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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF COLIN REALTY,  
Appellant,

-against-

TOWN OF NORTH HEMPSTEAD,  
Respondent.  
-----

No. 150

20 Eagle Street  
Albany, New York 12207  
September 10, 2014

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

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1 CHIEF JUDGE LIPPMAN: Mumber 150, Matter of  
2 Colin Realty. Counsel?

3 MR. CALICA: Sure.

4 CHIEF JUDGE LIPPMAN: Do you want any  
5 rebuttal time, counselor?

6 MR. CALICA: Yes. Respectfully, Your  
7 Honor, I'll reserve two minutes for rebuttal.

8 CHIEF JUDGE LIPPMAN: Two minutes. Go  
9 ahead, counsel.

10 MR. CALICA: All right. Good afternoon,  
11 Chief Judge Lippman and members of the panel. My  
12 name is Robert M. Calica. My firms represents  
13 petitioner-appellant Colin Realty.

14 As the court will recognize, while the - -  
15 -

16 CHIEF JUDGE LIPPMAN: Counsel, what's at  
17 issue here? Are - - - are you prejudiced by the  
18 approval of this - - -

19 MR. CALICA: Without question. The - - -  
20 the record in this action is that my client is the  
21 most directly impacted adjacent owner - - -

22 CHIEF JUDGE LIPPMAN: Is it an - - - is it  
23 an area that's - - - that's filled, that has  
24 businesses there now? I mean, are there empty - - -  
25 a lot of empty areas? What's the context?

1                   MR. CALICA: It is so enormously complex -  
2                   - - congested, Your Honor, that the ZBA record quotes  
3                   an exchange between these ZBA member and the zoning  
4                   counsel, which may even have been Mr. Migatz,  
5                   bemoaning how difficult the traffic and parking  
6                   situation - - -

7                   CHIEF JUDGE LIPPMAN: It's traffic - - -  
8                   when you say congestion, that's what you're talking  
9                   about?

10                  MR. CALICA: And parking congestion, Your  
11                  Honor.

12                  JUDGE GRAFFEO: This was a commercial  
13                  establishment even before this current business - - -

14                  MR. CALICA: Right. It predates the - - -

15                  JUDGE GRAFFEO: - - - correct?

16                  MR. CALICA: - - - enactment of the Code.  
17                  The point is, my client is most directly affected  
18                  because he has a vastly improved retail strip to the  
19                  north of it that has off-street parking, unlike all  
20                  of the other nonconforming uses. It is a newer  
21                  building with newer stores and a - - - and a - - -  
22                  and he will be the most acutely and directly - - -

23                  CHIEF JUDGE LIPPMAN: So your argument is  
24                  this is a use rather than an area?

25                  MR. CALICA: Without question, Your Honor.

1 This court made clear over forty years ago in Off - -  
2 - in Off Shore Restaurant, that where the parking  
3 requirement is tied not to dimensional factors of the  
4 parcel, its size or the size of the building, but the  
5 character of the use, in particular, whether it's a  
6 restaurant, a bar - - -

7 CHIEF JUDGE LIPPMAN: What does the Town  
8 Code say about all of this, in your view?

9 MR. CALICA: The Town Code says that in the  
10 case of a restaurant, you have to have an - - - a  
11 space for each four patrons who can be seated. And  
12 where it's coupled, as here, with take-out, you're  
13 required one for every two.

14 CHIEF JUDGE LIPPMAN: So that's why it's a  
15 use variance? That's - - -

16 MR. CALICA: It's a use variance because  
17 it's - - -

18 CHIEF JUDGE LIPPMAN: - - - in your view?  
19 Yeah?

20 MR. CALICA: Yes. Because it's directly  
21 tied to the character of the use going from basically  
22 a low-volume retail store - - - it was historically a  
23 card store or - - - or I guess sleepy retail uses  
24 like that - - -

25 JUDGE ABDUS-SALAAM: Counsel, how does the

1 amendment to the Town Code affect this case?

2 MR. CALICA: All right. First of all, by  
3 its terms, Your Honor, it's not retroactive. It  
4 doesn't state it's retroactive. Second of all, it  
5 would be an odd notion if the ZBA, three years ago,  
6 considered the application under a wrong legal  
7 standard, if their error could be remedied now,  
8 because by a statute enacted two-and-a-half years  
9 later, they redefined the legal standards.

10 CHIEF JUDGE LIPPMAN: What happens if we  
11 agree with you and it goes back to them? What  
12 happens?

13 MR. CALICA: Well, the answer is, they  
14 would have to reconsider it. And on this record,  
15 they would turn it down. Actually, this court could  
16 turn it down, because in effect, they never made the  
17 dollars-and-cents showing required under 267 of the  
18 Town Law, and required historically under Otto v.  
19 Steinhilber, and all of the use variance cases. So  
20 basically - - -

21 JUDGE ABDUS-SALAAM: Counsel, aren't we  
22 required to review this under the new Town Code?

23 MR. CALICA: Your Honor, we did some  
24 supplemental briefing, because it - - - it came up at  
25 the time. Among the things we'll point out is that

1 this is a change of use without regard to the  
2 parking. Article 70-208 of the Town Code says, in  
3 effect, you cannot increase the nonconformity of a  
4 nonconforming use, period. That means if you want to  
5 change a retail use from a card or a gift store to a  
6 restaurant of forty-five seats, take-out capacity,  
7 then in effect, even for the - - - you're not even  
8 entitled to a special permit. It's - - - it's not a  
9 permitted use by special permit. Increasing the  
10 nonconformity under the explicit scheme of the North  
11 Hempstead Code, is, itself, a use variance, and there  
12 was just no effort before the Zoning Board of Appeals  
13 to make the type of showing that's required for a use  
14 variance.

15 Beyond that, the redefinition is  
16 inconsistent with the Town Law. You would - - - you  
17 would have a - - - a - - - you would have a  
18 preemption issue.

19 In 1991, the New York legislature decided  
20 to clear the difficulty created by the case law that  
21 had defined use variances as unnecessary hardship and  
22 area variances as practical diffi - - - I struggled  
23 with this forty years ago when I was clerk in the  
24 Appellate Division. I'm sure everybody does.

25 They did a statutory test to clarify the

1 difficulty of saying which was which. The Town of  
2 North Hempstead can't override 267 of the Town Law.  
3 They can't say what is plainly a use variance under a  
4 hundred years of Court of Appeals - - -

5 JUDGE SMITH: What - - - what - - -

6 MR. CALICA: - - - jurisprudence - - -

7 JUDGE SMITH: - - - what's - - - what in  
8 the Town Law says this is a use variance?

9 MR. CALICA: No, the Town Law says that in  
10 considering a parking nonconformity, the ZBA shall  
11 invoke the new law that - - - that they adopted post-  
12 appeal, under an area variance standard.

13 And we're saying we can't - - - they can't  
14 - - -

15 JUDGE SMITH: I'm sorry. I'm - - - I was  
16 trying to follow your preemption argument.

17 MR. CALICA: Okay. The Town Law defines  
18 what is a use variance and what is an area variance.  
19 This court's case law - - -

20 JUDGE SMITH: And what - - - and what in  
21 the Town Law says this is a use variance?

22 MR. CALICA: What the Town Law - - - the  
23 Town Law - - - essentially it does, because it says -  
24 - - well, no, the Town Law basically articulates the  
25 standard, Your Honor, for a use variance and an area

1 variance.

2 JUDGE SMITH: I - - - I understand it  
3 articulates the variance. But how - - - we can't  
4 read the Town Law and figure out whether this is more  
5 like a use variance or an area variance.

6 MR. CALICA: Well, it - - - this court's  
7 decision in - - - in Off Shore Restaurant made clear  
8 that this is a use variance. But it's also a use  
9 variance even if we go beyond the parking, Your  
10 Honor, because there's no loading dock, and because  
11 it's an intensification of a historical retail use,  
12 which under their own Code is not permitted, because  
13 Article 70-208 says there shall be no, in - - - in  
14 effect, change, intensification, that increases the  
15 nonconformity, period.

16 So in order to - - -

17 JUDGE PIGOTT: What did they fail to  
18 consider that you think they should have?

19 MR. CALICA: Excuse me?

20 JUDGE PIGOTT: What did they fail to  
21 consider that you think they should have?

22 MR. CALICA: Several things, Your Honor.  
23 They failed to consider that under Off Shore  
24 Restaurant, they were governed by a use variance  
25 standard and they were required to - - -



1 JUDGE PIGOTT: But the - - - we - - - that  
2 case has been criticized too, right, I mean - - -

3 MR. CALICA: Not by this court, Your Honor.

4 JUDGE PIGOTT: Well, the commentaries  
5 didn't seem to like it.

6 MR. CALICA: It - - - I - - - it's  
7 startling, Your Honor, that this court's clear  
8 ruling, written by Judge Breitel, and the dissent was  
9 trying to harmonize some considerations, was so  
10 dismissive on it.

11 But beyond that, a use variance was  
12 required merely to rezone the property. And then  
13 last - - - because they increased the nonconformity.  
14 There was a total relaxation, elimination of the  
15 parking deck. That's not in - - - the loading area.  
16 That's not - - - that's not an area variance  
17 consideration. That's in - - - inextricably tied to  
18 use. And - - -

19 JUDGE SMITH: What would - - - why - - -  
20 when would a park - - - give me an example of a  
21 parking variance that would be an area - - - would be  
22 analogized to an area variance?

23 MR. CALICA: You have a 60,000-foot  
24 supermarket and some stores, and you require 100  
25 spots and you have 90. That's a traditional area

1 variance. You have an insufficient number based upon  
2 the area - - -

3 JUDGE SMITH: Isn't - - - but isn't the  
4 parking here related not quite as directly to space?  
5 It's a per-table or per-patron thing?

6 MR. CALICA: Well, Your Honor, that's  
7 really per-use, because in effect, it says the lawmu  
8 - - - the lawful number of seats, and that means  
9 occupants. They're really looking at users.

10 JUDGE SMITH: Well, the number - - - the  
11 number of seats sounds like it has more to do with  
12 space than use.

13 MR. CALICA: No, Your Honor. It could vary  
14 with layout. It's really related specifically to  
15 who's going to sit down.

16 Finally, Your Honor - - -

17 JUDGE GRAFFEO: Is the - - - is the  
18 presence of the two municipal lots at all relevant to  
19 this determination?

20 MR. CALICA: They're 800 feet away, Your  
21 Honor. And they're - - - you know, we've shown it, I  
22 think, on page 31 of the record, or one of the pages,  
23 they are literally an 800-foot walk away. There is  
24 no off-street parking that's feasible.

25 Finally - - -

1 JUDGE SMITH: You - - - you suggested  
2 earlier that - - - that the commentators weren't  
3 treating Off Shore with the proper respect. The  
4 Appellate Divisions haven't been following it either,  
5 have they?

6 MR. CALICA: Well, I think, perhaps, that's  
7 why this court granted our motion for permission to  
8 appeal. But I would say that it's a sound rule - - -

9 JUDGE SMITH: Why - - - why is it - - - why  
10 doesn't Off Shore get more respect. Is there - - -  
11 is it possible that maybe it's either wrong or very  
12 hard to apply?

13 MR. CALICA: It's correctly decided, Your  
14 Honor. It may not be written with the precision that  
15 the statute is. But that has historically been a  
16 problem with use vers - - - versus area variances.  
17 But it's very clear, because the facts are analogous  
18 to Long Beach Code, had the same language, it was  
19 changing a delicatessen to a lounge. He had  
20 challenged - - - challenged change - - -

21 JUDGE ABDUS-SALAAM: But counsel, in Off  
22 Shore, which was decided the year before the  
23 Restaurant Corp case, that involved the same parking  
24 problem and this court decided that it was an area  
25 variance.

1                   MR. CALICA: But that was because, Your  
2 Honor, it was merely the dimensional sizes of an  
3 office. It was tied to the size - - - it was the - -  
4 - the traditional differentiation between when a  
5 building of a certain size requires additional  
6 parking, because they were adding office space and  
7 the parking - - -

8                   JUDGE ABDUS-SALAAM: Well, haven't most  
9 parking cases been decided as area cases? Isn't Off  
10 Shore a little bit of an aberration?

11                   MR. CALICA: Well, it's interesting, Your  
12 Honor. We wound - - - wound our way through all the  
13 Appellate Division cases. But the answer is, the  
14 Court of Appeals has not revisited, in forty years,  
15 and I'm saying, Your Honor, this - - - the ruling was  
16 soundly made, and it should not be revisited - - -

17                   JUDGE GRAFFEO: So what's the distinction  
18 you want us to make?

19                   MR. CALICA: That where, as here, there's a  
20 - - -

21                   JUDGE GRAFFEO: If you were writing the  
22 rule here, how do you want to articulate when you use  
23 - - -

24                   MR. CALICA: Right.

25                   JUDGE GRAFFEO: - - - a use variance?

1 MR. CALICA: In the circumstance, first,  
2 where you're relaxing a hundred percent the  
3 requirement, there's no parking, and the  
4 nonconformity relates to the type of use and not the  
5 dimensional size of the user - - - in other words,  
6 when it's a restaurant or the type of facility - - -  
7 in - - - in Off Shore it was - - - it was a bar and  
8 lounge - - - that draws more people to the same size  
9 space - - - it's not dependent on the size of the bar  
10 or the si - - - but what will attract in terms of,  
11 you know, take-out and whatever, that under those  
12 circumstances, the sound Off Shore premises - - - Off  
13 Shore Restaurant rule, should continue - - -

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. CALICA: - - - to be viable and find  
16 this a use variance.

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

19 MR. CALICA: Your Honor, just a - - -

20 CHIEF JUDGE LIPPMAN: No, no, counsel,  
21 you'll have your rebuttal.

22 MR. CALICA: Thank you, Judge.

23 CHIEF JUDGE LIPPMAN: Counselor.

24 MS. FREEMAN: Good afternoon. May it  
25 please the court, my name is Simone Freeman of Amato

1 Law Group, PLLC. I am of counsel to the Town of  
2 North Hempstead and the Town of North Hempstead Board  
3 of Zoning and Appeals.

4 CHIEF JUDGE LIPPMAN: Counsel, how do you  
5 get around the Off Shore case?

6 MS. FREEMAN: It's simple, Your Honor.

7 CHIEF JUDGE LIPPMAN: It's what?

8 MS. FREEMAN: It's - - - it's a pretty  
9 simple case. The applicant here is purporting to  
10 challenge the board's determination, granting an  
11 applicant area variances for off-street parking. But  
12 since the underlying use here was permitted under the  
13 Town Code, there's no need - - - there was no need or  
14 basis to treat the underlying application as one for  
15 a use variance.

16 JUDGE SMITH: The question is how you get  
17 around the Off Shore case.

18 MS. FREEMAN: Yes. In Off Shore - - - you  
19 don't necessarily need to get around Off Shore. Off  
20 Shore supports this premise.

21 CHIEF JUDGE LIPPMAN: Why not? It's the  
22 precedent in our - - - in our court.

23 MS. FREEMAN: Yes, but it supports this  
24 premise.

25 CHIEF JUDGE LIPPMAN: Oh, go ahead.

1 MS. FREEMAN: I think that - - -

2 CHIEF JUDGE LIPPMAN: Why does it - - -

3 MS. FREEMAN: - - - and not - - -

4 CHIEF JUDGE LIPPMAN: - - - support your  
5 premise?

6 MS. FREEMAN: I think it supports this  
7 premise, because in Off Shore, this court held that  
8 you are to look to the reasons for the restriction  
9 and then adopt rules that are applicable to the - - -  
10 to either area or a use variance standard.

11 In this instance, the use is permitted.  
12 This is not a - - - a prohibited use. Use variances  
13 have always been applied in cases where the use is  
14 not permitted. Here the use is permitted.

15 JUDGE SMITH: Well, it's obviously - - -

16 JUDGE GRAFFEO: What use - - -

17 JUDGE SMITH: - - - not a pure use variance  
18 or a pure area variance. It's a parking variance.  
19 But doesn't Off Shore say that those things are  
20 usually treated in the same way as use variances?

21 MS. FREEMAN: No, it doesn't nec - - - no,  
22 it does not necessarily say that. In Off Shore the  
23 facts were different than the case here. In Off  
24 Shore, there was a preexisting nonconforming  
25 deli/restaurant, and they were seeking to expand that

1 into a restaurant/lounge. They were seeking to  
2 renovate the existing facility and enlarge that facil  
3 - - - facility. So in essence, it's an enlargement  
4 of a nonconforming use.

5 Here we're not enlarging the nonconforming  
6 use.

7 CHIEF JUDGE LIPPMAN: But isn't the  
8 principle the same? If you want to keep - - - if you  
9 wanted to keep parking outside of a use variance, you  
10 could - - - you could do it.

11 MS. FREEMAN: Yes, if you - - - what - - -  
12 I'm sorry, Your Honor. I - - -

13 CHIEF JUDGE LIPPMAN: Why is this not - - -  
14 you didn't in this case.

15 MS. FREEMAN: I'm not sure I - - - I want  
16 to make sure - - -

17 CHIEF JUDGE LIPPMAN: Parking - - - parking  
18 is related to use, in the Town Code, isn't it?

19 MS. FREEMAN: Parking is tied to both area  
20 and use under the Town Code, as is, in most town  
21 codes.

22 JUDGE ABDUS-SALAAM: So how - - - counsel,  
23 how does - - - I'll ask you what I asked your  
24 adversary: how does the amendment to the Town Code  
25 impact this?



1 MS. FREEMAN: The amendment to the Town  
2 Code codifies the historic treatment by the Zoning  
3 Board of Appeals as viewing applications from the  
4 off-street parking restrictions as area variances,  
5 which they've done - - -

6 CHIEF JUDGE LIPPMAN: Yeah, yeah, but  
7 you're doing that after-the-fact. How does it affect  
8 this case now that you've done that?

9 MS. FREEMAN: Well, for this case it - - -  
10 again, it's - - - the intent of the Town Board was to  
11 codify the historic treatment of the board, which is  
12 how they viewed this case and is how they viewed  
13 every case.

14 JUDGE SMITH: But if the Town - - - if you  
15 assume that the Town Board was wrong when it made  
16 this decision - - - I understand you're saying it was  
17 right. But assume they were wrong. Would the - - -  
18 would the amendment to the Code moot the case or  
19 change the result?

20 MS. FREEMAN: Would the amendment to the  
21 Code lose this?

22 JUDGE SMITH: Well, yeah. Yeah. I mean,  
23 if - - - in other words, if you were - - - if you  
24 were wrong the first time, can the amendment to the  
25 Code make you right?

1 MS. FREEMAN: No, because in both cases  
2 it's - - - it's a permitted use. There is no use  
3 variance required here.

4 JUDGE SMITH: Okay, so we - - - we can't -  
5 - - we can't just look at the amendment - - - the  
6 recent amendment to the Code and say we're done. We  
7 have to figure out whether - - - whether this is a -  
8 - - whether the use variance or area variance  
9 standard applies?

10 MS. FREEMAN: Yes. You would just - - -  
11 you would take the Town Board's amendment to the  
12 Code, as codifying the Town - - - the traditional - -  
13 -

14 JUDGE SMITH: For you, that's evidence of  
15 what the - - - of what the Code always meant?

16 MS. FREEMAN: Yes, exactly. That's exactly  
17 true.

18 JUDGE GRAFFEO: Why is it - - - why is the  
19 absence of parking entirely the equivalent of not  
20 having enough parking?

21 MS. FREEMAN: It's - - -

22 JUDGE GRAFFEO: In other words, they need  
23 twenty-four - - -

24 MS. FREEMAN: Um-hum.

25 JUDGE GRAFFEO: - - - parking spaces here,

1 right? If there had been a lot, and they had twenty,  
2 so they're four short, I think your adversary is  
3 saying that might fall under area variance. But  
4 where you have no parking available for your  
5 permitted use, why should that be the equivalent of  
6 an area variance?

7 MS. FREEMAN: Because it comes down to  
8 numbers. It's the same thing. You have - - - if you  
9 are short four spaces, you're short four spaces.  
10 It's an area variance. If you're short twenty  
11 spaces, you're short twenty spaces. It's an area  
12 variance. Here - - -

13 JUDGE GRAFFEO: Even though the requirement  
14 for so many spaces per seats in the restaurant - - -

15 MS. FREEMAN: Yes, because both uses in  
16 this case are permitted.

17 JUDGE GRAFFEO: Is a requirement?

18 MS. FREEMAN: If it - - - if the case - - -  
19 if they were not permitted uses, then you would need  
20 an ar - - - a use variance. However - - -

21 CHIEF JUDGE LIPPMAN: Let me - - - let me  
22 ask you one last question. Again, what you were  
23 asked before. If that's not what the Code used to  
24 mean, and now you come and say this is what it means,  
25 what happens?

1 MS. FREEMAN: Well - - -

2 CHIEF JUDGE LIPPMAN: What's the effect on  
3 this case that was decided under the old Code  
4 provisions? And let's say it's - - - those  
5 provisions were about use variance - - - put it in  
6 the use variance pocket. What happens now that  
7 you've changed the Code?

8 MS. FREEMAN: So you're - - - you're saying  
9 we're assuming - - -

10 CHIEF JUDGE LIPPMAN: Assuming you were  
11 wrong.

12 MS. FREEMAN: Okay. That they were wrong.

13 CHIEF JUDGE LIPPMAN: And now you're saying  
14 it's an area variance. What happens to this case?

15 MS. FREEMAN: I don't think there's any  
16 change in the result of this case. All the  
17 applicable cri - - - applicable criteria were  
18 properly considered and evaluated by the board in  
19 rendering its decision.

20 JUDGE SMITH: You say you win even under a  
21 use variance standard?

22 MS. FREEMAN: I'm sorry - - - excuse me? I  
23 didn't - - -

24 JUDGE SMITH: Even - - - even under the use  
25 variance standard, you say you win?

1 MS. FREEMAN: No, it would not win under  
2 the use variance standard, because the use variance  
3 standard is a much more stringent standard, and it  
4 doesn't imply - - - it doesn't imply a balancing  
5 test. You must meet four prongs and that is it.

6 However, again - - -

7 JUDGE RIVERA: Which prong wouldn't be - -  
8 - or which prongs wouldn't be satisfied?

9 MS. FREEMAN: It's - - - I think we're  
10 speculating. It may or it may not meet all four  
11 prongs. That would be something that the applicant  
12 would have to show. If I misspoke, more correctly,  
13 the applicant would have to show it met all four  
14 prongs.

15 The balancing test for an area variance is  
16 less stringent than a use variance test.

17 CHIEF JUDGE LIPPMAN: Okay, counsel - - -  
18 oh, I'm sorry, Judge Read?

19 JUDGE READ: Just to follow up on something  
20 that Judge Lippman asked you. So you're not arguing  
21 that the amendment moots this case?

22 MS. FREEMAN: The amendment codifies the  
23 treatment - - - the board's treatment. So either  
24 way, regardless, it would still be treated as - - -

25 JUDGE READ: I guess the answer to that is

1 yes, you're not arguing that? You're not arguing  
2 that it moots the case?

3 MS. FREEMAN: No, not necessarily.

4 CHIEF JUDGE LIPPMAN: Okay, thanks,  
5 counsel. Let's hear from your colleague.

6 MR. MIGATZ: May it please the court, Bruce  
7 W. Migatz, Albanese & Albanese, counsel for the  
8 respondent and the applicant, Manhasset Pizza and  
9 Fradler Realty.

10 I am arguing that the change in the Town  
11 Code does moot this case. And I will quote from my  
12 brief, in the matter of Calverton Industries: "It is  
13 well settled law that absent special facts that would  
14 warrant an exception, a court will apply the zoning  
15 ordinance currently in existence at the time a  
16 decision is rendered on appeal." And this court  
17 denied leave to appeal on that - - -

18 JUDGE PIGOTT: Are there any exceptions to  
19 that?

20 MR. MIGATZ: The special facts exception,  
21 where - - - where the applicant can show he was  
22 entitled to a permit as a right, and there was  
23 unreasonable delay by the town or village that caused  
24 him prejudice.

25 JUDGE SMITH: But aren't you - - - aren't

1           you assuming that they - - - I mean, don't we first  
2           have to decide whether by its terms the amendment  
3           applies to this case? It doesn't say we're changing  
4           the standard going backwards. It just says from here  
5           - - - I mean, it could be read to say, from here on,  
6           this is the standard we'll apply.

7                       MR. MIGATZ: Well, it doesn't say "from  
8           here on", Judge, it says a parking variance is an  
9           area variance. And so it - - - that - - - to me,  
10          that - - - that moots this case. But I hope this  
11          court - - -

12                      CHIEF JUDGE LIPPMAN: Going backwards it  
13          moots the case? That basically we go back in and say  
14          - - - even though it was decided under the old  
15          standard? I don't quite get why it moots the case.

16                      MR. MIGATZ: Yes. I - - -

17                      JUDGE READ: It's retroactive, you're  
18          saying. How do we - - - how would we know that? How  
19          - - -

20                      MR. MIGATZ: Well, you know - - -

21                      JUDGE READ: - - - do you know you're right  
22          about that?

23                      MR. MIGATZ: - - - well - - - well - - -

24                      JUDGE RIVERA: I thought your argument was  
25          it was simply clarifying.

1 MR. MIGATZ: No, I didn't argue that.

2 JUDGE RIVERA: Okay.

3 MR. MIGATZ: The Second - - - the Second  
4 Department has - - - has held in numerous cases, and  
5 this court grant - - - has denied leave to appeal.  
6 The - - - the citation I just quoted you.

7 But I would like to move on. I have  
8 limited time here, because there were a couple things  
9 that were said that I want to address, if I may.

10 Off Shore is distinguishable, because that  
11 code was a very different code. In that code, in  
12 order to change the use, a use permit had to be  
13 granted. In order to grant any variance, I should  
14 say, a use permit had to be granted by the building  
15 commissioner, based upon a finding of conformity with  
16 all provisions of the Code.

17 JUDGE SMITH: But even if the - - -

18 JUDGE GRAFFEO: So - - -

19 JUDGE SMITH: - - - even if the case is  
20 distinguishable on its facts, there's some language  
21 in there that we would have to reject in order to go  
22 for you. Isn't that - - - I mean, they say that  
23 ordinarily a parking variance is more like a use than  
24 an area variance.

25 MR. MIGATZ: No, it says - - - the court -



1 - - the court said it depends upon the reason for the  
2 restriction. And in - - - and in the City of Long  
3 Beach case, the reason for the restriction was to  
4 eliminate nonconforming uses. And Off Shore is cited  
5 in cases concerning the elimination of nonconforming  
6 uses. That's where that case always comes up.

7 JUDGE ABDUS-SALAAM: Is the parking - - -

8 MR. MIGATZ: It's always cited in cases  
9 that have to deal with can you eliminate a  
10 nonconforming use; can you expand a nonconforming  
11 use?

12 JUDGE ABDUS-SALAAM: Counsel, is the  
13 parking the only problem here? Isn't there some kind  
14 of loading permit - - -

15 MR. MIGATZ: Well - - -

16 JUDGE ABDUS-SALAAM: - - - that had to be -  
17 - -

18 MR. MIGATZ: - - - loading - - - loading  
19 zones is part of the parking standard.

20 JUDGE ABDUS-SALAAM: I'm sorry? The  
21 loading zone - - -

22 MR. MIGATZ: The loading zone is part of  
23 the parking ordinance.

24 JUDGE SMITH: They - - -

25 JUDGE ABDUS-SALAAM: So you're saying a

1 separate use permit would not be required for that?

2 MR. MIGATZ: No. Not - - - not in the  
3 North Hempstead scheme. It's a parking variance  
4 only.

5 If there's any confusion - - -

6 JUDGE SMITH: But what we said - - - what  
7 we said in - - - in Off Shore, is: "In determining  
8 the rules to govern variance from parking  
9 restrictions, one should look to the reasons for the  
10 restrictions, then adapt the rules applicable to use  
11 or area variances, whichever best meets the problem."  
12 I'm skipping a little: "Most often, the parking  
13 restriction will relate to uses." Is that right or  
14 wrong?

15 MR. MIGATZ: That is wrong. That is dead  
16 wrong. Most - - -

17 JUDGE SMITH: Okay, okay. But that is - -  
18 - that is what we said in Off Shore.

19 MR. MIGATZ: You - - - you said that in the  
20 context of what that code was trying to do. I have  
21 one minute left, I have a lot to say. I don't want  
22 to be rude, Your Honor.

23 CHIEF JUDGE LIPPMAN: Yeah, but answer the  
24 question, first.

25 MR. MIGATZ: It did - - - you did - - - it

1 did - - - you did say that in Off Shore, but the - -  
2 - what you said was you have to look at the reason  
3 for the restriction. In the City of Long Beach Code,  
4 the reason for that restriction was to eliminate  
5 nonconforming uses.

6 JUDGE PIGOTT: But wasn't - - - isn't the  
7 point of - - - of saying you've got to have x number  
8 of parking spaces per chair, and you need a loading  
9 zone, is because you're going to use it as a  
10 restaurant?

11 MR. MIGATZ: It's - - - it's a dimensional  
12 restriction. It's a limitation on area. All - - - I  
13 have never seen a zoning code - - -

14 CHIEF JUDGE LIPPMAN: So everything is an  
15 area variance by your standard - - -

16 MR. MIGATZ: Absolutely.

17 CHIEF JUDGE LIPPMAN: - - - regardless of  
18 what Off Shore says, what any - - - anything to do  
19 with parking is an area variance?

20 MR. MIGATZ: Unless - - - unless there's  
21 unusual code. In the North Hempstead Code and in the  
22 - - - in the codes that I have cited in my brief, the  
23 City of Albany - - - and by the way, I walked more  
24 than 800 feet to get to this courthouse today, and I  
25 walked uphill. So it's not that unusual for someone

1 to have to walk to go to a restaurant.

2 But just like the City of Albany Code, it -  
3 - - the parking relates to use and to dimension.  
4 Because you're not going to have the same parking  
5 requirements for a warehouse that employs few people  
6 - - -

7 JUDGE PIGOTT: Or a card store?

8 MR. MIGATZ: - - - as you do for - - - or a  
9 card store - - - as you do for a restaurant or a  
10 furniture store.

11 JUDGE PIGOTT: But isn't that why it's - -  
12 - it's a question of use?

13 MR. MIGATZ: It's how you calculate. My -  
14 - - it's how you calculate the dimension. Whether -  
15 - - whether it's based upon square footage, how many  
16 people can fit into a - - - a space; whether it's how  
17 many tables can fit into the space. That's what  
18 North Hempstead does.

19 JUDGE SMITH: Are you - - -

20 MR. MIGATZ: How many tables - - -

21 JUDGE SMITH: - - - are you really - - -

22 MR. MIGATZ: - - - fit - - -

23 JUDGE SMITH: - - - are you really  
24 suggesting that the - - - the Off Shore - - - what  
25 looks like the Off Shore test, which is you figure

1 out whether it's more related to use or to area, is  
2 unworkable, because most or all of them are related  
3 to both?

4 MR. MIGATZ: Yes, Judge. And not only is  
5 it unworkable, it would be devastating if this court  
6 were to hold a parking variance is a use variance.

7 JUDGE ABDUS-SALAAM: You would like us to  
8 overrule Off Shore. Is that what you're asking?

9 MR. MIGATZ: Well, you know, you never  
10 abrogated Off Shore, you know? I mean you never  
11 abrogated Overhill. You never said that - - -

12 JUDGE READ: You just want us to interpret  
13 it narrowly.

14 MR. MIGATZ: - - - want you to clarify it.

15 JUDGE READ: Yeah, okay.

16 MR. MIGATZ: Because if you - - - if you -  
17 - - if you issue a - - -

18 CHIEF JUDGE LIPPMAN: But isn't the Town  
19 the master of its own fate on this stuff? You put in  
20 whatever you want. You want it to be an area, you -  
21 - - the parking is an area variance.

22 MR. MIGATZ: Well, they have. That's why I  
23 - - - that's why - - -

24 CHIEF JUDGE LIPPMAN: They may have. But  
25 again, what - - - then what happens now?

1                   MR. MIGATZ: That - - - if you send this  
2 case - - - if you were to send this case back, it's  
3 an area variance.

4                   JUDGE PIGOTT: But if - - - if - - - let's  
5 assume for a minute that it - - - that you have a  
6 neighbor who's a realty store, and they decide they  
7 want to do a restaurant. Wouldn't you be saying,  
8 wait a minute, you know, you're changing the use of  
9 that, and you've got to have twenty-four parking  
10 spaces and a loading zone. You can't change that.  
11 And you would not put up with the idea that all we're  
12 talking about is an area variance?

13                   MR. MIGATZ: I - - - no - - - I disagree,  
14 Judge. If the use is permitted, if the restaurant is  
15 permitted, if the - - - if the retail store is  
16 permitted, if the ware - - - if it's a permitted use,  
17 it's not a use variance.

18                   JUDGE PIGOTT: But don't you think that if  
19 you have a restaurant, you ought to have a place to  
20 dump your refuse, or you need a place, as they  
21 apparently have, for - - - you know, to load and  
22 unload, and - - - you know - - - and those - - -  
23 that's directly related to the use, not to the fact  
24 that it's 200 square feet.

25                   MR. MIGATZ: That - - - that's why many

1 rest - - - that's why many codes, as North Hempstead,  
2 has restaurants as conditional uses, which is deemed  
3 a permitted use, which the petitioner - - - which the  
4 appellant has not challenged the fact that we did get  
5 a conditional use permit. That's how this town and  
6 other towns treats that.

7 It's a conditional use. You go before the  
8 zoning board. We treat - - - we handle the garbage.  
9 Just like with auto sales and service, they're  
10 conditional uses in many codes. They come before the  
11 zoning board, tantamount to a permitted use - - -  
12 that's an Off Shore Steakhouse case - - - but the  
13 zoning board can put conditions on it.

14 But if I may just - - -

15 CHIEF JUDGE LIPPMAN: No, no - - -

16 MR. MIGATZ: - - - conclude?

17 CHIEF JUDGE LIPPMAN: - - - that's it. Any  
18 more questions?

19 Thank you - - - oh, I'm sorry, Judge Smith?

20 JUDGE SMITH: What - - - what were you  
21 going to say in conclusion?

22 JUDGE PIGOTT: Good question.

23 MR. MIGATZ: I wanted to finish my - - - my  
24 thought that why it would be devastating to the land  
25 use community if a parking variance was across-the-

1 board a use variance, because everybody - - - if you  
2 wanted to put on an addition to an office building  
3 across the street, and you - - - you rely on the lot  
4 that I walked 800 feet from, if that's deemed a use  
5 variance, you could never meet unnecessary hardship.

6 JUDGE PIGOTT: But one of - - - one - - -  
7 as I understand it, one of their problems is that  
8 they think you're going to use their - - - their  
9 parking.

10 MR. MIGATZ: We're not going to - - - they  
11 have every right to rope that off. They could - -  
12 they - - - they chain it off now.

13 JUDGE PIGOTT: Well, you're having that  
14 fight. But I'm saying that's - - - that's what their  
15 concern is. You're - - - there's a use there - - -

16 MR. MIGATZ: That's - - -

17 JUDGE PIGOTT: - - - that is going to, in  
18 their view, impinge upon, you know, their right to  
19 use their land in - - - in a fashion in which they've  
20 been permitted.

21 MR. MIGATZ: It - - - that is their  
22 purported concern. They can address that. As the  
23 zoning board said in their decision, you could chain  
24 it off. There is a large municipal lot right behind  
25 this - - - this shopping center that all the stores



1 use, because none of them, except for Mr. Colin's,  
2 has off-street parking. And they all come before the  
3 board and they all rely on the public parking, as do  
4 this courthouse - - - does this courthouse and the  
5 other buildings around here. That's what you rely  
6 on.

7 If you had to show unnecessary hardship  
8 that is unique to your piece of property, and it's  
9 not self-created - - - I mean, you didn't buy the  
10 property, subject to the Code, you could never make a  
11 case out for a parking variance. There would never  
12 be a parking variance. And that's - - - that would  
13 be devastating to - - - to the City of Albany, the  
14 Town of North Hempstead, and every other town and  
15 village in this state.

16 Parking variances deal with dimensional  
17 requirements. The zoning board has the authority to  
18 take into account the adverse impact on the  
19 community. If they think there's not sufficient  
20 municipal parking, they can deny it. But if they say  
21 there's a parking garage across the street, down the  
22 block, that provides ample parking for this use, and  
23 people can walk 800 feet, it's handled as an area  
24 variance, and properly so, and the neighborhood is  
25 protected by the area variance standards.

1                   Nobody could make out a use variance  
2                   standard for parking - - -

3                   JUDGE SMITH:   You've answered my question.  
4                   Thanks.

5                   MR. MIGATZ:    Thank you, Judge.   Thank you  
6                   very much.

7                   CHIEF JUDGE LIPPMAN:   Thank you, counselor.  
8                   Counsel, rebuttal.

9                   MR. CALICA:    I know.   Okay.   A couple of  
10                  things.   It's not a permitted use, because as I  
11                  pointed out under 70-208 of the Code, they're not  
12                  allowed to increase the nonconformity.   So when they  
13                  go from retail store to restaurant, it's not - - -  
14                  and we say it in our petition - - - amended petition  
15                  and brief in every court - - - it's not a permitted  
16                  use, so we did - - - we did challenge that.   We said,  
17                  in effect, that they can't increase the  
18                  nonconformity, that is, go from a retail store to a  
19                  restaurant.

20                  JUDGE SMITH:    Is that - - - I mean, aren't  
21                  you asking us to address something that the - - -  
22                  that the Appellate Division didn't - - - didn't - - -  
23                  I mean, you're saying this isn't a variance problem  
24                  at all; you're just saying this is a nonconform - - -  
25                  a nonconfor - - - a forbidden use?

1 MR. CALICA: We said both in our - - - we  
2 said both in our petition and our briefs. They  
3 address only parking. But we're saying it's a use  
4 variance as to parking - - -

5 JUDGE SMITH: So you're asking us to affirm  
6 on the alternate ground that they never had to reach  
7 the variance question, because they had a forbidden  
8 use?

9 MR. CALICA: That's one. Secondly, we're  
10 saying it's clearly a parking use variance, because  
11 it was not a permitted use, so their analog saying  
12 they're going from one permitted to a conditionally  
13 permitted one, just doesn't work.

14 CHIEF JUDGE LIPPMAN: Counsel, why can't  
15 they do whatever they want now?

16 MR. CALICA: Okay. The reason is this,  
17 Your Honor. They didn't change their Code to say, in  
18 effect, you no longer need parking. Their parking  
19 (sic) still says you need a spot for every employee  
20 and two spots for every seat. So it's tied to user.  
21 They can't trump 267 of the Town Law that goes back  
22 before the 1991 amendment. They can't confer  
23 jurisdiction on the Board of Zoning Appeals that's  
24 governed by the state legislature.

25 JUDGE SMITH: You're - - - you're saying

1           that they - - - that the - - - the Off Shore standard  
2           is binding even if a town wants to get out of it?

3                   MR. CALICA:   They can get out of it by  
4           rezoning the property.   But if instead they leave  
5           their parking requirement and loading requirement  
6           saying the amount of parking is tied to the number of  
7           occupants and the number of employees - - -

8                   JUDGE SMITH:   So you're saying as long - -  
9           - any town that grants variances has to follow Off  
10          Shore, even if it amends its town code to say we  
11          don't want to follow it?

12                   MR. CALICA:   Well, it's even before Off  
13          Shore.   It's going back to historically - - - I think  
14          it was Otto v. Steinhilber - - - but whatever is  
15          historically, under this court's jurisprudence, a use  
16          variance, must be governed under the Town Law.   Where  
17          the power comes from the state legislature, the  
18          zoning power to the towns, they can't enact it and  
19          say well, 100 years of Court of Appeals jurisprudence  
20          and 267 of the Town Law forever - - -

21                   CHIEF JUDGE LIPPMAN:   They can't change it  
22          if they want to, and despite the fact that they  
23          changed that Code, it doesn't have the effect that  
24          they thought it would.   It's still a use variance?

25                   MR. CALICA:   It's a use variance.   They

1 can't say it'll be governed by area variance.

2 If the Town wants to get out of it, what  
3 they should do is repeal their parking ordinance and  
4 say, in effect, it's no longer tied to use, it's tied  
5 to area. But they didn't, Your Honor. So they can't  
6 confer jurisdiction under the ZBA that contradicts  
7 this court and the state legislature in 267.

8 And finally, just - - - I say it the last  
9 time - - - I know the Court of Appeals is hardly at  
10 the place to say that you should grant an Article 78  
11 petition even on the variances. But this is a record  
12 on which they excluded evidence - - -

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. CALICA: - - - that they should have  
15 considered.

16 CHIEF JUDGE LIPPMAN: Okay, counsel,  
17 thanks.

18 MR. CALICA: Thank you for your time and  
19 attention, Your Honor.

20 CHIEF JUDGE LIPPMAN: Thank you, all.

21 (Court is adjourned)  
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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Colin Realty v. Town of North Hempstead, No. 150 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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