ZONING & LAND USE

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I. ZONING ENACTMENTS/AMENDMENTS

A. Spot Zoning

Although frequently used imprecisely, "spot zoning" is "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. . . ."[1] "[S]pot zoning is the very antithesis of planned zoning."[2] However, zoning in compliance with a community's comprehensive plan, which is calculated to serve the general welfare of the community, is not, by definition, "spot zoning."[3]

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1. Rodgers v. Vill. of Tarrytown, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951).

2. *Id*. at 124, 96 N.E.2d at 735.

3. *See* Rye Citizens Comm. v. Bd. of Trs., 249 A.D.2d 478, 479, 671 N.Y.S.2d 528,

The petitioner in *Rotterdam Ventures, Inc. v. Town Board* purchased a former Army depot as surplus property from the United States in 1969 and operated the property as an industrial park.[4] "In 2008, . . . SYNC Realty Group, Inc. [(SYNC)] purchased a smaller . . . adjacent eight-acre parcel of surplus military property from the United States."[5] The federal government had constructed numerous multifamily dwellings on the property and used them as housing for military families from 1951 until SYNC purchased the property in 2008.[6] Although the property and the former depot/industrial park had been zoned for industrial use since 1955, the residential use of the SYNC parcel was exempt from the town's zoning ordinance while it was owned by the United States.[7] The town's 1980 comprehensive plan continued the industrial zoning classification of both properties, which was retained in the 2001 and 2009 comprehensive plan revisions.[8]

The town board subsequently granted SYNC's petition to rezone the property from industrial to residential and to amend the comprehensive plan to permit multifamily housing on the parcel.[9] The petitioner then instituted an Article 78 proceeding challenging the rezoning as constituting spot zoning.[10] The appellate division affirmed supreme court's dismissal of the petition.[11]

Zoning determinations are entitled to a strong presumption of validity and a court may invalidate such enactments only upon a demonstration beyond a reasonable doubt that the decision was arbitrary and unreasonable or otherwise unlawful.[12] The court reiterated that "spot zoning is 'defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners.'"[13] In analyzing

529 (2d Dep't 1998), *leave denied*, 92 N.Y.2d 808, 700 N.E.2d 1229, 678 N.Y.S.2d 593 (1998).

4. 90 A.D.3d 1360, 1360, 935 N.Y.S.2d 698, 699 (3d Dep't 2011).

5. *Id*.

6. *Id*.

7. *Id*.

8. *Id*. at 1360-61, 935 N.Y.S.2d at 699-700.

9. *Rotterdam Ventures, Inc.*, 90 A.D.3d at 1361, 935 N.Y.S.2d at 700.

10. *Id*.

11. *Id*.

12. *Id*. at 1361-62, 935 N.Y.S.2d at 700 (citing Asian Ams. for Equality v. Koch, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988)).

13. *Id*. at 1362, 935 N.Y.S.2d at 700 (citing Citizens for Responsible Zoning v. Common Council, 56 A.D.3d 1060, 1062, 868 N.Y.S.2d 800, 802 (3d Dep't 2008)); *see also* Boyles v. Town Bd. Of Bethlehem, 278 A.D.2d 668, 690, 718 N.Y.S.2d 430, 432 (3d Dep't

a claim of spot zoning, courts "may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the recommendations of professional planning staff."[14]

Although the property in *Rotterdam Ventures, Inc.* abutted a portion of the petitioner's industrial park, it also extended into an area of predominantly residential use.[15] The town and its planner determined that "rezoning the property so as to permit its continued use for residential purposes would benefit the community by retaining a transitional area between residential/commercial and industrial zones."[16] On the other hand, industrial use of the property would create a conflict with the prevailing character of the residential neighborhood.[17] As a result, the court concluded that the petitioner had failed to satisfy its heavy burden of establishing that the rezoning of the property was arbitrary and unreasonable or otherwise unlawful.[18]

The decision confirms that although one may often be able to argue that a rezoning may introduce some degree of incongruity with existing land uses, particularly given the applicable presumptions and difficult burden of proof, a rezoning generally will not be found to constitute spot zoning if a valid planning rational for the land use decision is demonstrated.

B. Preemption

Although the grant of authority to municipalities to adopt zoning regulations is broad, it must yield to the authority of the state when paramount state interests have been evidenced by express or implied preemption. In *Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead*, the town had amended its zoning law to prohibit check-cashing establishments in all districts other than the industrial and light manufacturing districts.[19] The amendment provided for a five-year amortization period during which existing check-cashing establishments

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2000).

14. *Rotterdam Ventures, Inc.*, 90 A.D.3d at 1362, 935 N.Y.S.2d at 701 (citing *Citizens for Responsible Zoning*, 56 A.D.3d at 1062, 868 N.Y.S.2d at 802).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (citing *Citizens for Responsible Zoning*, 56 A.D.3d at 1062, 868 N.Y.S.2d at 802; Baumgarten v. Town Bd., 35 A.D.3d 1081, 1083-84, 826 N.Y.S.2d 811, 813 (3d Dep't 2006)).

19. 91 A.D.3d 126, 127, 933 N.Y.S.2d 388, 390 (2d Dep't 2011).

located in the districts in which the use became prohibited were required to terminate.[20] The plaintiffs' check-cashing businesses, each of which were located in business districts, "became nonconforming uses and were required to terminate or relocate to industrial or light manufacturing districts . . . within five years."[21] The plaintiffs contended that the provision was "preempted by state law, that it was not a valid exercise of the [t]own's zoning power, and that it was unconstitutional."[22] The supreme court granted summary judgment in favor of the town and the appellate division reversed and determined that the amendment was invalid pursuant to the doctrine of conflict preemption.[23]

Although New York's constitutional home rule provision[24] "confers broad police powers upon local governments relating to the welfare of its citizens,"[25] it cannot adopt "laws that are inconsistent with the Constitution or with any general law of the State."[26] "Broadly speaking, State preemption occurs in one of two ways—first, when a local government adopts a law that directly conflicts with a State statute and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility."[27]

"Under the doctrine of conflict preemption, a local law is preempted by a state law when a 'right or benefit is expressly given . . . by . . . State law which has then been curtailed or taken away by the local law.'"[28] "Put differently, conflict preemption occurs when a local law prohibits what a state law explicitly allows, or when a state law

20. *Id*. Pursuant to the zoning law:

A check-cashing establishment is defined as a place where checks are cashed and/or payday or other short-term type loans are offered, but where general banking services, including but not limited to the establishment of savings and checking accounts, provision for deposits and withdrawals therefrom, and payment of accrued interest, are not offered on a regular basis.

Id. at 128, 933 N.Y.S.2d at 391.

21. *Id*. at 127, 933 N.Y.S.2d at 390.

22. *Id*. at 128, 933 N.Y.S.2d at 390.

23. *Sunrise Check Cashing & Payroll Srvs., Inc.*, 91 A.D.3d at 128, 933 N.Y.S.2d at 390.

24. N.Y. CONST., art. IX § 2(c).

25. *Sunrise Check Cashing & Payroll Srvs., Inc.*, 91 A.D.3d. at 133, 933 N.Y.S.2d at 394 (citing Jancyn Mfg. Corp. v. Cnty. of Suffolk, 71 N.Y.2d 91, 96, 518 N.E.2d 903, 905, 524 N.Y.S.2d 8, 10 (1987)).

26. *Id.* (citing Vill. of Nyack v. Daytop Vill., 78 N.Y.2d 500, 505, 583 N.E.2d 924, 929-30, 577 N.Y.S.2d 215, 217 (1991)).

27. *Id*. at 133-34, 933 N.Y.S.2d at 394 (quoting DJL Rest. Corp. v. N.Y.C., 96 N.Y.2d 91, 95, 749 N.E.2d 186, 190, 725 N.Y.S.2d 622, 625 (2001)).

28. *Id*. at 134, 933 N.Y.S.2d at 395 (quoting Chwick v. Molvey, 81 A.D.3d 161, 167-68, 915 N.Y.S.2d 578, 584 (2d Dep't 2010)).

prohibits what a local law explicitly allows."[29] In determining the applicability of conflict preemption, courts consider the language of the local ordinance and the state statute and whether the direct consequences of a local ordinance renders illegal that which is explicitly permitted by state law.[30] "The crux of conflict preemption is whether there is 'a head-on collision between the . . . ordinance as it is applied' and a state statute."[31]

Pursuant to the doctrine of field preemption, "a local law regulating the same subject matter [as a state law]" is considered to be inconsistent with the state's superior interest, "whether or not the terms of the local law actually conflict with a state-wide statute."[32] "Such [local] laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns."[33] "Field preemption applies [to] any of three different scenarios",[34] that is, an "express statement in [a] state statute [that] explicitly [states] that it preempts all local laws on the same subject matter;"[35] a declaration of state policy that manifests the intent of the legislature "to preempt local laws on the same subject matter";[36] or the legislature's enactment of a comprehensive and detailed regulatory scheme which demonstrates an intent to preempt local laws.[37]

Article 9-A of the Banking Law, entitled "Licensed Cashers of Checks," was enacted "to provide for the regulation of the business of cashing checks by the superintendent of banks whether the cashing of

29. *Id*. (quoting *Chwick*, 81 A.D.3d at 168, 915 N.Y.S.2d at 584); *see also* Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs, 74 N.Y.2d 761, 762-63, 543 N.E.2d 725, 726, 545 N.Y.S.2d 82, 83 (1989)).

30. *Sunrise Check Cashing & Payroll Srvs., Inc.*, 91 A.D.3d at 134, 933 N.Y.S.2d at 395 (citing *Chwick*, 81 A.D.3d at 168, 915 N.Y.S.2d at 584).

31. *Id*. (quoting *Chwick*, 81 A.D.3d at 168, 915 N.Y.S.2d at 584).

32. *Id.* (quoting *Chwick*, 81 A.D.3d at 169, 915 N.Y.S.2d at 585).

33. *Id.* at 134-35, 933 N.Y.S.2d at 395; *Chwick*, 81 A.D.3d at 169, 915 N.Y.S.2d at 585 (quoting Jancyn Mfg. Corp. v. Cnty. of Suffolk, 71 N.Y.2d 91, 97, 518 N.E.2d 903, 905-06, 524 N.Y.S.2d 8, 11 (1987)); *see also* Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 373, 377, 546 N.E.2d 920, 922, 547 N.Y.S.2d 627, 629 (1989).

34. *Sunrise Check Cashing & Payroll Servs., Inc*., 91 A.D.3d at 135, 933 N.Y.S.2d at 395 (citing *Chwick*, 81 A.D.3d at 169, 915 N.Y.S.2d at 585).

35. *Id.* (citing *Chwick*, 81 A.D.3d at 169, 915 N.Y.S.2d at 585).

36. *Id.*, 933 N.Y.S.2d at 395-96 (citing *Chwick*, 81 A.D.3d at 169, 915 N.Y.S.2d at 585).

37. *Id.*, 933 N.Y.S.2d at 396 (citing *Chwick*, 81 A.D.3d at 168-69, 915 N.Y.S.2d at 585-86); *see also* N.Y. State Club Ass'n v. N.Y.C., 69 N.Y.2d 211, 216-17, 505 N.E.2d 915, 916-17, 513 N.Y.S.2d 349, 350-51 (1987), *aff'd,* 487 U.S. 1 (1988)).

checks, drafts and money orders . . . ."[38] Banking Law section 367 enumerates the licensing requirements for "cashers of checks" and prohibits the business of cashing checks for consideration unless a license is first obtained from the superintendent of banks.[39] Banking Law section 369 provides, in part, that, "if the superintendent shall find that the granting of such application will promote the convenience and advantage of the area in which such business is to be conducted, . . ." he shall grant a license to permit the cashing of checks, drafts and money orders.[40] The provision further relates that, "in finding whether the application will promote the convenience and advantage to the public, the superintendent shall determine whether there is a community need for a new licensee in the proposed area to be served."[41] The Legislature additionally related that in adopting a 1994 amendment to section 369(1) of the Banking Law,

> the legislature hereby finds and declares . . . that the licensing of check cashers shall be determined in accordance with the needs of the communities they are to serve; and that it is in the public interest to promote the stability of the check cashing business for the purpose of meeting the needs of the communities that are served by check cashers.[42]

In addition, the superintendent has promulgated regulations concerning licensed cashers of checks.[43] An applicant seeking to obtain a license to cash checks must submit, among other things, a

> business plan containing such information as shall permit the superintendent to make a finding that the granting of the license will promote the convenience and advantage of the area in which the business is to be conducted including a determination that there is a community need for a new licensee in the proposed area to be served.[44]

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38. *Sunrise Check Cashing & Payroll Servs., Inc*., 91 A.D.3d at 135, 933 N.Y.S.2d at 396 (quoting *Historical & Staturory Notes*, N.Y. BANKING LAW, 417 (McKinney 2008)).

39. *Id.* at 136, 933 N.Y.S.2d at 396 (citing N.Y. BANKING LAW § 367(1) (McKinney 2008)).

40. *Id.* (quoting N.Y. BANKING LAW § 367(1)).

41. *Id*. (quoting N.Y. BANKING LAW § 369(1)).

42. *Id*. at 137, 933 N.Y.S.2d at 397 (quoting Act of July 26, 1994, ch. 546, 1994 McKinney's Sess. Laws of N.Y. 1295).

43. *See* N.Y. COMP. CODES R. & REGS. tit. 3 § 400 (2011).

44. *Id*. § 400.1(c)(7). The business plan must contain the following information:

(i) description of primary market area (e.g., identification of blocks and other landmarks including the locations of banking institutions and other licensed check cashers operating in the service area surrounding the proposed location); (ii) description of projected customer base; (iii) proposed days and hours of operations; (iv) types of services proposed to be

As a result, as the language of Banking Law section 369(1) demonstrates that the legislature vested the superintendent with the duty to determine whether each applicant for a check-cashing license proposes to perform that function in an appropriate location, whether there is a community need for a new licensee at that location, and whether the granting of such an application will be advantageous to the public.[45] Pursuant to the Banking Law and to the regulations promulgated by the superintendent, where a license is granted, the successful applicant necessarily has demonstrated that the business is appropriately located based upon community needs, economic development plans, and demographic patterns.[46]

The challenged provision prohibited check-cashing establishments from being located anywhere in the town except in the industrial and light manufacturing districts.[47] In enacting the provision, the town implicitly concluded that it did not believe that the town's business district was an appropriate location for check-cashing establishments and that such establishments are only suitably located in the industrial and light manufacturing districts.[48] However, the legislature specifically delegated to the superintendent the duty to determine whether particular locations are appropriate for such establishments.[49] The superintendent's decision to grant licenses to the plaintiffs necessarily included the conclusion that "'there is a community need for a new licensee in the proposed area to be served,' and that granting the applications would 'promote the convenience and advantage to the public.'"[50] As a result, the court concluded that the provision impermissibly conflicted with existing state law.[51]

Although "separate levels of regulatory oversight can coexist"[52]

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offered including special services such as fluency in languages which are predominant in the area of licensed location(s); (v) detailed description of demographics of the area including population density which information should be derived from official government records and other published sources; (vi) description of any proposed economic development of area; and (vii) specific marketing targets, if any.

Id. § 400.1(c)(7)(i)-(vii)

45. *See Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d at 138, 933 N.Y.S.2d at 397.

46. *See id.*, 933 N.Y.S.2d at 397-98 (citing N.Y. BANKING LAW § 369(1)).

47. *Id.*, 933 N.Y.S.2d at 398.

48. *Id.*

49. *Id.*

50. *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d at 138-39, 933 N.Y.S.2d at 398 (quoting N.Y. BANKING LAW § 369 (1)).

51. *Id.* at 139, 933 N.Y.S.2d at 398.

52. *See id.* (citing DJL Rest. Corp. v. N.Y.C., 96 N.Y.2d 91, 97, 749 N.E.2d 186, 191, 725 N.Y.S.2d 622, 626 (2001)).

and "State statutes do not necessarily preempt local laws having only 'tangential' impact on the State's interests,"[53] the facts of the case demonstrated that the amendment had more than a tangential impact on the operation of the relevant provisions of the Banking Law.[54] The zoning amendment attempted to accomplish the same function as is delegated to the superintendent by making a determination as to the appropriate location for check-cashing establishments.[55] By permitting such establishments to be located only within the industrial and light manufacturing districts, it essentially divested the superintendent of the delegated authority to determine whether "there is a community need for a new licensee in the proposed area to be served . . . ."[56]

Consequently, the amendment prohibited the continuation of existing check-cashing establishments at locations in the business district notwithstanding the fact that it was necessarily determined by the superintendent that the sites were appropriate to serve a community need.[57] Because such a prohibition does not exist pursuant to state law and because the legislature "vested the superintendent with the authority to determine appropriate locations for check-cashing establishments, [the provision was] preempted by State law."[58]

C. Nature of Land Use as Compared to Identity of Owner

In *Mead Square Commons, LLC v. Village of Victor*,[59] the plaintiff sought to invalidate a portion of a zoning law which prohibited "Formula Fast Food Restaurants" (FFFR) in the village's central business zoning district.[60] The plaintiff proposed to replace an existing

53. *Id*. (quoting *DJL Rest. Corp.*, 96 N.Y.2d at 97, 749 N.E.2d at 19, 725 N.Y.S.2d at 626).

54. *Id.*

55. *Sunrise Check Cashing & Payroll Servs., Inc.*, 91 A.D.3d at 138, 933 N.Y.S.2d at 398.

56. *Id*. at 138-39, 933 N.Y.S.2d at 398 (citing N.Y. BANKING LAW § 369(1)).

57. *See id.*

58. *See id.* at 139, 933 N.Y.S.2d at 398-99 (citing Lansdown Entm't Corp. v. N.Y.C. Dep't of Consumer Affairs, 74 N.Y.2d 761, 764-65, 543 N.E.2d, 725, 726-27, 545 N.Y.S.2d 82, 83-84 (1989).

59. 33 Misc. 3d 876, 930 N.Y.S.2d 431 (Sup. Ct. Ontario Cnty. 2011).

60. *Id.* at 877, 930 N.Y.S.2d at 432. The zoning law defined a "Formula Fast Food Restaurant" as:

> Any establishment, required by contract, franchise or other arrangements, to offer two or more of the following: (i) Standardized menus, ingredients, food preparation and/or uniforms[;] (ii) Prepared food in ready to consume state[;] (iii) Food sold over the counter in disposable containers and wrappers[;] (iv) Food selected from a limited menu[;] (v) Food sold for immediate consumption on or off premises[; and] (vi) Where customer pays before eating.

structure with a mixed-use building with commercial uses on the ground floor including, potentially, a Subway restaurant which, pursuant to the challenged provision, constituted an FFFR.[61] The complaint alleged that the prohibition of FFFRs in the central business district was based on whether the owner or operator of the establishment is under some contractual or franchise arrangement to utilize FFFR criteria and not upon the characteristics of the restaurant.[62] Consequently, it was alleged that the prohibition was impermissibly "based on the nature or identity of the owner or operator and not upon the use itself."[63]

"The presumption of constitutionality enjoyed by a legislative enactment, such as a zoning ordinance . . . is formidable but not conclusive . . . a zoning ordinance will be struck down if it bears no substantial relation to the police power objective of promoting the public health, safety, morals or general welfare . . . ."[64] Because the challenged provision was a component of the village's zoning law, it was presumed to be both valid and constitutional.[65]

The plaintiff's contention that the prohibition of FFFRs in the zoning district was unlawfully based solely upon ownership was premised on the "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it."[66] In *Dexter v. Town Board*, the Court of Appeals invalidated a condition of a zone change which restricted the amendment to a particular property owner.[67] The Court determined that "zoning deals basically with land use and not with the person who owns or occupies it."[68] However, *Dexter* was not intended to "divest [municipalities] of their discretionary power to impose reasonable conditions in connection with a zoning decision."[69] "A zoning board may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an

See id. at 878, 930 N.Y.S.2d at 433.

61. *Id*. at 877, 930 N.Y.S.2d at 432.

62. *Id.*

63. *Mead Square Commons, LLC*, 33 Misc. 3d at 877, 930 N.Y.S.2d at 432.

64. *See id.* at 878, 930 N.Y.S.2d at 433 (quoting Trs. of Union Coll. v. Schenectady City Council, 91 N.Y.2d 161, 165, 690 N.E.2d 862, 864, 667 N.Y.S.2d 978, 980 (1997)).

65. *Id*. (citing *Trs. of Union Coll.*, 91 N.Y.2d at 165, 690 N.E.2d at 864, 667 N.Y.S.2d at 980).

66. *Id*. (citing Dexter v. Town Bd., 36 N.Y.2d 102, 105, 324 N.E.2d 870, 871, 365 N.Y.S.2d 506, 507 (1975)).

67. *Dexter*, 36 N.Y.2d at 105-06, 324 N.E.2d at 871-72, 365 N.Y.S.2d at 507-08.

68. *Id*. at 105, 324 N.E.2d at 871, 365 N.Y.S.2d at 508.

69. *See Mead Square Commons LLC*, 33 Misc. 3d at 879, 930 N.Y.S.2d at 433-34.

area that might result from the grant of a variance or special permit."[70] Instead, "*Dexter* prohibited personal conditions which focused on the person [using or] occupying the property rather than the use of the land or the possible effects of that use on the surrounding area."[71]

The court in *Mead Square Commons* concluded the provision was not based upon the identity of the owner or operator of the restaurant.[72] The measure was not "plainly personal" nor did it "seek to regulate a specific entity."[73] Individualized treatment, which condemned the condition in *Dexter* was not relevant and all similarly situated owners were treated alike.[74] Instead, the provision was based on neutral planning and zoning concepts.[75]

The court also rejected the assertion that the FFFR regulation was an invalid overregulation of the details of business operation because the provision did not regulate any detail of the operation of a fast food restaurant, but instead, merely prohibited formulaic fast food restaurants in the central business district.[76]

D. Permissible Scope of Zoning Parameters Amendment

Although the construction of recreational amenities often and properly is a condition of land use approvals, the decision in *Town of Huntington v. Beechwood Carmen Building Corp.* confirms that such improvements must be explicit conditions of a rezoning or land use approval in order to be enforceable, and that a municipality may not rely on permissive provisions of a zoning regulation which may have envisioned such developer-installed facilities.[77]

In *Beechwood Carmen Building Corp.*, the town commenced an action to compel the defendants to construct a pool and a community center in accordance with the apparent intention of the zoning law.[78] The defendant's predecessor had received a zone change to an "R-PUD The Greens at Half Hollow Planned Unit Development District"

70. *Id*. at 779, 930 N.Y.S.2d at 434 (quoting St. Onge v. Donovan, 71 N.Y.2d 507, 515-16, 522 N.E.2d 1019, 1022-23, 527 N.Y.S.2d 721, 725 (1988)).

71. *Id*. (citing *St. Onge*, 71 N.Y.2d at 515-16, 522 N.E.2d at 1022-23, 527 N.Y.S.2d at 724-25).

72. *Id.*

73. *Id*.

74. *Mead Square Commons LLC*, 33 Misc. 3d at 779, 930 N.Y.S.2d at 434.

75. *Id*. at 880, 930 N.Y.S.2d at 434.

76. *Id*.

77. 82 A.D.3d 1203, 1206-07, 920 N.Y.S.2d 198, 200-01 (2d Dep't 2011).

78. *Id*. at 1204, 920 N.Y.S.2d at 199.

designation for a 382-acre parcel.[79] The developer proposed a senior residential community on a portion of the property and development of single-family dwellings on another part of the parcel.[80] The provisions of the zoning law for the district provided that buildings within the single-family portion of that district could only be used for detached single-family dwellings, accessory uses and activities, and a community building not to exceed 5000 square feet.[81] The final generic environmental impact statement had related that the developer proposed a recreation area including a community center and swimming pool for inclusion in the single-family dwelling portion of the district.[82] The developer proposed that a specific lot (lot seventy-three) within the single-family portion of the development would be used as a recreational facility, including such amenities as tennis courts and a playground.[83] The final approved subdivision plat contained a note for the lot providing: "Future Community Recreation Facility, Common Area."[84] The defendant developed a community recreation area on the lot, consisting of a playground, a tennis court, and a gazebo, but no pool or community center.[85]

The court determined that to the extent the provisions of the zoning law required that the development of lot seventy-three include a swimming pool and community center, such a provision is ultra vires and void as a matter of law.[86] "Towns and municipal governments lack inherent power to enact zoning or land use regulations and 'exercise such authority solely by legislative grant.'"[87] Although the zoning enabling statutes set forth in Town Law article 16 confer authority upon a town to enact zoning laws enumerating permissible land uses, nothing in the enabling legislation authorizes a town to enact a zoning law "which mandates the construction of a specific kind of building or amenity."[88]

In reaching its conclusion, the court relied on the holding in a similar matter, *BLF Associates, LLC v. Town of Hempstead*, which

79. *Id*. at 1204-05, 920 N.Y.S.2d at 199.

80. *Id*. at 1204, 920 N.Y.S.2d at 199.

81. *Id*. at 1205, 920 N.Y.S.2d at 199.

82. *Beechwood Carmen Bldg. Corp.*, 82 A.D.3d at 1205, 920 N.Y.S.2d at 199.

83. *Id*.

84. *Id*.

85. *Id*., 920 N.Y.S.2d at 200.

86. *Id*. at 1206, 920 N.Y.S.2d at 200-01.

87. *Beechwood Carmen Bldg. Corp.*, 82 A.D.3d at 1206-07, 920 N.Y.S.2d at 201 (quoting Kamhi v. Planning Bd., 59 N.Y.2d 385, 389, 452 N.E.2d 1193, 1194, 465 N.Y.S.2d 865, 866 (1983)).

88. *Id*. at 1207, 930 N.Y.S.2d at 201.

involved a seventeen-acre parcel of property previously owned by the United States and used as an Army Reserve facility.[89] The property and the surrounding area was zoned "B Residence" in which single-family detached housing or senior residences were permitted.[90] After the facility was closed, the property was made available for purchase pursuant to the Federal Base Closure and Realignment Act of 1990 and the town "was afforded the first opportunity to acquire the property and redevelop it for a public purpose."[91] In furtherance of its interest in acquiring the property, the town formed a local redevelopment agency to develop a plan for the property.[92] The adopted plan "contemplated a specific mixed-use development limited to [thirty-four] single-family homes . . . and [forty] senior citizen semi-attached dwellings with a [maximum sales price], and a community recreational facility."[93] "Ultimately, the [t]own chose not to purchase the property."[94]

The public notice of availability of the property noted that the town had prepared "a redevelopment plan for the property which included a mix of single-family and senior dwellings and a community recreational facility."[95] The petitioner agreed to purchase the property with no reference to the town's plan or with any restriction on the use being imposed as a condition of the sale.[96] The town thereafter created a new zoning district for the property which provided that the property could be utilized for "no more than [thirty-four] single-family homes, no more than [forty] senior citizen semi-attached dwellings, and a community recreational facility," and for no other use.[97] Pursuant to the zoning law amendment, the community recreational facility was required to consist of 9000 square feet on at least 1.25 acres of land, with a swimming pool, a picnic area, a minimum of two tennis courts, an exercise room, no fewer than two shuffleboard courts, a kitchen, an office, and a community room/lounge and required the transfer of the 1.25–acre recreational facility to a homeowners' association.[98] After title was transferred, a declaratory judgment action was instituted seeking a

89. *See id.* at 1206-07, 920 N.Y.S.2d at 200-01; *see also* BLF Assocs., LLC v. Town of Hempstead, 59 A.D.3d 51, 52, 870 N.Y.S.2d 422, 424 (2d Dep't 2008), *lv. denied*, 12 N.Y.3d 714, 911 N.E.2d 860, 883 N.Y.S.2d 797 (2009).

90. *BLF Assocs., LLC*, 59 A.D.3d at 52, 870 N.Y.S.2d at 424.

91. *Id*.

92. *Id*.

93. *Id*.

94. *Id*. at 53, 870 N.Y.S.2d at 424.

95. *BLF Assocs., LLC*, 59 A.D.3d at 53, 870 N.Y.S.2d at 424.

96. *Id*.

97. *Id*.

98. *Id*., 870 N.Y.S.2d at 424-25.

judgment that the adoption of the law was ultra vires, void, and unconstitutional.[99]

Town Law section 261 confers upon towns broad authority to enact zoning regulations which,

> For the purpose of promoting the health, safety, morals, or the general welfare of the community . . . regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of [the] lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land . . . .[100]

Town Law section 262 provides that towns may create "districts of such number, shape and area as may be deemed best suited to carry out the purposes of this [enabling] act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land."[101] Town Law section 263 mandates that such zoning regulations enacted in accordance with the preceding statutes be "made in accordance with a comprehensive plan."[102]

"The re-zoning of property for implementation of a specific project which [a municipality] had intended to construct if it [had] acquired . . . property is not a consideration or purpose embodied in the [zoning] enabling act[s]."[103] Moreover, although Town Law sections 261 and 262 authorize towns to regulate and restrict lot sizes and permitted uses, nothing in those provisions authorizes towns to specify in a zoning regulation the exact number and type of dwelling permitted.[104]

In addition, the enabling statutes do not authorize the enactment of a zoning regulation "that requires construction of a 9000-square foot community recreational facility, with specified amenities, on no fewer than 1.25 acres of land."[105] "Zoning ordinances may go no further than determining what may or may not be built" and the challenged provision was unnecessarily and excessively restrictive and not enacted for a legitimate zoning purpose.[106] Moreover, the requirement that the recreational facility be owned by a homeowners' association and that

99. *Id.*, 870 N.Y.S.2d at 425.

100. N.Y. TOWN LAW § 261 (McKinney 2004).

101. *Id.* § 262.

102. *Id.* § 263.

103. *BLF Assocs., LLC*, 59 A.D.3d at 55, 870 N.Y.S.2d at 426.

104. *Id.*

105. *Id.*

106. *Id.* (citing Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493, 498-501, 121 N.E.2d 517, 518-21, (1954)).

the senior citizen dwellings be cooperative units also was ultra vires and void because, "[i]t is a 'fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it.'"[107]

The court additionally rejected the town's contention that the developer could not be heard to complain because it knew about the plan and zoning amendment before it took title because the "[p]urchase of property with knowledge of [a] restriction does not bar the purchaser from testing the validity of the zoning ordinance [because] the zoning ordinance in the very nature of things has reference to land rather than to owner."[108]

The decision confirms that zoning deals with the potential use of land and cannot dictate what will be constructed. Certainly the town in *Ferraro* could have conditioned the zone change or subsequent approvals on the construction or recreational amenities, had it done so properly. However, it could not rely on the permissible provisions of the zoning law to compel the installation of improvements which were not conditions of the rezoning or approval.

E. Protest Petitions

Town Law section 265[109] and Village Law section 7-708[110] provide that a protest petition in prescribed form may be filed with respect to any proposed rezoning of property or other amendment of a zoning law by any of three distinct groups of property owners, thereby necessitating an affirmative vote of at least three-fourths of the members of a town board or board of trustees to approve the zoning amendment. Such a protest petition may be filed by:

> the owners of twenty percent or more of the area of land included in such proposed change; or the owners of twenty percent or more of the area of land immediately adjacent to that land included in such proposed change, extending one hundred feet therefrom; or the owners of twenty percent or more of the area of land directly opposite thereto, extending one hundred feet from the street frontage of such opposite land.[111]

The vagueness of the statutory language and lack of particularity in the statute have compelled the courts to interpret the requirements and

107. *Id.* (quoting Dexter v. Town Bd., 36 N.Y.2d 102, 105, 324 N.E.2d 870, 871, 365 N.Y.S.2d 506, 507 (1975)).

108. *BLF Assocs., LLC*, 59 A.D.3d at 56, 870 N.Y.S.2d at 426 (quoting *Vernon Park Realty, Inc.*, 307 N.Y. at 500, 121 N.E.2d at 520).

109. *See* N.Y. TOWN LAW § 265 (McKinney 2004).

110. *See* N.Y. VILLAGE LAW § 7-708 (McKinney 2011).

111. N.Y. TOWN LAW § 265; N.Y. VILLAGE LAW § 7-708.

parameters of the provision.

The petitioners in *Ferraro v. Town Board* instituted a proceeding to annul the rezoning of two adjoining parcels of property to construct several commercial structures, condominiums, and a hotel.[112] After the owners of property adjoining the parcel protested the proposed rezoning, the developer amended the rezoning petition to include a 101 foot "buffer zone" which would maintain the existing zoning classification.[113] The town board approved the amended rezoning petition by a four to three vote.[114]

The petitioners asserted that the owners of more than twenty percent of the property located directly opposite the property had protested the rezoning and that, as a result, the rezoning was required to be approved by at least three-fourths of the members of the town board in order to be effective.[115] Pursuant to Town Law section 265(1)(c) (and Village Law section 7-708(1)(c)), approval of at least three-fourths of the members of a board is necessary if an amendment is protested by, among other potential categories, "the owners of [twenty percent] or more of the area of land directly opposite thereto, extending [one hundred] feet from the street frontage of such opposite land."[116] The petitioners alleged that the petition was proper because their properties were "directly opposite" the property and within one hundred feet from the south side of the road adjoining the entire parcel.[117] However, the court held that the petitioners' properties must be within one hundred feet of that portion of the property to be rezoned in order for Town Law section 265(1)(c) to be applicable.[118]

Determination of the question depended on what area of property is referred to by the word "thereto" in Town Law section 265(1)(c).[119] The legislative history of the provision establishes that it "was intended to apply to property directly opposite the property included in [a] proposed rezoning."[120] The initial proposed language of the statute stated that a three-fourths vote was required if written protests were

112. 79 A.D.3d 1691, 1692-93, 914 N.Y.S.2d 525, 526-27 (4th Dep't 2010), *appeal denied*, 16 N.Y.3d 711, 947 N.E.2d 1194, 923 N.Y.S.2d 415 (2011).

113. *Id.* at 1693, 914 N.Y.S.2d at 527.

114. *Id*.

115. *Id*.

116. *Id*. (quoting N.Y. TOWN LAW § 265(1)(c)); *see also* N.Y. VILLAGE LAW §7-708(1)(c).

117. *Ferraro*, 79 A.D.3d at 1693, 914 N.Y.S.2d at 527.

118. *Id*.

119. *Id*. (citing N.Y. TOWN LAW § 265(1)(c)).

120. *Id*.

filed by "the owners of [twenty percent] or more of the area of land directly opposite *to that land included in such proposed change*, extending [one hundred] feet from the street frontage of such opposite land."[121] The word "thereto" in the adopted statute "was substituted for the emphasized language in the proposed statute."[122] Because there would be a 101-foot "buffer zone" separating the petitioners' properties and the rezoned portion of the property, they were not directly opposite the property to be rezoned and the property to be rezoned was not within one hundred feet of the street frontage of petitioners' properties.[123] As a result, the "buffer zone" created by the developers rendered Town Law section 265(1)(c) inapplicable.[124]

The court also rejected the petitioners' claim that "the driveways to the proposed development . . . should have been [required to be] rezoned and that petitioners' properties [then] would [have been] within [one hundred] feet of that rezoned property."[125] However, the commissioner of buildings had determined that the driveways would serve a dual purpose and, therefore, were not required to be rezoned and petitioners did not appeal that determination to the zoning board of appeals.[126]

The decision is consistent with the similar conclusion reached by the Court of Appeals in *Eadie v. Town Board* that "the 'one hundred feet' must be measured from the boundary of the rezoned area, not the parcel of which the rezoned area is a part."[127] Accordingly, the case law reflects that the permissible area to be included within a zoning amendment protest petition must be measured from the affected area, that is, the area to be rezoned, and not from the entirety of the property.

II. ZONING BOARDS OF APPEAL

A. Filing of Decision

Town Law section 267-a(9) provides that "[t]he decision of the board of appeals on [an] appeal shall be filed in the office of the town

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121. *Id*. at 1693-94, 914 N.Y.S.2d at 527 (quoting Report of Law Revision Commission, 1990 McKinney's Sess. Laws of N.Y. 2311 (codified at N.Y. TOWN LAW § 265(1)(b) (2004)).

122. *Ferraro*, 79 A.D.3d at 1694, 914 N.Y.S.2d at 527.

123. *Id*.

124. *Id*. (citing Eadie v. Town Bd., 7 N.Y.3d 306, 314-16, 854 N.E.2d 464, 467-68, 821 N.Y.S.2d 142, 145-46 (2006)).

125. *Id*., 914 N.Y.S.2d at 527-28.

126. *Id*., 914 N.Y.S.2d at 528.

127. Eadie, 7 N.Y.3d at 314, 854 N.E.2d at 467, 821 N.Y.S.2d at 145.

clerk within five business days after the day such decision is rendered, and a copy thereof mailed to the applicant."[128] Despite the statutory directive, the statute does not contain any sanction if a decision is not filed in a timely manner. In *Frank v. Zoning Board*, the court properly determined that the failure of a zoning board of appeals to file its written decision in the office of the town clerk within five business days after it was rendered does not require annulment of the decision because "Town Law [section] 267-a(9) does not specify a sanction for failure to comply with the five day filing requirement."[129] As support for its correct conclusion, the court relied on its decision in *Nyack Hospital v. Village of Nyack Planning Board*, which determined that a site plan application was not deemed to be approved by operation of law as a result of the failure to render a determination within sixty-two days of the filing of an application as required by Village Law section 7-725-a(8) and Town Law section 274-a(8).[130] The *Nyack Hospital* court reasoned that:

> the lack of an approval-by-default provision in either Village Law [section] 7-725-a(8) (Village Law [section] 7-725-a [formerly (7)]) or Town Law [section] 274-a(8), which govern site plan approval, while default provisions are included in Village Law [section] 7-728(8) and Town Law [section] 276(8), which govern subdivision approval, compels the conclusion that the defendant's alleged failure to render a determination within [sixty-two] days of the submission of the request for final site plan approval does not result in automatic approval under Village Law [section] 7-725-a(8).[131]

The court further concluded that "[t]he failure of the Legislature to include an approval-by-default provision in the site plan statutes [constitutes a] strong indication that [the] exclusion was intended, particularly where . . . all four of the previously mentioned laws were amended" concurrently in 1994 and the provision relating to default approvals was maintained in Village Law section 7-728 and Town Law section 276(8), while no comparable provision was added to either Village Law section 7-725-a or Town Law section 274-a.[132] Instead, the exclusive remedy for asserted violation of the statutory time

128. N.Y. TOWN LAW § 267-a(9) (McKinney 2004); *see also* N.Y. VILLAGE LAW § 7-712-a(9) (McKinney 2011).

129. 82 A.D.3d 764, 764-65, 917 N.Y.S.2d 697, 699 (2d Dep't 2011).

130. *See id.*; *see also* Frank v. Zoning Bd., 231 A.D.2d 617, 617, 647 N.Y.S.2d 799, 800 (2d Dep't 1996).

131. *Nyack Hosp*., 231 A.D.2d at 617, 647 N.Y.S.2d at 800.

132. *Id*. at 617-18, 647 N.Y.S.2d at 800.

provisions is a special proceeding to compel the defendant to act.[133]

The appropriate decision reached in *Frank* should be contrasted with the extraordinary conclusion reached in *Barsic v. Young*, in which the Second Department determined that, "under the circumstances" presented therein, a decision should be annulled and remanded to the board for a new determination because of the failure to timely file a decision denying a variance application.[134] However, the determination reviewed in *Barsic* was not filed until twenty-seven months after the decision was rendered.[135] Because the statute does not provide that a determination is invalid or for any other sanction or remedy if a decision is not filed within five business days, no such remedy can be implied or enforced. Except under extraordinary circumstances, the failure to timely file a decision should not affect its validity. Instead, the decision in *Barsic* is an anomaly that should be confined to the unusual facts of the case and *Frank* represents the proper principle.

B. Exhaustion of Administrative Remedies

It is well-settled that exhaustion of administrative remedies applies to claims made to a zoning board of appeals.[136] Consequently, a litigant may not raise new claims in an Article 78 proceeding that were not raised at the administrative level before a zoning board of appeals.[137] Similarly, "[j]udicial review of an administrative determination is limited to the grounds invoked by the agency in making its decision."[138] Although the petitioners in *Kearney* had related their opinion to the zoning board of appeals that they believed that variances were unnecessary because their property was exempt from the dimensional requirements pursuant to the "small lot exception" of the zoning law,

133. *Id*. at 618, 647 N.Y.S.2d at 800.

134. *See* 22 A.D.3d 488, 489, 801 N.Y.S.2d 829, 831 (2d Dep't 2005). This case was also discussed in the 2005-2006 Annual Survey of New York Law. Terry Rice, *Zoning Law*, *2005-06 Survey of New York Law*, 57 SYRACUSE L. REV. 1455, 1469-70 (2007).

135. *Barsic*, 22 A.D.3d at 489, 801 N.Y.S.2d at 831.

136. *See* O'Donnell v. Town of Schohaire, 291 A.D.2d 739, 740, 738 N.Y.S.2d 459, 460-61 (3d Dep't 2002); *see also* Hays v. Walrath, 271 A.D.2d 744, 745, 705 N.Y.S.2d 441, 442 (3d Dep't 2000).

137. *See* Kearney v. Vill. of Cold Springs Zoning Bd. of Appeals, 83 A.D.3d 711, 713, 920 N.Y.S.2d 379, 381 (2d Dep't 2011); *see also* Klapak v. Blum, 65 N.Y.2d 670, 672, 481 N.E.2d 247, 247, 491 N.Y.S.2d 615, 615 (1985) (citing Barry v. O'Connell, 303 N.Y. 46, 51-52, 100 N.E.2d 127, 130 (1951)); Emrey Props., Inc. v. Baranello, 76 A.D.3d 1064, 1067, 908 N.Y.S.2d 255, 257 (2d Dep't 2010); Mary T. Probst Family Trust v. Zoning Bd. of Appeals, 79 A.D.3d 1427, 1427-28, 913 N.Y.S.2d 813, 814 (3d Dep't 2010); Trident Realty L.P. v. Planning Bd., 248 A.D.2d 545, 545, 669 N.Y.S.2d 873, 873 (2d Dep't 1998).

138. *See Kearney*, 83 A.D.3d at 713, 920 N.Y.S.2d at 381 (quoting Filipowski v. Zoning Bd. of Appeals, 77 A.D.3d 831, 832, 909 N.Y.S.2d 530, 531 (2d Dep't 2010)).

they explicitly informed the board that they were not seeking such an exemption, but were only seeking variances.[139] Consequently, the zoning board of appeals' findings and decision were limited to the question presented, that is, whether the petitioners were entitled to variances and did not address the question of whether the property was exempt from the otherwise applicable dimensional requirements.[140] "Accordingly, the petitioners' claim that their property was . . . exempt [was] 'precluded from judicial review'" because of their failure to exhaust administrative remedies.[141]

C. Statute of Limitations

Town Law section 267-c(1) and Village Law section 7-712-c(1) relate that a proceeding must be filed within thirty days after the "filing of a decision of the board" in the office of the town [or village] clerk.[142] Because the statute of limitations within which to institute an Article 78 proceeding challenging a decision of a zoning board of appeals is so short, comprehending the precise event which triggers the commencement of the period of limitations is imperative.

In *92 MM Motel, Inc. v. Zoning Board of Appeals*, the appellate division reiterated that the minutes of a meeting at which a decision is rendered which includes the vote of each board member constitutes the determination of a zoning board of appeals, the filing of which commences the running of the statute of limitations.[143] Consequently, the thirty day limitations period commenced to run on the date on which the minutes were filed in the office of the town clerk.[144]

As is reiterated in *Birch Tree Partners, LLC v. Zoning Board of Appeals*, although the timely filing of an Article 78 petition commences a proceeding, service must be made in accordance with the provisions of CPLR section 306-b.[145] Pursuant to CPLR section 306-b, a petitioner is required to serve the petition and notice of petition not later than fifteen days after the date on which the applicable statute of limitations

139. *Id*., 920 N.Y.S.2d at 381-82.

140. *Id*., 920 N.Y.S.2d at 382.

141. *Id*. (quoting *Emrey Props., Inc.*, 76 A.D.3d at 1067, 908 N.Y.S2d at 257).

142. *See* N.Y. TOWN LAW § 267-c(1) (McKinney 2004); N.Y. VILLAGE LAW § 7-712-c(1) (McKinney 2011).

143. 90 A.D.3d 663, 664, 933 N.Y.S.2d 881, 882 (2d Dep't 2011) (citing Kennedy v. Zoning Bd. of Appeals, 78 N.Y.2d 1083, 1084-85, 585 N.E.2d 369, 370, 578 N.Y.S.2d 120, 121 (1991)).

144. *Id.*

145. *See* 90 A.D.3d 749, 750, 934 N.Y.S.2d 324, 325 (2d Dep't 2011).

expired.[146]

D. Use Variances

Because a use variance permits the use of property that is contrary to a community's adopted zoning scheme and zoning law, the proof necessary to obtain relief is specific and exacting. The decision in *Jones v. Zoning Board of Appeals* demonstrates the detailed evidence necessary to establish entitlement to a use variance.[147] The property consisted of nineteen acres located in a zone in which residential and agricultural uses were permitted and contained a sand and gravel mine that had been inactive for fifty years.[148] The zoning board of appeals granted the owners' application for a use variance to operate the mine.[149]

In reviewing the determination, the court reiterated the standard that zoning boards of appeal are afforded considerable discretion in considering applications for variances and that their determinations "will not be disturbed if they have a rational basis and are supported by substantial evidence in the record."[150] An applicant for a use variance possesses:

> the burden of demonstrating that restrictions on the property have caused an unnecessary hardship, which requires a showing that (1) the property cannot yield a reasonable return if used for permitted purposes as it is currently zoned, (2) the hardship results from the unique characteristics of the property, (3) the proposed use will not alter the essential character of the neighborhood, and (4) the hardship has not been self-imposed.[151]

As to the first requirement, that the property cannot yield a reasonable return if used for permitted purposes as it is currently zoned, an applicant must provide "dollars and cents" proof demonstrating "that the land cannot yield a reasonable return if used solely for a purpose permitted in the zone."[152] The applicant provided a suggested reasonable rate of return evaluation and a real estate appraiser's analysis

146. *Id*.

147. *See generally* 90 A.D.3d 1280, 934 N.Y.S.2d 599 (3d Dep't 2011).

148. *Id*. at 1280, 934 N.Y.S.2d at 601.

149. *Id*. at 1281, 934 N.Y.S.2d at 601.

150. *Id*. (citing Ifrah v. Utschig, 98 N.Y.2d 304, 308, 774 N.E.2d 732, 734, 746 N.Y.S.2d 667, 669 (2002)).

151. *Id.* (citing N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2004)); *see also* N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 2011).

152. *Jones*, 90 A.D.3d at 1281-82, 934 N.Y.S.2d at 601-02 (citing Vill. Bd. v. Jarrold, 53 N.Y.2d 254, 257-58, 423 N.E.2d 385, 386, 440 N.Y.S.2d 908, 909 (1981)).

of the current market conditions which established that the market value of the parcel, if subdivided and sold for residential purposes, was $16,000, which was significantly less than the total investment in the property of $125,000.[153] "This assessment was based upon . . . an examination of the market in the general area, the topography of the property, its prior mining history, existing wetlands and archaeologically sensitive areas, and set back and minimum lot size requirements contained within the [t]own's land use regulations."[154] In addition, an engineering report established that the property's existing soil conditions were not suited for conventional septic tank absorption and that poor filtering and contamination of the water supply were possible during flooding.[155] It was established that the previous use of "the property for [agriculture] yielded less than $700 per year and that the quality of the soil [was] not conducive" for growing crops of higher value.[156] The applicant also demonstrated that the remainder of the property, which consisted of steep slopes, brush, and existing stone piles, was not adaptable for any allowable use permitted by the zoning law.[157] In sustaining the board's conclusion, the court noted that issues of credibility are within the exclusive province of the zoning board of appeals to determine and that the board could accept the applicant's evidence over that of the opponents which primarily consisted of conclusory assertions.[158]

Substantial evidence also supported the board's conclusion that the hardship resulted from unique conditions peculiar to and inherent in the property as compared to other properties in the zoning district.[159] Although the petitioners claimed that their property suffered from the same conditions, the board rationally concluded that the nearly three-acre gravel and sand mine, a portion of which was already exposed due to prior mining activity, constituted a unique characteristic of the property that significantly contributed to the hardship.[160]

In addition, the board reasonably concluded that the "variance

153. *Id*. at 1282, 934 N.Y.S.2d at 602.

154. *Id*.

155. *Id*.

156. *Id*.

157. *Jones*, 90 A.D.3d at 1282, 934 N.Y.S.2d at 602.

158. *Id*. (citing Supkis v. Town of Sand Lake Zoning Bd. of Appeals, 227 A.D.2d 779, 781, 642 N.Y.S.2d 374, 376 (3d Dep't 1996)).

159. *Id*. at 1282-83, 934 N.Y.S.2d at 602 (quoting First Nat'l Bank of Downsville v. City of Albany Bd. of Zoning Appeals, 216 A.D.2d 680, 682, 628 N.Y.S.2d 199, 201 (3d Dep't 1995)).

160. *Id.* at 1283, 934 N.Y.S.2d at 602-03 (citing Douglaston Civic Ass'n v. Klein, 51 N.Y.2d 963, 965, 416 N.E.2d 1040, 1041, 435 N.Y.S.2d 705, 706 (1980)).

would not alter the essential character of the neighborhood."[161] The record demonstrated that the property was not located in a conventional neighborhood and that the closest residence was situated 700 feet from the property line.[162] The evidence further established that the mining operations generally would be below the line of sight from the adjoining road, would not be visible from any nearby residence, would not have a significant impact on traffic, and would be conditioned on measures to mitigate against extensive noise, including seventeen conditions of the Department of Environmental Conservation (DEC) approval intended to ensure that the character of the neighborhood would not be affected.[163]

Lastly, the board properly concluded that the hardship was not self-created.[164] "A hardship is considered self-imposed if the variance applicant purchased the property subject to the restrictions and was aware of the zoning restrictions at the time that it purchased the property."[165] At the time of the purchase of the property, a valid use variance to operate the sand and gravel mine existed which ran with the land.[166] Although the conveyance transpired while an appeal of the variance was pending, the zoning board of appeals could rationally find that that fact alone did not render the hardship self-imposed.[167]

E. Area Variances

1. Balancing Test

Town Law section 267-b(3)(b) and Village Law section 7-712-b(3)(b) mandate that a zoning board of appeals entertaining an area variance application weigh the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood and community.[168] The statutes further itemize five obligatory criteria to be considered in undertaking the weighing

161. *Id.*, 934 N.Y.S.2d at 603.

162. *Jones*, 90 A.D.3d at 1283, 934 N.Y.S.2d at 603.

163. *Id.*

164. *Id.* at 1284, 934 N.Y.S.2d at 603.

165. *Id.* at 1283, 934 N.Y.S.2d at 603 (quoting Ctr. Square Ass'n, Inc. v. City of Albany Bd. of Zoning Appeals, 19 A.D.3d 968, 971, 798 N.Y.S.2d 756, 759 (3d Dep't 2005)).

166. *Id.* (citing St. Onge v. Donovan, 71 N.Y.2d 507, 520, 522 N.E.2d 1019, 1025, 527 N.Y.S.2d 721, 727 (1988)).

167. *Jones*, 90 A.D.3d at 1284, 934 N.Y.S.2d at 603 (citing Clute v. Town of Wilton Zoning Bd. of Appeals, 197 A.D.2d 265, 268-69, 611 N.Y.S.2d 710, 712 (3d Dep't 1994)).

168. N.Y. TOWN LAW § 267-b(3)(b) (McKinney 2004); N.Y. VILLAGE LAW § 7-712-b(3)(b) (McKinney 2010).

analysis.[169] A variance determination lacking evidence that the board undertook the requisite balancing test based upon consideration of the five statutory considerations will be annulled and the matter remitted to the board for a complying determination.[170] However, in undertaking the balancing test for area variances, a zoning board of appeals is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational."[171] Although a decision lacking substantiation for a board's conclusion with respect to each factor may not be judicially infirm, the preferable procedure is to relate the facts to each of the germane mandatory considerations and to arrive at a conclusion with respect to each applicable factor. In that matter, a court can understand a board's rational, evaluate the evidence and arrive at a reasoned conclusion with respect to the rationality of the decision.

2. Speculative Comments Insufficient

The court reinforced the conclusion that invalidation is the likely outcome of a variance decision that is premised on conjecture and speculation in *Cacsire v. City of White Plains Zoning Board of Appeals*.[172] The petitioners purchased property in 1993 that was used as a two-family residence at the time of purchase with the intention of using the property as an investment by renting the two apartments.[173] The house had been constructed in 1904 and was located in an area zoned for one and two-family use.[174] The property had been listed as a two-family dwelling and was described in the contract of sale as a two-family use.[175] The petitioner's mortgage was conditioned on the

169. N.Y. TOWN LAW § 267-b(3)(b); N.Y. VILLAGE LAW § 7-712-b(3)(b).

170. *See* Nye v. Zoning Bd. of Appeals, 81 A.D.3d 1455, 1455, 917 N.Y.S.2d 499, 500 (4th Dep't 2011).

171. Morando v. Town of Carmel Zoning Bd., 81 A.D.3d 959, 960, 917 N.Y.S.2d 672, 674 (2d Dep't 2011); *see also* Friedman v. Bd. of Appeals, 84 A.D.3d 1083, 1084-85, 923 N.Y.S.2d 651, 652 (2d Dep't 2011) (quoting Merlotto v. Town of Patterson Zoning Bd. of Appeals, 43 A.D.3d 926, 929, 841 N.Y.S.2d 650, 653 (2d Dep't 2007)); Frank v. Zoning Bd. of Appeals, 82 A.D.3d 764, 765, 917 N.Y.S.2d 697, 699 (2d Dep't 2011) ("We also reject the petitioners' contention that the determination must be annulled because the Board failed to make specific factual findings as to each of the relevant statutory factors set forth in Town Law [section] 267–b(3)(b). The Board's decision specified the evidentiary basis upon which its determination relied, and is sufficient to permit an informed judicial review.").

172. 87 A.D.3d 1135, 1138, 930 N.Y.S.2d 54, 58 (2d Dep't 2011), *leave denied,* 18 N.Y.3d 802 (2011).

173. *Id.* at 1135, 930 N.Y.S.2d at 56.

174. *Id.*

175. *Id.*

property's use as a legal two-family dwelling and a certificate of occupancy search by the title company related that the building department had stated that no certificate of occupancy had been issued for the house because it had been built prior to the enactment of the certificate of occupancy regulations and that the property was classified by the city for tax purposes as a two-family dwelling.[176]

After having rented the property out as a two-family house and paying taxes on that basis for nine years, the petitioners sought permits to renovate a portion of the house, which were granted.[177] After completion of the renovations at a cost of $10,000, the building department refused to issue certificates of completion for the work because of a claimed inconsistency with its records regarding the classification of the property and advised the petitioners that a variance was necessary in order to utilize the property for two-family occupancy.[178] The zoning board of appeals denied petitioner's application for the requisite six area variances finding that the variances requested "were substantial, would produce an undesirable change in the character of the neighborhood, would result in a detriment to the health, safety, and general welfare of the community and that the . . . hardship was self-created."[179] The supreme court denied the relief requested in petitioners' Article 78 proceeding, and the appellate division reversed that decision.[180]

Although local zoning boards of appeal possess "broad discretion in considering applications for variances,"[181] conclusory findings of fact are insufficient to support a determination, because a zoning board of appeals "is required to clearly set forth how and in what manner the granting of the variance would be improper."[182] Similarly, a determination will not be considered to be rational if it lacks an objective factual basis and is based entirely on subjective considerations, such as general community opposition.[183]

Although the zoning board of appeals rationally concluded that the requested variances were substantial, the record lacked any evidence to support the conclusion that the variances would have an undesirable

176. *Id.*
177. *Cacsire*, 87 A.D.3d at 1136, 930 N.Y.S.2d at 56.
178. *Id.*
179. *Id.*, 930 N.Y.S.2d at 56-57.
180. *Id.*, 930 N.Y.S.2d at 57.
181. *Id.*
182. *Cacsire*, 87 A.D.3d at 1136, 930 N.Y.S.2d at 57 (quoting Garbrielle Realty Corp. v. Bd. of Zoning Appeals, 24 A.D.3d 550, 550, 808 N.Y.S.2d 258, 259 (2d Dep't 2005)).
183. *Id.* at 1137, 930 N.Y.S.2d at 57.

effect on the character of the neighborhood.[184] To the contrary, the record demonstrated that the property had been used and taxed by the city as a two-family dwelling for over fifty years.[185] The record further established that granting the variances would not result in an increase in congestion, traffic, and neighborhood population.[186] Significantly, the hardship was not self-created because the record established that the petitioners had reasonably believed that the property was legally being used as a two-family residence at the time of purchase and that they would suffer significant financial hardship if the variances were not granted; as a result, the court concluded that the record lacked sufficient evidence to support the rationality of the determination.[187]

3. Substantiality

Among the compulsory factors in evaluating an area variance application is "whether the requested variance is substantial."[188] Although many decisions have concluded that the substantiality of a variance request should be assessed by considering all of the pertinent circumstances,[189] most decisions still simply view the substantiality of an area variance application exclusively by reference to the percentage magnitude of the request, particularly when the nonconformity is large.[190] In *JPS Enterprises, LLC v. Wright*, a forty-one percent insufficiency in the number of off-street parking spaces was considered to be substantial.[191] In *Smelyansky v. Zoning Board of Appeals*, the court affirmed the denial of a minimum lot size variance to authorize a three-family dwelling, in part, because the lot consisted of only twenty-

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184. *See id*., 930 N.Y.S.2d at 57-58 (citing Filipowski v. Zoning Bd. of Appeals, 38 A.D.3d 545, 547, 832 N.Y.S.2d 578, 581 (2d Dep't 2007); *see also* Beyond Builders, Inc. v. Pigott, 20 A.D.3d 474, 475, 799 N.Y.S.2d 241, 242 (2d Dep't 2005)).

185. *Cacsire*, 87 A.D.3d at 1137, 930 N.Y.S.2d at 58.

186. *Id*. at 1137-38, 930 N.Y.S.2d at 58.

187. *Id*.

188. N.Y. TOWN LAW § 267-b(3)(b)(3) (McKinney 2010); N.Y. VILLAGE LAW § 7-712-b(3)(b)(3) (McKinney 2010).

189. *See* Tetra Builders v. Scheyer, 251 A.D.2d 589, 590, 674 N.Y.S.2d 764, 765 (2d Dep't 1998); Kleinhaus v. Zoning Bd. of Appeals, N.Y.L.J., March 26, 1996, at 37 (Sup. Ct. Westchester Cnty. Mar. 25, 1996); Raubvogel v. Bd. of Zoning Appeals, N.Y.L.J., Dec. 27, 1995, at 33 (Sup. Ct. Nassau Cnty. Dec. 26, 1995).

190. *See* Sakrel v. Roth, 176 A.D.2d 732, 735, 574 N.Y.S.2d 972, 975 (2d Dep't 1991), *appeal dismissed*, 79 N.Y.2d 851, 588 N.E.2d 98, 580 N.Y.S.2d 200 (1992); Carbone v. Town of Bedford, 144 A.D.2d 420, 422, 534 N.Y.S.2d 211, 213 (2d Dep't 1988); Four M Constr. Corp. v. Fritts, 151 A.D.2d 938, 940, 543 N.Y.S.2d 213, 215 (3d Dep't 1989); Grace v. Palermo, 182 A.D.2d 820, 821, 582 N.Y.S.2d 284, 286 (2d Dep't 1992); Robbins v. Seife, 215 A.D.2d 665, 628 N.Y.S.2d 311, 312 (2d Dep't 1995).

191. 81 A.D.3d 955, 957, 917 N.Y.S.2d 302, 304 (2d Dep't 2011).

one percent of the area required.[192]

4. Appeals

In *Witkowich v. Zoning Board of Appeals*, a neighbor appealed the issuance of a building permit to build a large garage on an adjacent lot located in a residential zoning district.[193] The zoning board of appeals confirmed the issuance of the permit and concluded that the garage was an allowable accessory building to the property owner's residence.[194] The appellate division reversed the supreme court's dismissal of the petition.[195]

Where the decision of a zoning board of appeals is rational and substantiated by evidence in the record, "a reviewing court may not substitute its own judgment for that of the board, even if such a contrary determination may be supported by the record."[196] However, the decision of the zoning board of appeals in *Witkowich* that the garage was a permitted "accessory" building as defined by zoning law was not rational.[197] The zoning law defined an "accessory" building as a "subordinate building . . . the use of which is customarily incidental to that of a main building on the same lot."[198] However, the record established that the garage was designed to store at least eight or nine automobiles and would have nearly twice the square footage of the residence.[199] Additionally, the record lacked sufficient evidence to support a finding that the use of a structure of that size as a garage is "customarily incidental" to a residence in the neighborhood.[200]

Additionally, a zoning board may rely on personal knowledge of board members regarding the attributes of a neighborhood.[201] However, the record lacked of any indication that the board relied on evidence of any specific accessory structures in the neighborhood or the dimensions or uses of any such structures.[202] In addition, although the property

192. 83 A.D.3d 1267, 1270, 920 N.Y.S.2d 828, 831 (3d Dep't 2011).

193. 84 A.D.3d 1101, 1102, 923 N.Y.S.2d 645, 646 (2d Dep't 2011).

194. *Id.*

195. *Id.*

196. *Id.* at 1102-03, 923 N.Y.S.2d at 646 (quoting Rossney v. Zoning Bd. of Appeals, 79 A.D.3d 894, 895, 914 N.Y.S.2d 190, 191 (2d Dep't 2010)).

197. *Id.* at 1103, 923 N.Y.S.2d at 646.

198. *Witkowich*, 84 A.D.3d at 1103, 923 N.Y.S.2d at 646-47 (quoting TOWN OF YORKTOWN ZONING ORDINANCE § 300-3(B) (2011)).

199. *Id.*, 923 N.Y.S.2d at 647.

200. *Id.*

201. *Id.* (citing Thirty W. Park Corp. v. Zoning Bd. of Appeals, 43 A.D.3d 1068, 1069, 843 N.Y.S.2d 106, 107 (2d Dep't 2007)).

202. *Id.*

owner submitted letters asserting that similar accessory structures existed in the neighborhood, those letters were undeserving of any weight because they did not identify the locations or dimensions of those structures.[203] As a result, the decision lacked a rational evidentiary basis to support its finding that the proposed garage constituted a permissible accessory building.[204]

5. Private Covenants

The relationship between zoning regulations and private covenants was demonstrated in *Rowe v. Town of Chautauqua*.[205] A decision approving the demolition of an existing cottage and the construction of a two-family dwelling on the property of the Chautauqua Institute was challenged, in part, based on the assertion that the town had improperly delegated its zoning authority and effectively accorded veto power to the Institute with respect to the issuance of building permits because the town asked if permission required by a private covenant had been secured.[206] However,

> [t]he use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement.[207]

Pursuant to that principle, although a land use is permitted pursuant to a local zoning law, it may be enjoined as violating a restrictive covenant.[208] Further, issuance of a permit for a use allowed by a zoning law may not be refused because the use would contravene a restrictive covenant.[209]

Consequently, the court concluded that the town had not delegated its authority to the Institution and that, to the extent that the town ascertained whether such approval was obtained prior to the issuance of a building permit, it did so only in order to encourage efficiency by diminishing the possibility that there would be multiple building permit

203. *Witkowich*, 84 A.D.3d at 1103, 923 N.Y.S.2d at 647.

204. *Id*.

205. *See generally* 84 A.D.3d 1728, 922 N.Y.S.2d 719 (4th Dep't 2011), *leave denied*, 17 N.Y.3d 709, 954 N.E.2d 1180, 930 N.Y.S.2d 554 (2011).

206. *Id.* at 1729, 922 N.Y.S.2d at 720-21.

207. *Id*. at 1729-30, 922 N.Y.S.2d at 721 (quoting Chambers v. Old Stone Hill Rd. Assoc., 1 N.Y.3d 424, 432, 806 N.E.2d 979, 982, 774 N.Y.S.2d 866, 869 (2004)).

208. *Id*. at 1730, 922 N.Y.S.2d at 721.

209. *See id*.

applications for the same property.[210]

III. SITE PLAN REVIEW

Town Law section 274-a(2)(a) relates that:

> Site plans shall show the arrangement, layout and design of the proposed use of the land on said plan. The ordinance or local law shall specify the land uses that require site plan approval and the elements to be included on plans submitted for approval. The required site plan elements which are included in the zoning ordinance or local law may include, where appropriate, those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law.[211]

The petitioner in *Valentine v. McLaughlin* challenged the denial of a site plan application to improve a right-of-way easement which traversed a steep hill and would possess a ninety degree curve.[212] The improvements depicted on the site plan included extensive excavations, the removal of large trees, and the construction of retaining walls as high as twelve feet in height along the sides of a roadway which was proposed to be erected below the grade of the adjacent lot.[213] The appellate division reversed the judgment of supreme court, which had granted the relief sought in an Article 78 petition and thereby sustained the planning board's denial of the application.[214]

Among the factors a planning board may properly consider criteria are whether the proposed development is consistent with the use of neighboring properties, whether it "'would bring about a noticeable change in the visual character of the area,' and whether the change would be irreversible."[215] In analyzing a site plan application, "[a] local planning board has broad discretion . . . and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary,

210. *Rowe*, 84 A.D.3d at 1730, 922 N.Y.S.2d at 721.

211. N.Y. TOWN LAW § 274–a(2)(a) (McKinney 2004); *see also* N.Y VILLAGE LAW § 7-725-a(2)(a) (McKinney 2011).

212. 87 A.D.3d 1155, 1156, 930 N.Y.S.2d 51, 52 (2d Dep't 2011), *leave denied*, 18 N.Y.3d 804 (2012).

213. *Id.*

214. *Id.*

215. *Id.* at 1157, 930 N.Y.S.2d at 53 (quoting Home Depot, USA, Inc. v. Town of Mount Pleasant, 293 A.D.2d 677, 678, 741 N.Y.S.2d 274, 276 (2d Dep't 2002)) (internal quotation marks omitted).

or an abuse of discretion."[216] As a result, if a planning board's decision possesses a rational basis in the record, a court may not substitute its own judgment even if the evidence could support a different conclusion.[217]

The planning board denied the application based on: the grade of the driveway, combined with the ninety degree turn and deep cut bordered by high retaining walls; the inability of emergency vehicles, particularly fire trucks, to negotiate the turn; the excessively large retaining walls; the failure to adequately demonstrate the manner in which the retaining walls could be constructed without encroaching on neighboring properties; the failure to make provisions for snow removal; and the absence of safe pedestrian access.[218] Given the specificity of the findings and the sufficiency of the evidence supporting them, the planning board's denial of the application was "premised on clear findings of deleterious changes that adversely affect the adjoining area."[219] In addition, although conflicting evidence was adduced on certain issues, the court accepted the planning board's "common-sense judgment that the . . . site plan was not suitable for the topography of the area or to the character of the neighborhood" and found that the conclusion was supported by the record.[220]

In *Greencove Associates, LLC v. Town Board*, the appellate division sustained a condition of a site plan approval for expansion of a shopping center.[221] When a zoning change authorizing the construction of the original shopping center was approved on the five acre parcel in 1959, a restriction was imposed mandating the maintenance of a landscaped buffer along the portion of the parcel that bordered a road which is adjacent to a residential neighborhood.[222] The town board approved a site plan application in 1999 to expand the shopping center conditioned upon improvements to the landscaped buffer area which resulted in a buffer averaging twenty-two feet in width.[223]

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216. *Id*. (quoting In-Towne Shopping Ctrs., Co v. Planning Bd., 73 A.D.3d 925, 926, 901 N.Y.S.2d 331, 332 (2d Dep't 2010)).

217. *Valentine*, 87 A.D.3d at 1158, 930 N.Y.S.2d at 53 (citing Metro Enviro Transfer, LLC v. Vill. of Croton-on-Hudson, 5 N.Y.3d 236, 241, 833 N.E.2d 1210, 1212, 800 N.Y.S.2d 535, 537 (2005)).

218. *Id.*, 930 N.Y.S.2d at 54.

219. *Id*. (quoting E. N.Y. Props. v. Cavaliere, 142 A.D.2d 644, 646, 530 N.Y.S.2d 842, 844 (2d Dep't 1998)).

220. *Id*. (citing Market Square Props., Ltd. v. Town of Guilderland Zoning Bd. of Appeals, 66 N.Y.2d 893, 895, 489 N.E.2d 741, 741, 498 N.Y.S.2d 772, 772 (1985)).

221. 87 A.D.3d 1066, 1066, 929 N.Y.S.2d 325, 326 (2d Dep't 2011).

222. *Id*. at 1066-67, 929 N.Y.S.2d at 326.

223. *Id*. at 1067, 929 N.Y.S.2d at 326.

The petitioner sought site plan approval in 2010 to construct an additional 10,000 square foot structure on the portion of the property that included the buffer area and bordered the road.[224] It was proposed that the new structure would infringe on the existing landscaped buffer, diminishing it to four to five feet directly behind the building.[225] In its review pursuant to General Municipal Law section 239-m,[226] the county planning commission recommended that the building be reduced in size to 6800 square feet to permit the building to better fit into the irregular-shaped site and to be relocated further from the property line in order to maintain the existing buffer.[227] The town board approved the site plan application subject to the recommendation of the planning commission.[228]

Town Law section 274-a(2)(a) and Village Law section 7-725-a(2)(a) authorize review site plans including elements relating to "parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law."[229] The town code provided that, in determining whether to approve, approve with modifications, or disapprove a site plan, the town board may consider the "overall impact on the neighborhood, including compatibility of design considerations and adequacy of screening from residential properties."[230]

The court found that the board properly imposed the challenged condition.[231] "[A] condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property."[232] The challenged condition was a reasonable means of ensuring that the existing landscaped buffer would be preserved in order to screen the adjacent residential neighborhood from the impacts of the shopping

224. *Id.*

225. *Id.*

226. *See* N.Y. GEN. MUN. LAW § 239-m (McKinney 2007).

227. *Greencove Assocs.*, 87 A.D.3d at 1067, 929 N.Y.S.2d at 326-27.

228. *Id.*, 929 N.Y.S.2d at 327.

229. N.Y. TOWN LAW § 274-a(2)(a) (McKinney 2004); N.Y. VILLAGE LAW § 7-725-a(2)(a) (McKinney 2011); *see also* Home Depot, U.S.A., Inc. v. Town Bd., 63 A.D.3d 938, 939, 881 N.Y.S.2d 160, 162 (2d Dep't 2009).

230. *Greencove Assocs.*, 87 A.D.3d at 1068, 929 N.Y.S.2d at 327 (quoting TOWN OF NORTH HEMPSTEAD CODE §§ 70-219(E)(1), 70-219(B) (2007)).

231. *Id.*

232. *Id.* (quoting Int'l Innovative Tech. Grp. Corp. v. Planning Bd., 20 A.D.3d 531, 533, 799 N.Y.S.2d 544, 546 (2d Dep't 2005)).

center.[233] Despite the fact that the proposed 10,000 square foot building complied with the area and set-back requirements of the zoning law, the court sustained the reduction in the size of the building because a structure of that size could not fit on that portion of the parcel without encroaching on the buffer.[234]

In *Bagga v. Stanco*, the denial of a site plan application was annulled because the determination lacked support in the record and was based on unspecific community opposition.[235] The petitioner previously had received site plan approval for a 14,727 square foot, two-story retail building fronting a state highway with the first floor to be used for retail units and the second floor for storage.[236] The petitioner subsequently applied for revised approval to permit the second floor to be used for eleven residential apartments, a use permitted in the district.[237] The modified proposal would add only one more vehicular trip than the previously approved site plan and it was proposed to provide seventy-three off-street parking spaces, which was six more than required by the zoning law, and two access driveways with adequate sight distance.[238] The county planning commission recommended approval of the modified site plan, finding that it "conformed with its objective of promoting mixed use commercial/residential development along arterial roadways and that approval of the project might encourage redevelopment of other marginal properties" along the highway.[239] The planning board denied the application after a number of residents opposed the petitioner's application claiming that apartments over retail stores would attract undesirable tenants.[240] In denying the application, the planning board "cited concern over access to the [development], the [likelihood] of excessive traffic congestion, and a lack of parking."[241] The supreme court denied the petition seeking to annul the denial, finding that there was a rational basis for the determination because "some of the residents who testified at the public hearings expressed concerns over increased traffic and the difficulty of ingress to and egress from a

233. *Id.*, 929 N.Y.S.2d at 327-28 (citing *Int'l Innovative Tech. Grp. Corp*, 20 A.D.3d at 533, 799 N.Y.S.2d at 546).

234. *Id.*, 929 N.Y.S.2d at 328.

235. 90 A.D.3d 919, 919, 934 N.Y.S.2d 493, 493-94 (2d Dep't 2011).

236. *Id.*, 934 N.Y.S.2d at 494.

237. *Id.*

238. *Id.*

239. *Id.* at 920, 934 N.Y.S.2d at 494.

240. *Bagga*, 90 A.D.3d at 920, 934 N.Y.S.2d at 494.

241. *Id.*

heavily traveled local thoroughfare."[242] The appellate division reversed and annulled the denial.[243]

The record lacked sufficient evidence to support the rationality of the planning board's decision.[244] Instead, the record controverted the residents claimed apprehensions that were relied upon by the planning board as the basis for its decision.[245] The court found that the decision improperly was based upon generalized community opposition.[246]

IV. SPECIAL PERMITS

The classification of a use as a special permit use is tantamount to a legislative finding that the use is in harmony with a community's general zoning plan and will not adversely affect the neighborhood.[247] As a result, designation of a land use as a special permit use yields a strong presumption in favor of the use[248] and constitutes "a per se finding that it is in harmony with the neighborhood."[249] A special permit application must be assessed by reference to authorized and legitimate planning criteria[250] and may not be denied solely because of general community objections, speculation, generalized objections, or anecdotal complaints.[251]

The applicant in *Kinderhook Development, LLC v. City of Gloversville Planning Board* applied for a special permit to erect four multi-family apartment buildings containing forty-eight affordable housing units which use was permitted upon obtaining a special use permit and site plan approval.[252] Petitioner provided a plan to address

242. *Id*.

243. *Id*.

244. *Id*., 934 N.Y.S.2d at 495.

245. *Bagga*, 90 A.D.3d at 920, 934 N.Y.S.2d at 495.

246. *Id.* at 921, 934 N.Y.S.2d at 495 (citing Bower Assocs. v. Planning Bd., 289 A.D.2d 575, 575, 735 N.Y.S.2d 806, 806 (2d Dep't 2001), *leave denied*, 98 N.Y.2d 604, 773 N.E.2d 1016, 746 N.Y.S.2d 278 (2002)).

247. *See* Retail Prop. Trust v. Bd. of Zoning Appeals, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 731, 746 N.Y.S.2d 662, 666 (2002).

248. *See* Cove Pizza v. Hirshon, 61 A.D.2d 210, 212-13, 401 N.Y.S.2d 838, 839-40 (2d Dep't 1978).

249. Pilato v. Zoning Bd. of Appeals, 155 A.D.2d 864, 865, 548 N.Y.S.2d 950, 951 (4th Dep't 1989).

250. *See* Tri-State Outdoor Media Grp. v. Churchill, 261 A.D.2d 924, 924, 689 N.Y.S.2d 832, 833 (4th Dep't 1999).

251. *See* Market Square Props. v. Town of Guilderland Zoning Bd. of Appeals, 66 N.Y.2d 893, 895, 489 N.E.2d 741, 741, 498 N.Y.S.2d 772, 772 (1985); Church of Jesus Christ of Latter-Day Saints v. Planning Bd., 260 A.D.2d 769, 769, 687 N.Y.S.2d 794, 795 (3d Dep't 1999).

252. 88 A.D.3d 1207, 1208, 931 N.Y.S.2d 447, 448 (3d Dep't 2011).

storm-water runoff during the State Environmental Quality Review Act (SEQRA) review process.[253] The planning board did not request additional information with respect to water runoff, but commented that a number of property owners had expressed concern about runoff.[254] Petitioner's engineer provided a letter in which he confirmed that the project would not increase the rate of runoff to the surrounding area and would marginally diminish it and petitioner further agreed to pay $50,000 to the city for a study of drainage problems in the neighborhood.[255] In addition, the planning board adopted a negative declaration pursuant to SEQRA and determined therein that the petitioner's storm-water management plan adequately addressed the potential storm-water impacts of this project.[256] However, the application received neighborhood opposition at the public hearing and the planning board denied the application based upon the water runoff issue.[257]

In affirming supreme court's annulment of the decision, the appellate division reiterated that "the classification of a particular use as permitted in a zoning district is 'tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.'"[258] Petitioner had satisfied its initial burden of establishing that the proposed project complied with the legislatively imposed conditions on the use.[259] Although the planning board possessed the authority to assess and reject the application "[i]f there [were] specific, reasonable grounds . . . to conclude that the proposed special use [was] not desirable at the particular location," such a determination is arbitrary and unreasonable unless it is supported by substantial evidence in the record.[260]

In *Kinderhook Development*, the engineering evidence demonstrated that the project would reduce pre-existing runoff problems and respondent relied upon that evidence in adopting a negative declaration pursuant to SEQRA.[261] Even if the planning board

253. *Id*.

254. *Id*.

255. *Id*.

256. *Id*.

257. *Kinderhook Dev. LLC*, 88 A.D.3d at 1208, 931 N.Y.S.2d at 448.

258. *Id*. (quoting Twin Cnty. Recycling Corp. v. Yevoli, 90 N.Y.2d 1000, 1002, 688 N.E.2d 501, 502, 665 N.Y.S.2d 627, 628 (1997)).

259. *Id*. at 1209, 931 N.Y.S.2d at 448 (citing Retail Prop. Trust v. Bd. of Zoning Appeals, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 731, 746 N.Y.S.2d 662, 666 (2002)).

260. *Id*., 931 N.Y.S.2d at 449 (quoting Steenrod v. City of Oneonta, 69 A.D.3d 1030, 1031, 892 N.Y.S.2d 649, 650 (3d Dep't 2010)).

261. *Id*.

was not bound by its own negative declaration in rendering a decision on the application, the only evidence it subsequently received on the issue consisted of conclusory opinions of opposed neighbors.[262] Because the planning board based its decision on generalized community objections rather than the unchallenged empirical evidence, the determination was not supported by substantial evidence.[263]

262. *Kinderhook Dev. LLC*, 88 A.D.3d at 1209, 931 N.Y.S.2d at 449.

263. *Id.* (citing *Twin Cnty. Recycling Corp.*, 90 N.Y.2d at 1002, 688 N.E.2d at 502, 665 N.Y.S.2d at 628).