Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

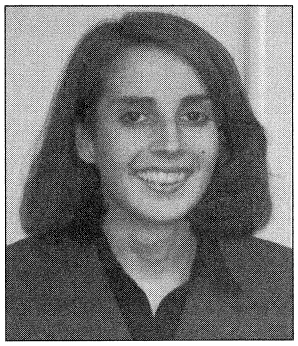
This has been a lean quarter in the world of land use decisions. Still, the Third Department has added two decisions to the vast and ever-changing body of land use law, one logical and one perhaps less so. It remains for the reader to decide which is which.

I. Issuance of a Negative Declaration Under SEQRA Does Not Preclude Denial of an Application for Subdivision Approval Based on the Subdivision's Potential Environmental Impacts

MLB, LLC v. Schmidt[1] addresses, albeit on very narrow facts, the question of whether a board may deny an application solely on environmental grounds after adopting a negative declaration under SEQRA.[2] On its face that question would seem to answer itself, but the Third Department reminds us that life is full of surprises. In *MLB, LLC*, the Third Department held, among other things, that a planning board's issuance of a negative declaration under SEQRA—which can only be issued if the lead agency determines that the proposed action will have no environmental impact or that any environmental impacts will not be significant—does not preclude a planning board from denying an application for final subdivision approval based on purported potential environmental impacts of the proposed subdivision.

The petitioner was the owner of a parcel of property in the Village of Monticello, Sullivan County (the "Village") and applied to the Village's planning board (the "Planning Board") to subdivide the parcel into three residential lots. At a public hearing on petitioner's application, petitioner's engineer testified that any drainage impacts associated with the development of a residence on each of the three proposed lots could be mitigated through the use of dry wells, and the Village's engineer generally agreed.[3] Neighboring downgrade property owners voiced their objection to the project, citing their personal observation of the existing poor drainage conditions in the neighborhood, and urged the Planning Board to deny the petitioner's application on the grounds that the development of three new residences would, in their opinion, exacerbate those conditions.[4]

The Planning Board, as lead agency, first issued a negative declaration under SEQRA, in effect finding that in its opinion the proposed subdivision would not have any significant environmental impacts.[5] Strangely, however, it then proceeded to deny petitioner final site plan approval on the grounds that the proposed subdivision would exacerbate already bad drainage conditions in the neighborhood.[6]



Petitioner challenged the denial on the grounds that the opinion of its engineer that dry wells could mitigate any drainage impacts the proposed subdivision would have on neighboring property owners, and the Village Engineer's general agreement—along with the negative declaration issued by the Planning Board—demonstrate that its application should have been approved and it was improperly denied in response to generalized community opposition.[7]

The lower court dismissed the petition and upheld the Planning Board's denial of final subdivision approval.[8] The Third Department affirmed, holding that the issuance of the negative declaration did not preclude denial of the application on environmental impact grounds, reasoning that:

> Initially, we note that the Board's issuance of a negative declaration is not wholly inconsistent with its denial of petitioner's application. In its SEQRA determination, the Board acknowledged the potential adverse effects associated with drainage and flooding problems, yet simply did not find them to be so significant in their impact as to require a positive declaration. Thus, since the Board's SEQRA determination was that no *significant* adverse impacts would result from the proposed subdivision, but that there could be adverse effects associated with the drainage and flooding problems, we do not find the Board's SEQRA determination to be incompatible with its subsequent denial of petitioner's application for approval of the subdivision.[9]

In response to Petitioner's claim that the denial was improper because it was based on generalized community opposition, the Court held that the testi-

mony of the neighboring property owners did not constitute "generalized community objections," but rather found the concerns of the neighbors to be "specific and based upon personal experience and observations."[10] The Court made this finding notwithstanding that the petitioner's engineer indicated that drainage issues could be addressed through the use of dry wells, an opinion with which the Village's Engineer generally agreed, except to note that he thought the wells could be overstressed and flood in certain circumstances, basing its finding on the opposing neighbors' testimony about the *existing* conditions in the neighborhood.[11]

This decision is confusing for several reasons. In the first instance, it appears to exalt the observations and personal experiences of neighboring property owners of the existing conditions of the neighborhood over the testimony of the applicant's engineer, which was at least generally endorsed by the Village's own engineer, describing how the proposed subdivision would not exacerbate those conditions. Additionally, it apparently holds that development approvals can be denied if they have the potential to cause environmental impacts that are not significant, or at least not significant enough to require the preparation of an Environmental Impact Statement ("EIS") under SEQRA, notwithstanding the well-recognized rule that the threshold for requiring the preparation of an EIS is extraordinary low.[12]

Although one can posit a set of facts which would justify denial of an application on other than purely environmental grounds following the issuance of a negative declaration, this case is troubling because the basis for denial was limited to what is clearly an environmental impact falling squarely within the four corners of SEQRA review. The Court is in effect saying that an environmental impact which is not significant enough to require preparation of an EIS may still be significant enough to justify denial of an application. The decision turns SEQRA on its head since, following the Court's logic, an environmental assessment form which identifies at least one potentially significant environment impact will trigger an EIS, giving an applicant an opportunity to make a record and propose mitigation, while a potentially insignificant impact justifies immediate denial. One can only hope that reason will prevail and that future decisions will limit this case to its narrow facts.

II. Interpretation of a Zoning Ordinance

In *Woodland Community Association v. Planning Board of the Town of Shandaken*,[13] the Court held that the Planning Board was not authorized to interpret the Town's zoning code, since, pursuant to the Town's code, the authority to interpret the zoning code was reserved to the Town's Zoning Board of Appeals (the "ZBA").

In *Woodland Community Association*, defendant Good Water Corporation ("Good Water") applied to the Planning Board for site plan approval and a special use permit for "water bottling and related uses," a use permitted in the subject low-density residential zoning district of the Town of Shandaken, to enable it to withdraw and transport by truck twice daily approximately 5,800 gallons of spring water from property owned by Andrew and Daria Poncic.[14] Good Water intended to use the spring water obtained from the Poncics' property for non-potable uses such as filling swimming pools. Apparently, the Planning Board made a determination that the proposed use was a "related use" under the water bottling and related uses special use permit and processed the application accordingly.[15]

In October 2006, after almost five years of review, the Planning Board granted Good Water's applications. The approvals granted by the Planning Board were subsequently challenged by the Woodland Community Association on the grounds that, among other things, the Planning Board lacked jurisdiction to determine whether the use proposed by Good Water was a special permit use since the Shandaken Code vests the authority to interpret the zoning code with the ZBA.[16]

The Supreme Court, Ulster County dismissed the petition, but the Appellate Division, Third Department reversed, agreeing with the petitioners that the Planning Board had no authority to interpret the Town's zoning code to determine whether Good Water's proposed use was in fact a special permit use.[17]

As mentioned above, it appears from the Third Department's opinion that the Planning Board determined Good Water's proposed use fell under the "water bottling and related uses" special permit use included in the Town's Code and processed the application accordingly. However, the Third Department held that Good Water's proposed use could not fall under the "water bottling and related uses" special use category because on its face the proposed use involves no water bottling and no use of the property related to water bottling.[18] Rather, the Court held that since the proposed use was not expressly permitted under the Shandaken Code and the Code provides that special uses which are not specifically permitted are prohibited unless the ZBA deems the proposed use to be "sufficiently similar" to a use in the Code, the Court reasoned that Good Water's use would only be permitted if the ZBA determined it was "sufficiently similar" to a use permitted under the Code. Accordingly, the Planning Board exceeded its authority when it interpreted the "water bottling and related uses" use category as including the proposed use and was required to refer the application to the ZBA for a determination of whether the proposed use was sufficiently similar to another use in the Code before it could process Good Water's application.[19]

The Court remanded the matter to the Planning Board for that Board to refer the application to the ZBA for a determination of whether Good Water's proposed use was "sufficiently similar" to a use in the Code.[20] On remand, the ZBA may want to review the recent Appellate Division, Fourth Department case of *Turner v. Andersen*,[21] for a reminder that while a court will defer to a zoning board of appeals' interpretation of a zoning ordinance, the court is vested with the ultimate responsibility of interpreting a zoning code and will not hesitate to invalidate an interpretation by a zoning board of appeals where it finds such interpretation to be unreasonable or irrational.[22]

It is also worthy to note that the Court, in addition to its central holding in *Woodland Community Association*, notes the petitioners did not have to apply to the ZBA for redress before bringing an Article 78 proceeding in court challenging the approvals, since petitioner's challenge was a challenge to approvals granted by the Planning Board and the ZBA is not authorized to hear appeals from decisions of the Planning Board. Rather, the Shandaken Code Section 116-46 and New York Town Law Section 274-b[9] provide for direct judicial review of a planning board's decision on special use permit applications.[23]

III. Challenges to Conditions to Site Plan Approval Are Subject to the 30-Day Statute of Limitations

In *Hampshire Management Co. No. 20, LLC v. Feiner*,[24] the Second Department held that petitioner's challenge to a Town Board's imposition of a condition to site plan approval on the grounds that the condition was *ultra vires* was subject to the 30-day statute of limitations imposed by Town Law Section 274-a.[25]

Petitioner sought to set aside a resolution of the Town of Greenburgh Town Board granting it amended site plan approval subject to certain conditions, among which was a condition requiring the petitioner to move an electrical transformer to a certain location on the site or onto another site. The conditional amended site plan approval was filed on April 7, 2006 and petitioner commenced the instant Article 78 proceeding challenging the imposition of the condition on August 7, 2006, four months after the approval was filed.[26] The Town moved to dismiss the petition, arguing that petitioner's claim was time-barred by the 30-day statute of limitations imposed by Town Law Section 274-a. The Supreme Court granted the Town's motion and dismissed the petition. The Second Department affirmed.[27]

In opposition to the Town's motion, petitioner argued that the 30-day statute of limitations set forth in Town Law 274-a was inapplicable because the Town Board acted beyond the scope of its authority in imposing the disputed condition. The Second Department recognized that "'[w]here a local land use agency acts without jurisdiction in approving or denying a site plan, special permit, or other land use determination, a challenge to such an administrative action, as ultra vires, is not subject to the 30-day limitations period . . . .'"[28] However, the court stated that in order for the statute of limitations to be tolled, petitioner has to *show* a jurisdictional defect, not just *allege* one. In this case, there was no jurisdictional defect since the Town Board was authorized both by state and local law to consider the "acoustic, visual, and otherwise aesthetic impact of the proposed land use" in the site plan review process and thus the imposition of the disputed condition was not beyond the authority of the Board.

The clear effect of the Court's holding is to require a petitioner to essentially win on the merits in order to toll the statute of limitations. The lesson for practitioners is when in doubt, assume a 30-day statute of limitations.

IV. Liability May Not Be Imposed on a Municipality for Failure to Enforce Its Building or Zoning Laws

In *Bell v. Village of Stamford*,[29] plaintiff was the owner of a parcel of property in the defendant Village of Stamford. The plaintiff alleged that the owner of three properties across the street from her residence constructed a building and parking area on its properties without obtaining the required building permits, variances, and other approvals from the defendant Village. Plaintiff informed the Village of the unauthorized construction on the three lots, but the Village declined to take action to stop the construction. Based on the Village's failure to enforce its building and zoning regulations, plaintiff brought the instant action claiming negligence and breach of contract.

The Village moved to dismiss the complaint on the grounds that plaintiff failed to state a cause of action. The Supreme Court, Delaware County denied the motion and the Third Department reversed, dismissing the complaint and finding that plaintiff failed to allege facts to establish a "special relationship" between the plaintiff and the Village which a plaintiff must establish for liability to be imposed on a municipality. In so holding the Court stated that

> [I]t has long been the rule in this State that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation. . . . A special relationship may arise in three ways: (1) when the municipality violates a statu-

> tory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation. . . .[30]

With regard to the first factor, the Court held that the adoption of a zoning and/or building ordinance, without more, does not create a special relationship between the municipality and its residents. Moreover, plaintiff did not allege facts sufficient to establish that the Village "voluntarily assume[d] a duty that generate[d] justifiable reliance by the person who benefits from the duty; or . . . assume[d] positive direction and control in the face of a known, blatant and dangerous safety violation."[31] Similarly, plaintiff did not allege any facts to support her breach of contract claim. Thus, the action was dismissed. Because plaintiff apparently did not seek relief pursuant to CPLR Article 78 in the nature of mandamus to compel the municipal officers to enforce the provisions of the Village's building and zoning laws, the Court did not reach the issue of whether an Article 78 proceeding is available to a village resident to compel village government to enforce its building and zoning regulations against another resident.

Endnotes

1. *MLB, LLC v. Schmidt*, 50 A.D.3d 1433 (3d Dep't 2008).
2. State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law, Art. 8 and 6 N.Y.C.R.R. Part 617.
3. *MLB, LLC*, 50 A.D.3d at 1435.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *MLB, LLC*, 50 A.D.3d at 1435 (emphasis original).
10. *Id.*
11. *Id.*
12. *See, e.g., S.P.A.C.E. v. Hurley*, 291 A.D.2d 563, 564 (2d Dep't 2002) ("Because the operative word for triggering an EIS is 'may,' there is a relatively low threshold for the preparation of an EIS.").
13. *Woodland Community Association v. Planning Board of the Town of Shandaken*, 860 N.Y.S.2d 653 (3d Dep't 2008).
14. *Id.* at 654.
15. *Id.*
16. *Id.*
17. *Id.* at 654–655.
18. *Id.*
19. *Woodland Community Association*, 860 N.Y.S.2d at 654–655.
20. *Id.* at 655.
21. *Turner v. Andersen*, 50 A.D.3d 1562 (4th Dep't 2008).
22. *See id.; see also Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd. of Appeals of Village of Mamaroneck* (2d Dep't 2008).
23. *Woodland Community Association*, 860 N.Y.S.2d at 654.
24. *Hampshire Management Co., No. 20, LLC v. Feiner*, 52 A.D.3d 714, 860 N.Y.S.2d 204 (2d Dep't 2008).
25. *Id*; Town Law Section 274-a[11](Site Plan Review) provides that "Court review. Any person aggrieved by a decision of the authorized board or any officer, department, board or bureau of the town may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules. Such proceedings shall be instituted within thirty days after the filing of a decision by such board in the office of the town clerk."
26. *Hampshire Management Co.*, 52 A.D.3d 714, 860 N.Y.S.2d 204.
27. *Id.*
28. *Id.*
29. *Bell v. Village of Stamford*, 51 A.D.3d 1263, 857 N.Y.S.2d 804 (3d Dep't 2008).
30. *Bell*, 51 A.D.3d at 1264, 857 N.Y.S.2d at 806 (citations omitted).
31. *Id.*

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