ZONING & LAND USE

Terry Rice[†]

CONTENTS

I. ZONING ENACTMENTS/AMENDMENTS 1007
A. *Preemption* 1007
B. *Spot Zoning/Comprehensive Plan* 1014
C. *Uniformity* 1018
D. *Standing* 1020
II. ZONING BOARDS OF APPEAL 1025
A. *Findings of Fact* 1025
B. *Area Variances* 1026
1. *Character of the Neighborhood* 1026
2. *Consideration of Precedential Effect* 1026
C. *Statute of Limitations* 1027
III. CONFLICTS OF INTEREST/OPEN MEETINGS 1029
IV. MOOTNESS 1031
V. SITE PLAN REVIEW 1032
VI. SPECIAL PERMITS 1039
VII. FIFTH AMENDMENT TAKINGS 1045

I. ZONING ENACTMENTS/AMENDMENTS

A. Preemption

Municipalities are delegated extensive authority to regulate land use. However, a municipality may not adopt zoning regulations that relate to a subject area that has been preempted by the State Legislature.[1] One of the most controversial issues of preemption relates to municipal attempts to prohibit mining from a municipality or from specific zoning districts and, more lately, efforts to ban hydraulic fracturing ("hydrofracking") from a community.

A controversy has developed regarding whether the Environmental Conservation Law ("ECL") preempts municipalities from banning the use of high-volume hydrofracking to obtain natural gas from the Marcellus black shale formation which underlies the southern portion of New York State. ECL section 23-0303(2) provides that:

[†] Partner, Rice & Amon, Suffern, New York; author, McKinney's Practice Commentaries, Town Law, Village Law (West Group).

1. *See generally* Cohen v. Bd. of Appeals of Saddle Rock, 100 N.Y.2d 395, 795 N.E.2d 619, 764 N.Y.S.2d 64 (2003); *see also* Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 377, 546 N.E.2d 920, 922, 547 N.Y.S.2d 627, 629 (1989).

> The provisions of [Mineral Resources Article 23 of the ECL] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.[2]

The decision in *Anschutz Exploration Corp. v. Town of Dryden*, determined "whether a local municipality may use its power to regulate land use to prohibit exploration for, and production of, oil and natural gas."[3] Town residents had petitioned the town board to prohibit hydrofracking because of perceived risks of contamination of ground and surface water supplies.[4] As a result, the town amended its zoning law to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum with the goal of prohibiting hydrofracking.[5] The plaintiff possessed gas leases that had been acquired prior to the adoption of the amendment and had invested more than five million dollars in furtherance of those leases.[6] The plaintiff sought to invalidate the amendment on the basis that it was preempted by ECL section 23–0303, the Oil, Gas and Solution Mining Law ("OGSML"), and that it impermissibly conflicted with the provisions of the OGSML that directly regulate gas production.[7]

The supersession language of the OGSML relates that "[t]he provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law."[8] That provision was last revised more than thirty years ago—long before the use of hydrofracking to recover natural gas could have been foreseen.[9] However, the Court of Appeals had concluded in *Frew Run Gravel Products v. Town of Carroll*,[10] ("*Frew Run*") that a comparable supersession clause contained in the Mined Land Reclamation Law

2. N.Y. ENVTL. CONSERV. LAW § 23-0303(2) (McKinney 2007).

3. 35 Misc. 3d 450, 452-53, 940 N.Y.S.2d 458, 461 (Sup. Ct. Tompkins Cnty. 2012).

4. *See id.* at 453, 940 N.Y.S.2d at 461.

5. *See id.*

6. *See id.*

7. *See id.*

8. *Anschutz Exploration Corp.*, 35 Misc. 3d at 459, 940 N.Y.S.2d at 466 (quoting N.Y. ENVTL. CONSERV. LAW § 23–0303(2) (McKinney 2007)).

9. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 459, 940 N.Y.S.2d at 466.

10. 71 N.Y.2d 126, 518 N.E.2d 920, 524 N.Y.S.2d 25 (1987).

("MLRL")[11] did not preempt local zoning laws.[12] Because of the similarities between the OGSML and the MLRL, as it existed at the time of the *Frew Run* decision, the court considered the *Frew Run* precedent to be controlling.[13]

Frew Run construed the following supersession provision of the MLRL:

> For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.[14]

The *Frew Run* court concluded that the zoning ordinance banning mining in the town did not relate to the extractive mining industry, but to a completely dissimilar matter, that is, land use.[15]

> In *Frew Run*, we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the type of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities. In *Frew Run*, we concluded that nothing in the plain language, statutory scheme, or legislative purpose of the Mined Land Reclamation Law suggested that its reach was intended to be broader than necessary to preempt *conflicting regulations dealing with mining operations and reclamation of mined lands*, and that in the absence of a clear expression of legislative intent to preempt local control over land use, the statute could not be read as preempting local zoning authority.[16]

The *Anschutz Exploration* court determined that the principal

11. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 459, 940 N.Y.S.2d at 466 (citing N.Y. ENVTL. CONSERV. LAW § 23-2703(2)).

12. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 459, 940 N.Y.S.2d at 466 (citing *Frew Run Gravel Prods.*, 71 N.Y.2d at 129, 518 N.E.2d at 921, 524 N.Y.S.2d at 26).

13. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 459, 940 N.Y.S.2d at 466.

14. *Frew Run Gravel Prods.*, 71 N.Y.2d at 129, 518 N.E.2d at 921, 524 N.Y.S.2d at 26 (quoting N.Y. ENVTL. CONSERV. LAW. § 23-2703(2)).

15. *Anschutz Exploration Corp.*, 35 Misc. 3d at 460, 940 N.Y.S.2d at 466.

16. *Id.*, 940 N.Y.S.2d at 466-67 (quoting Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 681-82, 664 N.E.2d 1226, 1234, 642 N.Y.S.2d 164, 172 (1996)).

language of the two supersession clauses is nearly identical.[17] Neither supersession clause contains a clear manifestation of legislative intent to preempt local zoning and land use authority.[18] Notably, the MLRL law was amended in 1991 to codify the *Frew Run* decision and the amended supersession clause was construed by the Court of Appeals in 1996 in *Gernatt* to permit a total ban on mining activities within a municipality.[19] Despite that legislative and judicial activity regarding the preemptive scope of the MLRL, the OGSML, as enacted in 1976 and amended in 1981, does not contain a supersession clause evidencing an unequivocal legislative intent to preempt local zoning authority over oil and gas production.[20] In addition, no significant difference exists in the goals of the two laws—both provide for statewide regulation of operations with the primary objective of promoting efficient use of a natural resource.[21] The supersession provisions of each were enacted to eliminate inconsistent local regulations which hinder that goal.[22] Further, no substantial difference in the purpose of the two statutes is apparent from their regulatory schemes.[23]

The lack of a unequivocal expression of legislative intent in the OGSML to preempt local zoning authority also is evident when it is compared to two state statutes that categorically preempt local zoning authority, such as ECL, Article 27, title 11 (siting industrial hazardous waste facilities) and Mental Hygiene Law section 41.34 (siting community residential facilities).[24] Unlike the OGSML, the intent to preempt local zoning regulation is clearly expressed in the text of those statutes.[25] Further, those statutes mandate the consideration of traditional land use issues in deciding whether to issue a permit under state law.[26] On the other hand, the OGSML does not require

17. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 461, 940 N.Y.S.2d at 467.

18. *See id.*

19. *See id.* (referencing *Frew Run Gravel Prods.*, 71 N.Y.2d 126, 518 N.E.2d 920, 524 N.Y.S.2d 25; *Gernatt Asphalt Prods.*, 87 N.Y.2d 668, 664 N.E.2d 1226, 642 N.Y.S.2d 164).

20. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 461, 940 N.Y.S.2d at 467.

21. *See id.* at 463, 940 N.Y.S.2d at 468.

22. *See id.*

23. *See id.* at 465, 940 N.Y.S.2d at 470.

24. *See id.* at 466, 940 N.Y.S.2d at 470 (citing *Gernatt Asphalt Prods.*, 87 N.Y.2d at 682, 664 N.E.2d at 1234, 642 N.Y.S.2d at 172; N.Y. ENVTL. CONSERV. LAW § 27–1103 (McKinney 2007); N.Y. MENTAL HYG. LAW § 41.34 (McKinney 2011)).

25. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 466, 940 N.Y.S.2d at 471.

26. *See id.* (citing N.Y. ENVTL. CONSERV. LAW § 27–1103(2)(b), (c), (g), (h); N.Y. MENTAL HYG. LAW § 41.34(c)(5)).

consideration of such factors prior to issuance of a permit.[27] To ensure that local concerns are considered, those statutes require advance notice to, and permit participation by, a municipality in which a proposed facility is to be located.[28] By contrast, the OGSML does not require notice to an affected municipality until after a permit has been granted.[29] Consequently, a manifest legislative intent to preempt local zoning authority is not evident from the fact that the OGSML does not specifically provide a mechanism for consideration of local land use concerns.[30] Instead, "local governments may exercise their powers to regulate land use to determine where within their borders gas drilling may or may not take place, while DEC regulates all technical operational matters on a consistent statewide basis in locations where operations are permitted by local law."[31]

The fact that the zoning amendment prohibits all operations related to oil and gas exploration and production throughout a municipality does not induce a different result.[32] The Court of Appeals rejected the argument in *Gernatt* that if land within a municipality contains extractable minerals, the municipality must allow them to be mined somewhere in the community.[33] The Court concluded that because the MLRL does not constrain the authority to zone, a municipality may exercise its zoning authority to prohibit mining within its borders.[34]

Although the issue was a case of first impression in New York, the Supreme Courts of Pennsylvania and Colorado reached the same result in concluding that their respective state's statutes governing oil and gas production do not preempt the authority of a local government to exercise its zoning power to determine the districts in which gas wells are a permitted use for property.[35]

However, the court annulled the portion of the law that provided that "'[n]o permit issued by any local, state or federal agency,

27. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 466, 940 N.Y.S.2d at 471.

28. *See id.* (citing N.Y. ENVTL. CONSERV. LAW §§ 27–1105(3)(c), 27–1113; N.Y. MENTAL HYG. LAW § 41.34(c)).

29. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 467, 940 N.Y.S.2d at 471 (citing N.Y. ENVTL. CONSERV. LAW § 23–0305(13)).

30. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 467, 940 N.Y.S.2d at 471.

31. *Id.*

32. *See id.*

33. *See id.*

34. *See id.* at 468, 940 N.Y.S.2d at 472.

35. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 468-69, 940 N.Y.S.2d at 472-73 (citing Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 858 (Pa. 2009); Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., 830 P.2d 1045 (Colo. 1992)).

commission or board for a use which would violate the prohibitions of this section or of this Ordinance shall be deemed valid within the Town.'"[36] Although a municipality may regulate the use of land within its borders, including banning oil or gas operations, it has no authority to nullify a permit lawfully issued by another governmental entity.[37] By purporting to revoke permits issued by any state agency, including the DEC, the provision directly related to the regulation of the oil and gas industries and, accordingly, is expressly preempted by the OGSML and is invalid.[38] However, the invalidity of that provision did not require annulment of the entire amendment because the offending provision could be severed without impairing the underlying purpose of the amendment.[39]

Another court arrived at the same conclusion in *Cooperstown Holstein Corp. v. Town of Middlefield*.[40] The town had adopted an amendment to its zoning law similar to the one examined in *Anschutz*, which also effectively prohibited hydrofracking.[41] The issue considered was whether the State by "the enactment of ECL § 23–0303(2), prohibit[ed] local municipalities from enacting legislation which may impact upon the oil, gas and solution drilling or mining industries other than that pertaining to local roads and the municipalities' rights under the real property law[.]"[42]

In evaluating the interaction between local regulation and the extent of state preemption enacted in ECL section 23–0303(2), a court must look to the legislative intent and the legislative history of the statute to ascertain the scope of such preemption.[43] Intent to preempt local legislation may be evidenced expressly, by implication, or by operation of conflict preemption.[44] Because the legislature expressly addressed preemption in the statute, the issue was the extent of the preemption.[45] To address that question, the court expansively examined the legislative history of the statute and of its precursor and determined

36. *Anschutz Exploration Corp.*, 35 Misc. 3d at 470, 940 N.Y.S.2d at 473 (quoting DRYDEN, N.Y., ZONING ORDINANCE § 2104(5) (2011)).

37. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 470, 940 N.Y.S.2d at 473.

38. *See id.*, 940 N.Y.S.2d at 473-74.

39. *See id.*, 940 N.Y.S.2d at 474 (internal citations omitted).

40. 35 Misc. 3d 767, 943 N.Y.S.2d 722 (Sup. Ct. Otsego Cnty. 2012).

41. *See id.* at 768-69, 943 N.Y.S.2d at 722-23.

42. *See id.* at 770, 943 N.Y.S.2d at 724.

43. *See id.*

44. *See id.* at 771, 943 N.Y.S.2d at 724.

45. *Cooperstown Holstein Corp.*, 35 Misc.3d at 771, 943 N.Y.S.2d at 724.

the legislative history leading up to and including the 1981 amendment of the ECL as it relates to the supersession clause did not support the contention that the phrase "'this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries'" was intended to abrogate the constitutional and statutory authority vested in local municipalities to enact legislation affecting land use.[46]

Decisional law also supports the conclusion that ECL section 23–0303(2) does not preempt municipalities from adopting local zoning regulations which may prohibit oil, gas, and solution drilling or mining.[47] Similar to the discussion of the court in *Anschutz Exploration*, in addressing the scope of the MLRL supersession clause, ECL section 23–2703(2), the Court of Appeals had concluded in *Frew Run*, that the challenged zoning regulations at issue therein did not frustrate the state's '"purposes of the statute . . . to foster a healthy, growing mining industry and to aid in assuring that land damaged by mining operations is restored to a reasonably useful and attractive condition.'"[48] The Court of Appeals found that the "strikingly similar" supersession clause preempted the localities from adopting regulations pertaining to the methods of mining because such regulations were exclusively within the jurisdiction of the State while, at the same time, allowing the municipalities, by exercise of their constitutional and statutory authority, to '"regulate land use generally."'[49] "Here, no less can be said about ECL [section] 23–0303(2) as the preemption does not apply to local regulations addressing land use which may, at most, 'incidentally' impact upon the 'activities' of the industry of oil, gas and solution drilling or mining."[50]

The Court of Appeals confirmed the *Frew Run* conclusion that the supersession clause of the MLRL drew a distinction between the manner and method of mining and local land use regulation.[51] "Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of

46. *Id.* at 771, 775, 777, 943 N.Y.S.2d at 724, 727, 728.

47. *Id.* at 778, 943 N.Y.S.2d at 729.

48. *Id.* (quoting Frew Run Gravel Prods. v. Town of Carroll, 71 N.Y.2d 126, 132, 518 N.E.2d 920, 923, 524 N.Y.S.2d 25, 28 (1987) (internal quotation marks omitted)).

49. *Cooperstown Holstein Corp*., 35 Misc.3d at 778, 943 N.Y.S.2d at 729 (quoting *Frew Run*, 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 28).

50. *Cooperstown Holstein Corp*., 35 Misc.3d at 778, 943 N.Y.S.2d at 729.

51. *Id.* (citing Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 681-82, 664 N.E.2d 1226, 1234, 642 N.Y.S.2d 164, 172 (1996)).

regulatory provisions the Legislature foresaw as preempted by Mind Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities."[52] Consequently, a municipality may ban mining throughout the community in furtherance of its land use authority.[53]

The *Cooperstown Holstein* court concluded that the zoning law at issue was a legitimate and permissible exercise of the municipality's constitutional and statutory authority to enact land use regulations even if it may have an attendant impact upon the oil, gas, and solution drilling or mining industry.[54] It did not conflict with the State's interest in implementing uniform policies and procedures for the manner and method of the industry and did not impede accomplishment of the state's declared policy with respect to these resources.[55]

As a result, the court concluded that the supersession clause, contained within ECL section 23–0303(2), does not preempt a municipality from enacting land use regulations and/or prohibiting oil, gas, and solution mining or drilling in conformity with such constitutional and statutory authority.[56]

Consistent with the reasoning of *Frew Run* and *Gernatt*, both decisions conclude that the State Legislature did not preempt local land use regulatory authority in adopting the OGSML, including the authority to ban the use entirely.

B. Spot Zoning/Comprehensive Plan

"Spot zoning" is "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . . ."[57] "[S]pot zoning is the very antithesis of planned zoning."[58] On the other hand, zoning designations that conform with a municipality's comprehensive plan to advance the general welfare of

52. *Cooperstown Holstein Corp.*, 35 Misc. 3d at 778-79, 943 N.Y.S.2d at 729 (quoting *Gernatt Asphalt Prods.*, 87 N.Y.2d at 681-82, 664 N.E.2d at 1234, 642 N.Y.S.2d at 172).

53. *See Cooperstown Holstein Corp.*, 35 Misc. 3d at 779 n.2, 943 N.Y.S.2d at 730 n.2 (citing *Gernatt Asphalt Prods.*, 87 N.Y.2d at 683, 664 N.E.2d at 1235, 642 N.Y.S.2d at 173).

54. *See Cooperstown Holstein Corp.*, 35 Misc. 3d at 779, 943 N.Y.S.2d at 730.

55. *See id.*

56. *Id.* at 780, 943 N.Y.S.2d at 730.

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

58. *Id.*

the community are not, by definition, "spot zoning."[59]

In *Bergami v. Town Board of Rotterdam*, a comprehensive plan adopted in 2001 pursuant to Town Law section 272(a) recommended a change in the zoning designation for a particular property from agricultural to an industrial or light industrial designation.[60] Despite that suggestion, the town board did not take further action to rezone the property and it remained zoned as agricultural.[61] Subsequently, the property was included in a 2004 study, which examined the area around the New York State Thruway exit 25A ("Exit 25A study") and recommended that the property be rezoned from an industrial designation to professional office residential ("POR") classification, which would allow the establishment of professional offices in existing residential structures.[62] The town board amended the comprehensive plan in February 2009 to incorporate the Exit 25A study and map.[63] The town board again did not take any action to amend the zoning designation of the subject property.[64] The property owner petitioned for a change of zone for the property to B–2, a general business zone, in March 2009, and the rezoning was enacted in March 2010.[65] An Article 78 proceeding was instituted, challenging the zoning amendment, the Exit 25A study, and the map and the comprehensive plan.[66]

The Third Department rejected the claim that the rezoning of the property impermissibly conflicted with the town's comprehensive plan.[67] Because a municipality's zoning enactments are entitled to a strong presumption of validity, "one who challenges such a determination bears a heavy burden of demonstrating, 'beyond a reasonable doubt, that the determination was arbitrary and unreasonable or otherwise unlawful.'"[68] However, land use regulations must conform with a community's comprehensive plan in order to avoid spot zoning, "which affects the land of only a few without proper concern for the

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

60. 97 A.D.3d 1018, 1018, 949 N.Y.S.2d 245, 246 (3d Dep't 2012).

61. *See id.*

62. *See id.* at 1018-19, 949 N.Y.S.2d at 246-47.

63. *See id.* at 1019, 949 N.Y.S.2d at 247.

64. *See id.*

65. *See Bergami*, 97 A.D.3d at 1019, 949 N.Y.S.2d at 247.

66. *See id.*

67. *See id.* at 1020, 949 N.Y.S.2d at 247.

68. *Id.* at 1019, 949 N.Y.S.2d at 247 (quoting Rotterdam Ventures, Inc. v. Town Bd. of Rotterdam, 90 A.D.3d 1360, 1361-62, 935 N.Y.S.2d 698, 700 (3d Dep't 2011)).

needs or design of the entire community."[69] Consequently, in assessing whether a zoning amendment is contrary to a local government's comprehensive plan, a court must consider whether the change '"conflict[s] with the fundamental land use policies and development plans of the community.'"[70]

The record in *Bergami* confirmed that the town's rezoning of the property was consistent with its overall land use policies and development plans as articulated in the comprehensive plan and was enacted for the legitimate objective of benefitting the community as a whole through economic development.[71] The Exit 25A study area was found to be suitable for commercial and industrial growth and was designated for future industrial growth.[72] The subject property was located on a highway and within 500 feet of the State Thruway ramps.[73] The property also was located directly across from B-2-zoned property which contained a truck stop and fast-food restaurants and was adjoined by business and commercial zones on three sides.[74] Although the fourth side was zoned for agricultural use and included single family residential parcels, the court found that the petitioners failed to demonstrate that the town impermissibly "singl[ed] out a small parcel of land for a use classification totally different from that of the surrounding area."[75] Moreover, the fact that the study recommended that the property be zoned POR instead of B-2 did not render the rezoning inconsistent with the general planning scheme as evidenced in the comprehensive plan.[76] As a result, the petitioners failed to satisfy their heavy burden of establishing that the rezoning improperly conflicted with the comprehensive plan.[77]

Similarly, the Second Department rejected a claim that a zoning amendment which added "Arborist Services, Landscape Services, and/or Wholesale Nurseries" as a special permit use in the R–35 zoning

69. *See Bergami*, 97 A.D.3d at 1019-20, 949 N.Y.S.2d at 247 (citing Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 685, 664 N.E.2d 1226, 1236, 642 N.Y.S.2d 164, 174 (1996)).

70. *Bergami*, 97 A.D.3d at 1020, 949 N.Y.S.2d at 247 (quoting *Gernatt Asphalt Prods.*, 87 N.Y.2d at 685, 664 N.E.2d at 1236, 642 N.Y.S.2d at 174).

71. *See Bergami*, 97 A.D.3d at 1020, 949 N.Y.S.2d at 247-48.

72. *See id.* at 1020, 949 N.Y.S.2d at 248.

73. *See id.*

74. *See id.*

75. *Id.* (quoting Rotterdam Ventures, Inc. v. Town Bd. of Rotterdam, 90 A.D.3d 1360, 1362, 935 N.Y.S.2d 698, 700 (3d Dep't 2011)).

76. *See Bergami*, 97 A.D.3d at 1020, 949 N.Y.S.2d at 248.

77. *See id.*

district constituted spot zoning in *Marcus v. Board of Trustees of Village of Wesley Hills*.[78] Although the amendment was enacted "primarily" for the benefit of one specific arborist business, "zoning changes are not invalid merely because a single parcel is involved in or benefitted by [an amendment]".[79] The local law applied to all properties in the R–35 zoning district which could satisfy certain standards and the record demonstrated that approval of the use could be sought by two other properties.[80] The amendment did not authorize a use which was completely dissimilar from that allowed in the surrounding area and was in conformity with the village's comprehensive plan.[81]

The court additionally rebuffed a claim that the amendment should be invalidated because the board of trustees failed to timely file a report of its final action with the county department of planning within 30 days pursuant to the requirement of General Municipal Law section 239–m(6).[82] "Under the circumstances of [the] case," where the board otherwise complied with the referral provisions of General Municipal Law section 239–m and there was no assertion of prejudice, the board's failure to timely file a report of the final action with the county department of planning was characterized by the court as a mere excusable procedural irregularity.[83]

In *VTR FV, LLC v. Town of Guilderland*, the town previously had adopted a local law in 1993 which authorized a planned unit development ("PUD") for a particular assemblage of property.[84] The purpose of the amendment was to facilitate an affordable community for elderly residents which would provide all levels of living accommodations, including independent housing, assisted living, and nursing care.[85] The development plan contemplated four phases, phase I being an assisted living facility while a nursing home was to be constructed on the phase IV site.[86] When no plans were advanced to

78. 96 A.D.3d 1063, 1063, 947 N.Y.S.2d 591, 592 (2d Dep't 2012) (internal quotation marks omitted).

79. *Id.* at 1064-65, 947 N.Y.S.2d at 592-93 (citing Rodgers v. Vill. of Tarrytown, 302 N.Y. 115, 124, 96 N.E.2d 731, 735 (1951)).

80. *See Marcus*, 96 A.D.3d at 1065, 947 N.Y.S.2d at 593 (citing *Rodgers*, 302 N.Y. at 124, 96 N.E.2d at 735).

81. *See Marcus*, 96 A.D.3d at 1065, 947 N.Y.S.2d at 593.

82. *See id.* (citing N.Y. GEN. MUN. LAW § 239–m(6) (McKinney 2012)).

83. *Marcus*, 96 A.D.3d at 1065, 947 N.Y.S.2d at 593.

84. No. 514507, 2012 NY Slip Op. 9123, at 1 (3d Dep't 2012).

85. *See id.*

86. *See id.* at 1-2.

establish a nursing facility on the phase IV site, the town board amended the zoning law in 2011 to expand the definition of "nursing home" to include an assisted living facility and/or memory care facility, thereby permitting a competitor to build a second assisted living or memory care facility within the PUD.[87] The owners of the assisted care facility developed on the phase I parcel challenged the 2011 amendment, contending that it constituted spot zoning.[88]

In rejecting the challenge, the court determined that, although the original 1993 local law authorized a skilled nursing facility on the phase IV site, a principal reason for enacting the PUD in 1993 was "'to encourage the creation of affordable housing opportunities for retirement aged persons and to further encourage the creation of mixed-use neighborhoods.'"[89] Because no plans had been filed to establish a skilled nursing facility on the phase IV site and the land had remained vacant for more than seventeen years, enlarging the definition of "nursing home" to include the challenged project took into account changing conditions, advanced the underlying rationale for the law, and addressed the concerns of the community.[90] In addition, the amendment did not authorize a use "'totally different from that of the surrounding area.'"[91] Consequently, although the amendment may have benefitted the developer of the parcel, "'it was nevertheless[ ] enacted for the general welfare of the community.'"[92] Therefore, the petitioners failed to demonstrate that the 2011 amendment constituted illegal spot zoning.[93]

C. Uniformity

Town Law section 262 and Village Law section 7-702 authorize the adoption of zoning regulations and the division of a town or village into districts.[94] However, the statutes condition that authority on the

87. *See id.* at 2.

88. *See id.*

89. *VTR FV, LLC*, 2012 NY Slip Op. 9123, at *5.

90. *Id.* at *5-6.

91. *Id.* at *6 (quoting Rotterdam Ventures, Inc. v. Town Bd. of Rotterdam, 90 A.D.3d 1360, 1362, 935 N.Y.S.2d 698, 700 (3d Dep't 2011)).

92. *VTR FV, LLC*, 2012 NY Slip Op. 9123, at *6 (quoting Hunter Goodrich v. Town of Southampton, 39 N.Y.2d 1008, 1009, 355 N.E.2d 297, 297, 387 N.Y.S.2d 242, 243 (1976)).

93. *See VTR FV, LLC*, 2012 NY Slip Op. 9123, at *6.

94. *See* N.Y. TOWN LAW § 262 (McKinney 2004); N.Y. VILLAGE LAW § 7-702 (McKinney 2011).

stipulation that "such regulations shall be uniform for each class or kind of buildings throughout each district but the regulations in one district may differ from those in other districts."[95] In *Tupper v. City of Syracuse*, the owners of non-owner occupied houses within the "Syracuse University Special Neighborhood District" commenced an action to declare invalid a city ordinance that imposed objectionable parking requirements for one- and two-family residences that were owned by absentee owners.[96] The challenged amendment required those properties to have one off-street parking space for each potential bedroom.[97]

The court found that the ordinance violated General City Law section 20(24),[98] identical in all relevant respects to Town Law section 262 and Village Law section 7-702, because the ordinance was not uniform for each class of buildings within the district.[99] The court rejected the city's contention that absentee-owner properties are in a different "class" from owner-occupied properties because "'[t]he uniformity requirement is intended to assure property holders that all *owners* in the same district will be treated alike and that there will be no improper discrimination.'"[100] Uniformity provisions protect against legislative overreaching by mandating that zoning regulations be enacted without reference to particular owners.[101] However, the disputed ordinance impermissibly treated buildings within the same class differently based solely on the status of the property owner; that is, absentee property owners as opposed to owners who occupy the property.[102]

95. N.Y. TOWN LAW § 262 (McKinney 2004); N.Y. VILLAGE LAW § 7-702 (McKinney 2011)

96. 93 A.D.3d 1277, 1277-78, 941 N.Y.S.2d 383, 385 (4th Dep't 2012), *leave denied*, 96 A.D.3d 1514, 945 N.Y.S.2d 587 (4th Dep't 2012).

97. *Id.* at 1278, 941 N.Y.S.2d at 385 ("Although existing absentee-owner properties were exempt from the new requirements, the owners of those properties would be required to meet the new parking requirements if they made any 'material changes' to the properties.").

98. *See id.* at 1280, 941 N.Y.S.2d at 387 (citing N.Y. GEN. CITY LAW § 20(24) (McKinney Supp. 2012)).

99. *See Tupper*, 93 A.D.3d at 1280, 941 N.Y.S.2d at 387.

100. *Id.* at 1281, 941 N.Y.S.2d at 387 (quoting Rice, *Practice Commentaries*, N.Y. TOWN LAW § 262, at 64 (McKinney 2004) (emphasis added)).

101. *Tupper*, 93 A.D.3d at 1281, 941 N.Y.S.2d at 388.

102. *See id.*

D. Standing

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] In *Tuxedo Land Trust, Inc. v. Town of Tuxedo*, the petitioners sought to annul resolutions of the town board which accepted a DSEIS and FSEIS, adopted SEQRA findings, amended a special permit, and adopted several zoning amendments to approve modifications for a portion of a site of a previously approved and unchallenged large development proposal.[104] The town moved to dismiss the petition, in part, based on the lack of standing of the petitioners.[105]

Persons or entities whose properties are in close proximity to the site of a challenged project "'are the beneficiaries of a presumption that they are adversely affected by the alleged SEQRA violation and, accordingly, need not allege a specific harm.'"[106] Property owners seeking to rely on that presumption possess "'the burden of coming forward with competent evidence to support a finding that their property is located in the immediate vicinity of the [the site].'"[107] In seeking to challenge the modification of the approval, the petitioners were also required to establish that their alleged injury was the result of the recent modification of the approvals and not some previous claimed error.[108] "Thus, to be entitled to the close proximity presumption petitioners had the burden to produce competent evidence that their properties are located in the immediate vicinity of one of those specific areas [which were the subject of the recent amendments]."[109] Because the petitions failed to satisfy that burden, each was required to establish that he or she would suffer an environmental injury which is different from that of the public at large as a result of the challenged action.[110] "'[P]erfunctory

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) (citations omitted).

104. No. 12675/10, 2012 NY Slip Op. 50377(U), at 3 (Sup. Ct. Orange Cnty. 2012).

105. *See id.*

106. *Id.* at 4 (quoting Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 213 A.D.2d 484, 485, 623 N.Y.S.2d 613, 615 (2d Dep't 1995)).

107. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 3 (quoting Piela v. Van Voris, 229 A.D.2d 94, 95, 655 N.Y.S.2d 105, 107 (3d Dep't 1997)).

108. *See Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 3.

109. *Id.* at *5.

110. *Id.* at *6 (citing *Long Island Pine Barrens Soc'y, Inc.*, 213 A.D.2d at 485, 623 N.Y.S.2d at 615).

allegations of harm' are insufficient; petitioners 'must *prove* that their injury is real and different from the injury most members of the public face.'"[111]

Petitioners failed to satisfy their burden of proof regarding the claims that they would suffer impacts from increased vehicular traffic and pollution of drinking water.[112] In addition, any injury claimed would be no different from that suffered by the public at large.[113] "Such generalized allegations of impact to a public drinking water supply are insufficient to establish standing to assert a SEQRA claim."[114]

Petitioners also failed to satisfy their burden with respect to the claimed diminution of their enjoyment of various historic and natural resources.[115] Under such circumstances, in order to demonstrate standing, a petitioner must establish that the action of which he complains would have an adverse impact upon a particular resource and that his use of such resource is "repeated[,] not rare or isolated"[116] to such a degree that the adverse impact would, for him, constitute "an injury distinct from the public in the particular circumstances."[117] Petitioners failed to satisfy either aspect of the analysis.[118] Petitioners' allegations of injury to natural and historic resources were speculative and conclusory and were devoid of any evidentiary support.[119] Moreover, petitioners failed to demonstrate that any of their alleged injuries would be different from that of the public at large.[120] Although the individual petitioners alleged that they have often utilized those resources, they did not allege or demonstrate that they utilize such resources "more frequently or with any greater enthusiasm,

111. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 6 (quoting Save the Pine Bush, Inc. v. Common Council of Albany, 13 N.Y.3d 297, 306, 918 N.E.2d 917, 922, 890 N.Y.S.2d 405, 410 (2009)).

112. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 6-7.

113. *Id.* at 7.

114. *Id.* (citing Shelter Island Ass'n v. Zoning Bd. of Appeals, Shelter Island, 57 A.D.3d 907, 909, 869 N.Y.S.2d 615, 617 (2d Dep't 2008), *dismissed in part, leave denied*, 12 N.Y.3d 797, 906 N.E.2d 1077, 879 N.Y.S.2d 43 (2009)).

115. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 7.

116. *Id.* (quoting *Save the Pine Bush, Inc.*, 13 N.Y.3d at 305, 918 N.E.2d at 921, 890 N.Y.S.2d at 409).

117. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 7 (quoting Citizens Emergency Comm. to Pres. Pres. v. Tierney, 70 A.D.3d 576, 576, 896 N.Y.S.2d 41, 42 (1st Dep't 2010)).

118. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 7.

119. *Id.* at 8.

120. *Id.*

inquisitiveness or concern than any other person with physical access to the same resources."[121] "A general—or even a special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances."[122] As a result, petitioners failed to satisfy their burden to establish that any of the injuries upon which they relied would be different from those of the public at large.[123]

The decision is consistent with the case law that concludes that unless one owns property that is situated very closely to the portion of a site that is the subject of a land use application, they must establish that they will suffer an actual, non-speculative injury in order to possess standing. Further, even if proximity or actual injury is demonstrated, standing is absent unless the precise injuries alleged are different in kind than those that might be alleged to be suffered by the public at large.

The standing of a municipality to challenge aspects of a neighboring municipality's zoning amendments was discussed in *Village of Pomona v. Town of Ramapo*.[124] The lower court had previously dismissed all claims in an Article 78 proceeding instituted by a neighboring village for lack of standing.[125] However, although affirming that the village lacked standing to assert claims of spot zoning and lack of compliance with the town's comprehensive plan in the adoption of a zoning amendment, the appellate division reversed the decision of the lower court and found that the village had standing to assert its SEQRA claims and claim of deficient compliance with General Municipal Law section 239-m.[126] The zoning amendment altered the town's zoning map by changing the zoning designation of a portion of a parcel of property along the town–village border from R–40, which allows only single-family residences on lots with a minimum area of 40,000 square feet, to MR–8, which permits multi-family dwellings at a density of eight units per acre.[127]

The appellate division confirmed that the village did not have standing to assert the claims that the rezoning constituted improper spot

121. *Id.*

122. *Id.* (quoting *Citizens Emergency Comm.*, 70 A.D.3d at 576, 896 N.Y.S.2d at 42).

123. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 9.

124. 94 A.D.3d 1103, 943 N.Y.S.2d 146 (2d Dep't 2012).

125. *See* Vill. of Pomona v. Town of Ramapo, 30 Misc. 3d 263, 914 N.Y.S.2d 566 (Sup. Ct. Rockland Cnty. 2010), *aff'd*, 94 A.D.3d 1103, 943 N.Y.S.2d 146 (2012).

126. Vill. of Pomona v. Town of Ramapo, 94 A.D.3d 1103, 1104, 943 N.Y.S.2d 146, 149 (2d Dep't 2012).

127. *Id.*, 943 N.Y.S.2d at 148-49.

zoning.[128] "[V]illages 'have no interest in [a] Town Board's compliance with . . . its Comprehensive Plan,' since, unlike individuals who reside within the Town, '[villages] are beyond the bounds of the mutuality of restriction and benefit that underlies the comprehensive plan requirement."[129]

The claim that the rezoning violated General Municipal Law section 239–nn[130] was also properly dismissed.[131] That provision provides that a legislative body, having jurisdiction, must provide notice to an adjacent municipality of hearings regarding various specified proposed zoning actions affecting land within five hundred feet of the adjacent municipality, and that "'[s]uch adjacent municipality may appear and be heard'" at the hearings.[132] The objective of the statute is to provide

> an opportunity for abutting municipalities to participate in a public hearing held by the municipality [undertaking planning and zoning actions which may impact on those neighboring municipalities] and provide their input on the proposed planning or zoning action [so as to] encourage intergovernmental cooperation and area planning for land use among neighboring municipalities in New York state.[133]

The village had received notice and had participated in the public hearings on the zoning amendment.[134] As a result, the claim was properly dismissed because the statute does not create a right of action based on an alleged disregard of the public policy of encouragement of the spirit of cooperation articulated in the statute.[135]

However, the court found that the village possessed standing to assert a claim pursuant to SEQRA.[136] "To establish standing under SEQRA, the petitioner[] must show (1) that [it] will suffer an environmental injury that is in some way different from that of the public at large, and (2) that the alleged injury falls within the zone of

128. *Id.*, 943 N.Y.S.2d at 149.

129. *Id.* (quoting Vill. of Chestnut Ridge v. Town of Ramapo, 45 A.D.3d 74, 88, 841 N.Y.S.2d 321, 334 (2d Dep't 2007)).

130. N.Y. GEN. MUN. LAW § 239-nn (McKinney 2012).

131. *Vill. of Pomona*, 94 A.D.3d at 1104-05, 953 N.Y.S.2d at 149.

132. *Id*. at 1105, 943 N.Y.S.2d at 149 (quoting GEN. MUN. LAW § 239–nn(5)); *see also* GEN. MUN. LAW § 239–nn(3).

133. *Vill. of Pomona*, 94 A.D.3d at 1105, 953 N.Y.S.2d at 149 (quoting Senate Introducer Mem. in Support, Bill Jacket, L. 2005, ch. 658, at 3).

134. *Vill. of Pomona*, 94 A.D.3d at 1105, 953 N.Y.S.2d at 149.

135. *Id.*

136. *Id.* at 1105-07, 943 N.Y.S.2d at 150-51.

interest sought to be protected or promoted by SEQRA."[137] "[V]illages may have standing to sue in appropriate cases . . . where they have a demonstrated interest in the potential environmental impacts of the project."[138] "Such a 'demonstrated interest' sufficient to give a municipality SEQRA standing may be established based on a potential threat to community character."[139] The court restated the rationale of *Village of Chestnut Ridge*, that "'community character is specifically protected by SEQRA.'"[140] Consequently, according to the appellate division,

> [t]he power to define the community character is a unique prerogative of a municipality acting in its governmental capacity . . . Substantial development in an adjoining municipality can have a significant detrimental impact on the character of a community . . . thereby limiting the ability of the affected municipality to determine its community character.[141]

The court concluded that the village demonstrated a sufficient interest in the potential environmental impacts of the town's rezoning amendment to accord it standing to pursue a SEQRA claim.[142]

The court further opined that the village possessed standing to allege a violation of General Municipal Law section 239–m.[143] The purpose of the statute is to "'bring pertinent inter-community and county-wide planning, zoning, site plan and subdivision considerations to the attention of neighboring municipalities and agencies having jurisdiction' (General Municipal Law § 239–l[2]) and by so doing to facilitate regional review of land use proposals that may be of regional concern.'"[144]

137. *Id.* at 1105, 943 N.Y.S.2d at 150 (quoting Vill. of Chestnut Ridge v. Town of Ramapo, 45 A.D.3d 74, 89-90, 841 N.Y.S.2d 321, 335 (2d Dep't 2007)).

138. *Vill. of Pomona*, 94 A.D.3d at 1105-06, 943 N.Y.S.2d at 150 (quoting *Vill. of Chestnut Ridge*, 45 A.D.3d at 91, 841 N.Y.S.2d at 336).

139. *Vill. of Pomona*, 94 A.D.3d at 1106, 943 N.Y.S.2d at 150 (citing *Vill. of Chestnut Ridge*, 45 A.D.3d at 92-94, 841 N.Y.S.2d at 337-38).

140. *Vill. of Pomona*, 94 A.D.3d at 1106, 943 N.Y.S.2d at 150 (quoting *Vill. of Chestnut Ridge*, 45 A.D.3d at 94, 841 N.Y.S.2d at 338).

141. *Vill. of Pomona*, 94 A.D.3d at 1106, 943 N.Y.S.2d at 150 (quoting *Vill. of Chestnut Ridge*, 45 A.D.3d at 94–95, 841 N.Y.S.2d at 339).

142. *Vill. of Pomona*, 94 A.D.3d at 1107, 943 N.Y.S.2d at 151 (citing *Vill. of Chestnut Ridge*, 45 A.D.3d at 92-94, 841 N.Y.S.2d at 339).

143. *Vill. of Pomona*, 94 A.D.3d at 1107-08, 943 N.Y.S.2d at 151.

144. *Id.* at 1108, 943 N.Y.S.2d at 151-52 (quoting *Vill. of Chestnut Ridge*, 45 A.D.3d at 88–89, 841 N.Y.S.2d at 334).

II. ZONING BOARDS OF APPEAL

A. Findings of Fact

It is necessary for a zoning board of appeals to adopt findings of fact supporting its decisions to explain the rationale for a decision to the parties and public and to permit judicial review of a board's decision.[145] However, scenarios may transpire in which, for various reasons, a board is unable to adopt findings of fact. As is illustrated by the decision in *Jonas v. Stackler*, the courts may search the record under such circumstances to ascertain the basis for a determination.[146]

The applicant in *Jonas* was required to obtain the approval of each of the remaining three board members as a consequence of one recusal and one vacancy on a five-member zoning board of appeals.[147] Although the board was able to reach an agreement and granted a number of the requested variances, it could not agree on one of the requested variances.[148] A motion to approve that variance did not obtain the required number of votes to pass and, as a result, the variance was deemed to have been denied pursuant to the provisions of Town Law section 267-a(13)(b), with no factual findings having been adopted.[149] The applicant then commenced an Article 78 proceeding challenging the denial of the one variance.[150]

Judicial review was not precluded by the absence of factual findings.[151] Where there are no formal findings of the reasons for the denial of an application, "an examination of the entire record, including the transcript of the meeting at which the vote was taken along with affidavits submitted in the Article 78 proceeding can provide a sufficient basis for determining whether the denial was arbitrary and capricious."[152]

145. *See* Pearson v. Shoemaker, 25 Misc. 2d 591, 593-94, 202 N.Y.S.2d 779, 782 (Sup. Ct. Rockland Cnty. 1960) ("'Findings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination.'" (quoting Gilbert v. Stevens, 284 A.D. 1016, 135 N.Y.S.2d 357, 359 (3d Dep't 1954))).

146. *See generally* 95 A.D.3d 1325, 945 N.Y.S.2d 405 (2d Dep't 2012), *leave denied*, 20 N.Y.3d 852 (2012).

147. *Id.* at 1326, 945 N.Y.S.2d at 407.

148. *Id.* at 1326-27, 945 N.Y.S.2d at 407.

149. *Id.* at 1327, 945 N.Y.S.2d at 407.

150. *Id.*

151. *Jonas*, 95 A.D.3d at 1328, 945 N.Y.S.2d at 408.

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

The decision presents an uncommon scenario in which a board could not adopt findings because the application was deemed denied by operation of law and implemented a common sense resolution of a predicament. Although the courts will search the record in reviewing a determination lacking formal findings in various unusual circumstances, absent such exceptional situations, the more likely consequence of the lack of findings is annulment of a decision and a remand for the adoption of findings.

B. Area Variances

1. Character of the Neighborhood

"[T]he conformity or dissimilarity of a property, as compared to the prevailing conditions in the neighborhood with respect to bulk and area, is a highly significant consideration" in reviewing an area variance application.[153] Consistent with that tenet, the denial of side yard and bulkhead setback variances was annulled in *Daneri v. Zoning Board of Appeals of Southold* because the record lacked any evidence that the requested variances would have an adverse effect on the character or physical and environmental conditions of the neighborhood.[154] To the contrary, the record substantiated that the relief sought was consistent with the predominant condition in the neighborhood.[155] Moreover, all of the surrounding lots were nonconforming with respect to the variances sought, and granting relief would have increased the distance between the bulkhead and the applicant's proposed new residence.[156] In addition, the zoning board of appeals had recently granted relief in similar circumstances.[157]

2. Consideration of Precedential Effect

A determination of a zoning board of appeals that neither adheres to its own precedent nor provides a basis for a different result on essentially the same facts is arbitrary and capricious.[158] However, the

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

154. 98 A.D.3d 508, 510, 949 N.Y.S.2d 180, 182 (2d Dep't 2012), *leave denied*, 20 N.Y.3d 852 (2012).

155. *Id.* at 510, 949 N.Y.S.2d at 182.

156. *Id.*

157. *Id.*

158. *See* Knight v. Amelkin, 68 N.Y.2d 975, 977, 503 N.E.2d 106, 106, 510 N.Y.S.2d

precedential effect of a board's decision is not one of the specified statutory factors in evaluating an area variance application. Nevertheless, in *Davydov v. Mammina*, the appellate division concluded that a zoning board of appeals is "entitled to consider, as a factor in its determination, the precedential effect of its decision, and the impact of its decision upon the 'effectiveness of the zoning ordinance.'"[159] Although the "precedential effect" of a variance may be considered, the decision of a board must comply with the mandatory weighing analysis dictated by Town Law section 267-b(3)(b) and Village Law section 7-712(3)(b).

C. Statute of Limitations

A proceeding seeking review of a decision of a zoning board of appeals must be instituted within thirty days after the "filing of a decision of the board" in the office of the town clerk or village clerk.[160] Further, as is related in *Birch Tree Partners, LLC v. Zoning Board of Appeals of East Hampton*,[161] although the timely filing of an Article 78 petition commences a proceeding, service must be made in accordance with the provisions of CPLR section 306-b.[162] Pursuant to CPLR section 306-b, a petitioner must serve the petition and notice of petition no later than fifteen days after the date on which the relevant statute of limitations expired.[163]

In *Torres v. New York City Board of Standards and Appeals*, a neighbor futilely attempted to employ the tolling provision of CPLR section 217(1) to rehabilitate a time-barred challenge to a decision.[164] A special proceeding instituted by the infant petitioner's grandmother was dismissed because she failed to timely serve the petition and notice of

550, 550 (1986) ("We have recently held that '[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.'" (quoting *In re* Charles A. Field Delivery Serv., Inc., 66 N.Y.2d 516, 516-17, 488 N.E.2d 1223, 1225, 498 N.Y.S.2d 111, 113 (1985)).

159. 97 A.D.3d 678, 679, 948 N.Y.S.2d 380, 382 (2d Dep't 2012) (quoting Genser v. Bd. of Zoning & Appeals, N. Hempstead, 65 A.D.3d 1144, 1147, 885 N.Y.S.2d 327, 330 (2d Dep't 2009)).

160. N.Y. TOWN LAW § 267-c(1) (McKinney 2004); N.Y. VILLAGE LAW § 7-712-c(1) (McKinney 2011).

161. 90 A.D.3d 749, 750, 934 N.Y.S.2d 324, 325 (2d Dep't 2011).

162. N.Y. C.P.L.R. 306-b (McKinney Supp. 2013).

163. *Id.*

164. *See* No. 9136/12, 2012 NY Slip Op. 51009(U), at 1 (Sup. Ct. Queens Cnty. 2012).

petition upon the respondents within fifteen days of the expiration of the thirty-day statute of limitations in accordance with the dictates of CPLR section 306–b.[165] The infant petitioner, by his mother, subsequently sought leave to institute a new Article 78 proceeding seeking the same relief.[166] Because the thirty-day statute of limitations had expired, the infant was proposed as the petitioner in an apparent effort to circumvent the statute of limitations.[167] CPLR section 217(1) provides a two-year statute of limitations for instituting an Article 78 proceeding brought by one suffering from a disability, including infancy, upon leave of the court.[168]

Although CPLR section 217(1) is the general statute of limitations governing the commencement of Article 78 proceedings, it is inapplicable to proceedings challenging a decision of a board of appeals.[169] CPLR section 217(1) mandates that an Article 78 proceeding must be instituted within four months, or, if the petitioner is an infant on the date of the final determination sought to be reviewed, within two years, but only with leave of the court, unless a shorter statute of limitations applies.[170] However, because the statute of limitations applicable to Article 78 proceedings brought against a board of appeals is thirty days, the infant petitioner could not rely on the provisions of CPLR section 217(1) to institute an Article 78 proceeding challenging the decision of the board of standards and appeals.[171] Moreover, no other statute provides for the tolling of the thirty-day statute of limitations for commencing an Article 78 proceeding against a board of appeals premised on a petitioner's disability.[172] For example, the toll for infancy or insanity provided by CPLR section 208, which provides that a statute of limitations of less than three years is extended by the period of infancy, is applicable only to actions and not to special proceedings.[173]

165. *Id.* at 2.
166. *Id.*
167. *Id.* at 2-3.
168. *Id.* at 3.
169. *Torres*, 2012 NY Slip Op. 51009(U), at 3.
170. *Id.* at 3-4 (citing N.Y. C.P.L.R. 217(1) (McKinney 2003)).
171. *Torres*, 2012 NY Slip Op. 51009(U), at 2.
172. *Id.* at 5.
173. *Id.*; *see also* N.Y. C.P.L.R. 208.

III. CONFLICTS OF INTEREST/OPEN MEETINGS

General Municipal Law section 801 prohibits numerous conflicts of interest, principally related to contractual relationships between municipal officials, employees and outside contractors.[174] However, an improper conflict of interest may exist without a provision of the General Municipal Law being violated.[175] For example, in *Tuxedo Land Trust, Inc. v. Town of Tuxedo*, it was claimed that the members of the town board took a trip during which "meetings" were held which were neither publicly noticed nor open to the public, purportedly in violation of the Open Meetings Law and Public Officers Law section 104.[176] In support of its motion to dismiss, the town provided affidavits that demonstrated that the board members desired to inspect a similar planned community to assess the municipality's experience and travelled to New Jersey to speak with officials with respect to municipal impacts and costs.[177] The board members did not discuss the project or otherwise conduct public business during the trip.[178] The court concluded that a trip by the members of a public body to obtain information that will furnish them with a better comprehension of the issues involved in their analysis of an application before them does not violate the Open Meetings Law.[179] In any event, conclusory and speculative assertions that a violation transpired are inadequate to state a claim for voiding an action, particularly where the petitioners fail to allege any facts refuting the members' sworn statements that no violation occurred.[180]

It was also alleged that the town supervisor, planner, and a member of the town board travelled to, and were provided accommodations in, Florida at the applicant's expense.[181] The petitioners alleged that such travel and accommodations constituted "impermissible gifts" in violation of General Municipal Law section 805–a(1)(a).[182] The town submitted the affidavits of each of the officials who made the trip and averred that they travelled to Florida on an airplane chartered by the

174. GEN. MUN. LAW § 801 (McKinney 2012).

175. *See* Zagoreos v. Conklin, 109 A.D.2d 281, 287, 491 N.Y.S.2d 358, 363 (2d Dep't 1985).

176. Tuxedo Land Trust, Inc. v. Town Bd. of Tuxedo, No. 13675/10, 2012 NY Slip Op. 50377(U), at 10 (Sup. Ct. Orange Cnty. 2012).

177. *Id.* at 11.

178. *Id.*

179. *Id.* at 11.

180. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 10.

181. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U) at 10.

182. *Id.*

applicant to tour four similar planned communities, that they were provided with lunch, and that they returned the same day.[183]

Even assuming that the travel or snacks constituted "gifts" within the meaning of General Municipal Law section 805–a(1)(a), no statutory provision provides standing to a private person to enforce its strictures.[184] The exclusive remedies prescribed by the statute for violations consist of the imposition of a fine, suspension, or removal from office.[185] Consequently, no cause of action may be stated to void the determination of a municipal body based upon allegations that one or more of its members violated General Municipal Law section 805-a(1)(a).[186]

However, a cause of action to annul such a determination may be cognizable premised on an assertion that voting members of a municipal board should have been disqualified due to a conflict of interest which was likely to have unduly influenced or otherwise tainted proceedings.[187] Nevertheless, the court found that the behavior did not "rise to the level of a conflict of interest, much less one that was likely to have unduly influenced or otherwise tainted the town board's determination."[188]

In *Haberman v. Zoning Board of Appeals of Long Beach*, it was alleged that the chairman of the zoning board of appeals had a conflict of interest and that, because of that conflict, he conducted the public hearing held on an appeal to revoke a building permit in a prejudicial manner.[189] It was asserted that, at the time of the public hearing and approval of the appeal, the chairman was a renter in a neighboring building and had an interest in assuring that the proposed adjacent building was not erected.[190]

The court determined that if, as alleged, the chairman was a tenant of appellant who sought annulment of the permit, he had a personal interest in the outcome to the extent that he would benefit from its

183. *Id.* at 11-12.

184. *Id.* at 12.

185. *See id.* (citing GEN. MUN. LAW § 805–a(2) (McKinney 2012)).

186. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 10 (citing Cahn v. Planning Bd. of Gardiner, 157 A.D.2d 252, 259, 557 N.Y.S.2d 488, 495 (3d Dep't 1990) (citations omitted)).

187. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 12 (citing *Cahn*, 157 A.D.2d at 259, 557 N.Y.S.2d at 491).

188. *Tuxedo Land Trust, Inc.*, 2012 NY Slip Op. 50377(U), at 10.

189. 94 A.D.3d 997, 1000, 942 N.Y.S.2d 571, 575 (2d Dep't 2012), *leave denied*, 19 N.Y.3d 951, 973 N.E.2d 195, 950 N.Y.S.2d 98 (2012).

190. *Id.*

revocation.[191] Consequently, the petition adequately alleged that he should have disclosed that interest as is required by General Municipal Law section 809; that his purported bias, as established by his questioning at the hearing, he may have inappropriately influenced the board, and that the decision should have been annulled on that ground.[192]

IV. MOOTNESS

One challenging a land use approval must attempt to maintain the status quo by requesting a stay or preliminary injunction during the pendency of an action or proceeding contesting such approval or the litigation may be rendered moot by virtue of significant construction by the property owner. For example, *Kowalczyk v. Town of Amsterdam Zoning Board of Appeals*, after having obtained a use variance and building permit, the property owner openly began construction of a proposed garage which was visible to the neighboring petitioners.[193] The appellate division affirmed the dismissal of a proceeding challenging the approvals because the petitioners had failed to seek interim injunctive relief and the garage had been fully constructed during the pendency of the proceedings.[194]

"Typically, the doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy."[195] Relief is "theoretically available" after construction has been completed during the pendency of a proceeding because a structure or project can be demolished.[196] Several considerations are relevant in assessing if relief is academic.[197] In addition to consideration of the extent of progression of the toward completion, a litigant's failure to seek preliminary injunctive relief or to otherwise endeavor to preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation is highly significant. In *Kowalczyk*, the petitioners had failed to make an attempt to preserve the status quo and to protect their rights by failing to

191. *Id.* at 1001, 942 N.Y.S.2d at 576.

192. *See id.*

193. 95 A.D.3d 1475, 1476, 944 N.Y.S.2d 660, 661-62 (3d Dep't 2012).

194. *See id.* at 1477, 944 N.Y.S.2d at 663.

195. *Id.* at 1477, 944 N.Y.S.2d at 662 (quoting Dreikausen v. Zoning Bd. of Appeals of Long Beach, 98 N.Y.2d 165, 172, 774 N.E.2d 193, 196, 746 N.Y.S.2d 429, 432 (2002)).

196. *Kowalczyk*, 95 A.D.3d at 1477, 944 N.Y.S.2d at 662 (quoting *Dreikausen*, 98 N.Y.2d at 172, 774 N.E.2d at 196, 746 N.Y.S.2d at 432).

197. *See id.* at 1477, 944 N.Y.S.2d at 662.

attempt to obtain an injunction or stay to prevent the commencement of the construction of the garage despite the open, visible, and ongoing construction.[198]

Similarly, in *Papert v. Zoning Board of Appeals of Quogue*, the issuance of a coastal erosion management permit to reconstruct an existing house on oceanfront property was challenged.[199] After the project was finished and a certificate of occupancy issued, the pending proceeding was dismissed because of the substantial completion of the house.[200]

The appellate division affirmed the dismissal because the petitioner had failed to seek a preliminary injunction to preserve the status quo during the pendency of this litigation.[201] He had failed to timely "do all he could have done" to protect his interests.[202] The court additionally concluded that the property owner did not commence the construction in bad faith or without authority and that, under the circumstances, he would suffer significant prejudice if the petitioner prevailed.[203] The court also determined that the proceeding did not present "novel issues or public interests such as environmental concerns" that would justify the retention of jurisdiction.[204]

On the other hand, even if one unsuccessfully seeks to enjoin construction of an approved project during the pendency of action or proceeding, the litigation will not be deemed to be moot.[205]

V. SITE PLAN REVIEW

In *Valentine v. McLaughlin*, the denial of a site plan application to improve a right-of-way easement which traversed a steep hill and would possess a 90-degree curve was sustained.[206] The proposal necessitated extensive excavations, the removal of large trees and the erection of retaining walls as high as twelve feet in height along the sides of a road that was intended to be constructed below the grade of the adjacent

198. *Kowalcyzk*, 95 A.D.3d at 1476, 944 N.Y.S.2d at 661-62.

199. 98 A.D.3d 581, 582, 949 N.Y.S.2d 466, 466 (2d Dep't 2012).

200. *See id.*, 949 N.Y.S.2d at 466-67.

201. *Id.*, 949 N.Y.S.2d at 467 (citations omitted).

202. *Id.*

203. *Id.* at 582-83, 949 N.Y.S.2d at 467 (citations omitted).

204. *Papert*, 98 A.D.3d at 583, 949 N.Y.S.2d at 467 (citations omitted).

205. *See* ADM, LLC v. Vill. of Macedon, 101 A.D.3d 1717, 1717, 957 N.Y.S.2d 538, 540 (4th Dep't 2012).

206. 87 A.D.3d 1155, 1156, 930 N.Y.S.2d 51, 52 (2d Dep't 2011), *leave denied*, No. 2011/1207, 2012 NY Slip Op. 60892 (2012).

lot.[207]

Among the authorized considerations of site plan review, a planning board may legitimately consider whether a proposed development is consistent with the use of neighboring properties, whether it "would bring about 'a noticeable change in the visual character' of the area," and whether any change would be irreversible.[208] In reviewing a site plan application, "[a] local planning board has broad discretion . . . and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion."[209] Consequently, if the decision of a planning board reviewing a site plan application possesses a rational basis in the record, a court may not substitute its own judgment even if the evidence could support a different conclusion.[210]

In *Valentine*, the planning board had denied the application based on: the grade of the driveway, together with the 90–degree turn and deep cut bounded by elevated retaining walls; the inability of emergency responders to navigate the turn; the failure to adequately demonstrate the manner in which the retaining walls could be constructed without encroaching on adjoining properties; the failure to provide for snow removal; and the lack of safe pedestrian access.[211] As a result of the specificity of the findings of fact and the sufficiency of the evidence corroborating the findings, the denial of the application was "premised on clear findings of deleterious changes that adversely affect the adjoining area."[212] Although conflicting evidence was provided on various issues, the court accepted the planning board's common-sense reasoning that the site plan was not appropriate for the difficult topography of the area or with the character of the neighborhood and found that the conclusion was supported by the record.[213]

Town Law section 274-a(4) and Village Law section 7-725-a(4) authorize a planning board to impose "reasonable conditions" in granting

207. *Id.*

208. *Id.* at 1157, 930 N.Y.S.2d at 53 (quoting Home Depot, U.S.A. v. Town of Mount Pleasant, 293 A.D.2d 677, 678, 741 N.Y.S.2d 274, 276 (2d Dep't 2002)).

209. *Id.* at 1157-58, 930 N.Y.S.2d at 53 (quoting In–Towne Shopping Ctrs. v. Planning Bd. of Brookhaven, 73 A.D.3d 925, 926, 901 N.Y.S.2d 331, 332 (2d Dep't 2010)).

210. *Valentine*, 87 A.D.3d at 1157, 930 N.Y.S.2d at 53.

211. *Id.* at 1158, 930 N.Y.S.2d at 53-54.

212. *Id.*, 930 N.Y.S.2d at 54 (quoting E. N.Y. Props. v. Cavaliere, 142 A.D.2d 644, 646, 530 N.Y.S.3d 842, 844 (2d Dep't 1998)).

213. *Valentine*, 87 A.D.3d at 1157, 930 N.Y.S.2d at 53.

site plan approval.[214] However, such conditions must be "directly related to and incidental to the proposed use of the property,"[215] and must be "corrective measures designed to protect neighboring properties against the possible adverse effects of that use."[216] In addition, the record must contain sufficient factual evidence to support the basis for imposing a particular condition.[217]

A condition of site plan approval limiting the length of a boathouse to twenty feet was annulled in *89JPS, LLC v. Joint Village of Lake Placid, Town of North Elba Review Board*.[218] The petitioner sought approval of a one-story boathouse on the shore and lake with a length of thirty-two feet which was the maximum length allowed by the zoning law.[219] At the hearing on the application, the Joint Regional Board ("JRB") considered factual data furnished by the planning office regarding other boathouses on the lake, including how far each extended into the lake and the percentage of the shoreline length of each lot occupied by the boathouse.[220] The information was not given to the applicant until after a decision was adopted.[221] The JRB calculated that the average length of all boathouses on the lake as being "a little over [twenty] feet."[222] One member voted to deny the application entirely after having previously recused himself because he disapproved of boathouses in general.[223] In restricting the length of the boathouse, the five remaining members of the JRB relied upon the undisclosed evidence from the planning office.[224]

Although a board permissibly may condition the approval of a site plan, such authority is not limitless.[225] Pursuant to the authority of

214. N.Y. TOWN LAW § 274-a(4) (McKinney 2004); N.Y. VILLAGE LAW § 7-725-a(4) (McKinney 2011).

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

216. *Id.*

217. *See* Richter v. Delmond, 33 A.D.3d 1008, 1010, 824 N.Y.S.2d 327, 329 (2d Dep't 2006); Hudson Canyon Constr., Inc. v. Town of Cortlandt, 289 A.D.2d 576, 576, 735 N.Y.S.2d 807, 807 (2d Dep't 2001).

218. *See generally* No. 0029/11, 2012 NY Slip Op. 51151(U) (Sup. Ct. Essex. Cnty. 2012).

219. *Id.* at 1.

220. *Id.*

221. *Id.*

222. *Id.*

223. *89JPS, LLC*, 2012 NY Slip Op. 51151(U), at 1.

224. *Id.*

225. *Id.* at 3 (quoting Smith v. Town of Mendon, 4 N.Y.3d 1, 28, 822 N.E.2d 1214, 1231, 789 N.Y.S.2d 696, 713(2004)).

Town Law section 274–a(4) and Village Law section 7-725-a(4), conditions must be reasonable, directly related to, and incidental to a proposed site plan.[226] Conditions are permissible if intended to protect nearby properties against the potential adverse impacts of a proposed use.[227] On the other hand, conditions are improper if they do not seek to ameliorate the impacts of a proposed use.[228]

In determining that the condition challenged in *89JPS* was improper, the court stressed that the applicant had been prevented from acquiring the factual information provided by the planning office or having an opportunity to rebut that information.[229] In addition, the board accepted the information after the public hearing was closed:[230]

> [b]y not affording 89 JPS the opportunity to rebut or challenge the planning office report, its 'due process rights were violated by the board'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.'[231]

The court rejected the board's contention that it could rely on the knowledge of board members who are familiar with local conditions and are able to appreciate the size of the proposed boathouse and its scale to the property as compared to other boathouses:[232]

> [i]t is well-established law that a board may act upon its own knowledge of conditions and/or its own personal inspection, but the mere conclusory statement in the findings of its personal knowledge and inspection does no more than demonstrate or establish the basis for the board's arrival at the factual findings. When the board does so act, it is incumbent upon it to set forth in its return the facts known to the members, but not otherwise disclosed.[233]

Nonetheless, the record did not contain a recital of such personal information upon which the members had based their decision.[234] In addition, the twenty-foot restriction also lacked any empirical basis in

226. *89JPS, LLC*, 2012 NY Slip Op. 51151(U), at 3; *see* N.Y. TOWN LAW § 274-a(4) (McKinney 2004); *see also* N.Y. VILLAGE LAW § 7-725-a(4) (McKinney 2011).

227. *89JPS, LLC*, 2012 NY Slip Op. 51151(U), at 3.

228. *Id.*

229. *Id.*

230. *Id.* at 3-4.

231. *Id.* at 4.

232. *89JPS*, 2012 NY Slip Op. 51151(U), at 4.

233. *Id.* (quoting Cmty. Synagogue v. Bates, 1 N.Y.2d 445, 454, 136 N.E.2d 488, 493, 154 N.Y.S.2d 15, 22-23 (1956)).

234. *89JPS*, 2012 NY Slip Op. 51151(U), at 4.

the record, and the board merely chose a number corresponding to the average length of approved boathouses with no nexus or relationship between that distance and the criteria of the zoning law.[235]

As a result, the court determined that the condition lacked an objective factual basis in the record, but, instead, was based on subjective considerations such as general community opposition and the subjective opinions of the board members.[236] Having found that the board inappropriately considered the data provided by the planning office and having rejected the members' personal knowledge of relevant local conditions, the court found that the record lacked adequate evidence to limit the length of the boathouse to twenty feet.[237] Consequently, the court annulled the condition because where a condition is determined to be arbitrary and capricious, the appropriate relief generally is to eliminate the condition.[238]

Although the receipt of material after a public hearing has been closed is improper, a few decisions suggest that consideration of such information is permitted where a board receives such information from a municipal official or employee lacking a vested interest in the decision.[239] However, as the *89JPS* decision reflects, such a practice is to be eschewed. Fairness, if not due process, requires that all interested parties have an opportunity to address any factual information, even from an objective municipal official who could make a factual error.

Similarly, a decision may be based, at least in part, on personal knowledge of board members.[240] In addition, a board also may properly base its decision in part upon a site visit to the property in question.[241] However, the facts ascertained to the extent they are relevant to a member's decision-making must be discussed in the record or decision.

235. *Id.* at 5.

236. *Id.*

237. *Id.*

238. *Id.* at 5-6.

239. *See* Cilla v. Mansi, No. 3563/02, 2002 NY Slip Op. 50208(U), at 17 (Sup. Ct. Suffolk Co. 2002); Silveri v. Nolte, 128 A.D.2d 711, 712, 513 N.Y.S.2d 205, 206 (2d Dep't 1987); Stein v. Bd. of Appeals of Islip, 100 A.D.2d 590, 591, 473 N.Y.S.2d 535, 537 (2d Dep't 1984); DeBlois v. Wallace, 88 A.D.2d 1073, 1073, 452 N.Y.S.2d 734, 735 (3d Dep't 1982); Russo v. Stevens, 7 A.D.2d 575, 578, 184 N.Y.S.2d 989, 993 (3d Dep't 1959).

240. *See* Witkowich v. Zoning Bd. of Appeals of Yorktown, 84 A.D.3d 1101, 1103, 923 N.Y.S.2d 645, 647 (3d Dep't 2011); Russia House at Kings Point, Inc. v. Zoning Bd. of Appeals of Kings Point, 67 A.D.3d 1019, 1020, 892 N.Y.S.2d 104, 105 (2d Dep't 2009); Thirty W. Park Corp. v. Zoning Bd. of Appeals of Long Beach, 43 A.D.3d 1068, 1069, 843 N.Y.S.2d 106, 107 (2d Dep't 2007).

241. Frank v. Zoning Bd. of Yorktown, 82 A.D.3d 764, 766, 917 N.Y.S.2d 697, 699 (2d Dep't 2011).

A condition also was invalidated in *Kempisty v. Town of Geddes* because the condition was improperly based on the applicant's history of zoning violations.[242] The applicant in *Kempisty* sought site plan approval to enlarge a motor vehicle dealership with a sales lot on an adjacent parcel, a use permitted by right by the zoning law, subject to obtaining site plan approval.[243] The town board granted site plan approval, subject to the "special conditions" enumerated in the zoning law for issuance of a special permit to operate a motor vehicle service and repair facility or motor vehicle sales facility.[244] However, the property was not situated in a zoning district in which a special permit was necessary for such use.[245] The town supervisor related that as a consequence of the history of the applicant's noncompliance with town code, the town board decided to condition the site plan approval on the special permit conditions relating to the operation of motor vehicle sales and motor vehicle service and repair which would have applied if the use was sought to be established in certain other districts.[246] As a result, the decision to impose special permit conditions on the site plan approval was based on the applicant's purported history of zoning violations and the rancorous relationship with the town, rather than upon the need to "minimiz[e] [any] adverse impact that might result from the grant of the [application]."[247] The condition contravened the "fundamental principle" that "conditions imposed on the [approval of a site plan] must relate only to the use of the property that is the subject of the [site plan] without regard to the person who owns or occupies that property."[248]

On the other hand, a condition of a site plan approval for the expansion of a shopping center was confirmed in *Greencove Associates, LLC v. Town Board of North Hempstead*.[249] A condition of a zoning change authorizing the construction of the original shopping center in 1959 required the preservation of a landscaped buffer along a portion of

242. 93 A.D.3d 1167, 1171, 940 N.Y.S.2d 381, 385 (4th Dep't 2012).

243. *Id.* at 1168, 940 N.Y.S.2d at 383.

244. *Id.* at 1168-69, 940 N.Y.S.2d at 383-84.

245. *Id.* at 1170-71, 940 N.Y.S.2d at 385.

246. *Id.*

247. *Kempisty*, 93 A.D.3d at 1171, 940 N.Y.S.2d at 385 (quoting Twin Town Little League, Inc. v. Town of Poestenkill, 249 A.D.2d 811, 813, 671 N.Y.S.2d 831, 833 (3d Dep't 1998), *leave denied*, 92 N.Y.2d 806, 806, 700 N.E.2d 320, 320, 677 N.Y.S.2d 781, 781 (1998)).

248. *Kempisty*, 93 A.D.3d at 1171, 940 N.Y.S.2d at 385 (quoting St. Onge v. Donovan, 71 N.Y.2d 507, 511, 522 N.E.2d 1019, 1020, 527 N.Y.S.2d 721, 722 (1988)).

249. 87 A.D.3d 1066, 1066-67, 929 N.Y.S.2d 325, 326 (2d Dep't 2011).

the parcel that abutted a road adjoining a residential neighborhood.[250] A site plan application subsequently was approved allowing the extension of the shopping center, conditioned upon improvements to the landscaped buffer area which resulted in a buffer averaging twenty-two feet in width.[251]

The owner again sought amended site plan approval to construct an additional 10,000 square foot structure on the portion of the property that included the buffer area.[252] The proposed new structure was intended to impinge on the landscaped buffer, reducing it to four to five feet behind the building.[253] In its review pursuant to General Municipal Law section 239-m, the county planning commission recommended that the size of the building be decreased to 6,800 square feet to permit the building to better fit into the irregular-shaped site and that it be relocated further from the property line to preserve the buffer.[254] The town board approved the site plan application conditioned upon compliance with the recommendation of the planning commission.[255]

Town Law section 274–a(2)(a), like Village Law section 7-725-a(2)(a), authorizes the review of site plans including features relating to "parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law."[256] The town code in *Greencove Associates* provided that, in deciding whether to approve, approve with modifications, or disapprove a site plan, the board could consider the "overall impact on the neighborhood, including compatibility of design considerations and adequacy of screening from residential properties."[257]

The court concluded that the board permissibly imposed the challenged condition.[258] "[A] condition may be imposed upon property so long as there is a reasonable relationship between the problem sought

250. *Id.*

251. *Id.* at 1067, 929 N.Y.S.2d at 326.

252. *Id.*

253. *Id.*

254. *Greencove Assocs., LLC*, 87 A.D.3d at 1067, 929 N.Y.S.2d at 326-27; *see generally* N.Y. GEN. MUN. LAW § 239-m (McKinney 2013).

255. *Greencove Assocs., LLC*, 87 A.D.3d at 1067, 929 N.Y.S.2d at 327.

256. *Id.* at 1068, 929 N.Y.S.2d at 327 (quoting N.Y TOWN LAW § 274-a(2)(a) (McKinney 2004)); *see also* N.Y. VILLAGE LAW § 7-725-a(2)(a) (McKinney 2011).

257. *Greencove Assocs., LLC*, 87 A.D.3d at 1068, 929 N.Y.S.2d at 327.

258. *Id.*

to be alleviated and the application concerning the property."[259] The condition was a logical means of ensuring that the existing landscaped buffer would be maintained in order to screen the adjacent residential neighborhood from the impacts from the shopping center.[260] Despite the fact that the proposed 10,000 square foot building complied with the area and set-back requirements of the zoning law, the court sustained the reduction in the size of the structure because a building of that size could not fit on that portion of the parcel without impinging on the buffer or affecting the neighboring residences.[261]

VI. SPECIAL PERMITS

The designation of a land use as a special permit use is synonymous with a legislative finding that the use is harmonious with a community's general zoning plan and will not adversely affect the neighborhood.[262] As a result, classifying a use as a special permit use produces a strong presumption in favor of the use and constitutes "a per se finding that it is in harmony with the neighborhood."[263] "Unlike a use variance, a 'special exception allows the property owner to put his property to a use expressly permitted by the ordinance . . . subject only to 'conditions' attached to its use to minimize its impact on the surrounding area.'"[264] An applicant requesting a special permit is only "required to show compliance with any legislatively imposed conditions on an otherwise permitted use."[265] Significantly, a special permit application must be assessed by comparison to delegated or permissible planning standards and may not be denied merely because of general community objections, speculation, or anecdotal complaints.[266]

259. *Id.* (quoting Int'l Innovative Tech. Grp. Corp. v. Planning Bd. of Woodbury, 20 A.D.3d 531, 533, 799 N.Y.S.2d 544, 546 (2d Dep't 2005)).

260. *Greencove Assocs., LLC*, 87 A.D.3d at 1068, 929 N.Y.S.2d at 327-28.

261. *Id.*, 929 N.Y.S.2d at 328.

262. *See* Retail Prop. Trust 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); Wegmans Enters. v. Lansing, 72 N.Y.2d 1000, 1001, 530 N.E.2d 1292, 1292, 534 N.Y.S.2d 372, 373 (1988); Robert Lee Realty Co. v. Vill. of Spring Valley, 61 N.Y.2d 892, 893, 462 N.E.2d 1193, 1193, 474 N.Y.S.2d 475, 475 (1984).

263. Pilato v. Zoning Bd. of Appeals of Mendon, 155 A.D.2d 864, 865, 548 N.Y.S.2d 950, 951 (4th Dep't 1989).

264. Capriola v. Wright, 73 A.D.3d 1043, 1045, 900 N.Y.S.2d 754, 756 (2d Dep't 2010) (quoting N. Shore Steak House v. Bd. of Appeals of Thomaston, 30 N.Y.2d 238, 244, 282 N.E.2d 606, 609, 331 N.Y.S.2d 645, 649 (1972)).

265. *Retail Prop. Trust*, 98 N.Y.2d at 195, 774 N.E.2d at 731, 746 N.Y.S.2d at 666.

266. *See* Tri-State Outdoor Media Grp. v. Churchill, 261 A.D.2d 924, 689 N.Y.S.2d 832, 833 (4th Dep't 1999); Mkt. Square Props. v. Town of Guilderland Zoning Bd. of Appeals,

Those principles are illustrated by the decision in *Kabro Associates, LLC v. Town of Islip Zoning Board of Appeals*.[267] The petitioner in *Kabro Associates* owned property improved with a strip shopping center and a free-standing pharmacy.[268] The front section of the parcel was zoned as "Business 1," while the rear portion of the lot was zoned as a "Residence A."[269] Pursuant to conditions imposed for a prior special permit for a restaurant on the property, the petitioner was required to apply for a special permit to allow the expansion of its off-street parking into the portion of the lot situated in the residential zoning district and to enlarge the floor space of existing buildings by 3,000 square feet.[270] Neighbors objected to approval of the special permit at the hearing on the application, asserting that the proposed changes would aggravate existing traffic congestion and negatively affect their property values.[271] However, the petitioner produced the testimony of a traffic engineer and a real estate appraiser, both of whom concluded that the proposed changes would not adversely affect the neighboring properties.[272] The zoning board of appeals denied the application because of its concerns with traffic, impact on property values, and the appropriateness of the plan for the locale.[273] The supreme court denied the petition contesting the denial and the appellate division reversed.[274] The appellate division concluded that the zoning board of appeals' denial was arbitrary and capricious.[275] The neighbors' objections were uncorroborated by any empirical data and were refuted by the applicant's expert evidence.[276] Accordingly, the rejection of the application lacked a rational basis and the court remitted the matter to the zoning board of appeals to issue a special permit, subject to any conditions or restrictions as may be appropriate.[277]

Similarly, the rejection of a special permit application was

66 N.Y.2d 893, 895, 489 N.E.2d 741, 741, 498 N.Y.S.2d 772, 772 (1985); 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); C & B Realty Co. v. Town Bd. of Oyster Bay, 139 A.D.2d 510, 512, 526 N.Y.S.2d 612, 614 (2d Dep't 1988).

267. 95 A.D.3d 1118, 1118, 944 N.Y.S.2d 277, 278 (2d Dep't 2012).
268. *Id.*, 944 N.Y.S.2d at 278-79.
269. *Id.*, 944 N.Y.S.2d at 279.
270. *Id.* at 1118-19, 944 N.Y.S.2d at 279.
271. *Id.* at 1119, 944 N.Y.S.2d at 279.
272. *Kabro Assocs., LLC*, 95 A.D.3d at 1119, 944 N.Y.S.2d at 279.
273. *Id.*
274. *Id.*
275. *Id.* at 1120, 944 N.Y.S.2d at 280.
276. *Id.*
277. *Kabro Assocs., LLC*, 95 A.D.3d at 1120, 944 N.Y.S.2d at 280.

invalidated in *Young Development, Inc. v. Town of West Seneca* because there the record lacked any support for the decision.[278] The court also confirmed that the thirty-day statute of limitations set forth in Town Law section 274-b(9) was inapplicable because the denial of the special permit application was by the town board and not the planning board.[279] Instead, the four-month statute of limitations set forth in CPLR section 217 applied.[280]

Likewise, in *Royal Management, Inc. v. Town of West Seneca*, denial of a special permit by the town board to construct an apartment building was found to be arbitrary and capricious.[281] The denial was premised on two grounds, that is: (1) that the sewer system in the area was "in very poor shape" and had recently experienced severe failures and backups; and (2) that the project was inconsistent with existing properties in the immediate contiguous area due to the shape of the lot.[282] With respect to the first reason, the record lacked any evidence to support the claimed apprehension regarding the sewer system.[283] To the contrary, the town engineer recently had confirmed that the sewer had the capacity to accommodate a larger project.[284] The record also failed to support the town board's finding that the planned apartment building would be inconsistent with existing properties in the area.[285] Instead, the code enforcement officer had advised the town board that the property was zoned for the proposed use, that the lot was sufficiently large to accommodate the building, and that the use conformed with the zoning law.[286] Additionally, there was no basis for the finding that the proposed building would be aesthetically out of character with existing properties in the immediate area because there were multiple dwellings within 200 feet of the project with similar placement.[287]

As in *Young Development*, the court also confirmed that the four-month statute of limitations set forth in CPLR section 217, rather than the thirty-day period prescribed by Town Law section 274–b(9), applied to the Article 78 proceeding challenging the decision of the town

278. 91 A.D.3d 1350, 1351, 937 N.Y.S.2d 512, 514 (4th Dep't 2012).
279. *Id.*, 937 N.Y.S.2d at 513.
280. *Id.*
281. 93 A.D.3d 1338, 1339, 940 N.Y.S.2d 766, 767 (4th Dep't 2012).
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Royal Mgmt., Inc.*, 93 A.D.3d at 1339, 940 N.Y.S.2d at 768.
287. *Id.*

board.[288]

Continuing with the repudiation of the rejection of special permit applications based solely on generalized community complaints, in *Kinderhook Development, LLC v. City of Gloversville Planning Board* a special permit application to construct four multifamily apartment buildings containing forty-eight affordable housing units was denied.[289] The applicant had submitted a proposal to ameliorate storm-water runoff during the SEQRA review process.[290] The planning board did not request additional information concerning water runoff, but commented that a number of property owners had expressed a concern about runoff.[291] The applicant demonstrated that the project would not increase the rate of runoff to the neighboring area and, in fact, would marginally lessen it.[292] In addition, the applicant further consented to pay $50,000 to the city for a study of drainage difficulties in the area.[293] Notably, the planning board had adopted a negative declaration pursuant to SEQRA, concluding, among other things, that the applicant's storm-water management plan adequately addressed the potential storm water impacts of this project.[294] However, after neighborhood opposition to the application was expressed, the planning board denied the application based on water runoff concerns.[295]

The court concluded that the engineering evidence demonstrated that the project would diminish existing runoff problems, and respondent had relied on that evidence in approving a negative declaration.[296] Even if the planning board was not constrained by its own negative declaration in assessing the application, the only evidence it subsequently obtained on the issue consisted of conclusory opinions expressed by neighbors opposed to the application.[297] Because the planning board improperly premised its determination on generalized community objections rather than the unchallenged empirical evidence, the court annulled the determination.[298]

288. *Id.* at 1338-39, 940 N.Y.S.2d at 767.

289. 88 A.D.3d 1207, 1208, 931 N.Y.S.2d 447, 448 (3d Dep't 2011), *leave denied*, 18 N.Y.3d 805, 963 N.E.2d 791, 940 N.Y.S.2d 214 (2012).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Kinderhook Dev., LLC*, 88 A.D.3d at 1208, 931 N.Y.S.2d at 448.

295. *Id.*

296. *Id.* at 1209, 931 N.Y.S.2d at 449.

297. *Id.*

298. *Id.*

On the other hand, the court largely confirmed the rejection of a special permit application to install two drive-thru windows, to allow for parking in front yard setbacks, and to construct a refuse/recycling enclosure to establish a twenty-four hour fast-food restaurant in *White Castle System, Inc. v. Board of Zoning Appeals of Hempstead*.[299] The record, including testimony by traffic and real estate experts and by neighboring property owners, substantiated the finding that the drive-thru and parking in front yard setbacks would hinder the orderly and reasonable use of neighboring properties and would negatively affect the safety, health, welfare, comfort, convenience, or order of the town.[300]

It is well settled that religious uses, because religious institutions are considered by the New York courts to be intrinsically beneficial to the community, enjoy a preferred status which inhibits the legitimate review authority of local boards reviewing land use applications.[301] Although "[t]here simply is no conclusive presumption that any religious or educational use automatically outweighs its ill effects," approval of such uses may be denied only if the use is inarguably dangerous or contrary to the public welfare of the community.[302] As a result, municipalities must in general apply their zoning regulations in a more flexible manner when dealing with religious uses.[303] Moreover, it has been determined that when religious institutions seek a variance, there is "an affirmative duty on the part of a local zoning board to suggest measures to accommodate the planned religious use, without causing the religious institution to incur excessive additional costs, while mitigating the detrimental effects on the health, safety and welfare of the surrounding community."[304]

In *Tabernacle of Victory Pentecostal Church v. Weiss*, the appellate

299. 93 A.D.3d 731, 731, 940 N.Y.S.2d 159, 161 (2d Dep't 2012).

300. *Id.* at 732, 940 N.Y.S.2d at 162. However, the denial of the special permit to construct a refuse/recycling enclosure was not supported by evidence in the record. *Id*.

301. *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); *see also* Diocese of Rochester v. Planning Bd. Of Brighton, 1 N.Y.2d 508, 522, 523, 136 N.E.2d 827, 834, 154 N.Y.S.2d 849, 858-59 (1956).

302. *Bagnardi*, 68 N.Y.2d at 595, 503 N.E.2d at 515, 510 N.Y.S.2d at 867.

303. *See* Islamic Soc'y of Westchester & Rockland, Inc. v. Foley, 96 A.D.2d 536, 537, 464 N.Y.S.2d 844, 845 (2d Dep't 1983), *leave denied*, 60 N.Y.2d 559, 458 N.E.2d 1261, 470 N.Y.S.2d 1025 (1983), *appeal dismissed*, 64 N.Y.2d 645, 474 N.E.2d 260, 485 N.Y.S.2d 1032 (1984).

304. *Id.* at 537, 464 N.Y.S.2d at 845; *see also* St. Thomas Malankara Orthodox Church, Inc. v. Bd. of Appeals of Hempstead, 23 A.D.3d 666, 667, 804 N.Y.S.2d 801, 801-02 (2d Dep't 2005), *leave denied*, 7 N.Y.3d 740, 852 N.E.2d 245, 819 N.Y.S.2d 874 (2006); *see also* Young Israel of N. Woodmere v. Town of Hempstead Zoning Bd. of Appeals, 221 A.D.2d 646, 647, 634 N.Y.S.2d 199, 200-01 (2d Dep't 1995).

division applied the same reasoning to annul the denial of a special permit for a religious use.[305] The church sought a special exception permit and an area variance for a waiver of the off-street parking requirements to permit it to hold religious services on a parcel that had no on-site parking.[306] The church proposed that only 105 people would be allowed to enter the sanctuary and that church vans would transport half of the sixty members to the site, resulting in the need for off-site parking for eight to ten vehicles during its peak hours of operation.[307] The board denied the applications in their entirety.[308]

"Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right."[309] The "inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood."[310]

"[W]hile religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made."[311] As a result, a board is required to "suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible."[312] The church had suggested restrictions on its use in order to mitigate the impact on the surrounding community.[313] However, the board did not suggest any "measures that

305. 101 A.D.3d 738, 740, 955 N.Y.S.2d 180, 182 (2d Dep't 2012).

306. *Id.* at 181.

307. *Id.*

308. *Id.* at 181-82.

309. *Id.* (quoting Retail Prop. Trust v. Bd. of Zoning Appeals of Hempstead, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 730-31, 746 N.Y.S.2d 662, 665-66 (2002)).

310. *Tabernacle*, 955 N.Y.S.2d at 182 (quoting *Retail Prop. Trust*, 98 N.Y.2d. at 195, 774 N.E.2d at 731, 746 N.Y.S.2d at 666).

311. *Tabernacle*, 955 N.Y.S.2d at 182 (quoting Genesis Assembly of God v. Davies, 208 A.D.2d 627, 628, 617 N.Y.S.2d 202, 203 (2d Dep't 1994)); *see also* Capriola v. Wright, 73 A.D.3d 1043, 1045, 900 N.Y.S.2d 754, 756 (2d Dep't 2010); St. Thomas Malankara Orthodox Church, Inc. v. Bd. of Appeals of the Town of Hempstead, 23 A.D.3d 666, 667, 804 N.Y.S.2d 801, 801-02 (2d Dep't 2005), *leave denied*, 7 N.Y.3d 740, 852 N.E.2d 245, 819 N.Y.S.2d 874 (2006).

312. *Tabernacle*, 955 N.Y.S.2d at 182 (quoting *Genesis Assembly of God*, 208 A.D.2d at 628, 617 N.Y.S.2d at 203).

313. *Tabernacle*, 955 N.Y.S.2d at 181.

would have accommodated the proposed religious use while mitigating the adverse effects on the surrounding community."[314] The court annulled the unconditional denial because the board had denied the applications in their entirety, even though the proposed religious use could have been substantially accommodated by the conditions proposed by the petitioner.[315]

Consequently, a board may not simply deny a variance for application of a religious or educational use unless the use is demonstrated to be dangerous or contrary to the public welfare of the community. Instead, the board must, as part of its denial, suggest measures that would enable it to grant the variance application while adequately ameliorating the deleterious impacts on the variance.

VII. FIFTH AMENDMENT TAKINGS

The Supreme Court rarely provides guidance in land use or taking claims. However, in *Arkansas Game and Fish Commission v. United States*, the Court concluded that "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability."[316]

The Arkansas Game and Fish Commission ("Commission") owns 23,000 acres of land, designated for a wildlife and hunting preserve, along both banks of the Black River.[317] The Army Corps of Engineers operates a dam upstream from the preserve.[318] Between 1993 and 2000, the Corps deviated from its standard release of water from the dam which caused significantly more flooding in the preserve during tree-growing seasons.[319] The Commission asserted that the sustained flooding caused by the deviations constituted a taking under the Fifth Amendment.[320] The Court of Federal Claims agreed, finding that six consecutive years of abnormal flooding cumulatively resulted in "catastrophic mortality" of timber and awarded $5.7 million in damages.[321] The Federal Circuit Court of Appeals reversed, recognizing that although temporary government action may sometimes implicate the Fifth Amendment, government-induced flooding is "different," providing a basis for a takings claim only in cases of

314. *Id.* at 182.
315. *Id.*
316. 133 S. Ct. 511, 515 (2012).
317. *Id.*
318. *Id.* at 516.
319. *See id.*
320. *See id.*
321. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 517.

"permanent or inevitably recurring" flooding.[322] The Supreme Court reversed.[323]

The Court acknowledged that "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking."[324] However, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[325] Thus, the Court reiterated the two instances of categorical takings, that is, a permanent physical occupation of property authorized by government,[326] or when a property owner is compelled to sacrifice all economically beneficial use of land.[327] However, most takings claims turn on situation-specific factual inquiries.[328]

The issue in *Arkansas Game and Fish Commission* was whether temporary flooding can ever give rise to a takings claim.[329] The Court first noted that the principle that takings temporary in duration can be compensable was solidly established in the World War II era.[330] Significantly, the takings claims approved in those decisions "were not confined to instances in which the Government took outright physical possession of the property involved. A temporary takings claim could be maintained as well when government action occurring outside the property gave rise to 'a direct and immediate interference with the enjoyment and use of the land.'"[331] Since those decisions, the Court has rejected the argument that government action must be permanent to constitute a taking.[332] "Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the

322. *Id.* at 517-18.

323. *Id.* at 515.

324. *Id.* at 518.

325. *Id.* (quoting Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002)).

326. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)).

327. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

328. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 (citing Penn Cent. v. N.Y.C., 438 U.S. 104, 124 (1978)).

329. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518.

330. *See id.* at 519 (citing United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 267 (1950)); *see also* Kimball Laundry Co. v. United States, 338 U.S. 1, 16 (1949).

331. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519 (quoting United States v. Causby, 328 U.S. 256, 266 (1946)).

332. *See Ark. Game & Fish Comm'n*, 133 S. Ct. at 519.

taking was effective.'"[333]

Consequently, the Court concluded that:

> [b]ecause government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.[334]

333. *Id.* (quoting First English Evangelical Lutheran Church of Glendale v. L.A. Cnty., 482 U.S. 304, 321 (1987)); *see also* Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337 (2002).

334. *Ark. Game & Fish Comm'n*, 133 S. Ct at 519.