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Recommended Citation

John R. Nolon & Jessica A. Bacher, Year in Review: 2007's Most Significant Land Use Cases, N.Y. L.J., Dec. 19, 2007, at 5, <http://digitalcommons.pace.edu/lawfaculty/668/>.

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**Year in Review:
2007's Most Significant Land Use Cases**

Written for Publication in the New York Law Journal
December 19, 2007

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Abstract: New York courts busily decided a multitude of land use cases due to the increased growth in magnitude and complexity of land use issues. This year, as in the past, the authors provide a summary describing some of the most crucial New York land use cases. This year's cases include the following topics: review of local board action, takings law, eminent domain, enforcement, jurisdiction, religious land uses, standing, moratoria, and New York's State Environmental Quality Review Act (SEQRA).

This column collects and describes over two dozen of the most significant land use cases decided by the New York courts since our end of the year report last year.

Review of Local Board Action

Russia House at Kings Point v. Zoning Board of Appeals of Village of Kings Point, 835 N.Y.S.2d 450 (N.Y. App. Div. 2007). ZBA determination overturned because the board failed to properly engage in a balancing test as required by Village Law § 7-712-b (3) and did not consider whether the requested area variances would have an adverse impact on the neighborhood and the character of the community. The court reinforced the decision of the New York Court of Appeals in *Cohen v. Board of Appeals of the Village of Saddle Rock*, 795 N.E.2d 619 (N.Y. 2003), which held that the legislature intended to preempt enactment of conflicting local laws with respect to issuing area variances when it enacted § 7-712-b of the Village Law.

Evans v. Zoning Board of Appeals of the Village of Buchanan, 836 N.Y.S.2d 498 (N.Y. Sup. Ct. 2007). Where landowner sought significant height and setback area variances, the ZBA was justified in denying those variances after balancing the statutorily enumerated factors. "A zoning board is invested with considerable discretion in evaluating applications for variances." The ZBA denied all of the variances, citing the creation of drainage issues, inhibition of the flow of sunlight to neighboring properties, the availability of alternative less intrusive designs, and self-

creation of the difficulty. The height and setback restrictions were in place well before petitioner bought the property.

Inn at Hunter, Inc. v. Village of Hunter, 827 N.Y.S.2d 714 (N.Y. App. Div. 2006). The village's denial of petitioner's request for water and sewer connection due to lack of capacity was rational, supported by evidence, and non-discriminatory.

In *Haberman v. Zoning Board of Appeals of City of Long Beach*, 827 N.Y.S.2d 176 (N.Y. App. Div. 2006), the court held that the ZBA's revocation of the building permit was not arbitrary and capricious. By its terms, the variance terminated when the applicant failed to apply for a building permit within five years from its issuance. The purpose of imposing a time limit on the variance was to insure that "in the event conditions have changed at the time of expiration of the period prescribed, the board will have the opportunity to reappraise the proposal by the applicant in light of the existing facts and circumstances." In *Haberman v. Zoning Board of Appeals of City of Long Beach*, No. 132, 2007 N.Y. LEXIS 3279 (N.Y. November 19, 2007), the Court of Appeals reversed and held that "where a zoning board of appeals has voted to grant a variance, the board's lawyer, acting with actual or apparent authority, may agree to extend the time to build the improvements permitted by the variance. A second board meeting and vote are not required." Failure to apply for the building permit within the five-year period was excused by the lawyer because the city failed to install the underground utility lines by the agree-upon date.

Aliperti v. Trotta, 827 N.Y.S.2d 274 (N.Y. App. Div. 2006). Determination by ZBA, which denied property owner's application for a variance, was arbitrary and capricious where the board had granted the owner's prior application for an area variance and gave no rational basis for reaching a different conclusion on almost identical facts.

Bartoszewski v. Town of Hannibal Zoning Board of Appeals, 827 N.Y.S.2d 806 (N.Y. App. Div. 2006). Petitioner argued that a fence, concrete footers, and steel posts, which he replaced with a concrete wall and extended roof, constituted pre-existing nonconformities, and, thus, the setback requirements do not apply. The court disagreed and upheld the ZBA's determination that the setback standards must be followed.

Stanton v. Town of Islip Dept. of Planning and Development, 829 N.Y.S.2d 596 (N.Y. App. Div. 2007). Planning department's issuance of wetlands and watercourse permit allowing only reinstallation of six mooring poles was not arbitrary and capricious because the limited number of moorings permitted to be installed was in accordance with provisions of the Islip Town Code and the landowner failed to meet the burden of proving bad faith and disparate treatment on the part of the department.

Takings

Putnam County National Bank v. City of New York, 829 N.Y.S.2d 661 (N.Y. App. Div. 2007), *app. denied*, 870 N.E.2d 695 (N.Y. 2007). Economic impact on value of land from city's enforcement of watershed regulations was insufficient to support a claim of regulatory taking. "The property owner bears a heavy burden of demonstrating by dollars and cents evidence that under no permissible use would the parcel as a whole be capable of producing a reasonable return upon enforcement of the challenged regulation." Plaintiff sold the property for 1.4 million dollars, which it claimed was 20% of the total value of the property had it been developed without the limitations set out by watershed regulations.

Eminent Domain

Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007). Petitioners claim that the condemnation of property for the Atlantic Yards arena and development project in Brooklyn was for the private benefit of the developer and not designed to secure public benefits. The court noted that a taking "fails the public use requirement if and only if the uses offered to justify it are 'palpably without reasonable foundation.'" The court held that the project's sole purpose is not to benefit a private developer nor is the condemnation a pretext for granting a benefit to a private developer. In fact, the project will create housing, including affordable units, office space, and a sports arena, in an area that is mostly blighted.

49 WB, LLC v. Village of Haverstraw, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007). Court held that condemnation did not serve a public purpose because the property was taken from one affordable housing developer to build affordable housing units that would be credited toward the contractual affordable housing obligation required of the developer of waterfront redevelopment. The court determined that the condemnation would actually result in fewer affordable units for village residents and volunteers and thus detract from, rather than promote the public benefit of affordable housing.

Rocky Point Realty, LLC v. Town of Brookhaven, 828 N.Y.S.2d 197 (N.Y. App. Div. 2007). The court found that the town's notice of the public hearing was sufficiently detailed to identify the property to be condemned; that "enhance[ment] of the golf course and expan[sion] [of] recreational opportunities" is a "legitimate public purpose" under the state and federal constitutions; and that the town appropriately issued a negative declaration since the environmental review did not identify any significant environmental harm.

Doyle v. Schuylerville Cent. School Dist., 826 N.Y.S.2d 797 (N.Y. App. Div. 2006), *app. denied*, 872 N.E.2d 877 (N.Y. 2007). The court deferred to the discretion of the condemning school board and upheld its determination to take petitioner's property to accommodate an expansion of the school campus, requiring petitioner's land for a second access road. The court stated that the simple existence of alternate sites was insufficient to overcome a condemnation determination and the condemnation

was not excessive, as claimed by petitioner, who asserted that the board need only acquire an easement over the target property rather than fee simple interest.

Aspen Creek Estates v. Town of Brookhaven, No. 2006-03815, 2007 N.Y. App. Div. LEXIS 12308 (N.Y. App. Div. December 4, 2007). The court upheld that the condemnation of 39 acres of farmland intended by a private developer landowner to be used for a residential development. The purpose of the taking of the land was to preserve its existing use as farmland and maintain open space and scenic vistas. The possible incidental benefit to private farmers who could buy or lease the land did not invalidate the dominant public purpose of farmland preservation.

Enforcement

O'Mara v. Town of Wappinger, No. 141, 2007 N.Y. LEXIS 3229 (N.Y. November 15, 2007). Use restrictions found in the formal notes contained on a subdivision plat are binding on subsequent purchasers of the land because the subdivision plat is filed on the official land records and constitutes record notice.

Jurisdiction

Beneke v. Town of Santa Clara, 828 N.Y.S.2d 692 (N.Y. App. Div. 2007), *app. denied*, 866 N.E.2d 1041 (N.Y. 2007). The Appellate Division found that the town did have jurisdiction under the State Uniform Fire Prevention and Building Code to regulate the construction of boathouses and that even if the lake was “navigable,” any conflicts between the Building Code and the Navigation Law could be reconciled.

Amerada Hess Corporation v. Town of Oyster Bay, 828 N.Y.S.2d 536 (N.Y. App. Div. 2007). The court held that the Town of Oyster Bay acted illegally in conditioning the grant of a special use permit upon the imposition of a restrictive covenant prohibiting the sale of alcoholic beverages at the site. The state has preempted the field of regulation of the sale of alcohol. Further, the court found that the board's revocation of the special use permit was arbitrary and capricious.

Religious Uses

Westchester Day School v. Village of Mamaroneck, 504 F.3d 338 (2d Cir. 2007). ZBA's denial of religious school's application for modification of its special permit to allow for expansion of the school violated Religious Land Use and Institutionalized Persons Act (RLUIPA) because the denial imposed a substantial burden on the school's exercise of religion without a compelling governmental interest. The Second Circuit held that the expansion of the school involved religious exercise and triggered RLUIPA, and that RLUIPA does not violate the Establishment Clause of the First Amendment. “RLUIPA cannot be said to advance religion simply by requiring that states not discriminate against or among religious institutions.”

Western New York District, Inc. of the Wesleyan Church and the Vine Wesleyan Church v. Village of Lancaster, 841 N.Y.S.2d 740 (N.Y. Sup. Ct. 2007). Denial of a church's special use permit application to use property in Village Industrial Park as a church was upheld by the court because it withstood rational basis review. The court said there is no conclusive presumption that any religious use automatically outweighs its ill effects and the village board was entitled to consider the overall impact on the community in making its determination.

Standing

Village of Chestnut Ridge v. Town of Ramapo, 841 N.Y.S.2d 321 (N.Y. App. Div. 2007). Four villages located within the town challenged enactment of local law permitting adult student living facilities in areas adjacent to villages. The villages have standing under SEQRA because they have a stake in the determination--the student facilities will have an effect on their roads, shared water supply and sewer system, and character of village neighborhoods. However, the villages do not have standing to assert claims that the town did not follow required procedures because the villages have a "limited stake in the integrity of the governmental decision-making process in the Town."

Moratoria

Laurel Realty, LLC v. Kent, 836 N.Y.S.2d 248 (N.Y. App. Div. 2007), *app. denied*, 876 N.E.2d 513 (N.Y. 2007). A short term moratorium on processing subdivision applications is valid and may be applied to subdivision applicants who have already submitted their application to the planning board. On Appeal, the Second Department stated that "[t]he moratorium, which was extended twice for short periods of time, is a valid stopgap or interim measure, reasonably designed to temporarily halt development while the Town considered updates to its Zoning Ordinances." The Second Department further found that the moratorium was properly applied to the petitioner's application because the court order from the original Article 78 stated that the Planning Board would hear the application subject to the planning board's rules, which include the properly enacted moratorium.

SEQRA

Serdarevic v. Town of Goshen, 834 N.Y.S.2d 233 (N.Y. App. Div. 2007). When a municipality makes a declaration that a proposed action will not negatively affect the environment under the State Environmental Quality Review Act (SEQRA), it must identify areas of environmental concern, take a "hard look" at those areas and make a "reasoned elaboration of the basis for its determination." In this case, evidence was submitted that the drainage project would result in increased erosion and sedimentation and that the proposed project would harm the root systems of nearby trees. Given this evidence, the town's negative declaration was made without sufficient data, scientific authority, and explanation.

In *Ingraham v. Planning Board of Town of Southeast*, No. 149, 150, 2007 N.Y. LEXIS 3357 (N.Y. 2007). The Court of Appeals held that “a lead agency’s determination whether to require a SEIS [Supplemental EIS] – or in this case a second SEIS – is discretionary.” (Emphasis in the decision). The court noted that it could only overturn the board’s decision if it were arbitrary, capricious, or not supported by evidence and the court should not substitute their judgment for that of the lead agency. The Court held that the board did take the requisite hard look and provided a reasoned elaboration as required by SEQRA using the vast information contained in the file.