New York Law Journal
Long Island Weekly

Tuesday, February 21, 2006

ALM

The 'Day of Decision' Rule

BY ANTHONY S. GUARDINO

Local governments on Long Island and elsewhere throughout the state often change or amend their zoning laws. Certainly, when property owners then file applications for building permits or variances, their requests are governed by the new law. But what law governs applications pending at the time a zoning ordinance is altered?

The answer may be surprising. Under well-established New York precedent, a court will apply the zoning ordinance in existence at the time a decision is rendered, a so-called "day of decision" rule, unless "special facts" are present. Case law, including a substantial number of cases arising in Long Island courts,[1] helps to explain the application of this rule and the special facts exception.

Consider the recent case of *Matter of Berman v. Warshavsky*,[2] which arose after a property owner in the Village of Lawrence sought and obtained approval from the planning board to subdivide a certain parcel of property into three smaller parcels. Other residents commenced a proceeding pursuant to CPLR Article 78 to challenge the planning board's determination. Supreme Court, Nassau County, denied the petition and dismissed the proceeding. The petitioners appealed.

Anthony S. Guardino *is a partner with Farrell Fritz in Uniondale.*

ZONING & LAND USE

The Appellate Division, Second Department, pointed out that the village's zoning provisions provided that no building could be erected upon any lot having a street frontage of less than 150 feet.[3] It added that, at the time of the property owner's application, the village code defined the word "street" as any "public or private road, avenue…and any private driveway used by or giving access to more than two lots."

In granting the application to subdivide, the appellate court continued, the planning board determined that the frontage of certain post-subdivision parcels that abutted the petitioners' right of way satisfied the frontage requirement. However, the Second Department stated, after the Planning Board's grant of subdivision approval, the village amended its code and the word "street" was redefined as "an existing state, county or village road or a road shown upon a subdivision plot duly filed and recorded."

The appellate court then ruled that the Supreme Court had erred in failing to apply the amended definition of the word "street." Accordingly, it held, the property owner was not entitled to subdivision approval. Adding that there were no special facts pursuant to which the former ordinance might still be deemed to be controlling, it reversed the Supreme Court's decision, granted the petitioners' application, and annulled the determination granting the property owner permission to subdivide.

The Second Department reached the same result in another case, *Matter of Marasco v. Zoning Board of Appeals of the Village of Westbury*,[4] where the law was changed while the case was being appealed.

Here, a property owner applied to the Village of Westbury's zoning board of appeals to review the village building official's determination that the owner's proposed use violated the zoning code.

The zoning board upheld the official's determination, but Nassau County Supreme Court remanded the matter and directed the zoning board to grant the permit.

On appeal, the Second Department reversed. It noted that while the appeal was pending, the village code was amended to prohibit the property owner's proposed use for his site.

Accordingly, it held, the property owner was no longer entitled to a building permit as of right.

Given that the petitioner had failed to establish "special facts" indicating that the Village of Westbury had acted in bad faith when it amended the code, which would permit application of the prior zoning ordinance, the appellate court ruled that the Supreme Court's judgment had to be reversed and the determination denying the property owner's application for a permit confirmed.

'Special Facts'

Matter of Pokoik v. Silsdorf[5] illustrates the kinds of "special facts" that will result in application of the prior zoning code. In this case, the petitioners owned a parcel of property with a four-bedroom dwelling in the Village of Ocean Beach on Fire Island.

Several months after the petitioner applied for a building permit for the purpose of adding two bedrooms, a bath, and a den to his existing structure, the village's mayor advised him that his application was rejected because he had previously violated the one-family zoning restriction by renting rooms in a residential district without a license. The mayor further stated that the petitioner had not explained to the satisfaction of the village why he required additional rooms.

The petitioner revised his plans for the alteration of his home and applied for a permit to construct an addition of one bedroom, a bath, a den, and a deck. The papers were properly submitted to the building inspector but, two months later, the mayor advised the petitioner that the inspector found this application to be substantially the same as the previous one and declared that no action concerning it would be taken.

After Suffolk County Supreme Court ordered the building inspector to act on the application, the building inspector denied it—nearly three months after the court decision and nearly one year after the second application was made.

The petitioner appealed to the zoning board of appeals, but two days before the board notified the petitioner of the date of his hearing, the village amended its zoning ordinance to limit the size of a one-family dwelling to not more than four bedrooms. The ordinance became effective well in advance of the petitioner's appeal hearing.

The board then denied the petitioner's application. In its decision, the board took cognizance of the fact that petitioner had been guilty of violating the zoning ordinances of the village. It also noted the recent amendment limiting a one-family dwelling to no more than four bedrooms, adding that the amendment was evidence of the attempt by the village to limit the growth and development of the community. The dispute reached the New York Court of Appeals.

Under New York law, the special facts that will permit an application to be processed under the law that existed at the time the application was made can take various forms.

This case, the Court found, fit into the "special facts" exception so that the zoning ordinance, as amended, did not apply "and the arbitrary action of the board may not prevail."

As the Court explained, the petitioner demonstrated that he was entitled to the permit as a matter of right by full compliance with the requirements at the time of the application and that proper action upon the permit would have given him time to acquire a vested right.

The Court continued its analysis by noting that, if action had been taken within a reasonable time after the petitioner resubmitted his application to the building inspector, he would have had a year in which to begin construction before the effective date of the amendment.

"The petitioner was denied this right by the unjustifiable actions of the village officials, and by an abuse of administrative procedures," the Court emphasized. It concluded that it seemed "clear from the record" that the village had improperly delayed reviewing the application and the board presented unsatisfactory reasons for denial, resulting in the disregard of the petitioner's rights.

It then found the action of the board to be arbitrary, and ordered that the relief requested by the petitioner be granted.

Other special facts that allow the prior law to apply to a pending application relate to the doctrine of vested rights. The Court of Appeals has recognized that an owner will be permitted to complete a structure or development, which an amendment has rendered nonconforming, where the owner has undertaken substantial construction and substantial expenditures prior to the effective date of the amendment.[6]

Under New York law, the special facts that will permit an application to be processed under the law that existed at the time the application was made can take various forms.

Clearly, however, in the absence of such special facts, the law in effect on the day of decision will govern.

1. See, e.g., *Matter of Greene v. Zoning Board of Appeals of Town of Islip*, 2006 N.Y. App. Div. Lexis 508 (2d Dep't Jan. 17, 2006).
2. 256 A.D.2d 334 (2d Dep't 1998).
3. Village of Lawrence Code §212-13(D).
4. 242 A.D.2d 724 (2d Dep't 1997).
5. 40 N.Y.2d 769 (1976).
6. See, e.g., *Matter of Ellington Construction Corp. v. Zoning Board of Appeals*, 77 N.Y.2d 114 (1990); see also, *Matter of Berman v. Warshawsky*, supra.