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Administrative Res Judicata

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ZONING & LAND USE

The doctrine of res judicata prohibits an adjudicated issue from being relitigated. The doctrine is based on the principle that no one should be sued twice for the same cause of action. In New York, courts have recognized a comparable doctrine, known as administrative res judicata, which applies to quasi-judicial determinations of zoning boards of appeals.

Thus, a second application for identical relief brought by the same person or a person in privity with the first applicant may be barred by administrative res judicata, and a zoning board of appeals could simply refuse to rehear the application. The courts will sustain a denial of a second application by a zoning board of appeals without a hearing if the applicant made no allegation that warranted a new hearing.

In one case, for example, the owner of property in the Village of Old Westbury requested an area variance, claiming the property was "unmarketable" without it. After a hearing, the village's zoning board of appeals denied the application, finding that the property owner had "treated and used" the property and an adjacent lot as "one parcel" for about three decades. The property owner challenged the decision in an Article 78 proceeding, but the court dismissed it and confirmed the determination of the zoning board of appeals.

Some time later, the property owner reapplied for the same area variance, and the zoning board of appeals again denied the request. The property owner brought another Article 78 proceeding, and Nassau Supreme Court held that the doctrine of administrative res judicata barred the property owner from the relief sought.

That decision was affirmed by the Appellate Division, Second Department. The appellate court noted that, under traditional principles of res judicata, the earlier determination of the zoning board of appeals served as a complete bar to the later proceeding, in which the property owner sought the same relief.

The appellate court was not persuaded that a different result should obtain merely because at the second hearing before the zoning board of appeals the property owner adduced proof that tended to establish certain facts (e.g., the value of the property with and without an area variance) that were not proved at the first hearing.

In the appellate court's opinion, this only demonstrated that the property owner "had improved the quality of his proof," and it said there was "no authority for the proposition that a claim which has been litigated fully once may be relitigated again, simply in order to permit the losing party to cure a defect in this proof."[1]

There are various circumstances, however, where administrative res judicata will not be applied to bar a hearing on an application for a zoning variance, permit or other relief.

One situation is where an application is materially different from a previous application by the same property owners. In one case, for example, the record demonstrated that two applications filed by the same property owners "involved factually distinguishable proposals for constructing an addition to [their] residence." As a result, the Second Department held that the Board of Zoning Appeals of the Incorporated Village of Malverne "was not precluded by the doctrine of res judicata from considering the second application."[2]

The Second Department's recent decision in another case, *Kreisberg v. Scheyer*,[3] illustrates what an applicant

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might have to demonstrate to persuade a zoning board of appeals, or a court, that circumstances have changed and administrative res judicata should not be applied.

The petitioners in this case owned property in West Islip and sought a variance to expand their one-car garage to a two-car garage. The zoning board of appeals rejected the application without a hearing, pointing out that, more than 20 years earlier, an application by the property's previous owners to add a two-car garage had been denied.

The Second Department rejected that ruling, finding that the two applications were substantially different. As the court explained, the placement of the garage was different in the second application from where it was proposed in the first.

In addition, the size of the garage in the second application was not as wide as in the earlier application—it was approximately five feet shorter. Moreover, the second application proposed a garage that did not infringe into the side yard as far as proposed in the first application and did not include the room addition to the back that was contained in the first application.

Additionally, the Second Department noted, although the earlier application had been opposed by the neighbor to the south of the property, there apparently was no opposition in the neighborhood to the later application and, in fact, the neighbor whose property was located on the side of the petitioners' house where the variance was requested had submitted a letter supporting the application.

Accordingly, the Appellate Division remitted the matter to the zoning board of appeals and ordered that it hold a hearing.

Change in Law

Another instance when administrative res judicata will not apply is when the applicable law changes between the time the first and second applications are filed.

The New York Court of Appeals decision in *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*[4] affirms this rule. The case involved a substandard, unimproved parcel of land in West Hempstead. In 1969, the property owner sought and was denied an area variance to build a single-family dwelling there. After the adoption of Town Law §267-b, which sets forth the factors that must be examined by a zoning board of appeals when considering whether to grant an area variance, the petitioner entered into a contract for the purchase of the land.

Where prior applications by the same parties or those with whom the later applicants are in privity sought the same relief, the zoning board of appeals may well be justified in rejecting the new application on res judicata grounds.

The contract was contingent on the petitioner obtaining an area variance and a permit to build a single-family dwelling on the property.

The board denied the application and the petitioner commenced an Article 78 proceeding. Nassau Supreme Court granted the petition, finding, among other things, that the board's denial of the variance in 1969 did not bar the granting of the variance requested by the second application. The Appellate Division modified that order, and the case reached the Court of Appeals.

In its decision, the Court upheld the decision by the zoning board of appeals, finding that it could not conclude that the board's denial of the variance was either an abuse of discretion or irrational under the circumstances presented. Significantly, the Court added that although the board relied on its 1969 denial of a similar variance, "it did not give estoppel effect to that decision."

Indeed, the Court emphasized, it could not do so because "Town Law §267-b was enacted after that determination." Applications filed prior to the changes in state law, which enumerated the standards for the granting of variances that became effective in 1992, thus should not be deemed to bar, on res judicata grounds, similar applications made now or in the future.[5]

Conclusion

Property owners seeking zoning relief, as well as their attorneys, and government officials considering those applications should consider the effect of administrative res judicata on those requests.

Where prior applications by the same parties or those with whom the later applicants are in privity sought the same relief, the zoning board of appeals may well be justified in rejecting the new application on res judicata grounds.

Given the limited resources available to local governments today, such a reaction is understandable and completely within the law.

1. *Jensen v. Zoning Board of Appeals of the Village of Old Westbury*, 130 A.D.2d 549 (2d Dep't 1987).

2. *Matter of Hunt v. Board of Zoning Appeals of Incorporated Village of Malverne*, 2006 N.Y. App. Div. Lexis 2594 (2d Dep't March 7, 2006).

3. 808 N.Y.S.2d 889, 2006 N.Y. Misc. Lexis 167 (Sup. Ct. Suffolk Co. Feb. 3, 2006).

4. 2 N.Y.3d 608 (2004).

5. See, also, *Matter of Josato, Inc. v. Wright*, 288 A.D.2d 384 (2d Dep't 2001) (res judicata inapplicable where prior applications for area variances for petitioner's property were made by different applicants before the Town Law was amended to set forth the requirements for an area variance, and involved different proposals for constructing houses on the property); *Matter of Peccoraro v. Humenik*, 258 A.D.2d 465 (2d Dep't 1999) (doctrine of res judicata inapplicable where prior application was made before Village Law §7-712-b(3)(b) was amended to define requirements for an area variance).

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