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ZONING AND LAND USE PLANNING

Zoning Boards Cannot Ignore Prior Decisions

By **Anthony S. Guardino**

Several years ago, Benmar Properties, LLC, purchased real property located in a residential zoning district within the Village of Mamaroneck in Westchester County. The property included a single family residence. Benmar applied for a building permit and a subdivision of the property to build a second single family residence; it also applied for an area variance in connection with the proposed subdivision. After a public hearing, the village's board of appeals granted the application for the area variance and Benmar was granted a building permit to build the new single family residence on the new lot on the property.

A number of individuals challenged that decision on the ground that it was arbitrary and capricious as the board of appeals had failed to properly distinguish Benmar's application from a virtually identical application that the board of appeals had denied about 15 years earlier. Supreme Court, Westchester County, granted the petition and annulled the board of appeals' determination, and Benmar appealed.

The Appellate Division, Second Department, affirmed in a recent decision, *Matter of Lucas v. Board of Appeals of Village of Mamaroneck*.[1] The appellate court explained that where, as here, a zoning board was faced with an application that was substantially similar to a prior application that had been previously determined, the zoning board was required to provide a rational explanation for reaching a different result. In this case, it ruled, the Westchester County Supreme Court had properly determined that the reasons cited by the board of appeals to differentiate Benmar's application from the application it had denied in 1991 "did not support a determination that there was a material change in circumstances sufficient to justify the different result." As a result, the appellate court concluded, the Westchester Supreme Court properly held that the board of appeals' determination should be annulled as arbitrary and capricious for its failure to follow its 1991 precedent.

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The General Rule

New York law has long provided that a decision of a zoning board or other administrative agency that neither adhered to its own prior precedent nor indicated its reasons for reaching a different result on essentially the same facts was arbitrary and capricious and mandated reversal—even if there was otherwise evidence in the record sufficient to support the determination. More than two decades ago, in *Matter of Charles A. Field Delivery Service Inc.*,[2] the New York Court of Appeals explained the rationale for the rule.

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The Court reasoned that "stare decisis" was no more an inexorable command for administrative agencies than it was for courts, and that administrative agencies therefore were free, like courts, to correct a prior erroneous interpretation of the law by modifying or overruling a past decision. Moreover, the Court continued, administrative agencies were free to determine how disputed facts were to be decided, judging credibility and drawing reasonable inferences to resolve contested questions of fact.

The Court declared that the policy reasons for consistent results, given essentially similar facts, were largely the same whether a proceeding was administrative or judicial: to provide guidance for those governed by the determination made; to deal impartially with litigants; to promote stability in the law; to allow for efficient use of the adjudicatory process; and to maintain the appearance of justice. The Court stated that the "underlying precept" was that in administrative, as in judicial, proceedings justice demanded that "cases with like antecedents should breed like consequences."

From these policy considerations, the Court reasoned that it followed that when an agency determined to alter its prior stated course, it had to set forth its reasons for doing so. Unless such an explanation was furnished, a reviewing court would be unable to determine whether the agency had changed its prior interpretation of the law for valid reasons, or had simply overlooked or ignored its prior decision. Absent such an explanation, the Court held, failure to conform to agency precedent therefore required reversal on the law as arbitrary—even if there was in the record substantial evidence to support the determination made.

Same Property

The rule has been applied quite often, including in cases involving the same property. For example, *Matter of Campo Grandchildren Trust v. Colson*[3] arose when the owner of a 56,136-square-foot parcel of land in Mt. Sinai, in the Long Island Town of Brookhaven, sought area variances that,

in effect, modified area variances that had been previously approved in connection with the parcel. The property owner sought the variances to subdivide the parcel into three substandard nonconforming lots and to develop the proposed lots by constructing a dwelling on each.

The zoning board of appeals denied the application, acknowledging that it had previously granted a similar application submitted by the property owner's predecessor-in-interest pertaining to this property. The zoning board found that due to "changed circumstances," the zoning board was not bound to adhere to its prior grant as the newer application contained "substantially different relief and changed circumstances than the prior application."

After the property owner commenced an article 78 proceeding to review the zoning board's determination, Supreme Court, Suffolk County, denied the petition and dismissed the proceeding. The Second Department, however, reversed that judgment, granted the petition, and annulled the zoning board's determination.

The Second Department found that the property owner had established that the zoning board lacked a rational basis for reaching a different conclusion on its application on substantially the same facts that were before it several years earlier. Therefore, it held, the zoning board's determination was "arbitrary and capricious," and the Supreme Court should have annulled the determination and remitted the matter to the zoning board to approve the variances and subdivision application.

Different Property

Courts also apply the rule in cases involving different parcels of property. For instance, in *Matter of Mobil Oil Corporation v. Village of Mamaroneck Board of Appeals*,4 the petitioner applied for an area variance to erect a canopy over its three gas-pumping islands. The Village of Mamaroneck Board of Appeals branded the petitioner's difficulty as self-created because, when it purchased the property, it knew of two previous denials of variances for canopies for this property.

The Second Department found that reasoning to be irrational, noting that the petitioner had applied for the area variance only after the board of appeals evinced a willingness to grant such an application when it granted a variance permitting the Shell Oil Company to erect a canopy at its gas station in an identically zoned C-1 district on Mamaroneck Avenue adjacent to a residential district. Thus, the Second Department ruled, the prior denials to the petitioner's predecessors were not relevant as evidence of the board of appeals' "attitude" toward the petitioner's application.

In addition, the Second Department reasoned, the board of appeals had not properly distinguished its prior determination granting an area variance to Shell. The appellate court observed that the board of appeals in the Shell case had expressly stated that the relief it granted there would be precedent for 10 other gas stations, including the petitioner's, located within the municipality. Finally, in granting Shell's variance, the board of appeals disclaimed expertise to determine the minimum size and location for a canopy, and deferred to the Board of Architectural Review and Planning Board as to the dimensions of Shell's canopy. Yet, the Second Department pointed out, when the board of appeals denied the petitioner's application, it opined that the petitioner's canopy would be much larger than Shell's canopy. It also distinguished Shell as a solely self-service gas station whereas one third of the petitioner's pumps were devoted to full service. This distinction was "not rational," the Second Department held, noting that the canopy was necessary to protect customers equally in both operations. In view of the errors committed by the board of appeals, the Second Department concluded that it could not be said that it had appropriately distinguished the Shell precedent to satisfy its "quasi-judicial obligations."

Once presented with a decision of a prior similar application, the board can choose to follow its prior precedent, or it must set forth reasons to justify a different result. If the board fails to do so, its decision will be viewed as arbitrary and capricious, and will be subject to invalidation by the courts.

Satisfactory Explanations

Of course, not every similar situation will be sufficient for a court to find that a zoning board's decision was arbitrary and irrational. In *Matter of Conversions for Real Estate, LLC v. Zoning Board of Appeals of Inc. Village of Roslyn*,5 a village zoning board of appeals denied the petitioners' application for a parking variance. The petitioners' article 78 proceeding was dismissed by Supreme Court, Nassau County, and the petitioners appealed.

The Second Department affirmed, holding that the denial of the petitioner's application for a parking variance was not illegal, arbitrary, capricious, or an abuse of discretion. The appellate court explained that the petitioners had failed to establish the existence of earlier determinations by the zoning board with sufficient factual similarity to their application so as to warrant an explanation from the board.

Finally, *Matter of Nozzleman 60, LLC v. Village of Cold Spring Zoning Board of Appeals*6 illustrates what a zoning board must find to be able to distinguish prior decisions. In this case, the Village of Cold Spring Zoning Board of Appeals confirmed the village building inspector's denial of the petitioner's application for a building permit. Supreme Court, Putnam County, granted the petition and directed the zoning board to direct the building inspector to issue the building permit, but the Second Department reversed.

The Second Department acknowledged that the zoning board's determination confirming the building inspector's decision to deny the petitioner's application for a building permit would be arbitrary and capricious if the zoning board did not follow prior precedent and failed to set forth its reason for reaching a different result on essentially the same facts. However, it continued, the zoning board "did not follow prior precedent" in making its determination. Indeed, before the petitioner's application, the zoning board had, on more than one occasion, applied the "R-1" zoning district's dimensional requirements to lots within "I-1" zoning districts that had single family houses. However, the Second Department stated, in denying the petitioner's application to construct a one family house on a lot within an I-1 zoning district, the zoning board set forth a "rational" and "satisfactory" explanation for departing from the prior precedent. Although, the zoning board had in the past applied the R-1 zoning district's dimensional requirements to lots within the I-1 zoning districts in violation of the village's zoning code, it claimed to have done so mistakenly, and it was "free…to correct a prior erroneous interpretation of the law." The zoning board was entitled to "refuse to duplicate" the mistake and was "not bound to perpetuate" its prior error, the Second Department concluded.

When presenting a variance application, an applicant should attempt to identify all cases with sufficient factual similarities that have been decided by the zoning board. These decisions should be presented to the board as part of the applicant's case, and the nature and extent of the similarities should be adequately explained. Once presented with a decision of a prior similar application, the board can choose to follow its prior precedent, or it must set forth reasons to justify a different result. If the board fails to do so, its decision will be viewed as arbitrary and capricious, and will be subject to invalidation by the courts.

1. 57 A.D.3d 784 (2nd Dep't 2008).
2. 66 N.Y.2d 516 (1985).
3. 39 A.D.3d 746 (2nd Dep't 2007).
4. 293 A.D.2d 679 (2nd Dep't 2002).
5. 31 A.D.3d 635 (2nd Dep't 2006).
6. 34 A.D.3d 682 (2nd Dep't 2006).