the grant of automatic approval finding that "the record indicates that the municipal officials misperceived the effect of the MLUL upon their former practice of securing county approval prior to acting upon a preliminary subdivision application. The township's reliance upon its understanding of the law was clearly genuine."

Despite the reversal of automatic approval, the state Supreme Court acknowledged that the legislature's clear intent was to require planning boards to adhere to the strict statutory timetables; it condemned permissive interpretations of such statutes. However, the court also recognized a narrow exception in cases where a planning board's violation of the statutory time limits was inadvertent or unintentional.

In the 1992 case *D'Anna v. Planning Bd. of Washington*, the trial court granted plaintiff's preliminary major subdivision approval pursuant to the automatic approval provisions set forth in N.J.S.A. 40:55D-48c after its application was misfiled and the municipal board took no action. The Appellate Division reversed, finding that "a simple inadvertent act of misfiling or mislaying" revised plans did not warrant automatic approval. The Appellate Division further noted:

> Absent evidence of bad faith on the part of the Board such as "untoward delaying tactics, simply to frustrate or forestall the applicant, an evil which the [automatic approval] statute was specifically designed to overcome," automatic approval of the preliminary subdivision application should not have been granted.

The Appellate Division also explained that because the plaintiff had not demonstrated that all of the lots possessed acceptable percolation tests, and that the board's engineer found some grade and sight issues, the "trial court erred in granting automatic approval because it totally frustrates the Board's obligation to protect the public."

> The court stated that despite the fact some commentators have concluded the courts are "very reluctant" to affirm automatic approvals, "in the absence of mistake, inadvertence, or other unintentional delay, there should be no such reluctance."

Likewise, in 2002 in *Eastampton Center, LLC v. Planning Bd. of Eastampton*, the Appellate Division reversed the grant of automatic approval to a developer of a large general development plan. There, the applicant sought GDP approval to construct 577 residential units with a commercial component. At the time of the application, the planning board had not yet adopted a GDP checklist. Instead, the planning board relied on the detailed checklist set forth in the MLUL. When the applicant's GDP application was deemed incomplete for failure to submit some information required in the MLUL checklist, the applicant argued that because the township had not formally adopted a checklist, it was without authority to declare the application incomplete. Ultimately, the applicant demanded a default approval for the board's failure to take any action within the statutory time period. The township refused to issue a default approval, and the applicant appealed to the Superior Court.

The trial court awarded the applicant a default approval. The Appellate Division reversed finding that the application was, in fact, incomplete. In *dictum*, the panel noted that even if the board wrongly found that the application was incomplete, its belief that it was incomplete was reasonable. Thus, its failure to act in a timely fashion would have been inadvertent and unintentional. Similarly, in 2004 in *Fallone Properties, LLC v. Bethelem Township Planning Bd.*, automatic approval was denied when a planning board failed to act on a contract purchaser's application based on its belief that N.J.S.A. 40:55D-10.3 requires proof of the owner's consent prior to application being deemed complete. The Appellate Division found the board's legal misimpression was a reasonable one and, thus, delay was inadvertent.

Pendulum swings toward stricter adherence to these statutory timetables.

Fortunately, the pendulum has taken a decidedly positive swing toward stricter adherence to these statutory timetables. Recently, in 2008, the New Jersey Supreme Court upheld an automatic approval in the matter entitled *Amerada Hess Corporation v. Burlington County Planning Board*, There, Hess sought to expand and modify an existing gasoline service station that then fronted on two roads. The proposed expansion would utilize additional property that had frontage on the Burlington County By-Pass (Route 541). In November 2002, Hess met informally with the local Technical Review Committee to discuss the proposed modifications. The TRC recommended that Hess explore access to the county by-pass. Following up on the TRC's recommendation, in February 2003, Hess met with the county engineer to discuss the proposed access. After various communications between the parties, toward the end of the summer in 2003, the county asked Hess to wait on submitting a formal application since the county was in the process of conducting a study of the Route 541 corridor for the area which could have an impact on Hess' proposed access to the by-pass.

Over the course of the next year and a half, Hess was repeatedly asked to hold off on submitting a formal plan, since the county was still working on its study of the Route 541 corridor. In the summer of 2005, Hess decided to finally file a formal application with both the county board and the township planning board showing egress only to the by-pass since the county was still working on its study of the Route 541 corridor and formalization was nowhere in sight. The application to the county board was deemed complete on Aug. 10, 2005, and the township application was deemed complete Aug. 23, 2005.

The township board granted approval after two public hearings and after an independent traffic consultant confirmed that the proposed access was safe. No action was taken by the county board. Instead, in February 2006, the county board invited Hess to yet another public meeting to discuss the proposed study of the Route 541 corridor.

Realizing the county board was not going to act on the application anytime soon, Hess filed a complaint against the county board seeking to invoke the automatic approval provision of the County Planning Act, N.J.S.A. 40:27-6.7 which requires the county board to act within 30 days, or within 60 days if both the municipal approving authority and the applicant consent. There is no provision in the law for an extension beyond those limits.

Law Division grants automatic approval pursuant to N.J.S.A. 40:27-6.7.

Hess then filed a motion for summary judgment. In response, the county board argued that summary judgment should be denied because it had not acted in bad faith and that it cooperated with Hess throughout the process and that it was lured into thinking it had an extension because Hess did not run into court on the 31st day claiming entitlement to an automatic approval.

The trial court granted Hess' motion for summary judgment finding that the issue of bad faith is not relevant because the county board admitted that it never obtained the consent of the township board for any extension and that plaintiff did not approve any such extension as required by N.J.S.A. 40:27-6.7.

The trial court further found that Hess had "no affirmative obligation to make such a declaration of automatic approval." Specifically, they found:

> An applicant who wishes to claim automatic approval of an application for development as a result of a municipal agency's failure to act is required to provide public notice of the claimed approval as set forth in N.J.S.A. 40:55D-10.4 ... no comparable notice requirement is set forth in the county approval legislation, see N.J.S.A. 40:55D-6.1 to 6.3 nor does defendant suggest such a requirement.

Importantly, the trial court also concluded:

> It was apparent that Hess was attempting at every turn to obtain county planning board approval and, in so doing, to comply with each request for information demanded by the board's staff. Every attempt at compliance led only to more demands, never any formal action. Moreover, I do not accuse the board of "inattention" to plaintiff's application. ... Rather the county board engaged in a pattern of conduct that appears to have purposefully foreclosed formal action by making one demand after another for technical data and amendments to plans, all the while concluding that access to the Burlington Bypass could not be approved under any circumstances. That inaction by the county board is the functional equivalent of purposeful delay and inattention with no end in sight for any formal action on plaintiff's application.

The county board then appealed. The Appellate Division affirmed based on the trial court's decision noting only the public safety exception identified in *D'Anna v. Planning Bd. of Wash. Twp.*, where the board had already deemed the site plan safe and had then filed a petition for certification which was granted.

Supreme Court affirms automatic approval for county board's failure to act.

Justice Virginia A. Long writing for the court further found that:

> [W]here a county planning board fails to act within the statutory time limits on a land use application, even for what it considers good reasons, the statute is violated and automatic approval comes into play; only where the board establishes that its delay was inadvertent or unintentional can its conduct be excused.

Ruling in favor of Hess, the court cautioned that a reviewing agency could no longer "claim confusion over the applicability and operation of the actual time limits within the automatic approval statutes" since the court had previously stated in *Manalapan*:

> This opinion now clarifies and makes explicit the requirements of the statute with respect to the manner and time within which a municipality must act upon an application for preliminary subdivision approval.

The court also noted it shall be presumed that "boards are fully familiar with the time constraints in the approval statutes, including the method for obtaining extensions and the limits thereon." The court stated that despite the fact some commentators have concluded the courts are "very reluctant" to affirm automatic approvals, "in the absence of mistake, inadvertence, or other unintentional delay, there should be no such reluctance." This language is very encouraging.

Conclusion

As demonstrated by the length of the litigation in *Hess*, an automatic approval is not so automatic. With that in mind one should carefully weigh their options before invoking an automatic approval provision. It is far easier to try to work with the reviewing agency to attain an approval after negotiating conditions than it is to get tangled in the wheels of justice. Clearly, if the board is operating under an understandable misconception of the law or an inadvertent mistake, an automatic approval under those circumstances will not be warranted.

Therefore, before charging into court ask yourself whether their misapplication of the law is reasonable and, if so, try to convince their attorney that they should attempt to expedite the review process even if they are beyond the statutory time limitations. If, however, the reviewing agency is simply stalling and there is no room for a reasonable compromise, an automatic approval will not only be justified, but possibly the only way you are going to get the reviewing agency to respond to your application.

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