Land Use Case Law Update

By Noelle Crisalli Wolfson

This edition of the Case Law Update features cases from the Second and Third Departments. While it is unlikely that any of the recent land use cases will become a best-selling beach read this summer, they are informative on issues such as judicial review of a default denial of an area variance (*Jonas v. Stackler*[1]), generalized community opposition as a basis (or, rather, lack of basis) to deny a land use approval in the face of contrary expert evidence (*Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals*[2]), the standing of one municipality to challenge the land use decisions of another (*Village of Pomona v. Town of Ramapo*[3]) and the steps a land use approval challenger must take to ensure that his challenge will not be rendered moot by substantial construction (*Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*[4]).

I. A Court May Affirm a Default Denial of an Area Variance Absent Factual Findings to Support the Denial, Provided Support for the Denial Is in the Administrative Record

In *Jonas v. Stackler,*[5] the Second Department affirmed a default denial of an area variance (a denial based on a failure of a majority of the Board to vote to grant or deny the variance)[6] notwithstanding that such denial was not supported by factual findings.

Therein the petitioner was the owner of a vacant waterfront parcel in the Village of Centre Island and sought to build a residence on the parcel. Among other approvals, variances from the Village's frontage, lot size, building setback and building elevation requirements were necessary to allow petitioner to construct the proposed residence.[7] The Village's Board of Zoning Appeals (BZA) was a five-member board; however, at the time of petitioner's variance application, one seat was vacant and one member recused himself. Accordingly, in order to obtain the variances necessary to construct the proposed residence, the unanimous approval of the BZA members able to vote on the application was required.[8] After several public hearings and the submission of credible evidence both in favor of and in opposition to the requested variances, the board members entitled to vote on the application unanimously agreed to grant the lot area, frontage and setback variances, but could not reach an agreement regarding the elevation variance. Because no unanimous agreement was reached, the elevation variance was denied as a matter of law, with no factual findings provided to support the denial of the variance.[9]

The petitioner commenced an Article 78 proceeding challenging the denial of the elevation variance as arbitrary and capricious, and the lower court, agreeing with petitioner, annulled the BZA's determination and directed that the elevation variance be granted.[10] The BZA members appealed and the Second Department reversed and dismissed the petition on the merits, reasoning that the absence of a formal statement of reasoning in support of the default denial was not necessarily required since a review of the record of the application before the BZA, along with affidavits submitted in the Article 78 proceeding (the precise nature of which were not described), can provide a sufficient basis from which a reviewing court can determine whether the denial was rational.[11] Here, the Court held that the record before the Board did, indeed, support the BZA's denial of the elevation variance.[12]

II. General Community Opposition Is Not Sufficient Basis Upon Which to Deny a Land Use Approval

In *Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals,*[13] the Second Department, in reversing the Town of Islip Zoning Board of Appeals' denial of a special exception permit (and the Supreme Court, Suffolk County's affirmance of that denial), reminds the reader of the well-established principle that a determination to deny a land use approval that rests entirely on generalized community opposition and lacks an objective factual basis is irrational.

In *Kabro Associates, LLC,* the petitioner was the owner of a shopping center that was located along Montauk Highway in West Islip. The front portion of petitioner's property (the portion along Montauk Highway) was located in the Town's Business 1 District, and the rear portion of the property was located in the Town's Residence A District. Petitioner applied to the Town's Planning Board for a special permit to establish a restaurant on the property. As a condition of the restaurant special use permit, the Planning Board required petitioner to obtain a special exception permit from the Town's Zoning Board of Appeals (ZBA) to allow extension of off-street parking into the residence district and to increase the size of the building on the property by more than 3,000 square feet. The ZBA held a public hearing on petitioner's application, at which petitioner presented the testimony of a traffic engineer

and real estate appraiser, who respectively testified that the proposal would not exacerbate existing traffic congestion or negatively impact real estate values in the surrounding area. Neighboring property owners also appeared at the public hearing and argued that the petitioner's proposal would negatively impact traffic conditions and decrease property values, but their arguments were not supported by any type of expert or empirical evidence.[14]

Ultimately, the ZBA denied petitioner's application, citing concerns about traffic, impact on property values, and the appropriateness of the proposal for the location as grounds for the denial. Petitioner commenced this Article 78 proceeding challenging the denial. The Supreme Court, Suffolk County, denied the petition and dismissed the proceeding, and the Second Department reversed.[15]

In support of its reversal of the lower court's decision, the Second Department recognized the weighty deference that must be given to a zoning board of appeals' decision, but annulled the ZBA's decision, finding it to be irrational and unsupported by the record. The Court explained that "[a] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis."[16] In light of the expert testimony petitioner presented demonstrating that its proposal would not negatively impact traffic or property values (and the Town's Department of Planning and Development's concurrence with that finding), the Court held that the ZBA was not free to deny the petitioner's application on the grounds that it would negatively impact traffic and real estate values based only on the uncorroborated and unsupported assertions of the opposing neighbors.[17]

The Second Department further annulled the finding that the proposed use was not appropriate for the given location since the petitioner was seeking special exception approval, not a variance. The Court distinguished the special exception application from a variance application, explaining that the petitioner's burden in an application for special exception use approval is lighter than in an application for a variance since the special exception use carries with it a legislative determination that the use is appropriate for the specific location provided that certain legislatively imposed conditions are met. Here, the Court held that the ZBA's finding that such standards were not met (i.e., that the application would have a negative impact on property values and traffic) was arbitrary and capricious, and therefore so was the Board's determination that the proposed use was not an appropriate use in the proposed location.[18]

III. Standing of One Municipality to Challenge the Zoning Enactments of Another

In *Village of Pomona v. Town of Ramapo*,[19] the Second Department further defines and clarifies, again with the help of the Town of Ramapo and one of its neighboring villages,[20] when one municipality may challenge the land use decisions of another.

In *Village of Pomona*, the Village challenged the Town of Ramapo's decision to, among other things, rezone property in the Town adjacent to the Town's Pomona border from R-40 (40,000-square-foot single-family zoning) to MR-8, which permits multi-family housing at a density of eight units per acre, on the grounds that such rezoning was not in accordance with the Town's comprehensive plan (i.e., that it was impermissible spot zoning), that the rezoning was adopted in violation of General Municipal Law §§239-nn and 239-m, and was adopted in contravention of SEQRA.[21] The Town moved to dismiss the proceeding on the grounds that the Village lacked capacity and standing to sue.[22]

The Second Department dismissed the argument that the Village lacked capacity to sue with little discussion, but held that the Village had standing to bring and maintain some, but not all, of its challenges to the rezoning.

The Court first held that the Village did not have standing to challenge the Town's rezoning on the grounds that the rezoning was not in accord with the Town's comprehensive plan, citing (as it does several times in the opinion) *Village of Chestnut Ridge v. Town of Ramapo*[23] for the proposition that "villages 'have no interest in [a] Town Board's compliance with...its comprehensive plan.'"[24]

The Court dismissed the Village's cause of action pursuant to General Municipal Law §239-nn, but denied the Town's motion to dismiss the Village's General Municipal Law §239-m cause of action. General Municipal Law §239-nn *encourages* adjacent municipalities to cooperate in adopting land use development decisions and regulation in a manner that is respectful of the goals of each municipality, but only *requires* the giving of notice of public hearings for certain types of approvals to the neighboring municipality, and that the non-adopting municipality be given a chance to appear and be heard at any public hearing on the proposed application. Since there was no dispute that the Village received the required notice and appeared at the public hearings, the Town was entitled to dismissal of the Village's cause of action pursuant to General Municipal Law §239-nn, notwithstanding the Village's apparent allegations that the Town did not act in the manner encouraged by the statute.[25] However, the Court held that the Village could maintain its cause of action

pursuant to General Municipal Law §239-m since the Village was challenging the adequacy of the Town's compliance with that section's procedural requirements, and, because General Municipal Law §239-m facilitates regional review of land use plans, a neighboring municipality has an interest in making sure that the procedures set forth therein are followed.[26]

With respect to the Village's SEQRA claim, the Court begins its analysis, as courts often do when considering SEQRA challenges, with a recitation of the required showing that must be made to establish standing. Specifically, the decision provides as follows:

> "[T]he right of a municipality to challenge the acts of its neighbors must be determined on the basis of the same rules of standing that apply to litigants generally".... "To establish standing under SEQRA, the petitioner[ ] must show (1) that [it] will suffer an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of interest sought to be protected or promoted by SEQRA"... "[V]illages may have standing to sue in appropriate cases...where they have a demonstrated interest in the potential environmental impacts of the project[.]"...[27]

Here, the Court held that the Village adequately demonstrated its standing under SEQRA based on its allegations that the Town failed to take a hard look at the potentially significant environmental impacts resulting from the rezoning of the subject property, including the impact on community character. Indeed, as was noted by the Rockland County Department of Planning, the proposed rezoning had the potential to essentially quadruple the residential density of the subject property, which did not seem consistent with the relatively low-density zoning in the adjacent portions of the Town and Village.

IV. Challengers to the Grant of Land Use Approvals Must Take Steps to Maintain the Status Quo During the Pendency of the Litigation or Risk Dismissal on the Grounds of Mootness

In *Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*,[28] the Third Department affirmed the Supreme Court, Montgomery County, determination that two Article 78 proceedings (one challenging the issuance of a use variance and one challenging the issuance of site plan approval) were moot because the work permitted pursuant to such approvals was essentially completed and the petitioners did not seek to enjoin the work.

In *Kowalczyk*, the petitioners were the owners of property located adjacent to a residentially zoned parcel improved with a pre-existing, nonconforming junkyard. In 2007 the owner of the junkyard property (the Kaczkowskis) applied to the respondent Zoning Board of Appeals (ZBA) for a use variance to construct a garage on their property which would be used to dismantle cars and sell the car parts.[29] In November of 2008 the respondent ZBA granted the use variance and the Kaczkowskis obtained a building permit to construct the garage. Petitioners commenced an Article 78 proceeding challenging the grant of the use variance. For reasons not explained in the decision, the ZBA, at the Kaczkowskis' request, held a rehearing on the use variance application in 2009 and again voted to approve the variance and the issuance of the building permit. Petitioners commenced a second Article 78 proceeding challenging the ZBA's determination (the two proceedings were ultimately consolidated into one proceeding, referred to in the Third Department's opinion as proceeding No. 1).[30]

In the Fall of 2010 the Kaczkowskis obtained site plan approval from the Town's Planning Board and received a certificate of occupancy for the garage. However, between the grant of site plan approval and the issuance of the certificate of occupancy, petitioners commenced another Article 78 proceeding challenging the grant of site plan approval and seeking the removal of the garage from the Property (proceeding No. 2).[31]

The ZBA made a motion, which the Kaczkowskis joined, to dismiss proceedings No. 1 and 2 on the grounds that they were moot at the time of the motion because the construction of the garage was completed and the petitioners never sought to enjoin the construction or otherwise maintain the status quo during the pendency of the proceedings notwithstanding that the such construction was readily visible to petitioners.[32] The lower court granted the motion and the Third Department affirmed, reasoning that:

> "Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy".... Where, as here, the change in circumstances concerns a construction project which is completed, while relief is "theoretically available" in that a structure or project "can be destroyed," courts have considered several factors to be significant...in addition to "how far the work has progressed towards completion"...."Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise

> preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation"....
>
> We agree with Supreme Court's conclusion that petitioners failed to make sufficient efforts to preserve the status quo and safeguard their rights, pending judicial review, by failing to even attempt to obtain an injunction or stay to prevent the commencement of the construction of the garage or the continuation of the open, visible and ongoing construction, although aware of the availability of that relief.[33]

Thus the clear lesson to challengers is that they must take steps to preserve the status quo or halt construction during the pendency of a judicial challenge to land use approvals, or run the risk of their challenge being rejected as moot in the face of advanced construction.

Endnotes

1. *Jonas v. Stackler*, 95 A.D.3d 1325, 2012 WL 1939964 (2d Dep't 2012).
2. *Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals*, 944 N.Y.S.2d 277 (2d Dep't 2012).
3. *Village of Pomona v. Town of Ramapo*, 94 A.D.3d 1103 (2d Dep't 2012).
4. *Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*, 95 A.D.3d 1475, 944 N.Y.S.2d 660 (3d Dep't 2012).
5. *Jonas v. Stackler*, 95 A.D.3d 1325, 2012 WL 1939964 (2d Dep't 2012).
6. *See* Village Law §7-712-a [13](b).
7. *Jonas*, 95 A.D.3d 1325, 2012 WL 1939964, *1.
8. *Id.*
9. *Id.*
10. *Jonas*, 95 A.D.3d 1325, 2012 WL 1939964, *2.
11. *Id.*
12. *Jonas*, 95 A.D.3d 1325, 2012 WL 1939964, *3.
13. *Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals*, 944 N.Y.S.2d 277 (2d Dep't 2012).
14. *Id.* at 279.
15. *Id.*
16. *Id.*
17. *Id.* at 280.
18. *Id.*
19. *Village of Pomona v. Town of Ramapo*, 94 A.D.3d 1103 (2d Dep't 2012).
20. *See also Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74 (2d Dep't 2007).
21. State Environmental Quality Review Act (ASEQRA@ collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617).
22. *Village of Pomona*, 94 A.D.3d at 1104.
23. *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74 (2d Dep't 2007).
24. *Village of Pomona*, 94 A.D.3d at 1104.
25. *Id.* at 1105.
26. *Id.* at 1107-1108.
27. *Id.* at 1105 (internal citations omitted).
28. *Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*, 95 A.D.3d 1475, 944 N.Y.S.2d 660 (3d Dep't 2012).
29. *Kowalczyk*, 944 N.Y.S.2d at 661.
30. *Kowalczyk*, 944 N.Y.S.2d at 661-662.
31. *Kowalczyk*, 944 N.Y.S.2d at 662.
32. *Id.*
33. *Kowalczyk*, 944 N.Y.S.2d at 662-663.

Noelle Crisalli Wolfson is a member of the Land Use Committee of the Municipal Law Section of the New York State Bar Association and is an associate in the law firm Hocherman Tortorella & Wekstein, LLP. She is a 2001 graduate of Siena College and a 2006 graduate of Pace University School of Law, where she was a Research and Writing Editor of the *Pace Environmental Law Review* and an Honors Fellow with the Land Use Law Center.