ZONING & LAND USE

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I. ZONING AMENDMENTS

A. Compliance with Comprehensive Plan/Spot Zoning

Town Law section 261 and Village Law section 7-706 endow expansive authority for municipalities to regulate land use and to enact

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zoning regulations.[1] Town Law section 263 and Village Law section 7-704, however, require that such zoning regulations must "be made in accordance with a comprehensive plan."[2] Town Law section 272-a and Village Law section 7-722 provide authority for and mandate procedures for the adoption of a written comprehensive plan.[3]

"A comprehensive plan has as its underlying purpose the control of land uses for the benefit of the whole community based upon consideration of its problems and applying the enactment or a general policy to obtain a uniform result not enacted in a haphazard or piecemeal fashion."[4] Irrespective of the source, the germane evidence must demonstrate "a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole."[5]

A comprehensive plan is not required to be contained in a single document, nor, for that matter, is it mandatory that it be a written document.[6] Instead, a community's comprehensive plan may consist of all relevant evidence of a municipality's land use policies.[7] Furthermore, a municipality is not required to act only in accordance with existing adopted land use policies if circumstances support different results.[8] "Although stability and regularity are essential to the operation of zoning plans, zoning is not static; the obligation is the support of comprehensive planning with recognition of the dynamics of change, not slavish servitude to any particular plan."[9] The case law confirms that if a change is necessary for the betterment of a community and a zoning amendment advances that need, such a modification forms a part of a community's

1. *See* N.Y. TOWN LAW § 261 (McKinney 2013); N.Y. VILLAGE LAW § 7-706(1) (McKinney 2011).

2. TOWN § 263; VILLAGE § 7-704.

3. *See* TOWN § 272-a; VILLAGE § 7-722.

4. Kravetz v. Plenge, 84 A.D.2d 422, 429, 446 N.Y.S.2d 807, 811 (4th Dep't 1982) (citing Walus v. Millington, 49 Misc. 2d 104, 108, 266 N.Y.S.2d 833, 839 (Sup. Ct. Oneida Cty. 1966)).

5. Taylor v. Vill. of Head of the Harbor, 104 A.D.2d 642, 644, 480 N.Y.S.2d 21, 23 (2d Dep't 1984) (first citing Town of Bedford v. Vill. of Mount Kisco, 33 N.Y.2d 178, 188, 306 N.E.2d 155, 159, 351 N.Y.S.2d 129, 136 (1973); and then citing Udell v. Haas, 21 N.Y.2d 463, 469, 235 N.E.2d 897, 900, 288 N.Y.S.2d 888, 893 (1968)).

6. *See* Asian Ams. for Equal. v. Koch, 72 N.Y.2d 121, 131, 527 N.E.2d 265, 270, 531 N.Y.S.2d 782, 787 (1988); Neville v. Koch, 173 A.D.2d 323, 324, 575 N.Y.S.2d 463, 464 (1st Dep't 1991).

7. *See Asian Ams. for Equal.*, 72 N.Y.2d 121 at 131, 527 N.E.2d at 270, 531 N.Y.S.2d at 787; *Udell*, 21 N.Y.2d at 471, 235 N.E.2d at 902, 288 N.Y.S.2d at 895; Rodgers v. Vill. of Tarrytown, 302 N.Y. 115, 121–22, 96 N.E.2d 731, 733 (1951).

8. *See Kravetz*, 84 A.D.2d at 430, 446 N.Y.S.2d at 812.

9. *Id. See also Town of Bedford*, 33 N.Y.2d at 188, 306 N.E.2d at 159, 351 N.Y.S.2d at 136.

comprehensive plan.[10] In assessing a challenged amendment, "the court decides whether it accords with a well-considered plan . . . by determining whether the original plan required amendment because of the community's change and growth and whether the amendment is calculated to benefit the community as a whole . . . ."[11]

Accordingly, "[w]here detailed planning has been done, courts are less inclined to find that a zoning amendment was not enacted in accordance with a comprehensive plan."[12] To satisfy the statutory requirements of Town Law section 263 and Village Law section 7-704, it must be established that the zoning amendment was "adopted for a legitimate governmental purpose and that there is [a] reasonable relation between the end sought to be achieved by it and the means used to achieve that end."[13]

Zoning amendments often are challenged as constituting impermissible 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."[14]

In *Greenport Group, LLC v. Town Board of Southold*, the rezoning of a thirty-one acre parcel from a Limited Business and Hamlet Density district to an R-80, low density residential district was attacked as being inconsistent with the Town's comprehensive plan and as constituting impermissible reverse spot zoning.[15] When the property was purchased in 1999, it contained four buildings, each containing two dwelling units.[16] The structures were part of a 140-unit senior housing project which had been

10. *See Kravetz*, 84 A.D.2d at 429, 446 N.Y.S.2d at 811 (citing Gilmer v. Fritz, 28 A.D.2d 804, 805, 281 N.Y.S.2d 154, 157 (3d Dep't 1967)).

11. *Asian Ams. for Equal.*, 72 N.Y.2d at 131, 527 N.E.2d at 270, 531 N.Y.S.2d at 787 (first citing Randolph v. Town of Brookhaven, 37 N.Y.2d 544, 547, 337 N.E.2d 763, 764, 375 N.Y.S.2d 315, 317 (1975); and then citing *Town of Bedford*, 33 N.Y.2d at 188, 306 N.E.2d at 159, 351 N.Y.S.2d at 136)).

12. W. Branch Conservation Ass'n v. Town of Ramapo, N.Y.L.J., Mar. 8, 2000, at 32 (Sup. Ct. Rockland Cty.) (citing Goodrich v. Southampton, 39 N.Y.2d 1008, 1009, 387 N.Y.S.2d 242, 242 (1976)).

13. Vill. Bd. of Trs. v. Zoning Bd. of Appeals of Malone, 164 A.D.2d 24, 28, 562 N.Y.S.2d 973, 975 (3d Dep't 1990) (citing *Asian Ams. for Equal.*, 72 N.Y.2d at 131–32, 527 N.E.2d at 270, 531 N.Y.S.2d at 787).

14. Rogers v. Vill. of Tarrytown, 302 N.Y. 115, 123, 96 N.E.2d 731, 734 (1951) (first citing Harris v. Piedmont, 42 P.2d 356, 358 (Cal. Ct. App. 1935); then citing Cassel v. Baltimore, 73 A.2d 486, 488–89 (Md. 1950); then citing Bd. of Cty. Comm'rs v. Snyder, 46 A.2d 689, 691 (Md. 1946); then citing Leahy v. Inspector of Bldgs. of New Bedford, 31 N.E.2d 436, 438–39 (Mass. 1941); then citing Page v. Portland, 165 P.2d 280, 284 (Or. 1946); and then citing Weaver v. Ham, 232 S.W.2d 704, 709 (Tex. 1950)).

15. *See* 167 A.D.3d 575, 576–77, 90 N.Y.S.3d 188, 192 (2d Dep't 2018).

16. *Id.* at 576, 90 N.Y.S.3d at 191.

approved in 1986.[17] No construction had occurred on the property since 1984.[18] The zoning amendment, which was enacted in 2000, increased the minimum lot size applicable to the property from 10,000 square feet to 80,000 square feet.[19]

In rejecting the contention that the amendment did not comply with the comprehensive plan, the court reiterated the rigorous standard that a party challenging a zoning enactment bears, that is, the heavy burden of countering "the strong presumption of validity accorded the enactment."[20] A party asserting such a claim must establish that the zoning law "is not justified under the police power of the state by any reasonable interpretation of the facts."[21] If the validity of a legislative zoning classification "is even 'fairly debatable,' the classification must be sustained upon judicial review."[22]

In *Greenport Group, LLC*, the Town established that the rezoning was not arbitrary and was consistent with the comprehensive plan.[23] It demonstrated that prior to Greenport's and its predecessor's purchase of the property, the Town planning consultant had prepared a comprehensive study that included the property and identified various planning objectives for that area.[24] Those goals included preservation of the rural character and natural environment of the area.[25] The rezoning of the property was reasonably related to accomplishment of those legitimate objectives because most of the property consisted of woodlands and wetlands, abutted land zoned as parkland, and was across the street from a nature preserve.[26] Repudiating the argument that the stated intent of the zoning amendment was not the real purpose for the re-zoning, the court opined that although "'the courts must satisfy themselves that the rezoning meets the statutory requirement that zoning be "in accordance with [the] comprehensive plan"

17. *Id.*

18. *Id.*

19. *See id.* at 576, 90 N.Y.S.3d at 191–92.

20. *Greenport Grp., LLC*, 167 A.D.3d at 579, 90 N.Y.S.3d at 193 (quoting Taylor v. Vill. of Head of the Harbor, 104 A.D.2d 642, 644–45, 480 N.Y.S.2d 21, 23 (2d Dep't 1984) (citing Town of Bedford v. Vill. of Mount Kisco, 33 N.Y.2d 178, 186, 306 N.E.2d 155, 158, 351 N.Y.S.2d 129, 134–35 (1973)).

21. *Id.* at 579, 90 N.Y.S.3d at 193–94 (quoting *Town of Bedford*, 33 N.Y.2d at 186, 306 N.E.2d at 158, 351 N.Y.S.2d at 134).

22. *Id.* at 579, 90 N.Y.S.3d at 194 (quoting *Town of Bedford*, 33 N.Y.2d at 186, 306 N.E.2d at 159, 351 N.Y.S.2d at 135) (citing Hart v. Town Bd. of Huntington, 114 A.D.3d 680, 683, 980 N.Y.S.2d 128, 131 (2d Dep't 2014)).

23. *Id.* (citing *Town Bd. of Huntington*, 114 A.D.3d at 683, 980 N.Y.S.2d at 131).

24. *See id.*

25. *See Greenport Grp., LLC*, 167 A.D.3d at 579, 90 N.Y.S.3d at 194.

26. *See id.* at 579–80, 90 N.Y.S.3d at 194 (citing Nicholson v. Vill. of Garden City, 112 A.D.3d 893, 894–95, 978 N.Y.S.2d 288, 290 (2d Dep't 2013)).

of the community,' this does not entail 'examin[ing] the motives of local officials.'"[27]

The Town also was entitled to summary judgment with respect to the reverse spot zoning claim.[28] Reverse spot zoning is "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones."[29] The Town Board demonstrated that the property "was not arbitrarily singled out for different, less favorable treatment than neighboring properties in a manner that was inconsistent with a well-considered land-use plan, as would be required to sustain a finding of unconstitutional reverse spot zoning."[30] To the contrary, the amendment was consistent with a well-considered land-use plan.[31]

The court also denied Greenport's claim that it possessed vested rights in the prior zoning classification.[32] Vested rights can be obtained if substantial expenditures have been made and significant construction undertaken prior to the effective date of the zoning regulation.[33] An owner's actions in reliance on the previous zoning "must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless."[34] Neither Greenport nor its predecessors had undertaken construction and expenditures so substantial as to render the improvements on the property effectively worthless.[35]

Finally, the court rejected the regulatory taking claim.[36] To establish a regulatory taking, a property owner

27. *Id*. at 580, 90 N.Y.S.3d at 194 (quoting Udell v. Haas, 21 N.Y.2d 463, 471, 235 N.E.2d 897, 901–02, 288 N.Y.S.2d 888, 895 (1968)).

28. *See id*.

29. C/S 12th Ave. LLC v. City of New York, 32 A.D.3d 1, 9, 815 N.Y.S.2d 516, 524 (1st Dep't 2006) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978)).

30. *Greenport Grp., LLC*, 167 A.D.3d at 580, 90 N.Y.S.3d at 194 (quoting *Nicholson*, 112 A.D.3d at 895, 978 N.Y.S.2d at 290) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 132).

31. *Id*. (quoting *Nicholson*, 112 A.D.3d at 895, 978 N.Y.S.2d at 290) (first citing *C/S 12th Ave. LLC*, 32 A.D.3d at 9–10, 815 N.Y.S.2d at 524; and then citing Peck Slip Assocs. LLC v. City Council of N.Y., 26 A.D.3d 209, 210, 809 N.Y.S.2d 56, 58 (1st Dep't 2006)).

32. *See id*. at 576–77, 90 N.Y.S.3d at 192.

33. *Id*. at 578, 90 N.Y.S.3d at 192 (first citing Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 14–15, 382 N.Y.S.2d 538, 541 (2d Dep't 1976); then citing Berman v. Warshavsky, 256 A.D.2d 334, 335–36, 681 N.Y.S.2d 303, 305 (2d Dep't 1998); and then citing Town of Orangetown v. Magee, 88 N.Y.2d 41, 47, 665 N.E.2d 1061, 1064–65, 643 N.Y.S.2d 21, 24–25 (1996)).

34. *Id.* at 578, 90 N.Y.S.3d at 192 (quoting *Town of Orangetown*, 88 N.Y.2d at 47–48, 665 N.E.2d at 1065, 643 N.Y.S.2d at 25).

35. *Greenport Grp., LLC*, 167 A.D.3d at 578, 90 N.Y.S.3d at 193 (citing *Berman*, 256 A.D.2d at 335–36, 681 N.Y.S.2d at 305).

36. *See id*. at 577, 579, 90 N.Y.S.3d at 192, 193.

> must show by 'dollars and cents' evidence that under no use permitted by the regulation under attack would the properties be capable of producing a reasonable return; the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue.[37]

"'[T]he mere diminution in the value of property, however serious, is insufficient to demonstrate a taking,' as is 'the fact that a regulation deprives the property of its most beneficial use.'"[38] Although it was demonstrated that the rezoning had greatly reduced the value of the property, "the extent of the diminution, standing alone, was insufficient to constitute a regulatory taking."[39] Greenport also failed to raise a triable issue of fact as to whether the rezoning so "restrict[ed][its] property that [it was] precluded from using it for any purpose for which it is reasonably adapted."[40] Although the number of permissible units was drastically reduced, the zoning designation still permitted residential development of the property.[41]

The court also rejected a challenge to a number of zoning amendments in *Bonacker Property, LLC v. Village of East Hampton Board of Trustees*, concluding that the amendments were consistent with the Village's comprehensive plan.[42] The Village had adopted five local laws reducing the maximum allowable gross floor area for residences, decreasing the maximum permitted development coverage for structures, lessening the maximum allowable gross floor area for accessory buildings, enacting a definition of the term "story," and amending the definition of the term "cellar."[43]

Village Law section 7–722(11)(a) and Town Law section 272-a dictate that where a municipality has adopted a formal comprehensive plan, the community's zoning decisions must be in accordance with that

37. *Id*. at 578, 90 N.Y.S.3d at 193 (quoting De St. Aubin v. Flacke, 68 N.Y.2d 66, 77, 496 N.E.2d 879, 885, 505 N.Y.S.2d 859, 865 (1986) (first citing Spears v. Berle, 48 N.Y.2d 254, 263, 397 N.E.2d 1304, 1308, 422 N.Y.S.2d 636, 640 (1979); and then citing Briarcliff Assocs. v. Town of Cortlandt, 272 A.D.2d 488, 490, 708 N.Y.S.2d 421, 424 (2d Dep't 2000)).

38. *Id*. (quoting *Briarcliff Assocs*., 272 A.D.2d at 490, 708 N.Y.S.2d at 424).

39. *Id.* (first citing In re New Creek Bluebelt, Phase 4, 122 A.D.3d 859, 861 (2d Dep't 2014); and then citing *De St. Aubin*, 68 N.Y.2d at 76–77, 496 N.E.2d at 885, 505 N.Y.S.2d at 865).

40. *Greenport Grp., LLC*, 167 A.D.3d at 578–79, 90 N.Y.S.3d at 193 (quoting *De St. Aubin*, 68 N.Y.2d at 77, 496 N.E.2d at 885, 505 N.Y.S.2d at 865).

41. *Id*. at 579, 90 N.Y.S.3d at 193 (citing Putnam Cty. Nat'l Bank v. City of New York, 37 A.D.3d 575, 577, 829 N.Y.S.2d 661, 663 (2d Dep't 2007)).

42. *See* 168 A.D.3d 928, 930, 93 N.Y.S.3d 328, 331 (2d Dep't 2019).

43. *See id*. at 928–29, 93 N.Y.S.3d at 330.

plan.[44] Because zoning laws are legislative acts, they carry a presumption of validity.[45] "[E]ven if the validity of a provision is 'fairly debatable,' the municipality's judgment as to its necessity must control."[46] "Thus, when a plaintiff fails to establish a 'clear conflict' with a formal comprehensive plan, a zoning classification may not be annulled for incompatibility with the comprehensive plan."[47]

The petitioners failed to establish that any of the disputed amendments were inconsistent with the comprehensive plan.[48] The existing comprehensive plan related the importance of ensuring that development of residential properties was compatible with the existing character of the neighborhood.[49] The Village had accomplished that goal in the existing comprehensive plan by restricting the floor area of homes in relation to lot size and the total coverage of the lot.[50] The comprehensive plan endorsed further restricting the maximum gross floor area and coverage for residential lots, including accessory structures, so that new residential development would be compatible with the scale of existing development.[51] As a result, the amendments were consistent with the comprehensive plan.[52]

B. General Municipal Law Section 239-m Compliance

General Municipal Law section 239-m(3) mandates that various land use actions, including the adoption or amendment of a zoning ordinance or local law, which effects property located within 500 feet of

44. *See* N.Y. VILLAGE LAW § 7-722(11)(a) (McKinney 2011); N.Y. TOWN LAW § 272-a(11)(a) (McKinney 2013).

45. *Bonacker*, 168 A.D.3d at 930, 93 N.Y.S.3d at 331 (citing 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)).

46. *Id.* (quoting Stringfellow's of N.Y. v. City of New York, 91 N.Y.2d 382, 396, 694 N.E.2d 407, 414, 671 N.Y.S.2d 406, 413 (1998)) (first citing Hart v. Town Bd. of Huntington, 114 A.D.3d 680, 683, 980 N.Y.S.2d 128, 131 (2d Dep't 2014); and then citing 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)).

47. *Id.* (quoting Nicholson v. Vill. of Garden City, 112 A.D.3d 893, 894, 978 N.Y.S.2d 288, 290 (2d Dep't 2013) (first citing *Town Bd. of Huntington*, 114 A.D.3d at 683, 980 N.Y.S.2d at 131; and then citing Bergstol v. Town of Monroe, 15 A.D.3d 324, 325, 790 N.Y.S.2d 460, 461–62 (2d Dep't 2005)).

48. *Id.*

49. *Id.*

50. *Bonacker*, 168 A.D.3d at 930, 93 N.Y.S.3d at 331–32.

51. *Id.* at 930, 93 N.Y.S.3d at 332.

52. *Id. See also* Star Prop. Holding, LLC v. Town of Islip, 164 A.D.3d 799, 802, 83 N.Y.S.3d 149, 150 (2d Dep't 2018).

various enumerated boundaries, highways, parks and other features, be referred to the respective county planning agency.[53]

General Municipal Law section 239–m(1)(c) instructs referring agencies to refer a "full statement" of the proposed action to the county planning agency, including "all . . . materials required by such referring body in order to make its determination of significance pursuant to the state environmental quantity review act [("SEQRA")]."[54] In addition,

> [w]hen 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.[55]

The failure to refer a covered action or to make a proper referral to the county planning agency constitutes a jurisdictional defect rendering any succeeding approval by the municipal agency null and void.[56]

A zoning amendment which added a new special permit use for senior living facilities was challenged in *Save Harrison, Inc. v. Town/Village of Harrison* for, among other things, failure to fully comply with the dictates of General Municipal Law section 239-m.[57] The Town Board had referred the initial rezoning petition and supporting documents to the county planning agency.[58] It was unnecessary for the final zoning amendment text again to be referred to the county planning agency because the final text did not differ significantly from the draft version which had been referred to the county planning agency.[59] On the other hand, the applicant had submitted several environmental studies to the Planning Board which were required in order to substantiate the adoption of a negative declaration subsequent to the original submissions to the county planning agency.[60] Pursuant to General Municipal Law section 239-m, the Planning Board was required to refer those documents to the

53. N.Y. GEN. MUN. LAW § 239-m(3)(a)–(b) (McKinney 2012).

54. *Id.* § 239–m(1)(c).

55. *Id.*

56. *See* Calverton Manor, LLC v. Town of Riverhead, 160 A.D.3d 842, 845, 76 N.Y.S.3d 72, 75 (2d Dep't 2018); Annabi v. City Council of Yonkers, 47 A.D.3d 856, 857, 850 N.Y.S.2d 625, 627 (2d Dep't 2008).

57. *See* 168 A.D.3d 949, 950, 953, 93 N.Y.S.3d 74, 77, 79 (2d Dep't 2019).

58. *Id.* at 953–54, 93 N.Y.S.3d at 80.

59. *Id.* (first citing 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); 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)).

60. *Id.*

county planning agency for its review.[61] Because it did not, the court annulled the amendment for failure to comply with General Municipal Law section 239-m.[62]

C. Notice

The authority to enact zoning regulations, not being an inherent power of local governments, is delegated to municipalities by the state legislature.[63] Thus, the authority to adopt zoning laws only may be exercised in "strict compliance with the statutory procedures prescribed."[64] Town Law section 264 requires notice of the time and place of a public hearing on proposed zoning enactments to be published in a newspaper of general circulation at least ten days prior to the hearing.[65] Substantial adherence to those procedures is required.[66] Town Law section 264 and Village Law section 7-706 do not dictate the content of the mandatory notice of public hearing, other than relating that it shall provide "the time and place of such hearing."[67] Nevertheless, it is clear that the notice must "fairly apprise the public of the fundamental character of the proposed zoning change [and] not mislead interested parties into foregoing attendance at the public hearing."[68] Moreover, the property affected by a proposed zoning enactment must be described definitely enough to inform individuals of the parcels that may be affected by the enactment.[69]

The notice of hearing for a zoning amendment challenged in *Johnson v. Town of Hamburg* stated that the amendment affected a described parcel

61. *Id.* (first citing LCS Realty Co. v. Vill. of Roslyn, 273 A.D.2d 474, 474–75, 710 N.Y.S.2d 605, 606 (2d Dep't 2000); and then citing Batavia First v. Town of Batavia, 26 A.D.3d 840, 841, 811 N.Y.S.2d 236, 237 (4th Dep't 2006)).

62. *See Save Harrison, Inc.*, 168 A.D.3d at 954, 93 N.Y.S.3d at 80.

63. *See* BLF Assocs., LLC v. Town of Hempstead, 59 A.D.3d 51, 54, 870 N.Y.S.2d 422, 425 (2d Dep't 2008) (first citing Kamhi v. Planning Bd. of Yorktown, 59 N.Y.2d 385, 389, 452 N.E.2d 1193, 1194, 465 N.Y.S.2d 865, 866 (1983); and then citing Bayswater Realty & Capital Corp. v. Planning Bd. of Lewisboro, 149 A.D.2d 49, 52, 544 N.Y.S.2d 613, 615 (2d Dep't 1989)).

64. Vizzi v. Town of Islip, 71 Misc. 2d 483, 485, 336 N.Y.S.2d 520, 523 (Sup. Ct. Nassau Cty. 1972) (first citing Merritt v. Vill. of Portchester, 71 N.Y. 309, 311–12 (1877); and then citing Vill. of Williston Park v. Israel, 19 Misc. 6, 9, 76 N.Y.S.2d 605, 607 (Sup. Ct. Nassau Cty. 1948)).

65. N.Y. TOWN LAW § 264(1) (McKinney 2013).

66. *See* Cohn v. Town of Cazenovia, 42 Misc.2d 218, 220–21, 247 N.Y.S.2d 919, 922 (Sup. Ct. Madison Cty. 1964).

67. TOWN § 264(1); N.Y. VILLAGE LAW § 7-706(1) (McKinney 2011).

68. Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 87 N.Y.2d 668, 678, 664 N.E.2d 1226, 1232, 642 N.Y.S.2d 164, 170 (1996).

69. *See* Blumberg v. City of Yonkers, 41 A.D.2d 300, 307, 341 N.Y.S.2d 977, 984 (2d Dep't 1973) (citing Mallet v. Vill. of Mamaroneck, 283 A.D. 1094, 1094–95, 131 N.Y.S.2d 504, 506 (2d Dep't 1954)).

containing of "'29.29 acres of vacant land' rather than the 24.24 acres actually under consideration."[70] The notice was adequate because the record was devoid of any evidence that a member of the public could reasonably have been misled by the inaccurate description of the acreage and "thereby caused to forego attending the public hearing."[71]

II. FIFTH AMENDMENT TAKINGS CLAIMS

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, the Supreme Court held in 1985 that a property owner whose property has been taken by a local government has not suffered a cognizable violation of his Fifth Amendment rights.[72] Accordingly, a federal takings claim could not be instituted in federal court until a state court had denied the property owner's claim for just compensation pursuant to state law.[73] The Court anticipated that if a property owner failed to obtain just compensation pursuant to state law in state court, he would be able to bring a ripe federal takings claim in federal court.[74] However, the Court subsequently held in *San Remo Hotel v. City and County of San Francisco* that a state court's determination of a claim for just compensation pursuant to state law generally had preclusive effect in any subsequent federal suit.[75]

In *Knick v. Township of Scott*, the Supreme Court reversed that portion of the holding in *Williamson* because "[t]he *San Remo* preclusion trap should tip us off that the state-litigation requirement rests on a mistaken view of the Fifth Amendment."[76] "[T]he state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled. A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it."[77] However,

> [t]hat does not mean that the government must provide compensation in advance of a taking or risk having its action invalidated: So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. But it does mean that the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just

70. 167 A.D.3d 1539, 1540, 90 N.Y.S.3d 781, 782 (4th Dep't 2018).
71. *See id*.
72. *See* 473 U.S. 172, 182, 200 (1985).
73. *See id*. at 195.
74. *See id*.
75. *See* 545 U.S. 323, 335 (2005).
76. *See* 139 S. Ct. 2162, 2167 (2019).
77. *Id*.

> compensation, and therefore may bring his claim in federal court under § 1983 at that time.[78]

The plaintiff in *Knick* owned 90 acres consisting of a single-family home, a grazing area for farm animals, and a small graveyard where ancestors apparently were buried.[79] The Township adopted an ordinance that mandated that "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[80] Knick filed an action pursuant to 42 U.S.C. section 1983 alleging that the ordinance violated the Takings Clause of the Fifth Amendment.[81] The district court dismissed the takings claim pursuant to *Williamson* because Knick "had not pursued an inverse condemnation action in state court."[82]

Williamson held that the takings claim of a developer whose subdivision application had been denied was not ripe for two reasons.[83] First, the developer had not obtained a "final decision" because he could have applied for a variance or different layout.[84] The final decision requirement was not challenged in *Knick*.[85] The second holding of *Williamson* was that the federal takings claim was not ripe because he had not sought compensation "through the procedures the State ha[d] provided for doing so."[86] According to *Williamson*, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the [Takings] Clause until it has used the procedure and been denied just compensation."[87] The Court determined that the developer's federal takings claim was "premature" because he had not sought compensation through the State's inverse condemnation procedure.[88] That requirement was the subject of *Knick*.[89]

The Court concluded that, contrary to *Williamson*,

> a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. . . . And the property owner may sue the government at that time

78. *Id*. at 2167–68.

79. *See id*. at 2168.

80. *See id*.

81. *See Knick v. Twp. of Scott*, 139 S. Ct. at 2168.

82. *Id.* at 2169 (citing Knick v. Scott Twp., No. 3:14-CV-02223, 2016 U.S. Dist. LEXIS 121220, at *18 (M.D. Pa. Sept. 7, 2016)).

83. *Id.*

84. *See id.* (citing Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985)).

85. *See id*.

86. *Knick*, 139 S. Ct. at 2169 (quoting *Williamson*, 473 U.S. at 194).

87. *Id*. (quoting *Williamson*, 473 U.S. at 195).

88. *Id*. (quoting *Williamson*, 473 U.S. at 196–97).

89. *See id.*

> in federal court for the 'deprivation' of a right 'secured by the Constitution.'[90]

Accordingly, "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."[91] The *Knick* Court noted that

> [t]he "general rule" is that plaintiffs may bring constitutional claims under § 1983 "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.". . . This is as true for takings claims as for any other claim grounded in the Bill of Rights.[92]

As a result, "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time."[93]

As a consequence of *Knick*, federal courts will become an active forum for litigation of taking claims. However, a takings plaintiff must still satisfy the first, and now only, prong of *Williamson* by obtaining a "final decision" as to the permissible development of the property at issue. An as-applied challenge to municipal actions is not ripe unless the governmental entity charged with enforcing the regulations has "reached a final decision regarding the application of the regulations to the property at issue."[94] "The finality prong of the ripeness test forces plaintiffs to 'obtain a final, definitive decision from local zoning authorities [and] ensures that . . . all non-constitutional avenues of resolution have been explored first, perhaps obviating the need for judicial entanglement in the constitutional disputes.'"[95] That will remain, in many instances, a preclusive jurisdictional threshold.

III. ZONING BOARDS OF APPEAL

A. Time to Appeal

Town Law section 267-a(5)(a) and Village Law section 7-712-a(5)(a) provide that every decision or order of a building inspector or other official charged with enforcement of the zoning law "shall be filed in the office of such administrative official, within five business days

90. *Id.* at 2170 (citing 42 U.S.C. § 1983 (2018)).

91. *Knick*, 139 S. Ct. at 2170.

92. *Id*. at 2172–73.

93. *Id*. at 2172.

94. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

95. Adrian v. Town of Yorktown, 341 F. App'x. 699, 700 (2d Cir. 2009) (quoting Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 353–54 (2d Cir. 2005)).

from the day it is rendered . . . ."[96] Town Law section 267-a(5)(b) and Village Law section 7-712-a(5)(b) provide that an appeal may be taken to a zoning board of appeals within sixty days after the filing of such decision or order.[97] The decision in *Corrales v. Zoning Board of Appeals of Dobbs Ferry*, confirms that those procedures must be complied with or the time within which to file an appeal to a zoning board of appeals will not commence to run.[98]

The property owner in *Corrales* had applied for site plan approval for two residential buildings, each of which were proposed to contain six condominium units.[99] The Building Department forwarded the application to the Planning Board in November 2012 for its recommendation pursuant to the terms of the zoning law.[100] The Planning Board recommended approval of the site plan and the Board of Trustees, which possessed final site plan approval authority pursuant to the zoning law, granted site plan approval.[101]

The Architectural and Historic Review Board (AHRB) denied the owner's application on January 13, 2014.[102] Pursuant to the terms of the zoning law, the owner appealed the AHRB denial to the Zoning Board of Appeals.[103] While the appeal was pending, the petitioners, objecting neighbors, contended in letters to the Village Building Inspector and Zoning Board of Appeals, that the proposed use of the property was not allowed in the zoning district because "multifamily buildings" and "multifamily housing complexes" were proscribed in that district.[104] The petitioner also asserted the contention during a meeting of the AHRB on July 28, 2014.[105] At that meeting, the Assistant Building Inspector stated that he had conferred with Village counsel that day and that it was his opinion that proposed use of the property was permissible.[106]

The petitioners filed an appeal to the Zoning Board of Appeals on August 20, 2014 of what they characterized as the July 28, 2014 "determination" of the Building Department that the proposed use of the

96. N.Y. TOWN LAW § 267-a(5)(a) (McKinney 2013); N.Y. VILLAGE LAW § 7-712-a(5)(a) (McKinney 2011).

97. TOWN § 267-a(5)(b); VILLAGE § 7-712-a(5)(b).

98. 164 A.D.3d 582, 586, 83 N.Y.S.3d 265, 269 (2d Dep't 2018).

99. *See id.* at 583, 83 N.Y.S.3d at 267.

100. *Id.*

101. *See id.* at 583–84, 83 N.Y.S.3d at 267–68.

102. *See id.* at 584, 83 N.Y.S.3d at 268.

103. *Corrales*, 164 A.D.3d at 584, 83 N.Y.S.3d at 268.

104. *Id.*

105. *Id.*

106. *Id.*

property was a permitted use.[107] The Zoning Board of Appeals dismissed the appeal, finding that by forwarding the application to the Planning Board in November 2012 without rejecting it as impermissible pursuant to the zoning law, the Building Inspector had "inherently" determined at that time that the use complied with the zoning law despite the fact that there was no written determination to that effect.[108] The Zoning Board of Appeals further concluded that pursuant to the terms of the zoning law, the petitioners' appeal was untimely because it was filed more than 30 days after the November 2014 "determination."[109] It should be noted that it is doubtful whether a municipality may permissibly shorten the 60-day period provided for taking an appeal in Town Law § 267-a(5)(b) and Village Law § 7-712-a(5)(b).

The forwarding of the application by the Building Inspector to the Planning Board was not disclosed to the public.[110] The appeal was timely because, contrary to the terms of the zoning law, the Building Inspector's determination was not filed anywhere.[111] Consequently, the time period to file an appeal did not commence to run in November 2012 when the Building Inspector forwarded the application to the Planning Board.[112]

B. Administrative Res Judicata

Administrative *res judicata* applies to quasi-judicial determinations of municipal administrative agencies, including zoning boards of appeal.[113] As a result, absent changed facts or circumstances or, alternatively, a determination to grant a rehearing of an appeal, an applicant cannot cure defects in the proof in a succeeding application or again attempt to persuade a board to grant relief which previously has been denied.[114]

The petitioners in *Voutsinas v. Schenone* applied for a building permit for a two-story restaurant.[115] The application was denied because

107. *Id.*

108. *Corrales*, 164 A.D.3d at 584, 83 N.Y.S.3d at 268.

109. *Id.*

110. *Id.* at 586, 83 N.Y.S.3d at 269.

111. *See id.*

112. *See id.* at 586, 83 N.Y.S.3d at 269–70.

113. *See* Jensen v. Zoning Bd. of Appeals of Old Westbury, 130 A.D.2d 549, 550, 515 N.Y.S.2d 283, 284 (2d Dep't 1987) (citing Ryan v. N.Y. Tel. Co., 62 N.Y.2d 494, 499, 467 N.E.2d 487, 489–90 (1984)).

114. *See* Freddolino v. Vill. of Warwick Zoning Bd. of Appeals, 192 A.D.2d 839, 840, 596 N.Y.S.2d 490, 492 (3d Dep't 1993). *See also Ryan*, 62 N.Y.2d at 500, 467 N.E.2d at 490; Freddolino v. Vill. of Warwick Zoning Bd. of Appeals, 192 A.D.2d 839, 840, 596 N.Y.S.2d 490, 492 (3d Dep't 1993).

115. 166 A.D.3d 634, 634, 88 N.Y.S.3d 57, 59 (2d Dep't 2018).

the proposal did not satisfy the off-street parking requirement of the zoning law.[116] The applicant appealed the denial to the Zoning Board of Appeals and also sought a variance from the off-street parking requirement.[117] The Zoning Board of Appeals granted relief only to the extent of approving a one-story restaurant and a parking variance for a restaurant of that size.[118] The Zoning Board of Appeals denied the application to the extent that it sought approval for a two-story structure because the nearby municipal parking lots could not accommodate the parking demand generated by the addition of a second floor and, additionally, because it found that such a variance would intensify problems produced by traffic congestion and inadequate parking capacity in the area.[119]

A second application to erect a two-story restaurant on the property employing two nearby properties to provide valet parking in order to satisfy the off-street parking requirement also was denied.[120] The petitioners again appealed the denial of the application to the Zoning Board of Appeals and requested an area variance from the off-street parking requirement.[121] The Zoning Board of Appeals concluded that covenants and restrictions on those properties prevented their use for valet parking.[122] The Board also concluded that, absent the valet parking proposal, the application was "not materially different" from the petitioners' initial application and that it was constrained by its earlier determination.[123]

"[T]he principles of res judicata and collateral estoppel apply to quasi-judicial determinations of administrative agencies, such as zoning boards, and preclude the re-litigation of issues previously litigated on the merits."[124] Having found that the proposed valet parking was impermissible, the Board correctly concluded that it was bound by its prior determination.[125] The earlier decision found that the addition of a

116. *Id.*

117. *Id.* at 634–35, 88 N.Y.S.3d at 59.

118. *Id.* at 635, 88 N.Y.S.3d at 59.

119. *Id.*

120. *Voutsinas*, 166 A.D.3d at 635, 88 N.Y.S.3d at 59.

121. *Id.* at 635, 88 N.Y.S.3d at 59–60.

122. *Id.* at 635, 88 N.Y.S.3d at 60.

123. *Id.*

124. *Id*. at 636, 88 N.Y.S.3d at 60 (quoting Palm Mgmt. Corp. v. Goldstein, 29 A.D.3d 801, 804, 815 N.Y.S.2d 670, 674 (2d Dep't 2006) (first citing Josey v. Goord, 9 N.Y.3d 386, 389, 880 N.E.2d 18, 20, 849 N.Y.S.2d 497, 499 (2007); then citing Calapai v. Zoning Bd. of Appeals of Babylon, 57 A.D.3d 987, 989, 871 N.Y.S.2d 288, 290 (2d Dep't 2008); and then citing In re Hunter, 4 N.Y.3d 260, 269, 827 N.E.2d 269, 274, 794 N.Y.S.2d 286, 291 (2005)).

125. *Voutsinas*, 166 A.D.3d at 636, 88 N.Y.S.3d at 60.

second floor would create an excessive parking burden in an already congested area and denied the variance.[126] That constituted a final determination on the merits of those issues.[127] The revisions to the plan did not alter the germane parking considerations.[128]

C. Minutes

The extraordinary remedy of mandamus is cognizable only to compel the performance of a ministerial act and only if there is a clear legal right to the relief sought.[129] Accordingly, an Article 78 proceeding in the nature of mandamus is inappropriate unless the act sought to be compelled is ministerial, nondiscretionary, and nonjudgmental and is premised upon explicit authority requiring performance in a specified manner.[130] Although mandamus may be an apt remedy to compel the performance of a ministerial duty, it is well settled that it will not be granted to compel an act for which the official may exercise any discretion or judgment.[131]

The content of the minutes of board meetings vary substantially from municipality to municipality. It is not uncommon that the minutes do not fully reflect what occurred, omit essential material, or conditions of approval, or are incorrect. Notably, if a condition of an approval is not specifically stated in the motion of approval, it is ineffectual.[132]

In *Voutsinas v. Schenone*, the petitioners contended that the minutes of the Zoning Board of Appeals violated the Open Meetings Law, Public Officers Law section 100 *et seq*., because they falsely stated that the vote

126. *Id.*

127. *Id.* (citing *Palm Mgmt. Corp*., 29 A.D.3d at 804, 815 N.Y.S.2d at 674).

128. *Id*. at 636, 88 N.Y.S.3d at 60–61.

129. *See* Maron v. Silver, 14 N.Y.3d 230, 249, 925 N.E.2d 899, 907, 899 N.Y.S.2d 97, 105 (2010) (citing Gimprich v. Bd. of Educ., 306 N.Y. 401, 406, 118 N.E.2d 578, 580 (1954)); 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); Lee v. Marrus, 74 A.D.3d 1206, 1206, 902 N.Y.S.2d 411, 411 (2d Dep't 2010).

130. *See* Peirez v. Caso, 72 A.D.2d 797, 797, 421 N.Y.S.2d 627, 627 (2d Dep't 1979) (citing Stutzman v. Fahey, 62 A.D.2d 1070, 1071, 403 N.Y.S.2d 800, 801 (3d Dep't 1978)).

131. *See* Klostermann v. Cuomo, 61 N.Y.2d 525, 539, 463 N.E.2d 588, 595, 475 N.Y.S.2d 247, 254 (1984).

132. *See, e.g.*, Hoffmann v. Gunther, 245 A.D.2d 511, 513, 666 N.Y.S.2d 685, 687 (2d Dep't 1997) (first citing Sabatino v. Denison, 203 A.D.2d 781, 783, 610 N.Y.S.2d 383, 385 (3d Dep't 1994); then citing Proskin v. Donovan, 150 A.D.2d 937, 939, 541 N.Y.S. 2d 628, 630 (3d Dep't 1989); and then citing S. Woodbury Taxpayers Ass'n v. Am. Inst. of Physics, Inc., 104 Misc. 2d 254, 259, 428 N.Y.S.2d 158, 162 (Sup. Ct. Nassau Cty. 1980)); *Sabatino*, 203 A.D.2d at 783, 610 N.Y.S.2d at 385 (first citing Holmes v. Planning Bd. of New Castle, 78 A.D.2d 1, 32, 433 N.Y.S.2d 587, 606 (2d Dep't 1980); and then citing *S. Woodbury Taxpayers Ass'n*, 104 Misc. 2d at 259, 428 N.Y.S.2d at 163); Marro v. Libert, 819 N.Y.S.2d 210, 210 (Sup. Ct. Nassau Co. 2006)).

granting the petitioners' application for a parking variance was conditioned on the Board counsel's review of covenants and restrictions related to the application, but that no such condition was discussed or imposed when the vote was taken.[133] Hence, the mandamus petition sought to compel the Zoning Board of Appeals to file "corrected" minutes of the meetings.[134]

The court reiterated that "[t]he extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists . . . clear legal right to the relief sought."[135] Consistent with the mandate of Public Officers Law section 106(1), the minutes of the meeting included a summary of the motion to approve the petitioners' application and the vote thereon.[136] Mandamus was inappropriate because one does not have a legal right to compel a board to modify its minutes to reflect a particular result from the recorded vote.[137]

D. Conduct of Public Hearings

Although Zoning Board of Appeals hearings are considered to be quasi-judicial in nature, "[a] public hearing is not a formal quasi-judicial hearing . . . ."[138] Strict rules of evidence do not apply in hearings before a zoning board of appeals.[139] Similarly, cross-examination of witnesses is not required.[140]

In seeking to invalidate a negative declaration, special permit, and variances granted for a cultural center adjoining an existing church, the petitioners in *Healy v. Town of Hempstead Board of Appeals* contended

133. 166 A.D.3d 632, 633, 88 N.Y.S.3d 62, 63 (2d Dep't 2018). *See* N.Y. PUB. OFF. LAW § 106(1) (McKinney 2008).

134. *Id.*

135. *Id.* (quoting Betty Y. v. Brennan, 163 A.D.3d 834, 835, 77 N.Y.S.3d 313, 313 (2d Dep't 2018)). *See also* Glyka Trans, LLC v. City of New York, 161 A.D.3d 735, 739, 76 N.Y.S.3d 585, 590 (2d Dep't 2018).

136. *Id.* (citing Perez v. City Univ. of N.Y., 5 N.Y.3d 522, 530, 840 N.E.2d 572, 576, 806 N.Y.S.2d 460, 464 (2005)). *See* PUB. OFF. § 106(1).

137. *Id.* (citing *Glyka Trans, LLC*, 161 A.D.3d at 739, 76 N.Y.S.3d at 590).

138. Aprile v. Lo Grande, 89 A.D.2d 563, 565, 452 N.Y.S.2d 104, 107 (2d Dep't 1982) (citing Muscillo v. Town Bd. of Oyster Bay, 28 Misc. 2d 79, 82, 211 N.Y.S.2d 939, 942 (Sup. Ct. Nassau Cty. 1961).

139. *See, e.g.*, Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280, 287, 155 N.E. 575, 577 (1927); Merlotto v. Town of Patterson Zoning Bd. of Appeals, 43 A.D.3d 926, 929, 841 N.Y.S.2d 650, 653 (2d Dep't 2007) (first citing Von Kohorn v. Morrell, 9 N.Y.2d 27, 32, 172 N.E.2d 287, 288, 210 N.Y.S.2d 525, 527 (1961); and then citing Holy Spirit Ass'n for the Unification of World Christianity v. Rosenfeld, 91 A.D.2d 190, 201, 458 N.Y.S.2d 920, 928 (2d Dep't 1983)).

140. *See* Milt-Nik Land Corp. v. City of Yonkers, 24 A.D.3d 446, 447, 806 N.Y.S.2d 217, 219 (2d Dep't 2005); Cioppa v. Apostol, 301 A.D.2d 987, 990, 755 N.Y.S.2d 458, 461 (3d Dep't 2003).

that the hearing on the application was unfair and violated their due process rights.[141] During the twelve hour hearing, the Zoning Board of Appeals heard testimony from sixteen witnesses in support of the applications and twenty-four witnesses in opposition, including at least two attorneys in opposition to the application.[142] The petitioners asserted that the manner in which the hearing was conducted, including their inability to cross-examine the applicant's witnesses, violated their due process rights.[143]

The court reiterated that zoning boards of appeal are not constrained by the rules of evidence and may conduct informal hearings.[144] A zoning board of appeals hearing is not quasi-judicial in nature and, hence, the swearing of witnesses or cross-examination is not required.[145] In *Healy*, voluminous testimony, including expert testimony and exhibits, were submitted to the Board by the petitioners.[146] Significantly, the petitioners failed to identify any testimony or exhibits that they were prevented from presenting.[147] "Although petitioners may argue that the hearing was not perfect, it certainly was fair—their position was heard loud and clear over the course of a 12-hour hearing."[148]

E. Exhaustion of Administrative Remedies

It is well settled that one must avail himself of available administrative remedies as a prerequisite to commencement of an Article 78 proceeding.[149] The exhaustion requirement is especially pertinent to appeals from a determination of a Building Inspector, a principle which was emphasized by the decision in *Vineland Commons, LLC v. Building Department of Riverhead*.[150] The Building Department had denied the

141. 61 Misc. 3d 408, 409, 411, 83 N.Y.S.3d 836, 838, 839 (Sup. Ct. Nassau Cty. 2018).

142. *Id.* at 411, 83 N.Y.S.3d at 839.

143. *Id.*

144. *Id.* (first citing *Von Kohorn*, 9 N.Y.2d at 32, 172 N.E.2d at 288, 210 N.Y.S.2d at 527; and then citing Stein v. Board of Appeals of Islip, 100 A.D.2d 590, 590, 473 N.Y.S.2d 535, 536 (2d Dep't 1984)).

145. *Id.* (citing Aprile v. Lo Grande, 89 A.D.2d 563, 565, 452 N.Y.S.2d 104, 107 (2d Dep't 1982)).

146. *Healy*, 61 Misc. 3d at 411, 83 N.Y.S.3d at 839.

147. *Id.*

148. *Id.*

149. *See* LaRocca v. Dep't of Planning, Envt'l, & Dev., 125 A.D.3d 659, 659, 3 N.Y.S.3d 98, 99 (2d Dep't 2015) (quoting Keener v. City of Middletown, 115 A.D.3d 859, 860, 982 N.Y.S.2d 325, 326 (2d Dep't 2014)) (first citing Henderson v. Zoning Bd. of Appeals, 72 A.D.3d 684, 685, 897 N.Y.S.2d 518, 520 (2d Dep't 2010)); then citing We're Assocs. Co. v. Comm'r of Dep't of Planning & Dev., 185 A.D.2d 820, 821, 586 N.Y.S.2d 315, 315 (2d Dep't 1992); and then citing Perosi Homes v. Maniscalco, 223 N.Y.S.2d 173, 174 (2d Dep't 1961)).

150. *See* 165 A.D.3d 808, 809, 86 N.Y.S.3d 513, 514 (2d Dep't 2018).

petitioner's application for a building permit to operate a convenience store subsequent to the Town having amended the zoning law to exclude retail use as a permitted use in the district.[151] The petitioner commenced a hybrid proceeding pursuant to Article 78 to review the determination of the Building Department and an action seeking to declare that retail use was a permitted use on the property.[152]

The petitioner was required to exhaust its administrative remedies before instituting the proceeding/action.[153] The constitutional basis of challenges to the Building Department's determination did not excuse the petitioner's failure to exhaust available administrative remedies through an appeal to the Zoning Board of Appeals.[154]

F. Appealable Determination

Town Law section 267-a(4) and Village Law section 7-712-a(4) provide that

> Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article.[155]

Consequently, with the exclusion of specific permit review authority delegated to a zoning board of appeals by a town board or village board of trustees, such as for special permits, the jurisdiction of a zoning board of appeals is appellate only.[156] Whether a zoning board of appeals may consider if a use is a permitted use in the course of review of an

151. *Id.* at 808, 86 N.Y.S.3d at 514.

152. *Id.*

153. *Id.* at 809, 86 N.Y.S.3d at 514.

154. *Id.* (first citing Parkview Assocs. v. City of N.Y., 71 N.Y.2d 274, 281, 519 N.E.2d 1372, 1374, 525 N.Y.S.2d 176, 178 (1988); then citing Warner v. Town of Kent Zoning Bd. of Appeals, 144 A.D.3d 814, 821, 40 N.Y.S.3d 517, 524 (2d Dep't 2016); then citing BBJ Assocs., LLC v. Zoning Bd. of Appeals of Kent, 65 A.D.3d 154, 157 n.1, 881 N.Y.S.2d 496, 499 n.1 (2d Dep't 2009); and then citing 563 Grand Med. v. N.Y.S. Ins. Dep't., 24 A.D.3d 413, 413, 805 N.Y.S.2d 643, 644 (2d Dep't 2005)).

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

156. *See* Brenner v. Sniado, 156 A.D.2d 559, 559, 549 N.Y.S.2d 68, 69 (2d Dep't 1989) (first citing Moriarty v. Planning Bd. of Sloatsburg, 119 A.D.2d 188, 196, 506 N.Y.S.2d 184, 189 (2d Dep't 1986); and then citing ROBERT M. ANDERSON, NEW YORK ZONING LAW & PRACTICE §§ 22.37, 22.39, 25.04 (3rd ed. 1984)); Barron v. Getnick, 107 A.D.2d 1017, 1017, 486 N.Y.S.2d 528, 529 (4th Dep't 1985) (citing ANDERSON, § 22.37).

application for area variances was the issue in *Chestnut Ridge Associates, LLC v. 30 Sephar Lane, Inc*.[157]

During the hearings on an applicant's area variance application, an objecting, adjoining property owner filed a request for an interpretation as to whether the applicant's landscaping/storage use was a permitted use, which application the Zoning Board of Appeals entertained as being germane to the area variance application.[158] The court concluded that in the absence of a determination of the Building Inspector or other administrative official charged with the enforcement of the zoning law, the Zoning Board of Appeals lacked the jurisdiction to consider the objector's application for an interpretation of the local zoning law to determine if the landscaping business was a permitted use in the zoning district.[159]

G. Type of Variance

The definition of "use variance" and "area variance" in Town Law section 267(1) and Village Law section 7-712(1) should eliminate any question as to the nature of the necessary relief in practically every instance.[160] A use variance is "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."[161] An area variance is "the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations."[162]

Indeed, although an issue may previously have been perceived to exist as to whether a variance from the required number of parking spaces was a use or area variance, the Court of Appeals conclusively confirmed in *Colin Realty Co., LLC v. Town of North Hempstead*, that "a zoning board of appeals should evaluate requests for off-street parking variances by applying the standards for an area variance so long as the property is intended to be used for a purpose permitted in the zoning district."[163] Accordingly, "[r]egardless of the method of computation of the number

157. *See* 169 A.D.3d 995, 997, 94 N.Y.S.3d 596, 597 (2d Dep't 2019).

158. *See id.*

159. *Id.* (first citing VILLAGE § 7-712-a; then citing VILLAGE § 7-712-b; then citing CHESTNUT RIDGE, N.Y., ZONING LAW, art. XV(2) (2019); and then citing *Getnick*, 107 A.D.2d at 1017, 486 N.Y.S.2d at 528).

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

161. TOWN § 267(1)(a); VILLAGE § 7-712(1)(a).

162. TOWN § 267(1)(b); VILLAGE § 7-712(1)(b).

163. 24 N.Y.3d 96, 100, 21 N.E.3d 188, 188, 996 N.Y.S.2d 559, 559 (2014).

of required parking spaces, the underlying use of the property remains a permitted use. Consequently, a variance from parking requirements should be treated as an area variance."[164]

Similarly, the petitioners in *Route 17K Real Estate, LLC v. Zoning Board of Appeals of Newburgh* contended that an area variance granted for a hotel should have been considered as a use variance.[165] The owner applied for a variance from a requirement of the zoning law which directed that a hotel must have its "principal frontage" on a state or county highway.[166] As is related above, Town Law section 267(1)(b), like Village Law section 7–712(1)(b), define an area variance as the "authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations."[167] The court concluded "that the 'principal frontage' requirement [was] a 'physical requirement,' rather than a use restriction, and that [the] application [was] properly reviewed as one for an area variance."[168]

H. Use Variances

In *54 Marion Ave., LLC v. City of Saratoga Springs*, the petitioner applied for a use variance to utilize vacant property for a dental office in a district in which the use was not permitted.[169] The Zoning Board of Appeals denied the variance, concluding that the asserted hardship was not unique and that it was self-created.[170]

The property was located at the intersection of a side street and major road.[171] The petitioners demonstrated that that condition inflicted a unique financial hardship on them because of the commercial development in the area and the growing traffic on the thoroughfare over the more than thirty years that they owned the property.[172] They provided evidence of unsuccessful efforts to sell the property for the permissible residential use and that increasing traffic produced unique safety and

164. Terry Rice, *2012 Practice Commentaries*, *in* MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 61, § 267-b, at 84 (2013).

165. 168 A.D.3d 1065, 1066, 93 N.Y.S.3d 107, 109 (2d Dep't 2019).

166. *Id.* at 1066, 93 N.Y.S.3d at 110 (citing NEWBURGH, N.Y., ZONING CODE § 185–27(C)(1) (2007)).

167. TOWN § 267(1)(b); VILLAGE § 7–712(1)(b).

168. *Route 17K Real Estate, LLC*, 168 A.D.3d at 1066, 93 N.Y.S.3d at 110.

169. 162 A.D.3d 1341, 1341, 80 N.Y.S.3d 487, 488 (3d Dep't 2018).

170. *Id.*

171. *Id.* at 1342, 80 N.Y.S.3d at 489.

172. *Id.* at 1342–43, 80 N.Y.S.3d at 489.

noise problems for the property that rendered it unmarketable for residential use.[173]

The court observed that the Zoning Board of Appeals had agreed that "the location of this property on a corner may impact its value."[174] Consequently, its finding that the financial hardship was not unique "seemingly ran counter to that observation."[175] Furthermore, because the necessity for a use variance arose decades after the property had been acquired and as a consequence of a gradual change in the character of the area that rendered the permitted residential use impractical, the hardship was not self-created.[176]

I. Area Variances

The petitioner in *Schweig v. City of New Rochelle* had owned two lots containing a home on one lot and an adjacent, vacant 10,018 square foot lot.[177] The zoning law subsequently was amended in 2005 to increase the minimum lot size in the zoning district from 10,000 square feet to 15,000 square feet.[178] The amendment provided that a building permit could be obtained for a single-family residential building on a lot in any single-family residential district that existed prior to May 19, 2005, although the lot frontage or lot area of the lot was less than that required, provided that the lot met the lot frontage and lot area requirements in effect for the lot prior to May 19, 2005, and, in addition, the lot was in different ownership than any other contiguous lot on May 19, 2005 and was still in different ownership as of the date of issuance of the building permit.[179]

The petitioners sold the improved lot in 2015 and then sought a building permit to erect a single-family dwelling on the vacant lot.[180] The Building Inspector denied the application because the lot did not satisfy the 15,000 square foot minimum lot size requirement.[181] In denying the application for an area variance, the Zoning Board of Appeals concluded

173. *Id*. at 1343, 80 N.Y.S.3d at 489.

174. *54 Marion Ave., LLC*, 162 A.D.3d at 1343, 80 N.Y.S.3d at 489.

175. *Id*. at 1343, 80 N.Y.S.3d at 489–90 (citing Douglaston Civic Ass'n v. Klein, 51 N.Y.2d 963, 965, 416 N.E.2d 1040, 1041, 435 N.Y.S.2d 705, 706 (1980)).

176. *Id*. at 1343, 80 N.Y.S.3d at 490 (quoting Citizens Sav. Bank v. Bd. of Zoning Appeals of Lansing, 238 A.D.2d 874, 875, 657 N.Y.S.2d 108, 108 (3d Dep't 1997)) (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 *Douglaston Civic Ass'n*, 67 A.D.2d at 61, 414 N.Y.S.2d at 363).

177. 170 A.D.3d 863, 864, 95 N.Y.S.3d 569, 570 (2d Dep't 2019).

178. *Id*. at 864, 95 N.Y.S.3d at 571.

179. *Id*. (quoting NEW ROCHELLE, N.Y., ZONING CODE § 313-13(C) (2005)).

180. *Id.*

181. *Id.*

that the variances sought were substantial because the size of the lot was deficient by 5,000 square feet, requiring a thirty-three percent variance.[182] The Board further found that in balancing the equities, there were no compelling or unique circumstances that weighed in favor of granting relief as compared to the goal of preserving the existing character of the neighborhood.[183] It further concluded "that there [would] be an undesirable change to the character of the neighborhood and nearby properties because the applicant [sought] to construct a home on an undersized lot while the City Council" had determined ten years previously to increase the minimum lot size consistent with the established character of the neighborhood of larger homes on larger lots.[184] The Board further found that if the variance were to be granted, "it would produce a uniquely substandard lot."[185]

The court reiterated the standard of review that "[l]ocal zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken was illegal, arbitrary, or an abuse of discretion."[186] The court found that the Zoning Board of Appeals had appropriately weighed the prerequisite considerations and that its determination was rational.[187] Further, the petitioners were on notice of the upzoning which had transpired ten years before they listed and sold their home.[188] They could have included the vacant lot as part of the conveyance of the adjacent improved property at that time.[189]

In *Feinberg-Smith Associates, Inc. v. Town of Vestal Zoning Board of Appeals*, the petitioner's property was improved with eight buildings containing "one- and two-bedroom apartments leased to students who attend[ed] a nearby university."[190] The Zoning Board of Appeals denied a variance application "to increase the number of dwelling units based on

182. *Schweig*, 170 A.D.3d at 865, 95 N.Y.S.3d at 571.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 865, 95 N.Y.S.3d at 571–72 (quoting Daneri v. Zoning Bd. of Appeals of Southold, 98 A.D.3d 508, 509, 949 N.Y.S.2d 180, 181 (2d Dep't 2012) (citing Halperin v. City of New Rochelle, 24 A.D.3d 768, 770–71, 809 N.Y.S.2d 98, 104 (2d Dep't 2005)).

187. *Schweig*, 170 A.D.3d at 865, 95 N.Y.S.3d at 572 (first citing Pecoraro v. Bd. of Appeals of Hempstead, 2 N.Y.3d 608, 612, 814 N.E.2d 404, 406, 781 N.Y.S.2d 234, 236 (2004); then citing Hargraves v. City of Rye Zoning Bd. of Appeals, 162 A.D.3d 1022, 1023, 81 N.Y.S.3d 72, 74 (2d Dep't 2018); and then citing Monte Carlo 1, LLC v. Weiss, 142 A.D.3d 1173, 1175–76, 38 N.Y.S.3d 228, 231 (2d Dep't 2016)).

188. *Id.*

189. *Id.*

190. 167 A.D.3d 1350, 1350–51, 91 N.Y.S.3d 578, 579 (3d Dep't 2018).

the lot size, [to] decrease the minimum living area per unit and [to] decrease the required number of parking spaces."[191]

In addition to recapping the applicable standard of review, the court observed that regardless of how a court might have determined a matter in the first instance, its function is restricted to reviewing a decision of a zoning board of appeals "rather than [to] substitute its own judgment."[192] Additionally, a zoning board of appeals is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational."[193]

Given the extent of the variances requested and the probable detrimental impact on the area, the relief requested was found to be substantial.[194] The pertinent minimum lot size would have permitted 154 units on the property, while the petitioner proposed 409 apartments.[195] The application also sought to reduce the minimum living space per unit from 750 square feet to 474 square feet, and to decrease the number of required parking spaces from 818 to 309.[196] The number of student tenants would have increased from 222 to 562 residents.[197] "Each of the requested variances was substantial individually" and the significance was amplified when the project as a whole was considered.[198]

The record also confirmed the potential adverse impacts on the character of the neighborhood.[199] Neighbors provided first-hand, fact-based information regarding "problems with vehicle and pedestrian traffic in the neighborhood."[200] Notably, although the apartments were marketed to students, a variance runs with the land.[201] As a result, there could be no constraint on the identity of future tenants.[202] In addition, if a variance were to have been granted, reducing the minimum living area

191. *Id.* at 1351, 91 N.Y.S.3d at 579.

192. *Id.* at 1351, 91 N.Y.S.3d at 580 (citing *Pecoraro*, 2 N.Y.3d at 613, 814 N.E.2d at 407, 781 N.Y.S.2d at 237).

193. *Id.* at 1352, 91 N.Y.S.3d at 580 (quoting Merlotto v. Town of Patterson Zoning Bd. of Appeals, 43 A.D.3d 926, 929, 841 N.Y.S.2d 650, 653 (2d Dep't 2007)) (citing Cohen v. Town of Ramapo Bldg., Planning & Zoning Dept., 150 A.D.3d 993, 994, 54 N.Y.S.3d 650, 651 (2017)).

194. *See id.*

195. *Feinberg-Smith Assoc., Inc.*, 167 A.D.3d at 1352, 91 N.Y.S.3d at 580.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Feinberg-Smith Assoc., Inc.*, 167 A.D.3d at 1352, 91 N.Y.S.3d at 580.

201. *Id.*

202. *Id.*

to 474 feet, it would have been permissible for an entire family to occupy such a small unit in the future.[203] Likewise, a reduced number of parking spaces might be rational if most of the residents did not have vehicles and walked to campus.[204] However, the Zoning Board of Appeals rationally could consider that the proposed number of parking spaces could be inadequate "if the units were occupied by families or even single nonstudents."[205]

Lastly, the difficulty was self-created; the petitioner could feasibly have attained the benefit of increased rental units by configuring the project with 154 five-bedroom apartments which would accommodate 770 residents without requiring any variances.[206] Accordingly, the court concluded that the Zoning Board of Appeals had analyzed the germane statutory factors, undertaken the appropriate balancing, and reached a rational determination that was supported by the record.[207]

IV. FAMILY

As a result of "significant alterations in demography, social concepts, housing conditions and economics that have occurred over the last several decades and affected substantial segments of the population," the traditional conception and treatment of what comprises a single-family has undergone a transformation.[208] The traditional method of defining a family for zoning purposes as being a group related by blood, marriage or adoption, or some small number of unrelated individuals living as a single housekeeping unit has been discarded by the New York courts.[209] A zoning law may not restrictively define the term "family" to limit the occupancy of single-family dwellings only to people related by blood, marriage or adoption.[210] Instead, the definition of the term

203. *Id.* at 1352, 91 N.Y.S.3d at 581.

204. *Id.*

205. *Feinberg-Smith Assocs., Inc.*, 167 A.D.3d at 1352, 91 N.Y.S.3d at 581.

206. *Id.* at 1353, 91 N.Y.S.3d at 581.

207. *Id.* (first citing Pecoraro v. Bd. of Appeals of Hempstead, 2 N.Y.3d 608, 613, 814 N.E.2d 404, 407, 781 N.Y.S.2d 234, 237 (2004); 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); and then citing Wen Mei Lu v. City of Saratoga Springs, 162 A.D.3d 1291, 1294, 78 N.Y.S.3d 764, 767–68 (3d Dep't 2018)).

208. McMinn v. Town of Oyster Bay, 105 A.D.2d 46, 51, 482 N.Y.S.2d 773, 777 (2d Dep't 1984)).

209. *See id.* at 59, 482 N.Y.S.2d at 783.

210. McMinn v. Oyster Bay, 66 N.Y.2d 544, 550, 488 N.E.2d 1240, 1243, 498 N.Y.S.2d 128, 131 (1985) (quoting City of White Plains v. Ferraioli, 34 N.Y.2d 300, 306, 313 N.E.2d 756, 758–59, 357 N.Y.S.2d 449, 453 (1974)).

"family" in a zoning law may not exclude those living arrangements that constitute the factual and functional equivalent of a family.[211]

For example, in *White Plains v. Ferraioli*, the Court of Appeals concluded that a group home consisting of a married couple, their two children, and ten foster children comprised a family pursuant to a zoning law which defined "family" as enumerated relatives of the owner or tenant living together as a single housekeeping unit.[212] The group home was organized as a single housekeeping unit, was to all outward appearances a typical family unit, and was "set up in theory, size, appearance and structure to resemble a family unit."[213] The arrangement was not "a temporary living arrangement as would be a group of college students sharing a house and commuting to a nearby school."[214] The Court found the group home to be "a permanent arrangement and akin to a traditional family, which also may be sundered by death, divorce, or emancipation of the young.[215] The Court acknowledged that:

> Thus the city has a proper purpose in largely limiting the uses in a zone to single-family units. But if it goes beyond to require that the relationships in the family unit be those of blood or adoption, then its definition of family might be too restrictive. Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings.[216]

Accordingly, if a group home or other living arrangement "bears the genetic character of a family unit as a relatively permanent household" and is not used for transient living arrangements, it constitutes a family.[217] The Court concluded that:

> In short, an ordinance may restrict a residential zone to occupancy by stable families occupying single-family homes, but neither by express provision nor construction may it limit the definition of family to a household which in every but a biological sense is a single family. The

211. *Id.* at 550, 488 N.E.2d at 1243, 498 N.Y.S.2d at 112 (first quoting *White Plains*, 34 N.Y.2d at 305, 357 N.Y.S.2d at 452, 313 N.E.2d at 758; and then quoting Grp. House of Port Washington, Inc. v. Bd. of Zoning & Appeals of N. Hempstead, 45 N.Y.2d 226, 272, 380 N.E.2d 207, 209, 408 N.Y.S.2d 377, 379 (1978)).

212. *White Plains*, 34 N.Y.2d at 303–04, 313 N.E.2d at 757–58, 357 N.Y.S.2d at 450–51.

213. *Id.* at 303, 313 N.E.2d at 757, 357 N.E.2d at 450–51.

214. *Id.* at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

215. *Id.* at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

216. *Id.* (first citing Kirsch Holding Co. v. Manasquan, 281 A.2d 513, 518 (N.J. 1971); then citing City of Des Plaines v. Trottner, 216 N.E.2d 116, 119 (Ill. 1966); and then citing Boston-Edison Protective Ass'n v. Paulist Fathers, Inc., 10 N.W.2d 847, 848 (Mich. 1943)).

217. *White Plains*, 34 N.Y.2d at 305–06, 313 N.E.2d at 758, 357 N.Y.S.2d at 453 (citing Planning & Zoning Comm'n of Westport v. Synanon Found., Inc., 216 A.2d 442, 443 (Conn. 1966)).

> minimal arrangement to meet the test of a zoning provision, as this one, is a group headed by a householder caring for a reasonable number of children as one would be likely to find in a biologically unitary family.[218]

On the other hand, transient residency or those lacking long-term permanence in the identity of the occupants cannot constitute a functional equivalent of a "family."[219] In *McMinn v. Town of Oyster Bay*, for example, a home located in a single-family zoning district was rented to four unrelated friends and co-workers between the ages of twenty-two and twenty-five.[220] The owners instituted an action to declare the portion of the zoning ordinance that defined the term "family" to be invalid as violative of the equal protection and due process clauses of the New York State Constitution.[221] The zoning ordinance defined "family" as:

> (a) any number of persons, related by blood, marriage, or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit; or
>
> (b) any two (2) persons not related by blood, marriage, or legal adoption, living and cooking on the premises together as a single, nonprofit housekeeping unit, both of whom are sixty-two (62) years of age or over, and residing on the premises.[222]

The governmental objectives sought to be advanced by the law were legitimate, that is, the "preservation of the character of traditional single-family neighborhoods, reduction of parking and traffic problems, control of population density and prevention of noise and disturbance."[223] Instead, the issue depended on whether the means utilized, that is, the ordinance and its definition of family, were reasonably related to the accomplishment of those legitimate purposes.[224] The Court concluded that restricting the occupancy of single-family dwellings based on the biological or legal relationships of the residents did not beat a reasonable relationship to those goals.[225] To the contrary, the achievement of those objectives depends on

218. *Id.* at 306, 313 N.E.2d at 758–59, 357 N.Y.S.2d at 453.

219. *See id.* at 305–06, 313 N.E.2d at 758, 357 N.Y.S.2d at 453 (citing *Planning & Zoning Comm'n of Westport*, 216 A.2d at 443).

220. 66 N.Y.2d 544, 548, 488 N.E.2d 1240, 1242, 498 N.Y.S.2d 128, 130 (1985).

221. *Id*. at 546, 488 N.E.2d at 1241, 498 N.Y.S.2d at 129.

222. *Id*. at 547–48, 488 N.E.2d at 1241–42, 498 N.Y.S.2d at 130.

223. *Id*. at 549, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

224. *Id.*

225. *McMinn*, 66 N.Y.2d at 549, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131 (first citing Moore v. City of E. Cleveland, 431 U.S. 494, 499–500 (1977); then citing *Moore*, 431 U.S.

the size of the dwelling and property, as well as the number of residents.[226] Accordingly, the definition was both fatally overinclusive and underinclusive.[227] It was overinclusive in disallowing a young unmarried couple who do not imperil the aims of the zoning ordinance from occupying a large house.[228] The definition also was underinclusive in failing to exclude the occupancy of a two-bedroom home by, for example, ten or twelve persons who are only distantly related and who may cause severe overcrowding and traffic problems.[229]

The definition was also inadequately related to the goal of preserving the character of the "traditional single-family neighborhood."[230] Such a legitimate objective may not be accomplished by adopting a zoning law that "[limits] the definition of family to exclude a household which in every but a biological sense is a single family."[231] Because zoning is "intended to control types of housing and living and not [] genetic or intimate internal family relations[hips]", a zoning law does not serve a legitimate function in excluding from a single-family neighborhood a household that is the "functional and factual equivalent of a natural family."[232]

In *Northwood School, Inc. v. Joint Zoning Board of Appeals of North Elba & Village of Lake Placid*, a single-family residence, located near the school, was donated to Northwood, a private boarding school, for the purpose of "housing for a group of high school students and a supervising faculty member."[233] The Code Enforcement Officer determined that the use was not permitted in the zoning district in which the property was located because it did not comply with the definition of a single-family residential use.[234] Northwood appealed the denial of its application for a certificate of occupancy to the Zoning Board of Appeals, which then denied the appeal.[235]

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at 520 n. 16 (Stevens, J., concurring); and then citing State v. Baker, 405 A.2d 368, 373 (N.J. 1979)).

226. *Id.*

227. *Id.* at 549–50, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

228. *Id.*

229. *Id.*

230. *McMinn*, 66 N.Y.2d at 550, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

231. *Id.* (quoting White Plains v. Ferraioli, 34 N.Y.2d 300, 306, 313 N.E.2d 756, 758–59, 357 N.Y.S.2d 449, 453 (1974)).

232. *Id.* (first quoting *White Plains*, 34 N.Y.2d at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452; and then quoting Grp. House of Port Washington, Inc. v. Bd. of Zoning & Appeals of N. Hempstead, 45 N.Y.2d 266, 272, 280 N.E.2d 209, 209, 408 N.Y.S.2d 377, 379–80 (1978)).

233. 171 A.D.3d 1292, 1292, 97 N.Y.S.3d 787, 789 (3d Dep't 2019).

234. *Id.*

235. *Id.*

The property was located in the South Lake Residential District of the Town of North Elba.[236] "[T]he objective of this district [was] to maintain its current character and intensity of development."[237] Single-family and two-family residential uses are the only permitted uses in the district.[238] "Single-family residential" was defined, in part, as "[a] detached dwelling unit designed for year-round or seasonal occupancy by one family only."[239] A "family" was defined as "[a] group of people, related or not related, living together as a common household, with numbers of persons and impacts typical of those of a single family."[240]

Based upon the "entire record" and "the relative lack of 'permanence' in the groups of persons who would be in residence," the Zoning Board of Appeals concluded that the proposed use did not qualify as a single-family residence.[241] The decision found that "the feeling of the property is more akin to a boarding house, group home, or dormitory than that of a single-family dwelling."[242]

Courts generally will not defer to the conclusions reached by a zoning board of appeals with respect to "pure legal interpretation of terms in an ordinance."[243] However, "that body is accorded reasonable discretion in interpreting an ordinance that addresses an area of zoning 'where it is difficult or impractical for a legislative body to lay down a rule which is both definitive and all-encompassing.'"[244] Further, "[a zoning board's] fact-based interpretation of a zoning ordinance that determines its application to a particular use or property is entitled to great deference."[245] The court stated that whether the proposed use of the property constituted a "family" pursuant to the terms of the zoning law "'is essentially a factual

236. *Id.* at 1293, 97 N.Y.S.3d at 789.

237. *Id.* (quoting NORTH ELBA, N.Y., LAND USE CODE § 2.3(A) (2011)).

238. *Northwood Sch., Inc.*, 171 A.D.3d at 1293, 97 N.Y.S.3d at 789 (citing NORTH ELBA, N.Y., LAND USE CODE § 2.3(B)).

239. *Id.* (quoting NORTH ELBA, N.Y., LAND USE CODE § 10.2).

240. *Id.* (quoting NORTH ELBA, N.Y., LAND USE CODE § 10.2).

241. *Id.*

242. *Id.*

243. *See Northwood Sch., Inc.*, 171 A.D.3d at 1293, 97 N.Y.S.3d at 789 (quoting Shannon v. Vill. of Rouses Point Zoning Bd. of Appeals, 72 A.D.3d 1175, 1177, 903 N.Y.S.2d 539, 541 (3d Dep't 2010)).

244. *Id.* at 1293–94, 97 N.Y.S.3d at 789–90 (quoting Fruchter v. Zoning Bd. of Appeals of Hurley, 133 A.D.3d 1174, 1175, 20 N.Y.S.3d 701, 702 (3d Dep't 2015)).

245. *Id.* at 1294, 97 N.Y.S.3d at 790 (quoting Erin Estates, Inc. v. McCracken, 84 A.D.3d 1487, 1489, 921 N.Y.S.2d 730, 732 (3d Dep't 2011) (first citing Frishman v. Schmidt, 61 N.Y.2d 823, 825, 462 N.E.2d 134, 134, 473 N.Y.S.2d 957, 957–58 (1984); and then citing Edscott Realty Corp. v. Town of Lake George Planning Bd., 134 A.D.3d 1288, 1290, 21 N.Y.S.3d 447, 449 (3d Dep't 2015)).

question'; thus, we will defer to respondent's determination unless it was irrational or unreasonable."[246]

The finding of a lack of permanence of the students residing in the dwelling was supported by the record which corroborated that

> the identities of the student residents would change from year to year, that no student would reside in the property for more than two years, that students would stay at the property only during the academic year and would be required to leave during school breaks and vacations, that they would not use the property's address as their own and that their permanent addresses would be elsewhere.[247]

The Zoning Board of Appeals also considered the layout of the property, including the relationship between bedrooms and bathrooms, and the fact that a separate part of the residence was provided for the supervising teacher and her spouse.[248] The students would not normally eat meals at the residence and would not share common household activities and responsibilities.[249] Therefore, the record substantiated a rational basis for the conclusion that the use of the property was not consistent with the zoning laws definition of a "family."[250]

The court also spurned Northwood's contention that its application should have been granted "the special treatment afforded schools and churches stem[ming] from their presumed beneficial effect on the community."[251] Northwood had not sought a special use permit to allow the expansion of its educational functions into a residential neighborhood.[252] Had a special permit application been appropriate, the Board would have been required to balance the benefits of the proposed use to the community against potential harm and "to review the effect of the proposed expansion on the public's health, safety, welfare or morals."[253]

246. *Id.* (quoting Grp. House of Port Washington v. Bd. of Zoning & Appeals of N. Hempstead, 45 N.Y.2d 273, 274, 380 N.E.2d 207, 211, 408 N.Y.S.2d 377, 381 (1978)) (citing Lumberjack Pass Amusements, LLC v. Town of Queensbury Zoning Bd. of Appeals, 145 A.D.3d 1144, 1145, 42 N.Y.S.3d 473, 475 (3d Dep't 2016)).

247. *Id.*

248. *Northwood Sch., Inc.*, 171 A.D.3d at 1294, 97 N.Y.S.3d at 790.

249. *Id.*

250. *Id.* (first citing City of Schenectady v. Alumni Ass'n of Union Chapter, Delta Chi Fraternity, 5 A.D.2d 14, 15, 168 N.Y.S.2d 754, 755 (3d Dep't 1957); and then citing Bayram v. City of Binghamton, 27 Misc. 3d 1032, 1035, 899 N.Y.S.2d 566, 568 (Sup. Ct. Cortland Cty. 2010)).

251. *Id.* at 1295, 97 N.Y.S.3d at 790 (quoting Cornell Univ. v. Bagnardi, 68 N.Y.2d 583, 595, 503 N.E.2d 509, 515, 510 N.Y.S.2d 861, 867 (1986)).

252. *Id*. at 1295, 97 N.Y.S.3d at 790–91.

253. *Northwood Sch., Inc.*, 171 A.D.3d at 1295, 97 N.Y.S.3d at 791 (quoting Pine Knolls All. Church v. Zoning Bd. of Appeals of Moreau, 5 N.Y.3d 407, 413, 838 N.E.2d 624, 627, 804 N.Y.S.2d 708, 711 (2005)) (first citing Trs. of Union Coll. v. Members of Schenectady

However, Northwood sought an interpretation of a specific term in the zoning law and its application to the proposed use—"an analysis in which such a balancing process plays no role."[254]

The *Northwood* decision confirms that a group of students living together ordinarily cannot constitute a family because of the lack of permanency of the living arrangement. In addition, any group of people living together cannot be the functional and factual equivalent of a family if they do not live as a single housekeeping unit and share expenses.

V. ARTICLE 78—RECORD AND RETURN

An Article 78 proceeding challenging a decision of a zoning board of appeals or planning board is determined based on a review of the record and return.[255] Corroborating that the evidence and testimony produced before a board is the relevant inquiry and that the record may not be supplemented after the fact, the court in *Bennett* determined that supreme court should not have considered an affidavit of the Building Inspector that was not presented to the Board.[256] "Consideration of 'evidentiary submissions as to circumstances after the [ZBA] made its determination [violates a] fundamental tenet of CPLR article 78 review—namely, that [j]udicial review of administrative determinations is confined to the facts and record adduced before the agency.'"[257] Hence, while an affidavit from a professional or knowledgeable participant describing the evidence may be considered in an Article 78 proceeding, the record cannot be augmented.

VI. SITE PLAN

A. Site Plan Waivers

Zoning boards of appeal are authorized to entertain variance applications from the terms of a local zoning law pursuant to Town Law section 267-b and Village Law section 7-712-b.[258] In addition, planning

City Council, 91 N.Y.2d 161, 167, 690 N.E.2d 862, 865–66, 667 N.Y.S.2d 978, 981–82 (1997); and then citing *Bagnardi*, 68 N.Y.2d at 589, 503 N.E.2d at 511, 510 N.Y.S.2d at 863).

254. *Id.*

255. *See* Bennett v. Zoning Bd. of Appeals of Sagaponack, 170 A.D.3d 716, 718, 96 N.Y.S.3d 246, 248 (2d Dep't 2019) (quoting Featherstone v. Franco, 95 N.Y.2d 550, 554, 742 N.E.2d 607, 610, 720 N.Y.S.2d 93, 96 (2000)).

256. *See id.* at 717–18, 96 N.Y.S.3d at 248.

257. *Id.* at 718, 96 N.Y.S.3d at 248 (quoting *Featherstone*, 95 N.Y.2d at 554, 742 N.E.2d at 610, 720 N.Y.S.2d at 96). *See also* Finger Lakes Pres. Ass'n v. Town Bd. of Italy, 25 Misc. 3d 1115, 1119, 887 N.Y.S.2d 499, 503 (Sup. Ct. Yates Cty. 2009).

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

boards frequently are authorized by a community's zoning law or site plan regulations to grant waivers from certain zoning or site plan requirements. In *Carr v. Village of Lake George Village Board*, the issue was whether the authorization for a planning board to grant waivers encroached on the exclusive jurisdiction of the zoning board of appeals.[259] The court determined that the preemption of variance standards by the adoption of Village Law section 7-712-b and Town Law section 267-b did not divest town boards and boards of trustees of the authority to authorize planning boards to grant waivers from site plan regulations.[260]

In *Cohen v. Board of Appeals of Saddle Rock*, the Court of Appeals concluded that that in enacting the 1991 amendments to the Town Law and Village Law, the State Legislature evinced an intent to occupy the field and to make variance analysis uniform throughout the State.[261] The legislative history indicated that the statutes were enacted to provide readily understandable standards for zoning boards of appeal and applicants for variances and to eliminate the confusion that had surrounded area variances.[262]

In *Carr v. Village of Lake George Village Board*, site plan approval was granted for the construction of a 12,000 square foot boat storage facility, as well as a waiver from the Village's Architectural Standards and Guidelines.[263] The provision authorizing waivers provided that

> [t]he mandatory provisions of [the Architectural Guidelines] may be waived by the Planning Board through Site Plan Review, where it can be proven that there will not be an adverse impact on the "architectural character" of the neighborhood. Criteria for assessing such waivers shall be the same criteria used for area variance reviews.[264]

A neighboring property owner challenged the waiver and approval.[265]

The petitioner contended that the local law authorizing waivers was invalid because it violated Village Law section 7-712-b.[266] Village Law § 7-712-b(3)(a), like Town Law § 267-b(3)(a), provides that zoning boards of appeal "shall have the power . . . to grant area variances," while

259. *See* 64 Misc. 3d 542, 555, 102 N.Y.S.3d 404, 415 (Sup. Ct. Warren Cty. 2019).

260. *See id.* at 548, 102 N.Y.S.3d at 410.

261. 100 N.Y.2d 395, 401–02, 795 N.E.2d 619, 623, 764 N.Y.S.2d 64, 68 (2003).

262. *Id.* at 402, 795 N.E.2d at 624, 764 N.Y.S.2d at 69 (quoting Sasso v. Osgood, 86 N.Y.2d 374, 383, 657 N.E.2d 254, 258, 633 N.Y.S.2d 259, 263 (1995)).

263. 64 Misc. 3d 542, 543, 102 N.Y.S.3d 404, 407.

264. *Id*. at 543–44, 102 N.Y.S.3d at 407–08.

265. *See id*. at 545, 102 N.Y.S.3d at 408.

266. *Id.* at 545, 102 N.Y.S.3d at 409.

Village Law § 7-712-b(3)(b), like Town Law § 267-b(3)(b), enumerates the specific factors to be considered in making such a determination.[267] Village Law § 7-712-b(3)(c), like Town Law § 267-b(3)(c), further provides that a zoning board of appeals "shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community."[268]

Based on the Appellate Division decision in *Cohen*,[269] the court related that "by enacting Village Law § 7-712-b, the Legislature expressed a desire to preempt the entire field of area variances, thereby precluding a Village from enacting its own standard."[270] "[B]y codifying and enacting a comprehensive standard for area variances, in the explicit effort to eliminate confusion and inconsistent case law, the State clearly evinced an intent to preclude the enactment of [any] conflicting local law[s]."[271]

In *Carr*, the Village's Architectural Guidelines detailed various dimensional and physical requirements, including requirements related to building orientation, setbacks and relationship to the street level, building proportion and size, building materials and colors, and roof design.[272] The petitioner asserted that because the Planning Board was authorized to waive those dimensional and physical requirements, it essentially authorized the Planning Board to approve area variances.[273] It was alleged that the authorization conflicted with Village Law § 7-712-b(3)(a), which, like Town Law § 267-b(3)(a), relates that the Zoning Board of Appeals "shall have the power . . . to grant area variances."[274]

267. *See id*. (quoting N.Y. VILLAGE LAW § 7-712-b(3)(a) (McKinney 2011) (citing VILLAGE § 7-712-b(3)(b)). *See also* N.Y. TOWN LAW § 267-b(3)(a)–(b) (McKinney 2013).

268. *Carr*, 64 Misc. 3d at 545, 102 N.Y.S.3d at 409 (quoting VILLAGE § 7-712-b (3)(c)). *See also* TOWN § 267-b(3)(c).

269. *See generally* 297 A.D.2d 38, 746 N.Y.S.2d 506 (2d Dep't 2002), *aff'd*, 100 N.Y.2d 395, 765 N.E.2d 619, 764 N.Y.S.2d 64 (2003) (concluding that the Legislature intended to preempt the field of area variance review).

270. *Carr*, 64 Misc. 3d at 545, 102 N.Y.S.3d at 409 (quoting *Cohen*, 297 A.D.2d at 43, 746 N.Y.S.2d at 509).

271. *Id*. at 546, 102 N.Y.S.3d at 409 (quoting *Cohen*, 297 A.D.2d at 44, 746 N.Y.S.2d at 510).

272. *Id.*

273. *See id*.

274. *Id.* (quoting N.Y. VILLAGE LAW § 7-712-b(3)(a) (McKinney 2011). *See also* N.Y. TOWN LAW § 267-b(3) (McKinney 2013).

In opposition, the Planning Board claimed that the waiver delegation was authorized pursuant Village Law §§ 7-725-a(3) and (5).[275] Village Law § 7-725-a(3), like Town Law § 274-a(3), provides:

> Notwithstanding any provisions of law to the contrary, where a proposed site plan contains one or more features which do not comply with the zoning regulations, applications may be made to the [ZBA] for an area variance pursuant to [Village Law § 7-712-b], without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations.[276]

Further, Village Law § 7-725-a(5), like Town Law § 267-a(5), relates that

> The village board of trustees may . . . empower the [planning] board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of site plans submitted for approval. Any such waiver, which shall be subject to appropriate conditions set forth in the local law adopted pursuant to this section, may be exercised in the event any such requirements are found not to be requisite in the interest of the public health, safety or general welfare or inappropriate to a particular site plan.[277]

Previously, the appellate division determined in *Lockport Smart Growth, Inc. v. Town of Lockport*, that waivers from dimensional requirements permissibly were granted pursuant to Town Law § 274-a(5), identical to Village Law § 7-725-a(5), and that the applicant was not required to seek variances pursuant to Town Law § 274-a(3), identical to Village Law § 7-725-a(3).[278] In reaching that conclusion, the court relied on the decision in *Real Holding Corp. v. Lehigh*, in which the similar provisions relating to special permits in Town Law §§ 275-a(3) and (5) were analyzed.[279] In that case, the Court of Appeals determined that:

> [S]ubdivision (5) [does not] in any way conflict with subdivision (3), or diminish a ZBA's independent jurisdiction under subdivision (3). Subdivision (5) vests a town board with discretion to empower an "authorized board" to waive any requirement of a special use permit. The waiver authority in subdivision (5) is broader than a ZBA's

275. *Carr*, 64 Misc. 3d at 546, 102 N.Y.S.3d at 410.

276. *Id.* at 546–47, 102 N.Y.S.3d at 410 (quoting N.Y. VILLAGE LAW § 7-725-a(3) (McKinney 2011). *See also* N.Y. TOWN LAW § 274-a(3) (McKinney 2013).

277. *Id.* (quoting VILLAGE § 7-725-a(5). *See also* TOWN § 274-a(5).

278. *See* 63 A.D.3d 1549, 1550–51, 880 N.Y.S.2d 412, 414–15 (4th Dep't 2009) (citing Real Holding Corp. v. Lehigh, 2 N.Y.3d 297, 302, 810 N.E.2d 890, 893, 778 N.Y.S.2d 438, 441 (2004)). *See also* TOWN § 274-a(5); VILLAGE § 7-725-a(5).

279. *Id. See also Real Holding Corp.*, 2 N.Y.3d at 302, 810 N.E.2d at 893, 778 N.Y.S.2d at 441.

> authority in subdivision (3), which is restricted to granting area variances. The "authorized board" referred to in subdivision (5) is "the planning board or such other administrative body that [the town board] shall designate." In effect, subdivision (5) allows a town board to establish one-stop special use permitting if it so chooses. [W]here a town board exercises its discretion under subdivision (5), an applicant may have "two avenues to address an inability to comply with a given . . . requirement in connection with a special use permit", but this overlap "does not create discord in the Town Law or render either [subdivision (3) or subdivision (5)] superfluous."[280]

As a result, the waiver provision in *Carr* was authorized by Village Law § 7-725-a(5) and did not violate Village Law § 7-712(b), which separately relates to a zoning board of appeals' independent jurisdiction pursuant to Village Law § 7-725-a(3).[281]

B. No Authority for Planning Board to Interpret Zoning Law

Planning boards may face the issue of whether a use proposed in an application pending before it is a permissible use pursuant to the terms of the zoning law. Pursuant to the statutory scheme, the authority to interpret a zoning law exclusively is vested in the building inspector.[282]

For example, the petitioner in *Carr* challenged the site plan approval alleging that an approved 12,000 square-foot boat storage facility violated a provision of the zoning law which limited commercial accessory structures to seventy-five percent of the square footage of the primary structure.[283] However, "[p]lanning boards are without power to interpret the local zoning law, as that power is vested exclusively in local code enforcement officials and the zoning board of appeals."[284] As a result, the Planning Board did not have authority to deny site plan approval based on that zoning issue.[285]

280. *Real Holding Corp*., 2 N.Y.3d at 302, 810 N.E.2d at 893, 778 N.Y.S.2d at 441.

281. Carr v. Vill. of Lake George Vill. Bd., 64 Misc. 3d 542, 548, 102 N.Y.S.3d 404, 410–11 (Sup. Ct. Warren Cty. 2019).

282. *See* Moriarty v. Planning Bd. of Sloatsburg, 119 A.D.2d 188, 196–97, 506 N.Y.S.2d 184, 190 (2d Dep't 1986) (first citing Mialto Realty, Inc. v. Town of Patterson, 112 A.D.2d 371, 372, 491 N.Y.S.2d 825, 826 (2d Dep't 1985); and then citing Gershowitz v. Planning Bd. of Brookhaven, 52 N.Y.2d 763, 765, 417 N.E.2d 1000, 1001, 436 N.Y.S.2d 612, 613 (1980)).

283. *Carr*, 64 Misc. 3d at 555–56, 102 N.Y.S.3d at 416.

284. *Id*. at 556, 102 N.Y.S.3d at 416 (quoting Swantz v. Planning Bd. of Cobleskill, 34 A.D.3d 1159, 1160, 824 N.Y.S.2d 781, 782 (3d Dep't 2006)).

285. *Id*. (citing *Swantz*, 34 A.D.3d at 1161, 824 N.Y.S.2d at 782).

VII. SPECIAL PERMITS

A. Robert Lee Realty Standard

The enumeration of a use in a zoning law as a special permit use is "tantamount to a legislative finding" that the use is in harmony with a community's general zoning plan and will not adversely affect the neighborhood.[286] Accordingly, classification of a land use as a special permit use results in a strong presumption in favor of the use.[287] Nonetheless, entitlement to a special permit is not a matter of right.[288]

In *Robert Lee Realty Co. v. Village of Spring Valley*, the Court of Appeals concluded that "denial of such a [special] permit on the basis of traffic congestion may well be arbitrary absent evidence that the proposed special permit use would have a greater impact . . . than would other uses unconditionally permitted."[289] Consequently, a special permit application cannot be denied unless the evidence substantiating the detrimental characteristics of a proposed special permit use are greater than the impacts associated with uses permitted by right in the same district.[290]

286. Retail Prop. Tr. v. Bd. of Zoning Appeals of Hempstead, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 731, 746 N.Y.S.2d 662, 666 (2002) (quoting N. Shore Steak House v. Bd. of Appeals of Thomaston, 30 N.Y.2d 238, 243, 282 N.E.2d 606, 609, 331 N.Y.S.2d 645, 649 (1972). *See also* Wegmans Enters., Inc. v. Lansing, 72 N.Y.2d 1000, 1001, 530 N.E.2d 1292, 534 N.Y.S.2d 372, 373 (1988) (first citing Robert Lee Realty Co. v. Village of Spring Valley, 61 N.Y.2d 892, 893, 462 N.E.2d 1193, 1193, 474 N.Y.S.2d 475, 475 (1984); and then citing Pleasant Valley Home Constr., Ltd. v. Van Wagner, 41 N.Y.2d 1028, 1029, 363 N.E.2d 1376, 1377, 395 N.Y.S.2d 631, 632 (1977)).

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

288. *See* Tandem Holding Corp. v. Bd. of Zoning Appeals of Hempstead, 43 N.Y.2d 801, 802, 373 N.E.2d 282, 283, 402 N.Y.S.2d 388, 389 (1977) (citing Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 24, 181 N.E.2d 407, 409, 226 N.Y.S.2d 374, 376 (1962)).

289. 61 N.Y.2d 892, 894, 462 N.E.2d 1193, 1193–94, 474 N.Y.S.2d 475, 475–76 (1984) (first citing Oyster Bay Dev. Corp. v. Town Bd. of Oyster Bay, 88 A.D.2d 978, 979, 451 N.Y.S.2d 796, 797 (2d Dep't 1982); then citing RPM Motors, Inc. v. Gulotta, 88 A.D.2d 658, 658, 450 N.Y.S.2d 525, 526 (2d Dep't 1982); and then citing Hobbs v. Albanese, 70 A.D.2d 1049, 1049, 417 N.Y.S.2d 556, 557 (4th Dep't 1979)).

290. *See* 7-Eleven, Inc. v. Bd. of Trs. of Mineola, 289 A.D.2d 250, 250, 733 N.Y.S.2d 729, 729–30 (2d Dep't 2001*)* (first citing *Robert Lee Realty Co*., 61 N.Y.2d at 893, 462 N.E.2d at 1193, 474 N.Y.S.2d at 475–76; then citing Lerner v. Town Bd. of Oyster Bay, 244 A.D.2d 336, 337, 663 N.Y.S.2d 661, 662 (2d Dep't 1997); and then citing Serota v. Town Bd. of Oyster Bay, 191 A.D.2d 700, 700, 595 N.Y.S.2d 525, 526 (2d Dep't 1993)). *See generally also Lerner*, 244 A.D.2d at 337, 663 N.Y.S.2d at 663, *lv. denied*, 91 N.Y.2d 814, 698 N.E.2d 956, 676 N.Y.S.2d 127 (1998) (holding that denial of special use permit must be supported by evidence that the proposed use would have a greater impact than would other unconditionally permitted uses); G & P Investing Co. v. Foley, 61 A.D.3d 684, 877 N.Y.S.2d 143 (2d Dep't 2009) (same); Leisure Time Billiards v. Rose, 201 A.D.2d 340, 607 N.Y.S.2d 312 (1st Dep't 1994) (same); Samek v. Zoning Bd. of Appeals of Ballston, 162 A.D.2d 926, 558 N.Y.S.2d

The Planning Board in *QuickChek Corp. v. Town of Islip* approved a special permit for a convenience store and restaurant.[291] After a separate public hearing, the Town Board denied the application for a special permit to operate a gasoline service station.[292]

Judicial review of a decision on a special permit application is "limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion," and a court will "consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination."[293] "[D]enial of a special . . . permit must be supported by evidence in the record and may not be based solely upon community objection."[294]

The findings of the Town Board in *QuickChek Corp*. were not supported by substantial evidence in the record.[295] In particular, there was no evidence in the record that the proposed gasoline service station would have a greater impact on traffic than would other uses unconditionally permitted in the district.[296] Although there was some evidence that traffic would increase by three percent, there was no demonstration that the use would have a greater impact than would other permitted uses.[297] Consequently, the ostensible increase in traffic volume was an inadequate ground for the denial of the special permit.[298]

VIII. MOOTNESS

Unless a plaintiff or petitioner acts to maintain the *status quo* during the pendency of an action or proceeding challenging a land use approval, the matter may be moot if the owner has substantially completed the

257 (3d Dep't 1990) (same); Old Country Burgers Co. v. Town Bd. Oyster Bay, 160 A.D.2d 805, 553 N.Y.S.2d 843 (2d Dep't 1990) (same); Kidd-Kott Constr. Co. v. Lillis, 124 A.D.2d 996, 508 N.Y.S.2d 792 (4th Dep't 1986) (same); Cummings v. Town Bd. of N. Castle, 62 N.Y.2d 833, 466 N.E.2d 147, 477 N.Y.S.2d 607 (1984) (same); N.Y. Tennis Assocs. v. Town of Vestal, 97 A.D.2d 899, 470 N.Y.S.2d 466 (3d Dep't 1983) (same); Master Billiard Co. v. Rose, 194 A.D.2d 607, 599 N.Y.S.2d 68 (2d Dep't 1993) (same).

291. 166 A.D.3d 982, 983, 89 N.Y.S.3d 210, 211–12 (2d Dep't 2018).

292. *Id.* at 983, 89 N.Y.S.3d at 212.

293. *Id.* (quoting Beekman Delamater Props., LLC v. Vill. of Rhinebeck Zoning Bd. of Appeals, 150 A.D.3d 1099, 1103, 57 N.Y.S.3d 57, 62 (2d Dep't 2017)).

294. *Id*. at 983–84, 89 N.Y.S.3d at 212 (quoting White Castle Sys., Inc. v. Bd. of Zoning Appeals of Hempstead, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159, 162 (2d Dep't 2012)).

295. *Id.* at 984, 89 N.Y.S.3d at 212.

296. *Quickcheck Corp*., 166 A.D.3d at 984, 89 N.Y.S.3d at 212 (citing Robert Lee Realty Co. v. Spring Valley, 61 N.Y.2d 892, 894, 462 N.E.2d 1193, 1193–94, 474 N.Y.S.2d 475, 475–76 (1984)).

297. *Id.*

298. *Id.*

project.[299] In deciding whether the relief sought has become moot, a court must consider whether the petitioner sought injunctive relief to preserve the *status quo*.[300] A further consideration is the extent to which construction has progressed.[301]

In *Micklas v. Town of Halfmoon Planning Board*, the court rejected a claim that the substantial completion of construction rendered the proceeding moot because the construction could still be demolished or the operations within it enjoined.[302] Notably, the petitioners quickly challenged the Planning Board approvals and moved for a preliminary injunction after a building permit was issued and construction had commenced.[303] Although the requested preliminary injunction was not granted, it placed the respondent on notice that injunctive relief was a possibility if the petitioners prevailed in the proceeding.[304] The developer was thereby placed on notice that completion of the development was undertaken at its own risk, and, accordingly, the appeal, which was perfected in a timely fashion, was not moot.[305]

IX. APPLICATION REVIEW FEES

Municipalities commonly enact regulations requiring the establishment of an escrow account in order to obtain reimbursement of their professional land use application review costs. However, as is confirmed by the decision in *Landstein v. Town of LaGrange*, the case law

299. *See* Citineighbors Coalition 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) (quoting Dreikausen v. Zoning Bd. of Appeals of Long Beach, 98 N.Y.2d 165, 173, 774 N.E.2d 193, 197, 746 N.Y.S.2d 429, 433 (2002)).

300. *See* Schupak v. Zoning Bd. of Appeals of Marbletown, 31 A.D.3d 1018, 1019, 819 N.Y.S.2d 335, 336 (3d Dep't 2006) (quoting Defreestville Area Neighborhood Ass'n v. Planning Bd. of N. Greenbush, 16 A.D.3d 715, 717, 790 N.Y.S.2d 737, 740 (3d Dep't 2005)).

301. *See id*. at 1020, 819 N.Y.S.2d at 336 (citing *Citineighbors Coalition of Historic Carnegie Hill*, 2 N.Y.3d at 729, 811 N.E.2d at 4, 778 N.Y.S.2d at 742).

302. 170 A.D.3d 1483, 1485, 97 N.Y.S.3d 339, 341 (3d Dep't 2019) (first citing Town of N. Elba v. Grimditch, 131 A.D.3d 150, 156, 13 N.Y.S.3d 601, 607 (3d Dep't 2015); and then citing Kowalczyk v. Town of Amsterdam Zoning Bd. of Appeals, 95 A.D.3d 1475, 1477, 944 N.Y.S.2d 660, 662 (3d Dep't 2012)).

303. *Id.* (first citing *Citineighbors Coalition of Historic Carnegie Hill*., 2 N.Y.3d at 729, 811 N.E.2d at 4, 778 N.Y.S.2d at 742; and then citing *Dreikausen*, 98 N.Y.2d 165, 172–73, 774 N.E.2d 193, 196–97, 746 N.Y.S.2d 429, 433–34).

304. *Id.* at 1485, 97 N.Y.S.3d at 341–42.

305. *Id.* at 1485, 97 N.Y.S.3d at 342 (quoting Hart Family, LLC v. Town of Lake George, 110 A.D.3d 1278, 1279 n.1, 974 N.Y.S.2d 154, 156 n.1 (3d Dep't 2013)) (first citing *Grimditch*, 131 A.D.3d at 157, 13 N.Y.S.3d at 607; and then citing *Defreestville Area Neighborhood Ass'n*, 16 A.D.3d at 717–18, 790 N.Y.S.2d at 740).

has imposed restraints and limitations on such fees because of the potential for unnecessary or excessive charges.[306]

The petitioner in *Landstein* was an "amateur radio hobbyist" who sought a special permit and an area variance to erect an antenna structure on his property.[307] The Town initially required him to reimburse it for the more than $17,000 in legal consulting fees that it had incurred in connection with the applications.[308] The Town subsequently reduced the amount demanded to $5,874, but required the petitioner to maintain a minimum escrow balance of at least $1,000.[309] The Town exceeded the authority delegated to it because it did not limit the consulting fees charged to the petitioner to those necessary to the decision-making function of the Planning Board and Zoning Board of Appeals.[310]

The Federal Communications Commission (FCC) granted the petitioner a license in 2010 to operate an amateur radio station.[311] He subsequently filed an application with the Town for a special permit to erect a 100–foot–tall "ham radio antenna structure" on his property and paid the required $250 application fee.[312] The application form related that "all review costs are the sole responsibility of the applicant and full payment must be received by the Town prior to receiving final approval. The Planning Board may also, at their discretion, require an escrow account to be funded at the sole expense of the applicant."[313] He also sought a height variance from the 35-foot maximum height.[314] The antenna structure would be 18 inches by 18 inches wide and, according to the application, would be "barely visible above the tree line."[315] The Zoning Board of Appeals discussed the application at fourteen public hearings over a two-year period during which the petitioner agreed to reduce the height of the antenna to seventy feet.[316]

The zoning law stated that an applicant is responsible for payment of all the reasonable and necessary costs incurred by the Town for "the services of private engineers, attorneys or other consultants for purposes of engineering, scientific, land use planning, environmental, legal or

306. *See* 166 A.D.3d 100, 112, 86 N.Y.S.3d 155, 162 (2d Dep't 2018).
307. *Id.* at 101–02, 86 N.Y.S.3d at 156.
308. *Id.* at 102, 86 N.Y.S.3d at 156.
309. *Id.* at 102–03, 86 N.Y.S.3d at 156.
310. *Id.* at 103, 86 N.Y.S.3d at 156
311. *Landstein*, 166 A.D.3d at 103, 86 N.Y.S.3d at 157.
312. *Id.*
313. *Id.*
314. *See id*.
315. *Id.*
316. *See Landstein*, 166 A.D.3d at 104, 86 N.Y.S.3d at 157.

similar professional reviews of the adequacy or substantive aspects of applications, or of issues raised during the course of review of applications . . . ."[317] It additionally provided that the Town Board, Planning Board, or Zoning Board of Appeals could require advance periodic deposits to be held in escrow by the Town to secure reimbursement of the Town's consultant expenses.[318]

The Court of Appeals held in *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Village of Roslyn Harbor* that "the open-ended, indeed unlimited, nature of the fees" authorized by the zoning law in that case "makes the ordinance vulnerable to attack on the ground that it overreaches the State statute's implied grant of power to the village."[319] "[W]hen the power to enact fees is to be implied," there must be a limitation on this power in that the "fees charged must be reasonably necessary to the accomplishment of the statutory command."[320] The Court of Appeals further held that fees "should be assessed or estimated on the basis of reliable factual studies or statistics" and that the "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."[321] The Court went on to state:

> 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 untrammeled discretion, might think desirable or convenient, no matter how oppressive or discouraging they might in fact be for applicants.[322]

Unlike the ordinance challenged in *Jewish Reconstructionist*, the provision in *Landstein* appropriately required the applicant to be responsible only for reasonable and necessary consulting costs and implemented audit procedures to review whether the expenses incurred

317. *Id.* at 107, 86 N.Y.S.3d at 159 (quoting LAGRANGE, N.Y., TOWN CODE § 240-88(A) (2015)).

318. *Id.* at 108, 86 N.Y.S.3d at 160 (quoting LAGRANGE, N.Y., TOWN CODE § 240-88(B)).

319. 40 N.Y.2d 158, 163, 352 N.E.2d 115, 117, 386 N.Y.S.2d 198, 200 (1976).

320. *Id*. at 163, 352 N.E.2d at 118, 386 N.Y.S.2d at 200–01 (citing Buffalo v. Stevenson, 207 N.Y. 258, 261–62, 100 N.E. 798, 799–800 (1913)).

321. *Id*. at 163, 352 N.E.2d at 118, 386 N.Y.S.2d at 201 (quoting EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 26.36, at 109, (3d ed. 2005)) (citing Bon Air Estates, Inc. v. 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, 91–92, 164 N.Y.S.2d 204, 209–10 (2d Dep't 1957)).

322. *Id.*

were reasonable and necessarily incurred.[323] In addition, the zoning law correctly defined the term "reasonable" as "bearing a reasonable relationship to the customary fee charged by consultants within the region in connection with comparable applications for land use or development."[324] However, it improperly defined "necessary" much more expansively than permitted by *Jewish Reconstructionist*.[325] The definition of consulting expenses "necessarily incurred" included, among other expenses, expenses charged by an attorney for services rendered in order

> to assist in the protection or promotion of the health, safety or welfare of the Town or its residents; to assist in the protection of public or private property or the environment from potential damage that otherwise may be caused by the proposed land use or development . . . ; to assure or assist in compliance with laws, regulations, standards or codes which govern land use and development; to assure or assist in the orderly development and sound planning of a land use or development; . . . or to promote such other interests that the Town may specify as relevant.[326]

The import of this definition, particularly the "to assist" language and the open-ended invitation to utilize the assistance of counsel for any task deemed to be relevant, would include expenses that the Town could deem to be convenient as opposed to necessary.[327] The Town exceeded the statutory authority delegated to it because it did not restrict the "legal consulting fees charged to the petitioner to those reasonable and necessary to the decision-making function of the Planning Board and the [Zoning Board of Appeals]" based on data or experience resulting from its experience or those of comparable municipalities in similar cases.[328]

323. *Landstein*, 166 A.D.3d at 109, 86 N.Y.S.3d at 161 (citing LAGRANGE, N.Y., TOWN CODE § 240-88 (A)–(D) (2015)).

324. *Id*. (quoting LAGRANGE, N.Y., TOWN CODE § 240-88).

325. *Id.* at 109, 86 N.Y.S.3d at 161.

326. *Id.* at 109–10, 86 N.Y.S.3d at 161 (quoting LAGRANGE, N.Y., TOWN CODE § 240-88(C)).

327. *Id*. at 110, 86 N.Y.S.2d at 161 (citing *Jewish Reconstructionist Synagogue*, 40 N.Y.2d at 163, 166, 352 N.E.2d at 118, 119, 386 N.Y.S.2d at 201, 202).

328. *Landstein*, 166 A.D.3d at 110–11, 86 N.Y.S.3d at 161–62 (first citing *Jewish Reconstructionist Synagogue*, 40 N.Y.2d at 163–66, 352 N.E.2d at 117–20, 386 N.Y.S.2d at 200–02; then 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); then citing Valentino v. Cty. of Tompkins, 45 A.D.3d 1235, 1237, 846 N.Y.S.2d 745, 747 (3d Dep't 2007); then citing ATM One LLC v. Vill. of Freeport, 276 A.D.2d 573, 574, 714 N.Y.S.2d 721, 722 (2d Dep't 2000); then citing Cimato Bros., Inc. v. Town of Pendleton, 270 A.D.2d 879, 879–80, 705 N.Y.S.2d 468, 469–70 (2d Dep't 2000); and then citing Cimato Bros., Inc. v. Town of Pendleton, 237 A.D.2d 883, 884–85, 654 N.Y.S.2d 888, 889 (2d Dep't 1997)).

The scheme was unauthorized because the Town imposed the fees without ascertaining whether the charges would be so excessive that they would discourage applicants from applying for approvals and, further, without seeking to avoid "idiosyncratic or atypical charges" by discovering the prevailing practices of other, comparable municipalities.[329]

The Town additionally exceeded its authority by requiring the applicant to maintain an escrow balance of at least $1,000.[330] A requirement that an applicant continually make payments into an escrow account without any review as to whether the expenses are necessary, thereby potentially permitting unfettered spending by consultants, was found to be improper.[331]

Finally, by not restricting the legal consulting fees to those necessary to the decision-making function of the Planning Board and the Zoning Board of Appeals with respect to health, safety, or aesthetic considerations, the Town violated FCC declaratory ruling PRB–1, which announced that "local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose."[332] The Town exceeded the "minimum practicable regulation to accomplish the state or local authority's legitimate purpose."[333]

The reimbursement provision reviewed in *Landstein* satisfied the dictates of *Jewish Reconstructionist* and its progeny because the applicant was only responsible for "reasonable and necessary" consulting costs, an audit procedure existed, and the costs were required to bear a reasonable relationship to the customary fees charged by consultants in the region for comparable applications.[334] However, it defined the term "necessary" too broadly so that expenses could be charged to an applicant that were only "convenient" but not "necessary."[335] Reimbursement mechanisms

329. *Id.* at 111, 86 N.Y.S.3d at 162 (citing *Jewish Reconstructionist Synagogue*, 40 N.Y.2d at 164, 352 N.E.2d at 118, 386 N.Y.S.2d at 201).

330. *Id.*

331. *See id.* at 111–12, 86 N.Y.S3d at 162.

332. *See id.* at 112, 113, 86 N.Y.S.3d at 163 (quoting 101 F.C.C.2d 952, 960 (1985) (codified at 47 C.F.R. § 97.15(b) (2018)) (citing Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 319–26 (2d Cir. 2000)).

333. *Landstein*, 166 A.D.3d at 113, 86 N.Y.S.3d at 163 (quoting 47 C.F.R. § 97.15(b)).

334. *Id.* at 109, 86 N.Y.S.3d at 161 (citing LAGRANGE, N.Y., TOWN CODE § 240–88(A)–(D) (2015)).

335. *Id.* at 109–10, 86 N.Y.S.3d at 161 (citing *Jewish Reconstructionist Synagogue*, 40 N.Y.2d at 164, 352 N.E.2d at 118, 386 N.Y.S.2d at 201).

are necessary in order to ensure that a municipality does not bear the cost of expert consulting fees incurred in reviewing a land use application. Nevertheless, the restrictions and checks mandated by the case law are necessary to guarantee that the fees are fair, reasonable and necessary.

X. SUBDIVISIONS

A. Forms of Security

Town Law section 277(9) and Village Law section 7-730(9) enumerate the permissible forms of financial security that a municipality may require of a subdivider in order to guarantee that required public improvements are adequately installed.[336] As is confirmed by the decision in *Joy Builders, Inc. v. Town of Clarkstown*, the forms of security and methods of ensuring completion of public improvements set forth in Town Law section 277(9) and Village Law section 7-730(9) are the sole authorized statutory mechanisms for achieving that goal.[337]

The developer In *Joy Builders* received subdivision approval for two large parcels of property.[338] The subdivision approvals were conditioned on the requirement that it install the "infrastructure for each subdivision, including roads . . . , curbs, sidewalks, street signs, light poles and monuments."[339] It also was required to post performance bonds for each of its subdivision, which would expired after two years, and letters of credit with automatic annual renewals.[340] In addition, the subdivision regulations "authorized the Town to withhold the issuance of building permits for [ten percent] of each subdivision lot until [the developer] had [installed] the required infrastructure and improvements and they had been dedicated to the Town" ("Lot Holdback Provision").[341] The developer challenged the Town's refusal to issue building permits for a number of lots, seeking a declaration that the foregoing provisions were invalid.[342]

336. *See* TOWN LAW § 277(9) (McKinney 2013); VILLAGE LAW § 7-730(9) (McKinney 2011).

337. *See* 165 A.D.3d 1084, 1086, 87 N.Y.S.3d 60, 62 (2d Dep't 2018) (citing TOWN LAW § 277(9)); VILLAGE LAW § 7-730(9).

338. *Id*. at 1085, 87 N.Y.S.3d at 61.

339. *Id*.

340. *Id*.

341. *Id*.

342. *Joy Builders, Inc.*, 165 A.D.3d at 1085, 87 N.Y.S.3d at 61.

Municipalities lack inherent power to enact zoning and land use regulations and may exercise such authority solely by legislative grant.[343] Through the enactment of Town Law Article 16, as well as Village Law Article 7, the State Legislature has conferred on municipalities an extensive assortment of land use authority.[344] The court concluded, however, that Town Law section 277 does not authorize the Lot Holdback Provision.[345] Pursuant to the rules of statutory construction, the express provisions of Town Law section 277 exclude requirements, such as the one at issue in *Joy Builders*, which are not enumerated in Town Law section 277.[346] Nothing in Town Law section 277(9) impliedly authorized such a requirement.[347] Accordingly, the provision was inconsistent with the plain language of Town Law section 277(9), it was ultra vires and void ab initio.[348]

XI. ENFORCEMENT

A mandamus proceeding is an inappropriate remedy to compel a municipality to enforce its zoning laws because a decision whether to undertake enforcement proceedings is within the sole discretion of a municipality or its building official.[349]

The decision in *New York City Yacht Club v. New York City Department of Buildings* confirms the unsuitability of mandamus to require a municipal agency to undertake enforcement action or issue a violation.[350] The Department of Buildings' decision not to issue a notice of violation "involved the exercise of discretion, not the performance of a mandatory,

343. *Id.* at 1085, 87 N.Y.S.3d at 62 (quoting Kamhi v. Planning Bd. of Yorktown, 59 N.Y.2d 385, 389, 452 N.E.2d 1193, 1194, 465 N.Y.S.2d 865, 866 (1983)) (citing Town of Huntington v. Beechwood Carmen Bldg. Corp., 82 A.D.3d 1203, 1206–07, 920 N.Y.S.2d 198, 201 (2d Dep't 2011)).

344. *Id.* at 1085–86, 87 N.Y.S.3d at 62 (quoting *Kamhi*, 59 N.Y.2d at 389, 452 N.E.2d at 1194–95, 465 N.Y.S.2d at 866).

345. *See id.* at 1087, 87 N.Y.S.3d at 63; TOWN LAW § 277 (McKinney 2013).

346. *Id.* at 1086, 87 N.Y.S.3d at 62 (citing Walker v. Town of Hempstead, 84 N.Y.2d 360, 367, 643 N.E.2d 77, 79, 618 N.Y.S.2d 758, 760 (1994)).

347. *Joy Builders, Inc.*, 165 A.D.3d at 1087, 87 N.Y.S.3d at 63.

348. *Id.*

349. *See generally, e.g.*, Saks v. Petosa, 184 A.D.2d 512, 584 N.Y.S.2d 321 (2d Dep't 1992) (stating that the decision to enforce a zoning law rests in the discretion of the public officials charged with enforcement, and thus not a proper subject of a mandamus proceeding); Young v. Town of Huntington, 121 A.D.2d 641, 503 N.Y.S.2d 657 (2d Dep't 1986) (same); Fried v. Fox, 49 A.D.2d 877, 373 N.Y.S.2d 197 (2d Dep't 1975) (same); Mayes v. Cooper, 283 A.D.2d 760, 724 N.Y.S.2d 791 (3d Dep't 2001) (same); Citizens Accord, Inc. v. Town of Rochester, 98-CV-0715, 2000 U.S. Dist. LEXIS 4844 (N.D.N.Y. April 18, 2000) (same); Walsh v. La Guardia, 269 N.Y. 437, 199 N.E. 652 (1936) (same).

350. 172 A.D.3d 606, 606, 102 N.Y.S.3d 19, 20 (1st Dep't 2019).

non-discretionary act."[351] As a result, a writ of mandamus to compel was not available.[352] Nor was the petitioner entitled to a writ of mandamus to compel the Department of Buildings to issue a final determination on its request, which would have provided the petitioner further administrative review by the Board of Standards and Appeals because it did not identify any authority demonstrating that it has a clear legal right to the issuance of such a final determination.[353]

XII. CONFLICTS OF INTEREST

General Municipal Law section 801 prohibits various conflicts of interest, principally related to contractual relationships between municipal officials and employees and contractors.[354] Nevertheless, it is unnecessary that a particular provision of the General Municipal Law be violated in order for there to be a prohibited conflict of interest.[355] "Public officials . . . must perform their official duties solely in the public interest, and must avoid circumstances which compromise their ability to make impartial judgments on any basis other than the public good."[356] Accordingly, in order to maintain public confidence in the integrity of government, public officials must avoid even the appearance of impropriety.[357] "[T]he test to be applied is not whether there is a conflict, but whether there might be."[358]

The decision in *Titan Concrete, Inc. v. Town of Kent*, confirms that if a public official recuses himself from a matter, he or she may not participate in any aspect of the matter.[359] In *Titan Concrete*, a concrete

351. *Id*. at 606, 102 N.Y.S.3d at 20.

352. *Id*. (first citing Alliance to End Chickens as Kaporos v. N.Y.C. Police Dep't, 152 A.D.3d 113, 119, 55 N.Y.S.3d 31, 36 (1st Dep't 2017); then citing James v. City of N.Y., 154 A.D.3d 424, 425, 60 N.Y.S.3d 810, 811 (1st Dep't 2017); and then citing *Young*, 121 A.D.2d at 642, 503 N.Y.S.2d at 657–58).

353. *Id*. at 606–07, 102 N.Y.S.3d at 20 (citing Willows Condo. Ass'n. v. Town of Greenburgh, 153 A.D.3d 535, 536–537, 60 N.Y.S.3d 233 (2d Dep't 2017)).

354. *See* N.Y. GEN. MUN. LAW § 801 (McKinney 2012).

355. Titan Concrete, Inc. v. Town of Kent, 63 Misc. 3d 564, 572, 94 N.Y.S.3d 817, 823 (Sup. Ct. Putnam Cty. 2019) (citing Informal Op. 1998-26, 1998 N.Y. Op. (Inf.) Att'y Gen. 1063).

356. Informal Op. 2002-8, 2002 N.Y. Op. (Inf.) Att'y Gen. 1024 (first citing Informal Op. 1999-21, 1999 N.Y. Op. (Inf.) Att'y Gen. 1052; and then citing Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Tuxedo, 69 A.D.2d 320, 325, 418 N.Y.S.2d 638, 640 (2d Dep't 1979)).

357. *See* Informal Op. 2000-22, 2000 N.Y. Op. (Inf.) Att'y Gen. 1058 (citing Informal Op. 1997-19, 1997 N.Y. Op. (Inf.) Att'y Gen. 1047).

358. *Tuxedo Conservation & Taxpayers Ass'n*, 69 A.D.2d at 325, 418 N.Y.S.2d at 640.

359. *See* 63 Misc. 3d at 573, 94 N.Y.S.3d at 824 (quoting Informal Op. 2002-8, 2002 Op. (Inf.) Att'y Gen. 1024) (citing Informal Op. 1999-21, 1999 N.Y. Op. (Inf.) Att'y Gen. 1052).

batch plant had been operating, although with a period of discontinuance, since 1948.[360] The Zoning Board of Appeals concluded that the use existed pursuant to a use variance obtained and that the variance ran with the land.[361] At an ensuing Town Board meeting, the Town Supervisor related that she was a member of a local civic association consisting of homeowners whose properties were located in the vicinity of the property and had commenced a number of Article 78 proceedings challenging the decision of the Zoning Board of Appeals.[362] Both before and after she stated that she would recuse herself because of her membership in the homeowners' association, she participated in many discussions regarding the Town Board's wish that the Zoning Board of Appeals reconsider its decision and, also, regarding a proposed local law that would have made the use a nonconforming use and required its termination after a two-year amortization period.[363] In addition, she voted on several procedural motions relating to the proposed local law and participated in discussions at the public hearing on the local law.[364] She abstained on motions to adopt a negative declaration, to declare the property owner's protest petition pursuant to Town Law section 265 invalid, and on the vote which enacted the local law.[365] The property owner challenged the adoption of the local law, asserting that the Supervisor had a proscribed conflict of interest because of her participation in the proceedings.[366]

In annulling the adoption of the local law, the court reiterated that "[i]t is not necessary that a specific provision of the General Municipal or local law be violated to find a conflict of interests."[367] "In resolving conflict of interest questions, one fundamental principle predominates: a public official must avoid circumstances that compromise his or her ability to make impartial decisions solely in the public interest."[368] As a result,

> [i]t is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial. Thus, where a public official is uncertain about whether

360. *See id.* at 565, 566, 94 N.Y.S.3d at 819.

361. *Id*. at 566, 94 N.Y.S.3d at 819.

362. *See id*. at 567, 568, 94 N.Y.S.3d at 820, 821.

363. *See id*. at 567–71, 94 N.Y.S.3d at 820–23.

364. *See Titan Concrete, Inc*., 63 Misc. 3d at 567–71, 94 N.Y.S.3d at 820–23.

365. *See id*. at 571, 94 N.Y.S.3d at 823.

366. *See id*. at 572, 94 N.Y.S.3d at 823.

367. *Id*. (citing Informal Op. 1998-26, 1998 N.Y. Op. (Inf.) Att'y Gen. 1063).

368. *Id.* at 572, 94 N.Y.S.3d at 824 (quoting Informal Op. 2002-9, 2002 N.Y. Op. (Inf.) Att'y Gen. 9).

> he should undertake a particular action due to an actual or potential conflict, he must recuse himself *entirely* from the matter in question unless he procures an advisory opinion from a local ethics board that concludes otherwise.[369]

The Supervisor in *Titan Concrete*, being a member of the homeowner association suing the property owner and the Zoning Board of Appeals, arguably had a personal interest in the outcome of the litigation.[370] Her recusal from voting on the issue was inadequate.[371] She presided over the meetings and was present during every discussion about this issue.[372] The New York Attorney General has opined that:

> [A] board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interests, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.[373]

Although she recused herself from voting on the matter, her presence at the meeting and participation in discussions with the public made her presence questionable.[374] In addition, she acknowledged that she had had had many conversations with community members about the issue.[375] "There [was] an appearance, or the threat of an appearance, that she proverbially 'drove the bus' when it came to enacting the subject Local Law."[376] Even if the votes in which she participated could be characterized as procedural or ministerial, the appropriate course would have been for her to have declined to participate.[377] Notably, her mere attendance, in the presence of her neighbors and the public where it was known that her homeowner association's lawsuit was pending, could

369. *Titan Concrete, Inc.*, 63 Misc. 3d at 573, 94 N.Y.S.3d at 824 (first quoting Dudley v. Town Bd. of Prattsburgh, 880 N.Y.S.2d 872, 872 (Sup. Ct. Steuben Cty. 2009); and then quoting Informal Op. 2002-8, 2002 N.Y. Op. (Inf.) Att'y Gen. 1024) (citing Informal Op. 1999-21, 1999 N.Y. Op. (Inf.) Att'y Gen. 1052).

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 573–74, 94 N.Y.S.3d at 824–25 (quoting Informal Op. 1995-2, 1995 N.Y. Op. (Inf.) Att'y Gen. 2).

374. *Titan Concrete, Inc.*, 63 Misc. 3d at 574, 94 N.Y.S.3d at 825.

375. *Id.*

376. *Id.*

377. *See id.*

have influenced the other Town Board members.[378] Moreover, even if it did not, it had the appearance of doing so.[379] "Simply put, her continued presence gave her neighbors the impression that they had an 'in' with the Town Board, and Plaintiffs with the belief that they 'didn't stand a chance.'"[380]

It is clear that if a question regarding an official's impartiality, recusal is required. Further, if it is necessary to recuse oneself, the individual should not sit with the board or participate in any aspect of the proceeding.

378. *Id.*

379. *Titan Concrete, Inc.*, 63 Misc. 3d at 574–75, 94 N.Y.S.3d at 825 (citing Informal Op. 1988-18, 1988 N.Y. Op. (Inf.) Att'y Gen. 58).

380. *Id.*