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January 21, 2014

Zoning Board of Appeals
Town of Lewisboro
Cross River Shopping Center
20 North Salem Road
Cross River NY 10518

The Three Lakes Council, Inc.
Harold Rosenbaum
NOTICE OF APPEAL

Please be advised, Three Lakes Council, Inc. and Harold Rosenbaum, hereby appeal to the Zoning Board of Appeals from the determination of the Building Inspector dated October 19, 2012, copy attached. That determination ruled that a party who has illegally subdivided their land by deed – without the benefit of formal subdivision approval – is not required to comply with current laws when they attempt to legalize the subdivision.

We respectfully disagree with the Building Inspector's interpretation of Code Section 220-10E(2)(a), and request the ZBA vacate it and reach a different interpretation. Specifically, we believe that the developer should be required to comply with all current Code requirements.

This appeal arose in the context of an application filed with the Planning Board by Rudolph Petrucelli, concerning certain property located on Oscaleta Road, tax map 33B - 1157 - 46.

Notice of Appeal Procedure

Under the Code, the appellants have standing, as adjoining property owners, to file this appeal pursuant to Code Section 220-74E, which provides in pertinent part:

> Application. Appeals shall be taken within such time as shall be prescribed by the Board of Appeals by general rule, by filing with the Board of Appeals a notice of appeal specifying the grounds thereof, accompanied by a fee in accordance with the fee schedule adopted by the Town Board of the Town of Lewisboro. Each appeal shall specify the provision of the ordinance involved, the ruling sought from the Board and the grounds upon which it is claimed that the same should be granted. Affidavits of publication and service of notice by mail and such other data or information shall be submitted as the Board may deem necessary. The officer from whom the appeal is taken shall forthwith deliver to the Board of Appeals all papers constituting the record on which the action appealed from is taken.

I have not been able to find any ZBA rule prescribing the time within which to file an appeal; however, in this case, New York State law supplies the time limit, which is 60 days. Town Law 267-a(5)(b) provides:

> An appeal shall be taken within 60 days after the filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The administrative official from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken.

To the extent the Town has adopted a local law with a shorter time limit, this would be superseded by state law.[1] I recently handled a case directly addressing this question. See Daria v. Pleasant Valley, slip op. (copy enclosed).

The appeal is timely, because the appellants had no knowledge of the subject determination

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[1] The New York Court of Appeals has held that this provision was intended to preempt all inconsistent local laws, i.e., "field preemption." See Cohen v. Board of Appeals, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003). Where, as here, the local law is directly inconsistent with a State statute, it is preempted by the State law – even if the Town purports to exercise its Home Rule power, i.e. "conflict preemption." See Chwick v. Mulvey, 81 A.D.3d 161, 915 N.Y.S.2d 578 (2d Dept. 2010). There, the Second Department explained the doctrine of conflict preemption:

> The "home rule provision" of the State Constitution (see N.Y. Const., art. IX, § 2), "confers broad police power upon local government relating to the welfare of its citizens" .... However, this local power is subject to a fundamental limitation by the preemption doctrine (see Matter of Cohen v. Board of Appeals of Vil. of Saddle Rock, 100 N.Y.2d 395, 400, 764 N.Y.S.2d 64, 795 N.E.2d 619). In pertinent part, the home rule provision provides that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government" (N.Y. Const., art. IX, § 2 [c] [i]). FN9 "Broadly speaking, State preemption occurs in one of two ways—first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility" ....
> FN9. Municipal Home Rule Law § 2(5) defines "[g]eneral law" as "[a] state statute which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages."
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> Under the doctrine of conflict preemption, a local law is preempted by a State law when a "right or benefit is expressly given ... by [ ] State law which has then been curtailed or taken away by the local law"

(which was apparently issued internally in 2012), until it was announced to the public during a November 19, 2013 meeting of the Planning Board. 60 days from that date would be Saturday January 18, 2014. Under state law, we would then have until the next business day – today – to file this appeal. I have taken the liberty of attaching to the notice of appeal a brief excerpt from McKinney's Commentaries, which explains that neighbors like my clients, have 60 days to take the appeal, measured from when they actually learn of the determination.

Grounds for Our Position

We cannot possibly set forth every factual and legal basis for our appeal; that will be the subject of the public hearing. For now, however, it suffices to say that the determination is incorrect for several reasons:

First, on the face of the law, we believe the interpretation to be incorrect. When a subdivider has illegally subdivided his lot by deed, and later comes before the Planning Board to legalize his actions, he is creating a new lot by subdivision. Code Sec. 220E-(2)(a) provides:

> The area of any new lot created by subdivision must be documented to contain a portion of the basic required minimum lot area as specified in § 220-23 or 220-24 which consists of land likely to be buildable. Such portion of land shall not include land under water, land meeting the definition of "wetlands and watercourses," "one-hundred-year floodplain," or land with slope of or greater than 15% over a horizontal distance of 25 feet or more in the direction of the slope.[2]

Apparently, the Building Inspector's rationale was that the "lot" was created years earlier, by the illegal subdivision. But the developer could not sell any "lots" under Real Property Law 334, without filing a subdivision map withe the County. The "lots" did not exist, except as between the parties to the transaction. By definition, the only way a "lot" can be created, is through subdivision. That is why the developer is seeking subdivision approval. If he already has a "lot," why is he seeking subdivision approval?[3]

Second, the courts have ruled that a party who has illegally subdivided their land by deed – without the benefit of formal subdivision approval – is required to comply with current laws when they attempt to legalize the subdivision. See Atlantic Development LLC v. Town/Village of Harrison, 72 A.D.3d 1070, 901 N.Y.S.2d 71 (2d Dept. 2010)(lot created by illegal subdivision held, not entitled to any "grandfather" status).

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[2] The Code goes on to provide that in the R-1/2A zoning district, 20,000 square feet is required. This, together with other restrictions, would bar development of the lot – unless the applicant sought and received a variance from the ZBA.

[3] The answer, of course, is that no title company would ever insure title to the "lot." That's because the "lot" does not exist, legally.

Third, even assuming the "lot" existed for years, so no "new lot [is] created by subdivision," this does not automatically throw all existing laws out the window.

Fourth, the interpretation tends to reward illegal conduct. If the Planning Board, not applying current more-restrictive laws, approves the subdivision, this effectively authorizes building on the lot. There is no further review, and no other approvals are required.

We respectfully disagree with the Building Inspector's interpretation of Code Section 220-10E(2)(a), and request the ZBA vacate it and reach a different interpretation. Specifically, we believe that the developer should be required to comply with all current Code requirements.

Stay of Proceedings

We also note that the filing of this Notice of Appeal automatically stays all proceedings relating to the challenged determination. New York State Town Law 267-a(6) states

> "Stay upon appeal. An appeal shall stay all proceedings in furtherance of the action appealed from, unless the administrative official charged with the enforcement of such ordinance or local law, from whom the appeal is taken, certifies to the board of appeals, after the notice of appeal shall have been filed with the administrative official, that by reason of facts stated in the certificate a stay, would, in his or her opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application, on notice to the administrative official from whom the appeal is taken and on due cause shown."

We do not find a similar provision in the Town's Code. Once again, however, the state law would supersede the local law, should there be any inconsistency.

We understand that, since the challenged interpretation provides the basis for the Planning Board's review of the proposed subdivision, this would stay the Planning Board proceedings until the ZBA rules on this appeal. Indeed, the local code requires, that if a variance is necessary for the subdivided lot(s), any variance must be obtained first.

Conclusion

Accordingly, we ask that the ZBA place this matter on the next available agenda – which we assume would be February 2014 – for public hearing.

Sincerely,

David O. Wright

cc: Building Department

Peter Barrett

From: Peter Barrett [Building@lewisborogov.com]
Sent: Friday, October 19, 2012 3:20 PM
To: 'Jan Johannessen'; 'Praga, Lawrence'
Subject: Petruccelli 33B-11157-46

Jan,

I've been asked to come to a determination as to whether or not Mr. Petrucelli's lot referenced above needs to comply with Sec. 220-10E(2)(a) regarding buildable area.

As read in the ordinance "The area of any **new** lot created by subdivision....etc". The lot in question was created in the early seventies by deed. The owner is currently working with the Town as directed to correct the fact that the lot was not "created by subdivision". If in fact the lot had been created by subdivision in the seventies, the above code section would not have applied as I don't believe it was in effect at the time.

That being said, I don't believe the action now being undertaken is creating a "new" lot.

Regards,

Peter

Office Memorandum

Building Inspector' Opinion

On or about October 19, 2012, the Building Inspector determined that Mr. Petrucelli was not required to comply with Section 220-10E(2)(a) (minimum building lot size), because "the action now being undertaken is [not] creating a 'new' lot."

Apparently, this memo was discussed at the November 19, 2013 Planning Board Public Hearing.

Town Law 267-a(5)(b)

An appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The administrative official from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken.

McKinney's Commentaries

Although a disappointed applicant for a building permit will promptly be aware of an adverse decision in order to timely appeal the determination, a neighboring property owner may not be aware of the issuance of a building permit to a neighbor or other determination until a significant period of time has passed since its issuance. For example, a property owner may obtain a permit and defer the start of construction until some time thereafter. The decisions prior to the enactment of Town Law § 267-a(5)(b) recognized the inherent unfairness of strictly applying a preclusive time period when a neighbor had not received notice of the issuance of a permit and was not chargeable with laches or bad faith. *See* ***Pansa v. Damiano*, 14 N.Y.2d 356, 251 N.Y.S.2d 665, 200 N.E.2d 563 (1964)**; ***Rebhan v. Zoning Board of Appeals of the Town of Milan*, 163 A.D.2d 728, 558 N.Y.S.2d 716 (3d Dept.)**, *lv. denied*, **76 N.Y.2d 712, 563 N.Y.S.2d 768, 565 N.E.2d 517 (1990)**; ***Highway Displays, Inc. v. Zoning Board of Appeals of the Town of Wappinger*, 32 A.D.2d 668, 300 N.Y.S.2d 605 (2d Dept. 1969)**.

Decisions construing and implementing Town Law § 267-a(5)(b) have adopted the same philosophy as the pre-amendment decisions and consider an appeal to be timely if filed within 60 days after an aggrieved party received notice of, or should have been aware of, the issuance of a determination. For example, in ***Farina v. Zoning Board of Appeals of the City of New Rochelle*, 294 A.D.2d 499, 742 N.Y.S.2d 359 (2d Dept. 2002)**, the Appellate Division applied the foregoing notice prerequisite for the commencement of the running of the 60-day appeal period for property owners seeking review of the issuance of a permit to a neighbor. In *Farina*, a building permit was issued in early December 1999. It was not until March 2000 that the adjoining property owner was informed by his tenant that development had started on the

property and he promptly filed an appeal from the issuance of the permit, contending that a variance was necessary as a prerequisite to the issuance of a building permit. The court concluded that although the appeal had been filed more than 60 days after the permit had been granted, where a party seeks revocation of a building permit issued to another, the prescriptive period should be computed from the date such party receives notice of the issuance of the permit. *Farina* confirms that the continued viability of the prior case law, that is, that the appeal period does not commence until one has actual or constructive notice of the decision, remains in full force and effect.

Similarly, in ***Iacone v. Building Department of Oyster Bay Cove Village*, 32 A.D.3d 1026, 821 N.Y.S.2d 654 (2d Dept. 2006)**, the 60-day period within which to file an appeal from the issuance of a building permit to a neighbor did not commence on the day it was issued but, instead, under the circumstances, when the appellants first learned of the issuance of the permit two and a half months later. The appellants could not have been charged with actual or constructive notice of issuance of the permit prior thereto. See also Missere v. Gross, 82 F.Supp.2d 542, 563 (S.D.N.Y. 2011).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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In the Matter of the Application of
ANTHONY DARIA,

Petitioner,

-against-

THE TOWN OF PLEASANT VALLEY, MICHAEL WHITE AS ZONING ADMINISTRATOR, ZONING BOARD OF APPEALS and ROGER LEE, as Building Inspector of the Town of Pleasant Valley,

Respondents.

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DECISION AND ORDER

Index No. 2246/13

PAGONES, J.D., A.J.S.C.

The record indicates that petitioner is the owner of property located at 1432-1436 Route 44 in the respondent Town. The subject of the proceedings between the parties involves the 1434 Route 44 residence which is one of three single family residences on the property. This property and petitioner have been the subject of enforcement proceedings since on or about 2011

On June 11, 2012, a violation notice was issued by the respondent's Zoning Administrator alleging nine (9) separate counts associated with petitioner's use of the property as a multi-family residence. The parties appeared before the Town of Pleasant Valley Justice Court on September 27, 2012 and entered into a plenary written stipulation of settlement. Petitioner

agreed to pay a $500.00 fine. The settlement also provided for further inspections of the property within thirty (30) days and that additional violations would be cured within thirty (30) to ninety (90) days depending on the nature of the violation.

A mutually agreed inspection occurred on December 7, 2012. On December 17, 2012, petitioner was served with an Order to Remedy. The order directs petitioner to comply with its directives within sixty (60) days. On February 7, 2013, petitioner filed an appeal to the respondent's Zoning Board of Appeals regarding the Order to Remedy. Petitioner was issued an appearance ticket on March 18, 2013 to appear before the Town Justice Court on April 16, 2013 based upon his alleged non-compliance of the December 17, 2013 Order to Remedy.

On April 12, 2013, petitioner commenced this proceeding under CPLR Article 78 by way of an order to show cause with a request for a temporary restraining order ("TRO") pursuant to CPLR 7805 enjoining respondents from pursuing prosecution of petitioner for his alleged violation. A TRO was imposed through the date of this decision and order, and a tight schedule for the submission of answering and reply papers was established.

Two threshold issues have been thrust upon the Court for consideration. The first is whether petitioner is entitled to the injunctive relief he seeks. The second is whether the respondent Town's local law, Town Code §98-87-d(5), takes

precedence over Town Law §267-a(5)[b] with respect to the time frame within which an administrative appeal must be taken. The State law provides that an appeal must be taken within sixty (60) days after the filing of any order, requirement, decision, interpretation or determination of the administrative official. The Town Code shortens the time period to thirty (30) days. Town Law §267-a(6) provides for an automatic stay of all proceedings when an appeal is timely filed. Petitioner urges that the Town Law preempts the Town Code, and therefore, the sixty (60) day rule applies, thereby making his appeal timely. Respondents disagree, arguing that they had the authority pursuant to the "home rule provision" of our State Constitution (see NY Const, art IX, §2; Statute of Local Governments; Matter of Chwick v. Mulvey, 81 AD3d 161, 167 [2d Dept. 2010]) to enact the controverted local law. Thus, the thirty (30) day limitation is valid, and petitioner's appeal is untimely, thereby negating the automatic stay provision.

It is settled that a party seeking a preliminary injunction is required to demonstrate by clear and convincing evidence (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the moving party's position. (Family-Friendly Media, Inc. v. Recorder Television Network, 74 AD3d 738, 739 [2d Dept. 2010].) The same principles

apply in the context of an Article 78 proceeding. (*see*, Matter of Stewart v. Parker, 41 AD2d 785, 786 [3d Dept. 1973].)

It is also settled that the "home rule provision" is subject to fundamental limitation by the preemption doctrine. (Matter of Chwick v. Mulvey, *supra* at 167.)

> "Indeed, [t]he preemption doctrine represents a fundamental limitation on home rule powers. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, *the overriding limitation* of the preemption doctrine embodies 'the untrammeled primacy of the Legislature to act ***with respect to matters of State concern.' Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field [emphasis added and internal citation omitted]" (Matter of Cohen v. Bd. of Appeals of the Village of Saddle Rock, 100 N.Y.2d 395, 400 [2003].)

"Under the doctrine of conflict preemption, a local law is preempted by a state law when a 'right or benefit is expressly given...by...State law which has then been curtailed or taken away by the local law.'" (Jancyn Manufacturing Corp. v. County of Suffolk, 71 N.Y.2d 91, 97 [1987]; Matter of Cohen v. Bd. of Appeals of Village of Saddle Rock, *supra*, at 400; Matter of Chwick v. Mulvey, *supra*, at 167-168.) The word "curtail" means "to cut short or cut off a part of; abridge; reduce" (www.thefreedictonary.com).

The record indicates that Town Code §98-87-d(5) has curtailed the more generous time limitation set forth in Town Law

§267-a(5)[b], thereby reducing petitioner's appellate rights. This unmistakable fact permits the Court to find that petitioner has met his burden, clearly and convincingly, as to all three (3) elements for a preliminary injunction.

Therefore, the respondents are directed to refrain from pursuing the court proceedings presently pending against the petitioner, effective immediately, until such time as he pursues his administrative appeal to its conclusion (Town Law §267-a[6]).

The parties are directed to appear for a further conference on May 21, 2013 at 10:30 a.m. Adjournments are only granted with leave of the Court.

On this application, the Court considered the order to show cause supported by a notice of petition, verified petition with four (4) exhibits, affirmation in opposition with affidavit and five (5) exhibits, reply affirmation and correspondence from respondents' counsel, dated April 16, 2013.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
April 16, 2013

ENTER

HON. JAMES D. PAGONES, A.J.S.C.

TO: DAVID O. WRIGHT, ESQ.
Attorney for Petitioner
2025 Crompond Road
Yorktown Heights, New York 10597