Case Law Update -2019

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In the Matter of Whitney deBordenvave v. Village of Tuxedo Park ZBA, 2019 NY Slip OP 00272

- Facts:
  - In August 2013, Applicant requested an area variance for height and location of a stone wall previously built on his property along the road.
  - During the public hearing in September 2014, Applicant agreed to apply for an additional "line of sight" variance.
  - In October 2014, another public hearing was held on the "line of site" variance and after the hearing the variance was approved.
  - "No wall, fence, shrubbery or other ground condition, growth or structure shall be erected, altered or maintained which may cause danger by reducing the vehicular line of sight to less than 250 feet." – Section 100-18 VOT Code

Issues

- Did the ZBA properly apply the balancing test and consider the relevant statutory factors?
  - Character of the nieghborhood
  - Benefit can be sought by other feasible means
  - Substantiality
  - Adverse impact on environment
  - Self-created
- Did the ZBA acquire “jurisdiction” over the “line of site” variance without an application?
- Was the notice of hearing sufficient?

Holding

- The ZBA engaged in the required balancing test and considered the relevant statutory factors.
- The ZBA rules of procedure are not “jurisdictional” and therefore those rules can not be used to void a decision of the ZBA.
- The notice referred to Section 100-18 of the Village of Tuxedo Code, which states the requirement for line of site for fences.

Joy Builders, Inc. v. Town of Clarkstown, 165 AD3d 1084 2018

- Facts:
  - Joy Builders applied for a 22 lot and 55 lot subdivision.
  - Town Planning Board approved the subdivision.
  - Joy Builders was required to post a performance bond for two years and a letter of credit which renews annually.
  - Additionally, Town Code (§254-18B) authorizes the Code Enforcement Officer to withhold building permits for 10% of each subdivision until the required infrastructure and improvements were completed.
  - Joy Builders sued Town because the Planning Board refused to issue building permits for 9 lots and seeking to declare §254-18B is null and void as ultra virus.
  - Supreme court upheld §254-18B.

Issue

- Is a Lot Hold Back provision in a town code illegal?

Holding

- Towns and municipal governments lack the inherent power to enact zoning or land use regulations (*Kamhi v. Planning Bd. of the Town of Yorktown*).
- "They exercise such authority solely by legislative grant" (*Kamhi*)
- Town Law §277(9) enables towns to obtain enumerated forms of security sufficient to cover the full cost of infrastructure and other required improvements in case a developer fails to finish work.
- When interpreting a statute, courts should ascertain the intent of the Legislature, and the clearest indicator is the statutory text.
- The plain reading of §277 provides no express provision authorizing a Lot Holdback Provision and therefore this section mush be construed to exclude such a provision.
- Town Law §130 (enactment of Ordinances) does not provide the discretion to enact such a law.
- Would it make a difference if this was a Local Law.

Matter of Peterson v. Planning of City of Poughkeepsie, 163 AD3d 577 (2018)

- Facts:
  - Developer applied to build condominiums on land adjacent to the Dwight Street Historic District.
  - The Planning Board issued a negative declaration under SEQRA.
  - The Historic Southside Neighborhood Association, which is dedicated to the preserving the character of the historic neighborhoods, brought an Article 78.
  - The Association said the Planning Board violated SEQRA when it took "shortcuts" and failed to assess relevant environmental concerns.
  - Supreme court denied the Association's petition.

Issue

- The Applicant indicated on the long EAF that proposed action would affect aesthetic and historic resources and the character of the existing community and the parcel's forestation would be reduced from 2.75 acres to .30 acres.
- In issuing its Negative Declaration, the Planning Board listed 29 reasons for supporting its decision.
- The Planning Board noted that the project would not significantly impact the adjacent Dwight Street-Hooker Avenue Historic District.
- The Planning Board relied on a letter from the NYS OPRHP, which stated that the proposed action would not have an adverse impact on the historic district.
- Was the OPRHP letter sufficient to issue a negative declaration?

Holding

- The OPRHP letter is a “conclusory statement” and it fails to fulfill the reasoned elaboration requirements of SEQRA.
- The EAF contemplates that the impact of vegetation and fauna contemplates the reduction of the forestation from 2.75 to .30 acres.
- The negative declaration states, however, that the proposed action will not result in the removal or destruction of large quantities of vegetation or fauna.
- “In light of the foregoing, it is clear that the proposed action may have significant adverse environmental impacts upon one or more areas of environmental concern.”
- The matter was referred to the Planning Board so that an Environmental Impact Statement be prepared.

Matter of Wen Mei Lu v. City of Saratoga Springs, 162 AD3d 1291 (2018)

- Facts:
  - Applicant owned real property comprised of 6 contiguous parcels in the City of Saratoga Springs.
  - The properties were owned prior to the adoption of the current zoning ordinance.
  - The property is 105 feet wide and it is located in two zoning districts.
  - The roughly 285 foot on the western portion of the property is zoned Tourist Related Business and the remaining 359 foot portion is zoned Rural Residential.
  - In 2016, the Applicant submitted an application to the Zoning and Building Inspector to construct a pet boarding facility on the property.
  - The application was denied because it needed area variances.
  - The ZBA met and after evaluating the statutory requirements, granted the variance.
  - The neighbor brought an Article 78 claiming that the Applicant required a use variance, not an area variance.

Issue

- Did the ZBA properly decide that an area variance, rather than a use variance was required for the doggy day care?

Holding

- The law is well settled that the local zoning board have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken was illegal, arbitrary or an abuse of discretion.
- Under the zoning ordinance, animal kennels are permitted in a Rural Residential district but prohibited in a Tourist Related Business;
- The zoning ordinance further provides that when “a zoning district boundary line divides a lot or land in a single ownership as existing at the time fo this enactment, the district requirements on either side of the bourndary may be construed, at the property owner’s option, as extending into the remaining portion of the property for a distance not exceeding 100 feet.”

Holding – cont.

- The Applicant chose this option and extended Rural Residential 100 feet into the Tourist Related Business and the animal kennel will be located in that extended portion.

- While a small portion of the parking lot will be in the Tourist Related Business, the ZBA could rationally find that such accessory uses are not prohibited under the ordinance.

Tree of Life Christian Schools v. City of Upper Arlington, 6th Circuit, May 2016

- Facts
  - Plaintiff, TOL Christian Schools, proposed to build a 5,000 square foot religious school in the City of Upper Arlington, Ohio (Defendant)
  - Proposed school was to be located in an Office and Research District (ORD) – allowed uses included child day care centers, hotels/motels, hospitals, out patient surgery centers, and business and professional offices
  - Plaintiff applied for a zone change, but, City denied

Tree of Life Christian Schools v. City of Upper Arlington

- Facts (Cont'd)
  - City's Reasoning: Allowing a tax exempt religious institution would not comport with the City's Master Plan
    - City's Master Plan: Focuses on regulating uses of land in order to increase tax revenues
  - Plaintiff challenges the decision under federal statute entitled the Religious Land Use and Institutionalized Persons Act, which states: **"No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."**

Tree of Life Christian Schools v. City of Upper Arlington

- Plaintiff's Argument: The City treats similarly situated non-religious not-for-profits (i.e., hospitals) differently from religious not-for-profits in ORD districts because hospitals would be allowed in such a district despite the fact that hospitals pay no real property taxes

Issue

- Whether the Defendant treats nonreligious assemblies or institutions that would fail to maximize income tax-revenue in the same way it has treated the proposed religious school?

Holding

- Rule: The government cannot treat "similarly situated" religious and non-religious entities differently.
- There exists an issue of fact as to whether hospitals, day-cares and outpatient care centers (which would be allowed under the zoning scheme) are "similarly situated" to religious institutions (which would not be allowed under the zoning scheme) – sent back down to lower court for further fact development.

Matter of Heights of Lansing, LLC v. Village of Lansing 160 AD3d 1165 (2018)

- Facts:
  - Since 1989, Heights of Lansing, LLC owned real property located in a subdivision known as Lansing Trail which was adjacent to a 19.5 acre parcel that was zoned and Technology District.
  - The zoning of the adjacent property remained the same after a comprehensive plan was adopted in 1999 and amended in 2015.
  - In 2016, the Village Board passed a local law that rezoned the 19.5 acres High Density Residential.
  - The reason for the zone change was so a developer could construct a 140 unit apartment complex on the 19.5 acres.
  - A short form EAF was done for the zone change, and the Board issued a negative declaration because the zoning would be "down zoning" from a commercial to residential and the other 11 questions were determined to be small to moderate impacts.
  - The traffic would be less for residential than for commercial.

Issue

- Was SEQRA done properly?
- Was this spot zoning?

Holding

- Petitioner's claim that SEQRA review was deficient because there was no consideration of the anticipated but not yet proposed residential development was not an accurate reading of the record.
- A lead agency "need not investigate every conceivable environmental problem" and "generalized community objections or speculative environmental consequences" arn not sufficient to establish a SEQRA violation.
- The rezoning of the 19.5 acres was not impermissible spot zoning nor was it in contravention of the comprehensive plan because as a legislative action "zoning … amendments enjoy a strong presumption of constitutionality and the burden rests on the party attacking it to overcome that presumption beyond a reasonable doubt (*Asian Ams. For Equality v. Koch*, 72 NY2d 121).
- Even though a zoning amendment has to be adopted in accordance with a comprehensive plan, the Board's conclusion that, consistent with the comprehensive plan, rezoning the subject property would create a better transition from commercial to residential.
- Spot zoning defined – "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners" *Matter of Citizens for Responsible Zoning v. Common Council of the City of Albany*, 56 AD3d 1062.