ZONING AND LAND USE

Terry Rice†

CONTENTS

I. PREEMPTION

Although the State Constitution and the Municipal Home Rule provide broad authority to municipalities to adopt local laws appropriate to deal with local concerns, such authority is lacking if the State has preempted the particular field of regulation. A number of recent decisions illustrate the reluctance of the courts to imply preemption of local authority absent a clear expression of such intent by the legislature.

A. Preemption—Correctional Facilities

As was reviewed in the *2012-13 Survey of New York Law*, a number of appellate decisions concluded that the Oil, Gas and Solution Mining Law ("OGSML")[1] did not preempt local zoning law which barred oil and gas production activities—that is, hydrofracking—in a municipality or which restricted the zoning districts in which hydrofracking may be

† Law Offices of Terry Rice, Suffern, New York; author of McKinney's Practice Commentaries, Town Law, Village Law.

1. N.Y. Envtl. Conserv. Law § 23-0303 (McKinney 2014).

performed.[2] The Court of Appeals affirmed that precept in *Wallach v. Town of Dryden*, a decision involving the zoning laws of two municipalities.[3]

The plaintiffs contended that the energy policy of New York, as expressed in the OGSML, dictates a uniform methodology which cannot be superseded by local regulation.[4] They asserted that the suppression provision of the OGSML specifically preempts all local zoning regulation which prohibits or limits oil and gas operations.[5]

Article IX, section 2(c)(ii) of the State Constitution relates that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law[.]"[6] Municipal Home Rule Law section 10(1)(ii)(11) and (12) effectuates that authorization and empowers local governments to enact laws "both for the protection and enhancement of their physical and visual environment and for the government, protection, order, conduct, safety, health and well-being of persons or property therein."[7] Municipalities also may "'enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of [the community].'"[8] However, a municipality may not adopt laws that "conflict with the State Constitution or any general law."[9] Nevertheless, the courts "do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake. Rather, [they] will invalidate a zoning law only where there is a 'clear expression of legislative intent to preempt local control over land use.'"[10]

2. Terry Rice, Zoning & Land Use, 2012-13 Survey of New York Law, 64 Syracuse L. Rev. 993, 995-96 (2014) (discussing Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 38, 964 N.Y.S.2d 714, 724 (3d Dep't 2013), leave granted, 21 N.Y.3d 863, 995 N.E.2d 851, 972 N.Y.S.2d 535 (2013); Cooperstown Holstein Corp. v. Town of Middlefield, 106 A.D.3d 1170, 1171, 964 N.Y.S.2d 431, 432 (3d Dep't 2013), leave denied, 21 N.Y.3d 863, 995 N.E.2d 851, 972 N.Y.S.2d 535 (2013)).

3. 23 N.Y.3d 728, 739, 16 N.E.3d 1188, 1191, 992 N.Y.S.2d 710, 713 (2014).

4. *Id.* at 742, 16 N.E.3d at 1193-94, 992 N.Y.S.2d at 715-16.

5. *Id.*

6. *Id.* at 742, 16 N.E.3d at 1194, 992 N.Y.S.2d at 716 (quoting N.Y. Const. art. IX, § 2(c)(ii)).

7. *Id.* (alteration in original omitted) (internal quotation marks omitted) (quoting N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11)-(12) (McKinney 2014)).

8. *Wallach*, 23 N.Y.3d at 743, 16 N.E.3d at 1194, 992 N.Y.S.2d at 716 (alteration in original) (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)).

9. *Id.* at 743, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717 (citing N.Y. MUN. HOME RULE LAW § 10(1)(i)- (ii)).

10. *Id.* (quoting Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 682,

The plaintiffs in *Wallach* argued that the state legislature unequivocally expressed its intent to preempt local zoning regulations by enacting the suppression provision of the OGSML, which provides that "[t]he provisions of [the OGSML] *shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[11] The Court's reasoning was largely premised on the nearly identical suppression provision of the Mined Land Reclamation Law ("MLRL") reviewed in *Frew Run Gravel Products, Inc. v. Town of Carroll*.[12] The *Frew Run* Court enumerated three factors germane to the issue of preemption, that is: "(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history."[13]

The MLRL supersession clause examined in *Frew Run* provided:

> For the purposes stated herein, 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 local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.[14]

The *Frew Run* Court determined that the suppression clause did not preempt the prohibition of mining because the "plain language of the phrase 'local laws relating to the extractive mining industry' did not encompass zoning provisions."[15] To the contrary, the zoning law "relates not to the extractive mining industry but to an entirely different subject matter and purpose . . . the use of land in the Town . . . ."[16] Recognizing "a distinction between local regulations addressing 'the actual operation and process of mining' and zoning laws regulating land use generally," the *Frew Run* Court opined that only those regulations relating to the actual operation and process of mining were preempted by the

664 N.E.2d 1226, 1234, 642 N.Y.S.2d 164, 172 (1996)).

11. *Id.* at 743-44, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717 (quoting N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2014)).

12. *Id.* at 744-45, 16 N.E.3d at 1195-96, 992 N.Y.S.2d at 717-18 (citing *Frew Run Gravel Prods., Inc*, 71 N.Y.2d 126, 518 N.E.2d 920, 524 N.Y.S.2d 25 (1987)).

13. *Wallach*, 23 N.Y.3d at 744, 16 N.E.3d at 1195, 992 N.Y.S.2d at 717 (citing *Frew Run Gravel Prods., Inc.*, 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 27).

14. *Id.* at 744-45, 16 N.E.3d at 1195-96, 992 N.Y.S.2d at 717-18 (citation omitted).

15. *Id.* at 745, 16 N.E.3d at 1196, 992 N.Y.S.2d at 718 (quoting *Frew Run Gravel Prods., Inc* , 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 27).

16. *Id.* (alteration in original) (quoting *Frew Run Gravel Prods., Inc* , 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 27-28).

supersession provision of the MLRL.[17] "In effect, local laws that purported to regulate the 'how' of mining activities and operations were preempted whereas those limiting 'where' mining could take place were not."[18] The Court further found that the supersession clause was consistent with the MLRL as a whole and with its legislative history.[19] The goals of the MLRL are "to foster a healthy, growing mining industry and to aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition."[20] The legislative history further suggested an intent to promote the "mining industry by the adoption of standard and uniform restrictions and regulations to replace the existing patchwork system of local ordinances."[21] The "sole purpose" of the supersession clause was to preclude municipalities from adopting regulations "'dealing with the actual operation and process of mining' because such laws would 'frustrate the statutory purpose of encouraging mining through standardization of regulations pertaining to mining operations.'"[22] However, zoning regulations limiting the location of mining operations were beyond the preemptive suppression of the clause because "nothing in the [MLRL] or its history suggests that its reach was intended to be broader than necessary to preempt conflicting regulations dealing with mining operations and reclamation of mined lands."[23]

The first factor of the three-part test, that is, the language of the supersession clause, "is the clearest indicator of legislative intent" and the most significant element.[24] Because of the similarity of the suppression provisions in the MLRL and the OGSML, the reasoning of *Frew Run* was applicable to the Environmental Conservation Law ("ECL") section 23-0303(2) so that it only preempts local laws intended to regulate the actual operations of oil and gas activities and not to zoning regulations that restrict the location of or prohibit particular land uses in

17. *Id.* (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).

18. *Wallach*, 23 N.Y.3d at 745, 16 N.E.3d at 1196, 992 N.Y.S.2d at 718 (citing *Frew Run Gravel Prods., Inc* , 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 28).

19. *Id.*

20. *Id.* (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) (internal quotation marks omitted).

21. *Id.* (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).

22. *Id.* (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).

23. *Wallach*, 23 N.Y.3d at 745-46, 16 N.E.3d at 1196, 992 N.Y.S.2d at 718 (alteration in original omitted) (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).

24. *Id.* at 746, 16 N.E.3d at 1196, 992 N.Y.S.2d at 718 (quoting DaimlerChrysler Corp. v. Spitzer, 7 N.Y.3d 653, 660, 860 N.E.2d 705, 708, 827 N.Y.S.2d 88, 91 (2006)).

a community.[25] The zoning laws challenged in *Wallach* were intended to regulate land use generally and did not attempt to control "the details, procedures or operations of the oil and gas industries."[26] Although zoning regulations affect oil and gas enterprises, "this incidental control resulting from the municipality's exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the [oil, gas, and solution mining industries] which the legislature could have envisioned as being within the prohibition of the statute."[27] Moreover, unlike ECL section 23-0303(2), other statutes that preempt local zoning regulation routinely explicitly invoke zoning in the preemptive language.[28] In addition, the legislative programs of which those preemption clauses are a part normally include procedures that implicate concerns that otherwise would have been considered by traditional municipal zoning review.[29] As a result, the plain language of ECL section 23-0303(2) does not support preemption of the zoning laws.[30]

The second issue in determining whether a zoning law is preempted requires an appraisal of the clause's purpose in the statutory scheme as a whole.[31] The objectives of the OGSML are:

> (i) to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; (ii) to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had; (iii) to protect the correlative rights of all owners and the rights of all persons including landowners and the general public; and (iv) to regulate the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.[32]

In order to implement these goals, the OGSML includes a comprehensive mechanism which authorizes the Department of

25. *See id.* at 746, 16 N.E.3d at 1196-97, 992 N.Y.S.2d at 718-19 (citing *Frew Run Gravel Prods., Inc* , 71 N.Y.2d at 131-32, 518 N.E.2d at 922-23, 524 N.Y.S.2d at 27-28; N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2014)).

26. *Id.* at 746, 16 N.E.3d at 1197, 992 N.Y.S.2d at 719.

27. *Id.* (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).

28. *See Wallach*, 23 N.Y.3d at 748, 16 N.E.3d at 1198, 992 N.Y.S.2d at 720 (citing N.Y. ENVTL. CONSERV. LAW § 27-1107; N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney 2014); N.Y. RACING, PARI-MUTUEL WAGERING & BREEDING LAW § 1366 (McKinney 2014)).

29. *See id.* (citing N.Y. ENVTL. CONSERV. LAW § 27-1103(2)(g); N.Y. MENTAL HYG. LAW § 41.34(c); N.Y. RACING, PARI-MUTUEL WAGERING & BREEDING LAW § 1320(2)).

30. *Id.* at 749, 16 N.E.3d at 1198, 992 N.Y.S.2d at 720.

31. *Id.*

32. *Id.* at 749, 16 N.E.3d at 1199, 992 N.Y.S.2d at 721 (quoting N.Y. ENVTL. CONSERV. LAW § 23-0301) (internal quotation marks omitted).

Environmental Conservation ("DEC") to regulate oil, gas, and solution mining activities, and to adopt and enforce regulations regarding the safety, technical, and operational aspects of oil and gas activities.[33] The supersession clause is consistent with this legislative framework because it nullifies local regulations that would encroach on the DEC's regulatory supervision of the industry's operations in order to ensure standardized exploratory and extraction practices.[34] Like the equivalent provision interpreted in *Frew Run*, nothing in the OGSML implies that the supersession clause was intended to be more comprehensive than required to preempt incompatible local regulations directed at the technical operations of the industry.[35]

Lastly, the OGSML's legislative history corroborates that the legislature's primary concern was with avoiding wasteful oil and gas practices and ensuring that DEC possessed the authority and procedures to regulate the technical operations of the industry.[36]

The Court also rejected the argument that even if the OGSML's supersession clause did not preempt all local zoning regulations, it preempted those that prohibit hydrofracking throughout a community, a claim that was rejected by the Court of Appeals in *Gernatt Asphalt Products, Inc. v. Town of Sardinia*.[37] The Court in *Gernatt Asphalt* concluded that "zoning ordinances are not the type of regulatory provision the [l]egislature foresaw as preempted by the [MLRL]; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities."[38]

> A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.[39]

Consistent with the decisions interpreting the preemption provision of the MLRL, *Wallach* concludes that the OGSML does not prohibit a municipality from banning hydrofracking from certain or all zoning

33. *See Wallach*, 23 N.Y.3d at 749-50, 16 N.E.3d at 1199, 992 N.Y.S.2d at 721.

34. *See id.* at 750, 16 N.E.3d at 1199, 992 N.Y.S.2d at 721.

35. *See id.*

36. *See id.* at 751, 16 N.E.3d at 1200, 992 N.Y.S.2d at 722.

37. *Id.* at 753, 16 N.E.3d at 1201-02, 992 N.Y.S.2d at 723-24 (citing *Gernatt Asphalt Prods., Inc.*, 87 N.Y.2d 668, 683, 664 N.E.2d 1226, 1235, 642 N.Y.S.2d 164, 173 (1996)).

38. *Wallach*, 23 N.Y.3d at 753-54, 16 N.E.3d at 1202, 992 N.Y.S.2d at 724 (quoting *Gernatt Asphalt Prods., Inc.*, 87 N.Y.2d at 681-82, 664 N.E.2d at 1234, 642 N.Y.S.2d at 172).

39. *Id.* at 754, 16 N.E.3d at 1202, 992 N.Y.S.2d at 724 (quoting *Gernatt Asphalt Prods., Inc.*, 87 N.Y.2d at 684, 664 N.E.2d at 1235, 642 N.Y.S.2d at 173).

districts in a municipality.

B. Preemption—Cemeteries

It was determined in *Oakwood Cemetery v. Village/Town of Mount Kisco* that the Not-For-Profit Corporation Law did not preempt the provisions of a zoning law which barred crematoriums from the community.[40] The plaintiff, a not-for-profit cemetery corporation that operated a cemetery in the Town, desired to construct and operate a crematory on its property.[41] The contested zoning amendment defined the term "cemetery" to exclude cremation facilities.[42] The plaintiff argued that the zoning law's prohibition was preempted by Not-For-Profit Corporation Law section 1502(d), which provides that "[a] public mausoleum, crematory or columbarium shall be included within the term 'cemetery.'"[43]

Not-for-Profit Corporation Law Article 15 did not preempt local regulation of cemeteries under the doctrine of field preemption.[44] Field preemption may be germane when: an express declaration in a State statute explicitly declares an intent to preempt all local laws on the same subject matter; a declaration of State policy manifests "the intent of the [l]egislature to preempt local laws on the same subject matter;" and a legislative adoption of a comprehensive and detailed regulatory scheme in an area establishes an intent to preempt local laws.[45]

Not-for-Profit Corporation Law section 1501 proclaims that:

> The people of this State have a vital interest in the establishment, maintenance and preservation of public burial grounds and the proper operation of the corporations which own and manage them. This article is determined an exercise of the police powers of this [S]tate to protect the well-being of our citizens, to promote the public welfare and to prevent cemeteries from falling into disrepair and dilapidation and becoming a burden upon the community, and in furtherance of the public policy of this State that cemeteries shall be conducted on a non-profit basis for the mutual benefit of plot owners therein.[46]

40. 115 A.D.3d 749, 749-50, 981 N.Y.S.2d 786, 787 (2d Dep't 2014).

41. *Id.* at 750, 981 N.Y.S.2d at 788.

42. *Id.*

43. *Id.* (alteration in original) (citing N.Y. NOT-FOR-PROFIT CORP. LAW § 1502(d) (McKinney 2014)). The plaintiff further asserted that operation of a crematory was included within its permissible, nonconforming use of its property as a cemetery. *Id.*

44. *Oakwood Cemetery*, 115 A.D.3d at 751, 981 N.Y.S.2d at 788.

45. *Id.* (citing Chwick v. Mulvey, 81 A.D.3d 161, 169-70, 915 N.Y.S.2d 578, 585 (2d Dep't 2010)).

46. *Id.* at 751, 981 N.Y.S.2d at 788-89 (alteration in original omitted) (quoting N.Y.

Although Article 15 of the Not-for-Profit Corporation Law regulates corporations which own and manage cemeteries, it does not explicitly preempt zoning laws regulating land use by cemeteries.[47] Moreover, neither Not-for-Profit Corporation Law Article 15, nor the rules and regulations promulgated pursuant to it, substantiates a State preemptive policy.[48] Lastly, the regulatory scheme did not reveal a legislative desire to preempt local zoning authority.[49] As a result, the Not-for-Profit Corporation Law does not preempt the field of cemetery regulation.[50]

In addition, the more restrictive definition of "cemetery" in the zoning law was not invalid pursuant to the doctrine of conflict preemption.[51] Not-for-Profit Corporation Law section 1502(d) regulates the management of cemetery corporations, and the applicability of definitions contained therein is limited to that law.[52] The challenged definition of "cemetery" related to a separate and discrete substantive area-land use.[53] The definition was not in direct conflict because it relates to different substantive concerns.[54]

II. COMPREHENSIVE PLAN/SPOT ZONING

"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 . . . ."[55] "'[S]pot zoning' is the very antithesis of planned zoning."[56] However, zoning regulations that are consistent with a community's comprehensive plan are not, by definition, spot zoning.[57]

The plaintiffs in *Restuccio v. City of Oswego* challenged the rezoning of property to permit the construction of a hotel, maintaining that the amendment was inconsistent with the City's comprehensive

NOT-FOR-PROFIT CORP. LAW § 1501).

47. *Id.* at 751, 981 N.Y.S.2d at 789.

48. *Id.*

49. *Oakwood Cemetery*, 115 A.D.3d at 751, 981 N.Y.S.2d at 789.

50. *Id.*

51. *Id.*

52. *Id.* at 751-52, 981 N.Y.S.2d at 789 (citing N.Y. NOT-FOR-PROFIT CORP. LAW § 1502(d)).

53. *Id.* at 752, 981 N.Y.S.2d at 789.

54. *Oakwood Cemetery*, 115 A.D.3d at 752, 981 N.Y.S.2d at 789.

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

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

57. *See* Rye Citizens Comm. v. Bd. of Trs. of Port Chester, 249 A.D.2d 478, 479, 671 N.Y.S.2d 528, 529 (2d Dep't 1998), *leave denied*, 92 N.Y.2d 808, 700 N.E.2d 1229, 678 N.Y.S.2d 593 (1998).

plan.[58] A zoning amendment is entitled to a "strong presumption of validity."[59] Consequently, one who challenges such a legislative act bears a heavy burden of proof.[60] "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[61] As a result, a zoning classification must be upheld unless the plaintiff establishes a "clear conflict" with the comprehensive plan.[62]

The City in *Restuccio* established that the rezoning of the property was consistent with the City's comprehensive plan, that the rezoned classification corresponded more closely to the comprehensive plan than did the existing zoning, and that the rezoning was adopted only after a comprehensive review.[63] Because the rezoning was consistent with the comprehensive plan, it did not constitute impermissible spot zoning.[64] In addition, the rezoning was reasonably related to a legitimate governmental purpose, that is, implementation of the City's planned development, and thus was constitutional.[65]

The court also rejected the claim that the City council's adoption of the amendment was arbitrary because it denied the rezoning petition and subsequently approved it at the next meeting.[66] The plaintiff asserted that the adoption under those circumstances violated the principle that an administrative decision which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary.[67] However because the enactment was a

58. 114 A.D.3d 1191, 1191, 979 N.Y.S.2d 749, 750 (4th Dep't 2014).

59. *Id.* (quoting Morgan v. Town of W. Bloomfield, 295 A.D.2d 902, 903, 744 N.Y.S.2d 274, 276 (4th Dep't 2002); Rayle v. Town of Cato Bd., 295 A.D.2d 978, 978, 743 N.Y.S.2d 784, 785 (4th Dep't 2002), *leave denied*, 747 N.Y.S.2d 851 (4th Dep't 2002)).

60. *Id.* (citing Bergstol v. Town of Monroe, 15 A.D.3d 324, 325, 790 N.Y.S.2d 460, 461 (2d Dep't 2005), *leave denied*, 5 N.Y.3d 701, 832 N.E.2d 1188, 799 N.Y.S.2d 772 (2005); Town of Bedford v. Vill. of Mount Kisco, 33 N.Y.2d 178, 186, 306 N.E.2d 155, 158-59, 351 N.Y.S.2d 129, 134 (1973), *reargument denied*, 34 N.Y.2d 668, 355 N.Y.S.2d 1027 (1974)).

61. *Id.* at 1192, 979 N.Y.S.2d at 750 (quoting Shepard v. Vill. of Skaneateles, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)) (internal quotation marks omitted) (citing De Sena v. Gulde, 24 A.D.2d 165, 169, 265 N.Y.S.2d 239, 244 (2d Dep't 1965)).

62. *Id.* (quoting *Bergstol*, 15 A.D.3d at 325, 790 N.Y.S.2d at 461) (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), *appeal dismissed*, 11 N.Y.3d 781, 896 N.E.2d 89, 866 N.Y.S.2d 604 (2008), *reconsideration denied*, 11 N.Y.3d 852, 900 N.E.2d 547, 872 N.Y.S.2d 65 (2008)).

63. *Restuccio*, 114 A.D.3d at 1192, 979 N.Y.S.2d at 750.

64. *Id.* at 1192, 979 N.Y.S.2d at 751.

65. *Id.*

66. *Id.*

67. *Id.* at 1192-93, 979 N.Y.S.2d at 751 (quoting Hamptons, LLC v. Zoning Bd. of Appeals of E. Hampton, 98 A.d.3d 738, 739, 950 N.Y.S.2d 386, 388 (2d Dep't 2012)).

legislative action rather than administrative, "[n]o showing of a change of circumstances must be made for a legislative body to rezone property."[68]

Similarly, a challenge to the rezoning of property as being contrary to a Town's comprehensive plan was rejected in *Hart v. Town Board of Huntington*.[69] The amendment rezoned property from an R-40 designation, which permitted one single-family dwelling per acre, to a R-RM Retirement Community designation.[70] Notwithstanding the R-40 zoning, the property had been used for years as a nonconforming horse farm and stables, which included tree cutting, wood chipping, and wood carving businesses.[71] The owner proposed the construction of sixty-six townhouses on the property, as a part of a larger project comprised of eighty townhouses and three single-family homes.[72]

While the rezoning petition was pending, the Town Board adopted a comprehensive plan, which recommended the preservation of open spaces and the promotion of a diverse, affordable housing stock.[73] Although the property had been designated as an "Open Space Index Parcel" in the Town's 1974 open space plan, the Environmental Open Space Advisory Committee noted in 2007 that the natural features of the property had been disturbed and concluded that the Town should not pursue the purchase of the property for parkland.[74]

Applying the considerations described above, the court found that the petitioners had failed to raise a triable issue of fact as to whether a "clear conflict" existed between the zoning amendment and the comprehensive plan.[75] Although the master plan related, among its concerns, the desire to preserve the low-density character of the Town, it also acknowledged that because the demographics of the population were changing, a need existed for a diverse housing stock, including senior and affordable housing, while preserving open spaces.[76] Although the proposed development would increase the density of the neighborhood,

68. *Restuccio*, 114 A.D. at 1193, 979 N.Y.S.2d at 751 (alteration in original) (quoting Blumberg v. City of Yonkers, 41 A.D.2d 300, 305, 341 N.Y.S.2d 977, 982 (2d Dep't 1973), *appeal dismissed*, 32 N.Y.2d 896, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973), *leave denied*, 33 N.Y.2d 514 (1973)).

69. *See generally* 114 A.D.3d 680, 980 N.Y.S.2d 128 (2d Dep't 2014), *leave denied*, 24 N.Y.3d 908 (2014).

70. *Id.* at 682, 980 N.Y.S.2d at 130.

71. *Id.*

72. *Id.*

73. *Id.* at 682, 980 N.Y.S.2d at 131.

74. *Hart*, 114 A.D.3d at 682, 980 N.Y.S.2d at 131.

75. *Id.* at 683, 980 N.Y.S.2d at 131.

76. *Id.* at 683-84, 980 N.Y.S.2d at 131-32.

it would also preserve a substantial portion of the property as open land and provide senior and affordable housing.[77] Consequently, the zoning amendment was consistent with the overall planning policies related in the master plan and did not constitute impermissible spot zoning.[78]

A. Adequacy of Notice

Town Law section 264 does not mandate the substance of the compulsory notice of public hearing on a zoning amendment, other than relating that it shall provide the time and place of the hearing.[79] However, the case law provides that notice must "fairly apprise[] the public of the fundamental character of the proposed zoning change . . . [and] not mislead interested parties into foregoing attendance at the public hearing."[80] The sufficiency of the notice for an amendment which added a Planned Unit Development ("PUD") provision to a zoning law was challenged in *Dawley v. Town of Tyre*.[81] First, the action was timely because "the issue of adequate notice of a public hearing prior to enactment of a zoning ordinance has no statute of limitations, but may be asserted at any time after such legislation is enacted."[82]

The plaintiffs alleged that notice was deficient because it failed to explain what a PUD is.[83] A significant departure from the notice requirements affects the regularity of a hearing and results in the invalidity a law.[84] When a substantial deviation from the notice requirements is established, a party challenging the enactment need not demonstrate that he was among those not given notice, that the law would not have passed if proper notice had been given or any other form of specific prejudice.[85]

The contested notice stated that the public hearing is "regarding proposed Local Law No. 1 of 2014 in relation to enacting new Article 11.A Planned Unit Development."[86] The notice further provided the

77. *Id.* at 684, 980 N.Y.S.2d at 132.

78. *Id.*

79. N.Y. TOWN LAW § 264 (McKinney 2014).

80. Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 678, 664 N.E.2d 1226, 1232, 642 N.Y.S.2d 164, 170 (1996).

81. *See generally* No. 48154, 2014 N.Y. Slip Op. 50752(U) (Sup. Ct. Seneca Cnty. 2014).

82. *Id.* at 2 (citing generally Town of Lima v. Robert Slocum Enters., Inc., 38 A.D.2d 503, 331 N.Y.S.2d 51 (4th Dep't 1972) (eleven years); Coutant v. Town of Poughkeepsie, 69 A.D.2d 506, 419 N.Y.S.2d 148 (2d Dep't 1979) (twenty years)).

83. *Id.* at 4.

84. *Id.* at 5.

85. *Id.*

86. *Dawley*, No. 48154, 2014 N.Y. Slip Op. 50752(U), at 5 (internal quotation marks

hearing is "for the purpose of hearing public comments on the adoption of a proposed local law to amend the Town of Tyre Zoning Law in relation to enacting new Article 11.A . . . ."[87] It also advised the public that a copy of the proposed PUD local law was available for public review at the Town clerk's office and that a copy was available on the Town's website.[88]

The court found that although it may have been "prudent" to include information to explain that the proposed law would be effective throughout the entire Town and not in any specific existing zones and to define a "planned unit development," it was not misleading.[89] Moreover, because more than a hundred people attended the public hearing, the notice satisfactorily apprised the public of the purpose of the hearing.[90] Further, the notice informed the public that a copy of the proposed law was available at the Town clerk's office and on the Town's website.[91] "In today's society, the general public is used to accessing information on the internet and the notice as published allowed the public to read the full proposed law via the Town's website."[92] The court also opined that any claimed deficiencies in a subsequent notice were not germane because the second public hearing and notice of it were not required by Town Law section 264, which only requires one public hearing and notice.[93]

III. ZONING BOARDS OF APPEAL

A. Findings of Fact

Except in unusual circumstances, "[f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination."[94] Nevertheless, a court may undertake an independent evaluation of the germane law where the issue is one of legal interpretation of statutory terms.[95] The permissibility of a condition imposing a height restriction

omitted).

87. *Id.* (alteration in original) (internal quotation marks omitted).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Dawley*, No. 48154, 2014 N.Y. Slip Op. 50752(U), at 5.

92. *Id.*

93. *Id.* at 5-6; *see* N.Y. TOWN LAW § 264 (McKinney 2014).

94. S. Blossom Ventures, LLC v. Town of Elma, 46 A.D.3d 1337, 1338, 848 N.Y.S.2d 806, 807 (4th Dep't 2007) (quoting Perrella v. Suffolk Cnty. Classification & Salary Appeals Bd., 117 A.D.2d 603, 604, 498 N.Y.S.2d 70, 71 (2d Dep't 1986)), *leave dismissed*, 10 N.Y.3d 852, 889 N.E.2d 492, 859 N.Y.S.2d 614 (2008)).

95. *See* Livingston Parkway Ass'n, Inc. v. Town of Amherst Zoning Bd. of Appeals,

challenged in *Livingston Parkway* was one of legal interpretation.[96] The court determined that under the circumstances, the record contained ample facts to allow intelligent judicial review of the board's decision.[97]

B. Type of Variance

In defining "area" and "use" variances, Town Law section 267(1) and Village Law section 7-712(1) removed virtually any uncertainty as to the type of relief sought in almost any situation.[98] However, the courts sporadically have had some difficulty in classifying requests for variances, particularly when dealing with parking requirements. For example, the Court of Appeals related in *Off Shore Restaurant Corp. v. Linden*:

> [O]ff-street parking restrictions do not fall easily into either 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 variances 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.[99]

In *Overhill Building Co. 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 to be treated as an area variance."[100] On the other hand, 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.[101]

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114 A.D.3d 1219, 1220, 980 N.Y.S.2d 206, 207 (4th Dep't 2014).

96. *Id.*

97. *Id.* (quoting Iwan v. Zoning Bd. of Appeals of Amsterdam, 252 A.D.2d 913, 914, 677 N.Y.S.2d 190, 191 (3d Dep't 1988)).

98. N.Y. TOWN LAW § 267(1) (McKinney 2014); N.Y. VILLAGE LAW § 7-712(1) (McKinney 2014).

99. 30 N.Y.2d 160, 169, 282 N.E.2d 299, 304, 331 N.Y.S.2d 397, 405 (1972).

100. 28 N.Y.2d 449, 453, 271 N.E.2d 537, 539, 322 N.Y.S.2d 696, 699 (1971) (citation omitted).

101. *Off Shore Rest. Corp.*, 30 N.Y.2d at 169, 282 N.E.2d at 304, 331 N.Y.S.2d at 405.

The Court of Appeals ended any doubt as to the classification of parking variances in *Colin Realty Co., LLC v. Town of North Hempstead* and concluded that "a zoning board of appeals should evaluate requests for off-street parking variances by applying the standards for an area variance so long as the property is intended to be used for a purpose permitted in the zoning district."[102] The Court also concluded that to the extent the decision in *Off Shore* suggested otherwise, it should not be followed and was overruled.[103]

The applicant in *Colin Realty* wished to establish a forty-five seat, full-service, dine-in restaurant in a vacant storefront in a shopping center consisting of five storefronts.[104] Restaurants were permitted in the zoning district in which the building was located, subject to the issuance of a conditional use permit.[105] The building was constructed in 1939 when the zoning law did not require off-street parking or loading areas for the building.[106] However, by 2011, the zoning law required twenty-four off-street parking spaces and one off-street loading area for the use.[107] Two municipal parking lots and on-street parking were located near the property.[108]

The zoning board of appeals treated the application as one for area variances and granted the relief requested, subjected to a number of conditions.[109] The board noted in approving the area variances that the premises was located in a preexisting, non-conforming building, that the parking analysis submitted by the applicants' traffic engineer demonstrated that ample, if not excess, parking was available in the vicinity and that a restaurant use was in harmony with the surrounding properties and consistent with the character of the community, which primarily consisted of retail, office and food uses.[110]

The decision noted that Town Law section 267(1)(a), like Village Law section 7-712(1)(a), defines a "'use variance" as "the authorization by the zoning board of appeals for the use of land *for a purpose which is otherwise not allowed or is prohibited* by the applicable zoning regulations."[111] Town Law section 267(1)(b) and Village Law section

102. 24 N.Y.3d 96, 100, 21 N.E.3d 188, 189, 996 N.Y.S.2d 559, 560 (2014).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Colin Realty Co., LLC*, 24 N.Y.3d at 100, 21 N.E.3d at 189, 996 N.Y.S.2d at 560.
108. *Id.*
109. *Id.*
110. *Id.* at 100-01, 21 N.E.3d at 189, 996 N.Y.S.2d at 560.
111. *Id.* at 100, 21 N.E.3d at 189, 996 N.Y.S.2d at 560 (quoting N.Y. TOWN LAW §

7-712(1)(b) define "area variance" as "the authorization by the zoning board of appeals for the use of land *in a manner which is not allowed by the dimensional or physical requirements* of the applicable zoning regulations."[112] The Court noted that it had not considered the classification of variances from off-street parking requirements since its decisions in *Overhill* and *Off Shore*, more than forty years ago, or in the twenty years since the definitions of and criteria for evaluating use and area variances were codified in 1992.[113] In addition to distinguishing the circumstances and analysis in *Overhill* and *Off Shore*, the dicta in those decisions have been superseded by statute.[114] The Court concluded that "[o]ff-street parking requirements, while differing depending on use, regulate how the property's area may be developed, akin to minimum lot size or set-back restrictions."[115] Accordingly, area variance rules apply to requests for variances from off-street parking requirements when the underlying use is permitted in the zoning district, while use variance criteria applies only if the variance is sought in connection with a use prohibited or otherwise not allowed in the district.[116]

C. Use Variances

As substantiated by the decision in *Christian Airmen, Inc. v. Town of Newstead Zoning Board of Appeals*, the criterion necessary to establish entitlement to a use variance, enumerated in Town Law section 267-b(2) and Village Law section 7-712-b(2), is compulsory and exacting.[117] The denial of a use variance to authorize the paving of a runway at an airport was sustained in *Christian Airmen* because the petitioner failed to establish that the rejection of the variance application would prevent it from obtaining a reasonable return on the property.[118] The petitioner additionally failed to demonstrate that the land could not be productively used for agricultural uses or that the variance sought would have assuaged

267(1)(a) (McKinney 2014)); *see* N.Y. VILLAGE LAW § 7-712(1)(a) (McKinney 2014).

112. *Colin Realty Co., LLC*, 24 N.Y.3d at 102, 21 N.E.3d at 190, 996 N.Y.S.2d at 561 (quoting N.Y. TOWN LAW § 267(1)(b)) (citing N.Y. VILLAGE LAW § 7-712(1)(b)).

113. *Colin Realty Co., LLC*, 24 N.Y.3d at 103, 21 N.E.3d at 191, 996 N.Y.S.2d at 562.

114. *Id.* at 112, 21 N.E.3d at 197, 996 N.Y.S.2d at 568.

115. *Id.*

116. *Id.* (citing Terry Rice, Practice Commentary, McKinney's Cons Laws of NY, Book 61, Town Law § 267-b at 294-95).

117. *See* 115 A.D.3d 1319, 1320, 983 N.Y.S.2d 173, 175 (4th Dep't 2014) (citing N.Y. TOWN LAW § 267-b(2)(b); Iwan v. Zoning Bd. of Appeals of Amsterdam, 252 A.D.2d 913, 914, 677 N.Y.S.2d 190, 191 (3d Dep't 1998)); *see also* N.Y. VILLAGE LAW § 7-712-b(2) (McKinney 2014).

118. *Christian Airmen Inc.*, 115 A.D.3d at 1321, 983 N.Y.S.2d at 176.

the airport's financial predicament.[119] The applicant did not corroborate that it would have to terminate the airport and repay grant money it had received if the variances were denied.[120] Further, the claimed hardship was self-created because the deeds for the property established that the petitioner did not purchase portions of the property until almost a decade after enactment of the restrictive zoning law from which it sought relief.[121]

D. Area Variances

Among the criteria to be considered in assessing an area variance application is whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance.[122] In assessing that consideration "the 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.[123] Consistent with this precept, the court in *Huszar v. Bayview Park Properties, LLC* confirmed the approval of area variances because, although there were some wider lots in the vicinity of the property, the preponderance of lots in a two-block area had widths of fifty feet or less.[124] As a result, the board reasonably concluded that approval of the requested variances would not generate a deleterious change in the character of the neighborhood or a detriment to nearby properties.[125]

Similarly, the appellate division sustained the reversal of the denial of a lot-depth area variance in *Quintana v. Board of Zoning Appeals of Muttontown*.[126] Although the record contained some support for the board's conclusions that the difficulty was self-created and that the variance sought was substantial, there was no evidence that granting the variance would generate an undesirable change in the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the

119. *Id.*

120. *Id.*

121. *Id.*

122. N.Y. TOWN LAW § 267-b(3)(b)(1) (McKinney 2014); N.Y. VILLAGE LAW § 7-712-b(3)(b)(1) (McKinney 2014).

123. Verdeland Homes, Inc. v. Bd. of Appeals of Hempstead, No. 006084/06, 2006 N.Y. Slip Op. 52018(U), at 2 (Sup. Ct. Nassau Cnty. 2006) (citing Terry Rice, Practice Commentary, McKinney's Cons Laws of NY, Book 61, Town Law § 267-b at 294-95).

124. 109 A.D.3d 922, 924, 972 N.Y.S.2d 587, 590 (2d Dep't 2013).

125. *Id.*

126. 120 A.D.3d 1248, 1248, 992 N.Y.S.2d 332, 333 (2d Dep't 2014).

neighborhood or community.[127] The denial additionally was irrational because it was principally premised on "subjective considerations of general community opposition."[128] Moreover, the board's conclusions that the benefit sought could be achieved by a feasible alternative method did not have a rational basis in the record.[129]

IV. SITE PLAN REVIEW

Pursuant to Town Law section 274-a and Village Law section 7-725-b, among the elements that may be delegated to a planning board reviewing a site plan application are those related to screening, landscaping, location and dimensions of buildings, adjacent land uses, and physical features meant to protect adjacent land uses.[130] Consistent with such an authorization a "planning board may properly consider criteria such as whether the proposed project is consistent with the use of surrounding properties, whether it 'would bring about a noticeable change in the visual character of the area,' and whether the change would be irreversible."[131] Implementing that principle, the denial of a site plan application to create an all-terrain vehicle track was confirmed in *Dietrich v. Planning Board of West Seneca*.[132]

> In conducting site plan review, the Planning Board is required to set appropriate conditions and safeguards which are in harmony with the general purpose and intent of the Town's zoning code. To this end, a planning board may properly consider criteria such as whether the proposed project is consistent with the use of surrounding properties, whether it "would bring about a noticeable change in the visual character of the area," and whether the change would be irreversible.[133]

Judicial review of a planning board decision is limited to consideration of whether the determination was illegal, arbitrary, or an

127. *Id.* at 1249, 992 N.Y.S.2d at 334 (citing N.Y. VILLAGE LAW § 7-712-b(3)(b) (McKinney 2014); Daneri v. Zoning Bd. of Appeals of Southold, 98 A.D.3d 508, 949 N.Y.S.2d 180 (2d Dep't 2012), *leave denied*, 20 N.Y.3d 852, 98 N.E.2d 535, 956 N.Y.S.2d 485 (2012); Schumacher v. Town of E. Hampton Zoning Bd. of Appeals, 46 A.D.3d 691, 849 N.Y.S.2d 72 (2d Dep't 2007)).

128. *Id.*

129. *Id.* at 1249-50, 992 N.Y.S.2d at 334.

130. N.Y. TOWN LAW § 274-a(2)(a) (McKinney 2014); N.Y. VILLAGE LAW § 7-725-a(2)(a) (McKinney 2014).

131. Valentine v. McLaughlin, 87 A.D.3d 1155, 1157, 930 N.Y.S.2d 51, 53 (2d Dep't 2011) (citations omitted) (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)), *leave denied*, 18 N.Y.3d 804, 962 N.E.2d 287, 938 N.Y.S.2d 862 (2012)).

132. 118 A.D.3d 1419, 1419, 988 N.Y.S.2d 760, 761 (4th Dep't 2014).

133. *Id.* at 1420, 988 N.Y.S.2d at 762 (alteration in original omitted) (quoting *Valentine*, 87 A.D.3d at 1157, 930 N.Y.S.2d at 53).

abuse of discretion.[134] As a result, a decision of a planning board must be affirmed if it has a rational basis and is substantiated by substantial evidence.[135] Relatedly, a court may not substitute its judgment for that of the planning board even if there is substantial evidence supporting a different decision.[136] The record in *Dietrich* supported the planning board's conclusion that the ATV track would be incompatible with the residential character of the neighborhood, particularly with respect to the noise level and number of incidents of physical damage and trespass to neighboring properties.[137]

The court also rejected the petitioner's assertion that the matter should have been remitted to the planning board for the adoption of factual findings.[138] "Generally, findings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination."[139] The planning board had adequately related findings of fact by specifying that the decision was based on concerns with respect to trespassers and liability, property damage, and noise pollution.[140] In any event, even if the findings of fact were considered to be insufficient, judicial review was possible because the record as a whole addressed the germane considerations and substantiated a rational basis for the planning board's decision.[141]

V. SPECIAL PERMITS

The appellate division reiterated the standards applicable to special permit applications in *Smyles v. Board of Trustees of Mineola*.[142] "Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special [permit] gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right."[143]

134. *Id.* (quoting Kempisty v. Town of Geddes, 93 A.D.3d 1167, 1169, 940 N.Y.S.2d 381, 384 (4th Dep't 2012)).

135. *Id.* (quoting Pelican Point LLC v. Hoover, 50 A.D.3d 1497, 1498, 856 N.Y.S.2d 394, 395 (4th Dep't 2008)).

136. *Id.* at 1421, 988 N.Y.S.2d at 762 (quoting Violet Realty, Inc. v. City of Buffalo Planning Bd., 20 A.D.3d 901, 902, 798 N.Y.S.2d 283, 284 (4th Dep't 2005)).

137. *Dietrich*, 118 A.D.3d. at 1421, 988 N.Y.S.2d at 763.

138. *Id.*

139. *Id.* (quoting Livingston Parkway Ass'n, Inc. v. Town of Amherst Zoning Bd. of Appeals, 114 A.D.3d 1219, 1219-20, 980 N.Y.S.2d 206, 207 (4th Dep't 2014)).

140. *Id.*

141. *Id.*

142. *See generally* 120 A.D.3d 822, 992 N.Y.S.2d 83 (2d Dep't 2014).

143. *Id.* at 823, 992 N.Y.S.2d at 85 (quoting Retail Prop. Trust v. Bd. of Zoning Appeals of Hempstead, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 730-31, 746 N.Y.S.2d 662, 665-66

Therefore, the burden of proof for an applicant seeking a special permit is lighter than that demanded of an applicant for a variance.[144] The rejection of a special permit application will be invalidated unless it is supported by evidence in the record and is not based exclusively on community objections.[145] However, if the evidence supports denial of a special permit application, the discretion of the board must be accorded deference and, consequently, a court may not substitute its own judgment for that of the board, even if the record may support a different decision.[146]

The record in *Smyles*, including testimony by traffic and real estate experts and by neighboring property owners, substantiated the findings of the board that the proposed expansion of a day care facility into vacant retail space would result in a hazardous traffic condition, an over-intensification of land use with respect to parking, and an impediment to the provision of emergency services.[147] The board also was permitted to premise its decision on the board members' personal knowledge and familiarity with community conditions.[148] As a result, the denial of the special permit was supported by the record and was not arbitrary and capricious.[149]

Similarly, an application for special permit to allow for a 2100-square-foot Sonic restaurant in a Wholesale and Service Industry ("WSI") district was denied in *Serota Smithtown LLC v. Town of Smithtown Board of Zoning Appeals*.[150] A real estate appraisal expert concluded that the proposed restaurant would not deleteriously impact neighboring residential real estate values because the proposed use was common in the vicinity and because of the existence of a dense vegetated buffer and the topography between the site and the neighboring residences.[151] Expert testimony also demonstrated that the lighting for the site would comply with the Town Code and would not negatively impact the neighboring residential neighborhood.[152] A traffic engineer opined that there would be no discernable impact from the proposed

(2002)).

144. *Id.* (citations omitted).

145. *Id.* (citations omitted).

146. *Id*. at 823-24, 992 N.Y.S.2d at 85 (citations omitted).

147. *Smyles*, 120 A.D.3d at 824, 992 N.Y.S.2d at 85 (citations omitted).

148. *Id.* (citations omitted).

149. *Id.*

150. No. 12-38197, 2014 N.Y. Slip Op. 50513(U), at 1 (Sup. Ct. Suffolk Cnty. 2014).

151. *Id.* at 3.

152. *Id.* at 21.

restaurant.[153] Another expert concluded that the drive-in menu-board speakers, which would be more than 100 feet from the nearest residence, would be inaudible from those residences.[154] A number of residents testified against the application and expressed concerns about traffic, noise, "drunken teenagers," smells, loud radios, and safety.[155] The Board adopted a negative declaration pursuant to the State Environmental Quality Review Act ("SEQRA") and thereafter denied the application.[156]

Restating the governing principles, the court reiterated that unlike a use variance, a special permit authorizes a property owner to utilize his property for a use explicitly permitted by a zoning law, subject only to conditions attached to it to ameliorate the impacts on the neighborhood.[157] Enumeration of a use as a special permit use is equivalent to a legislative finding that it is in harmony with the general zoning plan and will not adversely affect the neighborhood.[158] The demonstration necessary to obtain a special permit is lighter than that required of one seeking for a variance.[159] An applicant for a special permit need only establish compliance with the legislative standards for the use.[160] "While the reviewing board retains some discretion to evaluate each application for a special use permit, to determine whether the applicable criteria have been met and to make commonsense judgments in deciding whether a particular application should be granted, such determination must be supported by substantial evidence."[161] Although scientific or expert evidence is not essential in every case, a determination on a special permit application may not be based exclusively on generalized community objections.[162] Notably, expert opinion, such as that concerning traffic impacts, may not be disregarded in favor of generalized community opposition.[163] Generalized or uncorroborated complaints from neighbors,

153. *Id.* at 4.

154. *Id.*

155. *Serota Smithtown LLC*, No. 12-38197, 2014 N.Y. Slip Op. 50513(U), at 5-6.

156. *Id.* at 9.

157. *Id.* at 10.

158. *Id.* (citing Retail Prop. Trust v. Bd. of Zoning Appeals of Hempstead, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 730-31, 746 N.Y.S.2d 662, 665-66 (2002); N. Shore Steak House, Inc. v. Bd. of Appeals of Thomaston, 30 N.Y.2d 238, 243, 282 N.E.2d 606, 609, 331 N.Y.S.2d 645, 649 (1972)).

159. *Id.* at 11.

160. *Serota Smithtown LLC*, No. 12-38197, 2014 N.Y. Slip Op. 50513(U), at 11 (citing Kabro Assocs., LLC v. Town of Islip Zoning Bd. of Appeals, 95 A.D.3d 1118, 1120, 944 N.Y.S.2d 277, 280 (2d Dep't 2012)).

161. *Id.* (citing 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)).

162. *Id.* at 11-12.

163. *Id.* at 12 (citing Market Square Props., LTD v. Town of Guilderland Zoning Bd. of

unsupported by empirical or expert evidence, generally constitute an insufficient factual foundation for a decision.[164]

The decision challenged in *Serota* was not supported by substantial evidence.[165] First, the consultant's SEQRA recommendation concluded that "[a]lthough concerns have been expressed regarding potential impacts associated with noise, fugitive light, odors, off-site parking, and off-site queuing of automobiles on the basis of such impacts having occurred at an existing Sonic restaurant in North Babylon, such impacts are not considered to be likely at this site . . . ."[166] Moreover, the Board's finding of inadequate parking capacity contradicted the traffic study and the Board's findings did not cite any facts or calculations upon which the conclusion was founded.[167] In addition, the Board's reliance on difficulties at another Sonic site disregarded the many distinctions between the other site and the subject site.[168]

Further, although apprehension about noise was a significant concern, a special permit application may not be denied because of characteristics which are inherent to the operation of such business.[169] The decision denying the special permit also asserted that the proposed fifty-seven-foot buffer consisting of deciduous, existing woods was insufficient.[170] However, the fifty-seven-foot buffer conformed to the Town Code's buffer requirement and an adjacent restaurant with outdoor dining was only required to have a ten-foot buffer.[171] The applicant's expert also had established that the site's lighting complied with the Town Code and would not negatively impact the neighboring properties.[172] As a result, the record lacked a factual basis to reject the application based on the proposed lighting for the site.[173]

Appeals, 66 N.Y.2d 893, 895, 489 N.E.2d 741, 741, 498 N.Y.S.2d 772, 722 (1985)).

164. *Id.* (citing Caspian Realty, Inc. v. Zoning Bd. of Appeals of Greenburgh, 68 A.D.3d 62, 75, 886 N.Y.S.2d 442, 452 (2d Dep't 2009)).

165. *Serota Smithtown LLC*, No. 12-38197, 2014 N.Y. Slip Op. 50513(U), at 12.

166. *Id.* at 13 (alteration in original omitted).

167. *See id.* at 14.

168. *See id.* at 18.

169. *Id.* (citing Holbrook Assocs. Dev. Co. v. McGowan, 261 A.D.2d 620, 621, 690 N.Y.S.2d 686, 687 (2d Dep't), *leave denied*, 93 N.Y.2d 817, 719 N.E.2d 925, 697 N.Y.S.2d 564 (1999); Green v. Lo Grande, 96 A.D.2d 524, 525, 464 N.Y.S.2d 831, 833 (2d Dep't 1983)).

170. *Serota Smithtown LLC*, No. 12-38197, 2014 N.Y. Slip Op. 50513(U), at 20.

171. *Id.*

172. *Id.* at 20-21.

173. *Id.* at 21.

The court determined that the board "improperly bowed to community pressure" in rejecting the application.[174] The objections of the neighbors and the findings of the board were unsubstantiated by any empirical data or expert testimony, and, accordingly, were inadequate to refute the expert testimony provided by the applicant and the Town's consultant.[175] As a result, the court invalidated the decision denying the application and remitted the matter for reconsideration of the application for variances,[176] for the board to render findings of fact, and, thereafter, for the issuance of the special permit, subject to any conditions as may be appropriate.[177]

A. Statute of Limitations

The petitioners in *Smyles* also alleged that the decision should have been annulled because of the Board's failure to comply with the time limitations set forth in Village Law section 7-725-b(6), the identical counterpart to Town Law section 274b-(6).[178] Village Law section 7-725-b(6) and Town Law section 274-b(6) directs that a public hearing must be held on a special permit application within sixty-two days after receipt of an application and that a decision must be rendered within sixty-two days after the hearing is closed.[179] However, the statute does not dictate a "default approval" if the applicable periods are violated.[180] The court in *Smyles* confirmed that the failure of a board to comply with those time limits does not mandate the invalidation of a decision.[181] Instead, the appropriate remedy for a board's failure to act in a timely manner is a special proceeding to compel a board to render a decision on an application.[182]

174. *Id.* at 29.

175. *Serota Smithtown LLC*, No. 12-38197, 2014 N.Y. Slip Op. 50513(U), at 29-30.

176. Because the board had denied the special permit application, the zoning board of appeals also had denied numerous variances sought as being moot and had made no findings with regard thereto. *Id.* at 30.

177. *Id.*

178. Smyles v. Bd. of Trs. of Mineola, 120 A.D.3d 822, 824, 992 N.Y.S.2d 83, 85 (2d Dep't 2014).

179. N.Y. VILLAGE LAW § 7-725-b(6) (McKinney 2014); N.Y. TOWN LAW § 274-b(6) (McKinney 2014).

180. Troy Sand & Gravel Co., Inc. v. Town of Nassau, 89 A.D.3d 1178, 1180, 932 N.Y.S.2d 564, 566-67 (3d Dep't 2011) (citing Kabinoff v. Vill. of Harriman Planning Bd., 147 A.D.2d 563, 563-64, 537 N.Y.S.2d 856, 857 (2d Dep't 1989)), *leave dismissed*, 18 N.Y.3d 920, 964 N.E.2d 1022, 941 N.Y.S.2d 554 (2012); *see generally Smyles*, 120 A.D.3d at 824, 992 N.Y.S.2d at 85.

181. *Smyles*, 120 A.D.3d at 824, 992 N.Y.S.2d at 85 (citing Frank v. Zoning Bd. of Yorktown, 82 A.D.3d 764, 765, 917 N.Y.S.2d 697, 699 (2d Dep't 2011)).

182. *See id.* at 824, 992 N.Y.S.2d at 85-86 (citing *Troy Sand & Gravel Co., Inc.*, 89

B. Rehearing of Decisions

The propriety of a decision of a zoning board of appeals to rehear and revoke a previously granted special permit on its on motion was considered in *Green 2009, Inc. v. Weiss*.[183] Town Law section 267-a(12) and Village Law section 7-712-a(12) provide that a zoning board of appeals may, by unanimous vote of "all members of the board then present," hold a rehearing to review any order, decision, or determination of the board.[184] The statute further authorizes a zoning board of appeals to "reverse, modify or annul its original order, decision or determination upon the unanimous vote of all members then present, provided the board finds that the rights vested in persons acting in good faith in reliance upon the reheard order, decision or determination will not be prejudiced thereby."[185] In *Green 2009*, the Town amended its zoning law to provide that the approval of any cabaret use shall be restricted to the specific approved cabaret use and that the provision would apply to any cabaret use previously or subsequently approved by the zoning board of appeals.[186] The zoning board of appeals voted to rehear a cabaret special permit that previously had been granted to the petitioner in 1969.[187]

The court concluded that the zoning board of appeals did not inappropriately exercise its discretion when it reopened and reheard the petitioner's application for a special permit after having originally granted it.[188] The court rejected the claim that the rehearing was improper because the petitioner had relied on the approval to its detriment and had spent funds remodeling and altering the premises for the approved use.[189] However, in accordance with the dictates of Town Law section 267-a(12) and Village Law section 7-712-a(12), the zoning board of appeals explicitly determined that the petitioner had not relied on the previously approved special permit in good faith.[190] Instead, the petitioner intentionally deceived the zoning board of appeals regarding the anticipated use of the site at the original hearing on the application.[191]

A.D.3d at 1180, 932 N.Y.S.2d at 567).

183. *See generally* 114 A.D.3d 788, 980 N.Y.S.2d 510 (2d Dep't 2014), *leave denied*, 23 N.Y.3d 903, 11 N.E.3d 204, 988 N.Y.S.2d 130 (2014).

184. N.Y. TOWN LAW § 267-a(12) (McKinney 2014); N.Y. VILLAGE LAW § 7-712-a(12) (McKinney 2014).

185. N.Y. TOWN LAW § 267-a(12); N.Y. VILLAGE LAW § 7-712-a(12).

186. *Green 2009, Inc.*, 114 A.D.3d at 788, 980 N.Y.S.2d at 511.

187. *Id.* at 788, 980 N.Y.S.2d at 511-12.

188. *Id.* at 789, 980 N.Y.S.2d at 512.

189. *Id.*

190. *Id.*

191. *Green 2009, Inc.*, 114 A.D.3d at 789, 980 N.Y.S.2d at 512.

The zoning board of appeals' findings with respect to the petitioner's lack of honesty and good faith was a decision regarding credibility, and issues of credibility are exclusively within the province of the zoning board of appeals to determine.[192] Further, in addition to the objections raised by the public, evidence also was provided which substantiated that approval of the special permit would have a detrimental impact on neighboring properties.[193]

C. Durational Limitations

A board approving a special permit application generally is considered to possess the authority to impose durational limits within which period a building permit must be obtained or substantial construction undertaken.[194] In addition, zoning laws often provide that an approval is deemed void by operation of law if a building permit is not obtained or substantial construction undertaken within a specified period of time.[195] In entertaining an application for an extension of such a durational limit, a board may be compelled to adhere to its previous approval of an application absent a material change in the relevant circumstances.[196] However, when appropriate, a board may reassess an application after an approval has lapsed in order to determine if changed circumstances necessitate a different result or the imposition of further conditions.[197]

The court dismissed a challenge to the denial of a request for a second one-year extension of a special use permit and site plan approval previously granted for a proposed wind farm in *Allegany Wind LLC v.*

192. *Id.* at 789-90, 980 N.Y.S.2d at 512-13 (citing Jones v. Zoning Bd. of Appeals of Oneonta, 90 A.D.3d 1280, 1282, 934 N.Y.S.2d 599, 602 (3d Dep't 2011)).

193. *Id.* at 790, 980 N.Y.S.2d at 513 (citing Retail Prop. Trust v. Bd. of Zoning Appeals of Hempstead, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 730-31, 746 N.Y.S.2d 662, 666 (2002); Brick Hill Constr. Corp. v. Zoning Bd. Of Appeals of Somers, 74 A.D.2d 810, 811, 425 N.Y.S.2d 516, 518 (2d Dep't 1980), *aff'd*, 53 N.Y.2d 621, 420 N.E.2d 968, 438 N.Y.S.2d 776 (1981)).

194. *See generally* Dil-Hill Realty Corp. v. Schultz, 53 A.D.2d 263, 385 N.Y.S.2d 324 (2d Dep't 1976); *but cf.* Scott v. Zoning Bd. Of Appeals of Salina, 88 A.D.2d 767, 451 N.Y.S.2d 499 (4th Dep't 1982); Garcia v. Holze, 94 A.D.2d 759, 462 N.Y.S.2d 700 (2d Dep't 1983); SV Space Dev. Corp. v. Town of Babylon Zoning Bd. Of Appeals, 256 A.D.2d 471, 682 N.Y.S.2d 95 (2d Dep't 1998).

195. *See, e.g.*, *Dil-Hill Realty Corp.*, 53 A.D.3d at 266, 385 N.Y.S.2d at 327.

196. *See, e.g.*, Am. Red Cross, Tompkins Cnty. Chapter v. Bd. of Zoning Appeals of Ithaca, 161 A.D.2d 878, 879, 555 N.Y.S.2d 923, 924 (3d Dep't 1990) (citing Jensen v. Zoning Bd. of Appeals of Old Westbury, 130 A.D.2d 549, 550, 515 N.Y.S.2d 283, 284 (2d Dep't 1987) ("Absent such material changes, respondent is bound to its earlier decision . . . ."), *leave denied*, 70 N.Y.2d 611, 518 N.E.2d 6, 523 N.Y.S.2d 495 (1987).

197. *See, e.g.*, Meilak v. Town of Coeymans, 225 A.D.2d 972, 639 N.Y.S.2d 547 (3d Dep't 1996).

Planning Board of Allegany.[198] Generally, where a party seeks an extension of a special permit, the applicant "must be afforded an opportunity to show that circumstances have not changed, and a denial of extension will only be sustained if proof of such circumstances is lacking."[199] Nevertheless, "[a] board has substantial discretion in dealing with requests for an extension of a durational limitation."[200] However, as with any land use determination, a board may not "base its determination on 'generalized community objections.'"[201]

The initial approval in *Allegany Wind* provided that it would expire if construction had not commenced within a year of the approval.[202] The approval subsequently had been extended on June 11, 2012, until the earlier of one year, or ninety days after the conclusion of a lawsuit commenced against the Town by a citizens' group.[203] The petitioner informed the Town on August 3, 2012, that it was considering use of alternate turbine models for the project and thereafter requested a second extension of the special use permit, which the planning board denied on October 15, 2012.[204]

The planning board's refusal to the approval a second time was not arbitrary or capricious because there had been a material change in circumstances since the special permit had been granted.[205] The petitioner had contemplated use of a particular type of turbine when the special use permit was granted, but proposed using alternate turbine models when it requested its second extension.[206] Moreover, the petitioner's counsel had acknowledged that a change in turbine models would constitute a change in circumstances sufficient to justify reconsideration of the approval, and its consultant had opined that the alternate turbines would result in noncompliance with the Town's noise setback regulations.[207]

The court also rebuffed the claim that the cessation date of the special use permit was tolled during the pendency of a lawsuit

198. 115 A.D.3d 1268, 1268, 982 N.Y.S.2d 278, 279 (4th Dep't 2014).

199. *Id.* (quoting 2 PATRICK E. SALKIN, N.Y. ZONING LAW & PRACTICE § 29:34 (2014)).

200. *Id.* (alteration in original) (quoting Terry Rice, *Zoning Law, 2005-06 Survey of New York Law*, 57 SYRACUSE L. REV. 1455, 1470 (2007)).

201. *Id.* at 1268, 982 N.Y.S.2d at 279-80 (quoting Metro Enviro Transfer, LLC v. Vill. of Croton-on-Hudson, 5 N.Y.3d 236, 240, 833 N.E.2d 1210, 1212, 800 N.Y.S.2d 535, 537 (2005)) (citing Constantino v. Moline, 4 A.D.3d 820, 821, 771 N.Y.S.2d 427, 427 (4th Dep't 2004)).

202. *Id.* at 1268, 982 N.Y.S.2d at 280.

203. *Allegany Wind LLC*, 115 A.D.3d at 1268-69, 982 N.Y.S.2d at 280.

204. *Id.* at 1269, 982 N.Y.S.2d at 280.

205. *Id.*

206. *Id.*

207. *Id.*

challenging the approval.[208] "Although several states have recognized an equitable doctrine that would allow for the tolling of the time period[,] . . . New York has not done so and, in any event, this case does not warrant the application of that equitable doctrine."[209] The record confirmed that the lawsuit was not the principal reason for the petitioner's failure to proceed with the project in a timely manner.[210] Instead, construction had not commenced because the petitioner was waiting to find out whether Congress would extend the Production Tax Credit for wind energy.[211] In addition, the petitioner's actions relating to the challenge to the approval did not support an equitable basis to toll the time period for the special use permit during the pendency of the proceeding.[212] The proceeding had been dismissed approximately six weeks after it had been commenced.[213] Although a notice of appeal was served, the appeal was not perfected within sixty days as required by the court rules and was subject to dismissal.[214] However, the petitioner did not move to dismiss the appeal.[215] Further, when the Town and petitioner were advised that the appeal would not be pursued, the petitioner's attorney declined to sign a stipulation discontinuing the action.[216] When the Town subsequently moved to dismiss the appeal, the petitioner threatened the Town with litigation if it did not withdraw the motion.[217] After the Town had withdrawn its motion, a citizens' group moved to dismiss its own appeal, but petitioner also opposed that motion despite the fact that the petitioner was a respondent on the appeal and had not cross-appealed.[218] Consequently, the court concluded that petitioner had engaged in continual efforts to delay dismissal of the appeal.[219]

208. *Allegany Wind LLC*, 115 A.D.3d at 1269, 982 N.Y.S.2d at 280.
209. *Id.* (citing 3 RATHKOPF, ZONING AND PLANNING § 58:24 (4th ed. 2011)).
210. *Id.*
211. *Id.* at 1269-70, 982 N.Y.S.2d at 280.
212. *Id.* at 1270, 982 N.Y.S.2d at 280.
213. *Allegany Wind LLC*, 115 A.D.3d at 1270, 982 N.Y.S.2d at 280.
214. *Id.* at 1270, 982 N.Y.S.2d at 280-81.
215. *Id.* at 1270, 982 N.Y.S.2d at 281.
216. *Id.*
217. *Id.*
218. *Allegany Wind LLC*, 115 A.D.3d at 1270, 982 N.Y.S.2d at 281.
219. *Id.*

VI. NECESSARY PARTIES

An applicant or property owner who has received a land use permit or approval must be made a party to a proceeding or action challenging the permit or approval.[220] That tenet and the proper analysis were reiterated in *Feder v. Town of Islip Zoning Board of Appeals*.[221]

A proceeding was commenced in *Feder* challenging the approval of area variances.[222] Although the property owners/applicants who had received the variances were named as respondents, a motion to dismiss them from the proceeding was granted because of defective service.[223] The building department issued a certificate of compliance for the authorized improvements subsequent to the institution of the proceeding, and the petitioners moved by order to show cause to revoke the certificate of compliance.[224] The appellate division reversed the supreme court's instruction that the certificate of compliance be rescinded.[225]

A party whose interest may be deleteriously affected by a potential judgment must be made a party to a New York Civil Practice Law and Rules ("CPLR") Article 78 proceeding.[226] As a result, an applicant who has obtained a variance is a necessary party in any proceeding challenging the variance.[227] The petitioners in *Feder* conceded that the applicant/property owners were necessary parties, but asserted that after assessing the considerations enumerated in CPLR section 1001(b), the supreme court properly allowed the proceeding to proceed in their absence.[228]

A court is authorized to excuse the failure to join a necessary party and allow an action to proceed if the five factors related in CPLR section 1001(b) are considered:

220. *See* Ferrando v. N.Y.C. Bd. of Stands. & Appeals, 12 A.D.3d 287, 288, 785 N.Y.S.2d 62, 63 (1st Dep't 2004); Red Hook/Gowanus Chamber of Commerce v. N.Y.C. Bd. of Standards & Appeals, 18 A.D.3d 558, 559, 795 N.Y.S.2d 298, 299 (2d Dep't 2005); Wittenberg Sportsmen's Club, Inc. v. Town of Woodstock Planning Bd., 16 A.D.3d 991, 992, 792 N.Y.S.2d 661, 663 (3d Dep't 2005).

221. 114 A.D.3d 782, 980 N.Y.S.2d 537 (2d Dep't 2014).

222. *Id.* at 784, 980 N.Y.S.2d at 539.

223. *Id.*

224. *Id.*

225. *Id.* at 786, 980 N.Y.S.2d at 540.

226. *Feder*, 114 A.D.3d at 784, 980 N.Y.S.2d at 539 (citing N.Y. C.P.L.R. 1001(a) (McKinney 2014); Karmel v. White Plains Common Council, 284 A.D.2d 464, 465, 726 N.Y.S.2d 692, 693 (2d Dep't 2001)).

227. *Id.* (citing Ferruggia v. Zoning Bd. of Appeals of Warwick, 5 A.D.3d 682, 774 N.Y.S.2d 760 (2d Dep't 2004); Long Island Pine Barrens Soc'y v. Town of Islip, 286 A.D.2d 683, 729 N.Y.S.2d 907 (2d Dep't 2001), *leave denied*, 97 N.Y.2d 606, 764 N.E.2d 394, 738 N.Y.S.2d 290 (2001); *Karmel*, 284 A.D.2d at 464, 726 N.Y.S.2d at 692).

228. *Id.* at 785, 980 N.Y.S.2d at 539 (citing N.Y. C.P.L.R. 1001(b)).

> (1) whether the petitioner has another remedy if the action is dismissed for nonjoinder, (2) the prejudice that may accrue from nonjoinder to the respondent or to the nonjoined party, (3) whether and by whom prejudice might have been avoided or may in the future be avoided, (4) the feasibility of a protective provision, and (5) whether an effective judgment may be rendered in the absence of the nonjoined party.[229]

The second through fifth factors weighed in favor of not allowing the proceeding to continue in the applicants' absence.[230] With respect to the second factor, the property owners would be subjected to substantial prejudice as a result of the proceeding having continued in their absence.[231] Although the other respondents had moved to dismiss the proceeding and possessed mutual interests, the applicant had interests dissimilar to those of the other respondents.[232] As a result, there was no certitude that the other respondents would satisfactorily protect their interests.[233] With respect to the third consideration, the petitioners easily could have averted the prejudice to the property owners by correctly serving them.[234] Although the property owners could have evaded any prejudice by voluntarily acceding to the court's jurisdiction, that factor was eclipsed by the petitioners' failure to articulate a sensible excuse for their failure to properly serve them.[235] With respect to the fourth factor, a protective provision was not feasible because invalidation of the variances would directly affect the property owners' interest in the use of their property.[236] Lastly, the fifth factor also weighed against proceeding in their absence because it was doubtful that an effective judgment could be rendered in their absence.[237]

Applying the factors enumerated in CPLR section 1001, the property owners were indispensable parties.[238] As a result, the supreme court should have denied that portion of the motion to compel the Building Commissioner to revoke the certificate of compliance, denied those branches of the petition which sought to annul the decision approving the

229. *Id.* at 785, 980 N.Y.S.2d at 539-40 (citing Red Hook/Gowanus Chamber of Commerce v. N.Y.C. Bd. of Standards & Appeals, 49 A.D.3d 749, 853 N.Y.S.2d 644 (2d Dep't 2008)).

230. *Id.* at 785, 980 N.Y.S.2d at 540.

231. *Feder*, 114 A.D.3d at 785, 930 N.Y.S.2d at 540.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Feder*, 114 A.D.3d at 785, 980 N.Y.S.2d at 540.

237. *Id.* at 785-86, 980 N.Y.S.2d at 540.

238. *Id.* at 786, 980 N.Y.S.2d at 540 (citing N.Y. C.P.L.R. 1001(b)).

area variances and dismissed those portions of the proceeding.[239]

Similarly, the filing of an amended petition naming initially-omitted necessary parties did not relate back to the time of the filing of the initial petition for statute of limitation purposes and resulted in dismissal of an action challenging a zoning amendment in *Ayuda Re Funding, LLC v. Town of Liberty*.[240] The original respondents moved to dismiss the petition on the ground that the petitioners had failed to name as necessary parties the owners of the parcels affected by the zoning amendment.[241] The supreme court agreed and directed the petitioners to file and serve an amended petition naming such property owners as respondents.[242] However, by the time the amended petition was filed, the statute of limitations had expired.[243] The supreme court subsequently dismissed the petition against the later-added respondents on statute of limitation grounds and, as a result, dismissed the balance of the petition against the original respondents as a consequence to petitioners' failure to timely join necessary parties.[244]

In affirming the dismissal, the appellate division observed that because the statute of limitations had expired prior to the time the later-added respondents were joined, dismissal of the proceeding against them was justified unless they could demonstrate applicability of the relation back doctrine.[245] The doctrine requires a demonstration:

> (1) that the claims arose out of the same occurrence, (2) that the later-added respondents were united in interest with the original respondents, and (3) that the later-added respondents knew or should have known that, but for a mistake by petitioners as to the identity of the proper parties, the proceeding would have been brought against them as well.[246]

The petitioners failed to satisfy the second and third elements of the doctrine.[247] Unity of interest is established where "the interest of the

239. *Id.*

240. 121 A.D.3d 1474, 1476, 996 N.Y.S.2d 379, 381 (3d Dep't 2014).

241. *Id.* at 1474-75, 996 N.Y.S.2d at 380.

242. *Id.* at 1475, 996 N.Y.S.2d at 380.

243. *Id.*

244. *Id.*

245. *Ayuda Re Funding, LLC*, 121 A.D.3d at 1475, 996 N.Y.S.2d at 381 (citing N.Y. C.P.L.R. 203(b) (McKinney 2014); Buran v. Coupal, 87 N.Y.2d 173, 177, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995)).

246. *Id.* at 1475, 996 N.Y.S.2d at 380-81 (citing *Buran*, 87 N.Y.2d at 178, 661 N.E.2d at 981, 638 N.Y.S.2d at 408; Mongardi v. BJ's Wholesale Club, Inc., 45 A.D.3d 1149, 1150, 846 N.Y.S.2d 441, 442 (3d Dep't 2007); De Sanna v. Rockefeller Ctr., Inc., 9 A.D.3d 596, 597-98, 780 N.Y.S.2d 651, 652-53 (3d Dep't 2004)).

247. *Id.* at 1475, 996 N.Y.S.2d at 381.

parties in the subject-matter is such that they [will] stand or fall together and that judgment against one will similarly affect the other."[248] The original respondents in *Auyda Re Funding* were the Town that adopted the challenged zoning amendment and the entities that sought the zoning amendment.[249] However, the later-added respondents, the owners of the property affected by the zoning changes, did not have the same interests in the enactment as the original respondents.[250] Moreover, because petitioners were aware of the existence of those property owners but failed to understand that they required to be named as respondents, the failure could not be excused as viewed as a mistake as to the identity of the proper parties.[251]

Lastly, because the later-added respondents raised a legitimate statute of limitations defense, the court properly dismissed the petition for failure to join necessary parties without consideration of the discretionary factors set forth in CPLR section 1001(b).[252]

248. *Id.* (alteration in original) (quoting *De Sanna*, 9 A.D.3d at 598, 780 N.Y.S.2d at 653).

249. *Id.*

250. *Ayuda Re Funding, LLC*, 121 A.D.3d at 1475-76, 996 N.Y.S.2d at 381 (citing Red Hook/Gowanus Chamber of Commerce v. N.Y.C. Bd. of Standards & Appeals, 5 N.Y.3d 452, 457, 839 N.E.2d 878, 880, 805 N.Y.S.2d 525, 527 (2005); Emmett v. Town of Edmeston, 2 N.Y.3d 817, 818, 814 N.E.2d 430, 431, 781 N.Y.S.2d 260, 261 (2004); Chalian v. Malone, 307 A.D.2d 619, 621, 762 N.Y.S.2d 707, 709 (3d Dep't 2003)).

251. *Id.* at 1476, 996 N.Y.S.2d at 381 (citing Windy Ridge Farm v. Assessor of Shandaken, 45 A.D.3d 1099, 1100, 845 N.Y.S.2d 861, 862 (3d Dep't 2007), *aff'd*, 11 N.Y.3d 725, 894 N.E.2d 1183, 864 N.Y.S.2d 794 (2008); Buran v. Coupal, 87 N.Y.2d 173, 181, 661 N.E.2d 978, 983, 638 N.Y.S.2d 405, 410 (1995); Mongardi v. BJ's Wholesale Club, Inc., 45 A.D.3d 1149, 1151, 846 N.Y.S.2d 441, 443 (3d Dep't 2007)).

252. *Id.* (citing N.Y. C.P.L.R. 1001(b) (McKinney 2014); *Windy Ridge Farm*, 11 N.Y.3d at 727, 894 N.E.2d at 1184-85, 864 N.Y.S.2d at 795-96; Alexy v. Otte, 58 A.D.3d 967, 967-68, 871 N.Y.S.2d 741, 743 (3d Dep't 2009); Romeo v. N.Y. State Dep't of Educ., 41 A.D.3d 1102, 1104-05, 839 N.Y.S.2d 297, 299 (3d Dep't 2007)).