

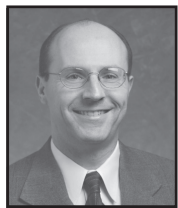
# Real Estate Journal

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## Negative county recommendations can result in denial of project, despite local majority approval

By Howard D. Geneslaw

An anomaly in New York's zoning laws can cause development projects, even those with strong local support and



which are approved by majority vote of the planning board or other local board, to be denied if the county planning agency recommends disap-

approval. This is because where disapproval is recommended, state law mandates that the project can proceed only if the local board overrides the negative county recommendation and approves the project by a "majority plus one" vote. A simple majority vote, although sufficient in other circumstances, results in the project's denial.

Those were the facts in a recent decision by New York's highest court, the Court of Appeals, in *Headriver v. Town Board of Town of Riverhead*. It involved an application for development of a big-box home improvement store in Riverhead, which required a special permit from the Town Board. The property was located on a county road, requiring referral to the Suffolk County Planning Commission. The Commis-

sion recommended denial of the special permit, triggering the statutory "majority plus one" voting requirement to approve the project and override the negative recommendation. But the Town Board could muster only a simple majority in support of the project. Thus, even though the Town Board voted 3-2 to approve the project, it was denied by operation of law for failure to achieve a majority plus one vote.

This placed the applicant in the unlikely position of having to file an appeal against the Town Board despite a majority of its members having voted to approve the project. The Court of Appeals found that the Town Board was compelled to deny the project based on its failure to achieve a majority plus one vote. And, adding insult to injury, the court ruled that since the County Planning Commission's determination could be overridden by the Town Board, it was "merely advisory" and therefore not subject to appeal. Thus, the applicant was out of luck.

Could this outcome have been different? A favorable recommendation would have made the difference between approval and denial of the project.

What can an applicant do in order to avoid the pitfalls associated with county referrals? There are several steps which can help avoid them and help ensure that referrals occur when, and only when, required by statute:

- Understand the statutory criteria for

determining the projects that require referral, which generally are limited to those within 500 feet of the following: municipal boundaries, county or state roads, county drainage facilities and certain other public and agricultural facilities.

- Determine whether referral is required by statute and, if so, whether the county planning agency has entered into an agreement with the municipality whereby certain categories of projects are exempt from referral.

- Maintain ongoing contact with the clerk to the planning board or other local board to ensure there is no automatic county referral of all applications that have been filed.

- If a referral is required, confirm with the clerk that it has occurred in a timely manner. Some municipalities simply do not make referrals to the county planning agency, even though they are legally required. This creates the risk of a jurisdictional defect and may force the applicant to file plans directly with the county planning agency.

If referral is required, maintain contact with the county planning agency and, well before termination of the 30-day reporting period, check to determine whether any issues have been identified that could lead to a negative recommendation. Oftentimes, aspects of a project are not entirely clear from the documents provided to the county planning agency. For example, the mu-

nicipal board may have forwarded only the plans but not supporting documents like a project description, traffic impact study or drainage report. Simply providing these materials directly to the county planning agency may resolve any unanswered questions.

If issues remain even after the county planning agency has all the relevant documents, ask to meet with the individuals who will have input into the county's recommendation (e.g., planning commissioner, county engineer, or county traffic engineer). Bring the appropriate experts or design professionals who can present facts to address the county's concerns. If the concerns are of a local nature, remind county officials that their review is limited by statute to only inter-community and county-wide considerations.

Although the county referral process may seem arduous, it allows the local board to override a negative county recommendation. In many jurisdictions, county approval is a legal requirement, with no municipal right to approve the project over the county's objection. Viewed in that light, the process seems somewhat less onerous.

**Howard D. Geneslaw is a director at the law firm of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., which has offices in New York, Newark and Trenton.**

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A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

One Riverfront Plaza  
Newark, New Jersey 07102  
973-596-4500 Fax: 973-596-0545

One Pennsylvania Plaza  
New York, New York 10119  
212-649-4700 Fax: 212-333-5980

224 West State Street  
Trenton, New Jersey 08608  
609-394-5300 Fax: 609-394-5301

e-mail: [firm@gibbonslaw.com](mailto:firm@gibbonslaw.com) • web site: [www.gibbonslaw.com](http://www.gibbonslaw.com)

Tel: 781-878-4540 / Fax: 781-871-1853 / 800-654-4993 / [nerej@rejournal.com](mailto:nerej@rejournal.com) / [www.rejournal.com](http://www.rejournal.com)