THE MLUL'S AUTOMATIC APPROVAL PROVISION GETS SOME "TEETH."

By: Donna M. Jennings, Esq.

In a recent decision entitled Bright and Varick Urban Renewal Company, LLC v. Jersey City Planning Board, *et al.*, the Appellate Division affirmed the grant of automatic approval to plaintiff-redeveloper to construct an 87-unit residential development when the Planning Board failed to act on its application within the statutory time limits set forth in N.J.S.A. 40:55D-46(c). This is a significant victory not only for the plaintiff-redeveloper here, but for, similarly situated applicants who face untoward delay tactics from municipal boards kowtowing to neighborhood opposition groups. These delay tactics – employed simply to frustrate or forestall an applicant – are the very evil which the automatic approval provision was specifically designed to overcome.

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Background

The statute is clear – a planning board must act within 95 days of submission of a complete site plan application. N.J.S.A. 40:55D-46.c. If the planning board is unable to render its decision within that time period, it is entitled to secure additional time "as may be consented to by the developer." Id. "Otherwise, the planning board shall be deemed to have granted preliminary approval of the site plan." Id.

Despite this strong language, history has shown that our courts have been reluctant to enforce the automatic approval provision. For example, in Manalapan Holding Co. v. Planning Bd. of Hamilton, 92 N.J. 466 (1983), 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 period. There, the township planning board had 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 obtained county planning board approval. Although the Supreme Court found the township planning board had no authority under the Municipal Land Use Law ("MLUL") 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." However, the Supreme Court cautioned that in the future it would only recognize a narrow exception in cases where a planning board's violation of the statutory time limits was inadvertent or unintentional.

The automatic approval provision did not gain much strength until the Supreme Court's 2008 decision in Amerada Hess Corp. v. Burlington County Planning Bd., 195 N.J. 616 (2008).[1] 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. After being repeatedly asked by the county planning board to hold off filing a formal application while it finished conducting a study of the Route 541 corridor, Hess eventually tired of the more than year long wait and filed its development application with both the township and county planning boards. The township planning board rendered a final decision after two public hearings but the county planning board simply refused to take action until it completed its study.

Since the county planning board took a wait and see attitude, Hess filed a motion for summary judgment seeking to invoke the automatic approval provision of the County Planning Act, N.J.S.A. 40:27-6.7, which requires the county planning board to act within 30 days or within 60 days if both the municipal approving authority and the applicant consent.

The trial court granted Hess summary judgment finding that the county planning board never obtained the consent of the township planning board for an extension and that Hess did not approve an extension as required by N.J.S.A. 40:27-6.7. The Appellate Division and subsequently the Supreme Court affirmed. Ruling in favor of Hess, the Supreme Court 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 Supreme Court further warned that "in the absence of mistake, inadvertence, or other unintentional delay, there should be no such reluctance" to grant an automatic approval.

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1. Ms. Jennings also represented Amerada Hess- the successful plaintiff in this case.

About the Author:
Donna M. Jennings is a shareholder at Wilentz, Goldman & Spitzer, P.A. in Woodbridge where she is a member of the Land Use/Environmental Team. Ms. Jennings represents developers and redevelopers in all phases of land use approvals, and related environmental and regulatory matters, as well as litigation and appeals involving the approval and permitting process. She represented the plaintiff Bright and Varick Urban Renewal Company, LLC in this case. She may be reached at 732-855-6039 or djennings@wilentz.com

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Bright and Varick Urban Renewal Company's ("BV") application.

On August 16, 2013, plaintiff-redeveloper BV filed an application seeking preliminary and final major site plan approval to construct a five story 87 unit multi-family residential development consistent with the Redevelopment Plan and the Amended Redevelopment Agreement. As part of the application, BV sent a letter to the Zoning Officer seeking to confirm that the application would proceed before the Planning Board. By letter dated August 23, 2013, the Zoning Officer responded affirmatively that the application would require Planning Board approval.

Shortly, thereafter, the City Planner advised BV that the application was nearing completion but that several items needed to be submitted before the application could be considered complete. In less than a week, BV submitted all of the missing checklist items but for one which required submission of additional copies for agent review upon request. By letter dated October 4, 2013, the City Planner advised BV that the application was "substantially complete" and instructed BV to submit plans for agent review.

During this completeness review process, a group of vocal neighborhood residents organized under the name the Van Vorst Park Association, Inc. ("VVPA") began to voice displeasure with the proposed development and demanded that the Redevelopment Plan be amended to, among other things, reduce the development's proposed density.

In response, City representatives repeatedly told VVPA and others that the City could no longer amend the Redevelopment Plan since BV was protected under the Time of Application Rule (N.J.S.A. 40:55D-10.1), stating numerous times that if it did anything to hold up the development, it would lose the lawsuit. The City representatives also repeatedly went on the record – whether at Town Hall meetings or through blog posts and emails – affirmatively stating that the proposed "density" was fully conforming with the Redevelopment Plan and that BV's application was an as-of-right development proposal – meaning no variances are required and that the Planning Board would have jurisdiction over site plan review. Several City representatives readily admitted that they had "brainstormed, researched and hunted for loopholes" to reduce the project's density but to no avail.

Yet despite telling the public there was no legal way to prevent the development from advancing, the City caved to public pressure and did exactly what it told the public it could not do – try and halt the development. Thus, three months after BV's fully conforming application had been filed and almost two months after the application had been deemed complete, the City did an about face claiming that the permitted density in the Redevelopment Plan was "ambiguous" despite the fact that this allegation had been previously raised by a former Mayor and soundly rejected by City representatives. Thereafter, the City removed BV's application from the Planning Board's agenda and ultimately the issue was referred to the Zoning Board of Adjustment which never scheduled a public hearing.

BV strenuously objected to the cancellation of its Planning Board hearing and repeatedly warned various City officials that the time to act on its fully conforming site plan application would expire shortly. No hearing was scheduled and so the 95 day period in which the Planning Board had to review BV's site plan application expired without the Planning Board taking any action. BV then requested the issuance of a certificate indicating that the Planning Board had failed to timely act on its application. In response, the Director of Housing Economic Development and Commerce advised BV that its application was denied due to the ambiguity surrounding the project's density and that BV may file an appeal of his decision with the Zoning Board within 20 days.

The Trial Court's Decision

On February 4, 2014, BV filed a seven-count Verified Complaint requesting, among other things, an automatic approval and a declaratory judgment confirming that there was no ambiguity with respect to the density standard in the Redevelopment Plan.

The trial court rendered a written decision on August 29, 2014, finding that because the Planning Board failed to act within the 95 day period and that since there was no evidence that its failure to act was "the result of mistake, mishap, inadvertence, or delay" BV was entitled to an automatic approval. Importantly, the trial court also ruled that BV's application was complete as of October 4, 2013 when the City Planner accepted its application as "substantially complete."

After the City Defendants' motion for reconsideration was denied, the City defendants bowed out and so the VVPA was permitted to intervene for the sole purpose of appeal.

The Appellate Division's Decision

On appeal the VVPA advanced several arguments – all of which were rejected by the Appellate Division. First, the VVPA argued that the trial court erred in granting automatic approval because BV's application was never deemed complete. However, N.J.S.A. 40:55D-10.3 states "an application for development shall be complete for purposes of commencing applicable time period for action by a municipal

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agency, when so certified by the municipal agency." By letter dated October 4, 2013, the City Planner had certified that BVUR's application was "substantially complete." Despite VVPA's assertion, the Appellate Division concluded:

> The Board decided to table and then deny a completed application because it wanted to address the density issue; a decision we conclude neither altered the completed status of the Application nor tolled the ninety-five day timeframe. There was no 'mistake' by the Board relative to notice of the meeting or misfiling of the Application. There was no "reasonable misapprehension" by the Board whether the application was complete.

VVPA also argued that the automatic approval was contrary to the public interest because the density issue had never been aired at a public hearing. This argument was also summarily rejected as the Appellate Division noted that "there were numerous noticed public hearings during the redevelopment process at which no member of the public, including VVPA, appeared and objected regarding the issue of density or on any other basis. By contrast, BV complied with the requirements imposed by the controlling ordinance in the application and was not advised by the board to the contrary."

Importantly, the Appellate Division concluded by noting that "in balancing the equities between the public interest and the interest of the developer, the outcome weighs in favor of BV." The Appellate Division arrived at that conclusion based on the VVPA's inaction during the numerous noticed public hearings addressing the Site's redevelopment in conjunction with BV's reliance on the controlling ordinance when it filed its site plan application. As the Appellate Division noted, the time periods set forth in the statute are in place to provide applicants with a "measure of predictability."

Unfortunately, although BV's request for an automatic approval was affirmed by the Appellate Division – almost four years have passed since it submitted its fully conforming site plan application and so there is nothing "automatic" about the process. In fact, as of the writing of this article the VVPA has filed a Notice of Motion for Reconsideration (which the City Defendants joined) and so BV must now wait for the Appellate Division to rule on this motion. Even assuming the Appellate Division denies the motion, the VVPA still has the right to file a Petition for Certification with the Supreme Court of New Jersey. If VVPA's Petition is granted, BV is most likely looking at another year or more before the Supreme Court will render a decision. This is a long time to wait for an "automatic" approval but when faced with a municipality bent on stalling a project indefinitely or killing a project – it provides the only avenue for keeping the project viable.

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