Land Use Law Case Law Update

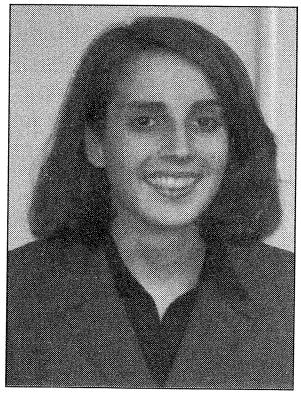
By Henry M. Hocherman and Noelle V. Crisalli

A. SEQRA Standing

In *Save the Pine Bush, Inc. v. Common Council of the City of Albany*[1] the majority on the one hand and two dissenters on the other debate the proper application of the test for organizational standing articulated in *Society of Plastics Industry, Inc. v. County of Suffolk*.[2] While the majority wins, a close look at the logic (or lack thereof) of the majority's decision as examined by the learned dissent causes one to believe that (as in a number of other recent Third Department cases) the decision will not be adopted by the other Departments.

In September 2003 respondent-developer Tharaldson made an application to the Common Council of the City of Albany (the "Common Council") to rezone a parcel of property from a residential district to a commercial district to enable it to construct a 124-room hotel on the subject property.[3] The property that was the subject of the application was in close proximity to Butterfly Hill, an area of the City in which the Karner Blue Butterfly and other plants and animals indigenous to Albany's Pine Barrens habitat live.[4] The City of Albany has set aside thousands of acres of Pine Barrens for the Pine Bush Preserve (the "Preserve"). The goal of the Preserve is to induce the Karner Blue Butterfly and other rare species to spread from Butterfly Hill (which is outside of the Preserve) to the Preserve (a journey of approximately 1,000 meters). Save the Pine Bush, Inc. ("Save the Pine Bush") and its members have a long history as advocates for the Preserve and the protection of the species inhabiting the Pine Barrens.[5]

The Common Council assumed the status of lead agency in the SEQRA review of Tharaldson's application and determined that it was a Type I action under SEQRA. The Common Council issued a positive declaration indicating that the action had the potential to cause at least one significant environmental impact and prompting the preparation of an environmental impact statement identifying and analyzing the potential environmental impacts of the proposed project. After reviewing Tharaldson's application, which included, among other things, a draft environmental impact statement and a final environmental impact statement, in December 2005 the Common Council issued a statement of Findings under SEQRA and granted the requested rezoning.[6]



Save the Pine Bush and individual members of that organization challenged, among other things, the SEQRA review of Tharaldson's application. Respondents moved to dismiss the petition on the grounds that petitioners lacked standing to maintain the special proceeding.

The Supreme Court found that the petitioners had standing and found that the Common Council, as lead agency under SEQRA, failed to take a hard look at the impact that the action would have on rare plant and animal species other than the Karner Blue Butterfly inhabiting Butterfly Hill and its subsequent impact on the Preserve. Accordingly, the Court annulled the SEQRA Findings and the rezoning.[7] The Third Department, in a 3-2 decision, affirmed.

With regard to petitioners' standing to maintain this Article 78 proceeding, the majority began by setting forth the well-established tests for individual and organizational standing under the seminal case of *Society of Plastics Industry, Inc. v. County of Suffolk*.[8] The Court explained that

> [P]etitioners [as individuals] were required to establish that they have sustained an injury-in-fact that is in some way different from that of the public at large and one that falls within the zone of interest protected by SEQRA. . . . An "[i]njury-in-fact may arise from the existence of a presumption established by the allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual or specific injury." . . . Moreover, as an organization seeking standing, Save the Pine Bush *"must demonstrate that at least one of its members would have standing to sue individually*, that the interests it asserts are germane to its purpose and that the resolution of the claim does not require the participation of its individual members[.]"[9]

In its application of this standard, the majority found that the individual petitioners and, as a consequence, Save the Pine Bush had standing, reasoning that:

> The individual petitioners have . . . demonstrated the existence of an actual injury different from that of the public at large. Petitioners have presented competent evidence not only that they regularly use the Preserve, but that at least one of them resides in sufficient proximity to the Preserve to facilitate that use and that the proposed development could have a substantial impact upon the migration of the Karner Blue Butterfly from Butterfly Hill to the Preserve. As such, petitioners have identified an injury-in-fact that falls within the zone of interest sought to be protected by SEQRA by presenting proof that "agency action will directly harm association members in their use and enjoyment of the affected natural resources[.]"[10]

In further support of its finding of standing, the majority relied on the individual petitioners' affiliation with Save the Pine Bush and their use and enjoyment of and their history of advocacy on behalf of the Preserve. The majority found that the individual petitioners, through their work with Save the Pine Bush, were harmed by potential harm to the Preserve in a manner different from the public at large. Because at least one of the individual petitioners had standing, the organization had standing.[11]

The dissent, however, found the majority's standing analysis to be circular and a clear departure from the rule in *Society of Plastics Industry, Inc.* that organizational standing flows from individual harm and not the other way around. The dissent argued that

> the majority essentially concludes that the only showing required [to establish standing] is that an organization has members who have acted in furtherance of its organizational purpose; there is really no need to show that the individual members have any distinct injury in fact. This rationale is directly contrary to the statement in *Society of Plastics Indus.* that "standing cannot be achieved merely by multiplying the persons a group purports to represent."[12]

Accordingly, the dissent would have granted the respondents' motion to dismiss the petition based on lack of standing.

The majority's reasoning in effect empowers a group to confer standing upon itself by virtue of perseverance and the passage of time, thus stripping the doctrine of standing of its essential, limiting, purpose. Whether the majority's application of the *Society of Plastics Industry* standard was a faithful application of that standard or an unwarranted departure from it will rest with future courts.

B. Statutes of Limitations: Challenges to the Issuance of a Building Permit

In *Letourneau v. Town of Berne*,[13] the Third Department (getting it right this time) held that a party wishing to challenge the issuance of a building permit after the 30-day statute of limitations on the issuance of the permit has run cannot restart the statute of limitations by making a request to the issuing municipality to revoke a building permit the challenger deems unlawfully issued and then bringing an Article 78 proceeding in the nature of mandamus to compel the municipality to rescind the building permit if his or her request is denied.

In that case, the respondent Town of Berne issued respondent Victor Procopio a building permit in 2001 to construct a new residence on the property that was the subject of controversy in this case. The building permit was subsequently renewed several times after 2001, the last renewal being in April 2007.

In 2004 petitioner purchased an adjoining lot. In December of 2006, after noticing some foundation markings on Mr. Procopio's property, petitioner submitted a request to the Town asking that Mr. Procopio's building permit be revoked on the grounds that, in petitioner's opinion, it was issued in violation of town, county and state law. The Town did not respond to the petitioner's request.

In June of 2007 the petitioner commenced the instant Article 78 proceeding to compel the Town to rescind Mr. Procopio's building permit and to prohibit the reissuance of the permit until certain conditions were met. The Supreme Court denied the petition on the grounds that the action which petitioner was seeking to review, presumably the Town's action (or inaction) on her request, was final in December of 2006 and thus petitioner's claim was barred by the four-month statute of limitations governing Article 78 proceedings in the nature of mandamus to compel municipal action.[14]

The Third Department affirmed the dismissal of the petition, but on different grounds, finding that:

> A CPLR article 78 proceeding must be commenced within four months of the time that the determination to be reviewed becomes final and binding—for a proceeding in the nature of

certiorari to review—or within four months of the agency's or official's refusal of the party's demand for the performance of a mandatory, ministerial act—for a proceeding in the nature of mandamus. . . . Petitioner asserts that her proceeding is in the nature of mandamus to compel the Town to rescind the building permit. In reality, petitioner is seeking review of the issuance and renewals of the building permit, alleging that it was issued and renewed in violation of Town, County and State laws. Allowing this proceeding to be couched in terms of mandamus would allow any party to begin anew the running of the statute of limitations in a certiorari matter by demanding recision of the original determination the party wishes to challenge. We cannot countenance this attempt to create an end-run around the statute of limitations. A challenge to "the issuance [or renewal] of a building permit accrues when the permit is issued [or renewed] and does not constitute a continuing wrong[.]"[15]

Thus, in the interest of finality, challengers will only have one opportunity to challenge the issuance of a building permit. The case reminds us once again that in the world of land use, the Biblical command to love one's neighbor is generally forgotten.

C. Fee in Lieu of Parkland Dedication

In *Davies Farm, LLC v. Planning Board of the Town of Clarkstown*[16] and *Joy Builders, Inc. v. Town of Clarkstown*,[17] decided together, the Appellate Division, Second Department held that a planning board may impose a fee in lieu of parkland dedication in connection with the approval of an application for subdivision approval at the final approval stage of the subdivision approvals process even if it did not impose such a fee during the preliminary approvals phase of the approvals process.

Petitioners in *Davies Farms, LLC* and *Joy Builders, Inc.* both had applications for residential subdivision approval before the Town of Clarkstown Planning Board. The Clarkstown Planning Board granted petitioners in both cases preliminary plat approval without making any finding of recreational need to support the imposition of a fee in lieu of parkland dedication pursuant to Town Law § 277(4) and without imposing their fee. In both cases, at the final subdivision approval stage of the approvals process the Clarkstown Planning Board required petitioners to make a payment in lieu of parkland dedication as a condition of final approval. Both lower court decisions, neither of which is reported, indicate that the requisite Town Law § 277(4) findings were made by the Planning Board prior to the imposition of the fee, apparently at the time of final approval. Both petitioners brought an Article 78 proceeding challenging the imposition of a fee in lieu of parkland dedication at the final plat approval phase of the subdivision approvals process with no finding of recreational need having been made during the preliminary plat phase. In both cases the Supreme Court, Rockland County dismissed the petition.

The Second Department affirmed the determinations of the Supreme Court in both cases, finding that "[n]othing in either Town Law § 276 or § 277 circumscribed the Planning Board's authority to impose the fee as a condition of final subdivision approval where it had already granted preliminary subdivision approval without a finding of recreational need."[18] The Court further supported its decision in both cases by reasoning that both petitioners were aware that a fee in lieu of parkland dedication could be imposed in connection with their applications. Although the reasoning is somewhat murky, the sole issue in both cases is merely the timing of the imposition of the fee and not the necessity for making individualized findings as a condition of such imposition.

D. Fire Districts are Not Exempt from Local Zoning

In *Volunteer Fire Association of Tappan, Inc. v. Town of Orangetown*,[19] the Second Department held that a fire district is not exempt from a town's local laws and regulations.

In this case plaintiff applied to the Town for a building permit to construct a new firehouse. The building permit was denied on the grounds that plaintiff did not have site plan approval for the proposed firehouse. In response to that determination, plaintiff commenced the instant action seeking a declaration that it is exempt from the Town's local laws and regulations. During the pendency of the action, the Town's Zoning Board of Appeals, after applying the *In re County of Monroe*[20] balancing test, determined that although plaintiff was exempt from the Town's zoning laws, it was required to apply for and obtain site plan approval for its proposed firehouse.[21] The Supreme Court similarly determined that plaintiff was required to obtain site plan approval from the Town, reasoning that "[u]nlike the encroaching governmental unit in *Matter of County of Monroe* . . . , the plaintiff in this case does not have its own land use approval process with public hearings and a comment period, and if the project were not subjected to site plan review by the Planning Board, there would be no equivalent review by any other entity."[22] Upon review, the Appellate Division, Second Department affirmed the Supreme Court's decision and directed the Supreme Court to en-

ter a judgment declaring that plaintiff was not exempt from the Town's local laws and regulations.

E. Helpful Reminders

The Second Department has recently decided several cases which serve as concise and helpful reminders of certain well settled principles of law.

In *Structural Technology, Inc. v. Foley*,[23] petitioner brought an Article 78 proceeding to review the determination of the Town of Brookhaven Town Board not to consider petitioner's application for a rezoning of a parcel of property in the Town. The Supreme Court granted the petition and directed the Town Board to consider the rezoning petition. The Second Department reversed and reminds us that "[a] Town Board is not required to consider and vote on every application for a zoning change[.]"[24]

In *Bassano v. Town of Carmel Zoning Board of Appeals*,[25] the Town of Carmel Zoning Board of Appeals denied an application for a variance required to permit the construction of a single-family home notwithstanding the fact that on three prior, factually similar occasions involving other applicants, the Zoning Board of Appeals granted the variance requested by petitioner. Because the Zoning Board of Appeals' decision was inconsistent with its prior decisions and did not explain the basis for its denial in this case, the Court reversed its decision, citing the well-established rule that "the decision of 'an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.'"[26]

In *John P. Krupski & Bros., Inc. v. Town Board of the Town of Southold*,[27] petitioner was the owner of a parcel of property in the Town of Southold that was the subject of a rezoning. Petitioner challenged the rezoning of its property arguing, among other things, that the rezoning must be annulled because of alleged deficiencies in the notice of the public hearing on the rezoning. Petitioner made this argument notwithstanding the fact that it apparently received actual notice of the hearing and appeared at the hearing. The Court found in this case that the hearing had been properly noticed; however, it went on to remind us that even if that were not the case "plaintiff's receipt of actual notice of, and its appearance at, the public hearing constitutes a waiver of the requirements that notice be given in strict accordance with the [Town Code]."[28]

Endnotes

1. 865 N.Y.S.2d 365 (3d Dep't 2008).
2. 77 N.Y.2d 761, 570 N.Y.S.2d 778 (1991).
3. *Save The Pine Bush, Inc.*, 865 N.Y.S.2d at 367.
4. Blue butterflies appear to be the bane of developers. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), wherein the Smith's Blue Butterfly played a role.
5. *Save The Pine Bush, Inc.*, 865 N.Y.S.2d at 367-68.
6. *Id.*
7. *Id.* at 368.
8. *Society of Plastics Indus., supra.*
9. *Save The Pine Bush, Inc.*, 865 N.Y.S.2d 365, 369 (3d Dep't 2008) (citations omitted).
10. *Id,* at 369-370 (citations omitted).
11. *Id.* at 370.
12. *Id.* at 376.
13. 866 N.Y.S.2d 462 (3d Dep't 2008).
14. *Id.*
15. *Letourneau*, 866 N.Y.S. 2d at 463 (citations omitted).
16. 54 A.D.3d 757, 864 N.Y.S.2d 84 (2d Dep't 2008).
17. 54 A.D.3d 761 864 N.Y.S. 2d 86 (2d Dep't 2008).
18. *Joy Builders, Inc*, 54 A.D.3d at 762; *Davies Farm*, LLC 54 A.D.3d at 758.
19. 54 A.D. 3d 850, 863 N.Y.S.2d 502 (2d Dep't 2008).
20. 72 N.Y.2d 338, 533 N.Y.S.2d 702 (1988). The Court of Appeals articulated a balancing test to be applied when a conflict exists between two governmental entities with regard to the application of local zoning regulations. Pursuant to that test, a governmental entity is exempt from local zoning regulations if it can show that the public interest served by the proposed project outweighs the public interest protected by local zoning regulations. In order to apply the balancing test, the Court of Appeals cited the following factors: "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulations would have upon the enterprise concerned and the impact upon legitimate local interest."
21. *Volunteer Fire Association of Tappan, Inc.*, 863 N.Y.S.2d at 503.
22. *Id.*
23. 56 A.D. 3d 677, 868 N.Y.S.2d 228 (2d Dep't 2008).
24. *Structural Technology, Inc.*, 868 N.Y.S.2d at 229.
25. 56 A.D. 3d 665, 868 N.Y.S.2d 677 (2d Dep't 2008).
26. *Bassano*, 868 N.Y.S.2d at 678.
27. 54 A.D.3d 899, 864 N.Y.S.2d 149 (2d Dep't 2008).
28. *Id.*

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