New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 18
WEDNESDAY, JULY 27, 2011

ZONING AND LAND USE PLANNING

Protest Petitions: Avoiding The 'Three-Fourths Rule'

By
Anthony S. Guardino

Local governments frequently amend or change zoning regulations. In the vast majority of instances, approval can be, and is, granted by a simple majority vote of a town or village board. Provisions in the N.Y. Town Law[1] and Village Law,[2] however, can trigger a requirement necessitating the affirmative vote of at least three fourths of the members of the governing board to approve a zoning change. Although that certainly can make it difficult, if not impossible, for developers or other property owners to obtain the zoning relief they seek, there may be steps that they can take to avoid application of the three-fourths rule.

Town Law §265(1) (as well as corresponding Village Law §7-708(1)) acknowledges that towns may amend zoning regulations, restrictions, and boundaries from time to time. Section 265(1) confirms that any such amendment can be effected by a simple majority vote of the town board. It then provides, however, that any such amendment requires the approval of at least three fourths of the members of a town board "in the event such amendment is the subject of a written protest, presented to the town board" and signed by any one of the following three categories of local property owners:

(a) the owners of twenty percent or more of the area of land included in such proposed change;

(b) the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or

(c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.

Protest petitions can be an important tool for opponents of rezoning applications, although developers may be able to insulate their projects by understanding the law's details.

Generally speaking, there has been little controversy over the first category: owners of twenty percent of the affected property. Numerous courts, however, have interpreted and applied the specific provisions in the other two categories.

Identifying Petitioners

Determining the validity of a protest petition first requires the computation of the total area of land subject to the amendment or the total area for which owners are eligible to sign the protest petition under each of the three categories. Thereafter, the percentage of the applicable area of land that is owned by the signers of the petition must be calculated.

One case, *Matter of Biedermann v. Town of Orangetown*,[3] reached the Appellate Division, Second Department, after Pearl River Shop-Rite Associates Inc., purchased a parcel of land, designated as lot 47, that was adjacent to Shop-Rite's existing supermarket in Pearl River. Lot 47 was split-zoned between the "retail commerce" and "general residential" zones. Shop-Rite asked the Orangetown town board to rezone lot 47 entirely to retail commerce. After a public hearing on the request, a property owner submitted a written objection that stated that he owned more than 20 percent of the land immediately adjacent to lot 47 and within a 100-foot radius of that lot, and, therefore, the resolution for a change of zoning required the approval of at least three fourths of the board's members. The town board, by a vote of 3 to 2, approved the application for a change in zoning, and the property owner went to court.

As the court explained, the parties agreed that the property owner owned land adjacent to lot 47, and that his contention would be valid if he owned 20 percent or more of the area of land "immediately adjacent to" and "extending 100 feet" from lot 47. The court then explained that the total amount of land adjacent to lot 47 (excluding the area lying in the street) was about 58,600

ANTHONY S. GUARDINO *is a partner with Farrell Fritz in Uniondale, Long Island. He can be reached at aguardino@farrellfritz.*

square feet. Of that figure, the property owner owned about 12,200 square feet, which constituted slightly over 20 percent of that total. Therefore, the court ruled, the property owner's contention was valid, and the town board's vote was insufficient to pass the amendment because at least 75 percent, or the vote of four of the five board members, was necessary for approval of the amendment.

"Directly Opposite"

In most cases, a computation of the area within a 100-foot perimeter adjacent to or across the street from the property affected by the proposed zone change is a simple, straight forward exercise. However, peculiar scenarios can raise difficult factual issues that may affect a property owner's standing to sign a protest petition, such as where there is a substantial intervening area between the protest petitioner's land and the land to be rezoned.

For instance, in *Webster Assoc. v. Town of Webster*,[4] the Supreme Court, Monroe County, invalidated a protest petition after determining that the land of one of the signers of a protest petition who was opposed to a rezoning to allow a shopping mall did not fall within the third category of potential protesters, that is, being directly opposite the land subject to the proposed zone change, extending 100 feet from the street frontage of such opposite land. The court found that the protest petitioner's property was separated from the proposed mall site by two expressway frontage roads, an embankment, and a 200-foot wide grassy median, which placed the protester's property between 415 and 500 feet away from the mall site. It also applied ordinary dictionary definitions of the words "directly" and "opposite" to conclude that the phrase "directly opposite," as used in Town Law §265(1), means "immediately across from without anything intervening." The court held that because of the substantial intervening area, the protest petitioner's land would not be significantly affected by the zoning change and did not fall within the category of property intended to be protected by Section 265(1) of the Town Law.[5]

The Buffer Option

An option that a growing number of developers and property owners use to limit the effectiveness of protest petitions is "buffer zoning," i.e., leaving the zoning of a strip of property unchanged to limit the ability of neighboring property owners to fall within any of the categories of Section 265(1). Courts in New York, and elsewhere, have recognized that a property owner may create a buffer zone on its own land between that portion of the property to be rezoned and the land of otherwise adjacent property owners as a means of insulating the rezoning from a protest petition and a supermajority requirement.

Provisions in the N.Y. Town Law and Village Law can trigger a requirement necessitating the affirmative vote of at least three fourths of the members of the governing board to approve a zoning change.

The benefits of creating a buffer zone are illustrated in *Matter of Eadie v. Town Board of Town of North Greenbush*,[6] where the Court of Appeals invalidated a protest petition challenging the Town of North Greenbush's decision to rezone a large area of land to permit retail development submitted by property owners who claimed to own more than 20 percent of the land located within 100 feet of the parcels affected by the rezoning, as shown by the town's tax map. However, because the developer did not seek a rezoning of its entire parcel, and instead carved out a "buffer area" where the zoning would remain unchanged, the town board determined that the protest petitioners did not own 20 percent of the land within 100 feet of the property to be rezoned and that their petition therefore was invalid.

After the town board approved the rezoning by a 3-2 vote, the protest petitioners challenged the vote on the basis of Town Law §265(1). The Court of Appeals found that the "one hundred feet" requirement "must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part." In the Court's view, the language of the statute, on its face, pointed to that result: "land included in such proposed change" could not refer to land to which the proposed zoning change was "inapplicable."

The Appellate Division, Fourth Department, reached a similar result in *Matter of Ferraro v. Town Board of Town of Amherst*,[7] where property owners filed protest petitions with the Town of Amherst's town board opposing a developer's application to rezone two parcels of property on which it intended to construct various commercial buildings, condominiums, and a hotel. Thereafter, the developer amended its petition for rezoning to include a 101-foot buffer zone immediately adjacent to the property, which buffer zone would retain the same zoning classification. The town board approved the amended petition for rezoning by a vote of 4 to 3. The petitioners sought to annul that decision, arguing that reversal was required because the owners of more than 20 percent of the property lying directly opposite the property to be rezoned had protested the rezoning and thus the petition for rezoning required the approval of at least three fourths of the town board members.

The Appellate Division, Fourth Department, rejected the petitioners' argument. It explained that the legislative history of Town Law §265(1)(c) established that subdivision (1)(c) was intended to apply to property directly opposite the property included in the proposed rezoning. The original proposed language of the statute provided that a three-fourths vote was required if written protests were filed by the owners of 20 percent or more of the area of land "directly opposite *to that land included in such proposed change*," extending 100 feet from the street frontage of such opposite land.[8] According to the Fourth Department, the word "thereto" in Section 265(1)(c) as enacted was substituted for the italicized language in the proposed statute. It then ruled that, inasmuch as there would be

a 101-foot buffer zone between the petitioners' properties and the rezoned property, the petitioners' properties were "not directly opposite the property to be rezoned" and the property to be rezoned was not within 100 feet of the street frontage of their properties. Indeed, the appellate court concluded, the buffer zone created by the developer rendered Town Law §265 (1)(c) inapplicable.

Local Interpretations

A number of cases have considered local municipalities' efforts to alter or interpret Section 265(1). For instance, in *Webster Assoc.*,[9] the developer argued that a protest petition had been submitted at the wrong time and therefore was invalid, thus making the town board's 3 to 2 vote to approve a rezoning adequate.

The court explained that the town's zoning ordinance provided for a six step zoning procedure: (1) planning board sketch plan review; (2) town board sketch plan review; (3) planning board review of preliminary development plan; (4) public hearing and town board intention to zone; (5) town board final site plan approval; and (6) town board's creation of the planned unit development. If the planning board approved the preliminary development plan, the town board had to hold a public hearing on a proposition to rezone the applicant's property. Thereafter, if the board determined that the change was in the public interest and in conformity with law, the board had to adopt a resolution declaring its intention to rezone the applicant's property subject to the board's approval of final plans and the developer's satisfaction of any additional conditions that the board might require. In this case, the protesters filed their petition at the "intention to zone stage," which the developer argued was not equivalent to the enactment, amendment, supplement, change, modification, or repeal of an ordinance. The court rejected the developer's argument.

As the court explained, stage 4 was "more than the intermediate step" that the developer claimed. Rather, it was the "critical point" at which the board determined whether the proposal would be approved and whether there would be a change of zones. The board's declaration at this point was subject only to the later formality of final plan approval and thus was tantamount to a change of the zoning ordinance, according to the court. It concluded that the protest had been properly interposed.[10]

A town board's efforts to add requirements to Section 265(1) were rebuffed several years ago by the Supreme Court, Rensselaer County, in *Matter of Application of Hanson v. Town Board of Town of Nassau*.[11] Here, the town board of the upstate town of Nassau rejected protest petitions submitted by about 100 protesters on the ground that their signatures had not been "acknowledged," as required by the town's local law. The court found that there was an "express conflict" between the town's local law and Section 265(1) because Section 265(1) permitted a protester to submit an unacknowledged petition and the local law "curtails or takes away" this right.[12] Accordingly, it ruled that the acknowledgment requirement was invalid and the board's determination to reject the protest petitions because the signatures were not acknowledged was improper.

Conclusion

The legislative purpose in requiring a greater than majority vote to rezone property was to provide additional protection to those property owners who would be most affected by a zoning change.[13] Courts strictly construe Section 265(1),[14] but a buffer exception is in essence contained in the law itself—the whole point of the "one hundred feet" requirement is that, where a buffer of that distance or more exists, neighbors beyond the buffer zone are far enough away from the proposed zoning change that they are not among the most affected. Of course, not every proposed rezoning may be able to rely on the "one hundred feet" rule; in those instances, 20 percent of neighboring property owners may be able to wield substantial power.

1. Town Law §265(1).

2. Village Law §7-708(1).

3. 125 A.D.2d 465 (2d Dept. 1986).

4. 119 Misc. 2d 533 (Sup. Ct. Monroe Co. 1983).

5. See also *Ryan Homes Inc. v. Town Board of the Town of Mendon*, 7 Misc.3d 709 (Sup. Ct. Monroe Co. 2005) (finding that protest petitioner's property, which was separated by the approximately 330-to-690-feet New York State Thruway right-of-way, was not directly opposite the land to be rezoned)

6. 7 N.Y.3d 306 (2006).

7. 79 A.D.3d 1691 (4th Dept. 2010).

8. See Recommendation of Law Rev Commn, 1990 McKinney's Session Laws of NY, at 2311 (emphasis supplied).

9. 119 Misc. 2d 533, supra.

10. See also 20 Opns St Comp, 1964, Opn No. 64-630 (comptroller opinion that protest may be filed after public hearing and at any time before town board votes on proposed amendment).

11. 16 Misc. 3d 1137A (Sup. Ct. Rensselaer Co. 2007).

12. The court also found that the town had failed to effectively supersede Section 265(1) under its supersession authority under the Municipal Home Rule Law.

13. *Webster Assoc.*, supra.

14. See, e.g., *Ryan Homes Inc.*, supra.