ZONING AND LAND USE

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I. ZONING AMENDMENTS

A. Compliance with Comprehensive Plan/Spot Zoning

Zoning laws must be adopted in conformity with a community's comprehensive plan.[1] A community's comprehensive plan is intended to reflect "a total planning strategy for rational allocation of land use,

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1. *See* N.Y. TOWN LAW § 263 (McKinney 2022); N.Y. VILLAGE LAW § 7-704 (McKinney 2022); Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1236 (N.Y. 1996); Udell v. Haas, 235 N.E.2d 897, 900 (N.Y. 1968).

reflecting consideration of the needs of the community as a whole."[2] The failure to comply with the directive that zoning regulations conform to a community's comprehensive plan renders the adoption of a zoning law unauthorized and *ultra vires*.[3]

The converse of comprehensive and rational planning is "spot zoning." Although often used imprecisely, "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.[4] Relatedly, "reverse spot zoning" is "a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones."[5] However, zoning regulations which conform with a community's comprehensive plan which is intended to advance the general welfare of the community is not, by definition, "spot zoning."[6]

The petitioner in *JDM Holdings, LLC v. Village of Warwick* owned a ten-acre parcel of land that retained its residential zoning after having been annexed into the Village.[7] The Village had adopted a comprehensive plan in 2004 which identified five "gateway corridors," one of which included the area in which the subject property was located, and recommended that "clustering provisions" be obligatory in those gateway corridors.[8] The Village enacted Local Law No. 14 of 2015 in December 2015 in order to implement the recommendations of the 2004 Comprehensive Plan regarding cluster development.[9] The Village adopted an additional local law which required cluster development of residential subdivisions located within any of the gateway corridors and imposed a per-unit special permit fee for all units

2. Taylor v. Vill. of Head of the Harbor, 480 N.Y.S.2d 21, 23 (N.Y. App. Div. 2d Dep't 1984), *leave to appeal denied*, 64 N.Y.2d 609 (N.Y. 1985); *see also* Town of Bedford v. Vill. of Mount Kisco, 306 N.E.2d 155, 159 (N.Y. 1973), *reargument denied*, 34 N.Y.2d 668 (N.Y. 1974).

3. *See* Lake Illyria Corp. v. Town of Gardiner, 352 N.Y.S.2d 54, 57 (N.Y. App. Div. 3d Dep't 1974).

4. Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 734 (N.Y. 1951) (citing Harris v. City of Piedmont, 42 P.2d 356, 358 (Cal Ct. App. 1935).

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

6. *See* Rye Citizens Comm. v. Bd. of Trs., 671 N.Y.S.2d 528, 529–30 (N.Y. App. Div. 2d Dep't 1998), *leave to appeal denied sub nom.* City of Rue v. Korff, 700 N.E.2d 1229 (N.Y. 1998).

7. JDM Holdings, LLC v. Vill. of Warwick, 160 N.Y.S.3d 297, 299 (N.Y. App. Div. 2d Dep't 2021).

8. *Id*.

9. *Id*.

over the number of units which otherwise would be permitted as of right in a fully conforming conventional subdivision.[10] The petitioner challenged the two local laws, asserting that their adoption was arbitrary and capricious and that the provisions conflicted with the objectives of the 2004 Comprehensive Plan.[11]

The court dismissed the challenge to the fee requirement because, not having a pending application, the petitioner was not subject to a demand for payment of the fee.[12] Consequently, it lacked an injury or the threat of injury resulting from the local law, and, accordingly, lacked standing to challenge it.[13]

In addition, Local Law No. 14 was not inconsistent with the 2004 Comprehensive Plan and did not constitute unconstitutional reverse spot zoning.[14] "Legislative enactments and local laws are presumptively valid."[15] "As zoning is a legislative act, zoning ordinances and amendments enjoy a strong presumption of legality, and the burden rests on the party attacking them to overcome that presumption beyond a reasonable doubt."[16] "[W]hen a [petitioner] fails to establish a clear conflict with a comprehensive plan, the challenged zoning ordinance must be upheld."[17] A zoning law adopted in accordance with a well-considered land-use plan cannot constitute spot zoning or "reverse spot" zoning.[18] The Village in *JDM Holdings* had demonstrated, *prima facie*, that the amendment was consistent with the 2004 Comprehensive Plan and was adopted in accordance with its recommendations.[19]

Similarly, in *Douglaston Civic Association v. City of New York*, the court rejected a challenge to the rezoning of a block to allow, among other things, affordable and senior housing.[20] The zoning amendment did not constitute "spot zoning" benefiting only one property owner because it brought other nonconforming parcels into conformity with the rezoned block.[21] It also constituted "part of a well-

10. *Id.*
11. *Id.*
12. *JDM Holdings, LLC,* 160 N.Y.S.3d at 299.
13. *Id.* at 300.
14. *Id.* at 300.
15. *Id.*
16. *Id.*
17. *JDM Holdings, LLC*, 160 N.Y.S.3d at 300.
18. *Id.*
19. *Id.*
20. Douglaston Civic Ass'n v. City of New York, 159 N.Y.S.3d 23, 24 (N.Y. App. Div. 1st Dep't 2021).
21. *Id.*

considered and comprehensive plan calculated to serve the general welfare of the community" by permitting the construction of affordable senior housing consistent with city policy.[22]

In *61 Crown St., LLC v. City of Kingston Common Council*, the court rebuffed the contention that the rezoning of a parcel as part of the Kingstonian Project, located in the Kingston Historic Stockade District ("KHSD"), constituted spot zoning.[23] The property was zoned C-2 commercial and was located within the Mixed Use Overlay District (MUOD), which permitted residential uses under defined conditions.[24] The parcels consisted of a City-owned parking lot and vacant municipal parking garage and a smaller, privately owned property bordering the KSHD (the Herzog parcel).[25] The Common Council approved the developer's petition to rezone the property and to extend the MUOD district to the Herzog parcel.[26] The petitioners asserted, among other claims, that the rezoning constituted spot zoning.[27]

The court reiterated that:

> Spot zoning is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners. In evaluating a claim of spot zoning, courts may consider several factors, including whether the rezoning is consistent with a comprehensive land use plan, whether it is compatible with surrounding uses, the likelihood of harm to surrounding properties, the availability and suitability of other parcels, and the recommendations of professional planning staff.[28]

The critical issue is "whether the challenged zoning is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community."[29] If a zoning amendment is not

22. *See id.* (quoting Pres. Our Brooklyn Neighborhoods v. City of New York, 132 N.Y.S.3d 290, 290 (N.Y. App. Div. 1st Dep't 2020)) (citing Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 733).

23. 61 Crown St., LLC v. City of Kingston Common Council, 171 N.Y.S.3d 203, 208 (N.Y. App. Div. 3d Dep't 2022).

24. *Id.* at 205.

25. *Id.*

26. *Id.*

27. *Id.*

28. *61 Crown St. LLC*, 171 N.Y.S.3d at 207–08 (quoting Evans v. City of Saratoga Springs, 164 N.Y.S.3d 227, 233 (N.Y. App. Div. 3d Dep't 2022)).

29. *Id.* at 208 (quoting Baumgarten v. Town Bd., 826 N.Y.S.2d 811, 813 (N.Y. App. Div. 3d Dep't 2006)) (citing Heights of Lansing, LLC v. Vill. of Lansing, 75 N.Y.S.3d 607, 611 (N.Y. App. Div. 3d Dep't 2018)).

inconsistent with a community's comprehensive plan, it "will be upheld if it is established that it was adopted for a legitimate governmental purpose and there is a reasonable relation between the end sought to be achieved by the amendment and the means used to achieve that end."[30]

The Defendants satisfied their initial burden on their motion for summary judgment of demonstrating that the zoning amendment was not spot zoning.[31] They established that the property abutted the MUOD district and that extending the MUOD was consistent with the city's comprehensive plan.[32] In fact, one of the goals of the comprehensive plan was to "[r]egulate a land use pattern that concentrates residential density and commercial activity in mixed-use cores" by "[a]llow[ing] mixed-uses in the C-2 [d]istricts."[33] The city demonstrated that the zoning amendment "was consistent with the [city's] comprehensive plan and was calculated to benefit the community as a whole as opposed to benefitting individuals or a group of individuals."[34] Having established *prima facie* entitlement to judgment in the city's favor, the petitioner failed to satisfy its burden of raising a triable issue of fact.[35]

The decisions consistently reflect that if there is any planning analysis that substantiates a rational basis for a zoning amendment, it is consistent with a community's comprehensive plan, does not constitute spot zoning, and will be sustained.

B. Venue

New York Civil Practice Law and Rules, (CPLR) section 506(b) provides that a proceeding against a municipal body or officer may be brought in any county in the judicial district in which a municipality is located.[36] In *Lamoureux ex rel. Friends for Responsible Vestal Zoning v. Town of Vestal Town Board*, the petitioner instituted an Article 78 proceeding seeking to annul the Town Board's negative declaration and local law which rezoned six parcels to allow construction of a

30. *Id.* (quoting *Heights of Lansing*, 75 N.Y.S.3d at 611) (citing Asian Ams. for Equal. v. Koch, 527 N.E.2d 265, 270 (N.Y. 1988)).

31. *Id.*

32. *Id.*

33. *61 Crown St. LLC*, 171 N.Y.S.3d at 208.

34. *Id.* (quoting *Heights of Lansing*, 75 N.Y.S.3d at 611) (citing Evans v. City of Saratoga Springs, 164 N.Y.S.3d 227, 234 (N.Y. App. Div. 3d Dep't 2022)).

35. *Id.* at 208–09.

36. N.Y. C.P.L.R. 506(b) (McKinney 2022).

housing complex.[37] A demand to change venue was filed on behalf of the respondents pursuant to CPLR Rule 511 on August 18, 2021, in which it was asserted that venue in Cortland County was improper pursuant to Town Law section 66(1) and demanded that venue be changed to Broome County, the county in which the Town of Vestal is located.[38] The petitioner's counsel filed an affirmation on August 23, 2021, in which he contended that venue in Cortland County was proper pursuant to CPLR section 506(b).[39] The private respondents filed a timely motion to change venue on August 27, 2021, but the Town Board did not move to change venue.[40]

The petitioner contended that venue was proper in Cortland County pursuant to CPLR section 506(b) because that was a county within the judicial district in which the Town Board made the challenged determinations.[41] On the other hand, the respondents relied on Town Law section 66(1), which provides that "[t]he place of trial of all actions and *proceedings* against a town or any of its officers or boards shall be the county in which the town is situated."[42]

The Appellate Division, Fourth Department held that there was no conflict between Town Law section 66(1) and CPLR section 506(b) and that Town Law section 66(1), as the more specific statute, controlled determination of the appropriate venue for proceedings against a town or any of its officers or boards.[43] Thus, Broome County, the county within which the Town of Vestal is situated, was the proper venue for the proceeding.[44] CPLR section 9803 contains an identical provision with respect to actions and proceedings against villages.[45]

However, the court concluded that the Town Board had waived its right to object to the improper venue and that the waiver precluded

37. Lamoureux v. Town of Vestal Town Bd., 157 N.Y.S.3d 335, 336 (N.Y. Sup. Ct. Cortland Cnty. 2021).

38. *Id*.

39. *Id*.

40. *Id*.

41. *Id*.

42. *Lamoureux,* 157 N.Y.S.3d at 336 (citing N.Y. TOWN LAW § 66(1) (McKinney 2022)).

43. *Id*. (citing Zelazny Fam. Enters., LLC v. Town of Shelby, 116 N.Y.S.3d 127, 130 (N.Y. App. Div. 4th Dep't 2019)).

44. *Id*. at 336–37.

45. *See* N.Y. C.P.L.R 9803 (McKinney 2022); *see also* N.Y. C.P.L.R 504 (McKinney 2022) ("[T]he place of trial of all actions against counties, cities, towns, villages . . . or any of their officers, boards or departments shall be, for . . . a city, except the city of New York, town, village . . . in the county in which such city, town, village . . . is situated.").

the private respondents from requesting a change of venue based on Town Law section 66(1).[46] Pursuant to CPLR section 511(b), a motion to change venue on the basis that the designated venue is improper must be made within fifteen days after service of a demand to change venue.[47] The Town Board waived its right to seek to change the venue of the proceeding to Broome County because it failed to move to change venue within fifteen days after filing its demand pursuant to CPLR Rule 511(b).[48] The private respondents lacked standing to assert that venue must be placed in accordance with Town Law section 66(1) because "venue provisions that are enacted for the convenience of a municipality . . . may be invoked only by a municipality and, when waived by a municipality, may not be invoked by other parties."[49] Accordingly, the private respondents lacked standing to a change of venue pursuant to Town Law section 66(1).[50]

II. ZONING BOARDS OF APPEAL

A. Time to Appeal

Town Law section 267-a(5)(a) provides that "[e]ach order, requirement, decision, interpretation or determination of the administrative official charged with the enforcement of the zoning local law or ordinance shall be filed in the office of such administrative official, within five business days from the day it is rendered, and shall be a public record."[51] Village Law section 7-712-a(5)(a) contains a nearly identical provision.[52] As an alternative, a town board or board of trustees may, by resolution, require that such filings instead be made in the municipal clerk's office.[53] Town Law section 267-a(5)(b) and Village Law section 7-712-a(5)(b) provide that "[a]n appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing

46. *See Lamoureux*, 157 N.Y.S.3d at 337.

47. *See id.* (citing Martirano v. Golden Wood Floors Inc., 27 N.Y.S.3d 555, 556 (N.Y. App. Div. 1st Dep't 2016).

48. *Id.* (citing N.Y. TOWN LAW § 66(1) (McKinney 2022)).

49. *Id*. (citing Arduino v. Molina-Ovando, 36 N.Y.S.3d 186, 188 (N.Y. App. Div. 2d Dep't 2016)).

50. *See id*. (citing N.Y. TOWN LAW § 66(1) (McKinney 2022)).

51. TOWN LAW § 267-a(5)(a).

52. N.Y. VILLAGE LAW § 7-712-a(5)(a) (McKinney 2022)).

53. TOWN LAW § 267-a(5)(a); VILLAGE LAW § 7-712-a(5)(a).

with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought."[54]

The petitioners in *Grout v. Visum Development Group LLC* appealed the Planning Board's April 2019 preliminary site plan approval for an apartment complex on September 16, 2019.[55] The Zoning Administrator rejected the appeal as being untimely because, he contended, the appeal was filed more than sixty days after the April 2019 determination.[56] The petitioners instituted an Article 78 proceeding and declaratory judgment action seeking, among other things, an order directing that the Zoning Board of Appeals hear its appeal.[57] The supreme court granted the municipal respondents' motion for summary judgment, opining that the petitioners had notice of the Planning Board's decision in April 2019 and, accordingly, the appeal was untimely.[58]

Relying on the comparable provisions to Town Law to section 267-a(5) and Village Law section 7-712-a(5), the appellate division reversed the decision of the supreme court because no determination was ever filed.[59] General City Law section 81-a(5)(b), like Town Law section 267-a(5)(b) and Village Law section 7-712-a(5)(b), "plainly provides that the time period for commencing a review proceeding is to be measured from the filing."[60] Because no filing transpired, the time within which to appeal had never began to run.[61] The court rejected the respondents' contention that the petitioners had constructive notice of the determination, thereby commencing the 60-day appeal period because constructive notice is not germane and "the statute provides a clear mechanism that starts the 60-day period."[62]

The court additionally remarked that "[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

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

55. Grout v. Visum Dev. Grp. LLC, 154 N.Y.S.3d 140, 142 (N.Y. App. Div. 3d Dep't 2021).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 142–43.

60. *Grout*, 154 N.Y.S.3d at 143.

61. *Id.* (citing Corrales v. Zoning Bd. of Appeals, 83 N.Y.S.3d 265, 269 (N.Y. App. Div. 2d Dep't 2018)).

62. *Id.*

appeals."[63] As a result, the court remanded that matter to the Zoning Board of Appeals for a determination of the petitioner's appeal.[64]

Town Law section 267-a(5)(b) and Village Law section 7-712-a(5)(b) provide that "[a]n appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official."[65] The question in *Sherbk, Inc. v. City of Syracuse Board of Zoning Appeals*, was whether the sixty-day period within which to file an appeal applied to an application for variances, as opposed to an actual appeal of a decision of a building inspector or code enforcement officer.[66] The petitioner in *Sherbk* commenced an Article 78 proceeding in the nature of prohibition, seeking to prohibit the Zoning Board of Appeals from acting on an application for area variances on the basis that the appeal was untimely.[67] The court rejected the contention that the variance application was an untimely appeal and concluded that General City Law section 81-a(5)(b), the identical counterpart to Town Law section 267-a(5)(b) and Village Law section 7-712-a(5)(b), did not compel a different conclusion.[68] The court also "reject[ed] petitioner's contention that the [Zoning Board of Appeals] is only empowered to hear appeals in zoning matters and thus that the variance application must be an appeal."[69] The General City Law, like the Town Law and Village law, provides that the jurisdiction of the Zoning Board of Appeals shall be appellate only, "[u]nless otherwise provided by local law or ordinance."[70] The Zoning Law delegated to the Zoning Board of Appeals, among other things, the authority to "hear, decide, grant or deny applications for variances and exceptions as herein provided."[71] Because the zoning law provided that the Zoning Board of Appeals had jurisdiction over applications for variances, it was acting

63. *Id*. (citing Swantz v. Plan. Bd., 842 N.Y.S.2d 781, 782 (N.Y. App. Div. 3d Dep't 2006)).

64. *See id*.

65. N.Y. TOWN LAW § 267-a(5)(b) (McKinney 2022); N.Y. VILLAGE LAW § 7-712-a(5)(b) (McKinney 2022).

66. Sherbk, Inc. v. Bd. of Zoning Appeals, 167 N.Y.S.3d 674, 675–76 (N.Y. App. Div. 4th Dep't 2022).

67. *See id*.

68. *Id*.

69. *Id*.

70. *Id*. (quoting N.Y. GEN. CITY LAW § 81-a (McKinney 2022)).

71. *Sherbk*, 167 N.Y.S.3d at 676 (quoting SYRACUSE, N.Y., Zoning Rules and Regulations, Part A, § II, Article 5(3) (2022)).

on an "application rather than deciding an appeal."[72] Consequently, the variance application was timely.[73]

Although an application for a variance is termed by the statute as an appeal, if an applicant does not dispute the determination of the building inspector that variances are required, as well as the magnitude of the variances, and does not appeal that determination, characterizing a variance application as an appeal is inconsistent with the nature of the application. Although the decision in *Sherbk* may have been based on the language of the Syracuse zoning law, the 60-day appeal period, in any event, should be inapplicable to variance applications because, in reality, they are not appeals.

B. Precedent

It has been established since *Knight v. Amelkin* that determinations of administrative agencies, including Zoning Boards of Appeal, which neither adhere to their own precedent nor indicate a reason for reaching a different result on the same facts, are arbitrary and capricious.[74] In *O'Connor & Son's Home Improvement, LLC v. Acevedo*, the Zoning Board of Appeals denied a minimum lot size variance required in order to subdivide a parcel into two lots.[75] The appellate division affirmed the supreme court's invalidation of the decision because the Zoning Board of Appeals failed to relate any factual basis in its decision to demonstrate why it had reached a different result on essentially the same facts as a prior application that had been approved.[76]

Similarly, the conceivable precedential effect of granting a variance is not among the specified statutory area variance considerations.[77] Nevertheless, the appellate division confirmed that the precedential effect of granting relief is a pertinent consideration in assessing an area variance application in *Morris Motel, LLC v. DeChance*.[78] Because the Zoning Board of Appeals had concluded that no comparable variances

72. *Id*. (citing Davis v. Zoning Bd. of Appeals, 112 N.Y.S.3d 399, 402 (N.Y. App. Div. 4th Dep't 2019)).

73. *See id.*

74. Knight v. Amelkin, 503 N.E.2d 106, 106 (N.Y. 1986) (citing *in re* Charles A. Field Delivery Serv., 488 N.E.2d 1223, 1225 (N.Y. 1985)).

75. *See* O'Connor & Son's Home Improvement, LLC v. Acevedo, 153 N.Y.S.3d 492, 493 (N.Y. App. Div. 2d Dep't 2021).

76. *See id*. at 494 (citing Nicolai v. McLaughlin, 81 N.Y.S.3d 89, 91 (N.Y. App. Div. 2d Dep't 2018)).

77. *See* N.Y. TOWN LAW § 267-b(3)(b) (McKinney 2022).

78. *See* Morris Motel, LLC v. DeChance, 153 N.Y.S.3d 897, 898 (N.Y. App. Div. 2d Dep't 2021) (citing Nataro v. DeChance, 53 N.Y.S.3d 156, 156 (N.Y. App. Div. 2d Dep't 2017)).

had been approved in the past, it was permitted to consider the prospect that granting the requested variances could establish a negative precedent.[79]

C. Generalized Community Objections

The court in *O'Connor & Son's Home Improvement* also annulled the denial of an area variance because, "[w]hile scientific or expert testimony is not required in every case to support a zoning board's determination, the zoning board may not base its determination solely upon generalized community objections."[80] Accordingly, non-specific, general complaints, devoid of a cognizable factual basis, are an insufficient basis on which to base a decision.[81]

D. Area Variances

It is not unreasonable to believe in the abstract that the fact that a contractor has made an error and located a building or structure at a mistaken location which violates setback or other bulk requirements would provide a feasible basis for an area variance. However, the case law reflects that an error by one's contractor, even if made in good faith, is attributable to the owner and constitutes a self-created hardship of the property owner.[82]

The petitioner in *Dutt v. Bowers* had employed a contractor to construct an in-ground pool which required a minimum side setback of fourteen feet.[83] However, because of a mistake by the contractor, the pool was built six feet from the property line.[84] The Zoning Board

79. *Id.*; *see also* Dutt v. Bowers, 172 N.Y.S.3d 64, 66 (N.Y. App. Div. 2d Dep't 2022), discussed below.

80. *O'Connor & Son's*, 153 N.Y.S.3d at 494 (quoting Greenfield v. Bd. of Appeals, 800 N.Y.S.2d 728, 730 (N.Y. App. Div. 2d Dep't 2005) (citing Cacsire v. Zoning Bd. of Appeals, 930 N.Y.S.2d 54, 57 (N.Y. App. Div. 2d Dep't 2011)).

81. *See* Ifrah v. Utschig, 774 N.E.2d 732, 734 (N.Y. 2002); *Greenfield*, 800 N.Y.S.2d at 730 (citing Twin Cnty. Recycling Corp. v. Yevoli, 688 N.E.2d 501, 502 (N.Y. 1997)).

82. *See* Johnson v. Zoning Bd. of Appeals, 777 N.Y.S.2d 562, 564 (N.Y. App. Div. 3d Dep't 2004); Carlucci v. Bd. of Zoning Appeals, 613 N.Y.S.2d 665, 666 (N.Y. App. Div. 2d Dep't 1994); Slakoff v. Hitchcock, 599 N.Y.S.2d 63, 64–65 (N.Y. App. Div. 2d Dep't 1993); Fendelman v. Zoning Bd. of Appeals, 577 N.Y.S.2d 138, 139 (N.Y. App. Div. 2d Dep't 1991); Nammack v. Krucklin, 540 N.Y.S.2d 277, 278 (N.Y. App. Div. 2d Dep't 1989); J.T.T. Contractors, Inc. v. Ward, 538 N.Y.S.2d 869, 870 (N.Y. App. Div. 2d Dep't 1989);
Rosewood Home Builders, Inc. v. Zoning Bd. of Appeals, 794 N.Y.S.2d 152, 154 (N.Y. App. Div. 3d Dep't 2005).

83. *Dutt*, 172 N.Y.S.3d at 65.

84. *Id.*

of Appeals denied the petitioner's application for an area variance and the supreme court annulled the determination and directed that the Zoning Board of Appeals issue the area variance.[85]

The appellate division reversed because the Zoning Board of Appeals had considered the five enumerated statutory factors and had undertaken the obligatory balancing test.[86] The Zoning Board of Appeals had determined that the variance would generate an undesirable change in the character of the neighborhood because there was no evidence of any comparably located in-ground pools in the neighborhood.[87] Moreover, approving a pool with such a small setback, where there were no similar structures in the neighborhood, would establish an unjustified precedent for future development of the area, "which could result in a detriment to nearby properties."[88] The Zoning Board of Appeals could legitimately consider the possibility that granting the requested variance could establish a negative precedent for the neighborhood.[89]

The Zoning Board of Appeals also found that the petitioner could have located the pool at a conforming location.[90] It also determined, based merely on the statistical deviation, that the variance was substantial because it sought a fifty-seven percent variance from the requirement.[91] Given the rationale for the setback requirement, which was to protect the privacy and quiet enjoyment of adjacent residential properties; the conclusion that the location of the pool was contrary to the character of the area; and the concern that approval of the variance would set an inappropriate precedent for the future development of the area, the Zoning Board of Appeals legitimately found that approval of the requested variance would have an adverse effect on the physical or environmental conditions in the neighborhood.[92] Additionally, the conclusion that the nonconformity was self-created because of the contractor's mistake was rational.[93]

85. *Id.*

86. *See id*. at 66.

87. *Id*.

88. *See Dutt*, 172 N.Y.S.3d at 66.

89. *See id*. (citing Morris Motel, LLC v. DeChance, 153 N.Y.S.3d 897, 898 (N.Y. App. Div. 2d Dep't 2021)).

90. *Id*.

91. *Id*.

92. *See id.*

93. *Dutt*, 172 N.Y.S.3d at 66 (citing Carlucci v. Bd. of Zoning Appeals, 613 N.Y.S.2d 665, 666 (N.Y. App. Div. 2d Dep't 1994)).

In *Sticks & Stones Holding, LLC v. Zoning Board of Appeals of Town of Milton*, the petitioner had purchased at a foreclosure sale a three-acre parcel which contained a decrepit double-wide mobile home and numerous human burial sites.[94] The petitioner applied for an area variance from the five-acre minimum lot requirement in order to construct a new 2,500-square-foot, single-family home.[95] The Zoning Board of Appeals had requested on several occasions that the petitioner provide an inventory of the burial sites, allow the Town Historian to photograph the gravestones, and take other measures to protect the burial sites.[96] The State Office of Parks, Recreation and Historic Preservation recommended that a twenty-five foot buffer be maintained around the burial sites, that the burial sites be protected during construction, and that the petitioner be required to execute a restrictive covenant providing for long-term protection of the site.[97] The petitioner agreed to the recommendations of the Office of Parks, Recreation and Historic Preservation but refused to comply with any of the Board's requests, including denying access to the site by any of the Board's representatives.[98] As a result, the Board denied the application.[99]

The court restated the well-known standard for review a determination of a zoning board of appeals. A decision of a zoning board of appeals may be set aside "'only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure,' and will not be disturbed so long as it 'has a rational basis and is supported by the record.'"[100] Significantly, "[i]n rendering a determination, a zoning board 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.'"[101]

The appellate division concluded that the decision was substantiated by the record and had a rational basis.[102] In affirming the denial of the application, the appellate division relied on the Board's conclusion

94. Sticks & Stones Holding, LLC v. Zoning Bd. 171 N.Y.S.3d 266, 267 (N.Y. App. Div. 3d Dep't 2022).

95. *Id*.

96. *Id*.

97. *Id*.

98. *Id*.

99. *Sticks & Stones Holding*, 171 N.Y.S.3d at 267.

100. *Id*. (quoting Feinberg-Smith Assocs., Inc. v. Zoning Bd. of Appeals, 91 N.Y.S.3d 578, 579 (N.Y. App. Div. 3d Dep't 2018)).

101. *Id*. (quoting *Feinberg-Smith Assocs.*, 91 N.Y.S.3d at 580).

102. *Id*.

that the benefit to the petitioner was outweighed by the detriment to the health, safety and welfare of the neighborhood because the locations of the burial sites had not been reliably determined and, consequently, it was uncertain whether a code-compliant well and septic system could be located on the property for the proposed larger residence without adversely affecting the burial sites.[103] The Board's conclusion that the risk of damage to the burial sites would create an undesirable change in the character of the neighborhood and would have an detrimental impact on both the physical and environmental conditions of the neighborhood was rational.[104] Because the petitioner refused to comply with the Board's requests, the Board could not assess the impact of the area variance on the burial sites.[105] Without the provision of such information, the Board reasonably concluded that approval of the variance would have a detrimental impact on the neighborhood.[106]

In addition, the record contained sufficient support for the Board's conclusion that the benefit could have been achieved by some other method because the petitioner had a right to rebuild the derelict structure that existed on the property without a variance.[107] The petitioner's difficulty also was self-created because it knew or should have known that an area variance would be required and that the burial sites were present when it purchased the property.[108] The record substantiated that the Board had carefully weighed the statutory factors and balanced the benefit to the petitioner against the detriment to the community.[109]

E. Type of Variance

It is apparent in almost every instance whether an application for a variance requires a use variance or an area variance. In fact, the definition of terms in Town Law section 267(1) and Village Law section 7-712(1) eliminates any doubt as to the nature of the required relief in almost every circumstance.[110] A use variance authorizes the utilization

103. *Id*. at 267–68.

104. *Sticks & Stones Holding*, 171 N.Y.S.3d at 268.

105. *Id*.

106. *Id*. (citing Braunstein v. Bd. of Zoning Appeals, 952 N.Y.S.2d 857, 859 (N.Y. App. Div. 3d Dep't 2012)).

107. *See id*. (citing Smelyansky v. Zoning Bd. of Appeals, 920 N.Y.S.2d 828, 830 (N.Y. App. Div. 3d Dep't 2011)).

108. *Id*. (citing Feinberg-Smith Assocs. v. Zoning Bd. of Appeals, 91 N.Y.S.3d 578, 581 (N.Y. App. Div. 3d Dep't 2018).

109. *Sticks & Stones Holding*, 171 N.Y.S.3d at 268 (citing Pecoraro v. Bd. of Appeals, 814 N.E.2d 404, 407 (N.Y. 2004)).

110. N.Y. TOWN LAW § 267(1) (McKinney 2022); N.Y. VILLAGE LAW § 7-712(1) (McKinney 2022).

of land for a use which is not permitted or is prohibited by a zoning law.[111] An area variance permits the use of land in a manner which is not permitted by virtue of the "dimensional or physical requirements" of a zoning law.[112]

Nevertheless, an issue has developed as to the nature of the relief requested in a few instances. For example, in *17K Real Estate, LLC v. Zoning Board of Appeals of Town of Newburgh*, the court rejected the claim that an area variance granted for a hotel should have been reviewed as a use variance.[113] The Applicant had applied for a variance from a provision of the zoning law which mandated that a hotel have its principal frontage on a state or county highway.[114] The court agreed with the conclusion of the Zoning Board of Appeals that the "principal frontage" requirement is a "physical requirement" rather than a use restriction and that the application was properly reviewed as one for an area variance.[115] The Court of Appeals determined in *Wilcox v. Zoning Board of Appeals of the City of Yonkers* that "[a] variance relating to the height of an apartment house, in an area zoned for apartment houses, is an area variance."[116] Relief from off-street parking requirements have been determined to require an area variance.[117]

In *Humphreys v. Somers Zoning Board of Appeals*, the Applicant owned two continuous parcels in a residential district in which a barn and a maximum of two horses were permitted.[118] The zoning law also allowed human habitation within an accessory apartment in an accessory structure, such as a barn, which was constructed prior to April 1, 1992.[119] The Zoning Board of Appeals granted a special permit and area variances for the construction of a barn for six horses and an accessory

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

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

113. Route 17K Real Est., LLC v. Zoning Bd. of Appeals, 93 N.Y.S.3d 107, 110 (N.Y. App. Div. 2d Dep't 2019).

114. *Id.*

115. *Id.*

116. Wilcox v. Zoning Bd. of Appeals, 217 N.E.2d 633, 635 (N.Y. 1966); *see also* Markovich v. Feriola, 247 N.Y.S.2d 29, 32 (N.Y. Sup. Ct. Westchester Cnty. 1963), *aff'd*, 253 N.Y.S.2d 417 (N.Y. App. Div. 2d Dep't 1964).

117. *See* Colin Realty Co. v. Town of N. Hempstead, 21 N.E.3d 188, 197 (N.Y. 2014) (citing Terry Rice, *2022 Supp. Practice Commentaries*, *in* MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 61, § 267-b, at 294–95 (2022)).

118. Humphreys v. Zoning Bd. of Appeals, 168 N.Y.S.3d 871, 871 (N.Y. App. Div. 2d Dep't 2022).

119. *Id.*

apartment on the second floor of the barn.[120] The supreme court dismissed a neighbor's Article 78 proceeding challenging the approval.[121] In affirming the dismissal of the proceeding, the appellate division opined that the Board properly concluded that the Applicants required an area variance rather than a use variance because the applicants "were not seeking to change the essential use of the property."[122]

F. Necessary Parties-Relation Back

If a petitioner fails to name or serve a necessary party within the time permitted for service, the proceeding may be subject to dismissal. However, if the relation back doctrine is applicable, late service may be permissible. In *Nemeth v. K-Tooling*, the petitioners previously were successful in overturning the granting of a use variance to permit the expansion of a nonconforming manufacturing use in a residential zone.[123] Subsequently, the use variance was again approved and the petitioners again challenged the approval in an Article 78 proceeding.[124] Because the petitioners failed to name the property owner as a respondent, the supreme court dismissed the petition.[125] The appellate division agreed that the property owner was a necessary party but remanded the matter with the direction that she be summoned.[126] The supreme court granted respondents' cross-moved to dismiss the petition because the claims against the property owner were time-barred and were not saved by the relation back doctrine.[127] The claims against the remaining parties also were dismissed because of the failure to name a necessary party.[128]

The appellate division affirmed the decision, concluding that the petitioners were not entitled to rely on the relation back doctrine.[129] The relation back doctrine

120. *Id.* at 871–72.

121. *See id*. at 872.

122. *Id*. (citing Wambold v. Zoning Bd. of Appeals, 32 N.Y.S.3d 628, 629–30 (N.Y. App. Div. 2d Dep't 2016)).

123. Nemeth v. K-Tooling, 168 N.Y.S.3d 572, 574 (N.Y. App. Div. 3d Dep't 2022) (citing Nemeth v. Zoning Bd. of Appeals, 7 N.Y.S.3d 626, 627 (N.Y. App. Div. 3d Dep't 2022)).

124. *Id.* at 574.

125. *Id*.

126. *Id.* (citing Nemeth v. K-Tooling, 81 N.Y.S.3d 255, 257–58 (N.Y. App. Div. 3d Dep't 2018)).

127. *Id.*

128. *Nemeth*, 168 N.Y.S.3d 574.

129. *Id.*

> [P]ermits a petitioner to amend a petition to add a respondent even though the statute of limitations has expired at the time of amendment so long as the petitioner can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her.[130]

The petitioner did not comply with the third condition.[131] In fact, the property owner was identified as the property owner and named as a respondent in the first proceeding.[132] Hence, "this simply is not an instance where the identity of a respondent . . . was in doubt or there was some question regarding that party's status."[133] "Under the established law of this state, any 'mistake' here would 'not [be one] contemplated by the relation back doctrine.'"[134]

G. Record and Return

The court in *Veteri v. Zoning Board of Appeals of Town of Kent* concluded that the supreme court properly had denied the petitioners' motion to compel the Zoning Board of Appeals to cure purported omissions in the Record and Return.[135] CPLR section 7804(e) provides that "The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration. . . . The court may order the body or officer to supply any defect or omission in the answer, transcript or an answering affidavit."[136] "Judicial review of administrative determinations is confined to the facts and record adduced before the agency."[137] The "proceedings under consideration" in *Veteri* related to an appeal from the building inspectors

130. *Id*. (citing Sullivan v. Plan. Bd., 58 N.Y.S.3d 692, 694 (N.Y. App. Div. 3d Dep't 2017), *leave to appeal denied*, 93 N.E.3d 1211 (N.Y. 2017)).

131. *Id.* at 576.

132. *Id.* at 575.

133. *Nemeth*, 168 N.Y.S.3d at 574 (quoting Baker v. Town of Roxbury, 632 N.Y.S.2d 854, 857 (App. Div. 3d Dep't 1995), *leave to appeal denied*, 664 N.E.2d 895 (N.Y. 1996)).

134. *Id*. at 575 (*quoting Sullivan*, 58 N.Y.S.3d at 695).

135. Veteri v. Zoning Bd. of Appeals, 163 N.Y.S.3d 231, 235 (N.Y. App. Div. 2d Dep't 2022).

136. N.Y. C.P.L.R. 7804(e) (McKinney 2022).

137. *Veteri*, 163 N.Y.S.3d at 234 (quoting Yarbough v. Franco, 740 N.E.2d 224, 226 (N.Y. 2000) (citing N.Y. State Corr. Officers & Police Benevolent Ass'n v. Governor's Off. of Emp. Rels., 50 N.E.3d 225, 227–28 (N.Y. 2016)).

recent decision, and not appeals from prior determinations.[138] Consequently, no reason existed to enlarge the record to include documents pertaining to appeals from prior determinations.[139] In addition, because the documents regarding prior applications were not provided to the Zoning Board of Appeals during the public hearing on the instant application, they could not be included in the Record and Return.[140]

III. SITE PLAN APPROVAL

An Article 78 proceeding challenging the decision of a planning board on a site plan application must "be instituted within thirty days after the filing of a decision by such board in the office of the town [or village] clerk."[141] Particularly given the abbreviated statute of limitations, it is essential for a potential litigant to discover when a decision of a board has been properly filed so as to commence the running of the statute of limitations. Complicating matters, the precise document which is sufficient to commence the running of the 30-day statute of limitations is not entirely free from doubt. Moreover, the impact of technology and the increased use of remote meetings, particularly necessitated by the Covid pandemic, creates additional issues as to when the statute of limitations begins to run.

In *Homer DG, LLC v. Planning Board of Village of Homer*, a Planning Board meeting was held virtually on April 12, 2021.[142] The Applicant's attorney repeatedly contacted the Village Clerk's office seeking a "formal notice of decision" of the Planning Board's denial of the application but was informed that one had not been prepared.[143] Finally, the clerk provided counsel with a letter on April 19, 2021 which stated that it was "official notification" that the application had been denied.[144] The minutes of the Planning Board meeting were filed in the Village Clerk's office on May 10, 2021 and the petitioners instituted an Article 78 proceeding challenging the denial on May 17, 2021.[145]

138. *Id.* at 235 (citing Voutsinas v. Schenone, 88 N.Y.S.3d 57, 62 (N.Y. App. Div. 2d Dep't 2018)).

139. *Id.*

140. *Id.* (citing Kelly v. Safir, 747 N.E.2d 1280, 1284 (N.Y. 2001)).

141. N.Y. TOWN LAW § 274-a (11) (McKinney 2022); N.Y. VILLAGE LAW § 7-725-a (11) (McKinney 2022).

142. Homer DG, LLC v. Plan. Bd., 154 N.Y.S.3d 403, 405 (N.Y. Sup. Ct. Cortland Cnty. 2021).

143. *See id.*

144. *See id.*

145. *See id.*

In moving to dismiss the petition, the Planning Board asserted that the proceeding was barred by the statute of limitations.[146] It asserted that the statute of limitations had begun to run immediately at the close of the Planning Board April 12, 2021 meeting, at which time a recording of the meeting that was conducted by Zoom was saved to a cloud-based server.[147] The Article 78 proceeding was commenced 35 days after that date.[148] The petitioner argued in opposition to the motion to dismiss the petition that an audio or video recording of a meeting cannot constitute a decision of a board and that the Zoom recording was not filed in the office of the Village Clerk as required by Village Law Section 7-725-a(11), the identical equivalent to Town Law section 274-a(11).[149] The petitioner further asserted that the Planning Board should be estopped from asserting a statute of limitations defense because, despite counsel's continued efforts to obtain a copy of the decision, the Clerk never informed him that the Planning Board considered the video recording of the meeting to be the decision of the Board.[150]

The court observed that "[n]o particular form of decision is mandated by statute."[151] Nevertheless, a decision must set forth the determination of the board, any conditions imposed by the board, and the vote of each member.[152] The filing of meeting minutes which contain "a record or summary of all . . . matter[s] formally voted upon and the vote thereon,"[153] may start the running of the statute of limitations if the minutes incorporate a decision.[154]

Tacitly recognizing that a video recording potentially might satisfy the requisites for constituting a "decision," the court opined that the recording of the Planning Board meeting conducted by video conferencing could satisfy the requirements of a "decision" as contemplated by Village Law section 7-725-a, identical to Town Law section 274-a, because it contained the resolution that was acted upon and

146. *See id*. at 405.

147. *See Homer DG, LLC*, 154 N.Y.S.3d at 405.

148. *See id*.

149. *See id*. at 406.

150. *See id*.

151. *Id.* (citing Terry Rice, *2011 Supp. Practice Commentaries*, *in* MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 63, § 7-725-a, at 98–99 (2011)).

152. *See Homer DG, LLC*, 154 N.Y.S.3d at 406 (citing Sullivan v. Dunn, 747 N.Y.S.2d 666, 667–68 (N.Y. App. Div. 4th Dep't 2002)).

153. *Id.* (citing N.Y. PUB. OFF. LAW § 106 (McKinney 2022)).

154. *Id.* (citing Bauman, Taub & Von Wettberg Inc. v. Zoning Bd. of Appeals, 609 N.Y.S.2d 373, 374 (N.Y. App. Div. 3d Dep't 1994)).

each member's vote.[155] Although an opinion of the Committee on Open Government has concluded that the minutes of a meeting should be reduced to writing,[156] the statute does not specify that a decision must be in writing.[157] Recognizing the potential impact of technology, the court noted in *Csorny v. Shoreham-Wading River Central School District*,[158] that "[t]he law has embraced the undeniable fact that modern electronic recording devices are silent observers of history. Video cameras provide the most accurate and effective way of memorializing local democracy in action."[159] In addition, the Electronic Signatures and Records Act, State Technology Law section 301 *et seq*., specifically authorizes government entities to produce, file, and store records electronically, provided that certain statutory and regulatory requirements are met.[160] The court concluded that a video recording of a planning board meeting, if properly filed with the appropriate officer, could constitute the "decision" of the planning board.[161]

However, the court denied the motion to dismiss the petition because the statute of limitations did not begin to run because the decision had never been filed with the Village Clerk.[162] The court rejected the argument that the Planning Board's decision was "filed" with the Village Clerk upon its automatic storage within the cloud management system.[163] Documents "that are required to be filed are considered to have been filed when they are received by the office with which, or by the official with whom, they are to be filed."[164] Although the recording of the Planning Board meeting may have been accessible to the Village

155. *See id.* at 407.

156. *See id*. at 407 n.3 (citing letter from Robert J. Freeman, Exec. Dir., N.Y. Dep't of State, Comm.on Open Gov't to David Stone (April 7, 1998) (Advisory Opinion 2872)).

157. *See Homer DG, LLC*, 154 N.Y.S.3d at 407 (quoting Csorny v. Shoreham-Wading River Ctr. Sch. Dist., 759 N.Y.S.2d 513, 517 (N.Y. App. Div. 2d Dep't 2003)).

158. *Csorny*, 759 N.Y.S.2d at 518.

159. *Homer DG, LLC*, 154 N.Y.S.3d at 407 (quoting *Csorny,* 759 N.Y.S.2d at 518).

160. *See id*. at 407 (first citing N.Y. STATE TECH. LAW §§ 302(2), 305(1) (McKinney 2022); then citing 9 N.Y.C.R.R. § 540.5 (2022)).

161. *See id*. at 407 (citing N.Y. VILLAGE LAW § 7-772(a) (McKinney 2022)).

162. *See id*.

163. *See id*.

164. *Homer DG, LLC*, 154 N.Y.S.3d at 407 (quoting Coty v. Cnty. of Clinton, 839 N.Y.S.2d 825, 826 (N.Y. App. Div. 3d Dep't 2007) (citing Gagliardi v. Bd. of Appeals, 591 N.Y.S.2d 629, 630 (N.Y. App. Div. 3d Dep't 1992), *leave for appeal denied*, 613 N.E.2d 969 (N.Y. 1993)).

Clerk and the public, it was not "filed" with the Village Clerk.[165] Accordingly, the recording could serve as the decision of the Planning Board for purposes of commencing the running of the statute of limitations. It is suggested that modern technology aside, the filing of a physical written decision in the clerk's office is a prerequisite to the commencement of the statute of limitations.

In any event, the Planning Board was estopped from asserting a statute of limitations defense.[166] "Estoppel is generally not available against a governmental agency exercising its governmental functions unless an exception of 'very limited application' is warranted by an 'unusual factual situation.'"[167] However, a governmental entity may be estopped from asserting a statute of limitations defense when its actions have wrongfully or negligently precluded a party from commencing a timely action or proceeding.[168]

Petitioner's counsel made several attempts to obtain a written notice of the Planning Board's decision from the Village Clerk immediately following the meeting, but was never advised that the Planning Board considered the video recording that had been already uploaded to the Zoom cloud server to be the Planning Board's decision.[169] It should have been obvious that the purpose of the inquiries was to determine when the statute of limitations would begin to run in order to institute an Article 78 proceeding.[170] Nevertheless, they failed to advise petitioner's counsel of their position that they considered the recording of the meeting to be the Planning Board's decision.[171] As a result, the Planning Board was estopped from asserting a statute of limitations defense.[172]

IV. SPECIAL PERMITS

The decision in *Marcus v. Planning Board of Village of Wesley Hills* is an instructive review of the principles applicable to special

165. *See id*. at 408.

166. *See id*.

167. *Id*.

168. *See id*. (citing Bender v. N.Y.C. Health & Hosps. Corp., 345 N.E.2d 561, 564 (N.Y. 1976)). In addition, the Covid pandemic, which necessitated the use of Zoom recording of minutes, was found to constitute an "unusual factual situation." *Homer DG, LLC*, 154 N.Y.S.3d at 408.

169. *Id.*

170. *See id*.

171. *See id*. at 408–09.

172. *See id*. at 409.

permits.[173] The Planning Board in *Marcus* approved a special permit and site plan to operate an arborist service, landscaping business, and a wholesale nursery.[174] The appellate division reversed the supreme court's dismissal of the petition.[175]

The appellate court recapped the principle that "[a] special permit is a use that has been found by the local legislative body to be appropriate for the zoning district and 'in harmony with the general zoning plan and will not adversely affect the neighborhood.'"[176] A special permit must be approved if the criteria set forth in the zoning law is satisfied.[177] However, the "[f]ailure 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."[178] As part of its special permit review authority, a board "does not have authority to waive or modify any conditions set forth in the ordinance."[179]

One of the applicable special permit requirements in *Marcus* was that an arborist service, landscape services, or wholesale nursery must have frontage on and practical access to two major roads.[180] The Planning Board abused its discretion by waiving that requirement and deeming "practical access" to a second major road to be unnecessary.[181] As a result, the supreme court should have annulled the Planning Board's decision which had granted the special use permit.[182]

It should be noted, however, that Town Law section 274-b(5) and Village Law section 7-725-b(5) enable a town board or board of trustees, respectively, to authorize a board reviewing special permit applications to "waive" any of the requirements for "approval, approval with modifications or disapproval" of a special permit.[183] In addition, Town Law section 274-b(3) and Village Law section 7-725-b(3) provide that

173. *See generally* Marcus v. Plan. Bd., 154 N.Y.S.3d 822 (N.Y. App. Div. 2d Dep't 2021).

174. *See id*. at 822.

175. *See id*.

176. *Id*. at 822–23 (quoting N. Shore Steak House v. Bd. of Appeals, 282 N.E.2d 606, 609 (N.Y. 1972)).

177. *See id.* at 823 (citing Juda Constr., Ltd. v. Spencer*,* 800 N.Y.S.2d 741, 744 (N.Y. App. Div. 2d Dep't 2005)).

178. *Marcus*, 154 N.Y.S.3d at 823 (quoting Muller v. Zoning Bd. of Appeals, 144 N.Y.S.3d 198, 201 (N.Y. App. Div. 2d Dep't 2021)).

179. *Id*. (quoting *Muller*, 144 N.Y.S.3d at 201) (citing Navaretta v. Town of Oyster Bay, 898 N.Y.S.2d 237, 240 (N.Y. App. Div. 2d Dep't 2010)).

180. *See id*.

181. *See id*.

182. *See id.*

183. N.Y. TOWN LAW § 274-b(5) (McKinney 2022); N.Y. VILLAGE LAW § 7-725-b(5) (McKinney 2022).

"where a special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance. . . ."[184] Accordingly, relief from noncompliance with special permit standards may be obtained under appropriate circumstances.

In addition, the site plan approval in *Marcus* should have been annulled.[185] The Zoning Law provided that the Planning Board "shall not approve a site plan unless it shall find that such plan conforms [with] the requirements of [the Village Zoning Law]."[186] Because the Zoning Law required that a lot in the zoning district in which the property was located have a maximum gross impervious surface ratio of .25, the Planning Board abused its discretion in approving the site plan which proposed a gross impervious surface ratio of .44.[187]

A. Default Approval

Special permit review authority may be delegated to any municipal board, including a zoning board of appeals.[188] Town Law section 267-a(8) and Village Law section 7-712-a(8) direct that "The board of appeals shall decide upon the appeal within sixty-two days after the conduct of said hearing."[189] Town Law section 267-a(13)(b) and Village Law section 7-712-a(13)(b) provide that "In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the enforcement official within the time allowed by subdivision eight of this section, the appeal is denied."[190]

In *999 Hempstead Turnpike, LLC v. Board of Appeals of Town of Hempstead*, the Zoning Board of Appeals failed to render a decision on an application for a special permit and area variances in sixty-two days after the hearing was closed.[191] The petitioner commenced an Article 78 proceeding asserting that the application had been denied by virtue of default pursuant Town Law section 267-a(13)(b), the

184. TOWN LAW § 274-b(3); VILLAGE LAW § 7-725-b(3).

185. *See* Marcus v. Plan. Bd., 154 N.Y.S.3d 822, 823 (N.Y. App. Div. 2d Dep't 2021).

186. *See id.*

187. *See id.*

188. TOWN LAW § 274-b(2); VILLAGE LAW § 7-725-b(2).

189. TOWN LAW § 267-a(8); VILLAGE LAW § 7-712-a(8).

190. TOWN LAW § 267-a(13)(b); VILLAGE LAW § 7-712-a(13)(b).

191. 999 Hempstead Tpk., LLC v. Bd. of Appeals, 173 N.Y.S.3d 256, 257 (N.Y. App. Div. 2d Dep't 2022).

identical counterpart to Village Law section 7-712-a(13)(b), and sought to annul the implied denial as being arbitrary and capricious.[192] The supreme court granted the petitioner's unopposed motion for a default judgment, granted the petition, annulled the supposed default decision and directed the Board to grant the special permit and area variance.[193] The court also denied the Zoning Board of Appeals' motion to vacate the judgment.[194]

The appellate division reversed and related that

> A proceeding to annul a determination by an administrative body 'should not be concluded in the petitioner's favor merely upon the basis of a failure to answer the petition on the return date thereof, unless it appears that such failure to plead was intentional and that the administrative body has no intention to have the controversy determined on the merits.'[195]

There was no evidence exhibiting an intentional default by the Zoning Board of Appeals.[196] As a result, the court should not have granted a default approval and should have allowed the Board to answer the petition and to file opposition papers.[197]

The court also dismissed the claim challenging the "denial" of the special permit for lack of subject matter jurisdiction because the application for a special permit had not been denied by default.[198] A failure to comply with the time period mandated by Town Law section 267-a(8), as well as Village Law section 7-712-a(8), results in a denial by default only when a zoning board of appeals is exercising *appellate* jurisdiction.[199] In considering a special permit application, a board exercises its original jurisdiction, rather than appellate jurisdiction.[200] Thus, there was no denial by default in *999 Hempstead Turnpike*.[201]

192. *Id*.

193. *Id.* at 257–58.

194. *Id*.

195. *Id.* (quoting Abrams v. Kern, 317 N.Y.S.2d 971, 973 (N.Y. App. Div. 2d Dep't 1970)) (first citing N.Y. C.P.L.R. 7804(e) (MCKINNEY 2022); then citing Exxon Mobil Corp. v. N.Y.C. Dep't of Env't Prot., 114 N.Y.S.3d 88, 91 (N.Y. App. Div. 2d Dep't 2019)).

196. *999 Hempstead Tpk.*, 173 N.Y.S.3d at 258 (citing *Exxon Mobil*, 114 N.Y.S.3d at 91).

197. *Id.*

198. *Id.*

199. *Id.* (first citing N.Y. TOWN LAW § 267-a(13)(b) (McKinney 2022)); then citing N.Y. VILLAGE LAW § 7-712-a(13)(b) (McKinney 2022)).

200. *Id.*

201. *999 Hempstead Tpk*., 173 N.Y.S.3d at 258 (citing Alper Rest. Inc. v. Zoning Bd. of Appeals, 51 N.Y.S.3d 705, 707 (N.Y. App. Div. 3d Dep't 2017)).

Hence, the issue was not ripe for judicial review because there was no final determination.[202] Although apparently not previously raised in the proceeding, "ripeness 'is a matter pertaining to subject matter jurisdiction which may be raised at any time, including *sua sponte*.'"[203]

B. Religious Uses

Because religious uses are considered by the New York courts to be intrinsically beneficial to the community, they have been accorded a preferred status that limits the permissible review authority of local administrative agencies.[204] Accordingly, municipalities must apply their zoning regulations in a more accommodating manner when reviewing application for religious and educational uses.[205]

In *United Full Gospel Church of God v. Board of Appeals of the Inc*., the Zoning Board of Appeals had denied an application for a special permit and parking variance for a place of public assembly that is capable of accommodating fifty or more occupants.[206] The petitioner provided reports and testimony by real estate and parking experts who established that the proposed church would not have an deleterious impact on the surrounding area.[207] It was also demonstrated that ample on-street parking existed and that parking in a nearby municipal parking field with thirty-six spaces was available.[208] The petitioner also had obtained a lease from the owner of a neighboring property for the use of its parking area with twenty parking spaces on Sundays and during special events.[209] The petitioner's architect testified that there would be acceptable egress from the building.[210]

Pursuant to the zoning law, in considering a special permit application, the Zoning Board of Appeals was required to assess whether a particular religious or educational or accessory use would create any of the following impacts:

202. *Id.* (citing Vill. of Kiryas Joel v. Cnty. of Orange, 121 N.Y.S.3d 102, 107 (N.Y. App. Div. 2d Dep't 2020)).

203. *See id.*

204. *See* Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 513 (N.Y. 1986); Diocese of Rochester v. Plan. Bd., 136 N.E.2d 827, 835 (N.Y. 1956).

205. *See* Islamic Soc'y of Westchester and Rockland, Inc. v. Foley, 464 N.Y.S.2d 844, 845 (N.Y. App. Div. 2d Dep't 1983), *leave for appeal denied*, 60 N.Y.2s 559 (N.Y. 1983), *rearguement denied*, 64 N.Y.2d 885 (N.Y. 1985).

206. United Full Gospel Church of God v. Bd. of Appeals, No. 600004/2021, slip op. at 1 (N.Y. Sup. Ct. Nassau Cnty. Aug. 20, 2021).

207. *See id.* at 2.

208. *See id.* at 2.

209. *See id.* at 3.

210. *See id.* at 2–3.

> (1) A significant traffic congestion problem that jeopardizes public safety;
>
> (2) a substantial adverse effect on surrounding property values;
>
> (3) [a] significant over-taxation of basic municipal services;
>
> (4) a cognizable and substantial fire or other emergency risk; and/or
>
> (5) [a]ny other negative impact, including chronic conditions of substantial noise disturbance or garbage accumulation, which may necessarily occur as a result of the conduct of the proposed use, as may be borne out by substantial evidence in the record before the Board.[211]

The Zoning Board of Appeals asserted that there was substantial evidence in the record that the proposed church would have significant adverse effects on fire safety, traffic, parking, and noise which would substantiate the Board's suggestions of mitigation measures or an outright denial of the application.[212] The Board also claimed that the petitioner was unwilling to agree to the mitigation measures suggested by the Board including a reduction in the number of seats to fifty persons, which would have eliminated the necessity for a special permit.[213] The Zoning Board of Appeals also asserted that the proposed church did not comply with the New York State Uniform Fire Prevention and Building Code and would negatively impact abutting properties by reason of noise, congestion, and the use of other's property without express permission and, additionally, because the proposal provided zero off-street parking.[214]

The court reiterated that:

> Entitlement to a special exception is not a matter of right. Compliance with local ordinance standards must be shown before a special exception permit may be granted. A zoning board has discretion to find, with proper support, that a particular use does not meet the criteria of the special use provisions of the zoning ordinance and must not yield to opposition.[215]

However, "[i]n the context of zoning regulations, churches and schools occupy a different status from commercial enterprises. Churches, schools and accessory uses are, in themselves, clearly in

211. *United Full Gospel*, slip op. at 6.

212. *See id.* at 3.

213. *See id* at 4.

214. *See id* at 2.

215. *Id.* at 7 (citing Pleasant Valley Home Constr., Ltd. v. Van Wagner, 363 N.E.2d 1376, 1377 (N.Y. 1977).

furtherance of the public good and general welfare."[216] Although religious institutions are not exempt from local zoning regulations, "greater flexibility is required in evaluating an application for a religious use than for an application for another use and every effort to accommodate the religious use must be made."[217] In reviewing an application for a religious use,

> Where an 'irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former' unless it is 'convincingly shown' that an application 'will have a direct and immediate adverse effect upon the health, safety or welfare of the community.'[218]

The petitioner had obtained a lease for parking at a neighboring property and a bus which would transport congregants to the church.[219] There was no evidence in the record that additional vehicle trips in the vicinity of the proposed church would result in conditions materially impacting public safety during the proposed hours of operation.[220] No evidence was furnished by the Board portraying the traffic conditions on the adjoining roads that would support a non-speculative inference that the municipal lot and private lot configurations would create a significant traffic risk to public safety.[221] Additionally, the petitioner's traffic expert opined that the use of the parking lot for church parking would be feasible because many of the businesses that might otherwise utilize the municipal lot or metered parking in the area would be closed when church services were to be held.[222] As a result, the Board's "[c]onclusory findings of fact [were] insufficient to support [its] determination."[223]

The court concluded that although parking is a legitimate issue, the Board's concerns could have been addressed by the imposition of

216. *United Full Gospel*, slip. op. at 10.

217. *Id.*

218. *See id*. at 6 (internal citations omitted) (first quoting Jewish Reconstructionist Synagogue of the N. Shore v. Inc. Vill. of Roslyn Harbor, 342 N.E.2d 534, 538 (N.Y. 1975); then quoting Westchester Reform Temple v. Brown, 239 N.E.2d 891, 895 (N.Y. 1968)) (citing Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 515–16 (N.Y. 1986)).

219. *See id*. at 9.

220. *See id*.

221. *See United Full Gospel*, slip op. at 9.

222. *See id.*

223. *See id*. at 10 (quoting Cacsire v. Zoning Bd. of Appeals, 930 N.Y.S.2d 54, 57 (N.Y. App. Div. 2d Dep't 2011)).

appropriate conditions. [224] However, the decision was devoid of any evidence that the Zoning Board of Appeals had made any attempt to accommodate the proposed religious use and, as a result, the decision was arbitrary and capricious.[225] "What is clear is that the record establishes that the Board has provided no accommodation to fashion a solution despite its claims and petitioner's attempts to do so."[226]

Accordingly, the court annulled the denial of the special permit and parking variance applications and directed the Board to grant the approvals subject to reasonable conditions that would accommodate the religious use while mitigating any deleterious impacts and assure compliance with all building and safety codes.[227]

V. STANDING

Appropriate standing is a threshold jurisdictional prerequisite to litigation of a claim.[228]

> Because the welfare of the entire community is involved when enforcement of a zoning law is at stake there is much to be said for permitting judicial review at the request of any citizen, resident or taxpayer; this idea finds support in the provision for public notice of a hearing. But we also recognize that permitting everyone to seek review could work against the welfare of the community by proliferating litigation, especially at the instance of special interest groups, and by unduly delaying final dispositions.[229]

In *Thiele v. Town of Southampton Zoning Board of Appeals*, the petitioners instituted an Article 78 proceeding to annul a decision of the Zoning Board of Appeals which interpreted the zoning law as allowing a private golf course as a permitted accessory use to a proposed seasonal resort residential development.[230] The Planning Board had requested an interpretation of the zoning law from the Zoning Board

224. *See id.* at 8 (citing Apostolic Holiness Church v. Zoning Bd. of Appeals, 633 N.Y.S.2d 321, 323 (N.Y. Ap. Div. 2d Dep't 1995)).

225. *See id.*

226. *See United Full Gospel*, slip op. at 8–9.

227. *See id*. at 10.

228. *See* Airport Parking Assocs., LLC v. Town of N. Castle, 154 N.Y.S.3d 839, 840 (N.Y. App. Div. 2d Dept. 2021).

229. *See* Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 133 (N.Y. 1987) (first citing 4 ANDERSON, AMERICAN LAW OF ZONING § 27.09 (3d ed. 1986); then citing John D. Ayer, *Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent*, 55 IOWA L. REV. 344, 347 (1969)).

230. *See* Thiele v. Zoning Bd. of Appeals, No. 6685/18, slip op. at 1 (N.Y. Sup. Ct. Suffolk Cnty. Nov. 4, 2021).

of Appeals and it concluded that the golf course was a permissible accessory use.[231]

Noting that "the burden of establishing standing to raise that claim is on the party seeking review,"[232] the court reiterated that in addition to establishing an injury-in-fact that is within the zone of interests sought to be protected by the pertinent statute, particularly in land use matters, the "petitioner 'must show that it would suffer direct harm, injury that is in some way different from that of the public at large.'"[233]

Although an allegation of close proximity might give rise to an inference of injury such that a nearby property owner may challenge a land use decision without proof of actual injury, nonetheless, a property owner must also establish that the interest alleged is different from that suffered by the public at large and is within the zone of interests sought to be protected by the statue or regulation.[234] With respect to organizational standing:

> First, if an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue; standing cannot be achieved merely by multiplying the persons a group purports to represent. Second, an association must demonstrate that the interests it asserts are germane to its purposes so as to satisfy the court that it is an appropriate representative of those interests. Third, it must be evident that neither the asserted claim nor the appropriate relief requires the participation of the individual members.[235]

With respect to proximity, "[g]enerally, the relevant distance is the distance between the petitioner's property and the actual structure or development itself, not the distance between the petitioner's property and the property line of the site."[236] In support of its motion to dismiss the petition, the respondent filed an affidavit which demonstrated the extensive distances between the individual petitioners' properties and

231. *See id.* at 2.

232. *See id*. at 3–4 (citing 159-MP Corp. v. CAB Bedford, LLC, 122 N.Y.S.3d 59, 61 (N.Y. App. Div. 2d Dep't 2020)).

233. *Id*. at 2 (quoting Ass'n for a Better Long Island, Inc. v. N.Y. Dep't of Env't Conservation, 11 N.E.3d 188, 192 (N.Y. 2014)).

234. *See id.* at 3.

235. *Thiele*, slip op. at 3 (quoting Soc'y of Plastics Indus. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1042 (N.Y. 1991)).

236. *Id.* (quoting Tuxedo Land Tr., Inc. v. Town Bd., 977 N.Y.S.2d 272, 274 (N.Y. App. Div. 2d Dep't 2013)) (citing Barrett v. Dutchess Cnty. Legis., 831 N.Y.S.2d 540, 543 (N.Y. App. Div. 2d Dep't 2007)).

various areas of the proposed development site.[237] Existing roads, overhead wires, traffic, residential properties, commercial office buildings, a railroad line, permanently protected forest land, and gas stations that existed between the petitioners' properties and the site also were provided.[238] Because none of the petitioners' properties were sufficiently close to the project, they failed to establish that they possessed presumptive standing based on proximity to the proposed project.[239]

In addition to the lack of proximity to the proposed project, none of the petitioners established an actual and specific injury that was different in kind or degree from that suffered by the public at large and that was not too speculative.[240] The allegations with respect to petitioners' primary purported injury, that is, damage to the groundwater as a result of the development of the golf course, were generalized and failed to establish that the individual petitioners would suffer an environmental injury that was different from the community-at-large.[241] The petitioners did not furnish any evidence to demonstrate the manner in which each of them would actually be harmed or how such injury was differed in kind or degree from the public at large.[242] Additionally, no evidence was provided that any of the petitioners had a private well that might suffer an individualized injury from the irrigation of the golf course or from any other aspect of the project.[243] The fact that two of the petitioners were heads of environmental organizations who use and enjoy the Pine Barrens lands, although alleging generalized claims that the project would have an adverse impact on the groundwater, was insufficient to confer standing on them individually or to confer standing upon their respective organizations.[244] Because the individual petitioners failed to establish an environmental injury that was different in kind or degree from the community at large, the petitioner organizations also lacked standing because they were dependent on the standing of the individual petitioners.[245]

Similarly, the petitioners in *61 Crown St., LLC v. New York Office of Parks, Recreation & Historic Preservation*, sought to redevelop 2.5

237. *See id.* at 3–4.
238. *See id*. at 4.
239. *See id*.
240. *See Thiele*, slip op. at 4.
241. *See id*.
242. *See id*.
243. *See id*.
244. *See id*. at 5 (citing Niagara Pres. Coal., Inc. v. N.Y. State Power Auth., 994 N.Y.S.2d 487, 492 (N.Y. App. Div. 4th Dep't 2014)).
245. *See Thiele*, slip op. at 5.

acres in the Kingston Stockade Historical District (KSHD) which was listed on the National Register of Historic Places.[246] The project would contain retail space, apartments, a public pedestrian bridge, plaza, boutique hotel, and parking garage.[247] In addition to requiring a zoning amendment in order to implement the project, the State Office of Parks, Recreation and Historic Preservation (OPRHP) was an involved agency because of public funding for the project.[248] OPRHP initially issued a letter that the project would have adverse effects to the KSHD because of obfuscation of the historic northern boundary of the district, the elimination of the historic Fair Street Extension and the impact of "monolithic" structures on the surrounding district.[249] The developer provided additional materials to OPRHP and OPRHP subsequently issued a letter that the project would not have an adverse effect on the KSHD.[250] The petitioners, consisting of seven entities that owned property in the KSHD, challenged OPRHP's "no impact letter."[251] The appellate division affirmed the supreme court's dismissal of the petition because the petitioners lacked standing.[252]

The appellate court recounted that "[s]tanding is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review."[253] Echoing the germane standard, the court related that "[t]o establish standing to challenge governmental action, the party asserting standing must show first, an injury-in-fact and, second, that the injury falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision."[254] A demonstration of a concrete and identifiable injury cannot be based on

246. 61 Crown St., LLC v. N.Y. Off. of Parks, Recreation & Hist. Pres., 172 N.Y.S.3d 164, 166 (N.Y. App. Div. 3d Dep't 2022).

247. *See id.*

248. *See id.*

249. *See id.*

250. *See id.* at 166–67.

251. *See 61 Crown St.*, 172 N.Y.S.3d at 167.

252. *See id.*

253. *Id.* (quoting Civ. Serv. Emps. Ass'n, Inc. v. City of Schenectady, 116 N.Y.S.3d 419, 421 (N.Y. App. Div. 3d Dep't 2019)).

254. *Id.* (quoting Lansingburgh Cent. Sch. Dist. v. N.Y. State Educ. Dep't, 151 N.Y.S.3d 730, 733 (N.Y. App. Div. 3d Dep't 2021)).

conjecture or speculation,[255] and the injury-in-fact must be "different in kind and degree from the community generally."[256]

The court rejected the petitioners' claim that they possessed presumptive standing based on their proximity to the property.[257] Proximity is "insufficient to confer standing where there are no zoning issues involved."[258] Accordingly, the petitioners "were required to demonstrate an actual and specific injury within the zone of interests of the relevant statutory provisions that is distinct from the type of injury generally suffered by the public."[259]

The statutes upon which the claims were premised "encompass the protection and promotion of 'the quality of any historic, architectural, archeological, or cultural property that is listed on the [N]ational [R]egister of [H]istoric [P]laces.'"[260] Although the petitioners asserted general grievances regarding the purported impact of the project on the historical characteristics of the KSHD, the allegations were not different from those that would be relevant to the public at large.[261] In addition, the claims of economic injuries with respect to potential loss of parking were outside of the zone of interests protected by PRHPL article 14.[262]

Although the obstruction of a scenic view may have established an injury within the protection of PRHPL article 14,[263] in order for the petitioners to have possessed standing, the asserted harm to the view was required to be protected by the zone of interests encompassed by

255. *See id.* (citing Brennan Ctr. for Just. at NYU Sch. of L. v. N.Y. State Bd. of Elections, 73 N.Y.S.3d 666, 669 (N.Y. App. Div. 3d Dep't 2018), *leave for appeal denied*, 117 N.E.3d 817 (N.Y. 2019)).

256. *61 Crown St.*, 172 N.Y.S.3d at 168 (quoting Piagentini v. N.Y. State Bd. of Parole, 108 N.Y.S.3d 481, 485 (N.Y. App. Div. 3d Dep't 2019), *leave for appeal denied*, 149 N.E.3d 56 (N.Y. 2020)).

257. *See id*.

258. *Id*. (quoting Shapiro v. Torres, 60 N.Y.S.3d 366, 368 (N.Y. App. Div. 2d Dep't 2017)) (citing Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 134 (N.Y. 1987)).

259. *Id*. (citing Clean Water Advocs. of N.Y. v. N.Y. State Dep't of Env't Conservation, 962 N.Y.S.2d 390, 391 (N.Y App. Div. 3d Dep't 2013) *leave to appeal denied*, 995 N.E.2d 182 (N.Y. 2013)).

260. *Id*. (citing N.Y. PARKS REC. & HIST. PRESERV. LAW §§ 14.01, .09(1) (McKinney 2022)).

261. *61 Crown St.*, 172 N.Y.S.3d at 168 (citing Gallahan v. Plan. Bd., 762 N.Y.S.2d 850, 850–51 (N.Y. App. Div. 3d Dep't 2003), *leave to appeal denied*, 807 N.E.2d 288 (N.Y. 2003)).

262. *See id*. (citing Peachin v. City of Oneonta, 149 N.Y.S.3d 258, 262 (N.Y. App. Div. 3d Dep't 2021)).

263. *See id.* at 168–69 (citing N.Y. PARKS REC. & HIST. PRESERV. LAW §§ 14.03(4)–(6), 14.09(1) (McKinney 2022)).

the statutes, that is, the historical significance of that view.[264] Moreover, the concerns expressed by the petitioners were unsupported and too speculative to establish standing.[265] The petitioners' anecdotal evidence of harm to their views also was refuted by the record, which demonstrated that the bluff and distant view of the Catskill Mountains were not related to the historical significance to the KSHD and, instead, were the result of changes that the district has undergone since its inception.[266] Accordingly, the petitioners lacked standing to assert their claims.[267]

Relatedly, the court in *Douglaston Civic Association v. City of New York*, rejected the contention that supposedly inadequate notice of a public hearing to the nonparty community board necessitated invalidation of the rezoning because a litigant "generally cannot raise 'the legal rights of another. . . .'"[268] However, "a party establishes third-party standing when (1) there is a substantial relationship between the party asserting the claim and the rightholder; (2) it is impossible for the rightholder to assert his or her own rights; and (3) the need to avoid a dilution of the parties' constitutional rights."[269] The petitioners in *Douglaston* failed to establish that "'it [was] impossible' for the community board 'to assert [its] own rights.'"[270]

A fire district's challenge to the approval of a special permit for the construction of an assisted living facility was dismissed in *Greenville Fire District v. Town Board of Town of Greenburgh* because the fire district did not possess standing.[271] "Standing is . . . a threshold requirement for a plaintiff seeking to challenge governmental action."[272] "Where standing is disputed, the '[p]etitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute

264. *See id.* at 169 (citing Ziemba v. City of Troy, 827 N.Y.S.2d 322, 325 (N.Y. App. Div. 3d Dep't 2006), *leave to appeal denied*, 864 N.E.2d 618 (N.Y. 2007)).

265. *Id.* (first citing *Peachin*, 149 N.Y.S.3d at 262).

266. *See 61 Crown St.*,172 N.Y.S.3d at 169 (citing *Peachin*, 149 N.Y.S.3d at 262).

267. *See id*.

268. Douglaston Civic Ass'n v. City of New York, 159 N.Y.S.3d 23, 24 (N.Y. App. Div. 1st Dep't 2021).

269. Fleischer v. N.Y. State Liquor Auth., 960 N.Y.S.2d 395, 397 (N.Y. App. Div. 1st Dep't 2013) (citing N.Y. Cnty. Laws. Ass'n v. State, 742 N.Y.S.2d 16, 20 (N.Y. App. Div. 1st Dep't 2002)).

270. *Id*. (quoting *Fleischer*, 960 N.Y.S.2d at 397).

271. Greenville Fire Dist. v. Town Bd., 163 N.Y.S.3d 551, 554 (N.Y. App. Div. 2d Dep't 2022).

272. *Id*. (quoting N.Y. State Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 407 (N.Y. 2004)).

alleged to have been violated.'"[273] "In land use matters, the petitioner must show that it would suffer direct harm, injury that is in some way different from that of the public at large."[274]

The petitioners in *Greenville Fire District* did not assert a legally cognizable injury based on a projected increase in the number of emergency calls resulting from the construction of the assisted living facility and the resultant need for additional personnel and equipment.[275] Those concerns were not within the zone of interests sought to be protected by the zoning law.[276] In addition, the petitioners' generalized allegations that the approval may result in a traffic safety hazard for its emergency vehicles were conclusory and speculative and, consequently, insufficient to establish standing.[277]

The appellate division affirmed the dismissal of an Article 78 proceeding which challenged the approval of a special permit for an assisted living facility in *Council of Greenburgh Civic Associations v. Town Board of Town of Greenburgh* because the petitioners lacked standing.[278] The court repeated the principle that "Standing is . . . a threshold requirement for a plaintiff seeking to challenge governmental action."[279] "Where standing is disputed, the '[p]etitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated.'"[280] In particular, "[i]n land use matters, the petitioner must show that it would suffer direct harm, injury that is in some way different from that of the public at large."[281]

273. *Id*. (quoting Ass'n for a Better Long Island, Inc. v. N.Y. State Dep't of Env't Conservation, 11 N.E.3d 188, 192 (N.Y. 2014)).

274. *Id*. (quoting *Ass'n for a Better Long Island*, 11 N.E.3d at 192) (citing 159–MP Corp. v. CAB Bedford, LLC, 122 N.Y.S.3d 59, 62 (N.Y. App. Div. 2d Dep't 2020)).

275. *See id*. at 554.

276. *See Greenville Fire Dist*., 163 N.Y.S.3d at 554 (citing Tappan Cleaners v. Zoning Bd. of Appeals, 868 N.Y.S.2d 320, 321 (N.Y. App. Div. 2d Dep't 2008)).

277. *See id*. (citing Stewart Park & Rsrv. Coal., Inc. v. Zoning Bd. of Appeals, 26 N.Y.S.3d 588, 590 (N.Y. App. Div 2d Dep't 2016)).

278. Council of Greenburgh Civic Ass'ns v. Town Bd.,159 N.Y.S.3d 699, 699 (N.Y. App. Div. 2d Dep't 2022), *leave to appeal denied*, 192 N.E.3d 346 (N.Y. 2022).

279. *Id*. at 700 (quoting N.Y. State Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 407 (N.Y. 2004).

280. *Id*. (quoting Ass'n for a Better Long Island, Inc. v. N.Y. State Dep't of Envt'l Conservation, 11 N.E.3d 188, 192 (N.Y. 2014)).

281. *Id*. (internal quotations omitted) (quoting *Ass'n for a Better Long Island*, 11 N.E.3d at 192) (citing 159–MP Corp. v. CAB Bedford, LLC, 122 N.Y.S.3d 59, 62 (N.Y. App. Div 2d Dep't 2020)).

"An allegation of close proximity may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury."[282] In construing "proximity," "[g]enerally, the relevant distance is the distance between the petitioner's property and the actual structure or development itself, not the distance between the petitioner's property and the property line of the site."[283] The individual petitioners in *Council of Greenburgh Civic Associations* failed to demonstrate that their properties were located in sufficient proximity to the proposed development to give rise to an presumption of damage or injury.[284]

One might assume that if one resides at or owns property in close proximity to property which is the subject of a land use approval, that person possesses standing to challenge the land use approval by virtue of that fact. However, in addition to the requirement that the claimed harm be protected by the relevant statute of regulation, the claimed injury must be different than that suffered by the public at large.[285] Consistent with the case law, the court in *Council of Greenburgh Civic Associations* concluded that the petition's generalized allegations that the approval may result in a public safety hazard failed to set forth an actual injury distinct from that suffered by the public at large.[286] In addition, because the standing of the civic association was dependent on the individual petitioners possessing standing, the civic associations also lack standing.[287]

On the other hand, the appellate division concluded in *Veteri v. Zoning Board of Appeals of Town of Kent*, that the petitioners possessed standing to challenge a decision of the Zoning Board of Appeals which reversed the Building Inspector's conclusion that a preexisting nonconforming use could no longer be used as a concrete batch

282. *Id*. (internal quotations omitted) (quoting *159–MP Corp.*, 122 N.Y.S.3d at 62).

283. *Council of Greenburgh*, 159 N.Y.S.3d at 700 (quoting Tuxedo Land Tr., Inc. v. Town Bd., 977 N.Y.S.2d 272, 274 (N.Y. App. Div. 2d Dep't 2013).

284. *See id*.

285. *See* Soc'y of Plastics Indus. v. Cnty. of Suffolk, 573 N.E.2d 1035, 1041–42 (N.Y. 1992); Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641, 644 (N.Y. 1990); Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 133 (N.Y. 1987); Little Joseph Realty, Inc. v. Town of Babylon, 363 N.E.2d 1163, 1166 (N.Y. 1977).

286. *See Council of Greenburgh*, 159 N.Y.S.3d at 700 (citing Stewart Park & Reserve Coal., Inc. v. Zoning Bd. of Appeals, 26 N.Y.S.3d 588, 590 (N.Y. App. Div. 2d Dep't 2016)).

287. *See id*. (citing *Tuxedo Land Trust*, 977 N.Y.S.2 at 274).

plant because of extended discontinuance of the use.[288] To establish standing, a petitioner must demonstrate that it will suffer an injury-in-fact and that the alleged injury falls within the zone of interest sought to be protected by the germane statute.[289] Particularly in land use matters, a petitioner must demonstrate "direct harm, injury that is in some way different from that of the public at large."[290] "An allegation of close proximity may give rise to an inference of damage or injury that enables a nearby property owner to challenge a land use decision without proof of actual injury."[291] However, "this does not entitle the property owner to judicial review in every instance."[292] Instead, "in addition to establishing that the effect of the proposed change is different from that suffered by the public generally, the [property owner] must establish that the interest asserted is arguably within the zone of interests the statute protects."[293]

The homeowners' association in *Veteri* possessed standing because it alleged environmental injuries to a private lake owned by it which was located directly across from the subject property, interference with recreational activities in and around the lake, and detrimental impacts to its properties from increased noise, truck traffic, dust, and pollutants from the concrete manufacturing use.[294] The alleged injuries were different from those suffered by the public at large,[295] and fell within the zone of interests protected by the town's zoning laws.[296] The court also rejected the argument that the homeowners' association was required to demonstrate organizational standing because it owned the lake across from the subject property.[297] The individual petitioners also satisfactorily asserted that they would be detrimentally affected by the Zoning Board of Appeals' determination

288. Veteri v. Zoning Bd. of Appeals, 163 N.Y.S.3d 231, 233 (N.Y. App. Div. 2d Dep't 2022).

289. *See id*. at 235 (citing *Soc'y of Plastics Indus*., 573 N.E.2d at 1041).

290. *Id*. (quoting *Soc'y of Plastics Indus.*, 573 N.E.2d at 1041) (citing 159–MP Corp. v. CAB Bedford, LLC, 122 N.Y.S.3d 59, 62 (N.Y. App. Div 2d Dep't 2020)).

291. *Id*. (quoting CPD NY Energy Corp. v. Plan. Bd., 32 N.Y.S.3d 275, 277 (N.Y. App. Div. 2d Dep't 2016)).

292. *Id*. (quoting *CPD NY Energy*, 32 N.Y.S.3d at 277).

293. *Veteri*, 163 N.Y.S.3d at 235 (quoting *CPD N.Y. Energy*, 32 N.Y.S.3d at 277–78) (citing Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 134 (N.Y. 1987).

294. *See id*. at 235–36.

295. *See id*. at 236 (citing Save the Pine Bush, Inc. v. Common Council, 918 N.E.2d 917, 922, (N.Y. 2009)).

296. *See id*. (citing *Sun-Brite Car Wash*).

297. *See id*. at 236 (citing Green Earth Farms Rockland, LLC v. Plan. Bd., 60 N.Y.S.3d 381, 385 (N.Y. App. Div. 2d Dep't 2017)).

and that their alleged injuries fell within the zone of interests protected by the zoning law.[298] Accordingly, the court remanded the matter for a determination on the merits.[299]

VI. ANSWER AFTER DENIAL OF MOTION TO DISMISS ARTICLE 78 PETITION

Although Article 78 proceedings are considered to be summary proceedings,[300] a motion to dismiss the petition is permissible,[301] and frequently is utilized. The CPLR contemplates that if a motion to dismiss is denied, "the court shall permit the respondent to answer, upon such terms as may be just. . . ."[302] However, a court may decide the merits of an Article 78 proceeding after the denial of a motion to dismiss if:

> [T]he dispositive facts and the positions of the parties are fully set forth in the record, thereby making it clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer, the court may reach the merits of the petition and grant the petitioner judgment thereon notwithstanding the lack of any answer and without giving the respondent a further opportunity to answer the petition.[303]

Accordingly, "leave to serve [and file] an answer should be refused only if it clearly appear[s] that no issue exist[s] which might be raised by answer concerning the merits of the petitioner's application."[304]

298. *See Veteri*, 163 N.Y.S.3d at 236.

299. *See id.*

300. *See* Urquia v. Cuomo, No. 109201/07, 2007 N.Y.L.J LEXIS 34, at *56–58 (N.Y. Sup. Ct. N.Y. Cnty. Jan. 11, 2008).

301. *See* N.Y. C.P.L.R. 7804(f) (McKinney 2022).

302. *Id.*

303. Chestnut Ridge Assocs., LLC v. 30 Sephar Lane, Inc., 12 N.Y.S.3d 168, 171 (N.Y. App. Div. 2d Dep't 2015) (quoting Kuzma v. City of Buffalo, 845 N.Y.S.2d 880, 883 (N.Y. App. Div. 4th Dep't 2007))
(citing Nassau BOCES Cent. Council of Tchrs. v. Bd. of Coop. Educ. Servs., 469 N.E.2d 511, 511 (N.Y. 1984)); *see also* Wood v. Glass, 640 N.Y.S.2d 234, 235 (N.Y. App. Div. 2d Dep't 1996);
see generally Bayswater Health Related Facility v. N.Y. State Dep't of Health, 394 N.Y.S.2d 314 (N.Y. App. Div. 3d Dep't 1977); Stortecky v. Mazzone, 591 N.Y.S.2d 304 (N.Y. Sup. Ct. 1992), *aff'd, modified on other grounds sub. nom in re* Estate of Wiggins, 606 N.Y.S.2d 423 (N.Y. App. Div. 3d Dep't 1994), *aff'd*, 650 N.E.2d 391 (N.Y. 1995)).

304. Karedes v. Colella, 761 N.Y.S.2d 534, 535 (N.Y. App. Div. 3d Dep't 2003); *see also* Julicher v. Town of Tonawanda, 824 N.Y.S.2d 522, 523 (N.Y. App. Div. 4th Dep't 2006); Burgess v. Selsky, 706 N.Y.S.2d 363, 364 (N.Y. App. Div. 3d Dep't 2000); Phillips v. Town of Clifton Park Water Auth., 626 N.Y.S.2d 865, 866 (N.Y. App. Div. 3d Dep't 1995).

For example, in *Miranda Holdings, Inc. v. Town Board of Town of Orchard Park*, the petitioner had applied to the Town Board for approval of a commercial structure with a restaurant and drive-through window.[305] It challenged a local law which prohibited the use of drive-through windows for businesses located in the zoning district in which the property was situated.[306] The supreme court granted in part and denied in part the respondents' motion to dismiss the petition.[307] The court rejected the respondents' claim that the supreme court had erred in granting judgment to petitioner on the first cause of action because the respondents had not yet answered the petition.[308] Where the dispositive facts and the arguments of the parties are fully set forth in the record, thereby making it "clear that no dispute as to the facts exists and [that] no prejudice will result from the failure to require an answer," a court may determine the merits of the petition and grant petitioner judgment without allowing respondents an opportunity to answer the petition.[309] Because the appellate division determined that no factual dispute existed and that no prejudice would result from deciding the petition based on the submissions, it rejected the respondents' contention.[310]

Similarly, the court in *7-Eleven, Inc. v. Town of Hempstead*, determined the merits of an Article 78 proceeding involving a site plan application after denying the respondents' motion to dismiss the petition.[311] The court related that "although the respondents did not file an answer, where, as here, 'it is clear that no dispute as to the facts exists and no prejudice will result,' the court can, upon a respondent's motion to dismiss, decide the petition on the merits."[312]

305. Miranda Holdings, Inc. v. Town Bd., 170 N.Y.S.3d 432, 433 (N.Y. App. Div. 4th Dep't 2022).

306. *See id*. at 433.

307. *See id*.

308. *See id*. at 434 (citing N.Y. C.P.L.R 7804(f) (McKinney 2022)).

309. *Id*. (citing Nassau BOCES Cent. Council of Tchrs. v. Bd. of Coop. Educ. Servs., 469 N.E.2d 511, 512 (N.Y. 1984)).

310. *See id*.; *see also* 7-Eleven, Inc. v. Town of Hempstead, 166 N.Y.S.3d 572, 573 (N.Y. App. Div. 2d Dep't 2022).

311. *7-Eleven*, 166 N.Y.S.3d at 573.

312. *Id.* (quoting Arash Real Est. & Mgt. Co. v. N.Y.C. Dep't of Consumer Affs., 52 N.Y.S.3d 102, 104 (N.Y. App. Div. 2d Dep't 2017)).