NEW YORK
ZONING LAW AND PRACTICE REPORT

MAY/JUNE 2009 Vol. 9, No. 6

In This Issue

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Specialty Composition/Rochester DTP

Published six times a year by West

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SPLIT-JURISDICTION PARCELS: HOW TO TREAT PROJECTS THAT EXCEED YOUR BORDERS

By: Jill L. Yonkers[1]

Introduction

One of the hallmarks of New York zoning is the carefully drawn boundaries utilized to separate uses, properties, and municipalities. While a municipality faces an interesting zoning situation when a parcel falls into two of its different zoning districts, an even greater puzzle presents itself when the property sits in two independent municipalities. This issue even occurs between states.[2] Further complicating factors exist when a building is found in two towns, or when the primary use is contained wholly within one locality while the secondary use exists solely within another. This article will discuss the unique questions raised when municipalities have so-called split-jurisdiction properties or uses in their midst, and provide guidance for occasions when an applicant appears at their doorstep seeking project approval.

Background and Statutory Authority

Land rights have been negotiated and fought over since before our country's birth. Although the division, acquisition, and separation of land continues, except for limited annexations, municipal boundaries today stay very static.[3] Most issues arising between municipalities now do not involve land rights but intermunicipal agreements, cooperative ventures, shared services, and environmental impacts from large development projects. The questions that arise in such contexts are relatively easy to an-

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swer. But what happens when a project affects more than one community because it is located within two independent jurisdictions? While at first blush the answer may seem to present a zoning quandary, the reality is that the resolution is not any more complex than the review of a more-traditional zoning application.

That is because of the great power cities, towns, and villages hold with regard to the territory within their respective borders. Most towns and villages reflect their allotment of land first and foremost with a statement of legislative intent adopting their respective local code and with the zoning map itself.[4] The local official map commands great deference by statute, to the point that if a municipality does not have one, the official county map is essentially adopted as the locality's official map.[5] While the governing map is a key starting point for the split-jurisdiction inquiry, it is not the only source that should be examined.

Next in a community's arsenal for dealing with split-jurisdiction parcels is Article 9 of the New York Constitution. That Article recognizes the power granted to local governments through a detailed bill of rights that ensures self-governance, including power over its own territory.[6] There is an express provision that local governments may create local laws regarding the "government, protection, order, conduct, safety, health and well-being of persons or property therein."[7] And it recognizes the broad powers conferred by "home rule," the third general area that ensures a municipality's right to govern land within its borders by express regulations.[8]

Indeed, New York's Municipal Home Rule Law stretches a community's authority to its maximum limit, even allowing supersession of state law in some land use contexts.[9] Part of home rule's express design is to give effect to local community's Article 9 powers.[10] The sovereignty granted to municipalities is especially clear with respect to villages, as New York law prevents cities and towns from necessarily imposing their rules upon them.[11]

All of these statutory provisions provide a seemingly clear backdrop for courts to consider when facing split-jurisdiction issues. They support the unquestionable power that a municipality enjoys within its own respective borders.

Primary Uses

Not surprisingly, given the territorial integrity that cities, towns, and villages all enjoy by statute, New York courts have not hesitated to find that a municipality's regulations end at its respective borders.[12] Although the issue does not find its way into litigation often, courts throughout New York confirm that each jurisdiction's provisions apply to the land or use within or proposed within its territorial limits; there is no increase or loss of power as a result of a split-jurisdiction parcel.

No case speaks to this issue more readily than *Siegel v. Tange*, where not only were two lots split between two governing jurisdictions, so were the houses on each.[13] The petitioner sought to make repairs and improvements to both homes from the village building inspector; he made no application to the town.[14] Under the village's procedural requirements and determinations, the petitioner needed area variances, but his subsequent application for them was denied.[15] In response to his Article 78 challenge to the denial, the village did not raise the co-jurisdiction of the town—that was absent from the review and approval process—but the reviewing court immediately seized upon its nonappearance, finding that the petitioner needed to apply, give notice to, and obtain permission from the town for his project.[16] This holding leaves no doubt that applicants seeking project approval within two separate jurisdictions must obtain permission from both. And this is the appropriate course when such projects are presented: ensure that any project within your community meets all local code requirements, or that the applicant can meet the applicable area variance standard.

Because of this governing independence, courts will not tolerate an attempt by one municipality to terminate activities taking place in another.[17] Thus, in *Action Redi-Mix Corp. v. Davison*, even

New York Zoning Law and Practice Report (USPS# pending) is issued bimonthly, six times per year; published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at Periodical rate is pending at St. Paul, MN. POSTMASTER: Send address changes to **New York Zoning Law and Practice Report**, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

though concrete trucks passed over roads and property located in one municipality on their way to the batching plant located in another, the owner was not operating the plant in violation of the complaining jurisdiction's zoning regulations.[18] There, about twenty-five percent of the operation existed in the protesting city for ingress and egress to the plant, for loading, washing, and parking trucks, and for temporary raw material storage; the plant building existed in the neighboring municipality.[19] The complaining municipality allowed a trucking terminal and storage of industrial vehicles or construction supplies as-of-right in the zoning district applicable to that property.[20] Since the portion of the operation occurring within its borders was proper, the court quickly dismissed the city's challenge as an attempt to regulate the overall operation, which was not allowed given its location in another community.[21]

Judicial intolerance of attempts to regulate development in other communities even extends to the governing local laws. For instance, the Town of Mamaroneck—in a matter of first impression in New York—enacted a local law seeking to regulate certain development projects in neighboring jurisdictions.[22] The law would have allowed the town veto power over specified development proposals if the applicant did not obtain a town permit.[23] The motivation for the law was apparently an application in the neighboring City of New Rochelle for an IKEA store that drew vehement opposition.[24] Although litigated in state and federal forums, the Supreme Court ultimately decided the matter for zoning purposes when it found that the law was enacted in violation of SEQRA.[25]

Of particular importance to the court was that the local law purported to assert authority over projects in adjacent towns without any inquiry into the effects of the law on those communities. The court rejected the law because it would have expanded the town's powers under the guise of protecting the welfare of its residents without any discussion of the adverse environmental impacts in the jurisdictions actually facing the true impacts.[26] The court's analogy of the attempt—characterizing the local law as the Sword of Damocles hanging over the development plans of New Rochelle—was very fitting.[27]

If ever there was a doubt about a municipality's zoning authority, these cases confirm the territorial integrity—as framed by statute—that cities, towns, and villages all have. Thus, for primary uses, the answer is quite clear that a use within your borders is subject to your regulations. For that purpose, a municipality should essentially ignore any portion of the operation not occurring within its borders, and focus instead on ensuring that the portion it has control over meets all code provisions.

Don't Neglect the County Referral Requirement

Notice to neighboring or co-jurisdictional municipalities is often required in zoning matters, particularly when a project requires review under the State Environmental Quality Review Act. It would be a rare case in split-jurisdiction circumstances that would not also require submission to the governing county under General Municipal Law § 239-m.[28] This section requires that projects within 500 feet of any city, village, or town boundary be referred to the county planning board for review.[29] The failure to make that referral is a jurisdictional defect that renders the municipal decision invalid.[30] Do not give later opponents an easy way to attack your decision through a procedural stumble such as failing to make the referral.

For example, in *Zelnick v. Small*, the owner of 36 adjoining acres in two different towns sought to keep 32 horses in an existing stable on the portion of land in one of the towns.[31] That town limited the number of allowable horses to one per acre, so the petitioner applied for a variance relying upon the entire 36 acres as part of the variance justification instead of the mere 15 acres that existed in the reviewing town.[32] The town granted a smaller variance than requested, allowing 23, which was the number of horses on site at the time.[33] Dissatisfied with the decision, the petitioner challenged it under Article 78.[34] The appellate court remanded the matter for further proceedings because the adjoining town had no notice of the proceeding—and thus did not participate in the process—and since the reviewing town failed to make the required county referral.[35] Thus, not only did the holding in *Zelnick* confirm that a municipality's jurisdiction ends at its border, but also that county referral requirements must be met.

The best advice to any governing body considering a project that extends into another municipality is to ensure that any other municipalities are notified of the application and at the very least, are given an opportunity to participate in the review proceedings. Jurisdictions must follow the procedural mandates of General Municipal Law § 239-m or any decision may be subject to annulment. Such notification may also lend itself to a cooperative discussion about the proposal and how best to address its expected impacts on both communities.

Accessory Uses

Accessory uses are generally allowed in any zoning district where the property is also used for a principal or primary use. Municipalities routinely define accessory uses in their zoning codes, usually as a use on the same lot, and one that is customarily incidental to or subordinate to the principal use. Typical examples are garages, sheds, and other small storage structures in residential areas, and signs, off-street parking, and landscaping in nonresidential zoning districts. What happens then when the primary use is in one locale while the accessory use is in another? New York courts have not spoken to this precise issue, but the general territorial rules would no doubt apply. Moreover, analogous circumstances outside New York provide some guidance on how New York courts would likely resolve the issue.

Although there are many cases in New York examining whether a use is accessory to another[36] and also evaluating uses that are split between zoning districts in the same municipality,[37] there are none dealing with the unique situation where a primary and accessory use are split between two different jurisdictions. Nonetheless, as discussed above, the territorial integrity speaks to this issue, as does law from other jurisdictions, which generally follow the New York-accepted standard that an applicant must meet both jurisdictions' requirements.

Some jurisdictions reviewing this unique issue have specifically held that municipalities are not required to allow an accessory use when the principal use is in an adjacent locale.[38] For example, in *Dupont v. Town of Dracut*, the applicant sought to construct a housing project for the elderly on a lot situated in two municipalities.[39] The building was proposed in the city, with the parking and access intended to be placed in the town.[40] To meet frontage requirements in the city, the applicant relied upon the existing frontage space in the town.[41] The town recognized a preexisting two-family dwelling in the city portion of the property as a legal nonconforming use; otherwise the town prohibited residential uses.[42]

When the applicant sought a declaration that the town could not prohibit it from creating parking on its property there, the court disagreed, specifically holding that the town had the right to prohibit the use of land for a use accessory to one not permitted in its zoning district.[43] The court specifically recognized a municipality's ability to "carry out the policies underlying the zoning ordinance or by-law with respect to the actual uses made of land within its borders."[44] This is the same principle espoused by courts in New York.

Of particular importance to the court there was the fact that the developer could still use the two-family dwelling, perhaps even modifying it under the city code.[45] In fact, the court noted that without the house, the developer would be in an even worse position, as it would need an area variance from the bulk area requirements in the town.[46] Finally, the court rejected the applicant's claim that parking was allowed in the town, since it was merely incidental to the primary use and was not an allowable commercial parking lot.[47]

Similarly, in *Town of Brookline v. Co-Ray Realty Co., Inc.*, a developer wanted to build an apartment house in Boston, using portions of its property in the neighboring town for rear yards and service entrances.[48] Unlike most municipalities, the town had regulations dealing with split-jurisdiction parcels, specifically stating that its regulations still apply to the portion within its borders.[49] The court relied on that language as well as the fact that the town land could still be used for other purposes in upholding the town's denial of the accessory use request.[50]

Given the strong preference courts have shown to preserving jurisdictional rights, it is likely that any New York court reviewing the accessory-use-split-jurisdiction issue would find that municipalities remain sovereign, and that they are not required to accept accessory uses when the primary use is located outside its borders. Of course, practically, strict adherence in split-jurisdiction lot cases may create a situation where no viable use can be located on the secondary parcel. At least one court has implied that attempts at compromise may be made in appropriate circumstances,[51] but most courts recognize such hardships only when the accessory-use land is landlocked and cannot be used for any other purpose.[52]

The best advice for a city, town, or village in this situation is to review its own code to determine whether the accessory use portion is allowable as a primary use. If not, nothing requires a New York municipality to allow an accessory use within its borders when the primary use is wholly within another jurisdiction. Communities should carefully review their accessory use definition in these instances. Unless unusual circumstances exist, courts will uphold application review decisions that comport with the municipality's own regulations, even when they deny a mere accessory use.

NOTES

1. Jill Yonkers is a partner with Hodgson Russ LLP in the Buffalo, New York office.
2. See New Jersey v. Delaware, 128 S.Ct. 1410, 170 L.Ed.2d 315 (2008).
3. The subject of annexation is outside the scope of this article, but State Constitution Article 9, § 1(d) allows such action if approved by the governing board of the local government as part of the public interest and if passed by majority vote on a referendum.
4. See N.Y. Mun. Home Rule Law § 20.
5. N.Y. Gen. Mun. Law § 239-e(5)(a).
6. N.Y. CONST. art. 9, § 1.
7. N.Y. CONST. art. 9, § 2(c)(10).
8. N.Y. CONST. art. 9, § 2.
9. N.Y. Mun. Home Rule Law § 10.
10. N.Y. Mun. Home Rule Law § 50(1).
11. See, e.g., N.Y. Stat. Local Gov'ts § 10(6); N.Y. Mun. Home Rule Law § 10.
12. Siegel v. Tange, 61 A.D.2d 57, 401 N.Y.S.2d 269, 271 (2d Dep't 1978) (holding that "a municipality is without power to impose its zoning regulations upon lands without its territorial limits.") (treatise citation omitted); Action Redi-Mix Corp. v. Davison, 292 A.D.2d 448, 739 N.Y.S.2d 411, 413 (2d Dep't 2002) (city that did not permit concrete operations could not halt concrete batching plant activities in neighboring city even when trucks passed through its borders, particularly where the complaining city allowed truck terminals and industrial vehicles storage uses); Zelnick v. Small, 268 A.D.2d 527, 702 N.Y.S.2d 105, 106 (2d Dep't 2000) (applicant could not rely on parcel's acreage in neighboring town to increase allowable number of horses for stabling operation in different town); Inf. Op. Att'y Gen. 98-56 (1998) (same).
13. Siegel, 61 A.D.2d at 58.
14. Siegel, 61 A.D.2d.at 58, 59.
15. Siegel, 61 A.D.2d.at 59.
16. Siegel, 61 A.D.2d.at 59-60 ("[A] municipality is without power to impose its zoning regulations upon lands without its territorial limits.") (*citing* 1 Anderson, New York Zoning Law and Practice, 2d § 5.15).
17. Action Redi-Mix Corp. v. Davison, 292 A.D.2d 448, 739 N.Y.S.2d 411, 413 (2d Dep't 2002).
18. Action Redi-Mix Corp., 292 A.D.2d at 449.
19. Action Redi-Mix Corp., 292 A.D.2d at 448-49.
20. Action Redi-Mix Corp., 292 A.D.2d at 448-49.
21. Action Redi-Mix Corp., 292 A.D.2d at 449.
22. City of New Rochelle v. Town of Mamaroneck, 2001 WL 1665463 (N.Y. Sup. 2001).
23. New Rochelle, 2001 WL 1665463.
24. New Rochelle, 2001 WL 1665463.
25. New Rochelle, 2001 WL 1665463.
26. New Rochelle, 2001 WL 1665463.
27. New Rochelle, 2001 WL 1665463.
28. N.Y. Gen. Mun. Law § 239-m.
29. N.Y. Gen. Mun. Law § 239-m(3)(b)(i).
30. Lamar Advertising of Penn, LLC v. Village of Marathon, 24 A.D.3d 1011, 1012 805 N.Y.S.2d 495, 496 (3d Dep't 2005); Zelnick v. Small, 268 A.D.2d 527, 529, 702 N.Y.S.2d 105, 106-107 (2d Dep't 2000).
31. Zelnick, 268 A.D.2d at 528.
32. Zelnick, 268 A.D.2d at 528.
33. Zelnick, 268 A.D.2d at 528.
34. Zelnick, 268 A.D.2d at 528.
35. Zelnick, 268 A.D.2d at 528-29; see also 98 Inf. Op. Att'y Gen. 56 (1998).
36. See, e.g., Incorporated Village of Atlantic Beach v. Zoning Bd. of Appeals of Town of Hempstead, 94 N.Y.2d 842, 702 N.Y.S.2d 573 , 724 N.E.2d 365 (1999) (holding enclosed sundeck to second floor apartment accessory use to beach club facility); Verstandig's Florist, Inc. v. Board of Appeals of Town of Bethlehem, 229 A.D.2d 851, 645 N.Y.S.2d 635 (3d Dep't 1996) (precluding temporary greenhouse as accessory use to floral corporation).
37. See, e.g., Miller v. Kozakiewicz, 289 A.D.2d 494, 735 N.Y.S.2d 176 (2d Dep't 2001) (shopping center over two different zones).
38. Dupont v. Town of Dracut, 41 Mass.App.Ct. 293, 295, 670 N.E.2d 183 (1996) (holding that "if a lot is located in two different zoning districts, a town may prohibit the portion in one district from being used for an accessory use to serve a principal use not allowed in that district.") (citations omitted).; Town of Brookline v. Co-Ray Realty Co., Inc., 326 Mass. 206, 93 N.E.2d 581 (1950) (upholding town's prohibition of use of town property for accessory rear yard requirements and service entrances to apartment house complex located in city); St. Luke Evangelical Lutheran Church v. Zoning Hearing Bd. of Easttown Tp., 43 Pa. Commw. Ct. 159, 163, 403 A.2d 128 (1979) (Pennsylvania zoning law "does not admit of any legal authority for the proposition that an accessory use in one municipality, incidental to a principal use in a second municipality, must be permitted in the municipality where the accessory use is located."); see also Kosla v. Board of Appeals of Holden, 55 Mass. App. Ct. 62, 63-64, 768 N.E.2d 1115 (2002) (holding town improperly granted variance to private club applicant, in part because it relied upon parking available on same lot, but in neighboring municipality).
39. Dupont, 41 Mass.App.Ct. at 293.
40. Dupont, 41 Mass.App.Ct. at 293.
41. Dupont, 41 Mass.App.Ct. at 293.
42. Dupont, 41 Mass.App.Ct. at 293..
43. Dupont, 41 Mass.App.Ct. at 294.
44. Dupont, 41 Mass.App.Ct. at 295.
45. Dupont, 41 Mass.App.Ct. at 294.
46. Dupont, 41 Mass.App.Ct. at 294.
47. Dupont, 41 Mass.App.Ct. at 296.
48. Co-Ray, 326 Mass. at 207.
49. Co-Ray, 326 Mass. at 211-212.
50. Co-Ray, 326 Mass. at 212-213.
51. Tofias v. Butler, 26 Mass. App. Ct. 89, 96, 523 N.E.2d 796 (1988) (land in one municipality but two different zoning districts; developer allowed to use whole parcel area in meeting bulk requirements of primary use portion of the property).

52. Lapenas v. Zoning Bd. of Appeals of Brockton, 352 Mass. 530, 533, 226 N.E.2d 361 (1967); Filanowski v. Zoning Bd. of Adjustment of Philadelphia, 439 Pa. 360, 362, 266 A.2d 670 (1970); Baronoff v. Zoning Bd. of Adjustment of Lower Makefield Tp., 385 Pa. 110, 111, 119, 122 A.2d 65 (1956); Wil-Nor Corp. v. Zoning Bd. of Appeals of City of Norwalk, 146 Conn. 27, 31, 147 A.2d 197 (1958) (rejecting corporation's claim of hardship when its engineer's own lack of diligence in checking existing maps caused it to build over property line); see also Town of Brookline v. Co-Ray Realty Co., Inc., 326 Mass. 206, 93 N.E.2d 581 (1950).

Decisions of Note from the New York Courts

Court of Appeals Upholds Condemnation of Farmland

In a short memorandum opinion, the court upheld the town's condemnation of 39 acres of farmland without addressing the Plaintiff's *Kelo* argument, finding that the challenged taking was constitutionally proper even assuming a preexisting farmland plan was necessary. The court found that the town had legislatively evidenced its policy of farmland preservation through the town's master plans supporting this goal. The court also noted that town voters had approved the issuance of $130 million of bonds to acquire rights in undeveloped land in the town, and among areas identified for possible use of the funds was the tract of land in question. The court concluded, "In short, the public benefits of the taking in this case were not incidental or pretextual in comparison with benefits to particular, favored private entities; petitioner's remaining arguments likewise lack merit." The court also noted that since the parties did not argued whether the New York Constitution (see NY CONST. art I, § 7[a]) imposes a more stringent standard for takings than does the Fifth Amendment as interpreted by *Kelo,* they would not address that issue. *Aspen Creek Estates, Ltd. v. Town of Brookhaven, 12 N.Y.3d 735, 876 N.Y.S.2d 680, 904 N.E.2d 816 (2009).*

First Department Says Private Land Use Agreement Between Developer and Neighborhood Group is Enforceable

In exchange for support to develop one project (the old Penn Central railway yard), Donald Trump allied himself with several environmental and neighborhood groups, and in exchange for the groups' support, Trump agreed to develop Riverside South with a development plan that called for parks, open spaces and public arts programs. The Riverside South Planning Corp. was also created to oversee the design, planning and construction of the site. In 1993, the parties entered into an agreement and pursuant to its terms the groups were to have an active role in planning Riverside South and ensuring that it was developed pursuant to the development plan's specifications. Among other things, the agreement obligated Trump to ensure that any entity that purchased real estate from him concerning the Penn Central yard would abide by the agreement. In June 2005, a real estate company purchased Trump's company's interest in Riverside South. Subsequently, the acquiring real estate company began constructing a building on the property with more glass than was permitted under the sustainability guidelines and failing to conduct the required environmental sustainability assessments and calculations. In November 2007, the groups filed a complaint alleging breach of contract and breach of the implied covenant of good faith and fair dealing. The defendant company moved to dismiss on the grounds that a sunset provision in the 1993 agreement made its provisions unenforceable. The trial court denied the motion, holding that the sunset provision was unclear whether it applied to the entire agreement. On appeal, the Appellate Division reversed, holding that the agreement was clear on its face that it only continued for 10 years at maximum. *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d 61, 869 N.Y.S.2d 511 (1st Dep't 2008).*

Second Department Finds Building Inspector Lacked Authority to Issue Permit for Fence Without Site Plan Approval

After finding that the trial court incorrectly determined that the petitioner lacked standing to challenge the determination of the zoning board of appeals which, after a hearing, upheld the issuance of a building permit by the building inspector to allow the installation of a 48-foot by 20-foot fence for purposes of creating an impound lot, the appeals court determined that the building inspector lacked authority to issue a permit for the construction of a fence on commercial property without site plan approval by the planning board. In reaching this conclusion, the Court looked at the plain language of the village zoning code which it found clearly states that the site plan approval by the planning board

for all special permitted uses is required prior to the issuance of a building permit for the construction of any structure. In this case, the property is used as an auto repair shop pursuant to a special use permit, and under the zoning code, a fence is defined as a structure. *J & M Harriman Holding Corp. v. Zoning Bd. of Appeals of Village of Harriman, 2009 WL 1238520 (N.Y. App. Div. 2d Dep't 2009).*

Second Department Finds that Board May Hire Outside Consultant and Require Applicant to Pay Fee, but Reminds that Board May Not Succumb to Community Pressure in Review Process

A town board, when reviewing a complex and difficult application, has the discretion to hire an outside consultant and require the applicant to pay the consultant's fee. The town code authorized the action when the board determines that the "complexity of the activity, the difficulty on determining the threat to the resource areas or the size of the request or project involves or requires more information and analysis than can reasonably be supplied to the Board without independent technical professional assistance." (See, Town of Southold Code §275-7[d]).

The court, however, ultimately annulled the determination of the board since the board relied on the recommendation of the Local Waterfront Revitalization Coordinator who stated that the application was inconsistent with the local waterfront revitalization plan. The board had made a previous determination that this staff member was not qualified to perform the required review, and therefore their reliance on his recommendation was misplaced. Further, the court concluded that rather than relying on the reports of the experts, the board improperly succumbed to community pressure to deny the application. *Moy v. Board of Town Trustees of Town of Southold, 877 N.Y.S.2d 186 (App. Div. 2d Dep't 2009).*

Second Department Determines that Animal Hospice Was Not an Accessory Use, Nor was it Entitled to Nonconforming Use Status

The petitioners own and operate out of their home in a residential district "Angels' Gate," a hospice and rehabilitation center for approximately 200 terminally ill and disabled animals. Following the issuance of a notice of violation, the petitioners applied to the zoning board of appeals for a certification of existing use on the ground that the animal hospice was a preexisting nonconforming use. Their application was denied, and an appeal ensured. The trial court denied the town's motion to dismiss.

The appeals court found that the trial court improperly substituted its judgment for that of the zoning board after the board rationally concluded that the animal hospice did not constitute a customary, accessory use nor was it a lawful preexisting nonconforming use. The court noted that the zoning board relied on Table of Use Regulations in the town's zoning ordinance which both expressly prohibited animal hospitals, veterinarians and kennels in the residential district, and further the ordinance provided that any uses not specifically listed were not permitted in the district (and an animal hospice was not specifically listed). Since the existing use of the land was commenced and maintained in violation of zoning ordinance, the petitioners cannot claim legal nonconforming use status. Further, the fact that the petitioners had maintained the use for 13 years prior to the notice of violation did not prevent the zoning board from enforcing the code now. *Marino v. Town of Smithtown, 877 N.Y.S.2d 183 (App. Div. 2d Dep't 2009).*

Second Department Says Board's Failure to Follow Own Precedent will Result in Reversal

The petitioner/plaintiff was granted a building permit to construct a six-story condominium building. Subsequent, a "10-day notice to revoke" was issued after the building department alleged that the work was not being done in accordance with the petitioner's certified plans. Shortly thereafter, the site was rezoned, which administratively caused the permit to lapse. The day after the rezoning, the building department revoked the permit based on the petitioner's failure to cure the department's objections. The petitioners then applied to the Board of Standards and Appeals to renew the permit, and prior to the hearing, the department reinstated the permit, finding that the petitioner had cured the remaining objections. However, the department then claimed it acted in error. Following a hearing on the renewal request, the board denied the application, based on its determination that the petitioner had not cured the objections as of the effective date of the rezoning.

On appeal, both the trial court and the appeals court concluded that the Board of Standards and Appeals acted in an arbitrary and capricious fashion when they failed to follow their prior precedent and failed to indicate any reason for reaching a different result on essentially the same facts. Furthermore, the court found that the petitioner established that it was entitled to an extension under the zoning resolution and that it had acquired vested rights. Therefore, the court ordered the board to issue the six month extension on the building permit. *Menachem Realty Inc. v. Srinivasan, 60 A.D.3d 854, 875 N.Y.S.2d 237 (2d Dep't 2009).*

Third Department Says Failure to Provide Proper Notice Will Result in Annulment of Use Variance

Following a denial of a special use permit, the Zoning Board of Appeals granted the respondent a use variance to allow him to use property he inherited in an RA-40 zone (permitted uses are residential and agriculture) for mining purposes. Petitioners, neighboring property owners, challenged the variance on the grounds that they did not receive adequate notice under both state statute and under the applicable zoning ordinance.

The appellate court agreed, and annulled the variance. The court explained that to satisfy notice requirements, the notice must not be misleading, and it must be clear and unambiguous. In this case, the published notice contained the tax parcel address of the subject property but not the property address. This, said the court, at the very least rendered the notice ambiguous. With respect to the issue of personal notice, the town zoning ordinance provides that at least 10 days before the hearing the applicant shall serve notice of the hearing and an explanation of the variance to all property owners within 200 feet of the subject property either by certified mail (return receipt) or by personal service (with a receipt signed by the property owner). If the notice is mailed, it is to be sent to the last known address as shown by the most recent tax records. In this case, notice was mailed to the petitioner and returned as undeliverable, since the town sent it to the last address known to the code enforcement officer, but not to the current address as was accurately reflected in the municipal tax records. Therefore, the court said, notice was not provided as required under the law. Further, the fact that the petitioner found out about the hearing two hours before it was scheduled and the petitioner did show up and voice objection and concerns, this did not cure the notice failure since the lack of adequate notice deprived the petitioner of the "opportunity to meaningfully participate in the hearing and frustrated the purpose and intent of the notice requirement." *Jones v. Zoning Bd. of Appeals of Town of Oneonta, 2009 WL 1149504 (N.Y. App. Div. 3d Dep't 2009).*

Fourth Department Holds that Failure to Join Necessary Parties was not Fatal

Petitioners sought to annul the approval of various applications submitted by McDonald's USA, LLC for the construction of a restaurant. The trial court dismissed the petition because the petitioners failed to name all of the owners of the subject property, these were necessary parties, and at that point in the proceeding, the statute of limitations had expired with respect to these necessary parties.

The appeals court first noted that although by the time of the appeal the restaurant had been built, this fact would not render the matter moot since the petitioners were not seeking injunctive relief to prevent construction, but rather they sought modifications that would not require demolition of the restaurant. While the appeals court agreed that at the time of the initial petition, the property owners in question were indeed necessary parties, the trial court should have ordered that they be part of the proceeding, rather than granting the motion to dismiss. The court noted that, "the expiration of the statute of limitations ... is not the equivalent of a jurisdictional defect" and that under New York law, the trial court was required to summon the necessary parties (see N.Y. CPLR 1001(b)). However, since the parties have now conveyed their interest in the property to McDonald's, the appeals court said they are no longer a necessary party. The court reinstated the petition. *Yaeger v. Town of Lockport Planning Bd., 2009 WL 1163854 (N.Y. App. Div. 4th Dep't 2009).*