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John R. Nolon
*Elisabeth Haub School of Law at Pace University*, jnolon@law.pace.edu

Jessica A. Bacher
*Elisabeth Haub School of Law at Pace University*, jbacher@law.pace.edu

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# Land-Use Discretion:
# Court of Appeals Again Restrains Lower Courts

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John R. Nolon and Jessica A. Bacher

[John Nolon is a Professor at Pace University School of Law, the Director of its Joint Center for Land Use Studies, and Visiting Professor at Yale's School of Forestry and Environmental Studies. Jessica Bacher is an Adjunct Professor at Pace University School of Law and a Staff Attorney for the Land Use Law Center.]

**Abstract:** Through a review of recent case history, this article examines the role of courts in land use decisions. The consensus of the holdings is that a court should not substitute its discretion for that of a local land use board so long as the board's decision was based on substantial evidence on the record. The rational for this standard of deference is based on the idea that local land use boards are legislative bodies that understand the needs of the communities they serve. This article highlights several instances where appeals courts reign in the power of trial courts that overstep judicial bounds by annulling valid land use board decisions.

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As it has several times in recent terms, the Court of Appeals had to restrain lower courts from substituting their judgments for those of local land use boards. In *Metro Enviro Transfer v. Village of Croton-On-Hudson*,[1] the Court of Appeals reiterated the role of the courts in reviewing discretionary land use decisions.[2] The court upheld the village board of trustees' denial of Metro Enviro Transfer's application for renewal of its special use permit to operate a waste transfer facility in the village. The original permit gave the village the right to revoke it if any of its conditions or limitations were violated. "Metro repeatedly and intentionally violated conditions of the permit"[3] and the council refused to reissue the permit as a result. Metro Enviro Transfer argued and the supreme court agreed that because there was no actual harm to the community or the environment, the village's denial of the permit renewal was arbitrary and capricious and not supported by substantial evidence. During the three-year special permit, Metro exceeded the capacity limitations on 26 occasions and falsified records to hide the excesses. The facility accepted prohibited waste at least 42 times, did not adequately train its personnel, kept insufficient records, and inappropriately stored tires on the site. Metro admitted to these violations and paid fines for many of the violations.

Following extensive hearings, the board denied Metro's application to renew its permit. "The Board released a 15-page statement of findings detailing its rationale, including a three-page chart summarizing Metro's violations."[4] In the statement, the

board relies significantly on the opinion of the town consultant. "He concluded they 'signify a facility that continually promises to improve but nonetheless persistently violates regulations that are designed to protect health and the environment.'"[5]

The supreme court annulled the board's decision finding that it was "'impermissibly based, in part, upon generalized opposition, which remains uncorroborated by any empirical data.'"[6] The appellate division reversed holding that "the [s]upreme [c]ourt 'erroneously substituted its own judgment for that of the Village.'"[7] On appeal to the Court of Appeals, Metro unsuccessfully argued that "the [b]oard must show substantial evidence not only of violations, but of violations that actually harmed or endangered health or the environment."[8] The Court of Appeals concluded that "[a]lthough inconsequential violations would not justify non-renewal, the many violations here, and their willful nature, sufficiently support the [b]oard's decision."[9] The board's decision whether to grant or renew a special permit is discretionary and will be upheld as long as it has a proper basis and is not based solely on generalizations. "'[E]xpert opinion . . . may not be disregarded in favor of generalized community objections,'"[10] but as long as there are other grounds in the record for the decision it will be upheld. The court held that substantial evidence of actual harm was not necessary and the threat of harm from the repeated willful violations was sufficient grounds to deny the renewal.

"There may, of course, be instances in which an applicant's violation is so trifling or de minimis that denying renewal would be arbitrary and capricious."[11] Here, the board "reviewed volumes of evidence," it heard contradictory evidence from Metro's expert and its own, "weighed the evidence and concluded it 'could no longer rely' on Metro's assurances of future compliance.'"[12] "A reviewing court 'may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record.'"[13] "Here, the quantity and character of Metro's violations would have constituted sufficient grounds to deny Metro's renewal application on their own, with or without expert testimony."[14]

In 2002, three Court of Appeals decisions were decided that should have put to rest any concerns about the attitude of the courts toward reviewing fact-based, local land use decisions. The first case, *Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*,[15] involves the denial of a special use permit sought by a regional mall for its expansion to accommodate a new department store. The ZBA denied the permit concluding that the proposed expansion would adversely impact traffic and air quality. The ZBA based its determination on facts presented to it by the project's opponents regarding the air pollution and traffic to be caused by other projects approved, but not yet built, in the vicinity of the mall. In overruling the appellate division reversal of the zoning board's determination, the Court of Appeals held that the ZBA's decision was based on substantial evidence and was rational. Although the mall owner presented credible evidence to support its proposed expansion of the mall, the Court of Appeals reasoned that deference must be given to the ZBA when the record contains other substantial grounds on which to base a denial.

Several aspects of this case counter local fears that courts are hostile to their efforts to control development. First, the source of the reports relied on – the project's opponents – was not important to the court's determination. As long as the reports are factual and contain substantial evidence supporting the board's decision, they are sufficient to justify that decision. Second, the court's role is not to weigh or balance the evidence presented in support of both sides, but simply to determine whether there was substantial evidence on the record that supports the board's decision. In other words the court may not substitute its judgment of the facts (and their weight) for that of the local administrative review board. Third, the Court of Appeals noted specifically that local review boards in these circumstances are entitled to judicial deference.

In *Ifrah v. Utschig,*[16] a landowner challenged the denial of a request for four area variances by the Town of Harrison's zoning board of appeals. The variances requested would have allowed the landowner to subdivide an already nonconforming lot and allow him to build a second home on the land. The result would have been to create two lots - each including less than a half-acre in an area zoned for single-family housing on lots of at least one acre in size. Again, the neighbors complained and put facts on the record about the impact on the neighborhood of the extra home and the traffic it would generate. The appellate division was impressed by the fact that most of the homes in the neighborhood were built on substandard size lots and that more than half of them were on lots even smaller than those proposed by the landowner in his variance request. From this, the appellate division concluded that granting the variance would not have an adverse effect on the neighborhood and thus the town zoning board's decision was not supported by substantial evidence.

The Court of Appeals reversed and upheld the denial of the variances by the zoning board. Essentially, it held that the appellate division erroneously performed the role of the local land use board by deciding which facts on the record should be used to decide the matter. Under state law, area variance decisions are to be made by local zoning boards after balancing a number of considerations. The Court of Appeals noted that the neighbors, in addition to simply voicing their opposition to the variances, placed facts on the record about the adverse effect of the proposed modern home in the neighborhood. They documented the impact of contemporary design on the neo-Tudor architectural style of the houses on the street, the interruption of the uniform spacing between the existing homes that gave them the appearance of being on larger lots, and the confluence of several existing driveways on the portion of the street affected by the driveway of the proposed new home. These are facts. Although they were placed on the record by the opponents, they do not simply reflect the unvarnished opposition of the neighbors. Based on these facts, the Court of Appeals found that the zoning board "could rationally conclude that the detriment the proposed subdivision posed to the neighborhood outweighed the benefit sought by petitioner, and its determination denying the requested variances was not arbitrary or capricious."[17]

In the third case, *P.M.S. Assets, Ltd. v. Zoning Board of Appeals of Village of Pleasantville*,[18] the Court of Appeals again overruled an appellate division decision that reversed a zoning board determination. In this case, neighbors in a residentially-zoned part of the village complained that the new owner of a lot which contained a

nonconforming industrial building had changed its use in violation of the local zoning law. The village zoning board determined that converting the use of a warehouse from storing customers' goods to housing the new business's equipment, inventory, and supplies was a qualitative change in the nonconforming use of the type prohibited by local zoning. Although both the supreme court and the appellate division reversed the board, the Court of Appeals found that the board could rationally have arrived at its decision and that its decision should not be disturbed by the judiciary.

In 2004, in *Pecoraro v. Board of Appeals of the Town of Hempstead*,[19] the Court of Appeals upheld the zoning board of appeal's denial of the landowner's area variance application. The plaintiff had entered into a contract to purchase a substandard parcel contingent on receiving an area variance. For a zoning board of appeals to grant a variance from the dimensional and area requirements of a zoning ordinance, state legislation requires a finding that the benefits to the applicant of the requested variance outweigh the detriment it will cause to the health, safety, and welfare of the neighborhood.[20] The board must weigh the benefits of the requested variance to the applicant against the five factors set forth in the statute.

In *Pecoraro,* the Court of Appeals held that the lower courts improperly supplanted their own judgments for that of the board in concluding that the decision was based on generalized community opposition. "The record demonstrates that the [b]oard reasonably considered all of the factors delineated in Town Law § 267-b and weighed the petitioner's interest against the interest of the neighborhood."[21] "As the board is entrusted with safeguarding the character of the neighborhood in accordance with the zoning laws . . . it was well within its discretion to deny a variance that would have allowed an owner to take advantage of an illegally non-conforming parcel by erecting a dwelling upon it."[22]

> [The] Court has often noted that local zoning boards have broad discretion in considering applications for area variances and the judicial function in reviewing such decisions is a limited one. Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure.[23]

In all these Court of Appeals cases, the local board was sustained, the intermediate courts told not to substitute their judgments for that of the local board, and the existence of facts on the record was found sufficient to uphold local board decisions under the substantial evidence rule. This rule was recently reiterated by Justice O'Connor in *Lingle v. Chevron*.[24] This U.S. Supreme Court regulatory takings case states that courts are not well suited for scrutinizing the efficacy of legislative decisions and doing so "would empower--and might often require--courts to substitute their predictive judgments for those of elected legislatures and expert agencies. Although [*Lingle*] is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role."[25] Referring to the lower court's finding that one expert was more persuasive than another, the Supreme Court held that "[t]he reasons for deference to legislative

judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."[26]

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[1] No. 120, 2005 N.Y. LEXIS 1572 (July 6, 2005).

[2] Following the Court of Appeals ruling, the village issued an order requiring Metro Enviro to stop accepting trash and to begin a 90-day closing process. A supreme court judge issued a temporary restraining order allowing the waste transfer station to remain open while he reviews a new lawsuit brought by Metro Enviro and its landlord. Metro Enviro claims that it is a nonconforming use and as such can operate without a special permit. A ruling is expected late summer.

Metro Enviro has also instituted a proceeding to have its facility and the 1,600 foot rail spur linking it to the Metro North Commuter Rail Road tracks declared a "railroad" that is exempt from state and local regulation. This proceeding is before the federal Surface Transportation Board and is being opposed by the village.

[3] *Id.* at *2.

[4] *Id.* at *3.

[5] *Id.*

[6] *Id.*

[7] *Id.* at *3-*4.

[8] *Id.* at *4.

[9] *Id.*

[10] *Id.* at *4-*5.

[11] *Id.* at *6.

[12] *Id.* at *6-*7.

[13] *Id.* (quoting Retail Prop. Trust v. Bd. of Zoning Appeals, 98 N.Y.2d 190 (2002)).

[14] *Metro Enviro Transfer, LLC*, 2005 N.Y. LEXIS 1572 at *7.

[15] 98 N.Y.2d 190 (2002).

[16] 98 N.Y.2d 304 (2002).

[17] *Id.* at 309.

[18] 98 N.Y. 2d 683 (2002).

[19] 2 N.Y.3d 608 (2004).

[20] N.Y. TOWN LAW § 267-b (McKinney 2003); N.Y. VILLAGE LAW § 7-712-b (McKinney 2003); N.Y. GEN. CITY LAW § 81-b (McKinney 2003).

[21] *Pecoraro*, 2 N.Y.3d at 614.

[22] *Id*. at 615.

[23] *Id.* at 613.

[24] 125 S. Ct. 2074 (2005).

[25] *Id*. at 2085.

[26] *Id*.