Land Use Case Law Update

By Noelle Crisalli Wolfson

This quarter's case law update highlights recent cases from the Third and Fourth Departments in a variety of areas of interest to the land use practitioner.

Center of Deposit, Inc. v. Village of Deposit[1] and *Dugan v. Liggan*,[2] both decided by the Third Department on the same day, address the fact-specific question of when a land use determination issued by an administrative agency is ripe for judicial review.

Addressing another threshold question in land use litigation matters, the Fourth Department, in *Young Development, Inc. v. Town of West Seneca*[3] and *Royal Management Inc. v. Town of West Seneca*,[4] held that the statute of limitations applicable to challenges to the determination of a town board on an application for a special use permit is four months, not 30 days as provided in Town Law §274-b(9).

In *Subdivisions, Inc. v. Town of Sullivan*,[5] the Third Department issued a warning to municipalities—carelessness in the drafting of a town zoning ordinance may have unanticipated and undesirable consequences.

Finally, in *Kempisty v. Town of Geddes*,[6] the Fourth Department annulled conditions to a site plan approval apparently imposed because of the respondents' view of the applicant, rather than the use proposed by the application, reinforcing the black letter rule that zoning may only regulate land uses, not users.

I. Ripeness to Review Determinations of Administrative Agencies

Two cases decided by the Appellate Division, Third Department, address the topic of ripeness to challenge a land use determination. Although neither makes new law, this is an often unclear and fact-specific analysis, and thus any new case on this topic can aid practitioners when undertaking a ripeness analysis.

In *Center of Deposit, Inc. v. Village of Deposit*,[7] the Third Department held, among other things, that petitioner's challenge to the Village Planning Board's positive declaration under SEQRA was ripe for review because under the circumstances of the application, the requirement to prepare an environmental impact statement constituted injury to petitioner.

In *Center of Deposit, Inc.*, the petitioner was the owner of a parcel of property improved with two vacant buildings. After several failed attempts at selling the property, it made an application to the Village of Deposit Planning Board for subdivision approval to separate the lot into two lots, each of which would be improved with one of the existing buildings. According to the Third Department's decision, no other improvements were proposed in connection with the subdivision application; its purpose was just the legal division of the property. In response to petitioner's application, the Planning Board classified the action as an unlisted action under SEQRA, adopted a positive declaration of environmental significance, and required the petitioner to submit a Draft Environmental Impact Statement ("DEIS") on the grounds that the application had the potential to negatively impact water quality, air quality, and public health because of, among other things, the probable presence of friable asbestos in at least one of the buildings.[8] Rather than preparing the DEIS, the petitioner commenced this Article 78 proceeding challenging the positive declaration adopted by the Planning Board.

The lower court dismissed the petition, holding that the Planning Board's determination was not ripe for review, and, in any event, it was rational. The Third Department reversed, finding that the case was ripe for review and that the Planning Board's determination was arbitrary and capricious in that it did not provide a reasoned elaboration to support its determination that proposed application had the potential to cause the above-described environmental impacts.[9]

Addressing the ripeness of the proceeding, the Court reminds the reader that there is no bright line rule of ripeness, and that courts must, on a case-by-case basis, determine whether an administrative agency's action

> impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process[,]...[which] inflicts an actual, concrete injury...[that] may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party[.][10]

If, in the facts presented, that question can be answered in the affirmative then the decision is "final" and thus ripe for review.

Although under most circumstances the adoption of a positive declaration is not ripe for review, here, the Court, necessarily intermingling its substantive determination on the reasonableness of the Board's determination and the issue of ripeness, held that the Board's determination inflicted concrete injury in the form of requiring petitioner to spend time and money to prepare a DEIS because the Board's determination was devoid of a reasoned elaboration as to how the proposed action—the legal division of the lot into two lots with no development or other physical improvements proposed—had the potential to cause some or all of the above-referenced environmental impacts. The Court went on to annul the Board's positive declaration on the same grounds.[11]

In *Dugan v. Liggan*,[12] decided on the same day as *Center for Deposit, Inc.*, the Third Department held that the petitioners' challenge to the Ulster County Department of Health-Environmental Sanitation Division's (the "Department") issuance of approval of certain aspects of a residential subdivision was timely since it was commenced within four months of the date the Department's substantive approval was issued.

In *Dugan*, the underlying project was a 21-lot residential subdivision (which also included one existing commercial lot) to be built in three phases in the Town of Rosendale, Ulster County. The Town's Planning Board, lead agency under SEQRA, classified the project as a Type I action. The Department was an involved agency. The Planning Board held public hearings on the application in April and December 2007. In July 2008, the Planning Board adopted a SEQRA negative declaration, finding that the project did not have the potential to generate any significant environmental impacts. The negative declaration was then filed with the Town Clerk. By resolution filed with the Town Clerk on September 4, 2008, the Planning Board granted preliminary plat approval for the project, such approval being extended in February 2009. In September 2009, the Department issued its approval for the subdivision and the Board granted final plat approval, such approval being promptly filed with the Town Clerk. In October 2009, petitioners, neighboring landowners who opposed the project, commenced the instant Article 78 proceeding seeking review of all of the above-referenced approvals.[13]

The lower court dismissed the petition as untimely and the petitioners appealed. The Third Department modified the lower court's determination, finding that the petitioners' challenge to the Department's approval of the sanitary aspects of sewage disposal for the subdivision (which carried with it a four-month statute of limitations) was timely since such determination did not become "final" until the Department issued its substantive approval, such approval being a separate and distinct inquiry from the SEQRA process. Thus, as respects the Department's approval, the negative declaration itself was not a final determination inflicting actual and concrete injury until the substantive approval was issued.[14]

II. Statute of Limitations Within Which to Challenge a Special Use Permit Issued by a Town Board

In *Young Development, Inc. v. Town of West Seneca*[15] and *Royal Management Inc. v. Town of West Seneca*,[16] the Fourth Department held, among other things, that a challenge to the denial of a special use permit by a Town Board is subject to CPLR 217's four-month statute of limitations, not the 30-day statute of limitations set forth in Town Law §274-b(9).

Although *Young Development, Inc.* and *Royal Management, Inc.* are clear in their holdings—that the 30-day statute of limitations set forth in Town Law §274-b(9) does not apply to the decision of a town board on an application for a special use permit—Town Law §274-b(9) could easily be read to provide otherwise. Subsection (9) of Town Law §274-(b)(approval of special use permits), specifically provides that:

> Any person aggrieved by a decision of the planning board *or such other designated body 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.[17]

Neither *Young Development, Inc.* nor *Royal Management, Inc.* explains why the italicized language above would not encompass the determination of a town board on an application for a special use permit. However, a 1997 case from the Second Department, *Chernick v. McGowan*,[18] which also held that that the statute of limitations within which to challenge a town board's determination on a special use permit application was four months, not 30 days, indicates that four months is the correct statute of limitations because, in retaining the authority to grant special use permits to itself, the town board "did not delegate its authority to grant the special use permits."[19]

In so much as the plain language of Town Law §274-(b) does not clearly provide that town boards are, in all circumstances, exempt from its 30-day statute of limitations, and many codes do expressly designate the town board as the agency authorized to issue special use permits,[20] there is at least an argument that its terms can apply to the determinations of town boards on special use permit applications. Thus, out of an

abundance of caution, it would be wise for practitioners, when possible, to commence actions challenging special use permit determinations by town boards within 30 days, but to anticipate that approvals that their clients receive (or grant in the case of attorneys representing town boards) may be subject to a four-month statute of limitations.

III. Interpretation of an Ambiguous Provision in a Zoning Code

In *Subdivisions, Inc. v. Town of Sullivan*,[21] the Third Department, interpreting an ambiguous provision of the Town's zoning ordinance in favor of the petitioners, held that a mineral resources use was a permissible use in the Town's agricultural district notwithstanding that it was not expressly listed as such in the Town's code.

In *Subdivisions, Inc.*, petitioner Subdivisions, Inc. was the owner of, among others, a parcel of property in the Town's agricultural district that had historically been used for mining. A mineral resources use was listed as a special permit use in the section of the Town's code setting forth additional requirements for special permit uses, but it was not listed as a permitted (or special permit) use in any district in the Town code's zoning use schedule.

In 2004, petitioner applied for a special use permit for the mining of minerals on its property. The application was tabled by the Town's planning board, and was then apparently "debated" between the planning board and the Town's zoning board of appeals (the "ZBA") for five years for reasons that were not apparent to the Court.[22] As relevant to the instant proceeding, the ZBA ultimately determined that the mineral resource use was prohibited in the Town's agricultural district (and thus on petitioner's property) because such use was not expressly listed in the Town's zoning schedule as a use permitted in the agricultural district. This Article 78 proceeding followed.

The lower court dismissed the proceeding, holding that the ZBA's determination was not irrational or unreasonable. Petitioners appealed, arguing that the town's zoning ordinance was ambiguous as respects the mineral resources use and thus should be interpreted in their favor.[23]

Before addressing the substantive issue before it, the Court set forth the legal framework that is applicable when it must interpret an allegedly ambiguous zoning law. The Court's decision provides that:

> When a reviewing court is confronted with an allegedly ambiguous zoning law, it generally will grant great deference to the ZBA's interpretation thereof—disturbing such interpretation "only if it is irrational or unreasonable".... If, however, the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required.... As zoning regulations are in derogation of the common law, they must be strictly construed against the municipality that enacted them and "any ambiguity in the language employed must be resolved in favor of the property owner"....[24]

Applying these principles to the facts at hand, the Third Department reversed the ZBA's determination, finding that it lacked a rational basis. The Court held that even though the mineral resources use was not specifically listed as a permitted use in any of the Town's zoning districts, including its agricultural district, the mining use was clearly contemplated as a use that would be permitted in the Town because, among other things, such use was included in the special use permit section of the Town's code. Thus, because the Town's code clearly (although, perhaps unintentionally) contemplated such use as permitted in the Town, the use was implicitly permitted in the agricultural district. In so holding, the Court reasoned that:

> Although we appreciate that a municipality cannot be expected—when crafting a zoning ordinance—to anticipate each and every potential use to which a property owner may wish to put his or her property, the zoning law here is, in our view, so poorly written with respect to identifying the zoning district(s) within which mineral resource uses are permitted as to be ambiguous. As such ambiguity must be resolved in favor of petitioners... we conclude that the ZBA's determination that "mineral resource uses are prohibited in agricultural districts under the 1979 [zoning law], either with or without the issuance of a special use permit," is unreasonable and irrational.[25]

However, the Court stopped short of issuing petitioners a permit to mine the subject property, directing that "the Planning Board can (and should) review petitioners' application on the merits and, after due consideration of the relevant standards, approve or deny it."[26]

IV. Conditions to Approvals Must Relate to the Use of the Property, Not the User

In *Kempisty v. Town of Geddes*,[27] the Appellate Division, Fourth Department, annulled six conditions of site plan approval on the grounds, among others, that such conditions were imposed because of the respon-

dents' view of the applicant and not the application before it.

In *Kempisty*, the petitioners were the owner and lessee of two parcels of property in the respondent Town of Geddes. Both properties were located in the town's Commercial C: Heavy Commercial District, in which motor vehicle sales, service and repairs (and uses and structures accessory thereto) were permitted with site plan approval. Notably, such uses were designated as permitted with a special permit in every other district in which they were permitted in the town. One of the petitioners' parcels was developed with an automotive use that was established before the applicable zoning code was adopted. The second parcel, which was contiguous to the first, was vacant. Petitioners sought approval from the town to use the second parcel to reconfigure and expand the existing business.

Petitioners made an application to the Geddes town board for site plan approval for the proposed expansion and reconfiguration of their automotive use. Originally the site plan application pertained to the vacant parcel only; however, at the town's request, but under protest, the petitioners included the developed parcel in the site plan application (its protest argument being that site plan approval was not required for the improved parcel because it was a pre-existing nonconforming use). The town board approved the petitioners' site plan for both parcels subject to twelve conditions. Conditions three through eight imposed the special conditions set forth in the section of the town's code applicable to "motor vehicle service and repair facilities and motor vehicle sales facilities" allowed with a special use permit (collectively, the "Special Permit Conditions").

Petitioners commenced this Article 78 proceeding challenging the town board's determination that both parcels were subject to site plan review and the imposition of the Special Permit Conditions.

The Fourth Department easily held that the entire site—not just the vacant parcel—was subject to site plan review because the applicant sought approval to enlarge its use over the improved and vacant parcels. However, the Fourth Department held that the inclusion of the Special Permit Conditions in petitioners' approval was an abuse of discretion because, in the Commercial C district, the motor vehicle use was a permitted use with site plan approval; it was not a special permit use. Moreover, the proof before the Court demonstrated that the Special Use Conditions were imposed in the context of this particular application because of the town's concerns arising out of *petitioners'* use of the property (apparently one of the petitioners had an acrimonious relationship with the town), rather than the use of the property in and of itself. The Court held that the imposition of the conditions based on the identity of the applicant, rather than to address the impacts of the proposed use, ran "afoul of the 'fundamental principle' that 'conditions imposed on the [approval of a site plan] must relate only to the use of the property that is the subject of the [site plan] without regard to the person who owns or occupies that property."[28]

Endnotes

1. Center of Deposit, Inc. v. Village of Deposit, 90 A.D.3d 1450 (3d Dep't 2011).
2. Dugan v. Liggan, 90 A.D.3d 1445 (3d Dep't 2011).
3. Young Development, Inc. v. Town of West Seneca, 91 A.D.3d 1350 (4th Dep't 2012).
4. Royal Management Inc. v. Town of West Seneca, 93 A.D.3d 1338 (4th Dept. 2012).
5. Subdivisions, Inc. v. Town of Sullivan, 92 A.D.3d 1184 (3d Dep't 2012).
6. Kempisty v. Town of Geddes, 93 A.D.3d 1167 (4th Dep't 2012).
7. *Center of Deposit, Inc.*, 90 A.D.3d 1450.
8. *Id.* at 1451-52.
9. *Id.* at 1453.
10. *Id.* at 1451.
11. *Id.* at 1452-53.
12. Dugan v. Liggan, 90 A.D.3d 1445 (3d Dep't 2011).
13. *Id.* at 1446-47.
14. *Id.* at 1447.
15. *Young Development, Inc.*, 91 A.D.3d 1350.
16. *Royal Management Inc.*, 93 A.D.3d 1338.
17. N.Y. TOWN LAW § 274-b(9) (emphasis added).
18. Chernick v. McGowan, 238 A.D.2d 586 (2d Dep't 1997).
19. *Id.* at 587.
20. For example, the West Seneca Code specifically designates the Town Board as the special use permit authority for certain types of uses. *See, e.g.*, West Seneca Code Section 120-22A(6), which specifically designates the town board as the board authorized to grant special permits for, among other things, concrete products manufacture.
21. Subdivisions, Inc. v. Town of Sullivan, 92 A.D.3d 1184 (3d Dep't 2012).
22. *Id.* at 1184.
23. *Id.* at 1185.
24. *Id.*
25. *Id.* at 1187.
26. *Id.*
27. Kempisty v. Town of Geddes, 93 A.D.3d 1167 (4th Dep't 2012).
28. *Id.* at 1171.

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