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Environmental Law

When the DEP Is Nonresponsive

Property owners faced with agency's inaction may seek judicial remedy

By John M. Bowens and Ryder T. Ulon

Bowens and Ulon are with Schenck, Price, Smith & King of Morristown.

What recourse does a property owner have when faced with the New Jersey Department of Environmental Protection's refusal to respond to legitimate questions and problems raised by its directives? This problem is of particular importance to the owners of the estimated 18,000 sites on the NJDEP contaminated list because

evidence suggests that NJDEP is subject to an increasing strain on its resources from politically sensitive priorities. When a property owner is faced with a Draconian cleanup order for which he legitimately believes he should have no responsibility, and NJDEP turns a deaf ear to his concerns, there is little he can do beyond filing suit against NJDEP.

One such case involves elderly residents of Hoboken. On July 7, 2000, they entered into a Memorandum of Understanding (MOA) with NJDEP pursuant to which they agreed to remediate contamination caused by a leaking Underground Storage Tank (UST) located on their property. The obligations under the MOA extended to remediating any contamination on adjoining properties. Through their contractor they removed approximately 50 tons of impacted soil from their own property and, then 60 tons of impacted soil from two adjoining properties.

Having excavated almost the entirety of their postage-stamp sized property and replacing the contaminated soil with stone, their contractor filed a remedial action report advising that all contaminated soils had been removed and requested a No Further Action Letter (NFA) from NJDEP. Original groundwater sampling indicated that the source material had been removed but subsequent tests ordered by NJDEP showed a spike in results. The contractor attributed these results to the tidal influence of the Hudson River, which lay a few feet below the surface of the property. Despite efforts to explain these anomalous results and unequivocal evidence that there was simply nothing left on the property which could be a source of contamination, NJDEP refused to respond to requests to even attend a meeting, let alone issue an NFA.

Not far away, in Bergen County, another homeowner entered into an MOA with DEP after he found that there were two small abandoned leaking USTs on his property. He was not the first owner of the property and he had always heated his home with gas, but under the Spill Act he

was nevertheless responsible for the cleanup. He dutifully had the tanks and contaminated soil removed from the property. NJDEP required additional sampling, as a result of which, additional and far more significant contamination was found. It was traced to a 4,000-gallon tank located on property owned by the municipality.

It was then learned that the property was part of a subdivision of four homes constructed on the site of a commercial laundry facility which had burned to the ground in the 1970s. The 4,000 gallon tank, which had serviced the boilers at the facility, was left at the site. It was located under the municipal sidewalk on land ceded to it as part of the subdivision.

Further sampling also produced evidence of dry cleaning solvents in the groundwater under the property. The property owner not only had nothing to do with the dry cleaning operation, but he did not even know it had been in existence. Nevertheless, NJDEP insisted he was responsible to remediate all of the contamination, even that emanating from off site. Although NJDEP did agree to a meeting on this case, it was solely to tell the property owner that he was stuck and that NJDEP was unmoved by the clear lack of fairness in its directive.

Faced with Herculean clean-up tasks that would cost millions of dollars and years of effort, the property owners had no alternative but to bring suit against NJDEP. NJDEP did not come to court willingly and offered a variety of grounds to support its position that it was immune from legal action, irrespective of the arbitrariness of its decisions. DEP argued that it could not be subject to the jurisdiction of the court because: (1) the doctrine of separation of powers precluded judicial involvement; (2) no final agency action has taken place; and, (3) the Appellate Division is the only venue potentially available to the citizens aggrieved by its arbitrary and capricious actions. To counter NJDEP's arguments, the property owners were forced to craft complaints that removed their cases from a run-of-the-mill agency action dispute, a

characterization which DEP quickly employed, to one which demonstrated the constitutional implications of institutionalized agency practices through which property owners are left to twist in the bureaucratic wind.

Having rendered the properties essentially unmarketable, it was clear that NJDEP's action, or more appropriately inaction, subjected it to a claim of inverse condemnation. In determining whether a taking has occurred, the Supreme Court of New Jersey requires courts to consider whether property rights have been destroyed by governmental action. See, e.g., *Washington Market Enterprises, Inc. v. The City of Trenton*, 68 N.J. 107, 122 (1975). To that end, the Court has held that "a compensable taking can occur when governmental action substantially destroys the beneficial use of private property." *Shiavone Construction Co. v. Hackensack Meadowlands Development Commission*, 98 N.J. 258, 263 (1985). According to the Court in *Washington Market*, to prevail on an inverse condemnation claim, the plaintiff must "show that there has been substantial destruction of the value of his property and that the defendant's activities have been a substantial factor in bringing this about." Significantly, unreasonable delay attributable to governmental action is sufficient to prevail on a claim of inverse condemnation. See *Griffith v. State of New Jersey, Dep't of Envtl. Prot.*, 340 N.J. Super. 596, 608-09 (App. Div. 2001); see also *Desai v. Bd. of Adjust. of the Town of Phillipsburg*, 360 N.J. Super 586 (App. Div. 2003). The clear import of these cases is to provide aggrieved parties with an avenue to attack arbitrary governmental conduct that would otherwise be immune from judicial scrutiny.

The corollary argument offered by the property owners was that NJDEP's conduct was arbitrary and capricious such that it constituted a deprivation of "property, without due process of law." Essentially, the argument that they made is that the agency conduct constituted a denial of substantive due process. In *Nicholas v. Pennsylvania State Univ.*, the

Third Circuit held that nonlegislative action violates substantive due process if it is "'arbitrary, capricious, or tainted by an improper motive,'" or if it is "so egregious that it shocks the conscience." 227 F.3d 133, 139 (3d Cir. 2000) (quoting *Woodwind Estates, Ltd. v. Gretowski*, 205 F.3d 118, 123 (3d Cir. 2000)). The Third Circuit has expressly recognized that "ownership is a property interest worthy of substantive due process protection" as "one would be hard-pressed to find a property interest more worthy of substantive due process." *DeBlasio v. Zoning Bd. of Adjustment*., 53 F.3d 592, 600-01 (3d Cir. 1995).

NJDEP's contention that no final agency action has occurred, and thus its conduct is not subject to judicial review fails because the refusal to act is tantamount to the agency's denial of the requested relief. *New Jersey Civil Serv. Ass'n, v. State*, 88 N.J. 605 (1982). Central to this argument is that the refusal to act has been "directly felt" by the aggrieved party.

The standard set forth by the *Nicholas* court, when applied to the facts of these two cases supports the claim that NJDEP's conduct towards these property owners was and continues to be arbitrary and capricious. DEP nevertheless argued that the courts are powerless to address such agency action, particularly where its lack of response stemmed from its limited resources. While NJDEP's resources may indeed be strained, that hardly justifies holding innocent property owners hostage until the cavalry arrives.

DEP also claims that any obligations it may have towards persons subject to MOAs are purely discretionary and not subject to judicial review. N.J.A.C. 7:26C-2.6 provides criteria upon which the "DEP shall issue no further action letters." The use of the word "shall" severely undermines DEP's contention that the issuance of an NFA is discretionary. More to the point, the agency treatment of the property owners discussed here cries out for judicial intervention when viewed through the prism of basic constitutional rights and fundamental fairness.

Although DEP vigorously pushes the doctrine of separation of powers as the concept which strips a court's right to review any agency action, this defense falls short where the action is challenged "for arbitrariness and abuse under traditional judicial doctrines." *In re Senior Appeals Examiners*, 60 N.J. 356, 367 (1972). Even in the context of discretionary acts, the court will "guard its right to review such actions or inactions in order to compel such agencies or officials to exercise the discretion where required, rather than frustrate those who at the least are entitled to the exercise of the discretion." *Colon v. Tedesco*, 125 N.J. Super. 446, 454 (Law Div. 1973). In *Colon*, the court held that separation of powers did not bar the court from compelling the Department of Labor to initiate proceedings against labor camp owners observing that "[w]ithout a hearing and the discovery to which plaintiffs may be entitled in advance of the hearing, there could be abuses which may never be discovered."

Finally, NJDEP's contention that only the Appellate Division has jurisdiction over improper agency actions fails for two reasons. First, it is beyond dispute that the Law Division is the proper forum to adjudicate actions involving inverse condemnation and 18 U.S.C. § 1983 actions.

Secondly, courts have consistently held that rules governing the divisions of responsibility between the Appellate Division and Law Division, and in particular R. 2:2-3(a), are "not jurisdictional in the subject-matter sense, but [are] rather a matter of expedition and organization…." *Hartz Mountain Industries, Inc. v. New Jersey Sports & Exposition Authority*, 369 N.J. Super. 175, 184 (App. Div. 2004). In *Hartz*, the Appellate Division overturned the trial court and held that an OPRA hearing is properly initiated in the Law Division as opposed to the Appellate Division, notwithstanding R. 2:2-3(a). Central to the court's reasoning was the importance of developing a factual record.

In sum, a property owner faced with NJDEP's or any agency's unwillingness to act reasonably, or act at all, have weapons in their arsenal to bring the offending conduct before the courts and overcome superficial agency defenses.