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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF SMITH,

Appellant,

-against-

TOWN OF THOMPSON PLANNING BOARD,

Respondent.

NO. 27

265 East 161st Street
Bronx, New York
March 10, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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CHIEF JUDGE WILSON: First case on today's calendar is the Matter of Smith v. Town of Thompson Planning Board.

Counsel?

MR. FOGEL: Good morning, Your Honors. Mike Fogel from Fogel & Brown representing the appellants this morning. I'd like to reserve two minutes for rebuttal, please.

CHIEF JUDGE WILSON: Yes.

MR. FOGEL: Thank you.

Your Honors, we respectfully submit to this court that the Third Department decision should be reversed because it failed to apply the well-established, applicable standard of review to planning board decisions and invaded the province - - - providence of the planning board and substituted its own judgment by determining that the planning board engaged in impermissible code interpretation when it issued the approvals for a warehouse.

JUDGE SINGAS: Are you saying there is no issue of fact? Or are you saying there was an issue of fact, and it was properly resolved by the planning board?

MR. FOGEL: There was no issue of fact, Your Honor. We submit that our client submitted an application for a warehouse. A warehouse was a permissible use by special use permit.

1 JUDGE TROUTMAN: So to ask question another way.
2 With respect to making a initial determination, that is
3 reviewing the submissions and making a finding, whose
4 responsibility is that?

5 MR. FOGEL: The planning board, Your Honor.

6 JUDGE TROUTMAN: And then, thereafter, what is
7 the responsibility of the zoning board? The - - - and the
8 review process?

9 MR. FOGEL: In this situation - - -

10 JUDGE TROUTMAN: - - - the appeals board?

11 MR. FOGEL: - - - Your Honor, the zoning board of
12 appeals had no role at all. The planning board was the
13 board responsible for processing the special use permit.

14 JUDGE RIVERA: But why - - - why isn't there a
15 matter of law question given counsel's representation that
16 all warehousing includes some distribution, and that there
17 is some material representation from an expert that,
18 indeed, the - - - the layout as described in the
19 submissions suggests that it really is set up to do
20 distribution - - - to be a distributing facility as opposed
21 to a warehouse?

22 MR. FOGEL: Our - - -

23 JUDGE RIVERA: Why isn't there a legal question
24 as to - - - to what extent does - - - I agree with you, of
25 course - - - the law permits the warehouse. To what

1 extent, whatever this distribution is that they
2 represented, was going to be part of this somehow
3 undermines their argument it's a warehouse?

4 MR. FOGEL: Your Honor, there was no
5 representation that there was distribution as part of this
6 application.

7 JUDGE RIVERA: I thought that's what counsel said
8 at some point. Did they not ever say that every warehouse
9 has to have some aspect that's distribution?

10 MR. FOGEL: Well, no, Your Honor. I mean, this
11 use was defined as a warehouse in our - - - in the
12 application.

13 JUDGE RIVERA: Well, it - - - they could say it's
14 a warehouse, but that's not what it is set up for, correct?

15 MR. FOGEL: No, that's not correct, Your Honor.

16 JUDGE RIVERA: No?

17 MR. FOGEL: It's - - - it's set up to be a
18 warehouse.

19 JUDGE RIVERA: So you just - - - whatever they
20 represent, you accept on face value?

21 MR. FOGEL: Well, it was part of the application.
22 There were engineering drawings which stated that it was a
23 warehouse. And the warehouse was a permitted use in - - -
24 in that zone.

25 CHIEF JUDGE WILSON: So the original project - -

1 - I'm sorry. Go ahead.

2 JUDGE RIVERA: Well, just to follow.

3 But if the applicant's position is that all
4 warehousing must include some aspect of distribution,
5 doesn't that, as I say, suggest as a question of
6 interpretation, of legal interpretation, that's more
7 appropriate for the zoning board?

8 MR. FOGEL: The applicant never made any
9 representation that there was distribution in connection
10 with this application.

11 JUDGE RIVERA: If they had, would you agree with
12 me? Let's assume for one moment they said exactly what I
13 said, that warehousing includes some distribution?
14 There'll be some distribution, but really this is a
15 warehouse. What would be the - - - the - - - the planning
16 board's responsibility in that case? What would be their
17 obligation? How would they resolve that kind of
18 application?

19 MR. FOGEL: Well, I think the planning board
20 would have to look at the - - - the totality of the record
21 here.

22 JUDGE RIVERA: Okay.

23 MR. FOGEL: And the representation that it was a
24 warehouse was obviously in the application. If you look at
25 the engineering drawings, it clearly shows two warehouse

1 buildings. The environmental assessment form that was
2 submitted along with the application references warehouse
3 buildings.

4 JUDGE CANNATARO: But Counsel, isn't it - - -
5 isn't it the case that counsel actually had to write a
6 letter to - - - not to the zoning board - - - to the - - -
7 to the other board clarifying that this was, in fact, a
8 warehouse because questions arose due to occasional use of
9 this phrase "warehouse/distribution"?

10 So it's - - - you make a very categorical
11 declarative statement that this was always presented as a
12 warehouse. But it seems as if, below, it - - - it was
13 debated, at least to some extent, what this was.

14 MR. FOGEL: There were some - - - I'm going to
15 refer to them as stray references, Your Honor, in certain
16 ancillary documents that were included with the application
17 materials that used the word "distribution" in connection
18 with the - - - with the word "warehouse".

19 CHIEF JUDGE WILSON: But the project originally
20 started as a distribution center, right?

21 MR. FOGEL: That's not correct, Your Honor.

22 CHIEF JUDGE WILSON: No?

23 MR. FOGEL: It was always presented as a
24 warehouse, Judge.

25 CHIEF JUDGE WILSON: There wasn't an initial



1 project for a two-million-square-foot facility?

2 MR. FOGEL: There was an initial application for
3 a two-million-square-foot warehouse.

4 CHIEF JUDGE WILSON: Not a distribution center?

5 MR. FOGEL: No, Your Honor. The application
6 always included calling it a warehouse.

7 Now, the - - - the scale of the project was
8 reduced from two million square feet to half a million
9 square feet, always to be warehouse space. But the
10 applicant amended the application based on some feedback it
11 had received that perhaps the project was too large.

12 JUDGE RIVERA: So - - - so the final - - - well,
13 the - - - the final submission - - - let me just leave it
14 that way then - - - and - - - and its plans, are you saying
15 that that is not amenable to distribution?

16 MR. FOGEL: It's only to be - - -

17 JUDGE RIVERA: As proposed.

18 MR. FOGEL: As proposed it's only to be used as a
19 warehouse.

20 JUDGE RIVERA: No, I understand the use. But it
21 - - - it would not be amenable to distribution?

22 MR. FOGEL: Perhaps every use could be put to
23 another future use. It could be a restaurant. It could be
24 apartments. It could be distribution - - -

25 JUDGE RIVERA: No, but we're talking about this.

1 We're not talking about - - -

2 MR. FOGEL: Right.

3 JUDGE RIVERA: - - - restaurants.

4 MR. FOGEL: But I think the key is, Your Honor,
5 that the only use that was approved by this planning board
6 is for a warehouse.

7 Now, if - - - like any other type of use, if it
8 was ever put to any use that wasn't specifically approved -
9 - -

10 JUDGE RIVERA: Is it possible that there's a
11 legal question as to whether or not you're correctly
12 interpreting warehouse, if indeed there is some aspect of
13 the project that includes distribution?

14 MR. FOGEL: No, Your Honor.

15 JUDGE RIVERA: And that's what needs to be
16 resolved by the zoning board?

17 MR. FOGEL: No, Judge. Because there's - - -
18 there's no ambiguity in the definition of warehouse if the
19 zoning code clearly provides that it's for storage of
20 goods, and that's what this application was for.

21 JUDGE RIVERA: So what's the line between
22 warehousing and distribution? I mean, obviously counsel
23 was correct in this way to say there's got to be some
24 distribution to this extent that the goods have to be
25 brought there, and perhaps at some point the goods will be

1 removed.

2 MR. FOGEL: Yeah. I - - - I - - - Your Honor, I
3 think if you look at the definition of distribution in the
4 zoning code, it doesn't necessarily always include a
5 warehouse.

6 JUDGE RIVERA: Uh-huh.

7 MR. FOGEL: Typically, it's - - - the way the
8 definition is drafted is that it's - - - it's set up more
9 as like an intermodal facility where goods arrive on a
10 truck and they're taken right off a truck and put onto a
11 rail car or - - - or something like that. We - - - you
12 know, we see those types of facilities.

13 But this was always designed and - - - to be a
14 warehouse, Your Honor. And that's the use that was
15 approved by the planning board.

16 Now, if the use was ever put to any use other
17 than what the planning board approved, and this goes for
18 any use, then it would be an enforcement issue if there was
19 some future use that deviated from the approval.

20 JUDGE CANNATARO: In granting the special use
21 permit, I believe the planning board stipulated that no
22 other unpermitted use was allowed. Wasn't that part of the
23 approval?

24 MR. FOGEL: That's correct, Your Honor. There
25 was a condition of the approval that specifically stated

1 that the only use expressly permitted by the approval was
2 for a warehouse. Any other type of use would be
3 unauthorized and would require a - - - a new application or
4 a modified application to the planning board and would be
5 subjected to a new review process.

6 JUDGE CANNATARO: So if you switched it over at
7 some point to a distribution center, I guess, that would be
8 the subject of some sort of code violation investigation or
9 something like that?

10 MR. FOGEL: It would be a code violation. The -
11 - - the town would have multiple - - -

12 JUDGE CANNATARO: Get like a stop work order?

13 MR. FOGEL: Yeah. It would have multiple
14 enforcement mechanisms at its disposal. Stop work order,
15 cease and desist order, notice of violation, a criminal - -
16 - even a criminal appearance ticket.

17 But I - - - I think that's the important thing is
18 that this was all conditioned on - - - on a specific use.
19 And if there was any other use proposed, yes, they'd be
20 subject to enforcement, but ultimately it would - - - it
21 would require a whole new application and having to go
22 through that entire process again.

23 JUDGE HALLIGAN: So - - -

24 MR. FOGEL: Yes, Your Honor.

25 JUDGE HALLIGAN: - - - so in an Article 78, we're

1 looking to see if there's the determination is in violation
2 of lawful procedure affected by an error of law, arbitrary
3 and capricious, or an abuse of discretion. Which of those
4 buckets are we looking at here, in your view?

5 MR. FOGEL: Well, I don't think any of them,
6 Judge.

7 JUDGE HALLIGAN: I understand that. I - - - I
8 appreciate that. But - - - but which question does this
9 case present in your view?

10 MR. FOGEL: I - - - I think the question is
11 really whether the - - - the planning board's review under
12 Article 78 was - - - you know - - - I think it would be
13 arbitrary and capricious, Your Honor. Because - - -

14 JUDGE HALLIGAN: And - - - and are we looking
15 then to see - - - I didn't see this very clearly elucidated
16 in the briefs. In your view, are we looking to see if
17 there's a rational basis, or are we looking to see if
18 there's substantial evidence?

19 MR. FOGEL: Well, I think there's - - - there's
20 both here, Your Honor. I think there's - - -

21 JUDGE HALLIGAN: Yes. But - - - but what's the
22 proper inquiry is what I'm trying to understand. Is it
23 rational basis or substantial evidence?

24 MR. FOGEL: Well, I think it's rational basis,
25 Your Honor. And - - - and - - -

1 JUDGE HALLIGAN: And - - - and why - - - why is
2 that? And not substantial evidence?

3 MR. FOGEL: I think the decision was based on
4 substantial evidence, Your Honor. So perhaps there's some
5 overlap.

6 But I think what - - - what we really want to
7 emphasize to this court is that this issue was reviewed
8 over the course of a six-month process by the planning
9 board. The planning board had engaged four technical
10 consultants who all reviewed the application for a
11 warehouse. They engaged special counsel that advised them
12 through the process. And the - - - the record also
13 includes numerous comment letters from outside agencies
14 such as Department of Transportation, Department of
15 Environmental Conservation, and Sullivan County Planning,
16 who all - - -

17 JUDGE HALLIGAN: You know, I think - - -

18 MR. FOGEL: - - - reviewed a warehouse.

19 JUDGE HALLIGAN: If I can? I think you both
20 agree, if I'm reading the briefs correctly, that the
21 planning board lacks authority to interpret the town code.
22 Is that your view?

23 MR. FOGEL: Yes, Your Honor.

24 JUDGE HALLIGAN: And why is that? What's - - -
25 what's the reason that they lack that authority?

1 MR. FOGEL: Well, Your Honor, if you - - - if you
2 go and you look at the planning boards or creation of New
3 York State town law.

4 JUDGE HALLIGAN: Uh-huh. Yeah.

5 MR. FOGEL: So they're only vested with the
6 authority granted to them - - -

7 JUDGE HALLIGAN: So in your view, it's the - - -

8 MR. FOGEL: - - - by statute.

9 JUDGE HALLIGAN: - - - it's the - - - it's the
10 grant of power and the town law that constrains them that
11 way?

12 MR. FOGEL: Yes. And the grant of power to this
13 planning board is to review applications for special use
14 permits.

15 CHIEF JUDGE WILSON: If the planning - - -

16 MR. FOGEL: In this case that's what the planning
17 board did.

18 CHIEF JUDGE WILSON: - - - board had thought - -
19 - if the planning board had thought that the definition of
20 warehouse or distribution center was not clear, could they
21 have referred the question to the zoning board of appeals?

22 MR. FOGEL: If they thought the definition of
23 warehouse was ambiguous, Your Honor, they - - - they could
24 have.

25 CHIEF JUDGE WILSON: There's a procedure for them

1 to do that?

2 MR. FOGEL: Yes, sir. Yes, Your Honor.

3 But they felt here that based on the record that
4 was developed over months and then input from their
5 consultants and from outside agencies, that there was - - -
6 there was no ambiguity at all in that definition, Your
7 Honor.

8 JUDGE GARCIA: Counsel, if we were to affirm,
9 what happens next? What's the process from here if we
10 affirm the Appellate Division?

11 MR. FOGEL: My client would have to decide how -
12 - - how it wants to proceed based on that, Your Honor.

13 JUDGE GARCIA: And it would be an entirely new
14 proceeding? A new petition?

15 MR. FOGEL: Before the - - - before the - - -

16 JUDGE GARCIA: Planning board?

17 MR. FOGEL: I suppose so. It could - - - that
18 could be one option, Judge. We're hoping that's not the
19 case.

20 JUDGE GARCIA: Hypothetical?

21 MR. FOGEL: Of course.

22 If there's no other questions.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. FOGEL: I rest on our briefs. Thank you.

25 MR. MOGEL: May it please the court. The



1 appellants state that they hired no less than eight expert
2 consulting firms. Their engineers, their planners, their
3 architects, their environmental experts, and their
4 attorneys put together an application and presented this
5 project to the planning board.

6 JUDGE TROUTMAN: So they - - - they presented an
7 application, and it was approved for a warehouse; was it
8 not?

9 MR. MOGEL: Well, first, Your Honor, it - - - it
10 was presented - - -

11 JUDGE TROUTMAN: Is a warehouse - - - let me try
12 it this way. Is a - - - a warehouse an approved use that
13 it could have been - - - that could have been granted?

14 MR. MOGEL: Absolutely, Judge. A warehouse is a
15 permitted use in that zone. However - - -

16 JUDGE RIVERA: Then why isn't he correct that it
17 then boils down to enforcement if there's a misuse? If
18 there's a noncompliant use, that's an enforcement question.
19 It's not a question of whether or not at the get-go on the
20 application it was a - - - it was properly - - - they got
21 the relief they wanted because they were able to say it was
22 a warehouse and that's how they were going to use it. That
23 was their representation.

24 MR. MOGEL: I think this goes back to Judge
25 Halligan's query, which is what's the standard here? So

1 it's an arbitrary, capricious abuse of discretion standard.

2 So we have a situation in which the applicants
3 have made representations - - - not an errant phrase. They
4 made representations to the planning board, to the
5 industrial development agency for the county, they put it
6 in all their application materials that this was a
7 warehouse distribution center. Only when - - -

8 JUDGE TROUTMAN: Does it matter what was in an
9 initial application if, in the final approval, it says
10 warehouse? What difference does it make if there is a
11 reference to a distribution center if the approval is for a
12 specific use that is permitted?

13 MR. MOGEL: And I think that goes back to two
14 components. One is the evaluation by our certified planner
15 that stated - - - not that this is something that could
16 potentially be used for an inappropriate purpose, but that
17 the number and density of the loading docks indicates that
18 distribution is, quote, likely - - -

19 JUDGE CANNATARO: So Counsel, what is it that
20 you're saying was arbitrary? Since you've chosen arbitrary
21 and capricious as your avenue of approach. Is it the
22 issuance of a special use permit for a warehouse that's
23 arbitrary and capricious? Or is it the planning board's
24 what, to me, seems like a factual determination, that the
25 use that they were reviewing was indeed a warehouse? Or

1 are they both arbitrary and capricious?

2 MR. MOGEL: I believe more narrowly, what is
3 arbitrary and capricious is to have the set of facts that
4 we have, the representations that were made, the
5 observation by a certified planner as to the - - - the
6 likely principal use, and to have - - -

7 JUDGE SINGAS: But why should we credit the
8 observations made as opposed to what the application is
9 for? I mean, the land use application said two warehouses,
10 the planning board approved warehouses. Why should we go
11 outside of that to rely on what an expert thinks might be
12 happening based on their observations, when, in black and
13 white, it says warehouse? The planning board approved
14 warehouse. If they decide not to use it as a warehouse
15 there are enforcement mechanisms that could be used against
16 them.

17 So I - - - I don't really understand why we would
18 even need to go there.

19 MR. MOGEL: Well, I think - - - again, I think
20 there are a couple of pieces. One is that I would say in
21 the absence - - - if we simply had a certified planner that
22 came in and gave an opposing opinion as to what this
23 project was, in the absence of the multiple representations
24 that this - - - that this was a warehouse distribution
25 center.

1 JUDGE TROUTMAN: Whose initial responsibility is
2 it to determine the facts? Was it the planning board?

3 MR. MOGEL: The planning board has a fact-finding
4 responsibility.

5 JUDGE HALLIGAN: So why isn't that all this is?
6 I'm - - - I'm struggling to see how this is something more
7 than a - - - a factual challenge. Where - - - where is the
8 interpretive question? I - - - I think you're saying there
9 is one, but I don't see it.

10 MR. MOGEL: There's absolutely an interpretive
11 function.

12 JUDGE HALLIGAN: What is it exactly?

13 MR. MOGEL: If we look at the warehouse and
14 distribution center definitions, they are in and of
15 themselves, the distribution function often has an
16 incidental warehousing function.

17 JUDGE HALLIGAN: So is - - - is your argument
18 that - - - that there's ambiguity as to whether they're
19 actually distinct definitions? I mean, presumably since
20 they're set forth separately, the intent is that they are
21 distinct uses.

22 MR. MOGEL: They're distinct uses. But under
23 these facts, under - - - given the representations and the
24 objective evidence - - -

25 JUDGE HALLIGAN: So what exactly - - - what is

1 the interpretive question you would - - - you would have
2 answered?

3 MR. MOGEL: Is reviewing the objective data,
4 reviewing the blueprints, the engineer's drawings presented
5 to the zoning board of appeals, the question would be does
6 this fit the Town of Thompson's definition of a warehouse,
7 or does it - - -

8 JUDGE HALLIGAN: That seems like a factual
9 question to me. What - - - what are we interpreting
10 exactly? An interpretive question to me typically means
11 does this word mean X, or does it mean Y? And where is
12 there such a question here?

13 I'm just - - - I'm just trying to understand your
14 position on it.

15 MR. MOGEL: I think although the Appellate
16 Division certainly used the word "interpretation", the - -
17 - under the Town Law 267-b, the zoning board, and for that
18 matter, any officials that are administering code, have a
19 much broader sense. It's not just interpretation. It's -
20 - - it's also, you know, the use of the property. What - -
21 - what is this precisely?

22 JUDGE CANNATARO: It sounds to me like what
23 you're saying is, given the record that was in front of the
24 planning board, that there is no way they could have
25 rationally come to the conclusion that this was a warehouse

1 and not a distribution center. That - - - I mean, short of
2 - - - short of any other interpretive issue that I'm not
3 aware of, you're just saying they made the wrong decision
4 about what this was.

5 MR. MOGEL: Judge, given the evidence that they
6 had, they had an obligation to refer it for an
7 interpretation, given the only evidence that was presented
8 that this was, in fact, a warehouse.

9 JUDGE TROUTMAN: And so - - -

10 JUDGE CANNATARO: What kind of interpretation? I
11 - - - I'm - - - I'm missing the interpretation. You know,
12 warehouses are allowed under the code. Distribution
13 centers are not allowed under the code. There's also some
14 language about what - - - what are the hallmarks of a - - -
15 of a warehouse, and I think, maybe, what are the hallmarks
16 of a distribution center as well, maybe not.

17 But none of that is interpretation. It all
18 sounds so factual to me. Why are those not factual
19 questions?

20 MR. MOGEL: Because we're designating whether - -
21 - I mean the principal question - - - the first question
22 that the planning board has to determine is what exactly is
23 it that they're seeking to approve?

24 CHIEF JUDGE WILSON: But why wouldn't - - -

25 MR. MOGEL: What are they evaluating?

1 CHIEF JUDGE WILSON: - - - why wouldn't - - - why
2 wouldn't that mean for every single application, they've
3 always got to go and get an interpretation of the code?

4 MR. MOGEL: I - - - I think the - - - the notion
5 that the sky is falling, which is, I - - - I think the - -
6 - the appellant's point - - - that, yes, a single family
7 home, a neighbor would say, oh, this could be used for a
8 home office, and as a consequence, this would need to go
9 before a zoning board of appeals for interpretation. I
10 think that's really a fallacy.

11 And the reason for that is we have helpfully put
12 forth a number of different cases in this - - - in the
13 Second and Third Department that talk about what's a
14 superfluous interpretation.

15 JUDGE TROUTMAN: So what is the specific
16 interpretation that would - - - that's to be answered?

17 MR. MOGEL: The specific interpretation would be
18 based on these - - - on - - - on the presentation, based on
19 the objective criteria that - - - that were presented in -
20 - -

21 JUDGE TROUTMAN: But isn't it - - -

22 MR. MOGEL: - - - this application - - -

23 JUDGE TROUTMAN: - - - an interpretation? Does
24 that not require a determination as to what the legal term
25 means? Because it seems you keep going - - -

1 MR. MOGEL: Yes.

2 JUDGE TROUTMAN: - - - back to that which is - -
3 - appears to be factual.

4 MR. MOGEL: There is a determination. There
5 should be a determination as to - - - as - - - as to that.
6 A factual determination. That determination was improperly
7 made by the planning board. It took - - -

8 JUDGE TROUTMAN: Because of the interpretation
9 that they gave it?

10 MR. MOGEL: Yes. They interpreted - - - they - -
11 - they observed. They looked at this documentation - - - I
12 - - - I withdraw.

13 I have no - - - there's no evidence in the record
14 that they actually looked at any documentation. What they
15 did, and what they specified, is that this statement, the
16 unsupported statement by counsel for the appellants saying,
17 oh, by the way, this is a warehouse, that was the beginning
18 and end of their factual inquiry. That was the beginning
19 and end of their interpretation.

20 JUDGE GARCIA: So Counsel, I'm sorry.

21 MR. MOGEL: It was one representation.

22 JUDGE GARCIA: To just go back to the Chief
23 Judge's question. What's the tipping point? So you come
24 in and say, use X. I want this. And somebody else comes
25 in and say, no, you're - - - you're going to use it for Y.

1 MR. MOGEL: Uh-huh.

2 JUDGE GARCIA: Is - - - do we have to refer that
3 to the zoning board?

4 MR. MOGEL: No, Judge. I - - -

5 JUDGE GARCIA: And I don't want to hear about
6 this case, though. I want to know a rule. So what's the
7 rule that gets that to the zoning board?

8 MR. MOGEL: If it is merely a question of an
9 unsupported allegation, then that, I would determine, is
10 superfluous.

11 JUDGE GARCIA: So in this case, you're
12 challenging the decision not to refer it to the zoning
13 board. That's what your claim is arbitrary and capricious?

14 MR. MOGEL: Yes, Judge.

15 JUDGE GARCIA: Okay.

16 JUDGE CANNATARO: Can I ask you what question the
17 planning board should have referred to the zoning board?

18 MR. MOGEL: The question should have been based
19 on the code and the definitions for a warehouse and
20 distribution center, what does this application - - - what
21 does it - - - what is it? Is it a - - -

22 JUDGE RIVERA: Oh, I - - - I thought that - - -
23 well, that really sounds like a fact question. I mean, I
24 thought your argument was that because counsel concedes
25 that these definitions result in a warehouse, as you've

1 explained, it has some incidental distribution component to
2 it. It's got to come in. The stuff has got to come in,
3 and at some point it may go out. And that the question
4 that the board would have to decide is where is the line?

5 How much of this incidental use is enough that
6 one could still call it a warehouse without now being
7 viewed as predominantly a distribution center? I thought
8 that's what you were arguing was the question that needed
9 to go to the board.

10 MR. MOGEL: You're correct, Judge. That is the
11 question that needs to go to board, but it can't be
12 divorced from the application that's brought it there.

13 So - - - so - - -

14 JUDGE RIVERA: Well, that's your vehicle to get
15 it to the board, I get that.

16 MR. MOGEL: Well, again - - -

17 JUDGE HALLIGAN: Hadn't you said though, that - -
18 - that the question - - - your - - - your view was that it
19 had to go to the board simply because, on these facts,
20 there was no way they - - - in response to - - - to Judge
21 Cannataro's question, there was no way that they could view
22 this as a warehouse instead of a distribution center.

23 That seems different than what you just said to
24 Judge Rivera in terms of what was your argument for getting
25 it to the zoning board.

1 MR. MOGEL: It's very difficult to divorce the
2 particular facts in - - - in this circumstance from the - -
3 - a bright-line legal rule. The - - - in - - - in this - -
4 - in this circumstance, that - - - that's correct. There
5 is overlap between the definitions of a warehouse and a
6 distribution center. There is no bright line saying X - -
7 - saying the - - - the inclusion or exclusion of a
8 warehouse component, or a warehouse component if it's sixty
9 percent - - -

10 JUDGE RIVERA: What - - - what if - - -

11 MR. MOGEL: - - - or twenty percent - - -

12 JUDGE RIVERA: - - - what if the - - - what they
13 decide - - - excuse me - - - they acknowledge that and they
14 say, okay, so we've looked at this application, we don't
15 think it - - - it passes that line. Why isn't that a fact
16 determination?

17 MR. MOGEL: By the planning board?

18 JUDGE RIVERA: Yes.

19 MR. MOGEL: Because the - - - the - - - the
20 determination of whether something - - - a warehouse use is
21 incidental, or primary - - -

22 JUDGE RIVERA: Uh-huh.

23 MR. MOGEL: - - - is in the code. It's - - - so
24 it's not for them to determine that - - - it's not for the
25 planning board to determine, well, we believe this is an

1 incidental use.

2 They should refer it to a building inspector.
3 And the building inspector could give a decision. This is
4 common - - - this is a common practice in land use.

5 JUDGE RIVERA: So - - - so then, just to clarify.
6 Your position isn't that the law in and of - - - inherently
7 has some ambiguity or some contradiction? You think it's
8 clear. It's just that they made the wrong call here?

9 MR. MOGEL: No, Judge, I would disagree. I do
10 believe that the law has ambiguity. I - - - I believe it's
11 something that has to be looked at in a - - - in a factual
12 sense. You have to apply the circumstances to the law, and
13 the law, in and of itself, is ambiguous.

14 JUDGE GARCIA: Isn't that - - - wouldn't that be
15 the case in every application? You're applying the law to
16 the circumstances in the case?

17 MR. MOGEL: I think there is an element of that
18 in all applications. And I think that the cases that are
19 cited, the Third Department's case in Micklas; Second
20 Department's case in East Moriches; Third Department's case
21 in Cady, where they're talking about superfluous
22 interpretations, I think that that's the guideline. That's
23 - - - that's the standard where - - -

24 CHIEF JUDGE WILSON: I'm not really sure what
25 you're asking for the planning - - - sorry - - - for the



1 zoning board of appeals to do. I mean, is it something
2 like if you have more than one loading dock per 10,000
3 square of storage space, this is a distribution center, not
4 a - - - are you looking for something like that?

5 I don't know what the rule is you would like, or
6 the definition is - - - that you would like.

7 MR. MOGEL: The - - - I - - - again, if we were
8 looking at this application as an example, or any
9 application as an example - - -

10 CHIEF JUDGE WILSON: But see, that's the problem.
11 Is if - - - if what you're really looking for - - - for the
12 ZBA to do is to say this application is on this side of the
13 line or that side of the line, without saying what the line
14 is, the next guy who wants to build a warehouse has the
15 same problem, and we're going to be back in front of the
16 ZBA. And the planning board would really have no function.

17 MR. MOGEL: The ZBA - - -

18 CHIEF JUDGE WILSON: What's the rule you - - -
19 what - - - how would you want them to define warehouse as
20 opposed to distribution center?

21 MR. MOGEL: They have to make a determination as
22 to what constitutes primary use versus incidental use.

23 So whether the ZBA makes - - -

24 CHIEF JUDGE WILSON: Yeah. But - - -

25 MR. MOGEL: - - - that determination - - -



1 CHIEF JUDGE WILSON: - - - but how would that be
2 articulated?

3 MR. MOGEL: It could be determined by means of
4 expert evidence that there's a percentage. It could be
5 determined - - -

6 CHIEF JUDGE WILSON: A percentage of what?

7 MR. MOGEL: A percentage of use. It could be
8 determined based on the number of loading docks. It could
9 be based on the - - -

10 CHIEF JUDGE WILSON: What - - - I'm sorry.
11 Percentage of use between what and what?

12 MR. MOGEL: Warehousing use versus distribution
13 use.

14 CHIEF JUDGE WILSON: But how are you going to
15 define warehousing and distribution?

16 MR. MOGEL: The only way that's going to be
17 determined would be through some sort of expert testimony,
18 which is lacking here.

19 CHIEF JUDGE WILSON: No, no. In terms of the
20 definition?

21 MR. MOGEL: In terms of the definition?

22 CHIEF JUDGE WILSON: Yeah.

23 MR. MOGEL: Again, that - - - that - - -

24 CHIEF JUDGE WILSON: Because if you're going to
25 calculate the percentage of something that is distribution

1 or that is warehousing, you need to know what distribution
2 counts as and what - - - how you define that. And that
3 seems to be - - -

4 MR. MOGEL: Which it - - -

5 CHIEF JUDGE WILSON: - - - that's what I'm
6 struggling with is what is it you want the ZBA to do?

7 MR. MOGEL: Well, the ZBA would also be
8 determining based on the - - - the - - - the statute. The
9 - - - the ZBA would be determining what those terms mean.
10 So - - -

11 JUDGE HALLIGAN: It seems hard under - - - under
12 this formulation to see what cases wouldn't have to go to
13 the ZBA.

14 MR. MOGEL: That's correct.

15 JUDGE HALLIGAN: Well, then what - - - you know,
16 to - - - to the Chief's point, what function then does the
17 planning board have?

18 MR. MOGEL: Well, the planning board has a number
19 of functions. And if - - - in a - - - in - - -

20 JUDGE HALLIGAN: So your understanding of the
21 scheme is that the zoning board should be reviewing all, or
22 nearly all determinations?

23 MR. MOGEL: Not at all.

24 JUDGE HALLIGAN: Well, I - - - I thought you just
25 said, though, that - - - that all, or almost all, cases

1 would have to go to the zoning board because there would be
2 some question about whether they were on the right side of
3 the line or not?

4 MR. MOGEL: No, Judge. I - - - I - - - I - - -
5 I'm sorry if I mischaracterized myself. That's - - - I'm
6 not taking that position at all.

7 JUDGE HALLIGAN: So - - - so where then is that
8 line between cases that the planning board alone can decide
9 and the ones that, in your view, raise some question? I -
10 - - I'm not clear anywhere whether it's an interpretive
11 question or just a question about whether the
12 determination, warehouse versus distribution, is correct.
13 But - - - but what's the line in terms of which ones have
14 to go and which ones don't?

15 MR. MOGEL: I would say the - - - the - - - the
16 line - - - there's already a line of case law that states
17 that if - - - if we're looking at what potential misuse a
18 particular project could be put to - - - as counsel states,
19 a restaurant or - - - or whatever - - - if - - - if we're
20 looking at that and there's no other evidence. Someone's
21 just coming out from the outside making this allegation,
22 saying, I think this should go to the ZBA - - -

23 JUDGE HALLIGAN: But I thought I heard you saying
24 that there were a number of types of evidence, for example,
25 number of docks, percentage of use, which would raise a

1 question about whether the primary use was warehousing
2 versus distribution, and that would have to go to the
3 zoning board. So - - -

4 MR. MOGEL: Correct.

5 JUDGE HALLIGAN: - - - in what cases where
6 there's any dispute about that, would the planning board be
7 able to resolve it? Would they all - - - anytime there's a
8 dispute, would it go to the zoning board then, about the
9 primary function?

10 MR. MOGEL: I believe if there is a grounded,
11 objective objection to the use, that a referral to either -
12 - - to either a building inspector or the zoning board of
13 appeals would be appropriate. Because it is not the
14 planning board's role to make that determination. And it's
15 not - - -

16 JUDGE SINGAS: So suppose you had a - - - a
17 permit for somebody who wanted to add an additional story
18 to an edifice - - - a house or a building, whatever. And
19 then someone comes along and says, you know what, that
20 looks like the foundation's a little too - - - built a
21 little too sturdily, and there's a lot of brick there. So
22 I think it's not going to go up one story. It's going to
23 go up two stories. Something like that, you'd think that
24 would be enough to get to the zoning board?

25 MR. MOGEL: I believe that would be more of a

1 building permit issue, Judge. I - - - I - - - I think what
2 we're talking about is use.

3 JUDGE SINGAS: But that kind of evidence. I
4 mean, you're saying if there's some kind of objective other
5 factors that you could look at which would give an
6 indication that it wouldn't be used for the purpose that it
7 was stated to be used for.

8 MR. MOGEL: I would say that if somebody puts in
9 an application to put a second story on their house, and
10 it's determined that they added on a commercial kitchen and
11 a parking lot, I would say that that suggests that they're
12 putting it to an alternative use. That it's not simply for
13 their residential use. That would be - - -

14 JUDGE SINGAS: That would be true. But in my
15 example, I'm just saying an expert can say that looks like
16 too many bricks for one story. That could - - - that could
17 definitely be two stories.

18 MR. MOGEL: Would - - - wouldn't be an
19 interpretation of - - - wouldn't be for an interpretation
20 of code, Judge. It would be something that - - - in those
21 circumstances, that would be something that a building
22 inspector would make that determination. They make that
23 determination. There are rights in most - - - under state
24 law to - - - to challenge that determination if they're
25 before a zoning board of appeals.

1 I mean, we have a real - - - what - - - what the
2 planning board hung their hat on was a simple statement by
3 the attorney that said it's a warehouse. He didn't - - -
4 there was no expert evidence. None of these eight expert
5 of - - - consulting firms put in an explanation. The
6 attorney didn't put in explanation as to what happened.

7 CHIEF JUDGE WILSON: Suppose - - -

8 MR. MOGEL: When did it - - -

9 CHIEF JUDGE WILSON: - - - suppose you're right,
10 and this is actually a distribution center. Do you have
11 any recourse?

12 MR. MOGEL: As was stated previously, is it
13 theoretically possible that my client's pizza places, gas
14 stations, could gather together; undertake some form of
15 study; engage experts to determine whether the number of
16 trucks that are going in and out indicates a - - - a
17 distributive function, and as a consequence make an - - -
18 make a demand of the town and under 268, I believe it is,
19 to - - - to - - - to take enforcement action. And if the
20 town doesn't do that, then they could bring an action. The
21 law provides this opportunity before a shovel ever hits the
22 ground.

23 CHIEF JUDGE WILSON: I was asking a different
24 question, though. Which is what - - - what opportunity do
25 you have later, if any?

1 MR. MOGEL: The - - - that would be the
2 opportunity, Judge. Is - - - is that - - -

3 CHIEF JUDGE WILSON: So if you see Amazon trucks
4 going in and out of there twenty-four hours a day - - -

5 MR. MOGEL: Right. After - - -

6 CHIEF JUDGE WILSON: - - - you have to get a
7 bunch of experts to create a study and band together and
8 file a lawsuit?

9 MR. MOGEL: And file a lawsuit; ask for a
10 preliminary injunction, Judge; bonds, as the court knows,
11 probably in the millions of dollars while the - - -

12 JUDGE RIVERA: Well, first you try and persuade
13 the planning board that there's an enforcement issue, since
14 they concede that if it's not being used as a warehouse,
15 then there is recourse?

16 MR. MOGEL: The building department. It would be
17 - - -

18 JUDGE RIVERA: The building department.

19 MR. MOGEL: - - - the building department. And
20 the building department, since they do code, then that
21 would be their determination.

22 JUDGE TROUTMAN: So why would you have to hire
23 experts if one could see that there - - - hundreds of
24 trucks going in and out? And if you can call witnesses,
25 put in a petition, affidavits indicating this is what

1 they're actually using it for, why would you need a study?

2 MR. MOGEL: Who would - - - who would count the
3 number of trucks in and out and make the determination that
4 that's - - -

5 JUDGE TROUTMAN: Not necessarily counting.

6 MR. MOGEL: - - - from warehousing - - -

7 JUDGE TROUTMAN: If you live next door to what
8 was - - - it's supposed to be an ice cream parlor, and then
9 tomorrow they're selling gas there. You can see there's
10 gas being sold there. Why would you need an expert?

11 MR. MOGEL: Both warehouses and distribution
12 centers have trucks going in and out. The evaluation that
13 was done, the traffic expert - - -

14 JUDGE RIVERA: So - - - so the volume would, of
15 course, help - - -

16 MR. MOGEL: Volume would help.

17 JUDGE RIVERA: - - - this argument. Right?

18 MR. MOGEL: Yes.

19 JUDGE RIVERA: But you only need really one
20 truck, right? All it does is go back and forth. They're
21 not really warehousing. They're just distributing. Maybe
22 it stays there a little while, maybe it doesn't.

23 So I - - - I thought I understood your argument
24 to be, given what you said before, that the zoning board
25 would help to further clarify the difference between

1 primary and incidental use, either, as you seem to be
2 suggesting, through providing some kind of multi-factor
3 test that the local planning board would go through. I
4 thought that's what you were arguing. I don't know that it
5 persuades, but I'm just trying to clarify what your
6 argument is. What this legal question that needs the
7 zoning board's input is.

8 MR. MOGEL: The - - - yes, Judge, and that - - -
9 comparing the two definitions side by side and based - - -
10 again, can't divorce it entirely from the facts - - - but
11 there is - - - there is an incidental and primary use, and
12 there is no explanation on the part of the - - -

13 JUDGE RIVERA: And that that's hard to figure out
14 because of the overlap?

15 MR. MOGEL: Yes.

16 JUDGE RIVERA: Okay. So let's say we agreed for
17 a moment. Let's say we - - - we felt that, yeah, this is
18 an issue. There is a question that should have gone to the
19 zoning board, and failing to send it to the zoning board is
20 arbitrary and capricious, or an error of law. What - - -
21 whatever the argument is going to be there.

22 And let's say the zoning board then provides some
23 further guidance. Do you agree, then, that once they
24 provide that guidance, the way that's applied by the local
25 planning board means there's not another question that then

1 goes to the zoning board? That's where you would stop the
2 kind of constantly sending up cases to the zoning board?

3 MR. MOGEL: Yes.

4 JUDGE RIVERA: Which it - - - it - - - this is
5 what this case sounds like. You just want a shot at
6 overturning the decision by getting it to the zoning board?

7 MR. MOGEL: I couldn't - - - what I would say,
8 Your Honor, is yes, that would conclude the interpretive
9 function.

10 Can I guarantee that if this court decides to
11 uphold the decision of the Appellate Division and send this
12 matter back for an interpretation in front of the zoning
13 board of appeals, and the zoning board of appeals makes the
14 decision, I have no ability to look at that decision from
15 where I stand now and say, well, we're not going to
16 challenge that decision, Judge. Because it could be
17 arbitrary, capricious, an abuse of discretion. It could be
18 any one of those - - - those things.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. MOGEL: Thank you Judge.

21 MR. FOGEL: Your Honors, just - - - just briefly.
22 I think - - - you know, respondents are the ones - - -

23 JUDGE RIVERA: Why - - - why isn't he right that
24 the interpretive function of the zoning board would be to
25 give guidance and further explain the difference between

1 primary and incidental, given the overlap? Which I think
2 you even recognize there's some overlap between these two
3 definitions.

4 MR. FOGEL: Because, Judge, there - - - there - -
5 - there's no ambiguity in the - - - in the definitions at
6 all.

7 JUDGE RIVERA: Uh-huh.

8 MR. FOGEL: So we don't think there's anything
9 for the ZBA to - - -

10 JUDGE RIVERA: Well, how much gets you past
11 incidental?

12 MR. FOGEL: Your Honor, the - - - the - - - the
13 definition of - - -

14 JUDGE RIVERA: How much is beyond incidental use?
15 Because everyone agrees it's a warehouse. You've got to be
16 able to bring in what's being warehoused, and at some point
17 it may be removed from the warehouse. Where's the line?

18 MR. FOGEL: Well, the - - - the - - - the way the
19 definitions are set up is that warehousing is for storage
20 of goods, and the distribution center is for, not
21 necessarily storage, just transfer of goods from one form
22 of transportation to another. That's how that definition
23 is set up.

24 JUDGE RIVERA: Well, there is some circular
25 aspect to that definition. Was it - - - okay. What line

1 is it storage versus you're keeping in there until you're
2 ready to distribute?

3 MR. FOGEL: Well, the way the definition's set up
4 - - -

5 JUDGE RIVERA: One week? Two months?

6 MR. FOGEL: No, Your Honor. Because the
7 distribution center as defined by the code doesn't
8 necessarily include a warehouse. That transport of these
9 goods is really instantaneous: lifted off of a truck and
10 placed onto a railcar.

11 JUDGE RIVERA: Okay. So that's - - - that's how
12 you all view this definition in - - - in the law?

13 MR. FOGEL: Yes, Judge. And the definition of -
14 - -

15 JUDGE RIVERA: That - - - that they can't hold it
16 for any significant period of time? Meaning it just has to
17 be held for the period of time that's necessary to move it
18 from one vehicle, perhaps to another?

19 MR. FOGEL: Yeah.

20 JUDGE RIVERA: That's it.

21 MR. FOGEL: One form of transportation to
22 another. One truck to another. Or as we see it,
23 intermodal facilities from - - - from a truck to a railcar.

24 JUDGE CANNATARO: Is that really how distribution
25 centers work - - - I'm sorry. Over here. Is that how they

1 - - - there's no time delay? You don't even - - - if the
2 truck comes in on Monday, it can't go out on a different
3 set of vehicles on Tuesday? That's not consistent with the
4 definition of a distribution center?

5 MR. FOGEL: The way this code defines it, Your
6 Honor, yes.

7 JUDGE CANNATARO: The way what defines it?

8 MR. FOGEL: The way this code defines it, that
9 definition, yes.

10 JUDGE CANNATARO: So there's no incidental
11 warehousing or storage that takes place in a distribution
12 center?

13 MR. FOGEL: There could be this - - - a warehouse
14 as part of distribution, but it's not necessary under this
15 code. You can just have a distribution facility where the
16 goods aren't stored in between transportation.

17 JUDGE CANNATARO: Well, I - - - it sounds like a
18 logistical nightmare, but I'll take your word for it
19 because you're probably more expert in that than I am. But
20 does the code allow for a distribution center that has some
21 incidental storage warehousing that goes along with it?

22 MR. FOGEL: Yes, it does.

23 JUDGE CANNATARO: So you could still be a - - -
24 and this gets to the heart, I think, of Judge Rivera's
25 question. You can be a warehouse and have some incidental

1 distributive functions, and you can be a distribution
2 center and have some incidental storage functions.

3 MR. FOGEL: Not under the definition - - -

4 JUDGE CANNATARO: So someone has to draw that
5 line.

6 MR. FOGEL: Well, not under the definition here,
7 Judge. Because the warehouse definition - - - we submit
8 that definition itself is not ambiguous at all, just a
9 building for the storage of goods. And that's what my
10 client applied for, was a warehouse. And that's what - - -
11 that's what was approved.

12 JUDGE CANNATARO: How does the goods get to the
13 warehouse?

14 MR. FOGEL: They're going to arrive by truck,
15 Judge.

16 JUDGE CANNATARO: And when someone needs the
17 goods from the warehouse, how do they get out of the
18 warehouse?

19 MR. FOGEL: Well, at some point it will have - -
20 - it would have to be arranged to - - - to be trucked out.

21 JUDGE CANNATARO: So that's distribution, isn't
22 it?

23 MR. FOGEL: Not under this code, Judge. That's
24 consistent with the warehouse use.

25 JUDGE RIVERA: So that's just transportation?

1 MR. FOGEL: Yes.

2 JUDGE RIVERA: Bring it in, bring it out?

3 MR. FOGEL: It has to get in there somehow.

4 JUDGE RIVERA: So - - - and - - - and
5 distribution is distinguished from transportation in what
6 way, according to the law? What's the difference.

7 MR. FOGEL: Not necessarily with storage, and
8 just transfer from - - - goods from one form of - - -

9 JUDGE RIVERA: Okay.

10 MR. FOGEL: - - - you know, vehicle to another.

11 JUDGE RIVERA: So if I'm - - - if I'm
12 understanding you, that this - - - in the warehousing, the
13 storage component has its own independent purpose. That's
14 not so for distribution? Distribution is, I'm just holding
15 it till that next vehicle comes?

16 MR. FOGEL: It's just arranging for it to go in
17 another vehicle to a separate destination. In this - - -
18 in this case, really the warehouse is the destination for
19 the storage of the goods.

20 JUDGE RIVERA: Is it possible that the way you've
21 sort of divided that, maybe is not the way the law should
22 be interpreted? Why isn't that a question for the zoning
23 board? Whether or not what you've just articulated is
24 correct as a legal matter?

25 MR. FOGEL: Because, Judge, I think the - - - the

1 planning board can say we - - - we received an application
2 for a warehouse. That application isn't ambiguous. And
3 we're going to do what we do with every application that
4 comes with us: we're going to process that application.

5 JUDGE RIVERA: Yes. But all I'm suggesting is if
6 your interpretation of the law is at its heart perhaps
7 erroneous, isn't that the question they're saying? That's
8 got to go to the board. And once the board resolves that,
9 then the local board planning board can - - - can apply it.

10 MR. FOGEL: I'm sorry, Judge. Can you repeat
11 that?

12 JUDGE RIVERA: I'm saying what - - - what if that
13 particular interpretation that you've just articulated, the
14 zoning board might say that's not what the law means?
15 That's not how we would define the distinction between
16 warehouse and distribution center, storage versus - - - you
17 know, just transportation versus actual distribution?

18 MR. FOGEL: Well, I think in this case, the - - -
19 there's no interpretation for the zoning board to make
20 because the applicant applied for a warehouse was - - -
21 which in and of itself, is an unambiguous - - -

22 JUDGE RIVERA: But a warehouse as you viewed it
23 when you read the application?

24 MR. FOGEL: Well, the plan - - -

25 JUDGE RIVERA: That - - - I think that's their

1 argument.

2 MR. FOGEL: The planning board does that every
3 day, Your Honor.

4 JUDGE RIVERA: Okay. Thank you.

5 MR. FOGEL: Thank you.

6 CHIEF JUDGE WILSON: Thank you.

7 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Smith v. Town of Thompson Planning Board, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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