May 5, 2021

Capital District Regional Planning Commission

Spring Webinar Series

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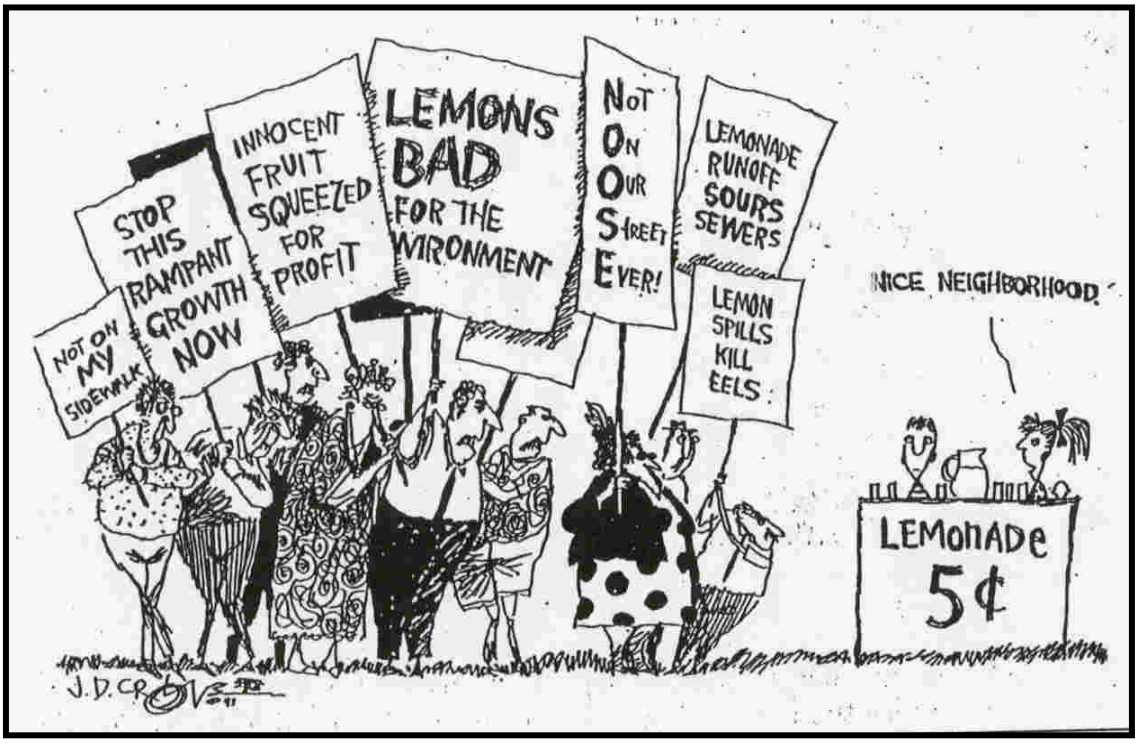
AGENDA

(Please note that cites to specific page numbers
within decisions have been omitted)



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GENERALIZED COMMUNITY OBJECTIONS:

Marina's Edge Owner's Corp v. City of New Rochelle Zoning Board of Appeals, 129 A.D.3d 841 (2d Dep't 2015): The applicant owns a 211-coop unit building with 160 on- site parking spaces for the cooperative owners, along with an unimproved lot adjacent to the building on which it seeks to add a 28 parking space facility. The zoning applicable to the property is two-family and provides for a maximum of four off-street parking spaces. The empty lot has an 8-foot high fence around it which blocks views to Long Island Sound. When the applicant applied for a building permit, it was denied and subsequently resulted in a request for an area variance. Following a hearing, the ZBA denied the variance due to an undesirable change in the character of the surrounding area and because of the negative aesthetic and visual impact on nearby properties. In reversing the denial, the Second Department recited that the ZBA failed to clearly set forth the "how" and "in what manner" the variance would be improper. Rather, "the ZBA was presented with the subjective objections and general community opposition of neighboring property owners, most of whom expressed their subjective opinions as to the negative aesthetics of a parking lot." Furthermore, there was "no objective basis upon which to conclude that the petitioner had a feasible alternative to the requested variance." Question: How were a couple of extra parking spaces going to alter a neighborhood where similar parking occurred on the adjacent lot?

Quintana v. Board of Zoning Appeals of Incorporated Village of Muttontown, 120 A.D.3d 1248 (2d Dep't 2014): *Apparently, 2 out of 5 is bad*. Without a tremendous number of facts, the Second Department tells us that in this case Manuel Quintana wanted to build a structure that required a lot-depth variance. Citing self-created hardship and substantiality of the area variance, the Board of Zoning Appeals denied the application and the applicant filed an Article 78 action based upon the Board's failure to apply the 5-part area variance balancing test. Both the Supreme Court and the Second Department found that the Board's decision denying the variance was arbitrary and capricious because there was no evidence of impact on the remaining three parts of the test, i.e. (1) undesirable change in the neighborhood; (2) adverse impact on the physical and environmental conditions; and (3) detriment to the healthy, safety and welfare of the neighborhood. The Courts went on to point out that the information relied on by the Board was "irrational, as it rested on largely subjective considerations of general community opposition." Furthermore, the "feasible alternative" cited by the Board had no rational basis within the record. This case represents a rare, but important, check on a zoning board's ability to fairly balance all the factors in an area variance test and not weight them as if under the use variance standards.

Bonefish Grill, LLC v. Zoning Board of Appeals of the Village of Rockville Centre, 45 Misc.3d 1216(A) (Sup. Ct. Nassau Co., 2014): *You can have a restaurant on the condition that it's not a restaurant*. In March of 2013, Bonefish Grill brought application before the ZBA for rear and side yard setbacks in order to open a restaurant on a lot which held an abandoned movie theater that heretofore had no parking. Prior to leasing the lot, Bonefish Grill was given a license for limited parking on an adjoining lot. The ZBA heard all of the information and granted the variances that same month. Demolition permits were granted to raze the old theater and building permits were granted to erect the new restaurant that same year. In March of 2014, the Court's decision tells us that the building was substantially complete and the applicant sought

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a Certificate of Occupancy from the Village. It was denied for three reasons: (1) a newly enacted Substantial Occupancy Permit ordinance was required for restaurants of 50 or more; (2) the building had not been completed timely; and (3) a parking variance was now needed which the Village previously did not think was required. After likely wanting to lose their minds, the Bonefish Grill applicants were heard before the ZBA on all three matters cited. There was vigorous opposition from other local restaurants against the application at the April 2014 public meeting. The ZBA granted the variances (extension of time and parking) and the Substantial Occupancy Permit with seven substantial conditions – at which time the building was substantially completed at a cost in excess of $1M. The conditions included that valet parking must be used at all hours the restaurant is open and all employees must pay for a $250 parking permit, the next month, the ZBA amended its decision to set a new condition which would only allow Bonefish Grill to open for lunch on Saturdays. The Court found that the conditions were contradictory and onerous which resulted in an arbitrary and capricious decision.

Feinberg-Smith Associates, Inc. v. Town of Vestal Zoning Board of Appeals, 2017 NY Slip Op 51054(U): Applicant wanted to expand its student housing development by adding 220-240 one to two bedroom apartments which would result in 340 new residents near the Binghamton University Campus. The total project would then be 409 apartments with 562 residents. The applicant requested variances from the ZBA to reduce the lot size requirement, reduce minimum living space, reduce the number of required parking spaces, and increase the allowable building height. The ZBA received over 80 written submissions and heard expansive public comment in opposition to the size and scope of the proposal. After due deliberation, the ZBA denied the variances on the grounds that (1) there would be a deleterious impact on the character of the neighborhood; (2) the relief was too substantial; and (3) there are less impactful alternatives available. The applicant challenged the determination as based purely on community pressure. The Court did not agree; instead finding that, while there was evidence to support the approval of the variance, there was equal evidence to support the denial. In such circumstances, the courts will not supplant their opinion for that of the ZBA's.

NOTE: The Court specifically noted that the denial of the variances would not render the property "unusable." Additionally, there was a way to build the project code compliant – 5 bedroom units.

Matter of Bonefish Grill, LLC v. ZBA of Village of Rockville Center, 153 A.D.3d 1394: When Bonefish Grill achieved its approval, its building permit required that the lot next door be merged with the restaurant lot; otherwise a parking variance would be required. When the Grill applied for its certificate of occupancy, the Building Department noted that the merger of the lots had not taken place. Bonefish instead had a licensing agreement which allowed the adjoining lot to be used for parking from the hours of 4:00 pm to 12:30 am Monday through Friday. The Building Department referred the application to the ZBA for a hearing on the parking variance. The ZBA imposed, as conditions, the terms of the licensing agreement by limiting the hours of operation of Bonefish and required valet parking. The Court, upon review, found that the conditions were reasonable because of the expert traffic engineer's comments, the ZBA members' knowledge of a high parking demand in that area, and the impact to surrounding businesses.

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Dutt v. Bowers, 2018 N.Y. Slip Op. 32684(U) (Sup. Ct. Suffolk Co, 2018): Owner hires Dunrite Pools (oh the irony, right?) to install a "free form" pool on its parcel in the Town of Islip. The pool company measures the narrowest point of the pool to northern boundary fence. Unfortunately, the fence was located 8 feet north of the property line on a neighbor's parcel and did not represent the correct marker. When the as-built survey was submitted to the Town, the side yard setback violation was noted. The ZBA heard the application and denied the area variance request on multiple grounds including self-created hardship, impact to the neighborhood, precedential effect, substantiality, and alternatives. The owner then commenced an Article 78 proceeding seeking a judgment vacating and annulling a zoning board determination denying petitioner's application for an area variance. In considering all of the evidence and balancing the totality of the circumstances, the court held that the zoning board had no explanation or support from the evidence for their determination that the constructed pool would produce an undesirable change in the character of the neighborhood (there were pools all over the place), be a detriment to nearby properties (there was ample screening and neighbors were in support), negatively impact the health, safety and welfare of the neighborhood or community, or create an "unwarranted precedent" (this was only one of four oversized lots in the subject area where a pool could exist). Finally, the court noted that condition was not self-created, as it was the excavator hired by the contractor who created the zoning violation. As such, the court held that the zoning board's determination was not rationally based and was arbitrary and capricious. Thus, the court annulled and vacated the determination and remitted the matter back to the zoning board.

Matter of Green Materials of Westchester v. Town of Cortland, 132 A.D.3d 868 (2d Dep't 2015): Petitioners applied to the ZBA for an interpretation whether they were considered "specialty trade contractors" under the relevant ordinance, and therefore permitted to engage in concrete aggregate recycling activities on their property. After obtaining a positive interpretation, the petitioners applied to the Planning Board for site plan approval. The Planning Board then directed the applicants to file an amended application about whether their concrete aggregate recycling activities also including the processing of raw materials. After holding a hearing, the ZBA denied the petitioners' application and concluded that they intended to process raw materials at the site; that they were not specialty trade contractors within the meaning; and that consequently, were ineligible to apply for a special permit now required of specialty trade contractors. In reversing the ZBA, the court found that the decision that the petitioners would process raw materials was irrational, as there is no evidence to support such claims and was in direct contravention of the applicants' testimony. The claim that they intended to process raw materials was nothing more than a baseless rumor espoused by an angry public at the meetings. NOTE: The case of **Lemmon v. Town of Waterloo Town Board and Town of Waterloo Planning Board**, 2015 NY Slip Op 50090(U) (Sup. Ct., Seneca Co. 2015) noted again correctly that "neither the Town Board nor the Planning Board may interpret a local zoning law, but only the CEO may do so, and that such interpretation must be appealed to the ZBA before a court may review it."

Matter of Lumberjack Pass Amusements, LLC v. Town of Queensbury Zoning Bd. Of Appeals, 145 A.D.3d 1144 (3d Dept 2016): *On again, off again*. Applicant owns a parcel in a commercial district that consists of a compliant building and a single family residence that is not compliant. The Zoning Administrator reviewed the use of the property during the preceding 18 months, and per the Town Code definition, determined that the owner had not abandoned the

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grandfathered use. Neighbors appealed this determination to the ZBA which sided with the Zoning Administrator. The Appellate Division also agreed with the ZBA that, since this was a fact-based inquiry and not a legal interpretation of the zoning law, the deference to the ZBA's assessment as a factor finder is given. The ZBA determined that the owner had submitted evidence that the dwelling had been occupied as a residence for at least some period during the last 18 months and thus, the preexisting nonconforming use had not been discontinued.

NOTE: Whether a pre-existing nonconforming use has been abandoned is largely a fact-based inquiry for a ZBA.

Matter of 7-Eleven, Inc., et al. v. Incorporated Village of Mineola, et al., 127 A.D.3d 1209 (2d Dep't 2015): A convenience store chain sought a special use permit to construct a store on the premises. The Board of Trustees held a public hearing on the application where the applicants presented experts to establish no exacerbation of traffic issues or decrease in market values. In response, Board members and members of the public referenced the clientele of the store as "unsavory" and that traffic conditions would worsen if the special use permit was issued. However, no experts or proof was provided to support the contrary position. The Board voted to deny the special use permit and the applicants appealed. In reversing the Board's decision, the Second Department found that the "conclusion that the proposed store would fail to comply with the applicable legislatively imposed conditions, and its concomitant determination to deny the petitioners' application, was arbitrary and capricious." The Court cited the lack of support in the record for claims about exacerbating traffic congestion and was directly contradicted the expert opinions. Notable, the Court pointed out that there was no showing that the convenience store would have a greater impact on traffic than any as-of-right use. NOTE: Generalized community objection is never a reason, on its own, to deny an application.

Allegany Wind LLC v. Planning Board of the Town of Allegany, 115 A.D.3d 1268 (4th Dep't 2014) *Your wind makes too much noise*: In 2011, the applicant received a special use permit to operate a 29-turbine wind farm in the Town of Allegany. The Planning Board required that construction commence within one year of the approval or it would expire. In the meantime, a citizens group filed an action opposing the project and the applicant applied for an extension prior to the expiration of the one year special use permit limitation. The Planning Board granted a second extension but only for early of one year or the within 90 days of the conclusion of the citizen group lawsuit. The lawsuit was dismissed within 6 weeks of its filing and an appeal was never perfected so it was subject to dismissal. However, the applicant did not move for its dismissal and, when the Town did so move, the applicant threatened the Town with legal action. Moreover, when advised by counsel for the citizen group of their intention not to proceed further, applicant's counsel still refused to sign the stipulation of discontinuance (anyone see the pattern here?). By the time the applicant sought another extension, 90 days had long since passed after the termination of the lawsuit and, thus, the applicant had to seek a new special use permit. This time, though, the Planning Board did not grant the special use permit because the applicant had switched the intended wind turbine models which models would have increased noise levels above the Town ordinance. As such, the Court found (1) there is no equitable tolling

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in NY for land use approvals being challenged; and (2) that a significant change in the application permitted the Planning Board to deny request for an extension a second time.

Serota Smithtown LLC v. Town of Smithtown Board of Zoning Appeals, 43 Misc.3d 1206(A) (Sup. Ct. Suffolk Co., 2014) *Sonic Bust to Boom*: In one of the great cases of the year, a Sonic franchise was met with an outpouring of neighborhood resistance to its proposal to locate a restaurant in Smithtown. In short, Sonic (aka Serota) needed a special use permit and a series of variances to construct at 2,100 square foot restaurant in a Wholesale and Service Industry district. The evidence presented by the applicant and Town consultants agreed upon the following: (1) real estate values would not be affected; (2) lighting would be in compliance with the Town Code; (3) all parking and traffic were within recommended guidelines; and (4) noise from the restaurant would be well within audible thresholds. In opposition, neighbors submitted newspaper clippings, photographs, YouTube videos, and documents from websites concerning the problems attendant to a Sonic in the adjacent Town of North Babylon. Apparently, North Babylon was experiencing loud radios, drunken teenagers, and long traffic lines at its new store which Smithtown residents were concerned would occur if the special use permit and variances were granted. The Supreme Court authored an excellent decision that takes a step-by-step analysis of a special use permit standard and articulated it as follows: "While the reviewing board retains some discretion to evaluate each application for a special use permit, to determine whether the applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence." Here, it is clear that the Board's denial of special use permit and the variances was arbitrary and capricious as it was based upon data from another restaurant in a neighboring town which was problems would to be recreated as evidenced by the applicant's and the Town's own empirical data. Notably, the Court also pointed out that denying a special use permit application because of characteristics necessarily inherent in the business itself (i.e. counter service) is equally irrational.

Matter of Blanchfield v. Hoosick, 149 A.D.3d 1380: Dog trainer received a notice from the Town that her business violated the Town Code and that a special use permit/site plan approvals were necessary. The local ordinance provided that noise coming from her property could not exceed 80 decibels. The owner, also a registered nurse, provided daily sound readings taken in a month, during daily intervals, which showed decibels of no more than 70 dbl. One of her neighbors produced an audio recording he alleged was taken from his house with the sounds coming from the applicant's property. Another neighbor, who operates a horse training business, supplied letters from her clients who complained of dog noise. The applicant offered to move her pens so they would be blocked by a building and erect a sound blocking stockade fence. The ZBA denied the application for a special use permit – citing insufficient mitigation measures. The Court reversed the ZBA because the applicant's scientific evidence when uncontroverted in the record and the Board improperly relied upon the unsubstantiated sound recordings.

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Matter of 7-Eleven Inc. v. Town of Babylon, 2017 NY Slip Op 31467(U): In the precedent of Matter of 7-11 Inc v. Village of Mineola, a proposed convenience store was denied site plan approval due to the Planning Board's finding that the proposal could not protect health, safetyand welfare of pedestrians, site access, and neighboring properties. A review of the facts of the case reveals no less than four separate site plan revisions to address concerns about traffic, access, truck deliveries, and limited delivery hours. The Town received a letter from a competing 7-11 franchise owner who owned a store less than a mile away indicating that 7-11 could not restrict truck deliveries to box truck only no matter what deed restrictions were signed. There was, of course, significant neighbor outcry about the impacts to the surrounding neighborhood and traffic increases. The applicant agreed to deed restrictions concerning the timing and size of trucks making deliveries, submitted expert traffic study, and engineering studies to support the project. The Planning Board voted to deny the site plan as revised, citing to the letter from the other franchise owner and that the site could not be developed safely without impact to health and safety. The Second Department reversed and cited the Mineola case as precedent concerning the denial of a special use permit largely based on generalized community objection. A few points the Court made deserve note: (1) the Planning Board failed to articulate HOW this permitted use would be any more impactful of a site than any other use permitted in the commercial zone: (2) Mineola involved a special use permit which is an even more intensive municipal review than a site plan which means there must be even more compelling data as to why it cannot be approved; (3) the use of a competitor's subjective unsworn assessment was not sufficient to counter the volumes of empirical data submitted by the applicant; and (4) reliance on conclusory and speculative concerns will not be sustained.

Matter of Frigault v. Town of Richfield Planning Board, 107 A.D.3d 1347 (3d Dep't 2013): The case of the siting of six wind turbines also involved the issue of the Open Meetings Law in an interesting way. Originally, the Planning Board gave notice of its public hearing and meeting to take place at Town Hall and indicated that the project would be the focus of the meeting. A huge public turnout resulted in Town Hall exceeding its maximum occupancy limit and the Town Attorney announced that the meeting would be moved to a church 2 blocks away. A note was placed on the Town Hall door to let late-comers know and the meeting started one hour late. The Supreme Court annulled the Planning Board resolution approving the project because of a violation of the Open Meetings Law, finding that the Board should have anticipated the large crowd and made proper arrangements. The Appellate Division disagreed and reversed the lower court. The efforts the Board took to relocate the meeting were reasonable in light of all the circumstances and, in addition, because the Public Officers Law requires that a public body "make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility that can adequately accommodate members the public who wish to attend such meetings." (S. 103(d)).

Desimone v. Town Board of the Town of Islip, 2016 NY Slip Op 30189(U) (Sup Ct., Suffolk Co 2016): Applicant sought review of the determination of the town board regarding the denial of petitioners' application for a removal of a restrictive covenant requiring owner occupation of the two family residence owned by petitioner. The board found that "the covenants and restrictions on the property are appropriate and reasonable as currently existing and help promote

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the health, safety and welfare of the surrounding community." The Court was unable to make a determination for procedural reasons (not an Article 78 but a CPLR 3001 plenary action) but the issue was framed about whether the owner occupancy condition imposed was invalid and should be repealed because it has no substantial relationship to the public, health, safety, welfare, and morals of the community. The Court stated that this was the "only" finding in the decision. The case was set down for a preliminary conference.

NOTE: While the court did not make determinations on the existing record, (1) it did openly question the use of a "bolstered" decision to support a determination made nearly a month beforehand and (2) it suggested that a recusing Town Board member was questioning during the public hearing in opposition and that neighbor outrage fueled the decision despite Planning Board and Commissioner's unanimous recommendation for approval (later retracted in his affidavit to the Court).

Spot zoning:

VTR FV, LLC v. Town of Guilderland, 101 A.D.3d 1532 (3d Dep't 2012): A PUD was created in the Town of Guilderland to establish affordable housing for the elderly and the petitioners own an assisted care facility within the PUD. In 2011, the Town expanded the definition of "assisted care facility" which permitted skilled nursing facilities and, so by, allowed a competitor to erect a second facility within the PUD. The petitioner brought an action seeking to have the amended PUD struck down as unconstitutional spot zoning. The courts agreed that the Town did not engage in spot zoning because the amendment was consistent with a "well-considered and comprehensive plan calculated to serve the general welfare of the community." Furthermore, the courts agreed that the expansion of the definition furthered the original intent of the PUD which was to establish affordable housing for the elderly.

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