Land Use Law Case Law Update

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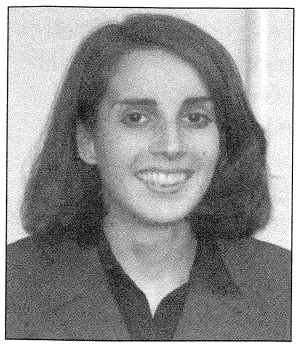
Although it appears that the drought in genuinely significant cases continues unabated, this quarter brings a few small, but nonetheless interesting, cases which, although they break no new ground, serve as reminders that old ground cannot be ignored.

Two Second Department cases, *Dobbs Ferry Development Associates v. Board of Trustees of the Village of Dobbs Ferry*[1] and *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*,[2] decided within three months of each other, while neither making nor broadening existing law, remind us that the requirements of *Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro*[3] continue in force, and are not to be blithely ignored. If nothing else, these two cases serve as appropriate reminders that the recreation fee permitted by Town Law Section 274-a[6] (as well as Village Law Section 7-725-1(6)) is not (as many municipalities view it) a tax on development to be imposed at will, but rather can be applied only in proper cases, when specific criteria exist, and upon individualized findings grounded in a proper record.

Fuentes v. Planning Board of the Village of Woodbury[4] teaches us that when a Planning Board approves a subdivision plat with the intention that open space portions of that plat not be further developed, that intention must be stated clearly and explicitly, and that such clear and explicit restriction must be endorsed on the plat itself or otherwise expressed in a document that will appear in a purchaser's chain of title; a statement in the minutes of a planning board meeting (such minutes not constituting a recorded document which will appear in a title search) is insufficient.

Underhill Avenue Corp. v. Village of Croton-on-Hudson[5] restates the well-established rule that an offer of dedication of land in a subdivision to the public, as manifested by designation of such land on a subdivision plat, is perpetual and does not expire merely by virtue of the passage of time and inactivity on the part of the municipality. Finally, an interesting bit of dictum in *Town of Huntington v. Beechwood Carmen Building Corp.*[6] reminds us that by their nature (and pursuant to the relevant state enabling statutes) zoning ordinances tell us what we can and cannot do; they don't tell us what we must do.



I. Recreation Fees

Dobbs Ferry Development Associates v. Board of Trustees of the Village of Dobbs Ferry[7] and *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*[8] turn on very similar facts. In *Dobbs Ferry Development Associates*, Dobbs Ferry Development Associates ("Associates") sought and obtained site plan approval for the construction of one single-family residence. The Village Board of Trustees[9] conditioned such approval upon, among other things, Associates paying a recreation fee pursuant to Village Law Section 7-725-a(6)(b), (c).[10] Associates brought an Article 78 proceeding challenging the imposition of the recreation fee as a condition of approval. The lower court declared the imposition of the fee invalid, and ordered the Village Board of Trustees to issue site plan approval to Associates without payment of a recreation fee.[11]

The Village Board and the Planning Board appealed, and in a very brief decision the Second Department found that although municipalities clearly have the authority to impose a recreation fee as a condition of site plan approval, an irreducible prerequisite to such imposition is the making of findings by the town body imposing the recreation fee, as required by *Bayswater Realty & Capital Corp. v. Planning Board of the Town of Lewisboro;*[12] namely, that the construction of a single-family home on Associates' land will add to (or create) unmet recreational needs in the community at large, and that such needs cannot be met on the land itself.[13] Citing *Twin Lakes Development Corp. v. Town of Monroe,*[14] the Court noted that "individualized consideration" was required of the facts at hand, and that no such consideration had been given, nor had specific findings been made.[15]

Although the Appellate Division declared the imposition of the recreation fee invalid on the record before it, it reversed so much of the lower court's decision as required the Village Board to grant site plan approval with the recreation fee condition removed. Rather, the Court held that the proper remedy in such cases is a remand to the village body which imposed the condition, in effect giving it the opportunity to make the requisite findings if the requisite conditions in fact exist.[16]

Pulte Homes of New York, LLC is essentially the same case except that it implicates the Town Law rather than the Village Law. There, the Town of Carmel Planning Board imposed a recreation fee as a condition of site plan approval for a senior citizen housing development. In this case, the lower court dismissed the petition and upheld the fee, notwithstanding that the requisite findings had not been made and that the Dobbs Ferry case had been decided just three weeks before.[17] The Second Department reversed the lower court's decision on the grounds that the Planning Board failed to make the "individualized consideration" required before a recreation fee can be imposed, and remanded the matter to the Planning Board for further proceedings to determine whether and to what extent a fee should be imposed.[18]

II. Restrictions on Future Development

In *Fuentes v. Planning Board of Village of Woodbury,*[19] petitioner-respondent Fuentes was the purchaser of two undeveloped lots in a tax sale. After acquiring title, Fuentes learned that the subdivision plat which had created the two lots designated each lot as an "open area" subject to a notation on the filed map that such lots were "not approved for building lots."[20] Taking the plain language of the notation at its word, Fuentes applied to the Village of Woodbury Planning Board for an amendment of the map to permit construction of residences on each of the two lots. The Planning Board denied his application, interpreting the map note as an outright prohibition on the further development of the two lots. The lower court annulled the Planning Board's determination, and the Planning Board appealed.[21]

After reiterating the well-established rule that a reviewing court may not disturb the decision of a municipal body charged with determining land use questions unless that body's decision is arbitrary and capricious, lacks a rational basis, or is an abuse of discretion, the Appellate Division upheld the lower court's determination annulling the Board's determination. The Planning Board had, *inter alia,* relied on the fact that the underlying subdivision had been characterized on the filed map as a "cluster plan." The court held that in approving the subdivision the Planning Board had not acted in conformity with Town Law Section 278, with the consequence that in fact the subdivision was not a conservation subdivision under that section, and that accordingly the Planning Board's conclusion that development of the lots was prohibited due to their inclusion as open space in a cluster subdivision lacked a rational basis.[22]

Presumably, had the subdivision plat actually been a Section 278 conservation subdivision, the inclusion of open space on the subdivision plat would have been reflected in additional density elsewhere on the plat, in which case ultimate development of the open space parcels would constitute a "double dip" in violation of Section 278. The logic of the court's decision in this case appears to be that where the requirements of Section 278 are not met, the presumption that the density attributable to the open space parcels has been utilized elsewhere in the subdivision does not exist, and accordingly the mere designation of a parcel as "open space" does not *ipso facto* disqualify it from future development. Further, the court relied (as had Fuentes) on the plain language of the plat restriction itself, determining that the phrase "not approved for building lots" does not explicitly restrict future development of the lots in question.[23]

Finally (and perhaps most importantly), in response to an argument by the Planning Board that the intention of the Planning Board to restrict future development was clearly set forth in the minutes of its meeting approving the subdivision plat, the court found that inclusion in the minutes is insufficient since the ultimate purchaser of a parcel of property will not thereby be put on notice of the restriction. The court held that the Planning Board "failed to make this restriction clear on any document which became part of Fuentes's chain of title."[24] The correctness of that holding is inescapable. Were it to be otherwise, every purchaser of a parcel of land would be in peril of falling afoul of a condition of which he or she had no notice.

III. Perpetual Is Forever

In *Underhill Avenue Corp. v. Village of Croton-on-Hudson,*[25] plaintiff sought a determination that a lot (Lot 14) on a subdivision plat that was filed in 1954 is not subject to an open offer of dedication as a playground area, apparently relying on the fact that more than half a century had passed without the Village taking up the offer of dedication. It appears that Lot 14 had been explicitly offered for dedication to the Village of Croton-on-Hudson as a playground area when the plat was approved. It is undisputed that the offer was noted on the subdivision plat, and that the Village never accepted the offer of dedication.[26]

The plaintiff purchased Lot 14 in 2007, and sought and was denied a building permit by the Village on the basis that the lot was to remain a "playground area" and was still subject to the offer of dedication.[27] Plaintiff brought a declaratory judgment action and sought summary judgment against the Village, which was then the sole defendant. The court dismissed plaintiff's motion without prejudice, ordering that plaintiff serve all homeowners within the affected subdivision with the pleadings and motion papers in the case. The decision does not indicate that there existed a homeowners' association with a right to enforce a restriction on the use of Lot 14, or that

the other homeowners in the subdivision had any direct property interest in Lot 14. Four homeowners intervened in the case. The lower court then denied plaintiff's motion for summary judgment, searched the record, and granted summary judgment in favor of the defendants.[28]

The plaintiff argued that the Village had, by virtue of the passage of time, implicitly rejected the offer of dedication.[29]

The Second Department, citing cases, held that although an offer of dedication may be rejected by a municipality, such rejection must be explicit, and the passage of time does not extinguish the offer which may be accepted at any time prior to a valid revocation by all interested parties.[30] Although the case articulates no new law, it is interesting to note that implicit in the court's requirement that all homeowners in the subdivision be served is inclusion in the class "all interested parties" of the other owners in the subdivision notwithstanding that (so far as appears from the decision) the other owners in the subdivision did not enjoy an easement of any kind over the playground parcel, nor, presumably, would they have enjoyed rights different from those of other members of the general public to use that parcel as dedicated to the Village. Nonetheless, it would appear that the unanimous consent of all such owners, as well as the Village and the owner of Lot 14, would be required to revoke the offer of dedication.

IV. Zoning's Limitations

Town of Huntington v. Beechwood Carmen Building Corp.[31] would be a case of little interest were it not for a bit of *dictum* which the court throws out in the penultimate paragraph of the decision. *Huntington* is a proceeding brought by the town in order to compel a developer to construct a pool and community center on a parcel of real property designated as a separate lot (Lot 73) in a residential development known as Country Pointe at Dix Hills.[32] The case involves a number of defendants. S.B.J. Associates, LLC ("SBJ") was the original purchaser and developer of the property. SBJ sold the property to a number of affiliated parties (the "Beechwood Defendants") including Beechwood Carmen Building Corp. The lower court dismissed the complaint against all defendants and the town appealed.[33]

SBJ acquired an approximately 382-acre parcel of real property in the Town of Huntington which, at the time of its acquisition, was zoned "R-80," a two-acre single-family residence district. Thereafter, SBJ proposed to construct a senior (presumably multi-family) residential project on a portion of the property, and single-family homes on the balance of the property, and accordingly sought an amendment of the Town Code to create a residential planned-unit development and to change the zoning of the entire property from R-80 to "R-PUD." In due course, the Town Board created the "R-PUD" District providing, among other things, that buildings within the single-family portion of the district were to be used only for detached single-family dwellings together with accessory uses and activities, and for a community building not to exceed 5,000 square feet. The Huntington Town Code (Section 198-21.2) also specifically permitted the construction of swimming pools in the single-family dwelling portion of the district. A final Generic EIS ("FGEIS") adopted by the Town Board at the time of the PUD's creation indicated that the developer had proposed a recreation area including a community center and swimming pool for inclusion in the single-family portion of the subdivision.[34]

As the application wended its way through the development process, SBJ proposed that Lot 73, as designated on the subdivision plat, would instead be used as a recreational facility including such facilities as tennis courts and a children's playground, but did not provide for construction of a swimming pool or community center. Ultimately, the Beechwood Defendants purchased the vacant land from SBJ and developed a community recreation area consisting of a playground, a tennis court and a gazebo, but no swimming pool.[35]

In 2006 the town commenced an action against SBJ and the Beechwood Defendants, which included allegations that the FGEIS and Town Code Section 198-21.2 (which on its face *permits* the swimming pools in the single-family residence district) *required* the construction of the swimming pool and community center.[36] In June of 2008 the town stipulated to discontinue the action with prejudice against defendant SBJ, but the cause of action relating to the construction of the swimming pool was separated and continued with respect to the Beechwood Defendants.[37] In 2008 the town commenced an action against the Beechwood Defendants to compel construction of the swimming pool; in January of 2010 all defendants moved for summary judgment, which the lower court granted.[38]

The Appellate Division upheld the lower court's decision as respects defendant SBJ on grounds of *res judicata*. In upholding the lower court's decision with respect to the Beechwood Defendants, the court relied upon the language of the FGEIS, holding that it did not explicitly require construction of a swimming pool and community center, and upon the plain language of Town Code Section 198-21.2 which permitted, but did not require, construction of a community center and swimming pool on Lot 73 or anywhere else in the

subdivision in question. The court held that both the FGEIS and the Town Code Section merely permitted but did not mandate construction of those facilities.[39]

Having disposed of the case, however, the court saw fit to add a paragraph holding that "Even if, as the Town contends, Town Code §198-21.2 requires that development of Lot 73 to include a swimming pool and community center not to exceed 5,000 square feet, such a provision would be *ultra virus* and void as a matter of law."[40] The court reasoned that a town does not have the inherent power to enact zoning or land use regulations, but derives that power wholly from the State, and that while Article 16 of the Town Law confers a "'wide variety of powers to zone the town into districts to regulate its growth and development,'"[41] it does not go so far as to confer authority on a town to enact a zoning ordinance which "mandates the construction of a specific kind of building or amenity [citing cases]."[42] Accordingly, the Beechwood Defendants were entitled to summary judgment in that the town failed to raise a triable issue of fact. Insofar as the court clearly has sufficient grounds to render its decision based upon its *res judicata* and interpretational determinations, this last paragraph is dictum, but is nonetheless instructive in that it reminds us, quite properly, of the limits of a municipality's zoning powers under Article 16 of the Town Law.

Endnotes

1. *Dobbs Ferry Development Associates v. Board of Trustees of Village of Dobbs Ferry*, 81 A.D.3d 945 (2d Dep't 2011).
2. *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*, 2011 WL 1733931 (2d Dep't May 3, 2011).
3. *Bayswater Realty & Capital Corp. v. Planning Board of Town of Lewisboro*, 76 N.Y.2d 460 (1990).
4. *Fuentes v. Planning Board of Village of Woodbury*, 918 N.Y.S.2d 213 (2d Dep't 2011).
5. *Underhill Ave. Corp. v. Village of Croton-on-Hudson*, 919 N.Y.S.2d 67 (2d Dep't 2011).
6. *Town of Huntington v. Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d 198 (2d Dep't 2011).
7. *Dobbs Ferry Development Associates v. Board of Trustees of Village of Dobbs Ferry*, 81 A.D.3d 945 (2d Dep't 2011).
8. *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*, 2011 WL 1733931 (2d Dep't May 3, 2011).
9. Pursuant to Section 300-69 of the Dobbs Ferry Code in effect at the time the subject approval was granted, the Village Board of Trustees was the body which had the authority to grant site plan approval in the Village of Dobbs Ferry, subject to the recommendation of the Planning Board.
10. *Dobbs Ferry Development Associates*, 81 A.D.3d at 945.
11. *Id.*
12. *Bayswater Realty & Capital Corp. v. Planning Board of Town of Lewisboro*, 76 N.Y.2d 460 (1990).
13. *Dobbs Ferry Development Associates*, 81 A.D.3d at 945-946.
14. *Twin Lakes Development Corp. v. Town of Monroe*, 1 N.Y.3d 98 (2003).
15. *Dobbs Ferry Development Associates*, 81 A.D.3d at 945-946.
16. *Id.* at 946.
17. *Pulte Homes of New York*, 2011 WL 1733931.
18. *Id.*
19. *Fuentes v. Planning Board of Village of Woodbury*, 918 N.Y.S.2d 213 (2d Dep't 2011).
20. *Id.* at 214.
21. *Id.*
22. *Id.* at 215.
23. *Id.* at 215-216.
24. *Fuentes*, 918 N.Y.S.2d at 215.
25. *Underhill Ave. Corp. v. Village of Croton-on-Hudson*, 919 N.Y.S.2d 67 (2d Dep't 2011).
26. *Id.* at 68-69.
27. *Id.*
28. *Id.* at 69.
29. *Id.*
30. *Underhill Ave. Corp.*, 919 N.Y.S.2d at 69-70.
31. *Town of Huntington v. Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d 198 (2d Dep't 2011).
32. *Id.* at 199.
33. *Id.* at 199-200.
34. *Id.* at 199.
35. *Id.* at 199-200.
36. *Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d at 200.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 200-201.
41. *Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d at 201(*quoting Kamhi v. Planning Board of the Town of Yorktown*, 59 N.Y.2d 385 (1983)).
42. *Beechwood Carmen Bldg. Corp.*, 920 N.Y.S.2d at 201.

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