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SHIPYARD ASSOCIATES, L.P., *Plaintiff,* v. HOBOKEN PLANNING BOARD. *Defendants*.	**SUPERIOR COURT OF NEW JERSEY** **Hudson County** **Law Division** **Docket No.: HUD-L-4157-12** **CIVIL ACTION** **OPINION**

Argued: January 6, 2014
Decided: January 23, 2014

Honorable Nesle A. Rodriguez, J.S.C.

CONNELL FOLEY, LLP
Attorneys for Plaintiff Shipyard Associates, L.P.
(Kevin J. Coakley, Esq. appearing)

THE GALVIN LAW FIRM
Attorneys for Defendant Hoboken Planning Board
(Dennis M. Galvin, Esq. appearing)

I. Introduction

Presented is an action in lieu of prerogative writ filed by Plaintiff Shipyard Associates, L.P., ("Shipyard"), seeking automatic approval of its site plan application pursuant to the Municipal Land Use Law ("MLUL"). Defendant Hoboken Planning Board (the "Planning Board" or "Board") did not hear the merits of Shipyard's completed application by the expiration of the statutory time limit. The Planning Board nevertheless issued a resolution denying the application before the deadline. The Planning Board

contends that this denial constituted an "act" sufficient to satisfy the automatic approval provision, and that automatic approval is otherwise inappropriate.

The Planning Board's complete disregard of its statutory duty to hold a hearing on the merits constitutes a failure to act. Specifically, the record reflects the Planning Board's deliberate attempt to avoid automatic approval while nevertheless deferring a hearing of the application until judicial resolution of a concomitant issue. The Planning Board's failure to act within the statutory period compels the enforcement of automatic approval. Accordingly, Shipyard's present application is GRANTED.

II. Facts and Procedural Posture

A. Statement of Facts

Shipyard is the owner and developer of several pieces of property along the northern Hoboken waterfront, abutting the Hudson River. On August 21, 1997, the Planning Board adopted a Final Site Plan Resolution consisting of multi-story residential buildings on Blocks A through F. Block G, the subject of the present litigation, was proposed as a commercial tennis facility. The Board argues that this designation was intended to assuage concerns as to green space and natural beauty in the Shipyard development.

On December 7, 1997, Shipyard entered into a Developer's Agreement with the City of Hoboken reflecting the application approved by the Planning Board. The Developer's Agreement states that "no subsequent alterations, amendments, or changes to this Agreement shall be binding upon either party unless reduced to writing and signed by each party." (Exhibit "B" at Appendix of the Record Below, Tab 29).

Shipyard has developed Blocks A through F in substantial accordance with the 1997 plan. On August 25, 2011, Shipyard filed an application seeking to amend the site plan approvals to develop residential high-rises on Block G. On October 13, 2011, in response to a letter from Shipyard indicating that the time period for action on the completeness of the application had expired pursuant to N.J.S.A. 40:55D-10.3, the Planning Board passed a resolution deeming Shipyard's application complete. In accordance with comments by the Board, Shipyard revised and resubmitted its application several times. The application was originally scheduled for a hearing on February 7, 2012. Subsequent comments necessitating changes to the application pushed the scheduled hearing back several months. During the pendency of the application, Shipyard alleges that the City of Hoboken orchestrated actions to oppose the project. None of these allegations are relevant to the present matter.

On March 7, 2012, the City of Hoboken filed suit against Shipyard to compel the completion of the project in accordance with the 1997 site plan approvals. The City of Hoboken based this suit on its interpretation of the Developer's Agreement, which it believed granted an interest in the property such that the City's approval was necessary for Shipyard to apply for amendment with the Planning Board. On June 11, 2012, the Planning Board requested that Shipyard voluntarily withdraw its application in light of the pending litigation. Shipyard refused and advised that the Planning Board was required to hear the application without regard to pending litigation under N.J.S.A. 40:55D-22.

After significant back and forth communication between Shipyard and the Planning Board as to the necessity of certain variances for the application, as well as

adjournments of the hearing date and revisions of the application, Shipyard received a letter June 21, 2012, indicating that the application would require five variances for approval. Shipyard responded that it had determined no such variances were necessary and, if the Planning Board did not hear the application despite the pending litigation, that it would pursue automatic approval. On June 29, 2012, the Planning Board's attorney stated that he would advise the Board to dismiss Shipyard's application without prejudice due to the pending litigation as well as the five incomplete variances.

On July 10, 2012, after several previous adjournments of a public hearing, the Planning Board held what was supposed to be a hearing on the merits of Shipyard's application. However, Shipyard was not given an opportunity to present its application to the Board. After a recommendation from the Planning Board's attorney that the Board should deny the application without prejudice rather than dismiss the application without prejudice because of Shipyard's intent to pursue automatic approval, the Planning Board voted to deny Shipyard's application without a hearing because of (1) a concern that it lacked jurisdiction, (2) the pendency of litigation regarding jurisdiction, and (3) variance issues. The Planning Board issued a resolution dated August 7, 2012, memorializing this decision.

B. Procedural Posture

After the entry of the Planning Board's Resolution dated August 7, 2012, Shipyard filed the present action, which the Court ultimately consolidated with the City of Hoboken's action on November 16, 2012. The Court also consolidated the present matter with Shipyard's action against the Hudson County Planning Board and the Hudson County Board of Chosen Freeholders. The Court also later granted motions to intervene

from both the Hudson Tea Building Condominium Association and the Fund for a Better Waterfront.

On June 21, 2013, the Honorable Patrick J. Arre rendered a decision granting summary judgment to Shipyard and dismissing the City of Hoboken's suit, holding that under Toll Bros. Inc. v. Bd. Of Chosen Freeholders of Cnty. of Burlington, 197 N.J. 223 (2008), the Developer's Agreement did not grant the City an interest in the property.

With the City of Hoboken's action against Shipyard dismissed and the issue of jurisdiction clarified, the Court proceeded with the present matter. The Court heard oral argument on January 6, 2014.

III. Municipal Land Use Law

"The MLUL serves as the predominant governmental tool for insuring that development in the state is carried out in a manner that best serves the public health, safety, and general welfare." Amerada Hess Corp. v. Burlington County Planning Bd., 195 N.J. 616, 627 (2008). "As its name indicates, the MLUL outlines the procedural steps for municipalities to effectuate principled development, including the review process for site plan applications." Id. One such procedural step is outlined by N.J.S.A. 40:55D-10(a), which requires that a planning board "shall hold a hearing on each application for . . . revision or amendment of [a] master plan."

The New Jersey Supreme Court has recently scrutinized, summarized, and simplified the interpretation of core statutory language central to the present matter. The Amerada Hess Court stated, "[w]ithin the MLUL . . . the Legislature has included several strict timetables for approval decisions. . . . Unless an extension has been granted,

failure to act within the statutory time period 'shall' result in automatic approval of the application." 195 N.J. at 628 (internal citations omitted, emphasis added).

The Amerada Hess opinion exhaustively details the development of MLUL automatic approval jurisprudence in the wake of Manalapan Holding Co. v. Planning Bd. of Hamilton, 92 N.J. 466 (1983), and, due to "loose language" in prior opinions, clarifies the recognized exceptions to automatic approval. See id. at 631-37. This analysis led the Amerada Hess Court to conclude:

> [I]n enacting the MLUL . . . the Legislature has made a value judgment that expeditious land use decisions are of such benefit to the public and applicants alike that the strong remedy of automatic approval is necessary and appropriate. We held in Manalapan that the time frames in the land use statutes are to be strictly applied, that automatic approval is the remedy for purposeful delay, and that it is only when government inaction is unintentional or inadvertent that the time frames are subject to relaxation. We reaffirm those principles here.

Id. at 644.

From its review of Manalapan's progeny, the Amerada Hess Court identified two cognizable exceptions to automatic approval: (1) "delay caused by ordinary mishaps or mistakes, such as . . . misfiling an application," and (2) "delay caused by a reasonable misapprehension regarding whether there was a complete application pending before the board, for example . . . where the board believed that consent of the property owner was necessary to perfect an application filed by a contract purchaser." Id. at 635 (internal citations omitted). Further, the Supreme Court explicitly invalidated language in prior decisions that suggested "that the applicant must separately demonstrate bad faith on the part of the planning board in order to obtain automatic approval . . . Such statements confuse the issue, run counter to the legislative command, and cast the burden on the

wrong party." Id. at 637. Amerada Hess undoubtedly narrows lower court discretion in denying automatic approval. See, e.g., Johnson v. Ocean City Planning Bd., Nos. A-5505-06T2, A-5534-06T2, 2010 N.J. Super. Unpub. LEXIS 2652 (App.Div. Nov. 3, 2010) (affirming Law Division grant of automatic approval after the Appellate Division's prior reversal of the Law Division was remanded by the Supreme Court for reconsideration in accordance with Amerada Hess; holding a board's tabling of a complete application did not fall within one of the enumerated exceptions).

The Amerada Hess Court noted that it was unlikely that "the vein of excusable delay" had been fully mined, indicating a willingness to entertain other reasons for a failure to act. Id. at 635. The summarization and simplification of the two recognized exceptions, however, coupled with the elimination of any bad faith requirement, emphasizes that lower courts should not be reluctant to grant automatic approval in the absence of mistake, inadvertence, or other unintentional delay. Id. at 636. "Where a board fails to act within the statutory limits, even for what it considers 'good' reasons, the statute is violated and automatic approval comes into play." Id. at 637. Amerada Hess's strict interpretation of the already strict application in Manalpan directs this Court's present determination.

IV. Analysis

The Court will first address the Planning Board's contention that its denial of Shipyard's application without a hearing constituted an action sufficient to satisfy the MLUL. Next, the Court will apply the present facts to the Amerada Hess automatic approval analysis. Finally, the Court will address the Planning Board's arguments as to variance requirements and safety considerations.

A. An "Act"

The Planning Board argues that, because it issued a resolution denying Shipyard's application within the statutorily prescribed time limits, it did not fail to act within the meaning of the automatic approval rules. The Board states that the belief that it lacked jurisdiction to act, coupled with Shipyard's refusal to withdraw the application even in light of pending litigation that would clarify this issue, was a legally justifiable reason to deny the application without a hearing. Shipyard responds that (1) the MLUL mandates that complete applications shall be heard despite pending litigation, and (2) that it is logically inconsistent to argue that the Planning Board's denial constitutes an action, but that it denied the application because the Board lacked the jurisdiction to act.

As a preliminary matter, the Court acknowledges the difference in language in the separate automatic approval provisions for N.J.S.A. 40:55D-48 and N.J.S.A. 40:55D-61. The Planning Board addresses this matter as falling under the automatic approval provision of N.J.S.A. 40:55D-48(c); this portion of the MLUL requires that "the planning board shall grant or deny preliminary approval within 95 days," or face automatic approval. Shipyard argues that its grant of time extensions to the Planning Board moves the analysis to N.J.S.A. 40:55D-61, which details a slightly different standard. Specific reference to grant or denial is not included in this automatic approval provision. The statute merely states "[f]ailure of the planning board to act within the period prescribed shall constitute approval of the application." N.J.S.A. 40:55D-61. The Court notes, however, that Amerada Hess refers to the N.J.S.A. 40:55D-48 automatic approval language as requiring a "failure to act" rather than specifically requiring a grant or denial.

195 N.J. at 628. Accordingly, this Court will treat the statutory language of the two provisions as identical.

At oral argument counsel for the Planning Board distinguished between (1) the Board's position that it lacked jurisdiction to hear the application, and (2) the Board's refusal to hold a hearing due to pending judicial review of the jurisdictional issue. The Planning Board's resolution also characterizes these positions as separate reasons for denial. As to the jurisdiction argument, the Planning Board has taken the same position as the City of Hoboken in the original lawsuit against Shipyard. The City argued that the Development Agreement created an interest in the property such that Shipyard must obtain permission from the City of Hoboken before making an application to the Planning Board. Because the Planning Board believed Shipyard lacked the capacity to make such an application without the City of Hoboken's consent, the Board refused to hear the merits of Shipyard's application, citing a lack of jurisdiction. The Planning Board nevertheless characterizes its resolution as an "act" because it denied on jurisdiction grounds.

As to the Planning Board's second argument, the Resolution dated August 7, 2012, separately states that the Board did not want to prejudge the merits of the application before the pending judicial review of its jurisdictional position. For these reasons, the Planning Board denied Shipyard's application without prejudice, indicating that it would permit Shipyard to re-file after a judicial determination of jurisdiction. The Court does not make a distinction between the Planning Boards two arguments, as Defense Counsel requests, because the Board knew on the date of the hearing that the pending judicial review would clarify its position on the jurisdiction issue. The Board

also knew that the MLUL required a hearing during the pendency of judicial review. Accordingly, the Planning Board's denial had the practical effect of a self-granted extension beyond the MLUL time limit for the sole purpose of awaiting judicial review. This is an impermissible delay under the Amerada Hess construction of automatic approval, and under South Plainfield Properties, L.P. v. Middlesex County Planning Bd., 372 N.J. Super. 410, 417 (App. Div. 2004).

i. The Statutory Charge

The MLUL contains a provision directly addressing the effect of pending litigation on planning board applications:

> In the event that a developer submits an application for development proposing a development that is barred or prevented, directly or indirectly, by a legal action instituted by any State agency, political subdivision or other party to protect the public health and welfare . . . the municipal agency shall process such application for development in accordance with this act and municipal development regulations, and, if such application for development complies with municipal development regulations, the municipal agency shall approve such application conditioned on removal of such legal barrier to development.

N.J.S.A. 40:55D-22. This section of the MLUL clearly details the process by which planning boards are to handle applications affected by pending litigation. Said applications *shall* be processed in accordance with the act and other regulations, *i.e.* on their merits without regard to the legal barrier, and in the event a board wishes to approve an application, it may do so conditioned on the outcome of the case. Id. Full compliance with applicable regulations is not a requisite to processing. The broad language employed in this section effectuates the legislative emphasis placed on spurring municipal action.

The MLUL required that the Planning Board hear Shipyard's application without regard to the pending litigation. The Board, however, does not attempt to argue that what occurred on July 10, 2012, was a hearing within the meaning of N.J.S.A. 40:55D-10(a). In both the original application and in the present matter, the Planning Board has not explained its complete failure to address the statutory requirement under N.J.S.A. 40:55D-22. The Board cannot claim ignorance as it was fully aware of this obligation based on communication by Shipyard. Accordingly, it is undisputed that the Planning Board failed to comply with this provision of the MLUL, that no hearing took place, and that the Board's desire not to prejudge the merits of the application runs counter to legislative command. The Planning Board argues that it nevertheless took action, but that it did not hear the merits of the application because it lacked the capacity to do so. The MLUL does not address the difference between a hearing and an act.

N.J.S.A. 40:55D-22 also informs the Court's analysis of the Planning Board's jurisdiction argument. On the date the hearing was supposed to take place, the Planning Board's attorney argued that the City of Hoboken had an ownership interest in the property such that the Planning Board lacked jurisdiction to hear the matter. At the same time, counsel acknowledged the uncertainty of this position and admitted that the pending litigation would resolve the uncertainty. The Planning Board then denied the application on these bases. It is inconsistent that the Planning Board refused to process the application in accordance with the MLUL on the presumption that the Court would resolve pending litigation in its favor, ignoring a statutory mandate to process applications *subject to* pending litigation, and at the same time to argue that it properly processed the application. Put another way, it is disingenuous of the Planning Board to

(1) claim that it has no authority to hear the merits of the application, (2) acknowledge that the Court will make the determination of whether it has authority to hear the merits of the application, (3) disregard a statutory obligation to hear the merits of the application subject to the Court's determination regarding authority, and (4) insist that, although it did not hear the merits of the application, it did "act" sufficient to avoid automatic approval.

This inconsistency suggests an inclination to delay a hearing on the merits until the judicial determination, while characterizing this delay as a denial. This inconsistency *does not* suggest the type of innocent inadvertence that Amerada Hess requires to avoid automatic approval. However genuine the Planning Board's concerns regarding jurisdiction, it was aware of the litigation on the matter. Nothing prevented the Board from hearing the application subject to the outcome of the litigation. Further, nothing prevented the Board from raising the issue of jurisdiction prior to the deeming of the application as complete. By denying without prejudice pending the outcome of the judicial review, the Planning Board has merely postponed a hearing that it was statutorily required to hold. The MLUL and Amerada Hess require automatic approval in response to postponement.

ii. Practical Effects

The record reflects the Planning Board's intent to bypass the automatic approval provision. Shipyard's application was deemed complete on October 13, 2011, due to delay-related failures on the part of the Planning Board. The City of Hoboken filed its lawsuit alleging the interest in the property and creating the jurisdiction issue on March 7, 2012. The Planning Board, however, did not address the issue of jurisdiction for the first

eight months of the application's pendency. On June 11, 2012, the Board requested that Shipyard withdraw its application pending the outcome of the City of Hoboken lawsuit. The Court notes that the Planning Board did not voice any concern regarding jurisdiction from the time the application was filed on August 25, 2011, until it was deemed complete on October 13, 2011. Cf. Fallone Properties, L.L.C. v. Bethlehem Township Planning Bd., 369 N.J. Super. 552, 570 (App. Div. 2004). Shipyard responded to the request for withdrawal by insisting that the MLUL required a hearing on the merits of the complete application under N.J.S.A. 40:55D-22 and that if the Planning Board did not hear the application that Shipyard would pursue automatic approval.

On the night the hearing was to occur, counsel for the Planning Board changed his recommendation to the Board in response to Shipyard's position. Counsel advised that the Board should "deny" the application rather than "dismiss" the application because (1) Shipyard had refused to withdraw its application and asserted the right to automatic approval, and (2) the MLUL requires that an application be either granted, denied, or granted with conditions. The difference in the language of the resolution adopted by the Planning Board is inconsequential. Of consequence to this Court are the indicia of a calculated attempt to avoid automatic approval while nevertheless denying Shipyard a hearing on the merits. By raising the jurisdiction issue—which is more appropriate for determination as to the completeness of an application—and ignoring a statutory requirement to hear the matter, the practical effect of a request for a temporary withdrawal, a dismissal, or a denial without prejudice, is that the Planning Board has granted itself an extension of time. The Amerada Hess Court noted that the New Jersey Legislature specifically changed the result of municipal inaction from automatic denial to

automatic approval "because the spectre of denial resulted in developers essentially having no choice but to grant extension after extension with concomitant delays and costs." 195 N.J. at 629. Clearly, the Legislature adopted automatic approval to discourage this type of government tendency toward inaction or delay.

The Appellate Division has affirmed automatic approval in the face of other attempts to "end-run around the statute." South Plainfield Properties, L.P. v. Middlesex County Planning Bd., 372 N.J. Super. 410, 417 (App. Div. 2004). This case is distinguishable from South Plainfield because the Middlesex County Planning Board more clearly evinced an impermissible delay by unilaterally granting itself an extension of time beyond the statutory period. Id. This case is analogous to South Plainfield, however, in the sense that both boards resorted to self-help in order to avoid the consequences associated with inaction.

The Planning Board has attempted to characterize its resolution as an "act" sufficient to satisfy the MLUL, and to justify this "act" despite a complete disregard of N.J.S.A. 40:55D-22; these justifications fail because they do not adequately account for the statutory requirements. Whether the Planning Board believed, from a practical perspective, (1) that it did not have jurisdiction to hear the application and that the Court would ultimately vindicate such a position, or (2) that it did not need to hold a hearing on the merits because the Court was making a determination that might allow the City of Hoboken an interest in the property, thereby invalidating the application and obviating the need for a hearing, in either case the Board has ignored the statutory requirement that applications are processed as normal, and if approved are to be made subject to the removal of the pending legal barrier. See N.J.S.A. 40:55D-22. The Board cannot

insulate its position on jurisdiction from its position on the pending litigation; the Board's knowledge that judicial review would clarify the jurisdiction argument is paramount. Regardless of its position, the Planning Board refused to hear Shipyard's application on its merits because it was waiting for the outcome of litigation.

Automatic approval is the result of self-created time extensions that delay the hearing of completed applications. See South Plainfield Properties, 372 N.J. Super. at 417. The Planning Board's proposed construction of the MLUL permits avoidance of this outcome by characterizing delays of otherwise complete applications as denials without prejudice. This construction would also permit municipalities to impede the processing of applications by filing lawsuits related to the application, a construction that the Legislature clearly designed N.J.S.A. 40:55D-22 to prevent. Applying the MLUL in this manner runs counter to the Amerada Hess Court's strict adherence to the legislative mandate. It is not this Court's position that an "act" in satisfaction of the automatic approval provisions must be a full hearing on the merits. See Sprint Spectrum, L.P. v. Zoning Bd. of Adj. of Township of Green Brook, 356 N.J. Super. 194 (Law. Div. 2002). However, a municipal entity is no more privileged to defeat the legislative intent of the automatic approval provisions by denying a complete application to await judicial clarification of a concomitant issue, than it is privileged to defeat the legislative intent by unilaterally postponing the hearing of a complete application for the same reason. To do so would permit municipalities to contrive determinations that "end-run around" the strict application of the statutory timetable, in direct contravention to the Amerada Hess decision. Accordingly, this Court holds that the Planning Board did not act within the meaning of the MLUL.

B. Application of Automatic Approval

As the Planning Board failed to act within the meaning of the MLUL, the Court will now address the applicability of the automatic approval provision. The Planning Board argues that automatic approval is inappropriate because its belief that it lacked jurisdiction was sincere. The Board also argues that automatic approval would not serve the public interest. Shipyard responds that the Planning Board's conduct does not fall within the exceptions enumerated by Amerada Hess.

The Planning Board argues at length regarding the reasonableness of the position that it had no jurisdiction. Assessment of the reasonableness of this position, however, is unnecessary to automatic approval analysis. The Amerada Hess Court did not find reasonable legal misimpressions to be an exception to automatic approval in the face of a failure to act. Rather, it found that technical mistakes or reasonable misapprehension as to the completeness of an application were the only two recognized exceptions to automatic approval. 195 N.J. at 635. The Planning Board has not raised the issue of a technical mishap such as a misfiling in the present matter. Because the Planning Board deemed Shipyard's application complete months before the purported hearing date, and because the Planning Board failed to act by the MLUL deadline, the Shipyard application does not fall within an exception to automatic approval currently recognized by the New Jersey Supreme Court.

The Planning Board also argues that automatic approval would not serve the public interest. In support of this argument, the Planning Board cites a number of cases which predate Amerada Hess, most of which contend that Courts apply automatic approval with caution, and rarely without a demonstration of bad faith. See, e.g.,

Tenenbaum v. Township Of Wall Bd. of Adjustment, 407 N.J. Super. 446 (App. Div. 2006). Bad-faith is not a requirement for automatic approval, and caution is not the mandate after Amerada Hess. 195 N.J. at 636 (holding "in the absence of mistake, inadvertence, or other unintentional delay there should be no . . . reluctance" to grant automatic approval). The Planning Board's failure to hold a hearing on the merits was not an unintentional delay, but a calculated move to avoid a hearing until the resolution of pending litigation.

The Amerada Hess Court identifies only narrow exceptions to automatic approval, but concedes that there may be other legitimate cause for excusable delay. The Planning Board's emphasis on the public interest in hearing the merits of the application implies a request that the Court carve out a new exception to automatic approval for a good-faith failure to act on a complete application. The Amerada Hess Court, however, specifically characterizes excusable delay only as inadvertent or unintentional; delay, even for "good" reasons, violates the statute. 595 N.J. at 636-37. It is not the province of this Court to create an exception in contravention to the plain language of the Amerada Hess Court's interpretation of automatic approval.

In the present matter, the legislative emphasis placed on the policy of timely disposition of MLUL applications outweighs the policy interest in a public hearing on the merits of the Shipyard application. The Planning Board's failure to act does not fall within an exception to automatic approval, and the legislature intended to avoid this type of inaction. Accordingly, automatic approval applies to the Shipyard application.

C. Variance Necessity and Safety Considerations

The Planning Board also argues that the Court should not apply automatic approval because the Shipyard application requires variance relief and contains safety issues that the Board has not fully addressed. As to the Planning Board's variance argument, Shipyard communicated in writing prior to the hearing date its position that no variance relief was required. A determination of the necessity of a variance, particularly when the applicant and the municipal entity have taken opposing views, is best suited for a hearing on the merits. More importantly, the Planning Board has not cited a rule, case, or statute supporting its proposition that this type of application deficiency or disagreement is a legitimate reason to avoid automatic approval. Indeed, the Planning Board's position runs counter to the purpose of automatic approval. The legislature specifically enacted the automatic approval provisions to discourage municipal inaction, and it did not condition such automatic approval on an absence of flaws in the application. The Planning Board points out that this is the inherent danger of automatic approval; that the Board's and the public's comments on these types of issues goes unheard. The Legislature, however, has made a value judgment that the danger of municipal inaction is a greater danger, and as a remedy it created automatic approval of an application without a hearing on the merits.

The Planning Board's brief also suggests that safety is a concern as to construction on the property. The Amerada Hess Court acknowledged that, "[i]t may be that some future case will present a compelling issue of safety or welfare that has not been captured by another level of government regulation." 595 N.J. at 643. However, "a project that receives automatic approval at [one] level is nevertheless subject to

conditions imposed by the municipality and to all relevant statewide health and welfare initiatives." Id. The Planning Board has not directly argued that safety concerns warrant the abrogation of automatic approval. More importantly, the Planning Board has failed to argue that, if automatic approval is granted, there will be a complete absence of government oversight on the remainder of the project such that an unsafe project will result. Because the Planning Board has failed to support its contentions regarding variance requirements and safety issues with cognizable legal arguments, the Court does not find a reason to avoid the application of automatic approval.

V. Conclusion

The Planning Board denied Shipyard's application without prejudice so that the Board could await the outcome of litigation affecting the application. The Planning Board was statutorily required to hold a hearing on the merits during the pendency of the lawsuit. The result of this delay is a failure to act on Shipyard's complete application within the period required by the MLUL. No exceptions to this failure to act recognized by the Amerada Hess Court apply to these facts. Accordingly, the MLUL and Amerada Hess require automatic approval of Shipyard's application.

Counsel for Shipyard shall prepare an order in conformity with this decision.