Hot Topics in Land Use: The Rare Variance, Effective Comprehensive Planning, Ethics and Case Law Update

John C. Cappello, Esq.
Jacobowitz & Gubits, LLP

Don Elliott, FAICP
Clarion Associates

LEADING COMMUNITIES TOWARD A RESILIENT FUTURE
PACE UNIVERSITY / LAND USE LAW CENTER ANNUAL CONFERENCE

HOT TOPICS IN LAND USE – EFFECTIVE COMPREHENSIVE PLANNING: THE RARE VARIANCE, CASE LAW UPDATE
December 6, 2013

Presented by

John C. Cappello, Esq.
Jacobowitz & Gubits, LLP
jcc@jacobowitz.com

Don Elliott, FAICP, Director
Clarion Associates, LLC
delliott@clarionassociates.com

Introduction

I. Comprehensive Plans in New York State

Town Law § 272-a; Village Law § 7-722; and General Cities Law § 28-a grant authority to local governments to consider and adopt comprehensive plans to plan the orderly growth and land use for the purpose of protecting the public health, safety and general welfare of its citizens.

A. All land use regulations must be in accordance with the comprehensive plan 272a(11)(a).

B. A comprehensive plan can be more than a justification for adopting zoning laws.

- "The town comprehensive plan is a means to promote the health, safety and general welfare of the people of the town and to give due consideration to the needs of the people of regions for which a town is part." Town Law 272-a(f)[1].

[1] This presentation refers primarily to the Town Law. Similar provisions relating to comprehensive planning are found in Article Village Law § 7-722 and General City Law § 28-a.

- A comprehensive plan is defined as "the materials written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports, and other descriptive material that identify the goals, objectives, principals, guidelines, policies, standards, devices, and instruments for the immediate and long-range protection, enhancement, growth and development of the town located outside the limits of any incorporated village or city." Town Law § 272-a(2)(a).
- A comprehensive plan may include; "General statements of goals, objectives, principals, policies and standards upon which proposals for the immediate and long-range enhancement, growth and development of the town are based." Town Law § 272-a(3)(a).
- Comprehensive plans may include proposed measures, programs, devices and instruments to implements the goals and objectives of the various topics within the comprehensive plan. Town Law § 272-a(3)(m).
- All plans for Capital projects of another governmental agency on land included in the municipality comprehensive plan shall take such plan into consideration.

Discussion

A municipality should understand that comprehensive planning process is for planning, not merely regulating, the orderly growth and development of a community. Therefore, municipalities should determine what programs, policies, guidelines, measures, etc., should be adopted to not just regulate, but encourage the type of growth and development the municipality aspires to.

For example, if one of the goals of the municipality is to increase energy efficiency, a municipality can, within its comprehensive plan, identify and implement programs designed to assist home and business owners to help achieve energy efficiency

C. Comprehensive plans can be used to foster regional planning activities.

- Comprehensive plans are intended to "foster cooperation among governmental agencies, planning and implementing capital projects in municipalities that may be directly affected thereby." Town Law § 272-a(1)(b).
- Comprehensive plan may include "consideration of regional needs and the official plans of other government units and agencies within the regions." Town Law § 272-a(3)(b).
- Municipalities can use authorities set forth in Town Law § 284 and Village Law § 7-741 to provide for inter-municipal cooperation to adopt comprehensive plans that cross municipal boundaries to address issues such as regional transportation patterns, infrastructure needs and more global issues, such as carbon emissions and water quality.

Discussion

Any action taken by one municipality will almost always have some impact on the neighboring communities. Inter municipal cooperation in comprehensive planning can provide more efficient services providing a financial as well as an environmental benefit to residents. For example, shared infrastructure serving both a village and town under an inter-municipal cooperation agreement should be included and considered within any comprehensive plan. Issues such as locations for future transmission lines needed to carry electricity generated by alternate energy means, i.e., solar, wind, etc. cannot be appropriately examined if limited to the scope of each individual municipality.

D. Plan for Provision of Appropriate Infrastructure to Support Desired Growth.

- Existing and proposed general location of public and private utilities and structures should be included in a comprehensive plan. Town Law § 272-a(g).

Discussion

Any comprehensive plan should include an analysis of the current capacity of all existing infrastructure i.e. water, sewer to determine what upgrades need to be made, how such systems can be run more efficiently, and what alternative technology can be used to implement and upgrade such facilities. It is important to consider what infrastructure improvements will be necessary to accommodate alternative energy sources such as solar, wind, geothermal, biomass for your community.

E. Need to Provide an Array of Housing Units and Mixed Uses to Accommodate Smart Sustainable and Diverse Growth

- "The great diversity of resources and conditions that exist within and among the towns of the state compels a consideration of such diversity and development of each town's comprehensive plan." Town Law § 272-a(1)(d).
- A comprehensive plan must consider "existing housing resources and future housing needs, including affordable housing." Town Law § 272-a(3)(h)(see also Berenson v. New Castle)
- A comprehensive plan may consider the "present, potential future, general location of commercial and industrial facilities." Town Law § 272-a(3)(k).

- A comprehensive plan may consider "the location and types of transportation facilities." Town Law § 272-a(3)(f).

Discussion and Implementation

In order to promote sustainable development, a municipality should, in its comprehensive plan, provide for transportation oriented development and smart growth. This includes a discussion of how to provide a variety of transportation choices, mixed land uses to allow jobs to be located near housing units, create an range of housing opportunities and choices to entice a mixture of business and manufacturing facilities, especially green manufacturing, and create walkable communities.

F. Use your comprehensive plan as a GEIS to promote the adoption of a zoning code implementing the goals you have identified.

II. Zoning Tools to Implement Your Preferred Growth Scenario

A. Only three (3) ways to implement plans – educate, spend money or change laws and incentives.

B. Many things in comp/growth plans do not lend themselves to zoning solutions – but many others do.

- The trick is in extracting from Com Plans those elements that can efficiently and effectively be implemented through zoning (and leaving the rest behind).

C. Do reference the Comp Plan goals in your purpose statements, but don't get carried away – purpose statements rarely affect the outcome of a zoning application or court dispute.

D. Focus on avoiding the "what was our intent" discussion by creating objective development standards.

- Examples related to build-to requirements, exemptions of small lots to encourage reinvestment.

E. Focus on removing barriers (i.e. outdated use distinctions and suburban dimensional and parking standards) before creating new standards.

F. Focus on incentives before mandates, but be realistic – not many planning goals can be effectively furthered by incentives.

- Most often you are fooling yourself that they will be used (or just listing incentives to avoid the requirement discussion).
- Keep the list of incentives as short as reasonably possible.

G. Where removing barriers or creating incentives won't work, don't be afraid to include new/revised standards.

- But be sure to tailor them to the context of the Comp Plan was talking about – they are rarely universal.
- Do not require special hearing or approvals unless it cannot be avoided.

III. The Rare Variance

A. Variance laws are largely a carryover from early zoning perpetuated by obsolete state enabling acts and a long history of case decisions.

- Among the issues is the "hardship" standard, which ignores the fact that variations are often requested because the alternative is better planning, not a hardship.
- Also the use variance (illegal in many states, difficult in NYS, impossible to avoid in PA and other states) vs. dimensional variance standard (available everywhere).

B. The more we try to fit new patterns over old cities, the worse the problem gets.

C. There are lots of alternative to variance procedures that can keep you out of this morass.

- Review variance records and change the code to avoid cases where variances are routinely granted.
- Give staff a limited amount of discretion to vary code provisions pursuant to objective criteria (5-20%).
- If necessary, create two (2) sets of dimensional standards in zone districts – or contextual development standards that vary with the surrounding context – to reflect different contexts.
- Attach conditions to troublesome uses to avoid the need for routine variances to accommodate them.
- Create Alternative Equivalent Performance / Waiver / Warrant procedure and let the Planning Commission decide them.
- Adopt a pattern book that shows owners/applicants more ways to develop typical sites without requesting a variance.
- Create neighborhood conservation overlays with standards that reflect historic development patterns.
- Adopt environmental regulations that prevent the creation of unbuildable lots.

IV. Case Law Update

A. ZBA area variance denial upheld - *Blandeburgo v. Zoning Board of Appeals of Town of Islip*, 2013 NY Slip Op 6680 (2nd Dept.); 972 N.Y.S.2d 693 decided October 16, 2013.

NYS 2nd Appellate Department determined that the Town of Islip Zoning Board of Appeals had properly applied the required balancing test in considering and denying an application for an area variance to permit the continued use of an in-ground pool installed without a proper building permit. The Court held that although the ZBA had granted two (2) prior applications seeking area variances for rear yard setbacks for in-ground swimming pools that such decisions did not constitute a precedence from which the ZBA was required to explain a departure. The Court held that there were only two (2) other area variances and the lots involved were not near the subject property and were located in different zoning districts. The Court held that the petitioners failed to establish that either of the two (2) cases in which a variance was granted bore sufficient factual similarity to the subject application so as to require an explanation for the ZBA. The Court held that the ZBA's determination to deny based upon the determination that the requested variance would produce an undesirable change in the character of the neighborhood, the variance was substantial and any hardship was self-created, had a rational basis, and was not arbitrary and capricious.

B. Denial of Area Variance Annulled – In the Matter of *Luburic v. Zoning Board of Appeals of Village of Irvington*, 106 A.D.3d 824 (2nd Dept. May 2013).

The Appellate Court Second Department annulled a denial of a site capacity area variance to permit the construction of a single family residential dwelling in the Village. In this case, the ZBA denied an application for a greater variance. The applicant amended its proposal to reduce the proposed home's floor area and the footprint of the home. The applicant then went through what appears to have been a long involved process with the planning board of that community to obtain a permit from the planning board to build on the property if certain conditions were met as set forth in a conditional negative declaration under SEQR. This environmental review took approximately three (3) years. The ZBA then according to the Court ignored the extensive environmental review of the planning board and

once again denied the application for variance concluding that petitioner's proposed construction would have an adverse impact on the environmental conditions of the neighborhood because the conditions imposed by the planning board were impractical and implausible. The Court held that since given the planning board's role in addressing the environmental concerns in the absence of any further evidence to support its conclusion the ZBA's finding on that factor lacked a reasonable basis.

The Court also found that the ZBA's determination that the proposed construction would produce an undesirable change in the neighborhood also lacked a rational basis, therefore the Court annulled the determination and remitted the matter to the ZBA to issue the requested variance.

C. ZBA Interpretation Annulled - In the Matter of *Baker Hall v. City of Lackawanna Zoning Board of Appeals,* 109 A.D.3d 1096 (4th Dept. September 2013).

The Appellate Court Fourth Department annulled the determination of the City of Lackawanna Zoning Board of Appeals, determining that a residential treatment facility was not a permitted use in a mixed residential zoning district. Without a lot of discussion, the Court held that although an interpretation of the Zoning Board of its governing code is generally entitled to great deference by the Court an interpretation that runs counter to the clear wording of a code provision is given little weight. The Court determined that the clear wording of the permitted uses in the end are zoning district did permit residential treatment facilities and thereby annulled the ZBA's determination.

D. ZHB Interpretation Annulled – *Northampton Area School District v. Zoning Hearing Board of the Township of Lehigh*, 64 A.3d 1152 (2013).

This Pennsylvania decision addresses an emerging legal issue that we may soon face in New York. The North Hampton Area School District, through the Alliance Energy Group, sought to locate a four (4) acre solar energy field consisting of seven thousand (7,000) solar energy panels divided into two hundred eight (208) individual units on School District property maintained for an elementary school. The zoning officer denied the application determining that the proposed solar field constituted a second commercial principal use of the property. The school district appealed, arguing that the proposed use was not a second principal use but was an accessory used to support the existing school use, i.e. generate power used to meet the energy needs of the school. The zoning board determined that the solar field was not used customarily incidental to a public and private school and therefore denied the appeal. The Court overturned the Zoning Board of Appeal's determination finding that the zoning code of the municipality contained a section specifically stating that solar energy units were permitted as an accessory use in any zone so long as they met the requirements of that particular zone.

While the zoning board determined that the requirements of the zone were that the accessory use be customarily and incidental to the school use, the Court determined that the only requirement in the zoning district where the school was located was that any accessory use be limited to twenty (20) feet in height and that the accessory structures not be located in the front yard. Since the solar panels to be installed were less than twenty (20) feet high and were not located in the front yard, the Court held that they were clearly permissible accessory uses and therefore remanded the matter to the zoning board to approve the application to install the energy field as an accessory use to the school.

E. Zoning relates to use of land, not identity of the user – *Sunrise Check Cashing and Payroll Services, Inc., v. Town of Hempstead*, 20 N.Y.3d 481 (decided Feb. 14, 2013.)

The Court of Appeals declared that a zoning measure that prohibited check cashing establishments in a town's business district was invalid because it violated the principle that zoning is concerned with the use of land, not with the identity of the user. The Town relied on a memorandum prepared by the deputy town attorney stating that the ordinance was directed at the perceived social evil of check cashing services, which were thought to exploit the younger and lower income people who were their main customers.

The Court held that during the defense of its zoning ordinance in the Court case, the Town did not defend the purposes as advanced in the memorandum as legitimate objects of the zoning power but instead tried to defend the ordinance by stating it was adopted to protect the health and safety of the community against the dangers created by armed robbery.

The Court held that the record of the proceedings did not support what appeared to be the Town's attempt to group check cashing services with businesses determined to have negative secondary effects on a community such as adult entertainment uses. The Court further held that the record in the proceedings clearly refutes the idea that the zoning provision was a public safety measure and therefore annulled the zoning law held that it was aimed at regulating the principle that it's trying to regulate the identity regulate zoning based upon the identity of the people using the facility.

F. Attorney disqualification – In The Matter of *Oyster Bay, v. 55 Motor Avenue Co., LLC*, 105 A.D.3d 549 (3rd Dept. August, 2013).

The law firm representing the town included a member who had a prior attorney-client relationship with 55 Motor Avenue Co., LLC, the appellants in this matter. The attorney in question represented the appellant in matters that the Court determined were substantially

related to the matters before the Town, and in the Court's opinion the interests of the Town and the Appellant were materially adverse to each other.

"There is a rebuttable presumption that where an attorney working in a law firm is disqualified from undertaking a subsequent representation involving a former client, all the attorneys of the firm are likewise precluded from such representation. The presumption may be rebutted by proof that any information acquired by the disqualified lawyer is unlikely to be significant or material in the subject litigation. Proof must be presented that the law firm properly screened the disqualified lawyer from dissemination and receipt of information subject to the attorney-client privilege". Oyster Bay, p. 551. The Court determined that the Town failed to present any evidence that its attorney ... did not acquire information that was significant or material in the subject litigations or that any actions were taken to screen the attorney to protect the dissemination of any such information by him to other attorneys in the firm. Therefore, the Court disqualified the firm.

G. Discrimination in Housing – *United States of America ex rel. Anti-Discrimination Center of Metro New York, Inc., v. Westchester County*, 712 F.3d 761 (2nd Circuit April, 2013).

The United States Court of Appeals, 2nd Circuit, in the case of *USA v. Westchester County*, 712 F.3d 761, affirmed a decision of the United States District Court for the Southern District of New York (Denise Cote, J.) finding the County in violation of the duty to comply with the terms of a Consent Decree which resolved a qui tam action brought by the Anti-Discrimination Center of Metro New York, Inc. (ADC) under the False Claims Act.

Background

In April 2006, ADC alleged that the County submitted false claims to the United States Department of Housing and Urban Development (HUD) in order to obtain millions of dollars in federal grant monies for fair housing. HUD requires local governments receive HUD funds to affirmatively further fair housing to consider the existence and impact of racial discrimination in analyzing barriers to housing opportunities. The County certified to HUD that it complied with the grant requirements. The District Court disagreed, ruling that the County was obligated, as a condition of the HUD grant, to consider race in connection with its certification that it affirmatively furthered fair housing. The Court determined that since the County failed to demonstrate that it considered rule-based impediments to fair housing and also failed to maintain records of any analysis of whether race created an impediment to fair housing, the County certifications to HUD were false as a matter of law. *United States ex rel Anti-Discrimination Center of Metro New York, Inc., v. Westchester County* 668 F Sup 2d 548 (SDNY 2009). The HUD funds that were received by the County totaled $52M. Under the Federal False Claim Act, anyone convicted of filing a false claim with the government to receive funding is subject to a penalty requiring a payback to the government of three (3) times the amount of funds fraudulently obtained. Therefore, the County's exposure under this action could have been $156M.

In August 2009, after the initial District Court determination, the United States Government intervened in the action. The Government offered and the parties agreed to sign a Consent Decree settling the action which obligated the County to pay $30M to the United States, $21.6M of which would be credited to the County's HUD account to fund fair housing in the County, and $2.5M would be paid to ADC as the realtor/whistle-blower. Under the False Claims Act, the party initiating a successful act (the Realtor) is eligible to receive up to 30% of the amount recovered. This provision encourages people who are aware of false

claims against the government to alert the government, and provides the government the opportunity to reclaim taxpayer money obtained in a fraudulent manner.

The Consent Decree required the County to take affirmative steps to further fair housing and to eliminate discrimination in housing opportunities. One (1) such step requires the County to "promote", through the County Executive, legislation currently before the Board of Legislators to ban 'source of income' discrimination in housing."

Source of income legislation would prohibit housing discrimination based upon an individual's source of income, such as, for example, social security benefits, State and Federal public assistance, and Section 8 vouchers.

In 2009, then County Executive Andrew Spano sent five (5) brief letters to advocacy organizations expressing his hope that they would continue to advocate for the County Board of Legislators to adopt the source of income legislation that had already been introduced. Mr. Spano also sent a letter to the leadership of the Board of Legislatures, encouraging enactment of that legislation. However, the legislation was not approved by the end of the 2009 legislative session.

The legislation was re-introduced in 2010, and eventually passed by the Board of Legislators in June 2010 with some alterations.

However, by that time, there was a newly elected County Executive, Robert Astorino, who not only failed to take any steps to promote the legislation, but subsequently vetoed the amended version of the legislation on June 25, 2010.

On July 11, 2011, the County submitted a revised analysis of impediments to affordable housing plan (AI Plan) to HUD. HUD by letter dated July 13, 2011, notified the County that the AI Plan did not meet requirements of the Consent Decree because it did not

incorporate corrective actions, including promotion of source of income legislation, or plans to overcome exclusionary zoning practices.

Once the fiscal year 2011 AI Plan was rejected, HUD removed the County as grantee-eligible for HUD funds and federal funding was discontinued. In response to this, the County and the United States sought review by the Monitor appointed by the District Court to monitor the County's compliance with the Consent Decree and resolve disputes between the parties. The Monitor issued a report that found, among other things, the County was in breach of its obligations to promote the source of income legislation.

The County objected to the Monitor's determination and sought review from the Federal Magistrate Judge. The Magistrate Judge sustained the County's objection on the dispute over the source of income legislation. The United States filed an appeal of the Magistrate Judge's decision with the District Court.

The District Court reversed the Magistrate Judge's decision and held the County did violate the Consent Decree. The County appealed the District Court decision to the Court of Appeals, Second Circuit.

Second Circuit Decision

In its appeal, the County first argued that the District Court did not have the authority to review the Magistrate Judge's decision, claiming that by terms of the Consent Decree, only the Magistrate Judge could review the Monitor's decision.

The Circuit Court rejected this argument and held that the District Court did have authority to review the Magistrate Judge's decision because:

1) The Consent Decree specifically reserved jurisdiction in the District Court; and

2) The Consent Decree stated that any additional review by the Magistrate Judge would comply with the relevant provisions of the Federal Rules of Civil Procedure which require that a District Judge review any part of the Magistrate Judge's decision to which a proper objection is made.

The County then argued that:

1) The Consent Decree only required that the County Executive "promote" the legislation and that the term "promote" was ambiguous;
2) The Consent Decree only applied to the County Executive in office at that time and the promotion of the source of income legislation as it existed in the 2009 legislative session;
3) The 2009 legislature, in authorizing the Consent Decree, could not bind future legislatures and County Executives; and
4) The Court could not interpret the Consent Decree in a manner that would require the County Executive to surrender his sovereign power to veto legislation.

The Circuit Court rejected all those arguments.

The Court held that the word "promote" had a clear and plain meaning which included "to bring or help bring into being, to contribute to the growth, enlargement or prosperity of, or to encourage or further". Therefore the promotion of the legislation required affirmative action by the obligated party to help bring the legislation to function.

The Court determined the effort of the former County Executive in writing five (5) short letters did not really rise to the goal of promotion, and coupled with the fact that the current

County Executive vetoed the legislation once adopted, clearly demonstrated that the County Executive violated the terms of the Consent Decree.

The Court held that a local government is not relieved of its obligations under a Consent Decree taken on by a previous administration merely because new local officials take office.

The duty of the County Executive to promote the legislation extended beyond the 2009 legislative session because if it were to determine that the County was only required to take affirmative steps for the last five (5) months of the 2009 legislative session, it would in effect render the Consent Decree meaningless.

The Court also reasoned that the County could not now claim that it was without power to do what it expressly represented was within its power as it sought to avoid hundreds of millions of dollars in liability. In entering the Consent Decree, the County chose to bind itself to the terms rather than have the District Court adjudicate the matter. The strong policy encouraging settlement of cases requires that the terms of the Consent Decree once approved by federal court, be respected as fully as a judgment entered after trial. Such an agreement constitutes a fully enforceable federal judgment that overrides any conflicting state law or state court order.

The Court held that the County Executive did retain his right to veto the legislation. But the Court determined that that veto constituted a breach of the Consent Decree, and, therefore, the County would be required to defend the False Claims Act suit under the original claim and subject itself to liability for up to $156M in damages if the veto were to continue.

In affirming the District Court's decision, the Second Circuit, acknowledged legitimate concerns that Federal Courts carefully consider the validity and scope of a Consent Decree,

but concluded that: "The County would have this Court rely upon the legitimate concerns that motivate modification of long-standing Consent Decrees to allow the County to shirk its voluntarily agreed to obligations, made less than four years ago, with no showing that the objects of the Consent Decree have been obtained and strong evidence indicating that they have not been. This we will not do."

H. *Utility Air Regulatory Group v. EPA* and related cases – The Supreme Court granted certiorari in response to six (6) petitions requesting review of the EPA's authority to regulate greenhouse gasses, limiting the question to whether the EPA was permitted to determine that the regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources.

*972 N.Y.S.2d 693; 2013 N.Y. App. Div. LEXIS 6647, *;*
*2013 NY Slip Op 6680, ***

[1]** In the Matter of Peter **Blandeburgo,** respondent, v Zoning Board of Appeals of **Town** of **Islip,** appellant. (Index No. 1936-11)

2012-05261

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

972 N.Y.S.2d 693; 2013 N.Y. App. Div. LEXIS 6647; 2013 NY Slip Op 6680

October 16, 2013, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

CASE SUMMARY

OVERVIEW: HOLDINGS: [1]-A zoning board properly denied petitioner's application for an area variance for an in-ground pool under **Town** Law § 267-b(3)(b) because the evidence supported the board's conclusions that granting the requested variance would produce an undesirable change in the character of the neighborhood, the variance was substantial, and any hardship was self-created, and because two prior grants of pool variances involved lots that were not near the subject property and were in different zoning districts.

OUTCOME: Judgment of trial court annulling board's decision reversed.

CORE TERMS: area variance, variance, zoning boards, neighborhood, petitioner's application, rational basis, in-ground, rear-yard, setback, building permit, swimming pool, arbitrary and capricious, balancing test, inter alia, self-created, undesirable, detriment, annulled, remitted, zoning, pool, feet

LEXISNEXIS® HEADNOTES Hide

Real Property Law > Zoning & Land Use > Judicial Review

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN1 Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. Therefore, a zoning board's determination should be sustained if it is not illegal, has a rational basis, and is not arbitrary and capricious. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN2 In deciding whether to grant an application for an area variance, a zoning board of appeals is required to engage in a balancing test that weighs the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community. The board must consider whether (1) an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will result by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some feasible method other than an area variance, (3) the requested area variance is substantial, (4) the proposed variance will adversely impact the physical or environmental conditions in the neighborhood if it is granted, and (5) the alleged difficulty was self-created. **Town** Law § 267-b(3)(b). More Like This Headnote

COUNSEL: **[*1]** Robert L. Cicale, **Town** Attorney, **Islip,** N.Y. (Christopher R. Nicolia of counsel), for appellant.

Christopher Modelewski, P.C., Huntington, N.Y., for respondent.

JUDGES: PETER B. SKELOS, J.P., RUTH C. BALKIN, LEONARD B. AUSTIN, SANDRA L. SGROI, JJ. SKELOS, J.P., BALKIN, AUSTIN and SGROI, JJ., concur.

OPINION

DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the **Town** of **Islip** dated December 14, 2010, which, after a hearing, denied the petitioner's application for an area variance, the Zoning Board of Appeals of the **Town** of **Islip** appeals from a judgment of the Supreme Court, Suffolk County (Rebolini, J.), dated May 1, 2012, which, upon an order of same court dated March 28, 2012, granted the petition, annulled the determination, and remitted the matter to the Zoning Board of Appeals of the **Town** of **Islip** to grant the petitioner's application for an area variance.

ORDERED that the judgment is reversed, on the law, with costs, the petition is denied, the determination is confirmed, and the proceeding is dismissed on the merits.

In 2007, the petitioner, without a building permit, installed a nonconforming in-ground swimming pool on his property **[*2]** located in Bayport in the **Town** of **Islip.** The pool's rear-yard setback of 8.8 feet was in contravention of the required minimum rear-yard setback of 18 feet (*see* Code of the **Town** of **Islip** § 68-386[D][1]). Thereafter, on September 15, 2010, the petitioner applied for a building permit to maintain the in-ground pool. After the building permit was denied, the petitioner filed an application with the Zoning Board of Appeals of the **Town** of **Islip** (hereinafter ZBA) seeking an area variance. After a hearing, the ZBA denied the application. The petitioner

then commenced this proceeding pursuant to CPLR article 78 to review the ZBA's determination. The Supreme Court held that the ZBA's determination lacked a rational basis, granted the petition, and remitted the matter to the ZBA to grant the requested variance. We reverse.

HN1"Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion'" (*Matter of Daneri v Zoning Bd. of Appeals of the* ***Town*** *of Southold*, 98 AD3d 508, 509, 949 N.Y.S.2d 180, quoting *Matter of Matejko v Board of Zoning Appeals of* ***Town*** *of Brookhaven*, 77 AD3d 949, 949, 910 N.Y.S.2d 123; **[*3]** *see Matter of Celentano v Board of Zoning Appeals of* ***Town*** *of Brookhaven*, 63 AD3d 1156, 1157, 882 N.Y.S.2d 448). Therefore, a zoning board's determination should be sustained if it is not illegal, has a rational basis, and is not arbitrary and capricious (*see* **[**2]** *Matter of Sasso v Osgood*, 86 NY2d 374, 384, 657 N.E.2d 254, 633 N.Y.S.2d 259; *Matter of Daneri v Zoning Bd. of Appeals of the* ***Town*** *of Southold*, 98 AD3d at 509; *Matter of Campbell v* ***Town*** *of Mount Pleasant Zoning Bd. of Appeals*, 84 AD3d 1230, 923 N.Y.S.2d 699; *Matter of Frank v Zoning Bd. of* ***Town*** *of Yorktown*, 82 AD3d 764, 765, 917 N.Y.S.2d 697; *Matter of Celentano v Board of Zoning Appeals of* ***Town*** *of Brookhaven*, 63 AD3d at 1157).

*HN2*In deciding whether to grant an application for an area variance, the Board "is required to engage in a balancing test that weighs the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community" (*Matter of Colin Realty Co., LLC v* ***Town*** *of N. Hempstead*, 107 AD3d 708, 710, 966 N.Y.S.2d 501, *lv granted* ___ NY3d ___ [2013]; *see* **Town** Law § 267-b[3][b]; *Matter of Daneri v Zoning Bd. of Appeals of the* ***Town*** *of Southold*, 98 AD3d at 509). The Board must consider whether (1) an undesirable change will be produced in the character of the neighborhood **[*4]** or a detriment to nearby properties will result by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some feasible method other than an area variance, (3) the requested area variance is substantial, (4) the proposed variance will adversely impact the physical or environmental conditions in the neighborhood if it is granted, and (5) the alleged difficulty was self-created (*see* **Town** Law § 267-b[3][b]).

Here, the Zoning Board of Appeals of the **Town** of **Islip** (hereinafter the ZBA) properly applied the required balancing test and considered the relevant statutory factors. Contrary to the conclusion reached by the Supreme Court, the ZBA's determination had a rational basis and was not arbitrary and capricious. The evidence before the ZBA supported its conclusions that granting the requested variance would produce an undesirable change in the character of the neighborhood, the variance was substantial, and any hardship was self-created (*see* **Town** Law § 267-b[3][b]). Contrary to the petitioner's contention, the ZBA's granting of two prior applications seeking, inter alia, area variances for rear-yard setbacks of in-ground swimming pools, did not constitute **[*5]** a precedent from which the ZBA was required to explain a departure, because the two prior applications, inter alia, involved lots that were not near the subject property and were located in different zoning districts. Thus, the petitioners failed to establish that either of the two cases in which a variance was granted bore sufficient factual similarity to the subject application so as to require an explanation from the ZBA (*see Matter of Kaiser v* ***Town*** *of* ***Islip*** *Zoning Bd. of Appeals*, 74 AD3d 1203, 1205, 904 N.Y.S.2d 166; *Matter of Moore v* ***Town*** *of* ***Islip*** *Zoning Bd. of Appeals*, 70 AD3d 950, 951, 895 N.Y.S.2d 188; *Matter of Brady v* ***Town*** *of* ***Islip*** *Zoning Bd. of Appeals*, 65 AD3d 1337, 1340, 886 N.Y.S.2d 465; *Matter of Conversions for Real Estate, LLC v Zoning Bd. of Appeals of Inc. Vil. of Roslyn*, 31 AD3d 635, 818 N.Y.S.2d 298). Accordingly, the Supreme Court improperly annulled the ZBA's determination denying the petitioner's application.

SKELOS, J.P., BALKIN, AUSTIN and SGROI, JJ., concur.

*106 A.D.3d 824, *; 966 N.Y.S.2d 440, **;*
*2013 N.Y. App. Div. LEXIS 3250, ***; 2013 NY Slip Op 3333*

In the Matter of Vesna **Luburic,** respondent, v Zoning Board of Appeals of Village of Irvington, appellant. (Index No. 5969/11)

2012-00148

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

106 A.D.3d 824; 966 N.Y.S.2d 440; 2013 N.Y. App. Div. LEXIS 3250; 2013 NY Slip Op 3333

May 8, 2013, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent applicant brought a CPLR art. 78 proceeding, seeking review of a determination of appellant zoning board of appeals (ZBA) which denied an application for a site capacity variance to build a single-family residential dwelling on certain real property. The Supreme Court, Westchester County (New York), granted the petition, annulled the determination, and remitted the matter. The ZBA appealed.

OVERVIEW: The ZBA found that granting the application would have produced an undesirable change in the neighborhood and have had a negative impact on the surrounding physical and environmental conditions, or that feasible alternatives to granting a site capacity variance might have existed. The appellate court, however, found that the village planning board, as the lead agency under the State Environmental Quality Review Act, issued a "Conditional Negative Declaration," concluding that, so long as certain conditions were met, the proposed construction would not have had a significant adverse effect on the environment. The ZBA concluded that the conditions imposed by the planning board were "impractical" and "implausible." However, given the planning board's role in addressing environmental concerns, and in the absence of any further evidence to support its conclusion, the ZBA's finding on this factor lacked a rational basis. Likewise, the ZBA's finding that the proposed construction would have produced an undesirable change in the neighborhood did not have a rational basis in the record, and the denial of a site capacity variance failed to address feasible alternatives.

OUTCOME: The judgment was affirmed.

CORE TERMS: variance, site, zoning boards, subject property, neighborhood, square feet, inter alia, proposed construction, single-family, environmental, annulled, zoning, build, altered, petitioner's application, certain conditions, record reveals, rational basis, environmental conditions, feasible alternatives, evidence to support, undesirable, dwelling, remitted

LEXISNEXIS® HEADNOTES Hide

Real Property Law > Zoning & Land Use > General Overview

Real Property Law > Zoning & Land Use > Administrative Procedure

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN1 Generally, local zoning boards have broad discretion in deciding applications. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

Real Property Law > Zoning & Land Use > General Overview

Real Property Law > Zoning & Land Use > Judicial Review

HN2 Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure. A determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis. Conclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth how and in what manner the granting of the variance would be improper. More Like This Headnote

COUNSEL: **[***1]** Stecich Murphy & Lammers, LLP, Tarrytown, N.Y. (Marianne Stecich of counsel), for appellant.

Richard T. Blancato, Tarrytown, N.Y., for respondent.

JUDGES: REINALDO E. RIVERA, J.P., THOMAS A. DICKERSON, JOHN M. LEVENTHAL, SHERI S. ROMAN, JJ. RIVERA, J.P., DICKERSON, LEVENTHAL and ROMAN, JJ., concur.

OPINION

[441]** **[*824]** DECISION & ORDER

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Village of Irvington dated February 4, 2011, which denied the petitioner's application for a site capacity variance to permit her to build a single-family residential dwelling on certain real property, the Zoning Board of Appeals of the Village of Irvington appeals from a judgment of the Supreme Court, Westchester County (Warhit, J.), entered November 22, 2011,

which granted the petition, annulled the determination, and remitted the matter to the Zoning Board of Appeals of the Village of Irvington to grant the requested variance.

[*825] ORDERED that the judgment is affirmed, with costs.

HN1 Generally, local zoning boards have broad discretion in deciding applications (*see* **[**442]** *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613, 814 N.E.2d 404, 781 N.Y.S.2d 234; *Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach*, 79 AD3d 874, 876, 912 N.Y.S.2d 668). HN2 "Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d at 613). "[A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis" (*Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 1137, 930 N.Y.S.2d 54). "Conclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth how and in what manner the granting of the variance would be improper" (*Matter of Gabrielle Realty Corp. v Board of Zoning Appeals of Vil. of Freeport*, 24 AD3d 550, 550, 808 N.Y.S.2d 258 [internal quotation marks omitted]).

Here, the Supreme Court properly annulled the determination of the Zoning Board of Appeals of the Village of Irvington (hereinafter the ZBA), which denied the petitioner's second application for a site capacity variance needed to construct a single-family residence on the vacant lot she owned (hereinafter the subject property). Although the dismissal of the petitioner's appeal from the judgment in a previous CPLR article 78 proceeding constituted an adjudication on the merits with respect to the ZBA's findings that the petitioner's requested variance was substantial and her hardship was self-created (*see Catalanotto v Abraham*, 94 AD3d 937, 937, 942 N.Y.S.2d 600; *Deutsche Bank Natl. Trust Co. v Posner*, 89 AD3d 674, 675, 933 N.Y.S.2d 52; *Auriemmo v Auriemmo*, 87 AD3d 1090, 1091, 930 N.Y.S.2d 221), the record before us does not support the ZBA's determination that granting the petitioner's second application would produce an undesirable change in the neighborhood and have a negative impact on the surrounding physical and environmental conditions, or that feasible alternatives to granting a site capacity variance might exist.

On the contrary, the record reveals that, after approximately three years of, inter alia, working with the Village of Irvington Planning Board (hereinafter the Planning Board), engaging in public hearings, and consulting with various experts, the petitioner obtained the requisite permit approval to build on the subject property if certain conditions were met. The Planning **[*826]** Board, as the lead agency under the State Environmental Quality Review Act (hereinafter SEQRA), issued a "Conditional Negative Declaration," concluding that, so long as certain conditions were met, the proposed construction would not have a significant adverse effect on the environment. Despite the Planning Board's extensive environmental review of the petitioner's plans, the ZBA concluded that the petitioner's proposed construction would have an adverse impact on the physical or environmental conditions of the neighborhood because the conditions imposed by the Planning Board were "impractical" and "implausible." However, given the Planning Board's role in addressing environmental concerns (*cf. Matter of Thorne v Village of Millbrook Planning Bd.*, 83 AD3d 723, 725, 920 N.Y.S.2d 369), and in the absence of any further evidence to support its conclusion, the ZBA's finding on this factor lacked a rational basis.

Likewise, the ZBA's determination that the petitioner's proposed construction would produce an undesirable change in the neighborhood did not have a rational basis in the record. Aside from the site capacity variance needed to build any structure on the subject property, the plans submitted by the petitioner with her first application to the ZBA were in compliance with all applicable zoning codes for single-family dwellings. After her first application was denied, the petitioner addressed the ZBA's concerns by submitting new plans for a smaller house with a redesigned **[**443]** roof. The ZBA summarily dismissed these proposed changes as not "dramatic enough," citing, inter alia, an Advisory Opinion issued by the Planning Board, which characterized the petitioner's altered plans as a "modest revision." However, the Planning Board's Advisory Opinion made this assessment

of the petitioner's altered plans in connection with construction and post-construction activities on the subject property, not as they related to the character of the neighborhood. Indeed, in her altered plans, the petitioner, inter alia, reduced the house's floor area ratio from 4,163 square feet to 3,484.9 square feet and the lot coverage from 2,100 square feet to 1,741 square feet. Furthermore, the ZBA's denial of the petitioner's second application for a site capacity variance failed to address the factor of feasible alternatives.

Overall, the record does not contain sufficient factual and objective evidence to support the rationality of the ZBA's determinations denying the petitioner's application for a site capacity variance (*see Matter of Cacsire v City of White Plains Zoning Bd. of Appeals*, 87 AD3d 1135, 930 N.Y.S.2d 54; *cf. Matter of Ifrah v Utschig*, 98 NY2d 304, 774 N.E.2d 732, 746 N.Y.S.2d 667). Accordingly, the Supreme Court properly concluded that the ZBA's determination was arbitrary **[*827]** and capricious, annulled the determination, and remitted the matter to the ZBA to issue the requested variance.

In light of our determination, we need not reach the parties' remaining contentions.

RIVERA ▾, J.P., DICKERSON ▾, LEVENTHAL ▾ and ROMAN ▾, JJ., concur.

*109 A.D.3d 1096, *; 971 N.Y.S.2d 713, **;*
*2013 N.Y. App. Div. LEXIS 6184, ***; 2013 NY Slip Op 6115*

IN THE MATTER OF **BAKER HALL,** DOING BUSINESS AS **BAKER** VICTORY SERVICES, PETITIONER-RESPONDENT, v CITY OF **LACKAWANNA ZONING BOARD** OF **APPEALS** AND CITY OF **LACKAWANNA,** RESPONDENTS-APPELLANTS.

845 CA 12-01990

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

109 A.D.3d 1096; 971 N.Y.S.2d 713; 2013 N.Y. App. Div. LEXIS 6184; 2013 NY Slip Op 6115

September 27, 2013, Released
September 27, 2013, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

COUNSEL: **[***1]** BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

DAMON MOREY LLP, CLARENCE (COREY A. AUERBACH OF COUNSEL), FOR PETITIONER-RESPONDENT.

JUDGES: PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ.

OPINION

[*1097] **[**713]** **Appeal** from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered May 9, 2012. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, to annul the determination of respondent City of **Lackawanna Zoning Board** of **Appeals** (ZBA) that a residential treatment facility (RTF) proposed by petitioner is not **[**714]** a permitted use

that a residential treatment facility (RTF) proposed by petitioner is not [* 2] a permitted use in the mixed residential (MR) district in which petitioner sought to construct it. We conclude that Supreme Court properly granted the petition to that extent. Although "[t]he interpretation by a **zoning board** of its governing code is generally entitled to great deference by the courts . . . , an interpretation that runs counter to the clear wording of a [code] provision is given little weight" (*Matter of Emmerling v Town of Richmond **Zoning** Bd. of **Appeals***, 67 AD3d 1467, 1467-1468, 888 N.Y.S.2d 703 **[***2]** [internal quotation marks omitted]). Here, the ZBA's determination that the proposed RTF is not permitted in an MR district is contrary to the clear wording of **Lackawanna** City Code (City Code) § 230-80 and the sections of the multiple residence law that are incorporated by reference therein (*see generally Matter of McGrath v Town of Amherst **Zoning** Bd. of **Appeals***, 94 AD3d 1522, 1523-1524, 943 N.Y.S.2d 704, *lv denied* 19 NY3d 809, 975 N.E.2d 913, 951 N.Y.S.2d 467).

Finally, we note that, inasmuch as petitioner did not take a cross **appeal** from the judgment, it is precluded from obtaining the affirmative relief it seeks (*see Millard v Alliance Laundry Sys., LLC*, 28 AD3d 1145, 1148, 814 N.Y.S.2d 433; *see generally Hecht v City of New York*, 60 NY2d 57, 61, 454 N.E.2d 527, 467 N.Y.S.2d 187).

Entered: September 27, 2013

Source: **Legal > / . . . / > NY Federal & State Cases, Combined**
Terms: **baker hall lackawanna zoning board of appeals** (Suggest Terms for My Search | Feedback on Your Search)
View: Full
Date/Time: Tuesday, November 19, 2013 - 12:29 PM EST

*64 A.3d 1152, *; 2013 Pa. Commw. LEXIS 101, ***

Northampton Area School District, Metrotek Electrical Services, Co. a/k/a Alliance Energy Group, LLC, Appellants v. Zoning Hearing Board of the Township of Lehigh, Northampton County and Lehigh Township

No. 680 C.D. 2012

COMMONWEALTH COURT OF PENNSYLVANIA

64 A.3d 1152; 2013 Pa. Commw. LEXIS 101

December 10, 2012, Argued
April 9, 2013, Decided
April 9, 2013, Filed

SUBSEQUENT HISTORY: Appeal denied by Northampton Area Sch. Dist. v. Zoning Hearing Bd., 2013 Pa. LEXIS 2233 (Pa., Oct. 2, 2013)

CASE SUMMARY

PROCEDURAL POSTURE: Appellant zoning applicants (ZAs) sought review of an order of the Court of Common Pleas of Northampton County (Pennsylvania), which affirmed a decision of appellee township zoning hearing board (ZHB). The ZHB had denied the applicants' request for approval to install a solar energy field (SEF) as an "accessory use."

OVERVIEW: One ZA owned property which was used principally for "public education," as an elementary school was located there. The ZAs sought approval to install a SEF in order to generate electric power to the school. A zoning officer denied the application. On administrative review, the ZHB determined that Lehigh, Pa., Zoning Ordinance § 180-25(A) did not permit the SEF as an accessory use "as of right." Upon review of the various Zoning Ordinances, the ZHB evaluated whether the SEF panels were "customarily incidental to the school." It concluded that they were not and accordingly, it concluded that the SEF did not constitute a permitted "accessory use." The trial court affirmed that decision. On further review, the court held that the ZHB erred in making its "customarily incidental" inquiry, as it had already been legislatively declared by the township that the SEF was an "accessory use" for every use in every zone. Further, under the plain language of § 180-25(A), the SEF was permitted as an "accessory use" as long as it complied with the "requirements of the zone." Finding that the ZAs' SEF did in fact comply with the zone requirements, the court concluded that approval was warranted.

OUTCOME: The court reversed the order of the trial court order reversed, and remanded the matter to the ZHB with directions to approve the ZAs' SEF application.

CORE TERMS: energy, solar, accessory use, customarily, incidental, zoning ordinance, zone, zoning district, common pleas, principal use, proposed use, special exception, feet, zoning

zoning district, common pleas, principal use, proposed use, special exception, feet, zoning, outdoor, private schools, install, generation, on-site, open space, residential, density, land use, ordinance, array, property lines, electric power, electricity, constructed, elementary

LEXISNEXIS® HEADNOTES Hide

Real Property Law > Zoning & Land Use > Building & Housing Codes

HN1 Lehigh, Pa., Zoning Ordinance § 180-30 prohibits more than one principal use per lot. More Like This Headnote

Real Property Law > Zoning & Land Use > Building & Housing Codes

HN2 See Lehigh, Pa., Zoning Ordinance § 180-25(A).

Administrative Law > Judicial Review > Standards of Review > De Novo Review

Real Property Law > Zoning & Land Use > Building & Housing Codes

Real Property Law > Zoning & Land Use > Judicial Review

HN3 The question of whether a proposed use falls within a given classification is a question of law that is fully subject to a court's review in a zoning appeal. More Like This Headnote

Real Property Law > Zoning & Land Use > Special Permits & Variances

HN4 See Lehigh, Pa., Zoning Ordinance § 180-94(A)-(G).

Real Property Law > Zoning & Land Use > Building & Housing Codes

HN5 "Customarily incidental," as used in zoning matters such as Lehigh, Pa., Zoning Ordinance § 180-94(A)-(G), is best understood by invoking an objective reasonable person standard. Under the standard, courts may look not only at how frequently a proposed accessory use is found in association with the primary use (if such evidence is available, it certainly is relevant) but also at an applicant's particular circumstances, the zoning ordinance and the indications therein as to the governing body's intent regarding the intensity of land use appropriate to the particular district, as well as the surrounding land conditions and any other relevant information, including general experience and common understanding, to reach a legal conclusion as to whether a reasonable person could consider the use in question to be customarily incidental. This approach respects the need for an understandable legal standard and the flexibility that is a necessary component of the analysis. More Like This Headnote

Real Property Law > Zoning & Land Use > Building & Housing Codes

HN6 See Lehigh, Pa., Zoning Ordinance § 180-16(A).

Real Property Law > Zoning & Land Use > Building & Housing Codes

HN7 A "structure" is defined in Lehigh, Pa., Zoning Ordinance § 180-15 as any assembly of materials constructed or erected with a fixed location on the ground, or attached to something having a fixed location on the ground, any portion of which is above the natural surface of the ground. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Real Property Law > Zoning & Land Use > Judicial Review

HN8 Where a common pleas court does not accept additional evidence in a zoning appeal, an appellate court's scope of review is limited to determining whether the common pleas court committed an abuse of discretion or an error of law in reaching its decision. The common pleas court commits an abuse of discretion where findings of fact are not supported by substantial evidence in the record. More Like This Headnote

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation

Evidence > Inferences & Presumptions > Presumptions > Presumption of Regularity

Real Property Law > Zoning & Land Use > Ordinances

HN9 The interpretation of a zoning ordinance is a question of law. In deciding whether a zoning hearing board correctly interprets a zoning ordinance, a court must bear in mind that zoning ordinances should receive reasonable and fair construction in light of the subject matter dealt with and the manifest intention of the local legislative body. A court ascertaining the intent of the drafters of an ordinance should presume they did not intend a result which is absurd, unreasonable or impossible of execution. More Like This Headnote

Real Property Law > Zoning & Land Use > Building & Housing Codes

Real Property Law > Zoning & Land Use > Ordinances

HN10 The plain language of Lehigh, Pa., Zoning Ordinance § 180-25(A) states that solar energy units are permitted as an "accessory use" in any zone. The provision is found in the section of the Zoning Ordinance which deals specifically with "Accessory Uses and Structures." The inclusion of solar energy units in this Section is telling and indicative of the Township's legislative declaration that solar energy units are a permitted "accessory use" so long as they meet the "requirements of the zone." More Like This Headnote

Real Property Law > Zoning & Land Use > Building & Housing Codes

HN11 Lehigh, Pa., Zoning Ordinance § 180-25(A) does not define the term "requirements of the zone." However, this language clearly and unambiguously refers to the height, area, setback and coverage standards applicable to "accessory uses" in each particular zone. Lehigh, Pa., Zoning Ordinance § 180-16 sets forth the requirements for "accessory uses" in the Agricultural/Rural Residential (A/RR) Zoning District. The only requirements for "accessory uses" in the A/RR Zoning District are the limitation of structure height (20 feet) and the limitation against the placement of an "accessory use" or structure in the front yard. More Like This Headnote

Real Property Law > Zoning & Land Use > Administrative Procedure

Real Property Law > Zoning & Land Use > Building & Housing Codes

HN12 "Accessory use" is defined in Lehigh, Pa., Zoning Ordinance § 83-26 as a subordinate use or building customarily incidental to, and located on the same lot occupied by, the main use or building. The term "customarily incidental" is incorporated within the definition of "accessory use." Because solar energy units are already legislatively declared by the Township to be an "accessory use" for every use in every zone, it is unnecessary for the Township Zoning Hearing Board to inquire into whether the use is

"customarily incidental" to a school. More Like This Headnote

Real Property Law > Zoning & Land Use > Building & Housing Codes

Real Property Law > Zoning & Land Use > Ordinances

HN13 The readily-ascertainable intent of Lehigh, Pa., Zoning Ordinance § 180-25(A) is to promote the use of alternative energy systems in each zoning district. The clear intent of § 180-25(A) is to encourage on-site generation of electric power from this alternative energy source, regardless of the nature of the underlying use. Undoubtedly, the goal of such a policy is to supplant existing off-site sources of electric power generation, rather than traditionally relying on fossil fuels, with clean, renewable energy sources. More Like This Headnote

COUNSEL: Blake C. Marles, Bethlehem, for appellants.

Thomas M. Caffrey, Allentown, for appellee Zoning Hearing Board of the Township of Lehigh, Northampton County.

James F. Preston, Bethlehem, for appellee the Township of Lehigh.

JUDGES: **[**1]** BEFORE: HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge. OPINION BY JUDGE McGINLEY.

OPINION BY: BERNARD L. McGINLEY

OPINION

[*1153] OPINION BY JUDGE McGINLEY

Northampton Area School District (School District) and Alliance Energy Group, LLC (Applicants) appeal from the order of the Court of Common Pleas of Northampton County (common pleas court) which affirmed the Lehigh Township Zoning Hearing Board's (ZHB) denial of Applicants' request for approval to install a solar energy field as an "accessory use."

The School District owns nineteen acres in the Agricultural/Rural Residential (A/RR) Zoning District of Lehigh Township (Property). The principal use of the Property is "public education." The "Lehigh Elementary School" (School) is located on the Property.

In October 2010, Applicants sought approval to install a solar energy field on **[*1154]** four acres located at the southeast corner[1] of the Property to generate electric power to the School. The solar energy field would consist of 7,000 solar energy panels, divided into 280 individual units, with each complete unit being approximately 13.5 feet wide and 26 feet long.

FOOTNOTES

1 This is an area that slopes downwardly **[**2]** to the south behind the School and behind a power line that serves the School.

The Zoning Officer denied the application and opined that the proposed use constituted a "second commercial principal use" of the Property.[2] The Zoning Officer also concluded that the Zoning Ordinance did not provide for the proposed use and, therefore, the use required a Conditional Use

Ordinance did not provide for the proposed use and, therefore, the use required a Conditional Use Hearing before the Board of Supervisors.

FOOTNOTES

2 HN1 Section 180-30 of the Lehigh Township Zoning Ordinance (Zoning Ordinance) prohibits more than one principal use per lot. The Zoning Officer determined that Applicants' request was a request to engage in a second use, i.e., an independent solar power generation use on the same lot as an existing principal public school use.

On December 8, 2010, Applicants appealed to the ZHB. Applicants argued that the proposed use was not a second principal use. According to Applicants, the purpose of the solar energy field was "to support the existing use," i.e., generate solar energy that would be used to meet the energy needs of the school. It would not be used to supply energy to any other party. They argued that the use was a permitted "accessory use" under Section 180-25(A) entitled "Accessory **[**3]** Uses — Alternative Energy Systems" which provided: HN2 "Solar energy units shall be permitted in any zone and subject to the requirements of that zone." (Emphasis added). In the event the ZHB deemed the use a "second principal use" Applicants sought "special exception" approval. Two public hearings were held on February 2, 2011, and February 17, 2011.

Applicants presented the testimony of Robert Toedter (Toedter), a licensed professional engineer. Toedter testified that the solar energy field was desirable because the School District would obtain energy at a significantly lower cost, and save between two and four million dollars over a twenty-year term. Hearing Transcript, February 2, 2011, at 25-26; Reproduced Record (R.R.) at 51a-52a. He explained that the solar energy field would also provide an educational component because the elementary and high schools could run programs regarding the application of solar energy, power and electricity. H.T. at 24; R.R. at 50a. He explained that the solar energy panels would comply with all building codes, and comply with all appropriate setbacks and requirements of the A/RR Zoning District. He also confirmed the solar energy panels would create no **[**4]** noise, no glare, no vibration, and, in his opinion, there were no deleterious effects on the surrounding neighborhoods. H.T. at 27-28; R.R. at 53a-54a. The solar energy field would be surrounded by vegetation. There would be no soil disturbance, and the solar energy panels would be weather and wind resistant.

On March 10, 2011, the ZHB issued a written decision which consisted of two separate rulings. First, the ZHB concluded that the proposed use did not constitute a "second principal use" which required "special exception" approval. The ZHB also rejected Applicants' argument that Section 180-25(A) of the Zoning Ordinance permits a solar energy field as an accessory use "as of right" in the A/RR Zoning District.

On the second issue, the ZHB reasoned that Section 180-25(A) allows solar **[*1155]** energy units[3] subject to the "requirements of the zone." The ZHB noted that the Property was located in the A/RR Zoning District, which permits private and public schools by special exception. The ZHB looked to Section 180-94(A)-(G)[4] which outlines the special exception standards for public and private schools in the A/RR Zoning District, specifically Section 180-94(G) which permits "accessory uses customarily **[**5]** incidental" to a public and private school. The ZHB concluded that "in accordance with the requirements of the A/RR District — the zone in which the subject property is located, the proposed solar field is permitted only if it constitutes an 'accessory use customarily incidental' to a public or private school." ZHB Decision, March 10, 2011, at 15.

FOOTNOTES

3 The ZHB now, for the first time, contends that Applicants failed to meet their burden of proving the proposed use falls within the category of "solar energy units" in Section 180-25(A). However, in its Decision, the ZHB never found or concluded that the proposed solar energy field or "solar energy array", as it was also referred to in the Decision, did not fall within the

contemplated meaning of "solar energy units." The ZHB noted that the term "solar energy units" was not defined, but it went on to render its Decision "assuming that" the proposed solar field constitutes solar energy units. ZHB Decision, March 10, 2011, at 14. Applicants argue that it is unfair for the ZHB to now claim that they failed to meet their burden to prove that the solar energy field qualifies as "solar energy units." Applicants argue that they, nevertheless, presented **[**6]** sufficient evidence to establish that the use would be used to generate solar energy for the principal use, i.e., energy from the sun, regardless of whether it is called a "solar panel array," "solar energy field" or "solar energy units."

*HN3*The question of whether a proposed use falls within a given classification is a question of law that is fully subject to this Court's review. A&L Investments v. Zoning Hearing Board of the City of McKeesport, 829 A.2d 775 (Pa. Cmwlth. 2003). Ascribing the plain and ordinary meaning to the term "solar energy units" and, in light of the undisputed evidence, this Court concludes that the term "solar energy units" includes the Applicants' proposed "solar energy field" and/or "solar panel array." To the extent that the ZHB argues that the proposed use is any different from the use of a lesser number of solar energy panels needed to power an individual home, there is no basis in the Zoning Ordinance for such a distinction based on the number of panels. In both cases, the use of the solar panels is exactly the same, i.e., on-site power generation solely to serve the principal use of the Property.

4 Section 180-94 (A)-(G) provides:

> *HN4*Within the A/RR ... Zone[], **[**7]** public and private schools are permitted by special exception, subject to the following criteria:
> A. All height, area, setback, and coverage standards within the underlying zone shall apply;
> B. All off-street parking lots shall be set back a minimum of 25 feet and shall be screened from all property lines;
> C. All buildings shall be set back at least 100 feet from all property lines;
> D. If education or day-care is offered below the college level, an outdoor play area shall be provided, at the rate of 65 square feet per individual enrolled. Off-street parking lots shall not be used as outdoor play areas. Outdoor play areas shall not be located within the front yard and must be set back a minimum of 25 feet from all property lines. Outdoor play areas shall be completely enclosed by a minimum four-foot fence and screened from adjacent properties. Any vegetative materials located within the outdoor play areas shall be of a nonharmful type (e.g. poisonous, thorny, allergenic, etc.). All outdoor play areas must provide a means of shade, such as shade trees or pavilions;
> E. Enrollment shall be defined as the largest number of students on the site at any one time during a seven-day period;
> F. Passenger **[**8]** drop-off and pickup areas shall be provided and arranged so that students do not have to cross traffic lanes on or adjacent to the school;
> G. Accessory uses customarily incidental to the above permitted uses.

Zoning Ordinance, Section 180-94(A)-(G). (Emphasis added).

The ZHB relied on **[*1156]** Hess v. Warwick Township Zoning Hearing Board, 977 A.2d 1216 (Pa. Cmwlth. 2009), for the definition of "customarily incidental:"

> *HN5*'Customarily incidental' is best understood by invoking an objective reasonable person standard. Under the standard, we may look not only at how frequently the proposed accessory use is found in association with the primary use (if such evidence is available, it certainly is relevant) but also at the applicant's particular
>
> circumstances, the zoning ordinance and the indications therein as to the governing body's intent regarding the intensity of land use appropriate to the particular district, as well as the surrounding land conditions and any other relevant information, including general experience and common understanding, to reach a legal conclusion as to

> whether a reasonable person could consider the use in question to be customarily incidental. This approach respects the need **[**9]** for an understandable legal standard and the flexibility that is a necessary component of the analysis. (Emphasis added).

Hess, 977 A.2d at 1224.

Pursuant to Hess, the ZHB went on to consider how frequently solar energy panels were found associated with a school. It noted that Applicants did not present any evidence of "other instances" in which the same or a similar type of solar energy panels were used to generate energy to a school. The ZHB indicated that it, therefore, had "no reason to believe that a solar field like the one proposed here has ever been constructed and used in association with a school facility." ZHB Decision, March 10, 2011, at 23.

The ZHB also considered the purpose of the A/RR Zoning District:

> HN6 Purpose. It is the purpose of this zone to promote residential areas and requirements for low density uses and to permit agriculture, conservation, recreation and other open space purposes. It is the intent of this zone to provide for residential development at densities that maintain a rural, open character and continue to rely upon on-site facilities; to provide for adequate housing opportunities by allowing a variety of housing choices; to provide sufficient light, air **[**10]** and privacy through adequate regulation of building density and placement and size; and to allow for the continuation of agriculture to promote the development of open space and recreation activities. This zone closely reflects current land use trends and densities within the Township.

Zoning Ordinance, Section 180-16(A).

Continuing with its analysis of whether the solar panels were "customarily incidental" to the school under Hess, the ZHB concluded that each of the 7,000 panels constituted HN7 a "structure" as defined in Section 180-15 of the Zoning Ordinance:

> [a]ny assembly of materials constructed or erected with a fixed location on the ground, or attached to something having a fixed location on the ground, any portion of which is above the natural surface of the ground.

The ZHB found that the erection of "7,000 structures" within a four-acre area that would otherwise be devoted to open space was "clearly inconsistent with the stated purpose of the A/RR Zoning District to 'maintain a rural, open character' and 'to promote the development of open space and recreation activities.'" ZHB Decision, March 10, 2011, at 24.

The ZHB also found that the Property was not an appropriate site because **[**11]** the solar panels would be in close proximity to residential properties.

Based on the above factors enunciated in Hess, the ZHB concluded that while the proposed solar energy field would be located **[*1157]** on the same lot as the School, and would be subordinate to the School, the solar energy field did not constitute a permitted "accessory use" because such use was not "customarily incidental" to the School.

Applicants filed a land use appeal on March 30, 2011. Lehigh Township timely intervened. After briefs were filed and oral argument held, the common pleas court, based on the record before the ZHB, affirmed in an opinion and order dated March 5, 2012.

On appeal[5] Applicants raise four issues: (1) whether the common pleas court erred when it concluded that the proposed solar energy field was not permitted as an "accessory use" where the

Zoning Ordinance expressly permitted solar energy units as "accessory uses" in every Zoning District; (2) whether the common pleas court erred when it concluded that the solar energy field was not "customarily incidental" to the School despite specific findings of fact and conclusions of law that the electricity generated by the solar energy field would be used **[**12]** by the School and would replace a substantial portion of the electricity currently used by the School; (3) whether the common pleas court erred when it concluded that solar energy field was not "customarily incidental" to the School based solely on an alleged lack of evidence that such a use has never been constructed and used in conjunction with a school facility; and (4) whether the common pleas court erred when it concluded that the solar energy field was not a use "customarily incidental" to the School due to the number and location of proposed structures?

FOOTNOTES

5 *HN8* Since the common pleas court did not accept additional evidence, this Court's scope of review is limited to determining whether the common pleas court committed an abuse of discretion or an error of law in reaching its decision. Valley View Civic Ass'n v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). The common pleas court commits an abuse of discretion where findings of fact are not supported by substantial evidence in the record. Id.

I.

Applicants argue that their proposed solar energy field is permitted as of right on the Property. They contend that the common pleas court misinterpreted Section 180-25(A) of the **[**13]** Ordinance which specifically designates solar energy units as an "accessory use" allowed in every Zoning District. Again, Section 180-25(A) titled "Accessory Uses and Structures" provides, in part:

> Solar energy units shall be permitted in any zone and subject to the requirements of the zone. (Emphasis added).

Applicants argue that the Township has already legislatively determined that solar energy units are "customarily incidental" to every principal use in every Zoning District. It was unnecessary for Applicants to separately and independently establish that solar energy units are "customarily incidental" to a school.

HN9 The interpretation of a zoning ordinance is a question of law. A & L Investments. In deciding whether a zoning hearing board correctly interprets a zoning ordinance, this Court must bear in mind that zoning ordinances should receive reasonable and fair construction in light of the subject matter dealt with and the manifest intention of the local legislative body. Appeal of Perrin, 305 Pa. 42, 55, 156 A. 305, 308-09 (1931). A court ascertaining the intent of the drafters of an ordinance, should presume they did not intend a result which is absurd, unreasonable or impossible **[**14]** of execution. **[*1158]** Rudolph v. Zoning Hearing Board of College Township, 80 Pa. Commw. 28, 470 A.2d 1104 (Pa. Cmwlth. 1984).

After reviewing Section 180-25(A) in context of the Zoning Ordinance, this Court agrees with Applicants. *HN10* The plain language of the Zoning Ordinance states that solar energy units are permitted as an "accessory use" in any zone. The provision is found in the section of the Zoning Ordinance which deals specifically with "Accessory Uses and Structures." The inclusion of solar energy units in this Section is telling and indicative of the Township's legislative declaration that

solar energy units are a permitted "accessory use" so long as they meet the "requirements of the zone.[6]" Thus, the ZHB was required to begin with the premise that solar energy units are an "accessory use." The only prerequisite is that the solar energy units must comply with the "requirements of the zone."

FOOTNOTES

6 It is undisputed that the proposed solar energy field would supply power solely for on-site use by the School. Whether solar energy panels may be a principal use of a property in the A/RR Zoning District is not before this Court.

*HN11*The Ordinance does not define the term "requirements of the zone." However, this Court **[**15]** finds that this language clearly and unambiguously refers to the height, area, setback and coverage standards *applicable to "accessory uses" in each particular zone*. Section 180-16 of the Zoning Ordinance sets forth the requirements for "accessory uses" in the A/RR Zoning District. The only requirements for "accessory uses" in the A/RR Zoning District are the limitation of structure height (20 feet) and the limitation against the placement of an "accessory use" or structure in the front yard. By all accounts, Applicants' proposed use met these standards.

That should have been the extent of the ZHB's inquiry.

The ZHB, instead, looked to the special exception provisions that pertain to a school use in the A/RR Zoning District. The ZHB reasoned that public and private schools were permitted in the A/RR Zoning District by special exception under Section 180-16(C)(12), subject to the "specific criteria" in Section 180-94(G). Again, this Section permits "accessory uses customarily incidental" to the school. The ZHB looked to the "requirements" of Section 180-94(G) to determine whether Applicants' solar energy field use was a permitted "accessory use." This was a clear error of law.

First, *HN12*"accessory **[**16]** use" is defined in Section 83-26 of the Zoning Ordinance as: "[a] subordinate use or building customarily incidental to, and located on the same lot occupied by, the main use or building." (Emphasis added) The term "customarily incidental" is incorporated within the definition of "accessory use." If solar energy units are permitted as an "accessory use" there is no reason for an applicant to separately establish that they are "customarily incidental" to the principal use when the very definition of "accessory use" requires that such use be "customarily incidental." Because solar energy units were already legislatively declared by the Township to be an "accessory use" for every use in every zone it was unnecessary for the ZHB to inquire into whether the use was "customarily incidental" to a school. By undertaking the inquiry of whether the use was "customarily incidental" to a school, the ZHB overrode the legislative declaration that the solar energy units are an "accessory use." In other words, the ZHB proceeded to decide whether the proposed solar energy field constituted a permitted "accessory use" when that question was **[*1159]** already answered definitively in the Zoning Ordinance.

The ZHB's **[**17]** interpretation is also circuitous. Under the ZHB's interpretation solar energy units are a permitted "accessory use" in every zone under Section 180-25(A) *so long as the use is permitted as an "accessory use" in each zone*. This interpretation is not tenable.

The ZHB's interpretation renders Section 180-25(A) inoperative and the permissive nature of the provision a nullity. *HN13*The readily-ascertainable intent of Section 180-25(A) was to promote the use of alternative energy systems in each zoning district. The clear intent of Section 180-25(A) was to encourage on-site generation of electric power from this alternative energy source, regardless of the nature of the underlying use. Undoubtedly, the goal of such a policy is to supplant existing off-site sources of electric power generation, rather than traditionally relying on fossil fuels, with clean, renewable energy sources. The ZHB's interpretation would force landowners wishing to further this intent to first demonstrate that such alternative energy uses are "customarily incidental" to their underlying use, which will be difficult, if not impossible, to show given their relative newness and dearth.

This Court concludes that the common **[**18]** pleas court erred as a matter of law when it affirmed the ZHB's dismissal of the Application to install the solar energy field. The order of the common pleas court is reversed.[7] The matter is remanded and the ZHB is directed to approve Applicants' application to install the energy field as an "accessory use" to the School.

Applicants' application to install the energy field as an "accessory use" to the School.

FOOTNOTES

7 Because this Court has disposed of this appeal on the first issue, it is unnecessary to address Applicants' remaining three issues.

BERNARD L. McGINLEY, Judge

ORDER

AND NOW, this 9th day of April, 2013, the order of the Court of Common Pleas of Northampton County in the above-captioned case is hereby reversed. The matter is remanded and the Zoning Hearing Board is directed to approve Northampton Area School District's and Alliance Energy Group, LLC's application to install the solar energy field as an accessory use to the Lehigh Elementary School.

BERNARD L. McGINLEY, Judge

*20 N.Y.3d 481, *; 986 N.E.2d 898, **;*
*964 N.Y.S.2d 64, ***; 2013 N.Y. LEXIS 125*

Sunrise Check Cashing and Payroll Services, Inc., et al., Respondents, v Town of **Hempstead,** Appellant.

No. 12

COURT OF APPEALS OF NEW YORK

20 N.Y.3d 481; 986 N.E.2d 898; 964 N.Y.S.2d 64; 2013 N.Y. LEXIS 125; 2013 NY Slip Op 949

January 7, 2013, Argued
February 14, 2013, Decided

SUBSEQUENT HISTORY: Reargument denied by ***Sunrise*** *Check Cashing & Payroll Servs., Inc. v Town of* ***Hempstead***, 21 NY3d 978, 992 NE2d 1091, 970 NYS2d 747, 2013 N.Y. LEXIS 1639 (N.Y., June 25, 2013)

PRIOR HISTORY: Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 29, 2011. The Appellate Division (1) reversed, on the law, so much of an order of the Supreme Court, Nassau County (Antonio I. Brandveen, J.; op 2010 NY Slip Op 31005[U] [2010]), as had denied plaintiffs' motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint, in effect, declaring that section 302 (K) of article XXXI of the Building Zone Ordinance of the Town of **Hempstead** is valid; (2) granted plaintiffs' motion for summary judgment; (3) denied defendant's cross motion for summary judgment; and (4) remitted the matter to Supreme Court for the entry of a judgment, among other things, declaring that section 302 (K) of article XXXI of the Building Zone Ordinance of the Town of **Hempstead** is void and of no effect.

Sunrise *Check Cashing & Payroll Servs., Inc. v Town of* ***Hempstead***, 91 AD3d 126, 933 NYS2d 388, affirmed.
Sunrise *Check Cashing & Payroll Servs., Inc. v Town of* ***Hempstead***, 91 AD3d 126, 933 NYS2d 388, 2011 N.Y. App. Div. LEXIS 8565 (N.Y. App. Div. 2d Dep't, 2011)

DISPOSITION: Order affirmed, with costs.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant town appealed an order by the Appellate Division (New York) that reversed a judgment in the town's favor and found that a town zoning ordinance was preempted by Banking Law art. IX-A and related regulations, which governed the licensing of

preempted by Banking Law art. 1X-A and related regulations, which governed the licensing of respondent **check-cashing** establishments.

OVERVIEW: The ordinance in question expressly prohibited **check-cashing** establishments in the town's business district. A memorandum by the deputy town attorney stated that the ordinance was directed at the perceived social evil of **check-cashing** services, which were thought to exploit the younger and lower income people who were their main customers. The Court of Appeals found, inter alia, that the town made no attempt to defend the purposes advanced in the memorandum as legitimate objects of the zoning power. Instead, the town tried to save the ordinance by attributing to it a different purpose: protecting the health and safety of the community against the dangers created by armed robbery. The record clearly refuted the idea that the ordinance was a public safety measure. The ordinance was obviously concerned, not with the use of the land, but with the business done by those who occupied it. Consequently, the ordinance was not a proper exercise of the town's zoning power in Town Law § 261.

OUTCOME: The order was affirmed.

CORE TERMS: zoning, check-cashing, establishments, lower income, armed robberies, town attorney, town boards, land use, invalid, exploit, deputy, power to regulate, general police power, secondary effects, implemented, customers, pawnshops, younger, robberies, occupy, strip, evil, save, business district, public policy, public safety, banking, rating, user

LEXISNEXIS® HEADNOTES ⊟ **Hide**

Real Property Law > Zoning & Land Use > Ordinances

HN1 A zoning measure that prohibits **check cashing** establishments in a town's business district is invalid, because it violates the principle that zoning is concerned with the use of land, not with the identity of the user. More Like This Headnote | *Shepardize:* Restrict By Headnote

Real Property Law > Zoning & Land Use > Local Planning

Real Property Law > Zoning & Land Use > Ordinances

HN2 See Town Law § 261.

Governments > Local Governments > Police Power

Real Property Law > Zoning & Land Use > Local Planning

HN3 Zoning power is not a general police power, but a power to regulate land use. More Like This Headnote | *Shepardize:* Restrict By Headnote

Real Property Law > Zoning & Land Use > Local Planning

HN4 A zoning board is charged with the regulation of land use and not with the person who owns or occupies it. More Like This Headnote | *Shepardize:* Restrict By Headnote

Available Briefs and Other Documents Related to this Case:

NY Court of Appeals Brief(s)

HEADNOTES / SYLLABUS Hide

HEADNOTES

Municipal Corporations -- Zoning -- Zoning Measure Prohibiting Check-Cashing Establishments in Town's Business District

Defendant town's zoning measure prohibiting **check-cashing** establishments in defendant's business district was invalid because it violated the principle that zoning is concerned with the use of land, not with the identity of the user. The zoning power is not a general police power, but a power to regulate land use. Defendant's zoning measure contradicted that principle, as it was clear that the measure was directed at the perceived social evil of **check-cashing** services, which were thought to exploit the younger and lower income people who are their main customers. Whatever the merits of that view as a policy matter, it could not be implemented through zoning. Although there are cases in which the nature of the business is relevant to zoning because of the businesses' negative secondary effects on the surrounding community, defendant had not tried to show and did not argue that **check-cashing** services were in a similar category. Further, assuming, as defendant argued, that a concern about armed robberies would justify a zoning regulation, the record refuted the idea that defendant's zoning measure was a public safety measure.

COUNSEL: *Berkman Henoch Peterson Peddy & Fenchel, P.C.*, Garden City (*Peter Sullivan*, *Todd Steckler*, *Robert Carruba* and *Daniel Evers* of counsel), for appellant. The Appellate Division improperly declared the subject Town Zoning Ordinance invalid as preempted by a conflict with the state Banking Law with respect to the licensing of **check-cashing** establishments. (*Monroe-Livingston Sanitary Landfill v Town of Caledonia*, 51 NY2d 679, 417 NE2d 78, 435 NYS2d 966; *People v New York Trap Rock Corp.*, 57 NY2d 371, 442 NE2d 1222, 456 NYS2d 711; *DJL Rest. Corp. v City of New York*, 96 NY2d 91, 749 NE2d 186, 725 NYS2d 622; *Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 583 NE2d 928, 577 NYS2d 215; *American Broadcasting Cos. v Siebert*, 110 Misc 2d 744, 442 NYS2d 855; *Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 674 NE2d 313, 651 NYS2d 383; *Matter of Myer*, 184 NY 54, 76 NE 920, 35 Civ Proc R 329; *Commissioners of State Ins. Fund v Low*, 3 NY2d 590, 148 NE2d 136, 170 NYS2d 795; *Matter of Shea*, 309 NY 605, 132 NE2d 864.)

Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, Uniondale (*Jeffrey G. Stark* and *Richard A. Blumberg* of counsel), for respondents. I. The Appellate Division properly held that section 302 (K) of article XXXI of the Building Zone Ordinance of the Town of **Hempstead** is unenforceable by reason of conflict preemption. (*DJL Rest. Corp. v City of New York*, 96 NY2d 91, 749 NE2d 186, 725 NYS2d 622; *Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d 99, 456 NE2d 487, 468 NYS2d 596; *Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 583 NE2d 928, 577 NYS2d 215; *Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 518 NE2d 903, 524 NYS2d 8; *Vatore v Commissioner of Consumer Affairs of City of N.Y.*, 83 NY2d 645, 634 NE2d 958, 612 NYS2d 357; *Matter of Moran Towing & Transp. Co. v New York State Tax Commn.*, 72 NY2d 166, 527 NE2d 763, 531 NYS2d 885; *Oneida Sav. Bank of Oneida v Tese*, 108 AD2d 1042, 485 NYS2d 614; *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 467 NE2d 510, 478 NYS2d 846; *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 403 NE2d 159, 426 NYS2d 454; *Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 823 NE2d 1265, 790 NYS2d 619.) II. Section 302 (K) of article XXXI of the Building Zone Ordinance of the Town of **Hempstead** is unenforceable by reason of field preemption. (*Vatore v Commissioner of Consumer Affairs of City of N.Y.*, 83 NY2d 645, 634 NE2d 958, 612 NYS2d 357; *DJL Rest. Corp. v City of New York*, 96 NY2d 91, 749 NE2d 186, 725 NYS2d 622; *People v De Jesus*, 54 NY2d 465, 430 NE2d 1260, 446 NYS2d 207; *Robin v Incorporated Vil. of **Hempstead***, 30 NY2d 347, 285 NE2d 285, 334 NYS2d 129; *Albany Area Bldrs. Assn. v Town of Guilderland*, 74 NY2d 372, 546 NE2d 920, 547 NYS2d 627; *Mayor of City of N.Y. v Council of City of N.Y.*, 4 Misc 3d 151, 780 NYS2d 266; *Matter of Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505, 548 NE2d 911, 549 NYS2d 373.)

III. Section 302 (K) of article XXXI of the Building Zone Ordinance of the Town of **Hempstead** is an invalid exercise of the zoning power. (*Suffolk Interreligious Coalition on Hous. v Town of Brookhaven*, 176 AD2d 936, 575 NYS2d 548; *Louhal Props. v Strada*, 191 Misc 2d 746, 743 NYS2d 810, 307 AD2d 1029, 763 NYS2d 773; *Matter of Augenblick v Town of Cortlandt*, 66 NY2d 775, 488 NE2d 109, 497 NYS2d 363; *De Sena v Gulde*, 24 AD2d 165, 265 NYS2d 239; *Matter of Old Country Burgers Co. v Town Bd. of Town of Oyster Bay*, 160 AD2d 805, 553 NYS2d 843; *Amerada Hess Corp. v Town of Oyster Bay*, 36 AD3d 729, 828 NYS2d 536; *Spilka v Town of Inlet*, 8 AD3d 812, 778 NYS2d 222; *McMinn v Town of Oyster Bay*, 66 NY2d 544, 488 NE2d 1240, 498 NYS2d 128; *Burger King Corp. v Village of Larchmont*, 89 Misc 2d 901, 395 NYS2d 922, 52 AD2d 898, 384 NYS2d 1015, 41 NY2d 1097, 364 NE2d 1135, 396 NYS2d 364.) IV. Section 302 (K) of article XXXI of the Building Zone Ordinance of the Town of **Hempstead** denies respondents the equal protection of the laws. (*Cleburne v Cleburne Living Center, Inc.*, 473 US 432, 105 S Ct 3249, 87 L Ed 2d 313; *Continental Bldg. Co. v Town of N. Salem*, 211 AD2d 88, 625 NYS2d 700.)

Eric T. Schneiderman, *Attorney General*, New York City (*Matthew W. Grieco*, *Barbara D. Underwood* and *Richard Dearing* of counsel), for Superintendent of Financial Services, amicus curiae. I. New York State Department of Financial Services's issuance of licenses to plaintiffs does not preempt the Town's Zoning Ordinance. (*Stringfellow's of N.Y. v City of New York*, 91 NY2d 382, 694 NE2d 407, 671 NYS2d 406; *Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 583 NE2d 928, 577 NYS2d 215; *Matter of Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505, 548 NE2d 911, 549 NYS2d 373; *Consolidated Edison Co. of N.Y. v Town of Red Hook*, 60 NY2d 99, 456 NE2d 487, 468 NYS2d 596.) II. New York State Department of Financial Services takes no position as to whether the ordinance is a legitimate exercise of the Town's zoning power. (*American Broadcasting Cos. v Siebert*, 110 Misc 2d 744, 442 NYS2d 855; *Group House of Port Washington v Board of Zoning & Appeals of Town of N. **Hempstead***, 45 NY2d 266, 380 NE2d 207, 408 NYS2d 377.)

JUDGES: Opinion by Judge Smith. Chief Judge Lippman and Judges Graffeo, Read and Pigott concur. Judge Rivera took no part.

OPINION BY: Smith

OPINION

[*483] [899] [***65]** Smith, J.

We hold that HN1 a zoning measure that prohibits **check-cashing** establishments in a town's business district is invalid, because it violates the principle that zoning is concerned with the use of land, not with the identity of the user.

The provision in question is section 302 (K) of article XXXI of **[*484]** the Building Zone Ordinance of the Town of **Hempstead,** adopted January 10, 2006. It says in pertinent part: "In any use district except Y Industrial and LM Light Manufacturing Districts, **check-cashing** establishments are hereby expressly prohibited" (§ 302 [K] [1]).

The only document explaining the purpose of this enactment is a memorandum from a deputy town attorney dated December 13, 2005, the date of a public hearing held on the proposal that became section 302 (K). The subject of the memorandum is "*Public Policy behind **Check** Cashing Ordinance*." The memorandum says that the measure "represents sound public policy" because:

> "Essentially, it serves the interest of encouraging young people and those of lower incomes to establish savings and checking accounts, do their banking at sound and reputable banking institutions, and develop credit ratings. It also eliminates predatory and exploitative finance enterprises from commercial areas, which is beneficial because these enterprises tend to keep a neighborhood down."

The memorandum consists of several pages criticizing **check-cashing** establishments on social policy grounds. It says that such establishments make it convenient for young and lower income people "to remain in the cash-only economy" and adds: "This is bad for society as a whole." The memorandum refers to studies finding that "**check-cashing** establishments actually exploit the poor and African Americans." It concludes that the proposal under consideration "encourages young and lower income people to open up bank accounts, save their money, and develop a credit rating" and "also removes a seedy type of operation, akin to pawnshops and strip clubs, from the commercial areas of the Town." Section 302 (K) was adopted by the Town Board some four weeks after the memorandum was issued.

Several **check-cashing** establishments brought the present action, seeking a declaratory judgment that section 302 (K) is invalid, and an injunction against its enforcement. Supreme Court granted summary judgment dismissing the complaint. The Appellate Division reversed, holding section 302 (K) to be preempted by article IX-A of the Banking Law and related regulations, which govern the licensing of **check**-cashers (***Sunrise*** *Check Cashing & Payroll Servs., Inc. v Town of* ***Hempstead***, 91 AD3d 126, 933 NYS2d 388 [2d Dept 2011]); the Town appeals to us as of **[*485]** right, pursuant to CPLR 5601 (b) (1). We affirm without reaching the preemption issue, because the challenged provision is not a proper exercise of the zoning power.

A town's power to adopt zoning regulations derives from HN2 Town Law § 261, which authorizes town boards

> "to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes" (*see also* Town Law § 263 [listing the purposes of zoning]).

[900]** **[***66]** Our cases make clear that the HN3 zoning power is not a general police power, but a power to regulate land use: "[I]t is a fundamental principle of zoning that HN4 a zoning board is charged with the regulation of land use and not with the person who owns or occupies it" (*Matter of Dexter v Town Bd. of Town of Gates*, 36 NY2d 102, 105, 324 NE2d 870, 365 NYS2d 506 [1975] [citations omitted]; *see also Matter of St. Onge v Donovan*, 71 NY2d 507, 515, 517, 522 NE2d 1019, 527 NYS2d 721 [1988]).

The provision at issue here contradicts this principle. It is clear from the memorandum of the deputy town attorney that section 302 (K) was directed at the perceived social evil of **check-cashing** services, which were thought to exploit the younger and lower income people who are their main customers. Whatever the merits of this view as a policy matter, it cannot be implemented through zoning. Section 302 (K) is obviously concerned not with the use of the land but with the business done by those who occupy it. It is true that there are cases in which the nature of the business is relevant to zoning because of the businesses' "negative secondary effects" on the surrounding community; this is true of so-called "adult entertainment" uses (*see Stringfellow's of N.Y. v City of New York*, 91 NY2d 382, 395-396, 694 NE2d 407, 671 NYS2d 406 [1998]), but, despite the reference to "pawnshops and strip clubs" in the deputy town attorney's memorandum, the Town has not tried to show and does not argue that **check-cashing** services are in a similar category.

Indeed, the Town makes no attempt to defend the purposes advanced in the memorandum as legitimate objects of the zoning power. Instead, the Town tries to save section 302 (K) by attributing to it a different purpose: protecting the health and safety of the community against

the dangers created by armed **[*486]** robbery. The Town quotes the observation of the court in *American Broadcasting Cos. v Siebert* (110 Misc 2d 744, 746, 747, 442 NYS2d 855 [Sup Ct, NY County 1981]) (a case arising under the Freedom of Information Law) that **check-cashing**

facilities "are and have been over the years, the subject of robberies, kidnappings and murders" and that "the risk of robberies inherently exists in the **check-cashing** business." There is no evidence that the Town Board of **Hempstead,** when it enacted section 302 (K), was worrying about armed robbery; but the Town, relying on the presumption of validity accorded to zoning legislation (*see Robert E. Kurzius, Inc. v Incorporated Vil. of Upper Brookville*, 51 NY2d 338, 344, 414 NE2d 680, 434 NYS2d 180 [1980]; *Town of Huntington v Park Shore Country Day Camp of Dix Hills*, 47 NY2d 61, 65-66, 390 NE2d 282, 416 NYS2d 774 [1979]) argues that, if any valid purpose for the enactment can be imagined, the body enacting it must be deemed to have had that purpose in view.

We reject the Town's argument. Deference to legislative enactments, at least where the issue is abuse of the zoning power, does not go as far as the Town would have us go. The record here clearly refutes the idea that section 302 (K) was a public safety measure. Assuming, without deciding, that a concern about armed robberies would justify a zoning regulation, this one cannot be justified on that ground.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Lippman and Judges Graffeo, Read and Pigott concur; Judge Rivera taking no part.

Order affirmed, with costs.

*109 A.D.3d 549, *; 970 N.Y.S.2d 798, **;*
*2013 N.Y. App. Div. LEXIS 5554, ***; 2013 NY Slip Op 5636*

In the Matter of Town of **Oyster Bay,** respondent, v 55 Motor Avenue Co., LLC, et al., appellants (and another title). (Index No. 11488/03)

2012-08448

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

109 A.D.3d 549; 970 N.Y.S.2d 798; 2013 N.Y. App. Div. LEXIS 5554; 2013 NY Slip Op 5636

August 14, 2013, Decided

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

CASE SUMMARY

OVERVIEW: HOLDINGS: [1]-An attorney in the law firm that represented a town in a condemnation proceeding had to be disqualified because he had a prior attorney-client relationship with the owners, the matters involved in his representation of the owners were substantially related to the matters involved in the attorney's representation of the town, and the interests of the owners and the town were materially adverse; [2]-The owners, were entitled to freedom from apprehension and to certainty that their interests would not be prejudiced due to the attorney's representation of the town; [3]-The law firm also had to be disqualified because no evidence was presented that the attorney did not acquire information that was significant or material in the subject litigation or that the firm took steps to screen him to protect the dissemination of any such information by him to the firm's other attorneys.

OUTCOME: Order reversed and motion granted.

CORE TERMS: disqualified, disqualify, disqualification, attorney-client, law firm, condemnation proceedings, former client, improvidently, dissemination, materially, opposing, continued representation

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Counsel > Disqualifications

Civil Procedure > Judicial Officers > Judges > Discretion

HN1 The **disqualification** of an attorney is a matter that rests within the sound discretion of a court. More Like This Headnote

Civil Procedure > Counsel > Disqualifications

Legal Ethics > Client Relations > Conflicts of Interest

HN2 A party seeking **disqualification** of its adversary's counsel based on counsel's purported prior representation of that party must establish: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel; (2) that the matters involved in both representations are substantially related; and (3) that the interests of the present client and former client are materially adverse. More Like This Headnote

Civil Procedure > Counsel > Disqualifications

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof

HN3 A party's entitlement to be represented in ongoing litigation by counsel of its own choosing is a valued right that should not be abridged absent a clear showing that **disqualification** is warranted. More Like This Headnote

Civil Procedure > Counsel > Disqualifications

Evidence > Inferences & Presumptions > Presumptions > General Overview

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Legal Ethics > Client Relations > Conflicts of Interest

HN4 There is a rebuttable presumption that where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation. That presumption may be rebutted by proof that any information acquired by the disqualified lawyer is unlikely to be significant or material in the subject litigation. Proof must also be presented that the law firm properly screened the disqualified lawyer from dissemination and receipt of information subject to the attorney-client privilege. More Like This Headnote

COUNSEL: **[***1]** Hamburger, Maxson, Yaffe, Knauer & McNally, LLP, Melville, N.Y. (Richard Hamburger and Andrew K. Martingale of counsel), for appellants.

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City, N.Y. (Joseph E. Macy and Steven Brock of counsel), for respondent.

JUDGES: REINALDO E. RIVERA, J.P., MARK C. DILLON, THOMAS A. DICKERSON, LEONARD B. AUSTIN, JJ. RIVERA, J.P., DILLON, DICKERSON and AUSTIN, JJ., concur.

OPINION

[*550] **[**799]** DECISION & ORDER

In two related condemnation proceedings, 55 Motor Avenue Co., LLC, Cubbies Properties, Inc., Jefry Rosmarin, and J. Jay Tanenbaum appeal from an order of the Supreme Court, Nassau County (Adams, J.), dated August 23, 2012, which denied their motion to disqualify Saul R. Fenchel and Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., from the continued representation of the Town of **Oyster Bay.**

ORDERED that the order is reversed, on the facts and in the exercise of discretion, with costs, and the motion of 55 Motor Avenue Co., LLC, Cubbies Properties, Inc., Jefry Rosmarin, and J. Jay Tanenbaum to disqualify Saul R. Fenchel and Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., from the continued representation of the Town of **Oyster Bay** is granted.

HN1 "The **disqualification** of an **[***2]** attorney is a matter that rests within the sound discretion of the court" (*Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d 383, 383, 799 N.Y.S.2d 97; *see Albert Jacobs, LLP v Parker*, 94 A.D.3d 919, 919, 942 N.Y.S.2d 597). HN2 A party seeking **disqualification** of its adversary's counsel based on counsel's purported prior representation of that party must establish: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131, 674 N.E.2d 663, 651 N.Y.S.2d 954; *see Gabel v Gabel*, 101 AD3d 676, 676, 955 N.Y.S.2d 171; *Calandriello v Calandriello*, 32 AD3d 450, 451, 819 N.Y.S.2d 569; *Columbus Constr. Co., Inc. v Petrillo Bldrs. Supply Corp.*, 20 AD3d at 383). HN3 "A party's entitlement to be represented in ongoing litigation by counsel of [its] own choosing is a valued right which should not be abridged absent a clear showing that **disqualification** is warranted" **[**800]** (*Matter of Dream Weaver, Realty, Inc.* [*Poritzky-DeName*], 70 A.D.3d 941, 943, 895 N.Y.S.2d 476; *see Gabel v Gabel*, 101 AD3d at 677).

Here, the appellants established that the attorney **[***3]** for the Town of **Oyster Bay** is Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. (hereinafter Berkman Henoch). The appellants further established that Saul Fenchel, who became a member of Berkman Henoch in 2010, had a prior attorney-client relationship with the appellants, that the matters involved in Fenchel's representation of the appellants were substantially related to the matters involved in Fenchel's representation of the Town, and that the interests of the appellants and the Town were materially adverse. Further, regardless of whether Fenchel actually **[*551]** obtained and disseminated confidential information in connection with his former representation of the appellants, they are "entitled to freedom from apprehension and to certainty that [their] interests will not be prejudiced" due to Fenchel's representation of the Town in the related condemnation proceedings (*Cardinale v Golinello*, 43 NY2d 288, 296, 372 N.E.2d 26, 401 N.Y.S.2d 191; *see Columbus Constr. Co. v Petrillo Builders Supply Corp.*, 20 AD3d 383, 384, 799 N.Y.S.2d 97; *Nationwide Assoc. v Targee Street Internal Med. Group, P.C.*, 303 AD2d 728, 729, 758 N.Y.S.2d 108). Accordingly, the Supreme Court improvidently exercised its discretion in denying that branch of the appellants' motion which was **[***4]** to disqualify Fenchel from representing the Town in these proceedings (*see Albert Jacobs, LLP v Parker*, 94 A.D.3d 919, 942 N.Y.S.2d 597; *M.A.C. Duff, Inc. v ASMAC, LLC*, 61 AD3d 828, 828-830, 878 N.Y.S.2d 748; *Columbus Constr. Co. v Petrillo Builders Supply Corp.*, 20 AD3d 383, 384, 799 N.Y.S.2d 97; *Moccia v Weisfogel*, 253 AD2d 800, 801, 677 N.Y.S.2d 503).

In addition, the Supreme Court improvidently exercised its discretion in denying that branch of the appellants' motion which sought to disqualify Berkman Henoch from representing the Town in these proceedings. HN4 There is a rebuttable presumption that "where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation" (*Kassis v Teacher's Ins. &*

Annuity Assn., 93 N.Y.2d 611, 616, 717 N.E.2d 674, 695 N.Y.S.2d 515). That presumption may be rebutted by proof that "any information acquired by the disqualified lawyer is unlikely to be significant or material in the [subject] litigation" (*Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d at 617). Proof must also be presented that the law firm properly screened the disqualified lawyer from dissemination and receipt of information subject to the attorney-client privilege **[***5]** (*id.*). Here, the Town failed to present any evidence that Fenchel did not acquire information that was significant or material in the subject litigation or that Berkman Henoch took steps to screen Fenchel to protect the dissemination of any such information by him to the other attorneys at the firm. Consequently, Berkman Henoch must also be disqualified from representing the Town in these proceedings (*see Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d at 618-619; *Matter of Haberman v Zoning Bd. of Appeals of City of Long Beach*, 85 AD3d 915, 916, 925 N.Y.S.2d 834).

RIVERA ▾, J.P., DILLON ▾, DICKERSON ▾ and AUSTIN ▾, JJ., concur.

*712 F.3d 761, *; 2013 U.S. App. LEXIS 6965, **

UNITED STATES OF AMERICA ex rel. ANTI-DISCRIMINATION CENTER OF METRO NEW YORK, INC., Plaintiff-Appellee, v. WESTCHESTER COUNTY, NEW YORK, Defendant-Appellant.*

* The Clerk of the Court is directed to amend the caption as set out above.

Docket No. 12-2047-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

712 F.3d 761; 2013 U.S. App. LEXIS 6965

December 12, 2012, Argued
April 5, 2013, Decided

SUBSEQUENT HISTORY: As Amended May 14, 2013.
Related proceeding at County of Westchester v. United States HUD, 2013 U.S. Dist. LEXIS 115531 (S.D.N.Y., Aug. 14, 2013)

PRIOR HISTORY: [1]**
[*764] Westchester County ("the County") appeals from a judgment of the United States District Court for the Southern District of New York (Denise Cote, J.) finding the County in violation of the duty to promote source-of-income legislation under a consent decree entered into to resolve a qui tam action brought by relator, the Anti-Discrimination Center of Metro New York, Inc., under the False Claims Act for the submission of false claims by the County to the United States Department of Housing and Urban Development in order to obtain federal grant monies for fair housing. We hold that the district court had jurisdiction to review the decision of the reviewing magistrate judge under the consent decree. We also hold that the County violated the terms of the consent decree.
United States ex rel. Antidiscrimination Ctr. of Metro N.Y., Inc. v. Westchester County, 2012 U.S. Dist. LEXIS 62424 (S.D.N.Y., May 3, 2012)

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant county sought review of a decision of the U.S. District Court for the Southern District of New York, which found it in violation of the duty to promote source-of-income legislation under a consent decree entered into to resolve a qui tam action brought by appellee relator under the False Claims Act, 31 U.S.C.S. §§ 3729-3732.

OVERVIEW: The consent decree obligated the county to affirmatively further fair housing, including promoting legislation to ban source-of-income discrimination. The county sent five letters to advocacy organizations and a letter to the board of legislators regarding the legislation, but passed less protective source of income legislation than the initial version. A

legislation, but passed less protective source of income legislation than the initial version. A monitor found that the county had breached the consent decree, a magistrate sustained the county's objection to the monitor's ruling, and the district court reversed. On appeal, the court held that under the express terms of the consent decree, the district court retained jurisdiction over its enforcement and interpretation. The plain language of the consent decree imposed a continuing obligation to promote source-of-income legislation. The county breached the decree because it took no affirmative steps after the letters to the advocacy organizations to promote this legislation. The election of new local officials did not relieve the county of its consent decree obligations, and the unmistakability and reserved powers doctrines did not apply to avoid the plain language of the consent decree imposing a duty to promote.

OUTCOME: The court affirmed the district court's decision.

CORE TERMS: consent decree, source-of-income, hud, veto, fair housing, promotion, police power, governance, housing, binding, legislative session, false claims, piece of legislation, unmistakability, affirmatively, sovereign, recommendation, sovereignty, urges, bind, jurisdiction to review, sovereign power, contemplate, hortatory, successor, surrender, assigned, reserved, election, elected

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Jurisdiction > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 Interpretation of a consent decree is an issue of law that an appellate court reviews de novo. Similarly, appellate courts review jurisdictional questions de novo. The propriety of relief granted for violations of a consent decree is reviewed for abuse of discretion. And though a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Contracts Law > Contract Interpretation > General Overview

HN2 Consent decrees reflect a contract between the parties, as well as a judicial pronouncement, and ordinary rules of contract interpretation are generally applicable. This requires that deference be paid to the plain meaning of the language of a decree and the normal usage of the terms selected. The rules of contract interpretation, however, do not contemplate considering any provision of the contract in isolation but in the light of the obligation as a whole and the intention of the parties as manifested thereby. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Judicial Officers > Magistrates > Objections

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

HN3 Fed. R. Civ. P. 72 specifically states that a district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. Fed. R.

Civ. P. 72(b)(3). More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN4 The ordinary meaning of "promote" includes to bring or help bring into being, to contribute to the growth, enlargement, or prosperity of, or to encourage or further. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Governments > Local Governments > Duties & Powers

HN5 A consent decree is binding on successor public officials: although the individual defendants named in the caption no longer serve, a consent decree remains binding on their successors. The election of a new administration does not relieve a local government of valid obligations assumed by previous administrations. A local government is not relieved of its obligations under a consent decree taken on by a previous administration merely because new local officials will and do take office. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Governments > Local Governments > Duties & Powers

HN6 In New York, the term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so. The cases construing the term limits rule all deal with the actual structure of governance and not with a duty to undertake a substantive action in accordance with a consent decree. "Governance" does not include each and every action taken by an elected official, but rather refers to the actual structuring of the local government and not the enactment of any legislation or the promotion of such legislation. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN7 The strong policy encouraging settlement of cases requires that the terms of a consent judgment, once approved by a federal court, be respected as fully as a judgment entered after trial. Such an agreement constitutes a fully enforceable federal judgment that overrides any conflicting state law or state court order. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN8 The unmistakability doctrine is a rule of contract construction that provides that in a contract with a sovereign government, an ambiguous term of a grant or contract will not be construed as a conveyance or surrender of sovereign power. The unmistakability doctrine prevents governments from being bound to contracts notwithstanding subsequent changes in the law, unless the government consented to be bound in clear and unmistakable terms in the contract. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

Governments > Federal Government > General Overview

Governments > Local Governments > Duties & Powers

Governments > State & Territorial Governments > General Overview

HN9 The unmistakability doctrine does not allow governments to undertake actions that are specifically aimed at voiding a contract or preventing performance of a contract. Sovereign power is that which could otherwise affect the government's obligation under a contract. A government cannot abrogate one of its contracts by a statute abrogating the legal enforceability of that contract, government contracts of a class including that one, or simply all government contracts. More Like This Headnote

Constitutional Law > Congressional Duties & Powers > Reserved Powers

Governments > State & Territorial Governments > Police Power

HN10 The "reserved powers" doctrine holds that a state government may not contract away an essential attribute of its sovereignty. Sovereign powers include, for example, the police power and the power of eminent domain. The singular exercise, or not, of a veto, however, is not essential to the executive's sovereignty, akin to the police power. More Like This Headnote

Contracts Law > Breach > Causes of Action > General Overview

Contracts Law > Performance > General Overview

HN11 A contract does not actually compel the actions agreed upon. Rather, if a contracting party chooses to act contrary to that which he has agreed, he will simply be in breach and be subject to the consequences of that breach. More Like This Headnote

Governments > State & Territorial Governments > Police Power

HN12 A State is without power to enter into binding contracts not to exercise its police power in the future. More Like This Headnote

Constitutional Law > The Judiciary > Case or Controversy > Political Questions

Constitutional Law > Relations Among Governments > Republican Form of Government

HN13 A violation of the great guaranty of a republican form of government in States, U.S. Const. art IV, § 4, cannot be challenged in the courts. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Judgments > Relief From Judgment > Excusable Neglect & Mistakes > General Overview

Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances

Civil Procedure > Judgments > Relief From Judgment > Newly Discovered Evidence

Civil Procedure > Judgments > Relief From Judgment > Prior Judgment Reversed

HN14 Horne v. Flores does not contain a generalized admonition against consent decrees, but is concerned with Fed. R. Civ. P. 60(b) applications for modifications of consent decrees. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Constitutional Law > State Autonomy > General Overview

HN15 Frew ex rel. Frew v. Hawkins held that the enforcement of a consent decree did not violate the Eleventh Amendment. The case authorized the authority of a federal court

violate the Eleventh Amendment. The case reiterated the authority of a federal court to enforce federal consent decrees, as long as the decree was validly entered. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN16 A party may move to modify a consent decree based on changed circumstances, including when the objects of the decree have been attained. More Like This Headnote

COUNSEL: ROBERT F. MEEHAN, Westchester County Attorney (Linda M. Trentacoste, Associate County Attorney, Adam Rodriguez, Senior Assistant County Attorney, Justin R. Adin, Assistant County Attorney, on the brief), White Plains, NY, for Defendant-Appellant.

DAVID J. KENNEDY, Assistant United States Attorney, Southern District of New York (Preet Bharara, United States Attorney, Sarah S. Normand, Benjamin H. Torrance, Assistant **[**2]** United States Attorneys, on the brief), New York, NY, for Plaintiff-Appellee.

Martin Sander Kaufman, Atlantic Legal Foundation, Larchmont, NY, for Amicus Curiae Building & Realty Institute of Westchester County, in support of Defendant-Appellant.

JUDGES: Before: POOLER, HALL, and CHIN, Circuit Judges.

OPINION BY: POOLER

OPINION

POOLER, *Circuit Judge*:

Westchester County ("the County") appeals from a judgment of the United States District Court for the Southern District of New York (Denise Cote, *J.*) finding the County in violation of its duty to promote source-of-income legislation under a Stipulation and Order of Settlement and Dismissal ("consent decree") entered into by the County with the United States to resolve a *qui tam* action initially brought by relator, the Anti-Discrimination Center of Metro New York, Inc. ("ADC"), under the False Claims Act alleging the submission **[*765]** of false claims by the County to the United States Department of Housing and Urban Development ("HUD") in order to obtain federal grant monies for fair housing. We hold that the district court indeed had jurisdiction to review the decision of the reviewing magistrate judge under the consent decree. We further hold that the County violated the terms **[**3]** of the consent decree.

BACKGROUND

I.

In April 2006, the ADC brought a *qui tam* action against the County under the False Claims Act, 31 U.S.C. §§ 3729-33. The action charged that from 2000 through 2006, the County submitted false claims to HUD in order to obtain millions of dollars in funds that were required, under 42 U.S.C. § 5304(b)(2), to be used to "affirmatively further fair housing." HUD regulations require grantees, as part of the requirement to affirmatively further fair housing, to consider the existence and impact of racial discrimination in analyzing the barriers to housing opportunities in their areas as a condition to receive these federal funds. *See* 24 C.F.R. §§ 91.425, 570.601; 1 Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev., Fair Housing Planning Guide 2-7 to -8; 2-16 to -17 (1996), *available at* www.hud.gov/offices/fheo/images/fhpg.pdf; *see also* Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 20, 1962). The ADC contended that the County failed to comply with HUD regulations but nonetheless certified its compliance with the grant requirements. In initial proceedings before the district court, the court ruled that the County was obligated to

[4]** consider race in connection with its certification to HUD, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 376 (S.D.N.Y. 2007), and that the County's certifications to HUD were false as a matter of law, *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 668 F. Supp. 2d 548, 562-65 (S.D.N.Y. 2009).

In August 2009, the United States intervened and, on the same day, presented the court with a consent decree to which all the parties had agreed. The consent decree obligated the County to pay $30 million to the United States, $21.6 million of which would be credited to the County's HUD account to fund fair housing, and pay $2.5 million to the ADC as relator. The County also made various commitments to affirmatively further fair housing and to eliminate discrimination in housing opportunities. The County's exposure under the False Claims Act would have been $156 million—treble damages based on $52 million in false claims. *See* 31 U.S.C. § 3729(a)(1). In order to ensure compliance with the consent decree, the district court appointed James E. Johnson of Debevoise & Plimpton to serve as Monitor, **[**5]** authorized to oversee the steps taken by the County to affirmatively further fair housing as contemplated by the consent decree. The Monitor was charged with reviewing the County's actions, recommending additional actions needed to ensure compliance, and to resolve disputes between the United States and the County. The dispute resolution provision of the consent decree reads:

> Within ten (10) business days of receipt of the Monitor's report and recommendation, the County or the Government may seek additional review from the magistrate judge assigned to this case; otherwise, the Monitor's resolution shall be final, binding and non-appealable. Should the County or the Government seek such additional review from the assigned magistrate judge, the relevant **[*766]** provisions of the Federal Rules of Civil Procedure, the Local Rules and the Court's Individual Rules governing reports and recommendations from a magistrate judge shall apply.

As part of the County's obligation to affirmatively further fair housing, the County agreed to, among other things, "promote, through the County Executive, legislation currently before the Board of Legislators to ban 'source-of-income' discrimination in housing." **[**6]** Source-of-income legislation bans housing discrimination based upon an individual's source of income, primarily whether an individual's lawful income comes in the form of Social Security benefits or any form of state or federal public assistance, including Section 8 vouchers.

In 2009, as recognized by the consent decree, the County Board of Legislators was considering the passage of source-of-income legislation. Following the County's commitment to the consent decree, the County Executive at the time, Andrew Spano, sent five brief letters to advocacy organizations expressing his hope that they would continue the work in which they were already engaged in advocating for the legislation. Spano also sent a letter to the leadership of the Board of Legislators encouraging enactment of the legislation. The legislation was not approved by the Board by the end of the 2009 legislative session, but it was reintroduced in 2010 in a form identical to the legislation pending when the consent decree was ratified at the Board of Legislators. The Board passed the source-of-income legislation in June 2010. The version passed by the Board contained three alterations made throughout the legislative process **[**7]** that rendered the passed legislation less protective against source-of-income discrimination than the initial version had been: It (1) removed "court-ordered payments" and "inheritance, annuities, pensions, and child and spousal support" from the definition of source of income, (2) set a monetary penalty of $50,000 for wanton, willful or malicious discrimination, while previous versions set the penalty at $50,000 for discrimination and $100,000 for wanton, willful or malicious discrimination, and (3) exempted cooperative apartments and condominiums. It is undisputed that, at the reintroduction of the legislation in January 2010, newly elected County Executive Robert Astorino took no steps to promote the legislation and subsequently vetoed the amended version on June 25, 2010.

Per the consent decree, on July 11, 2011, the County submitted its revised Analysis of Impediments ("AI") plan to HUD. By letter dated July 13, 2011, HUD notified the County that the AI did not meet the requirements of the consent decree because it did not incorporate the corrective

actions that HUD had earlier specified, including "promotion of source-of-income legislation or plans to overcome exclusionary zoning **[**8]** practices." HUD thus rejected the County's certification that it would affirmatively further fair housing and its Fiscal Year 2011 Action Plan ("FY2011 Plan"). Once the FY2011 Plan was rejected, the County was removed as a grantee eligible for HUD funds, and thus their federal funding was discontinued. In response to this rejection and the cut-off of federal funding, the County sought review by the Monitor on July 20, 2011. On August 18, 2011, the United States also sought review of several disputes from the Monitor, including the claim that County Executive Astorino's veto of the source-of-income legislation breached the consent decree. The other disputes addressed by the Monitor and the lower courts at that time are not at issue in the current appeal.

[*767] On November 17, 2011, the Monitor issued his amended report which found, among other things, that "the County is in breach of its obligation to promote certain 'Source of Income' legislation" and concluded that, under the consent decree, "promote" included an obligation to "help bring [such legislation] into being." On December 7, 2011, the County objected to the Monitor's determination and sought review from the Magistrate Judge. The **[**9]** Magistrate Judge, in a March 16, 2012 opinion and order, sustained the County's objection on the dispute over source-of-income legislation. In response to this decision, the United States filed an objection with the district court seeking review of the portion of the Magistrate Judge's opinion concluding that the County did not violate its duty to promote source-of-income legislation.

II.

Before the district court, the County argued that, based upon the terms of the consent decree, the court was without jurisdiction to review the Magistrate Judge's opinion and order. Further, the County argued that the Magistrate Judge's decision had been correct and that an alternate reading of the consent decree's duty to promote would violate the federal Constitution. As an initial matter, the district court addressed the County's jurisdictional argument, finding that, under the terms of the consent decree, it did indeed have authority to review the Magistrate's determination. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty.*, 06 Civ. 2860, 2012 U.S. Dist. LEXIS 62424, 2012 WL 1574819, at *4 (S.D.N.Y. May 3, 2012). On the merits, the district court reversed the Magistrate Judge's decision **[**10]** regarding the County's obligation with respect to the source-of-income legislation and affirmed the Monitor's initial decision that the County was in breach of its duty to promote that legislation. 2012 U.S. Dist. LEXIS 62424, [WL] at *5-9. The County now appeals.

DISCUSSION

*HN1*Interpretation of a consent decree is an issue of law that this Court reviews de novo. *Davis v. N.Y.C. Hous. Auth.*, 278 F.3d 64, 79 (2d Cir. 2002). Similarly, we review jurisdictional questions de novo. *See, e.g., Velez v. Sanchez*, 693 F.3d 308, 314 (2d Cir. 2012). The propriety of relief granted for violations of a consent decree is reviewed for abuse of discretion. *Davis*, 278 F.3d at 79. "And 'though a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad.'" *Id.* at 80 (quoting *EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991)).

*HN2*Consent decrees "reflect a contract between the parties (as well as a judicial pronouncement), and ordinary rules of contract interpretation are generally applicable." *Doe v. Pataki*, 481 F.3d 69, 75 (2d Cir. 2007). This requires that "'deference . . **[**11]** . be paid to the plain meaning of the language of a decree and the normal usage of the terms selected.'" *United States v. Broad. Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (quoting *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985)). The rules of contract interpretation, however, do not contemplate considering any provision of the contract in isolation "but in the light of the obligation as a whole and the intention of the parties as manifested thereby." *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009) (citation and internal quotation marks omitted).

I.

[*768] We first look to the terms of the consent decree to determine if the district court had jurisdiction to review the decision of the Magistrate Judge. Under the terms of the consent decree, the district court retains jurisdiction over both enforcement and interpretation:

> Notwithstanding any other provisions of this Stipulation and Order, this Court shall retain exclusive jurisdiction over this Stipulation and Order, including, but not limited to, any application to enforce or interpret its provisions, and over each party to the extent its obligations herein remain unsatisfied.

The County urges this Court to read the provision **[**12]** of the consent decree that contemplates review of decisions of the Monitor to divest the district court of its reserved jurisdiction. This provision of the consent decree reads:

> the County or the Government may seek additional review from the magistrate judge assigned to this case; otherwise, the Monitor's resolution shall be final, binding and non-appealable. Should the County or the Government seek such additional review from the assigned magistrate judge, the relevant provisions of the Federal Rules of Civil Procedure, the Local Rules and the Court's Individual Rules governing reports and recommendations from a magistrate judge shall apply.

In addition to the fact that the agreement reserves jurisdiction in the district court "[n]otwithstanding any other provisions" of the consent decree, the section concerning review of the Monitor's decisions cannot be read in the way the County urges. Contrary to the County's arguments, this provision does not invoke the jurisdiction of 28 U.S.C. § 636(c), whereby parties can agree to submit to the jurisdiction of a Magistrate Judge and authorize him or her to make binding decisions, and instead clearly invokes "the relevant provisions of the Federal **[**13]** Rules of Civil Procedure, the Local Rules and the Court's Individual Rules governing reports and recommendations from a magistrate judge." Once the County chose to seek review from the Magistrate Judge, it also consented to the application of the rules that govern all magistrate reports and recommendations. Federal Rule of Civil Procedure 72 expressly governs this scenario. Far from making the decision of a magistrate final, HN3 that Rule specifically states that the "district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). It is plain from the face of the consent decree that the district court did indeed have jurisdiction to review the decision of the Magistrate Judge once it had been properly objected to by one of the parties—in this case, the United States. As we have determined that the district court had jurisdiction below, we now turn to the merits of this appeal.

II.

At issue here is whether the County has breached the consent decree's requirement, laid out in paragraph 33(g), that it "promote, through the County Executive, legislation currently before the Board of Legislators to ban 'source-of-income' **[**14]** discrimination in housing."

A.

This Court has recently observed that HN4 "[t]he ordinary meaning of 'promote' includes 'to bring or help bring into being,' to 'contribute to the growth, enlargement, or prosperity of,' or to 'encourage' or 'further.'" *United States v. Awan*, 607 F.3d 306, 314 (2d Cir. 2010) (citation omitted). The plain meaning of the word "promote" naturally remains the same here. Thus, in **[*769]** entering into the consent decree, the County agreed to help bring the source-of-income legislation into being through the County Executive. While such a duty certainly does not require the County Executive to ensure that the legislation be enacted into law, *cf. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 821, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984), promotion requires affirmative action by the obligated party to help bring the object in question into being. While promotion does not require insurance, promotion is also not met by taking no action or taking an action that detracts from, rather than furthers, the end goal.

The fact that the County Executive does not fulfill the duty to promote if he takes no action or takes affirmative steps to detract from the passage of this **[**15]** legislation does not convert the duty to promote into a duty to ensure. For example, if the Board never passed the legislation, but the County Executive undertook numerous active steps trying to bring the legislation into being, the duty to promote could be discharged even while the passage would not have been ensured.

Despite the requirement imposed by the word promote, the County, relying on *Suter v. Artist M.*, 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), would have us conclude that the obligation contemplated in this provision of the consent decree is unclear in what it requires and is thus intended to be merely hortatory. *Suter* actually holds the converse—that where language was intended to be hortatory, it could not be said to provide unambiguous notice of what was required. *Id.* at 356. To rely on the logic of *Suter*, this Court need first consider whether the language at issue is hortatory. In the instant case, the plain language of the agreement belies any claim that the duty to promote was merely hortatory. Rather, the duty to promote is one of a series of enumerated duties that the County "shall" undertake, and thus *Suter* does not provide grounds upon which the County could somehow be relieved of this **[**16]** duty.

The County also insists that because other obligations taken on by the County in this section of the consent decree used terms such as "adopt" or "amend," paragraph 33(g) does not actually impose a particular duty upon the County Executive. The mere fact that other parts of this section of the consent decree used different verbs to describe other obligations does not change the clear meaning of the duty to promote. By its express terms, paragraph 33(g) contemplates a duty of the County to be carried out through the County Executive. As the County has repeatedly noted throughout this litigation, the passage of legislation takes both a majority vote from the Board and signing by the County Executive. A duty to adopt or amend could not apply where the County Executive is the operative party because the County Executive could not force the Board to pass the given legislation. Imposing a duty to "adopt" instead of a duty to "promote" on the County Executive would be attempting to bind the Executive to do something not solely within his power. As written, the provision places an affirmative duty on the County Executive, one that requires him to help bring the source-of-income legislation **[**17]** into being. Furthermore, the fact that this paragraph is not styled as the duty of the County Executive to sign passed legislation does not undermine the plain reading that there is an affirmative duty imposed upon the County Executive. Namely, the duty to promote is actually broader than a duty merely to sign a legislative enactment once passed by the Board. The duty to promote imposes affirmative **[*770]** duties on the Executive even before legislative enactment, whereas a duty simply to sign would only impose a duty on the Executive after the Board had passed the legislation in question. Thus, we hold that the plain language of the consent decree imposes a duty on the County, through the County Executive, to help bring the source-of-income legislation into being.

B.

Having determined what constitutes promotion, we next consider whether the obligation under paragraph 33(g) was a continuing one, as the United States urges and the district court found, or if it was extinguished with the close of the 2009 legislative session, as argued by the County. Paragraph 33(g) calls for the County Executive to promote "legislation currently before the Board of Legislators to ban 'source-of-income' discrimination **[**18]** in housing." The use of "currently" in this sentence is most naturally read as a descriptor of the legislation in question, providing great detail as to what legislation would be required in a few words by making reference to potential legislation being considered by the Board at the time the consent decree was entered. The County urges this provision be read as creating a time period in which the duty to promote would have existed—namely, what would have amounted to less than five months: from the time of the August

2009 entry into the agreement to the end of the legislative session in December 2009. The terms of the agreement do not support this reading. Language that would have limited the duty to the scant five months left in the 2009 legislative session would have either (1) explicitly set a time limitation or (2) read something like "promote before the current Board of Legislators . . . ." The consent decree does neither of these things.[1] Rather, this provision is best read to attach the duty to promote to source-of-income legislation of the kind pending before the Board at the entry

duty to promote to source-of-income legislation of the kind pending before the Board at the entry of the consent decree. Elsewhere in the consent decree, the parties demonstrate that they clearly **[**19]** knew how to establish a temporal obligation if one was intended and to provide mechanisms for the County to apply for the extension of such deadlines, lending further support to interpreting the provisions that lack such deadlines as imposing continuing obligations upon the County.

FOOTNOTES

1 The County also argues that because paragraph 33(g) refers to "*the* County Executive," its obligation only enured to Andrew Spano, who was County Executive when the agreement was signed in 2009. The use of the definite article in this provision simply cannot bear the weight that the County attempts to assign to it. At any given time there is only one County Executive, so it is only natural that this office would be referred to with the definite article. If the consent decree contemplated only binding Spano and not any future holder of the office of County Executive, it would have either (1) identified Spano by name or (2) said "the current County Executive." The County's argument attributing such significance to the use of the definite article is unsupportable.

It is ordinary practice that when a bill is not passed by a legislature during one session, it is introduced again in the next legislative session, **[**20]** which indeed is what occurred in this case. The exact same legislation that was pending at the time of the entry of the consent decree was reintroduced at the start of the Board's 2010 legislative session. Because the duty to promote did not expire with the end of the 2009 legislative session, the County Executive had a continuing duty to promote this legislation that was reintroduced in January 2010.

C.

Having concluded that the duty to promote requires the County Executive to **[*771]** help bring the legislation into being and that it was not temporally limited to the 2009 legislative session, the final question at issue is whether the County breached this duty. The total sum of action taken by the County, through two successive County Executives, in relationship to the source-of-income legislation amounted to: (1) a single letter to the Board of Supervisors from County Executive Spano in October 2009; (2) five identical letters to community organizations from Spano in November 2009, thanking them for their work and stating, "I hope you will continue your advocacy and efforts in reaching out to members of the Board of Legislators," in an effort perhaps best characterized as preaching to the **[**21]** choir; and (3) County Executive Astorino's June 25, 2010 veto of the source-of-income legislation passed by the Board. While the first two actions do constitute promotion, the veto was wholly inconsistent with the County Executive's duty to promote. Moreover, because the three aforementioned actions were the sum total of what the County Executive did with respect to the legislation, and no affirmative steps had been taken to promote the legislation since the November 2009 letters to the advocacy organizations, we hold that the County breached its duty to promote under the consent decree.

III.

The County further argues that because the County Executive and members of the Board are subject to term limits, they cannot bind their successors to the obligations of the consent decree —a proposition that, if accepted, would terminate all of the obligations under the consent decree at the close of the terms of office during which the agreement was entered. Such a conclusion

would amount to a sea change in the operation of consent decrees in the United States. Elected officials, when entering into such agreements, are serving as representatives of their unit of governance. And this Court has had **[**22]** no difficulty concluding that HN5 a consent decree is binding on successor public officials: "[a]lthough the individual defendants named in the caption no longer serve . . . , no one disputes that the consent decree remains binding on their successors." *Barcia v. Sitkin*, 367 F.3d 87, 90 n.1 (2d Cir. 2004). The Third Circuit has been even more explicit

that "the election of a new administration does not relieve [a local government] of valid obligations assumed by previous administrations." *Harris v. City of Phila.*, 47 F.3d 1311, 1327 (3d Cir. 1995). Just as the County "would not have been free to break its contract with a vendor or other contractor because of the election of a new administration," so too the election of new officeholders, even into term-limited offices, does not permit the County "to unilaterally default on its obligations to the court and other litigants." *Id.* We now explicitly hold what we implied in *Barcia*: a local government is not relieved of its obligations under a consent decree taken on by a previous administration merely because new local officials will and do take office.

Virtually all of the terms of the consent decree require future and continuing action by the **[**23]** County government. While it is true that HN6 in New York, the "term limits rule prohibits one municipal body from contractually binding its successors in *areas relating to governance* unless specifically authorized by statute or charter provisions to do so," *Karedes v. Colella*, 100 N.Y.2d 45, 50, 790 N.E.2d 257, 760 N.Y.S.2d 84 (2003) (emphasis added), that rule is inapposite to the case at hand. The cases construing the term limits rule all deal with the actual *structure* of governance and not with a duty to undertake a substantive action in accordance with a consent decree. *See* **[*772]** *Morin v. Foster*, 45 N.Y.2d 287, 293, 380 N.E.2d 217, 408 N.Y.S.2d 387 (1978) (county legislature could not amend charter to allow county manager to be removed at will); *City of Utica Urban Renewal Agency v. Doyle*, 66 A.D.3d 1495, 1496, 885 N.Y.S.2d 801 (N.Y. App. Div. 2009) (public officials and agency appointees could not enter into agreement extending term of agency executive director); *Hampton Heights Dev. Corp. v. Bd. of Water Supply*, 140 A.D.2d 958, 958, 531 N.Y.S.2d 512 (N.Y. App. Div. 1988) (mayor serving four-year term could not appoint water board member serving five-year term). These cases illustrate that "governance" does not include each and every action taken by an elected official, but rather refers **[**24]** to the actual structuring of the local government and not the enactment of any legislation or the promotion of such legislation. Thus, the argument that the term limits rule in New York prevents the County from entering into the consent decree fails. Further, the cases cited by the County to the contrary—*Perkins v. City of Chi. Heights*, 47 F.3d 212 (7th Cir. 1995), and *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984)—are inapposite on this same ground. Both of these cases deal with the restructuring of the local government, changing elections systems from at-large to single-member districts. In addition to the fact that these precedents would not bind this Circuit in any event, they remain inapplicable where the structure of governance has not been altered. Here, the County entered into the consent decree, agreeing that the County Executive would promote the source-of-income legislation. Requiring action on one piece of legislation does not alter the structure of County governance, as occurred in each of the cases cited by the County. We thus hold that the County did have the authority to enter into the consent decree and that the consent decree continues to bind successive **[**25]** elected County officials.

We also note that for the County to now claim that it was without power to do what it expressly represented was in its power as it sought to avoid hundreds of millions of dollars in liability is all the more problematic. In entering into the consent decree, the County chose to bind itself to these terms "rather than have the District Court adjudicate the merits." *Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986). HN7 "The strong policy encouraging settlement of cases requires that the terms of a consent judgment, once approved by a federal court, be respected as fully as a judgment entered after trial." *Id.* Such an agreement constitutes "a fully enforceable federal judgment that overrides any conflicting state law or state court order." *Id.*

IV.

Finally, the County urges this Court to reject the lower court's interpretation of the consent decree as untenable under two constitutional doctrines and a provision of the Constitution: (1) "the canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms," *United States v. Winstar Corp.*, 518 U.S. 839, 860, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996), (2) "the doctrine that a government may not . . . contract to **[**26]** surrender certain reserved powers," *id.*, and (3) the Guaranty Clause, U.S. Const. art. IV. § 4. Turning to each of these below, we conclude that none alters our interpretation of the consent decree.

A.

The County argues that the unmistakability doctrine prevents the current interpretation of the consent decree because the agreement did not surrender a **[*773]** sovereign power of the County Executive in unambiguous terms. HN8 This doctrine is a rule of contract construction that provides that in a contract with a sovereign government, "an ambiguous term of a grant or contract [will not] be construed as a conveyance or surrender of sovereign power." *Winstar*, 518 U.S. at 878. The unmistakability doctrine prevents governments from being bound to contracts notwithstanding subsequent changes in the law, unless the government consented to be bound in clear and unmistakable terms in the contract. *Id.* at 872. The County's reliance on this doctrine is flawed for two reasons. First, it strains, almost to the point of breaking, any reasonable definition of the word "promote" to contend that it could include a legislative veto. The County's commitment to help bring the source-of-income legislation into being **[**27]** was expressed in the consent decree in unmistakable terms. Second, even accepting, for purposes of this discussion, the County's argument that the duty to promote was unclear, the unmistakability doctrine still does not compel its preferred outcome. In the instant case, there is no subsequent change in the law that bears at all upon the County's obligations in the consent decree. Rather, in this case, the consent decree contemplates future promotion and possible passage of one piece of legislation. This is not an instance where the County would be prevented from undertaking "sovereign acts, needful for the public good," because doing so would "incidentally disable" it from performing the act promised in the consent decree. *Id.* at 921. Here, the County agreed to promote one particular piece of legislation; it has not been "incidentally disabled" from any sovereign act. HN9 The unmistakability doctrine does not allow governments to undertake actions that are *specifically* aimed at voiding a contract or preventing performance of a contract. *See id.* at 878 n.22 (sovereign power is that which "could *otherwise* affect the Government's obligation under the contract"). A government cannot "abrogate **[**28]** one of its contracts by a statute abrogating the legal enforceability of that contract, Government contracts of a class including that one, or simply all Government contracts." *Id.* The County's attempted invocation of the unmistakability doctrine would do just that if accepted here. Thus we conclude that the unmistakability doctrine does not apply to the interpretation of the consent decree at issue here because (1) the obligation at issue is not ambiguous, and (2) the County is not "*incidentally* disabled" from undertaking any sovereign acts; rather, the County *expressly* agreed to action related to a single piece of legislation.

B.

The County next moves to invoke the "reserved powers" doctrine to avoid the plain interpretation of the duty to promote under the consent decree. HN10 The "reserved powers" doctrine holds that "a state government may not contract away 'an essential attribute of its sovereignty.'" *Id.* at 888 (citation omitted). Sovereign powers include, for example, the police power and the power of eminent domain. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23-24, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). The County asserts that an interpretation of the consent decree that would require passage of the source-of-income **[**29]** legislation strips the County Executive of "an essential attribute of its sovereignty," as it implicates the police power. The singular exercise (or not) of a veto, however, is not essential to the Executive's "sovereignty," akin to the police power. The agreement does not alter the structure of County governance writ large, nor does it prevent the County **[*774]** Executive from exercising his standard powers.[2]

FOOTNOTES

2 We also note that HN11 a contract does not actually compel the actions agreed upon. Rather, if a contracting party chooses to act contrary to that which he has agreed, he will simply be in breach and be subject to the consequences of that breach. It is this unremarkable proposition to which the lower court was referring when noting that the County Executive had not been stripped of his veto power even in this one instance. *Westchester Cnty.*, 2012 U.S. Dist. LEXIS 62424, 2012 WL 1574819, at *10 n.7.

As the Court has noted, HN12"a State is without power to enter into binding contracts not to exercise its police power in the future." *Id.* at 23 n.20. However, as indicated above, the consent decree does not prevent any exercise of the County's police power. The County conclusorily asserts that vetoing legislation implicates the **[**30]** police power, without demonstrating any connection between a veto of the source-of-income legislation and the police power, and further appears to miss the fact that the consent decree does not create some general change in the power of the County Executive to veto legislation, which perhaps could be viewed as altering his sovereign powers, but is merely a substantive commitment to one piece of legislation. Moreover, the County retains the power to veto even this source-of-income legislation. By agreeing to such promotion in the consent decree, the County did not disable itself from taking contrary action with respect to the legislation. Rather, the County allocated the risk of breach to itself by entering into the consent decree. The County Executive remains free to veto the legislation, but if he does so, the County will be in breach of the consent decree and must live with the consequences of that choice. The County is not disabled from exercising "an essential attribute of its sovereignty." *Winstar*, 518 U.S. at 888. Moreover, as noted by the district court, this municipal veto is not an essential part of the police powers of the County, but rather "a prerogative of the County Executive **[**31]** within Westchester's system of governance, established by local code." *Westchester Cnty.*, 2012 U.S. Dist. LEXIS 62424, 2012 WL 1574819, at *10 (citing Westchester County, N.Y. Code, § 110.11 (11)). An agreement to help bring a single piece of legislation into being does not implicate an essential attribute of sovereignty because the agreement is in reference to the substance of the matter before it, namely, housing discrimination, and does not intrude upon the general powers and prerogatives of the County Executive or the County government.

C.

As its final constitutional salvo, the County argues that the instant interpretation of the consent decree violates the Constitution's Guaranty Clause. U.S. Const. art IV, § 4. As this and other courts have repeatedly noted, such determinations are nonjusticiable political questions. *Colegrove v. Green*, 328 U.S. 549, 556, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946) (holding thatHN13a "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts"); *Padavan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996). While we have recognized that "*perhaps* not all claims under the Guarantee Clause present nonjusticiable political questions," just as in *Padavan*, "there is no basis **[**32]** for us to say that the [County] here ha[s] presented a justiciable claim." *Id.* (emphasis added) (citation and internal quotation marks omitted). Furthermore, even if we determined the question here was justiciable, the County has not presented any evidence that it has been deprived of a republican form of government. The residents of the **[*775]** County remain able to "choose their own officers" and "pass their own laws," Appellant's Br. at 43, and they chose their own officers—ones that decided to enter into the current consent decree rather than open up the County to $156 million in damages liability.

D.

Finally, we note that the concerns identified in *Horne v. Flores*, 557 U.S. 433, 448, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009), and *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441-42, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004), are real ones, and federal courts should carefully consider the validity and scope of consent decrees before them. This Court takes that responsibility seriously and has done so in the current case. To the extent the County argues that these cases compel a different interpretation of the consent decree here or mandate a different outcome on its Guaranty Clause claim, however, it seriously misreads the holdings of these cases. HN14*Horne*, notably, **[**33]** does not contain a generalized admonition against consent decrees, but is concerned with Fed. R. Civ. P. 60(b) applications for modifications of consent decrees. In this context of consent decrees that have been in place for a long period of time, the Court was concerned that reviewing courts carefully consider the changed circumstances after the passage of many years when determining whether to alter or modify such agreements. *Horne*, 557 U.S. at 447-48. HN15In

Frew, the Court held that the enforcement of a consent decree did not violate the Eleventh Amendment. *Frew*, 540 U.S. at 436-41. This Court, applying *Frew*, has held that the case "reiterat[ed] the authority of a federal court to enforce federal consent decrees, as long as the decree was validly entered." *Barcia*, 367 F.3d at 102 (quoting *Frew's* definition of "validly entered federal consent decrees as those that 'spring from a federal dispute and further the objectives of federal law'" (alterations omitted)). Further, both *Barcia* and *Frew* recognized that HN16 a party may move to modify a consent decree based on changed circumstances, including when "the objects of the decree have been attained." *Frew*, 540 U.S. at 442; *Barcia*, 367 F.3d at 102. **[**34]** The County would have this Court rely upon the legitimate concerns that motivate modification of long-standing consent decrees to allow the County to shirk its voluntarily agreed to obligations, made less than four years ago, with no showing that the objects of the consent decree have been obtained and strong evidence indicating that they have not been. This we will not do.

CONCLUSION

For the reasons stated above, the judgment of the district court hereby is AFFIRMED.

*2013 U.S. App. LEXIS 19762, **

COUNTY OF **WESTCHESTER,** Plaintiff-Appellant, -v.- **UNITED STATES** DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SHAUN L.S. DONOVAN, as Secretary of HUD, Defendant-Appellant.

No. 13-3087-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2013 U.S. App. LEXIS 19762

September 25, **2013**, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
Appeal from the **United States** District Court for the Southern District of New York (Denise L. Cote, Judge).
County of **Westchester** v. **United States** HUD, **2013** U.S. Dist. LEXIS 115531 (S.D.N.Y., Aug. 14, **2013**)

CORE TERMS: moot, affirmatively, housing, restraining order, preliminary injunction, temporary, subject matter jurisdiction, certification, satisfaction, lapse

COUNSEL: FOR APPELLANT: ROBERT F. MEEHAN, **Westchester County** Attorney, White Plains, NY.

FOR APPELLEES: DAVID J. KENNEDY, Assistant **United States** Attorney (Emily E. Daughtry, Assistant **United States** Attorney, on the brief), for Preet Bharara, **United States** Attorney for the Southern District of New York, New York, NY.

JUDGES: PRESENT: JOHN M. WALKER, JR., PIERRE N. LEVAL, RICHARD C. WESLEY, Circuit Judges.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion for a temporary restraining order and a preliminary injunction is **DENIED.** The appeal is **DISMISSED** as moot as to Count IV of the Complaint.

The **County** of **Westchester ("County")** moves for a temporary restraining order and a preliminary injunction, enjoining the **United States** Department of Housing and Urban Development ("HUD") and its Secretary from reallocating federal funds previously allocated, but never distributed, to the **County.** We assume the parties' familiarity with the factual and procedural background of the case.

The appeal, as it concerns 42 U.S.C. § 12711 (Count IV), is dismissed as moot. HUD **[*2]** has acknowledged that the **County** has promoted source-of-income legislation to its satisfaction and this no longer presents an impediment to the allocation of fiscal year 2011 funds to the **County.**

The district court held that it lacked subject matter jurisdiction over the **County's** claims under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. *See Cnty. of* ***Westchester*** *v. U.S. Dep't of Housing and Urban Dev., et al.,* No. 13-cv-2741(DLC), **2013** U.S. Dist. LEXIS 115531, **2013** WL 4400843, at *3-5 (S.D.N.Y. Aug. 14, **2013).** There are strong arguments to be advanced that we lack jurisdiction. "The APA is not an independent grant of subject matter jurisdiction. Rather, it waives the federal government's sovereign immunity" for certain categories of actions. *Lunney v.* ***United*** *States,* 319 F.3d 550, 557-58 (2d Cir. 2003) (citations omitted). This waiver does not permit a plaintiff to challenge an action that "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Thus, even when Congress has not explicitly barred judicial review, it is not to be had when the applicable statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney,* 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

The **[*3] County's** complaint challenges the Secretary's determination that the **County** failed to submit sufficient evidence demonstrating that it will affirmatively further fair housing. The governing statutes, however, do not identify what acts are contemplated in the term "affirmatively further," nor do they define an evidentiary burden, but only state that the fund applicant must submit "supporting evidence" with its certification. *See* 42 U.S.C. §§ 5304(b)(2), 12704(21). The statutes require only that certification establish the applicant's commitment to furthering fair housing to the "satisfaction of the Secretary." *Id.* § 5304(b).

We need not decide whether "affirmatively further" sets a meaningful standard for review. Even assuming that it does, the **County** has not demonstrated a likelihood of success on the merits. To meet this requirement, "[i]t is not enough that the chance of success on the merits be better than negligible." *Nken v. Holder,* 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) (quotation marks omitted). Here, the **County** is unlikely to succeed on the merits.

We have considered all of the **County's** arguments and find them to be without merit. For the reasons stated above, the motion for a temporary restraining **[*4]** order and a preliminary injunction is **DENIED.** The appeal as to Count IV of the Complaint is **DISMISSED** as moot.[1]

FOOTNOTES

1 This Court is aware that the funds at issue lapse on October 1, **2013.** Should HUD reallocate the funds, or should they lapse without allocation, the parties or a future merits panel of this Court might well find the controversy moot. *See Cnty. of Suffolk v. Sebelius,* 605 F.3d 135, 144 (2d Cir. 2010).

Date/Time: Tuesday, November 19, 2013 - 12:13 PM EST

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

The New York Times

October 15, 2013

Supreme Court to Hear Challenge to E.P.A. Rules on Gas Emissions

By ADAM LIPTAK

WASHINGTON — The Supreme Court on Tuesday agreed to hear a major case challenging Environmental Protection Agency regulations of greenhouse gas emissions from stationary sources like power plants. The justices declined to hear a variety of related attacks on the agency's authority to address climate change.

The case is a sequel to Massachusetts v. Environmental Protection Agency, a 2007 decision that required the agency to regulate emissions of greenhouse gases from new motor vehicles if it found they endangered public health or welfare. Two years later, the agency made such a finding, saying that "elevated concentrations of greenhouse gases in the atmosphere" pose a danger to "current and future generations." It set limits on emissions both from new vehicles and from stationary sources like power plants.

States and industry groups challenged the regulations on several grounds. They said the agency's conclusions about the dangers posed by greenhouse gases were not supported by adequate evidence, that the so-called tailpipe regulations were flawed and that the agency was not authorized to regulate emissions from stationary sources.

A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit last year unanimously rejected the challenges, some on the merits and some on the ground that the parties before the court lacked standing to pursue them.

The Supreme Court accepted six petitions seeking review of that rejection, but it limited the issue it would consider to the question of whether the agency "permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouses gases." Among the cases accepted for review was Utility Air Regulatory Group v. Environmental Protection Agency, No. 12-1146.

"The regulations the court has agreed to review represent the Obama adminis major rule making to address the emissions of greenhouse gases from major st across the country," said Richard J. Lazarus, who teaches environmental law a the same time, the court declined to review E.P.A.'s determination that greenl

new motor vehicles endanger public health and welfare and therefore has left intact the government's current regulation of motor vehicles emissions to address climate change."

In urging the court to hear a challenge on the issue the justices agreed to hear, trade groups said the regulation of "greenhouse gas emissions from stationary sources represents the most sweeping expansion of E.P.A.'s authority in the agency's history, extending its reach to potentially millions of industrial, commercial, and residential facilities across the country, at costs estimated to run into the tens of billions of dollars per year."

Environmental groups reacted to Tuesday's developments by emphasizing the regulations the justices had let stand.

"Today's decision by the U.S. Supreme Court to deny numerous further legal challenges to E.P.A.'s science-based determination that six greenhouse gases threaten our nation's health and well-being is a historic victory for all Americans that are afflicted by the ravages of extreme weather," Vickie Patton, general counsel of the Environmental Defense Fund, said in a statement. "The justices have also declined to hear legal challenges to the broadly supported clean car standards that will strengthen our nation's energy security, cut carbon pollution and save families money at the gas pump. "

Greg Abbott, attorney general of Texas, one of the states challenging the regulations, said in a statement that he welcomed the opportunity to demonstrate that "the E.P.A. violated the U.S. Constitution and the federal Clean Air Act when it concocted greenhouse gas regulations out of whole cloth."

The court on Tuesday also issued its first decision in a case argued this term, dismissing as improvidently granted an appeal in an employment discrimination case, Madigan v. Levin, No. 12-872. The court's one-sentence order offered no explanation for the move.

The case concerned whether and when an age discrimination case may be brought under an old, broad civil rights law known as Section 1983 notwithstanding the more recent and focused Age Discrimination in Employment Act.

At the argument last Monday, the justices asked pointed and frustrated questions about whether the lower court had had the authority to decide the issue and whether the plaintiff, a former assistant Illinois attorney general, was covered by the newer law. The justices apparently concluded that the case was a poor vehicle for deciding the question they had agreed to review.

Utility Air Regulatory Group v. Environmental Protection Agency

Linked with:

- *Chamber of Commerce of the United States v. Environmental Protection Agency*
- *Virginia v. Environmental Protection Agency*
- *American Chemistry Council v. Environmental Protection Agency*
- *Coalition for Responsible Regulation v. Environmental Protection Agency*
- *Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation v. Environmental Protection Agency*
- *Southeastern Legal Foundation v. Environmental Protection Agency*
- *Texas v. Environmental Protection Agency*

Docket No.	Op. Below	Argument	Opinion	Vote	Author	Term
12-1146	D.C. Cir.	TBD	TBD	TBD	TBD	OT 2013

Issue: Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

SCOTUSblog Coverage

- Greenhouse gases briefing order
- Analysis: Greenhouse gases case
- Court to rule on greenhouse gases (UPDATE)
- Petition of the day

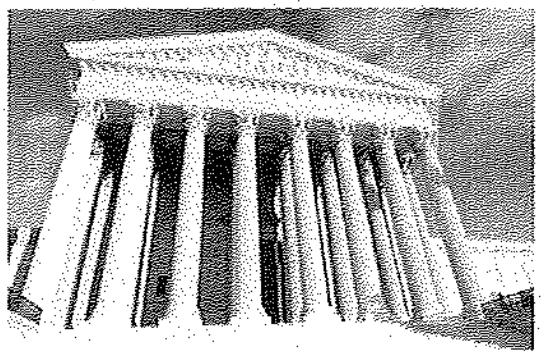
Date	Proceedings and Orders
Mar 20 2013	Petition for a writ of certiorari filed. (Response due April 22, 2013)
Mar 20 2013	Appendix of Utility Air Regulatory Group filed. (Volumes I-III)
Apr 10 2013	Brief of respondent National Mining Association in support filed.
Apr 11 2013	Order extending time to file response to petition to and including May 22, 2013, for all respondents.
Apr 19 2013	Brief amicus curiae of Washington Legal Foundation filed.
May 8 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Texas, and eight other states.
May 13 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party,received from counsel for petitioners Southeastern Legal Foundation, Inc., et al.
May 14 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Federal Respondent.
May 14 2013	Letter of respondent National Environmental Development Association's Clean Air Project in support of the petitioner received.
May 15 2013	Order further extending time to file response to petition to and including June 21, 2013, for all respondents.
May 17 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the State of Indiana.
Jun 6 2013	Order further extending time to file response to petition to and including July 22, 2013, for all respondents.
Jun 7 2013	Application (12A1181) to file consolidated brief in opposition in excess of word limits, submitted to The Chief Justice.
Jun 7 2013	Application (12A1181) to file consolidated brief in opposition in excess of word limits granted by The Chief Justice. The consolidated brief in opposition may not exceed 12,000 words.

Jul 1 2013	Application (13A35) to file consolidated brief in opposition in excess of word limits, submitted to The Chief Justice.
Jul 8 2013	Application (13A35) to file consolidated brief in opposition in excess of word limits granted by The Chief Justice. The consolidated brief in opposition may not exceed 11,000 words.
Jul 22 2013	Brief of respondents Environmental Protection Agency in opposition filed. VIDED.
Jul 22 2013	Brief of Environmental Organization respondents in opposition filed. VIDED.
Jul 22 2013	Brief of respondents New York, et al. in opposition filed. VIDED.
Aug 6 2013	Reply of petitioner Utility Air Regulatory Group filed.
Aug 7 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 7 2013	DISTRIBUTED for Conference of October 11, 2013.
Oct 15 2013	Petition GRANTED limited to the following Question: Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases. The cases are consolidated and a total of one hour is allotted for oral argument.
Oct 22 2013	Briefing proposal of the parties. VIDED
Oct 24 2013	Letter from Coalition for Responsible Regulation, Inc., et al. regarding briefing proposal. VIDED.
Oct 29 2013	Upon consideration of the letter of October 22, 2013, from counsel for petitioners in No. 12-1248 on behalf of the parties, the briefing proposal set out in the letter is adopted with the exception that the briefs of petitioners shall not exceed 45,000 words in aggregate. The briefs of respondents in support of petitioners shall not exceed 6,000 words each. The brief of the Solicitor General shall not exceed 15,000 words. The briefs of other respondents shall not exceed 10,000 words each. Reply briefs shall not exceed 18,000 words in aggregate. VIDED
Nov 1 2013	The time to file joint appendix, petitioners' briefs on the merits, and briefs of respondents in support of petitioners is extended to and including December 9, 2013. VIDED
Nov 1 2013	The time to file respondents' briefs on the merits is extended to and including January 21, 2014. VIDED
Nov 1 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the United States Federal Environmental Protection Agency, et al. VIDED.
Nov 1 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner Urility Air Regulatory Group. VIDED.
Nov 7 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Texas, et al. VIDED.
Nov 7 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party , received from counsel for Texas, et al. VIDED.
Nov 8 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Southeastern Legal Foundation, Inc., et al. VIDED.
Nov 8 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Coalition for Responsible Regulation, Inc., et al. VIDED.
Nov 12 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for American Chemistry Council, et al. VIDED.

FAQS ON SUPREME COURT'S CERT GRANT ON EPA'S REGULATION OF GREENHOUSE GAS EMISSIONS

Posted on **October 21st, 2013** by **Meredith Wilensky**

Add a comment



Meredith Wilensky, Associate Director & Fellow
Columbia Center for Climate Change Law

On October 15, the Supreme Court granted certiorari in response to six petitions requesting review of EPA's authority to regulate greenhouse gases. This post will address some basic questions to clarify the scope of the question accepted for review and the implications and potential outcomes of the Supreme Court's decision to grant cert.

Which greenhouse gas regulations are at issue?

The Supreme Court declined to review EPA's endangerment finding or its regulation of greenhouse gas emissions from motor vehicles. Instead, it chose to review the prevention of significant deterioration (PSD) program–a preconstruction review and permitting program under the Clean Air Act (the CAA) that applies to new "major" stationary sources of "any air pollutant."1 PSD permits subject sources to both site specific and technology-based requirements. EPA has long interpreted the PSD provision to require permitting for "major" sources of any pollutant regulated under the CAA. As a result, when EPA promulgated regulations for greenhouse gas emissions from automobiles in 2010, EPA determined that PSD permitting requirements were automatically triggered.

PSD permitting for greenhouse gases, however, posed logistical problems. The CAA defines sources as "major" for PSD purposes if they emit 100 tons per year of a given pollutant (or 250 tons for certain types of sources). Because greenhouse gasses are emitted in such large quantities, these limits would result in PSD regulation of a million or more stationary sources not usually subject to permitting, such as hospitals, schools and apartment buildings. To avoid such "absurd results," the EPA developed the "tailoring rule," which essentially adjusts the thresholds to practicable levels, with the plan of incorporating more emitters over time.

What aspect of the PSD permitting regulations is the Court reviewing?

The Supreme Court has limited its review to: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." In other words, the Court will review EPA's interpretation that PSD permitting is automatically required once a pollutant is regulated under any section of the CAA.

What questions has the Supreme Court declined to review and what are the implications?

While the grant of certiorari casts uncertainty on the future of PSD permitting, many have pointed to the important implications of the Supreme Court's refusal to review other questions presented in the petitions for certiorari. The Court declined to review EPA's 2009endangerment finding or its underlying science. The

Court also declined to question EPA's vehicle emissions standards. This narrow grant therefore may be read to implicitly uphold EPA's non-PSD greenhouse gas rules and affirm EPA's authority to address climate change through regulating greenhouse gas emissions under the CAA.

What is the legal framework for determining whether EPA's interpretation of the PSD provision is permissible?

Addressing whether EPA's determination was "permissible" alludes to the fact that EPA has a considerable level of discretion in statutory interpretation. The D.C. Circuit found that EPA's current interpretation is based on the plain meaning of the statute. In order to find that EPA's interpretation is impermissible, the Court would have to first find that the plain meaning is inconsistent with Congressional intent or that the provision is not as clear as the D.C. Circuit believed. This probably will require petitioners to convince the court either (1) that the D.C. Circuit got the plain meaning wrong; (2) that the provision should not be given its plain meaning because it would lead to absurd results; or (3) that the statute is not clear on its face and that EPA's interpretation is not reasonable.

Petitioners assert two lines of arguments as to why EPA's interpretation is impermissible. First, they assert that Congress established PSD permitting for the purposes of ensuring attainment of National Ambient Air Quality Standards (NAAQS) and preventing reduction of air quality in given geographic areas. Thus, PSD provisions should be interpreted to subject only major sources of NAAQS pollutants to PSD permitting. Since there are no NAAQS for greenhouse gases, PSD permitting requirements do not apply. Second, petitioners maintain that EPA is not permitted to adopt an interpretation that yields "absurd" results (and requires contradicting other statutory provisions to overcome the absurd results) where such results could be avoided through an alternative interpretation. Judge Kavanaugh supported this argument in his dissent from the D.C. Circuit's denial of the petition for rehearing en banc.

What are the alternative interpretations of the PSD provision and how would they affect implementation of PSD permitting?

While all of the petitioners agree that EPA's interpretation is impermissible, they disagree about how the statute should be interpreted. Electric utilities, led by the Utility Air Regulatory Group (UARG), take a hardline view that PSD permitting only applies to NAAQS pollutants and should not regulate greenhouse gas emissions at all. This argument primarily hinges on interpreting "any air pollutant" in the PSD section to refer only to those pollutants regulated under NAAQS. If the Court were to adopt this interpretation, there would be no regulation of greenhouse gases in the PSD program under any circumstances until and unless EPA issued NAAQS for them (an action that would face its own major difficulties).

On the other hand, the American Chemistry Council (ACC) focuses more narrowly on the triggering of PSD permitting. Instead of focusing on what is encompassed in the term "any air pollutant," ACC bases its argument on what constitutes a "major" source for PSD purposes. PSD permitting is required for all "major" facilities "constructed in any area to which this part applies."[2] ACC maintains that the part of the CAA which is being referred to is Part C, which covers NAAQS pollutants. Thus, a facility can only be considered "major" for PSD purposes based on its emissions of NAAQs pollutants. However, they concede that once a plant is subject to PSD permitting for any NAAQS pollutant, it must adopt best available control technology (BACT) for all pollutants subject to regulation under the Act, not just NAAQS pollutants.[3] This is an important distinction because most large emitters of greenhouse gases are also "major" facilities for NAAQS pollutants. According to ACC, their interpretation would still result in greenhouse gas regulation of the vast majority of stationary sources that are covered under the tailoring rule.

Is the Supreme Court's review constrained to the question for which it grants certiorari?

The Supreme Court is not bound by the scope of the question to which it grants review. While the Court has shown no inclination to address broader questions proposed by petitions, the latitude left to the Court in this respect does raise some concerns.

For example, if the Court holds EPA's interpretation is permissible, it might move on to address whether petitioners have standing to challenge the tailoring rule, which the D.C. Circuit declined to address because it found petitioners did not have standing as to that rule since it did not really harm them. Were the Court to determine that petitioners do have standing, this would open the door for challenges to the tailoring rule. However, as Michael Gerrard discussed in a previous post regarding *American Electric Power v. Connecticut*,[4] the Court is sharply divided over standing. Finding standing as to the tailoring rule could have broader consequences for standing doctrine, and it does not appear that the Supreme Court wishes to open that particular can of worms in this case.

How could the outcome of the Supreme Court's review affect President Obama's Climate Action Plan?

As part of the Climate Action Plan, Present Obama directed EPA to develop greenhouse standards for new and existing power plants. Just last month, EPA issued proposed regulations for new power plants. While the pollution standards will likely be challenged on their own accord, it is important to emphasize that they are not part of the current issue being addressed by the Supreme Court. New and existing stationary source standards and permitting provisions are in sections 111(b) and (d) of the Clean Air Act and are separate from PSD permitting requirements. Consequently, these regulations do not appear to be directly affected by the Court's narrow grant.

Had the Court taken on some of the broader questions presented, such as the EPA's endangerment finding, the future of the new and existing source standards would have been in question.

Photo credit: *Thinkstock*

The Rare Variance: Why Do We Overuse an Outdated Tool

Don Elliott, FAICP, Clarion Associates

From materials presented in A Better Way To Zone (Elliott, Island Press 2009) and 2013 American Planning Association National Conference presentation on "The Rare Variance"

1. The Assumption Underlying Zoning Theory Is That Zoning Rules Will Work the Vast Majority of the Time, and Only Rarely Will Variances Be Needed

In addition to thinking that zoning could be based on a few general rules, zoning drafters assumed that exceptions to the rules would be infrequent. Even a cursory reading of Euclidean ordinances shows that the vast bulk of the effort went into writing rules, and very little into thinking through what to do if the rules didn't fit the property very well. The traditional structure for getting a variance – a hearing before a board of adjustment – is fairly labor-intensive for minor variations, but it was assumed that the effort would not have to be made very often.

2. That Assumption Has Proven Very False

Tell that to a member of the board of adjustment in any medium or large city and she will laugh. In practice, most large cities find that there is a constant stream of requests to vary the rules. MIT's database of zoning variances reveals that between 1984 and 1987, the City of Boston received requests for variances at the rate of almost 600 annually. Until recently, the City of Winnipeg, Manitoba, was receiving over 1,000 requests for variances each year – that's three a day. Philadelphia was receiving applications for variances and conditional use approvals at the rate of more than 3,000 per year.

In many cities, each request for a variance requires an application, sometimes posting a sign on the property, sometimes mailed notice to the neighbors, and preparation of a staff report, in addition to the board of adjustment hearing itself. Advocates of both performance zoning and PUDs thought those tools would help reduce the need for variances, and they may have, but the volumes remains high in many cities.

Some of the most common requests are those for exceptions to minimum setbacks and minimum parking requirements. Most economically healthy cities are blessed with families that want to invest in their homes, and growing families are often faced with a decision as to whether to expand their existing home or buy a different one. Many families' first choice is to expand their existing home, and that often leads to requests to build a few feet closer to a boundary line or a few feet taller than the ordinance allows. In addition, stable older neighborhoods often have storefronts and other commercial buildings originally designed without off-street parking, and those could be redeveloped into small stores. If the ordinance requires that all commercial uses provide off-street parking at greenfield rates, then a request for an exception is almost guaranteed. The alternative to parking exceptions is the destruction

of neighboring buildings to provide parking, which the neighborhood often finds more offensive than a parking variance.

3. There Are Lots of Good Alternatives to the Overuse of Variances

a. Corrective Code Revisions.

In many communities, a large number of similar variances are reviewed to address a short list of problems – often involving setbacks, parking, and signs. Periodic review of variance records can highlight those high volume variances, and the code should be amended to revise the standard to align with the terms of common variances granted.

b. Administrative Adjustments

An increasing number of communities (legislatively) give their planning staff to deviate from numerical standards by a limited amount (usually 5-20%) if difficulties of compliance are documented and legislatively adopted criteria are met.

c. Contextual Development Standards

Many codes suffer from the application of newer development standards – often based on larger lot sizes and streets – to older properties that cannot comply with those standards – which gives rise to variance requests. Two or more sets of standards can be applicable to different "context" areas that are mapped in the zoning ordinance – for example an "urban" and a "suburban" context area.

d. Neighborhood Conservation Overlay Districts

When the need for variances arises because certain areas of the community were platted or developed in an unusual patter, create a neighborhood conservation overlay districts that varies the development standards to accommodate the unusual development pattern and allows it to be perpetuated (for the sake of context) notwithstanding the base zoning standards.

e. Pattern Books

Where the need for variances arises from builder/developer familiarity with a particular product or type of development, create a pattern book showing how similar development could be accommodated on typical lots without the need for variances. Some cities have even "pre-approved" pattern book layouts so

that complying applications automatically meet site planning review requirements and receive expedited review.

f. Use-specific Standards

If certain uses – for example gas stations, day labor halls, or convenience stores – are routinely requesting variances because standards do not allow for their effective operation, attach use-specific standards to those that allow the needed operations but subject them to conditions that mitigate their impacts.

g. Alternative Equivalent Performance Standards

A growing number of zoning ordinances include provisions allowing the director to administratively approve alternative designs for landscaping, lighting, buffering, circulation, and in some cases signs if the director determines that the new design meets legislatively adopted criteria and meets the purpose of the code standard as well or better than strict compliance with the code.

h. Prevention of the Cause

Many variance requests are caused by a bad "fit" between the zone district or subdivision development standards and the topography, drainage, or geology of the area where they are applied. On a going forward basis, adopt site design and subdivision standards that require development to avoid sensitive environmental areas and allow automatic clustering of remaining density on the less sensitive parts of the property.