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Kuzmich et al. v. 50 Murray Street Acquisition LLC: A Deal Gone Bad for Developers Who Helped Revitalize Lower Manhattan

By Alexander Lycoyannis

In *Kuzmich et al. v 50 Murray Street Acquisition LLC*, 34 N.Y. 3d 84, the Court of Appeals held that apartments in buildings receiving tax benefits under Real Property Tax Law (RPTL §421-g are not eligible for luxury deregulation under the Rent Stabilization Law (RSL), unlike most other rent-stabilized apartments. To appreciate the importance and consequences of this decision, one must understand the history of RPTL §421-g.

In 1993, lower Manhattan was in sharp decline. Following the World Trade Center bombing, vacancy rates in commercial buildings soared and their assessed values plummeted. Many commercial buildings in lower Manhattan were outdated and unfit to accommodate growing and changing industries. The nightly exodus of office workers leaving to return to their homes left lower Manhattan a virtual ghost town after business hours.

To turn the tide, then-Mayor Rudolph Giuliani proposed the Lower Manhattan Revitalization Plan (the LMRP). A key component of the LMRP was RPTL §421 g, which provided tax benefits to commercial building owners that converted either all or part of their buildings into residential apartments. The purpose of the 421 g program was to remove unused commercial space from the market and create a thriving, 24-hour community in lower Manhattan where people both live and work.

By any measure, the 421-g program did just that; it breathed life into lower Manhattan by fostering the creation of more than 25,000 residential apartments, transforming it into a full-blown residential district.

How were owners and developers incentivized to create new residential housing? While the newly created apartments were subjected to the RSL for a period

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of time in exchange for the receipt of tax benefits under the 421-g program, the statutory text and legislative history made clear that *all* of the RSL applied — including its deregulatory provisions. One such provision was codified at RSL §26-504.2(a). As is relevant here, RSL §26-504.2(a), enacted just two years prior to RPTL §421-g, permitted the "luxury" deregulation of a rent-stabilized apartment where a vacancy occurred and the legal regulated rent exceeded $2,000 per month. Crucially, however, if the "first rent" of a newly created apartment that would have otherwise been rent stabilized exceeded the $2,000 deregulatory threshold, the apartment was immediately deregulated and could be rented at a market rate.

Based on this understanding, developers availed themselves of 421-g tax benefits while creating thousands of new, mostly luxury apartments in lower Manhattan, which were in large part rented to wealthy tenants at market rates. Nevertheless, of the 25,000-plus apartments created pursuant to RPTL §421-g, approximately 2,500 had first rents that were low enough to keep them within rent stabilization. Thus, considerable new "affordable" housing was created as well.

There was no doubt among anyone in the real estate industry or the Legislature that luxury deregulation applied to 421-g apartments. In fact, Franz Leichter, the sole senator who voted against the LMRP, conceded on the Senate floor that luxury deregulation applied in 421-g buildings. This understanding was confirmed in correspondence between Mayor Giuliani and then-Senate Majority Leader Joseph Bruno. Administrative guidance issued by the Division of Housing and Community Renewal (which administers the RSL) and the Department of Housing Preservation and Development (which administers RPTL §421-g) further cemented this understanding and induced owners and developers to convert their commercial buildings to residential apartments pursuant to the 421-g program. Perhaps most importantly, RSL §26-504.2(a) itself contained three enumerated exceptions to luxury deregulation, and apartments in 421-g buildings were not among them. Accordingly, there was only one rational conclusion to be drawn: luxury deregulation applied to 421-g apartments.

Nevertheless, in 2016, a group of tenants in the 421-g buildings located at 50 Murray Street and 53 Park Place commenced an action against their landlord seeking, *inter alia*, a judgment declaring that their apartments had been wrongfully deregulated, the recalculation of their rents, reimbursement of all overcharges, treble damages, and attorneys' fees. Both sides moved for summary judgment. On July 3, 2017, Supreme Court, *inter alia*, held that the apartments are subject to rent stabilization and that the rents charged to the tenants since the commencement of their tenancies were unlawful.

The landlord appealed Supreme Court's ruling. By order entered on Jan. 18, 2018, the Appellate Division, First Department reversed Supreme Court and held that while "dwellings in buildings that receive tax benefits pursuant to [RPTL] §421–g are subject to rent stabilization for the entire period the building is receiving 421–g benefits," the absence of 421-g buildings from the listed exceptions in RSL § 26-504.2(a) was dispositive: "421-g buildings are subject to the luxury vacancy decontrol provisions of [RSL] §26–504.2(a), unlike buildings that receive tax benefits pursuant to [RPTL] §§421–a and 489." *Kuzmich v. 50 Murray Street Acquisition LLC*, 157 A.D.3d 556. While the tenants argued that the

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language of RPTL §421-g alone exempted apartments created pursuant thereto from luxury deregulation, the Appellate Division, reading the relevant statutes together, disagreed and held that "[RPTL] §421–g does not create another exemption to [RSL] §26–504.2(a)." *Id*. The Appellate Division thereafter granted the tenants leave to appeal to the Court of Appeals.

Continuing the see-saw of judicial opinions, on June 25, 2019 the Court of Appeals reversed the Appellate Division's order and, in a 6-1 ruling authored by Judge Leslie Stein, held that 421-g apartments are *not* subject to luxury deregulation. The Court of Appeals adopted the tenants' statutory argument, emphasizing RPTL §421-g's statement that apartments in buildings receiving tax benefits "shall be fully subject to control" under the RSL "notwithstanding the provisions of" that regime or any other "local law … unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit." This language, according to the Court of Appeals, evinced the Legislature's intent to exclude 421-g apartments from luxury deregulation, since it emphasized "control" under the RSL and expressly exempted only condominium and cooperative apartments.

In a vigorous dissent, Chief Judge Janet DiFiore approved of the Appellate Division's reasoning and opined that the majority opinion "misinterprets the statutory text [and] disregard[s] the broader regulatory scheme and legislative purpose of the relevant statutes." The Chief Judge concluded her dissent by noting the likely consequence of the Court's ruling:

> … [T]he next time government looks to the private sector and asks developers to take risk and finance a revitalization program, potential investors will think twice about relying on a commonsense reading of legislation, clear legislative history and the representations of implementing agencies — none of which protected them here from the majority's retroactive reading of statutory text that dramatically changes the terms of the bargain long after the legislature's goals have been achieved.

Kuzmich is now back in the lower courts. With the Court of Appeals having spoken on the regulatory coverage issue, the next round in this ongoing battle will concern the proper calculation of rent overcharges to be refunded to the newly rent-stabilized tenants — itself an unsettled and ever-changing area of law that may be the subject of a future article.

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REAL PROPERTY LAW

Former Owners Not Entitled To Surplus from Tax Foreclosure Sale

Hoge v. Chautauqua County
173 A.D.3d 1731
AppDiv, Fourth Dept.
(memorandum opinion)

In an action by former property owners for surplus moneys from a tax foreclosure sale, former owners appealed from Supreme Court's grant of the county's motion to dismiss. The Appellate Division affirmed, holding that former owners are not entitled to proceeds from a resale.

The county obtained title to the subject property by a default judgment of foreclosure pursuant to Real Property Tax Law article 15. The county then resold the property at auction. Former owner then brought this action for surplus proceeds. Supreme Court granted the county's motion to dismiss, and former owner appealed.

In affirming, the Appellate Division held that the surplus monies provisions of RPAPL article 13 are applicable only to mortgage foreclosure proceedings, not to tax foreclosure proceedings. The court held that under article 11, when a property owner does not redeem the property or submit an answer in the tax foreclosure proceeding, the tax district is entitled to a deed conveying fee simple absolute and the property owners are barred from any claim to the property. Hence, the court held that when the county obtained a valid judgment of foreclosure, the former property owners were not entitled to any compensation upon resale of the property.

Comment

RPAPL §1361 explicitly allows a person to file a notice of claim on surplus moneys subsequent to a mortgage foreclosure sale. RPTL article 11, a tax foreclosure statute, has no parallel surplus moneys provision. In the absence of such provision, so long as the taxpayer was provided adequate notice of an in rem tax foreclosure proceeding, the taxpayer's exclusive remedy is the right of redemption. In Sheehan v. County of Suffolk, *67 N.Y.2d 52, the Court of Appeals affirmed the denial of taxpayers' request for surplus moneys after the taxpayers failed to redeem during a three-year redemption period with a nine-month extension. The court held that the owner has or reasonably should have knowledge of the statutory provisions affecting its title and emphasized that the redemption period gives the owner a requisite opportunity to reclaim the property. Although RPTL §1110's current redemption period is two years after lien date, the court in* In re Foreclosure of Tax Liens, *72 A.D.3d 1636, dismissed a property owner's claim that the current period is so short that it deprived her of due process.*

If the tax district did not comply with RPTL 1125's notice provisions, RPAPL 1136[3] gives a delinquent

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taxpayer 30 days from entry to reopen a default. When moving to vacate, the owner must rebut the presumption that the tax district complied with the broad notice provisions of RPTL §1125, which require that if 'adequate' steps were taken to notify the owners of the charges due and the foreclosure proceedings, then the tax district had statutory authority to foreclose. The burden to prove that the tax district did not comply with notice provisions is a heavy burden. In Matter v. City of Rochester (Duvall), *92 A.D.3d 1297, the Fourth Department affirmed the order of denial to vacate judgment of a tax foreclosure after petitioner, who was illiterate, was sent multiple notices of his nonpayment of taxes, of the upcoming foreclosure sale, and a 10-day notice to quit following the sale. The Fourth Department held that it was reasonable for the tax district to believe that someone had read petitioner's mail to him and thus the rebuttal failed. However, a delinquent taxpayer can successfully rebut the presumption if it shows that the affidavit of service is defective. In* Matter of County of Seneca, *151 A.D.3d 1611, the Fourth Department reversed the denial of a property owner's motion to vacate judgment when the affidavit of service the tax district submitted did not reference the mailing of both ordinary mail and certified first class mail as required by RPTL 1125[1][b], and was mailed to "Rte 89" in Seneca Falls, an improper address since the tax district had notice of property owner's change of address to New Jersey.*

The U.S. Supreme Court upheld the right of a tax district to retain surplus money in Nelson v. City of New York, *352 U.S. 103. The Court affirmed the dismissal of taxpayers' claims for surplus moneys when the City of New York, in compliance with all notice provisions, retained all proceeds and surplus from the sale of the foreclosed property. The court indicated that although the statute was severe, "relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed."*

Joint Tenants Need Not Own Equal Interests

Chew v. Chea

NYLJ 8/30/19, p. 25, col. 6
AppDiv, Second Dept.
(memorandum opinion)

In an action for partition and sale, plaintiff co-tenant appealed from Supreme Court's grant of summary judgment to defendant co-tenant on defendant's counterclaim for a declaration that each of the parties owns a 50% interest in the property. The Appellate Division reversed, holding that questions of fact precluded summary judgment.

In 2006, the parties purchased the subject property as joint tenants with right of survivorship. Six years later, plaintiff co-tenant brought this partition action, and defendant co-tenant responded with a counterclaim for a declaration that each party owned a 50% interest in the property. Plaintiff co-tenant submitted a sworn affidavit averring that defendant co-tenant did not make any contributions toward the purchase price or maintenance of the property, and that defendant co-tenant's name was on the deed as a matter of convenience. Supreme Court nevertheless granted summary judgment to defendant co-tenant, and plaintiff co-tenant appealed.

In reversing, the Appellate Division concluded that plaintiff co-tenant's affidavit raised questions of fact about the parties' respective interests, rights and shares in the property. As a result, Supreme Court improperly granted summary judgment to defendant co-tenant

Comment

A joint tenant can rebut the presumption of equal interest by showing that he or she made a disproportionate contribution to the acquisition and improvement of the property. In Novak v. Novak, *135 Misc.2d 909, where a divorced couple sought partition of joint tenancy property acquired prior to their marriage, the court rejected the wife's argument that because the property was held in joint tenancy, the parties each had an undivided one-half interest in each party. The court emphasized that as the couple made disparate contributions to the improvements of the property, their equities in the property changed. Similarly, in* Furnace v. Comins, *263 A.D.2d 856, where the children sought fire insurance proceeds of real property held as joint tenants with their father, the court held that the children were not entitled to shares in the insurance proceeds because the father had purchased the policy, and also showed that the children did not contribute to the acquisition or improvement of the property.*

However, if the relationship between the parties suggests that the joint tenant who made more substantial contributions was making a gift to the other joint tenant, the parties retain equal interests in the property. In Melnick v. Press, *809 F.Supp.2d 43, where a girlfriend sought partition of real property held jointly with her boyfriend, the court, applying New York law, held that the boyfriend was not entitled to greater share of sale proceeds for his allegedly disparate contributions to the acquisition and improvement of the property and to the carrying costs. The court emphasized the quasi-marital nature of the parties' relationship and the parties' lack of effort to keep track of how much money either had contributed to the property.* Id. *at 60. The court further found that the boyfriend failed to establish that he paid more than his share of carrying costs and held that even if he did so, it would be inequitable to require the girlfriend to reimburse her boyfriend for these costs while they cohabitated, absent evidence showing such expectation.* Id. *at 61-62.*

By contrast, when evidence establishes that no gift was intended,

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the party who made greater contributions is entitled to imposition of a constructive trust on the interest of his or her joint tenant. In Hornett v. Leather, *145 A.D.2d 814, where a married man purchased real property to cohabitate with his girlfriend as joint tenants and paid for all expenses associated with the property, the court found clear evidence that the married man did not intend to make a gift to the girlfriend of his contributions to the property, and therefore imposed a constructive trust for the benefit of the married man. Based on the testimonies of the married man and the attorney who prepared the title transfer to joint tenancy, the court found that the married man's title transfer was based on the understanding that, if the parties' relationship should end, the girlfriend would reconvey her title in the property to the married man.* Id. *at 814-815. The court also credited the testimony that when the parties' relationship deteriorated after the girlfriend went to law school, she agreed to reconvey her interest in the property to the married man in return for his continued support of her through law school.* Id. *at 815.*

Fraud Action Not Premature Merely Because Truth of Representations Are the Subject of Pending Proceedings

Garendean Realty Owner LLC v. 14 Lincoln Place, LLC
NYLJ 8/30/19, p. 26, col. 2
AppDiv, Second Dept.
(memorandum opinion)

In purchaser's action against seller for breach of contract and fraud, purchaser appealed from Supreme Court's grant of summary judgment to seller. The Appellate Division reversed, holding that the action was not premature, even though the truth of seller's alleged misrepresentation was the subject of pending proceedings.

After the purchase of a multi-family apartment building, tenants in one of the apartments filed a complaint with DHCR contending that they were entitled to a renewal lease under the Rent Stabilization Code. Purchaser then brought this action based on seller's alleged misrepresentation that the subject apartment was exempt from rent regulation. Supreme Court granted seller's motion to dismiss on the ground that the action was premature and did not present a justiciable controversy. Purchaser appealed.

In reversing, the Appellate Division held that the viability of purchaser's claim was not contingent on DHCR's ultimate resolution of the tenants' complaint. The court emphasized that purchaser had adequately alleged that it sustained damages at the time the action was commenced by having been fraudulently induced into entering the contract of sale, and into paying an inflated price of the building, as a result of the alleged misrepresentation.

Comment

When a court faces a fraud claim that depends on resolution of a legal issue over which another decisionmaker has concurrent jurisdiction, the court has, as a practical matter, three basic choices: dismiss the action, decide the action on its own, or stay the action pending resolution by the other decisionmaker. In 165 William Street, LLC v. Baumane, *2008 N.Y. Misc. LEXIS 10083 (2008), the court stayed determination of landlord's fraud claim against tenants pending a determination by DHCR, an agency that had before it other aspects of the underlying dispute between landlord and tenants. In* 165 William, *tenants had filed a complaint with DHCR, contending that they were entitled to a renewal lease. Landlord resisted, contending that tenants had taken occupancy pursuant to an unlawful arrangement with the tenant of record, who was collecting more than the stabilized rent from tenants. Landlord brought an action in Supreme Court, raising a number of claims, including a fraud claim against tenants. Although the court did not dismiss the fraud claim because the details of the claim "allege[d] certain additional facts that are beyond what is before the DHCR to decide," but because the agency's determination could impact the fraud claim, the court decided to stay the claim pending the DCHR's decision.*

When the Second Department in Garendean *decided not to dismiss the fraud claim despite a related pending DHCR complaint, it did so because it found that whether or not the landlord-plaintiff sufficiently alleged a cause of action was not contingent on the outcome of the DHCR complaint. The Second Department did not decide the fraud claim; it simply did not dismiss it. The court effectively left the trial court with the same alternative the court took in* 165 William *— staying the landlord's fraud claim against the previous landlord until the DHCR makes a determination. That alternative would preserve the fraud claim while taking advantage of DHCR's expertise.*

Transferee from Incapacitated Person's Attorney-In-Fact Not a Bona Fide Purchaser

Irwin v. Regal 22 Corp.
NYLJ 8/30/19, p. 29, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In an action to quiet title to real property brought by the guardian of a former owner, a transferee appealed from Supreme Court's grant of the guardian's summary judgment motion. The Appellate Division affirmed, holding that transferee was not a bona fide purchaser protected by the recording act.

Pollard, the former owner of the property, executed a power of attorney on July 23, 2012. Acting

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on that power, Pollard's attorney-in-fact conveyed the property to transferee on Sept. 17, 2014. Then, on Oct. 19, 2016, in a guardianship proceeding, Pollard was declared an incapacitated person as of June 1, 2012. Guardian then brought this action to quiet title. Transferee claimed title as a bona fide purchaser, but Supreme Court granted summary judgment to guardian, restoring ownership to former owner. Transferee appealed.

In affirming, the Appellate Division noted that transferee had failed to produce a deed delivered to it, and failed to submit evidence that it paid $10,000 to purchase the property. As a result, transferee failed to raise a triable issue of fact on its claim to be a bona fide purchaser.

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DEVELOPMENT

Mining Prohibition Not Pre-Empted By State Law and Not In Violation of SEQRA

Frontier Stone, LLC v. Town of Shelby
174 A.D.3d 1382
Fourth Dept.
(memorandum opinion)

In a combined article 78 proceeding/declaratory judgment action challenging the town's prohibition on mining in a wildlife refuge overlay district, plaintiff stone mining company appealed from Supreme Court's dismissal of the petition. The Appellate Division affirmed, rejecting the company's contentions that the zoning prohibition was inconsistent with the town's comprehensive plan, was enacted in violation of SEQRA, and was pre-empted by state law.

In 2006, the mining company applied for a mining permit for a stone quarry in an agricultural/residential district (AR) within the town. The town then enacted a moratorium on processing special permit applications for mining projects. Then, in 2007, the town removed mining and excavation from the list of conditional uses within the AR district, limiting mining to a newly created ME overlay district, and requiring a special use permit and an approved site plan. In 2017, the town created a wildlife refuge overlay district. The mining company's parcel lies in a buffer area of land within the wildlife district. Mining and excavation is prohibited within the site. The company challenged the 2017 district on several grounds, but Supreme Court rejected those claims, prompting appeal.

In affirming, the Appellate Division first rejected the contention that the 2017 ordinance was inconsistent with the town' comprehensive plan. The court noted that the 2007 ordinance, which the parties agreed was part of the town's comprehensive plan, banned mining on the project site. The court then concluded that the Town Board had identified the relevant areas of environmental concern, and had taken the required "hard look" at environmental issues. The court rejected the mining company's argument that the town had failed to consider the positive impact its proposed operation would have on water levels in the district, concluding that the town board had discretion to overlook environmental impacts of doubtful relevance. Finally, the court rejected the argument that the new law is preempted by the state's Mined Land Reclamation Law. Because the prohibition is on mining within a district, and does not regulate the process or method of mining, the court held that the prohibition was not pre-empted by the state statute.

Comment

The Mined Land Reclamation Law (MLRL) provides that state law shall supersede all local laws pertaining to the extractive mining industry with two exclusions: 1) local laws of general applicability; and 2) local zoning ordinances or laws which determine permissible uses in zoning districts. ECL 23-2703. Courts have construed the statute to not override a locality's laws prohibiting or permitting mining within that locality's jurisdiction, but state law can preempt local law which would regulate specific methods of mining activity.

Frew Run Gravel Products, Inc. v Town of Carroll, *71 NY2d 126, 129 expressly held that the MLRL was not intended to and did not preempt local zoning ordinances establishing specific districts where mining practices were not allowed. In* Frew Run, *the court sustained the Town of Carroll's zoning law creating separate districts where mining operations could be conducted and others where mining was prohibited against a challenge by a landowner who sought to conduct sand and gravel extracting operations in a zone where such operations was prohibited. The MLRL also allows a local government to prohibit mining in the entirety of a municipal area, and not just individual zones. For example, in* Gernatt Asphalt Products, Inc. v Town of Sardinia, *87 NY2d 668, 683, the court held the MLRL did not preempt town's amendment prohibiting all mining operations throughout the entire town. The court relied upon ECL 23-2703's express preservation of municipal authority to regulate permissible uses of land.*

The MLRL does preempt municipal regulation designed to mitigate the effect of mining operation. In Philipstown Indus. Park, Inc. v Town Bd. of Town of Philipstown, *247 AD2d 525, 527, a mining company successfully challenged a local law conditioning the granting of local mining permits on a list of criteria set by the town, including: screening off the mining operation from public view and making*

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sure the property would not be so exploited as to prevent future use of the property for other purposes. The Phillipstown *court held that by conditioning the grant of a special use permit on specific aspects of a mine's operation and reclamation, the city was regulating the specific types of activity a mining operation could conduct.*

At least one trial court has also held that the MLRL's preemption section can render agreements between municipalities and mining entities unenforceable. In Manitou Sand & Gravel Co., Inc. v Town of Ogden, *9 Misc 3d 1112(A), the court upheld a mining company's challenge to the validity of an agreement it made to not use a specific mining method in return for the town's grant of a mining permit. Since the mining permit was predicated on a local restriction of the mining method, the court held that state regulations superseded the regulation in the agreement.*

Dog Training Facility Not a Customary Home Occupation

McFadden v. Town of Westmoreland Zoning Board
2019 WL 3955311
AppDiv, Fourth Dept.
(memorandum opinion)

In landowners' article 78 proceeding challenging conditions imposed on a use variance, landowner appealed from Supreme Court's denial of the petition. The Appellate Division affirmed, holding that landowners' proposed dog training use required a variance, and the conditions imposed on the variance were reasonable.

Landowners owns a dwelling in an R-2 district. The ordinance permits "customary home occupations" in R-2 districts. Landowners sought to lease a portion of their property, but not the dwelling, for use as a dog training business operated by a third party. When they sought a variance, the zoning board granted the variance on condition that the business could entertain a maximum of six dogs at a time and could not provide overnight boarding. Landowners brought this article 78 proceeding to challenge the determination, but Supreme Court denied the proceeding. Landowners appealed.

In affirming, the Appellate Division first rejected landowner's argument that the town erred in requiring a use variance. The court held that the proposed dog training business did not qualify as a "customary home occupation," which the ordinance defines as "[a]n occupation nor a profession which … [i]s customarily carried on in a dwelling unit or a building or other structure accessory to a dwelling unit." The court noted first that dog training business is not the sort of occupation customarily carried on in a dwelling unit, and emphasized further that landowners themselves were not attempting to carry on the occupation, but instead wanted to lease space to others. Because the court concluded that landowner could only maintain the facility with a variance, the court then turned to the conditions imposed on the variance, and held that they were reasonable.

Landowner Not Entitled to Variance When Hardship Is Not Unique to the Parcel

54 Marion Avenue, LLC v. City of Saratoga Springs
2019 WL 4307913
AppDiv Third Dept.
(Opinion by Devine, J.)

In an article 78 proceeding challenging denial of a use variance, landowner appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, concluding that landowner's hardship was not unique to its parcel, and that any hardship was self-created.

Landowner owns a vacant lot in a residential zoning district. Landowner sought a variance to permit a nonconforming dental office on the site, contending that the parcel's proximity to the intersection of a residential street and a thoroughfare created traffic and congestion that made the parcel unsuitable for residential development. The zoning board of appeals denied the variance, concluding that any hardship was not unique to the parcel, and that any hardship was self-created. Supreme Court upheld that determination and landowner appealed.

In affirming, the Appellate Division emphasized that the record included maps, photos, and correspondence from nearby homeowners complaining how traffic and commercialization have affected them. The court concluded that in light of that evidence, the ZBA could rationally conclude that the commercialization and traffic did not create a hardship unique to landowner's parcel. The court also noted that the owner had allowed a residential building on the premises to deteriorate, and then demolished the building, justifying a conclusion that the hardship was self-created.

Comment

Although an owner cannot obtain a variance without demonstrating that its hardship is unique (Town Law §267–b[3]; N.Y. Gen. City Law §81–b[4][b], N.Y. Village §7-712-[b]), a showing that the hardship is not generally applicable throughout the district suffices; landowner need not show that the hardship applies only to one parcel. For instance, in Douglaston Civic Ass'n. v. Klein, *51 N.Y.2d 963 (1980) the court held that the board did not act arbitrarily in granting a variance when the owner's hardship — the swampy nature of his property — was shared by other property in the area.*

As in Douglaston, *the uniqueness must relate to a physical condition. That requirement reflects the reality that when ordinances are enacted, the drafters are unlikely to be aware of the physical conditions of each parcel within the municipality. By contrast, courts have upheld variances denials where the only evidence of uniqueness was that the use of a lot was hindered by the presence of different uses maintained*

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Development

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by owners of a nearby properties. In Vomero v. City of New York, *13 N.Y.3d 840 (2009) the court held that the owner of a residentially zoned corner property was not entitled to a use variance where the commercial use in the neighborhood afflicted neighboring parcels as well as his own.*

At least one court has held that uniqueness is unnecessary when landowner establishes sufficiently severe hardship. In Family of Woodstock Inc. v. Auerback, *225 A.D.2d 854, 856 (1996), the Third Dept. overturned a variance denial to a non-profit seeking to establish a residence for homeless adolescents in a commercial area when the nonprofit managed to show that it would receive a zero return on investment if the property was used for commercial purposes, and only a 3% return if utilized as residential rental property. The court relied on dictum in earlier Court of Appeals cases to suggest that uniqueness is not always required, but the unique nature of landowner's mission might have played a role in the court's decision.*

ZBA Did Not Consider Statutory Variance Factors

Matter of Pangbourne v. Thomsen
NYLJ 8/23/19, p. 23, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In landowners' article 78 proceeding challenging denial of area variances, landowners appealed from Supreme Court's partial denial of their petition. The Appellate Division reversed and remitted to the zoning board of appeals ZBA) for a new determination, holding that the ZBA had not considered the statutory factors.

Landowner Pangbourne, who owns a two-family house, agreed to sell a portion of her property to landowner Ressa-Cibants, owner of the adjacent lot. Ressa-Cibants planned to demolish the single-family home on its parcel and to replace it with two two-family homes. Ressa-Cibants applied to the ZBA for height and coverage variances to permit construction of the new houses, and Pangbourne applied for a rights ide variance to permit maintenance of her current house. The ZBA denied the applications. Landowners brought this article 78 proceeding. Supreme Court annulled denial of the right-side variance, but denied the remainder of the petition. Landowners appealed.

In reversing, the Appellate Division held that the record failed to reflect any weighing by the ZBA of the statutory factors enumerated in section 7-712-b(3)(b) of the Village Law. In particular, the court concluded that the board had not considered whether there was any feasible way to achieve the benefit sought by Ressa-Cibants without granting height and coverage variances. As a result, the court remitted to the ZBA for new determinations.

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CO-OPS AND CONDOMINIUMS

Action Dismissed When Unit Owners Did Not Allege Wrongful Actions Outside Scope of Board Member's Duty As Board Member

Rhodes v. Swope
NYLJ 8/20/19, p. 21, col. 2
Supreme Ct., Warren Cty.
(Muller, J.)

In an action by owners of a townhouse in a common interest community against a member of the homeowners' association board and the association itself, the defendant board member moved to dismiss the causes of action asserted against her individually. The court granted the motion, holding that unit owners had not alleged any wrongful actions outside the scope of the board member's duty as a board member.

The Adirondack Park Agency granted permits to the association for a plan that would allow certain trees to be removed while others remained, creating filtered views of Lake George from the association properties. The association hired a contractor to complete the trimming. Unit owners contend that defendant board member directed the removal of a tree located beside their townhouse, even though removal of that tree was not authorized by the Agency permit. Unit owners also asserted a number of claims against the association itself. On this motion, the defendant board member sought to dismiss the complaint against her personally.

In granting her motion, the court concluded that unit owner had failed to allege with specificity any conduct outside defendant board member's position as a board member. Their trespass claim against the board member failed because the unit owners do not own the land on which the subject tree existed.

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