

# NEW YORK LAW JOURNAL

## A Land-Use Trilogy

### *Cases Show Court is Increasingly Siding With Municipal Boards*

*By John M. Armentano*

On July 1, as it was ending its 2001-2002 term, the New York Court of Appeals issued decisions in three land-use cases which, standing alone, might not seem significant. When viewed together, however, the three cases are an important statement by the Court regarding the extreme deference that courts must afford decisions by local zoning boards.

In particular, the Court held:

- in *Matter of P.M.S. Assets, Ltd. v. Zoning Board of Appeals of Village of Pleasantville*<sup>1</sup> that “the determination of a zoning board regarding the continuation of a preexisting nonconforming use must be sustained if it is rational and supported by substantial evidence, even if the reviewing court would have reached a different result”;
- in *Matter of Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*<sup>2</sup> a case that arose after a request for a “special exception,” that a reviewing court “is bound to examine only whether substantial evidence supports the determination of the board. Where substantial evidence exists, a court may not substitute its own judg-

ment for that of the board, even if such a contrary determination is itself supported by the record”; and

- in *Matter of Ifrah v. Utschig*<sup>3</sup> that “[l]ocal zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion.”

The unequivocal endorsement of the deference owed to local zoning boards — whether involving applications for use or area variances, special exceptions or otherwise — was only part of the significance of the Court’s decisions. The Court also elaborated on the phrase “substantial evidence,” providing a valuable roadmap for litigants as to the quantity and quality of evidence they should submit to zoning boards in support of — and in opposition to — these various applications.

#### **P.M.S. Assets**

The *P.M.S. Assets* case stemmed from the acquisition by P.M.S. Assets,

Ltd. of property in a residentially-zoned neighborhood in the Village of Pleasantville on which there was a four-story warehouse and a smaller building. The previous owners of the property had operated commercial moving and storage businesses at the site, a use that predated the adoption of the village zoning ordinance. They stored customers’ goods in the warehouse portion of the lot and used the smaller building as an office.

As a result of neighborhood complaints, the zoning board of appeals conducted public hearings and found that P.M.S. Assets was using the warehouse in a manner inconsistent with the prior nonconforming use of the building, because they stored *their own* goods in the warehouse portion of the property. The board further rejected P.M.S. Assets’ application for a use variance. After P.M.S. Assets commenced an article 78 proceeding and both the Supreme Court and the Appellate Division, Second Department, ruled in its favor, the case reached the Court of Appeals.

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## Supporting the Board

In a memorandum opinion, the Court observed that there was evidence in the record supporting the zoning board's determination that P.M.S. Assets' use of the warehouse was not qualitatively similar to the previous use and, consequently, that it had impermissibly exceeded the scope of the prior nonconforming use. As the Court pointed out, the zoning board rationally could have found that the warehouse was no longer used for commercial moving and storage purposes because P.M.S. Assets used the building in connection with the operation of a lighting design and installation business. Accordingly, the Court concluded, the zoning board's determination as to nonconforming use should not have been disturbed.

Notably, the dispute arose on the basis of "neighborhood complaints." However, the actual evidence concerning the nature of the use and how it differed from the prior non-conforming use was in the record and, the Court found, was supported by the evidence, i.e., it was a different type of "warehouse" and it included a similar office presence.

## Retail Property Trust

On the same day, the Court decided *Retail Property Trust*. That case arose when Retail Property Trust (RPT) applied for a special exception to expand the structure and parking facilities on its property, the Roosevelt Field Shopping Mall, to accommodate a Saks Fifth Avenue department store. At a public hearing, RPT introduced a report entitled "Traffic Impact Study," prepared by a traffic and parking consultant, predicting that the proposed expansion would increase vehicular traffic in the area of

the mall by about one percent during peak evening hours and by about two percent on peak Saturday hours. According to the report and testimony by the consultant, the additional traffic would have minimal impact on traffic conditions in the area of the mall.

RPT also presented an "Air Quality Study," prepared by a private engineering firm, concluding that there would be little effect on air quality as a result of the expansion. Supporting this report was a letter from the New York State Department of Environmental Conservation agreeing with the conclusions reached in the study.

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Objectors to the proposed mall expansion, including the Village of Garden City, which operates a school near the mall, introduced their own expert report (the "Salatti Report") in response to RPT's expert traffic report. The Salatti Report focused on and highlighted a number of concerns with RPT's traffic study, such as the failure to consider additional traffic yet to be generated by already approved land development projects in the area and future "as of right" building, as well as the use of overly optimistic assumptions about traffic patterns.

In addition, the report disputed the characterization of additional traffic created by the proposed expansion as "de minimis" in light of the fact that the roads servicing the mall already were operating at or near capacity, causing drivers to seek "congestion relief" by using secondary roads running through residential areas, primarily in the Village of Garden City.

## Hub Study

The objectors also introduced, and their expert relied on, the "Nassau Hub Study." This study, not prepared in connection with the mall expansion, is a comprehensive report of traffic and transportation issues and forecasts for the Nassau County Hub area, which includes the Roosevelt Field Shopping Mall. The objectors used the Hub Study to illustrate how even a minimal traffic increase created by mall expansion could have far-ranging effects in the area.

In its notice of decision, the board explained that the area around the mall was over-saturated and in need of future growth control given that the area surrounding the mall contained a high density of shopping venues and had potential for even more "as of right" development. The board further observed that past mall development already had affected the health, safety, comfort and welfare of surrounding communities. With respect to the traffic situation, the board determined that RPT's expert had not adequately addressed the effect of even a minuscule increase in traffic on the already existing traffic problems in the area or future increases anticipated by the Nassau Hub Study. Crediting the critique by the objectors' expert, the board also found fault with some of the

methodology employed by RPT's expert, and expressed concern about the impact of further mall expansion on air quality in the area. Taking all the factors into consideration, the board denied RPT's request.

Nassau County Supreme Court found that there was a rational basis for the board's determination and sufficient evidence to support the conclusion by the board that nearby properties would be negatively affected by the expansion and that the increased traffic generated by the expansion would adversely affect the health, safety, comfort and convenience of neighboring properties. The Appellate Division reversed, concluding that the board's findings with respect to increased noise and traffic and diminished air quality were not supported by substantial evidence. Specifically, the Appellate Division found the decision of the board to be dictated solely by community opposition and thus arbitrary and capricious.

The Court of Appeals ruled that the zoning board's determination had to be upheld, emphasizing that both sides' experts had "provided authoritative reports amounting to substantial evidence regarding the proposed expansion." Under such circumstances, the Court of Appeals held that the Appellate Division had improperly substituted its own judgment "for the contrary but equally reasonable" determination of the zoning board. The Court added that the evidence in this case presented "a close, fact-specific choice of the kind that local boards are uniquely suited to make." It concluded that the board acted rationally and with the support of substantial evidence in denying the application for a special exception permit.

The Court reached the same result in *Ifrah*, where a property owner sought

four area variances to be able to subdivide nonconforming property into two separate lots. The zoning board unanimously denied the application, finding that the granting of the variances would create two substantially substandard lots, both deviating from the zoning code's one-acre requirement by 60% or more. The board also held that the variances would have a significant impact on, and change the character of, the neighborhood. Supreme Court denied the property owner's petition but a divided Appellate Division reversed, holding that the board's determination was not supported by substantial evidence. As support for its holding, it pointed out that 33 of the 39 lots within 500 feet of the applicant's parcel were substandard, and 20 of those 39 lots were smaller than the smaller of the two lots that would be created by the proposed subdivision.

The Court of Appeals reversed, finding that the majority in the Appellate Division had failed to take into account the evidence supporting the numerous other factors considered by the board in denying the variances, and that the board's determination was rational and supported by substantial evidence. The Court noted that the board's conclusion that the proposed variances would have a detrimental impact on the character of the neighborhood was supported by objective and largely undisputed factual evidence in the form of oral and written testimony by neighbors with actual knowledge of the nearby conditions — not merely generalized community objections — corroborated by the documentary evidence supplied to the board.

The Court rejected the Appellate Division majority's exclusive reliance on lot size, declaring that lot size was not the only relevant factor when con-

sidering impacts on the character of a neighborhood. The Court stated that the record supported the board's conclusion that the variance would have other detrimental impacts on the neighborhood, notably, traffic flow, traffic safety and parking impacts. These "undisputed facts," the Court said, supported the concerns expressed to the board that the variances would exacerbate the already difficult local traffic and parking situation. The Court concluded that based on this objective evidence — as well as the fact that the area variances sought were substantial, the property owner's difficulty was self-created, and he would not be denied the ability to make productive use of use his property, which already contained a habitable single-family residence — the board rationally could conclude that the proposed subdivision would have substantial adverse impacts on the neighborhood.

## Conclusion

As the trilogy of cases illustrate, the Court of Appeals quite clearly is siding more and more frequently with municipal boards. That makes the evidence that the parties present at hearings before zoning boards all the more pivotal. Applicants must persuade the local board to act in their favor. Significantly, as reflected in *Matter of Retail Property*, a party need not even have its own experts prepare its own studies — critiquing the other side's evidence may be sufficient.

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## NOTES:

1. 2002 WL 1401678.
2. 2002 WL 1401725.
3. 2002 WL 1401712.