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ZONING AND LAND USE PLANNING

Court Overrules 40-Year-Old Precedent in Zoning Case

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The New York Court of Appeals rarely overrules itself, and even more rarely overrules itself in zoning or land use planning matters. Last month, however, in *Matter of Colin Realty v. Town of North Hempstead*,[1] the court overruled a decision from more than 40 years ago in a case involving variances from the off-street parking requirements of a town's zoning ordinance.

Background

The Colin Realty case arose in 2011 when Manhasset Pizza and Fradler Realty Corporation sought approval from the board of zoning and appeals (ZBA) of the Long Island town of North Hempstead to place a 45-seat, full-service, dine-in restaurant in a storefront in the town. Restaurants are permitted in the Business A district in which the building is located, subject to the issuance of a conditional use permit.

In 1939, when Fradler constructed the building, the town code did not obligate Fradler to provide off-street parking or loading/unloading areas for the building. By 2011, however, the town code imposed off-street parking requirements and standards throughout the town. Specifically, the town code called for the restaurant, as proposed, to supply 24 off-street parking spaces (one space per every four seats for patrons, plus additional spaces as specified in the town code to account for employees and takeout service) and one off-street loading/unloading area.

After a hearing, the ZBA granted a conditional use permit, subject to certain conditions, and the requested variances. Treating the application as a request for area variances, the ZBA concluded that the benefit to the applicants of granting variances from the town code's parking and loading/unloading restrictions outweighed the detriment imposed on the community.[2]

Thereafter, Colin Realty, the owner of a multi-tenant retail building next to the Fradler property, asked a court to annul the ZBA's determination on the ground that, pursuant to the 1972 decision by the Court of Appeals in *Matter of Off Shore Rest. v. Linden*,[3] the proposed restaurant required a use variance rather than an area variance from the town's parking and loading/unloading restrictions.[4] Colin Realty alleged that existing public parking was "overwhelmed" and inadequate to accommodate the applicants' proposed "high volume use."

A decision that a use variance rather than an area variance is necessary has significant practical ramifications. That is because to obtain a use variance, an applicant has the heavy burden of demonstrating that "applicable zoning regulations and restrictions have caused unnecessary hardship,"[5] whereas a ZBA can grant an area variance simply after taking into consideration "the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant."[6]

The Supreme Court, Nassau County, denied Colin Realty's petition and rejected its argument that use variances were necessary to excuse the applicants from complying with the town code's provisions for off-street parking and loading/unloading.

The Appellate Division affirmed, holding that the ZBA properly had determined that the variances pursuant to which the applicants sought relief from the parking and loading/unloading requirements "were to be treated as applications for area variances" under the town code.

Colin Realty appealed to the Court of Appeals, relying to a large extent on this paragraph of the court's 1972 decision in *Off Shore*:

> To be sure, off-street parking restrictions do not fall easily into either classification; hence, the divergence among the cases. Parking restrictions are an adjunct restriction sometimes tied to a use and at other times to an area restriction, generally depending upon the problem created by the use or the limited area involved. On this view, in determining the rules to govern variance from parking restrictions one should look to the reasons for the restrictions and then adapt rules applicable to use or area variances, whichever best meets the problem. Illustratively, a parking restriction may be required because the building lots are too small, or on the other hand, because the use of the building regardless of lot size will cause many vehicles to be brought to the site. Most often, the parking restriction will relate to uses, and the ordinance by requiring offstreet parking for certain uses by a stated formula will so indicate, as in this case. In others, the parking restriction may be related by the ordinance to the area. That was the situation in [*Matter of Overhill Bldg. Co. v. Delaney*, 28 N.Y.2d 449 (1971)] where the requirement for off-street parking was defined in terms

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of the office space available in the subject building. The Overhill court, looking to [*Matter of Fulling v. Palumbo*, 21 N.Y.2d 30 (1967)], with some qualifications it is true, applied rules applicable to area variances but also spoke of the test as one which was not met unless the owner was left with no reasonable use for his property. In this case, applying the rules applicable to use variances and in accord with the analysis in the Overhill case, it is material that [Off Shore] has made no showing that the property cannot yield a reasonable return without increasing the burden on street parking in violation of ... the zoning ordinance. Indeed, there is no indication that the present use of the property as a delicatessen is not profitable. No hardship is shown except that a desired expansion is not available, and that is exactly what the policy in terminating nonconforming uses is designed to control.

The Court's Decision

The Colin Realty court affirmed the Appellate Division in a decision by Judge Susan Phillips Read, holding that a ZBA should evaluate requests for off-street parking variances by applying the standards for an area variance so long as the property is intended to be used for a purpose permitted in the zoning district. The court said that, to the extent *Off Shore* suggested otherwise, "it should no longer be followed and is overruled."

In its decision, the court reasoned that the Off Shore paragraph relied on by Colin Realty seemed to say the following:

(1) A parking restriction may relate to use or to area in the particular locality, depending upon "the problem created by the use or the limited area involved."

(2) In determining whether a variance from an off-street parking requirement is an area or use variance, "one [must] look to the reasons for the restrictions and then adapt rules applicable to use or area variances, whichever best meets the problem." The majority in *Off Shore* interpreted the code to require a use permit for any change in use, even a change from one to another permitted use, and to obligate the applicant for such a use permit to comply with all code requirements in effect at the time of the application. Thus, the majority in *Off Shore* seems to have reasoned that this particular locality, by including especially stringent use permit provisions in its code, expressed a strong policy preference to speed up elimination of nonconforming uses, a goal "best [met]" or fulfilled by treating variances from off-street parking requirements as use rather than area variances.

(3) In any event, the "reasons for the restrictions" generally will be apparent from the face of the ordinance, as the restriction either will relate to use, by stating a formula for certain uses, or to area, by defining the restriction in terms of the space in the building.

(4) Even though the Overhill court considered the parking restriction to be an area variance, it held that the variance was properly denied because the owner (Overhill) could not show that it was "left with no reasonable use for [its] property."

(5) Off Shore did not make the showing necessary for a variance from the code's off-street parking requirements.

> The court's decision in 'Colin Realty' will have great practical significance for property owners, developers, local government officials, and individuals who live near, work by, or patronize businesses that provide off-street parking

The court then stated that because Off Shore was not entitled to a variance even under the more lenient test for an area variance, "everything the majority in *Off Shore* said about use variances was extraneous to the decision and might be considered dictum." Nevertheless, it continued, "the distinctions that the Off Shore majority sought to make" were "illusory." That was because off-street parking requirements "are routinely tied to and vary with a use" and parking restrictions generally are amenable to expression "in terms of either a formula or space, or some combination thereof."

The court noted that the North Hempstead town code called generally for a restaurant to provide one off-street parking space for every four seats for patrons, but it noted that the limitation could have been formulated in terms of one parking spot "for every so many square feet of floor area devoted to patron use."

Finally, the court stated, whether dictum or not, Off Shore's declarations about use variances for off-street parking requirements "have effectively been superseded by statute." As of July 1, 1994, the court explained, a "use variance" is defined as an authorization for the use of land for a purpose "otherwise not allowed or ... prohibited" in the zoning district, and an "area variance" is defined as an authorization to use land "in a manner which is not allowed by the dimensional or physical requirements" of the zoning regulations.[7] Thus, the court stated, area variance rules apply to requests to relax off-street parking requirements so long as the underlying use is permitted in the zoning district while use variance rules prevail only if the variance is sought in connection with a use prohibited or otherwise not allowed in the district.

In this case, the court then held, Manhasset Pizza and Fradler applied for an off-street parking variance in connection with a change in the storefront's use from a retail gift shop to a restaurant. Because both uses were permitted in the zoning district, the court concluded, the ZBA properly had considered the application as a request for an area variance.

Conclusion

The court's decision in *Colin Realty* will have great practical significance for property owners, developers, local government officials, and individuals who live near, work by, or patronize businesses that provide off-street parking by easing the ability of applicants to obtain off-street parking variances. That it comes in a reversal of a 40-year-old precedent makes it that much more notable to practitioners.

1. No. 150 (N.Y. Oct. 16, 2014).
2. See Town Law §267-b(3)(b).
3. 30 N.Y.2d 160 (1972).
4. Under Town Law §267(1), a "use variance" means "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." An "area variance" means "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." See, also, Village Law §7-712(1); General City Law §81-b(1).
5. Town Law §267b(2)(b); see, also, Village Law §7-712-b(2); General City Law §81-b(3).
6. Id. §267b(3)(b); see, also, Village Law §7-712-b(3); General City Law §81-b(4).
7. See, Town Law §267(1); Village Law §7-712(1); General City Law §81-b(1).