## CASE LAW UPDATE FOR PLANNING AND ZONING

The Onondaga County Planning Federation

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- 1. County versus Village - A balancing of interests. When a county wants to do something in a town or village, do they have an absolute right? There must be a "balancing of public interests." The County of Herkimer wanted to erect a county jail in an abandoned shopping center in the Village of Herkimer. The Village amended its zoning laws to exclude correctional facilities in the particular zone that was involved. The County was denied a permit to erect the facility, and commenced an Article 78 proceeding alleging that (a) the Village's zoning must yield to the County and (b) its amendments were not valid because of preemption by the State. The Board of Corrections had approved the plans and the site. The Supreme Court overturned the denials, but the 4<sup>th</sup> Department reversed, noting that where there is a conflict between municipalities, there must be a balancing of the public interests pursuant to the rule set down by the Court of Appeals in Matter of County of Monroe [City of Rochester], 72 NY2d 338 (1988). The matter was remanded for a factual determination. As for preemption, the Court held that merely because the State authorizes a use, it doesn't necessarily mean that it has taken away form a municipality the right to regulate the location of that use. County of Herkimer v. Village of Herkimer, 109 A.D.3d 1166 (4th Dept. 2013)
- 2. When Zoning Law is changed, which law applies? Rocky Point Drive-In, LP v. Town of Brookhaven, 21 N.Y.3d 729 (2013)

This is an interesting case, which relates to zoning law amendments, comprehensive plans, and rules relating to applications made during the process. The Town of Bookhaven adopted a comprehensive plan in 1997, and in that plan, a certain parcel of land was recommended to be zoned for commercial recreation. The Town did not enact legislation based on that plan, however, until 2000, when it began rezoning legislation procedures for the parcel in question. While this was happening, Rocky Point Drive-In, LP submitted a site plan for approval which would have allowed a Lowe's store on the site. The Town Board adopted the zoning amendment during this process, notwithstanding that Rocky Point had submitted a protest under Town Law §265, requiring a super-majority vote. Several Article 78 proceedings followed, and in 2002, the Town adopted a Local Law which provided that only a simple majority vote was necessary in cases of rezoning protests. It then rezoned the property to commercial recreation and then acted on the application and denied it. The case ultimately landed in

the Court of Appeals, and there Rocky Point argued that the law in effect when the application was filed should apply, not when the decision was made. Remember that the decision was delayed for several years during this process and only made after the rezoning. There is a "special facts" exception to the general rule that the law at the time of the decision applies, not the law in effect at the time of the application. Rocky Point argued that the Town held up the decision until it got the rezoning taken care of and that the rezoning was a case of targeting for selective enforcement. The Court of Appeals sided with the Town, noting that the special facts exception didn't apply because the record didn't show proof of selective enforcement, and Rocky Point did not have any vested rights in the project.

- 3. Estoppel - The rule for preventing enforcement of municipal zoning laws. Where a municipality allows a use to take place which is unlawful, but does not enforce its laws, can the owner force denying later enforcement using the argument that the municipality allowed the use to take place, so it should be "estopped" from enforcement? Without special conditions, the answer is "no." In Oakwood Property Management LLC v. Town of Brunswick, 103 A.D.3d 1067,(3rd Dept. 2013) property owner owned a landscaping and mulch business. He acquired in 2004 a 26 acre parcel in an area where the Zoning Map of the Town showed that the properties were zoned for "Cemetery and School" uses, even though the actual Zoning Code had no such district. The owner also had a 46 acre parcel where he had expanded his operations. Apparently, in his application for utilizing those parcels, the address of the proposed expanded use was his original parcel. The owner expanded his use into that parcel and in 2007 the Town Code Enforcement Officer notified owner that there was a concern about illegally expanding his operation. Ultimately the matter was brought before the Town Planning Board by owner with an application to expand his operation, and the matter was continuously adjourned. Owner went to the ZBA in the Town but was denied a variance. Owner then commenced an Article 78 proceeding to declare the ZBA action void and to enjoin the Town from enforcing its zoning laws because (a) the Code contained no such district and therefore the map was unconstitutionally vague and (b) that the Town be estopped from enforcing its zoning laws against these parcels because of the lapse of time and the fact that they had allowed the operations to continue for so many years. The Supreme Court denied and dismissed the petition and on appeal, the decision was affirmed. The court noted that it is well settled that estoppel cannot be invoked against a municipality to either (1) prevent it from discharging its statutory duties, (2) ratify administrative errors, or (3) preclude it from enforcing its zoning laws unless there is proven fraud, misrepresentation or deception, which is relied upon, none of which was present here.
- 4. <u>Docks who can regulate?</u> Where the State of New York holds title to land under navigable waters, local municipalities do not have the authority to regulate construction or modification of docks on those lands. The State has preempted

local laws with respect to such lands though the Navigation Law and local building codes don't apply unless the municipality applies for and receives authority from the State to regulate dock construction on the lakes or other navigable waters. Such was not the case in *Town of Carmel v. Melchner, 105 A.D.3d 82 (2<sup>nd</sup> Dept. 2013)*, where the Town attempted to obtain a preliminary injunction while it was involved in enforcement litigation. A similar holding was issued in *Hart Family, LLC v. Town of Lake George 110 A.D. 3d 1278 (3<sup>rd</sup> Dept. 2013)* 

- 5. Local municipalities can regulate uses, but not users. In another decision where a court looks at the reason behind a zoning law and its intended affect, the Court of Appeals held in Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead, 20 N.Y.3d 481 (2013) that a zoning ordinance that expressly prohibited "pay day" check-cashing establishments in certain business districts was void. The prohibition of check-cashing facilities was deemed to be not a land use regulation, but related to identity of the user of the land. The Town tried argue that this was a legitimate exercise of "police power" and argued on appeal that the purpose was to curtail armed robberies that are associated with this type of establishment. The problem was, none of this was in the "record" or in the findings of Town when the law was passed. In fact, the only "evidence" of what the Board was thinking when it passed the legislation was a memorandum submitted by the Deputy Town Attorney that said these kind of establishments "exploit poor and African Americans" and this policy encourages "young people and those of lower incomes to establish savings and checking accounts." Neither this memo nor the Board said anything about police powers. In affirming that a municipality can regulate land use but not users, the Court struck down the ordinance. In passing, the Court noted that there are some cases in which legitimate local concerns would allow for the banning of certain uses, such as certain "adult entertainment uses" the record did not show that this was a concern or that when the ordinance was passed there was a concern about armed robbery. Unspoken was the thought in the decision that all of these arguments were invented in response to the litigation. The moral of this story is that when specific uses are to be banned, the record must show a proper and genuine concern of the issue and the reasons behind the concern that relates to a proper exercise of a power of the town. In fact, the Court noted that fear of armed robbery might be a valid reason to prohibit a certain use. It is interesting to note that in the lower courts, the issue of preemption arose. The question was whether the State, by enacting the Banking Law, preempted local regulation of check cashing facilities. The Appellate Division had held that there was preemption, but the Court of Appeals held that since there was an invalid local zoning regulation, the preemption issue did not have to be reached.
- 6. There is an ongoing issue, on preemption, however, in the hydrofracking world. The State enacted the Oil, Gas and Solution Mining Law (Environmental

Conservation Law §23-2701 et. seq.) and in it there is a provision that specifically states that local municipalities cannot adopt local legislation which would regulate activities covered by the OGSML. The 3<sup>rd</sup> Department in a well-reasoned decision, held that there was neither express preemption nor implied preemption in the OGSML. Looking at the decisions relating to the mining industry, it held that while local governments cannot regulate the activities of the use, such as manner, methods, etc., it can ban them altogether. Further, it held that there was no implied preemption. The OGSML specifically contains provisions which regulate the technical and operational aspects of drilling, whereas the local municipality is left the opportunity to designate where, if at all, such drilling can take place. In August, the Court of Appeals granted leave to appeal, so this is a story that will continue. *Norse Energy Corp. V. Town of Dryden, 108 A.D.3d 25 (3<sup>rd</sup> Dept. 2013)* 

7. Vested rights and Pre-existing use - A case of land use in transition. Landowner owned property in the Town of Newburgh which was zoned R-3, which allowed multi-family residences. An application was made for a site plan to allow for a large project, consisting of several buildings containing 134 units. The Town was engaged in producing a comprehensive plan, but the initial draft did not mention any rezoning of the property. During the process before the planning board, the Town's consultant recommended that certain R-3 areas be rezoned R-1. providing only for single family residences. Included was the property in question. The chairman of the planning board wrote to the applicant and indicated that if the consultant's suggestions were adopted, the proposed use would not be allowed. Notwithstanding the letter, owner went ahead with a boundary adjustment with an adjoining neighbor an demolition of buildings, all of which were approved by the Town. The Town then rezoned the land. After the rezoning, the planning board went ahead and approved the site plan with 18 specific conditions, 11 of which were required to be fulfilled before the chairman could sign the site plan. Owner commenced an Article 78 proceeding and lost. The Appellate Division, in 2008, upheld the local law and held that the owner had not obtained vested rights. They also held that the approval of the boundary adjustment gave owner a three year period in which to move forward and obtain vested rights pursuant to Town Law 265-a. In 2009, owner applied to the planning board to amend the site plan, but was rejected because the conditions had not been complied with. A subsequent appeal to the ZBA affirmed the planning board decision. In a subsequent Article 78 proceeding, the court held that there were vested rights after all of the expenditure and permits had been issued, but on appeal, the Appellate Division reversed, stating that where there are unsatisfied conditions, there can be no vesting. Further, owner could not claim a common law right to vesting due to reliance because the various permits granted had to be taken for what they were, and they were not inconsistent with preparing the property for use in R-1. This decision, in which owner sued everybody, is worth reading and contains interesting facts and circumstances.

Exeter Building Corp. V. Town of Newburgh 2014 Slip Opinion 996 (2nd

## Dept. 2014)

- 8. Conditions - How Far Can You Go? The owner of a Christmas tree farm applied for and was granted a permit, subject to conditions, to operate and construct a farm stand in a portion of a building on the farm. The zoning code limited the amount of square footage for a farm stand, and owner indicated that he could partition his building to meet the code requirements. After the building department denied the application an appeal to the ZBA was made, and after a public hearing, the permit was granted, subject to conditions. The first was that in the area of the building not used for the farm stand, no item not produced on the farm could be stored. In other words, incidental accessory items not produced on the farm but offered for sale, could not be stored in the other part of the building. The second condition was that the farm stand was limited in its operation to a period from Labor Day through to March 31st. Owner appealed in an Article 78 proceeding, and initially his petition was dismissed. On appeal to the 2<sup>nd</sup> Department, however, the judgement was reversed and the conditions imposed by the ZBA annulled. The court held that while it could have required all farm stand inventory to be stored within the farm stand portion of the building, it did not have the authority to arbitrarily create a different rule which arbitrarily made a distinction between the types of inventory offered for sale. Further, the court ruled that there was no authority in the local code for a seasonal limitation. It's a good idea when imposing conditions to look and see what the local code allows and restricts and if there is to be a restriction on dates or hours of operation, make sure the record contains a basis for the decision to impose the particular condition. Edson v. Southold Town Zoning Board of Appeals, 102 A.D.3d 687 (2<sup>nd</sup> Dept. 2013)
- 9. You have to Follow the Rules - Procedural steps not fulfilled are a death warrant for granted permits. A recent case out of Madison County underlines the strict requirement for following the "rules" relating to zoning matters. An application was made for a special use permit to allow a wind farm in the Town of Richmond and the turnout was so large that the public hearing was moved to a large hall in a church several blocks away from the Town Hall. The requested special use permit was granted, and neighbors appealed. First, there was an argument that by moving the hearing away from the Town Hall, the Open Meetings Law was violated. While the Supreme Court agreed and annulled the permit and the negative declaration under SEQR, the Appellate Division disagreed and indicated that the record showed that the planning board made every effort to allow public attendance, including placing a notice at the Town Hall that the meeting had been moved. The court found all efforts reasonable under the circumstances and noted that although there might have been a technical violation of the Open Meetings Law, the resolutions passed are not void, but rather voidable for good cause shown. No good cause was shown here. Next, there was an argument that the provisions of SEQR were not followed, but a review of the EIS and the proceedings dismissed that argument. There was a

thorough and reasoned analysis of the project, and on appeal courts will not interfere with such decisions if rational. However, the planning board did not follow the provisions of Town Law §274-b nor General Municipal Law §239-m. Under the Town Law, the planning board was required to give the County of Otsego Planning Department 10 days notice of the public hearing with a full and detailed explanation of the application. There was no notice sent to Ostego County Planning Department, and the only materials sent to the county were incomplete and only a few days before the planning board issued the special permit. In other words, the referral didn't take place as set forth in the applicable codes. The special use permit was annulled on that ground. To add insult to injury, the local zoning code required, as most require, that certain enumerated conditions be present in order to obtain a special use permit. The planning board's ultimate resolution was silent on those conditions, and as with a ZBA resolution granting or denying a variance, the fact finding and resolution must show that each of the conditions were "considered and addressed" and that a finding of compliance or non-compliance found. The planning board failed to make any such findings, and thus another reason to annul the proceedings. On the discretionary matters, the planning board won, but when it failed to follow the procedural rules, its actions were set aside. Frigault v. Town of Richfield Planning Bd., 107 A.D.3d 1347 (3rd Dept. 2013)

10. Standing - Who has the right to complain? At a public hearing, anyone can stand and speak, whether they have "standing" or not, but for purposes of an Article 78 proceeding, there must be sufficient connection with the project to allow for "standing" before the court. In Clean Water Advocates of New York, Inc. V. New York State Department of Environmental Conservation, Inc., 103 A.D.3d 1006 (3<sup>rd</sup> Dept. 2013) Here, a not-for-profit corporation brought an action to set aside a storm water pollution prevention plan permit which had been granted for a Wal-Mart Supercenter in the Town of Lockport, Niagara County. Both the Supreme Court and 3rd Department dismissed the Article 78 proceeding on the basis of a lack of standing. Groups or individuals bring such an action must show not only proximity to the project, but that they would be adversely affected by the action of the board. Here, only one member of the organization lived anywhere near the proposed site (some 900 yards away from a portion of it), and the record was bare of any allegation of adverse affects to that member. No other member of the organization was anywhere near the site. Further, although some waterways might be impacted by the permit, the organization must show that its members would be affected to a greater degree than the general public. There was no evidence in the record to this effect. There must be a showing that a petitioner is affected more than a member of the general public, and that just wasn't the case here.

Likewise, in

Riverhead Neighborhood Preservation Coalition, Inc. V. Town of Riverhead Town Board, 112 A.D.3d 944 (2<sup>nd</sup> Dept. 2013), a group of residents opposed a

shopping mall. The members lived anywhere from 1300 to 2000 feet from the proposed mall, and there was no evidence in the record that they would be adversely affected any more than members of the general public. The main thrust of the argument was that the proposed mall would create substantial traffic on Fairway Drive, which runs through their community. The court reasoned that there was no showing that anyone lived near enough to the site and that the members would suffer environmental damage any more than members of the general public, who used the drive to access the local golf course. Case dismissed or lack of standing. Double bogey.

11. Subdivisions. A couple of cases were decided regarding proposed subdivision applications. The first, Nickart Realty Corp. v. Southold Town Planning Board, 109 A.D.3d 930 (2<sup>nd</sup> Dept. 2013) involved a case where the subdivision application was divided into two different approvals, preliminary and final. The preliminary application was approved, and during the process, a variance was obtained from the county Sanitary Code for transfer of sanitary flow credits. In fact, the resolution giving preliminary approval made that variance a condition. The variance was obtained from Suffolk County, and applicant went back to the planning board for final approval. The board approved but with additional conditions, including a condition that the sanitary flow credits only be used for affordable housing. The lower court and Appellate Division held that once preliminary approval is made, it is arbitrary and capricious to impose new conditions on a subdivision application unless new evidence or facts are discovered. Here, the planning board knew all along the nature of the project, and to introduce a new idea at that late stage was arbitrary and capricious. The denial of the permit was annulled.

In *Center of Deposit, Inc., v. Village of Deposit, 108 A.D.3d 851 (3<sup>rd</sup> Dept. 2013)* an applicant for subdivision approval had received a positive declaration under SEQR and had appealed the determination directly, which is allowed, since it is aggrieved at that point. The positive declaration was overturned and the matter sent back to the planning board in the Village of Deposit. The board issued a negative declaration, but denied the subdivision anyway, based on the fact that there was no legal access to the site. It didn't hurt that both the Broome County and Delaware County Planning Boards recommended denial. Thus there was a rational basis to deny the application.

12. Fees for Recreation Land A 4<sup>th</sup> Department decision reminds us that when a Town determines that there is a need for recreational land and that the parcel in question is unsuitable for such purposes, a fee in lieu of open land dedication pursuant to Town Law §277(4) can be assessed and put in a trust fund for use in the future in providing for recreational open land or acquiring land. The determination is based on a town-wide review, and can include future plans for a growing population in a suburban areas. Legacy at Fairways, LLC v. Planning

## Board of Victor, 112 A.D.3d 1289 (4th Dept. 2013)

13. Variances Contrary to the discussion of the *Frigault* case above, when the rules are followed, good things happen. A homeowner built an in-ground pool in the Town of Islip without obtaining a permit. When he applied for a variance, it was denied. On appeal, the applicant noted that two similar applications had been approved by the same board. The lower court annulled the denial and on appeal, the denial was reversed and the application denied. A reading of the decision shows that the ZBA followed the rules and engaged in the proper balancing test and thoughtfully considered and addressed the statutory conditions which need to be present in order to grant an area variance. The evidence before the ZBA supported its conclusions that granting the requested variance would produce an undesirable change in the character of the neighborhood, the variance was substantial, and any hardship was self-created. The evidence before the ZBA was sufficient to give a rational basis for its conclusions. As for the other approvals, they were in different zones and therefore irrelevant. Again, appellate courts do not like to interfere with decisions of zoning and planning boards so long as they are not arbitrary, follow the rules, and there is evidence in the record to support their decisions. Blandeburgo v. Zoning Board of Appeals of Town of Islip, 110 A.. D 3<sup>rd</sup> 875 (2<sup>nd</sup> Dept. 2013) To the contrary, where there isn't a rational basis, as we have seen, the determination will be overturned. In Luburic v. ZBA of Village of Irvington, 106 A.D.3d 824 (2nd Dept. 2013), applicant wanted to build a single family residence on a lot shw owned. She needed a variance. She had been dealing with the local planning board for several years. and dealing with various experts. For SEQR purposes, the planning board had declared itself lead agency and ultimately issued a conditional negative declaration. Apparently the planning board had conducted a through review. When applicant went for her variance, the ZBA denied the application for, guess what - environmental reasons. It held that there would be significant environmental impacts and that the conditions imposed by the planning board were "impractical" and "implausible". In the ultimate Article 78 proceeding, both the lower court and the Appellate Division annulled the ZBA determination as having no rational basis in the record. In fact, there was a substantial record to the contrary.

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