

**19  
89** | **OVER  
TWENTY  
FIVE  
YEARS**



## **Law: Zoning laws: Courts ensure the rules of the game are known to all competing interests**

January 27, 2014 - Spotlights

Zoning laws change constantly. The various government agencies tasked with creating, interpreting, implementing and enforcing the various zoning laws face a thankless job where few are happy with the result. The various, and usual complaints are numerous, either the laws, and the relevant zoning boards, favor business and development too much, at the expense of homeowners, or homeowners complain about restricting what can be done with their homes, or business and developers complain of an ever increasing maze of complexity and rules and ordinances which are constantly changing. Applicants complain that the "other guy" is treated better, or that the competition was given a more favorable ruling, refusing to acknowledge the difference in the different pieces of property. And then, of course, there is the

variance - ie, the zoning isn't to my liking, so I am going to get permission to use it how I want.

Every so often, the courts enter the fray to make sure the rules of the game are known to all of the competing interests. In *Rocky Point Drive-In, LP v Town of Brookhaven*, the court clarified the standard of review of a zoning denial. The standard is that "(a)s a general matter, a case must be decided upon the law as it exists at the time of the decision." The zoning regulations that govern, and will determine if a specific land use is acceptable, is "the law in effect when the application is decided...regardless of any intervening amendments to the zoning law," and not the zoning regulations in effect at the time the application was made, if the zoning was changed between the time of the application and the time of the decision. There is an exception to this rule, the "special facts" exception, which the court expanded upon as well.

In *Rocky Point*, the landowner, *Rocky Point Drive In, LP*, owned a 17 acre parcel of land. For many years, *Rocky Point*, and its predecessor in interest, tried unsuccessfully to obtain approval from the town to develop the parcel as a Lowe's Home Improvement Center. In 1997 the town created a new zoning classification. In February of 2000, the town discussed, for the first time, rezoning the *Rocky Point* parcel to the new zoning classification. Under the new classification, the proposed Lowe's Center would not have complied with the town zoning. In March of 2000, *Rocky Point's* predecessor in interest submitted a site plan application to the town for the Lowe's Center to be built on the Parcel. *Rocky Point's* predecessor successfully challenged the rezoning twice, because it was not passed with a super majority. In June of 2002 the town board amended the town code to allow for a simple majority to amend the zoning, and then, in October 2002, the *Rocky Point* parcel was rezoned to the new classification.

*Rocky point* filed an action seeking a declaratory judgment declaring that the site plan application was subject to the previous zoning classification. Ultimately, *Rocky Point* was successful at a non jury trial. The town appealed and the Second Department reversed the Supreme Court's decision. The Court of Appeals upheld the Second Department decision.

The Court of Appeals determined that *Rocky Point* was not entitled to the "special facts" exception, and its site plan was there for subject to review under the zoning classification at the time the application was decided - under the new classification. In order to qualify under the special facts exception, a landowner has to establish "entitlement as a matter of right to the underlying land use application" and "extensive delay indicative of bad faith," "unjustifiable actions by the municipal officials" or "abuse of administrative procedures."

Rocky Point was unable to establish that it qualified for the land use permit under the existing zoning when it applied for the permit - ie even if the site application was determined under the previous zoning of the property, Rocky Point would not have been approved as of right - and therefore, the court determined that the Rocky Point was unable to meet the threshold of the "entitlement as a matter of right to the underlying land use application." The court upheld the Second Department determination that the site plan was reviewed under the correct standard and the special facts exception was not applicable in this instance.

Steven Glassberg is the founder of Glassberg & Associates, LLC, New York, N.Y. and Port Washington, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540