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Addressing Municipal Estoppel Upon Invalidly Issued Building Permit

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What does a land use practitioner do when faced with an invalidly issued building permit? There are occasions when a local building inspector will make an honest mistake, issue a building permit that is contrary to, or in violation of, a local building code. The developer, in reliance on the permit, proceeds with construction only to be served with a stop work order. The stop work order will be sustained due to the fact that municipal estoppel—a doctrine which states that rights may not be conferred upon a municipality which acts in contravention of zoning laws—does not apply in the absence of governmental fraud, misrepresentation, deception or other misconduct on the part of the municipality. *Town of Copake v. 13 Lackawana Props. LLC.*, 99 A.D.2d 1061, 942 N.Y.S.2d 780 (3d Dept. 2012); lv. denied 20 N.Y.2d 857 (2013).

In a previous article in the Law Journal, the fundamental principles of municipal estoppel were set forth. ("When a Municipality Makes a Mistake," New York Law Journal, Sept. 28, 2016, page 6, Anthony S. Guardino).

As a general rule, an invalidly issued building permit confers no rights in contravention of zoning laws irrespective of developer reliance or actual notice by the municipality. *McGannon v. Board of Trustees for Village of Pomona,* 239 A.D.2d 392, 657 N.Y.S.2d 745 (2d Dept. 1988).

This article addresses the process a property owner faces when pursuing relief under municipal estoppel. When the stop work order is issued for a building under construction resulting from a determination that a parcel of property may not be used due to a prohibition in a zoning code, the landowner should seek an appeal to the zoning board for either an area variance or a use variance. The remedy is dependent upon whether the issued permit results in a violation of bulk area regulations (setbacks, area coverage, etc.) or violation of permitted use. See, e.g. N.Y. Town Law §267-b; N.Y. Village Law §712-b, N.Y. General City Law §81-b.

Municipal Estoppel

In the *Matter of Parkview Associates v. City of New York*, 71 N.Y.2d 274 (1988) the Court of Appeals held that it was permissible to revoke a permit that had been issued in error when the conditions were such that the permit should not have been issued. Further, estoppel could not be invoked against a municipal agency to prevent it from discharging its statutory duties, including the enforcement of zoning laws. This decision was consistent with other decisions of the court. *Scruggs-Leftwich v.*

Rivercross Tenants' Corp., 70 N.Y.2d 849 (1987); see also, *Matter of E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359 (1988).[1]

Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken, or erroneous, issuance of a permit, it therefore does not estop a municipality from correcting errors, even where there are harsh results (*Parsa v. State of New York*, 64 N.Y.2d 143, 147 (1984)). The courts follow the basic concept that reasonable diligence would have readily uncovered the existence of the unequivocal limitations of the zoning law.

Presumption of Knowledge

As a starting point, a prospective purchaser of real property is charged with knowledge of the municipality's zoning ordinances applicable to that property. The purchaser is presumed to have conducted a due diligence review of applicable state, county and local laws, as well as with rules and regulations applicable to the property. *McGlasson Realty v. Town of Patterson Board of Appeals*, 234 A.D.2d 462, 463, 651 N.Y.S.2d 131, 132 (2d Dept. 1997), lv. denied, 89 N.Y.2d 812 (1997).

This presumption leads to a fact-specific inquiry on the issue of "self-created hardship." The property owner is faced with the burden of proof in dealing with the concept of self-created hardship. The burden of proof varies depending upon whether the remedy is an area variance or use variance.

Area Variance

Under the zoning laws in New York, to meet the burden for an area variance, an owner must address certain concomitant variables. The relevant factors which an applicant for an area variance must address include: (1) whether an undesirable change will be produced in the character of the neighborhood, or, a detriment to nearby properties will be created by granting the variance; (2) whether the benefit sought by the applicant can be achieved by a method feasible for the applicant to pursue, other than an area variance; (3) whether the requested variance is substantial; (4) whether there will be an adverse impact on physical or environmental conditions in the neighborhood or district; and, (5) whether the alleged difficulty was self-created.

The criteria for receipt of an area variance is set forth in N.Y. Law §267-b(3), Village Law §712-b(3)(b) and General City Law §81-b(b). The statutory criteria and weighing analysis set forth in the aforecited case replaced "practical difficulties." *Sasso v. Osgood*, 86 N.Y.2d 374 (1995). The character of the neighborhood, whether the property owner can achieve the desired result without a variance, whether there will be negative environmental or physical impacts in the neighborhood, the substantiality of the variance and whether the difficulty is self-created are all balanced to weigh the benefit to the property owner against the detriment to the neighborhood. The submission of testimonial and documentary evidence to demonstrate compliance with each of the criteria is necessary.

The practitioner should consider filing a freedom of information request (FOIL) to obtain other decisions of the board in question which have dealt with similar variance requests. The reason is that if it can be demonstrated that the board granted relief in similar circumstances it must follow its precedent or explain why it hasn't. *Knight v. Amelkin*, 68 N.Y.2d 975 (1986); *L&M Grazioze v. City of Glen Cove*, 127 A.D.3d 863, 7 N.Y.S.3d 344 (2d Dept. 2015).

In addition, it is always wise to bring in a landscape plan to show proper screening to reduce the impact on the neighborhood.

Finally, unlike the use variance, an area variance does not require dollars and cents proof of economic hardship. Notwithstanding, the practitioner is wise to submit financial evidence of the hardship; however, evidence that the property is more profitable with the variance is not sufficient. Cowan v.

Kern, 41 N.Y.2d 591 (1977). The board has considerable discretion and, for example, may grant a variance if the applicant can show it requires the variance to meet the competition. Hampshire Management Company v. Nadel, 241 A.D.2d 496, 660 N.Y.S.2d 64 (2d Dept. 1997) lv. denied 91 N.Y.2d 806 (1998).

Further, unlike the use variance, self-created hardship is not a bar—rather, just another factor to be considered. Caspian Realty Inc. v. ZBA of Town of Greenburgh, 68 A.D.3d 62, 886 N.Y.S.2d 442 (2d Dept. 2009), lv. denied, 13 N.Y.3d 716 (2009).

Use Variance

Use variances do not issue often, but an understanding of the burden of proof, and how to meet it, is critical. The property owner must establish "unnecessary hardship" by a demonstration that (1) the applicant cannot realize a reasonable return which is substantial by submission of competent financial evidence; (2) the hardship alleged is unique and does not apply to a substantial portion of the district or neighborhood; (3) if granted, the variance will not alter the essential character of the neighborhood; and (4) the hardship is not self-created. If proven, the board of appeals must only grant the minimum variance necessary and adequate to address the hardship while at the same time preserving the character of the neighborhood and the health, safety and welfare of the community.

The proof required to establish a lack of reasonable return requires the property owner to prove by competent financial evidence that a reasonable return cannot be realized from each of the uses permitted in the zoning district. Village Bd. of the Village of Fayetteville v. Jarrold, 53 N.Y.2d 254 (1981). Personal hardship is irrelevant since the hardship must relate to the property, not the person. Conte v. Town of Norfolk Zoning Bd. of Appeals, 261 A.D.2d 734, 489 N.Y.S.2d 735 (3d Dept. 1999).

The evidence considered competent is "dollars and cents" proof most often submitted by an appraiser, accountant or other such expert. *Village Bd. of the Village of Fayetteville*, supra; *Edwards v. Davidson*, 94 A.D.3d 883, 884, 941 N.Y.S.2d 873, 873-74 (2d Dept. 2012). Upon review of the submission the board of appeals will determine the credibility of the submission as the administrative fact-finder Suskin v. Town of Sand Lake, 227 A.D.2d 779, 642 N.Y.S.2d 374 (3d Dept. 1996).

An excellent example of what should be submitted to demonstrate a "lack of reasonable return" is found in Crossroads Recreation v. Broz, 4 N.Y.2d 39 (1958). The property should submit the cost of the entire property; the annual income and expense statements; leases and rental income; expenses which include taxes, debt; fair market value appraisals; if the property has been listed for sale, the listing price; construction of hard and soft costs; and projected income and internal rate of return. The submission of several years of income and expense statements should also be proffered.

Where a property owner submits competent evidence of "dollars & cents" proof, boards of appeal will grant use variances. Soho Alliance v. New York City Board of Standards and Appeals, 264 A.D.2d 59, 703 N.Y.S.2d 150 (1st Dept. 2000), aff'd, 95 N.Y.2d 437 (2000) (financial evidence of a 9.9 percent rate of return was reasonable). In addition to "dollars and cents" proof, the inability to sell the property is relevant. Citizens for Gent v. Zoning Board of Appeals of the Town of Ghent, 175 A.D.2d 528, 572 N.Y.S.2d 957 (3d Dept. 1991). However, the efforts to sell must also be supported by competent evidence. *Forest v. Evershed*, 7 N.Y.2d 256, 262 (1959).

While the second and third prong of the test set forth in N.Y. General City Law §81-6(3), Town Law §267-6(3) and Village Law §712-b(3) have more to do with comprehensive zoning principles, the property owner must establish a special hardship which is peculiar to its property. *Clark v. Board of Zoning Appeals of the Town of Hempstead*, 301 N.Y. 86, 91 (1950), cert. denied 340 U.S. 933 (1951). The property owner typically would provide the board of appeals with a comparison of its property to others in the district or neighborhood to establish uniqueness. *Kingsley v. Bennett*, 185 A.D.2d 814, 586 N.Y.S.2d 640 (2d Dept. 1992). The distinctions relevant to the subject property as opposed to

other parcels may be a multiplicity of factors or singular. *Supkis v. Town of Sand Lake Zoning Board of Appeals*, 227 A.D.2d 779, 642 N.Y.S.2d 374 (3d Dept. 1996).

The last of the factors, that the hardship has not been self-created often arises with respect to invalidly issued building permits. In general, if the developer can establish it was purely a good-faith mistake by both the developer and the municipality there will be no self-created hardship.

The net result is that although difficult to establish, a property owner's remedy to an invalidly issued building permit is to proceed with expert testimony to meet the factors or criteria for an area or use variance.

Endnotes:

1. Estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties. *Morley v. Arricale*, 66 N.Y.2d 665, 667 (1985) (*City of Yonkers v. Rentways*, 304 N.Y. 499, 505) [1952]). "Estoppel is not available against a local government unit for the purpose of ratifying an administrative error." *Matter of B&G Constr. Corp. v. Board of Appeals*, 309 N.Y. 730, 732, (1955). ("[A] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches") and "[the] prior issue to petitioner of a building permit could not 'confer rights in contravention of the zoning laws.'"

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