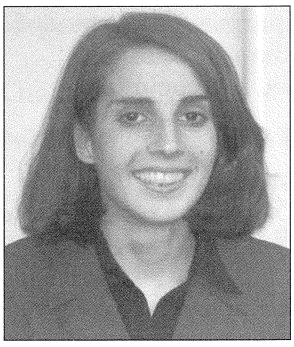
Land Use Law Case Law Update

By Henry M. Hocherman and Noelle V. Crisalli

As has been the case almost since the beginning of the economic downturn, this quarter's cases bring little by way of precedent-shattering law. Instead, to the extent that they teach us something, they provide a gloss on things we already knew and perhaps some enlightenment on things we might have taken for granted. *Ferraro v. Town Board of Town of Amherst*[1] simply repeats the well-established rule that the 100-foot buffer which defines the properties which may file a petition pursuant to Town Law Section 265, and thus invoke the supermajority provision of that section, extends from the boundary of the lands being rezoned rather than from the boundary of the property in which those lands are included. What makes this case somewhat interesting is the fact that the 100-foot buffer (101 feet in this case) was created defensively by the Respondent (proponent of the challenged rezoning) after the original rezoning petition was made the subject of a Section 265 petition by nearby landowners. The Fourth Department applied the strict letter of the law, notwithstanding that the 101-foot buffer was created after the fact, solely for the purpose of circumventing the statute, and resulted in a zone line that did not follow a property line.

Switzgable v. Board of Zoning Appeals of the Town of Brookhaven[2] again states a clearly established rule: that a zoning board of appeals must strictly apply the ubiquitous statutory balancing test when ruling upon an application for an area variance. In this case, the practitioner is reminded that a zoning board of appeals has no more right to tip the balance in favor of an applicant than it does to tip it in favor of those opposing the variance, and that the balancing test can no more be ignored in granting a variance than in denying one.

Stoffer v. Department of Public Safety of the Town of Huntington[3] tells us that a municipality may not create its own tribunal to adjudicate land use violations, since in New York, that role has been reserved to the courts. The case is interesting in that, by your writers' observation, a number of municipalities have delegated the task of adjudicating wetlands violations (and are imposing fines on account of those violations) to planning boards or to conservation boards, a practice which they will now have to revisit.



Finally, in *Petersen v. Incorporated Village of Saltaire*,[4] the Second Department held that a village board was justified in holding an official meeting outside the village limits. The Village of Saltaire is on Fire Island; the meeting in question was held in Manhattan and broadcast by video conference hookup to the Village Hall. Trivial as this decision may seem, it raises an interesting question in that the decision turns upon the fact that the Village Law does not require (as it once did) that Village Board meetings be held within the Village, and that it permits (but does not require) video conferencing. Reading the decision one wonders if the court, in emphasizing the letter of the Village Law, did not subvert the spirit of the Open Meetings Law.

I. Protest Petitions: Who Is Entitled to File a Petition Under Town Law §265(1)(c)

In *Ferraro v. Town Board of Town of Amherst*,[5] the Fourth Department held that petitioners' protest of the rezoning of a parcel of property did not implicate the supermajority vote requirement of Town Law §265 since the proponent of the rezoning preserved a buffer of 101 feet between the area to be rezoned and the petitioners' properties. The Court further held that the rezoning of the subject property was not inconsistent with the Town's comprehensive plan.

The property that was the subject of dispute in *Ferraro* is comprised of two parcels located generally to the south of the University of Buffalo's North Campus and to the north of Maple Road in the Town of Amherst (the "Property"). Petitioners are the owners of residential properties in a residential neighborhood located south of Maple Road and across from the Property. The owners of the Property and their agent, referred to as the Benderson respondents in the decision, sought to have the Property rezoned to permit a variety of uses including commercial uses, condominiums, and a hotel. In furtherance of that goal, the Benderson respondents petitioned the Amherst Town Board for a rezoning of the entire Property.[6] In response to the Benderson respondents' rezoning application, the petitioners protested the rezoning implicating the requirement that the Town Board approve the rezoning application by a supermajority vote.[7] In response to petitioners' protest, the Benderson respondents amended their rezoning ap-

plication to provide a 101-foot buffer along the Property's Maple Road frontage which would retain the existing zoning classification. The Town Board voted 4-3 to approve the rezoning application and rezoned the portion of the Property outside of the 101-foot buffer along Maple Road, holding that the rezoning was "generally consistent" with the Town's comprehensive plan.[8]

Petitioners in this hybrid declaratory judgment action/Article 78 proceeding challenged the Town Board's approval of the rezoning on the grounds that: (1) the Town Board was required to adopt the rezoning of the property by a supermajority vote because petitioners protested the rezoning and were the owners of more than 20 percent of the property directly across the street from the Property,[9] and (2) the rezoning was not consistent with the Town's comprehensive plan.[10]

The first issue to be resolved in this case was whether the distance set forth in Town Law §265(1)(c)[11] (one hundred feet from the street frontage opposite the property subject to the rezoning) defining who may file a protest petition implicating the supermajority vote requirement on a rezoning petition should be measured from the boundary of the area to be rezoned itself or the parcel of property of which the area to be rezoned is a part. Here the petitioners argued that the latter should be the rule and the Town and Benderson respondents argued that the former was the proper interpretation.

The Fourth Department, affirming the decision of the lower court and relying on the language of the statute and its legislative history, agreed with the Town and the Benderson respondents and held that pursuant to Town Law §265(1)(c) the supermajority vote requirement is only implicated if the protest petitioners own property within the qualifying distance of the area to be rezoned, not of the larger property.[12] This decision is clearly supported by the plain language of the statute and the 2006 decision of the Court of Appeals in *Eadie v. Town Board of the Town of North Greenbush*,[13] which held that pursuant to Town Law §265(1)(b) the '"one hundred feet' must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part."[14] Based on this interpretation, the Court held that Section 265(1)(c) was not applicable here because the Benderson respondents were providing a 101-foot buffer between the area to be rezoned and Maple Road which would maintain its existing zoning designation.[15]

The Court also dismissed the petitioners' claim that the rezoning should be annulled because it was not in accordance with the Town's comprehensive plan, a finding with which the dissent vigorously disagreed.[16] In order for the petitioners to have been successful on this challenge, it was their burden to show a "clear conflict" between the proposed zoning designation and the comprehensive plan; if it is "fairly debatable" whether the proposed rezoning is consistent with the comprehensive plan, the rezoning should be upheld.[17] Here, the Court, showing substantial deference to the Town Board's determination, held that it was "'fairly debatable' whether the proposed rezoning is consistent with the overall Plan"[18] notwithstanding the fact that the proposed rezoning clearly conflicted with the Town comprehensive plan's contemplated use of the Property, since the plan was designed to be flexible and provide only a generalized guide to future development. Therefore, the Court held that the petitioners failed to meet their burden of showing that there was a clear conflict between the overall plan (rather than the site-specific plan for the Property) and the rezoning.[19]

II. Zoning Boards of Appeals Must Apply the Statutory Area Variance Standard When Deciding Applications for Area Variances

Although recent Appellate Division decisions have repeatedly reaffirmed that courts will defer to a decision of a zoning board of appeals to grant or deny an area variance when the board applies the statutory area variance standard and its decision is reasonable,[20] in *Switzgable v. Board of Zoning Appeals of the Town of Brookhaven*,[21] the Court reminds us that where the Board fails to properly apply the balancing test or its application of the test is unreasonable, the Board's determination will be reversed. This is so even when the Board deviates in the direction of relaxing, to an applicant's benefit, the applicable standards.

In *Switzgable*, respondent Edward Lewis ("Lewis") was the owner of property in the Town of Brookhaven. He made an application to the respondent Zoning Board of Appeals for eight area variances, all of which were granted. Petitioners, presumably neighboring property owners, brought the instant Article 78 proceeding challenging the grant of the variances. The Supreme Court, Suffolk County granted the petition to the extent that it annulled one of the variances granted, but denied the balance of the petition. All parties appealed—the Board and Lewis appealing the annulment of the variance and the petitioners appealing the dismissal of the petition as to the remaining seven variances.[22]

The Appellate Division, Second Department affirmed the Supreme Court's annulment of one of the variances granted and reversed the lower court and annulled the remaining seven variances. In so holding, the Court reasoned that the Board's decision was arbitrary and capricious because it relied on the fact that there were comparable structures in the neighborhood—which the Court found to be either nonconforming or illegally built by Lewis—as the grounds to support the variances, which was improper under

the Town's Code.[23] Moreover, the Court held that the Board's failure to apply the statutory area variance standard to the application was a fatal flaw in its review of Lewis's application. On that point, the Court stated that:

> the Board failed to engage in the requisite balancing test, disregarding evidence that granting the variances would have an adverse impact upon the physical or environmental conditions in the neighborhood, which is part of the Fire Island National Seashore.... The Board disregarded evidence from neighbors with personal knowledge regarding detriment to the area, as well as their feasible suggestions as to how the benefit sought by Lewis could be achieved by methods other than the requested area variances.
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> In addition, under the circumstances of this case, the Board should have given more weight to the factor of self-created hardship.... In light of the fact that Lewis was a member of the Pines Zoning Advisory Committee, and did not deny that, over a period of years, he built illegally on his property with complete disregard for the zoning laws, his hardship was entirely self-created and supported denial of the variances. Notably, he can fully enjoy the property without building an addition to the residence, or building additional decks and fences.[24]

This case and the several other recent cases cited at endnote 20 reinforce the firmly established law that a zoning board of appeals must apply the statutory area variance standard when reviewing an area variance application. Beyond that, it demonstrates that the balancing test is intended to protect not only an applicant but the community as well, and that a zoning board of appeals has no more power to disregard the balancing test in favor of granting an application than it does in favor of denying one.

III. Municipalities May Not Create Tribunals to Adjudicate Land Use Violations

In *Stoffer v. Department of Public Safety of the Town of Huntington*,[25] the Second Department held that a town (with certain limited exceptions) may not create a separate body to adjudicate land use violations since the authority to adjudicate land use violations is vested with the Unified Court System.

The subject of the dispute in *Stoffer* was the Town of Huntington's accessory apartment law. Pursuant to that law, residents who wished to have an accessory apartment on their property were required to obtain a permit. A condition of the issuance of an accessory apartment permit was that the owner had to agree to allow periodic inspections of his or her property to confirm the property's compliance with building and fire codes.[26] Violations of the Town's accessory apartment law were reviewed by the Town's Accessory Apartment Bureau ("AAB") and a violation could result in the revocation of the permit.[27]

The Stoffers, the petitioners in this case, were the owners of a single-family home for which they possessed an accessory apartment permit. In November of 2007 the Stoffers were issued a violation for allegedly unlawfully using their property as a kennel and were told that if they did not remediate the situation and permit an inspection of their property they would be referred to the AAB for possible revocation of their accessory apartment permit.[28] The Stoffers refused to allow an inspection of the property as required under the accessory apartment law and therefore were notified that a hearing had been scheduled to consider the revocation of their accessory apartment permit.[29] A hearing officer of the AAB held a hearing at which the Stoffers' violation of the search provision of the accessory apartment law was considered, and revoked the Stoffers' accessory apartment permit on the grounds that they refused to comply with the law by failing to allowing a warrantless inspection of their premises. The hearing officer further informed the Stoffers that they were required to notify their tenant to vacate the premises and to schedule a "removal inspection" within 45 days.[30]

The Stoffers commenced this Article 78 proceeding challenging the determination by the AAB on the grounds, among others, that: (1) the provision of the accessory apartment law which required a search of the property was unconstitutional, and (2) the AAB did not have jurisdiction to adjudicate violation of the Town's Code.[31]

The Supreme Court, Suffolk County granted the petition and annulled the hearing officer's determination on the grounds that "the Court of Appeals' decision in *Sokolov v. Village of Freepor*...prohibited the Town 'from conditioning the continued use of an accessory apartment...upon the requirement that [the owners] consent to a warrantless search of the premises.'"[32] Because the court annulled the AAB's decision on this ground, it did not reach the question of whether the Town could authorize the AAB to adjudicate zoning violations.[33]

The respondents in the Article 78 proceeding appealed, arguing that the accessory apartment permit is

a privilege, not a right, and therefore the Town could require property owners with an accessory apartment permit to consent to a periodic inspection of their property.[34] In response, Petitioners agued that the warrantless search provision of the ordinance was unconstitutional. Alternatively, the Petitioners urged the Court to consider, among other things, their argument that the Town could not authorize the AAB to adjudicate zoning violations.[35]

The Appellate Division held that before it could consider the constitutionality of the search provision, it first had to address the question of whether the AAB could be granted the authority to adjudicate land use violations. It ultimately affirmed the Supreme Court's decision to annul the hearing officer's determination, but on the grounds that the AAB did not have the authority to adjudicate land use violations.[36]

In so holding, the Court reasoned that the New York State Constitution (Art. VI, §30) and, pursuant to its authority under the State Constitution, the New York State Legislature, have granted the authority to adjudicate land use violations exclusively to the courts.[37] Further, the Court held the Town could not exercise its authority under the Municipal Home Rule Law's home rule powers to delegate the authority to adjudicate land use violations to a municipal tribunal because the State Constitution limits a local government's power to interfere with the Legislature's authority to define the jurisdiction of the courts.[38] The Court also reasoned that even if the State Constitution could be read to allow a municipal government to create a tribunal to adjudicate land use violations, the Legislature has expressly prohibited municipalities such as the Town of Huntington (which has a population of approximately 200,000 people) from creating such tribunals since General Municipal Law Article 14-BB, §380 expressly permits municipalities of a certain population size (between 300,000 and 350,000 people) to establish an administrative tribunal for the purposes of code enforcement, preempting this area of law. The Court reasoned that if Huntington were permitted to create such a tribunal, General Municipal Law §380 would be rendered a nullity.[39] Because the Court held that the determination of the hearing officer was invalid based upon a lack of jurisdiction, it did not reach the question of whether the mandatory search provision of the Town's accessory apartment law was unconstitutional.[40]

IV. A Village Board of Trustees May Hold a Meeting and Public Hearings Outside of the Village

In *Petersen v. Incorporated Village of Saltaire*,[41] the Second Department held that the Village Board of Trustees (the "Board") could hold a public meeting and hearing outside of the Village limits since the Village Law does not require meetings of the Board to be held within the Village and the Board's meeting complied with the Open Meetings Law.

In *Petersen*, owners of homes in the Fire Island Village of Saltaire commenced an Article 78 proceeding to compel the Board to conduct all public meetings and public hearings within the boundaries of the Village.[42] By way of background, the Village of Saltaire is a small, seasonal community on Fire Island. It is inaccessible by car and must be accessed via ferry. However, during the winter months, ferry service is limited and, at times, unpredictable based on the weather. In February of 2006, the Village adopted legislation authorizing the Board to conduct official meetings outside of the Village limits under certain circumstances.[43] Pursuant to this authority, on February 3, 2009 the Board conducted a public meeting and public hearing in a conference room in midtown Manhattan. The meeting was simultaneously broadcast via two-way videoconferencing at the Village Hall allowing for full participation by members of the public. Petitioners took issue with this process and brought the instant Article 78 proceeding in the nature of mandamus to compel the Village Board to meet within the Village.[44]

It is well-established law that in order to be granted the remedy of mandamus to compel, "the petitioner's right to performance [must be] 'so clear as to admit of no doubt or controversy.'"[45] Although the Supreme Court, Suffolk County agreed with petitioners that they had a clear legal right to compel the Village Board to meet within the Village limits, the Second Department disagreed.[46]

In so holding, the Second Department held that because the Village Law does not require Village Board meetings to be held within the Village, the absence of such a requirement should be read to permit the Board to meet outside the Village boarders, citing the most wondrous of all Latin rules—"'expressio unius est exclusio alterius,' which means the expression of one thing implies the exclusion of others[.]"[47] In support of that holding the Court reasoned that although a prior version of the Village Law required the Board to meet within the confines of the Village, the current version of the Village Law eliminated that requirement. The Court viewed this omission by the Legislature as intentional and would not read it back into the statute.[48] Finally, the Court pointed out that the Open Meetings Law expressly permits videoconferencing as a method of holding public meetings.[49] That fact, along with the lack of requirement in the Village Law that the Board meet within the boundaries of the Village, confirmed the Second Department's reversal of the Supreme Court's decision and the dismissal of the petition.

Endnotes

1. *Ferraro v. Town Board of Town of Amherst*, 2010 WL 5395786 (4th Dep't December 30, 2010).
2. *Switzgable v. Board of Zoning Appeals of Town of Brookhaven*, 911 N.Y.S.2d 391 (2d Dep't 2010).
3. *Stoffer v. Department of Public Safety of the Town of Huntington*, 77 A.D.3d 305 (2d Dep't 2010).
4. *Petersen v. Incorporated Village of Saltaire*, 77 A.D.3d 954 (2d Dep't 2010).
5. *Ferraro v. Town Board of Town of Amherst*, 2010 WL 5395786 (4th Dep't December 30, 2010).
6. *Id.* at *1.
7. *Id.*; *see* Town Law §265(1)(c).
8. *Ferraro*, 2010 WL 5395786 *1.
9. *Id.*
10. *Id.* at 2.
11. Town Law §265(1)(c) provides as follows:

    > [Zoning] regulations, restrictions and boundaries may from time to time be amended. Such amendment shall be effected by a simple majority vote of the town board, except that any such amendment shall require the approval of at least three-fourths of the members of the town board in the event such amendment is the subject of a written protest, presented to the town board and signed by:
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    > ***
    >
    > (c) the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.
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    > The provisions of the previous section relative to public hearings and official notice shall apply equally to all proposed amendments.

12. *Ferraro*, 2010 WL 5395786, *1.
13. *Eadie v. Town Bd. of Town of North Greenbush* , 7 N.Y.3d 306, 314 (2006).
14. *Eadie*, 7 N.Y.3d at 314.
15. *Ferraro*, 2010 WL 5395786, *1. Petitioners also argued that they were the owners of property within the qualifying distance to file a protest petition since the driveway leading to the project off of Maple Road would also require a rezoning; however, the Town's Building Commissioner held that no rezoning of the driveway was required and the petitioners did not appeal that determination. *Ferraro*, 2010 WL 5395786, *2.
16. *Ferraro*, 2010 WL 5395786, *2-7.
17. *Id.* at 2.
18. *Id.*
19. *Id.*
20. *See, e.g., Russo v. City of Albany Zoning Board of Appeals*, 910 N.Y.S.2d 263 (3d Dep't 2010) (upholding denial of area variances where the board applied the statutory area variance standard and its decision had a rational basis); *Petikas v. Baranello*, 910 N.Y.S.2d 515 (2d Dep't 2010) (to the same effect); *Korzenko v. Scheyer*, 909 N.Y.S.2d 673, 674 (2d Dep't 2010); *Matejko v. Board of Zoning Appeals of Town of Brookhaven*, 77 A.D.3d 949 (2d Dep't 2010); *Mary T. Probst Family Trust v. Zoning Board of Appeals of Town of Horicon*, 2010 WL 5113005 (3d Dep't December 16, 2010); *Goldberg v. Zoning Board of Appeals of City of Long Beach* 2010 WL 5095316 (2d Dep't December 14, 2010) (upholding grant of area variances).
21. *Switzgable v. Board of Zoning Appeals of Town of Brookhaven*, 911 N.Y.S.2d 391 (2d Dep't 2010).
22. *Switzgable*, 911 N.Y.S.2d at 392-393.
23. *Id.*; Town of Brookhaven Code §85-29.1[B][2]("No nonconforming use of neighboring lands, structures or buildings in the same district and nonpermitted use of lands, structures or buildings in other districts shall be considered grounds for the issuance of a variance.").
24. *Switzgable*, 911 N.Y.S.2d at 392-393 (internal citations omitted).
25. *Stoffer v. Department of Public Safety of the Town of Huntington*, 77 A.D.3d 305 (2d Dep't 2010).
26. *Id.* at 308.
27. *Id.* at 309-310.
28. *Id.* at 309.
29. *Id.*
30. *Stoffer*, 77 A.D.3d at 310.
31. *Id.* at 310-311.
32. *Id.* at 311(citing *Sokolov v. Village of Freeport*, 52 N.Y.2d 341 (1981)).
33. *Stoffer*, 77 A.D.3d at 311.
34. *Id.*
35. *Id.* at 312.
36. *Id.*
37. *Id.* at 313-315 (citing New York State Constitution Article VI, §30, Uniform District Court Act §203; various sections of the Criminal Procedure Law, and Town Law §135[1]).
38. *Stoffer*, 77 A.D.3d at 316 (citing New York State Constitution Article IX, §3(a)(2)).
39. *Stoffer*, 77 A.D.3d at 316-317.
40. *Id.* at 318.
41. *Petersen v. Incorporated Village of Saltaire*, 77 A.D.3d 954 (2d Dep't 2010).
42. *Id.* at 954.
43. *Id.* at 954-955.
44. *Id.* at 955.
45. *Id.* (*citation omitted*).
46. *Id.* at 954.
47. *Petersen*, 77 A.D.3d at 956.
48. *Id.*
49. *Id.* at 957; *see* Public Officers Law §102.

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