ZONING AND LAND USE

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CONTENTS

I. ZONING

A. Intergovernmental Immunity/Preemption

The Court of Appeals jettisoned the governmental-proprietary analysis for assessing the applicability of local zoning regulations to the undertakings of other governmental units nearly thirty years ago in *City of Rochester v. County of Monroe*.[1] The governmental-proprietary test was replaced by the "balancing of the public interests" test.[2] The balancing of public interests evaluation necessitates a balancing of

> "the nature and scope of the instrumentality seeking immunity, the kind

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1. 72 N.Y.2d 338, 341, 530 N.E.2d 202, 202–03, 533 N.Y.S.2d 702, 703 (1988) (citing City of Rochester v. County of Monroe, 131 A.D.2d 74, 79–80, 520 N.Y.S.2d 676, 680 (4th Dep't 1987)).

2. *Id.* at 341, 530 N.E.2d at 203, 533 N.Y.S.2d at 703.

> of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests." . . . [T]he applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, and alternative methods of providing the needed improvement [and finally, the degree of] intergovernmental participation in the project development process and an opportunity to be heard.[3]

Few subsequent decisions have facilitated the evaluation and application of the relevant considerations or identified the appropriate process for applying the "balancing of the public interests" test.[4] The decision in *County of Herkimer v. Village of Herkimer* is one of the few decisions in which a court has analyzed the application of the *County of Monroe* factors in depth.[5]

County Law § 217 requires that every county in the state maintain a county jail.[6] All new sites for correctional facilities must be approved by the New York State Commission of Correction.[7] The Herkimer County Jail had been located in the Village of Herkimer since 1834.[8] The existing county jail suffered from acute overcrowding, requiring the County to board inmates at other facilities outside the county at a substantial expense.[9] The State Commission had allowed the County to continue to operate the jail pursuant to numerous variances issued by it but had related that it would require closure of the jail if the county failed to make progress in the siting and construction of a new facility.[10] The County considered various alternatives and began studying sites for a new facility in the early 2000s.[11] A viable site required "10–15 useable acres of flat land, availability of municipal water and sewer services, and close

3. *Id.* at 343, 530 N.E.2d at 204, 533 N.Y.S.2d at 704 (quoting Rutgers State Univ. v. Piluso, 60 N.J. 142, 153 (1972)) (first citing Orange County v. Apopka, 299 So. 2d 652, 655 (Fla. Dist. Ct. App. 1974); then citing Lincoln County v. Johnson, 257 N.W.2d 453, 458 (S.D. 1977); and then citing Blackstone Park Improvement Ass'n v. State Bd. of Standards & Appeals, 448 A.2d 1233, 1238 (R.I. 1982)).

4. *Id.* at 341, 530 N.E.2d at 203, 533 N.Y.S.2d at 703.

5. *See* 51 Misc. 3d 516, 536, 25 N.Y.S.3d 839, 854 (Sup. Ct. Herkimer Cty. 2016) (citing *County of Monroe*, 72 N.Y.2d at 343, 530 N.E.2d at 204, 533 N.Y.S.2d at 704)).

6. *Id.* at 519, 25 N.Y.S.3d at 842 (citing N.Y. COUNTY LAW § 217 (McKinney 2004)).

7. *Id.* (first citing N.Y. COUNTY LAW § 216 (McKinney 2004); then citing N.Y. CORRECT. LAW § 500-c(4) (McKinney 2014); and then citing N.Y. CORRECT. LAW § 45(10) (McKinney 2014)).

8. *Id.*

9. *Id.*

10. *County of Herkimer*, 51 Misc. 3d at 521, 25 N.Y.S.3d at 843.

11. *Id.* at 521–22, 25 N.Y.S.3d at 844.

proximity to the busiest courts."[12] The County reviewed approximately forty to fifty locations before it narrowed its evaluation to fourteen sites and selected the site in the Village.[13]

The chosen site consisted of an abandoned shopping center, which was located less than one mile from the county courthouse and near the village and town courts.[14] It was flat and partially sheltered from view, was accessible from a main road, and would allow for reuse of a site that had been vacant for many years.[15] It also was "located in an area with mixed commercial and industrial uses with screening from residential uses . . . and had access to existing infrastructure for municipal water and sewer."[16]

Prior to the instant litigation, the supreme court found that the Village's zoning amendment that proscribed correctional facilities in the village was preempted and invalid.[17] The appellate division reversed and concluded that the amendment was not preempted, but remanded the matter to the supreme court to determine whether the County was immune from the zoning prohibition pursuant to the *County of Monroe* considerations.[18]

In considering the *County of Monroe* factors, the court first declared that "the general trend is that public interest and public safety concerns in particular are of paramount concern."[19] In assessing the first element, that is, "the nature and scope of the municipality seeking immunity," the court observed that it is the County seeking immunity from the Village's zoning amendment in order to fulfill the State Department of Corrections' order to construct a new jail.[20] Although the court declined

> to go so far as to say the County is a superior instrumentality, under similar circumstances, other courts have held that "it would be anomalous to allow a small village to impede the County in the performance of an essential governmental duty for the benefit of the health and welfare of residents of the entire County."[21]

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12. *Id.* at 522, 25 N.Y.S.3d at 844.
13. *Id.*
14. *Id.* at 526, 25 N.Y.S.3d at 847.
15. *County of Herkimer*, 51 Misc. 3d at 526, 25 N.Y.S.3d at 847.
16. *Id.*
17. *Id.* at 517, 25 N.Y.S.3d at 841.
18. *Id.* at 518, 25 N.Y.S.3d at 841.
19. *Id.* at 531, 25 N.Y.S.3d at 851.
20. *County of Herkimer*, 51 Misc. 3d at 532, 25 N.Y.S.3d at 851 (citing City of Rochester v. County of Monroe, 72 N.Y.2d 338, 343, 530 N.E.2d 202, 204, 533 N.Y.S.2d 702, 704 (1988)).
21. *Id.* (first quoting County of Westchester v. Mamaroneck, 22 A.D.2d 143, 147–48, 255 N.Y.S.2d 290, 294 (2d Dep't 1964); and then quoting Westhab, Inc. v. Village of

With respect to the second factor, "the kind of function and land use," the use is a county jail.[22] "The care and custody of criminals is a function of government and the Legislature has delegated this obligation to the counties, as each county is required to maintain a county jail."[23]

The court described the third factor, "the extent of the public interest to be served thereby," as perhaps the most important in the instant matter.[24] "Where a project serves an overriding public purpose, courts have not hesitated to find the project exempt from the host municipality's land use regulation."[25] The proposed facility would serve a "quintessential governmental function" required by state law, would bring the County into conformity with state dictates, and would promote the public safety of all county residents, including village residents.[26]

The fourth *County of Monroe* consideration is "the effect land use would have on the enterprise concerned."[27] The Village's zoning law prevented the development of any correctional facility in the village.[28] The Court of Appeals has discouraged "parochial regulation[s] which 'could otherwise foil the fulfillment of the greater public purpose of promoting'" a municipality's public safety goals and responsibility to comply with state laws.[29] The courts have rejected the assertion of governmental immunity where the host municipality has "effectively tailored its zoning laws to block placement of the project or take action which could 'result in a court proceeding and even an appeal' delaying

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Elmsford, 151 Misc. 2d 1071, 1075, 574 N.Y.S.2d 888, 891 (Sup. Ct. Westchester Cty. 1991)).

22. *Id.* (quoting County of Cayuga v. McHugh, 4 N.Y.2d 609, 615, 152 N.E.2d 73, 76, 176 N.Y.S.2d 643, 647–48 (1958)) (citing N.Y. COUNTY LAW § 217 (McKinney 2004)).

23. *Id.* (quoting *McHugh*, 4 N.Y.2d at 615, 152 N.E.2d at 76, 176 N.Y.S.2d at 647–48) (citing COUNTY § 217).

24. *Id.* (quoting *County of Monroe*, 72 N.Y.2d at 343, 530 N.E.2d at 204, 533 N.Y.S.2d at 704).

25. *County of Herkimer*, 51 Misc. 3d at 532–33, 25 N.Y.S.3d at 851–52 (first citing Crown Commc'n N.Y., Inc. v. N.Y. Dep't of Transp., 4 N.Y.3d 159, 165, 824 N.E.2d 934, 937, 791 N.Y.S.2d 494, 497 (2005); then citing *County of Monroe*, 72 N.Y.2d at 344–45, 530 N.E.2d at 205, 533 N.Y.S.2d at 705; then citing Town of Hempstead v. State, 42 A.D.3d 527, 529−30, 840 N.Y.S.2d 123, 126 (2d Dep't 2007); then citing King v. Cty. of Saratoga Indus. Dev. Agency, 208 A.D.2d 194, 199−200, 622 N.Y.S.2d 339, 343 (3d Dep't 1995); and then citing Town of Queensbury v. City of Glens Falls, 217 A.D.2d 789, 791, 629 N.Y.S.2d 120, 122 (3d Dep't 1995)).

26. *Id.* at 532, 25 N.Y.S.3d at 851 (citing COUNTY § 217).

27. *Id.* at 533, 25 N.Y.S.3d at 852 (quoting *County of Monroe*, 72 N.Y.2d at 343, 530 N.E.2d at 204, 533 N.Y.S.2d at 704).

28. *See id.* at 517, 25 N.Y.S.3d at 841.

29. *Id.* at 534, 25 N.Y.S.3d at 852 (quoting *County of Monroe*, 72 N.Y.2d at 344, 530 N.E.2d at 205, 533 N.Y.S.2d at 705) (citing *Crown Commc'n N.Y. Inc.*, 4 N.Y.3d at 168, 824 N.E.2d at 939, 791 N.Y.S.2d at 499).

the project by 'many months, or even years, during which time the . . . problems remain.'"[30]

Moreover, the process of siting the jail, including litigation, had already exceeded fifteen years.[31] Subjecting the County to the Village's preclusive zoning amendment would require the County to start the process anew, thereby delaying the project for a substantial period of time.[32] As a result, the County would continue to violate the Commission's mandates.[33] In addition, the continuance of boarding inmates out while the approval process and construction occurred would be costly.[34] Further, because the availability of water and sewer services was the most critical of the siting criteria, the jail was required to be built within the village limits where such services were available.[35] Consequently, the zoning regulation had a "prohibitive effect" on the County's ability to construct the imperative facility.[36]

The fifth factor, "the impact of legitimate local interests," also weighed against the Village's application of the amendment to the County.[37] Although the Village's concerns with the location of the facility in the village were legitimate, "they must be viewed in light of all the circumstances."[38] The existing jail had been located in the village for more than one hundred years.[39] The vacant commercial site, which had been vacant for more than ten years, did not improve the character of the village or its economic viability.[40] The comprehensive fifteen-year siting process determined that there were few available feasible sites and that access to water and sewer services made siting in rural locations challenging.[41] Although the "[V]illage's concern about losing taxable property [was] real because 50% of its property [was] tax exempt, [the]

30. *County of Herkimer*, 51 Misc. 3d at 534, 25 N.Y.S.3d at 852 (quoting Village of Nyack v. Daytop Vill., Inc., 78 N.Y.2d 500, 508, 583 N.E.2d 928, 931, 577 N.Y.S.2d 215, 219 (1991)) (first citing Port Wash. Police Dist. v. Town of North Hempstead, No. 013319/09, 2009 N.Y. Slip Op. 51758(U), at 4 (Sup. Ct. Nassau Cty. Aug. 12, 2009); and then citing Bruenn v. Town Bd. of Kent, No. 1023/13, 2014 N.Y. Slip Op. 51116(U), at 7 (Sup. Ct. Putnam Cty. June 13, 2014)).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *County of Herkimer*, 51 Misc. 3d at 534, 25 N.Y.S.3d at 852.

36. *Id.* at 534, 25 N.Y.S.3d at 852–53.

37. *See id.* at 534, 25 N.Y.S.3d at 853 (quoting City of Rochester v. County of Monroe, 72 N.Y.2d 338, 343, 530 N.E.2d 202, 204, 533 N.Y.S.2d 704, 704 (1988)).

38. *Id.* at 535, 25 N.Y.S.3d at 853.

39. *Id.*

40. *County of Herkimer*, 51 Misc. 3d at 535, 25 N.Y.S.3d at 853.

41. *Id.*

site generated only $5,000 per year in property taxes."[42] Although the Village would have received more revenue in property taxes if the land were to be commercially developed, the site had remained undeveloped for many years.[43] Moreover, if the Commission directed that the existing jail be closed, the taxpayers would be required to pay the cost of boarding out the inmates, $64,000 of which would be apportioned to the village taxpayers.[44] Lastly, "generalized opposition to building the jail" in the village is not a justification for sustaining the land use regulation because every alternative proposal also received opposition and such a rationale could result in the jail being zoned out of the entire county.[45] "A court will not uphold a zoning restriction when 'the intruder cannot perform many of its statutory duties without use of lands within the territory of the host and other municipalities within the county.'"[46] As a result, the court found that the Village's articulated concerns did not to rise to the level of a "countervailing local interest of substance and significance."[47] Instead, the benefits intrinsic in the development of the project essential for the public welfare and safety of the area outweighed the interests of the Village in excluding the jail from the village.[48]

The sixth *County of Monroe* element is "the applicant's legislative grant of authority."[49] The County acted pursuant to County Law § 217 which requires every county in the state to operate a county jail.[50]

The seventh criterion is "alternative locations for the facility in less restrictive zoning areas."[51] Jails were permitted in the zoning district where the site was located prior to the amendment.[52] No less restrictive zoning designation existed in the village which would permit the operation of a jail.[53] All of the other sites comprehensively evaluated by

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42. *Id.*

43. *Id.*

44. *Id.*

45. *County of Herkimer*, 51 Misc. 3d at 535, 25 N.Y.S.3d at 853.

46. *Id.* (quoting Town of Caroline v. County of Tompkins, Nos. 2001-0788, RJI 2001-0489M, 2001 N.Y. Misc. LEXIS 1240, at *12 (Sup. Ct. Tompkins Cty. Sept. 20, 2001)).

47. *Id.* (citing *Town of Caroline*, 2001 N.Y. Misc. LEXIS 1240, at *14).

48. *Id.* at 535–36, 25 N.Y.S.3d at 853 (citing King v. Cty. of Saratoga Indus. Dev. Agency, 208 A.D.2d 194, 200, 622 N.Y.S.2d 339, 343 (3d Dep't 1995)).

49. *Id.* at 536, 25 N.Y.S.3d at 853 (quoting City of Rochester v. County of Monroe, 72 N.Y.2d 338, 343, 530 N.E.2d 202, 204, 533 N.Y.S.2d 704, 704 (1988)).

50. *County of Herkimer*, 51 Misc. 3d at 536, 25 N.Y.S.3d at 854 (citing N.Y. COUNTY LAW § 217 (McKinney 2004)).

51. *Id.* (quoting *County of Monroe*, 72 N.Y.2d at 343, 530 N.E.2d at 204, 533 N.Y.S.3d at 704).

52. *Id.*

53. *Id.*

the County were found to be inappropriate for valid reasons.[54]

Apropos to the eighth consideration, there was no "alternative methods of providing the needed improvement."[55]

The final standard is "intergovernmental participation in the project development process and an opportunity to be heard."[56] The County provided many opportunities for intergovernmental involvement and a chance to be heard, both with respect to public comment occasions and other opportunities to be heard before the County Legislature and meetings, including outreach with the Village.[57]

As a result, the court concluded that the County was immune from the Village's zoning restrictions.[58] In reaching that conclusion, it found that "the public safety concerns inherent in operating a safe and functional county jail are analogous to wider public interests, and the extent of the public interest to be served must be weighed in favor of the County."[59] Although the Village's concern regarding lost tax revenue was legitimate, the financial impact on the Village in locating the jail at the derelict shopping center lot did not outweigh the County's obligation to fulfill its statutory obligation to maintain a safe and functional county jail.[60] In addition, the financial impact in continuing to board out inmates would be more injurious to the Village than the loss of the parcel as a taxable property.[61] Lastly, although potential alternative sites existed, the difficulty in obtaining water and sewer services made other alternative locations impractical.[62]

In *Town of Ellery v. New York State Department of Environmental Conservation*, the County sought to expand an existing waste management facility (CCLF) which had been established in the Town pursuant to County Law § 226-b in 1981.[63] The CCLF replaced over forty dumps in the county and occupied eighty-three acres of an 800-acre parcel.[64] It is located in a sparsely populated, rural area, in an agricultural

54. *Id.*

55. *County of Herkimer*, 51 Misc. 3d at 536, 25 N.Y.S.3d at 854 (quoting *County of Monroe*, 72 N.Y.2d at 343, 530 N.E.2d at 204, 533 N.Y.S.3d at 704).

56. *Id.* (quoting *County of Monroe*, 72 N.Y.2d at 343, 530 N.E.2d at 204, 533 N.Y.S.3d at 704).

57. *Id.* at 537, 25 N.Y.S.3d at 855.

58. *Id.*

59. *Id.* at 537–38, 25 N.Y.S.3d at 855 (citing *County of Monroe*, 72 N.Y.2d at 343, 530 N.E.2d at 204, 533 N.Y.S.3d at 704).

60. *County of Herkimer*, 51 Misc. 3d at 538, 25 N.Y.S.3d at 855.

61. *Id.*

62. *Id.*

63. 54 Misc. 3d 482, 483–85, 40 N.Y.S.3d 877, 881–82 (Sup. Ct. Chautauqua Cty. 2016).

64. *Id.* at 484, 40 N.Y.S.3d at 881.

zoning district, which was the Town's least restrictive designation.[65] The CCLF was on the verge of exhausting its capacity to bury and process solid waste and sought to laterally expand the facility by constructing new landfill cells adjacent to, as opposed to on top of, those in use over approximately 53 acres of the site.[66] The Town challenged the approval of the boding resolutions adopted by the County Legislature and adopted a local law that essentially prohibited the expansion.[67] The County asserted a counterclaim against the Town seeking a declaration that the local law was pre-empted by County Law § 226-b.[68] The Town contended that the local law was not preempted and that the court must hold a hearing and apply the balancing test pursuant to *County of Monroe*.[69]

The court initially determined that the local law was in direct conflict with and preempted by County Law § 226-b.[70] Although a municipality is authorized to enact local laws that are not inconsistent with state law pursuant to article 9, section 2(c) of the State Constitution and Municipal Home Rule Law § 10(1), such local legislation is preempted where the State Legislature has evidenced its intent to occupy a particular field ("field preemption") or where a direct conflict with a state statute exists ("conflict preemption").[71] "Conflict preemption occurs when the ordinance prohibits what would be permissible under State law or imposes prerequisite additional restrictions on rights under State law so as to inhibit the operation of the State's general laws."[72] In this instance, no state statute of regulation expressly prohibited municipalities from adopting laws affecting landfills.[73] County Law § 226-b authorizes counties to establish solid waste landfills if they take into consideration local land use character and zoning.[74] The statute does not accord a municipality the authority to proscribe the construction or expansion of a landfill.[75] To the contrary, County Law § 226-b is explicitly intended to

65. *Id.*

66. *Id.* at 486, 40 N.Y.S.3d at 882.

67. *Id.* at 487, 40 N.Y.S.3d at 883.

68. *Town of Ellery*, 54 Misc. 3d at 487, 40 N.Y.S.3d at 883 (citing N.Y. COUNTY LAW § 226-b (McKinney 2004)).

69. *Id.* (citing City of Rochester v. County of Monroe, 72 N.Y.2d 338, 343, 530 N.E.2d 202, 204, 533 N.Y.S.2d 704, 704 (1988)).

70. *Id.* at 492, 40 N.Y.S.3d at 886 (citing COUNTY § 226-b).

71. *Id.* at 491, 40 N.Y.S.3d at 886 (citing Eric M. Berman, P.C. v. City of New York, 25 N.Y.3d 684, 690, 37 N.E.3d 82, 86, 16 N.Y.S.3d 25, 29 (2015)).

72. *Id.* (first citing *Eric M. Berman, P.C.*, 25 N.Y.3d at 690, 37 N.E.3d at 86, 16 N.Y.S.3d at 29; and then citing Consol. Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 107, 456 N.E.2d 487, 491, 468 N.Y.S.2d 596, 600 (1983)).

73. *Town of Ellery*, 54 Misc. 3d at 491, 40 N.Y.S.3d at 886.

74. *Id.* at 492, 40 N.Y.S.3d at 886 (citing COUNTY § 226-b).

75. *Id.*

provide for the collection and disposition of solid wastes as a county function.[76] The court concluded that state law only required the County to consider local land use laws and regulations.[77] However, the local law required the County to "acquiesce" to the Town's land use laws.[78] The "veto power" over the County's lawful actions "clearly frustrates the County's ability to exercise its powers and carry out its responsibilities under State law."[79] Consequently, the local law was preempted and invalid.[80]

In addition, the court conducted a hearing on the *County of Monroe* balancing of the public interests considerations.[81] With respect to the first factor, that is, the nature and scope of the instrumentality in question, the use is a landfill that is regulated by federal and state agencies.[82] The land use involved is the expansion of a facility that has existed for thirty-five years.[83] The public interest to be advanced is the continuation of an "environmentally sound and cost-effective means of managing waste."[84]

The implication of the local zoning regulation on the operation

> would be oversight by a hostile Town Board under a duplicative (at best) local licensing system, which encroaches upon the regulatory authority of the [Department of Environmental Conservation (DEC)] and subjugates an already rigorous and often complex environmental review process (as well as judicial review of the same) to the vote of the same Town Board.[85]

The likely consequence of application of the zoning regulation would be the termination of the CCLF's operations.[86]

The legislative grant of authority, County Law § 226-b, expressly provides for the collection and disposition of solid wastes as a county

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76. *Id.* (citing Riley v. County of Monroe, 43 N.Y.2d 144, 149, 371 N.E.2d 520, 522, 400 N.Y.S.2d 801, 804 (1977)).

77. *Id.* (first citing Informal Op. 1993-42, 1993 Ops. Att'y Gen. 1070 (construing County Law § 226-b); and then citing 1981 Att'y Gen. (Inf. Ops.) 140 (construing County Law § 226-b, Public Authorities Law §§ 1283(2), 1285(6))).

78. *Town of Ellery*, 54 Misc. 3d at 493, 40 N.Y.S.3d at 887.

79. *Id.*

80. *Id.*

81. *See id.* at 493, 40 N.Y.S.3d at 887–88 (first citing City of Rochester v. County of Monroe, 72 N.Y.2d 338, 343, 530 N.E.2d 202, 204, 533 N.Y.S.2d 702, 704 (1988); and then citing County of Herkimer v. Village of Herkimer, 51 Misc. 3d 516, 532, 25 N.Y.S.3d 839, 851 (Sup. Ct. Herkimer Cty. 2016)).

82. *Id.*

83. *Town of Ellery*, 54 Misc. 3d at 494, 40 N.Y.S.3d at 888.

84. *Id.*

85. *Id.*

86. *Id.*

function.[87] With respect to the existence of alternative locations in a less restrictive zoning area, the facility was "already located in the Town's least restrictive zoning area."[88] Alternative methods would be extremely expensive and would not be more protective of the environment.[89] DEC's "five-year-long environmental review" provided numerous opportunities for the Town and public to be heard.[90] Consequently, most if not all, of the *County of Monroe* considerations weighed in the County's favor.[91] Because "[t]he scales weigh heavily in the County's favor when all the factors are considered collectively," the County was immune from the application of the zoning regulation.[92]

The two decisions, particularly *County of Herkimer*, more than any prior decisions, provide guidance in the appropriate application of the *County of Monroe* considerations.

The State Constitution bestows on all local governments the authority "to adopt and amend local laws not inconsistent with the provisions of [the] constitution or any general law relating to its property, affairs or government."[93] To implement this express grant of authority, the Legislature adopted a number of statutes establishing a wide range of local powers including the authorization to regulate land use through the adoption of zoning laws.[94] Despite such broad grant of authority, the doctrine of preemption "represents a fundamental limitation on home rule powers."[95]

The plaintiff in *Smoke v. Planning Board of Greig* contended that the Water Resources Law, Environmental Conservation Law article 15,[96] preempted a Planning Board's imposition of conditions.[97] The Planning Board had granted a special permit "to install 7,600 feet of underground

87. *Id.* at 492, 40 N.Y.S.3d at 886 (first citing N.Y. COUNTY LAW § 226-b (McKinney 2004); and then citing Riley v. County of Monroe, 43 N.Y.2d 144, 149, 371 N.E.2d 520, 521–22, 400 N.Y.S.2d 801, 803 (1977)).

88. *Town of Ellery*, 54 Misc. 3d at 494, 40 N.Y.S.3d at 888.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. N.Y. CONST. art. IX, § 2(c).

94. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11) (McKinney 1994); N.Y. STATUTE OF LOCAL GOV'T LAW § 10(6), (7) (McKinney 1994).

95. Albany Area Builders Ass'n v. Guilderland, 74 N.Y.2d 372, 377, 546 N.E.2d 920, 922, 547 N.Y.S.2d 627, 629 (1989) (citing Dougal v. County of Suffolk, 65 N.Y.2d 668, 669, 481 N.E.2d 254, 254, 491 N.Y.S.2d 622, 622 (1985)); 5 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 15:2 (3d ed. 2013)).

96. N.Y. ENVTL. CONSERV. LAW § 15 (McKinney 2006).

97. Smoke v. Planning Bd. of Greig, 138 A.D.3d 1437, 1438, 31 N.Y.S.3d 707, 709 (4th Dep't 2016).

pipeline" for the purpose of conveying water from an aquifer under the petitioners' property to a facility for bulk sale in another town.[98] One of the conditions of the approval was that "no construction on the pipeline could begin until the use of wells on the applicants' other property was approved for commercial uses by the [Town]."[99] The petitioners contested the condition, alleging that the Planning Board lacked the authority to regulate the use of water resources or to require the petitioners to obtain any additional approval regarding water extraction from their property.[100]

The court found that the Water Resources Law does not preempt local zoning laws regarding land use[101]:

> Instead, the Water Resources Law preempts only those local laws that attempt "to regulate withdrawals of groundwater," which "includes all surface and underground water within the state's territorial limits." The Water Resources Law does not preempt the authority of local governments to "regulate the use of land through the enactment of zoning laws." Considering . . . the language of the statute, the statutory scheme as a whole, and the legislative history of the Water Resources Law . . . the intent of the legislation was to regulate water extraction "for commercial and industrial purposes" in order to "preserv[e] and protect[]" the natural resource "to conserve and control the State's water resources," "to manage the State's water resources to promote economic growth and address droughts," and to "assure compliance with the Great Lakes Compact which requires that New York regulate all water withdrawals occurring in the New York portion of the Great Lakes Basin."[102]

The court found that there is nothing in the legislation or legislative history that suggests an intent to preempt local government's power to

98. *Id.*

99. *Id.* at 1438, 31 N.Y.S.3d at 709.

100. *Id.*

101. *Id.*

102. *Smoke*, 138 A.D.3d at 1438–39, 31 N.Y.S.3d at 709–10 (alterations in original) (first quoting Woodbury Heights Estates Water Co. v. Village of Woodbury, 111 A.D.3d 699, 702, 975 N.Y.S.2d 101, 105 (2d Dep't 2013); then quoting Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 30, 964 N.Y.S.2d 714, 718 (3d Dep't 2013); then quoting Assembly Introducer's Memorandum in Support, Bill Jacket, ch. 401, at 5 (2011); then quoting Div. of the Budget Bill Memorandum, Bill Jacket, ch. 401, at 12 (2011); then quoting N.Y. State Dep't of Envtl. Conservation Memorandum, Bill Jacket, ch. 401, at 14 (2011); and then quoting Adirondack Council Memorandum in Support, Bill Jacket, ch. 401, at 20 (2011)) (first citing N.Y. ENVTL. CONSERV. LAW § 15-0103(1) (McKinney 2006), then citing Williams v. City of Schenectady, 115 A.D.2d 204, 205, 495 N.Y.S.2d 288, 289 (3d Dep't 1985); then citing Wallach v. Town of Dryden, 23 N.Y.3d 728, 744, 16 N.E.3d 1188, 1195, 992 N.Y.S.2d 710, 717 (2008); and then citing *Williams*, 115 A.D.2d at 205, 495 N.Y.S.2d at 289).

regulate "land use within its borders."[103] Instead, "the statute regulates how a natural resource may be extracted but does not regulate where in the Town such extraction may occur."[104]

B. Amortization of Nonconforming Uses

Although it was initially assumed that nonconforming uses would disappear over time, nonconforming uses endure.[105] Because nonconforming uses are incompatible with a community's zoning plan, the Court of Appeals has characterized the law's sanction of such uses as a "grudging tolerance" and has authorized municipalities to adopt reasonable measures to eliminate nonconforming uses,[106] including amortization periods, at the conclusion of which the nonconforming use must terminate.[107] An "amortization period simply designates a period of time granted to owners of nonconforming uses during which they may phase out" the use and make other arrangements.[108] It is, in effect, a grace period, putting owners on fair notice of the law and proving to them a reasonable opportunity to recoup their investment[109]:

> The validity of an amortization period depends on its reasonableness. We have avoided any fixed formula for determining what constitutes a reasonable period. Instead, we have held that an amortization period is presumed valid, and the owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power.[110]

It was alleged in *Suffolk Asphalt Supply, Inc. v. Board of Trustees of*

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103. *Id.* at 1439, 31 N.Y.S.3d at 710 (quoting DJL Rest. Corp. v. City of New York, 96 N.Y.2d 91, 96, 749 N.E.2d 186, 191, 725 N.Y.S.2d 622, 626 (2001)).

104. *Id.*

105. Harbison v. City of Buffalo, 4 N.Y.2d 553, 559–60, 152 N.E.2d 42, 45, 176 N.Y.S.2d 598, 602–03 (1958).

106. Pelham Esplanade v. Bd. of Trs. of Pelham Manor, 77 N.Y.2d 66, 71, 565 N.E.2d 508, 510, 563 N.Y.S.2d 759, 761 (1990).

107. *See* Suffolk Outdoor Advert. Co. v. Town of Southampton, 60 N.Y.2d 70, 73, 455 N.E.2d 1245, 1245, 468 N.Y.S.2d 450, 451 (1983).

108. Village of Valatie v. Smith, 83 N.Y.2d 396, 400, 632 N.E.2d 1264, 1266, 610 N.Y.S.2d 941, 943–44 (1994) (citing Art Neon Co. v. City of Denver, 488 F.2d 118, 121 (10th Cir. 1973)).

109. Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 479, 373 N.E.2d 255, 261–62, 402 N.Y.S.2d 359, 366–67 (1977).

110. *Smith*, 83 N.Y.2d at 400–01, 632 N.E.2d at 1267, 610 N.Y.S.2d at 944 (first citing *Harbison*, 4 N.Y.2d at 562–63, 152 N.E.2d at 46–47, 176 N.Y.S.2d at 604–06; then citing Town of Islip v. Caviglia, 73 N.Y.2d 544, 561, 540 N.E.2d 215, 244, 542 N.Y.S.2d 139, 148 (1989); and then citing *Modjeska Sign Studios, Inc.*, 43 N.Y.2d at 479, 373 N.E.2d at 261–62, 402 N.Y.S.2d at 366–67).

Westhampton Beach that an amendment to the zoning law which rendered the use of property as an asphalt plant nonconforming was invalid and unconstitutional.[111] Although the property had been utilized as an asphalt plant since 1945, a 1985 amendment to the zoning law made the use of the property as an asphalt plant nonconforming.[112] A subsequent local law adopted in 2000 "provided that the plaintiff's right to operate and maintain the nonconforming asphalt plant would terminate within one year unless the plaintiff applied to the Village Zoning Board of Appeals . . . for an extension of the termination date, which [could] not . . . exceed five years from the date the law was adopted."[113] The Zoning Board of Appeals granted the maximum allowable extension and directed that the use be terminated by July 2, 2005.[114] The plaintiff commenced an action seeking a declaration that the local law was invalid and unconstitutional.[115] The court was faced with several substantial issues regarding the application of the amortization provisions in deciding a motion in limine.[116]

"The plaintiff contends that in determining the . . . reasonableness of the amortization period, the court's inquiry should be limited to the five-year period from July 2000 to July 2005, which [was] the maximum period of amortization for which the law provide[d]."[117] On the other hand, "[t]he defendants contend[ed] that, since this [was] an as-applied challenge . . . , the court should also consider the period of time after 2005 during which litigation had been pending."[118] "In determining whether a property owner has recouped its investment, the Court of Appeals has considered the time of continued operation of a nonconforming use after the maximum period of amortization."[119] For example, in *Town of Islip v. Caviglia*, the Court of Appeals took into account the property owner continued to operate well past the maximum five-year amortization period provided in the contested law.[120] Similarly, in *Philanz Oldsmobile v. Keating*, in evaluating the reasonableness of a three-year amortization

111. 51 Misc. 3d 303, 305, 25 N.Y.S.3d 809, 811 (Sup. Ct. Suffolk Cty. 2016).

112. *Id.* at 304, 25 N.Y.S.3d at 810.

113. *Id.* at 304, 25 N.Y.S.3d at 811.

114. *Id.* at 304–05, 25 N.Y.S.3d at 811.

115. *Id.* at 305, 25 N.Y.S.3d at 811.

116. *See generally Suffolk Asphalt Supply, Inc.*, 51 Misc. 3d 303, 25 N.Y.S.3d 809 (discussing the three issues including the time period for amortization, the value of amortization, and the amount to include in the amortization such as the plaintiff's investment in the present litigation).

117. *Id.* at 306, 25 N.Y.S.3d at 811.

118. *Id.* at 306, 25 N.Y.S.3d at 811–12.

119. *Id.* at 306, 25 N.Y.S.3d at 812.

120. 73 N.Y.2d 544, 561, 540 N.E.2d 215, 224, 542 N.Y.S.2d 139, 148 (1989).

period, the court considered that the Town had not taken any enforcement actions for several years after the abatement period had expired, effectively, providing a ten-year amortization period.[121]

The *Suffolk Asphalt* court concluded that it is permissible to consider the fact "that a property owner has had more than the maximum amount of time for which the law provides to amortize its investment in a nonconforming use."[122] In addition, because the action was an as-applied challenge to the local law—which is dependent on the particular circumstances of each case—the fact that the plaintiff had many more years than the drafters of the legislation intended to recoup its investment in the nonconforming asphalt plant is a pertinent factor in considering whether the plaintiff has recouped its investment.[123]

The defendants next argued that "the court's inquiry should be limited to whether the plaintiff has been able to recoup its investment in the nonconforming asphalt plant and that the court should not consider the value of the continued operation of the business."[124] The plaintiff asserted that the court should consider a multitude of factors including the value of the buildings and equipment and the ability to relocate the plant.[125] The court observed that it had previously held the following:

> In determining what constitutes a substantial loss, a court will consider the nature of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which the owner may relocate the business, the cost of such relocation, as well as any other reasonable costs that bear on the kind and amount of damages the owner may sustain.[126]

The appellate division affirmed that determination, finding that it has eschewed any fixed formula for determining what constitutes a reasonable amortization period and that reasonableness is a question which must be decided in light of the facts of each case.[127] The appellate division further related that germane considerations include

> the length of [an] amortization period in relation to the investment and

121. 51 A.D.2d 437, 441, 381 N.Y.S.2d 916, 920 (4th Dep't 1976).

122. *Suffolk Asphalt Supply, Inc.*, 51 Misc. 3d at 307, 25 N.Y.S.3d at 812.

123. *Id.* (citing Chau v. SEC, 72 F. Supp. 3d 417, 426 (S.D.N.Y. 2014)).

124. *Id.* at 307, 25 N.Y.S.3d at 812–13.

125. *Id.* at 307, 25 N.Y.S.3d at 813.

126. *Id.* at 308, 25 N.Y.S.3d at 813 (first citing Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 480, 373 N.E.2d 255, 262, 402 N.Y.S.2d 359, 367 (1977); and then citing Harbison v. City of Buffalo, 4 N.Y.2d 553, 558–63, 152 N.E.2d 42, 44, 176 N.Y.S.2d 598, 602 (1958)).

127. Suffolk Asphalt Supply, Inc. v. Bd. of Trs. of Westhampton Beach, 59 A.D.3d 429, 429–30, 872 N.Y.S.2d 516, 517–18 (2d Dep't 2009).

> the nature of the use; the nature of the business; the improvements erected on the land; the character of the neighborhood and the damage caused to the property owner.[128]

In reaching a determination on whether the plaintiff had been provided a fair opportunity to recoup its investment in the nonconforming asphalt plant, a court possesses extensive authority to consider a range of factors including

> the nature of the business and of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which the owner may relocate the business, and the cost of such relocation. Other factors include . . . the initial capital investment, investment realization to date, life expectancy of the investment and the existence or nonexistence of a lease obligation.[129]

Ascertaining "the reasonableness of an amortization period is an inherently factual inquiry with a balance to be struck between an individual's interest in maintaining [a nonconforming] use of the property and the general welfare of the community."[130] As a result, the fundamental issue was whether, "considering the amounts invested in the plant, the value of the buildings and equipment, and the ability and cost of relocating the plant, among other things, the appropriate balance has been struck and the plaintiff has been given an opportunity to recoup its investment and avoid substantial financial loss."[131]

Finally, "[t]he defendants [sought] to preclude the plaintiff from including its litigation expenses as a factor to be considered . . . in determining whether the plaintiff had suffered a substantial financial loss."[132] Although no prior decision has dealt with the issue, the court determined, "[T]he plaintiff's reasonable litigation expenses are costs which bear upon the kind and amount of damages that the plaintiff has sustained," particularly because the plaintiff would "not have been able to stay in business had it not" contested the law.[133] Consequently, "evidence of reasonable litigation expenses" was relevant in order to determine the plaintiff's "investment in the nonconforming asphalt plant

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128. *Suffolk Asphalt Supply, Inc.*, 51 Misc. 3d at 309, 25 N.Y.S.3d at 813 (first citing *Suffolk Asphalt Supply, Inc.*, 59 A.D.3d at 430, 872 N.Y.S.2d at 518; and then citing *Harbison*, 4 N.Y.2d at 562–63, 152 N.E.2d at 47, 176 N.Y.S.2d at 605).

129. *Id.* at 310, 25 N.Y.S.3d at 814–15 (first citing *Harbison*, 4 N.Y.2d at 562–63, 152 N.E.2d at 47, 176 N.Y.S.2d at 605; and then citing *Modjeska Sign Studios, Inc.*, 43 N.Y.2d at 480, 373 N.E.2d at 262, 402 N.Y.S.2d at 367).

130. *Id.* at 310–11, 25 N.Y.S.3d at 815 (citing Lodge Hotel, Inc., v. Town of Erwin Zoning Bd. of Appeals, No. 90321, 2005 WL 6214563 (Sup. Ct. Steuben Cty. Apr. 25, 2005)).

131. *Id.* at 311, 25 N.Y.S.3d at 815.

132. *Id.*

133. *Suffolk Asphalt Supply, Inc.*, 51 Misc. 3d at 311–12, 25 N.Y.S.3d at 815–16.

and to determine whether it [had] suffered a substantial financial loss."[134]

II. ZONING BOARDS OF APPEALS

A. Due Process

Consideration of evidence after a hearing has been closed without providing concerned parties an opportunity to be heard violates the due process rights of the party.[135] However, a few decisions have held that the receipt of information from impartial municipal agencies after a public hearing is closed does not violate an applicant's due process rights.[136] For example, in *Silveri v. Nolte*, the appellate division determined that a Board did not violate the applicants' due process rights when it reviewed building department records after having given the applicants notice of its intention to do so.[137] On the other hand, in *89 JPS, LLC v. Joint Village of Lake Placid & Town of North Elba Review Board*, the Board had considered factual data provided by the municipal planning office after the public hearing was closed in rendering its decision and the information was not given to the applicant until after a decision was approved.[138] In concluding that a contested condition of the approval, which was premised on that information, was unlawful, the court stressed that the applicant had been thwarted from securing the factual information provided by the planning office or an opportunity to refute that information.[139] "By not affording [the petitioner] the opportunity to rebut or challenge the planning office report, its 'due process rights were violated by the [B]oard's ex parte receipt and consideration of the subject [analysis data] in that it arrived at its decision with the aid of new evidence which it had no right to consider under the circumstances presented.'"[140]

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134. *Id.* at 312, 25 N.Y.S.3d at 816.

135. *See* Hampshire Mgmt. Co. v. Nadel, 241 A.D.2d 496, 497, 660 N.Y.S.2d 64, 65–66 (2d Dep't 1997) (first citing Sunset Sanitation Serv. Corp. v. Bd. of Zoning Appeals of Smithtown, 172 A.D.2d 755, 755, 569 N.Y.S.2d 141, 142 (2d Dep't 1991); and then citing Stein v. Bd. of Appeals of Islip, 100 A.D.2d 590, 590–91, 473 N.Y.S.2d 535, 537 (2d Dep't 1984)); Cilla v. Mansi, No. 3563-02, 2002 N.Y. Slip Op. 50208(U), at 4 (Sup. Ct. N.Y. Cty. May 8, 2002).

136. *See* Von Kohorn v. Morrell, 9 N.Y.2d 27, 34, 172 N.E.2d 287, 289, 210 N.Y.S.2d 525, 528 (1960) (citing Cmty. Synagogue v. Bates, 1 N.Y.2d 445, 454, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 22 (1956)).

137. 128 A.D.2d 711, 712, 513 N.Y.S.2d 205, 206 (2d Dep't 1987).

138. No. 0029-11, 2012 N.Y. Slip Op. 51151(U), at 2 (Sup. Ct. N.Y. Cty. June 25, 2012).

139. *Id.* at 3.

140. *Id.* at 4 (quoting *Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 537) (first citing Wunder v. Macomber, 34 Misc. 2d 281, 289, 228 N.Y.S.2d 552, 561 (Sup. Ct. Monroe Cty. 1962); then citing Fulton v. Bd. of Appeals of Oyster Bay, 152 N.Y.S.2d 974, 976 (Sup. Ct. Nassau

In *Applebaum v. Village of Great Neck Board of Appeals*, the court rejected the contention the Board "improperly relied on letters it obtained from the Chief of the . . . Fire Company and the . . . Building Department without affording [the applicant] an opportunity to respond, as the letters . . . did not contain any new factual allegations, [and] were prepared by municipal officials without a vested interest in the decision."[141] In reaching its conclusion, the court relied on its previous decision in *Logiudice v. Southold Town Board of Trustees*[142] in which it had rejected a claim that a Board had inappropriately relied on a report from the Town Local Waterfront Revitalization Program Coordinator without providing the applicant with "an opportunity to respond" because the report "did not contain any new factual allegations, and was prepared by 'a municipal officer without a vested interest in the decision.'"[143]

Although the courts on a few occasions have permitted the receipt of information from ostensibly impartial municipal agencies or employees,[144] the practice should be considered to violate the due process rights of the parties. Many such reports may, indeed, be unbiased.[145] However, the status as a municipal employee does not guarantee that the writer is unbiased or does not have a veiled agenda.[146] Moreover, the facts upon which such a report or opinion is based may be inaccurate or the source of the information questionable.[147] The applicant or other parties should be entitled to comment on any such reports and the receipt and consideration of such reports without an opportunity to comment on them

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Cty. 1956); then citing Humble Oil & Refining Co. v. Bd. of Aldermen of Chapel Hill, 209 S.E.2d 447, 449 (N.C. 1974); then citing Pizzola v. Planning & Zoning Comm'n of Plainville, 355 A.2d 21, 24 (Conn. 1974); then citing *Hampshire Mgmt. Co.*, 241 A.D.2d at 497, 660 N.Y.S.2d at 65–66; and then citing *Sunset Sanitation Serv. Corp.*, 172 A.D.2d at 755, 569 N.Y.S.2d at 142).

141. 138 A.D.3d 830, 831, 28 N.Y.S.3d 459, 460 (2d Dep't 2016) (first citing Logiudice v. Southold Town Bd. of Trs., 50 A.D.3d 800, 801, 855 N.Y.S.2d 620, 621 (2d Dep't 2008); and then citing *Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 537).

142. *Id.* (first citing *Logiudice*, 50 A.D.3d at 801, 855 N.Y.S.2d at 621; and then citing *Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 537).

143. *Logiudice*, 50 A.D.3d at 801, 855 N.Y.S.2d at 621 (quoting *Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 537).

144. *See Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 537.

145. *Id.* (first citing *Wunder*, 34 Misc. 2d at 289, 228 N.Y.S.2d at 56; then citing *Fulton*, 152 N.Y.S.2d at 976; then citing *Humble Oil & Refining Co.*, 209 S.E.2d at 449; and then citing *Pizzola*, 355 A.2d at 24); *see also Applebaum*, 138 A.D.3d at 831, 28 N.Y.S.3d at 460 (first citing *Logiudice*, 50 A.D.3d at 801, 855 N.Y.S.2d at 621; and then citing *Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 537).

146. *See Stein*, 100 A.D.2d at 592, 473 N.Y.S.2d at 538 (Gibbons, J., dissenting).

147. *Id.* at 591, 473 N.Y.S.2d at 537 (majority opinion) (first citing De Blois v. Wallace, 88 A.D.2d 1073, 1074, 452 N.Y.S.2d 734, 736 (3d Dep't 1982); and then citing *Wunder*, 34 Misc. 2d at 290, 228 N.Y.S.2d at 561).

should be viewed as improper and prejudicial to the parties.[148]

A board must be able to fairly control its meetings, including the conduct of participants, the length of time provided for presentations and comments. The mere fact that a party desires more time than is allocated by a board or that a presentation is interrupted "by questions posed by individual ZBA members does not amount to a deprivation of a full and fair hearing."[149]

B. Use Variance

A use variance authorizes a use that is not permitted by a municipality's zoning law in a particular zoning district.[150] Consequently, the criteria that must be demonstrated is exacting and an applicant must satisfy each of the enumerated statutory standards.[151] The requirement that the applicant demonstrate an inability to realize a reasonable return from each use permitted in the zoning district in which one's property is located, is often the most daunting requirement for a use variance.[152] An inability to satisfy that prerequisite bars an applicant for a use variance from obtaining relief.[153]

In *DeFeo v. Zoning Board of Appeals of Bedford*, the majority of the property for which a use variance was sought was "commercially zoned as "RB," or roadside business[,] but a portion of the rear of the property" was zoned for residential use on lots of at least one-half acre.[154] The property was situated on a private road ending in a cul-de-sac.[155] The owner intended to construct a car wash with a lube and detail facility on the commercial part of the property and to utilize the residential portion

148. *Id.*

149. Cooney v. Town of Wilmington Zoning Bd. of Appeals, 140 A.D.3d 1350, 1352–53, 33 N.Y.S.3d 547, 550 (3d Dep't 2016) (citing Grossman v. Planning Bd. of Colonie, 126 A.D.2d 887, 890, 510 N.Y.S.2d 929, 932 (3d Dep't 1987)).

150. *See* N.Y. TOWN LAW § 267(1)(a) (McKinney 2013); N.Y. VILLAGE LAW § 7-712(1)(a) (McKinney 2011).

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

152. *See* TOWN § 267-b(2)(b)(1); VILLAGE § 7-712-b(2)(b)(1).

153. *See, e.g.*, Forrest v. Evershed, 7 N.Y.2d 256, 261, 164 N.E.2d 841, 843–44, 196 N.Y.S.2d 958, 962 (1959); Crossroads Recreation, Inc. v. Broz, 4 N.Y.2d 39, 45–46, 149 N.E.2d 65, 68, 172 N.Y.S.2d 129, 133 (1958) (citing Young Women's Hebrew Ass'n v. Bd. of Standards & Appeals of N.Y, 266 N.Y. 270, 276, 194 N.E. 751, 753 (1935)); P.M.S. Assets, Ltd. v. Zoning Bd. of Appeals of Pleasantville, 303 A.D.2d 411, 412, 755 N.Y.S.2d 856, 857 (2d Dep't 2003) (first citing Ifrah v. Utschig, 98 N.Y.2d 304, 307, 774 N.E.2d 732, 733, 746 N.Y.S.2d 667, 668 (2002); and then citing Fuhst v. Foley, 45 N.Y.2d 441, 445, 382 N.E.2d 756, 757, 410 N.Y.S.2d 56, 57 (1978)).

154. 137 A.D.3d 1123, 1124, 28 N.Y.S.3d 111, 113 (2d Dep't 2016).

155. *Id.*

of the property as a driveway and parking lot.[156] The Town's comprehensive plan suggested that "any property located along a side street, such as the one on which the property was located, should consider connection to the side street, even if the side street" primarily was residential in character.[157] Consequently, the proposed entrance and exit to the carwash driveway were designed to be on the private road with elimination of the existing curb cuts on the highway.[158] Neighbors contested the approval of area and use variances and a special permit granted by the Zoning Board of Appeals for the use.[159]

The court annulled the use variance because the applicant had failed to satisfy the first prerequisite element, that is, that "the property cannot yield a reasonable return if used only for permitted purposes" in the zoning district.[160] An applicant seeking a use variance must factually establish, "by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses" in the zoning district.[161] The applicant had demonstrated that the "residential portion of the property could not be developed for . . . any of the permitted uses in the residential" zone, including for a residence, because of the topography, the inability to construct a septic system and the narrow nature of the residential part of the parcel.[162] The applicant also had submitted an appraisal which concluded that if a use variance for the residential portion of the property were not granted, the development potential of the commercially-zoned portion of the property would be reduced: for the carwash proposal by twenty-seven percent, for retail use by thirty-five percent, and for office space by fifty-three percent.[163] However, the applicant failed to submit any actual financial information, such as

> the original purchase price of the property, the expenses and carrying costs of the property, the present value of the property, the taxes, the amount of any mortgages or other encumbrances, the amount of income

156. *Id.*

157. *Id.* at 1124, 28 N.Y.S.3d at 113–14.

158. *Id.* at 1125, 28 N.Y.S.3d at 114.

159. *See DeFeo*, 137 A.D.3d at 1125, 28 N.Y.S.3d at 114.

160. *Id.* at 1126, 28 N.Y.S.3d at 115 (quoting Westbury Laundromat, Inc. v. Mammina, 62 A.D.3d 888, 890, 879 N.Y.S.2d 188, 192 (2d Dep't 2009)) (citing N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2013)).

161. *Id.* at 1126, 28 N.Y.S.3d at 114 (quoting Dreikausen v. Zoning Bd. of Appeals of Long Beach, 287 A.D.2d 453, 456, 731 N.Y.S.2d 54, 57 (2d Dep't 2001) (Goldstein, J., dissenting)) (first citing Vill. Bd. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 256, 423 N.E.2d 385, 385, 440 N.Y.S.2d 908, 908 (1981); and then citing Bella Vista Apartment Co. v. Bennett, 89 N.Y.2d 465, 469, 678 N.E.2d 198, 200, 655 N.Y.S.2d 742, 744 (1997)).

162. *Id.* at 1126, 28 N.Y.S.3d at 115.

163. *Id.*

> presently realized, if any, or an estimate as to what a reasonable return on the entire property or any portion should be.[164]

Entitlement to a use variance cannot be demonstrated simply by establishing that the proposed use would be more profitable than a smaller project not requiring a use variance.[165] Although a property owner is entitled to realize a reasonable return, he or she does not have a right to the most profitable return of property.[166] As a result, the conclusion of the Zoning Board of Appeals that the applicant had demonstrated "unnecessary hardship" was arbitrary and capricious and lacked a rational basis in the record.[167]

A property owner challenged the denial of a use variance to raze both a school building and single-family residence located on a contiguous lot in order to construct a twenty-four-bed community residence for alcohol and substance abuse rehabilitation in *Rehabilitation Support Services v. City of Albany Board of Zoning Appeals*.[168] The property was located in a zoning district which allowed single- and two-family detached dwellings and houses of worship.[169] The previous owner of the school building had obtained a use variance in 2008 to renovate the school building for a similar purpose, but did not proceed with the proposal.[170]

The applicant failed to establish that the property could not yield a reasonable return if used only for uses permitted in the zoning district.[171] It had paid slightly over $40,000 for both properties and had obtained most of that sum from Albany County toward the purchase.[172] As a result,

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164. *DeFeo*, 137 A.D.3d at 1126, 28 N.Y.S.3d at 115 (first citing *Jarrold*, 53 N.Y.2d at 256, 423 N.E.2d at 385–86, 440 N.Y.S.2d at 908–09; and then citing 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)).

165. *See id.* (citing *Crossroads Recreation, Inc.*, 4 N.Y.2d at 46, 149 N.E.2d at 68, 172 N.Y.S.2d at 133–34).

166. *Id.* (first citing *Crossroads Recreation, Inc.*, 4 N.Y.2d at 46, 149 N.E.2d at 68, 172 N.Y.S.2d at 133–34; and then citing Westbury Laundromat, Inc. v. Mammina, 62 A.D.3d 888, 891, 879 N.Y.S.2d 188, 192 (2d Dep't 2009)).

167. *Id.* (first citing Hejna v. Bd. of Appeals of Amityville, 105 A.D.3d 843, 845, 964 N.Y.S.2d 164, 166–67 (2d Dep't 2013); then citing Edwards v. Davison, 94 A.D.3d 883, 884, 941 N.Y.S.2d 873, 874 (2d Dep't 2012); then citing Park Hill Residents' Ass'n v. Cianciulli, 234 A.D.2d 464, 464, 651 N.Y.S.2d 159, 160 (2d Dep't 1996); then citing Ferruggia v. Zoning Bd. of Appeals of Warwick, 233 A.D.2d 505, 507, 649 N.Y.S.2d 946, 948 (2d Dep't 1996); and then citing *Westbury Laundromat, Inc.*, 62 A.D.3d at 891–92, 879 N.Y.S.2d at 192).

168. 140 A.D.3d 1424, 1425, 34 N.Y.S.3d 256, 257 (3d Dep't 2016).

169. *Id.*

170. *Id.*

171. *See id.* at 1426, 34 N.Y.S.3d at 258.

172. *Id.*

it had invested less than $500 to purchase the properties.[173] The applicant provided insufficient proof regarding whether a reasonable return could be realized on the negligible investment by using the properties for any of the uses permitted in the zone.[174] Although a possible hardship could have resulted from the use of the old school building, the plan included demolition of the building, thus, in any event, the site could be used for a conforming use.[175] In addition, the project included the adjacent property where a single-family residence was proposed to be demolished, which would have resulted in a nonconforming use replacing a conforming use.[176]

Although the Zoning Board of Appeals had concluded in 2008 with respect to the prior owner's application that a community rehabilitation residence would not alter the essential character of the neighborhood, the Zoning Board of Appeals distinguished the current application because several other similar facilities had been approved in the ensuing six years resulting in a saturation of such uses in the community.[177] Further, the application would have resulted in the demolition of an historical school building while the earlier application sought to renovate the structure.[178] Lastly, the hardship was self-created because the applicant was aware that the use was not permissible when it purchased the property.[179] Consequently, the court sustained the denial of the use variance.[180]

C. Area Variances

The applicable standard for judicial review of a decision on an area variance application was reiterated in *Harris v. Zoning Board of Appeals of Carmel*.[181] "Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary [and capricious], or an abuse of discretion."[182] Therefore, a determination of a

173. *Rehab. Support Servs.*, 140 A.D.3d at 1426, 34 N.Y.S.3d at 258.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Rehab. Support Servs.*, 140 A.D.3d at 1426, 34 N.Y.S.3d at 258.
179. *Id.*
180. *Id.*
181. *See* 137 A.D.3d 1130, 1131, 27 N.Y.S.3d 660, 661 (2d Dep't 2016) (first quoting Daneri v. Zoning Bd. of Appeals of Southold, 98 A.D.3d 508, 509, 949 N.Y.S.2d 180, 181 (2d Dep't 2012); then quoting Matejko v. Bd. of Zoning Appeals of Brookhaven, 77 A.D.3d 949, 949, 910 N.Y.S.2d 123, 125 (2d Dep't 2010); and then quoting Celentano v. Bd. of Zoning Appeals of Brookhaven, 63 A.D.3d 1156, 1157, 882 N.Y.S.2d 448, 449 (2d Dep't 2009)).
182. *Id.*

zoning board must be sustained unless it is illegal, arbitrary and capricious or lacks a rational basis.[183]

Pursuant to Town Law § 267-b(3)(b) and Village Law § 7-712-b(3)(b), a zoning board must engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted in assessing whether to grant an application for an area variance.[184] It is not required in undertaking the requisite balancing test to substantiate its determination with supporting evidence for each of the five statutory factors if its determination is rational.[185] Because the Zoning Board of Appeals in *Harris* undertook the obligatory "balancing test . . . and its conclusion that the detriment to the surrounding neighborhood posed by granting the requested variance outweighed the benefit to the petitioners had a rational basis and was supported by the record," the court sustained the denial of relief.[186]

D. 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 restricts the allowable review authority of local administrative agencies.[187] Relatedly, the courts have consistently taken an expansive view of what constitutes a religious use and have held that a religious use is more than just prayer and worship.[188]

It was determined in *Sullivan v. Board of Zoning Appeals of Albany* that use of a portion of a church parsonage for a "home base" for up to fourteen homeless individuals who were not attending school, enrolled in training programs, or working at their current jobs was a permissible use

183. *See id.* (first citing Blandeburgo v. Zoning Bd. of Appeals of Islip, 110 A.D.3d 876, 877, 972 N.Y.S.2d 693, 694 (2d Dep't 2013); and then citing *Daneri*, 98 A.D.3d at 509, 949 N.Y.S.2d at 181).

184. *Id.* at 1131, 27 N.Y.S.3d at 661–62 (first citing N.Y. TOWN LAW § 267-b(3)(b) (McKinney 2013); and then citing *Daneri*, 98 A.D.3d at 509–10, 949 N.Y.S.2d at 182).

185. *Id.* at 1131, 27 N.Y.S.3d at 662 (first citing Petikas v. Baranello, 78 A.D.3d 713, 714, 910 N.Y.S.2d 515, 517 (2d Dep't 2010); and then citing King v. Town of Islip Zoning Bd. of Appeals, 68 A.D.3d 1113, 1115, 892 N.Y.S.2d 174, 176 (2d Dep't 2009)).

186. *Harris*, 137 A.D.3d at 1131–32, 27 N.Y.S.3d at 662.

187. *See* Cornell Univ. v. Bagnardi, 68 N.Y.2d 583, 594, 503 N.E.2d 509, 514, 510 N.Y.S.2d 861, 866 (1986) (citations omitted); Diocese of Rochester v. Planning Bd. of Brighton, 1 N.Y.2d 508, 522–23, 136 N.E.2d 827, 834–35, 154 N.Y.S.2d 849, 859 (1956) (citations omitted).

188. Cmty. Synagogue v. Bates, 1 N.Y.2d 445, 453, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 21–22 (1956).

in conjunction with a house of worship.[189] The church property included a sanctuary, an educational and social building, a parsonage, and a parking lot.[190] The petitioner was the owner of property adjacent to the church property.[191] Both properties were located in a residential district, which permitted, among other uses, houses of worship, which was defined as "[a] structure or part of a structure used for worship or religious ceremonies."[192]

Pursuant to the church's application to the Zoning Board of Appeals, the Board found that "that the proposed use is consistent with . . . [the] mission and actions of a house of worship, which logically include[ed] a structure or part of a structure used for worship or religious ceremonies."[193] As a result, it concluded that no variances or approvals were required for the proposed use.[194] The supreme court granted the relief sought in the neighbor's Article 78 proceeding and annulled the Board's determination, finding that the proposed use of the parsonage could not reasonably be interpreted as a house of worship.[195] The appellate division reversed.[196]

It was not "contend[ed] that the parsonage would be utilized for 'religious ceremonies.'"[197] Consequently, the issue distilled to whether the proposed use of the parsonage fell within the ambit of "worship," a term which was not defined in the zoning law.[198] If a law does not define a particular term, the courts will apply its plain or ordinary meaning.[199] Worship is defined as "'[a]ny form of religious devotion, ritual, or service showing reverence'—'especially with respect to a divine being or supernatural power'"[200] and includes "an act of expressing such reverence."[201] Although a "house of worship" often is synonymous with a building or other structure where formal, organized religious services take

189. 144 A.D.3d 1480, 1481, 1484, 42 N.Y.S.3d 428, 429, 431 (3d Dep't 2016).

190. *Id.* at 1480, 42 N.Y.S.3d at 429.

191. *Id.*

192. *Id.* (alteration in original) (quoting ALBANY, N.Y., CODE § 375-7(B) (2016)). The zoning law did not define the terms "worship" and "religious." *Id.*

193. *Sullivan*, 144 A.D.3d at 1481, 42 N.Y.S.3d at 429 (first alternation in original) (omission in original) (quoting the Board's findings).

194. *See id.*

195. *Id.* at 1484, 42 N.Y.S.3d at 431.

196. *Id.*

197. *Id.* at 1483, 42 N.Y.S.3d at 430.

198. *Sullivan*, 144 A.D.3d at1483, 42 N.Y.S.3d at 430.

199. *Id.* at 1482, 42 N.Y.S.3d at 430 (first citing Albany Basketball & Sports Corp. v City of Albany, 116 A.D.3d 1135, 1138, 983 N.Y.S.2d 337, 340 (3d Dep't 2014); and then citing Oefelein v. Town of Thompson Planning Bd., 9 A.D.3d 556, 558, 780 N.Y.S.2d 406, 408 (3d Dep't 2004)).

200. *Id.* at 1483, 42 N.Y.S.3d at 430–31 (quoting *Worship*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

201. *Id.* at 1483, 42 N.Y.S.3d at 431.

place, "the courts of this [s]tate have been very flexible in their interpretation of religious uses under local zoning ordinances."[202] It is well settled that

> "[a] church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. . . . To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation."[203]

As a result, "[s]ervices to the homeless have been judicially recognized as religious conduct"[204] because "the concept of acts of charity as an essential part of religious worship is a central tenet of all major religions."[205] The court conduced that the plain or ordinary meaning of the term "house of worship" encompasses the proposed use.[206]

The decision is consistent with the case law which concludes that "[t]he activities constituting religious or accessory uses which are entitled to preferential treatment have also been broadly construed."[207]

III. CONSISTENCY

A determination of an administrative agency acting in a quasi-judicial capacity which neither adheres to its own precedent nor indicates a reason for reaching a dissimilar result on essentially the same facts, is arbitrary and capricious.[208] However, the case law consistently indicates

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202. *Id.* (alteration in original) (quoting Yeshiva & Mesivta Toras Chaim v. Rose, 136 A.D.2d 710, 711, 523 N.Y.S.2d 907, 908 (2d Dep't 1988)) (first citing Capital City Rescue Mission v. City of Albany Bd. of Zoning Appeals, 235 A.D.2d 815, 816, 652 N.Y.S.2d 388, 390 (3d Dep't 1997); and then citing Comm. to Protect Overlook, Inc. v. Town of Woodstock Zoning Bd. of Appeals, 24 A.D.3d 1103, 1104, 806 N.Y.S.2d 748, 750 (3d Dep't 2005)).

203. *Sullivan*, 144 A.D.3d at 1483–84, 42 N.Y.S.3d at 431 (alteration in original) (omission in original) (quoting Cmty. Synagogue v. Bates, 1 N.Y.2d 445, 453, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 21–22 (1956)).

204. *Id.* at 1484, 42 N.Y.S.3d at 431 (alteration in original) (quoting Fifth Ave. Presbyterian Church v. City of New York, No. 01 Civ. 11493 (LMM), 2004 U.S. Dist. LEXIS 22185, at *8 n.3 (S.D.N.Y. 2004)).

205. *Id.* (quoting W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C., 862 F. Supp. 538, 544 (D.C. Cir. 1994)).

206. *Id.*

207. Terry Rice, *Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses*, 8 PACE L. REV. 1, 20 (1988).

208. Knight v. Amelkin, 68 N.Y.2d 975, 977, 503 N.E.2d 106, 106, 510 N.Y.S.2d 550, 550 (1986) (quoting Field Delivery Serv., Inc. v. Comm'r of Labor, 66 N.Y.2d 516, 516–17, 488 N.E.2d 1223, 1225, 498 N.Y.S.2d 111, 113 (1985)).

that the courts generally will accept a rational explanation provided by a board for its ostensibly divergent treatment.[209]

In *Harris v. Zoning Board of Appeals of Carmel*, the court rejected the claim that the Board's decision denying an application for an area variance was arbitrary and capricious because it had granted comparable applications: "[T]he fact that one property owner is denied a variance while others similarly situated are granted such variances, does not, in and of itself, indicate that the difference in result is due to impermissible discrimination or to arbitrariness."[210] The applicant had failed to satisfy their obligation to demonstrate that the Board had "reach[ed] a different result on essentially the same facts."[211]

Similarly, the decision in *Latuga v. Giannadeo*, exemplifies that an applicant possesses the burden of establishing that the properties and approvals to which he seeks to compare himself are comparable in pertinent respects.[212] The court in *Latuga* concluded that granting of various previous area variances did not constitute a precedent from which the Board was required to explain a departure because the applicant had failed to demonstrate that the situation displayed sufficient factual similarity to her application so as to necessitate a justification from the Board.[213]

In *Monte Carlo 1, LLC v. Weiss*, the petitioner sought review of a determination of a Zoning Board of Appeals to deny its application to renew use and area variances previously granted.[214] In 2006, the petitioner applied for a use variance to convert two of the offices in its

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209. *See, e.g.*, Harris v. Zoning Bd. of Appeals of Carmel, 137 A.D.3d 1130, 1131, 27 N.Y.S.3d 660, 662 (2d Dep't 2016) (first citing Petikas v. Baranello, 78 A.D.3d 713, 714, 910 N.Y.S.2d 515, 517 (2d Dep't 2010); and then citing King v. Town of Islip Zoning Bd. of Appeals, 68 A.D.3d 1113, 1115, 892 N.Y.S.2d 174, 176 (2d Dep't 2009)).

210. *Id.* at 1132, 27 N.Y.S.3d at 662 (alteration in original) (quoting *Spandorf*, 167 A.D.2d at 547, 562 N.Y.S.2d at 216) (first citing Spandorf v. Bd. of Appeals of E. Hills, 167 A.D.2d 546, 547, 562 N.Y.S.2d 215, 216 (2d Dep't 1990); then citing *Field Delivery Serv., Inc.*, 66 N.Y.2d at 521, 488 N.E.2d at 1228, 498 N.Y.S.2d at 116; then citing Arata v. Morelli, 40 A.D.3d 991, 993, 836 N.Y.S.2d 292, 294 (2d Dep't 2007); and then citing Conversions for Real Estate v. Zoning Bd. of Appeals of Roslyn, 31 A.D.3d 635, 636, 818 N.Y.S.2d 298, 299 (2d Dep't 2006)).

211. *Id.* (alteration in original) (quoting *Spandorf*, 167 A.D.2d at 547, 562 N.Y.S.2d at 216) (first citing *Field Delivery Serv.*, 66 N.Y.2d at 521, 488 N.E.2d at 1228, 498 N.Y.S.2d at 116; then citing *Arata*, 40 A.D.3d at 993, 836 N.Y.S.2d at 294; and then citing *Conversions for Real Estate*, 31 A.D.3d at 636, 818 N.Y.S.2d at 299).

212. *See* 140 A.D.3d 771, 772, 31 N.Y.S.3d 206, 207 (2d Dep't 2016) (first citing Kaiser v. Town of Islip Zoning Bd. of Appeals, 74 A.D.3d 1203, 1205, 904 N.Y.S.2d 166, 169 (2d Dep't 2010); and then citing Brady v. Town of Islip Zoning Bd. of Appeals, 65 A.D.3d 1337, 1340, 886 N.Y.S.2d 465, 468 (2d Dep't 2009)).

213. *Id.*

214. 142 A.D.3d 1173, 1173–74, 38 N.Y.S.3d 228, 229–30 (2d Dep't 2016).

building into three residential apartments and for an area variance from the off-street parking requirement.[215] In 2007, the Zoning Board of Appeals granted the applications "temporarily" until July 11, 2012.[216] The Zoning Board of Appeals denied the petitioner's application for a further use variance in 2009 to convert the remaining office on the first floor into two residential apartments and for an area variance from the off-street parking requirements.[217] The petitioner sought rehearing of its 2009 applications in December 2012 and to renew the use and area variances that had expired on July 11, 2012.[218]

The petitioners contended that the decision was arbitrary and capricious because it failed to adhere to its own prior precedent or to provide an explanation for reaching a different conclusion.[219] The appellate division reiterated that when

> "a zoning board is [considering] 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." "Where, however, a zoning board provides a rational explanation for reaching a different result on similar facts, the determination will not be viewed as either arbitrary or capricious." [A] zoning board "may refuse to duplicate previous error; it may change its views as to what is for the best interests of the [Town]; [or] it may give weight to slight differences which are not easily discernable."[220]

With respect to the renewal of the 2007 variances, the Zoning Board of Appeals' findings exhibited a rational basis for denying the application because, among other things, the petitioner had failed to demonstrate "unnecessary hardship": "The fact that the [Board had] previously temporarily approved the same application in 2007 did not relieve the petitioner" from satisfying its burden of establishing satisfaction of the statutory criteria in order to renew the use variance.[221]

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215. *Id.* at 1174, 38 N.Y.S.3d at 230.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See Monte Carlo 1, LLC*, 142 A.D.3d at 1176, 38 N.Y.S.3d at 231.

220. *Id.* at 1175–76, 38 N.Y.S.3d at 231 (first, third, and fourth alterations in original) (first quoting Hamptons, LLC 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); then quoting Waidler v. Young, 63 A.D.3d 953, 954, 882 N.Y.S.2d 153, 154 (2d Dep't 2009)) (citing Josato, Inc. v. Wright, 35 A.D.3d 470, 471–72, 826 N.Y.S.2d 381, 384 (2d Dep't 2006)).

221. *Id.* at 1176, 38 N.Y.S.3d at 231.

IV. MOOTNESS

A challenge to a land use approval is likely to be dismissed as moot if a litigant fails to seek relief to preserve the status quo during the pendency of the litigation.[222] In deciding whether the relief sought in an action or proceeding has been rendered moot, a court must assess whether petitioner sought injunctive relief to preserve the status quo and the degree to which construction has advanced toward completion.[223]

The appellate division dismissed an appeal of a trial court decision in *Lilly Pad, LLC v. Zoning Board of Appeals of East Hampton* which had dismissed challenges to the granting of variances because the appellant had failed to timely move in supreme court for a preliminary injunction to preserve the status quo during the pendency of the litigation.[224] The appellant had neglected to protect its rights "pending judicial review of the [decisions] at issue[]" and construction had been finished.[225]

V. ZONING ENFORCEMENT

A. Preliminary Injunction

In order for a private litigant to obtain a preliminary injunction, he or she must demonstrate "(1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor."[226] However,

> [t]o obtain preliminary injunctive relief based on a violation of its zoning ordinances, a town need not satisfy the traditional three-part test for injunctive relief, but is required "only [to] show that it has a likelihood of ultimate success on the merits and that the equities are

222. *See* Dreikausen v. Zoning Bd. of Appeals of Long Beach, 98 N.Y.2d 165, 173–74, 774 N.E.2d 193, 197–98, 746 N.Y.S.2d 429, 433–34 (2002).

223. Schupak v. Zoning Bd. of Appeals of Marbletown, 31 A.D.3d 1018, 1019, 819 N.Y.S.2d 335, 336 (3d Dep't 2006) (first citing Defreestville Area Neighborhood Ass'n. v. Planning Bd. of N. Greenbush, 16 A.D.3d 715, 717–18, 790 N.Y.S.2d 737, 740 (3d Dep't 2005); and then citing *Dreikausen*, 98 N.Y.2d at 173–74, 774 N.E.2d at 197–98, 746 N.Y.S.2d at 433–34), *lv. denied*, 8 N.Y.3d 842, 862 N.E.2d 786, 830 N.Y.S.2d 694 (2007).

224. 136 A.D.3d 823, 823, 24 N.Y.S.3d 910, 910 (2d Dep't 2016).

225. *Id.*

226. Chase Home Fin., LLC v. Cartelli, 140 A.D.3d 911, 911–12, 32 N.Y.S.3d 515, 515 (2d Dep't 2016) (first citing Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840, 833 N.E.2d 191, 192, 800 N.Y.S.2d 48, 49 (2005); then citing Zoller v. HSBC Mortg. Corp. (USA), 135 A.D.3d 932, 933, 24 N.Y.S.3d 168, 169 (2d Dep't 2016); then citing Armanida Realty Corp. v. Town of Oyster Bay, 126 A.D.3d 894, 894, 3 N.Y.S.3d 612, 613 (2d Dep't 2015); and then citing M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc. v Werner, 126 A.D.3d 859, 860, 5 N.Y.S.3d 517, 518 (2d Dep't 2015)).

balanced in its favor."[227]

The court denied the Town's application for a preliminary injunction to enjoin defendants from conducting a composting and mulch-processing operation on the in *Town of Brookhaven v. MMCCAS Holdings, Inc.*[228] The defendants claimed that the use was a lawful nonconforming, preexisting use of the premises.[229] The appellate division affirmed the denial of a motion for a preliminary injunction because the Town had failed to demonstrate that the equities balanced in its favor.[230] While the injury to the defendants were relief to be granted would have been substantial and likely to be irreversible, the harm to the Town should relief be denied was improbable and conjectural.[231] Further weighing against pendent lite relief, the defendants had been conducting extensive composting and mulch-processing activities on the property since at least 2007.[232]

Finally, the objective of a preliminary injunction is to maintain the status quo pending determination of the action.[233] However, the granting of relief would have disturbed the status quo, rather than maintaining it.[234] Under those circumstances, the Town's motion for a preliminary was properly denied.[235]

B. Private Enforcement Actions

A municipality clearly is the principal authority to enforce zoning laws or the provisions of a land use approval.[236] However, two avenues

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227. Town of Islip v. Modica Assoc., 122, LLC, 45 A.D.3d 574, 575, 846 N.Y.S.2d 201, 201 (2d Dep't 2007) (second alteration in original) (quoting First Franklin Sq. Assoc., LLC v. Franklin Sq. Prop. Account, 15 A.D.3d 529, 533, 790 N.Y.S.2d 527, 532 (2d Dep't 2005)) (first citing Town of Huntington v. Pierce Arrow Realty Corp., 216 A.D.2d 287, 288, 627 N.Y.S.2d 787, 788 (2d Dep't 1995); and then citing Village of Freeport v. Jefferson Indoor Marina, Inc., 162 A.D.2d 434, 436, 556 N.Y.S.2d 150, 152 (2d Dep't 1990)).

228. 137 A.D.3d 1258, 1258, 29 N.Y.S.3d 389, 390 (2d Dep't 2016).

229. *Id.*

230. *Id.* at 1258–59, 29 N.Y.S.3d at 391.

231. *Id.* at 1259, 29 N.Y.S.3d at 391.

232. *Id.*

233. Coinmach Corp. v. Alley Pond Owners Corp., 25 A.D.3d 642, 643, 808 N.Y.S.2d 418, 419 (2d Dep't 2006) (first citing Schweizer v. Town of Smithtown, 19 A.D.3d 682, 682, 798 N.Y.S.2d 99, 100 (2d Dep't 2005); and then citing Rattner & Assocs. v. Sears, Roebuck & Co., 294 A.D.2d 346, 346, 741 N.Y.S.2d 894, 894 (2d Dep't 2002)).

234. *MMCCAS Holdings*, 137 A.D.3d at 1259, 29 N.Y.S.3d at 391 (citing Bd. of Managers of the Britton Condo. v. C.H.P.Y. Realty Assocs., 101 A.D.3d 917, 919, 956 N.Y.S.2d 150, 152 (2d Dep't 2012)).

235. *Id.* (first citing *Bd. of Managers of the Britton Condo.*, 101 A.D.3d at 919, 956 N.Y.S.2d at 152; and then citing Behar v. Quaker Ridge Golf Club, Inc., 95 A.D.3d 808, 809, 942 N.Y.S.2d 879, 879 (2d Dep't 2012)).

236. N.Y. DIV. OF LOCAL GOV'T SERVS., N.Y. DEP'T OF STATE, ZONING ENFORCEMENT 1–

are potentially open to non-municipal individuals or entities to coerce such compliance.[237] Town Law § 268(2) provides that if a town or its authorized officials do not act to "prevent" the continuance of a violation of the zoning law within ten days after a written request by a "resident taxpayer" to do so, any three taxpayers of the town residing in the district in which the violation exists who are "jointly or severally aggrieved" thereby may commence an action to enjoin such illegal use to the same extent which the town or an appropriate official is authorized to act.[238] The statute is "intended to create an avenue for direct action by which resident taxpayers, acting in concert, may overcome official lassitude or nonfeasance in the enforcement of zoning laws."[239] The prerequisite requirements of the statute must be fulfilled as a condition to commencing such an action, including the condition that such an action must be brought by three taxpayers.[240] The Village Law does not have a comparable provision to Town Law § 268(2).[241] Nevertheless, separate and distinct from the provisions of Town Law § 268(2), a property owner who can establish special damages resulting from a violation of a zoning law possesses common law standing to seek to enjoin such activities, as well as for damages.[242]

The court considered the threshold standard necessary to demonstrate special damages sufficient to institute a private common law injunctive action to enjoin a zoning law in *Gershon v. Cunningham*:

"To establish standing to maintain a private common-law action to

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2 (2012).

237. *See, e.g.*, N.Y. TOWN LAW § 268(2) (McKinney 2013).

238. *Id.*

239. Little Joseph Realty v. Town of Babylon, 41 N.Y.2d 738, 741, 363 N.E.2d 1163, 1165–66, 395 N.Y.S.2d 428, 431 (1977).

240. *See* Guzzardi v. Perry's Boats, Inc., 92 A.D.2d 250, 254, 460 N.Y.S.2d 78, 81 (2d Dep't 1983) (citing *Little Joseph Realty*, 41 N.Y.2d at 741, 363 N.E.2d at 1165–66, 395 N.Y.S.2d at 431).

241. *See* N.Y VILLAGE LAW § 7-712 (McKinney 2011).

242. *See* Cord Meyer Dev. Co. v. Bell Bay Drugs, Inc., 20 N.Y.2d 211, 217, 229 N.E.2d 44, 47, 282 N.Y.S.2d 259, 263 (1967); Futerfas v. Shultis, 209 A.D.2d 761, 762, 618 N.Y.S.2d 127, 128 (3d Dep't 1994) (first citing *Little Joseph Realty, Inc.*, 41 N.Y.2d at 741–42, 363 N.E.2d at 1166, 395 N.Y.S.2d at 431; then citing *Cord Meyer Dev.*, 20 N.Y.2d at 217–18, 229 N.E.2d at 47, 282 N.Y.S.2d at 264; then citing Santulli v. Drybka, 196 A.D.2d 862, 863, 602 N.Y.S.2d 151, 151 (2d Dep't 1993); then citing Allen Avionics, Inc. v. Universal Broad. Corp., 118 A.D.2d 527, 528, 499 N.Y.S.2d 154, 155 (2d Dep't 1986); and then citing Guzzardi v. Perry's Boats, Inc., 92 A.D.2d 250, 253, 460 N.Y.S.2d 78, 81 (2d Dep't 1983)); Haddad v. Salzman, 188 A.D.2d 515, 516, 591 N.Y.S.2d 193, 194 (2d Dep't 1992) (first citing *Little Joseph Realty*, 41 N.Y.2d at 738, 363 N.E.2d at 1164, 395 N.Y.S.2d at 430; then citing *Cord Meyer Dev.*, 20 N.Y.2d at 211, 229 N.E.2d at 45, 282 N.Y.S.2d at 261; then citing Marcus v. Village of Mamoroneck, 283 N.Y. 325, 332–33, 28 N.E.2d 856, 860 (1940); and then citing Lesron Jr., Inc. v. Feinberg, 13 A.D.2d 90, 93–94, 213 N.Y.S.2d 602, 606 (1st Dep't 1961)).

> enjoin zoning violations, a private plaintiff must establish that, due to the defendant's activities, he or she will sustain special damages that are 'different in kind and degree from the community generally' and that the asserted interests fall 'within the zone of interest to be protected' by the statute or ordinance at issue." However, "an allegation of close proximity may give rise to an inference of injury enabling a nearby property owner to maintain an action without proof of actual injury."[243]

Because the plaintiff owned property in close proximity to a parcel that was the subject of the private injunctive action and his property interests were within the zone of interest sought to be protected by the zoning law claimed to have been violated, he possessed standing to prosecute the action to enjoin the defendant's use of his property in violation of the zoning law.[244]

An action was commenced pursuant to Town Law § 268(2) in *Phair v. Sand Land Corp.* to enjoin the defendant from utilizing its property for receipt of debris, including trees, brush, stumps, and leaves; the processing of such debris into topsoil and mulch; the storage, sale, and delivery of mulch, topsoil, and wood chips; and the receipt, processing, and/or disposal of concrete, demolition debris, asphalt pavement, brick, rock, and metals.[245] After this action was instituted, the landowner applied to the building inspector for a "pre-existing certificate of occupancy" for specified uses of the property.[246] The building inspector concluded that it was entitled to a preexisting certificate of occupancy for "(i) the operation of a sand mine, (ii) the receipt and processing of trees, brush, stumps, leaves, and other clearing debris into topsoil or mulch, and (iii) the storage, sale, and delivery of sand, mulch, topsoil, and wood chips."[247] The building inspector also concluded that Sand Land was not entitled to a preexisting certificate of occupancy "[a]s it relates to the receipt and processing of concrete, asphalt pavement, brick, rock, and stone into concrete blend."[248]

Upon appeal, the Zoning Board of Appeals confirmed the building inspector's conclusion that the operation of a sand mine, including the

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243. Gershon v. Cunningham, 135 A.D.3d 816, 816–17, 23 N.Y.S.3d 345, 346 (2d Dep't 2016) (first quoting Town of North Elba v. Grimditch, 131 A.D.3d 150, 155, 13 N.Y.S.3d 601, 606 (3d Dep't 2015); then quoting Zupa v. Paradise Point Ass'n, Inc., 22 A.D.3d 843, 844, 803 N.Y.S.2d 179, 181 (2d Dep't 2005)).

244. *Id.* at 817, 23 N.Y.S.3d at 346 (quoting *Zupa*, 22 A.D.3d at 844, 803 N.Y.S.2d at 181).

245. 137 A.D.3d 1237, 1238, 28 N.Y.S.3d 400, 401 (2d Dep't 2016).

246. *Id.* at 1238, 28 N.Y.S.3d at 401.

247. *Id.* at 1238, 28 N.Y.S.3d at 401–02.

248. *Id.*

storage, sale, and delivery of sand, was a legal preexisting nonconforming use, and that the receipt of trees, brush, stumps, leaves, and other clearing debris was a preexisting accessory use to the mining operation on the property.[249] It also determined that the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil or mulch, and the storage, sale, and delivery of mulch, topsoil, and wood chips were not preexisting uses and, accordingly, were not permitted expansions of any legally established nonconforming use.[250] The defendant moved to dismiss the causes of action claiming that they were "academic."[251]

Town Law § 268(2) permits a town to "institute any appropriate action or proceedings" to "restrain, correct or abate" a violation of its zoning ordinance or to prevent any illegal uses of land.[252] If "the proper local officer, board or body of the town" fails or refuses

> to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do.[253]

The provision was "intended to create an avenue for direct action by which resident taxpayers, acting in concert, may overcome official lassitude or nonfeasance in the enforcement of zoning laws."[254] However, "[i]n a taxpayer's action to enforce compliance with the zoning law upon failure of the town officers to do so, the taxpayer plaintiffs have no greater right to demand compliance than do the town officials."[255]

The court confirmed the decision of the Zoning Board of Appeals "that the use of the subject property for the operation of a sand mine, including the storage, sale, and delivery of sand, constituted a legal preexisting nonconforming use and, also that the use of the property for the *receipt* of trees, brush, stumps, leaves, and other land-clearing debris was a preexisting accessory use to the mining operation."[256] Because the

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249. *Id.* at 1239, 28 N.Y.S.3d at 402.

250. *Phair*, 137 A.D.3d at 1239, 28 N.Y.S.3d at 402.

251. *Id.* at 1240, 28 N.Y.S.3d at 403.

252. N.Y. TOWN LAW § 268(2) (McKinney 2013); *see also* N.Y. VILLAGE LAW § 7-714 (McKinney 2011).

253. TOWN § 268(2).

254. *Phair*, 137 A.D.3d at 1241, 28 N.Y.S.3d at 403 (quoting Little Joseph Realty v. Town of Babylon, 41 N.Y.2d 738, 741, 363 N.E.2d 1163, 1166, 395 N.Y.S.2d 428, 431 (1977)).

255. *Id.* at 1241, 28 N.Y.S.3d at 403–04 (quoting Marlowe v. Elmwood, Inc., 12 A.D.3d 742, 744, 784 N.Y.S.2d 206, 209 (3d Dep't 2004)).

256. *Id.* at 1241, 28 N.Y.S.3d at 404.

local officials had concluded that no zoning violation existed, there was no "official lassitude or nonfeasance in the enforcement of zoning laws which citizen taxpayers may overcome" and an action pursuant to Town Law § 268(2) could not be maintained.[257] However, the Zoning Board of Appeals made no such finding with respect to the use of the property for the processing of trees, brush, stumps, leaves, and other land-clearing debris into topsoil or mulch, or for the storage, sale, and delivery of mulch, topsoil, and wood chips.[258] Although the issue was not presented to the Zoning Board of Appeals, the building inspector had refused to grant preexisting use status for the use of the property for "the receipt, processing, and/or disposal of concrete, demolition debris, asphalt pavement, brick, rock, and metals."[259] Because there was no determination by the zoning officials that those uses were legal, either the Town or the citizen taxpayers could seek to enforce compliance with the zoning law in an action brought pursuant to Town Law § 268(2).[260] Consequently, the first cause of action was not academic to the extent that "it related to the use of the property for the processing of trees, brush, stumps, leaves, and other clearing debris into topsoil and mulch, the storage, sale, and delivery of mulch, topsoil, and wood chips, and the receipt, processing, and/or disposal of concrete, demolition debris, asphalt pavement, brick, rock, and metals."[261]

VI. SPECIAL PERMITS

A special permit authorizes the use of property in a manner that is consistent with a community's zoning scheme.[262] Although not synonymous with a use allowed as of right, the specification of a use as a special permit use is tantamount to a legislative conclusion that the use is harmonious with a community's overall zoning plan and will not adversely affect the area.[263] Thus, the burden of proof is appreciably less than that of one seeking a variance.[264] However, an applicant must establish compliance with the criteria applicable to the proposed use before a

257. *Id.* (quoting *Marlowe*, 12 A.D.3d at 744, 784 N.Y.S.2d at 209).

258. *Id.* at 1242, 28 N.Y.S.3d at 404.

259. *Phair*, 137 A.D.2d at 1242, 28 N.Y.S.3d at 404.

260. *Id.*

261. *Id.*

262. *See* 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).

263. *Id.* (quoting N. Shore Steak House 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)).

264. *Id.* (citing *N. Shore Steak House*, 30 N.Y.2d at 244, 282 N.E.2d at 609, 331 N.Y.S.2d at 649).

special permit may be granted.[265] An application for a special permit may be denied only if the record substantiates the decision by substantial evidence in the record and is not based exclusively on generalized community objections.[266] However, where the record contains substantial evidence substantiating denial of a special permit application, a board's decision must be accorded judicial deference.[267] Accordingly, a court may not substitute its judgment for that of a reviewing board, even if a different determination may be suggested by the record.[268]

In *Liska New York, Inc. v. City Council of New York*, the City Planning Commission's denial of a special permit application was affirmed because the Commission had reserved to itself the authority to grant or deny a special permit, without specifying standards limiting the exercise of its discretion.[269] Consequently, it was not bound by the standards set forth in the zoning law which seemingly defined its review authority.[270] Instead, pursuant to the case law, it possessed broader authority and could legitimately consider policy issues.[271] As a result, it legitimately denied the petitioners' special permit application based on matters related to the public welfare, including the oversaturation of similar buildings in the area, the poor condition of the petitioners' building, and the precedent that approval of the application would

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265. *Id.* (citing Wegmans Enters. v. Lansing, 72 N.Y.2d 1000, 1001, 530 N.E.2d 1292, 1292, 534 N.Y.S.2d 372, 373 (1988)); Franklin Sq. Donut Sys., LLC v. Wright, 63 A.D.3d 927, 929, 881 N.Y.S.2d 163, 165 (2d Dep't 2009) (first citing *Wegmans Enters.*, 72 N.Y.2d at 1001, 530 N.E.2d at 1292, 534 N.Y.S.2d at 373; then citing Roginski v. Rose, 97 A.D.2d 417, 417, 467 N.Y.S.2d 252, 253 (2d Dep't 1983); then citing 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); and then citing 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)), *lv. denied*, 14 N.Y.3d 711, 929 N.E.2d 1004, 903 N.Y.S.2d 769 (2010).

266. *Retail Prop. Tr.*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666 (citing Twin Cty. Recycling v. Yevoli, 90 N.Y.2d 1000, 1002, 688 N.E.2d 501, 502, 665 N.Y.S.2d 627, 628 (1997)); White Castle Sys., Inc. v. Bd. of Zoning Appeals of Hempstead, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159, 162 (2d Dep't 2012).

267. *Retail Prop. Tr.*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666; *see* 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) (first citing Mack v. Bd. of Appeals of Homer, 25 A.D.3d 977, 980, 807 N.Y.S.2d 460, 464 (3d Dep't 2006); and then citing Subdivisions, Inc. v. Town of Sullivan, 92 A.D.3d 1184, 1185, 938 N.Y.S.2d 682, 684 (3d Dep't 2012)).

268. *Retail Prop. Tr.*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666 (citing Toys "R" Us v. Silva, 89 N.Y.2d 411, 423, 676 N.E.2d 862, 867, 654 N.Y.S.2d 100, 107 (1996)); *White Castle Sys.*, 93 A.D.3d at 732, 940 N.Y.S.2d at 162.

269. 134 A.D.3d 461, 462, 19 N.Y.S.3d 884, 884 (1st Dep't 2015) (citing N.Y.C. CHARTER § 197-d (2004)).

270. *Id.*

271. *Id.* (citing Cummings v. Town Bd. of N. Castle, 62 N.Y.2d 833, 835, 466 N.E.2d 147, 148, 477 N.Y.S.2d 607, 608 (1984)).

establish for overbuilding and seeking after-the-fact approval.[272]

VII. SPECIAL FACTS EXCEPTION

Despite what is often a protracted process, an applicant for a land use approval has no protection from revision of applicable regulations while an application is under review.[273] As a result, a change in pertinent land use regulations can render an application moot.[274] Instead, a board or court must apply the law as it exists at the time when it makes a decision.[275] However, in rare instances when the bad faith of a board or municipality results in unjustified delay while superseding regulations are enacted, the applicant may be entitled to rely on the earlier zoning regulations pursuant to the "special facts exception."[276]

The petitioner in *Elam Sand & Gravel Corp. v. Town of West Bloomfield* had filed an application for a special permit to operate a sand and gravel mine on September 1, 2010.[277] While the application was under review, the Town enacted a moratorium on mining operations on June 8, 2011.[278] The Planning Board conducted a public hearing on April 26, 2012 on the application, after the petitioner had been required to obtain court intervention on two occasions, but it did not render a determination on the application.[279] The Town Board subsequently adopted an amendment to the zoning law on April 10, 2013 which banned mining on the subject property, and the Planning Board rejected the application because the use was no longer a permitted use.[280] The petitioner instituted an action/proceeding which claimed, among other things, that the Town and the Planning Board acted in bad faith and

272. *Id.*

273. *See* Bibeau v. Vill. Clerk of Tuxedo Park, 145 A.D.2d 478, 479, 535 N.Y.S.2d 106, 108 (2d Dep't 1988).

274. Magee v. Rocco, 158 A.D.2d 53, 59, 557 N.Y.S.2d 759, 763 (3d Dep't 1990).

275. *See, e.g.*, Denton v. Town of Brookhaven, 32 A.D.3d 395, 395, 819 N.Y.S.2d 547, 548 (2d Dep't 2006) (first citing Greene v. Zoning Bd. of Appeals of Isip, 25 A.D.3d 612, 612, 806 N.Y.S.2d 880, 880 (2d Dep't 2006); and then citing Pokoik v. Silsdorf, 40 N.Y.2d 769, 772, 358 N.E.2d 874, 876, 390 N.Y.S.2d 49, 51 (1976)).

276. *See* Ronsvalle v. Totman, 303 A.D.2d 897, 899, 757 N.Y.S.2d 134, 136 (3d Dep't 2003) (citing Cleary v. Bibbo, 241 A.D.2d 887, 888, 660 N.Y.S.2d 230, 231 (3d Dep't 1997)); Hatcher v. Planning Bd. of Nelsonville, 111 A.D.2d 812, 813, 490 N.Y.S.2d 559, 560 (2d Dep't 1985) (first citing Klein Enters., Inc. v. Braatz, 51 A.D.2d 1021, 1021, 381 N.Y.2d 304, 305 (2d Dep't 1976); then citing Gardiner v. Lo Grande, 83 A.D.2d 614, 615, 441 N.Y.S.2d 288, 289 (2d Dep't 1981); then citing *Pokoik*, 40 N.Y.2d at 773, 358 N.E.2d at 877, 390 N.Y.S.2d at 52; and then citing Faymor Dev. Co. v. Bd. of Standards & Appeals of N.Y., 45 N.Y.2d 560, 565, 383 N.E.2d 100, 102, 410 N.Y.S.2d 798, 800 (1978)).

277. 140 A.D.3d 1670, 1672, 33 N.Y.S.3d 625, 627 (4th Dep't 2016).

278. *Id.*

279. *Id.*

280. *Id.*

intentionally delayed the application until the Town Board adopted a new zoning law that prohibited mining on the property.[281]

The appellate division reversed the dismissal of the claim and found that the special facts exception may apply.[282] Generally, a case must be decided based on the law as it exists at the time of a decision, regardless of any intervening amendments to a zoning law.[283] However, where there have been "extensive delays indicative of bad faith . . . , unjustifiable actions by the municipal officials . . . , or abuse of administrative procedures" the special facts exception may be applicable.[284] A landowner must additionally demonstrate entitlement to the underlying land use permit as a matter of right.[285] "[T]he landowner must [also] be in full compliance with the [applicable] requirements at the time of the application, such that proper action upon the [application] would have given the landowner time to acquire a vested right."[286] If the foregoing is established, the application must be reviewed pursuant to the zoning law in effect at the time the application was submitted.[287] The court concluded that based on the facts alleged, a cause of action for application of the special facts exception had been stated.[288]

VIII. CONDITIONS

A board may impose a condition of approval only if the condition is "reasonable and relate[s] only to the real estate involved without regard to the person who owns or occupies it."[289] A board may not impose a condition which is unrelated to the objectives of zoning.[290]

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281. *Id.* at 1671, 33 N.Y.S.3d at 627.

282. *Elam Sand & Gravel*, 140 A.D.3d at 1671, 33 N.Y.S.3d at 627.

283. *Id.* (quoting Rocky Point Drive-In v. Town of Brookhaven, 21 N.Y.3d 729, 736, 999 N.E.2d 1164, 1167, 977 N.Y.S.2d 719, 722 (2013)).

284. *Id.* (quoting *Rocky Point Drive-In*, 21 N.Y.3d at 737, 999 N.E.2d at 1167, 977 N.Y.S.2d at 722).

285. *Id.* (quoting *Rocky Point Drive-In*, 21 N.Y.3d at 729, 999 N.E.2d at 1164, 977 N.Y.S.2d at 719).

286. *Id.* (quoting *Rocky Point Drive-In*, 21 N.Y.3d at 729, 999 N.E.2d at 1164, 977 N.Y.S.2d at 719).

287. *Elam Sand & Gravel*, 140 A.D.3d at 1671, 33 N.Y.S.3d at 627 (quoting *Rocky Point Drive-In*, 21 N.Y.3d at 736, 999 N.E.2d at 1167, 977 N.Y.S.2d at 722).

288. *Id.* at 1672, 33 N.Y.S.3d at 628 (citing Leon v. Martinez, 84 N.Y.2d 83, 88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994)).

289. Dexter v. Town Bd. of Gates, 36 N.Y.2d 102, 105, 324 N.E.2d 870, 871, 365 N.Y.S.2d 506, 508 (1975).

290. St. Onge v. Donovan, 71 N.Y.2d 507, 516, 522 N.E.2d 1019, 1023, 527 N.Y.S.2d 721, 725 (1988) (first citing 2 ROBERT M. ANDERSON, NEW YORK ZONING LAW AND PRACTICE § 23.55 (3d ed. 1984); and then citing *Dexter*, 36 N.Y.2d at 105, 324 N.E.2d at 871, 365 N.Y.S.2d at 508).

A condition that barred construction of a pipeline to transport water for bulk sale until the use of wells on the applicant's other property was approved was sustained in *Smoke v. Planning Board of Greig*[291]:

> "It is well settled that a zoning board may impose appropriate conditions and safeguards in conjunction with a grant of a special permit." "Conditions imposed to protect the surrounding area from a particular land use are consistent with the purposes of zoning, which seeks to harmonize the various land uses within a community." . . . [Moreover,] "the separation of business from nonbusiness uses is an appropriate line of demarcation in delimiting permitted uses for zoning purposes."[292]

IX. SUBDIVISIONS

The petitioner in *Sullivan Farms IV, LLC 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.[293] The Wurtsboro Planning Board granted conditional final site plan and subdivision approval in 2009 for the development of a seventy-two-unit townhouse residential cluster development known as "Kaufman Farms West."[294] After the approval expired, a successor obtained approval in 2012.[295] Petitioner Kaufman Farms, LLC submitted a site plan/special use application for a different residential cluster development, known as "Kaufman Farms East" on an adjacent parcel in June 2012.[296]

"The Planning Board revisited its approval of the Kaufman Farms West project in 2013.[297] While review of that application was pending, the Wurtsboro Board of Trustees amended the zoning law to modify the manner of calculating the number of permitted lots or dwelling units for a residential cluster subdivision.[298] As a result, the Planning Board

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291. 138 A.D.3d 1437, 1438, 31 N.Y.S.3d 707, 709 (4th Dep't 2016).

292. *Id.* at 1439–40, 31 N.Y.S.3d at 710 (first quoting Old Country Burgers Co. v. Town Bd. of Oyster Bay, 160 A.D.2d 805, 806, 553 N.Y.S.2d 843, 844 (2d Dep't 1990); then quoting *Donovan*, 71 N.Y.2d at 516, 522 N.E.2d at 1023, 527 N.Y.S.2d at 725; and then quoting Town of Huntington v. Park Shore Country Day Camp, Inc., 47 N.Y.2d 61, 66, 390 N.E.2d 282, 284, 416 N.Y.S.2d 774, 776 (1979)) (first citing *Dexter*, 36 N.Y.2d at 105, 324 N.E.2d at 871, 365 N.Y.S.2d at 508; and then citing Tarolli v. Howe, 37 N.Y.2d 865, 867, 340 N.E.2d 725, 725, 378 N.Y.S.2d 357, 357 (1975)).

293. 134 A.D.3d 1275, 1276, 21 N.Y.S.3d 450, 451 (3d Dep't 2015).

294. *Id.* (first citing N.Y. VILLAGE LAW § 7-738 (McKinney 2011); and then citing VILLAGE OF WURTSBORO, N.Y., ZONING LAW § 5.19 (2013)).

295. *Id.*

296. *Id.* at 1276, 21 N.Y.S.3d at 451–52.

297. *Id.* at 1276, 21 N.Y.S.3d at 452.

298. *Sullivan Farms IV, LLC*, 134 A.D.3d at 1276, 21 N.Y.S.3d at 452 (first citing Village of Wurtsboro, N.Y., Local Law No. 1 (Jan. 13, 2014); and then citing Village of Wurtsboro,

concluded that the approval conflicted with applicable state and local laws, that is was void ab initio and revoked its prior approval for Kaufman Farms West in May 2014.[299] The petitioner challenged the adoption of the local laws and the determination to revoke the subdivision and site plan approvals.[300]

The appellate division affirmed the dismissal of the proceeding.[301] A planning board possesses the authority to rescind an approval that was granted in excess of its authority and void ab initio.[302] Furthermore, "[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."[303] Because the Planning Board possessed such authority, the issue was whether it abused its discretion in doing so.[304]

Village Law § 7-738(3)(b), like Town Law § 278(3)(b), directs 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."[305] Utilizing the methodology set forth in the zoning law, the entire eighty-five-acre development would have had sufficient land to yield the proposed seventy-two dwelling units.[306] However, thirty-one acres of the subdivision were situated outside the village and had been included in the subdivision based on the belief that the land would be annexed into the village.[307] Because the annexation never transpired, the fifty-four acres within the village were inadequate to permit the

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N.Y., Local Law No. 2 (Jan. 13, 2014)).

299. *Id.*

300. *Id.* at 1276–77, 21 N.Y.S.3d at 452.

301. *Id.* at 1277, 21 N.Y.S.3d at 452.

302. *Id.* at 1277, 21 N.Y.S.3d at 452 (first citing Reiss v. Keator, 150 A.D.2d 939, 942, 541 N.Y.S.2d 864, 865–66 (3d Dep't 1989); and then citing Town of Amherst v. Rockingham Estates, LLC, 98 A.D.3d 1241, 1242, 951 N.Y.S.2d 602, 603–04 (4th Dep't 2012)).

303. *Sullivan Farms IV, LLC*, 134 A.D.3d at 1277, 21 N.Y.S.3d at 452 (first citing 1066 Land Corp. v. Planning Bd. of Austerlitz, 218 A.D.2d 887, 887, 630 N.Y.S.2d 389, 390 (3d Dep't 1995); and then citing Lynn v. Planning Bd. of E. Hampton, 89 A.D.3d 1028, 1028, 933 N.Y.S.2d 567, 568 (2d Dep't 2011)).

304. *Id.* at 1277, 21 N.Y.S.3d at 453 (first citing Ctr. of Deposit, Inc. v. Village of Deposit, 108 A.D.3d 851, 853, 968 N.Y.S.2d 731, 733 (3d Dep't 2013); and then citing *Lynn*, 89 A.D.3d at 1028, 933 N.Y.S.2d at 568).

305. *Id.* at 1277–78, 21 N.Y.S.3d at 453 (quoting N.Y. VILLAGE LAW § 7-738(3)(b) (McKinney 2011)).

306. *Id.* at 1278, 21 N.Y.S.3d at 452.

307. *Id.* at 1278, 21 N.Y.S.3d at 453.

development of seventy-two dwelling units.[308]

The court also rejected a claim of vested rights.[309] "[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."[310] Because the initial subdivision approval was contrary to law, no valid approval existed from which vested rights could be obtained.[311]

X. DURATION PROVISIONS

Durational limits on land use approvals, whether by limitation in a community's zoning law or by a condition of approval, have been relatively common for several years and generally will be enforced by the courts unless it is inequitable to do so.[312] The appellate division has related that

> [t]he purpose for imposing a time limitation in the grant of a special permit or variance . . . is to insure that in the event conditions have changed at the expiration of the period prescribed the board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances.[313]

A condition of a variance or approval limiting its duration must be related to a legitimate zoning objective and must be related to the property itself.[314]

However, the authority to impose a durational restriction as a condition of an approval is not self-operative.[315] The imposition of a

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

309. *Id.* at 1279, 21 N.Y.S.3d at 454 (first citing Lamar Advert. of Penn, LLC, v. Pitman, 9 A.D.3d 734, 736, 780 N.Y.S.2d 233, 234 (3d Dep't 2004); and then citing Asharoken v. Pitassy, 119 A.D.2d 404, 416, 507 N.Y.S.2d 164, 173 (2d Dep't 1986)).

310. *Id.* (quoting 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)) (first citing 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); and then citing Pete Drown, Inc. v. Town Bd. of Ellenburg, 229 A.D.2d 877, 878, 646 N.Y.S.2d 205, 206 (3d Dep't 1996)).

311. *Id.* (first citing *Pitman*, 9 A.D.3d at 736, 780 N.Y.S.2d at 234; and then citing *Asharoken*, 119 A.D.2d at 416, 507 N.Y.S.2d at 173).

312. *See, e.g.*, Am. Red Cross v. Bd. of Zoning Appeals of Ithaca, 161 A.D.2d 878, 879, 555 N.Y.S.2d 923, 924 (3d Dep't 1990); Dil-Hills Realty Corp. v. Schultz, 53 A.D.2d 263, 265, 385 N.Y.S.2d 324, 326 (2d Dep't 1976).

313. *Dil-Hills Realty Corp.*, 53 A.D.2d at 267, 385 N.Y.S.2d at 327.

314. *See* 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) (citing St. Onge v. Donovan, 71 N.Y.2d 507, 516, 522 N.E.2d 1019, 1023, 527 N.Y.S.2d 721, 725 (1988)).

315. *See id.* at 698, 619 N.Y.S.2d at 162.

durational limit is impermissible unless the zoning law authorizes the imposition of durational limits in connection with a particular approval or permit.[316] The petitioner in *Citrin v. Board of Zoning & Appeals of North Hempstead* owned a parcel of property bisected by a district boundary.[317] A restaurant operated on a portion of the property zoned for business use and an adjoining parking lot extended into a residential district.[318] The Zoning Board of Appeals granted a special permit to continue use of the parking lot in the residence district for a period of five years.[319] The petitioner instituted an Article 78 proceeding to annul the durational limit.[320]

In determining that the Board did not have the authority to impose a durational limit, the court reiterated that "[c]onditions imposed by a Board of Zoning Appeals must be authorized by the zoning ordinance."[321] Because the zoning law did not explicitly authorize the Board to impose durational limits for the permit, the court annulled the condition.[322]

316. *See* SV Space Dev. Corp. v. Town of Babylon Zoning Bd. of Appeals, 256 A.D.2d 471, 471, 682 N.Y.S.2d 95, 96 (2d Dep't 1998) (citing BABYLON, N.Y., CODE § 213-13 (1998)).

317. 143 A.D.3d 893, 894, 39 N.Y.S.3d 229, 230 (2d Dep't 2016).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* (quoting Long Island Univ. v. Bd. of Appeals of Old Westbury, 122 A.D.2d 53, 54, 504 N.Y.S.2d 209, 210 (2d Dep't 1986)) (first citing Cmty. Synagogue v. Bates, 1 N.Y.2d 445, 452, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 21 (1956); then citing SV Space Dev. Corp. v. Town of Babylon Zoning Bd. of Appeals, 256 A.D.2d 471, 471, 682 N.Y.S.3d 95, 96; and then citing Schlosser v. Michaelis, 18 A.D.2d 940, 940, 238 N.Y.S.2d 433, 434 (2d Dep't 1963)).

322. *Citrin*, 143 A.D.3d at 894, 39 N.Y.S.3d at 230 (first citing *Bates*, 1 N.Y.2d at 452, 136 N.E.2d at 493, 154 N.Y.S.2d at 21; then citing *SV Space Dev. Corp.*, 256 A.D.2d at 471, 682 N.Y.S.3d at 96; then citing *Long Island Univ.*, 122 A.D.2d at 54, 504 N.Y.S.2d at 210; and then citing *Schlosser*, 18 A.D.2d at 940, 238 N.Y.S.2d at 434).