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UNIFORMITY, NOT A BLOW, TO ZONING LAWS

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Frank and Jamie Russo merely wanted a height variance from the Board of Appeals of the Village of North Hills for a decorative gate at their residence. Jack Cohen sought a height variance from the Board of Appeals of the Village of Saddle Rock to construct a new residence. Neither thought their applications would take them to the heights of the Court of Appeals of the State of New York.

Both applications were denied by the local zoning board of appeals on the basis that the applicants failed to prove practical difficulty in complying with the village's zoning ordinance, the standard adopted by each village to supercede the "balancing test" for area variances set forth in Village Law '7-712-b. The Court of Appeals in *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock and Matter of Russo v. Black*, 2003 N.Y. Slip Op.15697, N.Y., July 2, 2003, 2003 WL 21512430 affirmed the decisions of the Supreme Court, Nassau County and the Appellate Division, Second Department holding that the State preempted the field of area variance review, thereby preventing the villages from exercising their supersession authority under Municipal Home Rule Law.

The decision of the Court of Appeals is not, as reported in *Newsday*, July 4, 2003, a "blow to zoning laws." Rather, the Court's decision provides needed State-wide uniformity to area variance applications and judicial review of decisions of boards of appeals.

Analysis of the need for State-wide uniformity in the standard for area variances must begin with an understanding of the prior "practical difficulty" standard. As stated in *Matter of Bienstock v. Zoning Bd. of Appeals of Town of E. Hampton,* 187 AD2d 578, 589 NYS2d 1004

(2nd Dept. 1992), "While there is no precise definition of the term 'practical difficulties', in general, the petitioner must show that as a practical matter he cannot utilize his property or a structure thereon without coming into conflict with certain of the restrictions of the zoning ordinance." This lack of a "precise definition" for the practical difficulty standard "led to amorphous descriptions of the required area variance criteria. Consequently, there resulted contradictory case law and confusion among applicants as well as zoning boards of appeal." *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock*, 297 AD2d 38, at 41, 746 NYS2d 506 (2nd Dept. 2002).

The contradictory case law surrounding area variances was described by Court of Appeals in *Sasso v. Osgood*, 86 NY2d 374, 633 NYS2d 259 (1995) as follows:

> The definition and application of the "practical difficulties standard" has proven far more troublesome.
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> Lacking a statutory definition, we have recognized the existence of "practical difficulties" where the unusual topography of the subject parcel interfered with construction of a building (*see, Matter of Wilcox v. Zoning Bd. of Appeals,* 17 N.Y.2d 249, 255, 270 N.Y.S. 2d 569, 217 N.E.2d 633), and where area variances were required to build a house on an amply sized but oddly shaped parcel that did not meet frontage and side yard requirements (*Conley v. Town of Brookhaven Zoning Bd. of Appeals,* 40 N.Y.2d 309, 316, 386 N.Y.S.2d 681, 353 N.E. 2d 594). We have also suggested that an area variance could be granted upon a showing of "significant economic injury" (*Matter of Fulling v. Palumbo,* 21 N.Y.2d 30, 33, 286 N.Y.S.2d 249, 233 N.E.2d 272; *see also, Matter of Cowan v. Kern,* 41 N.Y.2d 591, 596, 394 N.Y.S.2d 579, 363 N.E.2d 305). In *Matter of National Merritt v. Weist,* 41 N.Y.2d 438, 393 N.Y.S.2d 379, 361 N.E.2d 1028 we considered both unique topography and economic injury relevant to the application for an area variance. These cases are only illustrative. We have noted several times that there is no precise definition of the term "practical difficulties" (*Matter of Doyle v. Amster,* 79 N.Y.2d 592, 595, 584 N.Y.S.2d 417, 594 N.E.2d 911; *Matter of Fuhst v. Foley,* 45 N.Y.2d 441, 445, 410 N.Y.S.2d 56, 382 N.E.2d 756), observing that "[t]he basic inquiry at all times is whether strict application of the ordinance in a given case will serve a valid

> public purpose which outweighs the injury to the property owner" (*Matter of DeSena v. Board of Zoning Appeals,* 45 N.Y.2d 105, 108, 408 N.YU.S.2d 14, 379 N.E.2d 1144).
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> Without any legislative guidance defining the requirements for an area variance, the courts began to develop a list of considerations to be applied under Town Law former ' 267 (*see, Matter of Wachsberger v. Michalis,* 19 Misc. 2d 909, 191 NYS2d 621, *affd.* 18 A.D.2d 921, 238 N.Y.S.2d 309; *see also, Matter of Friendly Ice Cream Corp. v. Barrett,* 106 A.D.2d 748, 483 N.Y.S.2d 782; *Human Dev. Servs. v. Zoning Bd. of Appeals,* 110 A.D.2d 135, 493 N.Y.S.2d 481, *affd.* 67 N.Y.2d 702, 499 N.Y.S.2d 927, 490 N.E.2d 846). Although originally offered as guidance for determining whether "the spirit of the ordinance [is] observed, public safety and welfare secured and substantial justice done" (*see, Matter of Wachsberger v. Michalis,* 19 Misc. 2d at 912, 191 N.Y.S. 2d 621 [Meyer J.], *supra),* these criteria came to be known as "the practical difficulties" test (*see,* 2 Anderson, New York Zoning Law and Practice ' 23.34, at 208-290 [3d ed.]). The criteria notwithstanding, however, precise and concise definition of "practical difficulties" never emerged from the case law. In particular, it remained unclear whether a showing of "significant economic injury" was part of the Apractical difficulties" test (*see, e.g., Matter of Doyle v. Amster,* 79 N.Y.2d 592, 584 N.Y.S.2d 417, 594 N.E.2d 911, *supra; Matter of Orchard Michael, Inc. v. Falcon,* 65 N.Y.2d 1007, 494 N.Y.S.2d 98, 484 N.E.2d 127; *Matter of Children's Hosp. v. Zoning Bd. of Appeals,* 181 A.D.2d 1056, 582 N.Y.S.2d 317; *Matter of Stengel v. Town of Woodstock Zoning Bd. of Appeals,* 155 A.D.2d 854, 547 N.YS.2d 961; *Matter of Salierno v. Briggs,* 141 A.D.2d 547, 529 N.Y.S.2d 159)." 86 N.Y.2d at 380.

This confusion was intended to be eliminated by the codification of the area variance standard by the legislature in 1991 in the enactment of Village Law, ' 7-712-b(3), Town Law ' 267-(b)(3) and General City Law ' 81-b. These uniform statutes provide that:

> "In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to the nearby

> properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance."

In *Sasso v. Osgood*, *supra.* the Court of Appeals held that an applicant for an area variance is not required to demonstrate "practical difficulties," as that test was formerly applied. The balancing test standard set forth in Village Law '7-712-b(3), Town Law '267-(b)(3) and General City Law '81-b replaces "practical difficulties" and "significant economic injury" standards.

In short, the State Legislature made a studied decision that the turmoil and uncertainty which plagued the law of area variances for many years, and which boards of appeals and courts failed to solve, would be best solved, not at the local level, but by State action. The State Legislature's enactment of Village Law, '7-712-b(3), Town Law '267-(b)(3) and General City Law '81-b created a uniform standard to be applied by boards of appeals in every village, town and city of the State.

The State Legislature need not expressly state that it is preempting local municipalities in a given field. Preemption by the State may be implied where the State Legislature has enacted a comprehensive detailed scheme intended to address the need for statewide uniformity. *Albany Area Builders Association v. Town of Guilderland*, 74 NY2d 372, 547 NYS 627 (1989). The State Legislature's uniform codification of the standard for area variances in the Town Law, Village Law and General City Law demonstrates the intent to preempt the field. In such case,

neither a village, town or city may use its supersession power under the Municipal Home Rule to adopt local laws inconsistent with the State's policy concerns. *Albany Area Builders Association v. Town of Guilderland, supra.*

Where the State has preempted the field, a local law regulating the same subject matter is deemed inconsistent with the State's transcendent interest. "Such local laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns (*Jancyn Mfg. Corp. v. County of Suffolk,* 71 NY2d 91, 97, 524 NYS2d 8, 518 NE2d 903)." *Albany Area Builders Assn. v. Town of Guilderland, supra* at 377.

In *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock and Matter of Russo v. Black, supra.* the Court of Appeals stated:

> "The 1991 amendments to both the Town and Village Law, setting forth a standard of review for area variance applications, evinces an intent by the Legislature to occupy the field and bring a measure of Statewide consistency to the variance application and review process (see L 1991, ch 692). Contrary to the Board's argument, the history of these amendments does not suggest that they were intended merely to codify the disparate attempts in the courts to define 'practical difficulty' and, to a lesser extent, 'undue hardship' the earlier standards embodied in the Village and Town Law. Rather, the statutory history supports petitioners' position that the Legislature intended to replace the confusing 'practical difficulty' standard with a consistent test that weighed benefit to the applicant against detriment to the community, in addition to other enumerated factors. As stated in the Sponsor's Memorandum, '[t]his legislation is provided to recodify the laws which guide the function of zoning boards of appeal to encourage improved local understanding and facility in implementing the statute. Further, this legislation seeks to incorporate and standardize the universally acknowledged concepts of 'use' and 'area' variances in statute (Sponsor's Mem, Bill Jacket, L 1991, ch 692).

> The legislative history indicates that 'the statute [L1991, ch 692] was enacted to clarify existing law by setting forth readily understandable guidelines for both Zoning Boards of Appeal and applicants for variances and to eliminate the confusion that then surrounded applications for area variances' (*Matter of Sasso v. Osgood*, 86 NY2d 374, 383 [1995]). Numerous sources in the legislative history support the conclusion we reached in *Sasso a*nd its natural extension in the appeals before us: faced with the turmoil and uncertainty that had plagued the law in this area, the Legislature intended to occupy the field and thus preempt local supersession authority."

"Local Laws of general application - which are aimed at legitimate concerns of a local government - will not be preempted if their enforcement only incidentally infringes on a preempted field." *DJL Restaurant Corp. v. City of New York*, 96 NY2d,91 at 97, 725 NYS2d 622 (2001). However, the local laws adopted by the villages of North Hills and Saddle Rock were neither aimed at a legitimate concern of a local government nor merely incidentally infringed on a preempted field.

Municipal Home Law Rule Law ' 10(1)(ii)(e)(3) carves a narrow, well-demarcated area of purely local concern where the Villages can amend and even override provisions of the Village Law in their local applicability. In so doing, "the Legislature has recognized that situations may arise where laws of statewide application are appropriately tailored by municipalities to fit their own peculiarly local needs." *Kamhi v. Town of Yorktown*, 74 NY2d 423, at 430, 548 NYS2d 144 (1989). "The supersession authority is designed to permit villages to tailor governmental operations to meet uniquely local needs and conditions." Op. Atty. Gen. 99-6 (1999)

The adoption of zoning laws regulating uses of land is a matter of purely local concern that can be appropriately tailored by municipalities to fit their own unique local needs.

However, the standard to be applied by boards of appeals and the courts of this state in area variance applications is not a matter of purely local concern. The application of a uniform standard by all villages, towns and cities in the State to eliminate confusion shared by applicants, boards of appeals and the courts of this State, resulting in a high degree of potential to litigation, is a matter of State concern.

In *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock and Matter of Russo v. Black, supra.* the Court of Appeals stated:

> "By imposing a Statewide standard for area variance review, Village Law ' 7-712-b(3) does not impermissibly attempt to usurp the local zoning authority or violate home rule powers. Localities remain free to enact zoning regulations in the best interests of the health, safety and character of their communities. A uniform standard for area variance review, however, has clear advantages. Property owners and zoning practitioners around the State will benefit from a better understanding of the standards for a variance, notwithstanding the unique zoning requirements of each individual locality (see Sponsor's Mem, Bill Jacket, L 1991, ch 692). And far from being an encroachment on local zoning authority, the application of a uniform standard ensures that each locality's zoning decisions will be reviewed consistently by the courts without being subject to the vagaries of a standard elusive of easy definition or clear application (*see Matter of Sasso*, 86 NY2d at 380-381; see also Rice, Practice Commentaries, McKinney's Cons Laws of NY, Book 63, Village Law ' 7-712-b). Thus, in this critical area of overlap between State and local authority, traditional respect for the primacy of State interest requires that the will of the Legislature prevail over the desires of each individual locality."

In *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock and Matter of Russo v. Black, supra.* the Appellants argued that the former practical difficulty standard for area variances is preferable for due and proper administration of its local zoning laws. Conspicuously absent from Appellants' argument was the reason for its preference and the unique local need of

the villages of North Hills and Saddle Rock to follow a standard different than the standard applicable to every other village, town and city of this State. The local laws of these villages thwart the operation of the State's overriding policy concern of clarity and uniformity in the standard for area variances, and as such, the Court of Appeals properly held they were preempted by State law.

Bruce W. Migatz is partner with the Garden City law firm of Albanese & Albanese LLP. He argued the case *Matter of Cohen v. Board of Appeals of the Village of Saddle Rock and Matter of Russo v. Black* before the Court of Appeals on behalf of the Respondents. His practice concentrates in the areas of real estate, land use and litigation.