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THE TIE GOES TO THE COURTHOUSE

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Sports have ways to break ties. Baseball has extra innings (except when Bud Selig is around); football and ice hockey have sudden death overtime; golf has playoff rounds. [1] What happens though when an administrative agency's proceeding ends in a tie vote? Specifically what is the result when a seven member board of appeals votes: 2 in favor of a variance application, 2 against and there are 2 absentees and 1 abstention. Clearly the variance has not been approved but has it been denied? This seemingly simple question required two Article 78 proceedings and three appeals to resolve, and led to the abrogation of a 25 year old Second Department precedent and two Third Department decisions which followed its teaching. [2]

The Background

In re Tall Trees Constr. Corp. v. Zoning Bd., 97 NY2d 86, 761 NE 2d 565, 735 NYS 2d 873 (2001) ("*Tall Trees III*") presents a simple fact pattern involving a 1.94 acre parcel of land. The lot was a long rectangular piece with frontage on a public street. The owner, Tall Trees Construction Corporation ("Tall Trees"), wished to subdivide its land into two lots for single-family homes. The lots would be arranged so that one home would be built behind the other. In this type of subdivision, the rear lot is commonly referred to as a "flag lot" — a lot with a long strip in the shape of a flagpole extending back from the street to a point where the lot spreads out from sideline to sideline to afford the space necessary to construct a home. The image conjured up by this layout is a flag flying at full mast.

In order to so subdivide its property, Tall Trees needed to obtain what the Court of Appeals characterized as "minor area variances," [3] from the board of appeals in the Town of Huntington ("Board") [4]. After hearing the presentation, 2 members of the Board voted to grant the variances and 2 voted to deny them. The vice-chair (whose house abutted the Tall Trees property) abstained. Two members were absent. Based upon this outcome, the Board "issued a 'NO ACTION' decision." [5]

****130 The First Article 78 Proceeding and Appeal***

Tall Trees brought an Article 78 proceeding attacking the Board's "NO ACTION" decision. The Supreme Court dismissed the petition based upon *In re Walt Whitman Game Room v. Zoning Ba* [6] ("*Walt Whitman*") where in a nearly identical situation, the Appellate Division had held that a 2-2 vote of a seven-member board "was not a valid action and 'was equivalent to nonaction'." [7] On Tall Trees' appeal, the Second Department adhered to *Walt Whitman* and affirmed the dismissal of the petition. In re *Tall Trees Constr. Corp. v. Zoning Bd.*, 262 AD2d 494, 692 NYS2d 110 (2d Dep't 1999). ("*Tall Trees I*").

Though confirming the Board, the Appellate Division also affirmed the provision in the Supreme Court's judgment that had ordered a second vote. The second vote also ended 2-2 with two absences and an abstention by the vice chair. Once again the Board filed a "NON-ACTION" determination; once again Tall Trees sued.

The Second Article 78 Proceeding and Appeal

This time — in a spirit of judicial defiance — the Supreme Court refused to follow *Walt Whitman* and *Tall Trees I*. It held that the second vote constituted an arbitrary and capricious denial of the application. The Court annulled the Board's determination and granted the requested variances. Tall Trees' euphoria was short-lived. The Board appealed and the Second Department, invoking

Walt Whitman once again, reversed the lower court. "[W]here, as here, a majority of the Zoning Board has not voted either for or against an application, its determination is equivalent to a nonaction. Therefore, as we concluded on the prior appeal in this matter, the Zoning Board's tie vote must be deemed a nonaction, which neither granted nor denied the petitioner's applications." *In re Tall Trees Constr. Corp. v. Zoning Bd., 278 AD2d 421, 423, 717 NYS 2d 369, 370 (2d Dep't 2000)*. ("*Tall Trees II*").

Rather than put itself through what obviously was going to be an endless cycle, Tall Trees obtained leave to appeal to the Court of Appeals. It is on this appeal that we finally get an answer to the question: "Is a 2-2 vote of a seven person board of appeals a denial of a variance application?"

The General Construction Law

The path leading to the answer starts in that curious chapter of New York's Consolidated Laws called the General Construction Law ("*GCL*"). Unlike the other McKinney's volumes which have been republished during the last fifty years as the ****131*** statutes they contain have been amended, repealed or overhauled, Book 21 has not been reprinted since 1951. In fact, this "modern" edition replaced the volume published in 1917. [8]

One purpose of the *GCL* is to define common terms in statutes and in some instances (such as *GCL §§ 25, 31 and 58)*, certain terms used in contracts. The *GCL* tells us who "Men" [9] and "Women" [10] are, when it is "Now" [11], when it is night time [12] but not when it is daytime. It tells us that a year begins on January 1 — at least ever since 1753. [13] And how many of us know what a "half-holiday" is? *GCL § 24* defines that term as "the period from noon to midnight of each Saturday which is not a public holiday." [14]

In a more practical vein for the daily practice of law, it is the *GCL* which provides us with the statutory backup for our instinctive response that when the date on which the answer to a complaint is due falls on a weekend or a holiday, the due date becomes the "next succeeding business day." [15] The *GCL* does not define "business day", however.

GCL § 20 even adds a day to the year when a limitations period is involved under a concept it calls the "reckoning" — a term used not in the apocalyptic, but in the Jed Clampett sense of the word. Consider the calendar. The year 2001 began on January 1, 2001 [16] and ended on December 31, 2001, not January 1, 2002. [17] But, due to the "reckoning", the first day on which a sickness and accident insurance policy issued on August 6, 1957 with a two year contestability period no longer could be contested was August 17, 1959, i.e. the day after the second anniversary of the policy. This meant that the insurer still could question its liability for a heart attack suffered by the insured on August 16, 1959. [18]

Quorum and Majority

In the *Tall Trees* trilogy, it is *GCL § 41* which helps point the way. Before a board can act, there must be a quorum present. Quorum is defined as "a majority of the whole number of such [board members]" and "whole number" means "the total number which the board ... would have were there no vacancies and were none of the persons [on the board] disqualified from acting." [19] In simple English, for there to be a quorum of a seven member board, four members must be present. Each time the Board voted on the Tall Trees application, there were more than four members present; so the quorum requirement was always satisfied.

GCL § 41 goes on to provide that — assuming a quorum exists — "not less than a majority of the whole number may perform and exercise [the] power, authority or duty [conferred upon that board]." Again, in simple English, for a seven-person board to approve an action, four members must vote in favor of that action.

****133*** At first blush, *GCL § 41* seems to support the holdings in *Walt Whitman* and *Tall Trees I* and *II*. Fewer than four members of the Huntington board of appeals voted either to grant or deny the variance application. Hence, it took no action. Right? Wrong! One must couple *GCL § 41* with *NY Town Law § 267-a (4)*. The latter statute governs the procedure for a board of appeals. It provides that: "[t]he concurring vote of a majority of the members of the board of appeals shall be necessary ... to ***grant*** a use variance or area variance." (Emphasis supplied).

The Third Appeal

Faced with these two directives, the Court of Appeals looked for "a plain and harmonious reading of [these] related statutes." [20] Although the presence of a majority of the board members was required for the Board to have taken any action, the Court noted, "Town Law § 267-a (4) mandates a concurring majority vote of the Board in order ... to 'grant' a variance application [but] conspicuously fails to require the same majority vote concurrence for the denial of an application. Thus, if after participation and voting by a majority of the Board, no concurring vote of the majority exists to grant an application, the application must be, a fortiori, denied." [21] Hence the 2-2 vote constituted a denial of Tall Trees' application.

The Outcome

Ordinarily when a court determines that a board of appeals has acted arbitrarily, it will annul the board's action and order it to reconsider in light of the court's decision. [22] Occasionally, however, a court will go further and actually grant the requested variances. Usually when this occurs, one can sense exasperation in the court's words. *Tall Trees III* is such a situation.

First, the Court of Appeals realized that remitting the application to the Board probably would result in another tie vote. Tall Trees would never escape "zoning purgatory." [23] Second, Judge Wesley noted, "that this particular Zoning Board of Appeals has a history of 'nonaction' tie votes which, in effect, block an applicant's right to judicial review." [24] Judge Wesley went so far as to call this history "curious". One doubts that he was using the word in an affectionate sense, like when describing a kitten or a child.

With these justifications, the Court of Appeals felt comfortable addressing the merits of the Tall Trees application and concluded — as had the IAS court — "that the denial of the variances was arbitrary and capricious and an abuse of discretion." [25] By reversing the Appellate Division and reinstating the Supreme Court's judgment, the Court of Appeals, in effect, granted Tall Trees the variances that it needed in order to subdivide its property.

***134** It seems that the "No Action" technique for keeping controversial applications from getting to the courthouse had been utilized successfully by the Huntington board of appeals for almost thirty years. After all, the case that started it all — *Walt Whitman* — arose in Huntington. Now that the Court of Appeals has nixed this device, the question becomes: what other procedures can a board of appeals employ to try to prevent zoning matters from making it to the courthouse?

Can the "Leaves of Grass" Grow Anywhere Under the Tall Trees?

In addition to variances, these are four other common land use decisions that municipal boards vote upon: subdivisions, site plans, special permits and zoning amendments. Does *Walt Whitman* survive *Tall Trees III* in these areas?

Recall that Judge Wesley's opinion was not predicated solely on an interpretation of *GCL § 41*. Rather the Court's holding came from a recipe that mixed, one part of this statute with one part of *NY Town Law § 267-a (4)*. Do the statutes that govern the other four land uses contain the same type of language that Judge Wesley latched onto?

Subdivisions

An answer to this question is critical in the case of subdivisions because of the "approval by default" clauses contained in the relevant statutes. Whether property is located in a town, [26] a village, [27] or a city [28], if a planning board "fails to take action on a preliminary plat or a final plat within the time prescribed therefor ... such preliminary or final plat shall be deemed granted approval." [29] Hence a *Walt Whitman* "No Action" would lead to an approval by default.

Indeed such results have occurred in the Second Department. When one Village Planning Board split 2-2 with one absence [30] and another voted 2 against and 1 for, with one member abstaining and one member absent [31] both proposed plats were deemed approved.

Due to *In re Aloya v. Planning Bd.*, [32] it is doubtful that the same outcome would occur today. In *Aloya*, four members of a seven member Planning Board did vote to approve a final subdivision plat. However, the proposed subdivision had countywide significance such that the Rockland County Planning Department had exercised its power under *NY Gen. Municipal Law § 239-n (5)* to require five members of the Stony Point Planning Board to vote in favor of the plat in order for it to be approved.

Undaunted by the County's effort to stop it, the applicants argued that the 4-1 ***135** vote [33] was not an "action" because the Planning Board had "failed to take one of the three steps specified in [*Town Law § 276*]; it did not approve, conditionally approve or deny this application." [34] Accordingly, they argued, Stony Point did not meet the statutory deadline and their plat was approved by default.

Although the Court of Appeals lacked a safe place to nest in the statutory language of the General Municipal Law that it later would find in *Tall Trees III*, it rejected the applicants' argument for the obvious reason:

Permitting default approval pursuant to Town Law § 276(8) despite failure to obtain a "majority plus one" would ... negate the explicit requirement of General Municipal Law § 239-n (5) and defeat the legislative purpose behind that requirement. [35]

This makes sense. The "approval by default" mechanism is designed to prevent planning boards from interminably delaying a vote on a subdivision application, not to penalize a board which has voted but is deadlocked.

The Other Land Use Decisions

"Approval by default" does not exist for site plans, [36] special permits or zoning changes; hence the stakes are not quite so high. There are only a few cases which have interpreted a "less than majority vote" in one of these land use areas.

In re Monro Muffler/Brakes, Inc. v. Town Bd., [37] an application for a special permit ended in a 2-2 vote with one abstention. The Fourth Department, without even mentioning *Walt Whitman*, opined that this vote was not a "non-action" but a disapproval, the logic being that it was incumbent upon the applicant to obtain a majority of the board to vote in its favor. Its failure to have done so meant that it had lost.

Rockland Woods, Inc. v. Inc. of Suffern, [38] involved a vote on a proposed amendment to a zoning ordinance. On a resolution to adopt the changes, 2 trustees voted in favor of the amendment, one was against it and one abstained. (The fifth seat was vacant). The Second Department granted judgment declaring that the resolution to amend the ordinance was not adopted, holding that under *GCL § 41*, "[t]hree affirmative votes were required ... for the valid adoption of the resolution." [39] The fact that less than a majority voted against the amendment did not mean that the Board of Trustees had taken no action.

Yet three years later this same Court, once again called upon to interpret ***136** *GCL § 41*, held that a vote by a seven-member board of appeals that ended 2-2 with 2 abstentions and 1 absence was not a denial but a "nonaction". That case was *Walt Whitman*!

Judge Wesley was right. It's all so very "curious." [40]

Footnotes

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1 The exception was pairs figure skating at the 2002 Winter Olympics.

2 The Second Department case which no longer should be followed is *In re Walt Whitman Game Room v. Zoning Bd., 54 AD 2d 764, 387 NYS 2d 698 (2d Dep't 1976), lv. den., 40 NY 2d 809 (1977)*. The two Third Department decisions that suffer the same fate are *In re Jung v. Planning Bd., 258 AD 2d 865, 686 NYS 2d 147 (3d Dep't 1999)* and *In re Hoffis v. Zoning Bd., 166 AD 2d 850, 563 NYS 2d 183 (3d Dep't 1990)*.

3 *Tall Trees III, 97 NY2d at 89, 761 NE2d at 567, 735 NYS2d at 875*.

4 Everyone refers to a board of appeals as the zoning board of appeals, the board of appeals on zoning or just the zoning board. Even the headings of the statutes which require the creation of these boards in municipalities with zoning ordinances call them zoning boards of appeals. The actual statutory name given to these boards, however, is board of appeals. See *NY Town Law § 267(2)*, *NY Village Law § 7-712(2)* and *NY Gen. City Law § 81(1)*.

5 *Tall Trees, III, 97 NY2d at 89, 761 NE2d at 567, 735 NYS 2d at 875*.

6 See endnote 2 for the citation.

7 *Walt Whitman, 54 AD 2d 764, 387 NYS 2d 698*.

8 Depending on the time of year it was published, this volume hit the law libraries of America when either the Boston Red Sox or the Chicago White Sox were the World Series champions! If championship years for these terms factor into McKinney's decision to update its series, this volume may never be published again.

9 *GCL § 29*.

10 *GCL § 55*.

11 *GCL § 34*.

12 *GCL § 51*.

13 *GCL § 50*.

14 Earlier in that section, all of the “public holidays” are recited. There are 12 such days in every year, 13 in years when there is a “general election day” and countless more if either of our Georges (Bush or Pataki) says so.

15 *GCL § 25-a*.

16 *GCL § 50*.

17 See *In re Rosenstein's Estate, 124 NYS2d 783 (Sur. Ct. New York County 1953)* and *In re Title Guarantee and Trust Co., 183 Misc. 490, 48 NYS 2d 374 (Sup Ct. Kings County 1944)*.

18 *Union Mut. Life Ins. Co. v. Kevie, 17 AD 2d 109, 232 NYS 2d 678 (1st Dep't 1962), aff'd mem., 13 NY2d 971, 194 NE2d 686, 244 NYS 2d 777 (1963)*. For cases with the same holding but involving a statute of limitations and not a contractual period of limitations, see *Marino v. Proch, 258 AD2d 628, 685 NYS2d 761 (2d Dep't 1999)* and *Evans v. Hawker - Siddeley Aviatim, Ltd., 482 F. Supp. 547 (SDNY 1979)*.

19 *GCL § 41*.

20 *Tall Trees III, 97 NY2d at 91, 761 NE2d at 569, 735 NYS2d at 877*.

21 *Id.* Both *NY Gen. City Law § 81-a (4)* and *NY Village Law § 7-712-a (4)* are identical to *NY Town Law § 267-a (4)*. Hence, *Tall Trees III* should also apply to boards of appeals in cities and villages.

22 See e.g. *Zelnick v. Small, 268 AD2d 527, 702 NYS 2d 105 (2d Dep't 2000)* and *In re Probst v. Town of Wheatfield, 273 AD2d 843, 710 NYS2d 260 (4th Dep't 2000)*.

23 *Tall Trees III, 97 NY2d at 92, 761 NE2d 565 at 570, 735 NYS2d at 878*.

24 *Id. at 92, 761 NE2d at 569, 735 NYS2d at 877*. PS: I told you everyone uses the wrong name for the board of appeals.

25 *Id. at 92-3, 761 NE2d at 570, 735 NYS2d at 878*.

26 *NY Town Law § 276(8)*.

27 *NY Village Law § 7-728(8)*.

28 *NY Gen. City Law § 32(8)*.

29 This language appears in each of the three sections cited in endnotes 26, 27 and 28.

30 *In re Robert Kapson Enterprises, Ltd. v. Planning Bd., 65 AD 2d 796, 410 NYS 2d 540 (2d Dep't 1978)*.

31 *In re D.E.P. Resources, Inc. v. Planning Bd., 131 AD 2d 757, 516 NYS 2d 954 (2d Dep't 1987)*.

32 *93 NY2d 334, 712 NE2d 644, 690 NYS2d 475 (1999)*.

33 There was one abstention and one member was absent when the vote was taken.

34 *93 NY2d at 338, 712 NE2d at 645, 690 NYS2d at 476*.

35 *Id. at 340, 712 NE2d 646, 690 NYS2d at 477*.

36 Attempts have been made to engraft the “approval by default” provisions in the subdivision statutes onto the statutes controlling site plans. These attempts have failed for the logical reason that if the Legislature had wanted site plans to be approved by default, the statutes regulating site plan procedures [*NY Town Law § 274-a*, *NY Village Law § 7-725-a (8)* and *NY Gen. City Law § 27-a (8)*] would have contained the sacred text of the subdivision laws. See, *In re Tinker Street Cinema v. Town of Woodstock Planning Bd., 256 AD2d 970, 681 NYS 2d 907 (3d Dep't 1998)* and *Nyack Hospital v. Village of Nyack Planning Bd., 231 AD2d 617, 647 NY2d 799 (2d Dep't 1996)*.

37 *222 AD 2d 1069, 635 NYS 2d 882 (4th Dep't 1995)*.

38 *40 AD2d 385, 340 NYS 2d 513 (2d Dep't 1973)*.

39 *Id. at 386, 340 NYS2d at 514*.

40 *Tall Trees III, 97 NY2d at 92, 761 NE2d at 569, 735 NYS 2d at 877*.

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