Land Use Law Case Law Update

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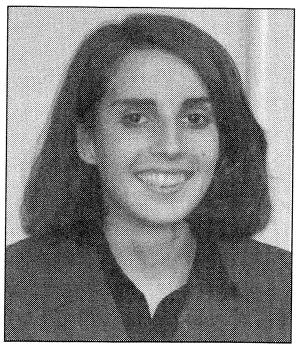
Just as biblical Egypt was graced by seven fat years and then plagued by seven lean ones, the first quarter of 2010 brings us little of interest following a quarter in which we had the privilege of reporting on *Goldstein v. New York State Urban Development Corporation*[1] and *Kaur v. New York State Urban Development Corporation*,[2] both fascinating and potentially far-reaching constitutional cases.

This quarter we report upon *Glacial Aggregates LLC v. Town of Yorkshire*,[3] a case which addresses vested rights in zoning and may, in the end, be limited in scope due to the uniqueness of the activity, mining, that the case involves; *Bout v. Zoning Board of Appeals of the Town of Oyster Bay*,[4] which teaches us a little bit about the longstanding requirement that a zoning board of appeals must adhere to its own precedent or explain why it failed to do so; and two cases, *Cunney v. Board of Trustees of the Village of Grand View*[5] and *Aliano v. Oliva*,[6] both decided by the Second Department, which remind us that while few would argue that a constitutional democracy cannot operate in the absence of transparency, in actual practice the New York Open Meetings Law may well be a paper tiger, an illusory right without a remedy.

I. Vested Rights

In *Glacial Aggregates LLC v. Town of Yorkshire*,[7] the Court of Appeals shed some light on the rule, enunciated by that Court in *Town of Orangetown v. Magee*,[8] governing when and under what circumstances a party becomes vested in the right to develop a property under its prior zoning, when that zoning has been changed in a way that prohibits or severely restricts the contemplated use. In this case, petitioner acquired its property at a time when the Town of Yorkshire had no zoning ordinance, with the consequence that the planned use of the property as a sand and gravel mine was permitted without the necessity of obtaining a local permit. After the property owner had expended large sums in obtaining the requisite DEC mining permits, but before the actual commencement of mining operations, the Town amended its zoning ordinance to make mining a special permit use. In an insightful and well-reasoned decision, the Court of Appeals held that petitioner had acquired a vested right to engage in mining activities on its property, a decision which broadens somewhat



the limits of the *Magee* doctrine, but which may in fact be limited to mining as an activity in which the cost of obtaining permits and approvals, an essentially front-loaded soft cost, well exceeds the up-front costs of infrastructure, since it is the nature of a sand and gravel mine that its operation and its construction are one and the same activity.

In *Glacial Aggregates LLC* the plaintiff was the owner of an approximately 375-acre parcel of property in the Town of Yorkshire, which it had acquired for the purpose of mining sand and gravel.[9] At the time that it purchased the property, the Town of Yorkshire had no zoning law in effect and therefore mining was a permitted use of the property with no permits required from the Town.[10] In 1996, plaintiff began the long and expensive process of obtaining a mining permit from the DEC, which included a full environmental impact statement review process under SEQRA, all at a cost of approximately $500,000.[11] In 1998, the Town adopted a moratorium on, among other things, mining while it considered adopting its first zoning ordinance.[12] In September of 1999 the DEC adopted SEQRA Findings and granted plaintiff a 5-year mining permit. The permit was conditioned on plaintiff, among other things, completing the construction of a haul road and a bridge over a creek on the property.[13] On March 13, 2000, plaintiff advised the Town that it had obtained the DEC mining permit and, on that same day, the Town lifted the moratorium on mining.[14] Plaintiff subsequently removed 40 truckloads (approximately 400 tons) of material for testing, cleared a certain portion of the site, performed some preliminary work on the haul road, acquired steel for the bridge, and dug monitoring wells. By the end of 2000, the property was ready to be mined with the exception that the haul road and bridge were not complete. In total, plaintiff spent more than $800,000 on the property (approximately $750,000 spent to acquire the land and obtain the DEC permit and approximately $50,000 on the balance of the work).[15]

In June of 2001, the Town adopted its first zoning law, which prohibited mining as a use without a special use permit.[16] In late 2003 or early 2004, plaintiff advised the Town, among other things, that it had attracted additional investors to fund the mining operation on the property and that it had secured a $2.9

million loan to finance the mining operations.[17] To aid plaintiff in closing on the loan, the Town provided plaintiff with a letter dated July 8, 2004 stating that plaintiff had the right to mine the property provided that its mining operations commenced before the DEC permit expired.[18] The letter made no reference to the need for a special use permit. However, on July 12, 2004, the Town changed course and authorized the Town supervisor to issue a letter stating that the plaintiff's property was subject to the new zoning law which made mining operations a special permit use. On July 22, 2004 the Town supervisor issued such a letter which provided that "[the plaintiff's mining operation] must comply with the Town's Zoning Law, since actual mining operations were not commenced prior to the adoption of the Zoning Law."[19]

In response to the supervisor's July 22nd letter, the plaintiff brought the instant action seeking a declaration that it had a vested right to use the property for mining without obtaining any local permits, that its use of the property for mining was a legal nonconforming use, and that it was entitled to monetary damages pursuant to 42 U.S.C. § 1983 on the theory that the Town acted in violation of its constitutional rights in denying it the use of its property for mining.[20] The Supreme Court, Cattaraugus County, after a jury trial, held that plaintiff had acquired a vested right to use the property for the mining of sand and gravel and that such use was a lawful nonconforming use and that it was entitled to monetary damages under section 1983.[21]

The Appellate Division, Fourth Department reversed, holding that, among other things, the plaintiff did not acquire a vested right to mine the property and that the mining of the property was not a nonconforming use.[22] In support of its finding that mining was not a legal nonconforming use, the Appellate Division reasoned that all of plaintiff's actions were in contemplation of mining and that actual mining activities had not commenced on the property before the zoning law was enacted, thereby precluding a finding that the use was nonconforming.[23] Applying (although, as it turns out, misapplying) the well settled rule that "a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development,"[24] the Appellate Division held that because most of the plaintiff's expenditures on the mining use were made before the DEC permit was issued, such expenditures were not made in reliance on a validly issued permit and therefore could not be considered in the analysis of whether the post-permit expenditures were substantial.[25] The Appellate Division held, however, that the post-DEC permit expenditures were not "substantial" so as to give the plaintiff a vested right to proceed with the mining use and that there was simply no rational basis on which the jury could have found "that plaintiff had commenced substantial construction of its sand and gravel mine sufficient to acquire a vested right to mine."[26]

Applying the same rule as applied in the Appellate Division, the Court of Appeals reversed and held, among other things, that plaintiff had acquired a vested right to mine the property.[27] In so holding, the Court of Appeals first points out that this case is unique because the Town had no zoning law when plaintiff first applied for the DEC permit and mining is a unique land use.[28] The Court held that because there was no zoning law in effect when plaintiff applied to the DEC for a mining permit, that it was doing so in reliance on the fact that the Town did not require any approval in order to establish a mining operation on the property—in other words, the lack of a zoning ordinance requiring permission to mine was tantamount to a permit or permission to mine on which the plaintiff could rely in expending money to acquire a vested right.[29] Because it was the local permission on which plaintiff was entitled to rely on in the vested rights analysis rather than the DEC-issued permit, the Court of Appeals held that the Appellate Division erred when it failed to consider the cost of the DEC permitting process in the analysis of whether the plaintiff had made a substantial expenditure in reliance on the Town's permission to mine the property. In fact, the Court of Appeals stated that the DEC permit is the key requirement in a mining operation since no substantial construction need occur before a mining operation can commence. Rather, the DEC permit, which could cost hundreds of thousands of dollars when considering the scope of the studies that must be completed to obtain the permit, was the primary cost for a mining operation.[30] The Court found that the only thing that needed to be completed was the haul road and the bridge, and given the substantial expenditure of time, money and effort in reliance on the Town's tacit permission to mine the property a rational jury could have found that plaintiff had a vested right and legal nonconforming use to continue its mining operation.[31]

Due to the somewhat unique facts of this case—the mining use plus the fact that the Town did not have a zoning law in place when the petitioner applied to the DEC for a mining permit—the general applicability of this case to future non-mining cases is uncertain. However, outside of the mining context, this case supports the argument that the cost of acquiring post-municipal approvals to construct a project should be considered in the analysis of whether an applicant has incurred a substantial expense in reliance on a validly issued permit in order to obtain a vested right, perhaps with the caveat that such approvals have to be specific to the

use permitted by the permit rather than an approval of general applicability.

II. Zoning Boards of Appeals: Adherence to Precedent

In *Bout v. Zoning Board of Appeals of the Town of Oyster Bay*,[32] the Appellate Division, Second Department held that the respondent zoning board of appeals acted in an arbitrary and capricious manner when it denied petitioner's application for a *de minimis* amendment to existing area variances because the Board did not provide a rationale for departing from its original decision to grant the variances. This decision reinforces the long-standing rule that a zoning board that "neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious...even if there may otherwise be evidence in the record sufficient to support the determination[.]"[33]

In this case the petitioner owned a house in the Town of Oyster Bay. He sought and was granted variances to construct an addition to his house.[34] During construction, the Town's building inspector noticed window cutouts that were not in accord with the notice of the variances granted and issued a stop work order. While the stop work order was pending, neighboring property owners complained to the respondent zoning board of appeals that the footprint of the addition was larger than permitted by the earlier variance and that the side-yard setback was smaller than permitted. The zoning board of appeals held a public hearing on this issue and, apparently, on an application by petitioner for amended variances, denied the amended variances, finding that the side yard was 16 inches narrower than it had originally permitted and the footprint of the house was larger.[35] Petitioner brought the instant Article 78 proceeding and the Court reversed and ordered the board to issue the requested variance amendment. The Court held that there was no basis in the record to support the conclusion that the side yard was 16 inches narrower than as originally approved, and, even if the dimension and setback of petitioner's home had changed slightly, such changes were *de minimis*. As such, in order to deny the variance amendments, the zoning board would have had to make findings explaining why it reached a different result on essentially the same facts, which it did not do.[36]

III. Open Meetings Law

In two recent cases, *Cunney v. Board of Trustees of the Village of Grand View*[37] and *Aliano v. Oliva*,[38] both decided on the same day, the Appellate Division, Second Department upheld the decisions of two local boards, notwithstanding that the decisions were adopted in violation of the Open Meetings Law,[39] reasoning that under the facts and circumstances of each case, the petitioners failed to establish "good cause" to annul the boards' determinations on Open Meetings Law grounds.

In *Cunney*, the petitioner was the owner of a parcel of property in the respondent Village of Grand View. He received site plan approval and a building permit to construct a home on his property and constructed the home according to the approved plans. However, there was an error in the topographical data used by petitioner's architect in calculating the height of the home and the house was actually three feet taller than permitted by the Village's zoning ordinance.[40] Upon learning that the house was taller than permitted by code, petitioner applied to the Village's zoning board of appeals for an area variance for the height difference. The variance was granted subject to the condition that an accessory pool house on the property be removed to provide an unobstructed view over the property.[41] Apparently, the vote on this application was taken in violation of the Open Meetings Law.

Petitioner challenged the condition on the grounds that it was unreasonable and inconsistent with the zoning law, and also challenged the decision on the grounds that it was adopted in violation of the Open Meetings Law.[42] The Supreme Court, Rockland County did not take issue with the condition of the variance, but annulled the board's action because of its violation of the Open Meetings Law. The Second Department held that the condition was proper and reversed the lower court's annulment of the board's decision on the Open Meetings Law ground, holding that the petitioner had not established "good cause" to declare void the action of the board since there was no evidence in the record to suggest that the board's failure to comply with the Open Meetings Law was anything more than negligent.[43]

In *Aliano*, the petitioner obtained a building permit to construct a house on his property. Apparently, the building permit was issued in error and permitted the construction of the building within a required setback. Accordingly, after the building permit was issued, the Town's director of code enforcement issued a stop work order. Approximately one month after the stop work order was issued petitioner applied to the Town's zoning board of appeals for a variance permitting him to continue the construction. Notably, the petitioner did not appeal the code enforcement officer's decision to issue the stop work order, but rather only applied for the variance (essentially, in the court's opinion, conceding that the stop work order was correctly issued).[44]

Ultimately, the zoning board of appeals adopted a resolution denying the petitioner's application. This action was apparently (or at least arguably) taken in violation of the Open Meetings Law. The petitioner then

brought the instant Article 78 proceeding to, among other things, annul the stop work order, annul the zoning board's decision denying the requested variance and order the zoning board to issue the requested variance, on the grounds that the board's decision was arbitrary and capricious and that the zoning board's decision was issued in violation of the Open Meetings Law and the procedural requirements of the Town Law.[45]

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The Supreme Court, Suffolk County, denied the petition to the extent that it challenged the stop work order, reasoning, among other things, that petitioner failed to exhaust his administrative remedies since he did not appeal the determination to the zoning board of appeals, but rather only applied for the area variance. The lower court also upheld the zoning board's denial of the variance and denied the portions of the petition challenging the board's decision based on the Open Meeting Law and Town Law procedural requirement grounds. The Second Department affirmed the decision of the lower court in its entirety.[46]

With regard to petitioner's claim that the zoning board's decision was adopted in violation of the Open Meeting Law, the court held that even if the board acted in violation of the Open Meeting Law, petitioner did not meet his burden of showing good cause to annul the determination on that ground since the decision was adopted after a public hearing and after all interested parties had a chance to comment on the application.[47]

Local boards and members of the public alike can take away something from these cases. The local board should be reminded that compliance with the Open Meeting Law's requirements is mandatory and that the courts have the authority to annul actions taken in violation of that Law. However, theses cases are also a cautionary reminder to the public that a local action will not necessarily be undone simply because the board did not strictly comply with the requirements of the Open Meetings Law, particularly where the court finds that the board's failure to comply with the Law was the result of simple negligence or oversight rather than malfeasance.

Endnotes

1. *Goldstein v. New York State Urban Development Corporation*, 13 N.Y.3d 511 (2009).
2. *Kaur v. New York State Urban Development Corporation*, 72 A.D.3d 1, 897 N.Y.S.2d 335 (1st Dep't 2009).
3. *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (2010).
4. *Bout v. Zoning Board of Appeals of Town of Oyster Bay*, 71 A.D.3d 1014, 897 N.Y.S.2d 205 (2d Dep't 2010).
5. *Cunney v. Board of Trustees of the Village of Grand View*, 2010 WL 1611059 (2d Dep't April 20, 2010).
6. *Aliano v. Oliva*, 2010 WL 1611121 (2d Dep't April 20, 2010).
7. *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (2010).
8. *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996).
9. *Glacial Aggregates LLC*, 897 N.Y.S.2d at 678 (Plaintiff owned or had the option to purchase 375 acres. The Fourth Department's decision indicates that the Plaintiff owned 216 acres (*Glacial Aggregates LLC v. Town of Yorkshire*, 57 A.D.3d 1362, 1363 (4th Dep't 2008)).
10. *Glacial Aggregates LLC*, 14 N.Y.3d at 131.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Glacial Aggregates LLC*, 14 N.Y.3d at 132; *Glacial Aggregates LLC*, 57 A.D.3d at 1363-1365.
16. *Glacial Aggregates LLC*, 14 N.Y.3d at 132.
17. *Id.*
18. *Id.*
19. *Id.* at 133.
20. *Id.*
21. *Glacial Aggregates LLC v. Town of Yorkshire*, 2007 WL 7117797 (Sup. Ct. Cattaraugus County 2007) (Trial Order).
22. *Glacial Aggregates LLC v. Town of Yorkshire*, 57 A.D.3d 1362 (4th Dep't 2008).
23. *Id.* at 1362-1364.
24. *Id.* at 1364 (quoting *Town of Orangetown v. Magee*, 88 N.Y.2d 41 (1996) and citing *Ellington Construction Corp. v. Zoning Board of Appeals of Incorporated Village of New Hempstead*, 77 N.Y.2d 114 (1990)).
25. *Glacial Aggregates LLC*, 57 A.D.3d at 1364-1365.
26. *Id.* at 1365.
27. *Glacial Aggregates LLC*, 14 N.Y.3d at 135. The Court of Appeals also held that plaintiff's use of the property was sufficient to obtain the status of a lawful nonconforming use citing its recent decision in *Buffalo Crushed Stone Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88 (2009), holding that overt manifestations of an intent to utilize a property for mining can establish a nonconforming use.
28. *Glacial Aggregates LLC*, 14 N.Y.3d at 136.
29. *Id.*
30. *Id.*
31. *Id.* at 137.
32. *Bout v. Zoning Board of Appeals of Town of Oyster Bay*, 71 A.D.3d 1014, 897 N.Y.S.2d 205 (2d Dep't 2010).
33. *Id.* at 1014 (2d Dep't 2010) (internal quotations omitted).

34. *Id.* at 1015.
35. *Id.*
36. *Id.*
37. *Cunney v. Board of Trustees of the Village of Grand View*, 2010 WL 1611059 (2d Dep't April 20, 2010).
38. *Aliano v. Oliva*, 2010 WL 1611121 (2d Dep't April 20, 2010).
39. Public Officers Law, Art. 7; *see* Public Officers Law § 107[1] ("Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.").
40. *Cunney v. Board of Trustees of the Village of Grand View*, 2010 WL 1611059 (2d Dep't April 20, 2010).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Aliano v. Oliva*, 2010 WL 1611121 (2d Dep't April 20, 2010).
45. *Id.*
46. *Id.*
47. *Id.*

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