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Case Law Update - 2018

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Friend of P.S. 163, Inc. v. NYS Department of Health, 146 A.D.3d 540 (2d Dept 2016)

- Facts:
  - The New York State Department of Health approved a proposal to build a nursing home for the Jewish Health Lifecare in Manhattan.
  - P.S. 163 challenged the approval because approval was inconsistent with DOH's obligation under SEQRA.
  - The two SEQRA issues challenged were: (i) noise and lead-containing airborne dust particles from air conditioners proposed for the project; and (ii) failure to provide a reasoned explanation for its findings.
  - The nursing home was adjacent to an elementary school with 600 students between the ages of 3 and 11. 14% of the students had learning disabilities.
  - DEIS was prepared.
  - Experts for P.S. 163 provided information that noise during construction (14 months) is "predicted to be loud enough to potentially interfere with the wellness and ability to learn …"

Issues

- DOH proposed new windows to “buffer” the noise;
- P.S. 163 wanted HVAC system to be built because windows are left open in old building.
- By disturbing the soil, hazardous material would be released. DOH proposed a remedial plan that would minimize the impact of soil disturbance (wetting exposed soil, covering trucks, air monitoring, construction workers wear suits).
- Did DOH take a hard look at the noise and hazardous waste issue when deciding to reject the experts opinion that new HVAC should be installed.

Holding

- The DOH took the requisite "hard look" at the projects anticipated adverse environmental impacts, including noise and hazardous material impacts, and provided a "reasoned elaboration" of its basis for approving the project, including remedial measures to be employed to mitigate adverse impacts.
  - Window air conditioning units will mitigate noise impacts and will supply fresh air. Further, they are widely used in the building.
  - DOH rationally rejected the new HVAC as unreasonably expensive and time-consuming ("the rough cost estimate obtained by DOH, though far from a detailed study, complied with 6 NYSRR 617.9 (b)(5)(v), which requires consideration of "the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the sponsor.")
  - "The mere fact that DOH did not accept or specifically address in the FEIS all the conclusions and recommendation of petitioner's experts with respect to the issues is not tantamount to failure to take a 'hard look' at the issue."
  - DOH can rely on minimum standards in CEQRTM for "temporal duration elevated noise."
  - Court found that motion court erroneously "substituted its analysis for the expertise of the lead agency" simply because the agency rejected what the trial level court considered to be better measures in mitigation.

Pamela Jenkins v. Leach Properties LLC, 151 A.D.3d 1419 (3rd Dept 2017)

- Facts:
  - Leach Properties owns a trash services facility.
  - It entered into a contract to buy an adjacent parcel of land from Suit Kote.
  - A condition of the sale/purchase was that Leach obtain a use variance from the Cortlandville ZBA allowing it to build an access road and add parking.
  - In October 2015 ZBA issued the use variance.
  - In December 2015, Jenkins brought an Article 78 claiming the Town did not follow its Code and Leach did not provide any evidence that it could not realize a reasonable return as currently permitted.
  - Court agreed with Jenkins.
  - Leach brought an appeal solely on the Court's finding that the hardship was self-created.

Issue

- Was the Court's decision that the hardship was self created reason to overturn the decision?
- Even if it was, who cares?
- Will the court give Leach an advisory opinion for when he brings the case back?

Holding

- Even assuming Leach is correct about the self created hardship, he has left unchallenged multiple independent grounds for granting the petition, including Supreme Court's determination that the ZBA failed to meet Town Code requirements and no competent financial on reasonable rate of return was provided.
- To the extent Leach seeks an advisory opinion in regard to a future attempt to obtain a use variance, "the courts of New York do not issue advisory opinions for the fundamental reason that in this state 'giving of such opinions is not the exercise of the judicial function.'"
- Article 78 proceeding "shall be instituted within thirty days after the filing of a decision of the board in the office of the town clerk." Town Law 267-c

Rodriguez v. Weiss, 149 A.D.3d 842 (2nd Dept 2017)

- Facts:
  - Petitioner owns real property with a two-family residential dwelling.
  - Petitioner applies to ZBA to renew a use variance allowing the two-family home without the condition that it be owner occupied.
  - The ZBA renewed the use variance on the condition that at least one of the apartments owner-occupied at all times.
  - The ZBA, however, never reached the merits of the application but relied on the doctrine of *res judicata* to deny the petitioner's request for renewal of the use variance without an owner-occupied condition.
  - Res Judicata – claims preclusion – "a matter [already] judged." Refers to a case in which there has been a final judgment and is no longer subject to appeal.
  - The Supreme Court dismissed the petition after reviewing the merits of the petitioner's application.

Issue

- Can the Supreme Court rule on the merits of the application if the ZBA did not?

Holding

- Upon concluding that the Board improperly invoked the doctrine of res judicata, the Supreme Court should not have then analyzed the merits of the Petitioner's application.
- "If the grounds relied upon by the agency are inadequate or improper, a reviewing court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."
- Remand back to ZBA.
- Interesting question – did the Supreme Court in essence just give an "advisory opinion."

DeCarr v. Zoning Board of Appeals for the Town of Verona, 2017 NY Slip Op 07058 (4th Dept 2017)

- Facts:
  - Verizon wants to build a cell tower in the Town of Verona.
  - Cell towers require a special permit from the ZBA.
  - An area variance was also required.
  - Residents opposed the special permit because of concerns about health issues and property values.
  - Also, the Petitioners claimed the ZBA Chairman "predetermined" the outcome of the application because he indicated that there is limited power of the ZBA to deny a public utility's application.

Issue

- Does the ZBA have to consider the “least intrusive means” to address a “significant gap” in service in order grant the application? TCA 332(c)(7)(B)(i)(II).
- Is the fact that the ZBA Chair stated his view of the law “prejudging” the application?

Holding

- When the zoning ordinance authorizes a use permit, the applicant need only show that the use is contemplated by the ordinance and that it complies with the conditions imposed to minimize anticipated impacts on surrounding areas.
- The ZBA is required to grant a special use permit unless it has reasonable grounds for denying the application.
- Further, “a telecommunications provider that is seeking a variance for a proposed facility need only establish that there is a gap in service, that the location of the proposed facility will fill the gap and that the facility presents a minimal intrusion on the community.”
- “Least intrusive” standard is used when the TCA requires a zoning authority to grant its application.
- ZBA Chair “prejudged the law,” not the facts. That’s ok.

Beekman Delamater Properties, LLC v. Village of Rhinebeck ZBA, 150 A.D.3d 57 (3d Dept 2017)

- Facts:
  - Rhinebeck Village Place, LLC proposed the development of a lodging facility on an adjacent lot owned by Mirbeau of Rhinebeck, LLC.
  - An area variance was granted by the ZBA to allow a lodging facility to be 302 feet from the road, rather than the maximum of 5 feet (a variance of 296.7 feet.
  - Petitioners filed a Article 78 claiming the project failed to comport with the Village Center principals as set forth in the Village's Code.
  - Petitioner also claimed SEQRA was done incorrectly – especially determining that the project would not result in the impairment of the character or quality of important historical … resources or existing community character.

Issue

- Was the variance too big?
- Was SEQRA followed properly?
- Were site plan and special permit approvals properly done?

Holding

- The Planning Board took the required hard look at the project and set forth well reasoned explanations for finding the project would not result in any significant environmental impacts (it did this by going through the EAF and answering the questions).
- In granting an area variance, a ZBA is required to engage in a balancing test, weighing the benefit to the applicant against the health, safety and welfare of the community if the variance is granted.
- Here the ZBA considered and properly weighed the relevant factors, and while there is little doubt the variance was substantial, there is no evidence that the variance would produce an undesirable change to the community.
- A local planning board has broad discretion in reaching a determination on site plan and special permit applications, and judicial review is limited to determining whether the approval was illegal, arbitrary or an abuse of discretion.
- The Planning Board properly determined that because of the lot configuration and the project's design, the front-yard setback couldn't be met, the project met the principles established for Village Center, and the inclusion of the health and wellness spa would have no greater impact than full development of the site.

Crowell v. Zoning Board of Appeals of the Town of Queensbury, 151 A.D.3d (3rd Dept 2017)

- Facts:
  - William and Pamela Roberts want to reconstruct two single-family dwellings on their property.
  - The property is in the Town's waterfront district.
  - This district limits the density to one single family house on a lot.
  - The two structures on the lot pre-date the Town's zoning code.
  - The Robert's applied to the ZBA for an area variance and a "variance" to construct two houses on the lot.
  - Before the hearing, a neighbor objected saying a use variance was required for density.
  - ZBA granted area variances for dimensions and density.
  - Decision filed on January 23, 2014 with Town Clerk; building permits issued on November 26, 2014 (appealed to ZBA in January under Town Law 267-a(5)(b); Spring of 2015 petitioner files injunction.
  - Supreme court grants injunction in June 2015.

Issue

- Was the appeal to ZBA regarding the issuance of building permit good, even when it was filed within the 30 day statute of limitations?

Holding

- No because . . .
  - The crux of the petitioner's challenge of the building permits is that a use variance, not an area variance was necessary.
  - This issue was decided by the ZBA in January 2014. He had 30 days from then to bring Article 78.
  - The claim is also barred by laches. It is well settled that were neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches, particularly in the are of land development.
  - Building permits were issued November 26, 2014, demolition commenced December 1, 2014, structure of the first house was set, appeal to ZBA was made on January 16, 2015, Robertses expended $250k at this point.

Town Law 267-1

- (a) “Use variance” shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.
- (b) “Area variance” shall mean the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.

Alper Restaurant Inc. v. Town of Copake Zoning Board of Appeals, 149 AD3rd 1337 (3rd Dept. 2017)

- Facts:
  - Rock Solid Development, LLC applied to ZBA for a special permit to construct a resort hotel.
  - During the review of the application, a vacancy occurred in the ZBA.
  - ZBA members voted 2-2 on special permit.
  - Later that year, a new member was appointed and the ZBA approved application for special permit 3-2.
  - Alper brings Article 78 saying the 3-2 vote was a default denial.
  - Supreme court dismisses.

Issues

- Was the 2-2 vote a default denial?
- Was the new member of the ZBA adequately informed to vote after he was appointed?

Holding

- Town Law 267-a says a tie vote of a ZBA only results in a default denial when it is acting in its appellate jurisdiction not its original jurisdiction.
- The newly appointed ZBA member was adequately informed about the application when he rendered his vote.

Voting Requirements

- 12. Rehearing. A motion for the zoning board of appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the board. A unanimous vote of all members of the board then present is required for such rehearing to occur. Such rehearing is subject to the same notice provisions as an original hearing. Upon such rehearing the board may reverse, modify or annul its original order, decision or determination upon the unanimous vote of all members then present, provided the board finds that the rights vested in persons acting in good faith in reliance upon the reheard order, decision or determination will not be prejudiced thereby.
- Voting requirements. 13 (a) Decision of the board. Except as otherwise provided in subdivision twelve of this section, every motion or resolution of a board of appeals shall require for its adoption the affirmative vote of a majority of all the members of the board of appeals as fully constituted regardless of vacancies or absences. Where an action is the subject of a referral to the county planning agency or regional planning council the voting provisions of section two hundred thirty-nine-m of the general municipal law shall apply.
- (b) Default denial of appeal. In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the enforcement official within the time allowed by subdivision eight of this section, the appeal is denied. The board may amend the failed motion or resolution and vote on the amended motion or resolution within the time allowed without being subject to the rehearing process as set forth in subdivision twelve of this section.