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COURT OF APPEALS

STATE OF NEW YORK

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ROCKY POINT DRIVE-IN, L.P.,

Appellant,

-against-

No. 197

TOWN OF BROOKHAVEN,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
October 16, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 197, Rocky Point.  
2 Counselor, would you like any rebuttal  
3 time?

4 MS. MARGOLIN: Two minutes, please, Your  
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
7 ahead.

8 MS. MARGOLIN: May it please the court, my  
9 name is Linda Margolin. I represent the  
10 plaintiff/appellant in this matter.

11 The special facts doctrine is an equitable  
12 doctrine that's not - - -

13 CHIEF JUDGE LIPPMAN: Counsel, do you have  
14 right under - - - under J - - - J-2 here to prevail?  
15 Putting aside the new - - - the new zoning Z - - -  
16 CR. Under J-2, would you have prevailed?

17 MS. MARGOLIN: Yes, Your Honor. Our  
18 position is that the town had stopped enforcing that  
19 zone, that - - -

20 CHIEF JUDGE LIPPMAN: Under its terms, you  
21 wouldn't prevail?

22 MS. MARGOLIN: Under its literal terms, we  
23 would not have prevailed.

24 JUDGE SMITH: So you have to show selective  
25 enforce - - -

1 MS. MARGOLIN: Because of the definition -  
2 - -

3 JUDGE SMITH: You have to show selective  
4 enforcement?

5 MS. MARGOLIN: Yes, or this - - - or this -  
6 - -

7 JUDGE SMITH: That's a tough one, isn't it?

8 MS. MARGOLIN: - - - or this court could  
9 look at the case of WF Shirley and decide that that  
10 constituted res judicata on the issue, because the  
11 judge in that case specifically decided that the Home  
12 Depot was a permitted use in the J-2 zone, and that  
13 was not appealed by the town.

14 And as our brief points out, subsequently -  
15 - - and our evidence showed - - - subsequently, the  
16 town changed the zoning categories, saying that the  
17 courts had invalidated the area distinctions between  
18 the J-2 and the J-3 zones, which was exactly the  
19 nature of the distinction that defined a commercial  
20 center - - -

21 JUDGE GRAFFEO: What - - - what - - - while  
22 - - - assuming that you were under the J-2 - - -

23 MS. MARGOLIN: Yes.

24 JUDGE GRAFFEO: - - - zoning regulations,  
25 why didn't you pursue the use variance, because you

1 had a nonconforming recreational use? So you would  
2 have needed the use variance, wouldn't you?

3 MS. MARGOLIN: Well, with respect, Your  
4 Honor, we did not believe that we needed any  
5 variance, because our anecdotal evidence at the time,  
6 certainly not as complete as the evidence we  
7 developed during the course of discovery in this  
8 case, was - - -

9 JUDGE GRAFFEO: But they knew it was more  
10 than five acres that were going to - - -

11 MS. MARGOLIN: Yes, but my client - - - my  
12 client - - -

13 JUDGE GRAFFEO: - - - be needed by Lowe's.

14 MS. MARGOLIN: My client, Lerner  
15 Heidenberg, had in 1989 applied for a shopping center  
16 site plan on a J-2 zoned property in the town of  
17 Brookhaven, and had gotten that approval without any  
18 variance, use variance or area variance.

19 There was - - - there were literally scores  
20 of other applications. We brought fifteen,  
21 approximately, forward during the trial, because the  
22 documents were legible, where the town before, during  
23 and after the pendency of our application did not  
24 enforce the J-2 supposed prohibition on commercial  
25 center - - -

1 JUDGE READ: So that - - -

2 MS. MARGOLIN: - - - the way it was  
3 written.

4 JUDGE READ: So that - - - so that's why  
5 you didn't apply after March 2000?

6 MS. MARGOLIN: Well, I have to say, Your  
7 Honor, that if we had not been distracted by the  
8 town's rezoning to commercial recreation, we probably  
9 would have proceeded with some kind of application,  
10 although it might not have been a variance  
11 application. We could have argued that we had single  
12 and separate ownership, such that we were not bound  
13 by the upzoning that had been occasioned by the  
14 definition of commercial center in 1961, because the  
15 property had been in single and separate ownership  
16 since before that time.

17 We could have pursued an area variance. Or  
18 we could have gone back to the town and showed them  
19 based on their pattern, that they were no longer  
20 enforcing this law, but between the time that we  
21 initially applied in early March of 2000, and the  
22 time that this issue came to the fore, while we were  
23 still J-2, the town was processing.

24 It is true that the reviewer's letter  
25 raised the issue, but the town was processing, and

1           asked us how did we want to proceed. Not, we cannot  
2           proceed with your application in the absence of a use  
3           ap - - - variance application, but how do you want to  
4           proceed? And in short order, the town moved  
5           illegally to rezone the property to commercial  
6           recreation, then announcing that a use variance was  
7           required, not something it had said before.

8                   JUDGE PIGOTT: When you say "illegally",  
9           what do you mean?

10                   MS. MARGOLIN: I mean, they didn't have  
11           enough votes.

12                   JUDGE PIGOTT: Okay. The - - -

13                   MS. MARGOLIN: In violation of - - -

14                   JUDGE GRAFFEO: For a majority - - -

15                   MS. MARGOLIN: Yes.

16                   JUDGE GRAFFEO: - - - but then it changed  
17           to a simple majority?

18                   MS. MARGOLIN: They changed it to a simple  
19           majority by amending the town code in 2000.

20                   JUDGE GRAFFEO: And you didn't change that,  
21           right, till, like, to the third - - - third attempt?

22                   MS. MARGOLIN: I'm not sure what you mean  
23           we didn't ch - - - the town had not changed the code  
24           to allow for a simple majority after filing of a  
25           protest until they adopted the third rezoning

1 effective in October of 2002.

2 JUDGE GRAFFEO: And that one you didn't  
3 challenge? Am I correct?

4 MS. MARGOLIN: No, Your Honor, we believed  
5 that that one was validly adopted but we believed  
6 that we - - -

7 JUDGE GRAFFEO: That's what I was asking.

8 MS. MARGOLIN: - - - were entitled to the  
9 special facts exceptions.

10 And Judge Pigott, picking up on your  
11 question, it was perfectly clear that the town acted  
12 illegally and voidly in declaring that vote to rezone  
13 the property. Not only in our opinion, and not only  
14 because of General Construction Law 41, but in Judge  
15 Whalen's two decisions, he so found and determined,  
16 and the town, although they filed notices of appeal  
17 from those determinations, never pursued either of  
18 the appeals. So the town essentially has conceded  
19 that it acted void - - - in relying on a void and  
20 illegal act.

21 The - - - the special facts doctrine, it  
22 exists under this court's four cases of Our Lady of  
23 Good Counsel, Pokoik v. Silsdorf, Amsterdam-Manhattan  
24 Associates, and Matter of Faymor Development. These  
25 four cases made it clear that the purpose of the

1 special facts doctrine is to provide a remedy when an  
2 applicant suffers from wrongful action - - -

3 JUDGE ABDUS-SALAAM: But are zoning - - -

4 MS. MARGOLIN: - - - by a municipality.

5 JUDGE ABDUS-SALAAM: Are zoning cases  
6 different than permits and other types of cases that  
7 those - - -

8 MS. MARGOLIN: Only in - - - oh, I'm sorry.

9 JUDGE ABDUS-SALAAM: - - - the other types  
10 of instances that those cases dealt with?

11 MS. MARGOLIN: I don't think that the  
12 purpose of the special facts, and the fact that it's  
13 provi - - - supposed to provide an equitable remedy  
14 is any different.

15 But in zoning cases, because - - - because  
16 of the doctrine of vesting, the applicant has to show  
17 that because of the delay, it's prevented from  
18 vesting, because a land use applicant has to vest in  
19 the prior zoning, typically by putting something in  
20 the ground, or having made considerable expenditures  
21 in connection with the permit, before it's vested in  
22 the prior zone. That's the only respect in which  
23 it's different.

24 These three - - - these four cases, three  
25 of them are actually land use cases. Our Lady of

1 Good Counsel is not, but it's the one that speaks to  
2 the fact that it doesn't matter whether the actions  
3 of the municipality are intentional or unintentional,  
4 because the effect on the applicant is the same.

5 Pokoik v. Silsdorf was a land-use case.  
6 Amsterdam-Manhattan Associates and Matter of Faymor  
7 Development, one was a bingo permit and the - - - no,  
8 excuse me, Our Lady of Good Counsel was - - -

9 JUDGE SMITH: But then - - -

10 JUDGE RIVERA: But aren't you back - - -  
11 aren't you still back coming full circle to having to  
12 show that you were entitled as of right?

13 MS. MARGOLIN: Well, Your Honor, I'm glad  
14 you brought that up, because I believe that we are  
15 entitled to show that if there is selective  
16 enforcement, that that's sufficient. That is partly  
17 an artifact of the Second Department's decision in  
18 this case, in 2007.

19 JUDGE RIVERA: And how can you show  
20 selective enforcement on the record?

21 MS. MARGOLIN: Because on the record of the  
22 - - - of the site plans that we brought forward,  
23 every one of which, according to the zoning  
24 criterion, involved a commercial use occupying a site  
25 of five acres or more, there were none that were

1 required to get a use variance. There was one, in  
2 1995, that was required to get an area variance with  
3 the full support of the planning board and the  
4 planning department. And the proof that was put on  
5 for the applicant at that time was pro forma proof;  
6 it didn't meet any of the criteria for an area  
7 variance.

8 And in fact, if an area variance is because  
9 your parcel is too large and you look at the criteria  
10 in the town law concerning area variances, a parcel  
11 that's too large and doesn't require a reduction in  
12 setbacks or parcel size or street frontage, which  
13 this parcel did not, the zoning board of appeals  
14 essentially is constrained - - -

15 JUDGE SMITH: Is the difference - - -

16 MS. MARGOLIN: - - - to grant the area  
17 variance.

18 JUDGE SMITH: On the law, the - - - the  
19 difference between the use variance and an area  
20 variance, the use is what's contested was only - - -  
21 was only illegal, if it was, because of the area  
22 occupied, right?

23 MS. MARGOLIN: Yes, that's exactly - - -

24 JUDGE SMITH: Is there - - - is there a  
25 difference between a use variance and an area

1 variance in this - - - in this context?

2 MS. MARGOLIN: Well, the standard of proof  
3 is vastly different.

4 JUDGE SMITH: Well, I mean, but it is - - -  
5 yeah. I mean, you're saying - - - is an area - - -  
6 are they both different ways of saying let me build  
7 something with more than five acres?

8 MS. MARGOLIN: The town took the position -  
9 - - we believe in order to prevent us from moving  
10 forward - - - that it required a use variance, in  
11 which the standard was that we had to prove that  
12 there was no feasible economic use of the property  
13 without the variance. An area variance, of course,  
14 requires basically proof that it won't upset the  
15 zoning in the area or won't be - - - won't upset the  
16 - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel.  
18 You'll have your rebuttal. Thanks.

19 MS. MARGOLIN: Thank you.

20 MS. LICCIONE: Good afternoon, my name is  
21 Maureen Liccione, and I represent the Town of  
22 Brookhaven, respondents, on behalf of the town  
23 attorney.

24 CHIEF JUDGE LIPPMAN: What about the  
25 selective enforcement issue?

1 MS. LICCIONE: Well, that's the  
2 contradiction in terms in the appellant's entire  
3 legal theory. On page 41 of their brief, they said  
4 that the delay was caused by selective enforcement.  
5 Five pages later, on page 46, they say that selective  
6 enforcement not only requires malice, but it requires  
7 something even greater than malice, if that's  
8 possible, which is an evil eye. Yet, they come  
9 before this court and ask them to apply - - - you to  
10 apply a negligence standard. It's - - -

11 JUDGE GRAFFEO: Well, was there selective  
12 enforcement? I think that's what we're asking.

13 MS. LICCIONE: Absolutely not, Your Honor.  
14 We went through fourteen, and - - - there were  
15 fourteen cases - - - and distinguish each of them.  
16 Many of them were pre-existing nonconforming uses.  
17 And I'd like to address, with regard to that, in  
18 1989, counsel indicated that her client had made  
19 another application. The problem with that is that  
20 the J-2 prohibition on commercial - - - commercial  
21 center development was enacted in 1995.

22 JUDGE PIGOTT: Before - - - before you get  
23 too far into those facts, I don't - - - I don't mean  
24 to interrupt you on those - - -

25 MS. LICCIONE: Sure.

1                   JUDGE PIGOTT: - - - but the trial court  
2 found in - - - in their favor. The Appellate  
3 Division then said "this court's authority" - - -  
4 meaning them - - - "is as broad as that of the trial  
5 court". What's our - - - what's our review  
6 authority?

7                   MS. LICCIONE: I believe you can review the  
8 facts and the law.

9                   JUDGE PIGOTT: So we - - - we have - - - we  
10 have factual - - - one of the rare cases where we  
11 have the ability to review the facts.

12                   MS. LICCIONE: Yes, Your Honor, that's what  
13 my research indicates.

14                   But let me get back to the selective  
15 enforcement. Five of those fourteen cases were  
16 before December 25th, 1995, when the J-2 zoning  
17 became effective. Six of them were before the 1996  
18 comprehensive plan, and that 1996 comprehensive plan  
19 is at page 1,155 of the record.

20                   JUDGE PIGOTT: Well, Ms. Margolin says that  
21 you never - - - you didn't enforce J-2. There's not  
22 a Lowe's in a J-2 area.

23                   MS. LICCIONE: Well, they went over about a  
24 twenty-five year period in - - -

25                   JUDGE PIGOTT: I was almost done.

1 MS. LICCIONE: Oh, I'm sorry, Your Honor.

2 JUDGE PIGOTT: And that based on that, and  
3 based upon what then transpired when they were trying  
4 to get this Lowe's built and the votes, et cetera,  
5 that it was pretty clear that they were being  
6 discriminated against. How do we make that  
7 determination one way or another, if we're fact  
8 finders?

9 MS. LICCIONE: Well, it's in the record,  
10 Your Honor.

11 JUDGE PIGOTT: I understand that, but you -  
12 - - I mean, are you suggesting that we go through all  
13 of, you know, the trial testimony and determine which  
14 ones are credible and which ones aren't? Or do you  
15 think that we just go through the time line and - - -  
16 and - - -

17 MS. LICCIONE: Well, I think that we've  
18 summarized pretty easily what the distinctions are.  
19 I - - - as I've just pointed out, most of them were  
20 before the 19 - - - before this zoning even took  
21 effect. Many of these were movie theaters; two of  
22 them were movie theaters. They're not retail or  
23 wholesale, so they're out. The - - - one of them was  
24 exempt from zoning, and that was the Stony Brook  
25 Village Center, which contained a post office.

1 Without the post office, it came down below the five  
2 acres.

3 The rest, on page 37 of our brief, we  
4 summarize those which were pre-existing nonconforming  
5 uses. They were - - - and the comprehensive plan - -  
6 -

7 JUDGE SMITH: What - - -

8 MS. LICCIONE: - - - if I can just finish,  
9 Your Honor - - - the comprehensive plan showed a  
10 preference for demolishing - - -

11 JUDGE SMITH: What about the WF Shir - - -  
12 what about the WF Shirley case? She says that's res  
13 judicata.

14 MS. LICCIONE: Well, for any number of  
15 reasons, it is not, and I'm glad you - - -

16 JUDGE SMITH: One or two will do.

17 MS. LICCIONE: I'm glad I stopped to let  
18 you ask the question. WF Shirley is not res judicata  
19 because it was a pre-existing nonconforming use and  
20 the variance application was for a parking variance.  
21 So that Judge Costello's one little phrase in there,  
22 a Home Depot is permitted in the J-2, is first of  
23 all, dicta. It wasn't necessary to his decision.

24 JUDGE SMITH: Was it - - - was it litigated  
25 in that case whether - - - whether a Home Depot was a

1 proper J-2 use?

2 MS. LICCIONE: No, it was not. And a Home  
3 Depot may be allowed, but it - - - that - - - he  
4 didn't say a commercial center was allowed. The Home  
5 Depot could have been less than five acres.

6 JUDGE PIGOTT: Well, you're speculating on  
7 that. But her - - - her argument is - - -

8 MS. LICCIONE: Right.

9 JUDGE PIGOTT: - - - her argument is Home  
10 Depot, Lowe's, what's the difference? And you're  
11 allowing a Home Depot in a J-2, from a - - - from a  
12 non - - - a previously nonconforming use. They're a  
13 previously nonconforming use. They want a Lowe's.  
14 The court is already collaterally estopped from  
15 saying that - - - that it's not.

16 MS. LICCIONE: The reason I disagree with  
17 that, Your Honor, is because the Lowe's was not a  
18 pre-existing nonconforming use in this case. It was  
19 a - - -

20 JUDGE PIGOTT: No, no, it wasn't - - - it  
21 wasn't whatever it was before?

22 MS. LICCIONE: No, it was used as a - - -

23 JUDGE PIGOTT: They were in - - - they were  
24 in conformance on a J-2?

25 MS. LICCIONE: No, it did not conform with

1 a J-2. It - - - there was a use variance there for a  
2 driving range. It was not retail. Commercial  
3 centers only concern retail and wholesale.

4 JUDGE PIGOTT: No, no, I mean - - - I - - -  
5 my understanding of the previous case was, it was a  
6 previous - - - it was a nonconforming - - -  
7 nonconforming use. They then wanted to do the Home  
8 Depot, and they were allowed to. She's saying we're  
9 a nonconforming use under J-2. We want to do a  
10 Lowe's, and they're saying that we can't, and having  
11 al - - - that decision already been made against them  
12 in the Home Depot case, they can't now say it's not -  
13 - - it's not binding on them in the Lowe's case.

14 MS. LICCIONE: The difference is, is that  
15 the use in the WF Shirley case was retail, and they  
16 were knocking down an abandoned retail - - -

17 JUDGE PIGOTT: What's Lowe's?

18 MS. LICCIONE: No, no, no.

19 JUDGE PIGOTT: You're saying the previous  
20 nonconforming use was - - -

21 MS. LICCIONE: The driving range was not.  
22 The driving range was not a retail use.

23 JUDGE PIGOTT: Was not a previous  
24 nonconforming use?

25 MS. LICCIONE: Yes, but it wasn't the same

1 kind of use.

2 JUDGE SMITH: You're saying it wasn't the  
3 same - - - you're saying Home Depot was already  
4 grandfathered for retail, and these people weren't?

5 MS. LICCIONE: Exactly, Your Honor.

6 Exactly. The other reason it's not res judicata is -  
7 - - is - - - has to do with the Appellate Division's  
8 first decision, which is at 534 of the record, which  
9 is based on Judge Emerson's decision on the summary  
10 judgment, which is 525. The Appellate Division in  
11 its 2007 decision did not reverse Judge Emerson.  
12 They modified the finding of the grant of summary  
13 judgment. They didn't reverse any of her findings.

14 And Judge Emerson said that a commercial  
15 center is not allowed in the J-2 in this area. And  
16 the Appellate Division affirmed that. When Ms. Margo  
17 - - -

18 JUDGE SMITH: Well, but - - - but how could  
19 they - - - then how could they have ordered a trial?  
20 I mean, shouldn't - - - shouldn't you have been  
21 entitled to summary judgment on that ground?

22 MS. LICCIONE: I agree, Your Honor, and  
23 actually, when Ms. Margolin and I arrived at the  
24 Second Department for our second go-around, I stood  
25 up as the appellant, and the first thing Judge

1 Leventhal said was, we messed this up the first time,  
2 didn't we? To which I - - - it's not part of the  
3 record, but I certainly agree. The Appellate  
4 Division found the first time that J-2 was not - - -  
5 there was no right to a commercial center use in the  
6 J-2.

7 JUDGE SMITH: So you're saying that the  
8 first time the Appellate Division found issues of  
9 fact as to the special facts issue, and didn't deal  
10 with the as of right issue?

11 MS. LICCIONE: No, they did, actually,  
12 that's why the Appellate Division first decision was  
13 wrong. The Appellate Division's first decision at  
14 page 534 of the record said that this is J-2, and a  
15 commercial center is not permitted. They didn't  
16 reverse Judge Emerson. They agreed with her.

17 JUDGE SMITH: So they said - - - so they  
18 said it - - - your view of it is they said it was not  
19 permitted, and then they failed to draw the logical  
20 conclusion from that statement?

21 MS. LICCIONE: Yes, Your Honor. Had - - -  
22 had I been counsel, I would have reargued that.

23 Back to your question, Judge Pigott, with  
24 respect to WF Realty, the only point I would  
25 underscore is that the driving range there was not a

1 retail use as - - - as Judge Smith pointed out.

2 JUDGE PIGOTT: But does - - - is that the  
3 key? In other words, if - - - if you've got three  
4 nonconforming uses, one retail, one recreational, one  
5 something else. Can you selectively decide that this  
6 nonconforming use can now continue in a nonconforming  
7 use because it's retail to retail, and this one,  
8 which is driving range to retail, we've decided we're  
9 not going to do that?

10 MS. LICCIONE: Yes, Your Honor, I - - -

11 JUDGE PIGOTT: And you can do that and  
12 that's not arbitrary, in your view?

13 MS. LICCIONE: I don't believe so, because  
14 it's one use. And the comprehensive plan on recall  
15 zoning - - -

16 JUDGE SMITH: Are you even allowed to say,  
17 well, you've got a driving range, so the retail is  
18 okay?

19 MS. LICCIONE: No, not under - - -

20 JUDGE SMITH: You can't change from one  
21 nonconforming use to another, as I understand it.  
22 You got to keep the same one.

23 MS. LICCIONE: Yes, and I - - - yes, Your  
24 Honor. But more important than that, is the  
25 comprehensive plan which is so critical here. The

1 comprehensive plan, and it's at pages 1,354 to 1,355  
2 of the record, says that we want to eliminate all the  
3 vacant and derelict shopping centers that we have in  
4 the Town of Brookhaven.

5 I think Caldor had just gone out of  
6 business, and they had all these derelict shopping  
7 centers. So the focus was, take down the old ones,  
8 fix them up, and we want to support the continuation  
9 of those nonconforming use as a matter of our  
10 comprehensive plan, which was developed over a course  
11 of several years.

12 So that's entirely different from taking a  
13 commercial, recreational use, and turning it into  
14 retail. The town wanted to - - - in its  
15 comprehensive plan - - - stop with the shopping  
16 centers, and have more recreational sp - - - space,  
17 so they preferred to fix up the derelict ones.

18 JUDGE RIVERA: In WF Shirley, was it the  
19 same owner from one nonconforming use to the other?

20 MS. LICCIONE: I don't know the answer to  
21 that.

22 JUDGE RIVERA: Okay.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MS. LICCIONE: Your Honor - - -

25 CHIEF JUDGE LIPPMAN: Thank you. Judge

1 Graffeo, do you have a question?

2 JUDGE GRAFFEO: Does the Alscot case have  
3 any bearing?

4 MS. LICCIONE: Well, the Alscot case  
5 actually is of assistance to us here, because what  
6 the Alscot case said was we will not take a - - -  
7 procedural mishaps and convert them into an - - - a  
8 special facts situation. So Alscot is helpful to us,  
9 and I might also - - - if I may, Our Lady - - -

10 CHIEF JUDGE LIPPMAN: Last thought,  
11 counsel, go ahead.

12 MS. LICCIONE: Our Lady of Good Counsel is  
13 not a land-use case. It's a license case, and it's  
14 the only case where the court came close to allowing  
15 negligence. And Pokoik, which was a land use case,  
16 which did require malice, was decided a year later.

17 CHIEF JUDGE LIPPMAN: Okay, counsel.  
18 Thanks, counsel.

19 MS. LICCIONE: Thank you.

20 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

21 MS. MARGOLIN: Yes, thank you, Your Honor.  
22 Judge Breitel in his dissent in Pokoik v. Silsdorf  
23 called the special facts rule a "court-created engine  
24 of justice". That's why we're here: to obtain  
25 justice for our client.

1                   There are some things that came up during  
2                   counsel's argument that I would like to address. One  
3                   is, what is the nature of the prohibition on  
4                   commercial centers, and when was it enacted? It was  
5                   first enacted in 1961. That appears at page 985 of  
6                   the record. It was amended in 1964 - - -

7                   JUDGE SMITH: She - - - she suggested, as I  
8                   understood her, that they started enforcing it a bit  
9                   more vigorously after the comprehensive plan came  
10                  out. Assuming that to be true, are they allowed to  
11                  do that?

12                  MS. MARGOLIN: No, the comprehensive plan  
13                  is a blueprint for future legislation. It doesn't  
14                  change the fact that the town is - - -

15                  JUDGE SMITH: Well, I - - - what I'm saying  
16                  - - - can - - - I - - -

17                  MS. MARGOLIN: - - - bound to enforce its  
18                  laws its - - -

19                  JUDGE SMITH: Can you make a select - - -  
20                  if - - - if a town ignores a rule for twenty years,  
21                  and then it says, okay, we're turning over a new  
22                  leaf; we're enforcing this starting tomorrow. Is  
23                  that selective enforcement?

24                  MS. MARGOLIN: Well, it might be able to do  
25                  that, but that's not what happened here. Clearly

1 here, if you look at the time lines - - - and the  
2 reason we put them in is that the town continued to  
3 not enforce the J-2 zone against other applications  
4 that were simultaneous with ours immediately before  
5 and immediately after - - - so that we were singled  
6 out, just as we were singled out for rezoning to  
7 commercial recreation. The only property in the  
8 town.

9 CHIEF JUDGE LIPPMAN: Why do you think you  
10 were singled out?

11 MS. MARGOLIN: Pardon?

12 CHIEF JUDGE LIPPMAN: Why were you singled  
13 out?

14 MS. MARGOLIN: We think we were singled out  
15 in order to prevent us from building a shopping  
16 center on the site. That's what the councilmen, the  
17 supervisor, the commissioner of planning said at the  
18 hearing. If we don't rezone this property, someone  
19 could build a giant cen - - - shopping center on it.  
20 If they'd had the votes to adopt a change of zone, if  
21 they had thought to adopt a moratorium, they could  
22 have done it. We would not be here.

23 JUDGE ABDUS-SALAAM: Counsel, you seem to  
24 be arguing that they showed bad faith, and that's  
25 what you need to show, not negligence, right? You -

1 - -

2 MS. MARGOLIN: That is true, Your Honor. I  
3 do believe we showed bad faith. But the Second  
4 Department, through the prism, or the view of  
5 requiring bad faith said that our facts didn't amount  
6 to bad faith.

7 I think that shows that a rule that  
8 requires malice is subject to potentially judicial  
9 mischief in the sense that it devalues the  
10 circumstantial proof, which as our amicus, Long  
11 Island Builders Institute, indicated, it's basically  
12 the only kind of proof you can get.

13 CHIEF JUDGE LIPPMAN: But you want it  
14 either way in your view?

15 MS. MARGOLIN: Yes.

16 CHIEF JUDGE LIPPMAN: Per se, negligence,  
17 either way, you want it.

18 MS. MARGOLIN: Yes, I would like to, if I  
19 may, to address one other thing which is I wanted to  
20 just - - -

21 CHIEF JUDGE LIPPMAN: One thing, counsel,  
22 go ahead.

23 MS. MARGOLIN: One correction. The  
24 prohibition on commercial centers, the way it is - -  
25 - it says theaters - - - the 1961 and '64 laws - - -

1 theaters, shops, so on and so forth, recreational  
2 areas. All of those things are permitted unless they  
3 are a part of a commercial center. These other  
4 things that the town argues were exempt from those  
5 prohibitions - - - that's incorrect. That's not a  
6 correct reading of the law.

7 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
8 you both.

9 MS. MARGOLIN: Thank you.

10 CHIEF JUDGE LIPPMAN: Appreciate it.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Rocky Point Drive-In, L.P. v. Town of Brookhaven, No. 197 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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