ZONING AND LAND USE

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I. ZONING

A. Intergovernmental Immunity/Preemption

In *In re County of Monroe's Compliance with Certain Zoning & Permit Requirements, etc.* the Court of Appeals announced the germane considerations in determining whether local zoning regulations apply when a conflict exists between a guest governmental entity's proposed land use and a host community's zoning laws.[1] The Court announced "a balancing of public interests" test which requires the consideration of numerous factors in order to determine whether an entity should be accorded immunity from local zoning requirements.[2] These factors include "the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned[,] and the impact upon legitimate local

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1. 72 N.Y.2d 338, 343, 530 N.E.2d 202, 204, 533 N.Y.S.2d 702, 704 (1988) (quoting Rutgers State Univ. v. Piluso, 286 A.2d 697, 702 (N.J. 1972)).

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

interests."[3] In addition to an absence of guidance in the application of the relevant considerations, the decisions have not clarified which governmental entity, that is, the host or encroaching entity, should make the determination as to the applicability of or exemption from local zoning requirements.

In *Incorporated Village of Munsey Park v. Manhasset-Lakeville Water District*, the appellate division found that it was acceptable for the guest entity to make the initial determination of exemption from local zoning requirements.[4] A water district, which was a special district of the town, had been established to provide potable water to customers within its boundaries.[5] The water district required water storage tanks to provide water and to maintain adequate pressure.[6] Because the village zoning law banned "buildings in excess of [thirty] feet in height," the tank was not a permitted use.[7] The water district determined that the tank, which had been constructed in 1929, had to be replaced.[8] It conducted two public hearings with municipal officials and revisions were made to accommodate concerns of the village and its residents.[9] Alternatives, including rehabilitation of the current tank and alternative sites, were entertained and rejected.[10] The water district thereafter determined that the "plan was immune from the village's zoning regulations and review" pursuant to the *County of Monroe* balancing test.[11]

The village commenced an action seeking a judgment that the water district must comply with its zoning law.[12] The court observed that the Court of Appeals did not identify the entity initially responsible for assessing the *County of Monroe* considerations and the village had failed to provide any basis for its claim that the host entity possessed the exclusive jurisdiction to apply the *Monroe* balancing test.[13] Nevertheless,

3. *Id.* at 343, 530 N.E.2d at 204, 533 N.Y.S.2d at 704 (quoting *Rutgers State Univ.*, 286 A.2d at 702).

4. 150 A.D.3d 969, 972, 57 N.Y.S.3d 154, 157 (2d Dep't 2017).

5. *Id.* at 969, 57 N.Y.S.3d at 155.

6. *Id.*

7. *Id.*

8. *Id.* at 970, 57 N.Y.S.3d at 155.

9. *Incorporated Munsey Park*, 150 A.D.3d at 970, 57 N.Y.S.3d at 155–56.

10. *Id.* at 970, 57 N.Y.S.3d at 156.

11. *Id.* (citing *In re* Cty. of Monroe's Compliance with Certain Zoning & Permit Requirements, 72 N.Y.2d 338, 341, 530 N.E.2d 202, 203, 533 N.Y.S.2d 702, 703 (1988)).

12. *Id.*

13. *Id.* at 971, 57 N.Y.S.3d at 156 (first citing *In re Cty. of Monroe's Compliance*, 72 N.Y.2d at 341–43, 530 N.E.2d at 203–05, 533 N.Y.S.2d at 703–05; and then citing Nanuet Fire Engine Co. No. 1 v. Amster, 177 Misc. 2d 296, 300, 676 N.Y.S.2d 890, 893 (Sup. Ct. Rockland Cty. 1998)).

the appellate division determined that the supreme court properly had employed the "balancing of public interests" test and properly concluded that the project was immune from the village's zoning laws.[14]

Although prior decisions, including *County of Monroe*, did not provide guidance as to which municipal entity should undertake the balancing of the public interests analysis, *Village of Munsey Park* sanctions such analysis by the guest municipality.

B. Final, Reviewable Determination

Ostensible procedural irregularities in the enactment of a zoning law or amendment, including noncompliance with SEQRA, must be challenged in an Article 78 proceeding.[15] Nevertheless, an Article 78 proceeding may not be used to challenge a nonfinal determination.[16] "In order to ascertain whether an action is 'final and binding on a [litigant],'" a two-step methodology is mandated.[17] "The agency must have arrived at a definitive position on the issue that inflicts [an] actual, concrete injury" and "the injury may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party."[18] In *Cor Route* 5 *Co. v. Village of Fayetteville*, the adoption of a negative declaration and of a zoning amendment were ripe for review notwithstanding the fact that the amendment was conditioned upon successful approvals by other agencies.[19] As a result, the supreme court

14. *Incorporated Munsey Park*, 150 A.D.3d at 971, 57 N.Y.S.3d at 156 (first citing Jamaica Water Supply Co. v. New York, 280 A.D. 834, 835, 114 N.Y.S.2d 79, 81 (2d Dep't 1952); then citing Town of Hempstead v. New York, 42 A.D.3d 527, 529, 840 N.Y.S.2d 123, 125 (2d Dep't 2007); then citing Town of Queensbury v. City of Glens Falls, 217 A.D.2d 789, 791, 629 N.Y.S.2d 120, 122 (3d Dep't 1995); then citing Cty. of Nassau v. S. Farmingdale Water Dist., 62 A.D.2d 380, 391, 405 N.Y.S.2d 742, 748 (2d Dep't 1978); and then citing Volunteer Fire Ass'n of Tappan, Inc. v. Town of Orangetown, 54 A.D.3d 850, 851, 863 N.Y.S.2d 502, 503 (2d Dep't 2008)).

15. *See* Amodeo v. Town Bd. of Marlborough, 249 A.D.2d 882, 883, 672 N.Y.S.2d 439, 440–41 (3d Dep't 1998).

16. Cor Route 5 Co. v. Vill. of Fayetteville, 147 A.D.3d 1432, 1433, 46 N.Y.S.3d 765, 766 (4th Dep't 2017) (quoting Young v. Bd. of Trs. of Blasdell, 221 A.D.2d 975, 977, 634 N.Y.S.2d 605, 608 (4th Dep't 1995)).

17. *Id.* (quoting Ranco Sand & Stone Corp. v. Vecchio, 27 N.Y.3d 92, 98, 49 N.E.3d 1165, 1169, 29 N.Y.S.3d 873, 877 (2016)).

18. *Id.* (quoting Best Payphones, Inc. v. Dep't of Info. Tech. & Telecomm., 5 N.Y.3d 30, 34, 832 N.E.2d 38, 40, 799 N.Y.S.2d 182, 184 (2005)).

19. *Id.* (first citing Eadie v. Town Bd. of N. Greenbush, 7 N.Y.3d 306, 317, 854 N.E.2d 464, 469, 821 N.Y.S.2d 142, 147 (2006); then citing O'Connell v. Zoning Bd. of Appeals of New Scotland, 267 A.D.2d 742, 744, 699 N.Y.S.2d 775, 778 (3d Dep't 1999); then citing Long Island Pine Barrens Soc'y v. Planning Bd. of Brookhaven, 247 A.D.2d 395, 396, 667 N.Y.S.2d 912, 913 (2d Dep't 1998); and then citing Price v. Cty. of Westchester, 225 A.D.2d 217, 220, 650 N.Y.S.2d 839, 840–41 (3d Dep't 1996)).

should not have granted the village's motion to dismiss the petition.[20]

II. ZONING BOARDS OF APPEAL

A. Procedure

The disposition of an application to a Zoning Board of Appeals when an affirmative vote on a motion could not be obtained remained obscure for many years. Then, in *Tall Trees Construction Corp. v. Zoning Board of Appeals of Huntington*, the Court of Appeals concluded that a tie vote by a Zoning Board of Appeals entertaining a variance application was deemed a denial of the application.[21] The court determined that "when a quorum of the Board is present and participates in a vote on an application, a vote of less than a majority of the Board is deemed a denial."[22] Consistent with the decision, Town Law § 267-a was amended in 2002 to provide:

> In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the enforcement official within the time allowed by subdivision eight of this section, the appeal is denied.[23]

By it terms, Town Law § 267-a(13)(b) applies to a Zoning Board of Appeals' "appellate jurisdiction only."[24] Town Law § 274-b(2) provides that

> [t]he town board may, as part of a zoning ordinance or local law adopted pursuant to this article or other enabling law, authorize the planning board or such other administrative body that it shall designate to grant special use permits as set forth in such zoning ordinance or local law.[25]

That authorization sanctions the delegation of special permit review authority to a Zoning Board of Appeals.[26] In *Alper Restaurant Inc. v. Town of Copake Zoning Board of Appeals*, the appellate division concluded that, unlike in instances of the exercise of appellate jurisdiction, a tie vote on a special permit application constitutes "non-

20. *Id.* at 1434, 46 N.Y.S.3d at 767.
21. 97 N.Y.2d 86, 89, 761 N.E.2d 565, 567, 735 N.Y.S.2d 873, 875 (2001).
22. *Id.*
23. N.Y. TOWN LAW § 267-a(13)(b) (McKinney 2013).
24. *Id.*
25. N.Y. TOWN LAW § 274-b(2) (McKinney 2013).
26. *Id.*

action."[27]

While a special permit application was pending before the Zoning Board of Appeals in *Alper Restaurant*, "a vacancy occurred on the five-member panel."[28] Subsequently, the four sitting Board members voted two to two on a motion to approve the application.[29] Because a majority vote was not obtained, the Zoning Board of Appeals determined that it had not acted.[30] The Zoning Board of Appeals voted again after a new member was appointed to fill the vacancy and granted the special permit application by a three two vote.[31] An adjacent property owner challenged the decision, asserting that the tie vote represented a "default denial" of the application.[32]

Because the tie vote constituted nonaction on the application, the Zoning Board of Appeals could permissibly vote on the application again.[33] Pursuant to the unequivocal language of Town Law § 267-a(13)(b), identical to Village Law § 7-712(a)(13)(b), a tie vote results in a default denial only when a Zoning Board of Appeals is exercising appellate jurisdiction.[34] Because the Zoning Board of Appeals was exercising its original jurisdiction pursuant to the town Board's delegation of special permit review authority to it pursuant to Town Law § 274-b(2), the initial "tie vote did not result in a default denial" and the Board could thereafter permissibly approve the application.[35]

B. Use Variances

A use variance authorizes a use that is not permitted by a municipality's zoning law in a particular zoning district.[36] As a result, the standard for establishing entitlement to relief is exceptionally arduous

27. 149 A.D.3d 1337, 1338, 51 N.Y.S.3d 705, 706 (3d Dep't 2017).

28. *Id.* at 1337, 51 N.Y.S.3d at 706.

29. *Id.* at 1337–38, 51 N.Y.S.3d at 706.

30. *Id.* at 1338, 51 N.Y.S.3d at 706.

31. *Id.*

32. *Alper Rest. Inc.*, 149 A.D.3d at 1338, 51 N.Y.S.3d at 706.

33. *Id.*

34. *Id.* at 1338, 51 N.Y.S.3d at 706–07 (citing TERRY RICE, PRACTICE COMMENTARY, MCKINNEY'S CONS. LAWS OF N.Y., Book 61, § 267-a (2013)); N.Y. TOWN LAW § 267-a(13)(b) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 2011).

35. N.Y. TOWN LAW § 274-b(2) (McKinney 2013); *Alper Rest. Inc.*, 149 A.D.3d at 1338, 51 N.Y.S.3d at 706–07 (citing COPAKE, N.Y., CODE § 232-28(C) (2006)).

36. *See* Croissant v. Zoning Bd. of Appeals of Woodstock, 83 A.D.2d 673, 674, 442 N.Y.S.2d 235, 237 (3d Dep't 1981) (citing Vill. of Bronxville v. Francis 1 A.D.2d 236, 239, 150 N.Y.S.2d 906, 909 (2d Dep't 1956)). "'Use variance' shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations." N.Y. TOWN LAW § 267(1)(a) (McKinney 2013).

and, by the terms of the statute, an applicant must satisfy each of the enumerated criteria pursuant to the requirements of Town Law § 267-b(2)(b) and Village Law § 7-712-b(2)(b).[37] Notably, if the "hardship" upon which a use variance application is premised is self-created, a variance may not be granted.[38] The petitioner in *Expressview Development, Inc. v. Town of Gates Zoning Board of Appeals* owned property adjacent to an interstate highway.[39] Five of the six landlocked, undeveloped parcels that constituted the property had obtained approval for development as an industrial park in 1982.[40] The petitioner "purchased the parcels and a sixth adjacent parcel in 1986, but [] never developed the property in accordance with the [approved] plan."[41] The petitioner attempted to sell the property in 2009 and the only offer came from the petitioner Expressview Development, contingent upon its obtaining variances that would permit "it to construct billboards that would be visible from the highway."[42] The proposed billboards were impermissible because the zoning law prohibited "commercial signs not located on the site of the business which they advertise."[43] The Zoning Board of Appeals denied the requested use and area variances and the petitioners instituted a hybrid Article 78 proceeding and declaratory judgment action seeking to annul the determination of the Zoning Board of Appeals and for a declaration that the provision of the zoning law was unconstitutional.[44] The appellate division affirmed the dismissal of the petition-complaint.[45]

The petitioner had failed to establish compliance with the standards necessary for entitlement to a use variance.[46] Substantial evidence supported the conclusion that the hardship was self-created.[47] "Although subsequent changes in economic conditions may have rendered the approved industrial park plan financially infeasible, the record establishe[d] that the extent of the limitations on the property of which

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

38. Clark v. Bd. of Zoning Appeals of Hempstead, 301 N.Y. 86, 89, 92 N.E.2d 903, 903 (1950), *cert. denied*, 340 U.S. 933 (1951) (citing Henry Steers, Inc. v. Rembaugh, 259 A.D. 908, 909, 20 N.Y.S.2d 72, 74 (2d Dep't 1940)).

39. 147 A.D.3d 1427, 1428, 46 N.Y.S.3d 725, 727 (4th Dep't 2017).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Expressview Dev., Inc.*, 147 A.D.3d at 1428, 46 N.Y.S.3d at 727.

45. *Id.* at 1430–31, 46 N.Y.S.3d at 729.

46. *Id.* at 1429, 46 N.Y.S.3d at 728 (citing N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2013)).

47. *Id.* (citing TOWN § 267-b(2)(b)(4)).

[the petitioner's predecessor] knew or should have known at the time of the purchase remained."[48] In fact, the petitioner "purchased the property after the approval of the industrial park plan, the adoption of the applicable zoning restrictions, and the construction of the highway adjacent to the property."[49] Consequently, the property always was the identically-vacant, "oddly-shaped, difficult-to-develop property that" had been purchased.[50] Although the purchase subsequently may be considered to be a bad investment, the "courts are not responsible for 'guarantee[ing] the investments of careless land buyers.'"[51] The court also appropriately concluded that the record contained substantial evidence substantiating the conclusion that the billboards would have a detrimental impact on the character of the neighborhood because the area could not aesthetically support additional signs.[52]

C. Area Variances

Although the substantiality of variances sought are a pertinent consideration in assessing an area variance application, substantiality cannot be judged solely by a comparison of the percentage deviation from the mandated requirements of a zoning regulation.[53] Instead, the overall effect of the granting of relief is the germane inquiry.[54] The approval of an area variance of 296 feet to allow a front-yard setback of approximately 302 feet, where the requirement was a maximum front setback of 5 feet, to permit a lodging facility was sustained in *Beekman Delamater Props., LLC v. Village of Rhinebeck Zoning Board of Appeals*.[55] The Zoning Board of Appeals evaluated and appropriately weighed the relevant factors in granting the requested area variance.[56] Although the variance was substantial, there was no evidence that granting relief would produce a detrimental change in the character of the neighborhood or have an adverse impact on the physical and environmental conditions in the area,

48. *Id.* at 1430, 46 N.Y.S.3d at 729.

49. *Expressview Dev., Inc.*, 147 A.D.3d at 1430, 46 N.Y.S.3d at 729.

50. *Id.*

51. *Id.* (quoting Barby Land Corp. v. Ziegner, 65 A.D.2d 793, 794, 410 N.Y.S.2d 312, 313 (2d Dep't 1978)) (first citing Kontogiannis v. Fritts, 131 A.D.2d 944, 946, 516 N.Y.S.2d 536, 538 (3d Dep't 1987); and then citing Carriage Works Enters., Ltd., v. Siegel, 118 A.D.2d 568, 570, 499 N.Y.S.2d 439, 441 (2d Dep't 1986)).

52. *Id.* (first citing N.Y. TOWN LAW § 267-b(2)(b)(3) (McKinney 2013); then citing Cromwell v. Ferrier, 19 N.Y.2d 263, 272, 225 N.E.2d 749, 755, 279 N.Y.S.2d 22, 30 (1967)).

53. Niceforo v. Zoning Bd. of Appeals of Huntington, 147 A.D.2d 483, 484–85, 537 N.Y.S.2d 579, 580–81 (2d Dep't 1989).

54. *See id.* at 484, 537 N.Y.S.2d at 580.

55. 150 A.D.3d 1099, 1100, 57 N.Y.S.3d 57, 60 (2d Dep't 2017).

56. *Id.* at 1101, 57 N.Y.S.3d at 61.

that the benefit to the applicant could be achieved by other means or that the difficulty was self-created.[57]

D. Conditions

Town Law § 267-b(4) and Village Law § 7-712-b(4) explicitly authorize a Zoning Board of Appeals to impose reasonable conditions and restrictions in granting area or use variances.[58] Nevertheless, such conditions must be directly related to and incidental to the proposed use of the property and must be designed to minimize the deleterious impact on the neighborhood caused by the variance.[59]

> Such conditions are proper because they relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of that use. Conditions imposed to protect the surrounding area from a particular land use are consistent with the purposes of zoning, which seeks to harmonize the various land uses within a community.[60]

In *Bonefish Grill, LLC v. Zoning Board of Appeals of Rockville Centre*, a condition of a parking variance which limited the hours of operation of a restaurant to coincide with the availability of the majority of its adjacent parking capacity was challenged.[61] Although the proposed restaurant was required to provide fifty-four off-street parking spaces, the property did not have any off-street parking spaces.[62] In order to furnish the requisite number of off-street parking spaces, the petitioner proposed to merge the subject property with an adjoining property.[63] The building department issued a building permit and when the restaurant was substantially completed, the building department discovered that the proposed merger had not occurred.[64] The building department required the petitioner to apply for a parking variance before it would issue a

57. *Id.*

58. N.Y. TOWN LAW § 267-b(4) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-b(4) (McKinney 2011).

59. St. Onge v. Donovan, 71 N.Y.2d 507, 515–16, 522 N.E.2d 1019, 1022–23, 527 N.Y.S.2d 721, 724–25 (1988) (quoting Pearson v. Shoemaker, 25 Misc. 2d 591, 591–92, 202 N.Y.S.2d 779, 780 (Sup. Ct. Rockland Cty. 1960)).

60. *Id.* at 516, 522 N.E.2d at 1023, 527 N.Y.S.2d at 725 (first citing Collard v. Incorporated Flower Hill, 52 N.Y.2d 594, 602, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981); and then citing Udell v. Haas, 21 N.Y.2d 463, 469–70, 235 N.E.2d 897, 901, 288 N.Y.S.2d 888, 894 (1968)).

61. 153 A.D.3d 1394, 1396, 61 N.Y.S.3d 623, 625–26 (2d Dep't 2017).

62. *Id.* at 1396, 61 N.Y.S.3d at 625.

63. *Id.*

64. *Id.*

certificate of occupancy.[65]

In seeking the variance, the petitioner provided a license agreement which allowed exclusive access to the adjoining property's forty parking spaces between 4:00 p.m. and 12:30 a.m. on Mondays through Fridays.[66] The Zoning Board of Appeals granted the parking variance but imposed a condition that restricted the restaurant's operating hours to 4:00 p.m. through 12:30 a.m. on Mondays through Fridays and required valet parking.[67]

In rejecting the restaurant's challenge and in sustaining the validity of the conditions, the court reiterated that "[a] zoning board may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit."[68] "However, 'if a zoning board imposes unreasonable or improper conditions, those conditions may be annulled although the variance is upheld.'"[69]

"'The need to alleviate traffic congestion by requiring adequate parking facilities' is a legitimate consideration for a Zoning Board of Appeals."[70] Accordingly, the conditions were permissible and proper because they "related directly to the use of the land and were intended to protect the neighboring commercial properties from the potential adverse effects of the petitioner's operation, such as the anticipated increase of traffic congestion and parking problems."[71]

It was additionally determined that the decision and conditions were substantiated by empirical evidence and testimony in the record.[72] The Zoning Board of Appeals could permissibly rely on the testimony of local

65. *Id.*

66. *Bonefish Grill, LLC*, 153 A.D.3d at 1396, 61 N.Y.S.3d at 625.

67. *Id.* at 1396, 61 N.Y.S.3d at 625–26.

68. *Id.* at 1397, 61 N.Y.S.3d at 626 (quoting St. Onge v. Donovan, 71 N.Y.2d 507, 515–16, 522 N.E.2d 1019, 1022–23, 527 N.Y.S.2d 721, 725 (1988)) (first citing N.Y. VILLAGE LAW § 7-712-b(4) (McKinney 2011); and then citing Rendely v. Town of Huntington, 44 A.D.3d 864, 865, 843 N.Y.S.2d 668, 670 (2d Dep't 2007)).

69. *Id.* (quoting Martin v. Brookhaven Zoning Bd., 34 A.D.3d 811, 812, 825 N.Y.S.2d 244, 246 (2d Dep't 2006)).

70. *Id.* at 1398, 61 N.Y.S.3d at 626–27 (quoting FNR Home Constr. Corp. v. Downs, 57 A.D.3d 540, 542, 868 N.Y.S.2d 310, 313 (2d Dep't 2008)).

71. *Bonefish Grill, LLC*, 153 A.D.3d at 1397–98, 61 N.Y.S.3d at 626 (first citing Milt-Nik Land Corp. v. City of Yonkers, 24 A.D.3d 446, 449, 806 N.Y.S.2d 217, 221 (2d Dep't 2005); then citing Plandome Donuts, Inc. v. Mammima, 262 A.D.2d 491, 491, 692 N.Y.S.2d 111, 112 (2d Dep't 1999); then citing Moundroukas v. Nadel, 223 A.D.2d 645, 646, 636 N.Y.S.2d 843, 844 (2d Dep't 1995); and then citing *FNR Home Constr. Corp.*, 57 A.D.3d at 542, 868 N.Y.S.2d at 313).

72. *Id.* at 1398, 61 N.Y.S.3d at 627.

store owners because "a zoning board's reliance upon specific, detailed testimony of neighbors based on personal knowledge does not render a variance determination the product of generalized and conclusory community opposition."[73] In addition, the members of the Zoning Board of Appeals "were also entitled to rely on their own personal knowledge of the area . . . ."[74]

E. Standard of Review

The standard of review for a court assessing an Article 78 proceeding contesting a decision of a Zoning Board of Appeals was reiterated in *Bartz v. Village of Leroy*.[75] If a determination is within the scope of authority delegated to a Board, a court may not invalidate the decision unless it is arbitrary, capricious, or unlawful.[76] "Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion."[77] Thus, a court's function is concluded once it determines that a rational basis supports a determination.[78] If an interpretation or decision has a rational basis, it must be affirmed even if a court might have reached a contrary conclusion.[79] It is not within the jurisdiction of a reviewing court to weigh the evidence or reject the choice made by the Zoning Board of Appeal if the evidence was conflicting and room for choice exists because great deference is accorded the findings of local boards.[80]

73. *Id.* (quoting Ramapo Pinnacle Props., LLC v. Vill. of Airmont Planning Bd., 145 A.D.3d 729, 731, 45 N.Y.S.3d 105, 107 (2d Dep't 2016)) (citing Fagan v. Colson, 49 A.D.3d 877, 878, 856 N.Y.S.2d 153, 154 (2d Dep't 2008)).

74. *Id.* (citing Colin Realty Co. v. Town of N. Hempstead, 107 A.D.3d 708, 710, 966 N.Y.S.2d 501, 503 (2d Dep't 2013)).

75. No. 93734, 2017 N.Y. Slip Op. 50418(U), at 3 (Sup. Ct. Genesee Cty. Jan. 31, 2017).

76. *Id.* (citing Castle Props. Co. v. Ackerson, 163 A.D.2d 785, 786, 558 N.Y.S.2d 334, 336 (3d Dep't 1990)).

77. *Id.* (quoting Pell v. Bd. of Educ., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 325, 356 N.Y.S.2d 833, 839 (1974)).

78. *Id.* (citing Howard v. Wyman, 28 N.Y.2d 434, 438, 271 N.E.2d 528, 530, 322 N.Y.S.2d 683, 686 (1971)).

79. *Id.* (first citing Mid-State Mgmt. Corp. v. N.Y.C. Conciliation & Appeals Bd., 112 A.D.2d 72, 76, 491 N.Y.S.2d 634, 637 (1st Dep't 1985); and then citing Savetsky v. Zoning Bd. of Appeals of Southampton, 5 A.D.3d 779, 780, 774 N.Y.S.2d 188, 189 (2d Dep't 2004)).

80. *Bartz*, 2017 N.Y. Slip Op. 50418(U), at 3 (first citing Calvi v. Zoning Bd. of Appeals of Yonkers, 238 A.D.2d 417, 418, 656 N.Y.S.2d 313, 314 (2d Dep't 1997); then citing Ifrah v. Utschig, 98 N.Y.2d 304, 308, 774 N.E.2d 732, 734, 746 N.Y.S.2d 667, 669 (2002); then citing Halperin v. City of New Rochelle, 24 A.D.3d 768, 771, 809 N.Y.S.2d 98, 104 (2d Dep't 2005); and then citing Mejias v. Town of Shelter Island Zoning Bd. of Appeals, 298 A.D.2d 458, 458, 751 N.Y.S.2d 409, 409 (2d Dep't 2002)).

III. SPECIAL PERMITS

The inclusion of a use in a zoning law as a special permit use 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."[81] As a result, classification as a special permit use results in a strong presumption in favor of the use.[82] Nevertheless, "[e]ntitlement to a special exception is not a matter of right."[83] "Failure to comply with any condition upon a special exception, however, is sufficient ground for denial of the exception."[84]

In *Beekman Delamater Properties, LLC v. Village of Rhinebeck Zoning Board of Appeals*, the special permit standards required that buildings be erected near the sidewalk, that off-street parking generally be set behind buildings and located in the interior of lots, and that buildings ordinarily "be located on small lots with small or non-existent front yards."[85] A lodging house was proposed to be located 302 feet from the sidewalk.[86] In confirming the granting of a special permit, the court reiterated that a board possesses "broad discretion in reaching its determination on site plan and special permit applications."[87] Accordingly, "judicial review is limited to determining whether the action was illegal, arbitrary, or an abuse of discretion."[88] "[C]ourts consider substantial evidence only to determine whether the record

81. Retail Prop. Trust v. Bd. of Zoning Appeals, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 731, 746 N.Y.S.2d 662, 666 (2002) (quoting N. Shore Steak House, Inc. v. Bd. of Appeals, 30 N.Y.2d 238, 243, 282 N.E.2d 606, 609, 331 N.Y.S. 645, 649 (1972)); Wegmans Enters., Inc., v. Lansing, 72 N.Y.2d 1000, 1001, 530 N.E.2d 1292, 1293, 534 N.Y.S.2d 372, 373 (1988).

82. Cove Pizza, Inc. v. Hirshon, 61 A.D.2d 210, 213, 401 N.Y.S.2d 838, 840 (2d Dep't 1978) (citing *N. Shore Steak House, Inc.*, 30 N.Y.2d at 243, 282 N.E.2d at 609, 331 N.Y.S. at 649).

83. Tandem Holding Corp. v. Bd. of Zoning Appeals, 43 N.Y.2d 801, 802, 373 N.E.2d 282, 283, 402 N.Y.S.2d 388, 389 (1977) (citing Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 24, 181 N.E.2d 407, 408, 226 N.Y.S.2d 374, 376 (1962)).

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

85. 150 A.D.3d 1099, 1102, 57 N.Y.S.3d 57, 62 (2d Dep't 2017) (citing RHINEBECK, N.Y. ZONING LAW § 120-19 (1977)).

86. *Id.* at 1100, 57 N.Y.S.3d at 60.

87. *Id.* at 1102–03, 57 N.Y.S.3d at 62 (first citing Ifrah v. Utschig, 98 N.Y.2d 304, 308, 774 N.E.2d 732, 734, 746 N.Y.S.2d 667, 669 (2002); then citing Davies Farm, LCC v. Planning Bd. of Clarkstown, 54 A.D.3d 757, 758, 864 N.Y.S.2d 84, 85 (2d Dep't 2008); then citing Gallo v. Rosell, 52 A.D.3d 514, 515, 859 N.Y.S.2d 675, 676 (2d Dep't 2008); and then citing Halperin v. City of New Rochelle, 24 A.D.3d 768, 771, 809 N.Y.S.2d 98, 104 (2d Dep't 2005)).

88. *Id.* at 1103, 57 N.Y.S.3d at 62 (first citing *Ifrah*, 98 N.Y.2d at 308, 774 N.E.2d at 734, 746 N.Y.S.2d at 669; then citing *Davies Farm, LCC*, 54 A.D.3d at 758, 864 N.Y.S.2d at 85; then citing *Gallo*, 52 A.D.3d at 515, 859 N.Y.S.2d at 676; and then citing *Halperin*, 24 A.D.3d at 771, 809 N.Y.S.2d at 104).

contains sufficient evidence to support the rationality of the [b]oard's determination.'"[89]

The planning board in *Beekman Delamater Properties, LLC* had properly weighed the germane statutory considerations and its decision was not illegal, arbitrary, or capricious.[90] The court concluded

> that, due to the configuration of the lot and the project's design, adherence to the front-yard setback requirement was not possible, development of the project otherwise met the principles established for the Village Center, and the inclusion of the health and wellness spa as a specially permitted ancillary use would have no greater impact on the site than the full development of the site with other permitted uses, had a rational basis.[91]

IV. STATUTE OF LIMITATIONS AND RELATION-BACK DOCTRINE

In addition to suing the municipal board which granted a land use approval, one challenging an approval must also sue the owner of the property for which an approval has been granted.[92] One who fails to name such a necessary party may attempt to alleviate the potentially fatal deficiency by filing an amended petition naming the omitted party.[93] However, as is illustrated by the decision in *Sullivan v. Planning Board of the Town of Mamakating*, such an endeavor is likely to be untimely as a consequence of the abbreviated statute of limitations unless the petitioner can employ the relation-back doctrine.[94]

A special permit and site plan application was approved in *Sullivan* for the construction of a telecommunications tower.[95] A neighboring

89. *Id.* (quoting *Gallo*, 52 A.D.3d at 515, 859 N.Y.S.2d at 676–77).

90. *Beekman*, 150 A.D.3d at 1103, 57 N.Y.S.3d at 62.

91. *Id.* (citing Rivero v. Voelker, 38 A.D.3d 784, 786, 832 N.Y.S.2d 616, 617 (2d Dep't 2007)).

92. *See* Karmel v. White Plains Common Council, 284 A.D.2d 464, 465, 726 N.Y.S.2d 692, 693 (2d Dep't 2001) (first citing N.Y. C.P.L.R. 1001(a) (McKinney 2006); then citing Manupella v. Troy City Zoning Bd. of Appeals, 272 A.D.2d 761, 763, 707 N.Y.S.2d 707, 710 (3d Dep't 2000); and then citing Sarva v. Tura Assocs., 204 A.D.2d 422, 423, 612 N.Y.S.2d 62, 63 (2d Dep't 1994)); Ferruggia v. Zoning Bd. of Appeals, 5 A.D.3d 682, 682, 774 N.Y.S.2d 760, 760 (2d Dep't 2004) (first citing Long Island Pine Barrens Soc'y v. Town of Islip, 286 A.D.2d 683, 683, 729 N.Y.S.2d 907, 907 (2d Dep't 2001); then citing *Karmel*, 284 A.D.2d at 465, 726 N.Y.S.2d 692; then citing *Manupella*, 272 A.D.2d at 763, 707 N.Y.S.2d at 710; then citing Artrip v. Incorporated Piermont, 267 A.D.2d 457, 457, 700 N.Y.S.2d 844, 845 (2d Dep't 1999); then citing Saunders v. Graboski, 282 A.D.2d 610, 610, 723 N.Y.S.2d 403, 404 (2d Dep't 2001); and then citing Save Our-Open Space v. Planning Bd., 246 A.D.2d 581, 582, 682 N.Y.S.2d 869, 869 (2d Dep't 1998)).

93. *See* Sullivan v. Planning Bd. of Mamakating, 151 A.D.3d 1518, 1519, 58 N.Y.S.3d 692, 694 (3d Dep't 2017).

94. *Id.* (holding that the petitioner failed to establish the three-prong test to employ the relation-back doctrine and accordingly the petition was time-barred).

95. *Id.* at 1519, 58 N.Y.S.3d at 694.

property owner challenged the approval in an Article 78 proceeding instituted against the telecommunications company and Planning Board, but the petitioner failed to name or serve the property owner.[96] After the court ruled that the property owner was a necessary party, the petitioner filed an amended petition naming the property owner as an additional respondent.[97] The supreme court granted the motion to dismiss the petition, concluding that the statute of limitations had run and that the relation back doctrine was inapplicable.[98]

The appellate division determined that the petitioners had failed to demonstrate that the relation back doctrine applied.[99] The relation back doctrine allows "a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment" if the petitioner can demonstrate that "the claims arose out of the same occurrence," the subsequently added "respondent [was] united in interest with a previously named respondent," and that the subsequently added respondent "knew or should have known that, but for a mistake by [the] petitioners as to the subsequently added respondent's identity, the proceeding also would have been brought against" them.[100]

The petitioners failed to satisfy the second prerequisite of the evaluation.[101] Although the telecommunications carrier and property owner may have the identical objective in opposing the petition, "that, in and of itself, does not create a unity of interest such that an action against [the owner] relates back to the filing date of the petition."[102] The telecommunications carrier's interest was to provide wireless coverage, while the owner's interest relates to the use of the real property.[103] "Such divergent long-term interests cannot be guaranteed to protect [Hart] from future prejudice in the case."[104] Accordingly, the property owner was "not

96. *Id.*

97. *Id.*

98. *Sullivan*, 151 A.D.3d at 1519, 58 N.Y.S.3d at 694.

99. *Id.*

100. *Id.* at 1519–20, 58 N.Y.S.3d at 694 (first citing Emmett v. Town of Edmeston, 2 N.Y.3d 817, 818, 814 N.E.2d 430, 431, 781 N.Y.S.2d 260, 261 (2004); then citing Buran v. Coupal, 87 N.Y.2d 173, 178, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995); and then citing Ayuda Re Funding, LLC v. Town of Liberty, 121 A.D.3d 1474, 1475, 996 N.Y.S.2d 379, 380–81 (3d Dep't 2014)).

101. *Id.* at 1520, 58 N.Y.S.3d at 694.

102. *Id.* at 1520, 58 N.Y.S.3d at 695 (quoting Red Hook/Gowanus Chamber of Commerce v. N.Y.C. Bd. of Standards & Appeals, 5 N.Y.3d 452, 457, 839 N.E.2d 878, 880, 805 N.Y.S.2d 525, 527 (2005)).

103. *Sullivan*, 151 A.D.3d at 1520, 58 N.Y.S.3d at 695.

104. *Id.* (quoting *Red Hook/Gowanus Chamber of Commerce*, 5 N.Y.3d at 457, 839 N.E.2d at 880, 805 N.Y.S.2d at 527).

united in interest" with the telecommunications carrier.[105]

The petitioners "also failed to establish" satisfaction of the third prong.[106] The petitioners had correctly identified the property owner in the initial petition, barring any argument that they had "made a mistake in identifying" the proper property owner.[107] The "fact that a petitioner is aware of the existence of a property owner but fails" to comprehend "that the property owner is legally required to be named in a proceeding" prevents application of the relation back doctrine.[108]

The decision emphasizes that the owner of property that is the subject of a land use application, as well as the applicant, must be made a party to a proceeding challenging an approval in a timely manner or the inescapable result will be dismissal of the proceeding.

V. MONEY IN LIEU OF RECREATION

Pursuant to Town Law § 277 and Village Law § 7-730, a planning board may require payment of a sum of money in lieu of the setting aside of recreation land if it is determined that "a suitable park or parks of adequate size . . . cannot be properly located on such subdivision plat."[109] In *Westhampton Beach Associates, LLC v. Incorporated Village of Westhampton Beach*, the plaintiff obtained the site plan approval for a 39-unit condominium project conditioned on the payment of a recreation fee "based upon the fair market value of a park area of 63,684 square feet with the amount to be set by the Board of Trustees of the Village."[110] After an appraisal of the plaintiff's property, the Board of Trustees "adopted a resolution establishing the amount" of the recreation fee to be $776,307.[111] "In 2012, the plaintiff sold the property to a nonparty."[112]

As a threshold issue, "the plaintiff's sale of the property to a

105. *Id.* (first citing *Red Hook/Gowanus Chamber of Commerce*, 5 N.Y.3d at 457, 839 N.E.2d at 880, 805 N.Y.S.2d at 527; then citing *Emmett*, 2 N.Y.3d at 818, 814 N.E.2d at 431, 781 N.Y.S.3d at 261; and then citing *Ayuda Re Funding, LLC*, 121 A.D.3d at 1475–76, 996 N.Y.S.2d at 381).

106. *Id.*

107. *Id.*

108. *Sullivan*, 151 A.D.3d at 1520, 58 N.Y.S.3d at 695 (first citing Branch v. Cmty. Coll. of Sullivan, 148 A.D.3d 1410, 1411, 48 N.Y.S.3d 861, 863 (3d Dep't 2017); then citing *Ayuda Re Funding, LLC*, 121 A.D.3d at 1476, 996 N.Y.S.2d at 381; and then citing Windy Ridge Farm v. Assessor of Shandaken, 45 A.D.3d 1099, 1099, 845 N.Y.S.2d 861, 862 (3d Dep't 2007)).

109. N.Y. TOWN LAW § 277(4)(c) (McKinney 2013); N.Y. VILLAGE LAW § 7-730(4)(c) (McKinney 2011).

110. Westhampton Beach Assocs., LLC v. Incorporated Westhampton Beach, 151 A.D.3d 793, 794, 56 N.Y.S.3d 518, 520 (2d Dep't 2017).

111. *Id.*

112. *Id.*

nonparty who was responsible for paying the Park Fee did not deprive the plaintiff of standing to challenge the constitutionality of [the provision]."[113] "[S]tanding requires an inquiry into whether the litigant has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request"[114] To establish standing, a plaintiff must demonstrate "that he or she will actually be harmed by the challenged action, and that the injury is more than" hypothetical.[115] Although the plaintiff sold the property before it paid any portion of the fee, a rider to the contract of sale reduced the sale price by the amount of the fee.[116] Although one generally does not "have standing to assert claims on behalf of another,"[117] the plaintiff possessed a sufficient interest in the claim to possess standing.[118]

The court also rejected the village's statute of limitations claim.[119] Because the action challenged the constitutionality of the recreation fee provision, it could not be asserted in an Article 78 proceeding.[120] Consequently, "the residual six-year statute of limitations, rather than the four-month statute of limitations applied to" Article 78 proceedings.[121]

The court rejected the contention that the provision was unconstitutionally vague.[122] "Due process requires that a statute be sufficiently definite 'so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms.'"[123] The challenged

113. *Id.* (citing WESTHAMPTON BEACH, N.Y., ZONING CODE art. VI, § 197-63 (2005)).

114. *Id.* at 795, 56 N.Y.S.3d at 520 (quoting Wells Fargo Bank Minn., N.A. v. Mastropaolo, 42 A.D.3d 239, 242, 837 N.Y.S.2d 247, 249–50 (2d Dep't 2007)).

115. *Westhampton Beach Assocs., LLC*, 151 A.D.3d at 795, 56 N.Y.S.3d at 520 (quoting Caprer v. Nussbaum, 36 A.D.3d 176, 183, 825 N.Y.S.2d 55, 63 (2d Dep't 2006)) (citing N.Y. State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211, 810 N.E.2d 405, 407, 778 N.Y.S.2d 123, 125 (2004)).

116. *Id.*

117. *Id.* at 795, 56 N.Y.S.3d at 520–21 (quoting *Caprer*, 36 A.D.3d at 182, 825 N.Y.S.2d at 62).

118. *Id.* at 795, 56 N.Y.S.3d at 521.

119. *Id.*

120. *Westhampton Beach Assocs., LLC*, 151 A.D.3d at 795, 56 N.Y.S.3d at 521 (first citing Save the Pine Bush, Inc., v. City of Albany, 70 N.Y.2d 193, 202, 512 N.E.2d 526, 529, 518 N.Y.S.2d 943, 946 (1987); then citing Ames Volkswagen, Ltd. v. State Tax Comm'n, 47 N.Y.2d 345, 348, 391 N.E.2d 1302, 1303–04, 418 N.Y.S.2d 324, 326 (1979); and then citing S. Liberty Partners, L.P. v. Town of Haverstraw, 82 A.D.3d 956, 958, 918 N.Y.S.2d 563, 565 (2d Dep't 2011)).

121. *Id.* at 795–96, 56 N.Y.S.3d at 521 (first citing N.Y. C.P.L.R. 213(1) (McKinney 2003 & Supp. 2018); and then citing N.Y. C.P.L.R. 217(1) (McKinney 2003)).

122. *Id.* at 796, 56 N.Y.S.3d at 521.

123. *Id.* (quoting Kaur v. N.Y. State Urban Dev. Corp., 15 N.Y.3d 235, 256, 933 N.E.2d 721, 732, 907 N.Y.S.2d 122, 133 (2010)).

provision provided that,

> In cases where the Planning Board determines that a reserved area cannot be properly located within the locus of the site plan, the applicant shall be required to pay a recreation area or park fee to the Village equal in amount to the fair market value at the time of the application procedure of the land area shown on the site plan that would otherwise be required for a reserved site . . . . The formula for the fee shall be the appraisal amount at the time of the application of the land area on the application as vacant land divided by the total area shown on the plan in square feet times 2,178 square feet of reserved area per dwelling times the number of dwelling units proposed on the plan.[124]

Contrary to the plaintiff's argument, the two provisions do not set forth inconsistent methods for calculating the recreation fee.[125] Instead, the second sentence relates a formula to be used in ascertaining the fair market value of the land area depicted on the site plan that otherwise would be reserved for park or recreation use.[126] That interpretation is consistent with the Planning Board's determination that the recreation fee be based on the fair market value of a park area of 63,684 square feet.[127] Accordingly, the provision was not unconstitutionally vague.[128]

VI. MOOTNESS

As a consequence of the doctrine of mootness, litigation challenging a land use approval may realize only an empty victory if the project has been substantially completed and he or she fails to act to maintain the status quo during the pendency of the action or proceeding.[129] In *PSEG Long Island, LLC v. Town of East Hampton*, a service provider for Long Island Lighting Company, "which is a subsidiary of the Long Island Power Authority [], a political subdivision of the State," sought to upgrade its transmission capacity between two substations located in the Town of East Hampton.[130] It was issued a stop work order upon commencement of construction of a new 6.2-mile overhead transmission line and modifications to the substations.[131] The town required it to obtain

124. *Id.* at 796–97, 56 N.Y.S.3d at 521–22 (quoting WESTHAMPTON BEACH, N.Y., ZONING CODE art. VI, § 197-63(Q)(2) (2005)).

125. *Westhampton Beach Assocs., LLC*, 151 A.D.3d at 797, 56 N.Y.S.3d at 522.

126. *Id.* (quoting WESTHAMPTON BEACH, N.Y., ZONING CODE § 197-63(Q)(2)).

127. *Id.*

128. *Id.*

129. *See* Dreikausen v. Zoning Bd. of Appeals, 98 N.Y.2d 165, 172–73, 774 N.E.2d 193, 196–97, 746 N.Y.S.2d 429, 432–33 (2002).

130. 154 A.D.3d 703, 704, 62 N.Y.S.3d 437, 439 (2d Dep't 2017).

131. *Id.*

a building permit and to comply with the New York State Uniform Fire Prevention and Building Code and the town zoning law.[132] The plaintiff instituted a declaratory and injunctive action "and moved for summary judgment declaring (1) that it is exempt from . . . local laws[] [and] regulations . . . that would otherwise govern the construction and maintenance of the [] transmission and distribution system, and (2) that the stop work order is null."[133] The supreme court determined that facilities were "exempt from all local legislation" and that the stop work order was a nullity.[134]

The appellate division denied the town's motion "to stay enforcement of the order and judgment pending determination of" its appeal.[135] The plaintiff then "moved to dismiss the appeal as" being academic, contending that the subsequent rescission of the stop work order by the town and completion and operation of the improvements rendered the appeal moot.[136]

> 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. Where the change in circumstances involves a construction project, [a court] must consider how far the work has progressed toward[] completion. Because a race to completion cannot be determinative, however, other factors bear on mootness in this context as well. Chief among them has been a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation.[137]

Additional considerations include "whether work was undertaken without authority or in bad faith, and whether substantially completed work is readily undone, without undue hardship" to the property owner.[138] Nevertheless, a court may, in its discretion, retain jurisdiction despite intervening "mootness if recurring novel or substantial issues are

132. *Id.*

133. *Id.*

134. *Id.*

135. *PSEG Long Island, LLC*, 154 A.D.3d at 704, 62 N.Y.S.3d at 439.

136. *Id.* at 704–05, 62 N.Y.S.3d at 439.

137. *Id.* (first alteration in original) (first quoting Dreikausen v. Zoning Bd. of Appeals, 98 N.Y.2d 165, 172, 774 N.E.2d 193, 196, 746 N.Y.S.2d 429, 432 (2002); and then quoting Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n, 2 N.Y.3d 727, 729, 811 N.E.2d 2, 4, 778 N.Y.S.2d 740, 742 (2004)) (citing Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 409 N.E.2d 876, 877–78, 431 N.Y.S.2d 400, 402 (1980)).

138. *Id.* (quoting *Citineighbors Coal. of Historic Carnegie Hill*, 2 N.Y.3d at 729, 811 N.E.2d at 4, 778 N.Y.S.2d at 742).

sufficiently" transitory to otherwise evade review.[139]

"[A]lthough the town attempted to preserve the *status quo* by unsuccessfully seeking a stay pending appeal, the [t]own" subsequently withdrew the stop work order.[140] Accordingly, "the plaintiff's completion of the construction was not done in bad faith."[141] The substation and improvements could not "be readily undone without [inflicting] undue hardship."[142] The court concluded that "[u]nder the circumstances, the issues of the validity of the stop work order and whether the plaintiff [was] exempt from" local laws and regulations "that would otherwise govern the . . . transmission and distribution system ha[d] been rendered academic."[143] Additionally, "none of the exceptions to the mootness doctrine [were] applicable."[144]

VII. ENFORCEMENT

Government officials possess broad discretion in determining whether and how to undertake enforcement actions.[145] In particular, pursuant to New York law, the determination of a municipality or its designated official whether or how to enforce a community's zoning laws is a discretionary function.[146] A mandamus proceeding generally is

139. *Id.* at 705, 62 N.Y.S.3d at 440 (quoting *Citineighbors Coal. of Historic Carnegie Hill*, 2 N.Y.3d at 729, 811 N.E.2d at 4, 778 N.Y.S.2d at 742).

140. *PSEG Long Island, LLC*, 154 A.D.3d at 705, 62 N.Y.S.3d at 440 (first citing Hidalgo v. 4-34-68, Inc., 117 A.D.3d 798, 799, 988 N.Y.S.2d 64, 66 (2d Dep't 2014); then citing E & J Sylcox Realty, Inc. v. Town of Newburgh Planning Bd., 12 A.D.3d 445, 446, 783 N.Y.S.2d 819, 820 (2d Dep't 2004); and then citing Town of Caroline v. Cty. of Tompkins, 299 A.D.2d 627, 628, 750 N.Y.S.2d 337, 338 (3d Dep't 2002)).

141. *Id.* at 705, 62 N.Y.S.3d at 440.

142. *Id.* at 705–06, 62 N.Y.S.3d at 440 (first citing *Town of Caroline*, 299 A.D.2d at 628, 750 N.Y.S.2d at 338; and then citing Save the Pine Bush v. Cuomo, 200 A.D.2d 859, 860, 606 N.Y.S.2d 818, 819–20 (3d Dep't 1994)).

143. *Id.* at 706, 62 N.Y.S.3d at 440 (first citing Bath Petroleum Storage, Inc. v. N.Y. State Dep't of Envtl. Conservation, 272 A.D.2d 746, 747, 709 N.Y.S.2d 636, 637 (3d Dep't 2000); and then citing *Save the Pine Bush*, 200 A.D.2d at 860, 606 N.Y.S.2d at 819–20).

144. *Id.* (citing Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714–15, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402–03 (1980)).

145. *See* Dyno v. Vill. of Johnson City, 261 A.D.2d 783, 784, 690 N.Y.S.2d 325, 327 (3d Dep't 1999) (first citing Khan v. Zoning Bd. of Appeals, 87 N.Y.2d 344, 351, 662 N.E.2d 782, 786, 639 N.Y.S.2d 302, 306 (1996); and then citing Sasso v. Osgood, 86 N.Y.2d 374, 384 n.2, 657 N.E.2d 254, 259 n.2, 633 N.Y.S.2d 259, 264 n.2 (1995)); Saks v. Petosa, 184 A.D.2d 512, 513, 584 N.Y.S.2d 321, 322 (2d Dep't 1992) (first citing Young v. Huntington, 121 A.D.2d 641, 642, 503 N.Y.S.2d 657, 657–58 (2d Dep't 1986); and then citing Fried v. Fox, 49 A.D.2d 877, 878, 373 N.Y.S.2d 197, 199 (2d Dep't 1975)); Citizens Accord. Inc. v. Town of Rochester, No. 98-CV-0715, 2000 U.S. Dist. LEXIS 4844, at *38 (N.D.N.Y. Apr. 18, 2000), *aff'd*, 29 F. App'x 767, 768 (2d Cir. 2002) (citing Gagliardi v. Vill. of Pawling, 18 F.3d 188, 192 (2d Cir. 1994)).

146. Manuli v. Hildenbrandt, 144 A.D.2d 789, 790, 534 N.Y.S.2d 763, 764 (3d Dep't

inappropriate to endeavor to compel a building inspector or code enforcement to act because mandamus will lie only to compel the performance of a ministerial act and only where there exists a clear legal right to the relief sought.[147] An Article 78 proceeding in the nature of mandamus to compel an act in respect to which the officer may exercise any discretion or judgment will not lie.[148]

In *Willows Condominium Ass'n v. Town of Greenburgh*, the petitioner instituted a mandamus proceeding seeking to compel the town and the building inspector to render a formal determination regarding its complaint of violations of the zoning law and to compel the Zoning Board of Appeals to hear and decide its appeal challenging the building inspector's failure to issue a formal determination of the contentions raised in its complaint letter.[149] The petitioner had previously sent a letter to the building inspector contending that a nearby nursery was "illegally manufacturing mulch and topsoil . . . ."[150] "The building inspector thereafter sent a notice of violation to the nursery, [directing] that it comply with applicable zoning laws."[151] The petitioner was not satisfied with the building inspector's actions and appealed to the Zoning Board of Appeals "to review the [b]uilding [i]nspector's failure to issue a formal determination of their complaint."[152] The petitioner then alleged in a mandamus petition that the Zoning Board of Appeals "declined to consider the merits of their application."[153] The appellate division affirmed the lower court's dismissal of the proceeding.[154]

> Mandamus . . . is an extraordinary remedy that, by definition, is available only in limited circumstances. [T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an

1988) (first citing *Young*, 121 A.D.2d at 642, 503 N.Y.S.2d at 657–58; then citing *Fried*, 49 A.D.2d at 878, 373 N.Y.S.2d at 199; and then citing Rottkamp v. Young, 21 A.D.2d 373, 375, 249 N.Y.S.2d 330, 334–35 (2d Dep't 1964)).

147. *See* Maron v. Silver, 14 N.Y.3d 230, 249, 925 N.E.2d 899, 907, 899 N.Y.S.2d 97, 105 (2010) (first citing Gimprich v. Bd. of Educ., 306 N.Y. 401, 406, 118 N.E.2d 578, 580 (1954); and then citing N.Y. C.P.L.R. 7801 (McKinney 2018)); Lee v. Marrus, 74 A.D.3d 1206, 1206, 902 N.Y.S.2d 411, 411 (2d Dep't 2010) (citing Legal Aid Soc'y of Sullivan Cty., Inc. v. Scheinman, 53 N.Y.2d 12, 16, 422 N.E.2d 542, 543–44, 439 N.Y.S.2d 882, 884 (1981)).

148. *See* Klostermann v. Cuomo, 61 N.Y.2d 525, 539, 463 N.E.2d 588, 595, 475 N.Y.S.2d 247, 254 (1984) (first citing *Gimprich*, 306 N.Y. at 406, 118 N.E.2d at 580; and then citing *Scheinman*, 53 N.Y.2d at 16, 422 N.E.2d at 543, 439 N.Y.S.2d at 884).

149. 153 A.D.3d 535, 536, 60 N.Y.S.3d 233, 235 (2d Dep't 2017).

150. *Id.* at 535, 60 N.Y.S.3d at 234.

151. *Id.*

152. *Id.* at 535, 60 N.Y.S.3d at 235.

153. *Id.*

154. *Willows Condo. Ass'n*, 153 A.D.3d at 536, 60 N.Y.S.3d at 235.

> exercise of judgment or discretion.
>
> A discretionary act involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result . . . .
>
> . . . . [M]andamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct how he [or she] shall perform that duty.[155]

Accordingly, "[a] party seeking mandamus must show a 'clear legal right' to relief."[156] As a result, "the decision to prosecute a suit is a matter left to the public officer's judgment and, therefore, cannot be compelled."[157]

In *Willows Condominium Ass'n*, the language of the town code did not impose a duty on the building inspector to issue a formal determination in response to every complaint received.[158] Instead, the decision as to how to respond to complaints of alleged zoning violations is left to the discretion of the building inspector.[159] Accordingly, the petitioner failed to allege a "clear legal right" to the issuance of a formal determination of the allegations of the complaint and the claim was properly dismissed.[160]

The petition also failed to sufficiently allege that the Zoning Board of Appeals had a non-discretionary duty to determine the merits of its application to review the failure of the building inspector to render a

155. *Id.* (first, second, fourth, and fifth alterations in original) (first omission in original) (first quoting Klostermann v. Cuomo, 61 N.Y.2d 525, 537, 463 N.E.2d 588, 594, 475 N.Y.S.2d 247, 253 (1984); then quoting Brusco v. Braun, 84 N.Y.2d 674, 679, 645 N.E.2d 724, 725, 621 N.Y.S.2d 291, 292 (1994); then quoting Tango v. Tulevech, 61 N.Y.2d 34, 41, 459 N.E.2d 182, 186, 471 N.Y.S.2d 73, 77 (1983); and then quoting People *ex rel.* Schau v. McWilliams, 185 N.Y. 92, 100, 77 N.E. 785, 787 (1906)) (first citing N.Y. Civil Liberties Union v. New York, 4 N.Y.3d 175, 184, 824 N.E.2d 947, 953, 791 N.Y.S.2d 507, 513 (2005); then citing *Klostermann*, 61 N.Y.2d at 540, 463 N.E.2d at 596, 475 N.Y.S.2d at 255; and then citing People *ex rel.* Hammond v. Leonard, 74 N.Y. 443, 446–47 (1878)).

156. *Id.* (quoting Cty. of Fulton v. New York, 76 N.Y.2d 675, 678, 564 N.E.2d 643, 644, 563 N.Y.S.2d 33, 34 (1990)) (citing Legal Aid Soc'y of Sullivan Cty. v. Scheinman, 53 N.Y.2d 12, 16, 422 N.E.2d 542, 543–44, 439 N.Y.S.2d 882, 884 (1981)).

157. *Id.* (quoting *Klostermann*, 61 N.Y.2d at 539, 463 N.E.2d at 595, 475 N.Y.S.2d at 254) (citing *Hammond*, 74 N.Y. 443, 446–47).

158. *See id.* at 537, 60 N.Y.S.3d at 235–36 (citing GREENBURGH, N.Y., CODE § 100-5(A) (2017)).

159. *Willows Condo. Ass'n*, 153 A.D.3d at 537, 60 N.Y.S.3d at 236 (first citing Saks v. Petosa, 184 A.D.2d 512, 513, 584 N.Y.S.2d 321, 322 (2d Dep't 1992); then citing Young v. Town of Huntington, 121 A.D.2d 641, 642, 503 N.Y.S.2d 657, 657–58 (2d Dep't 1986); and then citing Fried v. Fox, 49 A.D.2d 877, 878, 373 N.Y.S.2d 197, 199 (2d Dep't 1975)).

160. *See id.* (citing *Cty. of Fulton*, 76 N.Y.2d at 678, 564 N.E.2d at 644, 563 N.Y.S.2d at 34).

formal determination in response to its complaint.[161] Instead, Town Law § 267-a(4) restricts a Zoning Board of Appeals' appellate jurisdiction to reviewing an "order, requirement, decision, interpretation, or determination" of the zoning official.[162] The petition also failed to state a viable claim to mandamus because the petitioner failed to adequately allege a "clear legal right" to the issuance of a formal determination of the merits of their complaint to the Zoning Board of Appeals.[163]

VIII. FIFTH AMENDMENT TAKINGS

U.S. Supreme Court precedent had dictated that in assessing the impact of a regulation for takings purposes, one must view the entirety of the property and may not "segment" portions of the whole.[164] In *Penn Central Transportation Co. v. City of New York*, the Supreme Court determined that "'[t]akings' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[165] In *Penn Central*, the Supreme Court considered a landmark preservation ordinance that resulted in the owner being unable to erect a large building in the airspace above Grand Central Terminal.[166] The owner admitted that the existing train station provided viable economic uses, but argued that it had been totally deprived of the right to build above the station.[167] It argued that this was a complete deprivation of its use of that segment of its property, that is, the air rights.[168] The Supreme Court rejected the contention that the air rights could be separated for takings considerations.[169] The Court held that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments . . . ."[170] Instead, the Court focused "on the nature and extent of the interference with rights in the parcel as a whole—here, the

161. *See id.* (citing GREENBURGH, N.Y., CODE § 100-5(A)(5)).

162. *Id.* (quoting N.Y. TOWN LAW § 267-a(4) (McKinney 2013)) (citing GREENBURGH, N.Y., CODE § 285-48(A), (B) (2017)).

163. *See id.* (citing *Cty. of Fulton*, 76 N.Y.2d at 678, 564 N.E.2d at 644, 563 N.Y.S.2d at 34).

164. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131–32 (1978)); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting *Penn Cent. Trans. Co*., 438 U.S. at 130–31); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) (citing *Penn Cent. Trans. Co*., 438 U.S. at 130–31).

165. *Penn Cent. Trans. Co*., 438 U.S. at 130.

166. *Id.* at 116–17.

167. *Id.* at 130.

168. *Id.*

169. *Id.* at 130–31.

170. *Penn Cent. Trans. Co*., 438 U.S. at 130.

city tax block designated as the 'landmark site.'"[171]

This principle was reiterated in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, in which the Court rejected a piecemealing theory based on separate segments of property for takings law purposes, holding that "[m]any zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property."[172] In *Keystone*, a statute required companies mining subsurface coal to leave certain portions of the coal in place to support the surface above, thereby minimizing subsidence problems.[173] The plaintiffs argued that, for takings purposes, the twenty-seven million tons, which must be left unmined, constituted property of which they had been deprived all economic use.[174] The government argued that all of the coal available to be mined should be considered in assessing the existence of a remaining economic use.[175] The regulation of use in *Keystone* was analogized by the Court to a building setback: "A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that the coal pillars be left in place."[176] The *Keystone* Court concluded that

> under [the] petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. There is no basis for treating less than [two percent] of [the] petitioners' coal as a separate parcel of property.[177]

These and other decisions institutionalized the inflexible principle that one must consider the entirety of property in analyzing whether a taking has occurred. However, in *Murr v. Wisconsin*, the Supreme Court reconsidered whether a per se rule exists regarding the denominator of takings analysis or whether, as is frequently the case with Supreme Court takings jurisprudence, a more flexible, ad hoc analysis should apply.[178]

In *Murr v. Wisconsin*, the property owners claimed that the

171. *Id.* at 130–31.

172. 480 U.S. 470, 498 (1987); *see* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (citing Andrus v. Allard, 444 U.S. 51, 66 (1979)).

173. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 476–77 (citing 52 PA. STAT. § 1406.4 (1966) (repealed by 1994 Pa. Laws 54)).

174. *Id.* at 498.

175. *See id.* at 496 (citing 52 PA. STAT. § 1406.4).

176. *Id.* at 498.

177. *Id.* (*cf.* Gorieb v. Fox, 274 U.S. 603, 610 (1927)).

178. 137 S. Ct. 1933, 1943 (2017).

government had taken their undeveloped residential lot by the adoption of regulations which merged that lot with an adjacent lot containing a residence.[179] The petitioners were siblings who owned waterfront property on the St. Croix River in Wisconsin.[180] Their parents had purchased the property in the 1960s as two separate parcels.[181] They subsequently put the title of one in the name of the family business and later arranged for transfer of the two lots, on different dates, to the petitioners.[182] The county adopted land use regulations in 1976 pursuant to the Wild, Scenic and Recreational Rivers Act which established minimum lot sizes, grandfathered pre-existing "substandard" lots and adopted a "merger" provision for adjoining lots under common ownership.[183] The lots became substandard pursuant to those regulations.[184] After the regulations were effective, the parents conveyed the parcels to their children as a group, bringing both parcels under common ownership and thereby triggering the merger provision.[185] Because of the merger of the lots, they were unable to proceed with their plans to sell the unimproved lot and to utilize the proceeds to upgrade the cabin on the other lot.[186] The county denied their request for a variance.[187] They asserted a regulatory takings claim, contending that the regulation deprived them of "all, or practically all, of the use of [the unimproved lot] because the lot cannot be sold or developed as a separate lot."[188]

Reiterating the absence of bright-line rules, the Court related that it generally has refrained from announcing definitive taking rules.[189] Instead, "[t]his area of the law has been characterized by '*ad hoc*, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.'"[190] However, it has related two principles "for determining when government regulation is so onerous that it constitutes

179. *Id.* at 1939.

180. *Id.* at 1940.

181. *Id.*

182. *Id.*

183. 16 U.S.C. § 1274(a)(6) (2012); *Murr*, 137 S. Ct. at 1940; *see* WIS. ADMIN. CODE NR § 118.08(4)(a) (2017).

184. *Murr*, 137 S. Ct. at 1940; *see* WIS. ADMIN. CODE NR §§ 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b) (2017).

185. *Murr*, 137 S. Ct. at 1941 (citing Murr v. St. Croix Cty. Bd. of Adjustment, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011)).

186. *Id.*

187. *Id.*

188. *Id.* (quoting Joint Appendix at 9, *Murr*, 137 S. Ct. 1933 (2017) (No. 15-214)).

189. *Id.* at 1942; *see* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

190. *Murr*, 137 S. Ct. at 1942 (quoting Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002)).

a taking."[191] "First, 'with certain qualifications . . . a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause.'"[192]

> Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[193]

Recognizing the relevance of state law and land-use customs, the Court had announced in *Lucas* that "[t]he complete deprivation of use will not require compensation if the challenged limitations 'inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership.'"[194] "A central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility."[195]

In assessing whether a taking has occurred, the inquiry requires a determination of the "proper unit of property against which to assess the effect of the challenged governmental action."[196] In other words, one must determine that value of "the denominator of the fraction."[197] Accordingly, "[i]n some, though not all, cases the effect of the challenged regulation must be assessed and understood by the effect on the entire property held by the owner, rather than just some part of the property that, considered just on its own, has been diminished in value."[198] The Court's jurisprudence does not restrict "the parcel in an artificial manner to the portion of property targeted by the challenged regulation."[199] For example, in *Penn Central*, as is discussed above, the Court rejected a takings claim based on "the denial of a permit to build an office tower above Grand Central Terminal."[200] "The Court refused to measure the effect of the denial only against the 'air rights' above the terminal,

191. *Id.* at 1942.

192. *Id.* at 1942–43 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

193. *Id.* at 1942 (quoting *Palazzolo*, 533 U.S. at 617) (citing Penn Cent. Transp. Co., v. New York City, 438 U.S. 104, 124 (1978)).

194. *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).

195. *Murr*, 137 S. Ct. at 1943.

196. *Id.* at 1943.

197. *Id.* at 1943–44 (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987)).

198. *Id.* at 1944.

199. *Id.* at 1944.

200. *Murr*, 137 S. Ct. at 1944; *see* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 107 (1978).

cautioning that '[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.'"[201] In addition, "[a]lthough property interests have their foundations in state law . . . [s]tates do not have the unfettered authority to 'shape and define property rights and reasonable investment-backed expectations,' leaving landowners without recourse against unreasonable regulations."[202]

Consequently, no individual factor provides the exclusive analysis "for determining the denominator."[203]

> Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.[204]

"First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property."[205] The fact that "a purchaser took title after a law was enacted" does not necessarily defeat a takings claim because "a reasonable restriction that predates a landowner's acquisition [may] be one of the objective factors that [a landowner] would reasonably consider in establishing fair expectations about their property."[206] Similarly, a "restriction which is triggered only after, or because of, a change in ownership" is also a relevant factor in ascertaining private expectations.[207]

Second, the physical characteristics of the property, including "the physical relationship of any distinguishable tracts, the parcel's topography and the surrounding human and ecological environment" are germane considerations.[208] It is particularly significant if "property is

201. *Murr*, 137 S. Ct. at 1944 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 130).

202. *Id.* at 1944–45 (quoting Palazzolo v. Rhode Island, 533 U.S 606, 626 (2001)).

203. *Id.* at 1945.

204. *Id.* (*cf.* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)).

205. *Id.* (citing Ballard v. Hunter, 204 U.S. 241, 262 (1907)).

206. *Murr*, 137 S. Ct. at 1945 (citing *Palazzolo*, 533 U.S. at 627).

207. *Id.*

208. *Id.*

located in an area that is subject to, or likely to become subject to, environmental or other regulation" which restrict its use.[209] Third, the value of the property burdened by the challenged regulation must be assessed with particular consideration "to the effect of burdened land on the value of other" property of the same owner.[210] "Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty."[211] However,

> if the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the weakness of a regulatory takings challenge to the law.[212]

In *Murr*, the Court rejected the State's suggestion that the definition of the parcel be determined by reference to state law, which classified the two lots as a single lot.[213] That approach was inappropriate because, although the *Lucas* rationale considers state law, it also assesses whether the state regulations are consistent "with other indicia of reasonable expectations" regarding the property at issue.[214] The Court also rejected the petitioners' contention that lot lines presumptively define the germane parcel in every instance, thereby making the vacant lot in *Murr* the denominator, because "lot lines are [] creatures of state law which can be" modified by the State.[215]

The Court determined "that for purposes of determining whether a regulatory taking has" transpired, the "petitioners' property should be evaluated as a single parcel consisting of" the merged lots.[216] "First, the treatment of the property under state and local law" substantiates that the "property should be treated as one when considering the effects of the restrictions."[217] "Second, the physical characteristics of the property"

209. *Id.* at 1945–46 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)).

210. *Id.* at 1946.

211. *Murr*, 137 S. Ct. at 1946.

212. *Id.*

213. *See id.*

214. *Id.* at 1946–47.

215. *Id.* at 1947.

216. *Murr*, 137 S. Ct. at 1948.

217. *Id.*

buttresses its treatment as a single parcel.[218] "The lots are contiguous along their" lengthiest side and the "rough terrain and narrow shape make it reasonable to expect" that the potential use be limited.[219] In addition, because of the location of the property along the river, the petitioners should have expected that "public regulation might affect" the use of the property because "the Lower St. Croix was a regulated area" before the petitioners owned the land.[220] Third, the value that the vacant lot brings to the improved lot substantiates considering the two lots "as one parcel for purposes of determining if there is a regulatory taking."[221] The Court held the two lots may not be sold separately nor may an additional residence be built on either lot.[222] However, this restriction is ameliorated by the benefit of being able to utilize the property as a combined whole.[223]

"Considering [the] petitioners' property as a whole," a compensable taking had not occurred.[224] The petitioners did not suffer a "taking under *Lucas* as they have not been deprived of all economically beneficial use of their property."[225] They can utilize the "property for residential purposes, including an" improved, larger residence.[226] Because the value of the merged property has "decreased by less than [ten] percent," it has not lost all economic value.[227]

In addition, the petitioners did not incur a taking pursuant to the general considerations of *Penn Central*.[228] The economic impact of the regulation is not acute.[229] The "[p]etitioners cannot claim that they reasonably expected" to be able to sell or develop their lots separately because the regulations "predated their acquisition of both" parcels.[230] Lastly, "the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local" endeavor "to preserve the river and surrounding area."[231]

The Court concluded that "[l]ike the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory

218. *Id.*
219. *Id.* (citing Petition for Writ of Certiorari at A-5, *Murr*, 137 S. Ct. 1933 (No. 15-214)).
220. *Id.*
221. *Murr*, 137 S. Ct. at 1948.
222. *Id.*
223. *Id.* (citing Petition for Writ of Certiorari at B-9, *Murr*, 137 S. Ct. 1933 (No. 15-214)).
224. *Id.* at 1949.
225. *Id.* at 1949 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).
226. *Murr*, 137 S. Ct. at 1949 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001)).
227. *Id.* (citing *Lucas*, 505 U.S. at 1009 n.8).
228. *See id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
229. *See id*.
230. *Id.*
231. *Murr*, 137 S. Ct. at 1949–50.

takings cases cannot be solved by any simple test."[232] Instead, "[c]ourts must instead define the parcel in a manner that reflects reasonable expectations about the property."[233]

Although eschewing a per se rule and, instead, announcing a multi-factor test to guide courts in ascertaining the denominator for takings analysis, it is unlikely that the decision will change the ultimate result in the vast majority of taking cases. Efforts to segment property interests are likely to be universally unsuccessful because, even applying the Court's guidelines, most property interests which are the subject of a takings claim are characterized by a unity of factors which require that the entirety of the property interests be analyzed as one.

232. *Id.* at 1950 (quoting Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012)).

233. *Id.*