The Authority (or Rather Inability) of a Municipality to Adjudicate Land Use Violations Administratively

By Adam L. Wekstein

It would be tempting for a municipality to act as the accuser, judge and executioner (figuratively speaking) in controlling and punishing the conduct of violators of land use regulations, particularly the transgressions of recidivists who have learned how to manipulate the system. Being able to resolve land use violations administratively without the need to go to court could save time and expense. In fact, at least some municipalities have attempted to eliminate the need for judicial involvement in the disposition of land use offenses by establishing and/or empowering administrative entities to adjudicate violations of zoning ordinances,[1] accessory apartment regulations,[2] building codes[3] and local freshwater wetland ordinances.[4] Unfortunately for these municipalities, such a shortcut is not legal. Just last year, the Appellate Division reaffirmed the existing, albeit limited, authority holding that violations of land use regulations must be adjudicated in court, and not by a municipal administrative body.

Stoffer v. Department of Public Safety of the Town of Huntington

In *Stoffer v. Department of Public Safety of the Town of Huntington*,[5] the Second Department held that a town may not create a separate bureau to adjudicate land use violations since the authority to do so is vested solely with the Unified Court System. It found that delegation of the authority to resolve land use disputes to a municipal agency violates both statutory and state constitutional imperatives.

In *Stoffer* the Appellate Division reviewed the Town of Huntington's accessory apartment law. The Court framed the central issue as follows: "...whether the Accessory Apartment Bureau of the Town of Huntington Department of Public Safety, a quasi-judicial tribunal, had jurisdiction to adjudicate a violation of the Town Code of the Town of Huntington... and to revoke the petitioners' accessory apartment permit."[6] Pursuant to the challenged local law, residents seeking to establish an accessory apartment in their home were required to obtain a permit from a hearing officer following a public hearing.[7] In turn, as a *quid pro quo* for obtaining the permit, the owner of the home had to consent to an inspection of his or her property upon reasonable notice to allow confirmation that the property was in compliance with not only building and fire codes, but with the rules and regulations of any other agency having jurisdiction. The regulations provided that a determination by the hearing officer (who was also the chairman of the town's accessory apartment bureau ("AAB") that there was a refusal to allow a required inspection, could result in the revocation of the accessory apartment permit and the imposition of fines or penalties of between $250 and $500 for each week an inspection was not conducted and could not be completed.[8]

The Stoffers owned a single-family home which had received an accessory apartment permit. In November of 2007 the Stoffers were issued a violation for allegedly operating a kennel on their property and were notified that unless they remedied the alleged violation they would be referred to the AAB for possible revocation of their accessory apartment permit. When the Stoffers refused to allow a search of their property, as required under the accessory apartment law, the AAB scheduled a hearing, on notice, to consider the revocation of their accessory apartment permit. Following the hearing, the hearing officer revoked the Stoffers' permit, finding that they violated the law by refusing to allow a warrantless search of their premises.[9]

The Stoffers commenced an Article 78 proceeding challenging the determination by the AAB alleging, among other things, that: (1) the provision of the accessory apartment law which required consent to warrantless property searches was unconstitutional, and (2) the AAB did not have jurisdiction to adjudicate the violation of the accessory apartment provisions of the town code.

The Suffolk County Supreme Court granted the Stoffers' petition and annulled the hearing officer's determination, holding that "...the Court of Appeals' decision in *Sokolov v. Village of Freeport*...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.'"[10] As the lower court annulled the AAB's decision on Fourth Amendment search and seizure grounds, it did not reach the question of whether the town could create and authorize the AAB to adjudicate zoning violations.

In contrast, the Appellate Division refused to reach the propriety of the accessory apartment law's requirement of consent to administrative searches. The Second Department stated that before it could consider the constitutionality of the warrantless search requirement im-

posed by the regulations, it had to address the threshold question of whether the AAB could be granted the authority to hear and resolve land use violations.[11] On this issue, the Appellate Division held that the AAB did not possess (and could not have been authorized to have) jurisdiction to adjudicate land use violations.

The Appellate Division invoked several bases for its conclusion. First, it relied on the decision of the Supreme Court, Suffolk County, in *Greens at Half Hollow, LLC v. Town of Huntington*[12] *("Greens at Half Hollow")*, and Informal Opinion Number 2003-18 of the New York State Attorney General's Office,[13] both of which, as discussed below, invalidated attempts by towns to hear and decide land use violations in their own administrative tribunals. In citing such authority the Court did, however, recognize that as *Greens at Half Hollow* and Opinion No. 2003-18 were a lower court decision and administrative opinion, respectively, neither was binding on the Appellate Division.

Second, the Appellate Division invoked Article VI, Section 30, of the New York State Constitution, which grants to the State Legislature the power "to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised" and the Legislature's enactment of relevant statutes thereunder. For example, it relied on the authority granted to District Courts to adjudicate, among other things, zoning violations. Under Section 203(a) of the Uniform District Court Act ("UDCA") such courts, which exist only on Long Island,[14] are expressly given jurisdiction over actions to impose and collect penalties for the violation of state or local laws for the establishment and maintenance of housing standards, including local housing maintenance codes, building codes and health codes, and actions seeking "...the issuance of an injunction, restraining order or other order for the enforcement of housing standards..."[15]

The Appellate Division also considered the implications of the combination of the Criminal Procedure Law and the Town Law in concluding that both local criminal courts, which include District Courts (and for that matter, City, Village and Town Courts and New York City Criminal Court),[16] and the Supreme Court and County Court have been delegated the power to try violations of local ordinances, rules and regulations. Specifically, the Second Department recognized that Criminal Procedure Law §10.30[a] vests local Criminal Courts with jurisdiction to try petty offenses and misdemeanors, and that under Criminal Procedure Law §10.20 Supreme and County Court have jurisdiction to try misdemeanors and jurisdiction to try petty offenses only when such offenses are included in an indictment charging a crime. Bolstering its conclusion that the courts, rather than the localities, have jurisdiction over zoning and land use violations, the Court pointed out that Town Law §135 explicitly categorizes violations of a building code or zoning ordinance as an offense which, for the purposes of jurisdiction only, is treated as a misdemeanor; therefore, it recognized that such violations were designated for trial in local criminal courts and Supreme and County Court.

Third, the *Stoffer* decision rejected the possibility that the Town could employ any legal mechanism to interfere with the judiciary's authority over land use violations. It acknowledged that supersession of state law is allowed in certain circumstances under the Municipal Home Rule Law[17] and that Article IX of the State Constitution imbues local governments with power to adopt and amend local laws not inconsistent with any general law. However, it held that Article IX, §3(a)(2) of the Constitution prohibits the implementation of local laws "...abrogating or superseding the jurisdictional framework created by the Legislature in order to try zoning violations in an administrative tribunal."[18] Section 3(a) of Article IX of the Constitution reads, in pertinent part, as follows:

> (a) except as expressly provided, nothing in this article [which includes the bill or rights of local governments and limitations of such rights] shall restrict or impair any power of the [state] legislature in relation to...
>
> > (2) the courts as required or provided by Article VI of this constitution ...[19]

Fourth, to bolster its conclusion, the *Stoffer* decision noted that Article 14-BB of the General Municipal Law permits municipalities with a population of between 300,000 and 350,000 to "adopt a local law establishing an administrative adjudication hearing procedure...for all code and ordinance violations"[20] and that the Article was inapplicable to the Town of Huntington and could not have been the basis for the creation of the AAB.[21] The Appellate Division stated that "...in light of the Legislature's specific pronouncement regarding the conditions under which it will permit the creation of an administrative tribunal for the purpose of code enforcement, it is clear that the Legislature sought to preempt local governments that do not meet these conditions from creating such tribunals."[22] Conversely, it reasoned that if any municipality, such as the Town of Huntington, could create its own administrative adjudicatory procedure for violations of zoning ordinances and other local code provisions without specific legislative authority, Article 14-BB would be rendered superfluous,[23] a result it was unwilling to sanction.

As a result of its multi-pronged analysis, the court, in *Stoffer*, concluded that the AAB lacked jurisdiction

to adjudicate the claims that the Stoffers violated the accessory apartment law by refusing to consent to the search of their home. Consequently, it annulled the revocation of the Stoffers' accessory apartment permit and affirmed the lower court's decision.

Greens at Half Hollow

In *Greens at Half Hollow*, which preceded *Stoffer*, the court reached essentially the same outcome as *Stoffer* with respect to a locally created zoning violation bureau (the "ZVB"), although it showed more of a penchant for discussing abstract legal theory. The ZVB was established, also by the Town of Huntington, to hear and adjudicate all town land use codes, that is, zoning and land use violations.[24] The private plaintiff, Greens at Half Hollow, LLC (the "Greens") commenced an action seeking a declaration that the law which established the ZVB was unconstitutional and illegal and to enjoin any prosecutions before the ZVB. The Greens did not have to go it alone, as New York's Unified Court System, jealously guarding its turf, asserted that the ZVB was "...an unconstitutional usurpation of the judicial function which rests exclusively with the New York State Court System."[25]

The Supreme Court first rejected the Town's defense that because the Greens were not the subject of any prosecution before the ZVB, it lacked standing to maintain the action. It ruled that because the Greens were subject to the constraints of the local law which created the ZVB and in jeopardy of possible prosecutions or adjudication thereunder, the plaintiff clearly had standing.[26] Additionally, the court found that the Unified Court System had standing in light of its interest in protecting its exclusive authority to hear and determine cases and prevent the erosion of the courts as a co-equal branch of government.[27]

Reaching the merits of the case, the court actually referenced *Marbury v. Madison*[28] (something the author of this article has wanted to do since law school) and relied on scholars whose views shaped the governmental system of the United States. It began analyzing the merits of the case as follows:

> The Court is ever mindful that the doctrine of separation of powers as first presented by the French aristocrat Charles de Secondat, Baron de la Brede et de Montesquieu (hereinafter Montesquieu), who propounded the tripartite form of government with its built-in checks and balances on the power given to the executive, legislative and judicial functions. In his treatise "Of the Laws which Establish Political Liberty with Regard to the Constitution," Montesquieu stated "that men's minds can not be at rest if two or three kinds of governmental power are held within the same hands." Montesquieu's vision of a tripartite government clearly sets forth a basis of the separation of functions, i.e. legislative, executive and judicial, a doctrine adopted by and expanded by Sir William Blackstone and James Madison.[29]

The court continued its eloquent analysis, albeit on a more concrete level, in condemning the town's effort to solve its perceived problem. The decision stated:

> ...no town is above the law, nor should we as a freedom loving people tolerate the relaxation of constitutional safeguards and due process rights in the name of a "more effective, novel, creative and new" remedy in dealing with the persistent problem of zoning violations. The Court is cognizant of the Town's dilemma in developing adequate means and remedies within which to address the recurring problem of zoning violations and the enforcement of its local laws which it believes are ignored, trivialized and minimized. Nevertheless, the Court cannot condone clear violations of the New York State Constitution, statutory authority and attempts to make an "end run" around the court's jurisdiction as a means to a justified end by "taking the law into its own hands" under the guise of a pseudo "administrative tribunal" (ZVB) of its own creation.[30]

Among other things, in *Greens at Half Hollow*, the court rested its determination on the precept that the jurisdiction to try land use violations rests with the judiciary. As in *Stoffer*, the decision grounded its holding on the facts that Article VI §16 of the New York State Constitution gives the state legislative authority to regulate and/or discontinue District Courts, and, in turn, that Section 203 of the District Court Act expressly invests the District Courts with jurisdiction over actions brought to impose and collect a civil penalty for a violation of, *inter alia*, housing standards, including, applicable local housing maintenance codes, building codes and health codes.[31] Additionally, it invoked Municipal Home Rule Law §11(1)(e) in support of its holding, characterizing that statute as precluding municipal legislative bodies from superseding a state statute if the local law "...'[a]pplies to or affects the courts as required or provided by Article 6 of the Constitution.'"[32]

Greens at Half Hollow also emphasized that in identical language in Town Law §§135 and 268(1), the latter of which is included in the article of the Town Law which constitutes the enabling legislation for zoning, gives the courts jurisdiction over violations of zoning or a town building code.[33] Finally, it held the provision of the local law which granted the Town Attorney authority to appoint the hearing officer for the ZVB, when the Town attorney acted as the prosecutor of the zoning violations, contravened the requirement for due process.[34]

Opinion 2003-18

The final precedent directly addressing the legality of the adjudication of land use violation by a local administrative body is Attorney General Opinion 2003-18. Therein, the Attorney General's Office considered the Town of Hamburg's request for an opinion as to the propriety of the creation of an administrative tribunal to decide building code violations. It should be noted that unlike in *Stoffer* and *Greens at Half Hollow*, the Town of Hamburg is not located in a geographic area where a District Court would adjudicate code violations, but rather where such disputes would be heard in Town Court. This factor played no role in the Opinion's conclusion.

The Attorney General opined that the proposal was impermissible, stating "...the contemplated tribunal would thus possess judicial powers normally performed by the court."[35] The opinion again relied on the Criminal Procedure Law, finding that local courts, such as a town court, have jurisdiction over all offenses except felonies[36] and that with one exception they have exclusive trial jurisdiction over petty offenses, including violations, and concurrent jurisdiction with Supreme and County Courts over misdemeanors.[37] It also concluded that "...both the constitutional article conferring home rule power on municipalities and the statutes implementing this power limit the town's ability to adopt a local law that affects the courts."[38] In addition to citing Article 14-BB of the General Municipal Law, as an example of where the Legislature has expressly authorized local administrative tribunals to consider code violations, the Opinion relied on Vehicle and Traffic Law Article 2A, which empowers hearing officers to adjudicate traffic infractions in certain jurisdictions, to confirm the conclusion that the Legislature had granted no such quasi-judicial power to municipalities in general.

The Attorney General also reached an issue not raised in either of the judicial decisions. It expressed the view that a town may not enact legislation creating the position of a hearing officer to assist the town court in adjudicating criminal cases against persons charged with violating the town building code.

Conclusion

Both court decisions and the Attorney General's opinion discussed in this article appear to foreclose municipalities from utilizing administrative processes to adjudicate land use violations in the absence of express Legislative authorization to do so. Such authority makes clear that efforts at employing the home rule power to circumvent this principle would be unavailing. Rather, in order to bypass the courts and resolve zoning, building code and other related violations by a strictly administrative process, a municipality would need to obtain Legislation granting it jurisdiction to employ such means.

Endnotes

1. *Greens at Half Hollow, LLC, v. Town of Huntington*, 15 Misc.3d 415 (Sup. Ct. Suffolk Co. 2006).
2. *Stoffer v. Dep't of Public Safety of Town of Huntington*, 77 A.D.3d 305 (2d Dep't 2010).
3. 2003 N.Y. Op. Att'y Gen. 1105 No. 2003-18 (December 23, 2003).
4. TOWN OF LEWISBORO, N.Y., CODE § 271-11E (granting authority to the Town Planning Board to adjudicate guilt, impose civil penalties of up to $7,500 per wetlands violation and order mitigation, and making violations of the Planning Board's orders to be offenses and misdemeanors).
5. *Stoffer*, 77 A.D.3d at 305.
6. *Id.* at 307.
7. *Id.* at 307-308.
8. *Id.* at 308.
9. *Id.* at 310.
10. *Id.* at 311 (citation omitted). In *Sokolov v. Village of Freeport*, 52 N.Y.2d 341(1981), the Court of Appeals held that an ordinance requiring landlords to allow a warrantless inspection of their premises as a precondition to the issuance of a municipal permit authorizing the rental thereof was unconstitutional.
11. *Stoffer*, 77 A.D.3d at 312.
12. *Greens at Half Hollow, LLC*, 15 Misc.3d at 415.
13. 2003 N.Y. Op. Att'y Gen. 1105 No. 2003-18 (December 23, 2003).
14. The District Courts have been established only in Nassau and Suffolk Counties on Long Island. N.Y. Uniform District Court Act (UDCA) §2300.
15. *Stoffer*, 77 A.D.3d at 313-314. Curiously, while the Uniform City Court Act ("UCCA") contains a provision that is alike with that in the UDCA (UCCA §203), the Uniform Justice Court Act ("UJCA") (applying to Town and Village Courts) contains no like provisions. District, City, Town and Village courts are all explicitly vested with more generic jurisdiction over criminal matters as is provided by the Criminal Procedure Law. *See* UDCA §2001, UJCA §2001 and UCCA §2001.
16. N.Y. CRIM. PROC. LAW §10.10(3) (McKinney's 2010).
17. N.Y. MUN. HOME RULE LAW §10(1)(i),(ii)(d)(3) (McKinney's 2010).
18. *Stoffer*, 77 A.D.3d at 316.
19. N.Y. CONST. Art. IX §3(a) (McKinney's 2010).
20. N.Y. Gen. Mun. Law §380, allows creation of the administrative adjudication hearing procedure "for all code and ordinance violations regarding conditions which constitute a threat or danger to the public, health, safety or welfare."

21. *Stoffer*, 77 A.D.3d at 316.
22. *Id.* at 316-317.
23. *Id.* at 317.
24. *Greens at Half Hollow, LLC*, 15 Misc.3d at 416.
25. *Id.* at 417.
26. *Id.*
27. *Id.*
28. 5 U.S. (1 Cranc) 137, 2 L.Ed 60 (1803).
29. *Greens at Half Hollow, LLC*, 15 Misc.3d at 418.
30. *Id.*at 419-420.
31. *Id.* at 421.
32. *Id.*
33. The Zoning enabling article of the Village Law contains no provision which is analogous to the sections of the Town Law cited in text. N.Y. VILLAGE LAW §7-714 merely provides that in addition to other remedies, an action may be commenced to restrain, prevent or abate land use violations. N.Y. VILLAGE LAW §20-2006 is analogous to such Town Law provisions but applies only to violations or ordinances enacted prior to September 1, 1974. A provision mirroring Town Law §268 is absent from those provisions conferring zoning authority on Cities (Sections 20(24) and 20(25) of the General City Law), although Cities are afforded the authority to impose penalties, imprisonment or forfeitures for violation of any local law or ordinance or to seek injunctive relief or restrain violations. In particular, section 42 of the Second Class Cities Law provides that any person violating an ordinance of the common council is guilty of a misdemeanor although the ordinance may provide that a violation constitutes an offense.
34. *Greens at Half Hollow, LLC*, 15 Misc.3d at 422, 831 N.Y.S.2d at 654.
35. 2003 N.Y. Op. Att'y Gen. 1105 No. 2003-18 (December 23, 2003).
36. N.Y. CRIM. PROC. LAW §§10.10 (3)(d), 10.30 (1).
37. N.Y. CRIM. PROC. LAW §§10.30 (1)(a), (b).
38. Interestingly, in Informal Opinion No 2005-18, the Attorney General concluded that the Town of Huntington (clearly an active player in attempts to tinker with state land use law) had authority to modify penalties imposed by Town Law §268 by eliminating the possibility of imprisonment for first and second offenses and increasing the amount of fines imposed for such violations. The Opinion expressed the view that the modification of penalties did not interfere with the jurisdiction of courts, even though it speculated that the elimination of the possibility of imprisonment for the first and second offenses could divest Supreme and County courts of jurisdiction over such violations. At least this latter conclusion would seem to be at odds with *Stoffer* and *Greens at Half Hollow*.

Adam L. Wekstein Esq. is a Partner at the law firm of Hocherman, Tortorella & Wekstein, LLP, where he focuses in the areas of litigation, appellate practice, land use law, zoning and environmental law. He received his B.A. from Cornell University and his J.D. *cum laude* from the State University of New York Buffalo Law School.