ZONING & LAND USE

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I. ZONING BOARDS OF APPEAL

A. Time to Apply for A Variance

Similar to Village Law section 7-725-a(3), Town Law section 274-a(3) provides that:

> [W]here a proposed site plan contains one or more features which do not comply with the zoning regulations, application

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> may be made to the zoning board of appeals for an area variance pursuant to section two hundred sixty-seven-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations.[1]

Town Law section 274-b(3) and Village Law section 7-725-b(3),[2] relating to special permit applications, and Town Law section 277(6) and Village Law section 7-730(6), relating to subdivisions, similarly provide that an application for such an approval may be referred to the zoning board of appeals for an "area variance."[3] Alternatively, as has always been the case, an applicant can "appeal" a building inspector's denial of a building permit application because of, for example, insufficient area or bulk to the zoning board of appeals if it is believed that the decision is erroneous.[4]

Do any time constraints limit the time within which one seeking a variance after a denial by a building inspector must apply for variances? The issue is relevant when a use variance is necessary because the foregoing referral provisions, by their terms, apply only to area variances. In addition, there are innumerable instances when a referral is impracticable because an applicant requires only area variances and does not require site plan approval, a special permit or subdivision approval. Town Law section 267-b(2)(a) relates that "the board of appeals, on appeal from the decision or determination of the administrative official charged with the enforcement of such ordinance or local law, shall have the power to grant use variances . . . ."[5] Town Law section 267-a(5)(b) and Village Law 7-712-a(5)(b) provide that "An appeal shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official and with the board of appeals a notice of appeal . . . ."[6]

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1. N.Y. TOWN LAW § 274-a(3) (McKinney 2023); N.Y. VILLAGE LAW § 7-725-a(3) (McKinney 2023).

2. N.Y. TOWN LAW § 274-b(3) (McKinney 2023); N.Y. VILLAGE LAW § 7-725-b(3) (McKinney 2023).

3. N.Y. TOWN LAW § 277(6) (McKinney 2023); N.Y. VILLAGE LAW § 7-730(6) (McKinney 2023).

4. *See generally* VILLAGE § 7-725-a (appeal of a building inspector's denial of a building permit application).

5. N.Y. TOWN LAW § 267-b(2)(a) (McKinney 2023); N.Y. VILLAGE LAW § 7-712-b(2)(a) (McKinney 2023); N.Y. TOWN LAW § 267-b(3)(a) (McKinney 2023); N.Y. VILLAGE LAW 7-712-b(3)(a) (McKinney 2023) (area variances).

6. N.Y. TOWN LAW § 267-a(5)(b) (McKinney 2023); N.Y. VILLAGE LAW 7-712-a(5)(b) (McKinney 2023).

The Petitioners in *Citizens United to Protect Our Neighborhood-Hillcrest v. The Town of Ramapo* asserted that the sixty-day appeal period had lapsed before the applicant had applied for variances.[7] The court spurned the claim because "Following the issuance of the Denial Letter, Applicants applied for the variances listed by the Inspector. They did not appeal the Denial."[8] In reaching that conclusion, the court cited *Sherbk, Inc. v. City of Syracuse Bd. of Zoning Appeals*[9] in which the appellate division "reject[ed] petitioners' contention that the ZBA is only empowered to hear appeals in zoning matters and thus that the variance application must be an appeal."[10] The traditional thinking was that an application for a variance after a denial by a building inspector is an appeal. However, in actuality, it is not an appeal because although one can appeal a building inspector's denial, when one seeks a variance, he or she is accepting the building inspector's decision that one or more variances are required and is seeking relief from those provisions of the zoning law. Consequently, as determined by the court in *Citizens United*, an application for a variance after a building inspector's denial should not be characterized as an "appeal" for purposes of the sixty-day time constraint.[11]

The court also opined that based on the practices of the Town in *Citizens United*, strict interpretation of the sixty-day "appeal" provision for variances was illogical in view of the necessary orderly review of applications requiring Planning Board and Zoning Board of Appeals approvals and compliance with SEQRA.[12]

> 'An intent patently absurd is not to be attributed to the Legislature, and it will be presumed that the Legislature did not intend an absurd result to ensue from the legislation enacted.' Statutes § 145 (McKinney). [Consequently], 'if a construction sought to be placed on a statute produces an absurdity it is, as a general rule, to be discarded.'[13]

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7. *See* Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo, Nos. 031155/2022, 032462/2022, 2023 N.Y. Slip Op. 31194(U), at 24 (Sup. Ct. Rockland Cnty. Apr. 13, 2023).

8. *Id*. at 31.

9. *See* Sherbk, Inc. v. City of Syracuse Bd. of Zoning Appeals, 167 N.Y.S.3d 674, 676 (App. Div. 4th Dep't 2022).

10. *Citizens United*, 2023 NY Slip Op 31194(U), at 31 (*quoting* Sherbk, Inc. v. City of Syracuse Bd. of Zoning Appeals, 167 N.Y.S.3d 674, 676 (App. Div. 4th Dep't 2022); *see also* Terry Rice, *Zoning and Land Use Survey*, 73 SYRACUSE L. REV. 895, 903–04 (2023) (discussion of *Sherbk*).

11. *See Citizens United*, 2023 NY Slip Op 31194(U), at 31.

12. *See id*.

13. *Id.* at 31–32.

Because the interpretation alleged by the Petitioners would result in "an absurd situation impossible to accomplish in most situations," their contention was repudiated by the law and circumstances which would render the provisions of Town Law section 267-a impossible to apply.[14]

Town Law section 267-b(2)(a) provides that "[t]he board of appeals, on appeal from the decision or determination of the administrative official charged with the enforcement of such ordinance or local law, shall have the power to grant use variances . . . ."[15] However, when an applicant accepts the determination of a building inspector and seeks a variance, the application is not, in actuality or substance, an appeal. Both the nature of the application and, as confirmed by the decision in *Citizens United*, the reality of the administrative review process dictate otherwise. Hence, the *Citizens United* court properly determined that the sixty-day appeal period does not apply to an application for a variance.

B. Timeliness of Appeal

Town Law section 267-a(5)(b) and Village Law section 7-712-a(5)(b) require that an appeal to a zoning board of appeals must be filed within sixty days after the filing of an order, requirement, decision, interpretation or determination.[16] An aggrieved applicant for a building permit generally is promptly aware of the denial of the application and must file an appeal within sixty days of the filing of the decision in order for an appeal to be timely. However, a nearby property owner may not appreciate that a building permit or similar determination has been issued to a neighbor within sixty days if no discernable action has been taken to implement the work authorized by a permit within the statutory period. Consequently, the case law universally considers an appeal to be timely if filed within sixty days after an aggrieved party received notice of, or should have been aware of, the issuance of a determination.[17]

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14. *Id.* at 32.

15. N.Y. TOWN LAW § 267-b(2)(a) (McKinney 2023); N.Y. VILLAGE LAW § 7-712-b(2)(a) (McKinney 2023).

16. *See* N.Y. TOWN LAW § 267-a(5)(b); *see also* N.Y. VILLAGE LAW § 7-712-a(5)(b).

17. *See* Clarke v. Town of Sand Lake Zoning Bd. of Appeals, 860 N.Y.S.2d 646, 648 (App. Div. 3d Dep't 2008), *lv. denied*, 897 N.E.2d 1083 (N.Y. 2008); *see also* Iacone v. Building Dep't of Oyster Bay Cove Vill., 821 N.Y.S.2d 654, 656 (App. Div. 2d Dep't 2006); Farina v. Zoning Bd. of Appeals of the City of New Rochelle, 742 N.Y.S.2d 359, 361 (App. Div. 2d Dep't 2002); Missere v. Gross, 826 F.Supp.2d 542, 563 (S.D.N.Y. 2011).

However, the decision in *Castronova v. Town of Canadice Zoning Bd. of Appeals* determined that the time within which a neighbor must appeal the issuance of a building permit commences when his or her objections are formally rejected by the building inspector or code enforcement officer.[18] A building permit was issued to the Petitioner in *Castronova* for a "Pole Barn 22 x 24" consisting of 528 square feet on November 9, 2021.[19] The excavation for the barn began at the end of December 2021.[20] The neighbors observed the start of construction but assumed it to be a one-story garage.[21] The trusses for the roof and second floor of the barn were installed on February 3, 2022, which is when the neighbors first learned that the structure was a two-story pole barn.[22] The neighbors then filed a Complaint of Violation with the Code Enforcement Officer asserting several violations of the Zoning Law, including exceedance of the maximum permitted height.[23] The complaint was dropped off at the Code Enforcement Officer's office on Saturday, February 5, 2022, but no one was in the office until Tuesday, February 8, 2022.[24] The Code Enforcement Officer determined on February 8, 2022 that the building permit was correctly issued.[25] The neighbor appealed the decision to the Zoning Board of Appeals on February 25, 2022.[26] On October 12, 2022, the Zoning Board of Appeals granted the neighbor's appeal and determined that building permit application misstated the size of the structure, that as a result of the larger size, site plan review was required and that, accordingly, the building permit was invalid and should be revoked.[27] It was alleged in a subsequent Article 78 proceeding that the February 6, 2022 complaint to the Code Enforcement Officer was untimely because Town Law § 267-a(5)(b), like Village Law § 7-712-a(5)(b), required that the appeal be filed within sixty days of the issuance of the building permit on November 9, 2021.[28]

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18. *See* Castronova v. Town of Canadice Zoning Bd. of Appeals, No. 134580/2022, 2023 N.Y. Slip Op. 50718(U), at 4 (Sup. Ct. Ontario Cnty. 2023).
19. *Id.* at 2.
20. *See id.*
21. *See id*.
22. *See id*.
23. *See Castronova*, 2023 N.Y. Slip Op. 50718(U), at 2.
24. *See id.*
25. *See id*.
26. *See id*.
27. *See id*. at 3.
28. *See Castronova*, 2023 N.Y. Slip Op. 50718(U), at 3.

Town Law § 267-a (5) provides that "[a]n appeal [to the Zoning Board of Appeals] shall be taken within sixty days after the filing of any order, requirement, decision, interpretation or determination of the administrative official [charged with the enforcement of the zoning local law]."[29] The court rejected the contention that the issuance of the building permit started the sixty-day limitations period and found that the appeal was timely.[30] "While Petitioner is correct that the issuance of a building permit ordinarily starts the 60-day clock, the Court of Appeals has recognized that this rule is only reasonable '[a]s applied to an applicant *denied a [building] permit*.'"[31] However, where the issuance of a building permit to another person is challenged, the sixty-day appeal period begins to run "when the individual's objections are formally rejected by the official charged with enforcing the zoning code."[32]

The Petitioner did not become aware of the height of the barn's roof until February 3, 2023.[33] The Zoning Law permitted any person to file a written complaint with the Code Enforcement Officer "[w]henever a violation of this chapter occurs," but did not specify a time period within which a complaint must be filed.[34] However, the complaint in *Castronova* was filed within days of observing the apparent violation of the Zoning Law.[35]

The Code Enforcement Officer determined that there were no violations of the Zoning Law and that the permit was properly issued on February 8, 2022, which was appealed to the Zoning Board of Appeals by letter dated February 25, 2022.[36] In the opinion of the *Castronova* court, "the operative 'determination' that began the 60-day clock was

29. *Id.* (quoting N.Y. TOWN LAW § 267-a(5)(b) (McKinney 2023); *see also* N.Y. VILLAGE LAW § 7-712-a(5)(a) (McKinney 2023).

30. *See id.* at 4.

31. *Id.* (citing Pansa v. Damiano, 200 N.E.2d 563, 565 (N.Y. 1964) (emphasis added)).

32. *Id.* (first citing *Pansa*, 200 N.E.2d at 565 (limitations period for appeal to ZBA begins to run when neighbor's initial objection to proposed construction has been formally rejected); and then citing Farina v. Zoning Bd. of Appeals of City of New Rochelle, 742 N.Y.S.2d 359 (App. Div. 2d Dep't 2002) ("where a party seeks revocation of a building permit issued to another, the prescriptive period should be computed from the date such party received notice that his objections to the permit had been overruled")).

33. *See Castronova*, 2023 N.Y. Slip Op. 50718(U), at 4.

34. *See id.*

35. *See id.*

36. *See id.*

the CEO's February 8, 2022 determination, and Wright's appeal to the ZBA, filed 17 days later, was timely."[37]

As is referred to above, the prevailing case law concludes that an appeal to a zoning board of appeals is timely if filed within sixty days after an aggrieved party received notice of, or should have been aware of, the issuance of a determination. That precept is at odds with the holding in *Castronova* and *Pansa* which conclude that an appeal is timely if filed within sixty days after one receives a determination on objections to the issuance of a building permit. As is confirmed by the overwhelming volume of decisions, the appropriate time for the commencement of the running of the sixty-day appeal period for the issuance of a building permit to a neighbor is when the aggrieved party received notice of, or should have been aware of, the issuance of a determination. The holding of *Castronova* that the appeal time does not start to run until an objection has been determined could extend the appeal period for many months. Instead, the time to appeal should be computed from when one becomes aware of the issuance of a building permit to a neighbor or when one should have become aware of its issuance.

C. Findings of Fact

Adequate findings of fact are necessary "so that the parties, and the court in a proceeding to review, may be informed as to the basis for its conclusions."[38] Judicial review of the basis for a decision is not possible if substantiating findings of fact are not provided.[39] Conclusory findings are inadequate.[40] Findings of fact may not merely restate the pertinent statutory criteria[41] and must provide the factual basis for

37. *Id*. (citing N.Y. TOWN LAW § 267-a(5)(b) (McKinney 2023); N.Y. ZONING CODE § 120-158(B)(2)(a), (b); *see also Pansa*, 200 N.E.2d at 565; *Farina*, 742 N.Y.S.2d at 359).

38. Pearson v. Shoemaker, 202 N.Y.S.2d 779, 782 (Sup. Ct. Rockland Cnty. 1960).

39. *See* Swan v. Depew, 561 N.Y.S.2d 940, 942 (App. Div. 4th Dep't 1990); *see also* Rendino's Truck & Auto Collision, Inc. v. Zoning Bd. of Appeals of the City of Syracuse, 552 N.Y.S.2d 791, 792 (App. Div. 4th Dep't 1990); Greene v. Johnson, 503 N.Y.S.2d 656, 656 (App. Div. 2d Dep't 1986).

40. *See* Hum. Dev. Servs. v. Zoning Bd. of Appeals, 493 N.Y.S. 481, 487 (App. Div. 2d Dep't 1985), *aff'd*, 490 N.E.2d 846 (N.Y. 1986).

41. *See* Morrone v. Bennett, 559 N.Y.S.2d 565, 566 (App. Div. 2d Dep't 1990); *see also* Leibring v. Plan. Bd. of Newfane, 534 N.Y.S.2d 236, 237 (App. Div. 4th Dep't 1988); Pottick v. Duncan, 673 N.Y.S.2d 740, 741 (App. Div. 2d Dep't 1998).

concluding that each of the relevant criteria have or have not been satisfied.[42]

In *Guttman v. Covert Town Bd*., the supreme court previously had annulled a determination of the town board which had granted the respondents' application for a variance from the requirement that a building permit be obtained prior to making improvements to their property.[43] The appellate division in the prior proceeding remanded the matter to the town board because it had failed to provide its reasons or findings for granting the variance.[44] The town board subsequently submitted a document signed by its attorney which purported to constitute findings of fact.[45]

In again rejecting the findings of fact as inadequate, the court reiterated that "[f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination."[46] The appellate division concluded that intelligent judicial review of its decision was precluded because the "purported findings of fact are speculative and mere conclusions and contain very little[, if any,] factual matter."[47] Instead, the town board "must do more than merely restate the terms of the applicable ordinance" and the procedural history of the matter.[48] The town board was required to have set forth "findings of the facts essential to

42. *See* Putrino v. Zoning Bd. Of Appeals*,* 496 N.Y.S.2d 827, 828 (App. Div. 3d Dep't 1985); *see also* Farrell v. Bd. of Zoning & Appeals, 431 N.Y.S.2d 52, 54 (App. Div. 2d Dep't 1980); *cf.* Humphreys v. Somers Zoning Bd. of Appeals, 168 N.Y.S.3d 871, 872 (App. Div. 2d Dep't 2022) ("[I]n applying the balancing test, is not required to justify its determination with supporting evidence for each of the five statutory factors as long as its determination balancing the relevant considerations is rational" (internal citation omitted)); *see also* King v. Town of Islip Zoning Bd. of Appeals, 892 N.Y.S.2d 174, 176 (App. Div. 2d Dep't 2009).

43. *See* Guttman v. Covert Town Bd., 186 N.Y.S.3d 870, 871–72 (App. Div. 4th Dep't 2023).

44. *See id*. at 871.

45. *See id*.

46. *Id*. at 871–72 (quoting S. Blossom Ventures, LLC v. Town of Elma, 848 N.Y.S.2d 806, 807 (App. Div. 4th Dep't 2007), *lv. dismissed*, 889 N.E.2d 492 (N.Y. 2008) (internal quotation marks omitted) (citing Livingston Parkway Assn., Inc., v. Town of Amherst Zoning Bd. Of Appeals, 980 N.Y.S.2d 206, 207 (App. Div. 4th Dep't 2014)).

47. *Id*. at 872 (quoting Harrison Orthodox Minyan, Inc. v. Town Bd. Of Harrison, 552 N.Y.S.2d 434, 435 (App. Div. 2d Dep't 1990) (citing Seaford Jewish Ctr., Inc. v. Bd. of Zoning Appeals, 368 N.Y.S.2d 40, 41 (App. Div.2d Dep't 1975)).

48. *Guttman*, 186 N.Y.S.3d at 872.

its conclusion . . . ."[49] The court remanded the matter to the town board to properly set forth the factual basis for its determination within thirty days of the date of entry of the order because it had, yet again, "failed to articulate the reasons for its determination and failed to set forth [appropriate] findings of fact."[50] The decision emphasizes the necessity of providing detailed, fact-based findings of fact to corroborate the basis for a board's decision.

D. Use Variances

Town Law section 267-b(2)(b) and Village Law section 7-712-b(2)(b) require that an applicant for a use variance must establish that (1) for each permitted use in the zoning district in which the property is located, the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.[51] The decision in *Citizens United to Protect Our Neighborhood-Hillcrest v. The Town of Ramapo* clarified numerous issues relating to the required proof and assessment of use variance applications.[52] Although the project had been approved for twenty dwelling units when the property was purchased, the number of units had earlier been reduced to fifteen at the request of the Planning Board.[53]

First, regarding lack of reasonable return, the applicant in *Citizens United* had provided an appraisal report which evaluated the costs associated with the purchase of the property; the intended use of the property for which a use variance was sought; and the permitted uses in the zoning district to determine whether a reasonable return could be obtained should the property be utilized for a use permitted in the

49. *Id*. (quoting *Seaford Jewish Ctr.*, 368 N.Y.S.2d at 41).

50. *Id*. at 872 (quoting Fike v. Zoning Bd. of Appeals of Town of Webster, 769 N.Y.S.2d 415, 416 (App. Div. 4th Dep't 2003) (citing Foxluger v. Gossin, 411 N.Y.S.2d 51, 52–53 (App. Div. 4th Dep't 1978)).

51. N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2023); N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 2023).

52. *See* Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo, Nos. 031155/2022, 032462/2022, 2023 N.Y. Slip Op. 31194(U), at 2–3 (Sup. Ct. Rockland Cnty. Apr. 13, 2023).

53. *See id*. at 3.

zone in which it was located.[54] The report related that the purchase price of the property was $3,050,000 and that demolition costs, carrying and soft costs, including insurance, interest payments, and legal/engineering costs, amounted to $425,966.00, for a total purchase price inclusive of other expenses in excess of $4,000,000.[55] The report calculated the reasonable rate of return to be expected on such a real estate investment to be between 10% and 25%.[56] The report also analyzed each of the potential uses permitted as-of right in the zoning district and estimated the return for each to determine whether any use would yield a reasonable return on the applicant's investment.[57] The report concluded that none of the uses permitted by right in zoning district would provide any return to the property but would, instead, generate large losses.[58]

The Petitioners contended that the report was inadequate because, it was claimed, it failed to analyze the use of the property as a school.[59] "However, because a school is a special permit use and not a use permitted as of right, it was not required to be analyzed. Lack of reasonable return need only be demonstrated for uses permitted by right."[60] Moreover, contrary to the Petitioners' claims, "proof of a lack of reasonable return from permitted public uses is not required."[61]

The Petitioners also asserted that the "lack of reasonable return" was self-created because the applicant had paid too much for the property.[62] To the contrary, the record demonstrated that the applicant had purchased the property in February 2016 in a good faith, arms-length transaction, two years after the property had been approved for twenty dwelling units.[63] Although the prior approval had been invalidated on procedural grounds relating to the General Municipal Law referral

54. *See id*. at 11–12.

55. *See id*. at 12.

56. *See id*.

57. *See Citizens United*, 2023 N.Y. Slip Op. 31194(U), at 12.

58. *See id*. at 12–13.

59. *See id*. at 39.

60. *Id.* (citing Muller v. Williams, 451 N.Y.S.2d 278, 279 (App. Div. 3d. Dep't 1982)).

61. *Id.* at 38 (first citing Village of Fayetteville v. Jarrold, 423 N.E.2d 385, 385 (N.Y. 1981); then citing Grimpel Assocs. v. Cohalan, 361 N.E.2d 1022, 1024 (N.Y. 1977); then citing *Muller*, 451 N.Y.S.2d at 279; and then citing N.Y. TOWN LAW § 267-b (McKinney 2023)).

62. *Citizens United*, 2023 N.Y. Slip Op. 31194(U), at 36.

63. *See id.*

pursuant to General Municipal Law section 239-m, the applicant was under the reasonable assumption at the time of the purchase in 2016 that the 2014 variance was valid and beyond a timely challenge, thus making the purchase price reasonable under the circumstances.[64] The court related that although an argument can be made that a variance may be challenged up to six years after it is approved under certain circumstances, rather than the otherwise universally applicable thirty-day statute of limitations, it is reasonable that the applicant, a layman, did not know this.[65] In addition, the applicant had consulted with the firm that had obtained the original approvals which had advised him that the approvals were proper and remained valid.[66] Prior to purchasing the property, the applicant also had obtained an appraisal for financing purposes which appraised that the value of the property was $2,735,000, an amount approximately 10% lower than the actual sales price.[67] The appraiser testified that a 10% difference between an appraised amount and an actual sale is common and accepted.[68] Accordingly, the court rejected the contention that the applicant had acted in bad faith in purchasing the property or had paid too much for the property.[69]

The court also confirmed the Zoning Board of Appeals' finding that the property was "unique."[70] "Uniqueness . . . does not require that the property which is the subject of a use variance application be the exclusive property affected by the condition which is alleged to create the hardship."[71] "Instead, what is required is 'that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated were granted variances the zoning of the district would be materially changed.'"[72] Moreover, "[i]n finding that uniqueness had been demonstrated, the courts have credited multiple minor distinctions [citation omitted], or

64. *See id.* at 36–37.
65. *See id.* at 37.
66. *See id*.
67. *See Citizens United*, 2023 NY Slip Op 31194(U), at 37.
68. *See id.*
69. *See id.*
70. *See id.* at 40–41.
71. *Id.* at 40.
72. *Citizens United*, 2023 NY Slip Op 31194(U), at 40 (citing Douglaston Civic Ass'n v. Klein, 416 N.E.2d 1040, 1041 (N.Y. 1980); Kettaneh v. Bd. of Standards & Appeals of City of N.Y., 924 N.Y.S.2d 494, 497 (App. Div. 1st Dep't 2011); Vomero v. City of N.Y., 920 N.E.2d 340, 341 (N.Y. 2009).

singular distinguishing characteristics."[73] A planning report furnished by the applicant established that the property was essentially surrounded by multifamily uses and that the unique size and shape of the property did not occur anywhere else in the neighborhood.[74] The property also had only one means of ingress and egress and was required to provide a turn-around for emergency vehicles which utilized a significant portion of parcel, leaving little acreage for development.[75]

The Petitioners asserted the property was not unique because there were similarly shaped parcels and other comparable properties in the area.[76] In rejecting the contention, the court opined that, even if the "'comparables' suggested by the Petitioners were, in fact, comparable, the mere existence of a few similarly situated parcels does not mean that 'the hardship condition be not so generally applicable throughout the district.'"[77] Because it is not the role of the courts to second guess the fact-based determinations of zoning boards of appeal and the record substantiated the Zoning Board of Appeals' findings, the court confirmed the finding of uniqueness.[78]

The planning report further demonstrated that the proposed use was consistent with the existing character of the neighborhood because the area was characterized by large apartment buildings and multi-family housing at a density in excess of that which was approved by virtue of the use variance.[79] The court rejected the Petitioners' claim that the Board should have limited the "neighborhood" to properties located in the Town in which the property was located, to the exclusion of adjoining properties and nearby properties located in other municipalities.[80] "[W]hen one views the properties located adjoining a property and in the immediate vicinity, municipal boundaries are invisible and such artificial boundaries are meaningless."[81] The apartment buildings adjoining the property and multifamily dwellings in the immediate vicinity defined the prevailing character of the neighborhood regardless of the presence of municipal boundaries.[82] Moreover, "what constitutes the

73. *Id*. (quoting N.Y. TOWN LAW § 267-b (McKinney 2023) (Supplemental Practice Commentaries); citing Rice, *supra* note 10, at 1109).

74. *See id.*

75. *See id*. at 40–41.

76. *See id.* at 15.

77. *Citizens United*, 2023 NY Slip Op 31194(U), at 41.

78. *See id*.

79. *See id.* at 14–15.

80. *See id.* at 43.

81. *Id*.

82. *See Citizens United*, 2023 NY Slip Op 31194(U), at 43.

applicable 'neighborhood' clearly is within the sound discretion of the Zoning Board of Appeals."[83]

The Petitioners also asserted that the approval of the use variance was improper because it was inconsistent with the 2004 Town Comprehensive Plan which characterized the zone as a transitional zone.[84] "However, the verbiage in a comprehensive plan is not enumerated by Town Law § 267-b(2) as a germane use variance consideration."[85] In any event, "an outdated comprehensive plan does not bind a community to adhere to antiquated recommendations."[86] "A municipality is not required to act only in accordance with a previously adopted comprehensive plan if changed circumstances warrant different solutions."[87] "'[Z]oning is not static; the obligation is the support of comprehensive planning with recognition of the dynamics of the circumstances as they exist at the time of the Application, 'not a slavish servitude to any particular plan.'"[88]

The applicant's planning report demonstrated that the property bordered high-density apartment buildings and was across the street from scores of multi-family homes, consisting of four to six units per parcel, at a density of approximately twenty units per acre.[89] As a result, the Zoning Board of Appeals' conclusion that the variance was consistent with the character of the area and, thus, not inconsistent with the Town's "comprehensive plan," was not arbitrary or capricious.[90] In fact, the planning report concluded that "the granting of the use variance will

83. *Id*. (first citing W. Vill. Houses Tenants' Ass'n v. N.Y.C. Bd. of Standards & Appeals*,* 755 N.Y.S.2d 377, 378 (App. Div. 1st Dep't 2003) ("in considering whether the variance would 'alter the essential character of the neighborhood or district in which the zoning lot is located' . . ., the Board could look beyond the M1-5 zoning district to the surrounding neighborhood. There is no 'iron curtain' between districts."); and then citing SoHo All. v. N.Y.C. Bd. of Standards & Appeals*,* 741 N.E.2d 106, 108 (N.Y. 2000) ("No inflexible rule exists which requires, as a matter of law, that an economic analysis to support a use variance must be restricted exclusively to data on properties within a particular zoning district.")).

84. *See id*. at 24, 42.

85. *Id.* at 42.

86. *Id*.

87. *Citizens United*, 2023 NY Slip Op 31194(U), at 42.

88. *Id*. (quoting Kravetz v. Plenge, 446 N.Y.S.2d 807, 811 (App. Div. 4th Dep't 1982) (*citing* Town of Bedford v. Vill. of Mount Kisco, 306 N.E.2d 155, 159 (N.Y. 1973), *re-argument denied*, 34 N.Y.2d 668 (1974)).

89. *See id.* at 42.

90. *See id.*

place this parcel in conformance with the majority of the surrounding neighborhood, rather than at odds with the current neighborhood."[91]

The court also concluded that the Zoning Board of Appeals' finding that the hardship was not self-created was "entirely reasonable," particularly given the fact that "it is not the province of this court to second-guess the Zoning Board of Appeals' conclusion . . . ."[92]

Lastly, the court rejected the Petitioners' claim that the use variance should be invalidated because the Zoning Board of Appeals' findings did not explicitly state that it was granting the minimum variance necessary.[93]

> However, it does not follow that the 'failure' to make one statutory finding renders a variance void. Analogous to a use variance, it is well-settled that when approving an area variance, the ZBA, 'in applying the balancing test, is not required to justify its determination with supporting evidence for each of the five statutory factors as long as its determination balancing the relevant considerations is rational.[94]

The Zoning Board of Appeals adopted fact-based findings of fact that related the basis for its finding with respect to each of the four statutory use variance considerations.[95] The record reflected a serious and detailed examination of the use variance criteria by the Zoning Board of Appeals.[96] Although the case law confirms that findings need not specifically address each of the applicable considerations, "the 'minimum necessary variance' is not even one of the four statutory considerations required, but, is instead, a limitation on the extent of a variance."[97]Accordingly, "an explicit finding with respect to the 'minimum variance necessary' was not required and . . . the Board's detailed findings of fact are more than sufficient to satisfy the provision of findings of fact."[98] The appraiser testified the variances sought were the minimum necessary in order to attempt to obtain a reasonable return and the record fully substantiated that the use variance was the "absolute

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91. *Id.*

92. *Citizens United*, 2023 NY Slip Op 31194(U), at 44.

93. *See id.* at 35.

94. *Id.* (quoting Humphreys v. Somers Zoning Bd. of Appeals, 168 N.Y.S.3d 871, 872 (App. Div. 2d Dep't 2022) (internal citations omitted) (citing King v. Town of Islip Zoning Bd. of Appeals, 892 N.Y.S.2d 174, 176 (App. Div. 2d Dep't 2009)).

95. *See id*.

96. *See id*.

97. *Citizens United*, 2023 NY Slip Op 31194(U), at 35.

98. *Id.*

minimum that might enable Bluefield to break even-not even to realize a reasonable return."[99]

In any event, even if that were not the case, case law substantiates that a "remand is not mandatory, and that the merits of a proceeding may properly be reached" if the "factual underpinnings for the decision are present elsewhere in the administrative record."[100] The record contained sufficient evidence with respect to the need for the use variance.[101]

The decision in *Source Renewables, LLC v. Town of Cortlandville Zoning Board of Appeals* further elucidates the requisite standards for demonstrating entitlement to a use variance, particularly those relating to uniqueness and self-created hardship.[102] Petitioner Gunzenhauser Real Estate Company owned two abutting parcels of property since 1963.[103] One parcel, located in the City of Cortland, contained 38.5 acres, and the other parcel, located in the Town of Cortlandville, consisted of 24.5 acres.[104] Both properties were located in R–1 residential districts and "are elevated, with precipitous slopes and shallow bedrock," essentially rendering the properties undevelopable.[105] Petitioner Source Renewables was a contract vendee of the property, contingent on municipal approval to construct a solar energy system on the property.[106] Following hearings on Source Renewables' use variance application, the Zoning Board of Appeals found that it had demonstrated that the Town parcel could not yield a reasonable return as zoned but that it had not satisfied the remaining use variance criteria.[107] The Petitioners commenced a combined CPLR Article 78 proceeding and plenary action to annul the Zoning Board of Appeals' decision.[108] The supreme court partially granted the Respondents' motion to dismiss the petition, concluding that the Petitioners' alleged hardship was self-created.[109]

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99. *Id.*

100. *Id*. at 36 (citing Siano v. City of Saratoga Springs Zoning Bd. of Appeals, 873 N.Y.S.2d 515, 515 (Sup. Ct. Saratoga Cnty. 2006), *aff'd*, 835 N.Y.S.2d 922 (App. Div. 3d Dep't 2007)).

101. *See id.* at 36.

102. *See* Source Renewables, LLC v. Town of Cortlandville Zoning Bd. of Appeals, 185 N.Y.S.3d 331, 335–36 (App. Div. 3d Dep't 2023).

103. *See id.* at 333.

104. *See id.*

105. *Id.*

106. *See id.*

107. *See Source Renewables, LLC,* 185 N.Y.S.3d at 334.

108. *See id.*

109. *See id.*

The appellate division concluded that there was no basis in the record for the Zoning Board of Appeals' conclusion that the Petitioners had failed to demonstrate that the alleged hardship resulted from "unique conditions peculiar to and inherent in the property as compared to other properties in the zoning district" or neighborhood.[110] The Zoning Board of Appeals based its finding on the claim that the entire hillside was similar and that there were other parcels on the hill which had been utilized for the construction of houses.[111] The record, however, confirmed that the parcel was unsuited for residential development because of the lack of access to public utilities.[112] In addition, a viability study established that lots with installed infrastructure within a mile of the parcel had sold for $20,000 to $25,000, but that the per lot development cost for the parcel would be more than $100,000 because of the lack of infrastructure.[113] The record was devoid of any facts to substantiate the contention that other parcels offered by the Zoning Board of Appeals shared the same development constrains.[114]

In addition, the record lacked any evidence to support the Zoning Board of Appeals' finding that Petitioner had failed to establish that the variance would not alter the essential character of the neighborhood.[115] To the contrary, the Zoning Board of Appeals had acknowledged the negative SEQRA declaration adopted by the Planning Board, which had found that the project would not impair the quality of aesthetic resources, the existing community, or neighborhood character.[116]

Finally, although the supreme court had concluded that Petitioner had failed to prove that the proffered hardship was not self-created because it had entered into the sales contract knowing that the proposed use was prohibited, that was not a basis relied upon by the Zoning Board of Appeals in its decision.[117] In any event, the court also incorrectly premised its decision on the knowledge that Petitioner possessed when

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110. *Id*. at 335 (quoting Jones v. Zoning Bd. of Appeals of the Town of Oneonta, 934 N.Y.S.2d 599, 602 (App. Div. 3d Dep't 2011) (quoting First Nat'l. Bank of Downsville v. City of Albany Bd. of Zoning Appeals, 628 N.Y.S.2d 199, 201 (App. Div. 3d Dep't 1995)).

111. *See id.*

112. *See Source Renewables, LLC,* 185 N.Y.S.3d at 335.

113. *See id.*

114. *See id.*

115. *See id.* at 336.

116. *See id.*

117. *See Source Renewables, LLC,* 185 N.Y.S.3d at 336 (citing Mobil Oil Corp. v. Vill. of Mamaroneck Bd. of Appeals, 740 N.Y.S.2d 456, 458 (App. Div. 2d Dep't 2002)).

entering into the contract.[118] "'Although a contract vendee may apply for a use variance,' where, as here, the contract is executory and conditional upon the granting of the variance, 'it is the vendor's rights that are being determined.'"[119]

The court rejected the grounds for the Zoning Board of Appeals' conclusion because the property had not changed since Gunzenhauser purchased it in 1963. Any alleged hardship was self-imposed.[120] Although a hardship is self-created when property is acquired subject to the restrictions from which relief is sought,[121] Gunzenhauser had purchased the parcel before the Town adopted a zoning law or regulated solar energy systems.[122] Therefore, he did not willingly assume the hardship alleged.[123]

This decision is most noteworthy for the principle that a contract vendee stands in the shoes of the owner for purposes of ascertaining whether the hardship upon which a use variance application is based is self-created. If an owner's plight is not self-created as a consequence of a succeeding change in the applicable zoning regulations, the contract vendee of a contract which is executory and conditional upon the approval of a variance is not tainted by self-created hardship by virtue of contracting to purchase the property.

E. Area Variances

1. Effect of Invalidation of Use Variance on Area Variances

The Petitioners in *Citizens United* argued that if the contested use variance was invalid, then, the area variances automatically also

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118. *See id.*

119. *Id*. (quoting Amco Dev., Inc. v. Zoning Bd. of Appeals of Town of Perinton, 586 N.Y.S.2d 50, 51 (App. Div. 4th Dep't 1992) (quoting Colony Park, Inc. v. Malone, 205 N.Y.S.2d 166, 171-72 (Sup. Ct. Nassau Cnty. 1960) (citing Save the Pine Bush, Inc. v. Zoning Bd. of Appeals of Town of Guilderland, 643 N.Y.S.2d 689, 691 (App. Div. 3d Dep't), *lv. denied,* 673 N.E.2d 1243 (N.Y. 1996); DEP'T OF STATE, DIV. OF LOCAL GOV'T SERVS., JAMES A. COON LOCAL GOV'T TECH. SERIES, ZONING BD. OF APPEALS. at 16 [2005, 2023 reprint], available at https://dos.ny.gov/system/files/documents/2023/01/guidelines-for-applicants-to-the-zoning-board-of-appeals.pdf).

120. *See id.* at 336–37.

121. *Id.* (citing Conley v. Town of Brookhaven Zoning Bd. of Appeals, 353 N.E.2d 594, 597 (N.Y. 1976); Jones v. Zoning Bd. of Appeals of the Town of Oneonta, 934 N.Y.S.2d 599, 603 (App. Div. 3d Dep't 2011).

122. *See Source Renewables, LLC.* at 337.

123. *See id.* (citing Supkis v. Town of Sand Lake Zoning Bd. of Appeals, 642 N.Y.S.2d 374, 377 (App. Div. 3d Dep't 1996)).

would be void by virtue of that fact alone.[124] The court rebuffed the contention, concluding that "[o]nce, Applicants demonstrated entitlement to the requested area variances, Applicants could, in such a case, reapply for the use variance for the same project and the area variances would continue to be in effect."[125] The statutory standards for use and area variances are conspicuously different. Although a proposed project could not be implemented if a use variance approving the use were to be invalidated, that conclusion would not render approved area variances invalid.

2. Substantiality

The Petitioners in *Citizens United* also contended that the numerous area variances approved should be invalidated because, it was claimed, the percentage deviations from the applicable bulk requirements were substantial.[126] In sustaining the Zoning Board of Appeals' finding that, despite the magnitude of many of the variances, the variances were not substantial, the court opined that "[a]lthough one approach to analyzing this question is to look . . . solely at statistics and percentages, another approach is to view the totality of the circumstances and the overall effect of the granting of relief."[127] Significantly, the court approvingly quoted the decision in *Aydelott v. Town of Bedford Zoning Board of Appeals* in which the court determined that a:

> ZBA's consideration of this percentage deviation alone, taken in a vacuum, is not an adequate indicator of the substantiality of the Petitioner's Variance Application. Certainly, a small

124. *See* Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo, Nos. 031155/2022, 032462/2022, 2023 N.Y. Slip Op. 31194(U), at 15 (Sup. Ct. Rockland Cnty. Apr. 13, 2023).

125. *Id.* at 44.

126. *See id.*

127. *Id*. (discussing Kleinhaus v. Zoning Bd. of Appeals of the Town of Cortlandt, N.Y.L.J., Mar. 26, 1996, at 37 (Sup. Ct. Westchester Cnty. 1996); Raubvogel v. Bd. Of Zoning Appeals of the Vill. of Brookville*,* N.Y.L.J., Dec. 27, 1995, at 33 (Sup. Ct. Nassau Cnty. 1995); Korean Evangelical Church of Long Island v. Bd.of Appeals of the Vill. of Westbury, N.Y.L.J., Feb. 28, 1996, at 31 (Sup. Ct. Nassau Cnty. 1996); WWA Realty Holding II LLC v. Bd. of Zoning Appeals of the Vill. of Lynbrook, N.Y.L.J., Feb. 17, 2004, at 22 (Sup. Ct. Nassau Cnty. 2004); Aydelott v. Town of Bedford Zoning Bd. of Appeals, N.Y.L.J., June 25, 2003, at 21 (Sup. Ct. Westchester Cnty. 2003)); *see also* Niceforo v. Zoning Bd. of Appeals of the Town of Huntington, 537 N.Y.S.2d 579 (App. Div. 2d Dep't 1989), *appeal denied*, 545 N.E.2d 870 (N.Y. 1989)).

> deviation can have a substantial impact or a large deviation can have little or no impact depending on the circumstances of the variance application. Substantiality must not be judged in the abstract. The totality of the relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one.[128]

Consistent with that reasoning, the *Citizen's United* court determined that:

> [C]ourts have consistently held that zoning boards of appeal generally should not, and courts often will not, view substantiality in the abstract. The totality of the relevant circumstances must be evaluated in determining whether a deviation truly is substantial. The effect of the variance on the neighborhood, its true impact and the necessity for compliance with a regulation's mandate all are highly significant considerations in undertaking such an analysis.[129]

The Zoning Board of Appeals found that:

> [W]hen the totality of the circumstances are considered, including the fact that the proposal is consistent with the pattern of development in the neighborhood and at a density that is the same or less than that prevailing in the neighborhood, the relief requested is not substantial. In addition, as found by the Planning Board in adopting a Negative Declaration, the proposal will not have a significant adverse impact on the neighborhood.[130]

Fittingly, the court sustained the Zoning Board of Appeals' finding that the requested area variances were not substantial.[131]

3. Character of Neighborhood

Protecting the character of an area is one of the principal goals of zoning in general and perhaps the most significant consideration in evaluating area variance applications.[132] As a result, the consistency or dissimilarity from the predominant character of a neighborhood is one

128. *Id*. at 46 (quoting *Aydelott*, N.Y.L.J., June 25, 2003, at 26).

129. *Citizens*, 2023 N.Y. Slip Op. 31194(U), at 46–47 (citing N.Y. TOWN LAW § 267-b (McKinney 2023)).

130. *Id*. at 47.

131. *See id.* at 48–49.

132. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 394–96 (1926).

of the most compelling characteristics of the assessment of an area variance application.[133]

The Petitioner in *Pomponio v. DeChance* applied for area variances to subdivide a 17,839 square foot parcel into two lots, with a single-family dwelling to be constructed on one of the lots, which lot was proposed to consist of 4,000 square feet.[134] The Zoning Board of Appeals denied the application, concluding that the 4,000 square foot lot "'would bear no resemblance to the established development pattern of this neighborhood,' in which the minimum required lot size was 22,500 square feet."[135] In affirming dismissal of the petition challenging the denial, the appellate division concluded that the evidence in the record supported the finding that the proposed subdivision and requested variances would not conform to the established pattern of development and would produce an undesirable change in the character of the neighborhood.[136]

In *White Birch Circle Realty Corp. v. DeChance*, the court affirmed the denial of an application for area variances required in order to construct a single-family dwelling with access over an unimproved roadway.[137] The Zoning Board of Appeals aptly weighed the statutory considerations and appropriately concluded that the requested variances would produce an undesirable change in the character of the neighborhood.[138] The record substantiated that the proposed development was inconsistent with the pattern of development in the area with respect to lot size.[139] A number of lots of similar size were not comparable because they were created as a result of environmental constraints not present on the subject property.[140] In addition, employing the statistical

133. *See* Vereland Homes, Inc. v. Bd. of Appeals of the Town of Hempstead, 831 N.Y.S.2d 351, 351 (Sup. Ct. Nassau Cnty. 2006) ("[T]he conformity or dissimilarity of a property, as compared to the prevailing conditions in the neighborhood with respect to bulk and area, is a highly significant consideration" in reviewing an area variance application. (citing N.Y. TOWN LAW § 267-b, p. 56 (McKinney 2023) (Supplementary Practice Commentaries)).

134. *See* Pomponio v. DeChance, 191 N.Y.S.3d 411, 412 (App. Div. 2d Dep't. 2023).

135. *Id.*

136. *See id.* at 413 (citing Foster v. DeChance, 178 N.Y.S.3d 786, 788 (App. Div. 2d Dep't 2022)).

137. *See* White Birch Circle Realty Corp. v. DeChance, 182 N.Y.S.3d 719, 720 (App. Div. 2d Dep't. 2023).

138. *See id.* at 720–21.

139. *See id.*

140. *See id.* at 721.

approach, the variances were considered to be substantial, given the number of variances required, including lot area and lot frontage variances amounting to 80% and 54% deviations from zoning law, respectively.[141] In addition, viable alternatives existed, including acquisition of adjacent, undeveloped lots.[142]

On the other hand, the *Citizens United* court concluded that the record supported the finding that the proposed development was consistent with the character of development in the neighborhood and with the overwhelming pattern of development of multi-family housing in the vicinity.[143] The property was adjacent to large apartment buildings and the remainder of the area was characterized by three-family dwellings with multiple accessory apartments.[144] Moreover, the record was devoid of any evidence of significant adverse impacts from the proposed development.[145] In addition, the Planning Board had adopted a well-reasoned Negative Declaration which found that there were no deleterious impacts.[146]

F. Not All Necessary Variances Sought

Does the failure to seek all area variances required for a development affect the validity of approved variances? The court in *Nunnally v. Zoning Board of Appeals of the Town of New Windsor*, rejected the claim that the variances granted should be annulled because not all variances necessary for the project had been sought.[147] "[I]n the absence of an administrative determination to review, a zoning board of appeals is without power to grant a variance or render a *de novo* determination with respect to an issue not determined by an administrative official."[148] The only matters that could be decided by the Zoning Board of Appeals in *Nunnally* related exclusively to the four variances

141. *See id.* at 721.

142. *See White Birch Circle Realty Corp*., 182 N.Y.S.3d at 721.

143. *See* Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo, Nos. 031155/2022, 032462/2022, 2023 N.Y. Slip Op. 31194(U), at 47 (Sup. Ct. Rockland Cnty. Apr. 13, 2023).

144. *See id*. at 48.

145. *See id.*

146. *See id.*

147. *See* Nunnally v. Zoning Bd. of Appeals of the Town of New Windsor, 193 N.Y.S.3d 43, 47 (App. Div. 2d Dep't 2023).

148. *Id.* at 47 (quoting Capetola v. Town of Riverhead, 144 N.Y.S.3d 203, 206 (App. Div. 2d Dep't 2021)).

requested.[149] There was no determination by an administrative official regarding the need for any other area variances.[150]

Whether further variances in addition to those sought are required in order to construct a specific project is irrelevant to the validity of variances that are approved. Instead, whether additional variances are necessary is an issue for the Building Inspector at the time of application for a building permit. If additional variances are required, a building permit should be denied. However, that does not affect the validity of previously approved variances for a project.

II. STANDING

"Standing is . . . a threshold requirement for a plaintiff seeking to challenge governmental action."[151] 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."[152] "The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action . . . ."[153] Unless one's property is located in close proximity to the location of a condition upon which aggrievement is claimed, a petitioner lacks a cognizable injury in fact.[154] Even if one's property is located in sufficient proximity to the site of a development, the status of a neighbor does not automatically provide entitlement to judicial review in every instance.[155] A petitioner's close physical proximity as a neighbor to a proposed project may give rise to an inference of harm, but standing will not be recognized unless the

149. *See id.*

150. *See id.*

151. N.Y. Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 407 (N.Y. 2004).

152. 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).

153. Soc'y of Plastics Indus. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1040 (N.Y. 1991).

154. *See* Oates v. Vill. of Watkins Glen, 736 N.Y.S.2d 478, 481 (App. Div. 3d Dep't 2002); *see generally* Buerger v. Town of Grafton, 652 N.Y.S.2d 880, 881 (App. Div. 3d Dep't 1997), *lv. denied*, 681 N.E.2d 1303 (N.Y. 1997) (standing will be conferred upon a party seeking review only if it can demonstrate that it will suffer a specific environmental injury rather than one that is solely economic in nature).

155. *See* Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of the Town of North Hempstead, 508 N.E.2d 130, 134 (N.Y. 1987).

neighbor can show that the close proximity exposes him or her to a harm different from the that experienced by the public generally.[156]

The Zoning Board of Appeals in *Nunnally v. Zoning Board of Appeals of the Town of New Windsor* had granted area variances for the construction a hotel.[157] The proposed hotel was to be a four-story, eighty-eight–room hotel located approximately 1,050 feet from the Petitioner's property.[158] The appellate division affirmed the conclusion that the Petitioner lacked standing to challenge the Zoning Board of Appeals' approval of variances for building height, minimum side-yard setback requirement and minimum total side-yard setback requirement.[159]

The court reiterated that "a petitioner must establish standing by showing that it will suffer an injury-in-fact and that the alleged injury falls within the zone of interests sought to be protected by the statute."[160] Further, "[i]n land use matters, a petitioner must establish standing by showing 'that it would suffer direct harm, injury that is in some way different from that of the public at large.'"[161] In land use matters, "an inference of direct harm may arise from the petitioner's proximity to the property that is the subject of the administrative action: the closer the petitioner, the stronger the inference."[162] Because the hotel would be approximately 1,050 feet from the Petitioner's property, it was "too far a distance to allow a presumption of an injury-in-fact."[163] The Petitioner did not otherwise establish standing to challenge the area variances by establishing, beyond conclusory

156. *See id.*; *see also Soc'y of the Plastics Indus.*, 573 N.E.2d at 1041–42 (citing Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, 559 N.E.2d 641, 644 (N.Y. 1990)).

157. *See* Nunnally v. Zoning Bd. of Appeals of the Town of New Windsor, 193 N.Y.S.3d 43, 45 (App. Div. 2d Dep't 2023).

158. *See id.*

159. *See id.*

160. *Id.* (citing *Soc'y of Plastics Indus.*, 573 N.E.2d at 1041; *Sun–Brite Car Wash*, 508 N.E.2d at 134).

161. *Id.* (quoting *Soc'y of Plastics Indus.*, 573 N.E.2d at 1041).

162. *Nunnally*, 193 N.Y.S.3d at 45 (quoting Panevan Corp. v. Town of Greenburgh, 40 N.Y.S.3d 530, 532 (App. Div. 2d Dep't 2016).

163. *Id.* at 45–46 (first citing Riverhead Neighborhood Preserv. Coalition, Inc. v. Town of Riverhead Town Bd., 977 N.Y.S.2d 382, 385 (App. Div. 2d Dep't 2013); then citing Tuxedo Land Trust, Inc. v. Town Bd. of Town of Tuxedo, 977 N.Y.S.2d 272, 274 (App. Div. 2d Dep't 2013); and then citing Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Bd., 60 N.Y.S.3d 381, 384 (App. Div. 2d Dep't 2017) (2,000 feet)).

allegations, a cognizable injury that falls within the zone of interests that is different from that of the public at large.[164]

Whether a contract vendee who had appealed a determination of a building inspector or, in the alternative, sought area variances, possessed standing to challenge an adverse determination of a zoning board of appeals when the contract vendee's contract was canceled prior to the institution of an Article 78 proceeding was the issue in *Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown*.[165] The Petitioner, a State-chartered education corporation, provided secular and Jewish religious instruction to girls in grades pre-K through 12.[166] After the Petitioner had entered into a contract to purchase the property to use as a house of worship and a school, the Building Inspector denied its application for a building permit, determining that area variances were required.[167] The seller subsequently terminated the contract and revoked its consent for the Petitioner to make land use applications because the Petitioner had failed to appear at the scheduled closing for the property.[168] The Zoning Board of Appeals subsequently refused to entertain the Petitioner's appeal because the owner's consent had been revoked.[169] The supreme court granted the Town's motion to dismiss a number of the causes of action, finding that the Petitioner lacked standing.[170]

In affirming the decision, the appellate division reiterated that "[c]hallenges to zoning determinations may only be made by those 'aggrieved' by the determination."[171] Generally, "the immediate parties to an administrative proceeding are aggrieved persons who may seek judicial review."[172] However, the Petitioner in *Ateres Bais Yaakov Academy of Rockland* had lost whatever interest it possessed in the property once the contract was cancelled and the consent to make the

164. *See id*. at 46 (citing *Soc'y of Plastics Indus.*, 573 N.E.2d at 1043).

165. *See* Ateres Bais Yaakov Acad. of Rockland v. Town of Clarkstown, 193 N.Y.S.3d 126, 129 (App. Div. 2d Dep't 2023).

166. *See id*. at 128.

167. *See id*. at 128–29.

168. *See id*. at 129.

169. *See id*.

170. *See Ateres Bais Yaakov Acad. of Rockland*, 193 N.Y.S.3d at 129.

171. *Id*. (*citing* N.Y. TOWN LAW § 267–c(1) (McKinney 2023); *see* Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals of the Town of North Hempstead, 508 N.E.2d 130, 133 (N.Y. 1987); *see also* 3965 Amboy Rd., Inc. v. Limandri, 114 N.Y.S. 3d 659, 660 (App. Div. 2d Dep't 2020)).

172. *Id*. (quoting Sun–Brite Car Wash, 508 N.E.2d at 133).

land use applications was revoked.[173] Accordingly, although a party to the administrative proceedings, the Petitioner lacked standing to challenge the Building Inspector's determination.[174]

The Petitioner also failed to satisfy the conventional requirements for standing because it did not suffer an injury-in-fact falling within the zone of interests sought to be protected by the pertinent zoning regulation.[175] Zoning laws "are enacted to protect the health, safety and welfare of the community."[176] The Petitioner alleged that the Building Inspector's denial of the building permit application and the Zoning Board of Appeals' delay and refusal to consider the appeal caused it to lose its financing, culminating in cancellation of the contract.[177] However, the loss of an interest in a contract is not within the zone of interests protected by the zoning regulation pursuant to which the Building Inspector denied the permit.[178]

III. SEQRA-STANDING, HARMLESS ERROR

The *Citizens United* court rejected the Petitioner's contention that a number of agencies that were not listed as involved agencies for SEQRA purposes, in fact, were involved agencies and, thus, the Planning Board violated the procedures dictates of SEQRA.[179] However, the Petitioners lacked standing to make such a claim because "[a] challenge [to lead agency status] may only be commenced by another involved agency."[180] In addition, the County Department of Planning

173. *See id*. at 130.

174. *See id*. (first citing Violet Realty, Inc. v. Cnty. of Erie, 72 N.Y.S.3d 267, 269 (App. Div. 4th Dep't 2018); and then citing Madonia v. Board of Zoning Appeals, 755 N.Y.S.2d 84, 85 (App. Div. 2d Dep't 2002)).

175. *See Ateres Bais Yaakov Acad. of Rockland*, 193 N.Y.S.3d at 130 (citing Soc'y of Plastics Indus. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1041 (N.Y. 1991)).

176. *Id*. (*citing Sun–Brite Car Wash*, 508 N.E.2d at 132).

177. *See id*.

178. *See id*. (first citing Sun–Brite Car Wash, 508 N.E.2d at 13; then citing Tappan Cleaners v. Zoning Bd. of Appeals of Vill. of Irvington, 868 N.Y.S.2d 320, 321 (App. Div. 2d Dep't 2008); and then citing Long Island Bus. Aviation Ass'n v. Town of Babylon, 815 N.Y.S.2d 217, 218 (App. Div. 2d Dep't 2006)).

179. *See* Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo, Nos. 031155/2022, 032462/2022, 2023 N.Y. Slip Op. 31194(U), at 32–33 (Sup. Ct. Rockland Cnty. Apr. 13, 2023).

180. *Id*. at 57 (quoting Hart v. Town of Guilderland, 151 N.Y.S.3d 700, 706 (App. Div. 3d Dep't 2021) (quoting King v. Cnty. of Saratoga Indus. Dev. Agency, 622 N.Y.S.2d 339, 344 (App. Div. 3d Dep't) (internal quotation marks and citation omitted), *lv. denied*, 651 N.E.2d 920 (N.Y. 1995) (citing Vill. Of Poquott v. Cahill,

was not an involved agency because a county planning agency making a recommendation pursuant to General Municipal Law sections 239-l, -m and -n is not a permitting agency but is only authorized to make recommendations.[181]

Even if, for the sake of argument, any of those agencies should have been enumerated as involved agencies, any such hypothetical error was harmless and excusable because "[i]n various circumstances, a lead agency's nonprejudicial misstep in the SEQRA environmental review procedure may be excused as harmless . . . ."[182] The agencies which Petitioners claim should have been listed as involved agencies were fully involved in the review process and hence, any hypothetical error was nonprejudicial and excusable.[183]

IV. GENERAL MUNICIPAL LAW REFERRAL

General Municipal Law section 239-m(2)[184] requires that various land use applications, including variances, that are located within 500 feet of various boundaries and features be referred to the county planning agency for its review and recommendation prior to taking final action on application. General Municipal Law section 239-m(1)(c) requires the

782 N.Y.S.2d 823, 827, 539 (App. Div. 3d Dep't 2004), *lv. dismissed and denied*, 836 N.E.2d 1149 (N.Y. 2005)).

181. *See id*. at 58 (first citing Headriver, LLC v. Town Board of the Town of Riverhead, 813 N.E.2d 585, 586 (N.Y. 2004); then citing McEvoy Dodge West Ridge, Inc. v. Zoning Bd. Of Appeals, 329 N.Y.S.2d 171, 174 (Sup. Ct. Monroe Cnty. 1972); and then citing Vanderveer v. Van Rouwendaal, 348 N.Y.S.2d 55, 60 (Sup. Ct. Dutchess Cnty. 1973)).

182. *Id*. at 58–59 (quoting Rusciano & Son Corp. v. Kiernan, 752 N.Y.S.2d 377, 378 (App. Div. 2d Dep't 2002) (first citing Steele v. Town of Salem Plan. Bd., 606 N.Y.S.2d 810, 813 (App. Div. 2d Dep't 1994) (mistaken classification of action as Type II harmless where agency in fact follows procedures applicable to Type I action); then citing Jaffee v. RCI Corp., 500 N.Y.S2d 427, 429 (App. Div. 3d Dep't 1986); then citing Golden Triangle Assocs. v. Town Bd. of Town of Amherst, 585 N.Y.S.2d 895, 896 (App. Div. 4th Dep't 1992); then citing Bd. of Managers of Plaza Condo. v. N.Y.C. Dep't of Transp., 14 N.Y.S.3d 375, 376 (App. Div. 1st Dep't 2015); then citing Hartford/N. Bailey Homeowners Ass'n ex rel. Pasztor v. Zoning Bd. of Appeals of Town of Amherst, 881 N.Y.S.2d 265, 267 (App. Div. 4th Dep't), *lv. denied*, 922 N.E.2d 876 (N.Y. 2009); then citing Prospect Park E. Network v. N.Y. Homes & Cmty. Renewal, 2 N.Y.S.3d 467, 468 (App. Div. 1st Dep't 2015); and then citing Town of Victory by Richardson v. Flacke, 476 N.Y.S.2d 711, 711 (App. Div. 4th Dep't 1984)).

183. *See id*.

184. N.Y. GEN. MUN. LAW § 239-m(2) (McKinney 2023).

> referring body as an application on a proposed action, including a completed environmental assessment form and all other materials required by such referring body in order to make its determination of significance pursuant to the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations.[185]

The court rejected the contention in *Citizens United* that the General Municipal Law referral of the variance application by the Zoning Board of Appeals was inadequate because it did not contain a copy of the Negative Declaration adopted by the Planning Board.[186] Although the County Department of Planning provided numerous comments, including some related to SEQRA, it did not claim that the referral was incomplete.[187] "The Department of Planning's enumeration of recommendations without asserting that the referral was incomplete is significant."[188] The lack of an objection by the Department of Planning substantially undermined the credibility of the allegation.[189]

In addition, the Planning Board, as lead agency, had conducted a coordinated review of the action, had undertaken the environmental review and had adopted a Negative Declaration, thereby concluding the SEQRA review process for the entire action, that is, for the project and for all of discretionary approvals.[190] Therefore, the dictate of General Municipal Law section 239-m(1)(c) to provide the "materials required by such referring body in order to make its determination of significance pursuant" was irrelevant because the Zoning Board of Appeals was not required to make a SEQRA determination of significance because the Planning Board, in its capacity as lead agency in a coordinated review, had previously adopted a Negative Declaration.[191]

V. ARTICLE 78-DECISION ON THE MERITS AFTER DENIAL OF MOTION TO DISMISS

Although a motion to dismiss a petition pursuant to CPLR section 7804(f) which raises objections in point of law "proscribes dismissal on the merits following such a motion," an exception exists authorizing a

185. N.Y. GEN. MUN. LAW § 239-m(1)(c) (McKinney 2023).

186. *See Citizens United*, 2023 NY Slip Op 31194(U) at 32–33.

187. *See id.*

188. *Id.* at 33 (first citing Calverton Manor, LLC v. Town of Riverhead, 75 N.Y.S.3d 586, 590 (App. Div. 2d Dep't 2018); and then citing Calverton Manor, LLC v. Town of Riverhead, 76 N.Y.S.3d 72, 74 (App. Div. 2d Dep't 2018)).

189. *See id.*

190. *See id.*

191. *See Citizens United*, 2023 NY Slip Op 31194(U) at 33.

determination on the merits where "the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer."[192] Because there was no dispute as to the facts in *Source Renewables* and the arguments of the parties had been fully set forth in the motion papers, the court could legitimately address the merits of the petition.[193]

VI. MOOTNESS

A petitioner or plaintiff who neglects to act to maintain the *status quo* during the pendency of litigation challenging a land use approval may find that the litigation is considered to be academic if the project has been substantially completed.[194] The decision in *ENP Associates, LP v. City of Ithaca Board of Zoning Appeals* confirms that the failure to attempt to maintain the *status quo* during the pendency of litigation is likely to result in the dismissal of an action or proceeding.[195]

The Petitioner in *ENP Associates.* owned real property adjoining a short, dead-end roadway, known as Summit Avenue.[196] Summit Avenue ran over an adjacent parcel which the owner blocked in 2017 in preparation for the construction of an apartment complex on the property.[197] The Petitioner commenced an action against the owner of the property, asserting that it had a right of unobstructed access to Summit Avenue.[198] The appellate division affirmed the supreme court's granting of summary judgment dismissing the action in May 2021.[199] While that action was pending, the owner of the property obtained required area variances on three separate occasions and the Petitioner

192. Source Renewables, LLC v. Town of Cortlandville Zoning Bd. of Appeals, 185 N.Y.S.3d 331, 334 (App. Div. 3d Dep't 2023) (quoting Nassau BOCES Cent. Council of Teachers v. Bd. of Coop. Educ. Servs., 469 N.E.2d 511, 511 (N.Y. 1984) (citing Kickertz v. N.Y.U., 29 N.E.3d 893, 894 (N.Y. 2015)).

193. *See id.* (first citing Leonard v. Planning Bd. of Town of Union Vale, 26 N.Y.S.3d 293, 296–97 (App. Div. 2d Dep't 2016); then citing S & R Dev. Estates, LLC v. Feiner, 977 N.Y.S.2d 377, 379 (App. Div. 2d Dep't 2013); and then citing Hunt v. Hamilton Cnty., 652 N.Y.S.2d 402, 404 (App. Div. 3d Dep't 1997)).

194. *See* Raab v. Silverstein, 964 N.Y.S.2d 236, 237 (App. Div. 2d Dep't 2013).

195. ENP Assocs., LP v. City of Ithaca Bd. of Zoning Appeals, 193 N.Y.S.3d 334, 339 (App. Div. 3d Dep't 2023).

196. *See id.* at 336.

197. *See id.*

198. *See id*.

199. *See id*. at 337.

challenged each approval in successive Article 78 proceedings.[200] The Petitioner challenged the decision of the supreme court in the consolidated proceedings which granted the Respondents' motion to dismiss the petition.[201]

The Respondents contended in the appellate division that the appeal was moot because the construction was substantially complete.[202]

> Although "the doctrine of mootness may be invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy, where the change concerns the completion of construction," the completion itself is not dispositive since the constructed structure could still be demolished, and "courts must consider several factors, including whether the challengers sought preliminary injunctive relief or otherwise attempted to preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation."[203]

"Other '[f]actors weighing against mootness may include whether a party proceeded in bad faith and without authority,' whether 'novel issues or public interests such as environmental concerns warrant continuing review,' and whether 'a challenged modification [in a property's use] is readily undone, without undue hardship.'"[204]

The Petitioner in *ENP Assocs.* did not seek interim relief to secure its continued use of Summit Avenue or to prevent construction on the property while the matter was pending in supreme court, except for an unsuccessful effort to obtain a stay or temporary injunctive relief during the pendency of the proceeding.[205] Further substantiating a claim of mootness, although the property owner had obtained all required

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200. *See ENP Assocs.*, 193 N.Y.S.3d at 337.

201. *See id.*

202. *See id.*

203. *Id.* at 337–38 (quoting Town of N. Elba v. Grimditch, 13 N.Y.S.3d 601, 607 (App. Div. 3d Dep't 2015) (internal quotation marks, brackets and citation omitted), *lv. denied,* 38 N.E.3d 830 (N.Y. 2015) (first citing Citineighbors Coal. of Hist. Carnegie Hill v. N.Y.C. Landmarks Preserv. Comm'n., 811 N.E.2d 2, 4 (N.Y. 2004); and then citing Kowalczyk v. Town of Amsterdam Zoning Bd. of Appeals, 944 N.Y.S.2d 660, 662 (App. Div. 3d Dep't 2012)).

204. *Id.* (quoting Dreikausen v. Zoning Bd. of Appeals of City of Long Beach, 774 N.E.2d 193, 197 (N.Y. 2002) (first citing Kopald v. N.Y. Pub. Serv. Comm'n., 166 N.Y.S.3d 694, 696 (App. Div. 3d Dep't 2022), *lv. denied,* 199 N.E.3d 903 (N.Y. 2022); then citing City of Ithaca v. N.Y. Dep't of Env't Conservation, 135 N.Y.S.3d 503, 505 (App. Div. 3d Dep't 2020), *lv. denied,*174 N.E.3d 374 (N.Y. 2021)).

205. *See ENP Assocs.*, 193 N.Y.S.3d at 338.

approvals and commenced construction, the Petitioner neglected to seek a stay while the matter was pending in the appellate division or to ensure that the appeals were heard expeditiously.[206] The apartment complex was substantially completed while the ligation was pending, a temporary certificate of occupancy was issued and, by the time of oral argument of the appeal, the apartment complex was completed, a certificate of occupancy was issued, and the apartments were 100% occupied.[207]

The Petitioner had made minimal efforts to maintain the *status quo* and

> "construction on the [apartment] complex has long since been completed, and indeed much of it has been leased out and is occupied," and . . . the construction of the apartment complex at the subject property cannot be undone without causing undue hardship to both respondents and the tenants now residing there.[208]

Moreover, the owner did not proceed with the construction in bad faith because it had obtained all required approvals and the "ongoing construction was visible to all and certainly did not involve 'a race to completion.'"[209]

Consequently, although not entirely determinative of the issue, the failure to move for *pendente lite* relief is likely to result in the dismissal of litigation or an appeal if substantial construction of the project has been completed because "[t]he primary factor in the mootness analysis is 'a challenger's failure to seek preliminary injunctive relief or otherwise preserve the *status quo* to prevent construction from commencing or continuing during the pendency of the litigation.'"[210] Additionally, a litigant is required to "move for injunctive relief at each

206. *See id.*

207. *See id.*

208. *Id.* (quoting Stockdale v. Hughes, 592 N.Y.S.2d 897, 900 (App. Div. 3d Dep't 1993) (citing Granger Group v. Zoning Bd. of Appeals of Town of Taghkanic, 897 N.Y.S.2d 604, 605 (App. Div. 3d Dep't 2009); *but cf.* Micklas v. Town of Halfmoon Planning Bd., 97 N.Y.S.3d 339, 341–42 (App. Div. 3d Dep't 2019)).

209. *Id.* (citing Kowalczyk v. Town of Amsterdam Zoning Bd. of Appeals, 944 N.Y.S.2d 660, 663 (App. Div. 3d Dep't 2012) (quoting *Dreikausen*, 746 N.Y.S.2d at 432) (citing *City of Ithaca*, 135 N.Y.S.3d at 505–06).

210. Sierra Club v. N.Y. Dep't of Env't Conservation, 94 N.Y.S.3d 741, 743 (App. Div. 4th Dep't 2019).

stage of the proceeding."[211] Accordingly, a litigant must seek *pendente lite* relief to preserve the *status quo* at every stage of litigation in order to avoid a potential mootness argument.

VII. EQUITABLE ESTOPPEL

"The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted."[212] The doctrine of equitable estoppel is intended to prevent the infliction of unconscionable injury and loss on one who has relied on the promise of another.[213] The moving party bears the burden to demonstrate by clear and convincing evidence that the movant is entitled to invoke the doctrine of equitable estoppel.[214] The doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances.[215] Equitable estoppel should be applied only when the grounds for its application are fully established, and only when the failure to do so would defeat a right legally and rightfully obtained by another.[216]

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211. Weeks Woodlands Ass'n. v. Dormitory Auth. of N.Y., 945 N.Y.S.2d 263, 266 (App. Div. 1st Dep't), *aff'd*, 980 N.E.2d 532 (N.Y. 2012); *see also* Comm. for Environmentally Sound Dev. v. Amsterdam Ave. Redevelopment Assocs. LLC, 144 N.Y.S.3d 1, 6 (App. Div. 1st Dep't), *lv. denied,* 174 N.E.3d 371 (N.Y. 2021); Raab v. Silverstein, 964 N.Y.S.2d 236, 237 (App. Div. 2d Dep't 2013); deZafra v. Town of Brookhaven Planning Board, No. 34733/2012, 2013 NY Slip Op 31709(U), at 4 (Sup. Ct., Suffolk Cnty. 2013) ("A party seeking to halt construction must move for injunctive relief at each state of the proceeding."); Fallati v. Town of Colonie, 634 N.Y.S.2d 784, 786 (App. Div. 3d Dep't 1995).

212. Shondel J. v. Mark D., 853 N.E.2d 610, 613 (N.Y. 2006).

213. *See* Stainless Broad. Co. v. Clear Channel Broad. Licenses, L.P., 871 N.Y.S.2d 468, 471 (App. Div. 3d Dep't 2009).

214. *See* C.M. v. S.H, 834 N.Y.S.2d 829, 831 (Fam. Ct. Nassau Cnty. 2007).

215. *See* Feliciano v. N.Y.C. Hous. Auth., 999 N.Y.S.2d 456, 458 (App. Div. 2d Dep't 2014); Mahuson v. Ventraq, Inc., 988 N.Y.S.2d 309, 311 (App. Div. 4th Dep't 2014); Sanchez v. Jericho Sch. Dist., 120 N.Y.S.3d 163, 165 (App. Div. 2d Dep't 2020) (quoting Ceely v. N.Y.C. Health & Hosp. Corp., 556 N.Y.S.2d 694, 695 (App. Div. 2d Dep't 1990)).

216. *See* Waste Recovery Enter. LLC v. Town of Unadilla, 743 N.Y.S.2d 715, 717 (App. Div. 3d Dep't 2002); *see also* Scheurer v. N.Y.C. Emps.' Ret. Sys., 636 N.Y.S.2d 291, 292 (App. Div. 1st Dep't 1996); *see also C.M.*, 834 N.Y.S. 829 at 831.

Further, "[g]enerally, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties."[217] As a result, "[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error".[218] It follows, then, that, "[a] municipality . . . is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches."[219] Consistent with the foregoing principles "[t]he prior issue to petitioner of a building permit could not 'confer rights in contravention of the zoning laws.'"[220] "[E]stoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results . . . ." [221]

The decision in *E & S Realty, LLC v. Bd. of Appeals of Vill. of Sands Point* illustrates the application of the foregoing principles.[222] The Village amended its zoning law in 1989 to prohibit the use of accessory structures in a residential district for "habitable purposes".[223] The Petitioner applied for a building permit to enlarge and renovate an accessory structure located on his property in a residential zone in 2016, which, unbeknownst to the Village, was being used as a residence.[224] After a building permit was issued to the Petitioner, improvements were completed at a substantial cost to the Petitioner.[225]

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217. Parkview Assocs. v. City of New York, 519 N.E.2d 1372, 1374 (N.Y. 1988) (quoting Scruggs–Leftwich v. Rivercross Tenants' Corp., 517 N.E.2d 1337, 1339 (N.Y. 1987) (first citing Daleview Nursing Home v. Axelrod, 464 N.E.2d 130, 131 (N.Y. 1984); and then citing Hamptons Hosp. & Med. Center v. Moore, 417 N.E.2d 533, 536 (N.Y. 1981) (citing E.F.S. Ventures Corp. v. Foster, 520 N.E.2d 1345, 1350 (N.Y. 1988)).

218. *Id*. (quoting Morley v. Arricale, 486 N.E.2d 824, 825 (N.Y. 1985)).

219. *Id*. (quoting City of Yonkers v. Rentways, Inc., 109 N.E.2d 597, 599 (N.Y. 1952)).

220. *Id*. at 1374–75 (quoting B. & G. Constr. Corp. v. Board of Appeals, 128 N.E.2d 423, 424 (N.Y. 1955) (citing Buffalo v. Roadway Tr. Co., 104 N.E.2d 96, 100 (N.Y. 1952)).

221. *Id*. at 1375 (citing Parsa v. N.Y., 474 N.E.2d 235, 237 (N.Y. 1984); New York City v. City Civ. Serv. Comm'n., 458 N.E.2d 354, 361 (N.Y. 1983)).

222. *See generally* E & S Realty, LLC v. Bd. Of Appeals of Vill. of Sands Point, 175 N.Y.S.3d 269 (App. Div. 2d Dep't 2022) (the Board properly determined the Village was not estopped from denying the petitioner's application for a certificate of completion because the Village had previously issued a building permit).

223. *See id*. at 270.

224. *See id*. at 270–71.

225. *See id*. at 271.

The Village subsequently denied a certificate of completion for the accessory structure because the building permit had been issued in error and the renovations to the accessory structure required multiple variances.[226] The Zoning Board of Appeals denied the Petitioner's appeal which sought a certificate of completion based on the doctrine of equitable estoppel.[227] The appellate division rejected the claim of equitable estoppel.[228]

The court reiterated that "'the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results.'"[229] Consequently, the issuance of a building permit does not estop a municipality from properly enforcing its zoning laws.[230] The Zoning Board of Appeals in *E & S Realty* appropriately concluded that the Village was not estopped from denying the Petitioner's certificate of completion.[231] Fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon may provide an exception permitting the application of the doctrine of equitable estoppel against a municipality.[232] However, the Petitioner in *E & S Realty* failed to demonstrate fraud, deception, or other malfeasance by the Village.[233] Accordingly, the Village was not estopped from correcting its error in issuing the building permit by denying the Petitioner's certificate of occupancy.[234]

VII. NECESSARY PARTIES-RELATION BACK

In addition to suing the municipal agency which granted a land use approval, one challenging the approval must also sue the applicant and owner of the property for which an approval has been granted and

226. *See id*.

227. *See E & S Realty, LLC*, 175 N.Y.S.3d at 271.

228. *See id*. at 272.

229. *Id*. at 271 (quoting Astoria Landing, Inc. v. N.Y.C. Env't. Control Bd., 50 N.Y.S.3d 448, 450 (App. Div. 2d Dep't 2017) (quoting Westbury Laundromat, Inc. v. Mammina, 879 N.Y.S.2d 188, 191 (App. Div. 2d Dep't 2009) (internal quotation marks omitted)).

230. *See id*. at 271–72 (citing Parkview Assocs. v. City of New York, 519 N.E.2d 1372, 1375 (N.Y. 1988)).

231. *See id.* at 272.

232. *See* Town of Copake v. 13 Lackawanna Props., LLC, 952 N.Y.S.2d 780, 784 (App. Div. 3d Dep't 2012); *see also* Stone Bridge Farms, Inc. v. Cnty. of Columbia, 931 N.Y.S.2d 449, 452 (App. Div. 3d Dep't 2011).

233. *See E & S Realty, LLC*, 175 N.Y.S.3d at 272.

234. *See id.* (citing *Parkview Assoc.*, 519 N.E.2d at 1375; *Astoria Landing*, 50 N.Y.S.3d at 451; *Westbury Laundromat*, 879 N.Y.S.2d at 191).

anyone having an equitable interest in the property.[235] One who fails to do so may attempt to rectify the defect by filing an amended petition naming the omitted party.[236] However, because of the abbreviated statute of limitations, such an attempt is likely to be untimely unless the relation back doctrine can be applied.[237]

The Petitioners in *Wood v. Vill. of Painted Post* challenged the approval of a site plan for a warehouse and trucking distribution facility, suing the Planning Board and contract vendee, but not the owner.[238] The Respondents interposed objections in point of law asserting the petition should be dismissed because of the failure to timely name the owner of the property as a respondent.[239] The supreme court granted the Petitioners' motion for leave to amend the petition to add the owner as a respondent.[240] The supreme court subsequently granted the Respondents' motion to dismiss the amended petition based on the failure to timely join a necessary party.[241]

The Appellate Division, Fourth Department determined that the owner was, indeed, a necessary party.[242] Even assuming that the contract vendee was an equitable owner of the parcel,[243] the parcel's owner, nevertheless, was a necessary party to the proceeding.[244]

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235. *See* Wittenberg Sportsmen's Club, Inc. v. Town of Woodstock Planning Bd., 792 N.Y.S.2d 661, 663 (App. Div. 3d Dep't 2005); *see also* Karmel v. White Plains Common Council, 726 N.Y.S.2d. 692, 693 (App. Div. 2d Dep't 2001); Ferruggia v. Zoning Bd. of Appeals of Town of Warwick, 774 N.Y.S.2d 760, 760–61 (App. Div. 2d Dep't 2004); Long Island Pine Barrens Soc'y v. Town of Islip, 729 N.Y.S.2d 907, 907 (App. Div. 2d Dep't), *lv. denied*, 764 N.E.2d 394 (N.Y. 2001).

236. *See generally* Wood v. Vill. of Painted Post, 189 N.Y.S.3d 845, 847 (App. Div. 4th Dep't 2023) (the Court may grant petitioner permission to amend the petition and add an omitted party under the relation back doctrine).

237. *See generally id.* (the Court held the relation back doctrine does not apply).

238. *See id.* at 846.

239. *See id.* at 846–47.

240. *See id*. at 847.

241. *See Wood*, 189 N.Y.S.3d at 847.

242. *See id*.

243. *See id.* (citing Bean v. Walker, 464 N.Y.S.2d 895, 897 (App. Div. 4th Dep't 1983)).

244. *See id*. (first citing Ferruggia v. Zoning Bd. of Appeals of Town of Warwick, 774 N.Y.S.2d 760, 760–61 (App. Div. 2d Dep't 2004); then citing Artrip v. Vill. of Piermont, 700 N.Y.S.2d 844, 844 (App. Div. 2d Dep't 1999); and then citing Franklin Park Plaza, LLC v. V & J Natl. Enters., LLC, 870 N.Y.S.2d, 193, 196 (App. Div. 4th Dep't 2008)).

The proceeding was properly dismissed because the Petitioners had failed to commence the proceeding against the owner within thirty days after the decision of the Planning Board was filed with the village clerk.[245] The court rejected the Petitioners' contention that the owner was properly added after the expiration of the statute of limitations pursuant to the "relation back doctrine."[246] The relation back doctrine may be applicable to an action or proceeding if:

> (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits, and (3) the additional party knew or should have known that, but for a mistake by the [petitioner] as to the identity of the proper parties, the action would have been brought against the additional party as well.[247]

The relation back doctrine did not apply in *Wood* because the Petitioners' error was a mistake of law not embodied by the relation back doctrine.[248] The Petitioners simply "failed to appreciate that [PPD was] legally required to be named in proceedings of this type."[249]

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245. *See id*. (first citing N.Y. VILLAGE LAW § 7-725-a(11) (McKinney 2023); and then citing Citizens Against Sprawl-Mart v. City of Niagara Falls, 827 N.Y.S.2d 803, 805 (App. Div. 4th Dep't 2007).

246. *See Wood*, 189 N.Y.S.3d at 847.

247. *Id*. (quoting Kirk v. University OB-GYN Assoc., 960 N.Y.S.2d 793, 795 (App. Div. 4th Dep't 2013) (citing Buran v. Coupal, 661 N.E.2d 978, 981 (N.Y. 1995)).

248. *See id.* (first citing Windy Ridge Farm v. Assessor of Town of Shandaken, 845 N.Y.S.2d 861, 862 (App. Div. 3d Dep't 2007), *aff'd*, 894 N.E.2d 1183 (N.Y. 2008); and then citing Doe v. HMO-CNY, 785 N.Y.S.2d 813, 817 (App. Div. 4th Dep't 2004).

249. *See id.* at 847–48 (quoting *Windy Ridge Farm*, 845 N.Y.S.2d at 862 (citing Ayuda Re Funding, LLC v. Town of Liberty, 996 N.Y.S.2d 379, 381 (App. Div. 3d Dep't 2014)).