FOR ZONING DETERMINATIONS, THE THIRD DEPARTMENT CONFIRMS THAT "FILED" MEANS FILED

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A New York appellate court recently issued a decision confirming that the clock for filing administrative appeals to the Zoning Board of Appeals ("ZBA") does not begin to run until the zoning determination is filed. In *Grout v. Visum Dev. Grp. LLC*, No. 531423, 2021 WL 4200928 (3d Dep't 2021), the Third Department held that the City of Ithaca ZBA had improperly dismissed an administrative appeal as untimely after determining that a group of landowners were on constructive notice of the Planning Board's determination. The Court remitted the matter to the ZBA for a hearing on the merits.

The case involved the construction of a three-building student housing development in the City of Ithaca. The project developers applied for Site Plan Approval to the City of Ithaca Planning and Development Board. In April 2019, the Planning Board held a public hearing. Then, on July 23, 2019, the Planning Board declared itself lead agency under the State Environmental Quality Review Act ("SEQRA"), issued a negative declaration under SEQRA, and granted preliminary site plan approval.

On September 16, 2019, a group of landowners appealed the Planning Board's July determinations to the City of Ithaca ZBA. They argued that the project violated the City of Ithaca Zoning Code and lacked the necessary variances. The ZBA refused to hear their appeal, citing the 60-day time limit for appeals in New York General City Law § 81-a(5)(b). According to the ZBA, the landowners' appeal was untimely because they were on constructive notice of the Planning Board's determination that variances were not required in April 2019. A few weeks later, on September 24, 2019, the Planning Board granted final site plan approval.

The landowners then challenged the Planning Board's determinations, the ZBA's refusal to hear their appeal, and the final Site Plan Approval. The Supreme Court granted summary judgment for the City and project developers, finding that the landowners had constructive notice of the Planning Board's determination with regard to the need for variances in April 2019. As such, their administrative appeal of September 16, 2019 was untimely. The landowners appealed.

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The Third Department reversed and remitted the matter to the ZBA for a hearing on the merits. The Court cited General City Law § 81-a(5)(a), which imposes an affirmative duty on zoning enforcement officers to "file" each decision, order, or determination within five business days from when it is rendered. Once filing is complete, General City Law § 81-a(5)(b) requires appeals to be filed within sixty days. Here, it was impossible for the Court to ascertain exactly when the Planning Board determined that variances were not required. The notice for the April 2019 public hearing was silent on variances, and subsequent meeting agendas continued to state that a variance was "likely" required. But what was clear was that the Planning Board never filed a determination. Thus, the time period for the administrative appeal never began to run. The Court rejected the City's conclusion that the landowners were on constructive notice of the determination. The General City Law provides a clear mechanism that starts the 60-day period—the filing of the determination—and thus eliminates any defense of constructive notice.

Takeaways

The Court's rejection of the constructive notice defense does not change the rules about the sufficiency of public notices that alert the public about specific projects, if not the exact measures to be considered. *See Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 66 (1996). This case is about the importance of following precise requirements created by the zoning enabling statutes.

For any question you have regarding how this recent decision impacts any of your organization's activities, please contact Charles Malcomb (716.848.1261), Daniel Spitzer (716.848.1420), or any member of our Municipal and Land Use practice.