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## ZONING AND LAND USE

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# Decisions Help Clarify Rules On Variances, Permits, SEQRA

Real estate on Long Island is a major asset — if not the most important asset — of a large number of the people who live here. It should be no surprise, therefore, that a great deal of litigation involves government regulation of real property. In recent months, the New York Court of Appeals and the Appellate Division, Second Department, have issued a number of significant zoning and land use law decisions arising from Long Island disputes. These cases have helped clarify rules relating to area variances, and special use and building permits. In addition, a decision last year clarifies rules relating to the State Environmental Quality Review Act, also known as SEQRA.

### Area Variances

Toward the end of its last term, the Court of Appeals issued its decision in *Pecoraro v. Board of Appeals of Town of Hempstead.*[1] This case arose when Gregory Pecoraro entered into a contract for the purchase of an unimproved parcel of land in West Hempstead. The contract was contingent on Mr. Pecoraro obtaining an area variance and a permit to build a single-family dwelling on the property. The

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property had a total land area of 4,000 square feet, with 40 feet of frontage width and 100 feet of depth, but it was located within a "B" residential zoning district, which requires 6,000 square feet of lot area, including 55 feet of frontage width, a front yard setback of 26 feet, an individual side yard setback of five feet, an aggregate side yard setback of 15 feet, and a building coverage of 30 percent of the lot area.

The town's zoning board of appeals denied the application. The board concluded that the variance sought was a substantial one, requiring a 33.3 percent deficiency in lot area and a 27.3 percent deficiency in width area, and that the neighborhood surrounding the property was overwhelmingly conforming to or larger than the zoning requirements. The board thus held that granting the variance would adversely affect the character of the neighborhood.

Mr. Pecoraro commenced an article 78 proceeding and Supreme Court, Nassau County, granted the petition, holding that the board had improperly denied the variance based on "generalized community opposition." On appeal, the Second Department directed the board to issue the area variance, and the case reached the Court of Appeals.

In its decision, the Court pointed out that, pursuant to Town Law §267-b(3), when determining whether to grant an area variance, a zoning board of appeals must weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted. Moreover, the Court continued, the zoning board also is required to consider whether (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than a variance; (3) the requested area variance is substantial; (4) granting the proposed variance would have an adverse effect or impact on physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty is self-created.

The Court then held that both Supreme Court and the Appellate Division had improperly supplanted the "reasoned decision" of the board in favor of their own judgments. The Court concluded that the board's denial of the variance was neither

an abuse of discretion nor irrational under the circumstances presented, and it specifically noted that the board was "well within its discretion to deny a variance that would have allowed an owner to take advantage of an illegally non-conforming parcel by erecting a dwelling upon it."[2]

## Building Permits

*Mueller v. Zoning Board of Appeals of the Town of Southold*[3] arose after Paulette Satur Mueller, and her husband, Eberhard Mueller, purchased an 18-acre farm in the Town of Southold and asked the Suffolk County Farmland Committee for permission to build a greenhouse. The committee approved the request, and the Muellers constructed two temporary greenhouses on the northeastern portion of their farm.

When the construction came to the town's attention, the town building inspector informed Ms. Mueller that a building permit was required for the greenhouses. Ms. Mueller applied for and obtained a building permit for the structures, but Patricia and James McNamara, who live across the street from the Mueller farm, appealed the decision to issue the building permit to the town's zoning board of appeals. In support of their appeal, the McNamaras argued that the building inspector had erred in issuing the building permit without first requiring the Muellers to obtain site plan approval for construction of the greenhouses.

Following a public hearing, the zoning board granted the appeal, concluding that site plan approval was required prior to issuance of a building permit for the greenhouses. Ms. Mueller commenced an article 78 proceeding to annul the zoning board's determination. Supreme Court granted the petition, finding that there was no evidence that the temporary greenhouses would increase the volume of agricultural production on the property, which historically had been used to grow crops, and that no site plan approval therefore was necessary.

The Second Department reversed. It found that the record demonstrated that the purpose of the greenhouses was to increase the farm's productivity by extending the growing season of certain crops, and enabling other crops to survive the winter. Although the appellate court stated that it was true that crops had historically been grown on the farm, it added that it could not be said that the zoning board's determination that the greenhouses would intensify the existing agricultural use was irrational.

Furthermore, it concluded, the zoning board also "rationally concluded" that the addition of two structures totaling 6,000 square feet was a change that affected the farm's "open space" within the meaning of the local zoning ordinance. "The task of balancing a farmer's need to increase productivity by constructing improvements against the need to preserve open space for the enjoyment of all is a matter best left to the local zoning board," the Second Department concluded.[4]

## SEQRA

Finally, the Court of Appeals ruling in *Gordon v. Rush*[5] involved an effort by a group of oceanfront property owners in the Town of Southampton to obtain permission from the town and the Department of Environmental Conservation to install steel bulkheads to prevent erosion. The DEC agreed to assume lead agency status, classified the proposed action as unlisted, and conducted a coordinated SEQRA review which afforded all involved agencies, including the town's coastal erosion hazard board of review, the opportunity to participate in the SEQRA review. The board did not contribute to the review process, which resulted in the DEC's issuance of negative declaration, which means no adverse impact on the environment was found.

Thereafter, as part of a related variance application, the board assumed jurisdiction to conduct its own de novo SEQRA review and issued a positive declaration. The property owners challenged that action, and Supreme Court, Suffolk County, annulled the board's determination that it had the authority to conduct a new SEQRA review. The Second Department affirmed, holding that the board was "bound by the DEC's negative declaration, and may not perform [an] independent subsequent SEQRA review."

The Court of Appeals affirmed. It found that the board was bound by the negative declaration issued by the lead agency, the DEC, which had "properly identified the involved agencies at the beginning of the process and conducted an appropriate coordinated review." Finding evidence in the record that the DEC had taken the necessary "hard look" at "the relevant areas of environmental concern," the Court concluded that the DEC's decision to issue the negative declaration was not irrational, an abuse of discretion, or arbitrary and capricious and, consequently, should not be disturbed.

The Court's decision highlights the importance of an involved agency's participation in the coordinated SEQRA review process, and illustrates the consequences of failing to do so. Involved agencies are now on notice that each project is subject to only one SEQRA review, and that they will be bound by the SEQRA determinations of the lead agency. That being the case, involved agencies that wish to have their environmental concerns considered by the lead agency must raise these concerns early in the review process.

1. 2 N.Y.3d 608 (2004).
2. See, also, *Savetsky v. Board of Zoning Appeals of the Town of Southampton*, 5 A.D.3d 779 (2d Dept. 2004) (petition seeking to reverse zoning board's decision granting area variance should have been denied); *Stone Landing Corp. v. Board of Appeals of Village of Amityville*, 5 A.D.3d 496 (2d Dept. 2004) (orders board to review application in light of appropriate factors and standards).
3. __ A.D.3d __, 2004 N.Y. App.Div. LEXIS 10926 (2d Dept., Sept. 20, 2004).
4. See, also, *Huntington Yacht Club v. Incorporated Village of Huntington Bay*, 1 A.D.3d 480 (2d Dept. 2003) (plaintiff's failure to demonstrate that it had a protectable property interest in building permit dooms takings claim).
5. 100 N.Y.2d 236 (2003).

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