

Bond

Zoning Audit

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Introduction

- What do we mean by a zoning audit?
 - What function would it serve?

Boni Enterprises v. ZBA Town of Clifton Park

- Petitioner proposed 74 one-family dwellings on a single parcel. ZBA ruled that can only have one single family dwelling on parcel.
- Code permits multiple building on the same parcel in a B-1 district so long as overall density limitations not exceeded.
- Issue was whether residences were “buildings”.
- No deference on issues of law. Even though code differentiates between dwellings and other buildings, dwellings are subset of buildings. Court overturns ZBA ruling.

Interpretation of Zoning Law

- Saratoga County Economic Development Council v. Village of Ballston Spa ZBA
 - Petitioner sought to provide a variety of programs and services in ground floor of building in Central Business District.
 - Services were for low-income residents (e.g., nutrition program, Head Start, crisis intervention).
 - District requires uses must be retail with some exceptions including Vital Human Services. Vital Human Services include health related services (e.g., doctors, dentists, physical therapists and other necessary human services).
 - ZBA decision overturned.

Interpretation of Zoning Law

- Saratoga County Economic Development Council v. Village of Ballston Spa ZBA (cont.)
 - Code officer ruled proposed uses were excluded.
 - ZBA affirms.
 - Principles - deference to ZBA on construing facts; no deference on legal issues; zoning in derogation of common law and is strictly construed – ambiguity resolved in favor of property owner.
 - Nothing inherent in concept of “auditorium” that requires seating. ZBA decision overturned.

Interpretation of Zoning Law

- Albany Basketball and Sports Corp. v City of Albany
 - Armory located in a Commercial Office (CO zone). Parties agreed to submit to BZA question of what events were allowed under zoning code.
 - CO allowed “auditorium” uses.
 - Issue was whether rave party, night club, dance club is excluded from definition of auditorium.
 - BZA held that they were not “auditorium” uses due to lack of seating.

Variances

- Colin Realty v. Town of North Hempstead
 - Manhasset Pizza applied to convert an empty store into a full service restaurant. Applied for conditional use permit.
 - Could not meet the code requirements for off-street parking.
 - Conditional use permit granted and parking variance granted.
 - Parking variance judged based on area variance criteria.
 - Neighboring business brought Article 78 arguing that parking variance should be judged on use variance standards.

Variances

- Colin Realty v. Town of North Hempstead (cont.)
 - Where the parking requirement supports a use that is permitted under the zoning code, the area variance standard applies.
 - Where it supports a use that is not permitted, the use variance standard applies.

Special Use Permits

- Subdivisions, Inc. v. Town of Sullivan
 - The question was whether mining was a prohibited use in agricultural and industrial zones under the Town's zoning law. The ZBA concluded that the use was prohibited as it was not one of the uses that was explicitly enumerated as permitted.
 - Held: As a general rule, a court will defer to a ZBA's interpretation of its zoning law, except on issues of law. On legal issues, a court will exercise its own judgment and will decide ambiguities against local government as zoning is in derogation of the common law of real property.

Special Use Permits

- In isolation, the ZBA interpretation was supportable as it was consistent with established precedent holding that a law which lists permitted uses excludes all others. However, this interpretation was inconsistent with the remainder of the code which established standards for issuing special use permits for mining even though mining was not listed as a permitted use in any zone. This inconsistency created enough of an ambiguity for the court to conclude that the ZBA interpretation could not be sustained.

Deference

- Atkinson v. ZBA of Arietta
 - The issue was whether a use was properly classified as a “tourist accommodation” or as a “single-family residence” under the definitions in the zoning code. The property was a second home but was also sometimes rented out.

Deference

- Held: The Court found that the interpretation of the code definitions was purely a matter of law requiring no deference to the ruling of the Zoning Board of Appeals. It held that advertising the property for rent did not compel using the “tourist accommodation” designation. Moreover, any ambiguity in the definitions had to be decided in favor of the property owner as zoning laws are in derogation of the common law and so must be strictly construed. Since there was nothing in the definition of “single-family residence” that precluded occasional rentals, the Court sided with the owner.

Subdivision Review Recreation Fees

Dobbs Ferry Development Associates v. Bdoard Of Trustees of Dobbs Ferry. Rec fee required for single family residence in site-plan approval.

Pulte Homes of NY v. Town of Carmel. Under site-plan approval, rec fee required for senior housing development

- Held: These were invalid. Need to make case specific determination to impose recreation fee when approving new residential development under Town Law 274-a.

Land Use Approvals Generally

Interpretation of Zoning Law

Erin Estates v. ZBA Town of Erin

- Code Officer refused to give permit to install manufactured home on spec because code states that no sales lot or area can be used for selling mobile homes. Upheld by ZBA.
- Held: No deference because this is legal issue. Interpretation is not consistent with intent of code which states that mobile home parks to be established for habitation. OK, because the lot is intended for habitation not as a model home or a permanent sales lot.

Cell Towers Shot Clock Rule

Bell Atlantic Mobile of Rochester v. Town of Irondequoit

- The TCA requires that a local government act on a cell tower application within a “reasonable period of time” after the application is filed. Town required preparation on an EIS.

- Held: The Court agreed with the company that there was no substantial evidence in the record supporting the need to draft an EIS. Hence, it concluded that the time for review violated the Shot Clock Order. Once a Court determines that a local government has not acted within a reasonable time, it may use its discretion to fashion a remedy. Here, the Court concluded that the delay was willful and that additional review would serve no purpose. It ordered the Town to approve the application and grant the necessary permits.

Zoning Audit

- Designed as a preventative tool.
- Intended to address risks presented by text in existing zoning and land use laws or
- Identify opportunities to improve the performance of provisions in zoning and land use laws that are not adequately promoting comprehensive planning goals.

Zoning Audit

- Not an in depth review.
- Targets low hanging fruit.

Zoning Audit

- Scope of audit is flexible. Could be an overview of zoning and land use laws or could focus on a specific problem.
- Work product is a short report to governing body.

Zoning Audit

Examples of general audit issues:

- Definition problems
- Inconsistencies in code
- Absence of needed standards

Zoning Audit

Examples of audit focusing on specific issues or concern:

- Treatment of Non-Conforming Uses
- Adult Uses
- Affordable Housing
- Religious Uses
- Provisions Relating to Zoning Enforcement
- Imposition of Fees

Zoning Audit

Examples of audits focusing on zoning and land use laws that may be underperforming:

- Sign Laws
- PUD
- Incentives promoting particular land uses

Who will conduct the audits?

- Depending on the nature of the audit – legal or planning professionals or both
- All involved will be senior professionals so that the audits conducted in a highly efficient way

Legal Support on Land Use Issues the Trade Association Model

- Zoning Audit geared to issues with the code, this program addresses support on project review

Trade Association Model

- Trade associations hire consultants to provide advice to members on frequently recurring common questions. Because many of the issues are recurring or have common themes, provider can take advantage of economics of scale and offer lower cost for services.
- County Planning could act as the “trade association”

Trade Association Model

- Bond would provide 5-10 hours of consultation with municipal attorney on zoning and land use issues
- For smaller, lower population around \$500 – 1K. For larger may \$2-5K. Depends on number of hours of consultation and number of participating munis.
- Advice provided under an attorney-client relationship.

Areas of Concern

- Confidentiality
- Conflicts of Interest
- Support for, not replacement of, existing municipal staff
 - Municipal Organizations

Standard Scope

1. Definitions – clarity, application, consistency.
2. Internal consistency of law (i.e. conflicting provisions)
3. Jurisdictional issues.
4. Standards for approvals other than variances.
5. System for designating uses as either “as of right”, conditionally permitted or prohibited.
6. Treatment for non-conforming uses and structures.
7. Changes in state law reflected.

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