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John R. Nolon

*Elisabeth Haub School of Law at Pace University*

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**Local Authority:  
Communities Have Means of Influencing Land Use**

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John R. Nolon

[The author is Professor of law and Director of the Land Use Law Center of Pace University School of Law and Visiting Professor at Yale's School of Forestry and Environmental Studies.]

**Abstract:** This case analysis examines several court decisions, including the results of three New York Court of Appeals cases where litigants challenged the constitutionality of municipal land use decisions. In each case, the court afforded the municipality deference and found that their objectives were rationally related to the decisions, mostly decisions to deny development. However, this presumption of validity given to local legislatures and quasi-judicial agencies presents a problem when land use decisions affect outside municipalities. Thankfully, through the use of training programs, municipalities are learning to work together to resolve intermunicipal land use issues.

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Examined from the perspective of local land use officials, state law has them in a bind. Faced with urban decay in one community, rampant sprawl in another, and a depressed economy in a third, they feel ill equipped, legally, to redirect the market forces to accomplish their community development objectives. At the Land Use Law Center at Pace Law School, we have now trained over 600 local land use leaders from all types of communities in the Hudson River Valley and have heard this complaint from all too many all of them.

To be specific, they say, local governments have too few strategic tools to use, must allow all privately owned land to be developed, and have no ability to protect themselves from the external impacts of land use projects approved in adjacent communities. Further, they fear that if take bold steps to direct development to occur in certain places and prevent it in others, they will lose when landowners take them to court. This column deals primarily with this latter fear, then turns to the other assumptions that limit local officials' thinking about their ability to achieve their community's land use objectives. It concludes that most of these fears are false and that new paradigms are available to shape a more positive local response to land use challenges.

Last year, a trilogy of Court of Appeals decisions, all decided on July first, should put to rest any concerns about the attitude of the courts toward fact-based local

land use decisions. The first case, *Matter of Retail Property Trust v Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190 (2002), 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 *Ifrac v. Utschig*, 98 N.Y. 2d 304 (2002), 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 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 reflect the unvarnished opposition of the neighbors but rather the facts behind that opposition. Based on these facts, the Court of Appeals found that the zoning board “could rationally conclude that the detriment of the proposed subdivision posed to the neighborhood outweighed the benefit sought by the landowner, and its determination denying the requested variances was not arbitrary or capricious.”

In the third case, *P.M.S. Assets, Ltd. v. Zoning Board of Appeals of Village of Pleasantville*, 98 N.Y. 2d 683 (2002), 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 these three cases, the Court of Appeals affirmed decisions made by local land use boards acting in three different capacities: a review board determining whether to approve a request for a special use permit (Retail Property Trust); an appellate body balancing various factors to determine whether to award an area variance (Ifrah); and an appellate body interpreting the zoning code and whether it is violated by a change in land use (*P.M.S. Assets*). In all three capacities, 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.

If the highest court affords these quasi-judicial and administrative review boards such deference, imagine what it does when the local land use decision challenged is made by the local legislature: the town board, village board of trustees, or city council. In *Asian Americans for Equality v. Koch*, 72 N.Y. 2d 121, the petitioners challenged a New York City zoning amendment that provided greater zoning incentives for education facilities than it did for low income

housing. The Court of Appeals held that the challengers had not carried their burden of proving that the bonus provision was clearly arbitrary or capricious or undertaken for an improper purpose. See also *Kraveth v. Plenge*, 446 N.Y.S.2d 807 (4<sup>th</sup> Dept. 1982), one of a long line of cases holding that when local legislatures enact zoning amendments there is a “strong presumption of validity” and that the challenger must demonstrate the unconstitutionality of the amendment “beyond a reasonable doubt.” In *Tilles Investment Company v. Huntington*, 528 NYS2d 386 (2<sup>nd</sup> Dept 1988), the court held that “the Town was not required to explore or utilize alternative measures which would place less restrictions on the possible uses to which plaintiff’s property might be put.” To act otherwise would put the court in the position of second guessing the discretionary judgments of the local legislature. This is anathema to judges and illustrates why they cloak local regulations with a presumption of validity.

The Retail Property Trust case, *supra*, assuages the local fear that adjacent communities can not influence their neighbor’s land use decisions that might adversely affect them. In this case, the Village of Garden City introduced its own expert report into the record of the zoning board of the Town of Hempstead showing that the additional traffic caused by the proposed expansion of the mall would cause drivers to shift to less congested secondary roads running through the village. The existence of this report on the record influenced the Court of Appeals decision that the local zoning board’s decision was supported by substantial evidence. Since 1992, local governments have been encouraged by state statute to cooperate in comprehensive planning, land use regulation, and zoning enforcement. These state statutes make it clear that local governments have the authority to create intermunicipal planning boards, zoning boards of appeals, comprehensive plans, land use regulations, intermunicipal overlay districts, and programs for shared land use administration and enforcement. N.Y. GEN. CITY LAW § 20-g (McKinney 1989 & Supp. 1996), N.Y. TOWN LAW § 284 (McKinney 1987 & Supp. 1996) and N.Y. VILLAGE LAW §7-741 (McKinney 1996). Increasingly local governments have taken advantage of this authority to coordinate their regulatory influence on shared environmental resources, transportation corridors, and economic development. In the Hudson River Valley, the leaders we have trained are participating in nine such inter-local land use councils and have formed a consortium of those councils at the regional level. By their actions, these local leaders are putting to rest the fears of others concerned that localities have no effective means of influencing the land use actions of their neighbors.

Local land use officials in our training programs are surprised to learn that the Court of Appeals empowered them over 50 years ago to invent their own land use tools and techniques which will be upheld as long as their objective is to achieve the most appropriate use of the land. In reliance on this implied authority, communities have invented incentive zoning, planned unit development districts, traditional neighborhood development districts, recreational zoning, and floating zones, which was the technique attacked as beyond local zoning

authority in *Rodgers v. Tarrytown*, 302 N.Y. 115 (1951). The Court of Appeals, in defending the village's authority, noted "In view, however, of Tarrytown's changing scene and the other substantial reasons for the board's decision, we cannot say that its action was arbitrary or illegal. While hardships may be imposed on this or that owner, cardinal is the principle that what is best for the body politic in the long run must prevail over the interests of particular individuals." Earlier in the decision it wrote "persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise."