ZONING AND LAND USE

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I. ZONING ENACTMENTS/AMENDMENTS

A. Protest Petitions

Town Law section 265(1) and Village Law section 7-708 authorize the filing of a protest petition to a zoning amendment under specified circumstances which, if in satisfaction of the strictures of those statutes, triggers a requirement of approval of the amendment by an affirmative vote of three-fourths of the members of a town board or board of trustees, instead of an otherwise applicable simple majority.[1] A sufficient protest petition may be filed by any one of three different ownership categories, that is, the owners of 20% of the land included within a proposed zone change; the owners of 20% or more of the land immediately adjacent to the land which is the subject of a proposed zone change, extending 100 feet therefrom; or the owners of 20% or more of the land directly opposite

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1. N.Y. TOWN LAW § 265(1) (McKinney 2004); N.Y. VILLAGE LAW § 7-708 (McKinney 1996).

the land which is the subject of a proposed zone change, extending 100 feet from the street frontage of such opposite land.[2]

The issue considered in *Gosier v. Aubertine*, was "whether, under Town Law section 265(1)(a), the signature of only one spouse with respect to property held as tenants by the entirety is sufficient for the property to be included in order to meet the 20% threshold required for a valid protest petition."[3] The town assessor's office and town board concluded that a protest petition opposing an amendment to the zoning law did not satisfy the claimed basis of representing 20% of the area included with the proposed amendment which encompassed the entire town. The determination was based primarily on the conclusion that a majority of the signatures on the protest petition that were excluded in computing the number of "valid acres" were signatures of only one spouse where property was owned as tenants by the entirety.[4] The amendment was approved by a vote of three to two.[5] The petitioners asserted that had those signatures been considered to be valid, a supermajority would have been required to approve the amendment.[6] The appellate division affirmed the decision of the supreme court that the protest petition was valid and that, as a result, the local law was invalid because it had not been approved by a three-fourths majority.[7]

Neither Town Law section 265 nor Village Law section 7-708 define the term "owners," nor is there any case law interpreting the term in the context of those statutes.[8] However, in *Reister v. Town Board of the Town of Fleming*,[9] the Court of Appeals interpreted a similar provision in Town Law section 191 and found that the "salient characteristic [of a tenancy by the entirety] is the unique relationship between a husband and his wife each of whom is seized of the whole and not of any undivided portion of the estate" such that "both and each own the entire fee."[10] The Court concluded that the same reasoning applies to protest petitions and that it is sufficient to have the signature

2. N.Y. TOWN LAW § 265(1); N.Y. VILLAGE LAW § 7-708.
3. 71 A.D.3d 76, 77, 891 N.Y.S.2d 788, 789 (4th Dep't 2009).
4. *Id.* at 78, 891 N.Y.S.2d at 790.
5. *Id.* at 77, 891 N.Y.S.2d at 789.
6. *Id.* at 78, 891 N.Y.S.2d at 790.
7. *Id.*, 891 N.Y.S.2d at 789.
8. *Gosier*, 71 A.D.3d at 78, 891 N.Y.S.2d at 790.
9. 18 N.Y.2d 92, 95, 218 N.E.2d 681, 682, 271 N.Y.S.2d 965, 967 (1966).
10. *Gosier*, 71 A.D.3d at 79, 891 N.Y.S.2d at 790 (quoting *Reister*, 18 N.Y.2d at 95, 218 N.E.2d at 682, 271 N.Y.S.2d at 967); *see also In re* Estate of Violi, 65 N.Y.2d 392, 395, 482 N.E.2d 29, 31, 492 N.Y.S.2d 550, 552 (1985); Stelz v. Shreck, 128 N.Y. 263, 266, 28 N.E. 510, 511 (1891).

of only one spouse in order to consider the entire property for the purposes of a protest petition.[11]

II. ZONING BOARDS OF APPEAL

A. Area Variances

1. Effect on Character of Neighborhood

"Although no single statutory consideration is determinative in assessing an area variance application, the effect of the requested variance on the neighborhood and community is a critical aspect of a zoning board's responsibility in balancing the relief requested against the interests of the residents of the municipality."[12] In assessing the impact of variances on a neighborhood, one of the most important considerations is the extent to which the condition for which relief is sought is consistent with the existing conditions in the area.[13] In *Brady v. Town of Islip Zoning Board of Appeals*, for example, the rejection of a variance application to authorize an in-ground swimming pool on a 10,000 square foot lot, where 12,000 square feet was required for pools, was sustained because no swimming pools existed on substandard lots within 600 feet of the property.[14] In addition, there were only seven permanent above-ground swimming pools on substandard lots within the applicable community of approximately 300 homes.[15] Four of those pools predated the adoption of the zoning law, one was on a lot that was minimally substandard, consisting of 11,645 square feet, and only two were authorized by variances.[16]

11. *Gosier*, 71 A.D.3d at 79, 891 N.Y.S.2d at 790; *see also* 1987 Ops. Atty. Gen. No. 87-85; 1989 Ops. Atty. Gen. No. 89-17.

12. Lopez v. Zoning Bd. of Appeals of Hempstead, No. 6409/10, 2010 WL 2797908 (Sup. Ct. Nassau Cnty. 2010) (citing Verdeland Homes, Inc. v. Bd. of Appeals of Hempstead, No. 006084/06, 2006 N.Y. Slip Op. 52018(U), at 2 (Sup. Ct. Nassau Cnty. 2006); Chou v. Bd. of Zoning of N. Hempstead, No. 16300/09, 2010 WL 620644 (Sup. Ct. Nassau Cnty. 2010)).

13. *See* Allstate Props., LLC v. Bd. of Zoning Appeals of Hempstead, 49 A.D.3d 636, 636-37, 856 N.Y.S.2d 130, 130-32 (2d Dep't 2008).

14. 65 A.D.3d 1337, 1338-40, 886 N.Y.S.2d 465, 466, 468 (2d Dep't 2009), *lv. denied*, 14 N.Y.3d 703, 925 N.E.2d 104, 898 N.Y.S.2d 99 (2010).

15. *Id.* at 1340, 886 N.Y.S.2d at 468.

16. *Id.*, 886 N.Y.S.2d at 468. *See also* Kaiser v. Town of Islip Zoning Bd. of Appeals, 74 A.D.3d 1203, 1205, 904 N.Y.S.2d 166, 168 (2d Dep't 2010) (denying variance for pool under same circumstances sustained because there were no swimming pools on substandard lots within 500 feet of the property); 886 Flushing Ave. Corp. v. Bd. of Zoning Appeals of North Hempstead, 72 A.D.3d 1080, 1080, 899 N.Y.S.2d 374, 375 (2d Dep't 2010) (Board

In *Russo v. City of Albany Zoning Board*, the court sustained the denial of area variances sought to permit the petitioner to park in his front yard primarily because of the effect on the neighborhood and inconsistency with prevailing conditions.[17] Although some houses in the surrounding area had front-yard parking, such condition constituted the overwhelming minority of the properties.[18] Moreover, the petitioner's use drastically differed from other properties with front-yard parking because his parking area was in the middle of the lot as compared to the side of the residence, and resulted in his vehicle being parked over the sidewalk.[19] In addition, the court sustained the board's finding that petitioner's front-yard parking would present an aesthetic detriment because it would not be in keeping with the rest of the homes in the neighborhood.[20] The board also was entitled to consider that permitting petitioner to utilize his front yard for parking would undermine existing zoning regulations by encouraging further deviations where no unique hardship exists and set an inadvisable precedent for other property owners in the neighborhood.[21]

> Given that the variance would result in a constant impediment to the City's right-of-way and create potential safety issues to [drivers and pedestrians using the sidewalk], it was not an abuse of discretion for the board to [conclude] that the substantial nature and negative impact of such a variance weighed against granting it.[22]

In *Petikas v. Baranello*, the denial of variances to subdivide a parcel of property to construct three single-family dwellings was sustained because of the effect on the character of the neighborhood.[23] Each of the lots proposed would have a fifty-foot lot width while seventy-feet was required by the zoning law.[24] In addition to being substantial, the variances "would have a negative impact on the character of the neighborhood since the majority of properties in the area conformed to the zoning requirements."[25] Further, petitioners

considered properties within a 300-foot radius of the property to determine effect on the character of the neighborhood).

17. 78 A.D.3d 1277, 1280, 910 N.Y.S.2d 263, 265-66 (3d Dep't 2010).
18. *Id.*, 910 N.Y.S.2d at 265.
19. *Id.*, 910 N.Y.S.2d at 265.
20. *Id.*, 910 N.Y.S.2d at 265.
21. *Id.*, 910 N.Y.S.2d at 265-66 (citing Pecoraro v. Bd. of Appeals of Hempstead, 2 N.Y.3d 608, 615, 814 N.E.2d 404, 408, 781 N.Y.S.2d 234, 238 (2004)).
22. *Russo*, 78 A.D.3d at 1280, 910 N.Y.S.2d at 266.
23. 78 A.D.3d 713, 713-15, 910 N.Y.S.2d 515, 516-17 (2d Dep't 2010).
24. *Id.* at 714, 910 N.Y.S.2d at 516.
25. *Id.* at 715, 910 N.Y.S.2d at 517.

possessed the ability to realize a profit by constructing two homes on the property, "thereby obviating the need for the variances."[26] As a result, "the Board rationally concluded that the detriment the proposed variances posed to the neighborhood outweighed the benefit sought by the petitioners."[27]

In *Mary T. Probst Family Trust v. Zoning Board of Appeals of Horicon*, the denial of an area variance to permit construction of a one-bedroom cottage on the site of a garage four feet from the adjacent public road was sustained, in part, because of the negative impact on nearby properties, particularly the fact that vehicles exiting the property would enter the road near a sharp turn with limited visibility.[28]

These decisions illustrate the paramount importance of the effect of requested variances on the neighborhood in ascertaining whether relief is appropriate.

2. Economic Considerations

In codifying the requisite area variance considerations, the State Legislature did not enumerate economic considerations as a factor in determining whether an area variance should be granted.[29] Although the statutory factors have been determined to preempt inconsistent requirements and to be exclusive,[30] the court in *Chou v. Board of Zoning*

26. *Id.*, 910 N.Y.S.2d at 517.

27. *Id.* (citing Pecoraro v. Bd. of Appeals of Hempstead, 2 N.Y.3d 608, 814 N.E.2d 404, 781 N.Y.S.2d 234 (2004); Caspian Realty, Inc. v. Zoning Bd. of Appeals of Greenburgh, 68 A.D.3d 62, 886 N.Y.S.2d 442 (2d Dep't 2009), *lv. denied*, 13 N.Y.3d 716, 922 N.E.2d 905, 895 N.Y.S.2d 316 (2010); London v. Zoning Bd. of Appeals of Huntington, 49 A.D.3d 739, 855 N.Y.S.2d 561 (2d Dep't 2008), *lv. denied*, 10 N.Y.3d 713, 891 N.E.2d 308, 861 N.Y.S.2d 273 (2008); Allstate Props., LLC v. Bd. of Zoning Appeals of Hempstead, 49 A.D.3d 636, 856 N.Y.S.2d 130 (2d Dep't 2008), *lv. denied*, 12 N.Y.3d 711, 909 N.E.2d 1235, 882 N.Y.S.2d 397 (2009)).

28. 79 A.D.3d 1427, 1427-28, 913 N.Y.S.2d 813, 814 (3d Dep't 2010) (citing Ifrah v. Utschig, 98 N.Y.2d 304, 309, 774 N.E.2d 732, 734-35, 746 N.Y.S.2d 667, 669-70 (2002)). The court also concluded that the requested 92% variance was "substantial to the extreme." *Id*. at 1428, 913 N.Y.S.2d at 814. Additionally, petitioner's claim that the lot was in existence prior to the adoption of the town's zoning law and, therefore, exempt from the current requirements, had not been asserted before the zoning board of appeals and, as a result, could not be raised for the first time in the article 78 proceeding. *Id.* at 1427-28, 913 N.Y.S.2d at 814 (citing Henry v. Wetzler, 82 N.Y.2d 859, 862, 631 N.E.2d 102, 103, 609 N.Y.S.2d 160, 161 (1993), *cert. denied*, 511 U.S. 1126 (1994); Showers v. Town of Poestenkill Zoning Bd. of Appeals, 56 A.D.3d 1108, 1109, 867 N.Y.S.2d 782, 784 (3d Dep't 2008)).

29. N.Y. TOWN LAW § 267-b(3)(b) (McKinney 2004); N.Y. VILLAGE LAW § 7-712-b(3)(b) (McKinney 1996).

30. *See generally* Cohen v. Bd. of Appeals of Vill. of Saddle Rock, 100 N.Y.2d 395, 795 N.E.2d 619, 764 N.Y.S.2d 64 (2003).

Appeals of the Town of North Hempstead determined that "[i]n weighing the benefit to the applicant as against the detriment to the community, the zoning board must consider the economic cost to the applicant of correcting the zoning violation."[31] Nevertheless, the court concluded that a board is not required to grant a variance simply because costly demolition and reconstruction are the sole means of compliance.[32]

3. Self-Created Hardship

Unlike a use variance application, in which the existence of a self-created hardship bars relief, the self-created nature of a claimed difficulty is a relevant, but not a determinative factor, in assessing an area variance application.[33] In *Crilly v. Karl*, the court reiterated that an applicant's hardship is self-created when an applicant is a contract vendee of property which is the subject of a variance application.[34]

B. Use Variances

The petitioner in *194 Main, Inc. v. Board of Zoning Appeals for the Town of North Hempstead* purchased property that had been utilized as an antique store pursuant to a prior use variance and began to operate the premises for the display and sale of motorcycles.[35] The appellate division sustained the denial of a use variance for such use because the petitioner created the hardship by purchasing the land with knowledge that it was not zoned for commercial use.[36] The fact that a use variance had been granted to the prior owner for an antique furniture store could not have led to a reasonable expectation by the petitioner that it could operate a motorcycle sales, storage, and display store pursuant to the prior use variance.[37]

In *Morrissey v. Apostol*, the court confirmed the denial of a use variance to rent property to six unrelated college students.[38] The

31. 2010 N.Y. Slip Op. 30329(U), at 6-7 (Sup. Ct. Nassau Cnty. 2010) (citing Rosewood Home Builders v. Zoning Bd. of Appeals of the Town of Waterford, 17 A.D.3d 962, 964, 794 N.Y.S.2d 152, 154 (3d Dep't 2005)).

32. *Id.* at 7.

33. *See* N.Y. TOWN LAW § 267-b(3)(b)(5); N.Y. VILLAGE LAW § 7-712-b(3)(b)(5).

34. 67 A.D.3d 793, 795, 888 N.Y.S.2d 189, 191 (2d Dep't 2009), *lv. denied*, 14 N.Y.3d 709, 929 N.E.2d 1003, 903 N.Y.S.2d 768 (2010).

35. 71 A.D.3d 1028, 1029, 897 N.Y.S.2d 208, 209 (2d Dep't 2010).

36. *Id.*

37. *Id.*

38. 75 A.D.3d 993, 994, 996-97, 906 N.Y.S.2d 639, 639, 641-42 (3d Dep't 2010).

properties in the zoning district were restricted to single-family use.[39] The term "family" was defined by the zoning law to mean "[o]ne, two or three persons occupying a dwelling unit . . . or . . . [f]our or more persons occupying a dwelling unit and living together as a traditional family or the functional equivalent of a traditional family."[40] The zoning law also provided a presumption that four or more unrelated persons living in a single dwelling unit did not constitute the functional equivalent of a traditional family.[41] In confirming the denial of the variance, the court noted that, in addition to providing suspect financial data, the petitioner made no effort to establish that he could neither raise the rent nor sell the property at a profit as a one- or two-family home.[42] The petitioner also did not establish that the conditions upon which the variance application was based were substantially different from other residences in the neighborhood.[43] Further, any claimed hardship was self-created because the occupancy restriction had been in existence when the petitioner purchased the property.[44]

C. Interpretations

Town Law section 267-b(1) and Village Law section 7-712-b(1), as well as Town Law section 267-a(4) and Village Law section 7-712-a(4), recognize the authority of a zoning board of appeals to render interpretations of the zoning law upon an appeal from a decision of the building inspector or similar administrative official.[45] The standards for rendering interpretation were reiterated in *Sanantonio v. Lustenberger*.[46] The court first noted that zoning laws are in derogation of the common law and, as a result, generally must be strictly construed against the municipality.[47] Nevertheless, because it is unrealistic for a legislative body to adopt a law which is both definitive and all-encompassing, a reasonable amount of discretion in the interpretation of a zoning law

39. *Id.* at 994, 906 N.Y.S.2d at 640.
40. *Morrissey*, 75 A.D.3d at 994, 906 N.Y.S.2d at 640.
41. *Id.*
42. *Id.* at 997, 906 N.Y.S.2d at 642.
43. *Id.*
44. *Id.*
45. N.Y. TOWN LAW §§ 267-a(4), 267-b(1) (McKinney 2004); N.Y. VILL. LAW §§ 7-712-a(4), 7-712-b(1) (McKinney 2004).
46. *See generally* 73 A.D.3d 934, 901 N.Y.S.2d 109 (2d Dep't 2010).
47. *Id.* at 935, 901 N.Y.S.2d at 110 (citing Frishman v. Schmidt, 61 N.Y.2d 823, 825, 462 N.E.2d 134, 134, 473 N.Y.S.2d 957, 957 (1984); Baker v. Town of Islip Zoning Bd. of Appeals, 20 A.D.3d 522, 523, 799 N.Y.S.2d 541, 543 (2d Dep't 2005), *lv. denied*, 6 N.Y.3d 701, 843 N.E.2d 1155, 810 N.Y.S.2d 415 (2005)).

may be delegated to an administrative body or official.[48] "Under a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a particular property is, therefore, governed by the board's interpretation, unless unreasonable or irrational."[49]

In *Sanantonio*, the zoning board of appeals had determined that the petitioner's requested use of her home for professional hairdressing did not qualify as a "home occupation," as defined by the zoning law.[50] The zoning law enumerated barbershops and beauty parlors as the types of "'[p]ersonal service stores' which are permitted in the 'Business District B' zoning district."[51] "[I]t is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other."[52] As a result, because beauty and hair care services were expressly permitted in a business district, it was not unreasonable or irrational for the zoning board of appeals to determine that such services were not "home occupations" pursuant to the terms of the zoning law.[53]

Similarly, in *Bayram v. City of Binghamton*, the court confirmed an interpretation of the zoning board of appeals that concluded that a housing situation did not constitute the functional and factual equivalent of a family as defined by the zoning law.[54] The petitioner was the owner of a single-family dwelling located in an R-1 "Residential Single-Unit Dwelling District," which he rented to seven unrelated college students for two years.[55] On appeal of a violation notice that the use of the premises did not constitute a single family use, the zoning board of appeals upheld the determination of the building department.[56]

The interpretation by a zoning board of appeals of its own zoning

48. *Id.* (citing *Frishman*, 61 N.Y.2d at 825, 462 N.E.2d at 134, 473 N.Y.S.2d at 957-58; Arceri v. Town of Islip Zoning Bd. of Appeals, 16 A.D.3d 411, 412, 791 N.Y.S.2d 149, 150-51 (2d Dep't 2005); Saglibene v. Baum, 246 A.D.2d 599, 600, 668 N.Y.S.2d 39, 41 (2d Dep't 1998)).

49. *Id.* (quoting *Frishman*, 61 N.Y.2d at 825, 462 N.E.2d at 134-35, 473 N.Y.S.2d at 958) (citing Conti v. Zoning Bd. of Appeals of Vill. of Ardsley, 53 A.D.3d 545, 546, 861 N.Y.S.2d 140, 142 (2d Dep't 2008)).

50. *Id.* at 935-36.

51. *Sanantonio*, 73 A.D.3d at 936, 901 N.Y.S.2d at 110.

52. *Id.* (quoting Armonas v. Pratt, 138 A.D.2d 697, 699, 526 N.Y.S.2d 511, 513 (2d Dep't 1988) (citing N.Y. STAT. LAW §§ 97, 98, 130 (McKinney 1971)).

53. *Id.*

54. 27 Misc. 3d 1032, 1037, 899 N.Y.S.2d 566, 570 (Sup. Ct. Cortland Cnty. 2010).

55. *Id.* at 1033, 899 N.Y.S.2d at 567.

56. *Id.*

ordinance is entitled to substantial deference and must be confirmed if it is not irrational or unreasonable.[57] As a result, judicial review is confined to an analysis of whether a rational basis exists for a determination that is substantiated by evidence in the record.[58]

Pursuant to the terms of the zoning law, a dwelling unit located in a residential zoning district could be occupied only by a family or the equivalent of a family.[59] The zoning law defined a functional and factual family equivalent as "a group of unrelated individuals living together and functioning together as a traditional family."[60] In ascertaining whether a group of unrelated individuals constitute a functional and factual family equivalent, the zoning board of appeals was authorized by the zoning law to consider "whether the occupants share the entire dwelling unit or act as separate roomers" and "whether the household possesses stability akin to a permanent family structure."[61] The zoning law further provided that in order to decide whether a household possesses stability akin to a permanent family structure, the zoning board of appeals could consider:

> (1) [The] length of stay together among the occupants in the current dwelling unit or other dwelling units; (2) The presence of minor, dependent children regularly residing in the household; (3) The presence of one individual acting as head of household; (4) Proof of sharing expenses for food, rent or ownership costs, utilities and other household expenses; (5) Common ownership of furniture and appliances among the members of the household; (6) Whether the household is a temporary living arrangement or a framework for transient living; (7) Whether the composition of the household changes from year to year or within the year; (8) [and] [a]ny other factor reasonably related to whether or not the group of persons is the functional equivalent of a family.[62]

The zoning board of appeals concluded that the occupants did not share the entire dwelling unit, and instead acted as separate roomers.[63]

57. *Id.*

58. *Id.* (citing Ohrenstein v. Zoning Bd. of Appeals of Canaan, 39 A.D.2d 1041, 1042, 833 N.Y.S.2d 763, 764 (3d Dep't 2007); Point Lookout Civic Ass'n v. Zoning Bd. of Appeals of Hempstead, 94 A.D.2d 744, 745, 462 N.Y.S.2d 508, 510 (2d Dep't 1983); Kantor v. Olsen, 9 A.D.3d 814, 815, 780 N.Y.S.2d 443, 444 (3d Dep't 2004); Haas Hill Prop. Owners' Ass'n v. Zoning Bd. of Appeals of New Balt., 202 A.D.2d 895, 896, 609 N.Y.S.2d 416, 417 (3d Dep't 1994)).

59. *Bayram*, 27 Misc. 3d at 1034, 899 N.Y.S.2d at 568.

60. *Id.*

61. *Id.*

62. *Id.* at 1034-35, 899 N.Y.S.2d at 568.

63. *Id.* at 1035, 899 N.Y.S.2d at 568.

The board additionally determined that the tenants' living arrangement lacked the requisite degree of stability because it was temporary, limited at most to the two-year lease term.[64] No minor, dependent children resided at the premises.[65] Although there was evidence that the tenants shared utility expenses, there was no proof with respect to the pooling of money for the payment for food or other expenses.[66] Although the appliances were owned by the landlord, the most important items, such as computers and televisions, were individually owned and not used in common.[67] In addition, "none of the tenants' automobiles were registered to the property address, none of their driver's licenses listed the property as a residence address and none of the tenants were registered to vote in local elections."[68] Finally, the monthly rent of $2,800, which was considered to be three to four times the monthly rent typically paid for a single-family residence in the area, was a further indication that the property was leased to seven individuals, rather than to a single family unit.[69] Consequently, the court sustained the decision of the zoning board of appeals.[70]

In another decision dealing with a definition of the term family, *Morrissey v. Apostol*, discussed above, the court concluded that the definition of the term "family" contained in the zoning law was constitutional.[71] A zoning law is valid if it is enacted to further a legitimate governmental purpose and a reasonable relation exists between the objective of the law and the means utilized to accomplish that goal.[72] The petitioner accepted that the law served a legitimate goal, that is, the preservation of the single-family character of the area, but alleged that a reasonable relationship did not exist between the terms of the ordinance and accomplishment of that aim.[73] It was also contended that the absence of objective criteria defining what constitutes a "traditional family" or the "functional equivalent of a traditional family" rendered the law void for vagueness and provided

64. *Bayram*, 27 Misc. 3d at 1035, 899 N.Y.S.2d at 568.
65. *Id.* at 1036, 899 N.Y.S.2d at 569.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Bayram*, 27 Misc. 3d at 1037, 899 N.Y.S.2d at 569.
70. *Id.* at 1037, 899 N.Y.S.2d at 570.
71. 75 A.D.3d 993, 997, 906 N.Y.S.2d 639, 641 (3d Dep't 2010).
72. *Id.* at 995, 906 N.Y.S.2d at 640 (citing Genesis of Mount Vernon v. Zoning Bd. of Appeals of Mount Vernon, 81 N.Y.2d 741, 743-44, 609 N.E.2d 122, 124, 593 N.Y.S.2d 769, 771 (1992)).
73. *Id.* at 995, 906 N.Y.S.2d at 641.

unfettered discretionary enforcement authority to the building department.[74] The court rejected plaintiff's contentions.

"A statute withstands an attack for vagueness if it contains sufficient standards to afford a reasonable degree of certainty so that a person of ordinary intelligence is not forced to guess at its meaning and to safeguard against arbitrary enforcement."[75] The law satisfied those requirements because the terms "family" and "functional equivalent of a traditional family" were not so unclear as to confuse a person of common intelligence and, as a result, the law is "not susceptible to arbitrary enforcement."[76] Given the expansive body of case law interpreting the term "family," the meaning of the relevant terms was readily ascertainable.[77]

D. Extension of Variances

In *Cohen v. Village of Irvington*, the zoning board of appeals approved an extension of a variance that had been granted twenty-six years earlier despite a provision in the zoning law that provided that a variance is null and void, without further hearing or action by the board of appeals, if construction or use is not commenced within one year from the granting of the variance.[78] Petitioners contended that the zoning board of appeals acted in excess of its authority in granting the extension of the frontage variance because the variance expired in 1987.[79] On the other hand, the respondents asserted that the 2010 extension of the variance was in accordance with a provision of the zoning law that allows for "further . . . action by the Board of Appeals" and therefore the zoning board had the authority under the code to extend the variance.[80]

Primarily based on the decision in *American Red Cross v. Board of*

74. *Id.* at 995-96, 906 N.Y.S.2d at 641.

75. *Id.* at 996 (quoting Salvatore v. City of Schenectady, 139 A.D.2d 87, 89, 530 N.Y.S.2d 863, 864 (3d Dep't 1988)).

76. *Id.* (quoting Flow v. Mark IV Constr. Co., 288 A.D.2d 779, 780, 733 N.Y.S.2d 751, 752 (3d Dep't 2001)).

77. *Id.* (citing Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974); McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985); Grp. House of Port Wash. v. Bd. of Zoning & Appeals of North Hempstead, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974)).

78. No. 14474/10, 2010 N.Y. Slip Op. 52105(U), at 1 (Sup. Ct. Westchester Cnty. 2010) (citing VILLAGE OF IRVINGTON, N.Y., CODE § 224.97(B)(4) (2009)).

79. *Id.*

80. *Id.* (quoting VILLAGE OF IRVINGTON, N.Y., CODE § 294.97(B)(4)).

Zoning Appeals of the City of Ithaca,[81] the court determined that the extension was properly approved.[82] The *American Red Cross* court had determined that unless there has been a material change in circumstances surrounding the property between the time the initial variance was issued and the present, reissuance should be granted.[83]

> Although respondent [Zoning Board] may deny a reapplication for a variance upon the expiration of a time limitation imposed thereon . . . such denial must be premised on a change in the relevant conditions surrounding the application. . . . Absent such material charges, respondent is bound to its earlier decision . . . and may not refuse a variance previously granted on a prior finding of practical difficulty.[84]

Because there had been no change in any material condition, the extension was found to be permissible.[85]

III. ENFORCEMENT

In *Town of Southold v. Estate of Edson*, an injunction was granted prohibiting the operation of a retail store for the sale of items not grown on the property.[86] The court rejected the defendants' contention that because the town purportedly had acquiesced in the improper use of the premises over a period of several years, it should be estopped from enforcing the zoning law, as estoppel generally is unavailable to prevent a municipality from discharging its statutory duties.[87] Further, a building permit issued due to a misrepresentation by the applicant or an error by the municipal agency cannot confer rights in contravention of the zoning laws and is subject to corrective action, even where the results may be harsh.[88]

81. 161 A.D.2d 878, 879, 555 N.Y.S.2d 923, 924 (3d Dep't 1990).

82. *Cohen*, 2010 N.Y. Slip Op. 52105(U), at 3.

83. *See id.*

84. *Id.* (quoting Am. Red Cross, 161 A.D.2d at 879, 555 N.Y.S.2d at 924-25).

85. *Id.*

86. 78 A.D.3d 816, 816, 911 N.Y.S.2d 386, 387 (2d Dep't 2010).

87. *Id.* (citing Parkview Assocs. v. City of N.Y., 71 N.Y.2d 274, 282, 519 N.E.2d 1372, 1374, 525 N.Y.S.2d 176, 178, *cert. denied*, 488 U.S. 801; Daleview Nursing Home v. Axelrod, 62 N.Y.2d 30, 33, 464 N.E.2d 130, 475 N.Y.S.2d 826 (1984)).

88. *Id.* at 817, 911 N.Y.S.2d at 388 (citing Parkview Assocs., 71 N.Y.2d at 282, 519 N.E.2d at 1374, 525 N.Y.S.2d at 178; Town of Putnam Valley v. Sacramone, 16 A.D.3d 669, 670, 792 N.Y.S.2d 191, 191-92 (2d Dep't 2005); McGannon v. Bd. of Trs. for Vill. of Pomona, 239 A.D.2d 392, 393, 657 N.Y.S.2d 745, 746 (2d Dep't 1997); Baris Shoe Co. v. Town of Oyster Bay, 234 A.D.2d 245, 650 N.Y.S.2d 776 (2d Dep't 1996); Welland Estates v. Smith, 109 A.D.2d 193, 196, 491 N.Y.S.2d 342, 344 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 789, 492 N.E.2d 130, 501 N.Y.S.2d 22 (1986)).

In *Town of Southampton v. County of Suffolk*,[89] a preliminary injunction was granted with respect to use of trailers by the county in violation of the town zoning law, in part, because the county failed to demonstrate that it was immune from the town's zoning regulations pursuant to the balancing of the public interest test of *County of Monroe v. City of Rochester*.[90] A municipality seeking a preliminary injunction to restrain violations of zoning regulations and local codes and ordinances, such as building permit regulations, is only required to demonstrate that it has a likelihood to succeed on the merits of its claims and that the equities are balanced in its favor.[91] A strong prima facie demonstration that the defendants are violating one or more provisions of a zoning law or similar regulations is sufficient to satisfy the municipality's burden for establishing entitlement to a preliminary injunction.[92] In addition, a municipality:

> '[H]as the right pursuant to its police powers to prevent conditions dangerous to public health' and . . . 'it is not for the court to determine finally the merits of an action upon a motion for preliminary injunction; rather the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits. Viewed from this perspective, it is clear that the showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued must not be equated with a showing of a certainty of success.'[93]

The town's moving papers demonstrated that residential trailer housing was not a permitted use in the zoning districts where the trailers were located and that the county did not obtain any of the required variances, approvals, permits, or occupancy certificates required by the town code prior to the installation and use of the trailers.[94] The moving papers further established that the health, safety, and welfare of the

89. No. 19533-09, 2010 N.Y. Slip Op. 51039(U), at 1 (Sup. Ct. Suffolk Cnty. 2010). The town sought a preliminary injunction enjoining the county from altering, expanding, replacing or changing the physical structure of the trailers currently situated on the county's parcels.

90. *Id.* at 5-6 (citing *In re* Cnty. of Monroe, 72 N.Y.2d 338, 530 N.E.2d 202, 533 N.Y.S.2d 702 (1988)).

91. *Id.* at 4 (citing N.Y. TOWN LAW § 268 (McKinney 2004); Town of Riverhead v. Silverman, 54 A.D.3d 1024, 864 N.Y.S.2d 169 (2d Dep't 2008); Town of Islip v. Modica Assocs. of N.Y. 122, LLC, 45 A.D.3d 574, 846 N.Y.S.2d 201 (2d Dep't 2007); First Franklin Sq. Assoc. v. Franklin Sq. Prop. Account, 15 A.D.3d 529, 790 N.Y.S.2d 527 (2d Dep't 2005)).

92. *Id.* (citing *Town of Islip*, 45 A.D.3d at 574, 846 N.Y.S.2d at 201).

93. *Id.* (quoting Incorporated Vill. of Babylon v. John Anthony's Water Cafe, Inc., 137 A.D.2d 791, 525 N.Y.S.2d 341 (2d Dep't 1988)).

94. *Town of Southampton*, 2010 N.Y. Slip Op. 51039(U), at 4-5.

residents of the town was endangered by exposure to the risks associated with the establishment of multiple room occupancy trailers, which likely violated the plaintiff's zoning and building ordinances.[95] As a result, the town "established a likelihood of success on the merits of its claims and that a balance of the equities tips" in its favor.[96]

Based on *In re County of Monroe*, the County contended that it was exempt from the town's zoning laws and associated permit requirements because, it claimed, the County was required to provide such facilities pursuant to state statutes and regulations.[97] Initially, the court noted that the manner in which the immunity claim was asserted in *County of Monroe* was significantly different because the parties jointly had sought a judicial declaration of the issue of immunity, pursuant to Civil Procedure Law and Rules 3222(b)(3).[98] The court opined that,

> [i]n plenary actions for permanent injunctive relief wherein a demand for preliminary injunctive relief is met with an assertion of governmental immunity which invokes application of the balancing of public interests approach enunciated in *Matter of the County of Monroe* . . . determination of that governmental immunity claim has been found to be premature where a developed record does not exist and the papers before the court reveal the existence of various unestablished and facially conflicted facts.[99]

In *Town of Southampton*, given the procedural posture and the county's failure to utilize necessary local administrative mechanisms, there was no record or attempted demonstration of the factors necessary for the application of the balancing of public interests approach.[100] As a result, it was determined that the county had failed to demonstrate that it was immune from complying with the town zoning and building regulations.[101]

The decision suggests that an encroaching municipality may not establish a use under the assumption that it is immune from local zoning regulations. Instead, the encroaching municipal entity must seek approval from the appropriate official or agency of the "host" community and must obtain a determination as to whether it is exempt

95. *Id.* at 5.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Town of Southampton*, 2010 N.Y. Slip Op. 51039(U), at 5-6 (citing Town of Riverhead v. Cnty. of Suffolk, 66 A.D.3d 1004, 887 N.Y.S.2d 650 (2d Dep't 2009); Town of Riverhead v. Cnty. of Suffolk, 39 A.D.3d 537, 834 N.Y.S.2d 219 (2d Dep't 2007)).
100. *Town of Southampton*, 2010 N.Y. Slip Op. 51039(U), at 6.
101. *Id.*

from local regulation pursuant to *County of Monroe*. It is entirely inappropriate to institute such a use and then to later claim exemption without having utilized the local review processes.

IV. STANDING

> [C]hallenges to zoning determinations may only be made by aggrieved persons . . . . Aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of defendants . . . or—put another way—that it has sustained special damage, different in kind and degree from the community generally. Traditionally, this has meant that injury in fact must be pleaded and proved.[102]

As a result, in order to establish standing, a petitioner must demonstrate that he or she has "suffered an injury in fact, distinct from that of the general public," and "that the injury claimed falls within the zone of interests to be protected by the statute challenged."[103] Unless one's property is located in close proximity to property which is the subject of a SEQRA or land use determination, a petitioner lacks a cognizable injury in fact.[104]

In *Shapiro v. Town of Ramapo*, the petitioner challenged the rezoning of a portion of property from a single-family designation to one that permitted multi-family housing.[105] Although the entirety of the property owned by the developer was located across the street from the petitioners' property, the portion upon which their claims were based, that is, the area rezoned, was separated by proposed single-family homes and was located more than 1,000 feet from the rezoned

102. Shapiro v. Town of Ramapo, No. 5195/2010, 2010 N.Y. Slip Op. 51915(U), at 3 (Sup. Ct. Rockland Cnty. 2010) (quoting Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of North Hempstead, 69 N.Y.2d 406, 412-13, 508 N.E.2d 130, 133, 515 N.Y.S.2d 418, 421 (1987)); *see also* Youngewirth v. Town of Ramapo, No. 5194/2010, 2010 N.Y. Slip Op. 51916(U), at 2-3 (Sup. Ct. Rockland Cnty. 2010).

103. Transactive Corp. v. N.Y. State Dep't of Soc. Servs., 92 N.Y.2d 579, 587, 706 N.E.2d 1180, 1183, 684 N.Y.S.2d 156, 159 (1998) (citing Soc'y of Plastics Indus. v. Cnty. of Suffolk, 77 N.Y.2d 761, 771-74, 573 N.E.2d 1034, 1039-42, 570 N.Y.S.2d 778, 783-86 (1991)). The harmful effect on petitioners must be "direct injury different from that suffered by the public at large . . . ." Riverhead PGC, LLC v. Town of Riverhead, 73 A.D.3d 931, 933, 905 N.Y.S.2d 595, 597 (2d Dep't 2010).

104. Decisions have denied standing to petitioners who were 530 and 600 feet from the property that is the subject of a land use application. *See* Oates v. Vill. of Watkins Glen, 290 A.D.2d 758, 760, 736 N.Y.S.2d 478, 481 (3d Dep't 2002); Buerger v. Town of Grafton, 235 A.D.2d 984, 985, 652 N.Y.S.2d 880, 881 (3d Dep't 1997), *lv. denied*, 89 N.Y.2d 816, 681 N.E.2d 1303, 659 N.Y.S.2d 856 (1997).

105. *Shapiro*, 2010 N.Y. Slip Op. 51915(U), at 2.

property.[106] The court additionally observed that "significantly, there are no roadways between petitioners' parcel and the portion affected by the zoning change. That means that to reach the re-zoned portion of the property from petitioners' land would necessitate a journey of nearly one mile."[107] As a result, "the distance between petitioners' home and the re-zoned land is too far and is 'insufficient, without more, to confer standing; actual injury must be shown."[108] Because the petitioners failed to demonstrate an actual injury different from the public at large, they lacked standing.[109] Although the petition alleged that they would suffer from increased density, a change in the character of the neighborhood by virtue of the destruction of natural vegetation, and the re-grading of the property thereby endangering a claimed sole source aquifer and decreasing their ability to enjoy their property, none of those claimed harms were specific to the petitioners and were not distinguishable from that suffered by the public at large.[110]

In a companion case, *Youngewirth v. Town of Ramapo*, the court employed the same reasoning to also dismiss the article 78 proceeding of another neighbor whose property was located more than 1,155 feet from the rezoned portion of the property and also was buffered by proposed single-family homes because that neighbor also lacked standing.[111] Further, as in *Shapiro*, there were no streets between petitioner's property and the portion affected by the zoning change, necessitating a trip of more than one mile for petitioner to reach the rezoned portion of the property.[112] Youngewirth claimed that she suffered an injury different than the public at large because her street has only one exit to a nearby state highway, that the residents of the development will utilize that road and that "everyone" in her development utilizes that highway to travel to work, shopping, and other destinations.[113] However, that claim "boils down to a simple 'increase in traffic,' which is a harm suffered by everyone when new construction occurs. This is certainly not a harm specific to petitioner,

106. *Id.* at 3-4.

107. *Id.* at 4.

108. *Id.* (quoting Many v. Vill. of Sharon Springs Bd. of Trs., 218 A.D.2d 845, 845, 629 N.Y.S.2d 868, 870 (3d Dep't 1995)).

109. *Id.*

110. *Shapiro*, 2010 N.Y. Slip Op. 51915(U), at 4.

111. No. 5194/2010, 2010 N.Y. Slip Op. 51916(U), at 3-5 (Sup. Ct. Rockland Cnty. 2010).

112. *Id.* at 2.

113. *Id.*

or even confined only to those people who live [on her street]."[114] The petitioner also argued that there may be increased runoff and drainage problems and that "she 'faces the loss of wildlife or alternatively, too much . . . wildlife.'"[115] Both claims were "entirely speculative" and not particular injuries to the petitioner.[116] As a result, the petitioner failed to demonstrate that she will suffer any specific injury distinguishable from that suffered by the public at large and did not possess standing.[117]

Despite raising various claimed objections in her article 78 petition, Youngewirth did not attend any of the hearings on the zone change petition.[118] "[I]n a CPLR article 78 proceeding, the Court's review is limited to the arguments and record adduced before the agency."[119] Consequently, the doctrine of exhaustion of administrative remedies requires "litigants to address their complaints initially to administrative tribunals, rather than to the courts, and . . . to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts."[120] As a result, "courts generally refuse to review a determination on environmental or zoning matters based on evidence or arguments that were not presented during the proceedings before the lead agency."[121] Therefore, when a petitioner has "failed to comment upon . . . issues at the public hearing or during the period for submitting written comments, their issues are not . . . properly before [the] court for review."[122] Where a petitioner was not a party to, and did not participate in, the proceeding before the Zoning Board of Appeals, "[a]s a stranger to the administrative proceeding, a person or entity has no right to petition a court for a review of the decision rendered in that proceeding."[123] Because the petitioner had not appeared at any of the public hearings, nor submitted written comments, she had not exhausted administrative remedies and, as a result, the

114. *Id.*

115. *Id.* at 3.

116. *Youngewirth*, 2010 N.Y. Slip Op. 51916(U), at 3.

117. *Id.*

118. *Id.*

119. Kahn v. Planning Bd. of Buffalo, 60 A.D.3d 1451, 1452, 875 N.Y.S.2d 421, 422 (4th Dep't 2009), *lv. denied*, 13 N.Y.3d 711, 921 N.E.2d 203, 893 N.Y.S.2d 511 (2009).

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

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

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

123. *See Youngewirth*, 2010 N.Y. Slip Op. 51916(U), at 5 (quoting Ass'n of Friends of Sagaponack v. Zoning Bd. of Appeals of the Town of Southampton, N.Y.L.J., Aug. 20, 1999, at 26 (Sup. Ct., Suffolk Cnty.)); *see also In re* Jonas, 155 N.Y.S.2d 506 (Sup. Ct. Westchester Cnty. 1956), *aff'd*, 3 A.D.2d 668, 158 N.Y.S.2d 579 (2d Dep't 1957).

claims were barred for this additional reason.[124]

In a third related decision, *Village of Pomona v. Town of Ramapo*, the court dismissed a proceeding instituted by a neighboring village, again for lack of standing.[125] The petitioner first contended that the town had improperly amended its comprehensive plan and that the rezoning constituted impermissible spot-zoning.[126] Previously, in *Village of Chestnut Ridge v. Town of Ramapo*, the appellate division rejected claims of standing of various villages, including that of the Village of Pomona, and confirmed that they had "no interest in the Town Board's compliance with . . . its comprehensive plan . . . ."[127] Similarly, the *Chestnut Ridge* court additionally rejected the contention that adjoining villages possessed standing to contend that a zoning amendment of the town constituted spot-zoning.[128] Based on *Chestnut Ridge*, the court concluded that the village lacked standing to challenge the town's amendment of its comprehensive plan or the enactment of the zoning amendment as constituting spot-zoning.[129]

The court also determined that Pomona lacked standing to assert that the town did not properly override the Rockland County Planning Department's General Municipal Law review pursuant to General Municipal Law section 239-m.[130] The Town submitted the application and accompanying documents to the Rockland County Planning Board for its review and recommendations. The county planning board recommended various modifications and the town board overrode certain recommendations, setting forth the rationale for its overrides.[131] However, Pomona contended that the town board's reasoning was conclusory and did not provide factual evidence for the override.[132] The court determined that a valid cause of action had not been stated and that Pomona lacked standing to criticize the reasoning set forth in the resolutions which otherwise complied with General Municipal Law section 239-m.[133]

124. *Youngewirth*, 2010 N.Y. Slip Op. 51916(U), at 5.

125. 30 Misc. 3d 263, 266, 914 N.Y.S.2d 566, 569 (Sup. Ct. Rockland Cnty. 2010).

126. *Id.* at 265, 914 N.Y.S.2d at 568.

127. 45 A.D.3d 74, 88, 841 N.Y.S.2d 321, 334 (2d Dep't 2007), *lv. dismissed*, 12 N.Y.3d 793, 906 N.E.2d 1072, 879 N.Y.S.2d 39 (2009), 15 N.Y.3d 817, 934 N.E.2d 882, 908 N.Y.S.2d 149 (2010).

128. *Id.*

129. *Vill. of Pomona*, 30 Misc. 3d at 265, 914 N.Y.S.2d at 568-69.

130. *Id.* at 266-67, 914 N.Y.S.2d at 569.

131. *Id.* at 266, 914 N.Y.S.2d at 569.

132. *Id.* at 267, 914 N.Y.S.2d at 569.

133. *Id.*

The *Chestnut Ridge* decision also had determined that the villages in that proceeding possessed standing to challenge the town's compliance with SEQRA.[134] However, the court related that "a municipality is limited to asserting rights that are its own, and is not permitted to assert the collective individual rights of its residents."[135] Pomona could not possess standing unless it "demonstrated interest in the potential environmental impacts of the project."[136] Although Pomona alleged certain claimed "substantive criticisms of the final environmental impact statement and the draft environmental impact statement . . . it fail[ed] to assert with any specificity or detail that any of these problems have or will have a direct impact on Pomona."[137] Pomona alleged in its opposition to the motion to dismiss the petition that,

> noise, air pollution and traffic impacts from more than 1,000 vehicles per day that will be generated by the proposed [development] . . . will enter the Village of Pomona within a few feet of the project's driveway [and that the] . . . visual impacts of almost wall-to-wall development will change the character of the surrounding Pomona neighborhoods.[138]

However, Pomona did not provide any support for those conclusory contentions.[139] In fact, "'none of the roads from the proposed development even access roads maintained by Pomona'" and "'Pomona does not maintain the water, sewer, or any of the other public services that would serve the development.'"[140] As a result, Pomona failed to demonstrate that it had a "real, concrete interest in the 'potential environmental impacts of the project.'"[141] The *Chestnut Ridge* court found that the "municipalities had standing to maintain a cause of action concerning SEQRA" under the circumstances alleged "because they had demonstrated that they had an interest in the potential environmental impacts of the project as it affected their 'community character.'"[142] However, Pomona failed to make such a showing, "aside

134. 45 A.D.3d 74, 92, 841 N.Y.S.2d 321, 337 (2d Dep't 2007) *lv. dismissed*, 12 N.Y.3d 793, 906 N.E.2d 1072, 879 N.Y.S.2d 39 (2009), 15 N.Y.3d 817, 934 N.E.2d 882, 908 N.Y.S.2d 149 (2010).

135. *Id.* at 91, 841 N.Y.S.2d at 336.

136. *Vill. of Pomona*, 30 Misc. 3d at 269, 914 N.Y.S.2d at 571.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Pomona*, 30 Misc. 3d at 269, 914 N.Y.S.2d at 571.

142. *Id.* at 279-70, 914 N.Y.S.2d at 571.

from conclusory assertions."[143]

This decision demonstrates that a litigant must factually demonstrate the harmful effects of a proposed zoning decision and that reliance on purported impacts that affect the community at large are insufficient to establish standing. Moreover, the decision illustrates that although a neighboring municipality theoretically may possess standing to seek review of compliance with SEQRA with respect to a zoning decision of an adjoining community, standing will be rejected if the purported basis for claiming standing is unsubstantiated or hypothetical.

143. *Id.*