New Jersey Law Journal

VOL. 200 - NO.6 MAY 10, 2010 ESTABLISHED 1878

IN PRACTICE

CIVIL PROCEDURE

It's No Party For Third Parties

Appropriate harmonization of the rights of third parties to judicial review is needed

BY STUART J. LIEBERMAN AND SHARI M. BLECHER

The ability to petition the courts for judicial relief is, of course, one of the fundamental safeguards against over-reaching by either the executive or legislative branches. In New Jersey, the constitution provides that there is a right for judicial review of administrative agency actions in the same manner as there is a right for judicial review following decisions from either the Law Division or the Chancery Division. In all cases, such review occurs in the Appellate Division.

It is a small wonder that administrative agency decisions are reviewed by the Appellate Division in much the same manner as final judicial decisions from either the Law Division or the Chancery Division. Since our constitution was amended several decades ago, our administrative agencies have become increasingly powerful. Indeed, a review of copies of the *New Jersey Register* from decades ago compared with now indicates just how much more rule making now occurs. All of that rule making results in, or corresponds with, greater power of these agencies.

Imagine, then, what would happen if these powerful agencies were able to operate in a vacuum. If they were able to take final administrative agency actions relating to the issuance of a wide variety of permits, license decisions and case-by-case evaluations involving every facet of our lives from banking, to cemeteries, to environmental protection, without the potential for any judicial review. We all would be concerned that the absence of review would result in arbitrary behavior from these agencies with each agency doing what comes natural to administrative agencies: expanding jurisdictional reach iteration by iteration without checks or balances.

This is not a hypothetical, academic exercise. The reality for many people in New Jersey aggrieved by final administrative agency actions, Third Party Objectors, is that they have absolutely no right to judicial review of significant agency decisions.

Case in point: An individual who applies to fill three acres of freshwater wetlands and is denied has an unequivocal right to review in the Office of Administrative Law, an executive branch agency, and then before the Appellate Division of the Superior Court.

However, when an applicant applies for a Freshwater Wetlands Permit and the permit is granted, the neighboring property owners who stand to be affected by, perhaps flooding in the event that the permit is improperly granted, or anyone within the community who stands to be impacted because, for example, an endangered species habitat will be wrongfully destroyed by the issuance of the permit, has no right, or at best an extremely narrow right, of review by the Office of Administrative Law or the Appellate Division. This limitation is first established by statute and then by several cases which have interpreted this statute.

The statute in question is found at N.J.S.A. 52:14B-3.3, which is entitled Appeal of Permit Decision by Third Party. Subsection (a) of the statute provides that a state administrative agency is prohibited from promulgating a rule or regulation that would allow third parties to appeal permit decisions. Subsection (a) is limited by instances where federal law or statute requires otherwise. Subsection (b) of the law provides that nothing in the statute shall be construed as obligating or otherwise limiting a person to a constitutional or statutory right to appeal a permit decision.

The law is an amendment to the New Jersey Administrative Procedures Act, the body of law that governs both rulemaking and adjudicatory hearings by administrative agencies in New Jersey. The law seems to have been enacted largely for the purpose of saving money. Also, this statute was enacted to provide increased finality to administrative agency actions.

One of the first cases to look at

The authors are members of Lieberman & Blecher in Princeton. *They thank Michael G. Sinkevich, an associate at the firm, for his assistance with this article.*

this issue following the enactment of the amendment was the case of *In re Amico/ Tunnel Carwash,* 371 N.J. Super. 199 (App. Div. 2004). That case involved a 2001 application to the New Jersey Meadowlands Commission by Paul Amico for three bulk area variances to construct a car wash on his property located on the Route 3 Service Road in Secaucus.

The neighboring third parties sought OAL review. Initially, the Meadowlands Commission granted the third parties review by the OAL. However, in light of the then recent amendment to the Administrative Procedures Act that lead to the adoption to the statute now under discussion, the commission adopted a resolution denying the third-party hearing request. The Appellate Division affirmed this denial.

The third-party objectors owned property within 200 feet of the Amico property. On that basis, they asserted that they would suffer from a particularized harm if the permits were granted. In particular, they were concerned about traffic problems that would be exacerbated by the grant of the variances, allowing for the carwash construction. This position was rejected by both the commission and the court, which found that the third parties lacked sufficient particularized harm to justify a hearing by simply living close to an applicants' property.

Once the new statute was adopted, courts reviewing requests for hearings by third parties have generally found that particularized interests have not been sufficient to justify a hearing. In essence, these third parties have been left without the ability to challenge final administrative agency actions that may directly impact upon their lives and property rights.

One of the best examples of this persona non grata status is found in the case of *I/M/O Freshwater Wetlands Statewide General Permits,*185 N.J. 452 (N.J. 2006). This case sought a determination by the Court as to when third parties might be entitled to an adjudicatory hearing under this statute.

At issue was whether an adjoining property owner could challenge the issuance of a DEP permit to fill wetlands on a property consisting of seven acres of undeveloped property on which the developer intended to construct single-family homes.

The wetlands permits had been issued much to the chagrin of the neighboring property owners, who asserted that if the permits were issued and the project went forward, the filling of wetlands would increase flooding on their adjacent property and presumably result in a diminution of their property value.

The Appellate Division and ultimately the New Jersey Supreme Court agreed that no right to an OAL hearing or an appeal existed because of the statutory amendment to the Administrative Procedures Act. Thus, the neighboring property owners were left with no remedy — regardless of the validity or invalidity of the wetlands permits.

In reaching this conclusion, the Court observed that the DEP had undertaken significant review of the issues. It also observed that the thrust of the concern by the neighbors was that the development would result in flooding. The Court observed that the municipal planning board was required to evaluate whether the application would result in flooding, and that this review would occur within a trial-like process affording the objectors a full right to participate.

In January, the Appellate Division again found that third-party objectors lacked the right to an OAL hearing and ultimate review by the Appellate Division in the case of *I/M/O Riverview Development, LLC*, 411 N.J. Super. 409 (App. Div. 2010). This case concerned a Hudson River residential high rise development that received permits from the DEP, over the opposition of individuals residing in a neighboring apartment building. Those neighbors maintained that the applicant did not satisfy numerous technical regulations that the DEP is charged with considering. They also alleged that illegal filling occurred on the subject property.

In determining whether to grant a hearing request, the Appellate Division looked at the willingness of the DEP to receive documentation by any interested party. The court also considered that neighboring property owners do not have a right to protect a view unless they possess an easement for that purpose. In light of the open willingness by the agency to receive whatever anybody wanted to send to it, coupled with the lack of property interest in a view, it was determined that there was no right to a hearing.

All of this leaves the regulated community in an unsettled state. While third-party appeals are conceptually allowed, they are rare in practice. And if a line exists, it is uneasy to locate. The problem is not with the courts, it is with the statute, one that has proven to be too difficult to work with.

Agency decisions affect individuals beyond the applicant or the targeted party. If an agency misinterprets its own regulations or worse yet in the rare instance where an agency intentionally commits wrong, it makes no sense that third-party objectors with legitimate interests cannot appeal the issue to the OAL. The result is that a large number of New Jersey citizens have no right at all for agency review of important decisions and actions.

It has been the law of New Jersey for many years that third-party objectors who reside within 200 feet of a project have a right to judicial review under the MLUL. Indeed, our land use laws afford the right of review to not only people who live within 200 feet but a much greater number of people. N.J.S.A. 52:14B-3.3 should be repealed and the MLUL rule regarding third parties should apply to agency actions across the board. This will plug an unfair gap and appropriately harmonize the rights of third parties to judicial review.■