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Separating the Planning And Zoning Processes

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ZONING & LAND USE

Municipal planning boards and zoning boards of appeals have different—and separate—responsibilities under New York law and practice. For example, with respect to the subdivision process, Town Law §277 sets forth what a planning board may require, and what is required of a planning board, before it may approve a subdivision of land.

Subsection 3 of that section makes it clear that, where a zoning ordinance or local law has been adopted by a town, the lots must at least comply with those requirements. Subsection 6 explains that, if one or more lots do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance, and that in reviewing such application, the zoning board of appeals has to ask the planning board for a written recommendation concerning the proposed variance. However, the zoning board of appeals must make the decision on the area variance.

Indeed, under Town Law, a town zoning board of appeals is exclusively empowered to grant or deny zoning variances, and that power may not even be circumvented or vitiated by permitting a town board to control the defense of zoning board determinations regarding a requested variance. Accordingly, when a CPLR Article 78 proceeding has been brought against a zoning board of appeals to challenge the denial of a variance, such a proceeding may not be settled by the town board, nor may the town board move to withdraw an appeal in that proceeding on behalf of the zoning board. The town board, in such a proceeding, is a separate entity from the zoning board and may not eviscerate determinations of the zoning board or control the course of litigation against it.[1]

By the same token, the statute that authorizes a town board to appoint a zoning board of appeals—an event that must occur in a town that has a zoning law[2]—only gives that board of appeals appellate jurisdiction.[3] The power to control subdivision of land is not a power of a zoning board of appeals.[4] Similarly, town boards and planning boards do not have jurisdiction to grant area variances, since only a zoning board of appeals can grant such relief.[5]

Proper Process

A number of years ago, in *McEnroe v. Planning Board of the Town of Clinton*,[6] Dutchess County Supreme Court issued an opinion that explained the manner in which the planning and zoning process properly functions between a planning board and a zoning board of appeals of any town under New York state law in a subdivision situation.

In that case, the court pointed out that the "discretionary powers" granted to a board of appeals under Town Law were not granted to the planning board. Moreover, it explained, the authority of a planning board, unlike a zoning board of appeals, is "strictly limited" by §§276 and 277 of the Town Law. These sections specify the criteria upon which planning boards must rest their decisions, the court noted. It then ruled that an examination of the board's minutes showed that it had exceeded its statutory power in this case.

A substantial portion of the hearing before the board was taken up with the offering of evidence of the relative costs of lots in various forms of development and subdivision. The thrust of this proof was to establish the economic injury that the developer would suffer if he were required to subdivide in accordance with the bulk requirements of the zoning ordinance. The petitioners in this proceeding, who appeared as objectors at the hearing, made some attempt to rebut proof of economic impact that the developer attempted to show.

The court said that, although it was difficult to tell from the planning board's decision just what it was based upon, it seemed to be a decision on economic hardship, "far afield" from the planning board's proper function. As the court explained, in approving a plat, a planning board is not authorized to waive zoning restrictions.[7] Neither the filing of a map by a property owner nor its approval in any form not encompassing specific consideration of the classification of the town board could change the zoning or create an estoppel that would work such change, the court ruled.

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The Brookhaven Case

Recently, a Suffold County Supreme Court applied these principles in a case that arose in the Town of Brookhaven.[8]

The petitioner was the owner of a parcel of property in Brookhaven. The property was approximately 37,000 square feet in size, located in the B-1 Residence Zoning District, which requires lot sizes of no less than 20,000 square feet. The petitioner sought to subdivide her property into two lots, one containing the existing dwelling, which would retain 22,709 square feet and the unimproved portion, which would contain 14,367 square feet.

The petitioner made an application to the Brookhaven zoning board of appeals. The board conducted a hearing on April 27, 2005, even though it was informed that the Brookhaven town board had adopted an amendment to the town code that allegedly prohibited the zoning board from acting on variances concerning minor subdivisions before review and determination by the planning board.

After the hearing, the zoning board adjourned the matter to May 20, 2005, on which date it marked the application "Held Indefinitely."

In the interim, the planning board held a hearing regarding the petitioner's application on May 16, 2005. The petitioner's representative demonstrated that the proposed unimproved lot would conform to 64 of the 84 surrounding lots, and was in keeping with the existing development of the area, the character of which had been fully established by existing development patterns.

One member of the community spoke in opposition to the application, and the Brookhaven planning commissioner advised the planning board that it was its responsibility to render a decision as to the proposed subdivision, any issues as to required variances being the realm and domain of the zoning board.

The record indicated that the planning board did, in fact, discuss and consider matters that would require variances of the town zoning code requirements, which apparently impacted on its determination.

Apparently, after the public hearing portion of the meeting, the planning board adopted a determination denying the application, "with staff comments as findings," according to the transcript. Thereafter, a more formal determination was prepared, dated May 16, 2005, including those staff comments as the findings of the planning board, which was filed with the town clerk's office on May 20, 2005, and sent to the petitioner on May 27, 2005.

Proposal Invalid

The court found the town's process to be invalid because it usurped the natural flow created for zoning applications by state law. Simply put, the court found that the town board could not "revers[e] the process" between the zoning board of appeals and the planning board, requiring the planning board to render its determination of an application containing requests for relief that require variances, first, when, by law, it was required to turn down the application because it did not comply with the town zoning code, thus depriving the zoning board of appeals its exclusive jurisdiction to determine the issue of granting variance, with recommendations of the planning board, only, as per Town Law §277(6).

The reversal of process adopted by the town board, requiring review first by the planning board, with its limited authority that specifically excluded approval of applications that did not specifically conform to the zoning code, directly violated the very purpose of the requirement for a zoning board of appeals, the court continued. The court observed that the most significant danger in reversing the process, and asking the planning board to review an application that required variances, was that the planning board would, as it did in this case, consider the variances in reaching its determination.

"The applicant is no less entitled to such determination within the parameters of existing law," the court explained, and the planning board "is likely to make mistakes in applying that law" because it is not, nor is it required "to be learned in the specifics of the proper laws to be applied."

Moreover, the court explained, this danger could result in a court granting the relief denied by the planning board because of the prejudice suffered by an applicant by "the unknowingly arbitrary, capricious and unlawful applications of those requirements" by the planning board.

The court noted that in this case, the planning board (seemingly attempting to do the job of the zoning board of appeals at the direction of the town board), failed to make specific findings that could be reviewed, did not comment on the nature and character of the area, did not offer testimony to contradict the testimony of petitioner's witness, and failed to follow the direction of the town's planning director that it was its only function to deal with the subdivision and not its function to deal with the variances.

The court concluded that the town board could not "reverse, confuse, contort or otherwise confuse the proper planning and zoning process." It then granted the petitioner's application.

Conclusion

Towns may make efforts to centralize planning decisions or to engage in townwide decision making, but they must do so within the constraints of state law. Brookhaven's actions, like those of the Town of Clinton several decades ago, may have been well intentioned, but they could not stand given the dictates of the state's zoning enabling statutes.

1. See, e.g., *Commco, Inc. v. Amelkin*, 62 N.Y.2d 260 (1984).
2. See Town Law §267(2).
3. See, e.g., *Barron v. Getnick*, 107 A.D.2d 1017 (4th Dept. 1985).
4. See, e.g., *VanDeusen v. Jackson*, 35 A.D.2d 58 (2d Dept. 1970).
5. See, e.g., *Jaffe v. Burns*, 64 A.D.2d 691 (2d Dept. 1978).
6. 61 Misc.2d 937 (Sup. Ct. Dutchess Co. 1969).
7. Town Law §277.
8. *Matter of Deon v. Town of Brookhaven*, 12 Misc.3d 1196A (Sup. Ct. Suffolk Co. 2006).