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ZONING AND LAND USE PLANNING

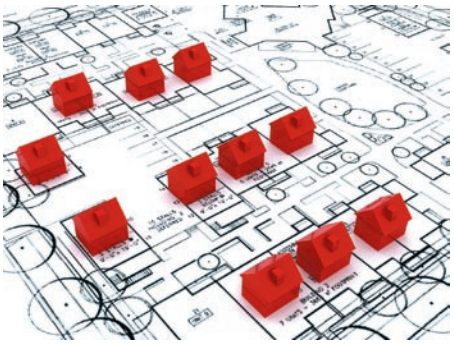
Zoning Boards May Weigh Deceitful Conduct, Panel Rules

By **Anthony S. Guardino**

It has been almost 20 years since the New York State Legislature amended both the Town and Village Laws to bring a measure of statewide consistency to the variance application and review process. Since then, when making determinations on applications for area variances, for example, zoning boards of appeals have been under an obligation to "weigh the benefit of the grant to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted"[1] and to consider five specific factors[2] set out in the amended statutes.[3]

The statutory factors do not include "misrepresentations" or "deceitful conduct" by the applicant, although prior to the adoption of these amendments to the Town and Village Laws, the Appellate Division, Second Department, had ruled that deliberate misrepresentations and deceptions by a municipal applicant, standing alone, permitted the denial of requested variances. For example, the 1978 decision of *Matter of Ostroff v. Sacks*[4] involved a homeowner's representation to a local zoning board that a kitchen to be installed on the second floor of his single family residence, in a single family residential zone, was to be the sole kitchen on the premises. Thereafter, it was learned that the homeowner had installed kitchens on both the first and second floors of the premises, which were equipped with separate entrances. The Second Department upheld the denial of a subsequent application for an area variance, ruling that because the homeowner had engaged in subterfuge during his initial application, he was estopped from having his subsequent application for an area variance approved.

In addition, in the 1983 case of *Matter of Holy Spirit Assn. for the Unification of World*



Christianity v. Rosenfeld,[5] the Unification Church of Reverend Sun Myung Moon sought a special use permit for a training and recruitment center for the church. While the application for a special use permit was pending before the town's zoning board, the church used the property for workshops, retreats, and seminars in violation of applicable zoning regulations, contrary to representations affirmatively made at the same time to the zoning board. Additionally, while the church had represented to the zoning board that no more than three persons unrelated by blood or marriage would reside at the property while the application was pending, an inspection of the site revealed no fewer than 12 beds made up for sleeping. The Second Department upheld the denial of the special use permit application on the ground that misrepresentations made by the church during the pendency of the zoning application properly permitted the zoning board to infer that the church would not comply with conditions imposed on its proposed use and that "the [c]hurch's deceit, in and of itself, justified denial of the special use permit."

Recently, the Second Department had occasion to consider, given the amendments to the Town and Village Laws, whether ongoing and deceitful representations by a variance applicant during earlier interaction with a planning board, and with a zoning board itself, permitted the denial of requested area variances on that ground alone. In *Matter of Caspian Realty Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*,[6] the appellate court formally rejected the decisions in *Ostroff* and *Rosenfeld*, explaining that they pre-dated the amendments to the Town and Village Laws, and that those amendments established a specific standard for zoning boards to use when making a decision about a variance request. However, the Second Department also clearly declared that an applicant's deceitful conduct may form the basis for the denial of a requested area variance if that conduct and other balanced considerations fall within the five- factor statutory test. The Appellate Division's decision makes it clear that a zoning board of appeals certainly may consider such actions when deciding whether to grant a variance application—and that such conduct will, as a practical matter, weigh heavily against an applicant.

Background

The *Caspian* case arose in 2000, when Caspian Realty Inc., applied to the planning board of the upstate New York town of Greenburgh for site plan approval of a proposed furniture store, with a main floor and a cellar. The dimensions of the proposed showroom were to be 6,208 square feet, equal to the square footage of the main floor. The square footage represented a Floor Area Ratio ("FAR") of .134, which was within the .135 FAR permitted by the Greenburgh town code.[7]

During the planning board's review of the application, Caspian was asked how it intended to use the cellar. In response, Caspian advised

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that the cellar would be used for storage and mechanicals only; that was significant, as any use of the cellar for retail purposes would have caused the premises to exceed the maximum permissible FAR. Moreover, a retail use of the cellar would have necessitated a significant parking variance.

After Caspian opened its furniture store, the town charged it with violating the town's zoning ordinance by operating a display area in the cellar contrary to the certificate of occupancy. In response, Caspian filed an application for two area variances. One variance sought to allow an increase of the FAR in contemplation of the cellar's continued use as retail space. The second variance was to reduce the required off-street parking from 62 spaces, as would be required with the retail use of the cellar, to 33 spaces. In its statement in support of the variance application, Caspian represented that it had been "unaware that it could not utilize the basement for retail sales."

The town's zoning board of appeals denied Caspian's application. It determined that Caspian had continuously deceived the town as to the intended use of the cellar, such that the benefit of granting the variances was outweighed by the detriment that would be caused to the town by allowing a diminution of respect for its planning, building, and tax laws. The board found that the retail use of the cellar burdened neighboring property owners in terms of noise, truck movement, and traffic tie-ups; that the variance requests were substantial, as they represented a 100 percent increase in permissible FAR and a 50 percent decrease in permissible parking; and that Caspian's need for the variances was self-created by its deceptive conduct.

Caspian went to court. Supreme Court, Westchester County, determined, as a matter of fact, that Caspian had deceived the town regarding the intended use and purpose of the cellar. Nevertheless, the Supreme Court determined that deception was not an enumerated statutory factor of Town Law §267-b(3) for granting or denying area variances. It then held that the board's focus on Caspian's misrepresentations had prevented it from properly assessing the five statutory factors that were expressly set forth in Town Law §267-b(3). On that basis, the Supreme Court annulled the board's determination and remitted the matter to the board for reconsideration of Caspian's application. The board appealed, and the Second Department reversed.

Appellate Ruling

In its decision, the Second Department first ruled that Caspian had, in fact, undertaken a concerted effort to mislead the town as to the purpose and use of the cellar, both before and after the issuance of the town's site plan approval and its issuance of certificates of occupancy. The appellate court then considered the legal effect of Caspian's deception upon its area variance application.

The Second Department decided that the standard set forth in Town Law §267-b(3) was "exclusive" and precluded zoning boards from considering any factors not recited there. It pointed out that the New York Court of Appeals had explained that the legislature intended to replace an earlier, confusing "practical difficulty" standard with a more consistent statutory scheme that weighed the benefits to the applicant against the detriment to the community, in addition to other express statutory factors.[8] Accordingly, the Second Department declared, to the extent that *Ostroff* and *Rosenfeld* could be construed as holding that an applicant's misrepresentations to a zoning board provided a sole basis for denying an area variance, such cases could no longer be considered viable.[9] However, it then considered the factors contained in the town law—and it upheld the Greenburgh board's decision denying Caspian's application.

The Second Department first examined the "primary consideration" of the statute: the benefit to the applicant weighed against any adverse impact upon the community. It noted that the board had concluded that any benefit to Caspian in permitting it to use the cellar as a retail showroom was outweighed by the detriment that would result from permitting Caspian "to successfully mislead planning, building, and tax authorities." The appellate court simply stated that it took "no issue" with the board on this point.

> Following this decision, it is clear that applicants who intentionally mislead local zoning boards do so at great risk to their integrity, and to their variance applications.

After observing that the requested variances were substantial (one of the five factors), the Second Department agreed with the Greenburgh board that Caspian's difficulties were self-created by virtue of its using the cellar of the building as a showroom without seeking or obtaining the required municipal approvals. It further agreed with the board that Caspian's self-created difficulties represented a "particularly compelling statutory factor, given its repeated and documentable misrepresentations."

The Second Department also found that the board had addressed the factor in Town Law §237-b(3) requiring that the variance applicant consider feasible alternatives that might alleviate the need for the variance, noting that the board found that the cellar could be put to an alternative use, as storage, which was consistent with the plans that were originally approved by the town. It should be noted that the Second Department ruled that not all of the statutory factors favored the denial of Caspian's area variance application, finding that the board's determination that the proposed variances would adversely affect the physical or environmental conditions of the neighborhood was unsupported by the record.

In sum, the Second Department found that the board's decision denying Caspian's requested area variances was neither arbitrary nor irrational, and therefore had to be upheld. It emphasized that Caspian's requests were significant and its difficulties self-created, in that Caspian had "designed and used its basement as a showroom knowing that doing so was in violation of local zoning regulations."

Conclusion

On its face, the Second Department's *Caspian* opinion clearly rejected the rule that an area variance applicant's bad deeds, in and of themselves, could serve as the basis for a denial of the applications. However, the appellate court also made it clear that that conduct could be considered significant and compelling to the extent it inextricably related to certain of the enumerated statutory factors, such as whether the benefit of a requested variance was outweighed by the adverse impact that might inure to the town and its ability to enforce the law in future cases if it were to grant an area variance to an applicant who had misled municipal authorities throughout the application process. Following this decision, it is clear that applicants who intentionally mislead local zoning boards do so at great risk to their integrity, and to their variance applications.

1. *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608 (2004).

2. The five factors are: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

3. See Town Law §267-b(3); Village Law §7-712-b(3).

4. 64 A.D.2d 708 (2d Dep't 1978).

5. 91 A.D.2d 190 (2d Dep't 1983).

6. 2009 N.Y. Slip Op. 06837 (2d Dep't Sept. 29, 2009).

7. The FAR was determined by dividing the proposed retail space of 6,208 square feet by the lot area of 46,320 square feet.

8. *Matter of Cohen v. Board of Appeals of the Vil. of Saddle Rock*, 100 N.Y.2d 395 (2003).

9. The Second Department noted that the Greenburgh board cited *Matter of Pioneer-Evans Co. v. Garvin*, 191 A.D.2d 1026 (4th Dep't 1993), as authority that deceptive conduct to a zoning board, standing alone, provided sufficient reason to deny the grant of a special use permit, notwithstanding the prior enactment of Town Law §267-b(3). The Second Department noted that Town Law §267-b(3) became effective July 1, 1992 (see L 1991, ch 692), while *Pioneer-Evans* was decided on March 12, 1993. The Second Department added, however, that *Pioneer-Evans* has "never been cited for that precise legal proposition since 1993." It then stated that, considering that *Pioneer-Evans* involved a zoning board's determination dated Feb. 19, 1992, the Fourth Department's decision "may have been based upon law that preceded the enactment of Town Law §267-b(3)." Moreover, it pointed out, *Pioneer-Evans* involved the denial of a special use permit (see Town Law §267-b[2]), which did not implicate Town Law §267-b(3), the statutory section relevant in the *Caspian* case. As a result, the Second Department declined to follow *Pioneer-Evans* under the circumstances presented in *Caspian*.