

NO “DO OVERS” FOR ZONING BOARDS OF APPEALS

By **Bruce W. Migatz**

This writer has long advocated, with mixed results from the lower courts, that if a zoning board of appeals fails to prepare findings of fact, an Article 78 proceeding commenced to annul the decision should not be remanded for the preparation of findings. Nor should the court consider findings of fact prepared after the commencement of an Article 78 proceeding and submitted with the board’s answer and return.

It is a firmly established principle of law that absent findings of fact, intelligent judicial review of a decision of a board of appeals is foreclosed. *Greene v. Johnson*, 121 A.D.2d 632, 503 N.Y.S.2d 656 (2nd Dept. 1986). If a board of appeals has failed to make findings of fact, historically courts generally 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).

There simply is no excuse for a board of appeals not to prepare findings contemporaneously with its decision. To the contrary, findings are required in order to make a rational decision. Like a jury that must first decide the facts before applying the law to reach its verdict, a board of appeals must first make findings of fact before applying the applicable legal criteria to determine if the variance or special use permit should be granted. The findings must set forth the factual predicate for concluding that each of the requisite criteria has or has not been

satisfied. *See, Putrino v. Zoning Board of Appeals*, 115 A.D.2d 932, 496 N.Y.S.2d 827 (3rd Dept. 1985)

If a board of appeals fails to prepare findings contemporaneously with its decision, the court should annul the determination and grant the application. A board of appeals should not get a second bite at the apple. There should be no “do over,” especially when the second bite comes after the commencement of an Article 78 proceeding and counsel for the board can draft findings tailored to the petition. This is highly prejudicial to the applicant.

It is no secret that many board of appeals’ decisions denying applications are based upon community pressure. Boards of appeals responding to community pressure know that their denial of an application will, most likely, be challenged by an Article 78 proceeding. (Community pressure is an insufficient ground upon which to base the denial of a variance or special use permit application. *Pilato v. Zoning Board of Appeals of the Town of Mendon*, 155 A.D.2d 864, 548 N.Y.S.2d 950 (4th Dept. 1989).)

However, time is on the side of the of the board of appeals and the opponents. If the board fails to prepare findings of fact, *knowing* that the court will simply remand the matter for the preparation of findings, the delay benefits the opponents. In many cases the delay will “make the problem go away” as a result of the expiration of the applicant’s/contract vendee’s time period to obtain the required variance or special use permit, or simply as a result of the prohibitive carrying costs of the subject property during the appeal process.

If intelligent judicial review of a board of appeals’ decision is foreclosed as a result of the board’s failure to prepare findings of fact contemporaneously with its decision, the board should suffer the consequences, not the applicant. The court should annul the decision and grant the application.

At a minimum, the court should not remand the matter for preparation of findings or consider the board's *post hoc* findings submitted with its answer and return. The court should review the record void of findings, or unpersuaded by the board's *post hoc* findings, to determine if the board's decision is supported by substantial evidence and decide accordingly.

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 should not be condoned. These earlier cases, still relied upon today by some courts, predate the State legislature's uniform codification of procedures for boards of appeals set forth in the Town Law, Village Law and General City Law.¹ To allow a board of appeals to supply findings of fact in its answer and return in an Article 78 proceeding is contrary to the statutory requirement that every determination of a board of appeals be filed in the office of the town, village or city clerk within five business days after it is rendered. Furthermore, this practice permits counsel for a board of appeals to prepare findings of fact tailored to the applicant's petition, which must be filed within 30 days after the decision is filed.

This practice is also contrary to the the very purpose of findings of fact. Findings are the factual *predicate* for concluding that the requisite criteria for a variance or special use permit have or have not been satisfied. *See, Putrino v. Zoning Board of Appeals, supra.*

Some lower courts have expressly held that findings of fact cannot be issued after the board has rendered its decision. *See, Matter of the Application of Steven Silverstein v. Board of Zoning Appeals of the Town of North Hempstead*, (Supreme Court, Nassau Co., Index No. 004564-99, March 16, 2000); *Samos v. Libert*, (Supreme Court, Nassau Co., Index No. 009068 03, November 20, 2003). However, in each of these cases the court, without explanation, nevertheless considered the board's *post hoc* findings of fact.

In the case *Shari Lyn Leasing Corp v. Mammina*, NYLJ December 10, 2003, p.17 col. 1 (Supreme Court, Nassau County, 2003) the petitioner asserted that the board of appeals' determination should be annulled and the petition granted on the ground the determination was not supported by findings of fact adopted contemporaneously with its decision. In that case, findings of fact were prepared after the commencement of the Article 78 proceeding and included in the answer and return. There was no evidence that the findings were ever adopted by the board.

In its decision annulling the board's decision, the court held:

"The Court concludes that findings of fact must be issued and duly adopted by the board of zoning appeals *no later* than the respondent's answer and return in an Article 78 proceeding in order for them to be considered by the Court, and in the absence of such findings, any decision of the board must be overturned for failure to set forth the reasons upon which it was based. In this case, the Court need not determine whether such findings must be adopted contemporaneously with the decision, because, upon the record herein, the court cannot determine whether such findings were ever adopted by the BOARD. Notwithstanding respondent's assertion that the Findings of Fact attached to the return were duly adopted, such purported findings are unsigned and undated, and the return does not include minutes of the meeting of the BOARD at which such findings were adopted. Petitioner's counsel asserts that he has examined the minutes of all meetings held between the date of the decision (February 26, 2003 and the date that such findings of fact were filed with the Town Clerk (July 8, 2003) and found that the Findings of Fact attached to respondent's return were not adopted by the BOARD. Because the record is inconclusive as to the basis for the BOARD's decision, judicial review is impossible at this time. Accordingly, it is

ORDERED, that the petition is granted. The February 26, 2003 decision of the BOARD is annulled, subject to re-argument, leave for which is hereby granted, so long as motion for re-argument is made within 30 days of entry of this Order in the records of the Nassau County Clerk."²

The Appellate Division, Fourth Department, held as early as 1990 in *Van Wormer v. Planning Board of the Town of Richland*, 158 A.D.2d 995, 551 N.Y.S.2d 145 (4th Dept. 1990), that 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. However, the Fourth Department did not hold that the court *should* annul the board's decision and remit the matter with the direction that the variance be issued. The lower courts seem reluctant to do so, and, as in *Silverstein* and *Samos*, some courts even consider findings prepared *post hoc*.³

In the recent case *Arceri v. Town of Islip Zoning Board of Appeals*, 2005 NY Slip Op. 01711 (2nd Dept. March 7, 2005) the Appellate Division, Second Department held that, if upon review of the record, the court finds no substantial evidence in the record to support the board's determination, it is error to remand the matter to the board for findings. In that case, the petitioner applied to the Board of Appeals for an interpretation of the Islip Town Code to determine if the office of a mortgage broker is a permitted home occupation under the zoning code definition of "home occupation." The Board held it was not. The Board's findings set forth in its decision were conclusory, couched in such terms as "it is the opinion of this Board," "this Board feels" and "we do not believe." The lower court found that the Board completely discounted petitioner's undisputed evidence without any stated basis. The court remanded the matter to the Board for reconsideration of the application and the issuance of a decision setting forth specific findings of fact to support its determination.

On appeal, the Second Department found that "[t]he Board premised its determination on its apparent disbelief of the uncontroverted evidence presented by the petitioner at the hearing, and its concomitant substitution of its own conclusory suppositions contradicting the hearing testimony." The court held that, "[u]nder the facts of this case, the Supreme Court should have granted the petition and directed the Board to issue the requested interpretation of [the code] to the petitioner, rather than remit the matter to the Board."

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 A.D.2d 875, 431 N.Y.S.2d 52 (2nd Dept. 1980). 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. *Necker Pottick, Fox Run Woods Builders Corp. v. Duncan*, 251 A.D.2d 333, 673 N.Y.S.2d 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*.

Conclusory findings are the equivalent of no findings. If it is error to remand the matter to the board of appeals for preparation of new findings when the board's findings are conclusory, it should be error to remand the matter to the board for preparation of initial findings when none were made. The court should review the record and make a determination if the decision is supported by substantial evidence, without giving counsel for the board the opportunity to draft findings tailored to the petition.

The case *Matter of Bianco Homes II, Inc. v. Weiler*, 295 A.D.2d 506, 744 N.Y.S.2d 431 (2nd Dept., 2002) cited by the court in *Arceri* further supports this position. In that case the petitioner commenced an Article 78 proceeding seeking to annul the decision of the Board of Zoning Appeals of the Incorporated Village of Hempstead denying a front yard setback variance.

The lower court held that “the Board’s decision was affected by an error of law and that it is not supported by substantial evidence.” The court stated:

“With respect to the error of law, the Board’s decision does not reflect that they considered the factors listed in Section 712-b(3)(b) of the Village Law or engaged in the balancing test weighing “the benefit to the applicant” against “the detriment of health, safety and welfare of the neighborhood or community (See *Sasso v. Osgood*, 86 NY2d 374, 383-384; *Easy Home Program v. Trotta*, 276 AD2d 553). For this reason alone, the decision must be annulled and the matter remanded to the Board for the purpose of making a new determination utilizing the standard for review contained in Section 7-712-b(3)(b) of the Village Law. (See *Miller v. Zoning Board*, 276 AD2d 633, 634).

Furthermore, there is no substantial evidence in the record that “[t]here is a long-standing problem of heavy traffic at the corner in question”; that “the proposed house might impair the ability of area residents to see oncoming traffic”; and that “[t]here have been many accidents at this location.” The opinions of nearby residents, unsupported by traffic and accident statistics and a line of sight study concerning the visibility of traffic approaching the corner should the proposed house be constructed, are insufficient to support the Board’s findings.

Accordingly, the decision is annulled and the matter is remanded to the respondent Board for the purpose of making a new determination applying the standard of review contained in Section 7-712-b(3)(b) of the Village Law. The Board may conduct another public hearing and take additional evidence, if so advised.”

On appeal, the Second Department held that the lower court properly annulled the Board’s decision since the Board “did not properly consider and weigh all the relevant statutory criteria.” But, the court went on to hold that “[h]owever, since the Supreme Court also properly found that the Board’s determination was not supported by substantial evidence, the Board should have been directed to issue the area variance to the petitioner, rather than make a new determination.”

A board’s decision unsupported by any findings is similarly affected by an error of law. Findings based upon the wrong criteria are the equivalent of no findings. If it is error to remand

the matter to the board of appeals for preparation of new findings when the Board's findings are based upon the wrong criteria, it should be error to remand the matter to the board for preparation of initial findings when none were made.

The adoption of findings of fact subsequent to rendering a decision, even if adopted prior to service of the board's answer and return, is a *post hoc* rationalization by counsel that cannot substitute for a factual determination by the board. The court in the *Matter of the Application of Steven Silverstein v. Board of Zoning Appeals of the Town of North Hempstead, supra*, held:

“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).”

As stated at the outset of this article, if a board of appeals fails to prepare findings contemporaneously with its decision, the court should annul the determination and grant the application. At a minimum, the court should not remand the matter for preparation of findings or consider the board's *post hoc* findings submitted with its answer and return. The court should review the record, void of findings or unpersuaded by the board's *post hoc* findings, to determine if the board's decision is supported by substantial evidence and decide accordingly. The Second Department's recent decision in *Arceri v. Town of Islip Zoning Board of Appeals, supra*, is authority for the latter, and lends support for the former.

Bruce W. Migatz is partner with the Garden City law firm of Albanese & Albanese LLP. He is a former municipal attorney, serving as counsel to boards of appeals. His practice concentrates in the areas of real estate, land use and litigation. He can be reached at (516) 248-7000 or Bmigatz@AAFLegal.com.

¹ A board of appeals must 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.

² Presumably the court granted the board of appeals leave to reargue in the event it could be demonstrated that the findings were adopted prior to service of respondent’s answer. However, the respondent did not move to reargue.

³ This reluctance is even demonstrated in recent decisions of the Fourth Department apparently adopting the policy of holding the case, reserving decision and remitting the case to the board to set forth the factual basis of their determination. *Pazera v. Drexelius*, 4 A.D.3d 804, 771 N.Y.S.2d 443 (4th Dept. 2004).