ZONING & LAND USE

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CONTENTS

I. ZONING ENACTMENTS & AMENDMENTS 993
A. *Preemption-Mining/Fracking*..993
B. *Checking Cashing Establishments* 1001
C. *Preemption-Correctional Facilities* 1002
D. *Legitimate Purpose of Zoning Designations* 1003
II. SITE PLAN REVIEW 1005
III. SPECIAL PERMITS 1006
IV. LACHES 1007
V. MOOTNESS 1008
VI. CONSISTENCY 1009
VII. SPECIAL FACTS EXCEPTION 1011
VIII. EXHAUSTION OF ADMINISTRATIVE REMEDIES 1014
IX. SUBDIVISION APPROVAL 1015
X. ZONING BOARDS OF APPEAL 1018
A. *Type of Variance* 1018
B. *Use Variances*..1019
C. *Area Variances* 1020
XI. RELIGIOUS USES 1020

I. ZONING ENACTMENTS & AMENDMENTS

A. Preemption-Mining/Fracking

Technological advances which have enabled the use of hydrofracking to mine and utilize natural gas and similar fuel deposits have renewed the conflict of local zoning authority with state environmental statutes which regulate the mining industry and the preemptive effect of the state statute. Although the litigation continues as to whether a municipality may ban hydrofracking in a community and the preemptive effect of the state statutes dealing with hydrofracking, the issues were largely determined in prior litigation regarding the preemptive effect of the Mined Land Reclamation Law ("MLRL")[1] on the ability of municipalities to ban mining through

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1. N.Y. ENVTL. CONSERV. LAW §§ 23-2701 to 23-2727 (McKinney 2013).

zoning laws.

The MLRL, first enacted in 1974, was intended, in part, "to foster and encourage . . . an economically sound and stable mining" and minerals industry in New York.[2] The objectives of the MLRL were to be effected "by replacing the existing patchwork of local regulatory ordinances with 'standard and uniform restrictions and regulations.'"[3] As initially adopted, the MLRL expressly

> supersede[d] all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from . . . enacting or enforcing local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.[4]

In *Frew Run Gravel Products, Inc. v. Town of Carroll*, the Court of Appeals, in 1987, interpreted that supersession language as not preempting local zoning ordinances which restricted mining to certain zoning districts.[5] The Court in *Frew Run* distinguished between local laws which regulate the mining industry itself, which are preempted, and laws which regulate land use, which are not.[6]

The suppression provision of the MLRL was amended in 1991 to provide that

> this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from . . . enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts.[7]

Subsequently, in *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, a zoning law which prohibited mining in all zoning districts in a town was challenged as being preempted by the MLRL.[8] Based on the conclusion in *Frew Run*, the owner of a nonconforming mine asserted that *Frew Run* established the limited authority of municipalities to determine in which zoning districts mining may occur,

2. *Id*. § 23-2703(1).

3. Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 680-81, 664 N.E.2d 1226, 1234, 642 N.Y.S.2d 164, 172 (1996) (quoting Frew Run Gravel Prods., Inc. v. Carroll, 71 N.Y.2d 126, 132, 518 N.E.2d 920, 923, 524 N.Y.S.2d 25, 28 (1987)).

4. N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 1991).

5. 71 N.Y.2d at 130-31, 518 N.E.2d at 922, 524 N.Y.S.2d at 27.

6. *Id.* at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 28.

7. N.Y. ENVTL. CONSERV. LAW § 23-2703(2)(b) (McKinney 2013).

8. *Gernatt Asphalt Prods., Inc.*, 87 N.Y.2d at 668, 664 N.E.2d at 1226, 642 N.Y.S.2d at 164.

but did not authorize the prohibition of mining in all districts in a community.[9] It was asserted that the local zoning regulations prohibiting mining throughout the town was preempted by the MLRL.[10]

The Court of Appeals concluded that the zoning law was not preempted by the MLRL and found that "[t]he patent purpose of the 1991 amendment was to withdraw from municipalities the authority to enact local laws imposing land reclamation standards that were stricter than the State-wide standard under the MLRL."[11] However, "the MLRL does not preempt the Town's authority to determine that mining should not be a permitted use of land within the Town, and to enact amendments to the local zoning ordinance in accordance with that determination."[12]

With that background, when faced with the potential of hydrofracking in their communities, many municipalities sought to prohibit the practice in their zoning districts. In two lower court decisions discussed in the *2011-2012 Survey*[13]—*Anschutz Exploration Corp. v. Town of Dryden*[14] and *Cooperstown Holstein Corp. v. Town of Middlefield*[15]—both courts determined that the Oil, Gas, and Solution Mining Law ("OGSML")[16] did not preempt municipalities from enacting local zoning laws which prohibit oil, gas and solution drilling or mining within a municipality.

In *Norse Energy Corp. USA v. Town of Dryden*,[17] the appellate division adopted the same rationale as the courts had utilized in *Anschutz Exploration* and *Cooperstown Holstein Corp.* In *Norse Energy*, the town had amended its zoning law to ban all activities related to the exploration for, and the production or storage of, natural gas and petroleum.[18] The petitioner's predecessor in interest, Anschutz Exploration, possessed leases covering 22,200 acres of land and challenged the amendment, contending that it was preempted by the

9. *Id.* at 681, 664 N.E.2d at 1234, 642 N.Y.S.2d at 172.

10. *Id.*

11. *Id.* at 682, 664 N.E.2d at 1235, 642 N.Y.S.2d at 173.

12. *Id.* at 683, 664 N.E.2d at 1235, 642 N.Y.S.2d at 173.

13. Terry Rice, *Zoning & Land Use, 2011-12 Survey of New York Law*, 63 SYRACUSE L. REV. 1007, 1008-12, (2013).

14. 35 Misc. 3d 450, 940 N.Y.S.2d 458 (Sup. Ct. Tompkins Cnty. 2012).

15. 35 Misc. 3d 767, 943 N.Y.S.2d 722 (Sup. Ct. Otsego Cnty. 2012), *aff'd*, 106 A.D.3d 1170, 964 N.Y.S.2d 431 (3d Dep't 2013), *lv. granted*, 21 N.Y.3d 863, 995 N.E.2d 851, 972 N.Y.S.2d 535 (2013).

16. N.Y. ENVTL. CONSERV. LAW § 23-0303 (McKinney 2013).

17. 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dep't 2013), *lv. granted*, 21 N.Y.3d 863, 995 N.E.2d 851, 972 N.Y.S.2d 535 (2013).

18. *See id.* at 27-28, 964 N.Y.S.2d at 716.

OGSML.[19] The court first reiterated that the New York State Constitution grants "'every local government [the] power to adopt and amend local laws not inconsistent with the provisions of [the] constitution or any general law relating to its property, affairs or government.'"[20] To implement this express grant of authority, the legislature adopted numerous statutes authorizing local powers, including the authority to regulate the use of land.[21] Nevertheless, the legislature possesses the authority to preempt such local legislation either by expressly stating its intent to preempt or by implication.[22] Where, as in *Norse Energy*, a statute includes an express preemption clause, its effect "'turns on the proper construction of [the] statutory provision.'"[23]

The supersession clause contained in the OGSML provides that "'[t]he provisions of [ECL article 23] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.'"[24] Accordingly, the clear language of the provision bars municipalities from enacting laws or ordinances "'*relating to the regulation* of the oil, gas and solution mining industries.'"[25] However, the zoning law challenged in *Norse Energy* did not endeavor to regulate the details or procedure of the oil, gas and solution mining industries.[26] To the contrary, it established permissible and proscribed uses of land within the town with the objective of regulating land use generally.[27] The court recognized that although the exercise of a municipality's right to regulate land use through zoning will inexorably have an incidental effect on the oil, gas, and solution mining industries, zoning laws are not the type of regulatory provision that the legislature intended to preempt by the enactment of the OGSML.[28]

The court further opined that the legislative history of the OGSML generally, and of Environmental Conservation Law ("ECL") section 23-0303(2) specifically, reinforced its conclusion.[29] Considering the

19. *Id.* at 28, 964 N.Y.S.2d at 716.

20. *Id.* at 30, 964 N.Y.S.2d at 718 (quoting N.Y. CONST. art. IX, § 2(c)).

21. *See id.* (citations omitted).

22. *Norse Energy Corp. USA*, 108 A.D.3d at 31, 964 N.Y.S.2d at 719 (citations omitted).

23. *Id.* (quoting Frew Run Gravel Prods., Inc. v. Carroll, 71 N.Y.2d 126, 131, 518 N.E.2d 920, 922, 524 N.Y.S.2d 25, 27 (1987)).

24. *Id.* (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2013)).

25. *Id.* (quoting N.Y. ENVTL. CONSERV. LAW § 2302(2)).

26. *Id.* at 32, 964 N.Y.S.2d at 719.

27. *Norse Energy Corp. USA*, 108 A.D.3d at 32, 964 N.Y.S.2d at 719.

28. *Id.*

29. *Id.* at 32, 964 N.Y.S.2d at 719-20.

legislative history of the OGSML and of the 1981 amendments, the legislative intention was to ensure uniform statewide standards and procedures with respect to the technical operational activities of the oil, gas, and mining industries in order to foster efficiency while minimizing waste.[30] The supersession provision was enacted to eliminate inconsistent local regulation that impeded that goal.[31] Nothing in the language, statutory scheme, or legislative history of the statute suggests an intent to usurp the authority traditionally delegated to municipalities to designate permissible and prohibited uses of land within a community.[32] In the absence of an unambiguous manifestation of legislative intent to preempt local jurisdiction over land use, the court refused to interpret such a construction:[33]

> By construing ECL 23–0303(2) as preempting only local legislation regulating the actual operation, process and details of the oil, gas and solution mining industries, the statutes may be harmonized, thus avoiding any abridgment of a town's powers to regulate land use through zoning powers expressly delegated in the Statute of Local Governments . . . and the Town Law.[34]

Substantiating its reasoning by the decision in *Frew Run*, the court related that,

> [c]onstruing the language "relating to the extractive mining industry" according to its plain meaning, the [*Frew Run*] Court found that the zoning law was not preempted by the MLRL's supersession provision as it was related to "an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town."[35]

In restricting supersession to those laws "relating to the extractive mining industry," the court concluded that "the Legislature intended to preempt only 'local regulations dealing with the actual operation and process of mining.'"[36] The decision in *Frew Run* had found that local zoning laws affect the mining industry only in incidental ways that do

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30. *Id.* at 34, 964 N.Y.S.2d at 721.

31. *Id.*

32. *Norse Energy Corp. USA*, 108 A.D. 3d at 34, 964 N.Y.S.2d at 721.

33. *Id.* at 34-35, 964 N.Y.S.2d at 721.

34. *Id.* at 35, 964 N.Y.S.2d at 721 (quoting Frew Run Gravel Prods., Inc. v. Carroll, 71 N.Y.2d 126, 134, 518 N.E.2d 920, 924, 524 N.Y.S.2d 25, 29 (1987)) (internal quotation marks omitted).

35. *Id*. at 35-36, 964 N.Y.S.2d at 722 (quoting *Frew Run Gravel Prods., Inc.*, 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 28).

36. *Id*. at 136, 964 N.Y.S.2d at 722 (quoting *Frew Run Gravel Prods., Inc.*, 71 N.Y.2d. at 133, 518 N.E.2d at 923, 524 N.Y.S.2d at 29).

not frustrate the MLRL's stated purpose "to foster a healthy, growing mining industry."[37] The amendment challenged in *Norse Energy*, although incidentally impacting the oil, gas, and solution mining industries, did not conflict with the state's interest in establishing uniform procedures for the operational activities of these industries.[38]

As a result, the court considered the unambiguous meaning of the language of the supersession clause, the germane legislative history, the purpose and policy of the OGSML as a whole, and the interpretation accorded to MLRL's comparable supersession provision. Based on those considerations, the court concluded that ECL section 23–0303(2) did not preempt a municipality's authority to enact local zoning regulations which prohibit oil, gas and solution mining or drilling within its borders.[39]

In addition, the amendment was not invalid because of the doctrine of implied preemption.[40] Although the existence of an express preemption clause in a statute implies that the Legislature did not intend to preempt other matters, it does not entirely exclude the possibility of implied preemption.[41] Pursuant to the doctrine of conflict preemption, a "'local government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law."[42] The terms of the OGSML, which relate to the spacing of wells, do not relate to traditional land use concerns but, instead, deal with the details and procedures of well-spacing by drilling operators.[43] The two spheres of regulation do not conflict, but rather, may harmoniously coexist—the zoning law will dictate in which, if any, districts drilling may occur, while the OGSML regulates the proper spacing of wells in permissible districts.[44]

As a result, the OGSML does not preempt, either expressly or impliedly, a municipality's power to adopt zoning regulations banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders.

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37. *Norse Energy Corp. USA*, 108 A.D.3d at 35-36, 964 N.Y.S.2d at 722 (quoting *Frew Run Gravel Prods., Inc.*, 71 N.Y.2d. at 132, 518 N.E.2d at 923, 524 N.Y.S.2d at 28).

38. *Id.* at 36, 964 N.Y.S.2d at 722.

39. *Id.* at 36, 964 N.Y.S.2d at 722-23.

40. *Id.* at 36-38, 964 N.Y.S.2d at 723-24.

41. *Id*. at 36-37, 964 N.Y.S.2d at 723.

42. *Norse Energy*, 108 A.D.3d. at 37, 964 N.Y.S.2d at 723 (quoting N.Y. State Club Ass'n v. City of N.Y., 69 N.Y.2d 211, 217, 505 N.E.2d 915, 917, 513 N.Y.S.2d 349, 351 (1987)).

43. *Id*.

44. *Id*.

Similarly, it was determined in *Troy Sand & Gravel Co., Inc. v. Town of Nassau* that the MLRL does not govern the manner in which decisions on special use permits must be made.[45] As a result, a municipality retains the authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations by its zoning authority.[46] However, a municipality may not directly regulate the specifics of mining activities or the reclamation process.[47] Although the SEQRA determination—made by the State Department of Environmental Conservation ("DEC") with respect to a mining permit issued by it pursuant to the MLRL—was binding on the town with respect to SEQRA issues, DEC's SEQRA determination did not supersede the town's zoning regulations relating to the review of special use permit applications, nor did it preordain the town's decision on the mine's special permit application.[48] Similarly, the SEQRA findings did not constrain the town to issue the requested special use permit or preclude it from utilizing the procedures and applicable special permit criteria in its zoning regulations, including those relating to the environmental and neighborhood impacts of the project.[49]

DEC's SEQRA determinations as lead agency bound the town to the extent that it could not conduct its own SEQRA review or any *de novo* SEQRA review.[50] However, local land use matters and zoning decisions, such as the review of special permit applications, exclusively are within the jurisdiction of each local municipality.[51] Moreover, although DEC issued a mining permit pursuant to the MLRL, no entitlement to a special use permit exists unless the applicant demonstrates that its proposed use at a particular location complies with the standards imposed by the zoning law.[52] Although the MLRL supersedes "all other state and local laws," supersession is expressly limited pursuant to ECL section 23-2703(2) to laws "'relating to the extractive mining industry,' thereby only precluding local laws regulating actual extractive mining operations or activities."[53] Consequently, "[l]ocal governments are not prevented from 'enacting or

45. 101 A.D.3d 1505, 1509, 957 N.Y.S.2d 444, 448 (3d Dep't 2012).

46. *Id*. at 1509, 957 N.Y.S.2d at 449.

47. *Id*.

48. *Id*. at 1507, 957 N.Y.S.2d at 447.

49. *Id*.

50. *Troy Sand & Gravel Co., Inc.*, 101 A.D.3d at 1507, 957 N.Y.S.2d at 447.

51. *Id.*

52. *Id*. at 1508, 957 N.Y.S.2d at 448.

53. *Id.* at 1508-09, 957 N.Y.S.2d at 448 (quoting N.Y. ENVTL. CONSERV. LAW § 23-2703(2) (McKinney 2013)).

enforcing local laws or ordinances of general applicability' that do not directly 'regulate mining and/or reclamation activities' . . . or local laws 'which determine permissible uses in zoning districts' . . . and which 'affect the extractive mining industry only in incidental ways.'"[54] "[T]he MLRL does not 'govern the manner in which decisions on special use permits must be made.'"[55] As a result, "a municipality retains general authority by means of its zoning powers to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of the mining activities or reclamation process."[56] The statute expressly contemplates that municipalities retain the right to adopt and enforce zoning regulations that determine permissible uses in zoning districts, as well as the authority to require a special permit for such uses.[57] The zoning regulations challenged in *Troy Sand & Gravel* governing special permit applications are the type of allowable local laws of general applicability that are not superseded, although the town is restricted by ECL section 23-2703(2)(b)(i-iv) in the conditions that it may attach to a special use permit for mining.[58] As a result, the challenged special permit zoning regulations were a valid exercise of the town's powers and were not preempted by Mined Land Reclamation Law section 23-2703.[59] The town could permissibly consider the environmental impact of the proposed mining operation in connection with the town's review of its special use permit application.[60]

Although the Court of Appeals will ultimately decide these issues, it seems clear that, regardless of one's view of the economic benefits or potential environmental concerns with hydrofracking, the OGSML does not preempt local zoning regulations which restrict its use to certain zoning districts or ban its use in all of its districts. Given the extensive history of litigation with the nearly identical language of the MLRL, it seems clear that the Legislature did not intend to preempt or diminish municipal land use authority in this area.

54. *Id*. at 1509, 957 N.Y.S.2d at 448 (citations omitted).

55. *Troy Sand & Gravel Co., Inc.*, 101 A.D.3d at 1509, 957 N.Y.S.2d at 448-49 (quoting Troy Sand & Gravel Co., Inc. v. Town of Nassau, 89 A.D.3d 1178, 1181, 932 N.Y.S.2d 564, 567 (3d Dep't 2011), *lv. denied*, 18 N.Y.3d 920, 964 N.E.2d 1022, 941 N.Y.S.2d 554 (2012)).

56. *Id.* at 1509, 957 N.Y.S.2d at 449 (quoting Preble Aggregate v. Town of Preble, 263 A.D.2d 849, 850, 694 N.Y.S.2d 788, 791 (3d Dep't 1999)) (internal quotation marks omitted).

57. *See id.* (citing N.Y. ENVTL. CONSERV. LAW § 27-2703(2)(b) (Consol. 2014)).

58. *Id*.

59. *Id*.

60. *Troy Sand & Gravel Co., Inc.*, 101 A.D.3d at 1509, 957 N.Y.S.2d at 449.

B. Checking Cashing Establishments

The *2010-2011 Survey*[61] discussed the decision of the Appellate Division, Second Department in *Sunrise Check Cashing & Payroll Services, Inc. v. Town of Hempstead*.[62] The Second Department had determined in *Sunrise Check Cashing* that a zoning amendment that prohibited check-cashing establishments in all districts other than the town's industrial and light manufacturing districts was preempted by Article 9-A of the Banking Law, which provides for the licensing of "Cashers of Checks" by the superintendent of banks.[63] In affirming the invalidity of the amendment, the Court of Appeals declined to address the preemption issue upon which the Appellate Division decision was premised.[64] Instead, it concluded that the amendment was an improper exercise of the zoning power because "it violates the principle that zoning is concerned with the use of land, not with the identity of the user."[65]

The exclusive document describing the objective of the enactment was a memorandum from a deputy town attorney that opined that the amendment "represents sound public policy" because it encourages young people and those of lower incomes to bank at reputable banking institutions and condemned check-cashing establishments based on various social policy grounds.[66] The court noted that a town's authority

> to adopt zoning regulations derives from Town Law [section] 261, which authorizes town boards "to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of 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 for trade, industry, residence or other purposes."[67]

The zoning authority "is not a general police power, but a power only to regulate land use: '[I]t is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with

61. Terry Rice, *Zoning & Land Use, 2010-11 Survey of New York Law*, 62 SYRACUSE L. REV. 865, 867 (2012).

62. 91 A.D.3d 126, 933 N.Y.S.2d 388 (2d Dep't 2011).

63. *Id.* at 139, 933 N.Y.S.2d at 399.

64. Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead, 20 N.Y.3d 481, 485, 986 N.E.2d 898, 899, 964 N.Y.S.2d 64, 65 (2013).

65. *Id.* at 483, 986 N.E.2d at 899, 964 N.Y.S.2d at 65.

66. *Id.* at 484, 986 N.E.2d at 899, 964 N.Y.S.2d at 65.

67. *Id.* at 485, 986 N.E.2d at 899, 964 N.Y.S.2d at 65 (quoting N.Y. TOWN LAW § 261 (McKinney 2013)).

the person who owns or occupies it.'"[68] The amendment also contradicted that precept because it was directed at the perceived social evil of check-cashing services, an objective that cannot be implemented through zoning.[69] The provision "obviously" was "concerned not with the use of the land but with the business done by those who occupy it."[70] The deleterious nature of a business has been found to be relevant to zoning objectives in a number of instances because of "negative secondary effects" on the surrounding community occasioned by a business, such as, for example, adult entertainment uses.[71] However, the town had not attempted to argue or demonstrate that check-cashing services are in a similar category.[72]

The Court also rebuffed the town's contention that the enactment constituted a public safety measure designed to combat the dangers created by armed robbery.[73] The record was devoid of any evidence that the town board was concerned about armed robbery when it enacted the amendment.[74] The Court rejected the town's reliance on the presumption of validity conferred on zoning legislation and on the principle that if any acceptable purpose for an enactment can be envisioned, the legislative body must be deemed to have had that purpose in view.[75] "Deference to legislative enactments, at least where the issue is abuse of the zoning power, does not go as far as the Town would have us go. The record here clearly refutes the idea that section 302(K) was a public safety measure."[76]

C. Preemption-Correctional Facilities

In *County of Herkimer v. Village of Herkimer*, the county sought to locate a county correctional facility in an abandoned shopping center located within the village.[77] Following a zoning amendment which

68. *Id*. at 485, 986 N.E.2d at 900, 964 N.Y.S.2d at 66 (quoting Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 105, 324 N.E.2d 870, 871, 365 N.Y.S.2d 506, 507 (1975)); *see also* St. Onge v. Donovan, 71 N.Y.2d 507, 515, 522 N.E.2d 1019, 1022, 527 N.Y.S.2d 721, 724 (1988).

69. *Sunrise Check Cashing & Payroll Servs., Inc.*, 20 N.Y.3d at 485, 986 N.E.2d at 900, 964 N.Y.S.2d at 66.

70. *Id*.

71. *Id*.

72. *Id*.

73. *Id*. at 485-86, 986 N.E.2d at 900, 964 N.Y.S.2d at 66.

74. *Sunrise Check Cashing & Payroll Servs., Inc.*, 20 N.Y.3d at 486, 986 N.E.2d at 900, 964 N.Y.S.2d at 66.

75. *Id*.

76. *Id*.

77. 109 A.D.3d 1166, 1167, 971 N.Y.S.2d 764, 765 (4th Dep't 2013).

eliminated "correctional facilities" from the uses permitted in a number of the village's zoning districts, including the location of the proposed correctional facility, the court rejected the county's claim that local zoning regulation was preempted by virtue of the state law.[78] To the contrary, "the New York State Legislature has not 'enacted a comprehensive and detailed regulatory scheme' with respect to the siting of County correctional facilities."[79] Similarly, the State also has not "otherwise 'demonstrated its intent to preempt [the] entire field and preclude any further local regulation' in that area."[80] Instead, the state legislation with respect to the siting of county correctional facilities is restricted to requiring approval of the State Commission of Corrections of a county's site selection.[81] The court concluded that "[t]he New York State Legislature has not directly or impliedly expressed any intent 'to trump local efforts to regulate the location of [correctional] facilities through the application of [the] zoning laws.'"[82]

The court also rejected the county's contention that the zoning amendment "'violate[d] the principle that zoning is concerned with the use of land, not with the identity of the user,'" because the objective of the amendment was "directed at land use, not at the entity that owns or occupies the land."[83] In addition, the amendment did not constitute exclusionary zoning.[84]

D. Legitimate Purpose of Zoning Designations

In *Nicholson v. Village of Garden City*, a local law was challenged which rezoned the corner lots on four streets, including the plaintiffs' 62,500 square-foot corner lot, from R-20 (a residential zoning designation requiring a minimum lot size of 20,000 square feet) to R-20C (a residential zoning classification prohibiting subdivision unless

78. *Id.* at 1168, 971 N.Y.S.2d at 766 (citations omitted).

79. *Id.* (quoting Consol. Edison Co. of N.Y. v. Town of Red Hook, 60 N.Y.2d 99, 105, 456 N.E.2d 487, 490, 468 N.Y.S.2d 596, 599 (1983)).

80. *Id*. (quoting Inc. Vill. of Nyack v. Daytop Vill., Inc., 78 N.Y.2d 500, 505, 583 N.E.2d 928, 930, 577 N.Y.S.2d 215, 217 (1991)).

81. *Id.*

82. *Cnty. of Herkimer*, 109 A.D.3d at 1168, 971 N.Y.S.2d at 766 (quoting *Inc. Vill. of Nyack*, 78 N.Y.2d at 507, 583 N.E.2d at 931, 577 N.Y.S.2d at 218).

83. *Id.* at 1168-69, 971 N.Y.S.2d at 766 (quoting Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead, 20 N.Y.3d 481, 483, 485, 986 N.E.2d 898, 899, 900, 964 N.Y.S.2d 64, 65, 66 (2013)).

84. *Id.* at 1169, 971 N.Y.S.2d at 766. The court also remanded the matter to the Supreme Court for the development of the record to determine whether the county might be exempt from the village zoning regulations by virtue of the balancing of public interests analysis. *See id.* at 1167-68, 971 N.Y.S.2d at 765-66 (citing Cnty. of Monroe v. City of Rochester, 72 N.Y.2d 338, 341, 530 N.E.2d 202, 203, 533 N.Y.S.2d 702, 703 (1988)).

the resulting corner lot has a minimum lot size of 40,000 square feet).[85] Initially, because the plaintiffs asserted a facial attack on the constitutionality of the local law, rather than an "as applied" challenge, the claim was ripe for review.[86]

In concluding that the local law was constitutional, the court reiterated that legislative enactments, including local laws, "are entitled to an 'exceedingly strong presumption of constitutionality.'"[87] "'With the police power as the predicate for the State's delegation of municipal zoning authority, 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.'"[88]

The delegation from the State Legislature to municipalities to exercise zoning authority requires that such authority be exercised consistent with a comprehensive plan designed to implement a plan for the future development of the community.[89] A zoning classification will not be invalidated for incompatibility with a comprehensive plan unless a "clear conflict" with a formal comprehensive plan is established.[90] The amendment challenged in *Nicholson* was not inconsistent with the village's comprehensive plan because the record established that the local law was reasonably related to the legitimate specified objective of preserving larger corner lots on the larger boulevard-style streets in a portion of the village.[91] The enactment was consistent with the ability of municipalities to "enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city."[92] In addition, the legislation was preceded by a planning study of the subdivision of various large corner lots in that portion of the village, which

85. No. 2012- 05095, 2013 N.Y. App. Div. LEXIS 8547, at *2-3 (2d Dep't Dec. 26, 2013).

86. *Id.* at *3; *see* Yee v. Escondido, 503 U.S. 519, 533-34 (1992); *see also* Levitt v. Vill. of Sands Point, 6 N.Y.2d 269, 273, 160 N.E.2d 501, 502, 189 N.Y.S.2d 212, 213 (1959).

87. *Nicholson*, No. 2012- 05095, 2013 N.Y. App. Div. LEXIS 8547, at *3 (quoting Lighthouse Shores v. Town of Islip, 41 N.Y.2d 7, 11, 359 N.E.2d 337, 341, 390 N.Y.S.2d 827, 830 (1976)).

88. *Id.* at *4 (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)).

89. *Id.* (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)).

90. *Id.* (citing Infinity Consulting Grp., Inc. v. Town of Huntington, 49 A.D.3d 813, 814, 854 N.Y.S.2d 524, 526 (2d Dep't 2008)).

91. *Id.* at *5.

92. *Nicholson*, No. 2012- 05095, 2013 N.Y. App. Div. LEXIS 8547, at *5 (quoting Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 129 (1978)).

recommended various options, including the adoption of the measure.[93]

The court additionally rejected a claim of unconstitutional reverse spot zoning, finding that the plaintiffs' property had not been arbitrarily singled out for disparate, less advantageous treatment than neighboring properties in a manner that was inconsistent with a well-considered land-use plan.[94] "A well-considered land-use plan can be shown by 'evidence, from wherever derived,' that serves to 'establish a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole,' ensuring that the public good will not be undetermined by 'special interest, irrational *ad hocery*.'"[95] To the contrary, the record established that the law affected twenty corner lots, and that the law complied with the village's comprehensive plan.[96]

II. SITE PLAN REVIEW

Town Law section 274-a(11) and Village Law section 7-725-a(11) provide that a challenge to a determination on a site plan application must be commenced within thirty days after the "decision" is filed in the office of the town or village clerk.[97] The precise document which suffices to commence the running of the statute of limitations can be somewhat perplexing. In *Shepherd v. Maddaloni*, a letter advising an applicant that the planning board had approved his site plan application did not constitute a "decision" for statute of limitations purposes because the letter did not relate the vote of the members of the planning board.[98] The letter merely constituted a "'notice that a decision had been made.'"[99] Although the record contained the minutes of the meeting at which approval was granted, including the text of the resolution approving the site plan application and indicating that the resolution was unanimously adopted, there was no indication on the copy of the minutes as to when or if it was filed with the clerk, and the respondents did not provide an affidavit indicating when or if the minutes were filed.[100] As a result, the

93. *Id.*

94. *Id*. at *5-6 (citations omitted).

95. *Id.* at *6 (quoting Taylor v. Inc. Vill. of Head Harbor, 104 A.D.2d 642, 644, 480 N.Y.S.2d 21, 23 (2d Dep't 1984)).

96. *Id.* at *6-7 (the court also determined that the law did not violate the uniformity requirement of Village Law section 7-702).

97. N.Y. TOWN LAW § 274-a (McKinney 2013); N.Y. VILLAGE LAW § 7-725-a (McKinney 2013).

98. 103 A.D.3d 901, 904, 960 N.Y.S.2d 171, 175 (2d Dep't 2013).

99. *Id.* (quoting Sullivan v. Dunn, 298 A.D.2d 974, 975, 747 N.Y.S.2d 666, 667 (4th Dep't 2002)).

100. *Id.* at 905, 960 N.Y.S.2d at 175.

thirty-day limitations period had not begun to run before this proceeding was commenced.[101]

The decision again confirms that one must be diligent in monitoring what documents are filed in connection with an approval because it is only a complying document that contains the requisites for a reviewable decision that commences the running of the statute of limitations.

III. SPECIAL PERMITS

In *Hejna v. Board of Appeals of Village of Amityville*, the respondent owned property situated partially in a B-2 business district and partly in a BB residential district.[102] Pursuant to a previously-approved special permit, the owner operated an auto body repair shop on the portion of the property located in the business district.[103] It applied for a modification of the special permit it to construct an addition to the existing building and to allow the parking of vehicles on the residentially zoned part of the property.[104] The court concluded that approval of the special permit to allow the addition was not arbitrary and capricious.[105] There was a rational basis for the conclusion that a previous amendment to the zoning law, which eliminated "public garages" as uses authorized by special permit in the B-2 Business District, "was not intended to prohibit the modification of an existing special [permit to allow] the expansion of an existing autobody operation."[106] The court also found that the board properly declined to consider the petitioners' contentions regarding the applicant's right to use a private right-of-way for access.[107] No issue existed "regarding adequate access to the premises, since access was provided by two curb cuts on an abutting public street."[108] "[T]he issues raised by the petitioners regarding the right-of-way concerned only enforcement of private property rights, which [wa]s not within the [board's] jurisdiction" to adjudicate".[109]

However, the court annulled the determination to grant a special permit to permit parking on the residentially-zoned portion of the site.[110]

101. *Id.*
102. 105 A.D.3d 843, 843, 964 N.Y.S.2d 164, 165 (2d Dep't 2013).
103. *Id.*
104. *Id.* at 843-44, 964 N.Y.S.2d at 165-66.
105. *Id.* at 844, 964 N.Y.S.2d at 166.
106. *Id.*
107. *Hejna*, 105 A.D.3d at 844, 964 N.Y.S.2d at 166.
108. *Id.*
109. *Id.* at 844-45, 964 N.Y.S.2d at 166.
110. *Id.* at 845, 964 N.Y.S.2d at 166.

The zoning law only authorized the approval of "a special exception for the purpose of providing parking areas required by" the zoning law.[111] Because the parking for which a special permit was sought was not required in order to comply with the zoning law's parking requirements, the board lacked authority to grant that portion of the special permit application.[112]

IV. LACHES

Although a thirty-day statute of limitations governs an Article 78 proceeding to review a determination by a planning board or zoning board of appeals, laches, nevertheless, may bar such a proceeding.[113] In *Miner v. Town of Duanesburg Planning Board*, the respondent purchased a parcel of property following approval of a special permit to construct a propane storage facility and engaged a contractor to construct the facility.[114] Petitioners, who resided across the street from the property, endeavored to negotiate changes to the appearance of the facility but the parties were unable to reach an understanding.[115] The petitioners instituted an Article 78 proceeding challenging the planning board's SEQRA compliance and special use approval after construction of the facility was nearly completed.[116]

> Dismissal based upon laches is appropriate where the following circumstances are present: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant.[117]

Although the petitioners had spoken at the March 2011 planning board meeting at which the application was heard and approved, they did not commence a proceeding until June 2011.[118] By the time the

111. *Id.*

112. *Hejna*, 105 A.D.3d at 845, 964 N.Y.S.2d at 166.

113. *See* Friends of Pine Bush v. Planning Bd. of Albany, 86 A.D.2d 246, 248, 450 N.Y.S.2d 966, 968 (3d Dep't 1982) (citing Sheerin v. N. Y. Fire Dep't Arts. 1 & 1B Pension Funds, 46 N.Y.2d 488, 496, 387 N.E.2d 217, 414 N.Y.S.2d 506, 510-11 (1979)).

114. 98 A.D.3d 812, 813, 950 N.Y.S.2d 207, 208 (3d Dep't 2012), *lv. denied*, 20 N.Y.3d 853, 981 N.E.2d 286, 957 N.Y.S.2d 689 (2012).

115. *Id.* at 813, 950 N.Y.S.2d at 209.

116. *Id.* at 813, 950 N.Y.S.2d at 208-09.

117. *Id.* at 813-14, 950 N.Y.S.2d at 209 (quoting Bailey v. Chernoff, 45 A.D.3d 1113, 1115, 846 N.Y.S.2d 462, 465 (3d Dep't 2007)) (internal quotation marks omitted).

118. *Id.* at 814, 950 N.Y.S.3d at 209.

proceeding was instituted, the property owner had expended over $200,000 on the nearly completed construction.[119] The petitioners' failure to pursue any legal remedy while construction of the facility proceeded to near completion required dismissal of the proceeding.[120] In addition, the respondents were not on notice that the petitioners were going to contest the approvals because petitioners' negotiations focused on their concerns regarding the viewshed.[121]

Similarly, in *Birch Tree Partners, LLC v. Zoning Board of Appeals of Town of East Hampton*, an adjoining property owner challenged a determination of the zoning board of appeals which revoked a certificate of occupancy and a building permit issued for a neighboring property until various conditions were met and empowered the building inspector to reissue both upon verifying compliance with those conditions.[122] The petitioner had been aware of the issuance of building permits and of the continuing construction as early as June 2007.[123] Nevertheless, it had failed to contest the neighbor's right to build the envisioned structures until July 2009, at which point one residence and its accessory structures and the foundation for the second residence had been completed and a certificate of occupancy had been issued for one residence and associated structures.[124] The challenge was barred by the doctrine of laches because the respondent was prejudiced by the petitioner's undue delay in challenging the authorization of the construction.[125]

V. MOOTNESS

A challenge to a land use approval, regardless of the strength of the merits, is likely to be dismissed as being moot if a litigant fails to act to preserve the status quo during the pendency of the litigation.[126] In determining whether the relief sought has been rendered moot, a court must evaluate "'whether petitioner sought injunctive relief . . . to preserve the status quo.'"[127] An additional consideration is the extent to which

119. *Miner*, 98 A.D.3d at 814, 950 N.Y.S.2d at 209.

120. *Id.*

121. *Id.*

122. 106 A.D.3d 1083, 1083, 966 N.Y.S.2d 193, 194 (2d Dep't 2013), *lv. denied*, 22 N.Y.3d 851, 997 N.E.2d 1236, 975 N.Y.S.2d 384 (2013).

123. *Id*.

124. *See id*. at 1083-84, 966 N.Y.S.2d at 194.

125. *See id*. at 1084, 966 N.Y.S.2d at 194 (citations omitted).

126. Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach, 98 N.Y.2d 165, 173-74 774 N.E.2d 193, 196-97 746 N.Y.S.2d 429, 432-33 (2002).

127. *See* Schupak v. Zoning Bd. of Appeals of the Town of Marbletown, 31 A.D.3d 1018, 1019, 819 N.Y.S.2d 335, 336 (2d Dep't 2006) (quoting Defreestville Area

construction has progressed towards completion.[128]

In *Raab v. Silverstein*, a neighboring property owner challenged variances permitting the construction of a second-story addition to a neighbor's house.[129] However, the petitioner did not seek a preliminary injunction in supreme court to enjoin the approved construction and also failed to move for a preliminary injunction in the appellate division to preserve the status quo during the pendency of the appeal.[130] In the interim, after the decision of supreme court's approving the variances, a building permit had been issued and the addition was substantially completed.[131] Because the petitioner had failed to preserve his rights pending appellate review, the appeal was dismissed as being academic.[132]

VI. CONSISTENCY

A decision of an administrative agency acting in a quasi-judicial capacity, including planning boards and zoning boards of appeals, "which neither adheres to its own precedent nor indicates a reason for reaching a different result on essentially the same facts is arbitrary and capricious."[133] However, the case law uniformly reflects that the courts will accept a rational explanation offered by a board for its seemingly differing treatment. For example, in rejecting a challenge to the denial of requested area variances, the court in *Chynn v. DeChance* concluded that the zoning board of appeals reasonably had determined that the circumstances of various prior variances it had granted were distinguishable from those of the instant application and, as a result, it was not bound by its earlier determinations.[134] Similarly, a challenge to the denial of an area variance based on the board's past precedent was rejected in *Blandeburgo v. Zoning Board of Appeals of Town of Islip* because the approval of two prior applications, which also sought area variances for rear-yard setbacks for in-ground swimming pools, did not

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Neighborhood Ass'n v. Planning Bd. of the Town of N. Greenbush, 16 A.D.3d 715, 717, 790 N.Y.S.2d 737, 740 (3d Dep't 2005)).

128. *See id*. at 1020, 819 N.Y.S.2d at 336-37 (citing Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Preserv. Comm., 2 N.Y.3d 727, 729, 811 N.E.2d 2, 4, 778 N.Y.S.2d 740, 742 (2004)).

129. 106 A.D.3d 746, 746, 964 N.Y.S.2d 236, 237 (2d Dep't 2013).

130. *See id*. at 746-47, 964 N.Y.S.2d at 237.

131. *See id*. at 747, 964 N.Y.S.2d at 237.

132. *Id.*

133. *See* Knight v. Amelkin, 68 N.Y.2d 975, 977, 503 N.E.2d 106, 106, 510 N.Y.S.2d 550, 550 (1986) (quoting *In re* Field Delivery Serv., 66 N.Y.2d 516, 517, 488 N.E.2d 1223, 1225, 498 N.Y.S.2d 111, 113 (1985)).

134. 110 A.D.3d 993, 994, 973 N.Y.S.2d 328, 330 (2d Dep't 2013) (citations omitted).

constitute a precedent from which the Zoning Board of Appeals was required to explain a departure.[135] The two prior applications were dissimilar because they involved lots that were not near the subject property and were located in different zoning districts.[136] The petitioners had failed to establish that either of the two cases in which a variance was granted bore sufficient factual similarity to the subject application so as to require an explanation from the zoning board of appeals.[137]

As is exemplified by the decision in *Hamptons, LLC v. Zoning Board of Appeals of Village of East Hampton*, the precept equally applies to special permit decisions, including the imposition of conditions on the issuance of special permits.[138] The court had ordered the zoning board of appeals to approve the petitioners' application for a special use permit to allow outdoor dining, subject to conditions consistent with those imposed upon the owner of the "1770 House."[139] The 1770 House was an inn and restaurant similarly situated to and sited in the same zoning district as the petitioners' inn and restaurant, whose application for the same special use permit previously had been granted by the board.[140] The board subsequently approved the special use permit, but imposed additional, more burdensome conditions than had been imposed on the owner of the 1770 House.[141]

"A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious."[142] Annulment of the decision was mandated, even if there might otherwise have been evidence in the record adequate to support the determination because the determinations failed to set forth a factual basis for the imposition of the conditions on the special permit issued to the petitioners that were not imposed on the owner of the 1770 House.[143]

As a result, when a board reviews an application that is substantially similar to a prior application, it must provide a rational explanation for

135. 110 A.D.3d 876, 878, 972 N.Y.S.2d 693, 695 (2d Dep't 2013).

136. *Id.*

137. *Id.* (citations omitted).

138. 98 A.D.3d 738, 739, 950 N.Y.S.2d 386, 387-88 (2d Dep't 2012).

139. *Id.* at 739, 950 N.Y.S.2d at 387.

140. *Id*.

141. *Id.*

142. *Id.* at 739, 950 N.Y.S.2d at 388 (quoting Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington, 97 N.Y.2d 86, 93, 761 N.E.2d 565, 570, 735 N.Y.S.2d 873, 878 (2001)).

143. *Hamptons, LLC*, 98 A.D.3d at 739, 950 N.Y.S.2d at 388 (citations omitted).

reaching a different result.[144] Where a board has arrived at a contrary result "on essentially the same facts, an explanation, or alternatively, a conforming decision, is required."[145] Because the board failed to relate a factual basis for the imposition of the conditions on the special permit that were not imposed on the owner of the 1770 House, the determination was arbitrary and capricious.[146]

VII. SPECIAL FACTS EXCEPTION

A court generally must apply the provisions of a zoning law in effect at the time it renders a decision.[147] Therefore, the courts must apply the current version of a zoning law when assessing a decision on a land use application even if it renders a proposed use noncompliant and, thus, impermissible.[148] Nevertheless, a court must apply the law in effect at the time an application is made if a board unduly delayed proceedings and acted in bad faith.[149] However, the special facts exception may apply only if the applicant was entitled to the relief sought as a matter of right before the law changed.[150]

In *Hamptons, LLC v. Rickenbach*, the village amended its zoning law to prohibit outdoor dining associated with restaurants as constituting accessory uses to commercial establishments located in residential districts after the petitioner had applied for a special permit.[151] The special facts exception applied because the petitioner would have been entitled to a special permit authorizing outdoor dining at their restaurant under the law as it existed when they applied for such permit.[152] The court further found that the municipal respondents had acted in bad faith in delaying action on the application and in hastily enacting the zoning which was specifically intended to impede the special permit application.[153] As a result, the application was entitled to be assessed

144. *Id.*at 739-40, 950 N.Y.S.2d at 388 (citation omitted).

145. *Id.* at 740, 950 N.Y.S.2d at 388.

146. *Id.*; *see also* Hamptons, LLC v. Rickenbach, 98 A.D.3d 736, 737-38, 950 N.Y.S.2d 182, 184 (2d Dep't 2012).

147. *See* Jul-Bet Enters., LLC v. Town Bd. of Town of Riverhead, 48 A.D.3d 567, 567, 852 N.Y.S.2d 242, 243 (2d Dep't 2008).

148. *Id*.

149. *See* BBJ Assoc., LLC v. Zoning Bd. of Appeals of Town of Kent, 65 A.D.3d 154, 158–59, 881 N.Y.S.2d 496, 500 (2d Dep't 2009).

150. Nathan v. Zoning Bd. of Appeals of Vill. of Russell Gardens, 95 A.D.3d 1018, 1019, 943 N.Y.S.2d 615, 618 (2d Dep't 2012); Jamaica Recycling Corp. v. City of New York, 38 A.D.3d 398, 400, 832 N.Y.S.2d 40, 43 (1st Dep't 2007).

151. 98 A.D.3d 736, 736-37, 950 N.Y.S.2d 182, 183-84 (2d Dep't 2012).

152. *Id*. at 737, 950 N.Y.S.2d at 184.

153. *Id*. at 737, 950 N.Y.S.2d at 183-84.

pursuant the law as it existed when the petitioner applied for the special permit.[154]

On the other hand, in *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, the special facts exemption was inapplicable because the proposed land use was not a permissible use pursuant to the zoning law in effect when the application was submitted.[155] The plaintiff owned a seventeen-acre parcel on which it desired to construct a 152,000 square foot Lowe's Home Improvement Center.[156] Previously, in 1997, the town adopted a comprehensive plan creating a new "commercial recreation" ("CR") zoning classification which to attract new types of private recreation, such as sports complexes, amusement and theme parks, ice hockey and ice skating rinks.[157] The subject parcel had been zoned as "J Business 2" ("J–2"), which permitted retail stores as of right, but did not allow "commercial centers" which were defined by zoning law as "[a]ny building or buildings . . . used by one (1) or more enterprises for a commercial purpose . . . where the proposed use occupies a site of five (5) acres or more."[158]

However, the town did not taken any measures to implement the CR classification until February 2000, when the town board discussed rezoning the subject parcel to CR for the first time.[159] Shortly before a scheduled public hearing on the proposed CE amendment, the submitted a site plan the Lowe's Center which would not have been permissible in the proposed CR zone.[160] The petitioner submitted a protest petition pursuant to Town Law section 265, thereby invoking the "super majority" requirement.[161] Although only five of the seven board members voted in favor of the rezoning amendment, the town declared the parcel to be rezoned to a CR designation and refused to process the site plan application.[162] After the supreme court invalidated the amendment because of an insufficient vote for approval, the town board again voted to rezone the parcel to CR without the requisite super majority which amendment also was invalidated for the same reason.[163] In June 2002,

154. *Id*. at 737, 950 N.Y.S.2d at 184.

155. 21 N.Y.3d 729, 737, 999 N.E.2d 1164, 1167, 977 N.Y.S.2d 719, 722 (2013).

156. *Id*. at 734, 999 N.E.2d at 1165, 977 N.Y.S.2d at 720.

157. *Id*.

158. *Id*.

159. *Id*. at 734-35, 999 N.E.2d at 1165-66, 977 N.Y.S.2d at 720-21.

160. *Rocky Point Drive-In, L.P.*, 21 N.Y.3d at 735, 999 N.E.2d at 1166, 977 N.Y.S.2d at 721.

161. *Id*.

162. *Id.*

163. *Id.*

the town board amended the zoning law to allow for a simple majority vote of approval, rather than a "super majority," for zoning amendments despite the filing of protests petitions.[164] In October 2002, the town board adopted a resolution, for the third time, rezoning the parcel to CR.[165] The property owner instituted an action seeking a declaration that its site plan application should be reviewed pursuant to previous J–2 zoning classification because the town had unduly delayed the review of the application.[166] At trial, the plaintiff introduced several site plan applications submitted to the town between 1986 and 2003, which it claimed demonstrated that the town was selectively enforcing the CR classification.[167]

The supreme court found that the town treated the application differently from other applications and had caused a significant delay in the review process.[168] As a result, it determined that the special facts exception warranted the application of the previous zoning designation to the application.[169] The Appellate Division, Second Department, reversed, finding that the trial court's conclusions were not supported by the trial evidence.[170]

Initially, the Court of Appeals reiterated that, "[a]s a general matter, a case must be decided upon the law as it exists at the time of the decision."[171] "In land use cases, the law in effect when the application is decided applies, regardless of any intervening amendments to the zoning law."[172] Pursuant to the special facts exception, if a landowner establishes that he is "entitled as a matter of right to the underlying land use application," the application is assessed pursuant to the zoning law in effect at the time the application was submitted.[173] A land owner is not entitled to approval as a matter of right unless the use and application are in "'full compliance with the requirements at the time of the application,' such that 'proper action upon the permit would have given [the land

164. *Id.*

165. *Rocky Point Drive-In, L.P.*, 21 N.Y.3d at 735-36, 999 N.E.2d at 1166, 977 N.Y.S.2d at 721.

166. *Id.* at 736, 999 N.E.2d at 1166, 977 N.Y.S.2d at 721.

167. *Id.*

168. *Id.*

169. *Id.* at 736, 999 N.E.2d at 1166-67, 977 N.Y.S.2d at 721-22.

170. *Rocky Point Drive-In, L.P.*, 21 N.Y.3d at 736, 999 N.E.2d at 1167, 977 N.Y.S.2d at 722.

171. *See id.*

172. *Id.* (citing Pokoik v. Silsdorf, 40 N.Y.2d 769, 772, 358 N.E.2d 874, 876, 390 N.Y.S.2d 49, 51 (1976)).

173. *Id.* (citing *Pokoik*, 40 N.Y.2d at 772, 358 N.E.2d at 876, 390 N.Y.S.2d at 51).

owner] time to acquire a vested right.'"[174] In addition to showing entitlement to approval as a matter of right, a land owner must also establish "'extensive delay indicative of bad faith,'"[175] "'unjustifiable actions'" by municipal officials,[176] or "'abuse of administrative procedures.'"[177]

The plaintiff did not satisfy the threshold requirement that it demonstrate entitlement to the requested land use approval pursuant to the law as it existed when it filed its application because the proposed use was not permissible pursuant to the zoning classification in effect when it submitted the application.[178] The property was zoned J–2 at the time the application was made, which did not permit "commercial centers" with buildings that would occupy a site of five or more acres.[179]

The plaintiff additionally asserted that the special facts exception should apply in any event although it did not satisfy the J–2 requirements as of right because, it contended, the town historically ignored the zoning requirements.[180] However, the Court sustained the appellate division's finding that the properties relied upon by the plaintiff were not similarly situated because they either fell within an exception or complied with the J–2 zoning classification requirements.[181]

As illustrated by these decisions, a daunting standard presents one who seeks to rely on the special facts exception. However, where the record establishes that a board has delayed review of an otherwise qualifying application until a prohibitive amendment is adopted, the courts will not hesitate to invoke the special facts exception and to apply the zoning law in effect when the application was filed.

VIII. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The doctrine of exhaustion of administrative remedies requires "'litigants to address their complaints initially to administrative tribunals, rather than to the courts, and . . . to exhaust all possibilities of

174. *Id.* at 737, 999 N.E.2d at 1167, 977 N.Y.S.2d at 722 (quoting *Pokoik*, 40 N.Y.2d at 773, 358 N.E.2d at 876, 390 N.Y.S.2d at 51).

175. *Rocky Point Drive-In, L.P.*, 21 N.Y.3d at 737, 999 N.E.2d at 1167, 977 N.Y.S.2d at 722 (quoting Alscot Inv. Corp. v. Vill. of Rockville Ctr., 64 N.Y.2d 921, 922, 477 N.E.2d 1083, 1083, 488 N.Y.S.2d 629, 629 (1985)).

176. *Id.* (quoting *Pokoik*, 40 N.Y.2d at 773, 358 N.E.2d at 876, 390 N.Y.S.2d at 51).

177. *Id.* (quoting *Pokoik*, 40 N.Y.2d at 773, 358 N.E.2d at 876, 390 N.Y.S.2d at 51).

178. *Id.*

179. *Id*.

180. *Rocky Point Drive-In, L.P.*, 21 N.Y.3d at 737, 999 N.E.2d at 1167, 977 N.Y.S.2d at 722.

181. *Id.* at 737-38, 999 N.E.2d at 1168, 977 N.Y.S.2d at 723.

obtaining relief through administrative channels before appealing to the courts.'"[182] Consequently, courts will not review a determination on zoning or environmental issues based on evidence or arguments that were not presented during the proceedings before the lead agency.[183] The court in *Aldrich* dismissed a petition because the petitioners had "failed to comment upon these issues at the public hearing or during the period for submitting written comments, [and] these issues [were] not . . . properly before [the] court for review."[184] As a result, where a petitioner was not a party to, and did not participate in, the proceedings before a zoning board of appeals "[a]s a stranger to the administrative proceeding, [such] person or entity has no right to petition a court for a review of the decision rendered in that proceeding."[185]

The court in *Shepherd v. Maddaloni* concluded that the petitioners were not barred from challenging a site plan approval on the ground that they did not actively participate in the administrative proceeding because the objections to the planning board's decision that were raised in a subsequent Article 78 proceeding were specifically advanced by an attorney representing the three other petitioners/plaintiffs during the administrative proceeding.[186] In support of its conclusion, the appellate division cited its decision in *Youngewirth v. Town of Ramapo Town Board*, a challenge to a zoning amendment, in which the petitioner had neither appeared at the hearings nor provided comments on a proposed amendment.[187] The appellate division in *Youngewirth* reversed the conclusion of supreme court dismissing the petitioner's claims upon the finding that she had failed to exhaust administrative remedies because "objections to the Town Board's determinations that she raises in this proceeding were fully and specifically advanced by others at a public hearing conducted by the Town Board or in written comments timely submitted to the Town Board."[188]

IX. SUBDIVISION APPROVAL

A final subdivision plat is expected to depict and to implement the modifications and requirements required by a planning board as a

182. Aldrich v. Pattison, 107 A.D.2d 258, 268, 486 N.Y.S.2d 23, 30 (2d Dep't 1985).

183. *See* Miller v. Kozakiewicz, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524, 526-27 (2d Dep't 2002).

184. *Aldrich*, 107 A.D.2d at 269, 486 N.Y.S.2d at 31.

185. Ass'n of Friends of Sagaponack v. Zoning Bd. of Appeals of the Town of Southampton, N.Y.L.J., Aug. 20, 1999, at 3 (Sup. Ct. Suffolk Cnty. Aug. 20, 1999).

186. 103 A.D.3d 901, 902, 960 N.Y.S.2d 171, 173 (2d Dep't 2013).

187. 98 A.D.3d 678, 681, 950 N.Y.S.2d 157, 160 (2d Dep't 2012).

188. *Id.* at 680, 950 N.Y.S.2d at 160.

condition of preliminary plat approval.[189] "Once preliminary approval has been granted, the final plat implements the design determinations made at the earlier stage and shows the project in greater detail."[190] As a result, because "[p]reliminary plat approval has greater weight than a mere informal reaction to a preliminary plat,"[191] a planning board may not refuse final approval if a property owner fulfills the required modifications or conditions of a preliminary approval.[192] Likewise, as is exemplified by the decision in *Town of Amherst v. Rockingham Estates, LLC*, a final plat must be consistent with the approved preliminary plat and incorporate any modifications mandated by the planning board.[193]

The preliminary plat approved by the planning board in *Rockingham Estates* depicted a public sanitary sewer easement.[194] However, the final plat showed the sewer easement as being private, rather than public.[195] The definitions of a preliminary plat and of a final plat contained in Town Law sections 276(4)(b) and (d), and Village Law sections 7-728(4)(b) and (d), confirm that a final plat should differ from the preliminary plat, if at all, only by any modifications that were mandated by the planning board at the time of approval of the preliminary plat.[196] In fact,

> a planning board may not modify a preliminary plat and then disapprove of the layout of a final plat that conforms to the modifications prescribed by the board and absent new information, a subsequent modification or rejection of a preliminarily approved subdivision layout is an arbitrary and capricious act subject to invalidation.[197]

Because the preliminary plat depicted a public easement, but the final plat substituted a private easement, the final plat was void.[198]

Unlike any other provision in Article 16 of the Town Law or Article 7 of the Village Law, Town Law section 276 and Village Law section 7-728 contain a default provision requiring approval of a preliminary or

189. Long Island Pine Barrens Soc'y, Inc. v. Planning Bd., 78 N.Y.2d 608, 612, 585 N.E.2d 778, 780-81, 578 N.Y.S.2d 466, 468-69 (1991).

190. Sun Beach Real Estate Dev. Corp. v. Anderson, 98 A.D.2d 367, 373, 469 N.Y.S.2d 964, 969 (2d Dep't 1983).

191. *Id.*

192. *See Long Island Pine Barrens Soc'y*, 78 N.Y.2d at 612, 585 N.E.2d at 780-81, 578 N.Y.S.2d at 468-69.

193. 98 A.D.3d 1241, 1242, 951 N.Y.S.2d 602, 603 (4th Dep't 2012).

194. *Id.* at 1241-42, 951 N.Y.S.2d at 603.

195. *Id.* at 1242, 951 N.Y.S.2d at 603.

196. *Id.*

197. *Id.* (quoting *Long Island Pine Barrens Soc'y*, 78 N.Y.2d at 612, 585 N.E.2d at 780-81, 578 N.Y.S.2d at 468-69) (internal quotation marks omitted).

198. *Rockingham Estates*, 98 A.D.3d at 1242, 951 N.Y.S.2d at 604.

final subdivision if a board fails to act within the specified time periods.[199] However, the sixty-two-day periods with respect to a preliminary plat do not start until a negative declaration or a notice of completion of a Draft Environmental Impact Statement has been filed.[200] In *Center of Deposit, Inc. v. Village of Deposit*, the planning board conducted a public hearing and issued a positive declaration of environmental significance, requiring the preparation of a Draft Environmental Impact Statement on a two-lot subdivision application on October 28, 2009.[201] That determination was reversed in an Article 78 proceeding instituted by the petitioner, and the matter was remanded to the planning board for further proceedings.[202] The planning board then issued a negative declaration on March 9, 2012, and, after a public hearing on March 28, 2012, denied the subdivision application.[203] In a subsequent Article 78 proceeding, the court rejected the petitioner's contention that the denial of the decision was untimely and that the petitioner was entitled to a default approval.[204]

Pursuant to New York Village Law, as well as New York Town Law, a public hearing is required to be held within sixty-two days of the filing of a complete preliminary plat application when a planning board has adopted a negative declaration and determined that an environmental impact statement is not required.[205] "Significantly, [t]he time periods for review of such plat shall begin upon filing of [a] negative declaration."[206] A decision on a final plat must then be made within sixty-two days after the public hearing.[207] Pursuant to Section 7-728(8) of New York Village Law and Section 276(8) of New York Town Law, the failure to render a timely determination on a complete application results in a default approval.[208] In *Center of Deposit*, the planning board had adopted a

199. N.Y. TOWN LAW § 276(8) (McKinney 2013); N.Y. VILLAGE LAW § 7-728(8) (McKinney 2013).

200. *See In re* Benison Corp. v. Davis, 51 A.D.3d 1197, 1197-98, 857 N.Y.S.2d 798, 799 (3d Dep't 2008).

201. 108 A.D.3d 851, 851, 968 N.Y.S.2d 731, 732 (3d Dep't 2013).

202. *Id.* at 852, 968 N.Y.S.2d at 732.

203. *Id.*

204. *Id.*

205. *Id.* at 852, 968 N.Y.S.2d at 732-33 (citing N.Y. VILLAGE LAW § 7-728(6)(d)(i)(1)(a) (McKinney's 2011)); *see also* N.Y. TOWN LAW § 276(6)(d)(i)(1)(a) (McKinney's 2010).

206. *Ctr. of Deposit, Inc.*, 108 A.D.3d at 852, 968 N.Y.S.2d at 733 (quoting N.Y. VILLAGE LAW § 7-728(6)(c)); *see also* N.Y. TOWN LAW § 276(6)(c).

207. *Ctr. of Deposit, Inc.*, 108 A.D.3d at 852, 968 N.Y.S.2d at 733 (citing N.Y. VILLAGE LAW § 7-728(6)(d)(i)(3)(a)); *see also* N.Y. TOWN LAW § 276(6)(d)(i)(3)(a).

208. *Ctr. of Deposit, Inc.*, 108 A.D.3d at 852, 968 N.Y.S.2d at 733 (citing N.Y. VILLAGE LAW § 7-728(6)(d)(i)(3)(a)); *see also* N.Y. TOWN LAW § 276(6)(d)(i)(3)(a).

negative declaration on March 9, 2012, conducted a public hearing nineteen days later, and immediately denied the subdivision application.[209]

The court rejected the petitioner's contention that because the planning board had held a public hearing on the application in October 2009, it lacked any authority to conduct additional hearings and that the time within which the board was required to determine the subdivision application began to run when the court set aside the initial positive declaration.[210] Pursuant to section 7-728(6)(c) of New York Village Law, as well as section 276(6)(c) of New York Town Law, a public hearing on the subdivision application must follow the filing of the negative declaration under SEQRA.[211] The hearing held prior to the issuance of the negative declaration in October 2009 could not satisfy the statutory hearing requirement.[212] As a result, the board had sixty-two days after the approval of the negative declaration in March 2012 to hold a public hearing and a further sixty-two days after the close of the hearing to make a decision on the application.[213] Because the board satisfied those time strictures, a default approval was inappropriate.[214]

X. ZONING BOARDS OF APPEAL

A. Type of Variance

It usually is apparent whether relief from a particular zoning regulation requires a use variance or an area variance. In fact, the definition of terms in section 267(1) of New York Town Law and section 7-712(1) of New York Village Law removes any uncertainty as to the type of relief in nearly every instance.[215] Because of the substantially dissimilar burdens of proof, the determination may have a significant influence on the treatment of an application. However, the courts occasionally have had some difficulty in categorizing requests for variances from parking requirements. For example, the Court of Appeals related in *Off Shore Restaurant Corp. v. Linden* that

> off-street parking restrictions do not fall easily into either

209. *Ctr. of Deposit, Inc.*, 108 A.D.3d at 852, 968 N.Y.S.2d at 733.

210. *Id.*

211. *Id.* (citing Kittredge v. Planning Bd. of Town of Liberty, 57 A.D.3d 1336, 1340, 870 N.Y.S.2d 582, 586 (3d Dep't 2008)).

212. *Id.* at 853, 968 N.Y.S.2d at 733.

213. *Id.*

214. *Id.*

215. *See* N.Y. TOWN LAW § 267(1) (McKinney 2013); N.Y. VILLAGE LAW § § 7-712(1) (McKinney 2013).

> classification; hence, the divergence among the cases. Parking restrictions are an adjunct restriction sometimes tied to a use and at other times to an area restriction, generally depending upon the problem created by the use or the limited area involved. On this view, in determining the rules to govern variance from parking restrictions one should look to the reasons for the restrictions and then adapt rules applicable to use or area variances, whichever best meets the problem. Illustratively, a parking restriction may be required because the building lots are too small, or on the other hand, because the use of the building regardless of lot size will cause many vehicles to be brought to the site. Most often the parking restriction will relate to uses, and the ordinance by requiring off-street parking for certain uses by a stated formula will so indicate . . . . In others, the parking restriction may be related by the ordinance to the area.[216]

Additionally, in *Overhill Building Company v. Delaney*, the Court of Appeals related that "while the change [in the off-street parking requirement] . . . is not strictly one of area, the variance is treated as an area variance."[217] On the other hand, in the court determined in *Off Shore Restaurant Corp* that relief from a provision which required one parking space for each four seats in a restaurant required a use variance. Most recently, the Appellate Division, Second Department, confirmed in *Colin Realty Co., LLC v. Town of North Hempstead* that a variance from the parking and loading-zone requirements of a zoning law was to be treated as applications for area variances.[218]

B. Use Variances

Confirming the high standard of proof required of an applicant for a use variance, in *Holimont, Inc. v. Village of Ellicottville Zoning Board of Appeals*, a use variance to extend a ski lift over a parcel of land acquired by a skiing operation was properly denied.[219] Although the petitioner had presented the testimony of an expert on the issue of lack of reasonable return, "it is the 'sole province of the [zoning board of appeals] . . . as administrative factfinder' to resolve issues of credibility."[220] Consequently, the board reasonably concluded that the applicant had not demonstrated that it could not realize a reasonable rate

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216. 30 N.Y.2d 160, 169, 282 N.E.2d 299, 304, 331 N.Y.S.2d 397, 405 (1972).

217. 28 N.Y.2d 449, 453, 271 N.E.2d 537, 539, 322 N.Y.S.2d 696, 699 (1971).

218. 107 A.D.3d 708, 709, 966 N.Y.S.2d 501, 502 (2d Dep't 2013), *lv. granted*, 21 N.Y.3d 864, 995 N.E.2d 1159, 973 N.Y.S.2d 87 (2013).

219. 112 A.D.3d 1315, 1315, 977 N.Y.S.2d 514, 514 (4th Dep't 2013).

220. *Id.* at 1315, 977 N.Y.S.2d at 514-15 (quoting 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)).

of return without the use variance.[221] Petitioner further failed to demonstrate that the intended development would not alter the essential character of the surrounding neighborhood.[222] To the contrary, the record substantiated that permitting an active ski lift and snowmaking equipment on the parcel would alter the quiet residential area because of the intensified use of the parcel.[223] Lastly, the hardship was self-created because the petitioner previously had agreed to restrictions establishing an "undisturbed green area" in the location sought to be develop.[224]

C. Area Variances

"[T]he conformity or dissimilarity of a property, as compared to the prevailing conditions in the neighborhood with respect to bulk and area, is a highly significant consideration" in reviewing an area variance application.[225] Consistent with this tenet, the court in *Huszar v. Bayview Park Properties, LLC*, sustained the granting of area variances because, although there were a few wide lots in the vicinity of the property, the majority of lots in a two-block adjoining area had a width of fifty feet or less.[226] As a result, the board rationally concluded that granting the requested variances "would not produce an undesirable change in the character of the neighborhood or a detriment to nearby properties."[227]

XI. RELIGIOUS USES

Because religious uses are considered by the New York courts to be intrinsically beneficial to the community, they have enjoyed a preferred status which curtails the permissible review authority of local administrative agencies.[228] As a result, municipalities must apply their zoning regulations in a more flexible manner when dealing with religious and educational uses.[229]

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221. *Id.* at 1315, 977 N.Y.S.2d at 514 (citation omitted).

222. *Id.* at 1315-16, 977 N.Y.S.2d at 515.

223. *Id.* at 1316, 977 N.Y.S.2d at 515.

224. *Holimont, Inc.*, 112 A.D.3d at 1316, 977 N.Y.S.2d at 515 (citation omitted).

225. Verdeland Homes, Inc. v. Bd. of Appeals of Town of Hempstead, No. 006084/06, 2006 N.Y. Slip Op. 52018(U), at 5 (Sup. Ct. Nassau Cnty. 2006) (citing Terry Rice, *Practice Commentaries*, N.Y. TOWN LAW § 267-b, at 56 (McKinney Supp. 2005).

226. 109 A.D.3d 922, 924, 972 N.Y.S.2d 587, 590 (2d Dep't 2013).

227. *Id.*

228. *See* Cornell Univ. v. Bagnardi, 68 N.Y.2d 583, 593, 503 N.E.2d 509, 514, 510 N.Y.S.2d 861, 866 (1986); Diocese of Rochester v. Planning Bd. of Brighton, 1 N.Y.2d 508, 523, 136 N.E.2d 827, 834, 154 N.Y.S.2d 849, 859 (1956).

229. *See* Islamic Soc'y of Westchester & Rockland, Inc. v. Foley, 96 A.D.2d 536, 537, 464 N.Y.S.2d 844, 845 (2d Dep't 1983).

The petitioner in *Gospel Faith Mission International, Inc. v. Weiss* sought approvals to conduct religious services on property owned by it in a residential zoning district.[230] The property was located in close proximity to a heavily travelled road and business district, and had no on-site parking.[231] The petitioner filed an application for a special permit to conduct religious services and to construct a parking lot for its parishioners, and for area variances from the off-site parking and parking lot maneuvering space requirements.[232] The petitioner proposed as a condition to the granting of approvals that only ninety people would be permitted to enter the sanctuary, and that two church vans would transport thirty-two of the petitioner's approximately seventy-five members to the site, resulting in the need for seven to ten vehicles during its peak hours of operation.[233] The proposed parking lot would provide seven on-site spaces, reducing the need for off-site parking spaces to zero, or at most three.[234] The zoning board of appeals denied the applications in its entirety.[235]

"'[W]hile religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made.'"[236] As a result, local boards are "required to 'suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible.'"[237] As a result, the court concluded that the denial of the applications was arbitrary and capricious.[238]

230. 112 A.D.3d 824, 825, 977 N.Y.S.2d 333, 334 (2d Dep't 2013).
231. *Id*.
232. *Id.*
233. *Id.* at 825, 977 N.Y.S.2d at 334-35.
234. *Id.* at 825, 977 N.Y.S.2d at 335.
235. *Gospel Faith Mission Int'l, Inc.*, 112 A.D.3d at 825, 977 N.Y.S.2d at 335.
236. *Id.* (quoting Genesis Assembly of God v. Davies, 208 A.D.2d 627, 628, 617 N.Y.S.2d 202, 203 (2d Dep't 1994)).
237. *Id.* at 825-26, 977 N.Y.S.2d at 335 (quoting *Genesis Assembly of God*, 208 A.D.2d at 628, 617 N.Y.S.2d at 203).
238. *Id.* at 825, 977 N.Y.S.2d at 335.