As Seen In **Nassau** **Lawyer** April 2009

Focus: Real Property

Current issues in land use and zoning law

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A. The Interpretation of Zoning Ordinances

As cities, towns and villages throughout the State face more complex land use and development issues, they enact more detailed, complex, and comprehensive zoning regulations and ordinances. As a result, the proper interpretation of these regulations and ordinances by municipal officials responsible for applying them has become a more prevalent theme in court proceedings brought under Article 78 of the CPLR.

In general, judicial review of determinations made by an administrative tribunal or officer "... is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion." *Matter of Rendely v. Town of Huntington*, 44 A.D.3d 864, 865 (2d Dept. 2007). Thus, courts give administrative determinations considerable deference and will not substitute their judgment for that of the administrative tribunal or officer. *See, e.g. Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613 (2004)

Notwithstanding this general standard of judicial review, in cases where the interpretation of a zoning ordinance is at issue, courts apply a different, more stringent standard of review. In these types of proceedings, courts have held that the administrative interpretation is "... not entitled to unquestioning judicial deference and such interpretation will be overturned when it is irrational or unreasonable." *Tartan Oil Corp. v. Bohrer*, 249 A.D.2d 481, 482 (2d Dept. 1998); *See, also, Baker v. Town of Islip Zoning Board of Appeals*, 20 A.D.3d 522, 523 (2d Dept. 2005). The rationale behind this more stringent standard of review is based on the consideration that since the ultimate responsibility for interpreting the law rests with the court, administrative interpretations of zoning ordinances should not be entitled to the same deference given to an administrative tribunal or officer in other discretionary types of determinations, such as the granting or denial of a variance application. *See, e.g., Id.*

Recently, in *Mamaroneck Beach & Yacht Club, Inc. v. Zoning Board of Appeals of Village of Mamaroneck*, 53 A.D.3d 494 (2d Dept. 2008), the Appellate Division, Second Department reiterated the stricter standard of review when considering an administrative interpretation of a zoning ordinance. In the *Mamaroneck Beach* case, the owners of a beach and yacht club applied to the village planning board seeking site plan approval for the construction of seasonal residences located in the MR Zoning District. The Village's Building Director issued a memorandum indicating that the proposed construction was permitted under the Village Code as an accessory use. Local neighbors who were concerned with this use appealed the Building Director's determination to the zoning board seeking the board's review of this interpretation. When the zoning board heard the appeal, it determined that based on the definition of an accessory use in the Village Code as a use "customarily incidental and subordinate to the principal use of the land or building located on the same lot with such principal use," the seasonal residences were not an accessory use. In other words, the zoning board overruled the Building Director. The zoning board based this determination on evidence that the seasonal residences would occupy more than 50% of the total building square footage at the property. The owners of the beach and yacht club commenced an Article 78 proceeding seeking to annul the zoning board's interpretation. The Supreme Court granted the owners' petition. The Village zoning board then appealed.

The Appellate Division agreed with the Supreme Court, and found that the zoning board's interpretation "engrafting area requirements upon provisions defining a permissive, accessory use, based upon square footage of other building structures on the same property, was irrational and unreasonable." *Id.* at 85. In other words, the Appellate Division held that the zoning board could not apply additional standards or restrictions to an ordinance that was not otherwise ambiguous. The court noted that, "[a] zoning board has the discretion to interpret an ambiguous provision in cases where 'it would be difficult or impractical' to promulgate a 'definitive' ordinance." *Id.*; quoting, *Matter of Arceri v. Town of Islip Zoning Bd. of Appeals*, 12 A.D.3d 411, 412).

Thus, when the meaning and interpretation of an ordinance is at issue, careful analysis is needed as to the proper scope of a board's discretion to determine the meaning of the provision that is challenged.

B. The Impact of the Increase of the Volume of Business at a Property With an Established Pre-existing Nonconforming Use

With the enactment of new and more restrictive zoning ordinances, many landowners find that a use of their property that was legal when originally established, no longer conforms to the standards, limits, or requirements of the newly enacted ordinance. This "nonconformity" with a municipality's zoning ordinance creates what is commonly known as a pre-existing nonconforming use. As a general rule, such uses are constitutionally protected and will be permitted to continue. Today, most, if not all municipalities have specific code provi-

sions that define what constitutes a pre-existing nonconforming use. The code provisions also set forth the circumstances under which such a use may be continued, changed, or enlarged. Because of this, each case before the courts dealing with the alteration or change of a pre-existing nonconforming use is fact specific. Reference to the language of the municipal code that governs the nonconforming use is always required to analyze the permissible scope of change to the use. However, there are several general principles of law that give guidance to property owners and developers.

One issue that frequently arises is whether an increase in the "volume" of a nonconforming business use constitutes an impermissible expansion of the use. This issue generally arises when a nonconforming business has existed on a property for many years, and due to an increase in business activity, the need for the modernization of business equipment at the property, or the owner's desire to make better economic use of the property, the issue of "expansion" comes before a local zoning board.

An important Appellate Division, Second Department case dealing with this issue is *Tartan Oil Corp. v. Board of Zoning Appeals of Town of Brookhaven*, 213 A.D.2d 486 (2d Dept. 1995). In *Tartan Oil Corp.*, the Court held that the modernization of the gas pumps at a pre-existing nonconforming gas station did not constitute an expansion of that use, even though the new pumps could serve twice the number of customers as the old pumps. *Id.* In reaching this holding, the Court set forth the principle that "merely increasing the volume of business does not amount to an expansion of a nonconforming use[,] ... [n]or does the modernization of the machinery used in the business. ..." *Id.* at 488, quoting *Matter of Syracuse Aggregate Corp. v Weise*, 72 A.D.2d 254, 260 (4th Dept. 1980), aff'd 51 N.Y.2d 278 (Internal citations omitted).

In two recent cases, the First and Second Departments have applied the holding of *Tartan Oil Corp.*, to find that an increase in the volume of business at a nonconforming property did not constitute an impermissible expansion of the nonconforming use.

In *Piesco v. Hollihan*, 47 A.D.3d 938 (2d Dept. 2008), a neighboring property owner brought an Article 78 proceeding to challenge the determination of a zoning board of appeals regarding a nonconforming restaurant use. The Board had found that the erection of a tent/canopy over an existing outdoor dining area of the nonconforming restaurant was not an impermissible expansion of that use. *Id.* The Appellate Division upheld the Supreme Court's ruling, affirming the determination of the zoning board of appeals. *Id.* The Appellate Division stated that "[t]he erection of a tent/canopy over the outdoor dining area is neither a separate 'use' nor an expansion of the nonconforming use of the property for a restaurant." *Id.* Further, in applying the holding of *Tartan Oil Corp.* the Court stated that "[a]n increase in volume or intensity of the same nonconforming use as has occurred on the property for decades is not an expansion of that nonconforming use ..." *Piesco*, 47 A.D.3d at 938.

In *City of White Plains v. Amodio's Garden Center and Flower Shop Inc.,* 3/4/2009 NYLJ 28, (col. 1) (1st Dept. 2009), the City brought an action alleging, *inter alia*, that the defendant's nonconforming nursery use of its property was "impermissibly enlarged and intensified when a new use was introduced when defendants began to conduct manufacturing of topsoil and hardwood mulch/wood chips, without approval of the Zoning Board." *Id.* at 2. However, the Court found that the facts in evidence showed otherwise. The Court found that the premises had been used as a nursery business since the 1940's and that this use continued to the present. *Id.* at 4. Additionally, the Court found that although the City alleged that the mulch and topsoil production at the premises had been added to the premises in 1999, the facts showed that nursery's nonconforming use had historically included mulch and topsoil production, but that the nursery owner had purchased modern equipment for its mulch and topsoil production in 1999. *Id.* The Court applied the holding of *Tartan Oil Corp.* to these facts, and found that "[p]laintiff ha[d] not established an increased volume of business from the production of mulch and topsoil, and the use of modern equipment presently used does not constitute an enlargement or expansion of the permitted nursery use of the defendants' property." *City of White Plains* at 4. Thus, the Court found that the modernization of the equipment used for mulch and topsoil production did not constitute an expansion of the pre-existing nonconforming nursery use at the premises.

The holdings of *Tartan Oil Corp.*, *Piesco*, and *Amodio's Garden Center* are especially important to the owners of businesses that are categorized as pre-existing nonconforming uses. The cases provide protection to such owners by differentiating an increase in the volume of business or the modernization of business equipment, from an impermissible expansion or change of that use. In many instances this is a fine, fact-specific distinction. However, this differentiation will allow such pre-existing nonconforming uses to legally continue and be economically viable. Moreover, although these cases provide general guidelines for the analysis of whether an increase in the volume of business of a pre-existing use constitutes a permissible change or expansion of that use, ultimately, such a determination can only be made after careful analysis of the facts of each individual case as related to the particular provisions of the municipal code governing non-conforming uses.

C. The Supplemental Environmental Impact Statement

One of the most challenging aspects of the development approval process in New York is understanding and complying with the complex substantive and regulatory requirements of the New York State Environmental Quality Review Act (SEQRA). Both applicants and municipal agencies must understand the intricacies of SEQRA's framework. An important issue in complex projects is whether and when a municipal agency must or may require a supplemental draft environmental impact statement (SEIS). A planning board's determination not to require a second SEIS was the subject of an important New York State Court of Appeals decision, *Riverkeeper, Inc. v. Planning Board of Town of Southeast*, 9 N.Y.3d 219 (2007).

When an application is made to a municipal agency for a large scale project or a project in an environmentally sensitive area, the municipal agency, acting as "lead agency," will typically classify the action as a "Type I" or "Unlisted" action. The agency will then issue a "positive declaration" requiring the preparation of a draft environmental impact statement (DEIS) and a final environmental impact statement (FEIS). In most circumstances, after the FEIS is deemed complete and

the lead agency issues a "findings statement," SEQRA review is finished. There are, however, certain instances where a municipal agency will require the applicant to prepare a SEIS. Given the size and scope of many projects, these instances are becoming more frequent.

Under the SEQRA regulations, a municipal agency acting as lead agency for the purposes of environmental review "... may require an [SEIS], limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project." 6 NYCRR 617.9(a)(7)(i). In the case of newly discovered information, the decision to prepare a SEIS "... must be based on the following criteria: (a) the importance and relevance of the information; and (b) the present state of the information in the DEIS." 6 NYCRR 617.9(a)(7)(ii).

In *Riverkeeper*, a developer submitted an application to the Planning Board of the Town of Southeast for approval of a residential subdivision comprising approximately 300 acres and over 100 homes. The Planning Board, acting as lead agency, issued a positive declaration. Between 1988 and 1991, the Planning Board required the preparation of a DEIS and a FEIS, a draft SEIS and a final SEIS. On February 25, 1991, the Planning Board issued its findings statement. Thereafter, on August 10, 1998, the Planning Board granted preliminary subdivision approval. The Planning Board then granted conditional final approval in June, 2002.

Petitioners, constituting several concerned citizen groups, challenged the conditional final approval on the grounds that due to certain changes during the eleven years that had elapsed between the findings statement and conditional final approval, the Planning Board should have required a second SEIS. The Supreme Court remitted the matter to the Planning Board, which adopted a resolution determining that a second SEIS was not required. Petitioners once again appealed, but the Supreme Court held that the Planning Board took the requisite "hard look" at the areas of concern. The Appellate Division, Second Department reversed, holding that the Planning Board "could not have met its obligation under SEQRA without requiring an SEIS to analyze the current subdivision plat in light of the change in circumstances, as explained below, since 1991." (32 A.D.3d 431, 435 (2d Dept. 2006)). The Planning Board then appealed.

Specifically, at issue before the Court of Appeals was whether changed circumstances, including the Army Corps of Engineers' expansion of the delineated wetlands acreage on the site and the tightened regulations pertaining to water quality in a nearby reservoir, required further study and a second SEIS. The Court of Appeals reversed the Appellate Division, Second Department, and held that the "hard look" standard of review should be applied to a "... lead agency's determination regarding the necessity for an SEIS." *Riverkeeper, Inc.*, 9 N.Y.3d at 232. The "hard look" standard requires a court to determine "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *Id.* at 231-32.

In its decision, the Court of Appeals stressed the deference courts must give to a planning board under the "hard look" standard. SEQRA determinations ultimately rest with the lead agency. So long as the lead agency conducts a detailed review and takes the requisite "hard look" at the environmental concerns, the Court of Appeals made clear that lower courts should not substitute their judgment for the judgment of a lead agency. To this extent, the Court found that, "[t]he lead agency ... has the responsibility to comb through reports, analyses and other documents before making a determination; it is not for a reviewing court to duplicate these efforts." *Id.* Further, "[w]hile a lead agency is encouraged to consider the opinions of experts and other agencies, it must exercise its own judgment in determining whether a particular circumstance adversely impacts the environment." *Id.* at 234 (emphasis added).

Taking into consideration the holding of the Court of Appeals in *Riverkeeper*, the Appellate Division, Second Department, recently upheld a determination of the Town Board of the Town of Oyster Bay to require the preparation of a SEIS. *Oyster Bay Associates Limited Partnership v. Town Board of Town of Oyster Bay*, 2009 WL 202187, 58 A.D.3d 855 (2d Dept. 2009). In this case, the Town Board relied on post-FEIS submissions as the reason for its decision to require a SEIS, and as a basis for it to deviate from the findings and recommendations of the Town's Environmental Review Commission made in July 2000 which were favorable to the Petitioner's application to build a 860,000 square foot shopping mall. The Petitioner, the developer of the proposed mall, claimed that the Town Board's request for a SEIS was arbitrary and capricious. The Supreme Court agreed and ordered the Town Board to approve the application. However, on appeal, the Appellate Division reversed, and held that the request for a SEIS was proper. Relying on *Riverkeeper*, the Appellate Division stated:

> The Supreme Court erred in determining that the Town Board's request that the petitioners prepare an SEIS was arbitrary and capricious. The Town Board, as the lead agency, "may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project [citations omitted]." *Oyster Bay Associates Limited Partnership*, 2009 WL at 4.

These decisions show that SEQRA cases are particularly fact intensive. Due to the vast amount of environmental information necessary to evaluate complex development projects, the amount of time each development may take to review and the specific SEQRA regulations that must be followed, courts are presented with and must make decisions based on very complex records of the proceedings before the lead agency.

Riverkeeper and *Oyster Bay Associates Limited Partnership* also demonstrate the extent to which the courts will defer to the determinations of the lead agency in SEQRA cases. Whether the determination is to require, or not to require a SEIS, provided the lead agency has taken a "hard look" at the facts, and made a reasonable decision, the courts will not substitute their judgment for the administrative determination.

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