COUNSEL's CORNER

BY RIELE MORGIEWICZ, NYCOM COUNSEL

Land Use Case Law Update, the Year in Review

This is a roundup of some of the recent court cases involving issues of planning and zoning. For copies of any of the cases mentioned in the article, please contact Riele Morgiewicz, NYCOM Counsel at (518)463-1185 or e-mail at riele@nycom.org.

Educational Uses

Zoning restrictions prohibiting educational uses from residential neighborhoods are considered invalid because courts have held that religious and educational uses enjoy special treatment owing to their inherently beneficial nature. In ***Albany Preparatory Charter School v. City of Albany***,[1] the appellate division held that the presumption also exists for commercial areas and invalidated the sections of the City's zoning law that resulted in the wholesale exclusion of educational uses from a commercial zone. Prior to this case an open question has been whether this rule extended to non-residential districts as well as residential districts. The court reaffirmed the authority of municipalities to require special use permits for educational uses. In this matter the petitioners had sought to construct and operate a charter school, which is considered a non-public school for purposes of local land use and zoning regulation, in a commercial zone in the City.

In ***Southside Academy Charter School et al. v. City of Syracuse,***[2] the appellate division court annulled the City of Syracuse Planning Commission's denial of a charter school's applications for site plan approval and re-subdivision of its property. The Southside Academy Charter School applied for site plan approval to construct a charter school in a residential district where private and public schools were a permitted use. The Planning Commission denied Southside's first application on three grounds: 1) that the school building was too large, 2) that the school had proposed more than one driveway entrance to the school grounds and 3) that the playground for the school was located opposite a cemetery. Southside commenced an Article 78 proceeding challenging this first denial.

At the supreme court level, the parties agreed to hold the litigation in abeyance while Southside modified its application to include sidewalks, set the playground further back on the property and make the building façade architecturally consistent with the surrounding community. The City Planning Commission disapproved the second application on the same grounds as it disapproved the first application. Southside commenced a second Article 78 proceeding, which was dismissed by the supreme court. On appeal to the Appellate Division, the Court dismissed the first Article 78 proceeding as moot in light of the re-application, but reversed the supreme court and held that the Planning Commission's denial was arbitrary and capricious. The court reasoned that the design elements disapproved by the Planning Commission were intrinsic to the use being a school. Thus, the Planning Commission had essentially disapproved the application based on the nature of the use despite the fact that the use was permitted. The court held that the Planning Commission's denial was tantamount to nullification of the zoning classification.

Limitations on Time

In ***Palm Management v. Goldstein***,[3] the Court of Appeals held that the time for neighbors of a hotel to challenge certificates of occupancy issued for the hotel in 1989 and 1993 ran respectively, 60-days from the time those certificates were issued even though the building inspector had reaffirmed the certificates of occupancy in 2003. The re-issuance of the certificate of occupancy stemmed from the hotel's need to obtain

refinancing. Palm Management owns or owned an inn in the Village of East Hampton, Long Island that was located in a residential area, but was determined by the building inspector in 1989 to be a lawful prior non-conforming use. The 1989 certificate of occupancy provided that the building could be occupied as a nonconforming use and this nonconforming use included a dormitory for workers at the inn. The 1993 certificate occupancy included the same language as the 1989 certificate and added a reference to a slate patio partially covered by an awning.

In 1999, several neighbors of the inn complained to the code enforcement officer about the inn. The complaints included concerns about the dormitory and the awning and patio. The code enforcement officer declined to take any enforcement action relying on the prior determinations made by that office. The neighbors appealed to the ZBA which found that the code enforcement officer had made no new determination and stated that the appeals were time barred. The protesting neighbors felt that the use of the dormitory and awning covered patio were unlawful because they did not predate the existing zoning and because they claimed the premise was abandoned for a year after the relevant zoning was effective. In 2003, the hotel received a new certificate of occupancy as part of a need to refinance which substantially restated the existing certificates. The only notable difference was that the awning and dormitory structure were described in more detail in the 2003 certificate.

The neighbors again appealed to the ZBA from the 2003 determination and the ZBA annulled several portions of the certificate of occupancy, including those portions relating to the dormitory and the awning covered patio. Palm Management appealed to the state supreme court, which dismissed Palm's petition. The Appellate Division modified the lower court decision and held that the ZBA's 2001 determination insofar as it pertained to the dormitory and the awning was entitled to *res judicata* treatment (meaning that the ZBA's 2001 determination should have been treated as final and binding). The Court of Appeals affirmed the Appellate Division's decision but on the grounds that the time to appeal on the original certificates of occupancy had run out and the neighbors were not entitled to reopen the issue where the subsequent certificate of occupancy was substantially a restatement of the original ones.

Use or Area Variance

One of the more vexing issues in zoning has to do with a category of variances that are dimensional but that at the same time are a way of regulating uses. In ***DeGroote v. Town of Greece Board of Zoning Appeals***,[4] the Appellate Division dismissed a petition challenging the Town zoning board's determination denying an area variance for an adult bookstore to locate 50 feet from a lot on which a dwelling was located rather than at least 1,000 feet as required by the zoning law. The court stated, "[a]t the outset, we note that, under the circumstances, petitioner is required to obtain a use rather than an area variance." However, the court went on to write that the ZBA must weigh the benefits of to the applicant of granting the variance against any detriment to the health safety and welfare of the community as is laid out in the area variance test, and as this test was applied properly the determination had a rational basis.

This decision is remarkable in that the court argues the petitioner should have applied for a use rather then an area variance as it seems to contradict a 2004 statement in *Matter of Real Holding Corp. v. Lehigh*.[5] In a footnote to that decision, the Court of Appeals held that the 1,000 and 2,500-foot separation distance requirements applicable to the gasoline filling stations were "area" rather than "use" requirements. The Court stated: "Contrary to the position taken by the ZBA, the distance standards at issue here, which specify how many feet must separate a gasoline filling station from certain residentially zoned areas and from other gasoline filling stations, are clearly 'dimensional or physical requirements' subject to area variance relief."

Prior to *Real Holding*, the cases treated distance requirements of the kind in *Real Holding* as use restrictions rather than area requirements.[6] Historically, distance requirements in zoning regulations were used to keep certain uses, which may present problems if poorly situated - such as gasoline stations, fast food establishments and adult uses, separated from each other or from protected places, such as residential districts, parks, places of worship and schools. When a zoning regulation requires that a use be separated from other uses, the regulation was considered a use restriction and deviations required a use variance.[7]

Endnotes

1. *31 A.D.3d 870 (2006).*
2. *32 A.D.3d 1295 (4th Dept. 2006), leave to appeal denied by 35 N.Y.3d 1295 (4th Dept. 2006).*
3. *8 N.Y.3d 337 (2007).*
4. *35 A.D.3d 1177 (4th Dept. 2006).*
5. *2 N.Y.3d 297 (2004).*
6. *See Lynch v. Gardner, 15 A.D.2d 562 (2d Dept. 1961) and AA&L Associates v. Casella, 207 A.D.2d 1012 (4th Dept. 1994).*
7. *See Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382 (1998); 3 Rathkopf, The Law of Zoning and Planning § 61:31 (4th Ed.).*