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Clarifying the Rules and Roles of Land Use Boards

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Abstract: This article discusses the rules and roles of land use boards, including planning boards, and zoning boards of appeals. Local governments are given broad authority to create land use regulations by the New York state legislature, and so long as they stay within the boundaries of the state land use statutes, the local government's fact based decisions are usually upheld in face of legal challenges in court. This column analyzes several recently decided cases in an attempt to clarify the uncertainties involved with the decisions of local land use boards, and challenges to land use board decisions.

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New York land use cases send three clear messages to local governments: 1. You have broad authority to adopt strategies to encourage the most appropriate use of the land; 2. The courts will seldom interfere with your fact-based decisions; and 3. It is important that you stay within the authority – and follow the procedures – prescribed by state land use statutes. The combination of these judicial guidelines, and a decade-long process of legislative reform of state land use statutes, is gradually clarifying the boundaries within which local legislatures, zoning boards of appeal, and planning boards must operate. In May 2004, three additional cases were handed down which further refine the understanding of practitioners regarding the role of each board and the discretion each is given.

Statutory Factors Must be Considered

In *Matter of Pecoraro v. Board of Appeals for the Town Hempstead*, the Court of Appeals upheld the zoning board of appeal's denial of the landowner's area variance application. No. 2004-59, 2004 N.Y. LEXIS 929 (N.Y. May 4, 2004). 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. N.Y. Town Law § 267-b

(McKinney 2003); N.Y. Village Law § 7-712-b (McKinney 2003); N.Y. General City Law § 81-b (McKinney 2003). The board must weigh the benefits of the requested variance to the applicant against the five factors set forth in the statute:

1. Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of an area variance?
2. Can the benefit sought by the applicant be achieved by some method that is feasible for the applicant to pursue other than an area variance?
3. Is the requested area variance substantial?
4. Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?
5. Is the alleged difficulty self-created? *Id*.

When making a decision to grant or deny an application for a variance, the zoning board of appeals must rigorously follow the statutory requirements, carefully review the evidence presented, and make a finding based on the record. Particularly in the case of area variances, where the legislature has specified factors that must be considered but has given no guidance as to how to weigh those factors, the record should reveal that all five factors were considered and state the findings of the board with respect to each.

In *Matter of 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 Board reasonably considered all of the factors delineated in Town Law § 267-b and weighed the petitioner's interest against the interest of the neighborhood." *Matter of Pecoraro*, 2004 N.Y. LEXIS 929, at *8. "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." *Id*. at *12.

> [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.
> *Id* at *6-7.

Courts Will Seldom Overrule Fact-Based Decisions

In *Matter of Metro Enviro Transfer v. Village of Croton-On-Hudson*, the Second Department upheld the village council's denial of Metro Enviro Transfer's application for the renewal of its special use permit to operate a waste transfer facility in the village. No. 2003-02335, 2004 N.Y. App. Div. LEXIS 6882 (N.Y. App. Div. May 10, 2004). The original special permit gave the village the right to revoke it if any of its conditions or limitations were violated. In a number of instances, Metro Enviro

Transfer had breached the conditions 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.

The Second Department noted that the "classification of a 'special permit' or 'special exception' is tantamount to a legislative finding that, if the special permit or exception conditions are met, the use will not adversely affect the neighborhood and the surrounding areas." *Id*. at *3 (quoting *Matter of C.B.H. Props. v. Rose*, 613 N.Y.S.2d 913, 914 (N.Y. App. Div. 1994)). The court further stated that a municipality's determination whether to renew a special permit will be upheld if it is supported by substantial evidence. And, finally, "Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record." *Id*. at *4 (quoting *Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, 774 N.E.2d 727, 731 (N.Y. 2003).

According to the Second Department, the Supreme Court substituted its opinion for that of the village council. The Supreme Court held "that the determination on review was the sole product of generalized opposition to the facility." *Id*. at *4. The Appellate Division found that "there is substantial evidence in [the] record not only establishing the existence of the subject violations, but also that they posed a threat to the community and environment" and that the various permit violations were a sufficient basis to deny the permit renewal. *Id*. at *5. The village did not have to wait for actual harm to occur.

The Role of the Zoning Board of Appeals

In *Matter of Real Holding Corp., et. al. v. Lehigh, et. al.*, the Court of Appeals held that "Town Law § 274-b(3) vests a zoning board of appeals … with authority to grant an area variance from any requirement in a zoning regulation, including those for a special use permit." No. 2004-58, 2004 N.Y. LEXIS 979, at *1 (N.Y. May 6, 2004). Real Holding Corp. applied for a special use permit to put a "gasoline filling station" on a parcel of land it owned in a "Highway Business District." *Id*. at *1. The applicant was unable to satisfy two distance standards required for the permit. The planning board advised it to seek area variances from these standards from the zoning board of appeals. The zoning board of appeals would not grant the variances because it believed it was powerless to do so without express authority from the Town Board.

Section 274-b(3) states that an "application may be made to the zoning board of appeals for an area variance" in those cases "where a proposed special use permit … [does] not comply with zoning regulations." Id. at *5. Contrary to the view of the zoning board of appeals, this does not clash with § 274-b(5) which vests a town board with the discretion to empower the planning board to waive the application of certain special permit requirements where they are unnecessary as applied to the project under review. *Id*. This section merely gives an applicant an alternative method for obtaining a special use permit when the proposal does not comply with the requirements. "To hold that a

[zoning board of appeals] may vary certain zoning provisions only if expressly empowered to do so by the town board overlooks the entire purpose of the [zoning board of appeals], which is to provide relief in individual cases from rigid application of zoning regulations enacted by the local legislative body." *Id*. at *6.

General Rules Review

Local boards are charged with the duty to make consistent, fair, and reasoned decisions. The goal of the many laws regulating the land use decision-making process is fairness to the public and to the applicants. Local governments in New York are not required to adopt zoning ordinances or comprehensive plans or to regulate land subdivision or site development. However, when localities enter the land use arena, they must follow the prescriptions of state enabling acts. For example, once the local legislature adopts a zoning ordinance, it must create a zoning board of appeals to review the zoning administrator's decisions and to entertain requests for variances. Local legislatures may also create planning boards to serve in an advisory capacity regarding community planning and the adoption of zoning provisions and to review applications for various land use activities. Other boards – such as a historic district commission, conservation advisory board, architectural review board, or wetlands agency – may be created, depending on local circumstances.

In *Moriarty v. Planning Board of the Village of Sloatsburg*, the court provides a virtual primer on the roles of each local board and municipal zoning officials. 506 N.Y.S.2d 184 (N.Y. App. Div. 1986). In *Moriarty*, the property owner proposed to build a metal fabricating plant on a vacant parcel of industrially zoned property. The zoning law required the owner to obtain site plan approval from the village planning board before any building permit could be issued. After submitting an application, the site plan approval was denied by the board because of inadequate fire protection mechanisms. The question was whether the planning board was empowered to deny site plan approval because of fire protection concerns. The court found that it was not, since that power was delegated by state law to another official, the local building inspector. The court stated that "[z]oning laws are . . . in derogation of common-law property rights and thus are subject to the long-standing rule requiring their strict construction." *Id*. at 195. Because the state legislature did not authorize the planning board to assume the powers of local building inspectors to deny building permits because of inadequate fire protection, the court annulled the board's denial of the application. The state legislature has since authorized planning boards to examine "any additional elements specified by the village board of trustees in . . . [the] local law." N.Y. Town Law § 274-a(2)(a) (McKinney 2003); N.Y. Village Law § 7-725-a(2)(a) (McKinney 2003); N.Y. General City Law § 30-a(1)(a) (McKinney 2003).

The procedures that local land use boards must follow are governed by state statutes that delegate to local governments the power to award variances, approve site plans and subdivisions, or award special use permits. These statutes must be consulted to determine whether a public hearing is required, how notice of the hearing is to be given, the time by which a decision must be rendered, how the decision is to be filed, and who

may appeal a local decision to the courts. The local legislature may establish additional procedures that must be followed by local boards. State statutes are prescriptive only to a point. With some limitations, they offer local legislative bodies wide latitude in deciding which boards should exercise various functions and how much authority each local board shall have.

Local bodies must be certain that the actions they take and the conditions they impose are within their legal authority to act. In *Matter of Metro Enviro Transfer* and *Matter of Pecoraro,* the local board was sustained, the lower 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. In *Matter of Real Holding Corp.,* the court addressed the requirement that boards act within their legislative authority finding that § 274-b(3) authorizes the zoning board of appeals to issue an area variance from the strict requirements for the award of a special use permit.