

## ZONING AND LAND USE

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### I. ZONING LAWS

#### A. *Spot Zoning*

“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.”<sup>1</sup> To be contrasted with impermissible spot zoning, zoning designations that are consistent with the goals set forth in a municipality’s comprehensive plan to advance the general welfare of the community are not, by definition, “spot zoning.”<sup>2</sup>

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1. *Rodgers v. Vill. of Tarrytown*, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951) (first citing *Harris v. City of Piedmont*, 42 P.2d 356, 358–59 (Cal. Ct. App. 1935); then citing *Cassel v. Baltimore*, 73 A.2d 486, 488–89 (Md. 1950); then citing *Bd. of Cty. Comm’r. of Anne Arundel Co. v. Snyder*, 146 A.2d 689, 691 (Md. 1945); then citing *Leahy v. Inspector of Bldgs. of New Bedford*, 31 N.E.2d 436, 439 (Mass. 1941); then citing *Page v. Portland*, 165 P.2d 280, 284 (Or. 1946); then citing *Weaver v. Ham*, 232 S.W.2d 704, 709 (Tex. 1950); and then citing *People v. Cohen*, 272 N.Y. 319, 321–22 (1936)).

2. *See Rye Citizens Comm. v. Bd. of Trs.*, 249 A.D.2d 478, 479, 671 N.Y.S.2d 528, 529 (2d Dep’t 1998) (first citing *Town of Islip v. Caviglia*, 73 N.Y.2d 544, 550–51, 540 N.E.2d 215, 217–18, 542 N.Y.S.2d 139, 141–42 (1989); then citing *Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 131, 527 N.Y.S.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988); and then citing *Cannon v. Murphy*, 196 A.D.2d 498, 500, 600 N.Y.S.2d 965, 967 (2d Dep’t 1993)), *lv. denied*,

In *Heights of Lansing, LLC v. Village of Lansing*, a 19.5-acre parcel had been zoned as a business and technology district (BTD) since 1989.<sup>3</sup> The zoning classification for the property continued unchanged after the Village adopted a comprehensive plan in 1999 and subsequent to amendment of the comprehensive plan in 2015.<sup>4</sup> The Board of Trustees rezoned the property in 2016 to a high density residential district (HDRD) to allow the construction of a 140-unit apartment complex.<sup>5</sup> Neighboring property owners asserted in an action that the amendment constituted impermissible spot zoning and was inconsistent with the Village's comprehensive plan.<sup>6</sup> Prior to adopting the challenged amendment, the Board of Trustees considered a traffic study, an engineering report, and a rental housing needs study.<sup>7</sup>

The court determined that the amendment did not constitute spot zoning and was not contrary to the comprehensive plan.<sup>8</sup> "As a legislative act, a 'zoning . . . amendment[] enjoy[s] a strong presumption of constitutionality and the burden rests on the party attacking [it] to overcome that presumption beyond a reasonable doubt.'"<sup>9</sup> Nonetheless, a zoning amendment must be enacted in accordance with a community's comprehensive plan.<sup>10</sup> While 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 said property to the detriment of other owners,"<sup>11</sup> "if a zoning amendment is consistent with the municipality's comprehensive plan, it is not spot zoning."<sup>12</sup> "A zoning amendment will be upheld if it is established that it was 'adopted for a legitimate governmental purpose and . . . there is . . . [a] reasonable

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92 N.Y.2d 808, 700 N.E.2d 1229, 678 N.Y.S.2d 593 (1998).

3. 160 A.D.3d 1165, 1166, 75 N.Y.S.3d 607, 608 (3d Dep't 2018).

4. *Id.*

5. *Id.* at 1166, 75 N.Y.S.3d at 608–09.

6. *Id.* at 1166, 75 N.Y.S.3d at 609.

7. *Id.*

8. *Heights of Lansing, LLC*, 160 A.D.3d at 1168, 75 N.Y.S.3d at 610 (citing N.Y. VILLAGE LAW § 7-722(11) (McKinney 2011)).

9. *Id.* (quoting *Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988)) (citing *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)).

10. *Id.* (first citing VILLAGE LAW § 7-722(11); then citing *Asian Ams. for Equality*, 72 N.Y.2d at 131, 527 N.E.2d at 270, 531 N.Y.S.2d at 787; and then citing *Birchwood Neighborhood Ass'n. v. Planning Bd. of Colonie*, 112 A.D.3d 1184, 1185, 977 N.Y.S.2d 454, 456, (3d Dep't 2013)).

11. *Id.* (quoting *Citizens for Responsible Zoning v. Common Council of Albany*, 56 A.D.3d 1060, 1062, 868 N.Y.S.2d 800, 802 (3d Dep't 2008)).

12. *Id.* at 1168, 75 N.Y.S.3d at 610–11 (citing Terry Rice, *Practice Commentaries*, in MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 63, § 7-722, at 45 (2011)).

relation between the end sought to be achieved by the [amendment] and the means used to achieve that end.”<sup>13</sup>

The property was adjacent to areas zoned for residential and commercial use.<sup>14</sup> The rezoning of the property from a BTM zone to an HDRD designation would create a superior transition between the two zones.<sup>15</sup> Although it was alleged that the high-end residential development would not encourage needed affordable housing identified in the comprehensive plan, the amendment nevertheless promoted the general need for rental housing and was consistent with the comprehensive plan’s goal of encouraging the development of a wide range of housing choices, particularly for the Village’s aging population.<sup>16</sup> Accordingly, the amendment was consistent with the Village’s comprehensive plan and was intended to benefit the community as a whole as opposed to benefitting individuals or a group of individuals.<sup>17</sup>

A spot zoning challenge to an amendment which rezoned property from a one-acre residential district to an MR-8, multi-family designation, with a density of eight units per acre, was rejected in *Youngewirth v. Town of Ramapo Town Board*.<sup>18</sup> Restating the onerous standard facing one asserting a spot zoning challenge, the court related: “As legislative acts, zoning ordinances carry a presumption of constitutionality. . . . [T]his presumption is rebuttable, but . . . unconstitutionality must be demonstrated beyond a reasonable doubt.”<sup>19</sup> Accordingly, a party challenging such an enactment bears the heavy obligation of demonstrating that the amendment is not justified under the police power by any rational interpretation of the facts.<sup>20</sup> “If the validity of the

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13. *Heights of Lansing, LLC*, 160 A.D.3d at 1168, 75 N.Y.S.3d at 611 (quoting *Birchwood Neighborhood Assn.*, 112 A.D.3d at 1185–86, 977 N.Y.S.2d at 456).

14. *Id.*

15. *Id.* at 1168–69, 75 N.Y.S.3d at 611.

16. *Id.* at 1169, 75 N.Y.S.3d at 611.

17. *Id.* (quoting *Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988)) (citing *Daniels v. Van Voris*, 241 A.D.2d 796, 798, 660 N.Y.S.2d 758, 760 (3d Dep’t 1997)).

18. 155 A.D.3d 755, 755, 65 N.Y.S.3d 540, 543 (2d Dep’t 2017).

19. *Id.* at 758, 65 N.Y.S.3d at 546 (alterations in original) (internal quotations omitted) (quoting *Vill. of Kiryas Joel v. Vill. of Woodbury*, 138 A.D.3d 1008, 1013, 31 N.Y.S.3d 83, 88 (2d Dep’t 2016)) (first citing *Birchwood Neighborhood Ass’n. v. Planning Bd. of Colonie*, 112 A.D.3d 1184, 1185, 977 N.Y.S.2d 454, 456, (3d Dep’t 2013)); then citing *Bergami v. Town Bd. of Rotterdam*, 97 A.D.3d 1018, 1019, 949 N.Y.S.2d 245, 247 (3d Dep’t 2012); and then citing *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)).

20. *Id.* at 759, 65 N.Y.S.3d at 546 (quoting *Hart v. Town Bd. of Huntington*, 114 A.D.3d 680, 683, 980 N.Y.S.2d 128, 131 (2d Dep’t)).

legislative classification for zoning purposes is even ‘fairly debatable,’ it must be sustained upon judicial review.”<sup>21</sup> “Thus, when a plaintiff fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld.”<sup>22</sup> “The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them.”<sup>23</sup>

The property in *Youngewirth* was not enumerated in the previously adopted comprehensive plan as among the sites “particularly suitable” for multifamily housing.<sup>24</sup> Nevertheless, the comprehensive plan related that it was probable “that there may be other sites that meet the . . . placement criteria that [had] not been [explicitly] identified.”<sup>25</sup> Because the Town Board reserved the latitude to identify further properties or area in the future, the petitioner failed to “establish a clear conflict with the comprehensive plan.”<sup>26</sup>

The petitioner also claimed that because the amendment affected only the subject property, it constituted impermissible spot zoning.<sup>27</sup> As related above, the court reiterated that “[s]pot 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 said property to the detriment of other owners.”<sup>28</sup> In reviewing a spot zoning claim, the “courts may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the

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21. *Id.* (first quoting *Hart*, 114 A.D.3d at 683, 980 N.Y.S.2d at 131; and then quoting *Town of Bedford v. Vill. of Mount Kisco*, 33 N.Y.2d 178, 186, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 135 (1973)) (citing *Taylor v. Vill. of Head of Harbor*, 104 A.D.2d 642, 645, 480 N.Y.S.2d 21, 23–24 (2d Dep’t 1984)).

22. *Id.* (internal quotations omitted) (first quoting *Hart*, 114 A.D.3d at 683, 980 N.Y.S.2d at 131; and then quoting *Infinity Consulting Grp., Inc. v. Town of Huntington*, 49 A.D.3d 813, 814, 854 N.Y.S.2d 524, 526 (2d Dep’t 2008)) (citing *Nicholson v. Inc. Vill. of Garden City*, 112 A.D.3d 893, 894, 978 N.Y.S.2d 288, 290 (2d Dep’t 2013)).

23. *Youngewirth*, 155 A.d.3d at 759, 65 N.Y.S.3d at 546–47 (internal quotations omitted) (quoting *Pecoraro v. Bd. of Appeals*, 2 N.Y.3d 608, 613, 814 N.E.2d 404, 407, 781 N.Y.S.2d 234, 237 (2004); then quoting *Kaiser v. Islip Zoning Bd. of Appeals*, 74 A.D.3d 1203, 1204, 904 N.Y.S.2d 166, 168 (2d Dep’t 2010); and then quoting *Merlotto v. Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 928, 841 N.Y.S.2d 650, 652 (2d Dep’t 2007)).

24. *Id.* at 760, 65 N.Y.S.3d at 547.

25. *Id.* (internal quotations omitted).

26. *Id.* (internal quotations omitted) (quoting *Hart*, 114 A.D.3d at 683, 980 N.Y.S.2d at 131).

27. *Id.*

28. *Youngewirth*, 155 A.D.3d at 760, 65 N.Y.S.3d at 547 (internal quotations omitted) (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)).

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recommendations of professional planning staff.”<sup>29</sup>

The fact that the zone change affected only the subject property did not, without more, render the amendment impermissible spot zoning.<sup>30</sup> The amendment was consistent with the Town’s comprehensive plan, was compatible with surrounding uses and, as a result, was valid.<sup>31</sup>

*Heights of Lansing* and *Youngewirth* confirm that if a rational basis exists for a zoning amendment, it is not impermissible spot zoning and will be sustained upon judicial review.<sup>32</sup>

**B. Standing**

In *Board of Fire Commissioners of Fairview Fire District v. Town of Poughkeepsie Planning Board*, the Board of Commissioners of a fire district challenged the issuance of a negative declaration pursuant to the State Environmental Quality Review Act (SEQRA) for a land contour permit by the Planning Board and rezoning by the Town Board of Property located in the fire district to an overlay district designation in order to develop a multifamily residential project.<sup>33</sup> The appellate division confirmed that the fire district lacked standing.<sup>34</sup>

“To establish standing under SEQRA, a petitioner must show (1) 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 interests sought to be protected or promoted by SEQRA.”<sup>35</sup> A litigant challenging a SEQRA determination must also establish that it will suffer an injury

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29. *Id.* (internal quotations omitted) (first citing *Residents for Reasonable Dev. v. City of New York*, 128 A.D.3d 609, 611, 11 N.Y.S.3d 116, 118 (1st Dep’t 2015); and then citing *Marcus v. Bd. of Trs. of Vill. of Wesley Hills*, 96 A.D.3d 1063, 1065–66, 947 N.Y.S.2d 591, 593 (2d Dep’t 2012)).

30. *Id.* (first citing *Residents for Reasonable Dev.*, 128 A.D.3d at 611, 11 N.Y.S.3d at 118; and then citing *Marcus*, 96 A.D.3d at 1065–66, 947 N.Y.S.2d at 593).

31. *Id.*

32. *Heights of Lansing, LLC v. Vill. of Lansing*, 160 A.D.3d 1165, 1166, 75 N.Y.S.3d 607, 609 (3d Dep’t 2018) (quoting *Riverkeeper, Inc. v. Planning Bd. of Southeast*, 9 N.Y.S.3d 219, 231–32, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007)); *Youngewirth*, 155 A.D.3d at 759, 65 N.Y.S.3d at 546 (first quoting *Hart v. Town Bd. of Huntington*, 114 A.D.3d 680, 683, 980 N.Y.S.2d 128, 131 (2d Dep’t 2014); then quoting *Town of Bedford v. Vill. of Mount Kisco*, 33 N.Y.2d 178, 186, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 135 (1973)) (citing *Taylor v. Inc. Vill. of Head of Harbor*, 104 A.D.2d 642, 645, 480 N.Y.S.2d 21, 23–24 (2d Dep’t 1984)).

33. 156 A.D.3d 621, 621–22, 67 N.Y.S.3d 30, 31 (2d Dep’t 2017).

34. *See id.* at 621, 67 N.Y.S.3d at 31.

35. *Id.* at 622, 67 N.Y.S.3d at 32 (quoting *Tuxedo Land Tr., Inc. v. Town Bd. of Tuxedo*, 112 A.D.3d 726, 727–28, 977 N.Y.S.2d 272, 274 (2d Dep’t 2013)) (first citing *Soc’y of Plastics Indus. v. Cty. of Suffolk*, 77 N.Y.2d 761, 772–74, 573 N.E.2d 1034, 1040–42, 570 N.Y.S.2d 778, 784–86 (1991); and then citing *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)).

that is environmental and not exclusively economic in nature.<sup>36</sup> Although the existence of an economic injury does not exclude standing to also assert environmental injury, economic injury is not within the zone of interests SEQRA protects.<sup>37</sup> The fire district's concern that an increase in the number of residents would result in an increase in the number of fire service calls, causing a financial burden on it, was inadequate to demonstrate standing because such interests are solely economic in nature.<sup>38</sup>

In addition, in order to demonstrate standing, a petitioner must establish that it 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.<sup>39</sup> The fire district's allegations regarding traffic impacts was insufficient to establish standing because it failed to demonstrate an environmental injury different from that suffered by the public at large.<sup>40</sup>

Moreover, the fire district's municipal status did not confer standing on it because a "municipality is limited to asserting rights that are its own . . . and is not permitted to assert the collective individual rights of its residents."<sup>41</sup> The fire district failed to establish the existence of an environmental injury that was different in kind from that of the public at large and that was not solely economic.<sup>42</sup>

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36. *Id.* (first citing *Cty. Oil Co., v. New York City Dept. of Env'tl. Prot.*, 111 A.D.3d 718, 719, 975 N.Y.S.2d 114, 116 (2d Dep't 2013); and then citing *Valhalla Union Free Sch. Dist. v. Bd. of Legislators of Westchester*, 183 A.D.2d 771, 772, 583 N.Y.S.2d 503, 505 (2d Dep't 1992)).

37. *Id.* at 622–23, 67 N.Y.S.3d at 32 (first citing *Blue Lawn, Inc., v. Cty. of Westchester*, 293 A.D.2d 532, 534, 740 N.Y.S.2d 404, 405–06 (2d Dep't 2002); then citing *Valhalla Union Free Sch. Dist.*, 183 A.D.2d at 772, 583 N.Y.S.2d at 504; then citing *Soc'y of Plastics Indus.*, 77 N.Y.2d at 777–78, 573 N.E.2d at 1043–44, 570 N.Y.S.2d at 787–88; and then citing *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990)).

38. *Bd. of Fire Comm'rs of the Fairview Fire Dist.*, 156 A.D.3d at 623, 67 N.Y.S.3d at 32 (first citing *Soc'y of Plastics Indus.*, 77 N.Y.2d at 777, 573 N.E.2d at 1043–44, 570 N.Y.S.2d at 787–88; then citing *Mobil Oil Corp.*, 76 N.Y.2d at 433, 559 N.E.2d at 644, 559 N.Y.S.2d at 950; and then citing *Valhalla Union Free Sch. Dist.*, 183 A.D.2d at 772, 583 N.Y.S.2d at 504–05).

39. *Id.* at 622, 67 N.Y.S.3d at 32 (first citing *Tuxedo Land Trs.*, 112 A.D.3d at 727–28, 977 N.Y.S.2d at 274; then citing *Soc'y of Plastics Indus.*, 77 N.Y.2d at 772–74, 573 N.E.2d at 1040–42, 570 N.Y.S.2d at 784–86; and then citing *Vill. of Chestnut Ridge*, 45 A.D.3d at 89–90, 841 N.Y.S.2d at 334–35).

40. *Id.* at 623, 67 N.Y.S.3d at 32 (first citing *Shelter Island Ass'n v. Zoning Bd. of Appeals of Shelter Island*, 57 A.D.3d 907, 909, 869 N.Y.S.2d 615, 617 (2d Dep't 2008); and then citing *Long Island Pine Barrens Soc'y v. Planning Bd. of Brookhaven*, 213 A.D.2d 484, 485–86, 623 N.Y.S.2d 613, 615 (2d Dep't 1995)).

41. *Id.* (quoting *Vill. of Chestnut Ridge*, 45 A.D.3d at 91, 841 N.Y.S.2d at 336).

42. *Id.* (first citing *Shelter Island Ass'n*, 57 A.D.3d at 909, 869 N.Y.S.2d at 617; and then

The fire district also lacked standing in its representative capacity.<sup>43</sup> “In order to establish standing to challenge a SEQRA determination, a municipality must demonstrate how its personal or property rights, either personally or in a representative capacity, will be directly and specifically affected apart from any damage suffered by the public at large.”<sup>44</sup> The fire district failed to contend in its petition that it was acting in its representative capacity for affected citizens.<sup>45</sup> Rather, it merely asserted the purported economic costs to it as a result of the project.<sup>46</sup>

## II. PREEMPTION

### A. Educational Uses

Public schools are immune from local zoning regulations and approvals.<sup>47</sup> Local land use authority is preempted because the exercise of the police power and zoning authority is limited by the State Constitution and applicable statutes, and the State has not surrendered its authority regarding the location and construction of school buildings to local governments.<sup>48</sup> The State Constitution requires that the Legislature provide a system of free public education and reserves to the Legislature full power regarding the “maintenance, support or administration” of the system, notwithstanding the powers conferred to municipalities by the home rule provisions of the Constitution.<sup>49</sup> In order to implement that

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citing *Long Island Pine Barrens Soc’y*, 213 A.D.2d at 485–86, 623 N.Y.S.2d at 615).

43. *Bd. of Fire Comm’rs of Fairview Fire Dist.*, 156 A.D.3d at 623, 67 N.Y.S.3d at 33.

44. *Id.* (quoting *Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 A.D.3d 1539, 1541, 945 N.Y.S.2d 434, 437–38 (3d Dep’t 2012)).

45. *Id.* at 624, 67 N.Y.S.3d at 33 (citing *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433–34, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990)).

46. *Id.*

47. *See Jewish Bd. of Family and Child’s Servs., Inc. v. Zoning Bd. of Appeals of Mount Pleasant*, 79 A.D.2d 657, 658, 433 N.Y.S.2d 840, 841 (2d Dep’t 1980) (first citing *Bd. of Coop. Educ. Serv. of Nassau Cty. v. Gaynor*, 60 Misc. 2d 316, 320, 303 N.Y.S.2d 183, 188 (Sup. Ct. Nassau Cty. 1969); then citing *Bd. of Educ. v. City of Buffalo*, 32 A.D.2d 98, 100, 302 N.Y.S.2d 71, 74 (4th Dep’t 1969); then citing *Union Free Sch. Dist. No. 14 v. Vill. of Hewlett Bay Park*, 279 A.D. 618, 619, 107 N.Y.S.2d 858, 860 (2d Dep’t 1951); then citing *Town of Onondaga v. Cent. Sch. Dist. No. 1*, 56 Misc. 2d 26, 26–27, 287 N.Y.S.2d 581, 583 (Sup. Ct. Onondaga Cty. 1968); then citing ROBERT M. ANDERSON, *NEW YORK ZONING LAW AND PRACTICE* 433–34, 436–37 (The Lawyers Co-Operative Publishing Co., 2d ed. 1973)); *see Durand v. Bd. of Coop. Educ. Servs.*, 70 Misc. 2d 429, 432–33, 334 N.Y.S.2d 670, 675 (Sup. Ct. Westchester Cty. 1972), *aff’d*, 41 A.D.2d 803, 341 N.Y.S.2d 884 (2d Dep’t 1973).

48. *See Town of Onondaga v. Cent. Sch. Dist.*, 56 Misc. 2d at 27, 287 N.Y.S.2d at 584 (first citing *Union Free Sch. Dist. No. 14 v. Vill. of Hewlett Bay Park*, 279 A.D. 618, 618–19, 107 N.Y.S.2d 858, 860 (2d Dep’t 1951); and then citing *Great Neck Cmty. Sch. v. Dick*, 140 N.Y.S.2d 221, 223 (Sup. Ct. Nassau Cty. 1955)).

49. *See Union Free Sch. Dist. No. 14*, 279 A.D. at 618–19, 107 N.Y.S.2d at 860 (2d Dep’t 1951) (first citing N.Y. CONST. art. XI, § 1, art. IX § 13; then citing *Bd. of Educ. v. Wilson*,

dictate, the Education Law imposes upon school districts the obligation to select the location of schools and, additionally, empowers them to obtain sites by condemnation, if necessary.<sup>50</sup>

Since the State has reserved unto itself the control over and the authority to regulate *all* school matters and, further, since the State has surrendered to school districts a portion of its (the State's) sovereign power and delegated to the districts some of these responsibilities imposed by the Constitution, including the selection of building sites and erection buildings thereon . . . it follows that a school district should be and is immune from the attempted regulation of these rights and responsibilities by means of buildings codes or zoning ordinances.<sup>51</sup>

In *Ravena-Coeymans-Selkirk Central School District v. Town of Bethlehem*, the zoning board notified the school district that the electronic sign it wished to erect was prohibited by the zoning law.<sup>52</sup> The Zoning Board of Appeals denied the school district's subsequent variance application and the school district nevertheless erected the electronic sign, contending that it was not subject to local zoning regulations and requirements because it was a public school.<sup>53</sup>

Although schools enjoy a measure of immunity from zoning regulations, the immunity is not as broad and absolute as the school district asserted.<sup>54</sup> “As a matter of constitutional and statutory delegation, local governments are authorized to legislate in enumerated areas of local concern, subject to the Legislature’s overriding interest in matters of statewide concern,’ one of which is ‘the administration of public education.’”<sup>55</sup> “The Legislature has charged the [State] Education Department and local boards of education with the management and

303 N.Y. 107, 114, 100 N.E.2d 159, 163 (1951); and then citing *People ex rel. Elkind v. Rosenblum*, 184 Misc. 916, 920, 54 N.Y.S.2d 295, 300 (Sup. Ct. Westchester Cty. 1945)).

50. See N.Y. EDUC. LAW §§ 404–405 (McKinney 2009).

51. Bd. of Educ. v. City of Buffalo, 32 A.D.2d 98, 100, 302 N.Y.S.2d 71, 74 (4th Dep’t 1969) (first citing N.Y. EDUC. LAW §§ 401, 407–408 (McKinney 2009)); then citing *Herman v. Bd. of Educ.*, 234 N.Y. 196, 201, 137 N.E. 24, 25 (1922); and then citing *Cty. of Westchester v. Vill. of Mamaroneck*, 41 Misc. 2d 811, 814, 246 N.Y.S.2d 770, 773 (Sup. Ct. Westchester Cty. 1964)).

52. 156 A.D.3d 179, 181, 66 N.Y.S.3d 534, 535 (3d Dep’t 2017), *lv. denied*, 31 N.Y.3d 901, 102 N.E.3d 432, 77 N.Y.S.3d 656 (2018).

53. *Id.* at 181, 66 N.Y.S.3d at 535–36.

54. *Id.* at 182, 66 N.Y.S.3d at 536.

55. *Id.* (first quoting *Cohen v. Bd. of Appeals of Vill. of Saddle Rock*, 100 N.Y.2d 395, 399, 795 N.E.2d 619, 622, 764 N.Y.S.2d 64, 67 (2003); and then quoting *Lanza v. Wagner*, 11 N.Y.2d 317, 326, 183 N.E.2d 670, 675, 229 N.Y.S.2d 380, 386–87 (1962)) (first citing N.Y. CONST. art. IX, § 3(a)(1); then citing *Weimer v. Board of Educ.*, 52 N.Y.2d 148, 153 n.2, 418 N.E.2d 368, 371 n.2, 436 N.Y.S.2d 853, 855 n.2 (1981); then citing *Board of Educ. v. City of New York*, 41 N.Y.2d 535, 542, 362 N.E.2d 948, 953, 394 NYS2d 148, 154 (1977); and then citing N.Y. CONST. art. XI, § 1).



control of educational affairs and public schools.”<sup>56</sup>

Some courts have interpreted that mandate as “the State . . . reserv[ing] unto itself the control over and the authority to regulate *all* school matters,’ such that ‘a school district should be and is immune from the attempted regulation of [certain] rights and responsibilities [granted under the Education Law] by means of building codes or zoning ordinances.”<sup>57</sup> “However, several of these courts have incorrectly interpreted prior decisions to extend a full exemption from zoning ordinances where it was not warranted.”<sup>58</sup>

Premised on the decision of the Court of Appeals in *Cornell University v. Bagnardi*, the court related that the decisions which have concluded that schools are immune from all zoning regulations are misplaced.<sup>59</sup> The *Ravena* court related that the Court of Appeals concluded in *Bagnardi* that it never intended to “render municipalities powerless in the face of a religious or educational institution’s proposed expansion, no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be,” and restated that there is no “conclusive presumption of an entitlement to an exemption from zoning ordinances’ for schools.”<sup>60</sup> The *Ravena* court also determined that the holding of *Bagnardi* is not restricted to private schools.<sup>61</sup> “[T]he [c]ourt explicitly mentioned public schools when discussing the beneficial presumption enjoyed by schools generally.”<sup>62</sup>

The scenario in *Ravena* did not require the Education Department oversight of local school boards, such as, for example, the selection of

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56. *Id.* (first citing N.Y. EDUC. LAW § 101 (McKinney 2009); and then citing N.Y. EDUC. LAW § 1709(33) (McKinney 2007)).

57. *Ravena*, 156 A.D.3d at 182, 66 N.Y.S.3d at 536–37 (quoting *Bd. of Educ. v. City of Buffalo*, 32 A.D.2d 98, 100, 302 N.Y.S.2d 71, 74 (4th Dep’t 1969)) (first citing *Jewish Bd. of Family & Child’s Servs. v. Zoning Bd. of Appeals*, 79 A.D.2d 657, 658, 433 N.Y.S.2d 840, 841, (2d Dep’t 1980); and then citing *R.G.H. Plumbing v. City of Syracuse*, 72 Misc. 2d 445, 448, 339 N.Y.S.2d 329, 332 (Sup. Ct. Onondaga Cty. 1972)).

58. *Id.* at 182–83, 66 N.Y.S.3d at 537 (citing *Durand v. Bd. of Coop. Educ. Servs.*, 70 Misc. 2d 429, 432, 334 N.Y.S.2d 670, 675 (Sup. Ct. Westchester Cty. 1972)).

59. *Id.* at 183, 66 N.Y.S.3d at 537 (citing 68 N.Y.2d 583, 589, 503 N.E.2d 509, 511, 510 N.Y.S.2d 861, 863 (1986)) (holding that the denial of a school’s expansion plan application was improper because the zoning board denied the application for reasons unrelated to the protection of the public health, safety, welfare, and morals).

60. *Id.* at 183–84, 66 N.Y.S.3d at 537 (internal quotations omitted) (quoting *Cornell Univ.*, 68 N.Y.2d at 594, 503 N.E.2d at 514, 510 N.Y.S.2d at 866) (citing *Diocese v. Planning Bd.*, 1 N.Y.2d 508, 526, 136 N.E.2d 827, 837, 154 N.Y.S.2d 849, 863 (1956)).

61. *Id.* at 184, 66 N.Y.S.3d at 538.

62. *Ravena*, 156 A.D.3d at 184, 66 N.Y.S.3d at 538 (citing *Cornell Univ.*, 68 N.Y.2d at 593, 503 N.E.2d 513–14, 510 N.Y.S.2d 865–66).

building sites and erection or demolition of buildings,<sup>63</sup> the sale or acquisition of property,<sup>64</sup> health or safety conditions within the schools,<sup>65</sup> or any use of a school building.<sup>66</sup> Review of sign placement is not required by Education Department regulations.<sup>67</sup> Thus, there would be no duplication of review or the possibility of conflicting determinations by State and local entities.<sup>68</sup>

The school district also claimed that it was immune from local zoning authority pursuant to the decision in the case of *In re County of Monroe* where the Court of Appeals adopted “a balancing of public interests” test.<sup>69</sup> That inquiry had not previously been applied to a school district or educational use.<sup>70</sup> Instead, the evaluation generally had been employed in situations involving land uses of an encroaching municipality.<sup>71</sup> The *Ravena* court determined that although a school district is a governmental unit, the balancing of public interests analysis is unnecessary for educational uses because the principles related in *Bagnardi* apply.<sup>72</sup>

Accordingly, the sign was subject to the zoning law.<sup>73</sup> In addition, the Zoning Board of Appeals provided rational reasons for its denial of the variances, including traffic safety, the brightness of the sign, and its potential to be more distracting and hazardous to passing motorists than

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63. *Id.* (citing N.Y. EDUC. LAW §§ 401, 407–408 (McKinney 2009)).

64. *Id.* (citing N.Y. EDUC. LAW §§ 402–405 (McKinney 2009)).

65. *Id.* at 184–85, 66 N.Y.S.3d at 538 (citing N.Y. EDUC. LAW §§ 409–409-i (McKinney 2009)) (explaining the health and safety school building regulations).

66. *Id.* at 185, 66 N.Y.S.3d at 538 (first citing N.Y. EDUC. LAW § 414 (McKinney 2009); then citing *Ithaca City Sch. Dist. v. City of Ithaca*, 82 A.D.3d 1316, 1318, 918 N.Y.S.2d 232, 234 (3d Dep’t 2011); and then citing *Bd. of Educ. v. Buffalo*, 32 A.D.2d 98, 100, 302 N.Y.S.2d 71, 74 (4th Dep’t 1969)).

67. *Ravena*, 156 A.D.3d at 185, 66 N.Y.S.3d at 538.

68. *Id.*

69. *Id.* (citing 72 N.Y.2d 338, 341–43, 530 N.E.2d 202, 203–05, 533 N.Y.S.2d 702, 703–05 (1988)).

70. *Id.*

71. *Id.* at 185, 66 N.Y.S.3d at 538–39 (first citing *Cty. of Herkimer v. Vill. of Herkimer*, 109 A.D.3d 1166, 1167, 971 N.Y.S.2d 764, 765 (4th Dep’t 2013); then citing *Vill. of Woodbury v. Brach*, 99 A.D.3d 697, 700, 952 N.Y.S.2d 92, 94 (2d Dep’t 2012); and then citing *Town of Fenton v. Town of Chenango*, 91 A.D.3d 1246, 1250, 937 N.Y.S.2d 677, 682 (3d Dep’t 2012)).

72. *Ravena*, 156 A.D.3d at 185, 66 N.Y.S.3d at 539; see *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 589, 503 N.E.2d 509, 511, 510 N.Y.S.2d 861, 863 (1986) (holding that the presumption that educational uses are always in furtherance of the public health, safety, and morals may be rebutted by a showing that the proposed use would actually have a net negative impact).

73. *Ravena*, 156 A.D.3d at 185–86, 66 N.Y.S.3d at 539.

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an ordinary sign.<sup>74</sup>

*B. Mining*

State legislation has precluded local zoning regulation in diverse substantive areas. Markedly, the Mined Land Reclamation Law (MLRL), Environmental Conservation Law §§ 23-2701–23-2727, contains a limited preemption of local zoning authority with respect to the extractive industry.<sup>75</sup> In *People v. Wainscott Sand & Gravel Corp.*, the defendants, who held a DEC permit for sand mining and extraction operations, were accused of violating their certificate of occupancy by processing trees, brush, stumps, leaves, and other debris into topsoil or mulch, and by permitting concrete and asphalt to be deposited and processed on the site.<sup>76</sup> The defendants moved to dismiss the accusatory instruments, contending that the MLRL preempted town zoning authority to regulate sand mining operations and ancillary activities.<sup>77</sup>

The determination of whether a “supersession clause” preempts local zoning laws requires consideration of: “(1) the plain language of the supersession clause; (2) the statutory scheme as a whole; and (3) the relevant legislative history.”<sup>78</sup> The MLRL applies “‘only [to] those laws that deal ‘with the actual operation and process of mining’ [that] are superseded,’ and not ‘local zoning ordinances that are addressed to subject matters other than extractive mining and that affect the extractive mining industry only in incidental ways.’”<sup>79</sup> Accordingly, the “supersession clause” of the MLRL was not intended to “‘limit municipalities’ broad authority to govern land use’ by means of their

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74. *Id.* at 186, 66 N.Y.S.3d at 539 (citing *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 35 (1st Cir. 2008)).

75. N.Y. ENVTL. CONSERV. LAW §§ 23-2701–23-2727 (McKinney 2007). *See generally* *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 71 N.Y.2d 126, 518 N.E.2d 920, 524 N.Y.S.2d 25 (1987) (holding that § 23-2703 was intended to prohibit any local regulation pertaining to actual mining activities, but not to preclude more stringent local laws pertaining to reclamation).

76. No. 2015-2912 S CR, 2018 N.Y. Slip Op. 28388, at 1 (2d Dep’t Dec. 5, 2018).

77. *Id.*; *see* ENVTL. CONSERV. §§ 23-2701–23-2727.

78. *Wainscott Sand & Gravel*, 2018 N.Y. Slip Op. 28388, at 2 (internal quotations omitted) (quoting *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 744, 16 N.E.3d 1188, 1195, 992 N.Y.S.2d 710, 717 (2014)) (citing *Frew Run Gravel Prods.*, 71 N.Y.2d at 131, 518 N.E.2d at 922, 524 N.Y.S.2d at 27 (1987)).

79. *Id.* (quoting *Hunt Bros., Inc. v. Glennon*, 81 N.Y.2d 906, 909, 613 N.E.2d 549, 550, 597 N.Y.S.2d 643, 644 (1993)) (first citing *Troy Sand & Gravel Co. v. Town of Nassau*, 101 A.D.3d 1505, 1509, 957 N.Y.S.2d 444, 448 (3d Dep’t 2012); then citing *Town of Riverhead v. T.S. Haulers, Inc.*, 275 A.D.2d 774, 775, 713 N.Y.S.2d 740, 741 (2d Dep’t 2000); and then citing *Preble Aggregate, Inc. v. Town of Preble*, 263 A.D.2d 849, 850, 694 N.Y.S.2d 788, 791 (3d Dep’t 1999)).

‘local zoning authority,’ but to ‘withdraw from municipalities the authority to enact local laws imposing land reclamation standards that were stricter than the State-wide standards under the MLRL.’<sup>80</sup> Consequently, zoning regulations are preempted only where there is a “clear expression of legislative intent to preempt local control over land use.”<sup>81</sup> Further, even when a statute includes an express preemption clause, “it is only when local zoning ordinances affect ‘the details or procedure[s]’ established by state law for such operations that the preemption rules apply.”<sup>82</sup> As a result, “[t]raditional land use considerations, such as ‘compatibility with neighboring land uses, and noise and air pollution’” are not preempted by the MLRL, either expressly or impliedly.<sup>83</sup> Because the violations charged in *Wainscott Sand & Gravel* did not involve the actual operation mining operations, they were subject to local regulation and to enforcement through the criminal process.<sup>84</sup>

### III. GENERAL MUNICIPAL LAW REVIEW

General Municipal Law § 239-m mandates that various land use applications, including the adoption or amendment of a zoning law, be referred to the county planning department or Planning Board before final action is taken if the enactment relates to real property located within five hundred feet of enumerated features and improvements detailed in General Municipal Law § 239-m(3).<sup>85</sup> General Municipal Law § 239-m(2) requires that each referring body, before taking final action on a proposed action subject to the referral provision, shall “refer the same to such county planning agency or regional planning council.”<sup>86</sup>

General Municipal Law § 239-m(1)(c) defines the term “full statement of such proposed action” as

all materials required by and submitted to the referring body as an application on a proposed action, including a completed environmental assessment form and all other materials required by such referring body

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80. *Id.* (quoting *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 681–82, 664 N.E.2d 1226, 1234–35, 642 N.Y.S.2d 164, 172–73 (1996)); see ENVTL. CONSERV. § 23-2703(2).

81. *Wainscott Sand & Gravel*, 2018 N.Y. Slip Op. 28388, at 2 (internal quotations omitted) (quoting *Norse Energy Corp. USA v. Town of Dryden*, 108 A.D.3d 25, 34–35, 964 N.Y.S.2d 714, 721 (3d Dep’t 2013)).

82. *Id.* (quoting *Norse Energy Corp. USA*, 108 A.D.3d at 32, 964 N.Y.S.2d at 719).

83. *Id.* (citing *Norse Energy Corp. USA*, 108 A.D.3d at 37, 964 N.Y.S.2d at 723).

84. *Id.*

85. See N.Y. GEN. MUN. LAW § 239-m(3) (McKinney 2012).

86. *Id.* § 239-m(2).

in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations. When the proposed action referred is the adoption or amendment of a zoning ordinance or local law, “full statement of such proposed action” shall also include the complete text of the proposed ordinance or local law as well as all existing provisions to be affected thereby, if any, if not already in the possession of the county planning agency or regional planning council.<sup>87</sup>

The statute also provides that a referring body and the county planning agency may agree as to what constitutes a “full statement” for purposes of its review.<sup>88</sup>

Lack of compliance with the foregoing mandate was alleged in four actions/proceedings which challenged the adoption of a comprehensive plan and adoption of amendments to a zoning law in *Calverton Manor, LLC v. Town of Riverhead*.<sup>89</sup>

The petitioner initially had submitted a site plan application in 2001 to construct a mixed-use residential and commercial development, and subsequently modified the site plan in order to conform to the then-applicable zoning regulations.<sup>90</sup> Contemporaneously and since 1997, the Town Board had been in the process of drafting a new comprehensive plan, one of the goals of which was to protect open space and farmland while concentrating development into identified areas of the town.<sup>91</sup> The adopted comprehensive plan eliminated various proposed uses on the petitioner’s parcel which were essential to the feasibility of the project.<sup>92</sup>

In *Calverton Manor, LLC v. Town of Riverhead*, the petitioner alleged that the Town Board failed to comply with General Municipal Law § 239-m in the adoption of the comprehensive plan.<sup>93</sup> The court determined that the referral of the comprehensive plan to the Suffolk County Planning Commission was correct.<sup>94</sup> Subsequent revisions made

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87. *Id.* § 239-m(1)(c).

88. *Id.*

89. *Calverton Manor, LLC v. Town of Riverhead (Calverton IV)*, 160 A.D.3d 842, 844, 76 N.Y.S.3d 72, 74 (2d Dep’t 2018); *Calverton Manor, LLC v. Town of Riverhead (Calverton III)*, 160 A.D.3d 838, 839, 75 N.Y.S.3d 232, 234–35 (2d Dep’t 2018); *Calverton Manor, LLC v. Town of Riverhead (Calverton II)*, 160 A.D.3d 833, 834, 75 N.Y.S.3d 586, 589 (2d Dep’t 2018); *Calverton Manor, LLC v. Town of Riverhead (Calverton I)*, 160 A.D.3d 829, 830, 76 N.Y.S.3d 75, 77 (2d Dep’t 2018); *see* GEN. MUN. § 239-m(3).

90. *Calverton IV*, 160 A.D.3d at 843, 76 N.Y.S.3d at 73.

91. *Id.*

92. *Id.*

93. *Calverton I*, 160 A.D.3d at 830, 76 N.Y.S.3d at 77; *see* GEN. MUN. § 239-m(3).

94. *Calverton I*, 160 A.D.3d at 831, 76 N.Y.S.3d at 77.

to the Comprehensive Plan after the referral were “embraced within the original referral” and, accordingly, the Town Board did provide a full statement of its proposed action.<sup>95</sup>

In another *Calverton* case, the petitioner challenged the enactment of zoning amendments establishing an Agricultural Protection Zone, asserting that the Town Board failed to make a proper referral of the Agricultural Protection Zone law to the Suffolk County Planning Commission.<sup>96</sup> Subsequent to receipt of the Town Board’s referral, the Planning Commission processed the referral, conducted a hearing, voted, and reported its recommendations to the Town Board.<sup>97</sup> There was no evidence in the record that the Planning Commission found the Town Board’s referral to be deficient in any respect.<sup>98</sup> As a result, the Town Board provided a “full statement” of the proposed law in accordance with General Municipal Law § 239-m.<sup>99</sup> In addition, revisions made to the law after its referral were “embraced within the original referral.”<sup>100</sup> The court reached the identical conclusion in a third *Calverton* case with respect to the referral of a zoning amendment establishing a Rural Corridor zone.<sup>101</sup>

On the other hand, in the fourth *Calverton* decision, the court annulled a zoning amendment which authorized the use of transfer of development rights (TDR) pursuant to Town Law § 261-a, and also designated petitioner’s property as a sending district whereby its development rights could be transferred to receiving districts.<sup>102</sup> Although the Town Board had referred the proposed TDR law to the Planning Commission as required by General Municipal Law § 239-m, the Planning Commission had notified the Town that the proposed law would not be reviewed until it received a complete revised text of the

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95. *Id.* at 831, 76 N.Y.S.3d at 78 (first citing *Vill. of Kiryas Joel v. Vill. of Woodbury*, 138 A.D.3d 1008, 1012, 31 N.Y.S.3d 83, 88 (2d Dep’t 2016); and then citing *Gernatt Asphalt Prods. v. Town of Sardina*, 87 N.Y.2d 668, 678–79, 664 N.E.2d 1226, 1232, 642 N.Y.S.2d 164, 170 (1996)).

96. *Calverton II*, 160 A.D.3d 833, 835, 75 N.Y.S.3d 586, 589 (2d Dep’t 2018).

97. *Id.* at 835, 75 N.Y.S.3d at 590.

98. *Id.*

99. *Id.*; see N.Y. GEN. MUN. LAW § 239-m (McKinney 2012).

100. *Calverton II*, 160 A.D.3d at 835, 75 N.Y.S.3d at 590 (internal quotations omitted) (first citing *Vill. of Kiryas Joel*, 138 A.D.3d at 1012, 31 N.Y.S.3d at 88; and then citing *Gernatt Asphalt Prods.*, 87 N.Y.2d at 679, 664 N.E.2d at 1232–33, 642 N.Y.S.2d at 170–71).

101. *Calverton III*, 160 A.D.3d 838, 840, 75 N.Y.S.3d 232, 235 (2d Dep’t 2018).

102. *Calverton IV*, 160 A.D.3d 842, 844–45, 76 N.Y.S.3d 72, 74–75 (2d Dep’t 2018) (first citing *LCS Realty Co. v. Inc. Vill. of Roslyn*, 273 A.D.2d 474, 474–75, 710 N.Y.S.2d 605, 606 (2d Dep’t 2000); then citing *Old Dock Assoc. v. Sullivan*, 150 A.D.2d 695, 697, 541 N.Y.S.2d 569, 570 (2d Dep’t 1989); and then citing *Eastport All. v. Lofaro*, 13 A.D.3d 527, 528–29, 787 N.Y.S.2d 346, 348–49 (2d Dep’t 2004)); see N.Y. TOWN LAW § 261-a (McKinney 2013).

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proposed amendment.<sup>103</sup> Because the Planning Commission did not receive the text of the proposed TDR law, the Town Board failed to refer a “full statement” of its proposed TDR law before enacting it.<sup>104</sup>

The court rejected the claim that the referral of prior drafts of the law averted the necessity for a new referral.<sup>105</sup> “Where changes are made to a proposed action following referral, a new referral is not required if ‘the particulars of the amendment were embraced within the original referral.’”<sup>106</sup> However, the adopted TDR law contained substantial modifications that compelled a new referral.<sup>107</sup> The final version of the law mapped sending and receiving districts and detailed the degree to which landowners in receiving districts could exceed the otherwise applicable density constraints.<sup>108</sup> Prior versions of the law that had been referred to the Planning Commission reserved those aspects for future consideration.<sup>109</sup> As a result, the failure to comply with the referral requirements of General Municipal Law § 239-m constituted a “jurisdictional defect.”<sup>110</sup> Accordingly, the TDR law was void and unenforceable.<sup>111</sup>

#### IV. SPECIAL FACTS EXCEPTION

A court generally must apply the provisions of a zoning law in effect at the time it renders a decision.<sup>112</sup> Hence, a challenge to a land use

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103. *Calverton IV*, 160 A.D.3d at 844, 76 N.Y.S.3d at 74; *see* GEN. MUN. § 239-m.

104. *Id.*

105. *Id.* at 844–45, 76 N.Y.S.3d at 74; *see* GEN. MUN. § 239-m(3).

106. *Calverton IV*, 160 A.D.3d at 845, 76 N.Y.S.3d at 74 (quoting *Benson Point Realty Corp. v. Town of E. Hampton*, 62 A.D.3d 989, 992, 880 N.Y.S.2d 144, 147 (2d Dep’t 2009)) (citing *Gernatt Asphalt Prods. v. Town of Sardina*, 87 N.Y.2d 688, 678–80, 664 N.E.2d 1226, 1232–33, 642 N.Y.S.2d 164, 170–71 (1996)).

107. *Id.* (citing *LCS Realty*, 273 A.D.2d at 475, 710 N.Y.S.2d at 606).

108. *Id.*

109. *Id.*

110. *Id.* at 845, 75 N.Y.S.3d at 75 (first citing *Annabi v. City Council of City of Yonkers*, 47 A.D.3d 856, 857, 850 N.Y.S.2d 625, 627 (2d Dep’t 2008); then citing *24 Franklin Ave. R.E. Corp. v. Heaship*, 139 A.D.3d 742, 744, 30 N.Y.S.3d 695, 698 (2d Dep’t 2016); then citing *Eastport All. v. Lofaro*, 13 A.D.3d 527, 529, 787 N.Y.S.2d 346, 349 (2d Dep’t 2004); and then citing *Zelnick v. Small*, 268 A.D.2d 527, 529, 702 N.Y.S.2d 105, 106 (2d Dep’t 2000)); *see* GEN. MUN. § 239-m.

111. *Calverton IV*, 160 A.D.3d at 845, 75 N.Y.S.3d at 75 (first citing *LCS Realty*, 273 A.D.2d at 474–75, 710 N.Y.S.2d at 606; then citing *Old Dock Assoc. v. Sullivan*, 150 A.D.2d, 695, 697, 541 N.Y.S.2d 569, 570 (2d Dep’t 1989); and then citing *Eastport All.*, 13 A.D.3d at 528–29, 787 N.Y.S.2d at 348).

112. *See, e.g., Jul-Bet Enters., LLC v. Town Bd.*, 48 A.D.3d 567, 567, 852 N.Y.S.2d 242, 243 (2d Dep’t 2008) (first citing *Cleary v. Bibbo*, 241 A.D.2d 887, 888, 660 N.Y.S.2d 230, 231 (3d Dep’t 1997); and then citing *Bibeau v. Vill. Clerk*, 145 A.D.2d 478, 479, 535 N.Y.S.2d 106, 108 (2d Dep’t 1988)).

determination must be reviewed by the courts pursuant to the current version of a zoning law even if it renders a proposed use impermissible.<sup>113</sup> Nevertheless, a court may apply the law in effect at the time an applicant applied for approval if the administrative agency unduly delayed review of the application and acted in bad faith.<sup>114</sup> The special facts exception may be applicable if a property owner was entitled to the approval sought as a matter of right before the law changed.<sup>115</sup>

Relying on the special facts exception, the property owner Calverton Manor, LLC contended in two actions that the recently adopted Agricultural Protection Zone and Rural Corridor laws did not apply to its project.<sup>116</sup> The special facts exception may be applicable where a landowner “‘establishes entitlement as a matter of right to the underlying land use application,’ and ‘extensive delay[] indicative of bad faith . . . unjustifiable actions by the municipal officials . . . or abuse of administrative procedures.’”<sup>117</sup>

The record was unclear as to whether the petitioner’s application was a “completed application” when it filed the last revised version of its site plan.<sup>118</sup> There was evidence that additional revisions were required before the application could be treated as a “completed application,” which would mean that the petitioner would not be entitled to approval as a matter of right.<sup>119</sup> On the other hand, there was evidence in the record that the Town Board had found the application to be a “completed

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113. *See, e.g., id.*

114. *See, e.g., BBJ Assoc., LLC v. Zoning Bd. of Appeals of Town of Kent*, 65 A.D.3d 154, 159, 881 N.Y.S.2d 496, 500 (2d Dep’t 2009) (first citing *Pokoik v. Silsdorf*, 40 N.Y.2d 769, 772–73, 358 N.E.2d 874, 876, 390 N.Y.S.2d 49, 51 (1976); then citing *Mamaroneck Beach & Yacht Club, Inc., v. Zoning Bd. of Appeals*, 53 A.D.3d 494, 497, 862 N.Y.S.2d 81, 85 (2d Dep’t 2008); and then citing *Caruso v. Town of Oyster Bay*, 250 A.D.2d 639, 640, 672 N.Y.S.2d 418, 419 (2d Dep’t 1998); and then citing *Figgie Int’l, Inc. v. Town of Huntington*, 203 A.D.2d 416, 418, 610 N.Y.S.2d 563, 566 (2d Dep’t 1994)).

115. *See, e.g., Nathan v. Zoning Bd. of Appeals*, 95 A.D.3d 1018, 1019, 943 N.Y.S.2d 615, 618 (2d Dep’t 2012) (first citing *BBJ Assoc., LLC*, 65 A.D.2d at 158–59, 881 N.Y.S.2d at 500); and then citing *Jam. Recycling Corp. v. City of New York*, 38 A.D.3d 398, 400, 832 N.Y.S.2d 40, 43 (1st Dep’t 2007)).

116. *Calverton IV*, 160 A.D.3d 838, 839 75 N.Y.S.3d 232, 234 (2d Dep’t 2018); *Calverton III*, 160 A.D.3d 833, 834, 75 N.Y.S.3d 586, 589 (2d Dep’t 2018).

117. *Calverton III*, 160 A.D.3d at 837, 75 N.Y.S.3d at 591 (quoting *Rocky Point Drive-In, L.P. v. Town of Brookhaven*, 21 N.Y.3d 729, 736–37, 999 N.E.2d 1164, 1167, 977 N.Y.S.2d 719, 722 (2013)) (first citing *Alscot Inv. Corp. v. Inc. Vil. of Rockville Ctr.*, 64 N.Y.2d 921, 922, 477 N.E. 1083, 1083, 488 N.Y.S.2d 629, 629 (1985); then citing *Pokoik*, 40 N.Y.2d at 772–73, 358 N.E.2d at 876, 390 N.Y.S.2d at 51; and then citing *Hamptons, LLC v. Rickenbach*, 98 A.D.3d 736, 737, 950 N.Y.S.2d 182, 183 (2d Dep’t 2012)).

118. *Id.*

119. *Id.* at 837–38, 75 N.Y.S.2d at 591–92; (citing *Rocky Point Drive-In*, 21 N.Y.3d at 737, 999 N.E.2d at 1167, 977 N.Y.S.2d at 722).



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application,” meaning the Town Board may have delayed processing the application in a manner indicative of bad faith, and, as a result, triable issues of fact existed as to the applicability of special facts.<sup>120</sup>

#### V. BUILDING PERMIT FEES

All municipal fees must be “reasonably necessary” to accomplish the task involved.<sup>121</sup> In addition, such a fee may not be open ended or potentially limitless in nature, but must be fixed in some method.<sup>122</sup> Further, municipal fees must be “assessed or estimated on the basis of reliable factual studies or statistics.”<sup>123</sup>

[T]he yardstick by which the reasonableness of charges made to an applicant in an individual case may be evaluated is the experience of the local government in cases of the same type. Without the safeguard of a requirement that fees bear a relation to average costs, a board would be free to incur, in the individual case, not only necessary costs but also any which it, in its untrammelled discretion, might think desirable or convenient, no matter how oppressive or discouraging they might in fact be for applicants.<sup>124</sup>

Such restrictions and limitations are necessary because, absent such protections, “the appearance of a potential for abuse or discrimination may arise.”<sup>125</sup>

The petitioner in *Joy Apartments, LLC v. Town of Cornwall*, obtained a building permit to construct a thirty-one-unit apartment building and paid the requested fee of \$33,362.00, computed at a rate of \$0.50 per square foot of floor area.<sup>126</sup> The check with which the building permit fee was paid did not specify that it was paid under protest.<sup>127</sup> Subsequent to the issuance of a certificate of occupancy for the building, Joy advised the building department that it believed that the building

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120. *Id.* at 838, 75 N.Y.S.2d at 592 (citing *Hamptons*, 98 A.D.3d at 736–38, 950 N.Y.S.2d at 183–84).

121. *See, e.g.*, *Jewish Reconstructionist Synagogue, Inc. v. Vill. of Roslyn Harbor*, 40 N.Y.2d 158, 163, 352 N.E.2d 115, 118, 386 N.Y.S.2d 198, 200 (1976) (citing *City of Buffalo v. Stevenson*, 207 N.Y. 258, 261–62, 100 N.E. 798, 799–800 (1913)).

122. *Id.* at 163, 352 N.E.2d at 117, 386 N.Y.S.2d at 200.

123. *Id.* at 163, 352 N.E.2d at 118, 386 N.Y.S.2d at 201 (quoting 9 MCQUILLAN, MUNICIPAL CORPORATIONS § 26.36) (first citing *Bon Air Estates, Inc. v. Vill. of Suffern*, 32 A.D.2d 921, 922, 302 N.Y.S.2d 304, 307 (2d Dep’t 1969); then citing *Hanson v. Griffiths*, 204 Misc. 736, 738, 124 N.Y.S.2d 473, 476 (Sup. Ct. Westchester Cty. 1953); and then citing *People v. Malmud*, 4 A.D.2d 86, 89, 164 N.Y.S.2d 204, 207 (2d Dep’t 1957)).

124. *Id.*

125. *Id.* at 164, 352 N.E.2d at 119, 386 N.Y.S.2d at 201.

126. 160 A.D.3d 958, 958, 75 N.Y.S.3d 249, 250 (2d Dep’t 2018).

127. *Id.*

permit fee had been an estimate and demanded an accounting to ascertain if a refund was due.<sup>128</sup> The building inspector informed the petitioner that the building permit and inspection fees were calculated based on the square footage of the project.<sup>129</sup> Joy then instituted a hybrid proceeding/action seeking an order directing the Town to account for the expenses it incurred with respect to the project and to refund the difference between the reasonable expenses it incurred and the amount paid.<sup>130</sup> It further sought a judgment declaring that the local law authorizing the building permit fee was void as an unauthorized tax.<sup>131</sup>

“[W]here a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement.”<sup>132</sup> Accordingly, fees may not be utilized to generate revenue or defray the costs of general governmental functions.<sup>133</sup> However, a precise equivalence between the fee and the total expenses is not necessary.<sup>134</sup> A building permit fee based on the square footage of the project is not illegal per se.<sup>135</sup>

The court concluded that the plaintiff in *Joy Apartments* was not entitled to a refund of any portion of the building permit fee.<sup>136</sup> “[T]he payment of a tax or fee cannot be recovered subsequent to the invalidation of the taxing statute or rule, unless the taxpayer can demonstrate that the payment was involuntary.”<sup>137</sup> Payment of a fee or tax under protest implies that payment is not voluntarily.<sup>138</sup> However, if payment is

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128. *Id.* at 958–59, 75 N.Y.S.3d at 250.

129. *Id.* at 959, 75 N.Y.S.3d at 250.

130. *Id.*

131. *Joy Apts.*, 160 A.D.3d at 959, 75 N.Y.S.3d at 250–51.

132. *Id.* at 959, 75 N.Y.S.3d at 251 (quoting *Torsoe Bros. Constr. Corp. v. Bd. of Trs.*, 49 A.D.2d 461, 465, 375 N.Y.S.2d 612, 616–17 (2d Dep’t 1975)).

133. *Id.* (citing *Harriman Estates at Aquebogue, LLC v. Town of Riverhead*, 151 A.D.3d 854, 856, 58 N.Y.S.3d 63, 65 (2d Dep’t 2017)).

134. *Id.* (citing *Suffolk Cty. Builders Ass’n v. Cty. of Suffolk*, 46 N.Y.2d 613, 621, 389 N.E.2d 133, 137, 415 N.Y.S.2d 821, 824–25 (1979)).

135. *Id.* (first citing *Jewish Reconstructionist Synagogue of N. Shore v. Vill. of Roslyn Harbor*, 40 N.Y.2d 158, 164, 352 N.E.2d 115, 118, 386 N.Y.S.2d 198, 201 (1976); and then citing *Wildlife Assocs. v. Town Bd. of Town of Southampton*, 141 A.D.2d 651, 652, 529 N.Y.S.2d 548, 549 (2d Dep’t 1988)).

136. 160 A.D.3d at 959, 75 N.Y.S.3d at 251.

137. *Id.* (quoting *Video Aid Corp. v. Town of Wallkill*, 85 N.Y.2d 663, 666, 651 N.E.2d 886, 888, 628 N.Y.S.2d 18, 20 (1965)).

138. *Id.* at 959–60, 75 N.Y.S.3d at 251 (quoting *Video Aid*, 85 N.Y.2d at 667, 651 N.E.2d at 888, 628 N.Y.S.2d at 20); (first citing *Mercury Mach. Importing Corp. v. New York*, 3 N.Y.2d 418, 424–25, 144 N.E.2d 400, 402, 165 N.Y.S.2d 517, 519 (1957); and then citing *Imperial Gardens v. Town of Wallkill*, 228 A.D.2d 562, 563, 644 N.Y.S.2d 528, 530 (2d Dep’t 1996)).

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“necessary to avoid threatened interference with present liberty of person or immediate possession of property, the failure to formally protest will be excused.”<sup>139</sup> Moreover, if payment of a tax or fee is based on a material mistake of fact, the payment may be recovered even if it was made without protest.<sup>140</sup>

The plaintiff did not pay the building permit fee under protest, nor was the payment made under duress because it did not involve a threatened interference with present liberty of person or immediate possession of property.<sup>141</sup> The plaintiff’s ostensible opinion that it was entitled to a refund was not a mistake of fact justifying its failure to pay under protest.<sup>142</sup> As a result, the complaint was properly dismissed.<sup>143</sup>

**VI. AREA VARIANCES**

Town Law § 267-b(3)(b) and Village Law § 7-712-b(3)(b) mandate that a zoning board must engage in a balancing test when deciding whether to approve an application for an area variance, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if relief is granted.<sup>144</sup> If a determination of a Zoning Board of Appeals balancing the germane considerations is rational, the board is not required to substantiate its decision with supporting evidence for each of the five statutory factors.<sup>145</sup>

The court sustained the denial of area variances sought for a plan to

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139. *Id.* at 960, 75 N.Y.S.3d at 251 (internal quotations omitted) (quoting *Video Aid Corp.*, 85 N.Y.2d at 667, 651 N.E.2d at 888, 628 N.Y.S.2d at 20) (first citing *Five Boro Elec. Contractors Ass’n v. City of N.Y.*, 12 N.Y.2d 146, 149, 187 N.E.2d 774, 775, 237 N.Y.S.2d 315, 317 (1962); and then citing *Adrico Realty Corp. v. New York*, 250 N.Y. 29, 40, 164 N.E. 732, 735 (1928)).

140. *Id.* (first citing *Mercury Mach. Importing Corp.*, 3 N.Y.2d at 425, 144 N.E.2d at 403, 165 N.Y.S.2d at 520; then citing *Adrico Realty*, 250 N.Y. at 32, 164 N.E. at 732; and then citing *Matteawan on Main, Inc. v. City of Beacon*, 109 A.D.3d 590, 591, 970 N.Y.S.2d 631, 633 (2d Dep’t 2013)).

141. *Joy Apts.*, 160 A.D.3d at 960, 75 N.Y.S.3d at 251 (first citing *Video Aid Corp.*, 85 N.Y.2d at 669–70, 651 N.E.2d at 890, 628 N.Y.S.2d at 22; then citing *Mercury Mach. Importing Corp.*, 3 N.Y.2d at 425, 144 N.E.2d at 402, 165 N.Y.S.2d at 520; and then citing *Imperial Gardens*, 228 A.D.2d at 563, 644 N.Y.S.2d at 530).

142. *Id.* at 960, 75 N.Y.S.3d at 251–52 (first citing *Mercury Mach. Importing*, 3 N.Y.2d at 426, 144 N.E.2d at 403, 165 N.Y.S. at 521; then citing *Adrico Realty*, 250 N.Y. at 38, 164 N.E. at 734; and then citing *Matteawan on Main*, 109 A.D.3d at 591–92, 970 N.Y.S.2d at 633–34).

143. *Id.* at 960, 75 N.Y.S.3d at 252.

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

145. *See, e.g., Petikas v. Baranello*, 78 A.D.3d 713, 714, 910 N.Y.S.2d 515, 517 (2d Dep’t 2010) (citing *King v. Town of Islip Zoning Bd. of Appeals*, 68 A.D.3d 1113, 1115, 892 N.Y.S.2d 174, 176 (2d Dep’t 2009)); *see* TOWN § 267-b(3)(b).

expand an existing private student housing development by constructing additional buildings in *Feinberg-Smith Associates, Inc. v. Town of Vestal Zoning Board of Appeals*.<sup>146</sup> The petitioner proposed to construct additional buildings in the complex in order to add 220 to 240 one- and two-bedroom apartments accommodating 340 residents, for a total of 409 apartments and 562 residents.<sup>147</sup> Numerous variances were required including those from the minimum lot size requirement, the minimum living space requirement per apartment from 750 square feet to 475 square feet, number and size of parking spaces, and maximum building height.<sup>148</sup> The petitioner claimed that its purpose was to have fewer residents and less population density than permitted pursuant to the zoning law.<sup>149</sup> The petitioner preferred to have one- and two-bedroom units instead of the four or five bedroom units permitted by the zoning law because the target market was college students.<sup>150</sup>

The applicable minimum lot size requirement was 3,000 square feet.<sup>151</sup> Without a variance, the zoning law would have permitted 150 dwelling units, each of which could accommodate five occupants, for a total of 750 occupants.<sup>152</sup> If the variances were to be granted, the structures would house fewer occupants, that is, 562 persons, but there would be substantially more dwelling units because they would consist of one- and two-bedrooms apartments.<sup>153</sup> The petitioner additionally sought a variance to allow 474 square feet for the one bedroom apartments instead of the required minimum living area of 750 square feet.<sup>154</sup> A 750-square-foot apartment with five occupants would allow 150 square feet per person.<sup>155</sup> The variance proposed considerably more space per person, that is, 474 square feet.<sup>156</sup> The zoning law required two parking spaces per dwelling unit, that is, 818 for the proposed 409 dwelling units.<sup>157</sup> The petitioner sought a variance to permit it to provide 309 parking spaces, asserting that between thirty-five and forty-three

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146. No. CA2017000913, 2017 N.Y. Slip Op. 51054(U), at 6 (Sup. Ct. Broome Cty. Aug. 15, 2017).

147. *Id.* at 1.

148. *Id.* at 1–2.

149. *Id.* at 2.

150. *Id.* at 1–2.

151. *Feinberg-Smith Assocs.*, 2017 N.Y. Slip Op. 51054(U), at 4.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Feinberg-Smith Assocs.*, 2017 N.Y. Slip Op. 51054(U), at 4.

157. *Id.*

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percent of the residents do not have cars and walk to campus.<sup>158</sup>

The court reiterated that although Town Law § 267-b(3)(b), like Village Law § 7-712(3)(b), requires that zoning boards of appeal undertake a balancing test of the statutory considerations, a Zoning Board of Appeals need not substantiate its decision with supporting evidence as to each of the five factors if its determination demonstrates that it has rationally balanced the germane considerations.<sup>159</sup> The petitioner asserted that the board had not and that the denial of the application was influenced by community pressure.<sup>160</sup>

With respect to the maximum number of dwelling units and parking variances, the board's colloquy included observations that the variances were substantial.<sup>161</sup> It was further related that the decrease in the minimum living area proposed was approximately one-third of the applicable requirement.<sup>162</sup> The board further concluded that granting relief would produce a change in the character of the neighborhood because the proposal would increase the number of dwelling units by approximately 120% and the population would increase by approximately 150%.<sup>163</sup> Additional buildings would be added to the site and the buffer between the development and abutting residences would be significantly diminished.<sup>164</sup> In addition, increased pedestrian traffic would be produced in an area without sidewalks.<sup>165</sup> Although anecdotal testimony generally is insufficient,<sup>166</sup> reliance on the specific testimony

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158. *Id.*

159. *Id.* at 3 (quoting *Caspian Realty, Inc. v. Zoning Bd. of Appeals*, 68 A.D. 3d 62, 73, 886 N.Y.S.2d 442, 450 (2d Dep't 2009)) (citing *Patrick v. Zoning Bd. of Appeals*, 130 A.D.3d 741, 741, 15 N.Y.S.3d 50, 51 (2d Dep't 2015)); see N.Y. TOWN LAW § 267-b(3)(b) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-b(3)(b) (McKinney 2011).

160. *Feinberg-Smith Assocs.*, 2017 N.Y. Slip Op. 51054(U), at 3.

161. *Id.* at 5.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Feinberg-Smith Assocs.*, 2017 N.Y. Slip Op. 51054(U), at 5.

166. See *Ernalex Constr. Realty Corp. v. Bellissimo*, 256 A.D.2d 338, 340, 681 N.Y.S.2d 298, 300 (2d Dep't 1998) (first citing *Chernick v. McGowan*, 238 A.D.2d 586, 587, 656 N.Y.S.2d 392, 394 (2d Dep't 1997); then citing *Framike Realty Corp. v. Hinck*, 220 A.D.2d 501, 502, 632 N.Y.S.2d 177, 178 (2d Dep't 1995); then citing *Koncelik v. Planning Bd. of E. Hampton*, 188 A.D.2d 469, 470–71, 590 N.Y.S.2d 900, 901–02 (2d Dep't 1992); and then citing *Orchards Assoc. v. Planning Bd. of North Salem*, 114 A.D.2d 850, 852–53, 494 N.Y.S.2d 760, 762 (2d Dep't 1985)); *Twin Cty. Recycling Corp. v. Yevoli*, 90 N.Y.2d 1000, 1002, 688 N.E.2d 501, 502, 665 N.Y.S.2d 627, 628 (1997); cf. *Gilchrist v. Town of Lake George Planning Bd.*, 255 A.D.2d 791, 792, 680 N.Y.S.2d 320, 321 (3d Dep't 1998) (first citing *Ferrigan v. Thompson*, 135 A.D.2d 953, 954, 522 N.Y.S.2d 362, 363 (3d Dep't 1987); and then citing *Ireland v. Zoning Bd. of Appeals*, 195 A.D.2d 155, 159, 606 N.Y.S.2d 843, 845 (3d Dep't 1994)).

of the neighbors was considered by the court to be permissible.<sup>167</sup> Further, the applicable statutory considerations were considered by the board.<sup>168</sup> Although the board adopted a negative declaration which concluded that the proposal would not have a substantial adverse impact on the environment, it did find that there would be a moderate to large impact in the use or intensity of use of the land, that the character or quality of the existing community would be deleteriously impacted, and that an adverse change in the existing level of traffic, whether mass transit, biking, or walkway, would be produced.<sup>169</sup> The board concluded that those findings did not prevent the adoption of a negative declaration and the court confirmed that it could have rationally reached a different conclusion on the ultimate granting of the variances.<sup>170</sup>

The court also concluded that the variances requested could be characterized as substantial, premised on the amount of additional area covered, population density, and the reduction of the buffer.<sup>171</sup> “Variances can be substantial based on the extent to which they deviate from the Code, and also based on the cumulative effect.”<sup>172</sup>

Although the proposed project could be characterized as a superior alternative because it would not result in as much of an increase in population as an as-of-right project, there were alternatives to the requested variances.<sup>173</sup> The property could accommodate more than 700 people with a project that conformed to the requirements of the zoning law if units with five bedrooms were to be constructed.<sup>174</sup>

The court determined the board did not disregard any of the relevant statutory considerations and found that that its determination had a rational basis.<sup>175</sup> The board balanced and weighed the germane statutory factors and its findings were based on objective evidence in the record.<sup>176</sup>

One might speculate that granting the requested variances would produce less impact on the area than as as-of-right development. However, because the Zoning Board of Appeals carefully considered

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167. *Feinberg-Smith Assocs.*, 2017 N.Y. Slip Op. 51054(U), at 5 (citing *Caspian Realty, Inc. v. Zoning Bd.*, 68 A.D.3d 62, 76, 886 N.Y.S.2d 442, 452 (2d Dep’t 2009)).

168. *Id.* at 4.

169. *Id.* at 4–5.

170. *Id.* at 5.

171. *Id.*

172. *Feinberg-Smith Assocs.*, 2017 N.Y. Slip Op. 51054(U), at 5 (citing *Millennium Custom Homes, Inc. v. Young*, 58 A.D.3d 740, 742, 873 N.Y.S.2d 91, 93 (2d Dep’t 2009)).

173. *Id.* at 5–6.

174. *Id.*

175. *Id.* at 6.

176. *Id.*

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each of the relevant considerations and weighed the benefit to the applicant as against the detriment to the health, safety and welfare of the neighborhood,<sup>177</sup> it was inappropriate for the court to substitute its judgment for that of the board. The decision confirms the necessity for a board to undertake the obligatory analysis and rationally base its determination on probative evidence in the record. If a board does so, its decision is likely to be sustained. If it fails to do so, annulment is probable.

In *Cooperstown Eagles, LLC v. Village of Cooperstown Zoning Board of Appeals*, the owner of a building containing a dental office on the ground floor and two residential apartments on the second floor, sought a tourist accommodation special permit that would allow it to rent one of the apartments as a “tourist accommodation,” that is, for short-term rentals of seven days or less, as compared to the otherwise applicable thirty-day minimum rental.<sup>178</sup> The zoning enforcement officer denied the application because the property was not owner-occupied as required by the zoning law.<sup>179</sup>

The owner then appealed for a special permit and an area variance seeking relief from owner-occupancy requirement.<sup>180</sup> The Zoning Board of Appeals denied the appeal, in part, because it concluded that the owner was not entitled to an area variance which would dispense with the owner-occupancy requirement.<sup>181</sup> The owner subsequently conveyed a twenty-five percent ownership interest in the property to the tenant of the other apartment and filed a second application for a special permit, asserting that the property complied with the owner-occupancy requirement.<sup>182</sup> The Zoning Board of Appeals granted the application for a tourist accommodation special permit and the petitioner commenced an Article 78 proceeding challenging the denial of its first application for an area variance.<sup>183</sup>

The appellate division determined that the original approval of the special use permit did not render the Article 78 proceeding moot.<sup>184</sup> A proceeding will not be rendered moot where “the rights of the parties will be directly affected by the determination of [the proceeding] and the interest of the parties is an immediate consequence of the judgment.”<sup>185</sup>

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177. *Feinberg-Smith Assocs.*, 2017 N.Y. Slip Op. 51054(U), at 6.

178. 161 A.D.3d 1433, 1434, 77 N.Y.S.3d 716, 717 (3d Dep’t 2018).

179. *Id.*

180. *Id.* at 1434, 77 N.Y.S.3d at 417–18.

181. *Id.* at 1434, 77 N.Y.S.3d at 418.

182. *Id.*

183. *Cooperstown Eagles*, 161 A.D.3d at 1434, 77 N.Y.S.3d at 418.

184. *Id.* at 1435, 77 N.Y.S.3d at 718.

185. *Id.* (internal quotations omitted) (quoting *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714,

In *Cooperstown Eagles*, “the property rights that attach upon the issuance of an area variance compared to the issuance of a special use permit are distinct,” because the issuance of a tourist accommodation special permit requires compliance with the owner-occupancy requirement.<sup>186</sup> On the other hand, the approval of an area variance would vest the owner with a property right relieving it from the owner-occupancy requirement, without, as would otherwise be required, any temporal limitation or renewal requirement.<sup>187</sup> Accordingly, a judicial determination in the petitioner’s favor would vest it with a property right superior and more valuable than what it possessed by virtue of the special permit alone.<sup>188</sup> Consequently, approval of the special permit did not moot the denial of the variance application.<sup>189</sup>

The court also determined that the denial of the area variance application from the owner-occupancy requirement was not an abuse of discretion.<sup>190</sup> The Zoning Board of Appeals considered all five of the applicable statutory criteria, including the substantiality of the requested variance.<sup>191</sup> The record confirmed that the board also discussed the fact that the owner-occupancy was the “cornerstone” of the tourist accommodation special permit criteria because it was the principal control mechanism for diminishing the potential deleterious impacts of short-term or transient rentals.<sup>192</sup> If the variance were to be granted, there would be no contact person on-site to deal with any issues that might arise.<sup>193</sup> The record also established that subsequent to the adoption of the owner-occupancy requirement, there was an immediate decrease in the

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409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980)) (citing *Truscott v. Albany Bd. of Zoning Appeals*, 152 A.D.3d 1038, 1039, 55 N.Y.S.3d 919, 920 (3d Dep’t 2017); and then citing *City of Glens Falls v. Town of Queensbury*, 90 A.D.3d 1119, 1120, 933 N.Y.S.2d 762, 763 (3d Dep’t 2011)).

186. *Id.* (first citing N.Y. VILLAGE LAW § 7-712-b(3) (McKinney 2011); then citing COOPERSTOWN, N.Y., POWERS AND DUTIES art. 4, § 300-66(c)(1) (2003); then citing N.Y. VILLAGE LAW § 7-725-b (McKinney 2011); then citing COOPERSTOWN, N.Y., DEFINITIONS art. 16, § 300-84 (2000); and then citing COOPERSTOWN, N.Y., SPECIAL PERMIT SUPPLEMENTARY REGULATIONS art. 3, § 300-17(A)(1)(a), (4)(a) (2003)).

187. *Id.* (citing COOPERSTOWN, N.Y., POWERS & DUTIES art. 4, § 300-66(c)(1) (2003)).

188. *Cooperstown Eagles*, 161 A.D.3d at 1435, N.Y.S.3d at 719.

189. *Id.* at 1435–36, N.Y.S.3d at 719 (citing *Cobleskill Stone Prods., Inc. v. Town of Schoharie*, 126 A.D.3d 1094, 1095–96, 6 N.Y.S.3d 305, 306 (3d Dep’t 2015); and then citing *City of Glens Falls*, 90 A.D.3d at 1120, 933 N.Y.S.2d at 763)).

190. *Id.* at 1438–39, N.Y.S.3d at 721 (citing *Pecoraro v. Bd. of Appeals*, 2 N.Y.3d 608, 615, 814 N.E.2d 404, 408, 781 N.Y.S.2d 234, 238 (2004); and then citing *Braunstein v. Bd. of Zoning Appeals*, 100 A.D. 1091, 1093–94, 952 N.Y.S.2d 857, 859–60 (3d Dep’t 2012)).

191. *Id.* at 1437, 77 N.Y.S.3d at 720 (citing VILLAGE § 7-712-b(3)(b); then citing POWERS AND DUTIES art. 4, § 300-66(C)(1)(b)).

192. *Id.*

193. *Cooperstown Eagles*, 161 A.D.3d at 1437, 77 N.Y.S.3d at 720.



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number of noise and disturbance complaints received with respect to short-term rentals.<sup>194</sup>

The board balanced the probability that the owner could earn more income if the variance were to be granted with the fact that the economic benefits could be achieved by alternatives other than granting an area variance, such as by the petitioner residing at the property.<sup>195</sup> Moreover, even if compliance with the owner-occupancy requirement was not feasible, the petitioner was not barred from continuing its existing practice of leasing the unit as a long-term rental.<sup>196</sup> Finally, any alleged difficulty or hardship was self-created because the owner-occupancy requirement was enacted before the petitioner acquired the property.<sup>197</sup>

Courts may “not engage in their own balancing of the factors, but must yield to the ZBA’s discretion and weighing of the evidence,”<sup>198</sup> “even if the court would have decided the matter differently in the first instance.”<sup>199</sup> The court found that the evidence for granting the area variance that would produce an undesirable change in the character of the neighborhood or detrimentally affect nearby properties was meager.<sup>200</sup> Consequently, the applicability of the statutory factors was “fairly evenly split.”<sup>201</sup> Although the resolution denying relief failed to enumerate specific factual findings, a review of the minutes of the hearing and the submissions filed in response to the petition demonstrated that the board properly applied the balancing test and considered all five statutory factors.<sup>202</sup> Hence, the court found that the determination was not irrational, arbitrary, or an abuse of discretion, and declined to disturb the

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194. *Id.*

195. *Id.*

196. *Id.* at 1437–38, 77 N.Y.S.3d at 720 (citing *Smelyansky v. Zoning Bd. of Appeals*, 83 A.D.3d 1267, 1269–70, 920 N.Y.S.2d 828, 831 (3d Dep’t 2011)).

197. *Id.* at 1438, 77 N.Y.S.3d at 720 (first citing *Bivona v. Town of Plattekill Zoning Bd. of Appeals*, 268 A.D.2d 877, 880–81, 701 N.Y.S.2d 734, 737 (3d Dep’t 2000); then citing *Rehabilitation Support Servs., Inc. v. City of Albany Bd. of Zoning Appeals*, 140 A.D.3d 1424, 1426, 34 N.Y.S.3d 256, 258 (3d Dep’t 2016); and then citing *Ctr. Square Ass’n, Inc. v. Albany Bd. of Zoning Appeals*, 19 A.D.3d 968, 971, 798 N.Y.S.2d 756, 759 (3d Dep’t 2005)).

198. *Cooperstown Eagles*, 161 A.D.3d at 1438, 77 N.Y.S.3d at 721 (internal quotations omitted) (quoting *Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals*, 126 A.D.3d 1152, 1155, 6 N.Y.S.3d 171, 174 (3d Dep’t 2015)).

199. *Id.* (internal quotations omitted) (quoting *Smelyansky*, 83 A.D.3d at 1268, 920 N.Y.S.2d at 830).

200. *Id.*

201. *Id.*

202. *Id.* (first citing *Fund for Lake George*, 126 A.D.3d at 1154, 6 N.Y.S.3d at 174; then citing *Ohrenstein v. Zoning Bd. of Appeals*, 39 A.D.3d 1041, 1043, 833 N.Y.S.2d 763, 766 (3d Dep’t 2007); and then citing *Iwan v. Zoning Bd. of Appeals*, 252 A.D.2d 913, 914, 677 N.Y.S.2d 190, 191 (3d Dep’t 1998)).

decision.<sup>203</sup>

## VII. SPECIAL PERMITS

Classification of a use as a special permit represents a recognition that the use is consistent with a community's zoning plan and will not deleteriously affect the neighborhood.<sup>204</sup> Accordingly, an applicant's burden of proof is substantially less than that of one seeking a variance.<sup>205</sup> Nevertheless, an applicant is required to establish compliance with the standards applicable to the proposed use before a special permit may be granted.<sup>206</sup> A special permit application may be denied only if the record corroborates the decision by substantial evidence.<sup>207</sup> However, where the record contains substantial evidence supporting denial of a special permit application, the board's decision must be accorded deference upon judicial review.<sup>208</sup>

The decision in *Troy Sand & Gravel Co. v. Fleming*, illustrates that although a special permit use is consistent with a community's land use scheme, a special permit application for a particular use may be denied if it is inconsistent with the criteria legislatively adopted for that use, and will cause serious detrimental impacts to the area.<sup>209</sup> The Town Board in

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203. *Cooperstown Eagles*, 161 A.D.3d at 1438–39, N.Y.S.3d at 721 (first citing *Pecoraro v. Bd. of Appeals*, 2 N.Y.3d 608, 615, 814 N.E.2d 404, 408, 781 N.Y.S.2d 234, 238 (2004); and then citing *Braunstein v. Bd. of Zoning Appeals*, 100 A.D. 1091, 1093–94, 952 N.Y.S.2d 857, 859–60 (3d Dep't 2012)).

204. *See, e.g., 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); *Twin Cty. Recycling Corp. v. Yevoli*, 90 N.Y.2d 1000, 1002, 688 N.E.2d 501, 502, 665 N.Y.S.2d 627, 628 (1997) (citing *N. Shore Steak House v. Bd. of Appeals of Vill. of Thomaston*, 30 N.Y.2d 238, 243, 282 N.E.2d 606, 609, 331 N.Y.S.2d 645, 649 (1972)).

205. *See, e.g., Retail Prop. Trust*, 98 N.Y.2d at 195, 774 N.E.2d at 731, 746 N.Y.S.2d at 666 (first citing *N. Shore Steak House*, 30 N.Y.2d at 244, 282 N.E.2d at 609, 331 N.Y.S.2d at 649; and then citing *Wegmans Enters., Inc. v. Lansing*, 72 N.Y.2d 1000, 1001, 530 N.E.2d 1292, 1292, 534 N.Y.S.2d 372, 373 (1988)).

206. *See, e.g., id.*

207. *See, e.g., id.* at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666 (citing *Twin Cty. Recycling*, 90 N.Y.2d at 1002, 688 N.E.2d at 502, 665 N.Y.S.2d at 628); *see also White Castle Sys., Inc. v. Bd. of Zoning Appeals*, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159, 162 (2d Dep't 2012) (first citing *Retail Prop. Trust*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666; and then citing *Twin Cty. Recycling*, 90 N.Y.2d at 1002, 688 N.E.2d at 502, 665 N.Y.S.2d at 628).

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

209. *See generally* 156 A.D.3d 1295, 68 N.Y.S.3d 540 (3d Dep't 2017) (affirming a denial of a special permit application where the use would create a highly intensive industrial use, harm property values, and harm the neighborhood's essential character, despite the use being

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**Zoning and Land Use**

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*Troy Sand & Gravel* denied an application for a special permit for a “commercial excavation” use, that is, to operate an open pit hard rock quarry requiring the blasting and crushing of solid rock formations on a 214-acre tract.<sup>210</sup> The property was located in a rural residential land use district, a designation intended to protect the rural character and environmental quality of the town while allowing for a mixture of housing types, home occupations, and rural living opportunities.<sup>211</sup> The district contained a substantial amount of lakes, streams, wetlands, and wildlife and camp communities.<sup>212</sup> Approximately seventy-nine acres of the parcel would be excavated in six phases spanning 100 to 150 years.<sup>213</sup> An additional ten acres were proposed to include access roads, storm water collection ponds, a crushing plant, stockpile areas, parking and an office building.<sup>214</sup> There would be an approximately 3,000-foot-long and 1,000-foot-wide rock face, with 275-foot-high benched walls as a result of the mining operations.<sup>215</sup> The quarry would operate 6:00 a.m. to 7:00 p.m. Monday through Friday and 7:00 a.m. to 5:00 p.m. on Saturday.<sup>216</sup>

Although most of the Town Board’s determinations regarding the special permit standards was premised on information outside of the SEQRA record, or entirely inconsistent with the final EIS, and, accordingly, were found to be irrational, denial of the application based on three of the special permit criteria, nevertheless, was rationally based on information in the final EIS.<sup>217</sup>

The first special use standard required that “[t]he location and size of the use, the nature and intensity of the operations involved, the size of the site in relation to the use and the location of the site with respect to existing or future access shall be in harmony with the orderly development of the district.”<sup>218</sup> The record established that the quarry would be a sizable, highly intensive industrial use in an area where only one small commercial entity existed.<sup>219</sup> Because alterations in land use

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consistent with the community’s land use scheme), *lv. denied*, 31 N.Y.3d 913, 106 N.E.3d 756, 81 N.Y.S.3d 373 (2018).

210. *Id.* at 1296–97, 68 N.Y.S.3d at 542–43.

211. *Id.* at 1300, 68 N.Y.S.3d at 545 (citing Town of Nassau, N.Y., Local Law No. 2 (1986)).

212. *Id.* at 1301, 68 N.Y.S.3d at 546.

213. *Id.*

214. *Troy Sand & Gravel*, 156 A.D.3d at 1301, 68 N.Y.S.3d at 546.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 1302, 68 N.Y.S.3d at 547 (quoting Town of Nassau, N.Y., Local Law No. 2, art. VI(A)(2) (1986)).

219. *Troy Sand & Gravel*, 156 A.D.3d at 1302, 68 N.Y.S.3d at 547.

trends can detrimentally affect orderly development of an area, the Town Board's determination that the specific commercial excavation use was not suitable at the particular location was not irrational.<sup>220</sup>

In concluding that the standard that "the nature and intensity of intended operations shall not discourage the appropriate development and use of adjacent land and buildings nor impair the value thereof," was not satisfied, the Town Board relied on a property value analysis which found that the quarry would have an adverse financial impact on homeowners in the area and could result in a substantial decrease in property values.<sup>221</sup> The Town Board could permissibly reject the property value analysis submitted by the applicant because it is within a reviewing board's discretion to evaluate competing expert evidence.<sup>222</sup>

The special permit standards also required a finding that "[t]he character and appearance of the proposed use . . . shall be in harmony with the character and appearance of the surrounding neighborhood."<sup>223</sup> The Town Board rationally concluded that the project would alter the essential character of the Town and immediate neighborhood which consisted of residences and undeveloped forest land.<sup>224</sup>

As a result, the applicant failed to satisfy its burden of demonstrating that the proposed use satisfied the special permit criteria.<sup>225</sup> Additionally, the previously adopted SEQRA findings did not preclude the Town Board from considering the applicable special permit criteria.<sup>226</sup> Although the Town Board improperly relied on environmental information that was outside of the SEQRA record and rendered factual findings that had no

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220. *Id.* (first citing *Connors v. Sullivan*, 171 A.D.2d 982, 983, 567 N.Y.S.2d 923, 925 (3d Dep't 1991); and then citing *Schadow v. Wilson*, 191 A.D.2d 53, 57 (3d Dep't 1993)).

221. *Id.* (internal quotations omitted) (quoting Town of Nassau, N.Y., Local Law No. 2, art. VI(A)(2) (1986)).

222. *Id.* at 1302–03, 68 N.Y.S.3d at 547 (citing *Albany-Greene Sanitation, Inc. v. Town of New Baltimore Zoning Bd. of Appeals*, 263 A.D.2d 644, 646, 692 N.Y.S.2d 831, 832 (3d Dep't 1999)); see *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); *Cleere v. Frost Ridge Campground, LLC*, 155 A.D.3d 1645, 1647, 65 N.Y.S.3d 405, 409, (4th Dep't 2017) (citing *Bounds v. Vill. of Clifton Springs Zoning Bd. of Appeals*, 137 A.D.3d 1759, 1760, 28 N.Y.S.3d 542, 543–44 (4th Dep't 2016)); *White Castle Sys., Inc. v. Bd. of Zoning Appeals*, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159, 162 (2d Dep't 2012) (first citing *Retail Prop. Trust*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666; and then citing *Twin Cty. Recycling*, 90 N.Y.2d at 1002, 688 N.E.2d at 502, 665 N.Y.S.2d at 628).

223. *Troy Sand & Gravel*, 156 A.D.3d at 1303, 68 N.Y.S.3d at 547 (internal quotations omitted) (quoting Town of Nassau, N.Y., Local Law No. 2, art. VI(A)(2) (1986)).

224. *Id.* at 1303, 68 N.Y.S.3d at 547–48.

225. See *id.* at 1303, 68 N.Y.S.3d at 548 (quoting *Wal-Mart Stores v. Planning Bd. of N. Elba*, 238 A.D.2d 93, 99, 668 N.Y.S.2d 774, 778 (3d Dep't 1998)).

226. *Id.* (quoting *Troy Sand & Gravel Co. v. Town of Nassau*, 101 A.D.3d 1505, 1507, 957 N.Y.S.2d 444, 447 (3d Dep't 2012)).

basis in the final EIS in evaluating most of the special permit criteria it applied, the failure to satisfy even one applicable standard constituted a sufficient basis to deny the special permit application.<sup>227</sup>

The court also rejected the claim that the Town Supervisor had a conflict of interest because he owned property in proximity to the quarry site.<sup>228</sup> Such an interest is one in common with many residents of the Town, and nothing in the record established that he stood to realize any gain by virtue of the denial of the application.<sup>229</sup> Further, his opposition to the quarry as a political candidate did not constitute a prohibited conflict of interest within the meaning of General Municipal Law § 801.<sup>230</sup> “Opposition to the project, without more, cannot constitute bias or a conflict of interest inasmuch as a contrary determination ‘would effectively make all but a handful of [the Town’s] citizens ineligible to sit on the [Town] Board.’”<sup>231</sup> Because the claimed conflict of interest and bias involved expressions of personal opinion, rather than any pecuniary or material interest in the denial of the application, there was no basis for annulment of the decision.<sup>232</sup>

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227. *Id.* (first citing *Connors v. Sullivan* 171 A.D.2d 982, 983, 567 N.Y.S.2d 923, 924–25 (3d Dep’t 1991); then citing *Wegmans Enters. v. Lansing*, 72 N.Y.2d 1000, 1001–02, 534 N.Y.S.2d 372, 373 (1988); then citing *R.J. Valente Gravel, Inc. v. Town of Kinderhook*, 250 A.D.2d 1014, 1015, 673 N.Y.S.2d 265, 267 (3d Dep’t 1998); and then citing *Eddy v. Neifer*, 297 A.D.2d 410, 413, 745 N.Y.S.2d 631, 634 (3d Dep’t 2002)).

228. *Troy Sand & Gravel*, 156 A.D.3d at 1304, 68 N.Y.S.3d at 548 (first citing *Town of Concord v. Duwe*, 4 N.Y.3d 870, 875, 832 N.E.2d 23, 26, 799 N.Y.S.2d 167, 170 (2005); and then citing *Rural Cmty. Coal., Inc. v. Vill. of Bloomingburg*, 118 A.D.3d 1092, 1095, 987 N.Y.S.2d 654, 658 (3d Dep’t 2014)).

229. *Id.* (first citing *Eadie v. Town Bd. of Town of N. Greenbush*, 47 A.D.3d 1021, 1024, 850 N.Y.S.2d 240, 243–44 (3d Dep’t 2008); then citing *Segalla v. Planning Bd.*, 204 A.D.2d 332, 333, 611 N.Y.S.2d 287, 288 (2d Dep’t 1994)).

230. *Id.* (citing *Byer v. Town of Poestenkill*, 232 A.D.2d 851, 853, 648 N.Y.S.2d 768, 771 (3d Dep’t 1996)); N.Y. GEN. MUN. LAW § 801 (McKinney 2012).

231. *Troy Sand & Gravel*, 156 A.D.3d at 1304, 68 N.Y.S.3d at 584–49 (alterations in original) (quoting *Ahearn v. Zoning Bd. of Appeals*, 158 A.D.2d 801, 802, 551 N.Y.S.2d 392, 394 (3d Dep’t)).

232. *Id.* at 1304, 68 N.Y.S.3d at 549 (first citing *Webster Assocs. v. Town of Webster*, 59 N.Y.2d 220, 227, 451 N.E.2d 189, 191, 464 N.Y.S.2d 431, 433 (1983); then citing *Laird v. Town of Montezuma*, 191 A.D.2d 986, 987, 594 N.Y.S.2d 939, 940 (4th Dep’t 1993); then citing *Pittsford Canalside Props., LLC v. Vill. of Pittsford*, 137 A.D.3d 1566, 1568, 29 N.Y.S.3d 709, 712 (4th Dep’t 2016); then citing *Schweichler v. Vill. of Caledonia*, 45 A.D.3d 1281, 1284, 845 N.Y.S.2d 901, 904–05 (4th Dep’t 2007); and then citing *Keller v. Morgan*, 149 A.D.2d 801, 802, 539 N.Y.S.2d 589, 591 (3d Dep’t 1989)).

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VIII. EFFECT OF REJECTION OF FINAL SUBDIVISION APPROVAL ON  
PRELIMINARY SUBDIVISION APPROVAL

In *Village of Pomona v. Town of Ramapo*, the appellate division determined that the denial or rejection of a final subdivision plat rescinds preliminary approval as a matter of law.<sup>233</sup>

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233. 155 A.D.3d 754, 755, 64 N.Y.S.3d 80, 82 (2d Dep't 2017) (citing *Aloya v. Planning Bd.*, 93 N.Y.2d 334, 341, 712 N.E.2d 644, 647, 690 N.Y.S.2d 475, 478 (1999)).