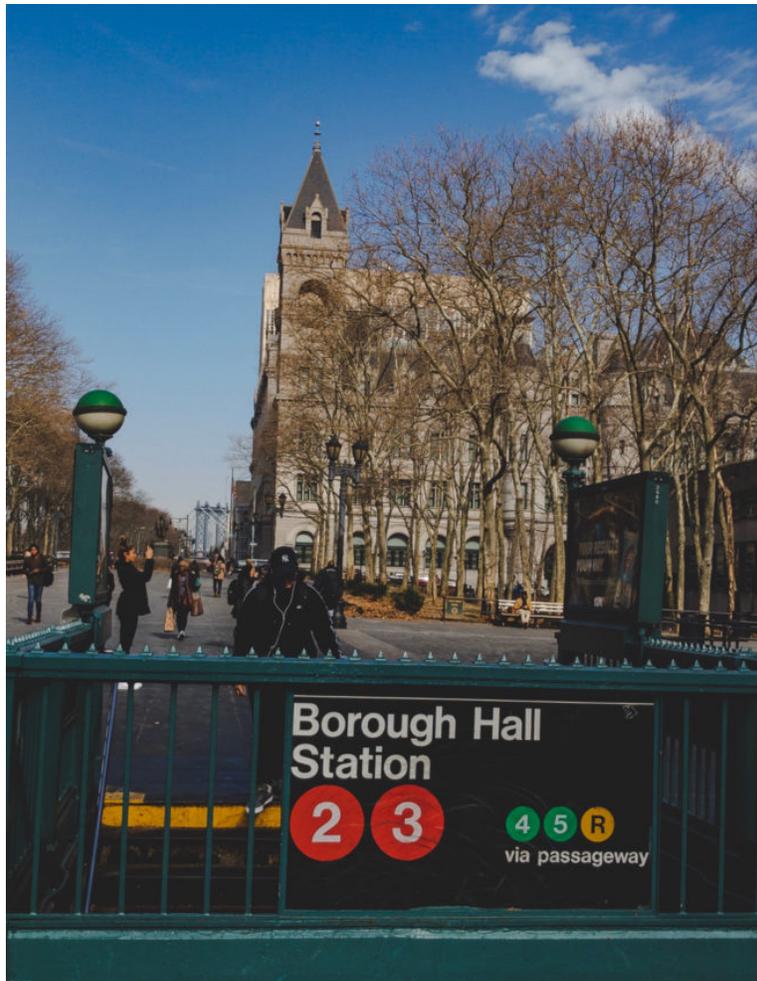


Long Island Land Use and Zoning

Time-Frames for Prosecuting an Article 78 Challenge May Be Shorter Than You Think



By John C. Stellakis on May 28, 2019



In [Rimler v. City of New York, 2019 N.Y. Slip Op. 03599 \(2d Dept, May 8, 2019\)](#), which involved a challenge to the issuance of a negative declaration, the Appellate Division, Second Department, affirmed a judgment of the Supreme Court, Kings County, granting respondents' motion to dismiss the petition and denying the petitioners' cross-motion to extend the time to serve process *nunc pro tunc*. The subject project ("**Project**") involved a mixed-use development in downtown Brooklyn, i.e. the sale and redevelopment of a site at the intersection of Cadman Plaza West, Clinton Street and Tillary Street ("**Site**"). The City of New York ("**City**") owned the Site, which previously contained a two-story branch of the Brooklyn Public Library ("**Library**"). The Project required the demolition of the Library building, followed by the construction of a 36-story building with below-ground parking, a new Library branch, a small amount of retail space and apartments.

The City Mayor's Office of Sustainability ("**MOS**") was designated the lead agency for environmental review under the State Environmental Quality Review Act and the Rules of the City governing City Environmental Quality Review. Following the MOS's preparation of an environmental assessment, MOS issued a negative declaration on June 12, 2015, which determined that the project would not have a significant adverse impact on the environment and that an environmental impact statement was not required. In addition, the Brooklyn Public Library, the City Department of Citywide Administration and the developer, Cadman Associates, LLC, applied to the City Planning Commission for approval of the Project because it involved the sale of City-owned land and was, therefore, subject to the City's Uniform Land Use Review Procedure. After public hearings, the City Planning Commission approved the Project on November 2, 2015. Thereafter, the City Council held a public hearing and, ultimately, approved the Project on December 16, 2015.

The petitioners commenced their Article 78 proceeding challenging the City's negative declaration by filing their petition on April 15, 2016, and served the petition upon the respondents between May 13 and May 23, 2016. The respondents moved to dismiss the petition on the ground that the petition was untimely served. The petitioners cross-moved, pursuant to CPLR Section 306-b, for an extension of time, *nunc pro tunc*, to serve the petition to the dates it was served. The Supreme Court denied petitioner's motion to extend time to serve, granted respondents' motion to dismiss, and held that the petition should also be denied on the merits. The petitioners appealed and the Appellate Division affirmed.

Although the petitioners timely commenced their challenge within the four-month statute of limitations, by filing on April 15, 2016, when the statute expired on April 16, 2016,^[1] the petitioners failed to timely serve their petition. Ordinarily, pleadings must be served within 120 days after the filing thereof; however, CPLR Section 306-b requires that where the applicable statute of limitations is four months or less, service of the pleadings shall be made no later than 15 days after the expiration of the state of limitations. Here, the statute expired in mid-April, the time within which to serve the petitioner expired 15 days later – in early May, and the petitioners did not serve their petition until the end of May.^[2]

While CPLR Section 306-b does allow for an extension of the time to serve, the Supreme Court and the Appellate Division held that the petitioners did not meet their burden to earn an extension. Courts, within their discretion, may give an extension "upon good cause shown or in the interest of justice." The Appellate Division noted that where a party fails to attempt timely service, good cause cannot exist. Because there was no evidence in the record that the petitioners even attempted service prior to the expiration of the 15 days, good cause did not exist to justify the extension.

Additionally, the Court discussed other considerations in deciding whether to grant the extension. Even though a party need not establish reasonably diligent efforts at service, Courts may consider diligence generally – or lack thereof – together with other relevant factors, including expiration of the statute of limitations, meritorious nature of the claims, length of delay in service, promptness of the request for an extension and prejudice to the opposing party. The Appellate Division agreed with the Supreme Court that the petitioners also failed to proffer meritorious claims in their petition, and that the MOS fulfilled its review obligations.

This decision is a reminder that an Article 78 petitioner must not only be mindful of the statute of limitations, but must also be aware of the timely service requirements of CPLR 306-b.

^[1] April 16, 2016, was a Saturday, and so the statute of limitations technically extended through to Monday, April 18, 2016. See N.Y. Gen. Constr. Law § 25-a(1) ("Where any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or public holiday, such act may be done on the next succeeding business day . . .").

^[2] The technical expiration date is disputable. See *supra* note 1.