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ZONING AND LAND USE

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Special Rules For Special Permits

Special permits¹ are a common technique for allowing a municipality to review a proposed use that is consistent with the community's zoning scheme in order to assure that its operation will not adversely impact the community. Unlike a variance, which is obtained to allow an otherwise prohibited use, a special permit is granted for a use that is permitted by the zoning ordinance, according to standards designed to ensure compliance with a community's planning goals.

The classification of a use as a special permit is tantamount to a legislative finding that the use is in harmony with the general zoning plan and will not adversely affect the neighborhood, provided that certain specified conditions or standards are met. Special permit standards are typically designed to avoid possible negative impacts of a proposed project or to address municipal development concerns such as traffic impacts, noise, lighting or landscaping. Thus, it is not uncommon for municipalities to include automobile service stations,²



drive-through restaurants³ and convenience stores⁴ as special permit uses.

Since a special permit use is deemed to be harmonious with a community's planning objectives, an applicant seeking a special permit has a lesser burden of proof than an applicant requesting a use variance who must demonstrate unnecessary hardship.⁵

While there is no entitlement to a special permit, once a property owner shows that the contemplated use meets the objective criteria articulated in the zoning regulations, a special permit must be granted unless there are reasonable grounds for its denial, supported by substantial evidence.⁶

The recent decision by the Appellate Division, Second Department, in *Matter of Stone Landing Corp. v. Board of Appeals of Village of Amityville*,⁷

underscores the distinction between special permits and variances, and illustrates how they are to be reviewed by the courts.

Compliance With Standards

Stone Landing arose when the petitioners applied for several area variances and a special exception permit in connection with the subdivision of one parcel into two smaller lots, the erection of a single-family dwelling on one of the new lots and the maintenance of an existing two-family dwelling on the other.

The Zoning Board of Appeals of the Village of Amityville denied the application, in part upon a finding that "there was no showing of financial hardship or practical difficulty on behalf of either the applicant or the current owner."

The petitioners sought to annul the board's determination and compel it to issue the variances and special exception permit. Suffolk Supreme Court denied the petition and dismissed the proceeding. The petitioners appealed.

In its decision, the Second Department decided that, contrary to the requirements articulated in the village code, an applicant for a special

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exception permit “need not show financial hardship or practical difficulties,” but only that its application “meets objective criteria articulated in the zoning ordinance, subject to reasonable conditions as a zoning board may impose that are rationally related to the salutary purposes of the ordinance.”

The court then ruled that because the zoning board had based its determination to deny both the special exception permit and the area variances in part on the petitioners’ failure to demonstrate practical difficulties or financial hardship, “it relied upon inappropriate factors,” and its determination thus was “irrational and an abuse of discretion.”

Accordingly, it remitted the matter to the zoning board for a new determination on the application “in light of the appropriate factors and standards.”

Variance of Standards

Not only do boards have relatively limited authority to deny an application for a special permit, but zoning boards of appeal have the power to waive or modify other zoning requirements specific to a special permit, as explained in a recent decision by the New York Court of Appeals.⁸

This case stemmed from the 1992 acquisition by Real Holding Company (RHC) of land within a town’s Highway Business District that had served since the mid-1960s as the site of a gas station, which had closed shortly before RHC’s purchase. After cleaning up the property, RHC opted to develop a new gas station. Toward that end, it sought a special use permit from the town planning board.

RHC, however, was unable to satisfy two provisions of the town code: one that mandated 1,000 feet between a

gas station and the boundary line of certain residentially zoned lands, and one that required 2,500 feet between gas stations. RHC asked the town’s zoning board for variance relief from these two standards, but the board turned it down, opining that it lacked jurisdiction to grant that relief.

The trial court granted RHC’s petition and remitted the matter to the zoning board for further proceedings. The Appellate Division affirmed, and the dispute reached the Court of Appeals.

The Court of Appeals affirmed. It found that since Town Law §274-b(3) authorizes a zoning board to grant variances from zoning regulations “without qualification” a board may grant area variances from special use permit requirements in those cases “where a proposed special use permit ... [does] not comply with the zoning regulations.” Indeed, the Court held, a zoning board may grant such variances “notwithstanding any provision of the law to the contrary.”

Permit Denied

An applicant, of course, will not always obtain a special use permit merely because it requests it. Consider *Matter of Leon Petroleum LLC v. Board of Trustees of Village of Mineola*.⁹

The petitioner in this case sought a special use permit to construct a convenience store at its gas station in the Village of Mineola. The village board denied the application, finding that the proposed use of a convenience store/gas station would be hazardous to the patrons of the petitioner’s facility and to the immediate neighborhood due to the limited size and limited access points of the subject premises.

The village board further found that

there would be an “overintensification” of the land if used as a gas station and convenience store, and that the traffic generated by the proposed use would further congest an overburdened area. Nassau Supreme Court disagreed and granted the petition.

When the dispute reached the Second Department, the court found that there was substantial evidence in the record supporting the village board’s determination that there was insufficient space on the petitioner’s lot to accommodate both a convenience store and a gas station.

According to the Second Department, the village board also reasonably had determined that the traffic generated by the proposed use could further congest an already overburdened area. The appeals court then ruled that the village board’s decision should be upheld.

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1. “Special permits” are sometimes referred to as “conditional uses,” “special use permits” or “special exceptions.”
2. See, e.g., Islandia Village Code 177-64(A).
3. See, e.g., Mineola Village Code §30.31(B)(3).
4. See, e.g., Brookhaven Town Code §85-256.1(C).
5. See, Town Law §267-b(2)(b); Village Law §7-712-b(2)(b).
6. See, e.g., *Matter of J.P.M. Properties, Inc. v. Town of Oyster Bay*, 204 A.D.2d 722 (2nd Dept. 1994).
7. 5 A.D.3d 496 (2nd Dept. 2004).
8. *Matter of Real Holding Corp. v. Lehigh*, 2 N.Y.3d 297 (2004).
9. 309 A.D.2d 804 (2nd Dept. 2003).

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