

Outline for Association of Town Presentation
Pitfalls in Planning and Zoning Administration

Presented by:

John C. Cappello, Esq.
Jacobowitz and Gubits, LLP
158 Orange Avenue, P.O. Box 367
Walden, New York 12586
www.jacobowitz.com

Ralph Huddleston, Jr.
Town of Goshen Planning Board Chairman
P.O. Box 217

Goshen, New York 10924

Stuart Turner, AICP
Stuart Turner & Associates
2 Executive Boulevard
Suite 401
Suffern NY 10901

I. Introduction – John Cappello

The general rule with respect to review of all zoning permits and approvals issued by a planning board is that a court will not substitute its own judgment for that of the planning board. See *Thomas v. Brookins*, 175 AD2d 619 (4th Dept 1991); *Brucia v. Planning Board of the Town of Huntington*, 157 AD2d 657 (2d Dept 1990). If the decision of the planning board is within the scope of authority delegated to it, it will not be annulled by a reviewing court unless the decision is arbitrary or unlawful and unsupported by the record. See *New City Office Park v. The Planning Board of the Town of Clarkston*, 144 Ad2d 348 (2nd Dept. 1988) and *Mascony Transport Ferry Service v. Richmond, et al*, 71 AD2d 896 (2nd Dept 1979). From a practical standpoint, if a planning board has set rules and procedures, follows these procedures, uses its consultants and documents the reasons supporting any decision, the likelihood of having those decisions overturned is greatly reduced if not entirely removed. This presentation, therefore, is aimed at providing practical recommendations to insure orderly function of a planning board and to avoid the potential pitfalls which could undermine the decisions of your planning board.

II. Know what you can and can't do – Planning Board Authority

A. What You Can Do

1. Review Subdivision Plans – Town Law §276(8)

(a) Watch out for default approvals. See *D.E.P. Resources v. Planning Board of the Village of Monroe*, 131 AD 2d 757 (2nd Dept. 1987). A board voted 2 to deny; 1 to approve; 1 member disqualifies himself and 1 was absent. The court held that this was a non-action and granted a default approval to the application.

(1) When is an application complete? Town Law Section 276(5)(c), a negative declaration has been filed or a notice

of completion of a Draft Environmental Impact Statement has been filed.

- (b) What constitutes a denial? See *Aloya v. Planning Board of the Town of Stony Point*, 230 AD2d 790 (2nd Dept. 1996). Subdivision was referred to the county Planning Board who recommend denial thus requiring a vote of a majority plus one. A seven (7) member board voted 4-1 to approve (5 required). The court held that this constituted a denial.
 2. Review Site Plans – Town Law §274-a
 - (a) Be aware of what items State Law and your municipality have authorized your Board to consider in reviewing site plans. See *Morianity v. Planning Board of the Village of Sloatsburg*, 119 AD2d 188 (2nd Dept 1986). See also *Pomona Pointe Associates, Ltd. v. Incorporated Village of Pomona*, 185 Misc. 2d 131 (Sup Ct Rockland County, June 9, 2000).
 3. Review Special Use Permits – Town Law §274-b
 - (a) A special use permit is a use that is permitted subject to requirements set forth in the Zoning Code. Be aware that denial cannot be based on the nature of the use itself. See *Tanama Oil Corp. v. Town Board of Town of Irondequoit*, 204 AD2d 1049 (4th Dept 1994).
 - (b) Make sure any conditions imposed on any approval are carefully drafted and directly related to the impacts of the proposed permit and/or approval. See *Dolan v. City of Tigard*, 512 US 687 (1994); *St. Onge v. Donovan*, 71 NY2d 507, (1988).
 - (c) Base your decision on facts contained in the record – Generalized opposition may not serve as the basis for dismissal. See *Church of Jesus Christ of Latter Day Saints v. Planning Board of the Town of Clifton Park*, 260 AD2d 769 (3rd Dept 1999). See also *Bower Associates v. Planning Board of the Town of Pleasant Valley*, 2001 WL 1674436, Supreme Court Dutchess County, December 31, 2001.
 4. Review and Comment on Comprehensive Plan – Town Law §271 and §272-a.
 - (a) Make every effort to involve the whole community.
 5. Recommend amendments to the Zoning Code and/or subdivision regulations – Town Law §271.
 6. Set Performance Bond amount for public improvements – Town Law §277.
 7. Act as lead agency in the SEQR process – Environmental Conservation Law Article 8; 6NYCRR Part 617 *et seq.*
 8. Procedural Local Rules – T.L. 271(13)
 9. Powers of Chairman: Oaths and subpoena – T.L. 271(10)
- B. What You Cannot Do
1. Make Law – Town Law §264
 2. Grant a Variance – Town Law §267-a and b
 3. Render Interpretations – *Matter of Gershowitz v. Planning Board*, 52 NY2d 763 (1980). See also *Matter of Apostolic Holiness Church v. Zoning Board of Town of Babylon*, 220 AD2d 740 (2nd Dept 1995); *J&R Esposito Builders, Inc. v. Coffman*, 183 AD2d 828 (2nd Dept 1992).

4. Deliberately delay or sabotage an application. *DLC Mgt. v. Hyde Park*, 163 F.3d 124, 131 (1988).

III. Function Efficiently – John Cappello

“An ounce of prevention is worth a pound of cure.”

OR

“One good Planning Board clerk saves the Town a lot of legal fees.”

- A. Make sure you have clear applications, forms and rules and procedures.
- B. Provide the opportunity for the applicant to meet with the Building Department so they know what they need to apply for.
- C. Make sure the clerk receives and distributes relevant materials;
 1. To all Planning Board members
 2. To the consultants
 3. To the applicant
 - (a) Public hearing notices
 - (b) Correspondence from consultants
 - (c) Fee and escrow notices
 - (d) Decision within 5 days
 - (e) Filing of resolution and the Statute of Limitations.
 4. SEQRA – Notices to individuals and interested agencies.
 5. GML – Referrals to County Planning.
 - (a) Failure to refer is a jurisdictional defect *Burchetta v. Town of Carmel*, 167 AD2d 339 (2nd Dept 1990).
 6. Agricultural Data Statements.
 7. Easement agreements, road dedications , etc.
 - (a) Coordinate with the Town Clerk

IV. How to Run a Planning Board Meeting – Ralph Huddleston

“Don’t let the dogs out”

- A. Know your fellow board members
 1. How do they function
 2. What do they need to function more effectively
 3. How do you keep your board focused
 4. How do you control a loose cannon
- B. Use your consultants
 1. Provide info earlier.
 2. Discuss complex matters in advance, if possible.
 3. Consultant’s advise protects the board’s right to approve or disapprove despite the applicant’s evidence.
- C. Use the expertise of the involved and interested agencies.
 1. Make sure they know your concerns.
- D. Preparatory Work
 1. Visit the site.
 2. Study the materials.
 3. Ask for help!!
- E. How to Run a Meeting
 1. Know your agenda
 - (a) Keep it manageable

- (b) Any controversial topics?
- 2. Know the crowd
 - (a) Is the project controversial – how controversial?
 - (b) Provide ample and fair opportunity for the public to express concerns
 - (1) Is Town Hall big enough?
 - (2) Do you need a special meeting to ensure ample time?
 - (3) Should you provide time for written comments?
 - (4) Do you need security?
 - (c) Keep the crowd focused on the issues and not personal animosity.
 - (1) Avoid repetitiveness
 - (d) Explore possibilities to provide for general public comment periods prior to and after the public hearing.

V. How to use a Consultant – Stuart Turner

- A. Get the Material to the consultant early
- B. Initial Review
 - (1) Coordinate with Building Inspector to make sure the application meets zoning requirements.
 - (2) Identify other regulatory agencies involved in the process and extent of their jurisdiction.
 - (3) Identify issues relating to conformance with comprehensive plan.
 - (4) Identify threshold environmental impacts
- C. Have your consultant at the meeting
 - (1) Ask them questions!!!!
 - (2) Review their correspondence
 - (3) Discuss consultant's comments and concerns with applicant.
- D. How to navigate the SEQR process – when to Pos. Dec. (error on the side of caution)
- E. Hire Special Consultant if you need them
 - (1) Telecommunications
 - (2) Traffic
 - (3) Noise
 - (4) Hydrology

VI. Hot Button Legal Issues – John Cappello

- A. Consultant's Fees
 - (1) SEQR – 6 NYCRR 617.13
 - (2) Non-SEQR – *Home Builders v. Town of Onondaga*, 267 AD2d 973 (4th Dept) 1999.
- B. Agricultural Uses – *Town of Lysander v. Hafner*, 96 NY2d 558 (2001).
- C. Telecommunications
 - (1) Impact of Federal Telecommunications Act
- D. SEQRA
 - (1) When to Pos Dec. (Error on the side of caution)
 - (2) What is the impact on adjoining municipalities? *The City of New Rochelle v. Town of Mamaroneck*, 2001 WL 1665463 (Sup Ct. Westchester County October 12, 2001).