

ZONING & LAND USE

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I. ZONING BOARD OF APPEALS

A. *Durational Conditions*

Despite the precept that the proof necessary to demonstrate satisfaction of the criteria for a variance relates to the land and not to the owner, zoning laws or a condition of a variance may require that a variance expires, for example, if a building permit is not acquired or construction pursuant to the variance is not begun within an indicated period of time.¹ Durational constraints are permissible if associated with a legitimate zoning purpose related to the property itself and may not be conditioned upon continuing ownership by an applicant.²

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1. See *Kennedy v. Zoning Bd. of Appeals of Patchogue*, 57 A.D.3d 546, 546, 868 N.Y.S.2d 309, 310 (2d Dep't 2008); *Holthaus v. Zoning Bd. of Appeals of Kent*, 209 A.D.2d 698, 699, 619 N.Y.S.2d 160, 161 (2d Dep't 1994).

2. See *Holthaus*, 209 A.D.2d at 699, 619 N.Y.S.2d at 161.

In *Waterways Development Corp. v. Town of Brookhaven Zoning Board of Appeals*, the petitioner's predecessor had obtained variances to allow the construction of three buildings having three stories and not exceeding thirty-five feet in height, instead of the maximum permissible of two and one-half stories not exceeding thirty-five feet, in a retirement community with more than 500 dwelling units.³ The variances were limited in duration to one year.⁴ Subsequently, a one-year extension of the variances was approved because, although construction of several buildings had begun, the project was anticipated to take six years to complete and a further one-year extension subsequently was granted.⁵ The Zoning Board of Appeals thereafter granted a further extension of the variances "for life of job" because of the scale of the development.⁶ After having completed almost half of the development, the petitioner's predecessor went bankrupt and petitioner purchased the property.⁷

The petitioner completed the second phase of construction and improvements, leaving only the midrise buildings consisting of 145 combined units to complete.⁸ The petitioner's application for building permits for the midrise buildings was denied because the plans did not comply with the two-and-one-half story restriction.⁹ Pursuant to the petitioner's appeal, the Zoning Board of Appeals rejected the assertion that the 1986 variance was still valid based on the estimate of the original applicant who had predicted a completion time of six years.¹⁰ The board also concluded that it would be unreasonable to disregard intervening changes in the law and allow completion of the project after nearly twenty-five years.¹¹ The Board further found that even if the initial variance could be valid after a twenty-five-year interval, bankruptcy, abandonment, and numerous transfers of ownership, it would, in any event, be void as of August 31, 2005, pursuant to a subsequently adopted amendment to the zoning law.¹² The supreme court granted the relief requested in the petitioner's Article 78 proceeding, finding that the determination that the 1986 variances were invalid was arbitrary and capricious and remitted the matter for the

3. 126 A.D.3d 708, 709, 5 N.Y.S.3d 450, 451 (2d Dep't 2015).

4. *Id.*

5. *Id.* at 709, 5 N.Y.S.3d at 451.

6. *Id.* at 709, 5 N.Y.S.3d at 452.

7. *See id.*

8. *Waterways Dev. Corp.*, 126 A.D.3d at 710, 5 N.Y.S.3d at 452.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

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issuance of building permits for the midrise buildings.¹³

The appellate division affirmed the decision.¹⁴ The 1986 variance explicitly stated “that the variances were ‘approved for life of job.’”¹⁵ By relying on estimates of the construction time-table made at the 1986 public hearing, the Zoning Board of Appeals sought to inappropriately impose a condition that was not stated in the variance approval.¹⁶ Moreover, the Board’s reliance on what it believed the Zoning Board of Appeals would have done in 1986 had they known about the subsequent delays in construction and changes in the law constituted impermissible speculation.¹⁷

The conclusion reached by the Zoning Board of Appeals also violated the petitioner’s vested rights to complete construction of the midrise buildings.¹⁸ Vested rights attach when an owner completes “substantial construction and incurs substantial expense, in good-faith reliance on a permit.”¹⁹ An owner may acquire vested rights where a site is but part of a single project, substantial construction had been commenced, and substantial expenditures have been made in connection with other phases of the integrated project which also benefit or bear some connection to the affected site, such as infrastructure for the entire project.²⁰ “Where vested rights accrue, a successor-in-interest succeeds to the vested rights.”²¹ The court concluded that the development was approved as an integrated project and that the petitioner “and its predecessors [had] completed substantial construction of project-wide infrastructure to the benefit of the [envisioned midrise buildings] and incurred substantial expenditures in good-faith reliance on the continu[ed] validity of the variances.”²² In addition, the petitioner was not divested of its vested rights through abandonment or recoupment.²³

The Zoning Board of Appeals’s application of the 2003 zoning law amendment to the 1986 variances also was arbitrary and capricious.²⁴ The provision provided that “unexpired and valid variances with no date

13. *Waterways Dev. Corp.*, 126 A.D.3d at 710–11, 5 N.Y.S.3d at 452–53.

14. *See id.* at 711, 5 N.Y.S.3d at 453.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Waterways Dev. Corp.*, 126 A.D.3d at 711, 5 N.Y.S.3d at 453.

19. *Id.*

20. *Id.* at 711–12, 5 N.Y.S.3d at 453.

21. *Id.* at 712, 5 N.Y.S.3d at 453.

22. *Id.* at 712, 5 N.Y.S.3d at 453–54.

23. *Waterways Dev. Corp.*, 126 A.D.3d at 712, 5 N.Y.S.3d at 454.

24. *See id.*

of expiration were to become null and void on August 31, 2005.”²⁵ In interpreting an ambiguous provision, a court must be guided by the principle that a zoning law “must be strictly construed in favor of the property owner and against the municipality which adopted” it and “any ambiguities must be resolved in favor of the property owner.”²⁶ Because the 1986 variances were granted for the life of the project, the variances were not affected by the amended code provision.²⁷ “In any event, [because of the petitioner’s] vested rights . . . and the town’s dilatory tactics,” the application of the 2003 amendment to the previously adopted variances also was arbitrary and capricious.²⁸

B. Filing of Decision

Section 267-a(9) of the New York Town Law and section 7-712-a(9) of the New York Village Law provide that a decision of a zoning board of appeals shall be filed in the office of the town or village clerk within five business days after the day the decision is rendered and a copy mailed to the applicant.²⁹ In *Stone Industries, Inc. v. Zoning Board of Appeals of Ramapo*, it was determined that the denial of an application for an interpretation that a particular use of the property was permissible should not be annulled because the Board’s written decision was not filed “in the office of the town clerk within five business days after it was rendered.”³⁰ Section 267-a(9) of the New York Town Law, like section 7-712-a(9) of the New York Village Law, “does not specify a sanction for the failure to comply with the five-day filing requirement.”³¹ Although the Board did not provide “an explanation for its delay, the petitioner [did not] demonstrate that it was prejudiced by the late filing.”³²

C. Timeliness of Appeal

Section 267-a(5)(b) of the New York Town Law and section 7-712-a(5)(b) of the New York Village Law permit the filing of an appeal to a zoning board of appeals within sixty days after the filing of an order, requirement, decision, interpretation, or determination by which

25. *Id.*

26. *Id.*

27. *Id.* at 712–13, 5 N.Y.S.3d at 454.

28. *See Waterways Dev. Corp.*, 126 A.D.3d at 713, 5 N.Y.S.3d at 454.

29. N.Y. TOWN LAW § 267-a(9) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-a(9) (McKinney 2011).

30. 128 A.D.3d 973, 975, 13 N.Y.S.3d 92, 95 (2d Dep’t 2015).

31. *Id.*

32. *Id.*

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one claims to be aggrieved.³³ However, a neighboring property owner may not be aware of the issuance of a building permit or similar determination issued to a neighbor within sixty days if no discernible action is taken to implement the permit within the statutory period. As a result, the decisions generally consider an appeal to be timely if filed within sixty days after an aggrieved party received notice of, or should have been aware of, the issuance of a determination.³⁴ However, in *Peehl v. Village of Cold Spring*, a 2012 application for the revocation of a building permit issued for a neighbor's shed was found to be untimely because the complaining neighbors had constructive notice of the issuance of the building permit in 2009.³⁵

D. Area Variances

In determining whether an area variance should be granted, section 267-b(3)(b) of the Town Law and section 7-712-b(3)(b) of the Village Law mandate that a zoning board of appeals must weigh the benefit to the applicant if the variance is granted, as compared to the detriment to the health, safety, and welfare of the neighborhood or community if relief is granted.³⁶ In undertaking such analysis, a board must consider:

- (1) 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;
- (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (3) whether the requested area variance is substantial;
- (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (5) whether the alleged difficulty was self-created³⁷

Although a zoning board of appeals is required to substantiate that it has undertaken the obligatory weighing analysis, the appellate division reiterated in *Patrick v. Zoning Board of Appeals of Russell Gardens*, that it is not required to explain its decision with supporting

33. N.Y. TOWN LAW § 267-a(5)(b) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-a(5)(b) (McKinney 2011).

34. See *Missere v. Gross*, 826 F.Supp. 2d 542, 564 (S.D.N.Y. 2012); *Clarke v. Town of Sand Lake Zoning Bd. of Appeals*, 52 A.D.3d 997, 999, 860 N.Y.S.2d 646, 648 (3d Dep't 2008); *Iacone v. Bldg. Dep't of Oyster Bay Cove Vill.*, 32 A.D.3d 1026, 1028, 821 N.Y.S.2d 654, 656 (2d Dep't 2006); *Farina v. Zoning Bd. of Appeals of New Rochelle*, 294 A.D.2d 499, 500, 742 N.Y.S.2d 359, 361 (2d Dep't 2002).

35. 129 A.D.3d 844, 845, 12 N.Y.S.3d 139, 140 (2d Dep't 2015).

36. N.Y. TOWN LAW § 267-b(3)(b) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-b(3)(b) (McKinney 2011).

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

substantiation for each of the five statutory considerations, as long as its determination balancing the relevant considerations is evident and rational.³⁸ In addition, no individual statutory factor is conclusive, but each consideration is only one element in the broader balancing test.³⁹

Further, a zoning board of appeals may not premise a decision on community opposition or pressure.⁴⁰ The denial of area variances for additional parking for a large cooperative housing development was vacated in *Marina's Edge Owner's Corp. v. City of New Rochelle Zoning Board of Appeals* because it was based on general opposition of the community.⁴¹ The cooperative owned an on-site parking lot with 160 spaces for the residents.⁴² It also owned an adjoining unimproved lot, located in a two-family residential zoning district which allowed a maximum of four off-street parking spaces, on which it is sought to construct a parking lot with twenty-eight parking spaces.⁴³

A determination will not be considered to be rational and will be invalidated if it is solely based “on subjective considerations, such as general community opposition, [or if it] lacks an objective factual basis.”⁴⁴ Additionally, “[c]onclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth ‘how’ and ‘in what manner’ the granting of a variance would be improper.”⁴⁵ Although the record supported the conclusion that the variance sought was substantial, the decision to reject the variance was conclusory and lacked an objective factual basis with respect to the other germane considerations.⁴⁶ The record was devoid of evidence to substantiate “that the health, safety, and welfare of the neighborhood or community would be [deleteriously impacted] by the granting of the . . . variance.”⁴⁷ To the contrary, the Board was only provided with “the general community opposition of neighboring

38. 130 A.D.3d 741, 741, 15 N.Y.S.3d 50, 51 (2d Dep’t 2015); see *L&M Graziore v. City of Glen Cove Zoning Bd. of Appeals*, 127 A.D.3d 863, 864, 7 N.Y.S.3d 344, 346 (2d Dep’t 2015).

39. *John Hatgis, L.L.C. v. DeChance*, 126 A.D.3d 702, 703, 5 N.Y.S.3d 236, 238 (2d Dep’t 2015).

40. See *DAG Laundry Corp. v. Bd. of Zoning Appeals of North Hempstead*, 98 A.D.3d 740, 741, 950 N.Y.S.2d 389, 389–90 (2d Dep’t 2012).

41. 129 A.D.3d 841, 843, 11 N.Y.S.3d 232, 234 (2d Dep’t 2015).

42. See *id.* at 842, 11 N.Y.S.3d at 233.

43. *Id.*

44. *Id.*

45. *Id.* (quoting *Gabrielle Realty Corp. v. Bd. of Zoning Appeals of Freeport*, 24 A.D.3d 550, 550, 808 N.Y.S.2d 258, 259 (2d Dep’t 2005)).

46. *Marina's Edge Owner's Corp.*, 129 A.D.3d at 843, 11 N.Y.S.3d at 234.

47. *Id.*

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property owners [who] expressed their subjective opinions as to the [adverse] aesthetics of a parking lot.”⁴⁸ The Zoning Board of Appeals did not furnish an objective basis to conclude that the applicant possessed “a feasible alternative to the requested variance” and the record was devoid of evidence to corroborate that the difficulty was self-created.⁴⁹ Given the deteriorated condition of the property, “the legality of using the lot as a small parking lot, and the fact that the lot [was] fenced so as to block ground-level water views,” the Board failed to justify how enlarging the number of parking spaces would adversely alter the character of the neighborhood.⁵⁰

E. Use Variances

Section 267-b(2)(b) of the New York Town Law and section 7-712-b(2)(b) of the New York Village Law mandate that an applicant for a use variance must establish that for each and every use permitted by the applicable zoning law for the district in which the property is located:

- (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
- (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
- (4) that the alleged hardship has not been self-created.⁵¹

The arduous demonstration required to establish entitlement to a use variance is examined in *Nemeth v. Village of Hancock Zoning Board of Appeals*.⁵² It had been determined in a prior action that a nonconforming manufacturing operation on the property had been unlawfully expanded by an addition to the facility.⁵³ The owner subsequently obtained a use variance permitting the continued use of the addition for manufacturing.⁵⁴ The appellate division annulled the determination as a result of a challenge by neighbors.⁵⁵

48. *Id.*

49. *Id.*

50. *Id.*

51. N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 2011).

52. 127 A.D.3d 1360, 1360–61, 7 N.Y.S.3d 626, 627 (3d Dep’t 2015).

53. *Id.* at 1361, 7 N.Y.S.3d at 627 (citing *Nemeth v. K-Tooling*, 100 A.D.3d 1271, 1275, 955 N.Y.S.2d 419, 423 (3d Dep’t 2012)).

54. *Id.*

55. *Id.*

Among the prerequisites for establishing entitlement to a use variance, an applicant “bears the burden of demonstrating . . . that the property cannot yield a reasonable return if used for any of the purposes permitted as it is currently zoned.”⁵⁶ In addition, “if a use variance is sought to enlarge a nonconforming use, ‘the applicant must demonstrate that the land cannot yield a reasonable return if used as it then exists *or* for any other use allowed in the zone.’”⁵⁷ An inability to obtain a reasonable return from all permitted uses must be demonstrated by “dollars and cents” proof for each permitted use.⁵⁸ In addition to permissible residential use of the property considered in *Nemeth*, the manufacturing facility was permitted as a nonconforming use.⁵⁹ As a result, the applicant was required to demonstrate that the “property could not yield a reasonable return if used” for any residential use and for the existing nonconforming use as a manufacturing facility without the addition.⁶⁰

“With regard to whether the property could yield a reasonable rate of return if [it was] continued to be used for manufacturing purposes without utilizing the . . . addition [which was] used to house older equipment that had been replaced by more advanced, efficient equipment.”⁶¹ Although the record was ambiguous as to whether that older equipment was used for manufacturing, no financial evidence was provided regarding the profitability, if any, produced by those machines.⁶² The unsubstantiated, conclusory representation that an additional ten to twenty percent of revenue would be required to locate a similarly-sized site to accommodate the older manufacturing equipment and that the applicant would go out of business without the addition, were inadequate to satisfy the requisite “dollars and cents” requirement.⁶³

Moreover, no evidence was provided with respect to the financial ramifications of changing the entire property to residential use.⁶⁴ Although the application was confined to the addition, the appropriate

56. *Id.*

57. *Nemeth*, 127 A.D.3d at 1361, 7 N.Y.S.3d at 628 (quoting *Upper Delaware Ave. Ass’n of Delmar v. Fritts*, 124 A.D.2d 273, 274–75, 508 N.Y.S.2d 73, 74 (3d Dep’t 1986)); see also *Crossroads Recreation, Inc. v. Broz*, 4 N.Y.2d 39, 44, 149 N.E.2d 65, 67, 172 N.Y.S.2d 129, 132 (1958).

58. *Id.* at 1361, 7 N.Y.S.3d at 628.

59. *Id.* at 1362, 7 N.Y.S.3d at 628.

60. *Id.*

61. *Id.*

62. *Nemeth*, 127 A.D.3d at 1362, 7 N.Y.S.3d at 628.

63. *Id.*

64. *Id.* at 1362, 7 N.Y.S.3d at 628–29.

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analysis regarding “an inability to realize a reasonable return may not be segmented to examine less than all of an owner’s property rights.”⁶⁵ Although financial evidence was provided regarding the cost of converting the nonconforming addition to a residential use, it is “with respect to the whole tract that reasonableness of return is to be measured.”⁶⁶

Because the proof “that the land could not yield a reasonable return as it existed as a nonconforming use or for any other use permitted in the zone” was inadequate, the variance should have been denied.⁶⁷ In addition to the well-established principle that an applicant for a use variance must demonstrate an inability to use the property for any use permitted in the zoning district by expert appraisal proof, the decision reiterated two fundamental precepts. First, in addition to providing such proof for all uses permitted by right, a use variance applicant must demonstrate an inability to yield a reasonable return for any permissible nonconforming use for which the property is being used.⁶⁸ Second, the analysis must relate to the entire property, including the financial aspects of portions that have been sold and may not be narrowly segmented to examine only the portion which may suffer from a financial difficulty.⁶⁹

F. Religious Uses

Because religious and educational institutions have been determined by the New York courts to be inherently beneficial to the community they serve, they have been accorded a preferred status which restrains the permissible review authority of local administrative agencies.⁷⁰ Although “[t]here is simply no conclusive presumption that

65. *Id.* at 1363, 7 N.Y.S.3d at 629.

66. *Id.* at 1362–63, 7 N.Y.S.3d at 629 (quoting *N. Westchester Prof'l Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 503–04, 458 N.E.2d 809, 815, 470 N.Y.S.2d 350, 356 (1983)); *see also* *Concerned Residents of New Lebanon v. Zoning Bd. of Appeals of New Lebanon*, 222 A.D.2d 773, 774, 634 N.Y.S.2d 825, 827 (3d Dep't 1995); *Amco Dev. v. Zoning Bd. of Appeals of Perinton*, 185 A.D.2d 637, 638, 586 N.Y.S.2d 50, 51 (4th Dep't 1992); *Citizens for Ghent v. Zoning Bd. of Appeals of Ghent*, 175 A.D.2d 528, 529, 572 N.Y.S.2d 957, 959 (3d Dep't 1991); *Upper Delaware Ave. Assn. of Delmar v. Fritts*, 124 A.D.2d 273, 275, 508 N.Y.S.2d 73, 74 (3d Dep't 1986).

67. *Nemeth*, 127 A.D.3d at 1363, 7 N.Y.S.3d at 629.

68. *Id.* at 1362, 7 N.Y.S.3d at 628.

69. *Id.* at 1362, 7 N.Y.S.3d at 629.

70. *See* *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 593–95, 503 N.E.2d 509, 514–15, 510 N.Y.S.2d 861, 866–67 (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) (citing *State ex rel. Tampa, Fla., Co. of Jehovah's Witnesses, North Unit, Inc. v. City of Tampa*, 48 So. 2d 78, 79 (Fla. 1950); *Bd. of Zoning Appeals of Decatur v. Decatur, Ind. Co. of Jehovah's*

any religious or educational use automatically outweighs its ill effects,” approvals necessary to establish such uses may be denied only if the use is inarguably dangerous or contrary to the public welfare of the community.⁷¹ As a result, municipalities must apply their zoning regulations in a more accommodating manner when dealing with religious and educational uses.⁷²

In *Septimus v. Board of Zoning Appeals for Lawrence, Bais Medrash*, an Orthodox Jewish religious organization, which owned three contiguous lots, had obtained approval to construct and operate a synagogue in December 2005, subject to various conditions and a declaration of restrictive covenants.⁷³ “The [restrictive] covenant prohibited vehicular traffic on Friday nights and Saturdays and . . . precluded use of the premises on weekdays, except for certain Jewish holidays.”⁷⁴ The Zoning Board of Appeals subsequently granted approval in 2015 to demolish “an existing structure on one of the lots, merge that lot with the one containing the synagogue building, and construct a parking lot,” for a minor expansion of the building and vacated the restriction prohibiting operation during the week.⁷⁵ Relief from the restrictive covenant precluding such weekday services was granted, “but only for a one-year trial period, to be re-evaluated after the year had passed.”⁷⁶ Bais Medrash claimed that it was unable to offer weekday religious services because of the restrictive covenant and “that the third of the current three lots had been purchased for the specific purpose of addressing the parking concerns that had been raised at the time the prior determinations had been made”⁷⁷ The expansion of the synagogue building was to accommodate the Torah Ark consisting of a “three foot by ten foot ‘bump out’ of the building.”⁷⁸ Opponents contended “that there had been no material change in circumstances that would justify relief from the restrictive covenants, that it would result in additional and [deleterious] vehicular traffic,” and that the parking lot

Witnesses, 117 N.E.2d 115, 119 (Ind. 1954)).

71. *Bagnardi*, 68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867 (citing *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Vill. of Roslyn Harbor*, 38 N.Y.2d 283, 292, 342 N.E.2d 534, 541, 379 N.Y.S.2d 747, 756, (1975) (Breitel, C. J., concurring)).

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

73. No. 15-006758, 2015 N.Y. Slip Op. 25424, at 1 (Sup. Ct. Nassau Cty. 2015).

74. *Id.*

75. *Id.* at 1–2.

76. *Id.* at 2.

77. *Id.*

78. *Septimus*, 2015 N.Y. Slip Op. 25424, at 1.

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would negatively alter the character of the neighborhood.⁷⁹

The court concluded that the Zoning Board of Appeals “did not grant a variance for construction of the parking lot, nor permission for on-street parking, but rather stated . . . that Bais Medrash could reapply for such a variance after the trial period ended.”⁸⁰ The Zoning Board of Appeals also “conditioned relief . . . on twelve . . . restrictions on the use of the property and [Bais Medrash’s] petitioning the . . . board of trustees for legislation which would prohibit parking on certain surrounding streets during . . . religious services and classes.”⁸¹ “The one-year trial period was to begin on the date Bais Medrash petitioned the . . . board of trustees for the legislation described, and expire automatically after the year passed unless renewed upon further application.”⁸²

The petitioner contended in challenging the condition that:

[L]imited use of the synagogue was the *sine qua non* of the [Zoning Board of Appeals’s] 2005 decision to permit its operation within the surrounding and holly residential neighborhood. Thus, because nothing had changed in the neighborhood and that there had been no showing that Bais Medrash could not operate and serve the religious needs of its congregants during the permitted hours, the [Zoning Board of Appeals’s] decision to lift the restrictions without any finding of a material change was arbitrary and capricious.⁸³

The petitioner also contended that the Zoning Board of Appeals was not authorized to grant conditional and temporary relief.⁸⁴ Lastly, it was alleged that the approval of temporary relief was arbitrary and contrary to law because it was “conditioned on action by another body, *i.e.*, legislation by the Village Board of Trustees.”⁸⁵

The court concluded that although the petitioner possessed the right to challenge the modification which permitted weekday services, she had no basis to challenge the temporary nature of the relief or the conditioning of relief on the application to the board of trustees, finding that the limitation could only adversely affect or be challenged by Bais Medrash.⁸⁶ “In short, she [was] not adversely affected either by the [Zoning Board of Appeals’s] establishment of a condition for the relief

79. *Id.*

80. *Id.* at 2.

81. *Id.*

82. *Id.*

83. *Septimus*, 2015 N.Y. Slip Op. 25424, at 2.

84. *Id.*

85. *Id.*

86. *Id.* at 3.

being granted, nor by so much of the ruling that even if the condition [was] met the relief [would] end in a year.”⁸⁷ Consequently, the petitioner lacked standing to assert such a claim.⁸⁸

Moreover, the zoning law explicitly authorized the Zoning Board of Appeals “to grant temporary and conditional permits of limited duration for nonconforming uses and buildings in undeveloped regions.”⁸⁹ The court opined that the Zoning Board of Appeals had implicitly interpreted the provision to authorize such permits “for *both* ‘nonconforming uses’ *and* ‘buildings in undeveloped regions,’ not just for ‘nonconforming uses and buildings’ in ‘undeveloped regions’ *only*.”⁹⁰ “[W]here an ordinance cannot by its terms comprehensively cover every circumstance to which that ordinance might apply, a municipal board’s interpretation of that ordinance in a given case governs unless unreasonable or irrational.”⁹¹ The court declined to disturb the “clearly implied” interpretation of the zoning law because it was neither unreasonable nor irrational.⁹²

The court also found that there was no authority to support the contention “that a zoning board [of appeals] must find a change in circumstances from the time of an earlier contrary ruling before it can exercise its regulatory powers.”⁹³ To the contrary, “there has been no showing that slavishly adhering to the prior restrictions would have met the balancing test required of the [Zoning Board of Appeals’s], and indeed that would undermine the very purpose of that analysis.”⁹⁴

In addition, as is referred to above, special treatment is required to be provided to “schools and religious entities seeking to expand in residential areas” pursuant to New York law.⁹⁵ Consequently, the Zoning Board of Appeals was required to explore “a compromise that would permit the use without unduly [impacting] the character of the surrounding neighborhood.”⁹⁶ The solution reached, in the opinion of

87. *Id.*

88. *Septimus*, 2015 N.Y. Slip Op. 25424, at 3.

89. *Id.* (quoting VILLAGE OF LAWRENCE, NY, CODE § 6-4.B (2013)).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Septimus*, 2015 N.Y. Slip Op. 25424, at 4.

94. *Id.*

95. *Id.* at 4. (citing *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 594–596, 503 N.E.2d 509, 514–16, 510 N.Y.S.2d 861, 866–68 (1986); *Tabernacle of Victory Pentecostal Church v. Weiss*, 101 A.D.3d 738, 740, 955 N.Y.S.2d 180, 182 (2d Dep’t 2012); *Apostolic Holiness Church v. Zoning Bd. of Appeals of Town of Babylon*, 220 A.D.2d 740, 743, 633 N.Y.S.2d 321, 323 (2d Dep’t 1995)).

96. *Id.*

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the court, was neither “irrational [nor] unsupported by evidence in the record.”⁹⁷ “Indeed, the fact that the prior determination of the [Zoning Board of Appeals’s] prohibited opening the synagogue for weekday services, undisputedly of importance to Orthodox Jewish practitioners, raises the potential application of the federal Religious Land Use and Institutionalized Persons Act of 2000 (‘RLUIPA’) (42 U.S.C. § 2000cc).”⁹⁸ The court found that RLUIPA was applicable because the existing restriction on weekday services constitutes a “substantial burden” on “religious exercise” by a “religious assembly.”⁹⁹ It further concluded that the Zoning Board of Appeals’s determination was “the least restrictive means of [promoting] a compelling governmental interest, [that is,] maintaining the integrity of an established residential neighborhood.”¹⁰⁰

Directing Bais Medrash to apply to the Village Board of Trustees for limited street parking, while allowing it to offer weekday services is thus compliant with the federal statute. Conversely, a flat refusal by the [Zoning Board of Appeals] that would have the effect of prohibiting the synagogue from offering those services would not be.¹⁰¹

It was proposed in *Winterton Properties, L.L.C. v. Town of Mamakating Zoning Board of Appeals* to convert property that had previously been utilized as a day spa into a mikvah, a bath-like structure used in Jewish religious practices.¹⁰² The property was located in a zoning district which permitted “neighborhood places of worship.”¹⁰³ The respondents appealed to the Zoning Board of Appeals the determination of the building inspector that the proposed mikvah constituted a “neighborhood place of worship” as defined by the zoning law.¹⁰⁴ The Zoning Board of Appeals disagreed and determined “that a mikvah did not constitute a neighborhood place of worship.”¹⁰⁵

The evidence before the Zoning Board of Appeals “established that a mikvah is generally housed in a standalone building, [separate] from a synagogue and dedicated solely to religious purposes.”¹⁰⁶ “Immersion in

97. *Id.*

98. *Septimus*, 2015 N.Y. Slip Op. 25424, at 5.

99. *Id.* at 6.

100. *Id.* at 6.

101. *Id.*

102. 132 A.D.3d 1141, 1141, 18 N.Y.S.3d 743, 745 (3d Dep’t 2015).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1142, 18 N.Y.S.3d at 745.

the waters of a mikvah is ‘a basic religious ritual [of Orthodox Jews].’”¹⁰⁷ The term “neighborhood place of worship” was not defined in the zoning law.¹⁰⁸ However, the zoning law provides that “[w]ords not specifically defined shall have their ordinary dictionary meanings.”¹⁰⁹ “‘Neighborhood’ is defined as ‘the immediate vicinity; the area near or next to a specified place.’”¹¹⁰ “‘A ‘place’ is ‘a building, location, etc., set aside for a specific purpose.’”¹¹¹ “‘Worship’ is defined as ‘[a]ny form of religious devotion, ritual, or service showing reverence, esp[ecially] for a divine being or supernatural power.’”¹¹² Although courts defer to a zoning board of appeals’s interpretation of a local zoning law, when, as herein, “the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required.”¹¹³ However, based on those definitions, the court found that a neighborhood place of worship “is a building or location set aside in a certain area for any form of religious devotion, ritual or service showing reverence, especially for a divine being or supernatural power.”¹¹⁴

In finding that the use did not satisfy the definition of “neighborhood place of worship,” the Zoning Board of Appeals imposed a further prerequisite of communal worship.¹¹⁵ However, neither the zoning law nor the dictionary definitions support that additional mandate.¹¹⁶ “In interpreting a zoning law, a zoning board of appeals ‘may not insert conditions or criteria into a zoning ordinance governing allowable uses in a zoned district that are not contained in the statutory language adopted.’”¹¹⁷ Consequently, the record established that “a mikvah comports with the definition of a neighborhood place of

107. *Winterton Properties*, 132 A.D.3d at 1142, 18 N.Y.S.3d at 745 (relying on the explanation of Jacob Schacter, “a rabbi and professor Jewish history”).

108. *Id.*

109. *Id.* (quoting Town of Mamakating, NY, Zoning Code § 199–6(A) (2001)).

110. *Id.* at 1142, 18 N.Y.S.3d at 746 (quoting *Neighborhood*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

111. *Id.* (quoting *Place*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1998)).

112. *Winterton Properties*, 132 A.D.3d at 1142, 18 N.Y.S.3d at 746 (quoting *Worship*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

113. *Id.* at 1142, 18 N.Y.S.3d at 745 (quoting *Albany Basketball & Sports Corp. v. City of Albany*, 116 A.D.3d 1135, 1137, 983 N.Y.S.2d 337, 340 (3d Dep’t 2014)).

114. *Id.* at 1142, 18 N.Y.S.3d at 746.

115. *Id.* at 1142–43, 18 N.Y.S.3d at 746.

116. *Id.* at 1143, 18 N.Y.S.3d at 746.

117. *Winterton Properties*, 132 A.D.3d at 1143, 18 N.Y.S.3d at 746 (quoting *Saratoga Cty. Econ. Opportunity Council, Inc. v. Vill. of Ballston Spa Zoning Bd. of Appeals*, 112 A.D.3d 1035, 1037, 977 N.Y.S.2d 419, 422 (3d Dep’t 2013)).

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worship” and, therefore, constituted a neighborhood place of worship for purposes of the zoning law.¹¹⁸

G. Interpretations

In *Fruchter v. Zoning Board of Appeals of Hurley*, the petitioner owned a two-bedroom, single-family residence which he considered to be his permanent residence.¹¹⁹ He listed the property on the Internet, offering to rent it for terms ranging from one night to a month or an entire season.¹²⁰ He would rent out the entire residence, did not stay there when it was rented, and did not serve or offer food or beverages.¹²¹ After the code enforcement officer issued the petitioner an order to remedy for illegally operating a bed-and-breakfast or hotel, he appealed the order to the Zoning Board of Appeals which determined that the short-term rentals were not permitted absent a special permit.¹²²

“Judicial review of a determination of a zoning board of appeals is generally deferential.”¹²³ Consequently, zoning boards of appeal are conferred reasonable discretion in interpreting a zoning law “where it is difficult or impractical for a legislative body to lay down a rule which is both definitive and all-encompassing.”¹²⁴ However, if, “the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required.”¹²⁵ Further, because “zoning restrictions are in derogation of the common law . . . [they] are strictly construed against the regulating municipality.”¹²⁶

Because the zoning law had not been updated to consider the implications of house sharing or short-term rentals through Internet sites, the activity did not fit within any of the definitions in the zoning law.¹²⁷ Thus, the issues presented were whether the rental aspect of the dwelling “removed the property from the definition of residential one-family dwellings and whether such activity fits under another

118. *Id.*

119. 133 A.D.3d 1174, 1174, 20 N.Y.S.3d 701, 702 (3d Dep’t 2015).

120. *Id.*

121. *Id.*

122. *Id.* at 1174–75, 20 N.Y.S.3d at 702.

123. *Id.* at 1175, 20 N.Y.S.3d at 702.

124. *Fruchter*, 133 A.D.3d at 1175, 20 N.Y.S.3d at 702 (quoting *Frishman v. Schmidt*, 61 N.Y.2d 823, 825, 462 N.E.2d 134, 134, 473 N.Y.S.2d 957, 957 (1984)).

125. *Id.* at 1175, 20 N.Y.S.3d at 702–03 (quoting *Albany Basketball & Sports Corp. v. City of Albany*, 116 A.D.3d 1135, 1137, 983 N.Y.S.2d 337, 340 (3d Dep’t 2014)).

126. *Id.* at 1175, 20 N.Y.S.3d at 703 (quoting *Saratoga Cty. Econ. Opportunity Council, Inc. v. Vill. of Ballston Spa Zoning Bd. of Appeals*, 112 A.D.3d 1035, 1036, 977 N.Y.S.2d 419, 421 (3d Dep’t 2013)).

127. *Id.*

definition” of the zoning law.¹²⁸

The Zoning Board of Appeals determined that the use was impermissible as either a bed and breakfast or hotel.¹²⁹ However, the petitioner’s use of the property did not fall under the definitions in the town code of either.¹³⁰ The appellate division determined that:

Inasmuch as petitioner’s use does not fall within the definition of activities requiring a special use permit, and the Town Code does not otherwise “expressly prohibit[] petitioner[] from renting [his] residence to vacationers[,] . . . we cannot say that petitioner[’s] decision to do so placed [his] otherwise obviously residential structure outside the Town’s definition of a [residential one-family dwelling].”¹³¹

H. Consistency

A decision of an administrative agency acting in a quasi-judicial capacity, including a zoning board of appeals, when entertaining variance and special permit applications, ““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.””¹³² As a result, “where . . . a zoning board is faced with an application that is substantially similar to a prior application that had been previously determined, the zoning board is required to provide a rational explanation for reaching a different result.”¹³³ In the absence of a rational explanation for such divergent treatment, annulment is mandated even if there may otherwise be evidence in the record sufficient to support the determination.¹³⁴

In *Fortunato v. Town of Hempstead Board of Appeals*, the petitioners contended that the board’s determination was arbitrary and capricious because the Zoning Board of Appeals “had previously

128. *Id.* at 1176, 20 N.Y.S.3d at 703.

129. *Fruchter*, 133 A.D.3d at 1176, 20 N.Y.S.3d at 703.

130. *Id.*

131. *Id.* (quoting *Atkinson v. Wilt*, 94 A.D.3d 1218, 1221, 941 N.Y.S.2d 798, 800 (3d Dep’t 2012)) (alteration in original).

132. *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 Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 516–17, 488 N.E.2d 1223, 1225, 498 N.Y.S.2d 111, 113 (1985)); *See also Tall Trees Const. Corp. v. Zoning Bd. of Appeals*, 97 N.Y.2d 86, 92–93, 761 N.E.2d 565, 570, 735 N.Y.S.2d 873, 878 (2001); *London v. Zoning Bd. of Appeals of Huntington*, 49 A.D.3d 739, 740, 855 N.Y.S.2d 561, 563 (2d Dep’t 2008).

133. *Lucas v. Bd. of Appeals of Mamaroneck*, 57 A.D.3d 784, 785, 870 N.Y.S.2d 78, 80 (2d Dep’t 2008).

134. *See Hamptons, L.L.C. v. Zoning Bd. of Appeals of E. Hampton*, 98 A.D.3d 738, 739–40, 950 N.Y.S.2d 386, 388 (2d Dep’t 2012).

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granted variances involving essentially the same facts” and that it failed to satisfactorily explain its reasons for reaching a different result.¹³⁵ However, to the extent that the purportedly similar applications identified by the petitioners involved similar facts, the Zoning Board of Appeals offered a rational explanation for reaching a different outcome.¹³⁶ With respect to the balance of the allegedly similar applications, the court found that the petitioners had failed to establish that they were sufficiently similar so as to constitute precedents for which the Zoning Board of Appeals was required to explain their treatment.¹³⁷

The court sustained the denial of setback and area variances for a second-story addition to an accessory building in *Sacher v. Village of Old Brookville* because the evidence supported the conclusion “that the detriment to the community outweighed the benefit of granting the requested variances.”¹³⁸ The record and the board members’ “visual inspection of the property supported [the] conclusion that granting” the requested relief would be detrimental to neighboring properties and generate “an undesirable change in the character of the neighborhood.”¹³⁹ The Board further rationally decided that the variances were substantial and that viable alternatives to enlarging the size of the accessory building existed because there were other structures on the property which could provide additional storage space.¹⁴⁰ In addition, the hardship was self-created because the petitioners constructed the additions without obtaining a building permit.¹⁴¹ Notably, the court confirmed that the precedential effect of its decision was a pertinent consideration in undertaking the obligatory balancing analysis.¹⁴²

The denial of area variances to construct an apartment building in a single-family neighborhood was affirmed in *People, Inc. v. City of Tonawanda Zoning Board of Appeals*, principally because granting the requested relief would promote an undesirable change to the character of the neighborhood by virtue of “increased population density [resulting] from the presence of an apartment building in a

135. 134 A.D.3d 825, 825, 21 N.Y.S.3d 322, 323 (2d Dep’t 2015).

136. *Id.*

137. *Id.*

138. 124 A.D.3d 902, 904, 3 N.Y.S.3d 69, 71 (2d Dep’t 2015).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (citing *Gallo v. Rosell*, 52 A.D.3d 514, 516, 859 N.Y.S.2d 675, 677 (2d Dep’t 2008)).

neighborhood consisting of single-family homes.”¹⁴³ In addition, the variances sought were substantial and the owners’ hardship was self-created because they were aware of the property’s zoning classification and zoning restraints when they purchased the property.¹⁴⁴ Similarly, the court sustained the denial of area variances to construct a single-family residence in *Traendly v. Zoning Board of Appeals of Southold* because the granting of relief “would have resulted in the creation of the most nonconforming lot in a [discrete] neighborhood.”¹⁴⁵

I. Necessary Parties

A property owner or applicant who has obtained a land use approval or permit must be made a party to a proceeding or action contesting the permit or approval.¹⁴⁶ In *Chestnut Ridge Associates, L.L.C. v. 30 Sephar Lane, Inc.*, the court determined that an adjoining property owner who sought an interpretation that the use of adjacent property was impermissible was not a necessary party in a proceeding that challenged the Zoning Board of Appeals’s determination that the use was not permitted because, according to the decision, it possessed no interest which would be affected by a potential judgment.¹⁴⁷

J. Proceedings in Article 78 After Denial of Motion to Dismiss

CPLR section 7804(f) provides that “[i]f the motion [to dismiss] is denied, the court shall permit the respondent to answer, upon such terms as may be just”¹⁴⁸ Consequently, “[t]he generally accepted rule is that the provisions stating that respondent must be permitted to answer after denial of a motion to dismiss is mandatory, and that a respondent is entitled to answer where its motion to dismiss is denied.”¹⁴⁹ A court

143. 126 A.D.3d 1334, 1335, 6 N.Y.S.3d 817, 818–19 (4th Dep’t 2015).

144. *Id.* at 1335, 6 N.Y.S.3d at 818.

145. 127 A.D.3d 1218, 1219, 7 N.Y.S.3d 544, 545–46 (2d Dep’t 2015). In addition, “the requested variances were substantial . . . and the hardship was self-created.” *Id.* at 1219, 7 N.Y.S.3d at 546.

146. *See Ferrando v. N.Y.C. Bd. of Standards & 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).

147. 129 A.D.3d 885, 887, 12 N.Y.S.3d 168, 171 (2d Dep’t 2015).

148. N.Y. C.P.L.R. 7804(f) (McKinney 2016).

149. 24 CARMODY-WAIT 2d § 145:369; *see also* *Detectives’ Endowment Ass’n, Inc. v. City of New York*, No. 100946/2012, 2012 N.Y. Slip Op. 32873(U), at 5 (Sup. Ct. N.Y. Cty. 2012) (citing N.Y. C.P.L.R. 7084(f) (McKinney 2016); *Bethelite Cmty. Church v. Dep’t of Envtl. Prot. of N.Y.C.*, 8 N.Y.3d 1001, 1002, N.E.2d 679, 680, 839 N.Y.S.2d 440, 441 (2007)).

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may decide the merits of an Article 78 proceeding following denial of a motion to dismiss only if:

[T]he proceeding can be resolved on the merits without providing an opportunity to serve an answer if “the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer” and “there only remain questions of law, the resolution of which are dispositive.”¹⁵⁰

In *Chestnut Ridge Associates, L.L.C. v. 30 Sephar Lane, Inc.*, after having denied the respondents’ motion to dismiss for failure to name a necessary party, the court decided the merits of the proceeding without the respondents having had an opportunity to answer or submit substantive opposition to the petition.¹⁵¹ The appellate division determined that the merits should not have been determined without providing the respondents an opportunity to answer and submit opposition.¹⁵²

Where “the dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer, the court may reach the merits of the petition and grant the petitioner judgment thereon notwithstanding the lack of any answer and without giving the respondent a further opportunity to answer the petition.”¹⁵³

The facts were not so fully presented in the papers of parties that it was evident that no disagreement existed regarding the facts and that no prejudice would result from the failure to permit the respondents to answer.¹⁵⁴

150. *In re Stortecky v. Mazzone*, 156 Misc.2d 16, 21–22, 591 N.Y.S.2d 304, 307–08 (Sup. Ct. Fulton Cty. 1992) (first citing *Nassau BOCES Cent. Council of Teachers v. Bd. of Cooperative Educ. Servs. of Nassau Cty.*, 63 N.Y.2d 100, 102 (1984); then citing *Bayswater Health Related Facility v. New York State Dep’t of Health*, 57 A.D.2d 996, 997, 394 N.Y.S.2d 314, 316 (3d Dep’t 1977)).

151. 129 A.D.3d 885, 887, 12 N.Y.S.3d 168, 171 (2d Dep’t 2015) (citing *TransGas Energy Sys., LLC*, 65 A.D.3d 1247, 1250, 887 N.Y.S.2d 99, 103 (2d Dep’t 2009)).

152. *Id.*

153. *Id.* (quoting *Kuzma v. City of Buffalo*, 45 A.D.3d 1308, 1311, 845 N.Y.S.2d 880, 883 (4th Dep’t 2007); citing *Nassau BOCES Cent. Council of Teachers*, 63 N.Y.2d at 102, 469 N.E.2d at 511, 480 N.Y.S.2d at 190).

154. *Id.*

II. SPECIAL PERMITS

A special permit sanctions the use of property in a manner that is consistent with a community's zoning law, although not as of right.¹⁵⁵ The specification of a use in a zoning law as a special permit use is tantamount to a legislative finding that the use is in harmony with a community's general zoning plan and will not deleteriously affect the neighborhood.¹⁵⁶ As a result, an applicant's burden of proof is lighter than that on one seeking a variance.¹⁵⁷ The applicant is obligated to establish compliance with the legislatively-imposed standards applicable to the proposed use before a special permit may be granted.¹⁵⁸ Further, the rejection of a special permit application must be substantiated by substantial evidence in the record and may not be premised exclusively on generalized community objection.¹⁵⁹ However, where such evidence exists, deference must be provided to the discretion of the board rendering the determination.¹⁶⁰ As a result, "a court may not substitute its [] judgment for that of [a reviewing] board, even if such" a dissimilar decision may be supported by the record.¹⁶¹

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

156. *Id.* (citing *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)); *Twin Cty. Recycling Corp. v. Yevoli*, 90 N.Y.2d 1000, 1002, 688 N.E.2d 501, 502, 665 N.Y.S.2d 627, 628 (1997) (2002) (citing *N. Shore Steak House*, 30 N.Y.2d at 243, 282 N.E.2d at 609, 331 N.Y.S.2d at 649); *N. Shore Steak House*, 30 N.Y.2d at 243, 282 N.E.2d at 609, 331 N.Y.S.2d at 649 (citing *Reed v. Bd. of Standards & Appeals*, 255 N.Y. 126, 135–36, 174 N.E. 301, 303–04 (1931); *Syosset Holding Corp. v. Schlimm*, 4 A.D.2d 766, 766–67, 164 N.Y.S.2d 890, 890–91 (2d Dep't 1957); *Bar Harbour Shopping Ctr. v. Andrews*, 23 Misc.2d 894, 898, 196 N.Y.S.2d 856, 863 (Sup. Ct. Nassau Cty. 1959)).

157. *Retail Prop. Tr.*, 98 N.Y.2d at 195, 774 N.E.2d 731, 746 N.Y.S.2d at 666 (citing *N. Shore Steak House*, 30 N.Y.2d at 244, 282 N.E.2d at 609, 331 N.Y.S.2d at 649).

158. *Id.*; *Wegmans Enters., Inc. v. Lansing*, 72 N.Y.2d 1000, 1001, 530 N.E.2d 1292, 1293, 534 N.Y.S.2d 372, 373 (1988) (citing *N. Shore Steak House*, 30 N.Y.2d at 243–44, 282 N.E.2d at 609, 331 N.Y.S.2d at 649); *Franklin Square Donut Sys., L.L.C. v. Wright*, 63 A.D.3d 927, 929, 881 N.Y.S.2d 163, 165 (2d Dep't 2009) (citing *Wegmans Enters.*, 72 N.Y.2d at 1001, 530 N.E.2d at 1293, 534 N.Y.S.2d at 373; *Roginski v. Rose*, 97 A.D.2d 417, 417, 467 N.Y.S.2d 252, 253 (2d Dep't 2009); *Tandem Holding Corp. v. Bd. of Zoning Appeals of Hempstead*, 43 N.Y.2d 801, 802, 373 N.E.2d 282, 283, 402 N.Y.S.2d 388, 389 (1977); *L&M Realty v. Vill. of Milbrook Planning Bd.*, 207 A.D.2d 346, 347, 615 N.Y.S.2d 434, 435 (2d Dep't. 1994)).

159. *Retail Prop. Tr.*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666; *White Castle Sys., Inc. v. Bd. of Zoning Appeals of Town of Hempstead*, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159, 162 (2d Dep't 2012).

160. *Meier v. Vill. of Champlain Zoning Bd. of Appeals*, 129 A.D.3d 1364, 1365, 11 N.Y.S.3d 743, 744 (3d Dep't 2015) (citing *Mack v. Bd. of Appeals of Town of Homer*, 25 A.D.3d 977, 980, 807 N.Y.S.2d 460, 464 (3d Dep't 2006); *Subdivisions, Inc. v. Town of Sullivan*, 92 A.D.3d 1184, 1185, 938 N.Y.S.2d 682, 684 (3d Dep't 2012)).

161. *See Retail Prop. Tr.*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666;

In *Liska N.Y., Inc. v. City Council of New York*, the court affirmed the city planning commission's denial of a special permit application.¹⁶² "Having reserved to itself the power to grant or deny a special permit, without enunciating standards for the exercise of its discretion . . . the [c]ouncil [was] not bound by the [explicit] . . . standards" of the zoning law which defined its review authority, but, instead, had broader review authority and could permissibly consider policy issues.¹⁶³ As a result, it permissibly denied the petitioners' special application based on "matters related to the public welfare, including . . . the over-saturation of similar buildings in the area, the poor condition of petitioners' building, and the precedent that approval of the [application] would [establish] for overbuilding" and seeking after-the-fact approval.¹⁶⁴

A delegation of special permit review authority must be accompanied by enumerated standards to guide and limit an administrative body's exercise of discretion.¹⁶⁵ A delegation of review authority without standards having been provided to govern a board's actions generally is considered to be an invalid delegation of authority, precluding the board from validly issuing special permits.¹⁶⁶ However, when a local legislative body, such as a town board or village board of trustees, reserves special permit review authority to itself, the constraint that the zoning law set forth criteria to govern its exercise of discretion is inapplicable.¹⁶⁷ Even if a zoning law sets forth criteria applicable to the issuance of special permits by a local legislative body, the board is not precluded from considering other factors "unless the standards expressed purport to be so complete or exclusive as to preclude the Board from considering other factors without amendment of the zoning ordinance."¹⁶⁸ Consequently, absent complete and exclusive standards, a local

White Castle Sys., Inc., 93 A.D.3d at 732, 940 N.Y.S.2d at 162.

162. 134 A.D.3d 461, 462, 19 N.Y.S.3d 884, 884 (1st Dep't 2015).

163. *Id.* (citing N.Y. CITY CHARTER § 197-d (2004)).

164. *Id.*

165. *Dun-Bar Realty Co. v. City of Utica*, 57 A.D.2d 51, 55, 394 N.Y.S.2d 913, 917 (4th Dep't 1977), *aff'd*, 44 N.Y.2d 1002, 380 N.E.2d 328, 408 N.Y.S.2d 502 (1978) (citing *Levine v. Whalen*, 39 N.Y.2d 510, 515, 349 N.E.2d 820, 822, 384 N.Y.S.2d 721, 723 (1976); *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 27, 332 N.E.2d 290, 293, 371 N.Y.S.2d 404, 408 (1975); *City of Utica v. Water Pollution Control Bd.*, 5 N.Y.2d 164, 168-69, 156 N.E.2d 301, 304, 182 N.Y.S.2d 584, 587 (1959)).

166. *Marshall v. Vill. of Wappingers Falls*, 28 A.D.2d 542, 542-43, 279 N.Y.S.2d 654, 656 (2d Dep't 1967) (citing *Davison v. Flanagan*, 273 A.D. 870, 870, 76 N.Y.S.2d 849, 849-50 (2d Dep't 1948)).

167. *Cummings v. Town Bd. of New Castle*, 62 N.Y.2d 833, 834-35, 466 N.E.2d 147, 148, 477 N.Y.S.2d 607, 608 (1984); *Chernick v. McGowan*, 238 A.D.2d 586, 587, 656 N.Y.S.2d 392, 394 (2d Dep't 1997).

168. *Id.*

legislative body may consider any matter related to the public welfare in determining whether a particular special permit use is appropriate at a particular location.¹⁶⁹ The *Liska* decision applies these principles to the New York City Council.¹⁷⁰

In *7-Eleven, Inc. v. Village of Mineola*, an application for a special permit for a convenience store was denied based on concerns regarding traffic and parking.¹⁷¹ The applicant provided expert testimony that the store would not deleteriously affect neighboring properties by aggravating traffic conditions or diminishing property values.¹⁷² Neighbors opposed the application, “primarily based on their belief that the convenience store’s [customers] would be unsavory and that the . . . proposed store would exacerbate existing traffic congestion.”¹⁷³ However, “no expert evidence was provided” challenging the applicant’s expert evidence.¹⁷⁴

The appellate division annulled the denial of the application.¹⁷⁵ The assertions of opponents that approval of the special permit application would worsen traffic congestion were uncorroborated by any empirical evidence and were rebutted by the expert opinions provided by the applicant’s experts.¹⁷⁶ Additionally, the denial of a special permit application will be invalidated if the record does not substantiate that the impacts of the proposed use are greater than those associated with uses permitted by right in the zoning district.¹⁷⁷ No evidence was provided that the applicant’s use “would have a greater impact on traffic than any as-of-right use[s].”¹⁷⁸ Moreover, in denying the application, the board disregarded the applicant’s offer to abide by certain restrictions regarding deliveries.¹⁷⁹

The approval of a special permit for the operation of six wind turbines was challenged in *Frigault v. Town of Richfield Planning Board* based on the allegation that two of the eight specified special permit standards relating to harmony of the use with orderly

169. *Id.*

170. *Liska N.Y., Inc. v. City Council of N.Y.*, 134 A.D.3d 461, 462, 19 N.Y.S.3d 884, 884 (1st Dep’t 2015) (citing *Cummings*, 62 N.Y.2d at 835, 466 N.E.2d at 147, 477 N.Y.S.2d at 607.)

171. 127 A.D.3d 1209, 1210, 7 N.Y.S.3d 517, 518 (2d Dep’t 2015).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *7-Eleven*, 127 A.D.3d at 1211, 7 N.Y.S.3d at 519.

177. *See id.*

178. *Id.*

179. *Id.*

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development of the district and not deterring appropriate development and use of adjacent land, were not satisfied.¹⁸⁰ The wind turbines were proposed to be “almost 500 feet tall when the rotor blades [were] fully vertical.”¹⁸¹ In approving the special permit, the Board noted that the turbines were proposed to be situated in an area where “high-voltage electric transmission lines . . . already altered the landscape” and additionally observed other factors that minimized the impact of the turbines on the viewshed.¹⁸² The Board further found that the project would have negligible impact on traffic and that, “given the economic benefits that would accrue to participating landowners,” approval would assist in preserving existing uses of the neighboring properties.¹⁸³ Although the record contained conflicting evidence, the supreme court improperly substituted its own judgment in annulling approval because substantial evidence supported the decision.¹⁸⁴

On the other hand, the appellate division affirmed the denial of a special permit to continue the operation of an illegal used-car and auto-repair business that had operated on the site for many years in *M&V 99 Franklin Realty Corp. v. Weiss* because the Board’s conclusion that the applicant had failed to satisfy the legislatively delegated standards for issuance of the requested special permit was supported by substantial evidence in the record.¹⁸⁵ The court rejected the contention that the Board was limited to consideration of the site plan actually submitted.¹⁸⁶ Instead, it properly considered pursuant to the provisions of the zoning law, “whether the plot area [was] sufficient . . . for the use and the reasonable anticipated operation . . . thereof.”¹⁸⁷ “Issues of credibility are within the province of the board.”¹⁸⁸ Accordingly, based on the testimony at the hearing and the members’ inspection of the property, the Board permissibly rejected the applicant’s contention that it would restrict the number of cars stored on the property to twenty and would

180. 128 A.D.3d 1232, 1234, 9 N.Y.S.3d 708, 710 (3d Dep’t).

181. *Id.* at 1234, 9 N.Y.S.3d at 710–11.

182. *Id.* at 1234, 9 N.Y.S.3d at 711.

183. *See id.* at 1234–35, 9 N.Y.S.3d at 711. A study demonstrated that property values would not be deleteriously affected by the project and the applicant had entered into setback agreements with nearby landowners, confirming that the project would not impair the use of nearby properties or development in the zoning district. *Id.* at 1235, 9 N.Y.S.3d at 711

184. *Frigault*, 128 A.D.3d at 1235, 9 N.Y.S.3d 708 at.

185. 124 A.D.3d 783, 785, 3 N.Y.S.3d 51, 55 (2d Dep’t 2015).

186. *Id.*

187. *Id.* (quoting TOWN OF HEMPSTEAD, N.Y., BUILDING ZONE ORDINANCE § 267(D)(2)(b)(11) (2010)).

188. *See id.*

cease parking cars on the adjoining residential street.¹⁸⁹ Furthermore, the Board's conclusion that the intended use of the property would thwart the orderly and reasonable use of neighboring properties due to vehicular overcrowding on the site, resulting in vehicles spilling over onto adjoining streets, was supported by "eyewitness testimony of actual conditions at the premises," not generalized community opposition.¹⁹⁰

III. ZONING

A. Spot Zoning

Pursuant to the delegation of zoning authority to local governments set forth in section 263 of the Town Law and section 7-704 of the Village Law, zoning regulations must be adopted in compliance with a community's comprehensive plan.¹⁹¹ The antithesis of comprehensive and rational planning is "spot zoning," which 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.¹⁹²

In *Itzler v. Town Board of the Town of Huntington*, the petitioners sought to annul a determination of the town board which rezoned a thirty-seven acre parcel from a R-40 zoning district (one acre residential) to R-RM (retirement community).¹⁹³ Although the R-RM zoning designation would have permitted a maximum of 538 units, the proposal was reduced to 256 units following the public hearing and a supplemental Environmental Assessment Form (EAF) was prepared to reflect the changes created by the reduction.¹⁹⁴ The amendment was adopted subject to a number of conditions, including that the property was to be limited to:

256 senior units; that affordable units be provided in accordance with the [t]own [c]ode; that the improvements listed in the [e]xpanded

189. *See id.*

190. *M&V 99 Franklin Realty Corp.*, 124 A.D.3d at 785–86 3 N.Y.S.3d at 55 (quoting *Franklin Square Donut Sys., L.L.C. v. Wright*, 63 A.D.3d 927, 929; 881 N.Y.S.2d 163, 165 (2d Dep't 2009)).

191. N.Y. TOWN LAW § 263 (McKinney 2013); N.Y. VILLAGE LAW §7–704 (McKinney 2011). *See also* *Gernatt Asphalt Prod., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 684, 664 N.E.2d 1226, 1236, 642 N.Y.S.2d 164, 174 (1996); *Udell v. Haas*, 21 N.Y.2d 463, 471, 235 N.E.2d 897, 901–02, 288 N.Y.S.2d 888, 895 (1968).

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

193. *Itzler v. Town Bd. of Huntington*, No. 14-18447, 2015 N.Y. Slipp Op. 32259(U), at 1 (Sup. Ct. Suffolk Co. 2015).

194. *Id.* at 1–2.

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EAF/Traffic study were to be provided by applicant at its own expense and, further, they were to install other traffic improvements, if required, by the County of Suffolk; that a soil management plan be provided; and that the open space area located on the northeast portion of the property should be enhanced during site plan review.¹⁹⁵

The court rejected the contention that the amendment constituted spot zoning.¹⁹⁶ A party challenging the determination of a local legislative board bears the heavy burden of demonstrating that the regulation is not justified by any reasonable interpretation of the facts.¹⁹⁷ If the validity of the legislative classification for zoning purposes is even fairly debatable, “it must be sustained upon judicial review”¹⁹⁸ Consequently, if a litigant fails to demonstrate a “clear conflict” with a community’s comprehensive plan, the zoning classification must be upheld.¹⁹⁹ Generally, land use regulations must comply with a community’s comprehensive plan in order to limit ad hoc or spot zoning, which affects the land of only a few without proper concern for the needs or design of the entire community.²⁰⁰

The amendment did “not constitute illegal spot zoning merely because it involve[d] a single parcel,” nor was it “*ad hoc* zoning legislation affecting the land of a few without proper regard to the needs or design of the community as a whole.”²⁰¹ “Although the proposed development [authorized by the amendment would] increase the density of the neighborhood, it also [would] preserve a sizeable portion of the property as open land, provide senior housing, and provide a number of affordable units.”²⁰² As a result, the re-zoning of the property was consistent with the overall policies related in the comprehensive plan.²⁰³ The record substantiated that the amendment was part of “a well considered and comprehensive plan to serve the general welfare of the community.”²⁰⁴ Because the re-zoning was consistent with the

195. *Id.* at 2.

196. *Id.* at 5.

197. *See id.* at 6 (citing *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, 134–35 (1973)).

198. *Itzler*, 2015 N.Y. Slip. Op. 32259(U), at 6 (citing *Hart v. Town Bd. of Huntington*, 114 A.D.3d 680, 683, 980 N.Y.S.2d 128, 131 (2d Dep’t 2014)).

199. *Id.* (citing *Hart*, 114 A.D.3d at 683, 980 N.Y.S.2d at 131).

200. *Id.*

201. *Id.* (emphasis added).

202. *Id.*

203. *Itzler*, 2015 N.Y. Slip Op. 32259(U), at 6.

204. *Id.* at 6–7 (quoting *Residents for Reasonable Dev. v. City of N.Y.*, 128 A.D.3d 609, 611, 11 N.Y.S.3d 116, 116).

comprehensive plan, it did not constitute impermissible spot zoning.²⁰⁵ Because the petitioner had failed to demonstrate a clear conflict with the comprehensive plan, the court sustained the rezoning.²⁰⁶

B. Restrictive Covenants

In *Blue Island Development, L.L.C. v. Town of Hempstead*, the plaintiffs had purchased land which had formerly been used as an oil storage facility with the intention of remediating the environmental contamination and developing the property into 172 waterfront condominium units.²⁰⁷ In order to develop the property in that manner, the Town Board re-zoned the property, subject to restrictive covenants, including a provision requiring that all units in the development be sold as condominium units, but which permitted subsequent owners of the units to lease them to the extent otherwise permissible under town law.²⁰⁸ At the developer's subsequent request, the Town Board modified the covenant to allow the developer to lease up to seventeen of the 172 units for a period of five years after the issuance of the certificate of occupancy or until the delivery of title to the 155th unit, whichever occurred first.²⁰⁹ The Town Board denied a subsequent request for a further modification that would have permitted it to sell thirty-two units and maintain the remaining 140 units as rentals.²¹⁰ The developer sought relief pursuant to Article 78, invalidation of the restrictive covenant pursuant to Real Property Actions and Proceedings section 1951, and relief pursuant to the takings clauses of the state and federal constitutions.²¹¹

“It is a ‘fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it.’”²¹² Moreover, “‘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.’”²¹³ “[R]estrictive covenants will be enforced

205. *See id.* (citing *Restuccio v. City of Oswego*, 114 A.D.3d 1191, 1192, 979 N.Y.S.2d 749, 750 (4th Dep't 2014); *Little Joseph Realty, Inc. v. Town of Babylon*, 52 A.D.3d 478, 479, 859 N.Y.S.2d 696, 697 (2d Dep't 2008)).

206. *Id.*

207. 131 A.D.3d 497, 498–99, 15 N.Y.S.3d 807, 809 (2d Dep't 2015).

208. *Id.* at 499, 15 N.Y.S.3d at 809–10.

209. *Id.* at 499, 15 N.Y.S.3d at 810.

210. *Id.*

211. *See id.*

212. *Blue Island Dev.*, 133 A.D.3d at 500, 15 N.Y.S.3d at 810 (quoting *BLF Assoc., L.L.C. v. Town of Hempstead*, 59 A.D.3d 51, 55, 870 N.Y.S.2d 422, 426 (2d Dep't 2008)).

213. *Id.* (quoting *Nicholson v. Inc. Vill. of Garden City*, 112 A.D.3d 893, 894, 978 N.Y.S.2d 288, 290 (2d Dep't 2013)).

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when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy.”²¹⁴ Moreover, the “[p]urchase of property with knowledge of [a] restriction does not bar the purchaser from testing the validity of the zoning ordinance [because] the zoning ordinance in the very nature of things has reference to land rather than to owner.”²¹⁵

The court concluded that the developer sufficiently alleged that the restrictive covenant was improper because it regulated its ability as the owner of the property to rent the units rather than the use of the land itself.²¹⁶ Further, in light of the provision permitting future owners to lease units in the development, the restrictive covenant “bears no substantial relation to . . . the public health, safety, morals or general welfare.”²¹⁷ Consequently, the supreme court properly declined to dismiss the cause of action seeking to declare the restrictive covenant invalid.²¹⁸

With respect to the enforceability of the covenant, Real Property Actions and Proceedings section 1951(1), provides that a restrictive covenant shall not be enforced if, at the time enforceability of the restriction is brought into question, it appears that:

[T]he restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.²¹⁹

The complaint stated a cause of action pursuant to Real Property Actions and Proceedings section 1951 because it was alleged that, assuming that a benefit existed by requiring that the units be sold rather than rented, because the rental restriction imposed by the restrictive covenant applies only to it and not to any subsequent owner of any of the units in the planned development, it would be no substantial benefit

214. *Id.* at 500, 15 N.Y.S.3d at 811 (quoting *Chambers v. Old Stone Hill Rd. Assoc.*, 303 A.D.2d 536, 537, 757 N.Y.S.2d 70, 71 (2d Dep’t 2003), *aff’d*, 1 N.Y.3d 424, 806 N.E.2d 979, 774 N.Y.S.2d 866 (2004)).

215. *Id.* (quoting *BLF Assoc.*, 59 A.D.3d at 56, 870 N.Y.S.2d at 426).

216. *See id.* at 501, 15 N.Y.S.3d at 811.

217. *Blue Island Dev.*, 131 A.D.3d at 501, 15 N.Y.S.3d at 811 (quoting *Nicholson*, 112 A.D.3d at 894, 978 N.Y.S.2d at 290 (internal quotation marks omitted)).

218. *Id.*

219. N.Y. REAL PROP. ACTS LAW § 1951(1) (McKinney 2009); *Blue Island Dev.*, 131 A.D.3d at 501, 15 N.Y.S.3d at 811 (quoting *N.Y.C. Econ. Dev. Corp. v. T.C. Foods Imp. & Exp. Co., Inc.*, 19 A.D.3d 568, 569, 797 N.Y.S.2d 549, 551 (2d Dep’t 2005)).

to the town.²²⁰

The court also refused to dismiss the taking claim asserted, which was premised upon “denial of development, as opposed to excessive exactions,”²²¹ finding the analysis of *Agins v. City of Tiburon* to be applicable.²²² Pursuant to *Agins*, “a zoning law effects a regulatory taking if either: (1) ‘the ordinance does not substantially advance legitimate state interests’ or (2) the ordinance ‘denies an owner economically viable use of his land.’”²²³ However,

[a] reasonable land use restriction imposed by the government in the exercise of its police power characteristically diminishes the value of private property, but is not rendered unconstitutional merely because it causes the property’s value to be substantially reduced, or because it deprives the property of its most beneficial use.²²⁴

Accordingly, a court assessing a takings claim must consider “(1) ‘[t]he economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations’; and (3) ‘the character of the governmental action.’”²²⁵ The complaint stated a cognizable cause of action because it alleged that the restrictive covenant did not advance any legitimate governmental interest and, additionally, that it denied any economically viable use of the land.²²⁶

IV. SUBDIVISIONS

The petitioner in *Sullivan Farms IV, L.L.C. v. Village of Wurtsboro*, owned fifty-four acres of property in the Village of Wurtsboro and thirty-one acres of contiguous property in the Town of Mamakating.²²⁷ It received conditional final site plan and subdivision

220. *See id.*, 131 A.D.3d at 501, 15 N.Y.S.3d at 811.

221. *Blue Island Dev.*, 131 A.D.3d at 502, 15 N.Y.S.3d at 812 (citing *Smith v. Town of Mendon*, 4 N.Y.3d 1, 11, 822 N.E.2d 1214, 1218–19, 789 N.Y.S.2d 696, 700 (2004)).

222. *Id.* at 502, 15 N.Y.S.3d at 812 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

223. *Id.* (quoting *Bonnie Briar Syndicate v. Town of Mamaroneck*, 94 N.Y.2d 96, 105, 721 N.E.2d 971, 974, 699 N.Y.S.2d 721, 724 (1999) (quoting *Agins*, 447 U.S. at 260)). It should be noted that the Supreme Court determined in *Lingle v. Chevron U. S. A Inc.*, 544 U.S. 528, 548 (2005), that “the ‘substantially advances’ formula is not a valid takings test, and . . . has no proper place in our takings jurisprudence.”

224. *Id.* (quoting *Putnam Cty Nat’l. Bank v. City of New York*, 37 A.D.3d 575, 577, 829 N.Y.S.2d 661, 663 (2d Dep’t 2007)).

225. *Id.* (quoting *In re New Creek Bluebelt*, 122 A.D.3d 859, 861, 997 N.Y.S.2d 447, 450 (2d Dep’t 2014)).

226. *See id.*

227. *Sullivan Farms IV, L.L.C. v. Vill. of Wurtsboro*, 134 A.D.3d 1275, 1276, 21

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approval from the Wurtsboro Planning Board in 2009 for the development and construction of a seventy-two-unit townhouse residential cluster development known as “Kaufman Farms West.”²²⁸ After the approval lapsed, the successor received approval in 2012.²²⁹ The petitioner, Kaufman Farms, L.L.C., submitted a site plan/special use application with the Planning Board for a different residential cluster development, known as “Kaufman Farms East” on neighboring property in June 2012.²³⁰

The Planning Board reconsidered its approval of the Kaufman Farms West project in 2013.²³¹ While that review was pending, the Wurtsboro Board of Trustees amended the zoning law to revise the method of calculating the number of permitted lots or dwelling units for a residential cluster subdivision.²³² As a result, the Planning Board concluded that the approval conflicted with applicable state and local laws, that is was *void ab initio* and it rescinded its prior approval for Kaufman Farms West in May 2014.²³³ The petitioner challenged the adoption of the local laws and the determination to rescind the subdivision and site plan approvals for Kaufman Farms West.²³⁴

The appellate division affirmed the dismissal of the proceeding.²³⁵ A planning board possesses the authority to rescind an approval that was granted in excess of its legal authority and *void ab initio*.²³⁶ In addition, “[d]espite the lack of statutory authority, a planning board may reconsider a determination if there has been a material change of circumstances since its initial approval of the plat or new evidence is presented.”²³⁷ Because the planning board possessed such authority, the issue was whether it abused its discretion in doing so.

Section 7-738(3)(b) of the Village Law, like section 278(3)(b) of

N.Y.S.3d 450, 451 (3d Dep’t 2015).

228. *Id.*

229. *Id.*

230. *Id.* at 451–52.

231. *Id.* at 452.

232. *Sullivan Farms IV*, 134 A.D.3d 1275 at 1277, 21 N.Y.S.3d at 452.

233. *Id.* at 452.

234. *Id.* (emphasis added).

235. *Id.*

236. *Id.* (emphasis added) (citing *Reiss v. Keator*, 150 A.D.2d 939, 941, 541 N.Y.S.2d 864, 865–66 (3d Dep’t 1989); *Town of Amherst v. Rockingham Estates, L.L.C.*, 98 A.D.3d 1241, 1242, 951 N.Y.S.2d 602, 603–04 (4th Dep’t 2012)).

237. *Sullivan Farms IV* (citing 1066 Land Corp. v. Planning Bd. of Town of Austerlitz, 218 A.D.2d 887, 887, 630 N.Y.S.2d 389, 390 (3d Dep’t 1995); *Lynn v. Planning Bd. of the Town of E. Hampton*, 89 A.D.3d 1028, 1028, 933 N.Y.S.2d 567, 568 (2d Dep’t 2011), *lv. denied*, 18 N.Y.3d 807, 963 N.E.2d 1264, 940 N.Y.S.2d 563 (2012)).

the Town Law, mandates that the number of building lots or dwelling units in a cluster development “shall in no case exceed the number which could be permitted, in the planning board’s judgment, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning local law applicable to the district or districts in which such land is situated.”²³⁸ Applying the formula set forth in the zoning law, the entire eighty-five-acre development would have possessed sufficient land to yield the proposed seventy-two dwelling units.²³⁹ However, thirty-one acres of the subdivision were located outside the village limits and were included in the subdivision based on the expectation that the land would be annexed into the village.²⁴⁰ Because the annexation never transpired, the fifty-four acres within the village were insufficient to permit the development of seventy-two dwelling units.²⁴¹

The court also rejected a claim of vested rights.²⁴² “[A] vested right can be acquired when, pursuant to a legally issued [subdivision approval], the landowner demonstrates a commitment to the purpose for which the [approval] was granted by effecting substantial changes and incurring substantial expenses to further the development.”²⁴³ Because the initial subdivision approval was contrary to law, no valid approval existed from which vested rights could be acquired.²⁴⁴

238. N.Y. VILLAGE LAW § 7-738(3)(b) (McKinney 2011); N.Y. TOWN LAW § 278(3)(b) (McKinney 2013).

239. *Sullivan Farms IV*, 134 A.D.3d 1275 at 1278, 21 N.Y.S.3d at 453.

240. *Id.*

241. *Id.*

242. *Id.* at 454.

243. *See id.* (citing *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 47, 665 N.E.2d 1061, 1064, 643 N.Y.S.2d 21, 24 (1996); *Waterways Dev. Corp. v. Town of Brookhaven Zoning Bd. of Appeals*, 126 A.D.3d 708, 711, 5 N.Y.S.3d 450, 453 (2d Dep’t 2015), *lv. denied*, 25 N.Y.3d 909, 32 N.E.3d 966, 10 N.Y.S.3d 529 (2015); *Pete Drown, Inc. v. Town Bd. of Town of Ellenburg*, 229 A.D.2d 877, 878, 646 N.Y.S.2d 205, 206 (3d Dep’t 1996), *lv. denied*, 89 N.Y.2d 802, 32 N.E.3d 966, 10 N.Y.S.3d 529 (1996)) (alterations in original).

244. *Sullivan Farms IV*, 134 A.D.3d 1275 at 1279, 21 N.Y.S.3d at 454 (citing *Lamar Adv. of Penn. L.L.C. v. Pitman*, 9 A.D.3d 734, 736, 780 N.Y.S.2d 233, 234 (3d Dep’t 2004); *Vill. of Asharoken v. Pitassy*, 119 A.D.2d 404, 416, 507 N.Y.S.2d 164, 173 (2d Dep’t 1986), *lv. denied*, 69 N.Y.2d 606, 507 N.E.2d 320, 514 N.Y.S.2d 1024 (1987)).