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SPRING, 2009 CASE LAW UPDATE

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ZONING AND LAND USE

Acquiescence to Nonconforming Use Does not Render It Legal:

Matter of Marino v. Town of Smithtown, __A.D.3d __ (2d Dept. 2009)

The Appellate Division Second Department upheld the determination of a zoning board finding that maintaining a "hospice" for terminally ill animals in a home over a period of years was neither a customary accessory use nor a legal non-conforming use. The local zoning code specifically states that animal hospitals are not permitted in residential districts and that any use not specifically listed as a permitted use is not permitted. The court held that nonconforming uses "may not be established where, as here, the existing use of the land was commenced or maintained in violation of a zoning ordinance" and therefore "the Zoning Board was not estopped from enforcing the zoning code…by the Town's apparent acquiescence over a period of approximately 13 years."

Denial of A Permit Cannot Be Based Upon Community Pressure Rather Than Expert Opinion:

Matter of Moy v. Board of Trustees of Town of Southhold, __A.D.3d __ (2d Dept. 2009)

A court reversed the denial of a wetlands permit based upon the conclusion that the Town Board "succumbed to community pressure." The Appellate Division, Second Department, found the Town Board relied upon various reports and recommendations which were by parties either unqualified to render such reports or who failed to address the criteria required by the Town's

code in determining whether to grant a permit. The court held that this and other reports and recommendations either not addressing the impacts of the proposal or expressing "concerns" about the proposal were "devoid of scientific data or analysis" and were therefore "insufficient to counter petitioners' expert's report and testimony…"

No Vested Rights In Nonconforming Sand and Gravel Mine

Matter of Glacial Aggregates LLC v. Town of Yorkshire, 57 A.D.3d 1362 (4th Dept. 2008)

The Plaintiff claimed that the operation of a sand and gravel mining operation on its 216 acre property was a legal non-conforming use to which it had a vested right. The court held that under the facts of this case the property owner did not have a legal non-conforming use and did not have vested rights.

Vacancy Rate Is An Appropriate Criteria In Determining To Issue A Use Variance:

Matter of O'Connell Machinery Co., Inc v. City of Buffalo Zoning Board of Appeals, __A.D.3d__ (4th Dept. 2009)

The court affirmed the granting of a use variance based upon the high vacancy rate of the property. The Appellate Division Fourth Department found that the property zoned light industrial was properly granted a variance to permit student housing, a hotel and other residential and commercial uses. The court found that the owner had proven hardship in "dollars and cents form" by demonstrating that the "property had been substantially vacant for 30 years" and that "only 10% to 15% of the space was occupied at the time of the applications and the prospects for expanding occupancy and generating sufficient revenue to cover necessary maintenance, repairs and improvements were marginal."

Exhaustion of Administrative Remedies:

Matter of Goldberg v Incorporated Village of Roslyn Estates, __A.D.3d __(2d Dept. 2009)

The Appellate Division Second Department dismissed a challenge to building inspector's refusal to issue a certificate of occupancy for failure to exhaust administrative remedies.

Court Upholds Finding That Wind Powered Generators are a Utility

Matter of Wind Power Ethics Group v. Zoning Board of Appeals of the Town of Cape Vincent, 60 A.D.3d 1282 (4th Dept. 2009)

In the emerging area of wind power the Appellate Division, Fourth Department upheld the decision of a local zoning board that wind powered generators are a utility. The Court found that the interpretation that wind powered generators fit the definition of utility in the local zoning

ordinance was a "rational construction ... entitled to deference." The local zoning ordinance defines a utility as "telephone dial equipment centers, electrical or gas substations, water treatment or storage facilities, pumping stations and similar facilities." The court concluded the determination that a wind powered generator is a utility "is neither irrational nor unreasonable, and that the determination is supported by substantial evidence."

Court Voids Denial of Permit Renewal For Failure to Adhere to Administrative Precedent

Matter of Menachem Realty Inc. v Srinivasan, __A.D.3d __ (2d Dept. 2009)

A determination of the New York City Board of Standards and Appeals (BSA) to deny a permit renewal was reversed by the Appellate Division as arbitrary, capricious and without a rational basis. The court found the denial of a permit renewal to complete construction, after a site had been rezoned, was inconsistent with prior determinations of the BSA.

Court Upholds Denial of Area Variance Due to Self Created Hardship

Matter of Tsunis v. Zoning Board of Appeals of Incorporated Village of Poquott, 59 A.D.3d 726 (2d Dept. 2009)

In a somewhat unusual decision, the Appellate Division Second Department upheld the denial of an area variance citing the zoning board's finding of self-created hardship. While self created hardship is one of the statutory criteria a zoning board must use in weighing whether to grant an area variance, Village Law also provides at section 7-712-b (3)(b)(5) that in considering self created hardship such "consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance."

In this case the court held: "the ZBA's determination that the alleged hardship was self-created is supported by the evidence in the record..." and the "determination was not otherwise illegal, arbitrary, or an abuse of the ZBA's discretion...."

Court Holds Challenges to Zoning Amendments Do Not Always Have to Be Brought Within Four Months

East Suffolk Development Corp. v Town Board of Town of Riverhead, __A.D.3d__ (2d Dept. 2009)

In 2007, I discussed the Court of Appeals' decision in the case of Eadie v. Town Board of the Town of North Greenbush (7 N.Y.3d 306[2006]) which I referred to as "Court Holds Challenge to Zoning Law Must Be Brought Within Four Months-- Sometimes." Now the Appellate Division, Second Department advised that sometimes the challenge can be brought within six years. The Town sought to have a challenge to a zoning amendment dismissed as untimely because it had not been brought within four months. I can only presume there was no SEQRA challenge involved, as SEQRA is not mentioned in the decision.

In denying the Town's motion the court held the amendment is a legislative act and that: "a declaratory judgment action, not a CPLR article 78 proceeding, is the proper vehicle to challenge the validity of the defendants' action...and the six-year statute of limitations set forth in CPLR 213(1) applies...."

Zoning Board Determination of Preexisting Nonconforming Use Upheld

Matter of Jacobsen v. Town of Bedford Zoning Board of Appeals, __A.D.3d __ (2d Dept. 2009)

An appellate court upheld a zoning board determination that the owner of a commercial property maintained a legal preexisting nonconforming use of a parking lot. The court reiterated the rule that such a decision will not be overturned "if it is rational and is not illegal or an abuse of discretion, even if the reviewing court would have reached a different result."

Challenge to a Local Law Requiring Discontinuance of a Nonconforming Use

Matter of Suffolk Asphalt Supply, Inc. v. Board of Trustees of Village of Westhampton Beach, 59 A.D.3d 452 (2d Dept. 2009)

In denying summary judgment to a property owner who challenged the amortization period during which a non-conforming use must be discontinued under a local law, the court held the property owner failed to demonstrate the law is invalid on its face. The court noted that “there remains a question of fact regarding whether the amortization period provided in the local law was reasonable and thus constitutional as applied to the plaintiff.”

The court stated the general rule in determining the reasonableness of an amortization period holding that: “[w]hether an amortization period is reasonable is a question which must be answered in light of the facts of each particular case"

Appellate Court Summarizes Rules for Area Variances

Matter of Millennium Custom Homes v. Young, 58 A.D.3d 740 (2d Ept. 2009)

The appellate division issued a decision which provides a concise summary of the various issues confronted by a zoning board of appeals in deciding area variances. In the court upheld the zoning board of appeals noting that the decision was rational and supported by evidence in the record. After reviewing the balancing test in the statute, the court found there was detailed evidence of the adverse impacts on the neighborhood. The court also noted that the board adequately distinguished this application from other similar cases.

Zoning Board’s Quasi-Judicial Administrative Decision is Subject to Res Judicata Dismissal

Matter of Calapai v. Zoning Board of Appeals of the Village of Babylon, 57 A.D.3d 987 (2d Dept. 2008)

The appellate division dismissed a challenge to the continuation of a condition to a variance on the grounds that the challenge is barred by the doctrine of res judicata. The court held that a variance conditioned upon the removal of the building modifications in the event of a change of circumstances was a condition which could have been challenged when the variance was granted in 2000. Therefore, this challenge to a 2007 renewal of the variance, on grounds that could have been raised in 2000, is barred.

Town Zoning Ordinance Voided

Matter of BLF Associates LLC v Town of Hempstead, __ A.D.3d ___ (2d Dept. 2009).

A town zoning ordinance, which established the specific number of residences and the form of ownership of the residences, as well as the size and ownership of recreational facilities for a specific property, was voided by the appellate division. In a decision which restates some of the fundamentals of zoning law in New York, the court held the attempt by the Town of Hempstead to control virtually every aspect of the ownership and use of a property exceeded its authority.

Court Reiterates Authority of Zoning Board to Interpret Local Zoning Code

Kennedy v. Zoning Board of Appeals of the Village of Patchogue, 57 A.D.3d 546 (2d Dept. 2008)

A local zoning board's interpretation of the application of a zoning ordinance provision to a particular property shall be upheld unless that interpretation is "unreasonable or irrational."

Planning Board May Require Recreation Fee at Time of Final Subdivision Approval

Matter of Davies Farms LLC v. Planning Board of the Town of Clarkstown, 54 A.D.3d 757 (2d Dept.. 2008) lv.den. 11 N.Y.3d 713

A Planning Board is not required to make a determination regarding a fee in lieu of parkland at the time of preliminary subdivision approval but may wait until it grants final subdivision approval. The Appellate Division Second Department found that Town Law sections 276 and 277(d) do not preclude a determination at the time of final subdivision approval that such a fee should be paid, even though there was no determination of recreational need at the time of preliminary subdivision approval.

An Invalid Permit Cannot Confer Vested Rights

In re GRA, LLC v. Srinivasan, 55 A.D.3d 58 (1st Dept. 2008)

Reiterating that "vested rights cannot be acquired in reliance upon an invalid permit" the Appellate Division of the First Department upheld a determination of the New York City Board of Standards and Appeals ("BSA").

Variance May Not Be Conditioned Upon Term of Ownership of Current Owner

Fowlkes v Zoning Board of Appeals of the Town of North Hempstead, 52 A.D.3d 711 (2d Dept. 2008)

In a recent decision by the Appellate Division Second Department that Court again reminded litigants that variances run with the land and zoning boards can only place conditions on variances that relate to the property involved. The Court pointed out: "any condition imposed when granting a variance must be directly related to the property involved and to the underlying purpose of the zoning code, without consideration of the particular person owning or occupying it…."

A Complete Record is the Key in Zoning Board Applications

Matter of Kaufman v Incorporated Village of Kings Point, 52 A.D.3d 604 (2d Dept. 2008)

This Appellate Division, Second Department reiterated the application of the doctrine of exhaustion of administrative remedies and the importance of a clear record in the proceedings of zoning boards. The neighbors of the property at issue brought an Article 78 proceeding challenging the variances and for the first time claimed that the lot in question did not have the required lot area. In modifying the decision of the Supreme Court, the Appellate Division held this issue should not have been considered as it was neither a question of law nor "apparent from the face of the record." However the Court still remitted the case to the zoning board noting that it was not clear from the record that the zoning board had considered the five factor balancing test required by Village Law section 7-712 (b) in granting the variances.

Allowing Hot Mix Asphalt Plant as Special Use is Not Spot Zoning

Matter of Little Joseph Realty, Inc. v Town Board of the Town of Babylon, 52 A.D.3d 478 (2d Dept. 2008)

A zoning amendment which permitted hot mix asphalt facilities as a special use in all industrial districts in the Town of Babylon was held not to be spot zoning. In the case, the court found the amendment was not enacted to benefit a single owner for a specific purpose only.

SEQRA

Property Owners Within the Modified Zoning District Have Standing to Challenge Amendment

Matter of Bloodgood v. Town of Huntington, 58 A.D.3d 619 (2d Dept. 2009)

The Appellate Division Second Department modified a lower court decision dismissing an action challenging a zoning amendment. The court separated the petitioners into several categories in order to analyze the question of standing from the standpoint of the potential environmental harm to each of the petitioners resulting from the rezoning.

The challenge at issue was based upon an alleged failure to take a "hard look" at the environmental impacts of the zoning amendment, as mandated by SEQRA, prior to adopting the zoning amendment. The court held that those owning property within the zoning district that was the subject of the amendment had standing. Further, the court held that the lower court erred in dismissing the complaint of a property owner whose property was located within fifty to sixty feet of the rezoned district, as that property owner had alleged specific adverse impacts. upon his property of traffic, sewerage, and groundwater that would result from the zone change. However, the court found that the individual petitioners who owned property that was not in close proximity to the rezoned district lacked standing.

Atlantic Yards Condemnation Litigation Continues

In re Develop Don't Destroy (Brooklyn) v. Urban Development Corporation, 59 A.D.3d 312 1st Dept. 2009

The Appellate Division, First Department addressed claims by property owners alleging that the State Environmental Quality Review Act (SEQRA) had not been adequately considered. In rejecting the claims, the court held (1) the ESDC's financial participation was not an area for environmental inquiry, (2) in the circumstances of this case the lead agency did not have to consider the possibility of terrorist attack and (3) estimates of the build year were based upon adequate evidence.

The court also rejected the claim that the lead agency did not adequately consider alternatives and specifically failed to take into account prevailing real estate trends.

Appellate Court Ignores Procedural Missteps by Planning Board in Granting Site Plan Approval

Wal-Mart v. Planning Board of Town of Greece, __A.D.3d __ (4th Dept. 2009)

In a case involving a challenge to site plan approval for a Wal-Mart, the Appellate Division Fourth Department found a number of challenges to procedural/technical oversights by the planning board to be insufficient to cause the court to overturn the approval. The court held: (1) the failure of the planning board to complete parts 2 and 3 of the SEQRA EAF was not fatal, (2)

the planning board complied with the referral requirements of General Municipal Law sections 239-m and 239-n, and (3) there was no error in issuing a conditional negative declaration for a Type I action under SEQRA.

The Lead Agency Has Discretion to Require A Supplemental Environmental Impact Statement

Matter of Oyster Bay Associates Limited Partnership v. Town Board of Town of Oyster Bay, __A.D.3d __ (2d dept. 2009)

In the Second Department upheld the denial of a special permit, holding the Town Board, as the lead agency, "may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; or (b) newly discovered information; or (c) a change in circumstances related to the project"

SEQRA Does Not Preclude a Revote on a Findings Statement

Matter of East End Property Company #1 LLC v. Town Board of the Town of Brookhaven, 56 A.D.3d 773 (2d Dept. 2008)

When a findings statement fails to pass, SEQRA does not preclude a reconsideration of the exact same findings statement at a later date. The Appellate Division found that there was nothing in the SEQRA regulations which precluded such reconsideration. The court noted: “the Town Board’s determination to adopt, rather than reject, the resolution to approve the SEQRA findings statement was neither arbitrary nor capricious, but was based on reasons readily apparent on the face of the record.”

A SEQRA Review Is Not Required To Deny An Application

Matter of Joseph Logiudice v. Southold Town Board, 50 A.D.3d 800 (2d. Dept. 2008)

Occasionally, early in the process of reviewing an application, everyone on the municipal board knows that an application is not likely to be granted. In upholding the denial of the application for a special permit, the Appellate Division Second Department noted: “because the Board determined to deny the petitioner's application, “no action having a significant effect on the environment was undertaken,” and, as such, “it was unnecessary for the Board, as lead agency, to comply with the requirements of the State Environmental Quality Review Act.”

FOIL

New York Legislature Clarifies Availability of Electronic Media Through FOIL

The Legislature has clarified a long contentious issue over the availability of electronic media under the New York Freedom of Information Law (FOIL). In Chapter 223 of the 2008 legislative

session, which became law on July 7, 2008, the Legislature expanded FOIL to include electronic data that must be complied by government agencies. The new law requires government agencies and municipalities to "provide records in the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service." The law also allows the agency to charge back the cost of the storage media, the actual cost of an outside service to retrieve the data or in some instances at least part of the salary of the person doing the retrieval.

Court Holds Communications from Consultant Not Exempt from FOIL

Tuck It Away Associates L.P. v Empire State Development Corp., 54 A.D.3d 154 (1st Dept. 2008)

The Appellate Division First Department held that certain communications from a consultant hired by the Empire State Development Corporation (ESDC) were not exempt from release under FOIL as intra-agency communications. Noting that while there is generally such an exemption "such communications lose their exemption if there is reason to believe that the consultant is communicating with the agency in its own interest or on behalf of another client whose interests might be affected by the agency action addressed by the consultant" the court held that because the consultant was also hired as a consultant by Columbia University to assist with the same project, the communications were subject to release under FOIL.