ZONING & LAND USE

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INTRODUCTION

Rather than announcing any significant new land use concepts, the decisions reviewed in this year's Survey article illustrate and reenforce important zoning principles in a variety of factual situations. In *Riedman Acquisitions, LLC v. Town Board of Town of Mendon,* the Court related the procedures and safeguards which must be employed in order for a zone change to provide for a valid reversion to the prior zoning designation if specified conditions of an amendment are not satisfied.[1] The decision in *The Hedges Inn, LLC v. Zoning Board of Appeals of the Village of East Hampton* confirmed that although municipalities possess significant authority pursuant to the Municipal Home Rule Law to vary or contradict many provisions of the Village

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1. 194 A.D.3d 1444, 149 N.Y.S.3d 417 (4th Dep't 2021).

Law or Town Law, any such enactment must express the local legislative board's intent to supersede the Village Law or Town Law and must identify the provision of the Village Law or Town Law which is intended to be superseded. The decision in *The Hedges Inn* also concluded that the uniformity requirement of Town Law § 262 and Village Law § 7-702, which requires that zoning regulations must be "uniform for each class or kind of buildings, throughout such districts . . .",[2] applied not only to actual zoning amendments, but also to local laws which essentially are a zoning amendment because they relate directly to the physical use of land and the potential impact of such use on neighboring properties.

The decision in *Circle T Sterling, LLC v. Town of Sterling Zoning Board of Appeals* confirms that although a decision of a zoning board of appeals that does not adhere to its own prior precedents or explain its reasons for arriving at a different conclusion on essentially the same facts is arbitrary and capricious, a prior decision of a zoning board of appeals has no precedential value in the review of the same application on remand after the original approval had been annulled.[3] In *Parsome, LLC v. Zoning Board of Appeals of Village of East Hampton*, the Appellate Division confirmed that a zoning board of appeals could permissibly consider the effect its decision would have as a precedent in future applications in denying a variance application.[4] The *Parsome* and *Teixeira v. DeChance*[5] decisions provide guidance in the review of area variance applications.

Although concepts of due process apply with particular force in the review of land use applications, the decision in *FCFC Realty LLC v. Weiss* confirmed that cross examination of witnesses is not required during zoning board of appeals hearings and, hence, the acceptance of correspondence by a board is permissible despite the fact that the writer cannot be cross examined.[6] The *FCFC Realty* decision also confirms that necessary findings of fact may be adopted after the institution of an Article 78 proceeding challenging the decision of a board.

The decision of the Second Department in *Capetola v. Town of Riverhead* reiterates that a zoning board of appeals lacks the authority

2. N.Y. TOWN LAW § 262 (McKinney 2021); N.Y. VILLAGE LAW § 7-702 (McKinney 2021).

3. 187 A.D.3d 1542, 132 N.Y.S.3d 483 (4th Dep't 2020).

4. 191 A.D.3d 785, 142 N.Y.S.3d 552 (2d Dep't 2021).

5. 186 A.D.3d 1521, 131 N.Y.S.3d 396 (2d Dep't 2020).

6. 192 A.D.3d 683, 144 N.Y.S.3d 57 (2d Dep't 2021).

to act unless an applicant is aggrieved by a decision of a building inspector and may not grant a variance or render a *de novo* determination with respect to an issue that was not determined by an administrative official.[7] The *FCFC Realty* Court also confirmed that only where revisions are so substantially different from an original proposal, must a county agency have an opportunity to again review and make recommendations on revised plans pursuant to General Municipal Law §§ 239-m or -n.

The Appellate Division confirmed in *Dean v. Town of Poland Zoning Board of Appeals* that a use variance cannot be approved unless the applicant establishes that it cannot obtain a reasonable return from all of the uses allowed in the zoning district and, significantly, that analysis must consider the entire parcel rather than just a portion of whole.[8] The Court in *WCC Tank Technology, Inc. v. Zoning Board of Appeals of Town of Newburgh* clarified the extent to which a use of land permissibly may vary from the perimeters of an approved use variance.[9]

Whether a proceeding in which a necessary party has not been named and served within the applicable 30-day statute of limitations may be rehabilitated by the subsequent service of a proper amended petition was the issue determined in *Mensch v. Planning Board of Village of Warwick.*[10] *Biggs v. Eden Renewables LLC,*[11] *Muller v. Zoning Board of Appeals Town of Lewisboro*[12] and *Sid Jacobson Jewish Community Center, Inc. v. Zoning Board of Appeals of Inc. Village of Brookville*[13] illustrate principles germane to the review of special permit applications in various factual contexts.

I. ZONING AMENDMENTS

A. Reversion of Zoning Amendments

Site plan or special permit approvals frequently are conditioned on a time limit within which a building permit must be obtained or construction commenced.[14]

7. 192 A.D.3d 789, 144 N.Y.S.3d 203 (2d Dep't 2021).
8. 185 A.D.3d 1485, 129 N.Y.S.3d 211 (4th Dep't 2020).
9. 190 A.D.3d 860, 140 N.Y.S.3d 237 (2d Dep't 2021).
10. 189 A.D.3d 1245, 138 N.Y.S.3d 621 (2d Dep't 2020).
11. 188 A.D.3d 1544, 1544, 137 N.Y.S.3d 515, 517 (3d Dep't 2020).
12. 192 A.D.3d 805, 806, 144 N.Y.S.3d 198, 201 (2d Dep't 2021).
13. 192 A.D.3d 693, 144 N.Y.S.3d 54 (2d Dep't 2021).
14. *See* Am. Red Cross, Tompkins Cnty. Chapter v. Bd. of Zoning Appeals, 161 A.D.2d 878, 879, 555 N.Y.S.2d 923, 924 (3d Dep't 1990) (citing Gina Petroleum v.

> The purpose for imposing a time limitation in the grant of a special permit or variance. . . is to insure that in the event conditions have changed at the expiration of the period prescribed the board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances. . . . [15]

As is discussed in *Riedman Acquisitions v. Town Board of Mendon*, a zone change may provide for a reversion to the prior zoning designation, but only if the applicable procedures and safeguards are employed.[16]

The *Riedman Acquisitions* court rejected the Town's claim that an amendment which rezoned property for use as a planned unit development ("PUD") reverted to its prior designation because the developer failed to timely proceed with the project.[17] The developer sought approvals for a patio home community on an eighty-seven-acre parcel and received a zone change to a PUD designation.[18] The Planning Board subsequently approved a preliminary site plan for the proposal in 2005 and the Town Board approved a sewer agreement in 2006 to allow the project to connect to the Town's sewer system.[19] The sewer agreement provided that it would remain in effect for forty years unless changed, modified or amended by mutual consent.[20]

The Planning Board granted final site plan approval for the first phase of the project in 2011, subject to a number of conditions which, if not satisfied, would cause the approval to expire.[21] After several extensions were approved, the developer decided that it would not proceed with the project.[22] A new entity purchased the property in December 2017 and requested confirmation from the Town Board and Planning Board that the property continued to be zoned PUD.[23]

Zoning Bd. of Appeals, 127 A.D.2d 560, 562, 511 N.Y.S.2d 363, 365 (2d Dep't 1987)); Dil-Hills Realty Corp. v. Schultz, 53 A.D.2d 263, 267, 385 N.Y.S.2d 324, 327 (2d Dep't 1976) (quoting *In re* Goodwin (Town of Greenburgh), N.Y. L. J., Jul. 5, 1962, at 10 (Sup. Ct. Westchester Cty.)).

15. *Dil-Hill Realty Corp.*, 53 A.D.2d at 267, 385 N.Y.S.2d at 327 (quoting *In re Goodwin*, N.Y. L. J., Jul. 5, 1962, at 10).

16. *See* 194 A.D.3d 1444, 1448, 149 N.Y.S.3d 417, 423 (4th Dep't 2021) (quoting D'Angelo v. Di Bernardo, 106 Misc. 2d 735, 737, 435 N.Y.S.2d 206, 207 (Sup. Ct. Niagara Cty. 1980)).

17. *See id.* at 1447, 149 N.Y.S.3d at 423.

18. *Id.* at 1445, 149 N.Y.S.3d at 421.

19. *Id.* at 1446, 149 N.Y.S.3d at 421.

20. *Id.* at 1446, 149 N.Y.S.3d at 421–22.

21. *See Riedman Acquisitions*, 194 A.D.3d at 1446, 149 N.Y.S.3d at 422.

22. *Id.*

23. *See id.*

However, the Town Supervisor unilaterally declared that the 2006 sewer agreement was void and required that a new agreement be negotiated.[24] In June 2018, the Planning Board issued a favorable report on the revised sketch plat, subject to approval of a new sewer agreement.[25] Nevertheless, the Town Board declared that the zoning designation reverted to the prior designation because the PUD zoning had been conditioned on satisfaction of the conditions of approval, which deadline, it asserted, had expired in 2015.[26]

The petitioners argued to the Town Board that the local law unconditionally rezoned the parcel to a PUD designation and contended that they were never notified about the prospect of an automatic reversion.[27] The petitioners also requested that the Town Board approve the new sewer agreement which had been negotiated.[28] Instead, the Town Board removed the PUD designation from the zoning law and disapproved the sewer agreement.[29] The petitioners commenced a hybrid action/proceeding challenging the foregoing actions.[30] The Appellate Division affirmed the supreme court's determination that the parcel remained zoned as PUD.[31]

"Zoning regulations must be strictly construed against the municipality . . . and any ambiguity must be resolved in favor of the property owner."[32] Nevertheless, "where . . . 'the language of a[n] [ordinance] is clear and unambiguous, courts must give effect to its plain meaning.'"[33] A parcel may automatically revert to a prior zoning designation only if such a scenario is "clearly set forth in [the] language of the zoning instrument."[34]

24. *See id.*

25. *Id.*

26. *Riedman Acquisitions*, 194 A.D.3d at 1446, 149 N.Y.S.3d at 422.

27. *Id.* at 1446–47, 149 N.Y.S.3d at 422.

28. *Id.* at 1447, 149 N.Y.S.3d at 422.

29. *See id.*

30. *Id.*

31. *Riedman Acquisitions*, 194 A.D.3d at 1448, 149 N.Y.S.3d at 423.

32. *Id.* at 1447, 149 N.Y.S.3d at 423 (first citing Allen v. Adami, 39 N.Y.2d 275, 277, 347 N.E.2d 890, 892, 383 N.Y.S.2d 565, 567 (1976); then citing Lodge Hotel, Inc. v. Town of Erwin Plan. Bd., 62 A.D.3d 1257, 1258, 877 N.Y.S.2d 803, 805 (4th Dep't 2009); and then citing AHEPA 91 v. Town of Lancaster, 237 A.D.2d 978, 979, 654 N.Y.S.2d 884, 885 (4th Dep't 1997)).

33. *Id.* at 1447–48, 149 N.Y.S.3d at 423 (quoting Fox v. Town of Geneva Zoning Bd. of Appeals, 176 A.D.3d 1576, 1578, 110 N.Y.S.3d 169, 172 (4th Dep't 2019)).

34. *Id.* at 1448, 149 N.Y.S.3d at 423 (quoting D'Angelo v. Di Bernardo, 106 Misc. 2d 735, 737, 435 N.Y.S.2d 206, 207 (Sup. Ct. Niagara Cty. 1980)).

> '. . . [E]ven where the automatic reversion language is clear a notice and public hearing must take place before the reversion is permitted to be confirmed by the legislative body' . . . In determining whether the zoning instruments contain the requisite clear language creating automatic reversion, the 'ordinance is to be construed as a whole, reading all of its parts together to determine the legislative intent and to avoid rendering any of its language superfluous.'[35]

The zoning designation of the property in *Riedman Acquisitions* did not automatically revert from a PUD designation to the prior designation because, when strictly construed against the Town Board, the germane zoning documents did not incorporate any explicit language cautioning the petitioners that the zone would automatically revert if certain conditions were not satisfied.[36] Neither the ordinance which rezoned the property nor the local law which amended the zoning map contained any express language declaring that the zoning designation could automatically revert to its prior designation.[37] Because the petitioners were not sufficiently placed on notice of that possibility, the property did not revert to its prior zoning designation.[38]

B. Municipal Home Rule Law Authority

Towns are authorized to legislate by the adoption of ordinances or local laws pursuant to the provisions of the Town Law.[39] The provisions of the Municipal Home Rule Law and the Statute of Local Governments provide an alternate basis of authority for the enactment of zoning local laws by towns.[40] A town may validly enact zoning regulations by local law pursuant to the Municipal Home Rule Law, rather than pursuant to the provisions of Town Law section 264.[41] Villages, however, are not

35. *Id.* (first quoting *D'Angelo*, 106 Misc. 2d at 737, 435 N.Y.S.2d at 207; and then quoting *Fox*, 176 A.D.3d at 1578, 110 N.Y.S.3d at 172).

36. *See* 194 A.D.3d at 1448, 149 N.Y.S.3d at 423 (first citing *Allen*, 39 N.Y.2d at 277, 347 N.E.2d at 892, 383 N.Y.S.2d at 567; and then citing *D'Angelo*, 106 Misc. 2d at 737, 435 N.Y.S.2d at 207).

37. *See id.* at 1448, 149 N.Y.S.3d at 423 (citing *D'Angelo*, 106 Misc. 2d at 737, 435 N.Y.S.2d at 207).

38. *See id.* at 1448, 149 N.Y.S.3d at 423.

39. *See* N.Y. TOWN LAW § 264(1) (McKinney 2021).

40. *See* Sherman v. Frazier, 84 A.D.2d 401, 409, 446 N.Y.S.2d 372, 377 (2d Dep't 1982) (first quoting N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(14) (McKinney 2021); and then quoting N.Y. STAT. LOC. GOVTS. LAW § 10(6) (McKinney 2021).

41. Yoga Soc'y of N.Y. v. Town of Monroe, 56 A.D.2d 842, 843, 392 N.Y.S.2d 81, 82 (2d Dep't 1977) (first citing N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(14); then citing N.Y. TOWN LAW § 264(1); and then citing Clifton Park v. C. P. Enters.,

authorized to legislate by the adoption of ordinances and must enact a local law in order to adopt zoning regulations.[42] Village Law section 21-2100 mandates that "[a]ny local law adopted pursuant to the powers granted by this chapter shall be in accordance with the procedure proscribed by the municipal home rule law."[43]

Municipal Home Rule Law sections 10(1)(ii)(a)(12), 10(1)(ii)(a)(14), 10(1)(ii)(d)(3) (towns), and 10(1)(ii)(e)(3) (villages) specifically authorize towns and villages to adopt zoning local laws.[44] Significantly, the Municipal Home Rule Law permits towns and villages to enact local laws that are not specifically authorized by the provisions of article 16 of the Town Law or Article 7 of the Village Law respectively.[45] Municipal Home Rule Law sections 10(1)(ii)(d)(3) (towns) and 10(1)(ii)(e)(3) (villages) authorize towns and villages respectively to amend or supersede the application of provisions of the Town Law or Village Law, as the case may be, in relation to various matters, which generally includes zoning enactments.[46] However, a local law which intends to utilize the supersession authority of Municipal Home Rule Law section 10(1)(ii)(d)(3) (towns) or section 10(1)(ii)(e)(3) (villages) must specifically recite the section, subsection

45 A.D.2d 96, 97, 356 N.Y.S.2d 122, 124 (3d Dep't 1974)); Schilling v. Dunne, 119 A.D.2d 179, 184, 506 N.Y.S.2d 179, 183 (2d Dep't 1986) (first citing N.Y. MUN. HOME RULE LAW § 10(1(ii)(a)(14); then citing *Sherman*, 84 A.D.2d at 409, 446 N.Y.S.2d at 377; then citing Vill. of Sovona v. Soles, 84 A.D.2d 683, 684, 446 N.Y.S.2d 639, 640 (4th Dep't 1981); then citing *Yoga Soc'y of N.Y.,* 56 A.D.2d at 843, 392 N.Y.S.2d at 82; and then citing *Clifton Park*, 45 A.D.2d at 97, 356 N.Y.S.2d at 124).

42. N.Y. VILLAGE LAW §§ 7-700, 7-706(5) (McKinney 2021).

43. N.Y. VILLAGE LAW § 21-2100(1).

44. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12); § 10(1)(ii)(a)(14); § 10(1)(ii)(d)(3); § 10(1)(ii)(e)(3); *see* Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 430, 547 N.E.2d 346, 349, 548 N.Y.S.2d 144, 147 (1989); *Sherman*, 84 A.D.2d at 409, 446 N.Y.S.2d at 377; *Schilling*, 119 A.D.2d at 185, 506 N.Y.S.2d at 182; Weinstein Enters., Inc. v. Town of Kent, 135 A.D.2d 625, 626, 522 N.Y.S.2d 204, 205 (2d Dep't 1987), *lv. denied*, 72 N.Y.2d 801, 526 N.E.2d 44, 530 N.Y.S.2d 553 (1988) (first citing *Sherman*, 84 A.D.2d 401, 446 N.Y.S.2d 372; then citing N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(14); then citing N.Y. STAT. LOC. GOVTS. LAW § 10(6); then citing Torsoe Bros. Constr. Corp. v. Architecture & Cmty. Appearance Bd. of Rev., 120 A.D.2d 738, 739, 502 N.Y.S.2d 787, 788 (2d Dep't 1986); then citing *Schilling*, 119 A.D.2d at 185, 506 N.Y.S.2d at 182; and then citing N. Bay Assocs. v. Hope, 116 A.D.2d 704, 706, 497 N.Y.S.2d 757, 760 (2d Dep't 1986)).

45. *Id.*

46. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (towns); § 10(1)(ii)(e)(3); *Kamhi*, 74 N.Y.2d at 430, 547 N.E.2d at 349, 548 N.Y.S.2d at 147; *see Sherman*, 84 A.D.2d at 409–10, 446 N.Y.S.2d at 377; *Schilling*, 119 A.D.2d at 185, 506 N.Y.S.2d at 182–83.

and clause of the Town Law which it seeks to amend or supersede and must unambiguously declare its intent to do so.[47]

In *The Hedges Inn, LLC v. Zoning Bd. of Appeals of the Village of East Hampton*, the Village had adopted a local law which prohibited any special event from being held "in whole or in part outdoors or in a tent on property containing a legally pre-existing nonconforming business use in a residential district."[48] When the local law was challenged as being antithetical to the uniformity requirement of Village Law section 7-702, the Village alleged in that it was not required to comply with the uniformity constraint because the law had been adopted pursuant to the supersession authority of the Municipal Home Rule Law.[49] The court rejected the defense.[50]

Pursuant to the Municipal Home Rule Law, villages and towns possess the authority to amend or supersede ". . . any provision of the village law [or town law] relating to the property, affairs or government of the village . . . notwithstanding that such provision is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law."[51] Accordingly, a village or town may supersede provisions of the Village Law or Town Law respectively as they relate to zoning matters.[52] However, that authority may only be implemented if the municipality has complied with the procedures for the adoption of local laws specified in the Municipal Home Rule Law.[53] Among the various requirements, the intent to supersede the Village Law or Town Law must be indicated by specifying "the chapter or local law or ordinance, number and year of enactment, section, subsection or subdivision, which it is intended to change or supersede."[54] Although section 22(1) relates that "the failure so to specify shall not affect the validity of such local law,"[55] the case law dictates that substantial

47. N.Y. MUN. HOME RULE LAW § 22(1); *Kamhi*. 74 N.Y.2d at 434, 547 N.E.2d at 352, 548 N.Y.S.2d at 150 (citing Turnpike Woods v. Town of Stony Point, 70 N.Y.2d 735, 738, 514 N.E.2d 380, 381, 519 N.Y.S.2d 960, 961 (1987)).

48. Hedges Inn, LLC v. Zoning Bd. of Appeals of the Vill. of E. Hampton, No. 201/2019, 2021 N.Y. Slip Op. 30140(U), at 4 (Sup. Ct. Suffolk Cty. 2021) (quoting EAST HAMPTON, N.Y., VILLAGE CODE § 139-15(D) (2021), https://ecode360.com/33286934).

49. *See id.* at 10.

50. *See id.*

51. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(e)(3).

52. *Hedges Inn, LLC*, 2021 N.Y. Slip Op. 30140(U), at 10 (citing Cohen v. Bd. of Appeals of Vill. of Saddle Rock, 100 N.Y.2d 395, 399, 795 N.E.2d 619, 622, 764 N.Y.S.2d 64, 67 (2003)).

53. *Id.*

54. *Id.* (quoting N.Y. MUN. HOME RULE LAW § 22 (1)).

55. *Id.* (quoting N.Y. MUN. HOME RULE LAW § 22 (1)).

adherence to the requirements of the statute is required.[56] Accordingly, "a clear statement by the local legislature invoking its supersession authority, made with definiteness and explicitness, [is required] in order to avoid the confusion that might result if one could not discern whether it intended to supersede a statute or which part or parts it intended to supersede."[57]

The record in *The Hedges* did not indicate whether the Board of Trustees had expressed its intent to invoke the supersession authority in adopting the local law.[58] Hence, there was no evidence in the record to support the Village's claim that the local law was intended to supersede Village Law section 7-702.[59]

C. Uniformity

Town Law section 262 and Village Law section 7-702 require that zoning regulations must be "uniform for each class or kind of buildings, throughout such districts . . . "[60] Significantly, the uniformity requirement

> is not merely a procedural or administrative detail . . . [but] constitutes a limitation on the zoning powers which have been granted to a town [or village] by the state. It constitutes a mandatory, binding directive to the town [or village] to promulgate use regulations which shall be uniform within and throughout identical districts."[61]

As a result, a municipality must strictly comply with the uniformity mandate.[62]

The owner of a pre-existing, nonconforming inn applied for permits to hold weddings outdoors in tents on its property in *The Hedges Inn, LLC v. Zoning Board of Appeals of the Village of East*

56. *Id.*

57. *Hedges Inn, LLC*, 2021 N.Y. Slip Op. 30140(U), at 10 (first citing Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 435, 547 N.E.2d 346, 352, 548 N.Y.S.2d 144, 150 (1989); then citing Turnpike Woods v. Town of Stony Point, 70 N.Y.2d 735, 738, 514 N.E.2d 380, 381, 519 N.Y.S.2d 960, 961–62 (1987); and then citing Viscio v. Town of Wright, 42 A.D.3d 728, 730, 839 N.Y.S.2d 840, 842 (3d Dep't 2007)).

58. *Id.*

59. *Id.* (citing Port Chester Police Ass'n. v. Vill. of Port Chester, 291 A.D.2d 389, 389–90, 736 N.Y.S.2d 907, 908 (2d Dep't 2002)).

60. N.Y. TOWN LAW § 262 (McKinney 2021); N.Y. VILLAGE LAW § 7-702 (McKinney 2021).

61. Klebetz v. Town of Ramapo, 109 Misc. 2d 952, 955, 441 N.Y.S.2d 216, 218 (Sup. Ct. Rockland Cty. 1981).

62. *Id.* at 955, 441 N.Y.S.2d at 219.

Hampton.[63] The Village denied the applications because outdoor dining was not a permitted use in the zoning district and was not authorized by the inn's Certificate of Occupancy.[64] The Village subsequently amended the Village code to prohibit special event "in whole or in part outdoors or in a tent on property containing a legally pre-existing nonconforming business use in a residential district."[65]

The petitioner instituted a declaratory judgment action/Article 78 proceeding asserting that holding outdoor special events had always been a customary accessory use of the inn property and that the amendment impermissibly targeted the inn as a pre-existing, nonconforming business use.[66] Although the local law was not contained in the Village's zoning law, the petitioner alleged that the Village had adopted what, in essence, was an amendment to the zoning law.[67] It asserted that the law violated Village Law section7-702, the identical counterpart to Town Law section 262, which requires that "all zoning regulations be uniform for each class or kind of buildings within a district."[68] The petitioner alleged that the amendment was a *de facto* zoning amendment which had been adopted in violation of the procedural and substantive requirements applicable to zoning amendments.[69]

The court concluded that the local law essentially was a zoning law because it related directly to the physical use of land and the potential impact of such use on neighboring properties.[70] The court determined that the law was invalid because it was enacted in violation of Village Law section 7-702, which requires that zoning "regulations shall be uniform for each class or kind of buildings, throughout such district but the regulations in one district may differ from those in other districts."[71]

The uniformity requirement of Village Law section 7-702 and Town Law section 262 are "intended to assure property holders that all owners in the same district will be treated alike and that there will be no

63. *Hedges Inn, LLC*, 2021 N.Y. Slip Op. 30140(U), at 2.

64. *Id.* at 3.

65. *Id.* at 4 (quoting EAST HAMPTON, N.Y., VILLAGE CODE § 139-15(D) (2021), https://ecode360.com/33286934).

66. *Id.* at 2.

67. *Id.* at 4–5.

68. *Hedges Inn, LLC*, 2021 N.Y. Slip Op. 30140(U), at 5 (quoting N.Y. VILLAGE LAW § 7-702 (McKinney 2021)).

69. *Id.* at 7.

70. *Id.* at 8 (citing Louhal Props., Inc. v. Strada, 191 Misc. 2d 746, 751, 743 N.Y.S.2d 810, 814 (Sup. Ct. Nassau Cty. 2002)).

71. *Id.* at 8.

improper discrimination."[72] "In other words, although zoning regulations obviously may vary from district to district, regulations must apply uniformly throughout any particular district."[73] "Where specialized circumstances exist for certain property within a district the uniformity rule may be bent," but "[a]n ordinance will be held to uniformity if the record does not disclose any reasonable basis for different treatment among similar parcels within a district."[74]

> Although the failure to observe the uniformity requirement will result in invalidation of a zoning provision, it is not a bar to fashioning appropriate zoning regulations to satisfy a community's needs; it generally does not interfere with the ability of a board of trustees to impose conditions on the rezoning of a parcel of property if such conditions are related to and incidental to the use of the property and intended to minimize any adverse impact on the surrounding area, and is not a bar to authorization of a use upon issuance of a special permit.[75]

The petitioners asserted that Village Law section 7-702 prohibits a village from singling out certain properties in the same zoning district for dissimilar treatment and that there was no rational basis for prohibiting special events outdoors or in tents at inns and restaurants in the Village's residential districts while allowing such events to be held at residential properties in those districts.[76] In addition, the Village continued to permit special events outdoors and in tents at other properties in the same district.[77] The court rejected the Village's claim that the prohibition did not conflict with Village Law section 7-702 because, it was asserted, inns and restaurants are not within the same "class or kind of buildings" as residences located in the Village's residential districts and, therefore, need not all be regulated uniformly.[78] The court also rejected the contention that because the amendment treated all nonconforming business uses in residential districts identically, it complied with the uniformity requirement of Village Law

72. *Id.* (quoting Augenblick v. Town of Cortlandt, 104 A.D.2d 806, 814, 480 N.Y.S.2d 232, 239 (2d Dep't 1984)).

73. *Id.* (quoting Terry Rice, *2022 Practice Commentaries*, *in* MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 63, Village Law § 7-702).

74. *Hedges Inn, LLC*, 2021 N.Y. Slip Op. 30140(U), at 8 (quoting *Augenblick*, 104 A.D.2d at 814, 480 N.Y.S.2d at 239).

75. *Id.* (citing Terry Rice, *2022 Practice Commentaries*, *in* MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 63, Village Law § 7-702).

76. *The Hedges Inn, LLC*, 2021 N.Y. Slip Op. 20140(U), at 8.

77. *Id.*

78. *Id.*

section 7-702.[79] The court concluded that the amendment did not treat all owners of property in the residential district the same because ". . . it is not enough, for purposes of the uniformity requirement, that [the amendment] treats all owners of nonconforming business uses in the residential district the same. Even if a rational basis might exist for treating residential property differently from nonresidential property, the [Village] did not articulated any basis-rational or otherwise-for distinguishing certain nonresidential property from other nonresidential property."[80]

II. ZONING BOARDS OF APPEAL

A. Consistency with Prior Decisions

A zoning board of appeals must decide applications in a manner which is consistent with its prior determinations on similar applications.[81] As a result, a decision of a zoning board of appeals that does not adhere to its own prior precedents or explain its reasons for arriving at a different conclusion on essentially the same facts is arbitrary and capricious.[82] Nevertheless, a decision of a zoning board of appeals which is vacated upon judicial review possesses no precedential value, even with respect to consideration of the same application on remand to the board.[83]

In *Circle T Sterling*, the Zoning Board of Appeals granted a variance from the 1,000-foot setback requirement from existing residences which was necessitated by the proposed access roads to the applicant's mine based, in part, on the observation that noise emanating from the mine would be equivalent to that of farming activities prevalent throughout the community.[84] The Appellate

79. *Id.* at 8–9.

80. *Id.* at 9.

81. *See, e.g.*, Knight v. Amelkin, 68 N.Y.2d 975, 977, 503 N.E.2d 106, 106, 510 N.Y.S.2d 550, 550 (1986) (first citing Cowan v. Kern, 41 N.Y.2d 591, 599, 363 N.E.2d 305, 310, 394 N.Y.S.2d 579, 599 (1977); then citing Holy Spirit Ass'n. v. Rosefeld, 91 A.D.2d 190, 197–98, 458 N.Y.S.2d 920, 925–26 (2d Dep't 1983); then citing ROBERT M. ANDERSON, NEW YORK ZONING LAW & PRACTICE § 23.59 (3d ed. 1984); and then citing PATRICK J. ROHAN, ZONING & LAND USE CONTROLS § 43.01 (2021)).

82. *See id.* (citing In re *Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 516–17, 488 N.E.2d 1223, 1225, 498 N.Y.S.2d 111, 113 (1985)).

83. Circle T Sterling, LLC v. Town of Sterling Zoning Bd. of Appeals, 187 A.D.3d 1542, 1543–44, 132 N.Y.S.3d 483, 485 (4th Dep't 2020) (citing Fichera v. New York State Dep't of Env't Conservation, 159 A.D.3d 1493, 1496, 74 N.Y.S.3d 422, 425 (4th Dep't 2018)).

84. *See id.* at 1542–43, 132 N.Y.S.3d at 484.

Division had vacated the decision approving the area variances in a previous appeal and remitted the matter to the Board for a new determination because it had failed to refer the application to the County Planning Board pursuant to General Municipal Law section 239-m.[85] The earlier decision also concluded that the Board had relied in its findings on documents and reports, including a traffic and noise report, which were generated subsequent to the Board having rendered its decision.[86]

Upon remand, the public hearing record included the traffic and noise report in which the frequency that neighboring residences would be passed by trucks was explained.[87] Additionally, the opponents' engineer contended that the information provided to the Department of Environmental Conservation during the permit review process regarding the noise to be produced by the project was not prepared by persons competent to conduct sound testing or modeling, was not performed in accordance with customary standards, and omitted crucial sources of potential noise.[88] Numerous residents also conveyed concerns that because the homes were located only a few hundred feet from the access road, they would suffer noise, odor, and dust from passing trucks, and that the mine would destroy the "peace and quiet" in the neighborhood.[89] In denying the application, the Board found that the "quiet and serene neighborhood would experience the noise of a truck entering or exiting the access road with acceleration and braking every 6 minutes" during the fifty-eight-hour work week.[90]

The court rejected the petitioner's claim that the decision to deny the variance was arbitrary and capricious because the Board was required to reach the same result as in its prior determinations in the matter or to explain its reasons for reaching a different result because the prior determinations were vacated and thus are "null and void."[91] Accordingly, the prior determinations had no precedential value in the review of the application on remand.[92]

85. *Id.* at 1543, 132 N.Y.S.3d at 485 (citing *Fichera*, 159 A.D.3d at 1496–97, 74 N.Y.S.3d at 426).

86. *Id.* at 1543, 132 N.Y.S.3d at 485 (citing *Fichera*, 159 A.D.3d at 1497, 74 N.Y.S.3d at 426).

87. *Id.*

88. *Circle T Sterling*, 187 A.D.3d at 1543, 132 N.Y.S.3d at 485.

89. *Id.*

90. *Id.*

91. *Id.* at 1543–44, 132 N.Y.S.3d at 485 (citing *Fichera*, 159 A.D.3d at 1496, 74 N.Y.S.3d at 425).

92. *Id.* at 1544, 132 N.Y.S.3d at 485.

B. Consideration of Precedential Effect of Granting Variance

Whether the potential precedential effect of a board's decision on future area variance applications is a relevant or permissible consideration was determined by the Appellate Division in *Parsome, LLC v. Zoning Board of Appeals of Village of East Hampton*.[93] The court determined that the Zoning Board of Appeals could permissibly consider the effect its decision would have as a precedent in future applications in denying the variance application.[94]

C. Area Variances

In *Parsome, LLC v. Zoning Board of Appeals of Village of East Hampton*, the Appellate Division affirmed the denial of area variances required for the expansion of a non-conforming commercial building.[95] The petitioner had purchased the property, which was located in a manufacturing district, in 2004.[96] The property was improved with a 6,600-square-foot commercial building which had been constructed in 1988, and a parking lot consisting of twenty-three parking spaces.[97] The building satisfied the Village's parking requirements when it was constructed, that is, one parking space for every 300 square feet of building floor space.[98] The Village amended its parking regulations in 1995 to require one parking space for every 200 square feet of building floor space and two parking spaces for every unit in a building.[99] The amendment did not require existing buildings to comply with the revised parking requirements if they were unable to add additional parking, unless the building underwent an "intensification" of its use.[100] The Village notified the petitioner in 2016 that it was in violation of its certificate of occupancy because the building contained six office units but only four were permitted pursuant to the certificate of occupancy.[101] The petitioner then sought

93. *See* 191 A.D.3d 785, 788 142 N.Y.S.3d 552, 555–56 (2d Dep't 2021) (first citing Pecoraro v. Bd. of Appeals of Town of Hempstead, 2 N.Y.3d 608, 614, 814 N.E.2d 404, 407, 781 N.Y.S.2d 234, 237 (2004); and then citing Gallo v. Rossell, 52 A.D.3d 514, 515–16, 859 N.Y.S.2d 675, 677 (2d Dep't 2008)).

94. *See id.* (first citing *Pecoraro*, 2 N.Y.3d at 614, 814 N.E.2d at 407, 781 N.Y.S.2d at 237; and then citing *Gallo*, 52 A.D.3d at 515–16, 859 N.Y.S.2d at 677).

95. *Id.* at 785, 142 N.Y.S.3d at 553–54.

96. *Id.* at 785, 142 N.Y.S.3d at 554.

97. *Id.*

98. *Parsome, LLC*, 191 A.D.3d at 785, 142 N.Y.S.3d at 554.

99. *Id.* (citing EAST HAMPTON, N.Y., VILLAGE CODE §§ 278-6(c)(3), 278-6(d)(1) (2021) https://ecode360.com/8385131).

100. *Id.* (citing EAST HAMPTON, N.Y., VILLAGE CODE, § 278-6(A)).

101. *Id.*

an area variance to permit it to retain the additional two office units without providing additional parking.[102]

The Zoning Board of Appeals determined that the petitioner's establishment of the additional units constituted an "intensification" of its use, thereby requiring compliance with the new parking regulations.[103] In rejecting the variance, the Board determined that twenty additional parking spaces were required and that the requested area variance was substantial.[104] It also concluded that the building had no access to public parking and sporadically experienced a parking shortage; that there was a parking shortage in the district in which the building was located; and that the parking shortage had a deleterious impact on traffic circulation and the neighborhood generally.[105] It also found that the hardship was self-created.[106]

In affirming the Board's conclusion that the use constituted an "intensification," the court related that "'[A] zoning board's interpretation of its zoning ordinance is entitled to great deference and will not be overturned by the courts unless unreasonable or irrational.'"[107] The Board's conclusion that the addition of two units within the building constituted an "intensification" was neither irrational nor unreasonable and, as a result, was required to be sustained.[108] The Board's finding that the variance would exacerbate the property's parking problems and those in the district also had a rational basis.[109] Additionally, any purported hardship was self-created because the petitioner was presumed to have known of the pertinent zoning regulations when it purchased the property.[110]

102. *Id.* at 785–86, 142 N.Y.S.3d at 544.

103. *Parsome, LLC*, 191 A.D.3d at 786, 142 N.Y.S.3d at 554.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 787, 142 N.Y.S.3d at 555 (quoting 7–Eleven, Inc. v. Town of Huntington, 140 A.D.3d 889, 890, 33 N.Y.S.3d 382, 383 (2d Dep't 2016)) (citing Gray v. Vill. of Patchogue, 164 A.D.3d 587, 588, 83 N.Y.S.3d 323, 324 (2d Dep't 2018)).

108. *Parsome, LLC*, 191 A.D.3d at 787, 142 N.Y.S.3d at 555 (quoting Halperin v. City of New Rochelle, 24 A.D.3d 768, 774, 809 N.Y.S.2d 98, 106 (2d Dep't 2005)).

109. *Id.* at 787–88, 142 N.Y.S.3d at 555 (first citing FNR Home Constr. Corp. v. Downs, 57 A.D.3d 540, 542, 868 N.Y.S.2d 310, 313 (2d Dep't 2008); and then citing Gallo v. Rosell, 52 A.D.3d 514, 515, 859 N.Y.S.2d 675, 677 (2d Dep't 2008)).

110. *Id.* at 788, 142 N.Y.S.3d at 556 (first citing Matejko v. Bd. of Zoning Appeals of Town of Brookhaven, 77 A.D.3d 949, 950, 910 N.Y.S.2d 123, 125 (2d Dep't 2010); and then citing *Gallo*, 52 A.D.3d at 516, 859 N.Y.S.2d at 677).

The Appellate Division confirmed the determination of the Zoning Board of Appeals that two adjacent lots had merged, as well as the denial of area variances, in *Teixeira v. DeChance*.[111] The petitioner owned two separate tax lots which shared a common rear boundary and bordered two parallel streets.[112] The lots were considered to have merged pursuant to the terms of the zoning law.[113] The petitioner sought an area variance to divide the property into two separate lots.[114] He claimed that he was entitled to the variance because the property consisted of two tax lots that previously had existed as single and separate lots.[115] The Zoning Board of Appeals denied the application, finding that the lots had merged.[116]

> Separate parcels of land in common ownership which have frontage on parallel streets and a common rear boundary are deemed not to have merged where it is shown that, during the period of common ownership, the parcels were never used in conjunction with one another and neither parcel materially enhanced the value or utility of the other.[117]

The petitioner asserted that because the two tax lots shared a common rear boundary and abutted two parallel streets, they constituted a "back-to-back split" configuration and, as a result, were single and separate lots.[118] However, the record confirmed that the two tax lots had merged because the properties previously shared a fence, sheds, and a playset.[119] The Zoning Board of Appeals rationally found that the two lots had merged and that the property was required to comply with the lot area restrictions of the zoning law.[120]

111. 186 A.D.3d 1521, 1521, 131 N.Y.S.3d 396, 397 (2d Dep't 2020).

112. *Id.*

113. *Id.* (first citing BROOKHAVEN, N.Y., LAND USE LEGISLATION, § 85-1(B) (2021), https://ecode360.com/8596434; then citing BROOKHAVEN, N.Y., LAND USE LEGISLATION, § 85-883(D)(4) (2021), https://ecode360.com/14790112).

114. *Id.*

115. *Id.*

116. *Teixeira*, 186 A.D.3d at 1521, 131 N.Y.S.3d at 397–98.

117. *Id.* at 1522, 131 N.Y.S.3d at 398 (citing Matherson v. Scheyer, 20 A.D.3d 425, 427–28, 799 N.Y.S.2d 86, 89 (2d Dep't 2005)).

118. *Id.*

119. *Id.* (citing Harn Food, LLC v. DeChance, 159 A.D.3d 819, 820, 72 N.Y.S.3d 538, 539 (2d Dep't 2018)).

120. *Id.* (first citing BROOKHAVEN, N.Y., LAND USE LEGISLATION, § 85-1(B) (2021), https://ecode360.com/8596434; then citing *Harn Food, LLC*, 159 A.D.3d at 820, 72 N.Y.S.3d at 539; then citing Sakrel, Ltd. v. Roth, 176 A.D.2d 732, 733–34, 574 N.Y.S.2d 972, 974 (2d Dep't 1991); then citing Berko v. Kern, 215 A.D.2d 476, 476, 627 N.Y.S.2d 575, 576 (2d Dep't 1995); then citing Cicenia v. Zoning Bd. of

The court reiterated that a zoning board of appeals is not required to justify its determination with supporting evidence for each of the five statutory factors as long as its decision balancing the considerations is rational.[121] The proposal in *Teixeira* was inconsistent with the pattern of development in the area because only nineteen percent of the lots would conform to the lot area and lot frontage requested in the variance application.[122] Additionally, the requested variances substantially deviated from the zoning requirements.[123] Hence, the Zoning Board of Appeals rationally weighed the germane factors and appropriately concluded that "the detriment to the health, safety, and welfare of the neighborhood outweighed the benefit to the petitioner."[124]

D. Due Process-Cross-Examination

Zoning board of appeals hearings commonly are characterized by more formality than planning board meetings. Such increased formality is appropriate because a zoning board of appeals is a "quasi-judicial" body charged with the obligation to apply the law to the evidence presented.[125] Despite the quasi-judicial nature of a zoning board's function, "a public hearing is not a formal quasi-judicial hearing . . ."[126] For example, cross-examination of witnesses is not required in a zoning board of appeals hearing.[127]

Appeals, 157 A.D.2d 722, 724, 549 N.Y.S.2d 818, 820 (2d Dep't 1990); and then citing § 85-2(C)(1)).

121. *Teixeira*, 186 A.D.3d at 1523, 131 N.Y.S.3d at 398 (first citing Traendly v. Zoning Bd. of Appeals of Southold, 127 A.D.3d 1218, 1218–19, 7 N.Y.S.3d 544, 545 (2d Dep't 2015); and then citing 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)).

122. *Id.*

123. *Id.*

124. *Id.* (citing Sasso v. Osgood, 86 N.Y.2d 374, 384, 657 N.E.2d 254, 259, 633 N.Y.S.2d 259, 264 (1995)).

125. Knight v. Amelkin, 68 N.Y.2d 975, 977, 503 N.E.2d 106, 106, 510 N.Y.S.2d 550, 550 (1986) (first citing Cowan v. Kern, 41 N.Y.2d 591, 599, 363 N.E.2d 305, 310, 394 N.Y.S.2d 579, 584 (1977); and then citing Holy Spiring Ass'n. v. Rosenfeld, 91 A.D.2d 190, 201, 458 N.Y.S.2d 920, 928 (2d Dep't 1983)); Turturro v. Zoning Bd. of Appeals of Town of Brookhaven, 16 Misc. 3d 1129(A), 1129(A), 847 N.Y.S.2d 905, 905 (Sup. Ct. Suffolk Cty. 2007) (citing *Knight*, 68 N.Y.2d at 977, 503 N.E.2d at 106, 510 N.Y.S.2d at 550).

126. Aprile v. Lo Grande, 89 A.D.2d 563, 565, 452 N.Y.S.2d 104, 106 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 886, 453 N.E.2d 545, 466 N.Y.S.2d 316 (1983) (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)).

127. *See id.*; 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).

Consistent with that principle, it was determined in *FCFC Realty LLC v. Weiss* that the Zoning Board of Appeals did not violate due process by considering a written statement from a resident who did not attend the hearing on the application and, accordingly, was not available to be cross-examined.[128] "Municipal land use agencies are 'quasi-legislative, quasi-administrative bodies,' and 'the public hearings they conduct are informational in nature and [do] not involve the receipt of sworn testimony or taking of evidence within the meaning of CPLR 7803(4).'"[129]

E. Findings of Fact

Findings of fact are indispensable for intelligent judicial review of the record and to establish the basis for a board's decision.[130] Although adopted more than a year after the hearing was held and, apparently, after the commencement of the proceeding challenging the decision, the *FCFC Realty* court also accepted the Zoning Board of Appeals' findings of fact.[131] The court opined that the adoption of the findings of fact relieved it from having to remit the matter to the Board in order for it to provide its reasons for the denial of the application.[132]

F. Jurisdiction

Except with respect to delegated permit applications, a zoning board of appeals lacks the authority to act unless an applicant is aggrieved by a decision of a municipal administrative official, such as a building inspector or code enforcement officer.[133] Confirming that

128. 192 A.D.3d 683, 684, 144 N.Y.S.3d 57, 61 (2d Dep't 2021).

129. *Id.* (quoting *In re* Halperin v. City of New Rochelle, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98, 103–04 (2d Dep't 2005)) (citing Wal-Mart Stores v. Plan. Bd., 238 A.D.2d 93, 96, 668 N.Y.S.2d 774, 776 (3d Dep't 1998)).

130. *See* Swan v. Depew, 167 A.D.2d 835, 836, 561 N.Y.S.2d 940, 942 (4th Dep't 1990) (first citing Leibring v. Plan. Bd., 144 A.D.2d 903, 903, 534 N.Y.S.2d 236, 237 (4th Dep't 1988); ROBERT M. ANDERSON, NEW YORK ZONING LAW & PRACTICE § 25.32 (3d ed. 1984)); Rendino's Truck & Auto Collision v. Zoning Bd. of Appeals of the City of Syracuse, 159 A.D.2d 949, 950, 552 N.Y.S.2d 791, 792 (4th Dep't 1990); *see also* Greene v. Johnson, 121 A.D.2d 632, 633, 503 N.Y.S.2d 656, 656–57 (2d Dep't 1986) (first citing Kadish v. Simpson, 55 A.D.2d 911, 390 N.Y.S.2d 450, 451 (2d Dep't 1977); and then citing Seaford Jewish Center, Inc. v. Bd. of Zoning Appeals, 48 A.D.2d 686, 686, 368 N.Y.S.2d 40, 41 (2d Dep't 1975)).

131. *FCFC Realty LLC*, 192 A.D.3d at 684, 144 N.Y.S.3d at 61.

132. *See id.* at 684, 144 N.Y.S.3d at 61 (first citing Thirty W. Park Corp. v. Zoning Bd. of Appeals of City of Long Beach, 43 A.D.3d 1068, 1069, 843 N.Y.S.2d 106, 108 (2d Dep't 2007); and then citing Berka v. Seltzer, 170 A.D.2d 450, 450, 565 N.Y.S.2d 234, 234–35 (2d Dep't 1991)).

133. *See* N.Y. TOWN LAW § 267-a(4) (McKinney 2021) ("[u]nless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be

principle, a parcel of land was rezoned subsequent to the respondent's purchase of the property in *Matter of Capetola v. Town of Riverhead*.[134] An application for a building permit was denied by the Building Inspector based upon his conclusion that the parcel did not comply with four bulk requirements, that is, impervious surface coverage, front yard setback, side yard setback, and combined side yard setbacks.[135] The owner then applied for variances for the four deficiencies identified by the Building Inspector.[136] The petitioner, a neighboring property owner, asserted at the hearing on the variances, that a lot size variance also was necessary, and subsequently challenged the approval of the four variances in an Article 78 proceeding.[137]

The Appellate Division reiterated that unless otherwise provided for by a local law, a zoning board of appeals' jurisdiction is appellate only.[138] Consequently, a zoning board of appeals lacks the authority to grant a variance or render a *de novo* determination with respect to an issue that was not determined by an administrative official.[139] The only germane issues to be decided by the Zoning Board of Appeals related to the four variances sought by the respondent in his variance application upon his appeal from the decision of the Building

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 pursuant to this article."); N.Y. VILLAGE LAW § 7-712-a(4) (McKinney 2021); Brenner v. Sniado, 156 A.D.2d 559, 559, 549 N.Y.S.2d 68, 69 (2d Dep't 1989) (first citing Moriarty v. Plan. Bd. of the Vill. of Sloatsburg, 119 A.D.2d 188, 196, 506 N.Y.S.2d 184, 189 (2d Dep't 1986) (citing ROBERT M. ANDERSON, NEW YORK ZONING LAW & PRACTICE § 22.37, 22.39, 25.04 (3d ed. 1984); and then citing Cohalan v. Schermerhorn, 77 Misc. 2d 23, 27–28, 351 N.Y.S.2d 505, 511 (Sup. Ct. Suffolk Cty. 1973)).

134. *See* 192 A.D.3d 789, 790, 144 N.Y.S.3d 203, 204 (2d Dep't 2021).

135. *Id.*

136. *Id.*

137. *Id.* at 790, 144 N.Y.S.3d at 204–05.

138. *See id.* at 792, 144 N.Y.S.3d at 206 (first citing N.Y. TOWN LAW § 267–a(4) (McKinney 2021); then citing Chestnut Ridge Assoc., LLC v. 30 Sephar Lane, Inc., 169 A.D.3d 995, 997–98, 94 N.Y.S.3d 596, 598 (2d Dep't 2019); then citing McDonald's Corp. v. Kern, 260 A.D.2d 578, 578, 688 N.Y.S.2d 613, 614 (2d Dep't 1999); then citing *Brenner*, 156 A.D.2d at 559, 549 N.Y.S.2d at 69; and then citing *Moriarty*, 119 A.D.2d at 196, 506 N.Y.S.2d at 189).

139. *See Capetola*, 192 A.D.3d at 792, 144 N.Y.S.3d at 206 (first citing N.Y. TOWN LAW § 267–a(4); then citing *Chestnut Ridge Assoc*., LLC, 169 A.D.3d at 997–98, 94 N.Y.S.3d at 598; then citing *McDonald's Corp.*, 260 A.D.2d at 578, 688 N.Y.S.2d at 614; then citing *Brenner*, 156 A.D.2d at 559, 549 N.Y.S.2d at 69; and then citing *Moriarty*, 119 A.D.2d at 196, 506 N.Y.S.2d at 189); *see also* N.Y. VILLAGE LAW § 7-712-a(4) (McKinney 2021).

Inspector which had identified those four required variances.[140] No determination of an administrative official existed requiring a lot size area variance for the Zoning Board of Appeals to review and there was no appeal by the petitioners of such issue.[141] Any error on the part of the Zoning Board of Appeals in deciding that issue did not require remittal for a new decision because the Zoning Board of Appeals lacked the authority to decide whether a lot size variance was necessary.[142]

G. General Municipal Law Referral

General Municipal Law section 239-m(3) mandates that various land use applications, including applications for variances, which effect property located within 500 feet of various enumerated boundaries, highways, parks and other features, be referred to the respective county planning agency.[143] General Municipal Law section 239-m(1)(c) requires the referring agency to provide to the County Department of Planning a "full statement of such proposed action," which is defined to mean:

> [A]ll materials required by and submitted to the referring body as an application on a proposed action, including a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations.[144]

However, "[o]nly where 'the revisions are so substantially different from the original proposal, [should] the county [agency] . . . have the opportunity to review and make recommendations on the new and revised plans.'"[145] In *FCFC Realty LLC v. Weiss*, the court found that a new referral to the County Planning Commission was not necessary because, although the County Planning Commission

140. *See id.* (citing N.Y. TOWN LAW § 267–b(3)(a)).

141. *See id.*

142. *Id.*

143. N.Y. GEN. MUN. LAW § 239-m(3) (McKinney 2021).

144. *Id.* § 239-m(1)(c).

145. Favre v. Plan. Bd. of the Town of Highlands, 185 A.D.3d 681, 683, 128 N.Y.S.3d 21, 23 (2d Dep't 2020) (quoting Ferrari v. Penfield Plan. Bd., 181 A.D.2d 149, 152, 585 N.Y.S.2d 925, 927 (4th Dep't 1992)).

reviewed only the petitioner's original plans, the revised plans were not substantially different from the initial plans.[146]

H. Use Variance

The prerequisites for obtaining a use variance are unambiguously enumerated in Town Law Section 267-b(2)(b) and Village Law section 7-712-b(2)(b).[147] The Appellate Division confirmed in *Dean v. Town of Poland Zoning Board of Appeals* that a use variance cannot be approved unless the applicant establishes that it cannot obtain a reasonable return from all of the uses allowed in the zoning district and that such analysis must consider the entire parcel rather than not just a portion of whole.[148]

The court vacated a use variance granted to the owner of a 17-acre parcel to construct a Dollar General store on a two-acre portion of the property.[149] The court restated that among the prerequisites for a use variance, an applicant must establish by dollar and cents proof that it cannot realize a reasonable return for the property for each use permitted in the zoning district.[150] The inability to demonstrate that a reasonable return cannot be achieved by using the property for any conforming use mandates denial of a use variance application.[151]

The applicant provided evidence of the cost of removing a dilapidated 19th-century house from the two-acre parcel, including the costs of asbestos remediation and air monitoring, which would be required to sell the property as vacant land.[152] However, the applicant's expert did not provide any evidence as to the potential use of the property other than as vacant land and, consequently, provided no evidence to demonstrate that the applicant could not realize a reasonable return if the property were to be used for any conforming

146. *See* FCFC Realty LLC v. Weiss, 192 A.D.3d 683, 685–86, 144 N.Y.S.3d 57, 62 (2d Dep't 2021) (first citing *Favre*, 185 A.D.3d at 683, 128 N.Y.S.3d at 23–24; and then citing Calverton Manor, LLC v. Town of Riverhead, 160 A.D.3d 829, 831, 76 N.Y.S.3d 75, 78 (2d Dep't 2018)).

147. *See* N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2021); N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 2021).

148. *See* 185 A.D.3d 1485, 1487, 129 N.Y.S.3d 211, 213 (4th Dep't 2020).

149. *See id.* at 1486, 129 N.Y.S.3d at 212.

150. *See id.* at 1486–87, 129 N.Y.S.3d at 212–213 (citing Vill. Bd. of Vill. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 256, 423 N.E.2d 385, 385, 440 N.Y.S.2d 908, 908 (1981)).

151. *See id.* at 1487, 129 N.Y.S.3d at 213 (first citing Leone v. City of Jamestown Zoning Bd. of Appeals, 151 A.D.3d 1828, 1829, 56 N.Y.S.3d 762, 764 (4th Dep't 2017); and then citing Edwards v. Davison, 94 A.D.3d 883, 884, 941 N.Y.S.2d 873, 873–74 (2d Dep't 2012)).

152. *See id.*

use.[153] Therefore, the applicant failed to satisfy its burden of establishing that it could not realize a reasonable return from the property without the requested use variance.[154]

Furthermore, the applicant's expert only discussed the possible return on the small, two-acre portion of the property rather than assessing the potential return on the entire parcel.[155] "[T]he inquiry as to an inability to realize a reasonable return may not be segmented to examine less than all of an owner's property rights subject to a regulatory regime."[156] The failure to address the ability to obtain a reasonable return on the remaining parts of the property or on other permitted uses in the zoning district destined the application to rejection.[157]

I. Perimeters of Use Variance

A use variance permits a use of property that is not allowed or prohibited by a zoning law.[158] The court in *WCC Tank Technology, Inc. v. Zoning Board of Appeals of Town of Newburgh* clarified the extent to which a use of land permissibly may vary from the perimeters of the approved variance.[159] The petitioner sought an interpretation that that the indoor parking and storage of vehicles with mounted hydrovac equipment was a permitted use pursuant to the terms of a previously granted use variance.[160] A use variance had been obtained by the petitioner to operate a "fuel tank lining business."[161] As the result of complaints regarding the use of the property, the petitioner sought an interpretation that the indoor parking and storage of vehicles with mounted hydrovac equipment was a use permitted by the previous use variance.[162] The Appellate Division confirmed that the Zoning Board of Appeals' interpretation that the use was not permitted

153. *Dean*, 185 A.D.3d at 1487, 129 N.Y.S.3d at 213.

154. *See id.* (citing *Leone*, 151 A.D.3d at 1829, 56 N.Y.S.3d at 764).

155. *See id.* (first citing Concerned Residents v. Zoning Bd. of Appeals, 222 A.D.2d 773, 774–75, 634 N.Y.S.2d 825, 827 (3d Dep't 1995); and then citing Amco Dev., Inc. v. Zoning Bd. of Appeals, 185 A.D.2d 637, 638, 586 N.Y.S.2d 50, 51 (4th Dep't 1992)).

156. *Id.* (quoting Nemeth v. Vill. of Hancock Zoning Bd. of Appeals, 127 A.D.3d 1360, 1363, 7 N.Y.S.3d 626, 629 (3d Dep't 2015)).

157. *See id.*

158. *See* N.Y. TOWN LAW § 267(1)(a) (McKinney 2021); N.Y. VILLAGE LAW § 7-7121(a) (McKinney 2021).

159. *See* 190 A.D.3d 860, 863, 140 N.Y.S.3d 237, 241 (2d Dep't 2021).

160. *See id.* at 861, 140 N.Y.S.3d at 239–40.

161. *See id.* at 860, 140 N.Y.S.3d at 239.

162. *See id.* at 861, 140 N.Y.S.3d at 239–40.

pursuant to the 1982 use variance was not illegal, arbitrary and capricious, or an abuse of discretion.[163]

In confirming the Board's interpretation, the court reiterated that "[a] use for which a use variance has been granted is a conforming use and, as a result, no further use variance is required for its expansion, unlike a use that is permitted to continue only by virtue of its prior lawful, nonconforming status."[164] Nevertheless, the fact that a property may be used for commercial purposes does not leave the development of the property unrestricted because the use of the property remains subject to the terms of the use variance.[165] Where a zoning board of appeals previously has determined that a use is limited by the terms of a use variance, a zoning board of appeals is not free to later ignore that determination.[166] The terms of the use variance in *WCC Tank Tech* were explicit and restricted the use to the operation of a fuel tank lining business.[167] The court rejected the petitioners' claim that they would be using the hydrovac vehicles in connection with the approved fuel tank lining business.[168] The record demonstrated that the petitioners intended to use the hydrovac vehicles in connection with an completely different business, that is, a hydro-excavation business, which was not permitted pursuant to the terms of the 1982 use variance.[169]

The decisions cited by the *WCC Tank Technology* court emphasize the conclusion that although a further use variance is not required for the expansion of a use for which a use variance has been granted, the perimeters of a use variance commonly are or should be established when first approved.[170] In particular, the Appellate Division reversed the granting of a use variance to expand a nonconforming motel in *Kogel v. Zoning Board of Appeals of Town of*

163. *See id.* at 861–62, 140 N.Y.S.3d at 240.

164. *WCC Tank Tech., Inc*., 190 A.D.3d at 862, 140 N.Y.S.3d at 240 (first citing Scarsdale Shopping Ctr. Assoc. v. Bd. of Appeals on Zoning for New Rochelle, 64 A.D.3d 604, 606, 882 N.Y.S.2d 308, 310 (2d Dep't 2009); and then citing Angel Plants, Inc. v. Schoenfeld, 154 A.D.2d 459, 460–61, 546 N.Y.S.2d 112, 113 (2d Dep't 1989)).

165. *See id.* (citing Borer v. Vineberg, 213 A.D.2d 828, 830, 623 N.Y.S.2d 378, 380 (3d Dep't 1995)).

166. *See id.* (citing Kogel v. Zoning Bd. of Appeals of Town of Huntington, 58 A.D.3d 630, 632, 871 N.Y.S.2d 638, 640 (2d Dep't 2009)).

167. *See id.*

168. *See id.*

169. *See WCC Tank Tech., Inc*., 190 A.D.3d at 862, 140 N.Y.S.3d at 240.

170. *See id*. (citing *Kogel*, 58 A.D.3d at 632, 871 N.Y.S.2d at 640).

171. 58 A.D.3d at 632, 871 N.Y.S.2d at 640.

Huntington.[171] The petitioner had operated a motel since 1982 and the use became nonconforming shortly thereafter.[172] The Zoning Board of Appeals granted the petitioner's use variance application to add fifteen units to the existing thirty-one unit motel in 1983.[173] The petitioner subsequently applied to Zoning Board of Appeals in 2003 seeking a determination that it was permitted to expand the motel from forty-six units to seventy-one units without having to obtain a new use variance based on the claim that the 1983 determination converted the previously nonconforming motel use into a permitted use.[174] The Zoning Board of Appeals denied the application, concluding that the 1983 use variance was limited to the addition of fifteen rooms.[175] The petitioner again applied to the Zoning Board of Appeals in 2004 to increase the number of motel units on the property from forty-six to sixty-one and the Board determined that a use variance was not required.[176]

First, the 2003 decision of the Zoning Board of Appeals that the petitioner was required to obtain a use variance to add additional motel units should have been given preclusive effect pursuant to the doctrine of collateral estoppel.[177] In addition, although the approval of an unconditional use variance renders a nonconforming use conforming so that an additional use variance is not required to enlarge the use, the use variance granted to the petitioner in 1983 was limited to the addition of fifteen rooms.[178] Hence, even if the determination had not been barred by collateral estoppel, the 2006 determination that a use

172. *See id.* at 631, 871 N.Y.S.2d at 639.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See Kogel*, 58 A.D.3d at 631–32, 871 N.Y.S.2d at 639.

177. *See id*. at 632, 871 N.Y.S.2d at 640 (first citing Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499–501, 467 N.E.2d 487, 489–91, 478 N.Y.2d 823, 825–27 (1984); then citing Palm Mgmt. Corp. v. Goldstein, 29 A.D.3d 801, 804, 815 N.Y.2d 670, 674 (2d Dep't 2006); then citing Timm v. Van Buskirk, 17 A.D.3d 686, 686, 793 N.Y.S.2d 520, 520–21 (2d Dep't 2005); and then citing Waylonis v. Baum, 281 A.D.2d 636, 638, 723 N.Y.S.2d 55, 57 (2d Dep't 2001)).

178. *See id.* (first citing Angel Plants v. Schoenfeld, 154 A.D.2d 459, 460–61, 546 N.Y.2d 112, 113 (2d Dep't 1989); and then citing Borer v. Vineberg, 213 A.D.2d 828, 829, 623 N.Y.S.2d 378, 379 (3d Dep't 1995)).

179. *See id.* (citing Pecoraro v. Bd. of Appeals of Town of Hempstead, 2 N.Y.3d 608, 613, 814 N.E.2d 404, 407, 781 N.Y.S.2d 234, 237 (2004)).

variance was not required for the proposed expansion was irrational and contrary to law.[179]

III. SITE PLAN REVIEW

It is clear that the owner of property, which is the subject of a land use approval, including site plan, must be named in a proceeding challenging that approval.[180] Whether a proceeding in which a necessary party has not been named and served within the applicable thirty-day statute of limitations may be rehabilitated by the subsequent service of a proper amended petition was the issued determined in *Mensch v. Planning Board of Village of Warwick*.[181] Neighboring property owners challenged the approval of a site plan to develop a property as a restaurant/catering facility.[182] The petitioners/plaintiffs (petitioners) neglected to name the owners as parties when they instituted the proceeding and subsequently amended the pleadings to include the owners as respondents/defendants.[183] The petitioners did not disagree that the owners were necessary parties or that the applicable thirty day statute of limitations had expired before they served the amended petition and complaint on the owners.[184] Instead, they argued that the first three causes of action, which alleged violations of the zoning law, and the fourth cause action, a mandamus claim to compel the Building Inspector to review the site plan for compliance with the zoning law, were timely.[185] They further asserted that the fifth, sixth,

180. *See* Ferruggia v. Zoning Bd. of Appeals of Town of Warwick, 5 A.D.3d 682, 774 N.Y.S.2d 760, 760 (2d Dep't 2004) (first citing Long Island Pine Barrens Soc'y., Inc. v. Town of Islip, 286 A.D.2d 683, 683–84, 729 N.Y.S.2d 907, 907–08 (2d Dep't 2001); then citing Karmel v. White Plains Common Council, 284 A.D.2d 464, 465, 726 N.Y.S.2d 692, 693–94 (2d Dep't 2001); then citing Manupella v. Troy City Zoning Bd. of Appeals, 272 A.D.2d 761, 764, 707 N.Y.S.2d 707, 711 (3d Dep't 2000); then citing Artrip v. Inc. Vill. of Piermont, 267 A.D.2d 457, 457, 700 N.Y.S.2d 844, 845 (2d Dep't 1999); then citing Saunders v. Graboski, 723 N.Y.S.2d 403, 404 (2d Dep't 2001); and then citing Save Our-Open Space v. Plan. Bd., 256 A.D.2d 581, 582 (2d Dep't 1998)); Long Island Pine Barrens Soc'y, Inc., 286 A.D.2d at 683–84, 729 N.Y.S.2d at 907–08, *lv. denied*, 97 N.Y.2d 606, 764 N.E.2d 394, 738 N.Y.S.2d 290 (2001) (first citing *Artrip*, 267 A.D.2d at 457, 700 N.Y.S.2d at 845; then citing *Saunders*, 723 N.Y.S.2d at 404; then citing *Save Our-Open Space*, 256 A.D.2d at 582; and then citing Kam Hampton I Realty Corp. v. Zagata, 251 A.D.2d 665, 666, 676 N.Y.S.2d 491, 491 (2d Dep't 1998)).

181. *See* 189 A.D.3d 1245, 1246, 138 N.Y.S.3d 621, 623–24 (2d Dep't 2020).

182. *See id.* at 1246, 138 N.Y.S.3d at 623.

183. *See id.*

184. *See id.* at 1246, 138 N.Y.S.3d at 623–24 (citing N.Y. VILLAGE LAW § 7-725-a(11) (McKinney 2021)).

185. *Id.* at 1246–47, 138 N.Y.S.3d at 624.

186. *Mensch*, 189 A.D.3d at 1247, 138 N.Y.S.3d at 624.

and seventh causes of action, which sought to annul the approval of the site plan, also were timely because of the relation-back doctrine.[186]

Where a declaratory judgment action seeks an adjudication of issues that could be determined in an Article 78 proceeding, the statute of limitations applicable to an Article 78 proceeding applies.[187] The petitioners' claims that the development violated the provisions of the zoning law could be asserted in the Article 78 proceeding challenging the approval of the site plan.[188] Accordingly, the thirty-day statute of limitations applicable to challenges to site plan approvals applied to the petitioners' request for declaratory relief.[189]

The first three causes of action, which sought review of the approval of the site plan and adoption of a negative declaration, would have been timely only if the relation-back doctrine applied so that the otherwise late joinder of the owners was timely.[190] The relation-back doctrine "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest.'"[191]

> In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties,

187. *Id.* (first citing N.Y. C.P.L.R. 217(1) (McKinney 2021); then citing Banos v. Rhea, 25 N.Y.3d 266, 276–77, 33 N.E.3d 471, 475–76, 11 N.Y.S.3d 515, 519–20 (2015); then citing Lenihan v. New York, 58 N.Y.2d 679, 682, 444 N.E.2d 992, 993–94, 458 N.Y.S.2d 528, 529–30 (1982); and then citing Solnick v. Whalen, 49 N.Y.2d 224, 233, 401 N.E.2d 190, 196, 425 N.Y.S.2d 68, 74 (1980)).

188. *See id.*

189. *Id.* (first citing Greens at Half Hollow, LLC v. Suffolk Cnty. Dep't of Pub. Works, 147 A.D.3d 942, 943, 48 N.Y.S.3d 147, 149 (2d Dep't 2017); then citing Block 3066, Inc. v. City of New York, 89 A.D.3d 655, 656, 932 N.Y.S.2d 130, 131 (2d Dep't 2011); and then citing Cloverleaf Realty of N.Y., Inc. v. Town of Wawayanda, 43 A.D.3d 419, 420, 843 N.Y.S.2d 335, 336 (2d Dep't 2007)).

190. *See id.* at 1248, 138 N.Y.S.3d at 625.

191. *Mensch*, 189 A.D.3d at 1248, 138 N.Y.S.3d at 625 (first quoting Buran v. Coupal, 87 N.Y.2d 173, 177, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995); and then quoting N.Y. C.P.L.R. 203(b) (McKinney 2021)).

> the action would have been brought against him or her as well.[192]

Although the claims in *Mensch* arose from of the same conduct, the petitioners failed to demonstrate that the owners were united in interest with the developer, as is required by the second prong of the relation-back doctrine.[193] In addition, the petitioners "failed to demonstrate a mistake as to the identity of the proper party or parties at the time of the original pleading," which is necessary in order for the relation-back doctrine to apply.[194]

Furthermore, the fourth cause of action, sounding in mandamus, sought to compel the Building Inspector to determine whether the site plan complied with the provisions of the zoning law. [195] "Mandamus . . . is an extraordinary remedy that, by definition, is available only in limited circumstances."[196] "'[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion.'"[197] "A discretionary act 'involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.'"[198] "'The general principle [is] that mandamus will lie against an administrative officer only to compel him [or her] to perform a legal duty, and not to direct

192. *Id.* at 1248–49, 138 N.Y.S.3d at 625 (quoting Mileski v. MSC Indus. Direct Co., Inc., 138 A.D.3d 797, 799–800, 30 N.Y.S.3d 159, 162 (2d Dep't 2016) (citing *Buran*, 87 N.Y.2d at 178, 661 N.E.2d at 981, 638 N.Y.S.2d at 408).

193. *Id.* at 1249, 138 N.Y.S.3d at 625.

194. *Id.* (quoting Ferruggia v. Zoning Bd. of Appeals, 5 A.D.3d 682, 683, 774 N.Y.S.2d 760, 761 (2d Dep't 2004)).

195. *Id.* at 1247, 138 N.Y.S.3d at 624.

196. *Mensch*, 189 A.D.3d at 1247, 138 N.Y.S.3d at 624. (quoting Klostermann v. Cuomo, 61 N.Y.2d 525, 537, 463 N.E.2d 588, 594, 475 N.Y.S.2d 247, 253 (1984)) (first citing Kleinknecht v. Siino, 165 A.D.3d 936, 938, 86 N.Y.S.3d 577, 580 (2d Dep't 2018); and then citing Willows Condo. Ass'n v. Town of Greenburgh, 153 A.D.3d 535, 536, 60 N.Y.S.3d 233, 235 (2d Dep't 2017)).

197. *Id.* (first quoting *Willows*, 153 A.D.3d at 536, 60 N.Y.S.3d at 235; and then quoting Brusco v. Braun, 84 N.Y.2d 674, 679, 645 N.E.2d 724, 725, 621 N.Y.S.2d 291, 292 (1994)).

198. *Id.* at 1247–48, 138 N.Y.S.3d at 624 (first quoting *Willows*, 153 A.D.3d at 536, 60 N.Y.S.3d at 235; and then quoting Tango v. Tulevech, 61 N.Y.2d 34, 41, 459 N.E.2d 182, 186, 471 N.Y.S.2d 73, 77 (1983)).

how he [or she] shall perform that duty.'"[199] Further, "[a] party seeking mandamus must show a 'clear legal right' to relief."[200]

The mandamus claim in *Mensch* alleged that the zoning law required the Building Inspector to issue a formal determination addressing the allegations contained in a letter of petitioners' attorney to the Building Inspector which, in effect, sought an advisory opinion regarding the project's compliance with the zoning law.[201] However, the unambiguous language of the zoning law did not impose a duty on the Building Inspector to issue a formal determination in response to letter.[202]

The *Mensch* decision reenforces the foolishness in failing to name the owner and applicant, as well as the municipal agency, in any challenge to a land use approval. Because the interests of an applicant and owner are infrequently united in interest and the identity of the proper parties generally is readily discernable, the invocation of the relation-back doctrine is unlikely, and the proceeding is apt to be dismissed as untimely.

IV. SPECIAL PERMITS

The classification 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 municipality's general zoning plan and will not deleteriously affect the neighborhood.[203] Consequently, categorization of a use as a special permit use results in a strong presumption in favor of approval of the use.[204] However, entitlement to a special permit is not a matter of

199. *Id.* at 1248, 138 N.Y.S.3d at 624–25 (first quoting *Willows*, 153 A.D.3d at 536, 60 N.Y.S.3d at 235; and then quoting People ex rel. Schau v. McWilliams, 185 N.Y. 92, 100, 77 N.E. 785, 787 (1906)).

200. *Id.* at 1248, 138 N.Y.S.3d at 625 (first quoting *Willows*, 153 A.D.3d at 536, 60 N.Y.S.3d at 235; and then quoting Cnty. of Fulton v. New York, 76 N.Y.2d 675, 678, 564 N.E.2d 643, 644, 563 N.Y.S.2d 33, 34 (1990)).

201. *Mensch*, 189 A.D.3d at 1248, 138 N.Y.S.3d at 625.

202. *Id.* (citing WARWICK, N.Y., ZONING CODE § 145-149.4 (2009), http://villageofwarwick.org/wp-content/uploads/2017/11/Zoning-updated-November-2017.pdf.

203. *See* Retail Prop. Tr. v. Bd. of Zoning Appeals of the Town of Hempstead, 98 N.Y.2d 190, 195, 774 N.E.2d 727, 731, 746 N.Y.S.2d 662, 666 (2002); Wegmans Enters. v. Lansing, 72 N.Y.2d 1000, 1002, 534 N.Y.S.2d 372, 373 (1988).

204. *See* Cove Pizza v. Hirshon, 61 A.D.2d 210, 212–13, 401 N.Y.S.2d 838, 839–40 (2d Dep't 1978) (first citing Tandem Holding Corp. v. Bd. of Zoning Appeals of the Town of Hempstead, 43 N.Y.2d 801, 802, 373 N.E.2d 282, 283, 402 N.Y.S.2d 388, 389 (1977); and then citing N. Shore Steak House v. Bd. of Appeals of Inc. Vill. of Thomaston 30 N.Y.2d 238, 243 282 N.E.2d 606, 609, 331 N.Y.S.2d 645, 649 (1972)).

right.[205] "Failure to comply with any condition upon a special exception, however, is sufficient ground for denial of the exception."[206]

In *Biggs v. Eden Renewables LLC*, the applicant applied for a special permit to construct a "major solar energy system."[207] The petitioners objected to the project because of concerns regarding potential detrimental visual impact and negative effect on adjoining property values.[208] In confirming the approval of the special permit, the court repeated the principle that "[a] Planning Board may not deny a special use permit based 'solely on community objection.'"[209] The record contained sufficient evidence to substantiate the Planning Board's conclusion that the impacts would be negligeable.[210] A visual assessment report found that the project would not be readily visible to the surrounding neighborhood because of existing vegetation and the topography.[211] The Planning Board further found that the petitioners' concern about potential reflected glare from the solar panels was sufficiently addressed through the use of anti-glare coating.[212] In addition, the Planning Board also required a 1,600-foot evergreen barrier.[213]

The petitioner in *Muller v. Zoning Board of Appeals Town of Lewisboro* owned eleven dogs that he maintained on a 2.1-acre parcel situated in a residential zone.[214] His special use permit application to operate a private dog kennel was denied, as was his application for a variance from the requirements of the zoning law which only allowed private kennels on lots of four acres or more and restricted the number of dogs over six months of age to ten.[215] The supreme court dismissed the petitioner's hybrid proceeding/action to vacate the Zoning Board of Appeals' determination and for a judgment declaring the provision which only allowed him to keep five dogs over six months of age on his residential property to be unconstitutional.[216]

205. *Tandem Holding Corp.*, 43 N.Y.2d at 802, 373 N.E.2d at 283, 402 N.Y.S.2d at 389.

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

207. 188 A.D.3d 1544, 1545, 137 N.Y.S.3d 515, 517 (3d Dep't 2020).

208. *Id.* at 1548, 137 N.Y.S.3d at 520.

209. *Id*. (quoting *Retail Prop. Tr.*, 98 N.Y.2d at 196, 774 N.E.2d at 731, 746 N.Y.S.2d at 666).

210. *Id.*

211. *Id.*

212. *Biggs*, 188 A.D.3d at 1548, 137 N.Y.S.3d at 520.

213. *Id.*

214. 192 A.D.3d 805, 806, 144 N.Y.S.3d 198, 201 (2d Dep't 2021).

215. *Id.*

216. *See id.*

A special use permit generally must be granted if an applicant satisfies all of the special permit criteria set forth in the zoning law.[217] "Failure to meet any one of the conditions set forth in the ordinance is . . . sufficient basis upon which the zoning authority may deny the permit application."[218] Further, a board reviewing a special permit application "does not have authority to waive or modify any conditions set forth in the ordinance."[219] However, an applicant who does not comply with any of the special permit criteria may seek an area variance from that requirement.[220] Because the Zoning Board of Appeals in *Muller* properly had denied the requested variances from the special permit requirements, the Applicant could not satisfy the special permit criteria, and the Board had a sufficient basis for denial of the application.[221]

The court also opined that the supreme court should not have summarily dismissed the cause of action seeking to declare the provision limiting the number of dogs to be unconstitutional in deciding the Article 78 proceeding.[222] "The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment."[223] "Thus, where no party makes a request for a summary

217. *Id.* at 807, 144 N.Y.S.3d at 201 (first citing Juda Constr., Ltd. v. Spencer, 21 A.D.3d 898, 900, 800 N.Y.S.2d 741, 744 (2d Dep't 2005); then citing Twin Cnty. Recycling Corp. v. Yevoli, 224 A.D.2d 628, 628, 639 N.Y.S.2d 392, 393 (2d Dep't 1996); and then citing J.P.M. Props. v. Town of Oyster Bay, 204 A.D.2d 722, 723, 612 N.Y.S.2d 634, 635 (2d Dep't 1994)).

218. *Id.* (quoting Wegmans Enters. v. Lansing, 72 N.Y.2d 1000, 1001–02, 534 N.Y.S.2d 372, 373 (1988)) (first citing Tandem Holding Corp. v. Bd. of Zoning Appeals of the Town of Hempstead, 43 N.Y.2d 801, 801–02, 373 N.E.2d 282, 283, 402 N.Y.S.2d 388, 389 (1977); and then citing Sullivan v. Town Bd. of Riverhead, 102 A.D.2d 113, 115, 476 N.Y.S.2d 578, 580 (2d Dep't 1984)).

219. *Muller*, 192 A.D.3d at 806, 144 N.Y.S.3d at 201 (quoting Dost v. Chamberlain-Hellman, 236 A.D.2d 471, 472, 653 N.Y.S.2d 672, 672–73 (2d Dep't 1997)) (first citing Navaretta v. Town of Oyster Bay, 72 A.D.3d 823, 825, 898 N.Y.S.2d 237, 240 (2d Dep't 2010); and then citing Vergata v. Town Bd. of Oyster Bay, 209 A.D.2d 527, 528 (2d Dep't 1994)).

220. *See id.* (first citing N.Y. TOWN LAW § 274–b(3) (McKinney 2021); then citing Tabernacle of Victory Pentecostal Church v. Weiss, 101 A.D.3d 738, 740, 955 N.Y.S.2d 180, 182 (2d Dep't 2012); then citing Real Holding Corp. v. Lehigh, 304 A.D.2d 583, 584, 756 N.Y.S.2d 893, 893 (2d Dep't 2003); and then citing Sunrise Plaza Assocs. v. Town Bd. of Babylon, 250 A.D.2d 690, 693, 673 N.Y.S.2d 165, 168 (2d Dep't 1998)); *see also* N.Y. VILLAGE LAW § 7-725-b(3) (McKinney 2021).

221. *See id.* at 808, 144 N.Y.S.3d at 202 (citing *Wegmans*, 72 N.Y.2d at 1001–02, 534 N.Y.S.2d at 373).

222. *See id.*

223. *Id.* (quoting Bonacker Prop., LLC v. Village of E. Hampton Bd. of Trs., 168 A.D.3d 928, 932, 93 N.Y.S.3d 328, 333 (2d Dep't 2019)) (first citing Rosenberg v.

determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action[.]"

Finally, in *Sid Jacobson Jewish Community. Ctr., Inc. v. Zoning Board of Appeals of Inc. Village of Brookville*, the court affirmed the denial of a special permit for a "day school" operated by a religious organization because the use was not a religious use which would entitle it for a special permit.[224] The property was located in a zoning district in which "any . . . nonresidential uses which may not be excluded pursuant to the state and federal laws" was a permissible special permit use.[225] The owner was a nonprofit nonsectarian Jewish organization which used the property to operate a day school and camp.[226] The Zoning Board of Appeals concluded that the use of the property for the day school and camp was not a conditional use allowed by the zoning law and that the proposed use would be detrimental to the neighborhood.[227]

The Zoning Board of Appeals' determination that the day school and camp did not qualify as either a religious or educational use and thereby be entitled to deferential zoning treatment had a rational basis.[228] Although the Applicant was a religious organization, the record substantiated the conclusion that the activities and programs offered at the day school and camp were typical recreational activities that are provided at any summer camp.[229] The record also supported the Zoning Board of Appeals' finding that the camp was recreational, and not academic, in nature.[230] The activities were predominately athletic and recreational in nature.[231] No evidence was provided to demonstrate that the staff were qualified to instruct in subjects which are part of a standard school curriculum.[232]

New York State Off. Of Parks, Recreation, & Historic Pres., 94 A.D.3d 1006, 1008, 943 N.Y.S.2d 123, 125 (2d Dep't 2012); and then citing 24 Franklin Ave. R.E. Corp. v. Heaship, 74 A.D.3d 980, 981, 901 N.Y.S.2d 863, 864 (2d Dep't 2010)).

224. *See* 192 A.D.3d 693, 693, 144 N.Y.S.3d 54, 55 (2d Dep't 2021).

225. *See id.*

226. *See id.*

227. *Id.* at 694, 144 N.Y.S.3d at 56.

228. *See id.* (quoting N. Shore F.C.P., Inc., v. Mammina, 22 A.D.3d 759, 759–60, 804 N.Y.S.2d 383, 384 (2d Dep't 2005)).

229. *Sid Jacobson*, 192 A.D.3d at 694, 144 N.Y.S.3d at 56 (citing McGann v. Inc. Vill. of Old Westbury, 293 A.D.2d 581, 583, 741 N.Y.S.2d 75, 76 (2d Dep't 2002)).

230. *See id.* at 695, 144 N.Y.S.3d at 56.

231. *See id.*

232. *See id.*