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ROCKLAND MUNICIPAL PLANNING FEDERATION

WINTER/SPRING 2021 CASE LAW UPDATE
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By: Christie Tomm Addona[1]

ZONING

- **Site Plan/Special Use Permit**

Biggs v. Eden Renewables LLC, 188 A.D.3d 1544 (3d Dep't Nov. 25, 2020)

The Court upheld Planning Board's grant of site plan approval and a special permit for a major solar energy system finding the Planning Board's determination had a rational basis and was not arbitrary and capricious. The Court held the Planning Board made the requisite findings required by the special permit and site plan standards in the Town's zoning ordinance.

Jane H. Concannon Revocable Trust v. Building Department of the Town of East Hampton, 189 A.D.3d 804 (2d Dep't Dec. 2, 2020)

The Court held Petitioners' challenge to the Building Inspector's issuance of a building permit for a restaurant on a neighboring property was untimely where the Planning Board had granted site plan approval for the property, which included the restaurant, four years earlier.

- **Building Department**

Astoria Landing, Inc. v. Del Valle, 188 A.D.3d 1189 (2d Dep't Nov. 25, 2020)

The Court upheld violations issued in 2011 by building department that the sign on the side of building was not allowed even though the building department had issued permits for the sign in

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1981. The fact that it was not until 2011 that the building department realized the 1981 permit had been issued in error does not establish bad faith by the municipality.

Mensch v. Planning Board of Village of Warwick, 189 A.D.3d 1245 (2d Dep't Dec. 16, 2020)

The Court upheld denial of Petitioner's Article 78 mandamus claim to compel the building inspector to issue a written determination regarding the zoning compliance of a site plan approval granted for a neighboring property where the Village Code did not impose such a duty on the building inspector.

- **Zoning Amendments**

Hampshire Recreation, LLC v. Village of Mamaroneck, 181 A.D.3d 904 (2d Dep't Mar. 25, 2020)

The Court held the Village Board's decision not to consider a zone text amendment requested by Petitioner was not subject to review in an Article 78 proceeding as amendments to zoning are a purely legislative function and the Board is vested with discretion to amend its zoning ordinance and is not required to consider and vote upon every zone change application.

Neeman v. Town of Warwick, 184 A.D.3d 567 (2d Dep't June 3, 2020)

The Court held the Town Board's Development Agreement with the owner of a campground to settle violations related to improper expansions of the campground without obtaining proper permits and approvals and use of the campground in violation of the zoning code constituted illegal contract zoning that rendered the agreement null and void because the agreement committed the Town to a specific course of action with respect to a zoning amendment.

Wallace v. Town of Grand Island, 184 A.D.3d 1088 (4th Dep't June 12, 2020)

The Court upheld a local law prohibiting short-term rentals in certain zoning districts unless the premises was owner occupied where Petitioner could not demonstrate the law amounted to a regulatory taking of its property as Petitioner failed to establish that under the new zoning the property was not capable of producing a reasonable return on his investment or that it was not adaptable to other suitable private use. Even if the law did amount to a regulatory taking, Petitioner's remedy was entitlement to just compensation, not declaring the law invalid.

Dodson v. Town Board of the Town of Rotterdam, 182 A.D.3d 109 (3d Dep't Feb. 20, 2020)

The Court rejected neighbor's claims that rezoning one property to allow a senior residential community constituted illegal spot zoning and conflicted with the Town's comprehensive plan as zoning amendments enjoy a strong presumption of constitutionality. However, the Court held the local law was not validly adopted with a 3-2 vote as a protest petition was filed by at least 20% of owners of land immediately adjacent to the property, extending 100 feet from the property, and therefore Town Law § 265 requires a supermajority vote (3/4 of the members of the Board) to approve the zoning amendment. Having the rezoning not apply to a 100 foot buffer around the edge of the Property was not an option to avoid the supermajority requirement in this case because certain improvements necessary solely for the propsed senior residential community were to be constructed in the buffer.

Town of Delaware v. Leifer, 34 N.Y.3d 234 (Court of Appeals Nov. 21, 2019)

The Court upheld zoning law and rejected Petitioner's claims that zoning law that precluded Petitioner holding a three-day music and camping festival on his rural, single-family residential property were unconstitutional as (1) violating Petitioner's First Amendment right to free speech, where the law constituted a content-neutral time, place and manner regulations that were sufficiently narrowly tailored, leaving open adequate alternative modes and channels for communication, (2) substantially overbroad where the law did not restrict musical expression or entertainment typically associated with residential use of property, and (3) vague where the zoning law lists the permitted uses and "measured by the standard of common understanding," was sufficient for Petitioner to be aware that the festival use was not permitted.

- **Area Variances**

Parsome v. Zoning Board of Appeals of Village of East Hampton, --- N.Y.S.3d ----, 2021 WL 480858 (2d Dep't Feb. 10, 2021)

The Court upheld Zoning Board's denial of area variance from parking requirements as the Zoning Board is entitled to broad discretion in considering variance applications and judicial review is limited to whether the action was illegal, arbitrary or an abuse of discretion. The Court held the record demonstrated the Board engaged in the required balancing test and considered the relevant statutory factors, the decision had a rational basis, the Board was entitled to consider the precedential effect of its decision and the property owner was presumed to know the applicable zoning regulations when he purchased the property.

Circle T Sterling, LLC v. Town of Sterling Zoning Board of Appeals, 187 A.D.3d 1542 (4th Dep't Oct. 2, 2020)

The Court upheld denial of area variance for gravel mine where access road did not comply with the setback requirements from existing residences even though the Zoning Board had previously granted the variance, but which grant was overturned the Court because the Zoning Board relied upon reports generated after it made its decision. There was not precedent from the prior approval because it was vacated by the Court.

D.P.R. Scrap Metal, Inc. v. Board of Zoning Appeals of Town of North Hempstead, 187 A.D.3d 748 (2d Dep't Oct. 7, 2020)

The Court overturned the Zoning Board's denial of an area variance from the Town Code's prohibition on storage or balling of scraps and junk outside of an enclosed building. After recognizing the Zoning Board had broad discretion in considering the application, the Court held the denial was arbitrary and capricious and not supported by evidence where the denial was based upon anonymous and unsubstantiated complaints and there was no evidence in the record to support the area variance factors were not satisfied. The Court questioned whether this application should have been treated as an area variance (implying it may have been a use variance), but since the parties all treated it as an area variance, the Court analyzed it under that standard.

Davis v. Zoning Board of Appeals of City of Buffalo, 177 A.D.3d 1331 (4th Dep't Nov. 8, 2019)

The Court rejected Petitioner's claims that the notice of the public hearing on an area variance application and the opportunity to the public to express their opinions was inadequate where the Board limited comments to three minutes and closed the public hearing before everyone present had an opportunity to speak, but accepted all written comments submitted.

- **Use Variances**

WCC Tank Technology, Inc. v. Zoning Board of Appeals of the Town of Newburgh, 190 A.D.3d 860 (2d Dep't Jan. 20, 2021)

The Court upheld the Zoning Board's (1) interpretation that operating the property as a hydro-excavation business with the outdoor parking of trucks and related equipment was not permitted under a prior use variance to utilize the property as a fuel tank lining business and (2) denial of a use variance to operate the property as a hydro-excavation business because Petitioner failed to show through competent financial evidence, i.e. dollars and cents proof, that they cannot yield and reasonable rate of return without the use variance.

Dean v. Town of Poland Zoning Board of Appeals, 185 A.D.3d 1485 (4th Dep't July 24, 2020)

The Court upheld the Zoning Board's denial of a use variance to operate a 2-acre portion of a 17-acre parcel as a Dollar General store because Petitioners failed to demonstrate they cannot realize a reasonable return by any conforming use where Petitioners did not explore use of the property for all permitted purposes and did not consider the property as a whole but only the 2-acre portion of it.

Sullivan v. Board of Appeals of Hempstead, 186 A.D.3d 611 (2d Dep't Aug. 12, 2020)

The Court upheld the Zoning Board's granting of a use variance to use a property in a single-family residential district as a two-family home with the condition that the residence be owner-occupied, which condition the applicant challenged. The Court stated "[i]n reviewing a determination by a zoning board, courts should presume that the decision was correct."

- **Preexisting (Legal), Nonconforming Uses**

Cradit v. Southold Town Zoning Board of Appeals, 179 A.D.3d 1058 (2d Dep't Jan. 29, 2020)

The Court upheld the Zoning Board's interpretation that use of a single-family home for short-term rentals was not a legal, nonconforming use existing before the Town Board prohibited transient rental properties because the short-term rental use was more akin to a hotel/motel use that was never permitted in the single-family residential district where the property was located.

Labate v. DeChance, 189 A.D.3d 838 (2d Dep't Oct. 5, 2020)

The Court overturned the Zoning Board's interpretation that use of Petitioner's property as a construction equipment storage site was not a legal, nonconforming use where Petitioner

demonstrated the property was continuously used for this purpose since 1947 and the Board's determination to the contrary was irrational, arbitrary and capricious.

SEQRA

- **SEQRA Regulations**

New SEQRA Regulations took effect January 1, 2019
https://www.dec.ny.gov/permits/83389.html

- **Typing of Action**

Hudson Valley Housing Development Fund Company, Inc. v. County of Ulster, 183 A.D.3d 974 (3d Dep't May 7, 2020)

The Court upheld the typing of the action to condemn a portion of Petitioner's land to be used as a bicycle and pedestrian path as an Unlisted action instead of a Type 1 action, where Type 1 actions have different procedures and carry a presumption that the action is likely to have a significant impact on the environment. The Court also held there was no basis to rescind the Negative Declaration issued by the lead agency.

Brunner v. Town of Schodack Planning Board, 178 A.D.3d 1181 (3d Dep't Dec. 5, 2019)

The Court upheld the Planning Board's determination, as lead agency, to issue a Negative Declaration even though it was a Type 1 action because a Type 1 action does not necessitate the preparation of an environmental impact statement and where the lead agency finds there will be no significant adverse environmental impacts, a negative declaration can be issued.

- **Standard of Review**

Davis v. Zoning Board of Appeals of City of Buffalo, 177 A.D.3d 1331 (4th Dep't Nov. 8, 2019)

The Court upheld the Planning Board's determination in the Final Environmental Impact Statement that demolishing 14 structures located within a district listed on the National Register of Historic Places would not have an adverse impact on the historic resources on or adjacent to the site even though the New York State Office of Parks, Recreation and Historic Preservation (SHPO) opined the project would significantly and negatively alter the character of the surrounding historic district where the record reflected the Planning Board conducted a lengthy and detailed review of the project and provided a reasoned elaboration for its determination.

Town of Waterford v. New York State Department of Environmental Conservation, 187 A.D.3d 1437 (3d Dep't Oct. 29, 2020)

The Court rejected Petitioners' argument that the DEC failed to adequately consider alternatives to a proposed landfill expansion during a years-long SEQRA review that included the preparation of an environmental impact statement where the Findings Statement discussed the available alternatives at length but concluded the landfill was necessary as the waste would need to be placed somewhere and the alternative sites or scenarios were infeasible or impractical. The Court noted

it is not the Court's role to weigh the desirability of an action or choose among alternatives, but to make sure the procedural and substantive requirements of SEQRA have been satisfied.

McGraw v. Town Board of Town of Villenova, 186 A.D.3d 1014 (4th Dep't Aug. 20, 2020)

The Court upheld the Town Board's determination that a Supplemental Environmental Impact Statement was not necessary where the applicant was proposing to increase the height of wind turbines from the approved 492 feet to 599 feet where the Town Board took a hard look at the areas of environmental concern and made a reasoned elaboration for concluding that an SEIS was not necessary.

Northern Manhattan Is Not for Sale v. City of New York, 185 A.D.3d 515 (1st Dep't July 23, 2020)

The Court upheld the City's SEQRA review of a redevelopment project in the Inwood section of Manhattan where the record showed the City took a hard look at the areas of environmental concern, culminating with a 1,100 page Final Environmental Impact Statement, even though it did not specifically address the impact of the redevelopment on Minority and Women Owned Businesses ("MWOB"), explaining "not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA."

- **Segmentation**

Sandora v. City of New York, 186 A.D.3d 1225 (2d Dep't Sept. 2, 2020)

The Court held the City did not improperly segment its SEQRA review of a project to convert two multi-story buildings to a transitional shelter for homeless adults from a City-wide review based upon a report issued by the City on homelessness eight months after the project application was made as the Report did not commit the City to a sufficiently definite course of future decisions requiring a SEQRA review.

Court Street Development Project, LLC v. Utica Urban Renewal Agency, 188 A.D.3d 1601 (4th Dep't Nov. 13, 2020)

The Court held the SEQRA review to take Petitioner's property by eminent domain did not improperly segment the future use of the property once condemned as no specific future use had been identified prior to the City acquiring Petitioner's property.

THRESHOLD LEGAL ISSUES

- **Standing**

Vasser v. City of New Rochelle, 180 A.D.3d 691 (2d Dep't Feb. 5, 2020)

The Court held Petitioners did not have standing to challenge the City Council's approvals to allow a senior citizen residence development where Petitioners did not live adjacent to the subject property but several streets and building lots away and the harm Petitioners alleged they would suffer was speculative and unsubstantiated.

Cady v. Town of Germantown Planning Board, 184 A.D.3d 983 (3d Dep't June 18, 2020)

The Court held Petitioners had standing to challenge approvals to construct a 9,000 square foot Dollar General on a property located within the Town's scenic viewshed overlay district designed to protect the Hudson River corridor and the Catskill Mountain viewshed where Petitioners' residence was adjacent to the subject property and the store was likely to obstruct or interfere with Petitioners' scenic views – an actual harm different from the public at large and within the zone of interest sought to be protected by the statute.

- **Mootness**

City of Ithaca v. New York State Department of Environmental Conservation, 188 A.D.3d 1322 (3d Dep't Nov. 5, 2020)

The Court held that proceeding challenging permit issued by Department of Environmental Conservation to allow the construction of a surface shaft was moot where the surface shaft had been completely constructed to the point that it could not be safely halted and substantial construction costs have been incurred and Petitioners never sought injunctive relief to prevent the construction while the proceeding was pending.

- **Ripeness**

Village of Kiryas Joel v. County of Orange, 181 A.D.3d 681 (2d Dep't Mar. 11, 2020)

The Court held Petitioners' challenge to the SEQRA review and local law adopted by the Town of Chester to rezone 60 acres to allow an industrial park to be developed on a parcel totaling 258 acres in three municipalities was ripe for judicial review because the action was complete and administrative remedies had been exhausted. The fact that Petitioners may be further aggrieved by the actions of other municipalities with respect to the parcel did not affect the ripeness of this action challenging the Town of Chester's actions.

WIRELESS TELECOMMUNICATIONS

Up State Tower Co, LLC v. Village of Lakewood, 431 F.Supp.3d 157 (W.D.N.Y. Jan. 6, 2020)

The Court overturned the Zoning Board's denial of a 180-foot telecommunications tower and directed the Zoning Board to grant the application where the Zoning Board's decision failed to provide substantial evidence that there were no gaps in coverage, that Plaintiff's efforts at finding a suitable site for the tower were insufficient, that there would be aesthetic harm from the tower and that the proposed tower height was not necessary to remedy the gaps in coverage. The Court rejected Plaintiff's request that the application be granted based upon an alleged violation of the shot clock deadlines promulgated by the Federal Communications Commission ("FCC") as the Zoning Board issued a decision shortly after Plaintiff filed its case in Court and had it not, the proper remedy would have been directing the Zoning Board to make a decision, not directing the application be approved.

RELIGIOUS USES

Thai Meditation Association of Alabama, Inc. v. City of Mobile, 980 F.3d 821 (11th Cir. Nov. 16, 2020)

The Court held that the District Court improperly denied Plaintiff's Religious Land Use and Institutionalized Persons Act ("RLUIPA") substantial burden claim because the District Court applied the wrong standard as substantial burden does not require a showing of a complete, total or insuperable burden and remanded the issue to the District Court to consider whether Plaintiff had established a substantial burden in considering factors identified by the Court. The Court held the District Court properly denied Plaintiff's RLUIPA equal terms claim where Plaintiff did not identify a similarly situated nonreligious comparator who received differential treatment under the challenged regulation. The Court also upheld the District Court's denial of Plaintiff's RLUIPA nondiscrimination claim because Plaintiff could not demonstrate the District Court committed clear error in finding the City did not act with discriminatory intent in denying the application for a Buddhist meditation and retreat center even though members of the public spoke in a manner that evidenced a discriminatory intent.

Marianist Province of the United States v. City of Kirkwood, 944 F.3d 996 (8th Cir. Dec. 13, 2019)

The Court held Plaintiff school failed to demonstrate a substantial burden on its religious exercise where the City would not allow the installation of lights on Plaintiff's baseball field that exceeded the zoning requirements so that the field could be used at night and Plaintiff failed to demonstrate that it was treated on less than equal terms than nonreligious uses where a public school also was not allowed to install lights that violated the zoning regulations.

Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona, 945 F.3d 83 (2d Cir. Dec. 20, 2019)

The Court modified and vacated parts of the District Court's holding that four local laws enacted by the Village in 2001, 2004 and two in 2007 that would allegedly affect Plaintiff's ability to develop and operate a rabbinical college on Plaintiff's property were unconstitutional and violated RLUIPA and granting injunctive relief precluding the Village from enforcing those four laws and directing that the Village process Plaintiff's application and how the application be treated. The Court held with respect to the Laws enacted in 2001 and 2004 that there was not a preponderance of evidence that the Village acted with a discriminatory intent and that there were legitimate land use concerns. However, given the change in climate by 2007, public knowledge of Plaintiff's proposed rabbinical college and both public and political opposition to Plaintiff's development, the Court upheld the District Court's finding that the 2007 laws were enacted with a discriminatory purpose and the Village could not demonstrate clear error on the part of the District Court in finding the laws would have a discriminatory effect on Plaintiff, thus rendering the 2007 local laws unconstitutional and in violation of RLUIPA. The Court held the Plaintiff did not have standing to assert his RLUIPA substantial burden and exclusion and limits claims challenging the local laws on the grounds that the laws would prevent building and operating a rabbinical college on Plaintiff's property and thus interfere with religious freedom because Plaintiff never actually made an application to use the property for the intended purpose and therefore did not allege an injury in fact.