ZONING AND LAND USE

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The Syracuse Law Review is indebted to Terry Rice for his continuous support and participation. Volume 75 marks his fortieth year contributing to the Survey on New York Law. Mr. Rice's enthusiasm as a contributor aligns with our mission in publishing the Survey. Not only do we strive to disseminate high quality legal scholarship, but we seek to enhance the practice of law in New York by assembling scholars and practitioners with exceptional grasps on their subject matter. Mr. Rice's experience and knowledge of Zoning and Land Use has been exhibited by his contribution to McKinney's, as well as by his many years representing municipalities as a practitioner. The Syracuse Law Review looks forward to many more enthusiastic contributions from Mr. Rice.

INTRODUCTION

In *Town of Beekman v. Town Board of Town of Union Vale*, the Appellate Court, Second Department sustained an encroaching municipality's determination that it was exempt from the zoning regulations of the host municipality in order to lease property owned by it in the host community to a cell phone carrier.[1] It was determined in *Patel v. Town of Rhinebeck* that because a determination on a zoning amendment is discretionary, mandamus does not lie to require a town board to "correct" an amendment purportedly made in error.[2] Because a zoning amendment promoted the general welfare of the community and was not adopted to benefit individual property owners, it was determined not to constitute spot zoning in *301 East 66th St. Condominium Corp. v. City of New York*.[3] The decision in *Manning v. City Council of City of New York* confirmed that a restrictive covenant cannot restrict a municipality from enacting zoning regulations that are inconsistent with the restrictive covenant.[4]

The Appellate Division determined in in *New York University v. City of New York* that NYU possessed standing to challenge a zoning amendment that continued a ban of university uses in a particular zoning district despite the fact that NYU did not have pending plans to use any specific property which it owned in the district for university

1. *See* Town of Beekman v. Town Bd. of the Town of Union Vale, 196 N.Y.S.3d 507, 509 (App. Div. 2d Dep't 2023).

2. *See* Patel v. Town of Rhinebeck, 208 N.Y.S.3d 642, 644 (App. Div. 2d Dep't 2024).

3. *See* 301 E. 66th St. Condo. Corp. v. City of New York, 205 N.Y.S.3d 335, 338 (App. Div. 1st Dep't 2024).

4. *See* Manning v. City Council of City of N.Y., 206 N.Y.S.3d 564, 566 (App. Div. 1st Dep't 2024).

uses.[5] Standing principles were also examined in *Green v. Town of Ramapo* in which the court determined that inhabitants of adjoining property who were neither the owners nor leaseholders lacked standing to challenge a land use approval.[6]

The decision in *Upper Delaware Hospital Corp. v. Town of Tusten Zoning Board of Appeals* illustrates that a decision to rehear a zoning board of appeals application can be effectuated only by unanimous vote of all members present.[7] *Ferris v. Grass* serves as a reminder that one who disagrees with a determination of a building inspector must exhaust available administrative remedies by appealing the decision to the zoning board of appeals before instituting an Article 78 proceeding.[8]

The Appellate Division explored various aspects of the analysis of an area variance application in *Margulies v. Town of Ramapo*.[9] Because strict rules of evidence do not apply to zoning board of appeals hearings, and hearsay evidence may be considered, the representations of an applicant's attorney establishing the basis for a variance application constituted sufficient cognizable evidence.[10] In sustaining the approval of an area variance in *Margulies*, the court determined that the Zoning Board of Appeals adequately explained its rationale for reaching a different result than its determination on the earlier application, including the owner's desire to provide a place to live for his mother-in-law and the increasing demand for housing in the area in the intervening four years due to population growth.[11] The decisions in *Margulies* and *Miller v. Zoning Board of Appeals of the City of Saratoga Springs*[12] also determined that one seeking to eliminate or modify a condition of a previously approved variance need not satisfy the otherwise applicable variance criteria. It was confirmed in *Seaview*

5. *See* N.Y. Univ. v. City of New York, 216 N.Y.S.3d 593, 597 (App. Div. 1st Dep't 2024).

6. *See* Green v. Town of Ramapo, 212 N.Y.S.3d 161, 162–63 (App. Div. 2d Dep't 2024).

7. *See* Upper Del. Hosp. Corp. v. Town of Tusten Zoning Bd. of Appeals, 203 N.Y.S.3d 437, 439 (App. Div. 3d Dep't 2024).

8. *See* Ferris v. Grass, 194 N.Y.S.3d 595, 597 (App. Div. 3d Dep't 2023).

9. *See* Margulies v. Town of Ramapo, 209 N.Y.S.3d 466, 469 (App. Div. 2d Dept. 2024).

10. *See id*. at 468 (citing FCFC Realty LLC v. Weiss, 144 N.Y.S.3d 57, 60–61 (App. Div. 2d Dep't 2021); Stein v. Bd. of Appeals, 473 N.Y.S.2d 535, 536 (App. Div. 2d Dep't 1984); Kenyon v. Quinones, 350 N.Y.S.2d 242, 246 (App. Div. 4th Dep't 1973)).

11. *See id*. at 469.

12. *See* Miller v. Zoning Bd. of Appeals of the City of Saratoga Springs, 671 N.Y.S.2d 954, 957 (Sup. Ct. Saratoga Cty. 1998).

Association of Fire Island, NY, Inc. v. Town of Islip Zoning Board of Appeals that if similar variances had not previously been approved, a zoning board of appeals could consider that approval of a variance application could establish a precedent constraining its future decision-making.[13] The applicant in *Bonadonna v. Board of Zoning Appeals of Village of Upper Brookville* failed to establish a case for binding precedence because he failed to establish whether the comparators existed prior to the enactment of the zoning law.[14]

The court reviewed the 2020 amendments to the anti-SLAPP statute, Civil Rights Law Section 76-a(1)(b) and CPLR 3211(g),[15] in *Nelson v. Ardrey,* which implied that comments made regarding a zoning application, controversy or decision made on a social platform are protected by the anti-SLAPP statute.[16]

The decision in *Guttman v. Covert Town Board* reiterates that although CPLR 7804(f) provides that if a motion to dismiss an Article 78 proceeding is denied, the court shall permit the respondent to answer, a court possesses the discretion to determine the merits of an Article 78 proceeding without allowing the respondent to answer if the facts are so fully presented in the papers that it is clear that no factual dispute exists and no prejudice will result.[17] *Seaview Association of Fire Island, NY, Inc. v. Town of Islip Zoning Board of Appeals* reiterated that judicial review of a decision of a zoning board of appeals is limited to the record before the zoning board of appeals.[18] The decision in *Kern v. Adirondack Park Agency* reminds litigants that in addition to seeking *pendente lite* relief in the trial court, a petitioner or plaintiff must also move to preserve the *status quo* in the appellate court in order to avoid a matter being deemed moot.[19]

Although Town Law Section 282[20] and Village Law Section 7-740[21] provide that an Article 78 proceeding challenging a

13. *See* Seaview Ass'n of Fire Island, NY, Inc. v. Town of Islip Zoning Bd. of Appeals, 199 N.Y.S.3d 609, 611–12 (App. Div. 2d Dep't 2023).

14. *See* Bonadonna v. Bd. of Zoning Appeals of Vill. of Upper Brookville, 198 N.Y.S.3d 368, 371 (App. Div. 2d Dep't 2023).

15. N.Y. CIV. RIGHTS LAW § 76-a(1)(b) (McKinney 2019); N.Y. C.P.L.R. 3211(g) (McKinney 2024).

16. *See* Nelson v. Ardrey, 216 N.Y.S.3d 646, 649 (App. Div. 2d Dep't 2024).

17. *See* Guttman v. Covert Town Bd., 202 N.Y.S.3d 608, 611–12 (App. Div. 4th Dep't 2023).

18. *See Seaview Ass'n of Fire Island, NY, Inc.*, 199 N.Y.S.3d at 612.

19. *See* Kern v. Adirondack Park Agency, 204 N.Y.S.3d 596, 598–99 (App. Div. 3d Dep't 2024).

20. *See* N.Y. TOWN LAW § 282 (McKinney 2024).

21. N.Y. VILLAGE LAW § 7-740 (McKinney 2024).

determination of a planning board must be commenced within thirty days after the filing of the decision in the office of the town or village clerk, the decision in *Fox v. Planning Board. of Village of Plandome* confirms that the filing of the minutes of a planning board meeting at which a determination is rendered commences the running of the statute of limitations.[22]

The decisions in *Chestnut Petroleum Dist., Inc. v. Town of Mount Pleasant Planning Board*[23] and *Preserve Pine Plains v. Town of Pine Plains Planning Board*[24] reiterate the standards applicable to the review of special permit applications. *Bali Two, LLC v. Pascale* discusses review of a decision regarding subdivision ingress and egress.[25] The decision in *WG Woodmere, LLC v. Nassau County Planning Commission* discusses the standards appliable to assessing the validity of municipal fees.[26] *Gabriele v. Zoning Board of Appeals of Town of Eastchester* reiterates that the submission of post-hearing evidence is impermissible.[27]

I. ZONING AMENDMENTS

A. Governmental Immunity

The Court of Appeals jettisoned the governmental-proprietary analysis for evaluating the applicability of local zoning regulations to the activities of other governmental entities in the host municipality in *City of Rochester v. County of Monroe*.[28] The governmental-proprietary analysis was supplanted by the "balancing of the public interests" test.[29] The balancing of public interests methodology entails a balancing of

22. *See* Fox v. Plan. Bd. of Vill. of Plandome, 196 N.Y.S.3d 177, 177 (App. Div. 2d Dep't 2023).

23. *See* Chestnut Petroleum Dist., Inc. v. Town of Mount Pleasant Plan. Bd., 201 N.Y.S.3d 475, 478 (App. Div. 2d Dep't 2023).

24. *See* Pres. Pine Plains v. Town of Pine Plains Plan. Bd., No. 500087/2024, 2024 N.Y. Slip. Op. 50696(U), at *1 (Sup. Ct. Putnam Cty. June 4, 2024).

25. *See* Bali Two, LLC v. Pascale, 207 N.Y.S.3d 554, 556 (App. Div. 2d Dep't 2024).

26. WG Woodmere, LLC v. Nassau Cnty. Plan. Comm'n, 218 N.Y.S.3d 627, 630 (App. Div. 2d Dep't 2024).

27. *See* Gabriele v. Zoning Bd. of Appeals of Town of Eastchester, 214 N.Y.S.3d 55, 57 (App. Div. 2d Dep't 2024).

28. *See* City of Rochester v. County of Monroe, 530 N.E.2d 202, 203 (N.Y. 1988).

29. *Id.*

> the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests . . . the applicant's grant of legislative authority, alternative locations in less restrictive zoning areas . . . alternative methods of providing the needed improvement [and lastly, the extent of] intergovernmental participation in the project development process and an opportunity to be heard.[30]

Despite the passage of more than thirty-five years, the courts have not identified the particular governmental entity that should undertake the balancing analysis nor provided significant guidance in assessing the germane factors.

In *Town of Beekman v. Town Board of Town of Union Vale*, the Town of Union Vale ("Union Vale") had approved a ground lease for the construction of a 150-foot monopole telecommunications tower on property it owned in the adjacent Town of Beekman ("Beekman").[31] Union Vale also determined that the project was exempt from Beekman's zoning laws.[32] Beekman challenged the resolutions adopted by Union Vale, contending that the project was not exempt from its zoning law.[33] The appellate division affirmed the supreme court's conclusion that Union Vale's balancing of the public interests analysis substantiated its finding that the project was immune from Beekman's zoning regulations.[34] The record corroborated the Board's finding that the construction of the tower would serve the public interest by alleviating a gap in cellular coverage and in assisting emergency services providers by permitting them to use the cell tower without charge.[35] The court opined that fact that the tower would benefit the private

30. *Id*. at 204 (quoting Rutgers State Univ. v. Piluso, 286 A.2d 697, 702 (N.J. 1972)); (citing Orange Cnty v. City of Apopka, 299 So. 2d 652, 655 (Fla. Dist. Ct. App. 1974)).

31. *See* Town of Beekman v. Town Bd. of Union Vale, 196 N.Y.S.3d 507, 509 (App. Div. 2d Dep't 2023).

32. *See id.*

33. *See id*.

34. *See id*.

35. *See id*. (citing Town of Hempstead v. State, 840 N.Y.S.2d 123, 126 (App. Div. 2d Dep't 2007)).

interests of Homeland Towers did not diminish the public purposes served by the tower.[36]

In jettisoning the governmental-proprietary test, the Court of Appeals related in *County of Monroe* that "[t]alismanic application of the old test 'beg[s] the critical question of which governmental interest should prevail when there is a conflict between the zoning ordinance of one political unit and the statutory authority of another unit *to perform a designated public function*.'"[37] It is doubtful that the lease of municipal land for the construction and use of a cell tower, even with its attendant use by emergency services agencies, is a "public function" for which zoning immunity may apply. In opining that the benefit to a private entity "[did] not undermine the public purposes served by the tower," the court cited the Court of Appeals decision in *Crown Communication New York, Inc. v. Department of Transportation of the State of New York*.[38] The Court of Appeals found in *Crown Communication* that cell towers constructed by a private entity on State Department of Transportation property were not subject to local zoning laws pursuant to the balancing of public interests' test.[39] The court found that the installation of licensed commercial antennae on the towers on DOT land served "a number of significant public interests that are advanced by the State's overall telecommunications plan."[40] The court related that the installation of the commercial antennae on the towers should be accorded immunity because co-location serves several significant public interests that are advanced by the State's overall telecommunications plan and improves the availability of 911 emergency cellular calls made by the public.[41] "In sum, the public and private uses of the towers are sufficiently intertwined to justify exemption of the wireless providers from local zoning regulations."[42] Distinguishing the scenario reviewed in *Town of Beekman*, the towers

36. *See Town of Beekman*, 196 N.Y.S.3d at 509 (citing Crown Commc'n N.Y., Inc. v. Dep't of Transp. of N.Y., 824 N.E.2d 934, 939 (N.Y. 2005)); cf. Little Joseph Realty, Inc. v. Town of Babylon, 363 N.E.2d 1163, 1166–67 (N.Y. 1977) (noting how sizeable private benefits were instructive under the governmental-proprietary test).

37. Cnty. of Monroe's Compliance with Certain Zoning & Permit Requirements, 530 N.E.2d 202, 203 (N.Y. 1988) (citing Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971)) (emphasis added).

38. *See Town of Beekman*, 196 N.Y.S.3d at 509 (citing *Crown Commc'n N.Y.*, 824 N.E.2d at 939).

39. *See Crown Commc'n N.Y.*, 824 N.E.2d at 939.

40. *Id*. at 938.

41. *See id*. at 938–39.

42. *Id*. at 939.

reviewed in *Crown Communication* were erected by the State DOT and were part of a larger statewide wireless system designed to enable intergovernmental communication, particularly in emergency situations.[43] On the other hand, the lease of public land for the construction and operation of a telecommunications tower considered in *Town of Beekman* ostensibly is a revenue driven decision extraneous to traditional governmental functions. Although the tower seemingly was necessary to alleviate a gap in cell phone coverage, the provision of cell phone service is not a traditional governmental function. Permitting use of the tower by emergency services providers, a typical concession, does not transform that which is a private enterprise into a governmental venture. Although there may be an overall public benefit by improving cell service, it is a minimal burden for a provider to be required to obtain site plan approval, at which time any deleterious impacts may be required to be ameliorated. Moreover, although the Telecommunications Act[44] significantly restricts municipal review authority of cell tower applications, it does not eclipse local zoning authority or divest the host municipality of review authority.[45]

The courts also have not discussed the appropriate municipal agency to conduct the public interest weighing analysis. Although any such determination is subject to judicial review, it seems to be inappropriate for the encroaching municipal entity to render the determination. Moreover, the lease of public property for cell towers should not be considered to be an exempt public function in most circumstances. Suitable protection is provided to cell service providers by the Telecommunications Act.

B. Mandamus to Compel Correction of Zoning Map

The petitioners in *Patel v. Town of Rhinebeck* were the owners of two vacant parcels who claimed that the properties had been zoned "Highway Business" when they purchased the properties.[46] Subsequent to their purchase of the land, the Town Board amended the zoning law which rezoned one of the petitioners' parcels of property to

43. *See id*. at 938; *Town of Beekman*, 196 N.Y.S.3d at 509.

44. Pub. L. No. 104-104, 110 Stat. 56.

45. *See* Sprint Spectrum L.P. v. Willoth, 996 F. Supp. 253, 256 (W.D.N.Y. 1998), *aff'd*, 176 F.3d 630, 634 (2d Cir. 1999) (citing BellSouth Mobility, Inc. v. Gwinnett Cnty., 944 F. Supp. 923, 927 (N.D. Ga. 1996); Gondolfo v. Town of Carmel, 174 N.Y.S.3d 197, 211 (Sup. Ct. Putnam Cty. 2022)).

46. Patel v. Town of Rhinebeck*,* 208 N.Y.S.3d 642, 643 (App. Div. 2d Dep't 2024).

"Neighborhood Residential."[47] Following the Town Board's refusal to "correct the error" by rezoning the residentially zoned property to a business zoning designation, the petitioners instituted an Article 78 proceeding in the nature of mandamus to compel the Town to correct the supposed error and to rezone the residentially zoned parcel to a business zoning designation.[48] The Appellate Division affirmed the Supreme Court's dismissal of the proceeding.[49]

The court observed that "[t]he extraordinary remedy of mandamus is available in limited circumstances only to compel the performance of a purely ministerial act which does not involve the exercise of official discretion or judgment, and only when a clear legal right to the relief has been demonstrated."[50] "Discretionary acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."[51]

The petitioners in *Patel* failed to establish a clear legal right to the relief requested.[52] Instead, they sought to compel the exercise of the Town Board's discretion and judgment.[53] The zoning law did not impose a duty on the Town Board to correct any claimed error in the designation of the zoning district applicable to a parcel upon demand from a property owner.[54] An amendment to the zoning law to change the applicable zoning designation for the parcel would necessitate a legislative act, which cannot be compelled in a mandamus proceeding.[55]

C. Spot Zoning

"Spot zoning" is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment

47. *Id.*

48. *Id.*

49. *Id.* at 644.

50. *Id.* at 644 (quoting Rose Woods, LLC v. Weisman, 924 N.Y.S.2d 574, 575 (App. Div. 2d Dep't 2011); then citing Klostermann v. Cuomo, 463 N.E.2d 588, 595 (N.Y. 1984); then citing N.Y. C.P.L.R. § 7803(1) (MCKINNEY 2003)).

51. *Patel*, 208 N.Y.S.3d at 644 (quoting All. to End Chickens as Kaporos v. N.Y.C. Police Dep't, 114 N.E.3d 1070, 1070 (N.Y. 2018); then citing N.Y.C.L. Union v. State, 824 N.E.2d 947, 953 (N.Y. 2005)).

52. *See id.*

53. *See id*.

54. *See id*.

55. *See id*. (citing Hampshire Recreation, LLC v. Vill. of Mamaroneck, 119 N.Y.S.3d 890, 891 (App. Div. 2d Dep't 2020)).

of other owners.[56] Zone changes do not constitute spot zoning simply because a single parcel is benefitted by an amendment.[57] "[I]f a zoning amendment is consistent with the municipality's comprehensive plan, it is not spot zoning."[58] Accordingly, where detailed planning corroborates the basis for a zoning amendment, the courts are unlikely to find that the amendment was not enacted in accordance with a comprehensive plan.[59]

The petitioner in *301 East 66th St. Condominium Corp. v. City of New York* asserted that a rezoning amendment to permit a laboratory and blood donation center constituted spot zoning.[60] In rebuffing the claim, the court stated that "[t]he vice of spot zoning is its inevitable effect of granting to a single owner a discriminatory benefit at the expense and to the detriment of his neighbors, without any public advantage or justification."[61] Hence, the "relevant inquiry" is whether the zoning amendment "was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community."[62]

The amendment challenged in *301 East 66th St. Condominium Corp.* did not constitute spot zoning benefitting only one property owner.[63] To the contrary, "it brought other existing properties with nonconforming lots in the rezoned area . . . into conformity, and was also 'part of a well-considered and comprehensive plan calculated to serve the general welfare of the community.'"[64]

D. Restrictive Covenants

The court considered in *Manning v. City Council of City of New York* whether a private restrictive covenant can inhibit a local legislative

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56. *See* Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 734 (N.Y. 1951).

57. *See id.* at 735; Marcus v. Board of Trs. of Vill. of Wesley Hills, 947 N.Y.S.2d 591, 593 (App. Div. 2d Dep't 2012).

58. Dodson v. Town Bd. of the Town of Rotterdam, 119 N.Y.S.3d 590, 595 (App. Div. 3d Dep't 2020) (quoting Heights of Lansing, LLC v. Vill. of Lansing, 75 N.Y.S.3d 607, 610–11 (App. Div. 3d Dep't 2018).

59. *See* Goodrich v. Southampton, 355 N.E.2d 297, 297 (N.Y. 1976)).

60. 301 E. 66th St. Condo. Corp. v. City of New York, 205 N.Y.S.3d 335, 337 (App. Div. 1st Dep't 2024).

61. *Id.* at 338 (quoting Thomas v. Town of Bedford, 184 N.E.2d 285, 288 (N.Y. 1962)).

62. *Id.* (quoting *Rodgers*, 96 N.E.2d at 735).

63. *See id.*

64. *Id.* (quoting Douglaston Civic Ass'n v. City of New York, 159 N.Y.S.3d 23, 24 (App. Div. 1st Dep't 2021)); *cf.* Residents for Reasonable Dev. v. City of New York, 11 N.Y.S.3d 116, 118 (App. Div. 1st Dep't 2015).

body from adopting a zone change or zoning amendment.[65] The petitioner asserted that the rezoning of a parcel violated restrictive covenants in the deed that conveyed the Governors Island National Monument to the predecessor of the current owner, the U.S. National Park Service.[66] The court affirmed the dismissal of the action because

> the use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement.[67]

Zoning regulations and restrictive covenants are distinct mechanisms. A property owner may be prohibited from using property for a use permitted by a zoning law if it is prohibited by the provisions of a restrictive covenant. However, a restrictive covenant cannot constrain a municipality from adopting zoning regulations that are inconsistent with a restrictive covenant.

II. STANDING

"Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation."[68] The burden of establishing standing is on the party seeking review.[69] In order to demonstrate standing, a litigant must establish that he or she has "suffered an injury in fact, distinct from that of the general public" and "that the injury claimed falls within the zone of interests to be protected by the statute challenged."[70] Hypothetical or speculative allegations of injury are insufficient to establish standing.[71] "The existence

65. *See* Manning v. City Council of City of N.Y., 206 N.Y.S.3d 564, 566 (App. Div. 1st Dep't 2024).

66. *See id.* at 566.

67. *Id.* (quoting Friends of the Shawangunks, Inc. v. Knowlton, 476 N.E.2d 988, 990 (N.Y. 1985)).

68. Soc'y of the Plastics Indus. v. Cty. of Suffolk, 573 N.E.2d 1034, 1038 (N.Y. 1991) (citing Dairylea Coop. v. Walkley, 339 N.E.2d 865, 867 (N.Y. 1975)).

69. *See id.*

70. Transactive Corp. v. N.Y. State Dep't of Soc. Servs., 706 N.E.2d 1180, 1183 (N.Y. 1998) (citing *Soc'y of the Plastics Indus.*, 573 N.E.2d at 1042–44); *see also* Sun-Brite Car Wash v. Bd. of Zoning & Appeals of the Town of N. Hempstead, 508 N.E.2d 130, 133–34 (N.Y. 1987).

71. *See* Long Island Bus. Aviation Ass'n, Inc. v. Town of Babylon, 815 N.Y.S.2d 217, 218 (App. Div. 2d Dep't 2006); N.Y. State Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 407 (N.Y. 2004); Brighton Residents Against

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 . . . ."[72] Although close physical proximity as a neighbor to a proposed project may give rise to an inference of injury, standing will not be accorded a litigant unless he or she can establish that the close proximity exposes him or her to a harm different from that experienced by the public generally.[73]

In a decision that is likely to be reviewed by the Court of Appeals, the First Department determined in *New York University v. City of New York*, that New York University ("NYU") possessed standing to challenge a zoning amendment which maintained a ban of university uses (classrooms and dormitories) in the SoHo/NoHo Special District despite the fact that NYU did not have pending plans to use any specific property which it owned in the district for university uses.[74] The originally proposed amendment would have added colleges and university uses as uses permitted by right throughout the newly proposed district.[75] However, after public hearings, the adopted amendment prohibited as-of-right university uses.[76] NYU asserted that the amendment violated the principles announced *Cornell Univ. v. Bagnardi*,[77] because such university uses were permitted only if a variance were to be granted.[78] NYU alleged that the amendment "'will interfere improperly with [NYU's] future uses' of properties it owns or will own in the Special District, citing the properties it owns or leases in the rezoned NoHo."[79] The City moved to dismiss the complaint, arguing that NYU lacked standing to assert the facial challenge to the

Violence to Child. v. MW Props., LLC, 757 N.Y.S.2d 399, 402–03 (N.Y. App. Div. 4th Dep't 2003), *appeal denied*, 801 N.E.2d 421 (N.Y. 2003).

72. *Soc'y of the Plastics Indus.*, 573 N.E.2d at 1040.

73. *See* Parisella v. Town of Fishkill, 619 N.Y.S.2d 169, 170 (App. Div. 3d Dep't 1994); McNamara v. Planning Bd. of the Village of N. Haven, 611 N.Y.S.2d 283, 283 (App. Div. 2d Dep't 1994); Bd. of Fire Comm'rs of the Fairview Fire Dist. v. Town of Poughkeepsie Plan. Bd., 67 N.Y.S.3d 30, 32 (App. Div. 2d Dep't 2017); Shelter Island Ass'n v. Zoning Bd. of Appeals of Town of Shelter Island, 869 N.Y.S.2d 615, 617 (N.Y. App. Div. 2d Dep't 2008); Youngewirth v. Town of Ramapo Town Bd., 950 N.Y.S.2d 157, 160 (App. Div. 2d Dep't 2012); Harris v. Town Bd. of Town of Riverhead, 905 N.Y.S.2d 598, 600 (App. Div. 2d Dep't 2010).

74. N.Y. Univ. v. City of New York, 216 N.Y.S.3d 593, 594 (App. Div. 1st Dep't 2024).

75. *See id.*

76. *See id.*

77. *See* Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 515–16 (N.Y. 1986).

78. *N.Y. Univ.*, 216 N.Y.S.3d at 594.

79. *Id.* at 594–95.

amendment.[80] The City contended that NYU did not allege a cognizable "injury in fact" because the identical prohibition existed both before and after the enactment of the challenged amendment.[81] Additionally, NYU did not contend that any impending plans were affected by the rezoning and only alleged interference with conceivable potential uses of its properties in the district.[82] NYU submitted an affidavit in opposition to the motion relating to plans for long-term growth and its need for additional university space.[83] It alleged that it had a past and present goal to use its properties in the district for university uses but had not pursued approvals because of the time, expense, and the inherent risk of the variance review process.[84] It also alleged that although the identical restriction on university uses existed under the former and present zoning provisions, that fact "did not erase the injuries being caused by the use restrictions imposed under the new zoning regime."[85]

The Supreme Court granted the City's motion to dismiss, concluding that because the prior zoning provisions also prohibited university uses, the amendment did not adversely affect NYU's rights.[86] "'[A]bsent some identifiable, current injury,' NYU lacked standing . . . ."[87] The Supreme Court decision also related that unlike scenarios where a challenged regulation enacts additional restrictions on permitted uses, "NYU may not rely 'for standing purposes on a claim of injury from the City's choice to refrain from *lifting* the prohibition on as-of-right educational uses in the rezoned area,' because that argument goes to the merits of the challenge to the rezoning."[88]

The First Department reversed the decision of Supreme Court and found that NYU did possess standing.[89] It began its analysis by reviewing the *Bagnardi* decision which determined that "educational uses are always in furtherance of the public health, safety and

80. *See id.* at 595.
81. *See id.*
82. *See id.*
83. *See N.Y. Univ.*, 216 N.Y.S.3d at 595.
84. *See id.*
85. *Id.*
86. *See id.*
87. *Id.* (quoting N.Y. Univ. v. City of New York, No. 153199/2022, 2023 NYLJ LEXIS 1245, at *3 (Sup. Ct. Cty. N.Y. May 9, 2023)).
88. *N.Y. Univ.*, 216 N.Y.S.3d at 595 (quoting *N.Y. Univ.*, No. 153199/2022, 2023 NYLJ LEXIS 1245, at *15 (Sup. Ct. Cty. N.Y. May 9, 2023) (emphasis in original)).
89. *See id.* at 596.

morals."[90] However, that presumption "may be rebutted by a showing that the proposed use would actually have a net negative impact, and that a reasonably drawn special permit requirement may be used to balance the competing interests in this area."[91] The Court also observed that the Court of Appeals determined in *Trustees of Union Coll. in Town of Schenectady in State of New York v. Members of Schenectady City Council*[92] that a complete ban of educational uses from a residential district was "unauthorized and therefore unconstitutional."[93] The *NYU* Court noted that the Court of Appeals has invalidated "blanket bans on religious or educational uses in particular communities in favor of a case-by-case review, endorsing the special use permit application process as the proper procedure for addressing expansion requests."[94]

NYU owns or leases space in numerous buildings in NoHo that are subject to the amendment's ban of university uses.[95] Consequently, NYU was required to "show that it would suffer direct harm, injury that is in some way different from that of the public at large" in order to possess standing to prosecute a facial challenge to the amendment.[96] The complaint claimed that the enactment "interferes materially with its ability to develop and use existing and future facilities for educational purposes in furtherance of its mission."[97] NYU also furnished particulars regarding its formulated plans for long-term growth and its requirement for additional educational space, which made clear NYU's past and present goal to develop and use its properties in the Special District for university purposes, which provided sufficient evidence of its injury in fact.[98] NYU was not required to allege or provide evidence that it has specific plans to utilize properties in the district for university uses that were currently in place and immediately affected by the enactment.[99] Furthermore, NYU previously used a

90. *Id.* (quoting Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 511 (N.Y. 1986)).

91. *Id.* (quoting *Bagnardi*, 503 N.E.2d at 511).

92. *See* Trs. of Union Coll. in the Town of Schenectady v. Members of Schenectady City Council, 690 N.E.2d 862 (N.Y. 1997).

93. *N.Y. Univ.*, 216 N.Y.S.3d at 596 (quoting *Trs. of Union Coll. in the Town of Schenectady*, 690 N.E.2d at 864).

94. *Id.* (quoting Pine Knolls All. Church v. Zoning Bd. of Appeals of Town of Moreau, 838 N.E.2d 624, 627 (N.Y. 2005).

95. *See id.* at 596.

96. *Id.* (quoting Soc'y of the Plastics Indus. v. Cty. of Suffolk, 573 N.E.2d 1034, 1041 (N.Y. 1991)).

97. *Id.*

98. *See N.Y. Univ.*, 216 N.Y.S.3d at 596–97.

99. *See id.*

property it owned in the district for university uses after obtaining a variance.[100] " Judicial consideration of NYU's claim seeking a declaration as to the unconstitutionality of the ZR amendment should not require that it first experience the harm it seeks to avoid by challenging the amendment."[101] The fact that the identical restriction existed in the previous zoning provision did not purge the injury imposed by the challenged restriction.[102]

A dissenting opinion argued that NYU had failed to demonstrate an injury in fact because it had not established that its rights had been materially curtailed by the amendment.[103] The dissent observed that there was no operative distinction in the impact of the new enactment as compared to its predecessor.[104] The challenged amendment did not create a new constraint on NYU's use of its property because university uses were not permitted under either provision.[105] Hence, in the opinion of the dissent, NYU was not entitled to a presumption that it possessed standing to challenge the amendment.[106] The dissent also opined that because NYU could apply for a variance in which deference would be accorded the application pursuant to the dictates of *Bagnardi*, the City's variance process complied with *Bagnardi*.[107] Finally, the dissent contended that NYU's expressed harm is "tenuous, ephemeral, or conjectural" and not "sufficiently concrete and particularized to warrant judicial intervention" because the complaint did not identify any particular property in the district that NYU anticipated to use for educational or dormitory purposes.[108]

It may well be that the rationale of the dissent would be correct if the matter did not involve an educational use.[109] However, by barring university uses in the zone, the enactment clearly violated the dictates

100. *See id.* at 597.

101. *Id.*

102. *See id.* at 597–98.

103. *See N.Y. Univ.*, 216 N.Y.S.3d at 598 (Gesmer, dissenting).

104. *See id.*

105. *See id.*

106. *See id.* at 599.

107. *See id*.

108. *N.Y. Univ.*, 216 N.Y.S.3d at 598 (quoting Mental Hygiene Legal Serv. v. Daniels, 122 N.E.2d 21, 25 (N.Y. 2019)).

109. The same rationale applied to religious uses. *See* Trs. of Union Coll. in the Town of Schenectady v. Members of Schenectady City Council, 656 N.Y.S.2d 425, 427 (App. Div. 3d Dep't 1997); Richmond v. City of New Rochelle Bd. of Appeals on Zoning, 809 N.Y.S.2d 110, 111 (App. Div. 2d Dep't 2005); Albany Preparatory Charter Sch. v. City of Albany, 818 N.Y.S.2d 651, 654 (App. Div. 3d Dep't 2006); St. Thomas Malankara Orthodox Church, Inc. v. Bd. of Appeals, 804 N.Y.S.2d 801, 801–02 (App. Div. 2d Dep't 2005).

and rationale of *Bagnardi*. An educational (or religious) use cannot be relegated to seeking a use variance in order to establish such a use in a residential district. Instead, the Court of Appeals make it in clear in *Bagnardi* and *Union College* that a special permit review process was the fitting device to "weigh the proposed use in relation to neighboring land uses and to cushion any adverse effects by the imposition of conditions designed to mitigate them."[110] Consequently, the court correctly concluded that NYU had standing to challenge the amendment that prohibited university uses in the district and which required it to obtain a use variance to use its properties for such educational uses.

The Appellate Division concluded in *Green v. Town of Ramapo* that residents of property adjacent to a site had failed to allege the existence of an injury different in kind or degree than any ostensible injury to the community generally in order to challenge the approval of area variances for a mixed-use project.[111] "Standing requirements are an indispensable part of the petitioners' case, and each element must be supported in the same way as any other matter on which the petitioners bear the burden of proof."[112] Although the petitioners purportedly resided on property bordering the site, "status as a neighbor does not automatically provide entitlement to judicial review."[113] Furthermore, although a leaseholder may have the same standing to challenge a zoning decision as a landowner, the petitioners in *Green* did not establish that they were owners or lessees of the adjacent property on which they claim to reside.[114]

Moreover, the petitioners also failed to demonstrate that granting the variances would cause them actual injury, rather than vague, hypothetical, or speculative injury which is insufficient to grant standing.[115] None of the approved variances would have had a direct impact on the petitioners' property.[116] Hence, the petitioners failed to assert

110. *See* Cornell Univ. v. Bagnardi, 503 N.E.2d 509, 514 (N.Y. 1986).

111. *See* Green v. Town of Ramapo, 212 N.Y.S.3d 161, 162 (App. Div. 2d Dep't 2024).

112. *Id*. at 162–63 (first citing Save the Pine Bush, Inc. v. Common Council of City of Albany, 918 N.E.2d 917, 922 (N.Y. 2009); then citing Tilcon N.Y., Inc. v. Town of New Windsor, 102 N.Y.S.3d 35, 39 (App. Div. 2d Dep't 2019)).

113. *Id*. at 163 (citing Sun-Brite Car Wash v. Bd. Of Zoning & Appeals of Town of N. Hempstead, 508 N.E.2d 130, 134 (N.Y. 1987)).

114. *See id*.

115. *See id*. (first citing N.Y. State Ass'n of Nurse Anesthetists v. Novello, 810 N.E.2d 405, 407 (N.Y. 2004); then citing Long Island Bus. Aviation Ass'n, Inc. v. Town of Babylon, 815 N.Y.S.2d 217, 218 (App. Div. 2d Dep't 2006)).

116. *See Green*, 212 N.Y.S.3d at 163.

an injury different in kind or degree than any injury to the community generally.[117]

III. ZONING BOARDS OF APPEAL

A. Rehearing

Town Law Section 267-a(12) and Village Law Section 7-712-a(12) each provides that

> [a] motion for the zoning board of appeals to hold a rehearing to review any order, decision or determination of the board not previously reheard may be made by any member of the board. A unanimous vote of all members of the board then present is required for such rehearing to occur.[118]

The decision in *Upper Delaware Hospital Corp. v. Town of Tusten Zoning Board of Appeals* illustrates that a decision to rehear an application will be annulled if the vote to rehear is not by a unanimous vote of all members present.[119]

The issuance of a certificate of occupancy for an eating and drinking establishment was appealed to the Zoning Board of Appeals by neighboring property owners.[120] The Zoning Board of Appeals voted four to one to dismiss the appeal as untimely.[121] Subsequently, in the same meeting, the Zoning Board of Appeals voted four to one vote to rescind its previous decision to dismiss the appeal and scheduled a rehearing of the appeal.[122] The supreme court granted the petition, annulled the resolution to rescind the initial resolution and to rehear the appeal and declared the original resolution to dismiss the appeal to be in full force and effect.[123] The appellate division affirmed the decision of supreme court.[124] The vote to rehear its earlier determination was ineffectual because it was not unanimous.[125] Accordingly, the supreme court appropriately annulled the resolution to rehear the appeal and

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117. *See id.*

118. N.Y. TOWN LAW § 267-a(12) (McKinney 2024); N.Y. VILLAGE LAW § 7-712-a(12) (McKinney 2024).

119. *See* Upper Del. Hosp. Corp. v. Town of Tusten Zoning Bd. of Appeals, 203 N.Y.S.3d 437 (App. Div. 3d Dep't 2024).

120. *See id.* at 438.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See Upper Del. Hosp. Corp.*, 203 N.Y.S.3d at 439.

125. *Id.* (citing Ireland v. Town of Queensbury Zoning Bd. of Appeals, 571 N.Y.S.2d 834, 837 (App. Div. 3d Dep't 1991), *lv. dismissed*, 588 N.E.2d 99 (1991)).

"declared the ZBA's initial resolution to dismiss respondents' appeal to be in full force and effect . . . ."[126]

B. Exhaustion of Administrative Remedies

The decision in *Ferris v. Grass* confirms that administrative remedies must be exhausted prior to commencing an Article 78 proceeding.[127] A violation notice was issued to the petitioners alleging that they had begun construction without having obtained site plan approval and necessary permits.[128] Subsequently, without having first appealed the issuance of the certificate of occupancy to the Zoning Board of Appeals, the petitioners commenced an Article 78 proceeding seeking to vacate the notice of violation.[129] The appellate division affirmed supreme court's dismissal of the petition because the petitioners had failed to exhaust administrative remedies.[130] "[O]ne who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law."[131] The court correctly determined that judicial review was premature because the petitioners had failed to first appeal the violation to the Zoning Board of Appeals.[132] The petitioners' contention that the exhaustion3 requirement should be excused because an appeal to the Zoning Board of Appeals would have been futile was rejected by the court as speculative.[133]

C. Area Variances

In *Margulies v. Town of Ramapo*, the court discussed a number of fundamental issues regarding variance applications, including whether the evidence supporting an area variance application may be based solely on the testimony of the applicant's attorney and whether changes in the area unrelated to the subject property itself substantiate a determination by a zoning board of appeals to act contrary to its

126. *Id.* at 438.

127. *See* Ferris v. Grass, 194 N.Y.S.3d 595, 597 (App. Div. 3d Dep't 2023).

128. *See id.* at 596.

129. *See id.* at 597.

130. *See id.*

131. *Id.* (quoting Town of Oyster Bay v. Kirkland, 978 N.E.2d 1237, 1240 (N.Y. 2012) (internal quotation marks and citation omitted), *cert. denied*, 568 U.S. 1213 (2013)).

132. *See Ferris*, 194 N.Y.S.3d at 597 (citing Foster v. N.Y. State Parole Bd., 16 N.Y.S.3d 633, 634 (App. Div. 3d Dep't 2015)).

133. *See id.*

decision in a prior application for the same property.[134] The decision also implicated the applicable standard for an applicant requesting that a condition of a prior variance be modified or removed.[135]

The Zoning Board of Appeals in *Margulies* approved an additional variance in order to add an accessory apartment within an existing structure and footprint four years after the it had granted area variances to construct a two-family dwelling and after the structure had been constructed.[136] The previous application sought area variances for a two-family dwelling with an accessory apartment.[137] The Board granted the variances subject to a condition that there not be an accessory apartment.[138] Subsequently, the owner's father-in-law died and he desired to construct the accessory apartment to afford his mother-in-law a place to live near her daughter, who would reside in one of the two primary units.[139] The appellate division reversed the supreme court's decision which annulled the Zoning Board of Appeals' determination.[140]

"The responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative boards composed of representatives from the local community. Local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community."[141] The courts will confirm a decision of a zoning board if it has a rational basis and the record contains sufficient evidence to substantiate the rationality of the determination.[142] "A determination is rational if it has some objective factual basis."[143] Hence, "[w]here supporting evidence exists, a court may not substitute its own judgment for that of a zoning board, even if a contrary determination is itself supported by the record."[144]

134. *See* Margulies v. Town of Ramapo, 209 N.Y.S.3d 466, 468–69 (App. Div. 2d Dept. 2024).
135. *See id.* at 468.
136. *See id.*
137. *See id.*
138. *See id.*
139. *See Margulies*, 209 N.Y.S.3d at 468.
140. *See id.* at 469.
141. *Id*. at 468 (quoting Cowan v. Kern, 363 N.E.2d 305, 310 (N.Y. 1977)).
142. *See id*.
143. *Id*. (quoting Duke v. Brosnan, 168 N.Y.S.3d 535, 537 (App. Div. 2d Dep't 2022)).
144. *Marguiles*, 209 N.Y.S.3d at 468 (quoting *Duke*, 168 N.Y.S.3d at 537).

Because "a zoning board of appeals is not constrained by the rules of evidence and may conduct informal hearings,"[145] "the strict rules of evidence do not apply to zoning board proceedings, [and] hearsay evidence may be considered."[146] Consequently, the representations and testimony of the applicant's attorney establishing the basis for the application constituted cognizable evidence.[147] Hence, the approval of the variance had a rational basis.[148] The revision to permit the conversion of one of the principal units to a smaller principal unit and an accessory apartment within the existing footprint would have a *de minimus* impact, if any.[149]

The court also rejected the claim that Zoning Board of Appeals was required to deny the application because it previously had denied approval of the accessory apartment.[150] "A decision of a zoning board which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious, and thus, where a board reaches contrary results on substantially similar facts, it must provide an explanation."[151] Nevertheless, a "zoning board may refuse to duplicate previous error; it may change its views as to what is for the best interests of the Town; or it may give weight to slight differences which are not easily discernable."[152] The Zoning Board of Appeals adequately explained its rationale for reaching a different result than its determination on the earlier application, including the owner's desire to provide a place to live for his mother-in-law.[153] Approval of the application was also supported by the increasing demand for housing in the town in the intervening four years due to population growth.[154]

Finally, because a court's review of a decision of a zoning board of appeals is limited to arguments made and evidence produced at the

145. *Id.* (quoting Stein v. Bd. of Appeals of Town of Islip, 473 N.Y.S.2d 535, 536 (App. Div. 2d Dep't 1984)).

146. *Id*. (citing FCFC Realty LLC v. Weiss, 144 N.Y.S.3d 57, 61 (App. Div. 2d Dep't 2021)).

147. *See id*.

148. *See id*. at 469 (citing White Birch Circle Realty Corp. v. DeChance, 182 N.Y.S.3d 719, 720 (App. Div. 2d Dep't 2023)).

149. *See Margulies*, 209 N.Y.S.3d at 469.

150. *See id*.

151. *Id*. (quoting O'Connor & Son's Home Improvement, LLC v. Acevedo, 153 N.Y.S.3d 492, 494 (App. Div. 2d Dep't 2021) (internal quotation marks omitted)).

152. *Id*. (quoting Monte Carlo 1, LLC v. Weiss, 38 N.Y.S.3d 228, 231 (App. Div. 2d Dep't 2016) (internal quotation marks omitted)).

153. *See id*.

154. *See Margulies*, 209 N.Y.S.3d at 469.

administrative level, the petitioner's arguments that were raised for the first time in the Article 78 proceeding should not have been considered by the trial court.[155]

By confirming that hearsay evidence can furnish a sufficient foundation to substantiate a decision of a zoning board of appeals, the court confirmed that an applicant's case may be presented by his or her attorney without the testimony of individual witnesses. Second, in relying on the increased demand for housing in the ensuing years since the earlier application was decided as a basis for reaching a contrary conclusion on the application, the court endorsed consideration of external factors unrelated to the property itself. Accordingly,

> [i]n some situations, the alleged change of circumstances involves a factor outside of the new application itself. Changes in the adjoining property or neighborhood are often alleged to be changes material enough to justify a reversal by a zoning board of a prior denial of an application for a variance.[156]

The board and court relied on the applicant's personal circumstances, in part, to substantiate approval of the variance, rather than considerations related to the land itself.[157] The courts largely have spurned personal convenience or the plight of a property owner as a basis for a variance. For example, in *Fuhst v. Foley* the Court of Appeals concluded that a setback variance was inappropriate to permit the enclosure of the entrance to a residence to benefit the health of the owner's children and to reduce heating costs.[158] The Court determined that:

> the possible alleviation of a family health problem is a purely personal objective, only tenuously related to petitioner's use of his property as a one-family residence. Only in rare circumstances . . . may problems of a personal nature possibly constitute 'practical difficulties' to the landowner, therefore justifying the issuance of an area variance.[159]

The *Fuhst* Court opined that the basis for the variance lacked a meaningful nexus to the property itself and related that a property owner is not entitled to an area variance by demonstrating that he is merely

155. *See id*. (citing Kaufman v. Incorporated Vill. of Kings Point, 860 N.Y.S.2d 573, 575 (App. Div. 2d Dep't 2008)).

156. 52 A.L.R.3d 494 § 2(a) (West 1973).

157. *See Margulies*, 209 N.Y.S.3d at 469.

158. Fuhst v. Foley, 382 N.E.2d 756, 757 (N.Y. 1978).

159. *Id.* at 758.

inconvenienced by a bulk restriction.[160] Courts commonly have rejected the desire to enlarge an existing dwelling to allow family members to live near or in the same house as a basis for a variance.[161] On the other hand, the courts have affirmed the granting of area variances based on what plainly was personal inconvenience in a number of instances. For example, in *Welch v. Law*, a case remarkably similar to *Fuhst*, the court affirmed the approval of a setback variance for the construction of a ramp to accommodate an occupant's physical disability.[162] The court concluded that the requested eleven-inch variance was insubstantial, that the use would not cause a detriment to the neighborhood, that alternative approaches were not feasible, and that the disability was not self-created.[163]

The inference is that while such personal circumstances are not irrelevant in evaluating an area variance application, the statutory criteria and weighing analysis must be utilized. The decision also confirms that external changes in conditions, not internal to the subject property itself, are germane in evaluating an area variance application.

It is significant that rather than denying the earlier variance application for a two-family dwelling with an accessory apartment, the Zoning Board of Appeals granted the application authorizing a two-family dwelling, conditioned on the proviso that it would not include an accessory apartment. When one applies for what, in effect, is an application to modify a condition of a previously approved variance, satisfaction of the statutory variance criteria and of the weighing analysis is unnecessary or, at least relaxed.[164] For example, in *Jackson v. Zoning Board of Appeals of the City of Long Beach*, a variance was granted allowing the owner to convert a two-family dwelling into a one-family

160. *See Id.*

161. *See* Larson v. Fernan, 609 N.Y.S.2d 23, 24 (App. Div. 2d Dep't 1994); *Cirrito v. Zoning Bd. of Appeals*, 602 N.Y.S.2d 275, 276 (App. Div. 4th Dep't 1993); Winsom v. Zoning Bd. of Appeals, 564 N.Y.S.2d 887, 887 (App. Div. 4th Dep't 1990); Quaglio v. La Freniere, 211 N.Y.S.2d 239, 241 (Sup. Ct. Nassau Cnty. 1960); *see also* Wank v. Van Etten, 389 N.Y.S.2d 54, 55 (App. Div. 3d Dep't 1976).

162. *See* Welch v. Law, 504 N.Y.S.2d 790, 792 (App. Div. 3d Dep't 1986).

163. *See id.*; *see also* Zebrowski v. Herdman, 339 N.Y.S.2d 989, 993 (Sup. Ct. Rochester Cty. 1972); Lippe v. Cisternino, 254 N.Y.S.2d 273, 277–78 (Sup. Ct. Westchester Cty. 1964).

164. *See* Jackson v. Zoning Bd. of Appeals of the City of Long Beach, 703 N.Y.S.2d 521, 522 (App. Div. 2d Dep't 2000); Miller v. Zoning Bd. of Appeals of the City of Saratoga Springs, 671 N.Y.S.2d 954, 956 (Sup. Ct. Saratoga Cty. 1998); Red House Farm, Inc. v. Zoning Bd. of Appeals of the Town of Greenbush, 650 N.Y.S.2d 891, 892 (App. Div. 3d Dep't 1996); E. 91st St. Neighbors to Pres. Landmarks, Inc. v. N.Y.C. Bd. of Standards & Appeals, 740 N.Y.S.2d 876, 876–77 (App. Div. 1st Dep't 2002).

dwelling with a dental office on the main level.[165] The variance was conditioned on the requirement that the owner reside at the premises on a permanent basis.[166] The owner subsequently wanted to relocate to a larger home and to rent the second-floor residence and applied to the Zoning Board of Appeals for elimination and/or modification of the residency condition.[167] "Upon finding the existence of a 'sufficient reason,'" the Zoning Board of Appeals granted his application.[168] The Second Department concluded that the applicant was not required to satisfy the statutory criteria for a variance.[169] "An examination of [the] application compels the conclusion that, rather than seeking a use variance, [it] sought only to modify a previously-imposed condition."[170] Therefore, despite the absence of evidence supporting the statutory variance criteria, the court upheld the Zoning Board of Appeals' decision because it had a rational basis and was supported by substantial evidence.[171]

Similarly, in *Miller v. Zoning Board of Appeals of the City of Saratoga Springs*, "[t]he narrow issue before the court entail[ed] an analysis of the standard of proof required of an applicant seeking to eliminate a condition imposed upon the issuance of a use variance."[172] The property owner in *Miller* had obtained a use variance allowing professional offices to be located in a residentially zoned district with a condition that there was to be "no ingress or egress from the property on Circular Street."[173] The Zoning Board of Appeals subsequently approved what was described in the application as a use variance to modify the condition in order to permit a driveway entrance on Circular Street.[174] The court affirmed the decision and concluded that

> [t]he Board correctly determined that the application, in reality, was not one for a use variance but rather was a request for the Board to modify a previously imposed condition. . . Thus the 'common sense approach' should prevail and the standard of review distills to

165. *See Jackson*, 703 N.Y.S.2d at 521–22.

166. *See id.* at 522.

167. *Id.*

168. *Id.*

169. *Id*.

170. *Jackson*, 703 N.Y.S 2d at 522 (first citing *Red House Farm, Inc.*, 650 N.Y.S.2d at 892; then citing *Miller*, 671 N.Y.S.2d at 956–97).

171. *See id*.

172. Miller v. Zoning Bd. of Appeals of the City of Saratoga Springs, 671 N.Y.S.2d 954, 955 (Sup. Ct. Saratoga Cty. 1998).

173. *See id*.

174. *See id*.

> assessing whether or not the Board acted in a reasonable manner when it modified the earlier imposed condition to allow a second driveway to be located on Circular Street.[175]

The court found that

> the applicant satisfied a majority of the Board that the one-driveway limit created an on-site safety problem and that allowing a second driveway to be installed would not be detrimental to the neighborhood. The court may not substitute its judgment for that of the Board since the Board's decision is supported by substantial evidence and therefore is reasonable, rationally based and not arbitrary and capricious.[176]

Accordingly, although not directly addressed by the appellate court, the application in *Margulies* in reality was for a modification or elimination of a condition of the previously approved variance. Thus, the applicant did not have to address the criteria in Town Law Section 267-b(3).[177] Additionally, because the application was correctly reviewed as such, the issue of whether changed circumstances existed or a vote to rehear the matter pursuant to Town Law Section 267-a(12) was required was not germane.[178]

D. Precedent

In *Seaview Association of Fire Island, NY, Inc. v. Town of Islip Zoning Board of Appeals*, the court confirmed that if similar variances had not been granted in the past, a zoning board of appeals could consider that approval of a variance application could establish a precedent constraining its future decision-making prerogatives.[179] Similarly, the Appellate Division concluded in *Bonadonna v. Board of Zoning Appeals of Village of Upper Brookville* that "[a]lthough the petitioner had introduced evidence that the variances he sought were consistent with conditions existing on neighboring properties, the

175. *Id*. at 955–57.

176. *Id*. at 957.

177. N.Y. TOWN LAW § 267-b(3) (McKinney 2014).

178. N.Y. TOWN LAW § 267-a(12) (McKinney 2014).

179. *See* Seaview Ass'n of Fire Island, NY, Inc. v. Town of Islip Zoning Bd. of Appeals, 199 N.Y.S.3d 609, 612 (App. Div. 2d Dep't 2023) (first citing Pecoraro v. Bd. of Appeals of Town of Hempstead, 814 N.E.2d 404, 408 (N.Y. 2004); then citing Dutt v. Bowers, 172 N.Y.S.3d 64, 66 (App. Div. 2d Dep't 2022)); *see also* Morris Motel, LLC v. DeChance, 153 N.Y.S.3d 897, 898 (App. Div. 2d Dep't 2021); Nataro v. DeChance, 53 N.Y.S.3d 156, 156 (App. Div. 2d Dep't 2017).

petitioner introduced no evidence as to whether those comparators existed prior to the enactment of the ordinance."[180] Accordingly, the Zoning Board of Appeals could consider that approval of the variances could establish a precedent.[181]

IV. ANTI-SLAPP STATUTE

New York's anti-SLAPP statute was initially enacted in 1992 and provided protection against SLAPP suits relating to a plaintiff's fitness to seek or hold a "permit, zoning change, lease, license, or certificate or other entitlement for use or permission to act from any government body . . . ."[182] The goal of a SLAPP suit is to burden the defendant with onerous litigation costs in an effort to chill the defendant's speech.[183] On the other hand, the intent of the anti-SLAPP law is to deter lawsuits that are not filed to vindicate a fair and reasonable legal claim but whose goal is to punish or harass a defendant for participating in a public issue or controversy.[184]

Amendments to the statute enacted in 2020 broadened the definition of "protected activity" to include "any communication in a place open to the public or a public forum in connection with an issue of public interest" and "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."[185] The amendment protects a wider array of petitioning activity, including speech directed at government bodies or intended to influence governmental processes.[186] In addition, the original version of the law provided that attorney's fees could be awarded at the discretion of the court.[187] Pursuant to the 2020

180. Bonadonna v. Bd. of Zoning Appeals of Vill. of Upper Brookville, 198 N.Y.S.3d 368, 371 (App. Div. 2d Dep't 2023) (citing Foster v. DeChance, 178 N.Y.S.3d 786, 788 (App. Div. 2d Dep't 2022); then citing *Dutt*, 172 N.Y.S.3d at 66; then citing *Nataro*, 53 N.Y.S.3d at 157).

181. *See id.*

182. N.Y. CIV. RIGHTS LAW § 76-a(1)(b) (McKinney 2019).

183. *See* Gottwald v. Sebert, 220 N.E.3d 621, 637–38 (N.Y. 2023); Ernst v. Carrigan, 814 F.3d 116, 117 (2d Cir. 2016); Suffolk Cnty. Police Benevolent Ass'n v. Trotta, No. 22-CV-0580, 2024 U.S. Dist. LEXIS 126205, at *5 n.5 (E.D.N.Y. July 17, 2024).

184. *See Gottwald*, 220 N.E.3d at 638.

185. N.Y. CIV. RIGHTS LAW § 76-a(1)(a) (McKinney 2020).

186. *See id.*

187. *See* N.Y. CIV. RIGHTS LAW § 70-a(1)(a) (McKinney 2019).

amendment, an award of attorney's fees and costs is mandatory rather than permissive.[188]

Pursuant to the previous version of the law, a motion to dismiss a SLAPP action was calendared on an expedited basis.[189] In order to ameliorate the intimidating effect of costly litigation expenses, the revised provision provides that "[a]ll discovery, pending hearings, and motions" shall be stayed pending the resolution of a motion to dismiss the complaint.[190] In deciding a motion to dismiss a SLAPP suit, in addition to the pleadings, a court "shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based."[191] If a defendant demonstrates that an action is based on his or her public communications or other free speech activities, the plaintiff can avoid dismissal only by establishing that the claim has a "substantial basis in law" or is supported by a "substantial argument" for modifying the law.[192] The amended version of the law shifts the burden of proof so that the plaintiff, as opposed to the moving defendant as is normally the case, carries the burden of proof to establish that a SLAPP suit is supported by a "substantial basis in the law."[193]

As is related above, the amendment also increased the protection of the anti-SLAPP statute to claims based on any communication in a place open to the public or a public forum in connection with an issue of public interest.[194] The Second Department assessed in *Nelson v. Ardrey* whether Facebook and other similar social media platforms constitute public forums pursuant to the anti-SLAPP statute.[195] The 2020 amendment defined a SLAPP suit as:

> a claim based upon:
>
> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in

188. *See* N.Y. CIVIL RIGHTS LAW § 70-a(1)(a) (McKinney 2024).
189. N.Y. C.P.L.R. 3211(g) (McKinney 2019).
190. N.Y. C.P.L.R. 3211(g)(3) (McKinney 2024).
191. *See id.* at 3211(g)(2).
192. *See id*. at 3211(g)(1).
193. *See id*. at 3211(g)(1).
194. N.Y. CIV. RIGHTS LAW § 76-a(1)(a) (McKinney 2024).
195. *See* Nelson v. Ardrey, 231 A.D.3d 179, 181 (App. Div. 2d Dep't 2024).

> connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.[196]

The *Nelson* Court confirmed that "[t]he term 'public forum' is traditionally interpreted as a place that is open to the public where information is freely exchanged."[197] The court found that term "public forum" has developed to include, *inter alia*, podcasts,[198] and internet forums that include customer reviews of businesses.[199] Consequently, the court concluded that Facebook also is a "public forum" as that term is defined in the anti-SLAPP statute.[200] In addition, the legislative history of the statute corroborates that the Legislature intended to include Facebook and other social media platforms within the meaning of the term "public forum."[201] Although the *Nelson* decision is not a zoning decision, *Nelson* clearly signifies that comments made regarding a zoning application, controversy or decision, as well as the numerous other issues of public interest, made on a social platform are protected by the anti-SLAPP statute.

V. ARTICLE 78 PROCEEDINGS

A. Determination on the Merits after Motion to Dismiss

CPLR 7804(f) provides that

> [t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry . . . .[202]

196. *See id.* at 182–83 (quoting N.Y. CIV. RIGHTS LAW § 76–a(1)(a) (McKinney 2020)).

197. *Id.* at 183 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

198. *See id.* (citing Gillespie v. Kling, 192 N.Y.S.3d 78, 80 (App. Div. 1st Dep't 2023)).

199. *See id.* (citing VIP Pet Grooming Studio, Inc. v. Sproule, 203 N.Y.S.3d 681, 687 (App. Div. 2d Dep't 2024)).

200. *See Nelson*, 231 A.D.3d at 183.

201. *See id.* at 184; *see also* Coleman v. Grand, 523 F. Supp. 3d 244, 266 (E.D.N.Y. 2021).

202. N.Y. C.P.L.R. 7804(f) (McKinney 2025).

However, despite the unequivocal directive of the statute, a court possesses the discretion to determine an Article 78 proceeding on the merits without allowing the respondent to answer after a motion to dismiss has been denied under certain circumstances.[203]

The Supreme Court had rendered judgment on the merits following the respondents' pre-answer motion to dismiss in *Guttman v. Covert Town Board*.[204] The petitioners asserted on appeal that Supreme Court was restricted to deciding the motion to dismiss while accepting the allegations as true and according to petitioners every favorable inference.[205] The Appellate Division disagreed and affirmed the dismissal of the petition on the merits.[206] A CPLR article 78 proceeding "may be summarily determined 'upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised.'"[207] "[G]iven the numerous evidentiary submissions by the parties related to the Board's determination [in *Guttman*]," the court found that "'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 a summary determination in the CPLR article 78 proceeding."[208]

Hence, although a respondent moving to dismiss an Article 78 petition may submit admissible documentary evidence to support the motion, he or she should be cognizant that if the motion is accompanied by extensive materials, the court may deny the motion and determine the merits of the proceeding without respondent having an opportunity to answer or submit a record and opposition papers.

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203. *See* Miranda Holdings, Inc. v. Town Bd. of the Town of Orchard Park, 170 N.Y.S.3d 432, 434 (App. Div. 4th Dep't 2022); *see also* Nassau BOCES Cent. Council of Teachers v. Bd. of Coop. Educ. Servs. of Nassau Cnty., 469 N.E.2d 512, 513 (N.Y. 1984); Laurel Realty, LLC v. Plan. Bd. of Kent, 836 N.Y.S.2d 248, 251 (App. Div. 2d Dep't 2007); 7-Eleven, Inc. v. Town of Hempstead, 166 N.Y.S.3d 572, 573 (App. Div. 2d Dep't 2022).

204. *See* Guttman v. Covert Town Bd., 202 N.Y.S.3d 608, 610 (App. Div. 4th Dep't 2023).

205. *See id*. at 610–11.

206. *See id*. at 610.

207. *Id*. at 611 (quoting Battaglia v. Schuler, 400 N.Y.S.2d 951, 953 (App. Div. 4th Dep't 1977)).

208. *Id.* (quoting Hudson v. Town of Orchard Park Zoning Bd. of Appeals, 194 N.Y.S.3d 649, 653 (App. Div. 4th Dep't 2023)); (citing 22-50 Jackson Ave. Assocs., L.P. v. Cnty. of Suffolk, 189 N.Y.S.3d 636, 639 (App. Div. 2d Dep't 2023), *appeal denied*, 232 N.E.3d 766 (N.Y. 2024); then citing Fiore v. Town of Whitestown, 4 N.Y.S.3d 421, 423 (App. Div. 4th Dep't 2015), *appeal denied*, 36 N.E.3d 90 (N.Y. 2015); *cf*. Bihary v. Zoning Bd. of Appeals of Buffalo, 170 N.Y.S.3d 420, 422 (App. Div. 4th Dep't 2022); Mintz v. City of Rochester, 155 N.Y.S.3d 897, 898 (App. Div. 4th Dep't 2021); Town of Geneva v. City of Geneva, 880 N.Y.S.2d 819, 819–20 (App. Div. 4th Dep't 2009)).

Consequently, if a movant does provide substantial supporting materials, he or she should be aware that the respondent may not have an opportunity to submit further papers supporting its position and should consider what papers and materials might prudently be included with the motion.

B. Article 78 Limited to Record

An Article 78 proceeding is a review of the administrative record to determine if a challenged decision is illegal, arbitrary, or an abuse of discretion.[209] Consequentially, "[j]udicial review of an administrative determination is confined to the record before the zoning board, 'and proof outside the administrative record should not be considered.'"[210] In *Seaview Association of Fire Island, NY, Inc. v. Town of Islip Zoning Board of Appeals*, the Appellate Division appropriately declined to consider affidavits submitted by the petitioner in an Article 78 proceeding because judicial review of a decision of a zoning board of appeals is limited to the record before the zoning board of appeals and the information in the affidavits was outside the record.[211]

C. Mootness

"[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy."[212] Several considerations are significant in assessing claims of mootness, "[c]hief among them has been 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."[213] Other factors include whether the "work was undertaken without authority

209. *See* N.Y. C.P.L.R. 7803 (McKinney 2025); *see also* Finger Lakes Pres. Ass'n v. Town Bd. of the Town of Italy, 887 N.Y.S.2d 499, 503–04 (Sup. Ct. Yates Cty. 2009).

210. Palmer v. Town of New Windsor Zoning Bd. of Appeals, 209 N.Y.S.3d 445, 446 (App. Div. 2d Dep't 2024) (quoting Kam Hampton I Realty Corp. v. Bd. of Zoning Appeals of Vill. of E. Hampton, 710 N.Y.S.2d 915, 915 (App. Div. 2d Dep't 2000); citing Veteri v. Zoning Bd. of Appeals of the Town of Kent, 163 N.Y.S.3d 231, 234 (App. Div. 2d Dep't 2022)).

211. *See Seaview Ass'n of Fire Island, NY, Inc.*, 199 N.Y.S.3d at 612 (citing Levine v. N.Y. State Liquor Auth., 245 N.E.2d 804, 804 (N.Y. 1969); then citing *Kam Hampton I Realty Corp.*, 710 N.Y.S.2d at 915; then citing Dearborn Assoc. v. Envtl. Control Bd., 534 N.Y.S.2d 417, 418 (App. Div. 2d Dep't 1988)).

212. Dreikausen v. Zoning Bd. of Appeals of the City of Long Beach, 774 N.E.2d 193, 196 (N.Y. 2002).

213. *Id.* at 196–97 (emphasis added) (citing Imperial Improvements v. Town of Wappinger Zoning Bd. of Appeals, 736 N.Y.S.2d 409 (App. Div. 2d Dep't 2002)).

or in bad faith" and whether "substantially completed work" can be undone without undue hardship."[214] However, "[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.'"[215]

As is exemplified by the decision in *Kern v. Adirondack Park Agency*, in addition to seeking *pendente lite* relief in the trial court, a petitioner or plaintiff must also move to preserve the *status quo* in the appellate court in order to avoid a matter from being deemed to be moot.[216] The Adirondack Park Agency ("APA") granted a permit to allow construction of an on-site wastewater treatment system on respondents' property.[217] Concurrently with institution of a proceeding challenging the issuance of the permit, the petitioners sought a temporary restraining order by order to show cause barring the respondents from cutting trees, disturbing wetlands and constructing the wastewater treatment system.[218] The supreme court signed the order to show cause with a TRO and subsequently amended it by vacating all of its provisions except for the provision that prohibited respondents from constructing the wastewater treatment system.[219] Subsequently, after the court severed the portion of the complaint seeking declaratory relief, dismissed the petitioners' Article 78 claims and vacated the restraining order, the petitioners appealed the judgment.[220] However, the construction of the wastewater treatment system had been completed during the pendency of this appeal.[221]

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214. Sierra Club v. N.Y. State Dep't of Env't Conservation, 94 N.Y.S.3d 741, 743 (App. Div. 4th Dep't 2019) (quoting Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n, 811 N.E.2d 2, 4 (N.Y. 2004); Wallkill Cemetery Ass'n, Inc. v. Town of Wallkill Plan. Bd., 905 N.Y.S.2d 609, 611 (App. Div. 2d Dep't 2010); Dowd v. Plan. Bd. of Vill. of Millbrook, 862 N.Y.S.2d 385, 386 (App. Div. 2d Dep't 2008)).

215. *Id.* (emphasis added) (quoting *Dreikausen*, 774 N.E.2d at 197); *see also* Weeks Woodlands Ass'n, Inc. v. Dormitory Auth. of the State of N.Y., 945 N.Y.S.2d 263, 264, 266 (App. Div. 1st Dep't 2012), *aff'd*, 980 N.E.2d 532 (N.Y. 2012); Comm. for Environmentally Sound Dev. v. Amsterdam Ave. Redevelopment Assocs. LLC, 144 N.Y.S.3d 1, 8 (App. Div. 1st Dep't 2021), *lv. denied,* 174 N.E.3d 371 (N.Y. 2021); *see* Raab v. Silverstein, 964 N.Y.S.2d 236, 237 (App. Div. 2d Dep't 2013).

216. *See* Kern v. Adirondack Park Agency, 204 N.Y.S.3d 596, 598 (App. Div. 3d Dep't 2024).

217. *See id*. at 597.

218. *See id*. at 598.

219. *See id*.

220. *See id*.

221. *See Kern*, 204 N.Y.S.2d at 598.

Generally, "courts are precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances."[222] "Whether the controversy has become moot requires the consideration of various factors, including how far the construction work has progressed towards completion, whether the work was undertaken in bad faith or without authority and whether the substantially completed work cannot be readily undone without substantial hardship."[223] "Chief among the factors to be considered 'has been 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.'"[224]

The petitioners sought to prevent construction during the pendency of the hybrid proceeding/action by requesting a temporary restraining order and preliminary injunction in the trial court.[225] However, they failed to seek interim relief to prevent the construction during the pendency of the appeal.[226] Although construction of the wastewater treatment system could be observed by the petitioners after the Supreme Court vacated the temporary restraining order, they failed to seek injunctive relief from the Appellate Division.[227] Also favoring dismissal of the appeal, the petitioners did not expeditiously perfect the appeal and sought two extensions.[228] Additionally, removal of the wastewater treatment system, should the petitioners prevail, would cause unwarranted hardship because the respondents had expended substantial funds in the construction of the plant.[229] Further, respondents proceeded with the construction in good faith because it had obtained all necessary variances and permits prior to starting the construction.[230]

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222. *Id.* (quoting City of New York v. Maul, 903 N.Y.S.2d 304, 308 (2010) (internal quotation marks omitted)).

223. *Id.* (emphasis added) (quoting City of Ithaca v. N.Y. State Dep't of Env't Conservation, 135 N.Y.S.3d 503, 505 (App. Div. 3d Dep't 2020)).

224. *Id.* (emphasis added) (quoting Citineighbors Coal. of Historic Carnegie Hill v. N.Y.C. Landmarks Pres. Comm'n, 811 N.E.2d 2, 4 (N.Y. 2004)).

225. *See id.*

226. *See Kern*, 204 N.Y.S.2d at 598.

227. *See id.* at 598–599.

228. *See id.* at 599.

229. *See id.* (first citing ENP Assoc., LP v. City of Ithaca Bd. of Zoning Appeals, 193 N.Y.S.3d 334, 338 (App. Div. 3d Dep't 2023); then citing *City of Ithaca*, 135 N.Y.S.3d at 505).

230. *See id.* (first citing Granger Grp. v. Zoning Bd. of Appeals of Town of Taghkanic, 879 N.Y.S.2d 604, 606 (App. Div. 3d Dep't 2009); then citing Mehta v. Town of Montour Zoning Bd. of Appeals, 771 N.Y.S.2d 754, 754 (App. Div. 3d Dep't 2004)).

The decision reenforces the requirement a petitioner or plaintiff must seek to preserve the *status quo* at each level of judicial review. Otherwise, because the failure to do so is the primary consideration, the ligation is likely to be deemed moot if construction has been substantially completed.

D. Statute of Limitations

Town Law Section 282 and Village Law Section 7-740 provide that an Article 78 challenging a determination of a planning board must be commenced within thirty days after the filing of the decision in the office of the town or village clerk.[231] The running of the statute of limitations commences upon the filing of any one of several documents, including the minutes of a planning board meeting at which an approval is granted.[232]

The petitioner in *Fox v. Planning Board. of Village of Plandome* challenged the October 22, 2020 preliminary plan approval for a subdivision, the minutes for which were filed with the Village Clerk on October 30, 2020.[233] The Appellate Division affirmed the dismissal of the Article 78 proceeding challenging the approval which was commenced on January 27, 2021 as time-barred because the statute of limitations had begun to run when the minutes containing that decision were filed with the Village Clerk on October 30, 2020.[234] Neither the fact that the Planning Board's counsel indicated that a written decision memorializing the decision would ensue, nor the fact that the Village Clerk did not provide petitioners with a copy of the filed minutes in response to their request for other related but different documents, demonstrated that the petitioners had been misled or otherwise adversely affected by any ambiguity or uncertainty as to the date of the filing of the minutes.[235]

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231. *See* N.Y. TOWN LAW § 282 (McKinney 2024); N.Y. VILLAGE LAW § 7-740 (McKinney 2024).

232. *See* Powell v. Town of Coeymans, 656 N.Y.S.2d 460, 462 (App. Div. 3d Dep't 1997); Allens Creek/Corbett's Glen Pres. Grp. v. Town of Penfield Plan. Bd., 672 N.Y.S.2d 222, 223 (App. Div. 4th Dep't 1998).

233. *See* Fox v. Plan. Bd. of Vill. of Plandome, 196 N.Y.S.3d 176, 176-77 (App. Div. 2d Dep't 2023).

234. *See id.* at 177 (first citing Kennedy v. Zoning Bd. of Appeals of Vill. of Croton-on-Hudson, 585 N.E.2d 369, 370 (N.Y. 1991); then citing DeBellis v. Luney, 513 N.Y.S.2d 478, 479 (App. Div. 2d Dep't 1987)).

235. *See id.* (first citing *Kennedy*, 585 N.E.2d at 370; then citing Casolaro v. Zoning Bd. of Appeals of Vill. of Elmsford, 607 N.Y.S.2d 79, 80 (N.Y. 1994)).

VI. SPECIAL PERMITS

The dismissal of an Article 78 proceeding challenging the denial of a special permit for a gas station with a convenience store and Dunkin Donuts drive-thru was affirmed by the Appellate Division in *Chestnut Petroleum Dist., Inc. v. Town of Mount Pleasant Plan. Bd*.[236] The court recapped the principles and considerations pertaining to special permits as follows:

> The classification of a particular use of property as a use permitted in a particular district subject to the granting of a special exception constitutes a legislative finding that if the special exception standards of the zoning ordinance are met then the use accords with the general plan of the ordinance and will not adversely affect the neighborhood.[237]

Consequently, "a special use permit confers authority to use property in a manner that is permitted by a zoning ordinance under stated conditions, and such a permit is required to be granted unless reasonable grounds exist for its denial."[238] However, the "failure to meet any one of the conditions set forth in the ordinance is sufficient basis upon which the zoning authority may deny the permit application."[239]

The *Chestnut Petroleum* court observed that a zoning board of appeals may "make commonsense judgments" in reviewing a special permit application.[240] Relatedly, board members may employ their personal knowledge and familiarity with the area.[241] A special use permit may not be denied because of a general objection to the specific

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236. *See* Chestnut Petroleum Dist., Inc. v. Town of Mount Pleasant Plan. Bd., 201 N.Y.S.3d 475, 477 (App. Div. 2d Dep't 2023).

237. *Id*. (quoting Robert Lee Realty Co. v. Vill. of Spring Valley, 462 N.E.2d 1193, 1193 (N.Y. 1984) (citing Marcus v. Planning Bd. of the Vill. of Wesley Hills, 154 N.Y.S.3d 822, 822–23 (App. Div. 2d Dep't 2021)).

238. *Id*. (quoting 7-Eleven, Inc. v. Bd. of Trustees of Inc. Vill. of Mineola, 733 N.Y.S.2d 729, 729 (App. Div. 2d Dep't 2001) (first citing N. Shore Steak House, Inc. v. Board of Appeals of Inc. Vill. of Thomaston, 282 N.E.2d 606, 606 (N.Y. 1972); then citing *Marcus*, 154 N.Y.S.3d at 823).

239. *Id*. at 477 (quoting *Marcus*, 154 N.Y.S.3d at 823) (citing Wegmans Enters., Inc. v. Lansing, 530 N.E.2d 1292, 1293 (N.Y. 1988)).

240. *Id*. (quoting Twin County Recycling Corp. v. Yevoli, 688 N.E.2d 501, 502 (N.Y. 1987)).

241. *See Chestnut Petroleum Dist.*, 201 N.Y.S.3d at 477 (citing Thirty W. Park Corp. v. Zoning Bd. of Appeals of City of Long Beach, 843 N.Y.S.2d 106, 107 (App. Div. 2d Dep't 2007); then citing Affiliated Brookhaven Civic Orgs., Inc. v. Plan. Bd. of the Town of Brookhaven, 177 N.Y.S.3d 257, 259 (App. Div. 2d Dep't 2022); then citing Smyles v. Bd. of Trustees of Vill. of Mineola, 992 N.Y.S.2d 83, 85 (App. Div. 2d Dep't 2014)).

use.[242] Moreover, a court must defer to the discretion of a zoning board of appeals and "may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record."[243]

The zoning law in *Chestnut Petroleum District* allowed convenience stores as an accessory use to a gas station if, among other things, a traffic circulation plan established that the use of the site for both a gas station and convenience store would not create unsafe conditions or vehicular conflicts.[244] The court found that the Planning Board's conclusion that the petitioner had not established that the proposal would not create unsafe traffic conditions or vehicular conflicts was rational and supported by the record.[245]

Forty years ago, the Court of Appeals determined in *Robert Lee Realty Co. v. Village of Spring Valley* that "denial of such a [special] permit on the basis of traffic congestion may well be arbitrary absent evidence that the proposed special permit use would have a greater impact than would other uses unconditionally permitted."[246] Therefore, pursuant to the *Robert Lee Realty* decision, a special permit application may not be denied unless the evidence substantiating the adverse effects of a proposed special permit use are greater than the impacts associated with uses permitted by right in the same zoning district.[247] Consistent with the constraints of the *Robert Lee Realty* decision, the Planning Board in *Chestnut Petroleum District* had a reasonable basis to conclude that the use as proposed would cause greater traffic congestion than as-of-right uses in the district.[248] The court concluded that

242. *See id.* at 478 (quoting Tandem Holding Corp. v. Bd. of Zoning Appeals of Town of Hempstead, 373 N.E.2d 282, 284 (N.Y. 1977)) (citing 153 Mulford Assoc., LLC v. Zoning Bd. of Appeals of the Town of E. Hampton, 168 N.Y.S.3d 527, 531 (App. Div. 2d Dep't 2022)).

243. *Id*. (quoting *153 Mulford Assoc*., 168 N.Y.S.3d at 531) (citing QuickChek Corp. v. Town of Islip, 89 N.Y.S.3d 210, 212 (App. Div. 2d Dep't 2018)).

244. *See id.* (citing TOWN OF MOUNT PLEASANT, N.Y., TOWN CODE § 218–33(J)(10) (2025)).

245. *See id.* (citing Gordon v. Plan. Bd. of Town of E. Hampton, 165 N.Y.S.3d 739, 740 (App. Div. 2d Dep't 2022); then citing Saint James Antiochian Orthodox Church v. Town of Hyde Park Plan. Bd., 17 N.Y.S.3d 481, 483 (App. Div. 2d Dep't 2015); then citing Valentine v. McLaughlin, 930 N.Y.S.2d 51, 53 (App. Div. 2d Dep't 2011)).

246. Robert Lee Realty Co. v. Vill. of Spring Valley, 462 N.E.2d 1193, 1193–94 (N.Y. 1984) (citing Oyster Bay Dev. Corp. v. Town Bd. of Oyster Bay, 451 N.Y.S.2d 796, 798 (App. Div. 2d Dep't 1982)).

247. *See id.* at 1194.

248. *See* Chestnut Petroleum Dist., Inc. v. Town of Mount Pleasant Plan. Bd., 201 N.Y.S.3d 475, 477–78 (App. Div. 2d Dep't 2023) (citing Smyles v. Bd. of Trs. of Vill. of Mineola, 992 N.Y.S.2d 83, 85 (App. Div. 2d Dep't 2014); Leon Petroleum

although the assertions of each party had factual support in the record, the Planning Board's decision was subject to judicial deference and should be confirmed.[249]

The petitioners in *Preserve Pine Plains v. Town of Pine Plains Planning Board* challenged the approval of a special permit to construct a solar energy farm on a forty-two-acre portion of a 172-acre property which would contain 23,000 photovoltaic panels that would be twelve feet in height.[250] The petitioners claimed that the applicant did not satisfy the special permit "criteria" set forth in the zoning law.[251] The Planning Board contended that it had undertaken a comprehensive review of the application, complied with all procedural and substantive requirements of the zoning law and imposed twenty-seven conditions to ameliorate any perceived deleterious impacts of the project.[252]

A special permit "gives a property owner permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right."[253] "A special use permit 'is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood.'"[254] In order to establish entitlement to a special permit, an applicant must demonstrate compliance with all applicable legislatively delegated criteria.[255] In reviewing a special permit application, "[a] local planning board has broad discretion in reaching its determinations . . . ."[256] A special permit application must be approved unless there are reasonable grounds in the record substantiating the denial.[257] The

v. Bd. of Trs. of Vill. of Mineola, 765 N.Y.S.2d 656, 659 (App. Div. 2d Dep't 2003); N. Shore Steak House, Inc. v. Board of Appeals of Inc. Vill. of Thomaston, 282 N.E.2d 606, 610 (N.Y. 1972); QuickChek Corp. v. Town of Islip, 89 N.Y.S.3d 210, 212 (App. Div. 2d Dep't 2018)).

249. *See id.* (citing 153 Mulford Assoc., LLC v. Zoning Bd. of Appeals of the Town of E. Hampton, 168 N.Y.S.3d 527, 531 (App. Div. 2d Dep't 2022)).

250. *See* Pres. Pine Plains v. Town of Pine Plains Plan. Bd., No. 500087/2024, 2024 N.Y. Slip. Op. 50696(U), at *1 (Sup. Ct. Putnam Ctny. June 4, 2024).

251. *See id.* at *14.

252. *See id.*

253. *Id.* (quoting 7-Eleven, Inc. v. Inc. Vill. of Mineola, 7 N.Y.S.3d 517, 518 (App. Div. 2d Dep't 2015), *lv. denied,* 38 N.E.3d 828 (N.Y. 2015)).

254. *Id.* (quoting Retail Prop. Tr. v. Bd. of Zoning Appeals of Town of Hempstead, 774 N.E.2d 727, 731 (N.Y. 2002)).

255. *See Pres. Pine Plains*, 2024 N.Y. Slip. Op. 50696(U), at *39.

256. *Id.* at *40 (quoting Gordon v. Plan. Bd. of the Town of E. Hampton, 165 N.Y.S.3d 739, 740 (App. Div. 2d Dep't 2022) (citing Twin Cnty. Recycling Corp. v. Yevoli, 688 N.E.2d 501, 502 (N.Y. 1997)).

257. *See id*. at *41.

Preserve Pine Plains Court opined that a Planning Board is free to consider any matter related to the public health, safety, and welfare in deciding whether to grant or deny a special permit application.[258] Additionally, it is not within the purview of a court to second-guess a planning board's decisions or substitute its judgment for that of a planning board.[259]

The court opined that the petitioners' supposition that the zoning law's special permit standards is mandatory and requires strict compliance was erroneous.[260] Instead, the zoning law provided that the Planning Board was authorized to "'prescribe appropriate conditions and safeguards to ensure accomplishment' of the 11 objectives.'"[261] The court contended that

> the objectives in the zoning ordinance are, more or less, aspirational and not mandatory criteria. This is a distinction with a difference. Said differently, the Planning Board was not subject to criteria in imposing the appropriate conditions and safeguards in considering the public health, safety, and welfare of citizens of the Town.[262]

In assessing the allegation that the project was detrimental to the character of the community, the court expressed the opinion that boards reviewing special permit applications "have broad discretion in deciding whether to grant a special use permit, irrespective of scientific or expert evidence."[263] Of course, a planning board may not deny a special permit based solely on community objection.[264] "If there are specific, reasonable grounds for the municipality to conclude that the proposed special use is not desirable at the particular location, then the permit may properly be denied even though the statutory requirements for the special use are met."[265]

Because some of the residents of the area might have had partial views of a corner of the solar project where no buffer would exist and,

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258. *See id.*

259. *See id.* at *42.

260. *See Pres. Pine Plains*, 2024 N.Y. Slip. Op. 50696(U), at *42.

261. *Id.* at *44; *see* TOWN OF PINE PLAINS, N.Y., ZONING LAW § 275-24 (D)(5)).

262. *Id.* at *41; *see* TOWN OF PINE PLAINS, N.Y., ZONING LAW § 275-55 (B)).

263. *Id.* at *43 (citing Metro Enviro Transfer, LLC v. Vill. of Croton-on-Hudson, 833 N.E.2d 1210, 1212 (N.Y. 2005)).

264. *See id.* (first quoting *Retail Property Trust*, 774 N.E.2d at 731; then quoting Biggs v. Eden Renewables LLC, 137 N.Y.S.3d 515, 520 (App. Div. 3d Dep't 2020)).

265. *See Pres. Pine Plains*, 2024 N.Y. Slip. Op. 50696(U), at *43–*44 (quoting Steenrod v. City of Oneonta, 892 N.Y.S.2d 649, 650 (App. Div. 3d Dep't 2010)).

accordingly, the project might have had an inconsequential impact on community character, the Planning Board required that the solar panels be constructed in less visible areas of the site where the view would be buffered by existing vegetation and by the topography and that additional vegetative screening be installed.[266] "Those conditions were reasonable 'to further shield the community's view of the solar project.'"[267]

The court further found that the Planning Board had rationally concluded that because there would be no visual negative impacts from the project, the property values of neighboring properties would not be deleteriously affected.[268] "The choice between weighing conflicting expert evidence rests in the discretion of the administrative agency."[269] Thus, the Planning Board could legitimately credit the professional opinions of its consultant and those of the developer's experts, and reject the studies offered by the petitioners, especially because the petitioners' reports were indefinite or contained conflicting conclusions.[270]

The court concluded that because the Planning Board's determination had a rational basis that was substantiated by the record, it was required to defer to the Planning Board's judgment.[271] The conclusion is correct given the apparently voluminous record establishing the lack of deleterious impacts and the Planning Board's imposition of mitigating conditions. However, the decision does not correctly relate certain pertinent principles. The court opined that "the Planning Board was not subject to criteria in imposing the appropriate conditions and safeguards in considering the public health, safety, and welfare."[272] A town board or village board of trustees is not restricted by the special permit criteria enumerated in a zoning law and is not prohibited from considering other factors "unless the standards purport to be so complete or exclusive as to preclude the Board from considering other

266. *See id*.

267. *Id*. at *46–*46 (quoting *Biggs*, 137 N.Y.S.3d at 520).

268. *See id*. at *48.

269. *Id*. at *49 (quoting Brooklyn Bridge Park Legal Def. Fund, Inc. v. N.Y. State Urban Dev. Corp., 856 N.Y.S.2d 235, 237 (App. Div. 2d Dep't 2008), *lv. denied,* 892 N.E.2d 401 (N.Y. 2008)).

270. *See Pres. Pine Plains*, 2024 N.Y. Slip. Op. 50696(U), at *49 (citing Ball v. N.Y. State Dep't of Env't Conservation, 826 N.Y.S.2d 698 (App. Div. 2d Dep't 2006)).

271. *See id*. at *51–52.

272. *Id*. at *41.

factors without amendment of the zoning ordinance."[273] However, a delegation of review authority to a planning board or other board authorized to review special permits must be accompanied by satisfactory standards to guide and limit an administrative body's exercise of discretion.[274] Such boards may only act in conformity with the authority delegated to them and may not exceed that authority.[275]

The Second Department determined in *Moriarty v. Planning Board of the Village of Sloatsburg* that, similar to the delegation of authority in *Preserve Pine Plains*, the site plan review authority was limited to those items specifically enumerated in the statute and that the delegation to consider "such other elements as may reasonably be related to the health, safety and general welfare of the community" provided no additional review authority.[276] Hence, the special permit review authority and the ability to impose conditions was required to relate to the specifically enumerated review criteria. The elements set forth in the provision in the zoning law were general and likely provided appropriate authority for the Board's actions. However, the court's reliance on public health, safety, and welfare is somewhat inaccurate.

Likewise, the opinion that satisfaction of the special permit elements is not mandatory and that strict compliance with the specified criteria is not required is an imprecise statement of the law. To the contrary, the failure to satisfy any one of the special permit criteria set forth in a zoning law mandates denial of a special permit application.[277]

273. Cummings v. Town Bd. of New Castle, 466 N.E.2d 147, 148 (N.Y. 1984) (citing 4M Club, Inc. v. Andrews, 204 N.Y.S.2d 610, 611 (App. Div. 2d Dep't 1960)); *see also* Liska N.Y., Inc. v. City Council of N.Y.C., 19 N.Y.S.3d 884, 884 (App. Div. 1st Dep't 2015).

274. *See* Dur-Bar Realty Co. v. City of Utica, 394 N.Y.S.2d 913, 917 (App. Div. 4th Dep't 1977), *aff'd*, 380 N.E.2d 328 (N.Y. 1978).

275. *See id.*

276. Moriarty v. Plan. Bd. of the Vill. of Sloatsburg, 506 N.Y.S.2d 184 (App. Div. 2d Dep't 1986) (quoting N.Y. VILLAGE LAW § 7-725(1)(a) (McKinney 2025)).

277. *See* Wegmans Enters. v. Lansing, 530 N.E.2d 1292 (N.Y. 1988); *see also* Frigault v. Town of Richfield Plan. Bd., 9 N.Y.S.3d 708, 709 (App. Div. 3d Dep't 2015); Dries v. Town Bd. of the Town of Riverhead, 759 N.Y.S.2d 367, 367 (App. Div. 2d Dep't 2003); Calabro v. Town of Oyster Bay Zoning Bd. of Appeals, 603 N.Y.S.2d 542, 543 (App. Div. 2d Dep't 1993); Beekman Delamater Props., LLC v Vill. of Rhinebeck Zoning Bd. of Appeals, 57 N.Y.S.3d 57, 62 (App. Div. 2d Dep't 2017).

VII. SUBDIVISIONS

A. Subdivision Access

In in *Bali Two, LLC v. Pascale*, the petitioner owned a 5.3-acre parcel that bordered Davidson Drive on its north side and Silas Carter Road on its east side.[278] The petitioner applied to the Planning Board to subdivide the property into four lots, with the westerly two lots having access from Davidson Drive.[279] The supreme court affirmed the Planning Board's denial of the application and the Appellate Division reversed and remanded the matter for a new hearing and determination.[280]

"An abutting landowner may only be deprived of access to a public highway if 'there is available a suitable alternative means of access to a public highway' and the municipality proves that the denial of access is 'reasonably necessary in the interest of public safety or welfare.'"[281] The property in *Bali Two* directly bordered a public highway, Davidson Drive.[282] Nevertheless, while the Planning Board concluded that Silas Carter Road provided a satisfactory alternative means of access to the property, it failed to consider whether the denial of the application was required in the interest of public safety.[283] Consequently, the Planning Board's decision was arbitrary and capricious and affected by an error of law.[284]

B. Fees

The amount of a municipal fee must bear a direct relation to the cost of providing the service.[285] If receipts from a fee far exceed the costs for which it was assessed, it is considered to be an unauthorized tax and to exceed the authority delegated to a municipality.[286] The

278. *See* Bali Two, LLC v. Pascale, 207 N.Y.S.3d 554, 555 (App. Div. 2d Dep't 2024).

279. *See id.*

280. *See id.* at 556.

281. *Id*. (first quoting BBJ Assocs., LLC v. Zoning Bd. of Appeals of Town of Kent, 881 N.Y.S.2d 496, 503 (App. Div. 2d Dep't 2009) (citing Burger King Corp. v. Cnty. of Suffolk, Dep't of Pub. Works, 503 N.Y.S.2d 157, 158 (App. Div. 2d Dep't 1986)).

282. *See id.*

283. *See Bali Two*, 207 N.Y.S.3d at 556.

284. *See id.*

285. *See* Suffolk Cnty. Builders Ass'n v. Cnty. of Suffolk, 389 N.E.2d 133, 136 (N.Y. 1979); *see also* Torsoe Bros. Constr. Corp. v. Bd. of Trs. of the Vill. of Monroe, 375 N.Y.S.2d 612, 616–17 (App. Div. 2d Dep't 1975); Bon Aire Ests., Inc. v. Vill. of Suffern, 302 N.Y.S.2d 304, 307 (App. Div. 2d Dep't 1969).

286. *See Torsoe Bros. Constr. Corp.*, 375 N.Y.S.2d at 617; *see also Bon Aire Ests., Inc.*, 302 N.Y.S.2d at 307.

Court of Appeals determined in *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor* that

> fees also "should be assessed or estimated on the basis of reliable factual studies or statistics." Put another way, the yardstick by which the reasonableness of charges made to an applicant in an individual case may be evaluated is the experience of the local government in cases of the same type."[287]

The Court set forth its rationale for that conclusion as follows:

> Without the safeguard of a requirement that fees bear a reasonable relation to average costs, a board would be free to incur, in the individual case, not only necessary costs but also any which it, in its untrammeled discretion, might think desirable or convenient, no matter how oppressive or discouraging they might in fact be for applicants.[288]

In *WG Woodmere, LLC v. Nassau County Planning Commission*, the petitioners challenged the validity of fees required for its application to subdivided a 117-acre golf course into 285 single-family lots.[289] The petitioners alleged that the fees purportedly were invalid because: the fees were excessive and constituted an unauthorized tax; the fees were implemented by the adoption of an ordinance, as opposed to a local law, in violation of Municipal Home Rule Law Section 10(1)(ii)(a); and the portion of the fees charged for the administration of a State Environmental Quality Review Act ("SEQRA") review was preempted by the SEQRA regulations.[290] The supreme court denied the petitioners' motion for summary judgment and the appellate division affirmed.[291]

Ordinances enacted by local governments, including those that exact subdivision application fees, are entitled to "a strong but rebuttable presumption of validity."[292] Moreover, a legislative body is presumed to have investigated the subject matter of its enactments.[293] The court

287. Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor, 352 N.E.2d 115, 118 (N.Y. 1976).

288. *Id.*

289. WG Woodmere, LLC v. Nassau Cnty. Plan. Comm'n, 218 N.Y.S.3d 627, 629 (App. Div. 2d Dep't 2024).

290. *Id.* (citing N.Y. MUN. HOME RULE § 10(1)(ii)(a) (McKinney 2025)).

291. *See id.*

292. *Id.* (citing Lighthouse Shores v. Town of Islip, 359 N.E.2d 337, 341 (N.Y. 1976)).

293. *See id.* at 629–630.

first rejected the claim that the fee was an illegal tax.[294] Regulatory fees must be "reasonably necessary to the accomplishment of the regulatory program."[295] However, such "fees cannot be charged to generate revenue or to offset the cost of other governmental functions."[296] Nevertheless, "exact congruence" between the expenses incurred in reviewing a fee-based application and the fees charged to an applicant is not required.[297] However, a fee cannot "far exceed" the cost of administration.[298] A fee that far exceeds a municipality's cost is an invalid, unauthorized tax.[299] The petitioners in *WG Woodmere* failed to satisfy their *prima facie* burden to demonstrate that the fees charged far exceeded the cost of review of the subdivision application.[300]

The court also rejected the contention that the fees were invalid because they were enacted by the adoption of an ordinance rather than a local law in contravention of the provisions of Municipal Home Rule Law Section 10(1)(ii)(a).[301] However, contrary to the petitioners' claim, the authority conferred on municipal governments by Municipal Home Rule Law Section 10(1)(ii)(a)(9-a) to act adopt local laws establishing fees is not a restriction against such enactments by other authorized means, such as, for example, by adoption of an ordinance pursuant to the authority of section 10 of the Statute of Local Governments.[302] Because the County's establishment of fees by ordinance was sanctioned by Statute of Local Governments Section 10 and not forbidden by Municipal Home Rule Law Section 10(1)(ii)(a)(9-a), the Municipal Home Rule Law did not bar adoption of the fee ordinance was not enacted contrary.[303]

Lastly, the court also rejected the petitioners' assertion that the fees charged for SEQRA review were preempted by state law.[304] "Under the

294. *See WG Woodmere, LLC*, 218 N.Y.S.3d at 630.

295. *Id.* (quoting Cella v. County of Suffolk, 199 N.Y.S.3d 109, 111 (App. Div. 2d Dep't 2023)).

296. *Id.* (quoting *Cella*, 199 N.Y.S.3d at 109).

297. *Id*. (citing Suffolk Cnty. Builders Ass'n. v. County of Suffolk, 389 N.E.2d 133, 137 (N.Y. 1979)).

298. *Id.* (citing Bon Aire Ests., Inc. v. Vill. of Suffern, 302 N.Y.S.2d 304, 307 (App. Div. 2d Dep't 1969)).

299. *See WG Woodmere, LLC*, 218 N.Y.S.3d at 630 (citing Joy Apartments, LLC v. Town of Cornwall, 75 N.Y.S.3d 249, 251 (App. Div. 2d Dep't 2018)).

300. *See id*. at 630–631 (citing Fairhaven Apartments No. 4, Inc. v. Town of N. Hempstead, 778 N.Y.S.2d 281, 282 (App. Div. 2d Dep't 2004)).

301. *See id*. at 631 (citing N.Y. MUN. HOME RULE § 10(1)(ii)(a) (McKinney 2025)).

302. *See id.* (citing N.Y. MUN. HOME RULE § 10(1)(ii)(a)(9-a) (McKinney 2025)).

303. *See id*.

304. *See WG Woodmere*, 218 N.Y.S.3d at 631.

doctrine of conflict preemption, local governments 'cannot adopt laws that are inconsistent with the Constitution or with any general law of the State.'"[305] "Under the doctrine of conflict preemption, a local law is preempted by a state law when a right or benefit is expressly given by State law which has then been curtailed or taken away by the local law."[306] The petitioners in *WG Woodmere* failed to establish that the segment of the fees charged for SEQRA review exceeded the fees allowable by the applicable SEQRA regulation, 6 N.Y.C.R.R. Section 617.13.[307]

VIII. DUE PROCESS

A party's due process rights are violated if a board accepts evidence after a hearing has been closed and without giving all interested parties an opportunity to review and comment on or rebut such information.[308] To be contrasted with that principle, the petitioner in *Gabriele v. Zoning Board of Appeals of Town of Eastchester* submitted a letter opposing an application for area variances seven weeks after the hearing had been closed.[309] Thereafter, she commenced an Article 78 proceeding challenging the subsequent approval of the variances, alleging that her due process rights were violated by the Zoning Board of Appeals' refusal to accept the post-hearing submission.[310] The court rejected her claim finding that "[t]he petitioner, who attended the hearing on three of the four hearing dates, including the final one, was afforded the 'opportunity to be heard in a meaningful manner at a meaningful time.'"[311]

305. *See id*. (quoting Inc. Vill. of Nyack v. Daytop Vill., 583 N.E.2d 928, 929–30 (N.Y. 1991)).

306. *See id*. at 700–701 (quoting Sunrise Check Cashing & Payroll Servs., Inc. v. Town of Hempstead, 933 N.Y.S.2d 388, 395 (App. Div. 2d Dep't 2011), *aff'd* 986 N.E.2d 898 (N.Y. 2013)).

307. *See id*. at 701; 6 N.Y.C.R.R.§ 617.13 (2025).

308. *See* Hampshire Mgmt. Co. v. Nadel, 660 N.Y.S.2d 64, 65–66 (App. Div. 2d Dep't 1997); Sunset Sanitation Serv. Corp. v. Bd. of Zoning Appeals of the Town of Smithtown, 569 N.Y.S.2d 141, 142 (App. Div. 2d Dep't 1991); Stein v. Bd. of Appeals of the Town of Islip, 473 N.Y.S.2d 535, 537 (App. Div. 2d Dep't 1984); 89 JPS, LLC v. Joint Vill. of Lake Placid, Town of North Elba Review Bd., 957 N.Y.S.2d 263, 263 (Sup. Ct. Essex Cty. 2012).

309. *See* Gabriele v. Zoning Bd. of Appeals of Town of Eastchester, 214 N.Y.S.3d 55, 56 (App. Div. 2d Dep't 2024).

310. *See id*.

311. *Id*. at 57–58 (quoting Kaur v. N.Y. State Urban Dev. Corp., 933 N.E.2d 721, 736 (N.Y. 2010) (citing Astoria Landing, Inc. v. Del Valle, 137 N.Y.S.3d 481, 484 (App. Div. 2d Dep't 2020)).

The Planning Board in *Bali Two* inappropriately relied on a letter it received from residents of Davidson Drive, objecting to the proposed access because the petitioner was not made aware of the letter until after the public hearing was closed and did not have an opportunity to refute the letter.[312]

312. Bali Two, LLC v. Pascale, 207 N.Y.S.3d 554, 555 (App. Div. 2d Dep't 2024) (first citing *Sunset Sanitation Serv. Corp.*, 569 N.Y.S.2d at 142; then citing *Stein*, 473 N.Y.S.2d at 536).