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Special Permits

Rulings Allow Expansion of Planning Device

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For quite some time, New York courts have recognized that when a local legislative body allowed a use in a particular zone as a special use, it was recognizing the compatibility of that use with the as-of-right uses in the zone, provided certain threshold conditions were met prior to the granting of the special permit and, provided further, that certain other conditions specific to the application were met that would mitigate any adverse impacts that such a use would have upon the neighborhood. The uses frequently subjected to special use permits have been educational and religious uses.

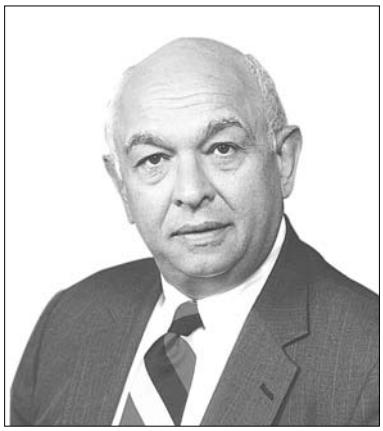
In the early 1990s, the New York State Legislature authorized the Joint Legislative Commission on Rural Resources to develop recommendations for recodifying local zoning laws. In 1992, the Legislature enacted legislation defining and governing approval of special use permits, a zoning device previously unmentioned in state statute despite its frequent use.[1]

Over the past 18 months, the New York Court of Appeals has issued three significant decisions involving special use permits that, to a large extent, redefine this land use tool and permit expansion of special use permits as a planning and zoning device. The Court's three opinions examined the authority of a zoning board of appeals ("ZBA") to grant area variances from special use permit requirements, the rules applicable to renewal of a special use permit, and the standard that an applicant must meet to obtain such a permit.

Local Power

Matter of Real Holding Corp. v. Lehigh[2] arose after Real Holding Corp. ("RHC") acquired a parcel of land within a highway business district in the Town of Wappinger that had served as the site of a gasoline filling station for many years, until it closed shortly before RHC's purchase. After cleaning up the property to the satisfaction of state environmental authorities, RHC opted to develop a new gasoline filling station there.

ZONING AND LAND USE PLANNING



To do so, RHC was obliged by the town code to obtain a "gasoline filling station" special use permit from the town planning board. RHC, however, was unable to satisfy two distance standards for this permit. RHC asked the town's ZBA for variance relief, but the ZBA turned RHC down, opining that it lacked jurisdiction to waive or modify zoning requirements specific to a special use permit. RHC thereafter commenced an Article 78 proceeding to seek annulment of the ZBA's determination and a judgment directing the ZBA to hear and decide its application for area variances. The dispute reached the Court of Appeals.

The ZBA argued that Town Law Sections 274-b(3) and (5) clashed and, at most, established that a ZBA may grant an area variance from general zoning requirements but not from a special use permit requirement unless express authorization to do so had been bestowed by a town board in the town's zoning code. The Court disagreed with that view. It observed that subdivision (3) states that "application may be made to the [ZBA] for an area variance" in those cases "where a proposed special use permit . . . [does] not comply with the zoning regulations." Moreover, it pointed out, a zoning board may grant these area variances "notwithstanding any provision of the law to the contrary."

The Court then noted that subdivision (3) refers to "zoning regulations" without qualification. In the Court's view, nothing in the statute's language suggested that area variances for special use zoning regulations should be treated differently than area variances from general, so-called bulk, zoning requirements. The Court stated that to hold that a ZBA may vary certain zoning provisions only if expressly empowered to do so by the town board overlooked the entire purpose of the ZBA, "which is to provide relief in individual cases from the rigid application of zoning regulations enacted by the local legislative body."

Moreover, the Court found, Section 274-b(3) directs that application for an area variance may be made to a ZBA "pursuant to" Section 267-b, which supplies the procedures for a ZBA to follow when issuing an area variance. Thus, the Court explained, Section 274-b authorizes ZBAs to issue area variances from special use permit requirements, following the statutory procedures applicable to the boards in the exercise of their area variance jurisdiction.

The Court also ruled that Section 274-b(5) did not conflict with subdivision (3), or diminish a zoning board's independent jurisdiction under subdivision (3). As the Court explained, subdivision (5) vests a town board with discretion to empower an "authorized board" to waive any requirement of a special use permit. The waiver authority in subdivision (5) is broader than a ZBA's authority in subdivision (3), which is restricted to granting area variances. In effect, the Court said, subdivision (5) allows a town board to establish one-stop special use permitting if it so chooses. Thus, where a town board exercises its discretion under subdivision (5), an applicant may have two avenues to address an inability to comply with a given requirement in connection with a special use permit, but this overlap does not create discord in the Town Law or render either subdivision (3) or subdivision (5) superfluous.

Real Holding, of course, is a very favorable decision for those seeking special permits. It is a clear indication that conditions that are imposed may not necessarily act as threshold conditions that would bar an applicant from being granted a special use permit or seeking a waiver of use on another condition. This brings the special permit closer to "as-of-right," provided, of course, that the requisite proof has been established. Of course, a local legislative body can avoid having an appointed body such as a ZBA emasculating conditions to a special permit by retaining the special permit power, including the variance power, unto itself.

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Permit Renewal

In July 2005, the Court of Appeals decided *Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*,[3] where it examined a village board's decision not to renew a special use permit. The case stemmed from a 1998 decision by Croton-on-Hudson's village board of trustees to a three year special permit for a solid waste transfer facility operated by Metro Enviro, LLC.

According to the Court, over the three-year period covered by the permit, Metro violated conditions of the permit by exceeding capacity limitations and by falsifying records. Metro also accepted prohibited types of industrial waste on a number of occasions. Metro admitted its violations, paid fines, and, as a direct result of its capacity excesses, lost its bid to increase the facility's capacity.

Metro thereafter applied to renew the permit, but the board rejected its request based on its doubts about Metro's credibility and its concern that Metro had not been forthright in its dealings with the village. Seeking to annul the board's decision, Metro went to court.

Metro argued that because it had admitted its violations, paid fines, and taken action to conform with the permit conditions in the future, the board was wrong in denying renewal of the permit. In essence, Metro asserted that to justify non-renewal, the board had to show substantial evidence not only of violations, but of violations that actually harmed or endangered health or the environment. The Court disagreed.

As the Court explained, a board has discretion in deciding whether to grant a special use permit—and, it stated, the same principle applies to renewal of a special use permit. The Court said that the board did not have to show substantial evidence of actual harm; it was enough that the board found the violations potentially harmful. Indeed, the Court continued, even if no single violation was dangerous in itself, the board was entitled to conclude that the history of repeated, wilful violations created an unacceptable threat of future injury to health or the environment.

The Court acknowledged that there may be instances in which an applicant's violation is so trifling or de minimis that denying renewal would be arbitrary and capricious. Moreover, it stated, denials and non-renewals are different and, where a facility is already in operation and its owner has made an investment, a board should take those facts into account. The Court then pointed out that in this case, however, the board had reviewed "volumes of evidence and opinions" from both Metro's expert and its own. Although Metro's expert said the violations were inconsequential, the board's expert stated, and the board was entitled to conclude, that despite Metro's assurances that it would comply, the facility persistently violated permit conditions designed to protect health and the environment. After noting that "the quantity and character of Metro's violations would have constituted sufficient grounds to deny Metro's renewal application on their own, with or without expert testimony," the Court upheld the board's decision.

Religious Uses

Finally, in *Pine Knolls Alliance Church v. Zoning Board of Appeals of the Town of Moreau*,[4] the Court returned to the application of special use permits to one of the groups that most frequently rely on them: religious institutions. In particular, the Court had to determine how best to balance the needs and rights of a church seeking to expand its facilities in a residential neighborhood against the concerns of local residents who might be harmed or inconvenienced by a proposed construction project.

In this case, the Pine Knolls Alliance Church in the Town of Moreau, in Saratoga County, proposed a major expansion. As a final aspect of the plan, although a driveway already connected the parking lot to Route 32, the church sought to build a second access road about 500 feet to the north of the existing driveway that would assist the flow of traffic between the parking lot and Route 32. The new roadway would be aligned opposite a residential cross street, creating a four way intersection on Route 32.

After conducting a public hearing, the ZBA approved every aspect of the development plan except the church's request to construct the second driveway. It found that the secondary roadway would "present undue and inconvenient impacts to the public welfare including noise and traffic upon the neighboring properties" and would affect "green space" to the extent that these negative impacts "outweigh any perceived benefit to the Church at this time." The ZBA found that the new driveway was unnecessary because the church's traffic needs could be met through minor upgrades to the existing entrance road, such as the removal of a planter, widening the existing driveway to establish two exit lanes and eliminating parking along the exit lanes. The denial of the additional driveway was made without prejudice to the church renewing its application or submitting a new application at a later time should the recommended measures prove to be ineffective.

The church filed an Article 78 proceeding challenging that portion of the determination that denied it permission to construct the secondary roadway. The church argued that the ZBA had impermissibly imposed a requirement that the church establish a "need" for the access road and was therefore arbitrary and capricious.

The Court stated that although educational and religious institutions are presumed to have a beneficial effect on the community, this presumption could be rebutted "with evidence of a significant impact on traffic congestion, property values, municipal services and the like."

This analysis, the Court continued, may result in zoning officials concluding that "a particular educational or religious use may actually detract from the public's health, safety, welfare or morals" and they may deny a special use permit on that basis. The Court added that when negative impacts are not so extreme as to warrant outright denial, mitigating conditions may be imposed to ameliorate the harm provided they do not, by their cost, magnitude or volume, operate indirectly to exclude such uses altogether.

The Court declared that although the church was denied permission to construct a new access road, this was not a denial of permission to expand. The ZBA acknowledged that the expansion project could result in internal traffic concerns, but found that the church could address those concerns in ways other than as proposed. Instead of constructing a new roadway off Route 32, the church was allowed to increase the capacity of its existing driveway. In the Court's view, this was the functional equivalent of imposing mitigating conditions on the grant of an application—a permitted practice so long as such conditions do not by their cost, magnitude or volume, operate indirectly to exclude the use. Concluding that the requirement that the church widen its existing driveway in lieu of constructing a new one was neither so costly or extreme that it undermined the efficacy of the expansion plan, nor did it prohibit the church's religious use of the newly acquired parcel, the Court upheld the decision of the ZBA permitting the expansion in a manner that was less intrusive to neighboring properties.

Conclusion

Although the special permit device is a very flexible tool in the land use area, regulating matters as diverse as churches, gas stations, and schools, a local board generally will be sustained if its decision is based upon substantial evidence in the record. Although this may sound like a boilerplate approach to the matter, it is critical for the practitioner to understand that the record, either for or against the application, must be made before the local board, in terms of real evidence and expert witnesses, rather than in terms of community opposition and political speeches. The courts in all of these matters seem to uphold the local boards far more often than not. The lesson to be garnered from it is that the case must be made for or against the application at the local level because the courts are willing, even in the constitutionally-protected religious area, to accept experts' opinions as to the damage to the health, safety and general welfare, if, of course, it exists. Frequently, expert witnesses are required to opine on the issue. In such a situation, the opponent must produce expert witnesses as required in order to make a strong record. Failure to do so may very well result in a reviewing court accepting the adversary's expert testimony as "unopposed."

1. See, e.g., Town Law §274-b (L 1992, ch 694).
2. 2 N.Y.3d 297 (2004).
3. 5 N.Y.3d 236 (2005).
4. No. 167 (Oct. 20).