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THE WHAT, WHEN AND WHAT IF OF BOARD OF APPEALS' FINDINGS OF FACT

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It is a firmly established principle of law that absent findings of fact, intelligent judicial review of a decision of a zoning board of appeals is foreclosed. *Greene v. Johnson*, 121 AD2d 632, 503 NYS2d 656 (2d Dept. 1986). However, the principles regarding the adequacy of findings of fact and the proper time for issuance of findings of fact appear not to be so firmly established in the procedures of local boards of appeals. A discussion of these issues must begin with a review of the applicable statutes (Town Law '267 *et seq*, Village Law 7-712 *et seq*, General City Law '81 *et seq*).

A board of appeals shall decide an appeal within sixty-two days after the closing of the public hearing, unless the time is extended by mutual consent of the applicant and the board. Town Law '267-a(8), Village Law '7-712-a(8), General City Law '81-a(8). The decision must be filed in the office of the town, village or city clerk within five business days and a copy mailed to the applicant. Town Law '267-a(9), Village Law '7-712-a(9) and General City Law '81-a(9). Any person "aggrieved" by a decision of a board of appeals may apply to the supreme court for review by a proceeding under Article 78 of the Civil Practice Law and Rules. This proceeding must be commenced within thirty days after the filing of the decision in the office of the town, village or city clerk. Town Law '267-c, Village Law '7-712-c and General City Law '81-c.

The statutes do not prescribe "what" constitutes a board's decision. Nor do the statutes discuss the requirement for findings of fact. These requirements are found in case law. Case law

requires a board of appeals to set forth findings of fact that are adequate to inform the court of the basis for the board's conclusions. *Greene v. Johnson, supra.* The findings of a board of appeals must be supported by substantial evidence. *Matter of Retail Property Trust v. Board of Zoning Appeals of the Town of Hempstead*, 98 NY2d 190, 746 NYS2d 662 (2002), *Matter of P.M.S. Assets, Ltd. v. Zoning Board of Appeals of Pleasantville* 98 NY2d 683, 746 NYS2d 440 (2002), *Matter of Ifrah v. Utschig* 98 NY2d 304, 746 NYS2d 667 (2002).

Conclusory findings of fact are insufficient to support a determination by a board of appeals, which is required to clearly set forth "how" and "in what manner" the granting of a variance would be proper or improper. *Matter of Farrell v. Board of Zoning and Appeals of the Incorporated Village of Old Westbury*, 77 AD2d 875, 431 NYS2d 52 (2nd Dept. 1980). A finding that a proposed use would adversely affect adjoining properties is conclusory and insufficient to support a determination. *Human Development Services of Portchester, Inc. v. Zoning Board of Appeals of the Village of Portchester*, 76 NY2d 702, 499 NYS2d 927 (1986).

A board's decision must set forth the factual basis for each conclusion reached and may not merely state bald conclusions or reiterate the prongs of the substantive legal standard (*i.e.* balancing test for area variances and unnecessary hardship test for use variances). *Necker Pottick, Fox Run Woods Builders Corp. v. Duncan*, 251 AD2d 333, 673 NYS2d 740 (2nd Dept. 1998), *Sarcona v. Board Appeals of the Incorporated Village of Floral Park*, 2001 WL 1606614 (Supreme Court, Nassau Co., 2001). Findings must (1) specifically identify facts found in the record that the board considers relevant in the application of the applicable substantive legal standard, and (2) evidence some analysis of those facts in relation to the substantive legal standard. *NYS Department of State, Counsel's Office, Legal Memorandum LG03.*

Findings of fact typically state: “Members of the board are familiar with applicant’s property and the surrounding neighborhood. In rendering its decision, the board members gave due and careful consideration to the record, the evidence heard at the hearing and the condition of the property as found by the board.”

Personal observations and knowledge of the board members may provide the factual basis for a decision, so long as those observations and knowledge are entered into the record. *Stein v. Board of Appeals of the Town of Islip,* 100 AD2d 590, 473 NYS2d 535 (2nd Dept. 1984). However, failure to disclose on the record what particular facts known to its members justified its decision warrants annulment of the decision. *Varley v. Zoning Board of Appeals of the City of Saratoga,* 131 AD2d 905, 516 NYS2d 355 (3rd Dept. 1987); McKinney’s Village Law, ' 7-712-a; Practice Commentaries by Terry Rice, page 396-397.

Findings cannot rely on facts not in the record. It is violative of an applicant’s due process rights if a board of appeals accepts evidence after a hearing has been closed and without giving the applicant an opportunity to review and rebut such information. *Stein v. Board of Appeals of the Town of Islip, supra*. In such cases, at a minimum, the applicant is entitled to a rehearing in the matter. *Sunset Sanitation Service Corp. v. Board of Zoning Appeals of the Town of Smithtown,* 172 AD2d 755, 569 NYS2d 141 (2nd Dept. 1991).

If a board of appeals has failed to make findings of fact, courts generally will remit the matter back to the board. “The absence of findings and the inadequacy of the evidence in the record to support [the board’s] determination requires vacatur of that determination and remittal of the matter to [the board] for a hearing, proper findings and a new determination.” *Graham v. Town of Tully Planning Board,* 237 AD2d 923 at 923, 654 NYS2d 542 at 543 (4th Dept. 1997).

However, where there is a failure of the board to make findings and the court finds that there is no substantial evidence in the record to support the board's decision, the court can annul the board's decision and remit the matter with direction that the variance be issued. *Van Wormer v. Planning Board of the Town of Richland,* 158 AD2d 995, 551 NYS2d 145 (4th Dept. 1990).

Although some earlier court decisions appear to condone the practice of permitting a board of appeals to supply findings of fact in its answer and return in an Article 78 proceeding, this practice is not preferred, and should not be condoned. Findings must be adopted by the board *contemporaneously* with its decision. The findings of fact cannot be issued after the board has rendered its decision. *Matter of the Application of Steven Silverstein v. Board of Zoning Appeals of the Town of North Hempstead,* (Supreme Court, Nassau Co., March 16, 2000, unreported); *Magee v. Town of Stony Point Zoning Board of Appeals,* New York Law Journal, May 10, 2000, page 35, column 3 (Supreme Court, Rockland Co., 2000); McKinney's Village Law ' 7-712-a, Practice Commentaries by Terry Rice, 2002 cumulative pocket part, page 36.

The adoption of findings of fact prepared by counsel, even if circulated to the board members subsequent to the rendering of their decision, is a *post hoc* rationalization by counsel that cannot substitute for a factual determination by the board. As stated by the court in the *Matter of the Application of Steven Silverstein v. Board of Zoning Appeals of the Town of North Hempstead, supra*:

> "The Board's findings must be adopted by the board contemporaneously with its decision. *Post hoc* rationalization by counsel cannot substitute for factual determination by the duly constituted members of the agency. *General Building Contractors v. Dormitory Authority,* 88 NY2d 66, 75 (1996). Although counsel may assist in the preparation of the Board's findings, the findings of

> fact cannot be issued after the Board has already rendered its decision. *Vreeland v. Zoning Board of Appeals*, 175 AD2d 552 (3rd Dept. 1991)."

Similarly, an affidavit of a board member prepared in response to an Article 78 petition seeking to annul the board's decision, does not constitute findings of fact. *Van Wormer v. Planning Board of the Town of Richland, supra.* A board member's affidavit is merely a conclusory hearsay statement of one member of the board of his or her recollection of alleged verbal findings made by the other board members. These alleged "findings" are not adopted by a vote of the board members voting on the application. This procedure is in violation of Town Law '267-a(1), Village Law '7-712-a(1), General City Law '81-a(1) requiring a board of appeals to "keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and . . . keep records of its examinations and other official actions." An affidavit of a board member does not constitute minutes of the board's decision and does not reflect that the board formally acted as a body. *McCartney v. Incorporated Village of East Williston,* 149 AD2d 597, 540 NYS2d 456 (2nd Dept. 1989).

It has been the practice of some municipalities to adopt, by local law, a procedure for the filing of a "short form decision" only stating if the application was granted or denied. Findings of fact are only prepared if the applicant requests a "long form decision." These local laws purport to supersede the provisions of the statutes that require "every order, requirement, decision or determination of the board of appeals" to be filed in the clerk's office within five business days. The statutes make no provision for filing a short form decision within five business days and a long form decision more than five business days after the board's determination.

The Appellate Division, Second Department recently held that a municipality cannot supersede the provisions of Town Law '267-b(3), Village Law '7-712-b(3) and General City Law '81-b(4), to impose a different standard for area variances on the basis the state has preempted the field of legislation. *Cohen v. Board of Appeals of the Village of Saddle Rock*, 297 AD2d 38, 746 NYS2d 506 (2nd Dept. 2002), *leave to appeal granted* 99 NY2d 503, 753 NYS2d 806 (2002), *Russo v. Black* , 297 AD2d 381, 746 NYS2d 605 (2nd Dept. 2002), *leave to appeal granted* 99 NY2d 503, 753 NYS2d 807 (2002). Although the court's decision was limited to the municipality's authority to supersede area variance standards, the decision supports the argument that the legislature has expressed a desire to preempt the entire field of board of appeal's standards and procedures.

Assuming, *arguendo*, a municipality has the authority to supersede the statutory provisions for the filing of decisions, a municipality lacks authority to overrule decisional law. The provisions of a local law authorizing a board to render its decision in short form format and only preparing findings of fact subsequent to rendering its decision upon request by the applicant, is contrary to case law requiring findings to be adopted by the board *contemporaneously* with its decision. The findings of fact cannot be issued after the board has rendered its decision. The adoption of a long form decision setting forth the boards findings of fact, prepared by counsel and circulated to the board members subsequent to the rendering of their decision, is a *post hoc* rationalization by counsel that cannot substitute for a factual determination by the board.

This procedure further denies the applicant due process of law since it compels the applicant to commence an Article 78 proceeding seeking to annul the board's decision prior to

the board's preparation of findings of fact, thereby permitting the board to then prepare findings of fact tailored to address the petition. In *Pace v. Pleus,* (Supreme Court, Nassau County, February 14, 2002, unreported) it was held that the filing of the short form decision commences the running of the statute of limitations for commencement of an Article 78 proceedings. As stated by the court: "Moreover, subdivision 1 of Village Law ' 7-712-c, which has not been amended by Local Law, provides that an Article 78 proceeding shall be instituted within thirty days after the filing of a decision of the board in the office of the Village Clerk. This statute makes no distinction between short form and long form decisions."

In conclusion, there is no valid reason for a board of appeals not to prepare proper findings of fact *contemporaneously* with its decision, to be filed in the office of the clerk within five business and mailed to the applicant. Whatever delay in rendering the decision might result from adhering to this requirement, is more than offset by avoiding the delay and costs of the commencement of an Article 78 proceeding resulting in remand. There is nothing worse for the zoning practitioner than having a client ask the question, "Why did the board deny my application?", and having to respond, "I do not know. They did not give a reason."

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