ZONING & LAND USE LAW

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INTRODUCTION

Recent developments in New York zoning and land use law reflect a continued recalibration of the balance between municipal home rule authority and the constraints imposed by state preemption, constitutional doctrine, and judicial oversight. Over the past *Survey* year,

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courts have addressed a wide spectrum of issues, including the scope of local authority over cannabis regulation, the continued vitality of the term limits rule, the prohibition against contract zoning, and the constitutional limits on development exactions. Recent decisions also consider the standards governing legislative zoning determinations, site plan and special permit review, and variance decisions. Collectively, these decisions reaffirm both the breadth of local zoning power and the doctrinal limits that define its exercise.

In the area of preemption, courts have emphasized that municipal zoning authority must yield where the State has enacted a comprehensive regulatory framework. In *Tink & E. Co. v. Town of Riverhead*, the court invalidated a local zoning provision which sought to impose a 2,500-foot separation requirement between cannabis dispensaries, holding that it was preempted by the Marijuana Regulation and Taxation Act ("MRTA") and its implementing regulations, which establish a 1,000-foot standard and reflect the State's intent to occupy the field.[1] The decision highlights that even traditional zoning tools, such as spacing and siting requirements, cannot be used to frustrate state policy by rendering permitted uses impracticable.

Courts have likewise continued to enforce longstanding limitations on contract zoning. In *Hudson View Park Co. v. Town of Fishkill*, the appellate division, second separtment, held that a memorandum of understanding requiring a town board to continue reviewing a zoning petition to final determination, and purporting to bind successor boards, violated the term limits rule and constituted impermissible contract zoning.[2] In reaching that conclusion, the court rejected attempts to invoke the "balancing of public interests" test articulated in *In re County of Monroe*,[3] reaffirming that such analysis is limited to intergovernmental land use conflicts and does not apply to agreements between municipalities and private developers. The decision reinforces the principle that zoning authority remains a discretionary legislative function that cannot be constrained by prior contractual commitments.

At the federal level, in 2024, the Supreme Court clarified the scope of constitutional scrutiny applicable to land use exactions. In *Sheetz v. County of El Dorado*, the Court held that the *Nollan*/*Dolan*

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1. *See* Tink & E. Co. v. Town of Riverhead, No. 606599/2025, 2025 N.Y. Slip Op. 51224(U), at 2–4 (Sup. Ct. Suffolk Cty. July 23, 2025).

2. *See* Hudson View Park Co. v. Town of Fishkill, 222 N.Y.S.3d 76, 83–85 (App. Div. 2d Dep't 2024), *aff'd*, No. 115, 2025 N.Y. Slip Op. 07080 (N.Y. Dec. 18, 2025).

3. *See In re* Cnty. of Monroe, 530 N.E.2d 202, 203–04 (N.Y. 1988).

framework applies not only to ad hoc administrative conditions but also to legislatively imposed development fees.[4] This expansion of takings doctrine potentially has significant implications for local governments. Applying that reasoning, New York courts have begun to scrutinize broadly applicable fees. In *Coalition for Fairness in Soho & Noho, Inc. v. City of New York*, the appellate division, first department, invalidated a mandatory "Arts Fund" fee imposed as a condition of residential conversion, concluding that it lacked both an essential nexus to legitimate land use interests and rough proportionality to any project-related impacts.[5] Although the decision was reversed by the Court of Appeals in 2026, a decision which will be analyzed in next year's *Survey* article, an understanding of the principles upon which the Court relied in its analysis is helpful in understanding important Supreme Court precedent in the area.

With respect to legislative zoning determinations, courts have continued to apply a highly deferential standard of review. In *Bennett v. Troy City Council*, the appellate division, third department, upheld a rezoning that permitted multi-unit residential development, emphasizing that such determinations are entitled to a strong presumption of validity and will be sustained where consistency with a community's comprehensive plan is "fairly debatable."[6] This deferential approach reflects the judiciary's recognition that local officials possess superior familiarity with community planning considerations.

Closely related principles govern site plan and special permit review, where local boards exercise administrative, rather than legislative, authority. Courts have reiterated that, although municipalities retain discretion to impose reasonable conditions, that discretion is restricted by the standards set forth in the zoning law and may not be used to revisit the prior legislative determination that a use is permissible. As the Court of Appeals held many years ago in *Retail Property Trust v. Board of Zoning Appeals*, once a use is permitted by special permit, the reviewing board's authority is limited to evaluating compliance with enumerated criteria and imposing conditions directly related to mitigating adverse impacts.[7] Recent cases have continued to

4. *See* Sheetz v. Cnty. of El Dorado, 601 U.S. 267, 275 (2024).

5. *See* Coal. for Fairness in Soho & Noho, Inc. v. City of New York, 221 N.Y.S.3d 89, 90–91 (App. Div. 1st Dep't 2024), *rev'd*, Coal. for Fairness in Soho & Noho, Inc. v. City of New York, 2026 N.Y. Slip Op. 00076 (Jan. 13, 2026).

6. *See* Bennett v. Troy City Council, 219 N.Y.S.3d 800, 805 (App. Div. 3d Dep't 2024).

7. *See* Retail Prop. Tr. v. Bd. of Zoning Appeals, 774 N.E.2d 727, 731 (N.Y. 2002).

enforce this limitation, annulling denials of special permit, as well as site plan, applications where boards relied on generalized community opposition or concerns already resolved by the legislative body in designating the use as a permitted use. These decisions confirm that site plan and special permit review remain mechanisms for ensuring that permitted uses are implemented in a manner consistent with established standards and not a review to determine whether the use itself is permissible.

Recent decisions involving zoning boards of appeal illustrate both adherence to established principles and a willingness to scrutinize the sufficiency of the record. In *80 Woodland Ave, LLC v. Village of Catskill*, the Third Department reaffirmed that self-created hardship generally precludes a use variance, particularly where the applicant acquired the property with knowledge of applicable zoning restrictions.[8] Nevertheless, the court acknowledged a narrow exception recognized in earlier precedent, including *Citizens Savings Bank v. Board of Zoning Appeals* and *Center Square Ass'n v. City of Albany Board of Zoning Appeals*, where post-acquisition circumstances rendered prior lawful uses infeasible and the hardship, accordingly, was not deemed self-created.[9]

By contrast, in *Williams v. Town of Lake Luzerne Zoning Board of Appeals*, the Third Department annulled the denial of an area variance, finding that the zoning board relied on conclusory assertions and failed to identify any actual adverse impact on the neighborhood.[10] In doing so, the court reinforced a growing body of case law emphasizing that the "substantiality" of a variance cannot be assessed in the abstract, but must instead be evaluated in light of its real-world impact, a principle reflected in earlier decisions such as *Kleinhaus v. Zoning Board of Appeals* and *Raubvogel v. Board of Zoning Appeals*.[11] The decision in *Freepoint Solar LLC v. Town of Athens Zoning Board of*

8. *See* 80 Woodland Ave, LLC v. Vill. of Catskill, 239 N.Y.S.3d 350, 354–55 (App. Div. 3d Dep't 2025).

9. *See* Citizens Sav. Bank v. Bd. of Zoning Appeals, 657 N.Y.S.2d 108, 108 (App. Div. 3d Dep't 1997); Ctr. Square Ass'n v. City of Albany Bd. of Zoning Appeals, 798 N.Y.S.2d 756, 758 (App. Div. 3d Dep't 2005).

10. *See* Williams v. Town of Lake Luzerne Zoning Bd. of Appeals, 240 N.Y.S.3d 284, 286 (App. Div. 3d Dep't 2025).

11. *See* Kleinhaus v. Zoning Bd. of Appeals, N.Y.L.J., Mar. 26, 1996, at 37 (Sup. Ct. Westchester Cty. 1996); Raubvogel v. Bd. of Zoning Appeals, N.Y.L.J., Dec. 27, 1995, at 33 (Sup. Ct. Nassau Cty. 1995).

Appeals clarified that solar energy facilities are entitled to a "relaxed" public necessity standard rather than traditional use variance criteria.[12]

Cuffaro v. Village of Bellport reaffirmed that estoppel is almost universally unavailable against a municipality for administrative errors, such as the prior issuance of permits for related "illegal" subdivision lots.[13] *Franklin Square Realty Associates v. Town of Hempstead* raised the possibility that a zoning board of appeals may under narrow circumstances examine the validity of an approval decades after it was granted if the original approval was jurisdictionally deficient.[14]

Supinsky v. Town of Huntington recognized that a court may direct the joinder of necessary parties even after the statute of limitations has expired.[15] The decision in *Johnson v. Zoning Board of Appeals* reiterated that a failure to refer a matter to a county planning agency pursuant to General Municipal Law Section 239-l or -m is a jurisdictional defect that renders a zoning board of appeals decision void, superseding the otherwise applicable thirty-day statute of limitations.[16] The decision in *Katz v. Town of Hempstead* illustrates that litigants must seek injunctive relief at every level, including at the appellate level, to prevent a project's substantial completion from rendering litigation moot.[17] *Smith v. Town of Thompson Planning Board* emphasized that a planning board lacks the authority to interpret the provisions of a zoning law which is a function of the zoning board of appeals.[18] The decision in *Friends of Coecles Harbor v. Town Board* emphasized the strong presumption of benefit for religious uses and reinforced the conclusion that close proximity alone does not confer standing without a specific, non-hypothetical injury-in-fact which is distinct from that of the public at large.[19]

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12. *See* Freepoint Solar LLC v. Town of Athens Zoning Bd. of Appeals, 224 N.Y.S.3d 219, 222–23 (App. Div. 3d Dep't 2024).

13. *See* Cuffaro v. Zoning Bd. of Appeals, No. 610155/2024, 2025 N.Y. Slip Op. 50248(U), at *6 (Sup. Ct. Suffolk Cty. Feb. 10, 2025).

14. *See* Franklin Square Realty Assocs., LLC v. Bd. of Appeals, 232 N.Y.S.3d 55, 58 (App. Div. 2d Dep't 2025).

15. *See* Supinsky v. Town of Huntington, 225 N.Y.S.3d 675, 677 (App. Div. 2d Dep't 2025).

16. *See* Johnson v. Zoning Bd. of Appeals, 239 N.Y.S.3d 867, 871–72 (App. Div. 4th Dep't 2025).

17. *See* Katz v. Town of Hempstead, 226 N.Y.S.3d 567, 569 (App. Div. 2d Dep't 2025).

18. *See* Smith v. Town of Thompson Plan. Bd., 223 N.Y.S.3d 356, 358–60 (App. Div. 3d Dep't 2024).

19. *See* Friends of Coecles Harbor, Inc. v. Town Bd., 233 N.Y.S.3d 678, 680–81 (App. Div. 2d Dep't 2025).

Taken together, these decisions demonstrate that while New York courts remain highly deferential to local zoning authority, they continue to enforce meaningful limits grounded in statutory law, constitutional doctrine, and principles of administrative rationality. Whether addressing emerging regulatory frameworks, such as cannabis licensing, or longstanding doctrines governing variances, site plan review, and zoning amendments, the courts have made clear that municipal discretion, although broad, is neither absolute nor immune from judicial scrutiny. As municipalities confront evolving development pressures and policy objectives, these constraints will continue to shape the trajectory of zoning and land use law in New York.

I. ZONING AMENDMENTS

A. Preemption

Although the Town Law, Village Law, and Municipal Home Rule Law afford vast authority to municipalities to enact zoning regulations, such authority is lacking if the State has preempted the field.[20] The authorization to enact zoning laws is rescinded if the Legislature has expressly forbidden the adoption of laws dealing with particular matters.[21] Additionally, intent to preempt a substantive area also may be found because of an unequivocal conflict between state and local laws or, alternatively, where the State has demonstrated an intent to occupy the field.[22] Field preemption occurs in one of three ways: (1) an express statement from the legislature that the state law preempts local law, (2) a declared state policy evincing the intent of the legislature to preempt local laws on the subject, or (3) "the Legislature's enactment of a comprehensive and detailed regulatory scheme in an area . . . deemed to demonstrate an intent to preempt local laws."[23] The field preemption analysis necessitates examination of the language of both the state statute and the local regulation as well as reviewing the direct consequences that the local law "render[s] illegal what is specifically allowed by State

20. *See* Kamhi v. Town of Yorktown, 547 N.E.2d 346 (N.Y. 1989); Sherman v. Frazier, 446 N.Y.S.2d 372 (App. Div. 2d Dep't 1982).

21. *See Kamhi*, 547 N.E.2d at 349.

22. *See* Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989).

23. *See* Chwick v. Mulvey, 915 N.Y.S.2d 578, 585 (App. Div. 2d Dep't 2010) (citing N.Y. State Club Ass'n v. City of New York, 505 N.E.2d 915, 917 (N.Y. 1987)).

law."[24] If the State has preempted a field, local regulation is impermissible even if no actual conflict exists between the regulations.[25]

The Marijuana Regulation and Taxation Act ("MRTA"), adopted in 2021, legalized adult-use cannabis sales and consumption.[26] MRTA and the implementing regulations reserve scant authority for municipalities that choose to allow retail cannabis dispensaries.[27] The preamble to MRTA stated that "it is in the best interest of the state to regulate the medical cannabis," thereby expressing a clear legislative intent for statewide oversight of this business.[28] With the exception of the specific opt-out provision, municipalities are broadly preempted from enacting any law, rule, ordinance, regulation, or prohibition pertaining to the operation or licensure of adult-use, medical, or cannabinoid hemp licenses.[29] Consequently, localities cannot enact their own licensing schemes or impose regulations that fundamentally interfere with the state's comprehensive licensing and operational framework.[30] Nevertheless, municipalities are permitted to pass local laws and regulations governing the "time, place and manner" of adult-use retail dispensaries and on-site consumption licenses.[31] This allows municipalities to address community-specific concerns.[32] However, a critical limitation on this local authority is the requirement that such laws and regulations may not make the operation of the licensed business "unreasonably impracticable" as determined by the Cannabis Control Board.[33] Likewise, implementing MRTA, 9 N.Y.C.R.R. Section 119.4(a) establishes a 1,000-foot distance requirement between cannabis dispensary locations.[34]

The implementing regulations, 9 N.Y.C.R.R. Section 119.1, provide that municipalities cannot adopt a local law allowing a dispensary or on-site consumption location to be situated: a) "on the same road and within 200 feet of the entrance of a building occupied exclusively as a house of worship;" b) "on the same road and within 500 feet of the

24. Lansdown Ent. Corp., v. N.Y.C. Dep't of Consumer Affs., 543 N.E.2d 725, 727 (N.Y. 1986) (citing People v. De Jesus, 430 N.E.2d 1260, 1263 (N.Y. 1981)).

25. *See Albany Area Builders Ass'n*, 546 N.E.2d at 922.

26. *See* 2021 McKinney's Sess. Law News of N.Y., ch. 92 (McKinney 2021) (codified at N.Y. CANNABIS LAW §§ 1–139 (McKinney 2026)).

27. *See* CANNABIS at § 131(2); 9 N.Y.C.R.R. § 119.1 (2026); *id.* § 119.4.

28. CANNABIS at § 2.

29. *See id.* at § 131(2); 9 N.Y.C.R.R. § 119.1.

30. *See* CANNABIS at § 131(2); 9 N.Y.C.R.R. § 119.1.

31. *See* CANNABIS at § 131(2).

32. *See id.*

33. *See id.*

34. *See* 9 N.Y.C.R.R. § 119.4(a)(1) (2026).

entrance of a building occupied exclusively as a school;" or c) "on the same road and within 500 feet of a structure or its grounds occupied exclusively as a public youth facility."[35] The Cannabis Law also provides that dispensaries cannot be open between the hours of 2:00 a.m. and 8:00 a.m. and that on-site consumption locations cannot be open between the hours of 4:00 a.m. and 8:00 a.m.[36] However, municipalities can adopt laws for cannabis businesses that are related to hours of operation, subject to the foregoing limitations, but they cannot establish hours less than a maximum of seventy hours per week.[37] They can also enact laws with respect to parking, traffic control for vehicles and pedestrians, noise, restrictions on distances between cannabis retailers and churches, schools, and other sensitive receptors.[38]

The petitioners in *Tink & E. Co. v. Town of Riverhead* sought to establish a cannabis dispensary in the town.[39] The town originally amended its zoning law to allow retail cannabis operations in 2022.[40] However, those regulations proved to be too restrictive, permitting only five properties that could potentially qualify as dispensary sites.[41] As a result, the town revised the zoning law in 2024, which amendments were intended to apply across five specified commercial "zoning corridors" in the town.[42] The revised provisions mandated a 2,500-foot "buffer" between retail cannabis dispensary locations which was significantly greater than the state's 1,000-foot standard.[43] In addition, the zoning law required properties to have direct frontage on Old Country Road to qualify as a dispensary as of right, even if they otherwise abutted the cannabis corridor.[44] The New York State Office of Cannabis Management previously had granted site protection to the property, unequivocally indicating that retail cannabis sales should be permitted at the location.[45] However, despite being adjacent to the designated cannabis corridor, the petitioners' property lacked direct frontage on Old Country Road.[46]

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35. *Id.* at § 119.1(a)(1)–(3).
36. *See id.* at §§ 119.2(a)(1)(i), (a)(2)(i), (a)(3)(i), (a)(4)(i).
37. *See id.* at §§ 119.2(a)(1)(ii), (a)(2)(ii), (a)(3)(ii), (a)(4)(ii).
38. *See* CANNABIS § 131(2); 9 N.Y.C.R.R. § 119.1.
39. *See* Tink & E. Co. v. Town of Riverhead, No. 606599/2025, 2025 N.Y. Slip Op. 51224(U), at 1 (Sup. Ct. Suffolk Cty. July 23, 2025).
40. *See id.* at 2.
41. *See id.*
42. *See id.*
43. *See id.*
44. *See Tink & E. Co.*, 2025 N.Y. Slip Op. 51224(U), at 3.
45. *See id.*
46. *See id*.

Although New York's constitutional home rule provision[47] "confers broad police powers upon local governments relating to the welfare of its citizens,"[48] a town or village cannot adopt laws that are inconsistent with the New York Constitution or with any general law of the state.[49] The authority of local governments to enact laws is subject to the fundamental constraint of the preemption doctrine.[50] The court opined that state preemption occurs in one of two ways, that is, when a local government adopts a law that directly conflicts with a state statute or when a local government legislates in a field for which the State Legislature has assumed full responsibility.[51]

9 N.Y.C.R.R. Section 119.4(a) established the required distance between cannabis dispensaries at 1,000 feet.[52] Because the Office of Cannabis Management conferred proximity protection on the property in 2024 and established a 1,000-foot boundary protecting the site, the State had decided the issue.[53] Thus, the town's effort to address the distance between cannabis dispensaries at 2,500 feet pursuant to its zoning law was preempted by state law.[54]

Moreover, as was related above, the adoption of MRTA in 2021 declared that "it is in the best interest of the state to regulate the legal cannabis industry," thereby expressing a specific intent of the State to regulate the industry.[55] Extensive regulations were promulgated by the Office of Cannabis Management and specifically provided that local governments are "preempted from adopting any law, rule, ordinance, regulation, or prohibition pertaining to the operation or licensure of . . . adult-use cannabis licenses."[56] Therefore, it is the State, not the town, which possesses the authority to regulate this industry.[57] The decision demonstrates that New York State's regulatory authority, particularly

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47. *See* N.Y. CONST. art. IX, § 2(c).

48. *Tink & E. Co.*, 2025 N.Y. Slip Op. 51224(U) at 2 (quoting Jancyn Mfg. Corp. v. Cnty. of Suffolk, 518 N.E.2d 903, 905 (N.Y. 1987)).

49. *See id.* (citing Inc. Vill. of Nyack v. Daytop Vill., Inc., 583 N.E.2d 928 (N.Y. 1991); N.Y. CONST. art. IX, § 2(c)).

50. *Tink & E. Co.*, 2025 N.Y. Slip Op. 51224(U) at 2.

51. *See id.*

52. *See id.* (citing 9 N.Y.C.R.R. § 119.4(a) (2025)).

53. *See id.*

54. *See id.* (citing Sunrise Check Cashing & Payroll Servs., Inc., v. Town of Hempstead, 933 N.Y.S.2d 388 (App. Div. 2d Dep't 2011), *aff'd sub nom.*, 986 N.E.2d 898 (N.Y. 2013)).

55. *Tink & E. Co.*, 2025 N.Y. Slip Op. 51224(U) at 2; *see also* N.Y. CANNABIS LAW § 2 (McKinney 2026).

56. *Tink & E. Co.*, 2025 N.Y. Slip Op. 51224(U) at 2 (quoting 9 N.Y.C.R.R. § 119.1(b) (2025)).

57. *See id.*

through MRTA, takes precedence over local regulations that impose more stringent or conflicting requirements on cannabis businesses.

B. Contract Zoning/Term Limit Rule

A petition seeking to amend a community's zoning law is addressed to the legislative discretion of the board of trustees, town board or city council.[58] Accordingly, such legislative boards are not obligated to entertain or vote on a zone change or text amendment petition.[59] As a result, a developer can expend substantial sums of money in preparing and advocating for a zone change or amendment only to find that the local legislative body will not consider the petition or terminate its review. Although some states authorize development agreements which delineate the development review process and, in some instances, freeze the zoning regulations in effect at the time of the agreement so as to protect a developer from ensuing changes in zoning regulations, New York does not, and they generally are considered to be invalid and unenforceable.[60]

In addition to the lack of statutory authorization, development agreements in New York typically conflict with two preclusive doctrines, that is, the term limits rule and contract zoning. "The term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so."[61] The basis for the principle

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58. *See* Norman v. Town Bd., 500 N.Y.S.2d 324, 325 (App. Div. 2d Dep't 1986); S. Dutchess Country Club v. Town Bd., 270 N.Y.S.2d 165, 166 (App. Div. 2d Dep't 1966), *aff'd*, 222 N.E.2d 739 (N.Y. 1966).

59. *See* Structural Tech., Inc. v. Foley, 868 N.Y.S.2d 228, 229 (App. Div. 2d Dep't 2008); Wolff v. Town/Vill. of Harrison, 816 N.Y.S.2d 186, 187 (App. Div. 2d Dep't 2006); Soc'y of N.Y. Hosp. v. Del Vecchio, 506 N.Y.S.2d 596, 598 (App. Div. 2d Dep't 1986), *aff'd*, 512 N.E.2d 302 (N.Y. 1987); Hampshire Recreation, LLC v. Vill. of Mamaroneck, 119 N.Y.S.3d 890 (App. Div. 2d Dep't 2020), *appeal dismissed*, 119 N.Y.S.2d 903 (App. Div. 2d Dep't 2020).

60. *See* ARIZ. REV. STAT. ANN. § 9-500.05 (2005); CAL. GOV'T CODE §§ 65864–65869.5 (West 1984); COLO. REV. STAT. § 24-68-101 (1987); FLA. STAT. ANN. §§ 163.3220–163.3243 (West 2011); HAW. REV. STAT. §§ 46-121 to 46-132 (West 1985); IDAHO CODE ANN. § 67-6511A (West 1999); LA. STAT. ANN. § 33:4780.21 (1988); MD. CODE ANN., LAND USE § 7-302 (West 2013); N.J. STAT. ANN. § 40:55D-45.2 (West 1987); NEV. REV. STAT. ANN. §§ 278.0201–278.0207 (LexisNexis 2015); OR. REV. STAT. ANN. § 94.504 (West 2007); S.C. CODE ANN. § 6-31-30 (1993); TEX. LOC. GOV'T CODE ANN. §§ 212.172, 382.102 (West 2021); VA. CODE ANN. § 15.2-2303.1 (2007); WASH. REV. CODE ANN. § 36.70B.170 (West 1995).

61. Karedes v. Colella, 790 N.E.2d 257, 259–60 (N.Y. 2003) (citing Morin v. Foster, 380 N.E.2d 217 (N.Y. 1978)); Charter Sch. for Applied Techs. v. Bd. of Educ., 964 N.Y.S.2d 366, 368 (App. Div. 4th Dep't 2013).

is that "[e]lected officials must be free to exercise legislative and governmental powers in accordance with their own discretion and ordinarily may not do so in a manner that limits the same discretionary right of their successors to exercise those powers."[62]

With respect to contract zoning, "no municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties."[63] The appropriate analysis is whether a development agreement compels a municipality to a specific course of action with respect to a zoning amendment.[64]

A developer and the town board and planning board entered into a memorandum of understanding ("MOU") in *Hudson View Park Co. v. Town of Fishkill*, whereby the town board agreed that it "shall not terminate its review of the [plaintiff's] Zoning Petition, and the Project in general, until it reaches a final determination on the merits in its legislative judgment regarding the best interests of the town based upon empirical data and other objective factual bases . . . ."[65] The MOU also provided that it would be binding on the parties' successors.[66] The plaintiff subsequently submitted a petition seeking a zone change and text amendments.[67] A year and a half later, a newly elected town board adopted a resolution terminating its review of the petition.[68] The plaintiff then instituted an action against the town, the town board, and the individual members of the town board based on the town board's termination of its review of the project.[69] The complaint asserted causes of action alleging breach of contract and breach of the duty of good faith and fair dealing and sought to recover damages for its costs incurred in prosecuting the petition.[70] The supreme court granted the town's motion to dismiss the complaint, finding that the MOU violated the term limits rule and that it further constituted illegal

62. *Karedes*, 790 N.E.2d at 260.

63. Collard v. Inc. Vill. of Flower Hill, 421 N.E.2d 818, 821 (N.Y. 1981); *see* Neeman v. Town of Warwick, 125 N.Y.S.3d 143, 146 (App. Div. 2d Dep't 2020).

64. *See* Save Harrison, Inc. v. Town/Vill. of Harrison, 93 N.Y.S.3d 74, 79 (App. Div. 2d Dep't 2019); *Neeman*, 125 N.Y.S.3d at 146.

65. Hudson View Park Co. v. Town of Fishkill, 222 N.Y.S.3d 76, 79 (App. Div. 2d Dep't 2024), *aff'd*, No. 115, 2025 N.Y. Slip Op. 07080 (N.Y. Dec. 18, 2025).

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See Hudson View Park*, 222 N.Y.S.3d at 79.

contract zoning.[71] The appellate division affirmed the dismissal of the action.[72]

> The term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so. Elected officials must be free to exercise legislative and governmental powers in accordance with their own discretion and ordinarily may not do so in a manner that limits the same discretionary right of their successors to exercise those powers.
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> An agreement that violates the term limits rule is against public policy.[73]

"Classification as to whether a municipal activity is governmental as opposed to proprietary depends on considerations including 'whether the activity was historically performed by government, whether it is best executed by government and whether it is undertaken for profit or revenue.'"[74] The term limits rule applies to various "contracts entered into by municipal bodies, [including] zoning, when the contracts are binding on the municipal bodies' successors, in areas in which the municipalities are exercising their 'governmental powers in accordance with their own discretion.'"[75] Although zoning enactments enjoy a presumption of validity, "[u]nless specifically provided by statute or charter provisions, the city council cannot contract away or in any manner limit or impair the discretionary authority of future councils in an area relating to governmental or legislative functions."[76]

The court found that the MOU in *Hudson View Park*, "which attempt[ed] to constrain the Town Board's decision-making process regarding its zoning responsibilities, implicate[d] the Town Board's governmental and legislative powers, as enacting zoning ordinances is

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71. *See id.* at 80.
72. *See id.* at 90.
73. *Id.* at 80–81 (first quoting Karedes v. Colella, 790 N.E.2d 257, 259–60 (N.Y. 2003); then citing Morin v. Foster, 380 N.E.2d 217, 220 (N.Y. 1978); and then quoting City of Newburgh v. McGrane, 920 N.Y.S.2d 160, 162 (App. Div. 2d Dep't 2011)).
74. *Hudson View Park*, 222 N.Y.S.3d at 81 (quoting *Karedes*, 790 N.E.2d at 260).
75. *Id.* (quoting *Karedes*, 790 N.E.2d at 260).
76. *Id.* (alteration in original) (quoting Quigley v. City of Oswego, 419 N.Y.S.2d 27, 29 (App. Div. 4th Dep't 1979)).

a significant function of local government."[77] "[A]mendment of a zoning ordinance is a purely legislative function, and the applicable statute vests in the Town Board broad legislative power, in its discretion, to amend its zoning ordinance, and does not require it to consider and vote upon every application for a zoning change."[78] The court rejected the plaintiff's argument that the MOU only committed the town board to a rezoning process and did not dictate a particular outcome because the MOU only assured that the town board would continue the review process until a final determination was rendered.[79] Moreover, the discretion of future town boards was constrained because the MOU required that the decision be based on "empirical data and other objective factual bases."[80]

The court also rejected the plaintiff's contention that, in applying the term limits rule, it should apply the "balancing of public interests" analysis established in *In re County of Monroe*,[81] rather than the traditional "governmental versus proprietary distinction" that has been used to determine whether a contract relates to governance.[82] The Court of Appeals abandoned the governmental-proprietary test for evaluating the applicability of local zoning regulations to the activities of other governmental entities in a host community in *In re County of Monroe* and replaced it with the "balancing of the public interests" test.[83] The balancing of public interests approach requires a balancing of:

> "[T]he 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[,] 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]

77. *Id.* at 83 (citing DJL Rest. Corp. v. City of New York, 749 N.E.2d 186, 191 (N.Y. 2001)).

78. *Id.* (alteration in original) (first quoting Wolff v. Town/Vill. of Harrison, 816 N.Y.S.2d 186, 187 (App. Div. 2d Dep't 2006); then citing N.Y. TOWN LAW § 265 (McKinney 2024)).

79. *See Hudson View Park*, 222 N.Y.S.3d at 83–84.

80. *Id.* at 84.

81. *In re* Cnty. of Monroe, 530 N.E.2d 202, 203 (N.Y. 1988).

82. *Hudson View Park*, 222 N.Y.S.3d at 84–85.

83. *In re Cnty. of Monroe*, 530 N.E.2d at 202–03.

> intergovernmental participation in the project development process and an opportunity to be heard.[84]

As the court correctly pointed out in *Hudson View Park*, *In re County of Monroe* related to a zoning conflict between two governmental entities.[85]

> The issues posed with regard to the distinction between governmental and proprietary functions that are present in the context of resolving zoning conflicts between two government entities, are not present in the instant matter, where the issue is whether a MOU that was entered into between a private developer and a municipality, and which purports to bind their successors, violates the term limits rule.[86]

In any event, even if, for the sake of argument, the balancing of public interests analysis applied, the constitutional rights of the public to choose government leaders who support their position takes precedence over the potential monetary loss which developers might suffer absent an agreement for the review process to be completed.[87]

Although a contract entered into by a town board that binds successor boards in areas relating to governance does not violate the term limits rule if the contract is "specifically authorized by statute or charter," neither Town Law Section 29(16) nor Section 64(6) specifically authorized the town board to enter into a MOU that binds successor boards.[88] Accordingly, the MOU violated the term limits rule.[89]

In addition, the MOU constituted impermissible contract zoning.[90] "[N]o municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties."[91] As a result, "[a]ll legislation by contract is invalid in the sense

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

85. *See Hudson View Park*, 222 N.Y.S.3d at 85.

86. *See id.*

87. *See id.* at 86.

88. *See id.* (citing N.Y. TOWN LAW §§ 29(16), 64(6) (McKinney 2024)).

89. *See id.*

90. *See Hudson View Park*, 222 N.Y.S.3d at 87–89.

91. *Id.* at 87 (alteration in original) (first quoting Collard v. Inc. Vill. of Flower Hill, 421 N.E.2d 818, 821 (N.Y. 1981); then citing Neeman v. Town of Warwick, 125 N.Y.S.3d 143, 146 (App. Div. 2d Dep't 2020)).

that a Legislature cannot bargain away or sell its powers."[92] "In determining whether the MOU constitutes illegal contract zoning '[t]he test is whether the [MOU] committed the [Town Board] to a specific course of action with respect to a zoning amendment.'"[93] Conversely, if an agreement does not commit a municipality to a specific course of action with respect to a zoning amendment, it has not engaged in contract zoning.[94]

The MOU challenged in *Hudson View Park* committed the town board to a specific course of action and constituted illegal contract zoning because it obligated the town board to review plaintiff's zoning petition, prohibited termination of the review process until the town board reached a final determination on the merits, and mandated that the determination be based on "empirical data and other objective factual bases."[95] Accordingly, the supreme court properly dismissed the causes of action for breach of contract and breach of the duty of good faith and fair dealing because the agreement was void and unenforceable.[96]

The scenario reviewed in *Hudson View Park* should be contrasted with the appropriate imposition of conditions on a zoning amendment. "[C]onditions per se do not void zoning amendments."[97] For example, it is not illegal for a municipality to require that a land use applicant donate land or file a restrictive covenant, even if the applicant's obligation to do so is conditioned upon its receipt of land use approvals, as long as the municipality has not committed itself to a specific course of action with respect to a zoning amendment as consideration therefor.[98]

92. *Id.* (first quoting Church v. Town of Islip, 168 N.E.2d 680, 683 (N.Y. 1960); then citing Citizens to Save Minnewaska v. New Paltz Cent. Sch. Dist., 468 N.Y.S.2d 920, 922 (App. Div. 3d Dep't 1983)).

93. *Id.* (alterations in original) (quoting *Neeman*, 125 N.Y.S.3d at 146).

94. *See id.* (citing Save Harrison, 93 N.Y.S.3d at 79; De Paolo v. Town of Ithaca, 694 N.Y.S.2d 235, 238 (App. Div. 3d Dep't 1999)).

95. *Hudson View Park*, 222 N.Y.S.3d at 84.

96. *See id.* at 90.

97. Levine v. Town of Oyster Bay, 272 N.Y.S.2d 171, 172 (App. Div. 2d Dep't 1966) (citing *Church*, 168 N.E.2d at 683); *see also* Cram v. Town of Geneva, 593 N.Y.S.2d 651, 652 (App. Div. 4th Dep't 1993).

98. *See* DePaolo v. Town of Ithaca, 694 N.Y.S.2d 235, 238–39 (App. Div. 3d Dep't 1999), *perm. app. denied*, 721 N.E.2d 22 (N.Y. 1999) (holding that there was no contract zoning because, "[w]hile [applicant's] grant of the license to the Town was conditioned upon its receipt of all approvals required for the project, including rezoning, no provision in the agreement obligated the Town to issue such approvals or approve [applicant's] rezoning application").

C. Impact Fees

Impact fees are charges imposed by a municipality primarily on new development to cover the costs of public infrastructure or services necessitated by the development and are generally considered to be invalid unless explicitly authorized by statute.[99] In *Nollan v. California Coastal Commission*[100] and *Dolan v. City of Tigard*,[101] the Supreme Court created a two-part test for land use exactions, modeled on the unconstitutional conditions doctrine. First, permit conditions must have an "essential nexus" to the government's legitimate land-use interest.[102] "The nexus requirement ensures that the government is acting to further its stated purpose, not leveraging its permitting monopoly to exact private property without paying for it."[103] Second, permit conditions must have a "rough proportionality" to the development's impact on the land-use interest.[104] "A permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose."[105] The *Nollan-Dolan* analysis applies regardless of whether a condition compels a landowner to relinquish property or to pay a "monetary exaction" instead of relinquishing the property.[106]

In *Sheetz v. County of El Dorado*, the Supreme Court considered whether the *Nollan-Dolan* test applied only to ad hoc, individual, case-by-case permit conditions imposed by administrative agencies, or if it also applied to legislatively mandated conditions, such as generally applicable impact fees.[107] Sheetz sought a building permit to build a small, prefabricated home on a residential lot.[108] The county required payment of a $23,420 "traffic impact mitigation fee," which was authorized by a legislatively adopted fee schedule, as a condition of issuance of the permit for the purpose of mitigating traffic congestion.[109]

99. *See, e.g.*, Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 921 (N.Y. 1989).

100. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

101. Dolan v. City of Tigard, 512 U.S. 374 (1994).

102. *Nollan*, 483 U.S. at 837.

103. Sheetz v. Cnty. of El Dorado, 601 U.S. 267, 275 (2024) (citing *Nollan*, 483 U.S. at 841).

104. *Dolan*, 512 U.S. at 391.

105. *Sheetz*, 601 U.S. at 276 (citing *Dolan*, 512 U.S. at 393).

106. *Id.* (citing Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612–15 (2013)).

107. *See id.* at 271.

108. *See id*. at 270, 272.

109. *See id.* at 272.

The fee amount was ascertained by a rate schedule, which considered the type of development and its location.[110] The amount of the fee was not based on the cost attributable to the particular project for which the fee was mandated.[111] Sheetz argued that the fee was an unconstitutional exaction under *Nollan* and *Dolan*.[112] The California courts rejected the contention, reasoning that *Nollan* and *Dolan* applied only to administrative exactions, not to fees set by legislative action.[113]

In a unanimous opinion, the Supreme Court reversed the California courts, determining that the Takings Clause does not differentiate between legislatively imposed and administratively imposed permit conditions.[114] The Court reasoned that "[i]f the government can deny a building permit to further a 'legitimate police-power purpose,' then it can also place conditions on the permit that serve the same end."[115] For example, if a proposed development will "substantially increase traffic congestion," the government permissibly may condition issuance of a building permit on the owner's willingness "to deed over the land needed to widen a public road."[116] However, the situation is dissimilar "when the government withholds or conditions a building permit for reasons unrelated to its land-use interests."[117]

The Court determined that the California courts' view that the *Nollan*-*Dolan* analysis was inapplicable to legislatively imposed monetary fees was mistaken.[118] "Nothing in constitutional text, history, or precedent supports exempting legislatures from ordinary takings rules."[119] Moreover, "[e]xcusing legislation from the *Nollan*/*Dolan* test would also conflict with precedent applying the unconstitutional conditions doctrine in other contexts."[120] As a result, "[t]he Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits."[121] Accordingly, broad, generally applicable development

110. *See Sheetz*, 601 U.S. at 272.
111. *See id.*
112. *See id.*
113. *See id.* at 273.
114. *See id.* at 276–78.
115. *Sheetz*, 601 U.S. at 274 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987)).
116. *Id.* at 274–75 (quoting Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 605 (2013)).
117. *Id.* at 275.
118. *See id.* at 276.
119. *Id.*
120. *Sheetz*, U.S. 601 at 279.
121. *Id.*

impact fees to fund infrastructure are subject to the same level of constitutional scrutiny as individualized conditions.[122] The Court noted that it did not consider "whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development."[123]

Applying the rationale of *Sheetz*, the appellate division invalidated an "Arts Fund" fee in *Coalition for Fairness in Soho & Noho, Inc. v. City of New York*.[124] New York City's 2021 SoHo/NoHo rezoning plan intended to modernize obsolete zoning regulations and to create more housing, in part, by permitting the conversion of existing Joint Live-Work Quarters for Artists ("JLWQA") units to general residential use.[125] A mandatory, non-refundable Arts Fund fee of $100 per square foot was required to be paid as condition to receiving a permit for such conversion.[126]

The court found that "[t]he Arts Fund fee constitutes a permit condition for which the 'two-part test modeled on the unconstitutional conditions doctrine' applies."[127] "Thus, the permit condition 'must have an "essential nexus" to the government's land-use interest,' which 'ensures that the government is acting to further its stated purpose.'"[128] In addition, the condition "must have 'rough proportionality' to the development's impact on the land-use interest."[129] Applying that standard, the

122. *See id.* at 280.

123. *Id.*

124. Coal. for Fairness in Soho & Noho, Inc. v. City of New York, 221 N.Y.S.3d 89, 90 (App. Div. 1st Dep't 2024), *rev'd*, Matter of Coal. for Fairness in Soho & Noho, Inc. v. City of New York, 2026 NY Slip Op 00076 (Jan. 13, 2026). As will be discussed in the 2026 *Survey* of Zoning and Land Use Law, the Court of Appeals reversed the decision of the appellate division. The Court held that the "opportunity" to convert a restricted JLWQA unit into an unrestricted residential unit is not, in and of itself, a property interest protected by the Takings Clause. The owners' existing rights to reside in the unit as a certified artist remained unchanged and un-diminished by the new law. In addition, because such a conversion is optional and the underlying property rights in the JLWQA unit remain intact if the owner chooses not to convert, the Court concluded there was no governmental "coercion" or "exaction." The Court opined that heightened constitutional scrutiny pursuant to the nexus and proportionality tests applies only to direct appropriations of property or monetary demands made "in lieu of" such an appropriation. A standalone monetary fee for a purely optional regulatory benefit does not trigger this level of review. Lastly, the Court distinguished the case from *Sheetz*. *Nollan* and *Dolan* by observing that the city did not "take" anything through eminent domain to enable the conversion. The fee was characterized as a legislative land-use regulation rather than an individualized extortionate demand.

125. *See id.*

126. *See id.*

127. *Id.* (quoting *Sheetz*, 601 U.S. at 270–71).

128. *Id.* (quoting *Sheetz*, 601 U.S. at 275).

129. *Coal. for Fairness*, 221 N.Y.S.3d at 90 (quoting *Sheetz*, 601 U.S. at 275–76).

Arts Fund fee requirement constituted a taking.[130] The long-term land use goal in enacting the zoning amendment was to phase out JLWQA units and to facilitate a broad range of permissible land uses in the district.[131] However, the city's goal in imposing the Arts Fund fee to support art and local artists was unrelated to any land use interest.[132] Additionally, payment into the Arts Fund did not promote the claimed legitimate aim of preserving JLWQA stock for certified artists because the Arts Fund did not pay for joint living-work units or other housing for artists or provide any benefits specifically to certified artists.[133] Instead, money from the Arts Fund was to be used to support arts programming, projects, organizations, with priority given to "under-resourced organizations and under-served areas."[134] The city also failed to demonstrate rough proportionality, because there was no evidence of negative impacts on artists arising from the change in zoning.[135]

D. Spot Zoning

The enabling legislation requires that zoning regulations must be adopted in compliance with a community's comprehensive plan.[136] The intent of a comprehensive plan is to reflect "a total planning strategy for rational allocation of land use, reflecting consideration of the needs of the community as a whole."[137] The failure to heed the directive that zoning regulations must comply with a community's comprehensive plan renders the adoption of a zoning law unauthorized and ultra vires.[138]

The converse of comprehensive and rational planning is "spot zoning." Although often used imprecisely, "spot zoning" is the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of

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130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* at 91.

134. *See Coal. for Fairness*, 221 N.Y.S.3d at 91 (quoting N.Y.C. ZONING RESOLUTION § 143-02 (2024)).

135. *See id.*

136. *See* N.Y. TOWN LAW § 263 (McKinney 2025); N.Y. VILLAGE LAW § 7-706 (McKinney 2025); Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1236 (N.Y. 1996); Udell v. Haas, 235 N.E.2d 897 (N.Y. 1968).

137. Taylor v. Vill. of Head of the Harbor, 480 N.Y.S.2d 21, 23 (App. Div. 2d Dep't 1984), *lv. denied*, 478 N.E.2d 210 (N.Y. 1985); *see also* Town of Bedford v. Vill. of Mount Kisco, 306 N.E.2d 155 (N.Y. 1973).

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

such property and to the detriment of other owners.[139] Conversely, zoning that conforms with a community's comprehensive plan to advance the general welfare of the community is not, by definition, "spot zoning."[140]

A zone change from a single-family designation to a planned development district was approved in *Bennett v. Troy City Council*, to permit construction of an apartment complex on a forested eleven-acre parcel located along the Hudson River.[141] The court initially recapped that a municipality's determination with respect to zoning designations is entitled to a strong presumption of validity, but nonetheless must be consistent with its comprehensive plan.[142] The city council in *Bennett* had determined that the project was consistent with the city's comprehensive plan because it would utilize a "low-impact design, increasing available residential units (specifically multi-unit buildings), expanding access to the waterfront, providing new open space areas, and connecting Lansingburgh to the Hudson River shoreline."[143] The court found that although the project differed from the current single-family zoning, it preserved a residential use and a multi-use trail along the shoreline would be established, providing public access to the Hudson River.[144] Although the planning commission's original rejection of the proposal was germane to the issue of compatibility,[145] an expanded environmental assessment report was prepared prior to the city council's approval of the amendment.[146] Because, under the circumstances, the issue of compatibility with the comprehensive plan was "fairly debatable," the court concluded that the petitioner had failed to satisfy her burden of establishing that the zoning amendment constituted illegal spot zoning.[147]

It is somewhat unfathomable that an apartment complex located next to a single-family neighborhood could be found consistent with

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

140. *See* Rye Citizens Comm. v. Bd. of Trs., 671 N.Y.S.2d 528, 529 (App. Div. 2d Dep't 1998), *lv. denied*, 700 N.E.2d 1229 (N.Y. 1998).

141. *See* Bennett v. Troy City Council, 219 N.Y.S.3d 800, 801 (App. Div. 3d Dep't 2024).

142. *See id.* at 805 (citing Evans v. City of Saratoga Springs, 164 N.Y.S.3d 227, 233 (App. Div. 3d Dep't 2022)).

143. *Id.*

144. *See id.*

145. *See id.* (citing Save Our Forest Action Coal., Inc. v. City of Kingston, 675 N.Y.S.2d 451, 454 (App. Div. 3d Dep't 1998)).

146. *See Bennett*, 219 N.Y.S.3d at 805.

147. *See id.* (citing *Evans*, 164 N.Y.S.3d at 234; Heights of Lansing, LLC v. Vill. of Lansing, 75 N.Y.S.3d 607, 611 (App. Div. 3d Dep't 2018)).

the city's comprehensive plan. The decision must be narrowly considered in the context of the applicable standard of review and the inability of a court to substitute its judgment for that of the local legislative body.

II. Zoning Boards of Appeal

A. Use Variances

If a hardship is found to be self-imposed, that fact is generally fatal to a use variance application.[148] A hardship is self-created if an applicant has acquired property subject to the zoning restrictions from which relief is sought.[149] Actual knowledge of zoning restrictions or of the nonconforming status of property ordinarily precludes the granting of relief as a matter of law.[150] Moreover, "[e]ven if a prospective purchaser of property does not have the actual knowledge of the applicable provisions of an ordinance, he is bound by them and by the facts and circumstances concerning the use of the property which he may learn by exercising reasonable diligence."[151] The decision in *80 Woodland Ave, LLC v. Village of Catskill* illustrates that an exception to the rule exists in rare, narrow circumstances.[152]

The petitioner in *80 Woodland Ave* purchased a defunct school property consisting of three buildings in 2017.[153] The area was zoned only for single-family residences and development of the property was additionally restricted because of its location in proximity to the Hudson River.[154] The zoning board of appeals denied the petitioners' application for a use variance to convert the buildings into forty-three apartment units in 2022.[155] The zoning board of appeals concluded that the petitioners had failed to show that traffic generated by the project would

148. *See* Clark v. Bd. of Zoning Appeals, 92 N.E.2d 903, 903 (N.Y. 1950).

149. *See* First Nat'l Bank of Downsville v. City of Albany Bd. of Zoning Appeals, 628 N.Y.S.2d 199, 200 (App. Div. 3d Dep't 1995); Tharp v. Zoning Bd. of Appeals, 526 N.Y.S.2d 646, 647 (App. Div. 3d Dep't 1988); Christian Airmen, Inc. v. Town of Newstead Zoning Bd. of Appeals, 983 N.Y.S.2d 173, 176 (App. Div. 4th Dep't 2014).

150. *See* Khanuja v. Denison, 610 N.Y.S.2d 364, 365 (App. Div. 3d Dep't 1994); Holy Sepulchre Cemetery v. Bd. of Appeals, 60 N.Y.S.2d 750, 755–56 (App. Div. 4th Dep't 1946).

151. *Tharp*, 526 N.Y.S.2d, at 647.

152. *See* 80 Woodland Ave, LLC v. Vill. of Catskill, 239 N.Y.S.3d 350, 354–55 (App. Div. 3d Dep't 2025).

153. *See id.* at 352.

154. *See id.*

155. *See id.* at 352–53.

not adversely affect the character of the neighborhood and that the hardship was not self-created.[156] The supreme court dismissed the petitioners' hybrid Article 78 proceeding/declaratory judgment action which challenged the decision, concluding that the zoning board of appeals' findings regarding the impact of traffic on the character of the neighborhood lacked a rational basis but that it rationally had concluded that the hardship was self-created.[157] The appellate division affirmed but found that the petitioners had failed to satisfy their burden with respect to both issues.[158]

The court reiterated the applicable standard of review, that is, that a zoning board of appeals' decision as to whether an applicant has satisfied its burden will be affirmed if it has a rational basis and is supported by the record.[159] With respect to the third use variance prerequisite, that is, "whether a variant use would disturb the essential character of a residential neighborhood is a determination which, like other zoning decisions, is best left to '[l]ocal officials [who] possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community.'"[160]

Although the neighborhood consisted of single-family homes and automobile traffic would be produced by the proposed project, the petitioners asserted that it would not alter the character of the neighborhood because the traffic generated by the tenants of the units would be equivalent to that experienced when the school was operating.[161] However, because the school had discontinued operations in 2006, and the property had been vacant since, traffic at the level experienced when the school was operating would significantly increase over that which the neighborhood had experienced in the two decades since it closed.[162] The appellate division concluded that, contrary to the decision of supreme court, the zoning board of appeals could rationally determine that the petitioners had failed to establish that the proposed use would not have a deleterious impact on the neighborhood.[163]

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156. *See id.* at 353.

157. *See 80 Woodland Ave*, 239 N.Y.S.3d at 353.

158. *See id.*

159. *See id.* (citing Pecoraro v. Bd. of Appeals, 814 N.E.2d 404, 407 (N.Y. 2004); Wen Mei Lu v. City of Saratoga Springs, 78 N.Y.S.3d 764, 766 (App. Div. 3d Dep't 2018)).

160. *Id.* at 353 (alterations in original) (quoting Rostlee Assocs., Ltd. v. Amelkin, 503 N.Y.S.2d 902, 903 (App. Div. 2d Dep't 1986)).

161. *See id.* at 353–54.

162. *See 80 Woodland Ave*, 239 N.Y.S.3d at 354.

163. *See id.* (first quoting Greco v. Denison, 599 N.Y.S.2d 761, 762 (App. Div. 3d Dep't 1993); then citing Rehab. Support Servs., Inc. v. City of Albany Bd. of

Town Law Section 267-b(2)(b)(4), like Village Law Section 7-712-b(2)(b)(4), provides that one of the mandatory prerequisites for a use variance is that "that the alleged hardship has not been self-created."[164] As related above, the fact that a hardship is found to be self-created is fatal to a use variance application.[165] "A hardship is considered self-imposed if the variance applicant purchased the property subject to the restrictions and was aware of the zoning restrictions at the time that it purchased the property."[166] Actual knowledge of the existence of restrictive zoning provisions is not necessary.[167] "Even if a prospective purchaser of property does not have the actual knowledge of the applicable provisions of an ordinance, he is bound by them and by the facts and circumstances concerning the use of the property which he may learn by exercising reasonable diligence."[168]

The case law insinuates that the purchase of property with knowledge of prohibitive zoning restrictions automatically, in all cases, creates a self-imposed hardship.[169] Nevertheless, there are rare exceptions to the otherwise universally applicable preclusive principle, for example, when changes in market conditions, technological advancements, or other external factors render the original lawful use obsolete, even if the owner was aware of the zoning restrictions at the time of purchase or only discovered the obsolescence after acquisition. For example, in *Citizens Savings Bank v. Board of Zoning Appeals*, property purchased at a foreclosure sale had been operated as a legal, nonconforming restaurant in a residential zone until it was closed because of the failure of its septic system.[170] After efforts to market the property as

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Zoning Appeals, 34 N.Y.S.3d 256, 257 (App. Div. 3d Dep't 2016); then citing Dave Van Denburg, Inc. v. Town of Bethlehem Bd. of Appeals, 504 N.Y.S.2d 859, 862 (App. Div. 3d Dep't 1986); and then citing *Rostlee Assocs.*, 503 N.Y.S.2d at 904)).

164. N.Y. TOWN LAW § 267-b(2)(b)(4) (McKinney 2025); N.Y. VILLAGE LAW § 7–712–b(2)(b)(4) (McKinney 2025).

165. *See* Clark v. Bd. of Zoning Appeals, 92 N.E.2d 903, 903 (N.Y. 1950) (citing Henry Steers, Inc., v. Rembaugh, 20 N.Y.S.2d 72, 74 (App. Div. 2d Dep't 1940)).

166. Jones v. Zoning Bd. of Appeals, 934 N.Y.S.2d 599, 603 (App. Div. 3d Dep't 2011) (quoting Ctr. Square Ass'n v. City of Albany Bd. of Zoning Appeals, 798 N.Y.S.2d 756, 759 (App. Div. 3d Dep't 2005)).

167. *See* Tharp v. Zoning Bd. of Appeals, 526 N.Y.S.2d 646, 647 (App. Div. 3d Dep't 1988).

168. *Id.*

169. *See* Christian Airmen, Inc. v. Town of Newstead Zoning Bd. of Appeals, 983 N.Y.S.2d 173, 176 (App. Div. 4th Dep't 2014); Khanuja v. Denison, 610 N.Y.S.2d 364, 365 (App. Div. 3d Dep't 1994).

170. *See* Citizens Sav. Bank v. Bd. of Zoning Appeals, 657 N.Y.S.2d 108, 108 (App. Div. 3d Dep't 1997).

a restaurant were unsuccessful, a use variance was sought.[171] Although admitting that the property was purchased with knowledge that the restaurant use was a nonconforming use and that there were issues with the septic system, the court concluded that the hardship was not self-created because the owner was not aware of the "full extent" of the problems with the septic system until after the foreclosure sale.[172] In *Center Square Association v. Board of Zoning Appeals*, fire officials caused a building to be vacated, respondent subsequently declared the property to be a general nuisance and rescinded its nonconforming use status shortly after the nineteen-unit, nonconforming apartment building was purchased.[173] The owners were granted use and area variances to renovate the building into thirteen apartments.[174] The third department affirmed the dismissal of an Article 78 petition challenging the variances.[175] The owners apparently were unaware that the declaration of the property as a general nuisance abrogated its nonconforming use status under the city zoning law, but, according to the court, even that decision appeared to invite future owners to apply for variances for multiple apartments.[176] The court found that, "[u]nder the circumstances, the Board [of Appeals] could have rationally determined that the hardship here was not self-imposed."[177]

Consistent with the foregoing decisions, the court in *80 Woodland* noted an exception to the preclusive impact of self-created hardship in a use variance application:

> [A] hardship might not be self-created where a landowner knew about the zoning restrictions impacting his or her property but ended up needing a variance because "the original purpose of the [buildings] became obsolete" over the period of ownership or the owner

171. *See id.*

172. *See id.* at 109.

173. *See* Ctr. Square Ass'n v. City of Albany Bd. of Zoning Appeals, 798 N.Y.S.2d 756, 758 (App. Div. 3d Dep't 2005).

174. *See id.*

175. *See id.* at 758.

176. *See id.*

177. *See id.* at 760; *see also* 54 Marion Ave., LLC v. City of Saratoga Springs, 80 N.Y.S.3d 487, 490 (App. Div. 3d Dep't 2018); Jones v. Zoning Bd. of Appeals, 934 N.Y.S.2d 599, 603 (App. Div. 3d Dep't 2011); Kontogiannis v. Fritts, 516 N.Y.S.2d 536, 538 (App. Div. 3d Dep't 1987); Douglaston Civic Ass'n v. Klein, 414 N.Y.S.2d 358, 363 (App. Div. 2d Dep't 1979).

> only learned of that obsolescence after acquiring the property.[178]

However, based on the record, the petitioners were not entitled to rely on the exception to the preclusive effect of the self-created hardship restriction.[179] The buildings had been vacant for many years when the petitioners purchased the property, and they were aware that the zoning law limited the permitted uses of the buildings.[180] They subsequently discovered that it would be difficult to realize a profit by developing the property consistent with the zoning regulations.[181] The petitioners "continue[d] to 'possess[] the same unused, . . . difficult-to-develop property that [80 Woodland] purchased, and although the purchase may now be viewed as a poor investment, courts are not responsible for "guarantee[ing] the investments of careless land buyers."'"[182] Accordingly, the zoning board of appeals had a rational basis to determine that the hardship was self-created.[183] Because the zoning board of appeals rationally concluded that the petitioners had failed to establish two of the prerequisite requirements for entitlement to a use variance, it properly had denied the application.[184]

B. Area Variances

The petitioner in *Williams v. Town of Lake Luzerne Zoning Board of Appeals* had acquired a lot in 2012 and purchased a contiguous lot six years later.[185] The petitioner obtained a demolition permit, removed a decrepit residence on the second lot, and constructed a three-bay metal garage on the lot without first obtaining a building permit.[186] The construction of the accessory structure on the adjacent lot without a principal residence on it violated the zoning law.[187] Accordingly, she

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178. 80 Woodland Ave, LLC v. Vill. of Catskill, 239 N.Y.S.3d 350, 354 (App. Div. 3d Dep't 2025) (second alteration in original) (quoting *Kontogiannis*, 516 N.Y.S.2d at 538).

179. *See id.* at 355.

180. *See id.* at 354.

181. *See id.*

182. *Id.* at 354–55 (alterations in original) (first quoting Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals, 46 N.Y.S.3d 725, 729 (App. Div. 4th Dep't 2017); then citing Diana v. City of Amsterdam Zoning Bd. Of Appeals, 664 N.Y.S.2d 634, 636 (App. Div. 3d Dep't 1997)).

183. *See 80 Woodland*, 239 N.Y.S.3d at 355.

184. *See id.*

185. *See* Williams v. Town of Lake Luzerne Zoning Bd. of Appeals, 240 N.Y.S.3d 284, 286 (App. Div. 3d Dep't 2025).

186. *See id.*

187. *See id.*

combined the two lots.[188] However, a variance was necessary with respect to the height of the garage relative to the principal residence.[189] The zoning law provided that an accessory structure could not exceed the height of the principal building, but the newly constructed garage exceeded the height of the principal residence by four feet.[190] Accordingly, the petitioner sought an area variance.[191] At the hearing, one of the neighbors who supported the application related that the demolished building had been higher and was an eyesore, and that the new garage was an improvement.[192] Nevertheless, the zoning board of appeals denied the application, concluding that the garage was out of character with and would be detrimental to the neighborhood, that the petitioner had failed to address other feasible alternatives, and that the requested variance was substantial and self-created.[193]

The appellate division reversed and remanded the matter with a directive to approve the requested variance.[194] The court rejected the zoning board of appeals' reliance on its finding that "there [were] no other accessory structures in that neighborhood that [were] higher than the principal structure."[195] The conclusion merely restated the prerequisite of the imperative that necessitated the variance, rather than a justification of any actual detriment.[196] Such reasoning, in the opinion of the court, would logically preclude the approval of any area variance for the specific height issue, effectively rendering the variance requirements meaningless.[197] Furthermore, both the garage and the residence were well within the maximum allowable height restrictions pursuant to the zoning law.[198] Likewise, the demolished dilapidated residence on the property was higher than the newly constructed garage.[199] The zoning board of appeals also neglected to explain why the four-foot height difference between the garage and the residence would create any actual detrimental impact or be out of character with

188. *See id.*
189. *See id.*
190. *See Williams*, 240 N.Y.S.3d at 286.
191. *See id.*
192. *See id.*
193. *See id.*
194. *See id.* at 288.
195. *Williams*, 240 N.Y.S.3d at 287 (second alteration in original).
196. *See id.*
197. *See id.*
198. *See id.*
199. *See id.*

the neighborhood.[200] The zoning board of appeals' emphasis on the fact that the garage was constructed of steel was not germane because metal garages were not proscribed by the zoning law, and the zoning board of appeals previously had adopted a negative declaration confirming that there would be no adverse environmental impacts.[201]

In assessing the "feasible alternatives," the court observed that the garage previously had been constructed.[202] Although the difficulty was self-created, the petitioner was unable to stabilize the residence on the contiguous lot for her intended storage purposes.[203] Furthermore, neither the zoning board of appeals nor supreme court addressed the statutory proviso that the self-created nature of one's difficulty, while germane, "shall not necessarily preclude the granting of the area variance."[204] The board also failed to adequately address the benefit to the petitioner of maintaining the garage as compared to the financial loss of removing it.[205]

The zoning board of appeals characterized the four-foot differentiation as a 29% variance, but the appellate division explicitly stated that percentage deviation alone is "not determinative."[206] The court found it "difficult to discern how a four-foot height difference between the residence and garage would have any negative impact on the surrounding community."[207] The conclusion is consistent with a growing body of case law:

> Courts have consistently held that zoning boards of appeal generally should not, and courts often will not, view substantiality in the abstract. The totality of the relevant circumstances must be evaluated in determining whether a deviation truly is substantial. The effect of the variance on the neighborhood, its true impact and the necessity for compliance with a regulation's mandate all are highly significant considerations in undertaking such an analysis.[208]

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200. *See Williams*, 240 N.Y.S.3d at 287.
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.* (quoting N.Y. TOWN LAW § 267-b(3)(b)(5) (McKinney 2025)).
205. *See Williams*, 240 N.Y.S.3d at 287.
206. *See id.*
207. *See id.*
208. Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo, Nos. 031155/2022, 032462/2022, 2023 N.Y. Slip Op. 31194(U), at 46–47 (Sup. Ct. Rockland Cty. Apr. 23, 2023) (citing Terry Rice, *2013 Practice*

The court in *Citizens United to Protect Our Neighborhood-Hillcrest v. Town of Ramapo* summarized the rationale of a number of unreported decisions which substantiate that the totality of the circumstances is the most appropriate analysis for assessing whether a variance request is substantial:

> In *Kleinhaus v. Zoning Board of Appeals of the Town of Cortlandt*, N.Y.L.J. March 26, 1996, p. 37, col. 7 (Sup. Ct. Westchester Co. 1996), although a variance application to erect a 120-foot amateur radio antenna was considered to be statistically substantial with respect to the applicable 35-foot height maximum, the Court determined that "substantial" is "relative" and could not be gauged in the abstract. In assessing the practical magnitude of the variance, the court related the deviation to the height above the tree line, 40 feet, instead of a gross differential of 85 feet. Although crediting the board's finding that the variance was substantial, the court, nonetheless, concluded that such a finding "begs the question as the deviation only becomes relevant if it relates to an adverse effect in the neighborhood. . . ."
>
> Similarly, in *Raubvogel v. Board of Zoning Appeals of the Village of Brookville*, N.Y.L.J. Dec. 27, 1995, p. 33, col. 2 (Sup. Ct. Nassau Co. 1995), a dwelling with approximately 97,000 cubic feet was proposed, while a maximum building volume of 65,000 cubic feet was permitted. The court found that the underlying circumstances minimized the impact of the magnitude of the variance (45%), specifically relying on the fact that 66% of the properties in the subdivision did not comply with the requirement. Similarly, the denial of a variance to permit the expansion of church facilities having 44 parking spaces, while 123 spaces were required, was annulled because of the lack of any factual basis for the board's mechanical recitation of the statutory standards.
>
> While not specifically discussing the obviously substantial nature of the deviation, the court in *Korean Evangelical Church of Long Island v. Board of Appeals of the Village of Westbury*, N.Y.L.J., Feb. 28, 1996, p. 31, col. 2 (Sup. Ct. Nassau Co. 1996)[,] emphasized

Commentaries, *in* MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 62, § 267-b, at 142 (McKinney 2013)).

that the parking requirement, aimed primarily at commercial establishments, was not rationally related to the church's intermittent use of the property and the fact that the expanded facilities would not increase the number of congregants. In *WWA Realty Holding II LLC v. Board of Zoning Appeals of the Village of Lynbrook*, N.Y.L.J. Feb. 17, 2004, p. 22, col. 1 (Sup. Ct. Nassau Co. 2004), a variance from a maximum height requirement of forty feet was sought in order to permit a 77-foot flagpole with a large America Flag in front of a car dealership. The zoning board of appeals denied the variance, in part, because it found the 93 percent variance to be "quite substantial." The reviewing court noted that it "does weigh against petitioner . . . that the variance sought is substantial." However, viewing the totality of the circumstances and considering the other applicable variance criteria, the court concluded that "under the circumstances, and in light of the subject matter, the court finds this factor standing alone is insufficient as a matter of law to deny the variance." (*citing Sexton v. Zoning Board of Appeals of the Town of Oyster Bay*, 300 A.D.2d 494, 497, 751 N.Y.S.2d 595, 598 (2d Dept. 2002).

In *Aydelott v. Town of Bedford Zoning Board of Appeals*, N.Y.L.J. June 25, 2003, p. 21, col. 4 (Sup. Ct. Westchester Co. 2003), the court criticized the zoning board of appeals' analysis in that it "was, primarily, concerned with the extent of the deviation from the standards established by the zoning code without considering the impact on the surrounding community." The Court concluded that:

> ZBA's consideration of this percentage deviation alone, taken in a vacuum, is not an adequate indicator of the substantiality of the Petitioner's Variance Application. Certainly, a small deviation can have a substantial impact or a large deviation can have little or no impact depending on the circumstances of the variance application. Substantiality must not be judged in the abstract. The totality of the relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one. *Id*. (*citing*

> *Raubvogel v. Board of Zoning Appeals of the Village of Brookville*, N.Y.L.J. Dec. 27, 1995, p. 33, col. 2 (Sup. Ct. Nassau Co. 1995); *Kleinhaus v. Zoning Board of Appeals of the Town of Cortlandt*, N.Y.L.J., March 26, 1996, p. 37, col. 7 (Sup. Ct. Westchester Co. 1996); *see also Niceforo v. Zoning Board of Appeals of Appeals of the Town of Huntington*, 147 A.D.2d 483, 537 N.Y.S.2d 579 (2d Dept. 1989), *appeal denied*, 74 N.Y.2d 612, 545 N.E.2d 870, 546 N.Y.S.2d 556 (1989).[209]

Crucially, the zoning board of appeals also had failed to identify any actual deleterious impacts.[210] The court also emphasized the substantial community support for the application, noting that zoning board of appeals members acknowledged that the new garage was "smaller in size and scope" than the demolished residential structure, and local residents support the construction as being an improvement to the property.[211] Hence, the court concluded that the zoning board of appeals failed to properly apply the statutory balancing test and it directed that the zoning board of appeals grant the variance.[212]

The decision demonstrates the relative weight and interplay of the five statutory factors. Although all factors must be considered by a zoning board of appeals, the court's rationale suggests that the absence of actual, demonstrable detriment to the community may, depending on the facts, weigh heavily in balancing the equities and considerations, particularly if a zoning board of appeals' findings regarding detriment are irrational or not supported by the record. The decision also confirms a growing body of case law which concludes that the substantiality of a variance should not be considered in the abstract as a mere statistic but, instead, the totality of the circumstances should be evaluated in determining whether a deviation truly is substantial.

C. Public Utilities

Public utilities are statutorily required to "provide such service, instrumentalities and facilities as shall be safe and adequate and, in all

209. *Id.* at 45–46.
210. *See Williams*, 240 N.Y.S.3d at 287.
211. *Id.* at 287–88.
212. *See id.* at 288.

respects just and reasonable."[213] Accordingly, a municipality may not exclude a utility if the utility has demonstrated a need to locate its facilities in the community.[214] Nonetheless, a variance frequently is necessary to establish a public utility facility at the appropriate location. The customary variance standards are inappropriate where a public utility seeks a use variance because the land may be usable for a purpose permitted by a zoning law, the uniqueness may be the result merely of the peculiar needs of the utility, and there may be some detrimental impacts on the neighborhood.[215] Accordingly, the Court of Appeals created a "public utility" exception to the customary showing required to obtain a use variance in *Consolidated Edison Co. v. Hoffman*.[216]

> [T]the utility must show that modification is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to modify the plant than to use alternative sources of power such as may be provided by other facilities.[217]

A public utility must establish that it is reasonably necessary to construct its facility at the specific site in order to enable it to render safe and adequate service.[218] In determining the reasonable necessity for the use of a particular site, consideration must be given to the availability of other sites and to the degree of impact to the neighborhood which might be caused by the use of the sites as weighed against their comparative advantages from the standpoint of efficiency and safety of operation.[219] In undertaking such an inquiry, the courts have placed emphasis on the public necessity when assessing a utility's application for a variance.[220] The rationale of *Consolidated Edison* applies to all public utilities and to new sitings of facilities as well as the modification of existing facilities.[221]

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213. N.Y. PUB. SERV. LAW § 65(1) (McKinney 2025).

214. *See* Long Island Light. Co. v. Griffin, 74 N.Y.S.2d 348, 350–51 (App. Div. 2d Dep't 1947), *aff'd*, 79 N.E.2d 738, 738 (N.Y. 1948); Long Island Water Corp. v. Michaelis, 282 N.Y.S.2d 22, 23 (App. Div. 2d Dep't 1967).

215. *See* Consol. Edison Co. v. Hoffman, 374 N.E.2d 105, 109 (N.Y. 1978).

216. *See id.* at 111.

217. *Id.*

218. *See* Niagara Mohawk Power Corp. v. City of Fulton, 188 N.Y.S.2d 717, 723 (App. Div. 4th Dep't 1959).

219. *See id.*

220. *See Griffin*, 74 N.Y.S.2d at 349–50.

221. *See* Cellular Tel. Co. v. Rosenberg, 624 N.E.2d 990, 994 (N.Y. 1993).

In *Freepoint Solar LLC v. Town of Athens Zoning Board of Appeals*, the petitioner applied for a use variance to erect a new solar energy generation facility in a residential zoning district in which the use was not permitted.[222] The court annulled the denial of the variance application because the zoning board of appeals applied an erroneous standard.[223] The matter was remanded to the zoning board of appeals with a direction to apply the public utility necessity standard instead of the traditional use variance criteria set forth in Town Law Section 267-b(2)(b).[224] The zoning board of appeals again denied the application, concluding that the applicant had failed to demonstrate the public necessity to construct the facility.[225] The appellate division reversed the supreme court's dismissal of the petition.[226]

Although Town Law Section 267-b(2)(b) and Village Law Section 7-712-b(2)(b) provide the criteria for use variance applications generally, "applicants that are proposing to develop public utility [facilities or] infrastructure are subject to the 'public necessity' use variance test," which, as is related above, establishes a relaxed burden for demonstrating an applicant's right to use variance.[227]

> A public utility provider seeking a use variance for the siting or modification of a proposed facility
>
> > must show that [siting a new facility or] modification [of an existing facility] is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, which make it more feasible to [grant a use variance] than to use alternative sources of power such as may be provided by other facilities and that where the intrusion or burden on the community is minimal, the showing

222. *See* Freepoint Solar LLC v. Town of Athens Zoning Bd. of Appeals, 224 N.Y.S.3d 219, 221 (App. Div. 3d Dep't 2024).

223. *See id.*

224. *See id.*; *see also* N.Y. TOWN LAW § 267-b(2)(b) (McKinney 2025); N.Y. VILLAGE LAW § 7-712-b(2)(b) (McKinney 2025).

225. *See Freepoint Solar*, 224 N.Y.S.3d at 222.

226. *See id.* at 224.

227. *See id.* at 222 (citing Consol. Edison Co. v. Hoffman, 374 N.E.2d 105, 111 (N.Y. 1978); Nextel Partners v. Town of Fort Ann, 766 N.Y.S.2d 712, 716 (App. Div. 3d Dep't 2003)).

> required by the utility should be correspondingly reduced.[228]

The court initially determined that the zoning board of appeals erred in failing to afford the petitioners a reduced burden as a public utility because of the project's minimal impact, a fact that was confirmed by the adoption of a negative declaration.[229] The court found that the board improperly focused on the concerns of a small group of local landowners in denying the variance application, noting that "local concerns are not typically part of the more general public necessity calculus."[230] Instead, "public necessity must be viewed in a broader consideration of the general public's need for the service."[231] Local concerns permissibly may "involve aesthetics and environmental impacts."[232] However, in *Freepoint Solar*, those issues were considered during the SEQRA review process which recognized that the project would have minimal impact.[233]

The court also rebuffed the zoning board of appeals' finding that no public necessity existed because New York State was "on track" to meet its renewable energy goals pursuant to the Climate Leadership and Community Protection Act.[234] The zoning board of appeals' finding improperly focused only on the minimum requirements and ignored the Act's broader, long-term objectives.[235]

Lastly, the court rejected the argument that petitioner had "failed to establish that there were compelling reasons, economic or otherwise, which made it more feasible to seek a use variance for [the project] than to use alternatives sites."[236] In reaching this determination, the zoning board of appeals mistakenly required the petitioners to demonstrate that it would be "*impossible* for [the project] to be constructed in a zoning district within the Town where solar facilities were permitted."[237] Thus, "[t]here is no legal requirement that [petitioners] analyze *each and every*

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228. *Id.* (quoting Cellular Tel. Co. v. Rosenberg, 624 N.E.2d 990, 994 (N.Y. 1993)) (internal quotation marks omitted).

229. *See id.* at 222–23.

230. *Freepoint Solar*, 224 N.Y.S.3d at 223.

231. *Id.* (quoting Freepoint Solar LLC v. Town of Athens Zoning Bd. of Appeals, No. EF2021-795, 2022 N.Y. Slip Op. 34473(U), at 13 (Sup. Ct. Greene Cty. Aug. 18, 2022)).

232. *Id.*

233. *See id.*

234. *See id.* at 223–24.

235. *See Freepoint Solar*, 224 N.Y.S.3d at 223–24.

236. *Id.* at 225 (alteration in original).

237. *Id.* (alteration in original).

possible parcel of land before obtaining a variance; such a requirement would be unworkable."[238] The petitioner could not simply move the project to a different location because it had already purchased the land, and had received approval to connect to Central Hudson's distribution system at that location.[239]

D. Estoppel

"Generally, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties."[240] Hence, "[e]stoppel is not available against a local government unit for the purpose of ratifying an administrative error."[241] It follows, then, that, "[a] municipality . . . is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches."[242] Case law applying those principles concludes that "[t]he prior issue to petitioner of a building permit could not 'confer rights in contravention of the zoning laws.'"[243] "[E]stoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results."[244]

For example, in *Parkview Associates v. City of New York*, the Court of Appeals decided that estoppel is not available to compel a municipality to ratify the mistaken issuance of a building permit or to prevent it from enforcing the restrictions of a zoning law, even if the consequences for the property owner are severe.[245] Likewise, the

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238. *Id.* (alterations in original) (quoting Horvath Commc'ns, Inc. v. Town of Lockport Zoning Bd. of Appeals, No. 165205/2018, 2018 N.Y. Slip Op. 33830(U), at 5 (Sup. Ct. Niagara Cty. Oct. 26, 2018)).

239. *See id.*

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

241. *Id.* at 1374 (alteration in original) (quoting Morley v. Arricale, 486 N.E.2d 824, 825 (N.Y. 1985)).

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

243. *Id.* at 1374–75 (alteration in original) (quoting B. & G. Constr. Corp. v. Bd. of Appeals, 128 N.E.2d 423, 424 (N.Y. 1955)).

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

245. *See Parkview Assocs.*, 519 N.E.2d at 1374–75.

Court of Appeals reiterated in *E.F.S. Ventures Corp. v. Foster* that estoppel is generally unavailable as against governmental agencies, except in the most exceptional factual circumstances where injustice would otherwise result.[246] The reasoning for the rule is to thwart public fraud, to avoid bestowing rights in violation of zoning laws, and to ensure that municipalities can fulfill their statutory obligations without being constrained by prior administrative errors or omissions.[247] Consequently, the case law clearly establishes that estoppel will not be invoked as against a governmental entity for actions taken in its governmental capacity, especially in the administration and enforcement of zoning laws.[248]

Despite the seemingly preclusive case law, the courts have acknowledged that exceptions to the general rule may be warranted in rare, extraordinary factual circumstances to prevent injustice.[249] Significantly, the Court of Appeals recognized in *Parkview Associates* that although estoppel may be available in rare instances, it is unavailable if reasonable diligence would have revealed the accurate facts.[250] "Fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon" may afford an exception allowing the application of the doctrine of equitable estoppel against a municipality.[251]

The issue in *Cuffaro v. Zoning Board of Appeals* was whether the village could deny a building permit on the ground that the property was created by an illegal subdivision, despite the fact that it had previously issued building permits or certificates of occupancy for a "sister lot" in the same subdivision.[252] Prior to 1978, the parcel later designated as Lot 7.2 was part of a larger property, designated as Lot 7.0.[253] Lot 7.2 was severed from Lot 7.0 in 1978 through a deed but

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246. *See* E.F.S. Ventures Corp. v. Foster, 520 N.E.2d 1345, 1350 (N.Y. 1988).

247. *See id.*

248. *See* Cymbidium Dev. Corp. v. Smith, 519 N.Y.S.2d 711, 713 (App. Div. 2d Dep't 1987); Carbone v. Town of Bedford, 534 N.Y.S.2d 211, 212 (App. Div. 2d Dep't 1988).

249. *See E.F.S. Ventures*, 520 N.E.2d at 1350.

250. *See* Parkview Assocs. v. City of New York, 519 N.E.2d 1372, 1372 (N.Y. 1988).

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

252. *See* Cuffaro v. Zoning Bd. of Appeals, No. 610155/2024, 2025 N.Y. Slip Op. 50248(U), at *1 (Sup. Ct. Suffolk Cty. Feb. 10, 2025).

253. *See id.*

without having obtained subdivision approval from the planning board, rendering it an illegal subdivision.[254] In 2018, four decades after the illegal conveyance, the Cuffaros purchased Lot 7.2, having waived a contract contingency that would have made the closing contingent on obtaining a building permit.[255] Accordingly, they purchased the property assuming the inherent risks associated with the property's buildability given its dubious legal status.

The Cuffaros thereafter applied for a building permit in 2021, maintaining that Lot 7.2 was "grandfathered" as a pre-existing nonconforming lot pursuant to the zoning law in effect prior to a 1992 amendment of the zoning law which increased the minimum lot size from 30,000 square feet to 40,000 square feet.[256] They also asserted that the issuance of certificates of occupancy for the adjacent sister lot, Lot 7.1, the other portion of the original Lot 7.0, legitimized the subdivision pursuant to the authority of *Lund v. Edwards*[257] and *Shaughessy v. Roth*.[258] The building inspector denied the permit, and, upon appeal, the zoning board of appeals sustained the denial.[259]

In *Lund,* the appellate division annulled the denial of a building permit where the building inspector had denied an application because the parcel had been part of a larger lot illegally subdivided eleven years earlier without subdivision approval from the planning board.[260] The building department's issuance of certificates of occupancy to another lot in the illegal subdivision effectively recognized the legal separateness of those lots.[261] The court determined that such recognition obliged the zoning board of appeals to legitimize the subdivision by deed, despite the absence of planning board approval.[262] The village was estopped from asserting that the lot was created by an illegal subdivision because it had repeatedly treated another related lot as being legally subdivided.[263]

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254. *See id.*
255. *See id.*
256. *See id.* at *2.
257. *See Cuffaro*, 2025 N.Y. Slip Op. 50248(U), at *2 (citing Lund v. Edwards, 498 N.Y.S.2d 870 (App. Div. 2d Dep't 1986)).
258. *See id.* at *3–4 (citing Shaughessy v. Roth, 611 N.Y.S.2d 281 (App. Div. 2d Dep't 1994)).
259. *See id.* at *3.
260. *See Lund*, 498 N.Y.S.2d at 871.
261. *See id.*
262. *See id.*
263. *See id.*

Fourteen years before the petitioners in *Shaughessy* had purchased the property, the planning board had granted preliminary subdivision approval of a larger parcel, which was intended to create one conforming parcel and a substandard parcel which was the subject of the proceeding.[264] Although final subdivision plat was never approved or filed, "the Town subsequently issued a building permit to the owner of the larger, conforming parcel, and a single family dwelling was built" on the property.[265] The appellate division concluded that the town's actions effectively "sanctioned" the subdivision.[266]

In rejecting the petitioners' reliance on *Lund* and *Shaughessy*, the court in *Cuffaro* observed that "[b]oth *Lund* and *Shaughessy* involved illegal subdivisions where one of the two tax map lots divided by deed had been granted approvals, despite the boards' *actual knowledge* that the approved lot was created by an illegal subdivision."[267] Accordingly: "[i]n both cases the Appellate Division found that the municipal boards had sanctioned the illegal subdivisions by granting the approvals to one of the two parcels while they had *actual knowledge* of the subdivision creating the two lots yet, nevertheless, denied approvals to the remaining lot in reliance upon the lack of planning board approval."[268] To be contrasted with the facts in *Lund* and *Shaughessy*, the village did not have prior knowledge that "Lot 7.2 had been illegally subdivided when it granted the building permits to Lot 7.1."[269] The court concluded that "[t]he Village never 'sanctioned' the subdivision."[270]

The decision corroborates that estoppel is almost universally inapplicable to municipalities, particularly in the realm of land use

264. *See* Shaughessy v. Roth, 611 N.Y.S.2d 281, 283 (App. Div. 2d Dep't 1994).

265. *Id.*

266. *See id.*

267. Cuffaro v. Zoning Bd. of Appeals, No. 610155/2024, 2025 N.Y. Slip Op. 50248(U), at *8 (Sup. Ct. Suffolk Cty. Feb. 10, 2025) (emphasis added).

268. *Id.* (emphasis added); *see also* Reiss v. Keator, 541 N.Y.S.2d 864, 866 (App. Div. 3d Dep't 1989) (The court rejected Petitioners' assertion that the Town had ratified the subdivision or that estoppel precluded rescission of the subdivision because the Town had issued a building permit. "Unlike *Matter of Lund v. Edwards*, 118 A.D.2d 574, 498 N.Y.S.2d 870, . . . there is no evidence that the town had actual knowledge of the illegal subdivision when the building permit was issued."); Scholl v. Eder, 760 N.Y.S.2d 336, 336 (App. Div. 2d Dep't 2003) ("[T]he record supports the BZA's finding that the Village never did anything from which it could be inferred that it recognized the lot as a legal building lot.").

269. *Cuffaro*, 2025 N.Y. Slip Op. 50248(U), at *9.

270. *Id.* (citing *Reiss*, 541 N.Y.S.2d at 866).

administration and enforcement. As the Court of Appeals emphasized in *Parkview Associates* and *E.F.S. Ventures*, and as the decision in *Cuffaro* confirms, exceptions to the rule exist in only the rarest and most unusual circumstances. It is significant that, as exemplified by *Cuffaro*, the lack of knowledge of inequitable circumstances on the part of a municipal agency bars the application of the exception to the rule. Moreover, estoppel is unavailable where reasonable diligence would have revealed the true facts.

E. Re-Examination of Approvals

One would presume that after the statute of limitations to challenge a land use approval has expired, the approval would be immune from question. However, the decision in *Franklin Square Realty Associates, LLC v. Board of Appeals* raised the possibility of a zoning board of appeals being able to examine the validity of an approval decades after the statute of limitations had run.[271] The commissioner of buildings denied a permit to construct a self-storage facility on a parcel characterized by split zoning, consisting of a business and a residence district, because a new use variance was necessary as a consequence of the residential zoning of portions of the property.[272] The property owner appealed the denial to the board of appeals, premised on a use variance which had been approved by the board in 1959.[273] The board confirmed the commissioner's denial.[274]

The appellate division reversed the supreme court's decision which had annulled the board of appeals' decision and sustained the board of appeals' denial of the building permit for two reasons. First, the 1959 use variance, upon which the appeal to the board of appeals was based, was deemed void ab initio.[275] Notably, the court opined that "the Board had the authority to review the 1959 use variance on the petitioners' appeal from the Commissioner's denial of their building permit application."[276] The court found that the board of appeals had exceeded its jurisdiction in 1959 because the original record lacked any evidence

271. *See* Franklin Square Realty Assocs., LLC v. Bd. of Appeals, 232 N.Y.S.3d 55, 58 (App. Div. 2d Dep't 2025).

272. *See id.* at 57.

273. *See id.*

274. *See id.*

275. *See id.* at 58.

276. *Franklin Square Realty*, 232 N.Y.S.3d at 58 (citing N.Y. TOWN LAW § 267-a(4) (McKinney 2025)); *see also* N.Y. VILLAGE LAW § 7-712-a(4) (McKinney 2025).

demonstrating the "practical difficulties or unnecessary hardships" required by the then-applicable zoning statute.[277]

Second, even assuming, for the sake of argument, that the 1959 variance had been validly granted, the court related that a use variance confers only limited permission for a particular use and does not operate as an amendment that rezones a property.[278] "[A] variance constitutes only limited permission to use a given parcel of property for a specific nonconforming use, and does not constitute a zoning amendment reclassifying the subject parcel."[279] As a result, "the 1959 use variance extending business use into the residential zones . . . did not obviate the need" for new use variances for the self-storage facility in the residential portions of the property.[280]

The court also reinforced the recognized principle that estoppel cannot be invoked against local government to sanction an administrative error, even if the buildings department had previously issued permits for other nonconforming uses following the 1959 variance.[281] "[E]stoppel is not available against a local government unit for the purpose of ratifying an administrative error."[282]

The possible ramifications of the decision potentially are far-reaching. Pursuant to the rationale of the decision, the legitimacy of a land use approval granted decades before may no longer be inviolable. Instead, the decision suggests a substantially increased level of due diligence to confirm the original procedural validity and evidentiary basis of those approvals or variances. If the original record is deficient, the variance, no matter its age, potentially may be vulnerable to challenge and possible invalidation. This could possibly create unexpected impediments for development proposals relying on historical approvals.

One would trust that the holding is limited to the peculiar facts disclosed by the record on appeal, which, although not appearing from the appellate division decision, indicate a lack of clarity as to whether a

277. *Franklin Square Realty*, 232 N.Y.S.3d at 58 (quoting TOWN OF HEMPSTEAD, N.Y., BUILDING ZONE ORDINANCE § Z-1.0(A) (1956)).

278. *See id.*

279. *Id.* (first quoting Abbey Island Park v. Bd. of Zoning Appeals, 518 N.Y.S.2d 823, 824 (App. Div. 2d Dep't 1987); then citing 194 Main, Inc. v. Bd. of Zoning Appeals, 897 N.Y.S.2d 208, 209 (App. Div. 2d Dep't 2010)).

280. *Id.*

281. *See id.*

282. *Franklin Square Realty*, 232 N.Y.S.3d at 58 (first quoting Parkview Assocs. v. City of New York, 519 N.E.2d 1372, 1374 (N.Y. 2988) (internal quotation marks omitted); then citing City of Yonkers v. Rentways, Inc., 109 N.E.2d 597, 599 (N.Y. 1952)).

variance or a special permit in excess of the authority delegated to the board of appeals was inappropriately approved. It is implausible that a land use board could, as in *Franklin Square Realty*, consider the validity of a land use approval decades after the statute of limitations expired.

F. Necessary Parties

The owner of property, as well as the applicant who has obtained a land use approval, is a necessary party in any proceeding challenging the approval.[283] The court in *Supinsky v. Town of Huntington* considered whether a necessary party can be joined after the statute of limitations has expired.[284] The appellate division reversed the supreme court's dismissal of a proceeding which challenged the approval of area variances for an assisted living facility, finding that the supreme court's ability to direct the joinder of necessary parties is not affected by the expiration of the statute of limitations.[285]

The appellate division concluded that "when a necessary party has not been made a party to a proceeding and is 'subject to the jurisdiction' of the court, the [appropriate] remedy is not dismissal of . . . the petition, but[, instead,] for the court to direct that the necessary party be summoned."[286] The supreme court's ability to direct joinder of the property owners at that point was not affected by the expiration of the statute of limitations.[287] The court also opined that the municipal respondents lacked standing to assert a statute of limitations defense on behalf of the property owners who had not yet appeared in the proceeding.[288]

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283. *See* Ferruggia v. Zoning Bd. of Appeals, 774 N.Y.S.2d 760, 760 (App. Div. 2d Dep't 2004); Long Island Pine Barrens Soc'y, Inc. v. Town of Islip, 729 N.Y.S.2d 907, 907 (App. Div. 2d Dep't 2001), *lv. denied*, 764 N.E.2d 394 (N.Y. 2001).

284. *See* Supinsky v. Town of Huntington, 225 N.Y.S.3d 675, 677 (App. Div. 2d Dep't 2025).

285. *See id.*

286. *See id.* (first quoting N.Y. C.P.L.R. 1001(b) (McKinney 2025); then citing U.S. Bank Tr. Nat'l Ass'n v. Germoso, 190 N.Y.S.3d 394, 396 (App. Div. 2d Dep't 2023); and then citing Mulford Bay, LLC v. Rocco, 131 N.Y.S.3d 84, 85 (App. Div. 2d Dep't 2020)).

287. *See id.* (first citing *U.S. Bank Tr.*, 190 N.Y.S.3d at 396; then citing *Mulford Bay*, 131 N.Y.S.3d at 85).

288. *See id.* (first citing *U.S. Bank Tr.*, 190 N.Y.S.3d at 396; then citing BHMPW Funding, LLC v. Lloyd-Lewis, 149 N.Y.S.3d 141, 145 (App. Div. 2d Dep't 2021)).

G. Statute of Limitations

The court determined in *Johnson v. Zoning Board of Appeals* that a proceeding challenging the approval of area variances for a landscape and construction materials processing business, which was commenced more than thirty days after the decision was filed with the village clerk, was timely because the zoning board of appeals had failed to refer the application to the county planning agency as required by General Municipal Law Section 239-m.[289] The applicant had sought variances from the requirement of the zoning law that all uses, including equipment for the handling of processes, must be conducted in a completely enclosed building and that no materials, supplies, or equipment may be permitted to be permanently stored outside any building.[290] The zoning board of appeals did not forward the application to the county planning agency but contended that it was not required to do so as a result of an agreement entered into between it and the county planning agency pursuant to General Municipal Law Section 239-m(3)(c).[291] That provision provides:

> The county planning agency or regional planning council may enter into an agreement with the referring body or other duly authorized body of a city, town or village to provide that certain proposed actions set forth in this subdivision are of local, rather than inter-community or county-wide concern, and are not subject to referral under this section.[292]

The appellate division found that the parties had entered into such an agreement which exempted specifically defined matters, including those relating to certain types of area variances, from General Municipal Law ("GML") review.[293] However, the agreement did not exempt all area variance applications from review, and the variances approved by the zoning board of appeals were not among those exempted as being for local determination.[294] Hence, the application was required

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289. *See* Johnson v. Zoning Bd. of Appeals, 239 N.Y.S.3d 867, 871–72 (App. Div. 4th Dep't 2025) (first citing N.Y. GEN. MUN. LAW § 239-m (McKinney 2025); then citing Fichera v. N.Y. State Dep't of Env't Conservation, 74 N.Y.S.3d 422, 424–26 (App. Div. 4th Dep't 2018)).

290. *See id.* at 869.

291. *See id.* at 869–70.

292. GEN. MUN. § 239-m(3)(c).

293. *See Johnson*, 239 N.Y.S.3d at 870–71.

294. *See id.* at 871.

to have been referred to the county planning agency, and the failure to do so rendered the approval jurisdictionally defective.[295]

As a result of the jurisdictional defect, the thirty-day statute of limitations was inapplicable.[296] "[W]here, [however], there is a jurisdictional defect, 'the statute of limitations does not begin to run upon the filing of [the] jurisdictionally defective document.'"[297] "Consequently, the statute of limitations did not begin to run upon the filing of the jurisdictionally defective decision with the Village Clerk," and the approval of the application was null and void.[298]

In *Camarda v. Ubert*, the zoning board of appeals had granted building height, lot coverage and side-yard setback variances to permit the construction of a new garage in April 2021, subject to the condition that petitioner comply with the plans submitted to the zoning board of appeals which indicated lot coverage of 33.8% and floor area of twenty-eight feet by thirty feet (the "April 2021 decision").[299] The petitioner subsequently had new plans prepared that modified the approved plans by increasing the lot coverage to 34.8% and the floor area to twenty-six feet by forty feet.[300] He obtained a building permit premised on these modified plans, purportedly after having been advised by the building inspector that approval of the modified plans by the zoning board of appeals was unnecessary.[301] The petitioner then demolished the existing garage and constructed a new garage in accordance with the modified plans.[302] Nevertheless, the building inspector issued a violation order in September 2021, which determined that he had violated the condition of the April 2021 decision requiring

295. *See id.*; *see also* Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 622 N.Y.S.2d 395, 399 (App. Div. 4th Dep't 1995), *rev'd on other grounds*, 664 N.E.2d 1226 (N.Y. 1996); Burchetta v. Town Bd., 561 N.Y.S.2d 305, 306 (App. Div. 2d Dep't 1990); Eastport All. v. Lofaro, 787 N.Y.S.2d 346, 348 (App. Div. 2d Dep't 2004), *lv. dismissed*, 839 N.E.2d 900 (N.Y. 2005), *and lv. dismissed*, 839 N.E.2d 901 (N.Y. 2005); Zelnick v. Small, 702 N.Y.S.2d 105 (App. Div. 2d Dep't 2000).

296. *See Johnson*, 239 N.Y.S.3d at 872.

297. *Id.* (alterations in original) (quoting Fichera v. N.Y. State Dep't of Env't Conserv., 74 N.Y.S.3d 422, 425 (App. Div. 4th Dep't 2018)).

298. *Id.*

299. *See* Camarda v. Ubert, 236 N.Y.S.3d 187, 188–89 (App. Div. 2d Dep't 2025).

300. *See id.* at 189.

301. *See id.*

302. *See id.*

him to comply with the plans approved by the zoning board of appeals.[303]

The petitioner appealed the violation order to the zoning board of appeals and also sought alternate relief to amend the April 2021 area variance relating to lot coverage to permit the lot coverage of the new garage as constructed.[304] The zoning board of appeals upheld the violation order in January 2022, concluding that the petitioner had breached the April 2021 decision's condition, and denied his request to amend the area variance for lot coverage, which decision was filed with the village clerk the following day (the "January 2022 decision").[305] The petitioner instituted an Article 78 proceeding challenging the January 2022 decision on February 11, 2022.[306] The appellate division reversed the supreme court's dismissal of the proceeding as time-barred.[307]

The appellate division concluded that, contrary to the decision of supreme court, the applicable thirty-day limitations period did not begin to run from the filing of the April 2021 decision.[308] Instead, the challenge was to the January 2022 decision which confirmed the violation and denied the requested amended variance.[309] The issues raised by the petitioner in challenging the January 2022 decision, that is, the propriety of the violation order based on the modified plans and the denial of his request to amend the variance, "were not, and could not have been," before the zoning board of appeals in April 2021.[310] "The [P]etitioner did not 'seek[] the same relief' in the November 2021 application as in the January 2021 application, nor did the November 2021 application 'advance[] factual and legal issues that were previously litigated' before the [zoning board of appeals]."[311] Because "the November 2021 application did not [comprise] a request for reconsideration of all or part of the April 2021 decision," the statute of

303. *See id.*
304. *See Camarda*, 236 N.Y.S.3d at 189.
305. *See id*.
306. *See id.*
307. *See id.* at 191.
308. *See id.* at 190.
309. *See Camarda*, 236 N.Y.S.3d at 189.
310. *See id.* at 190.
311. *Id.* (second and third alteration in original) (quoting Yarbough v. Franco, 740 N.E.2d 224, 226–27 (N.Y. 2000) ("A motion to reconsider generally seeks the same relief, and advances factual and legal issues that were previously litigated at the administrative level. For that reason, it cannot be used to extend the Statute of Limitations.").

limitations to challenge the January 2022 decision "did not begin to run at the time the April 2021 decision was filed with the village clerk," "even if it sought, as an alternative ground for relief, to amend a condition set forth therein."[312] Accordingly, the challenge to the January 2022 decision was timely. The decision confirms that a new and distinct decision by a zoning board of appeals can trigger a new limitations period if it addresses new issues or formally confirms a violation.

H. 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."[313] Several considerations are significant in evaluating 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."[314] Additional factors include "whether the 'work was undertaken without authority or in bad faith' . . . and whether 'substantially completed work' can be undone without undue hardship."[315] The overwhelming body of case law concludes that "[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.'"[316]

312. *Id.* (citing Riverso v. N.Y. State Dep't of Env't Conservation, 3 N.Y.S.3d 414, 417 (App. Div. 2d Dep't 2015); *cf.* Crowell v. Zoning Bd. of Appeals, 56 N.Y.S.3d 618, 620–21 (App. Div. 3d Dep't 2017)).

313. Dreikausen v. Zoning Bd. of Appeals, 774 N.E.2d 193, 196 (N.Y. 2002) (citing ARTHUR KARGER, POWERS OF THE NEW YORK COURT OF APPEALS § 71(a), at 426–29 (3d ed. 1997)).

314. *Id.* at 197 (citing Imperial Improvements v. Town of Wappinger Zoning Bd. of Appeals, 736 N.Y.S.2d 409, 410 (App. Div. 2d Dep't 2002)); *see also* Citineighbors Coal. of Historic Carnegie Hill *ex rel.* Kazickas v. N.Y.C. Landmarks Pres. Comm'n, 811 N.E.2d 2, 4 (N.Y. 2004).

315. 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) (citing *Citineighbors*, 811 N.E.2d at 4); *see* Wallkill Cemetery Ass'n, Inc. v. Town of Wallkill Plan. Bd., 905 N.Y.S.2d 609, 611 (App. Div. 2d Dep't 2010); s*ee also* Dowd v. Plan. Bd., 862 N.Y.S.2d 385, 386 (App. Div. 2d Dep't 2008)).

316. *Sierra Club*, 94 N.Y.S.3d at 743 (quoting *Dreikausen*, 774 N.E.2d at 196). *See* Weeks Woodlands Ass'n, Inc. v. Dormitory Auth., 945 N.Y.S.2d 263, 264, 266 (App. Div. 1st Dep't 2012), *aff'd*, 980 N.E.2d 532 (N.Y. 2012); *see also* Comm. for Env't Sound Dev. v. Amsterdam Ave. Redevelopment Assocs. LLC,

Moreover, a litigant must seek to preserve the status quo at each level of judicial review, including during the pendency of an appeal.[317]

The petitioners in *Katz v. Town of Hempstead* challenged the approval of area variances for the construction of a two-story residence on a bordering property.[318] The supreme court denied the petitioners' motion for a preliminary injunction, denied the petition, and dismissed the proceeding.[319] The appellate division dismissed the appeal as moot.[320]

"Where the change in circumstances involves a construction project, [the court] must consider how far the work has progressed towards completion." [321] The crucial consideration in evaluating a claim of mootness 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.'"[322] An additional significant consideration is "whether work was undertaken without authority or in bad faith, and whether substantially complete work is readily undone, without undue hardship."[323]

Although the petitioners in *Katz* had moved for a preliminary injunction in the supreme court, they failed to move for a preliminary injunction in the appellate division to preserve the status quo during the pendency of their appeal.[324] In the meantime, construction was substantially completed in accordance with the approvals, and annulling it

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144 N.Y.S.3d 1, 9 (App. Div. 1st Dep't 2021), *lv. denied*, 174 N.E.3d 371 (N.Y. 2021); Raab v. Silverstein, 964 N.Y.S.2d 236, 237 (App. Div. 2d Dep't 2013); Gorman v. Town Bd., 709 N.Y.S.2d 433, 434 (App. Div. 2d Dep't 2000); 315 Ship Canal Parkway, LLC v. Buffalo Urb. Dev. Corp., 178 N.Y.S.3d 658, 659–60 (App. Div. 4th Dep't 2022); Papert v. Zoning Bd. of Appeals, 949 N.Y.S.2d 466, 467 (App. Div. 2d Dep't 2012).

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

318. *See* Katz v. Town of Hempstead, 226 N.Y.S.3d 567, 569 (App. Div. 2d Dep't 2025).

319. *See id.*

320. *See id.* at 568–69.

321. *Id.* (alteration in original) (first quoting *Citineighbors*, 811 N.E.2d at 4; then citing Town of Mt. Pleasant v. Delaney, 53 N.Y.S.3d 340, 342 (App. Div. 2d Dep't 2017)).

322. *Katz*, 226 N.Y.S.3d at 569 (first quoting *Citineighbors*, 811 N.E.2d at 4; then citing Papert v. Zoning Bd. of Appeals, 949 N.Y.S.2d 466, 467 (App. Div. 2d Dep't 2012)).

323. *Id.* (quoting *Delaney*, 53 N.Y.S.3d at 342).

324. *See id.*

would cause substantial prejudice and undue hardship to the owner.[325] Accordingly, the appeal was properly dismissed as moot.[326]

III. SITE PLAN

Planning boards occasionally encounter site plan (or special permit) applications in which it is unclear whether a proposed use is permissible. However, a planning board lacks the authority to interpret the provisions of a zoning law or to deny site plan (or special permit) approval on the ground that the proposed use is not allowed under the zoning law.[327] Instead, "[t]he power to interpret the provisions of the local zoning law is vested exclusively in the zoning board of appeals . . . ."[328] However, the jurisdiction of a zoning board of appeals is appellate only.[329] Consequently, it possesses jurisdiction to act only upon an appeal of a decision of a building inspector or similar administration official.[330]

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325. *See id.*

326. *See id.*

327. *See* Moriarty v. Plan. Bd., 506 N.Y.S.2d 184, 190 (App. Div. 2d Dep't 1986); Jamil v. Vill. of Scarsdale Plan. Bd., 808 N.Y.S.2d 260, 261 (App. Div. 2d Dep't 2005) ("The Planning Board is without power to interpret the provisions of the local zoning law . . . ."); Figgie Int'l, Inc. v. Town of Huntington, 610 N.Y.S.2d 563, 565 (App. Div. 2d Dep't 1994); Swantz v. Plan. Bd., 824 N.Y.S.2d 781, 782 (App. Div. 3d Dep't 2006); Mialto Realty, Inc. v. Town of Patterson, 491 N.Y.S.2d 825, 825 (App. Div. 2d Dep't 1985).

328. Rattner v. Plan. Comm'n, 478 N.Y.S.2d 63, 63 (App. Div. 2d Dep't 1984) (citing N.Y. VILLAGE LAW § 7-712 (McKinney 1983); VILLAGE § 7-725 (repealed 1993); 113 Hillside Ave. Corp. v. Vill. of Westbury, 278 N.Y.S.2d 558, 559 (App. Div. 2d Dep't 1967)).

329. *See* N.Y. TOWN LAW § 267-a(4) (McKinney 2025) ("Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. Such appeal may be taken by any person aggrieved, or by an officer, department, board or bureau of the town."); *see also* VILLAGE § 7-712-a(4) (stating the same).

330. *See* Maidstone WJM Corp. v. Zoning Bd. of Appeals, 198 N.Y.S.3d 132, 134 (App. Div. 2d Dep't 2023) ("a zoning board of appeals' jurisdiction is appellate only, and in the absence of an administrative determination to review, a zoning board of appeals is without power to grant a variance or render a de novo determination with respect to an issue not determined by an administrative official" (quoting Capetola v. Town of Riverhead, 144 N.Y.S.3d 203, 206 (App. Div. 2d Dep't 2021))); Webster Citizens for Appropriate Land Use, Inc. v. Town of Webster, 159

Therefore, a planning board lacks the authority to decide if a proposed use is a permitted use pursuant to the local zoning law.[331] If there is any doubt regarding the permissibility of a proposed use, the planning board cannot refer the issue to the zoning board of appeals because the jurisdiction of a zoning board of appeals is exclusively appellate in nature.[332] Instead, the proper course of action is for the planning board to refer the question to the building inspector for a determination as to whether the use is permitted.[333] Any aggrieved party, including the planning board, can then appeal that decision to the zoning board of appeals.[334]

However, because Town Law Section 267-a(4), like Village Law Section 7-712-a(4), provides that the jurisdiction of a zoning board of appeals is appellate only "[u]nless otherwise provided by local law or ordinance, ..."[335] a provision in a zoning law may explicitly authorize a planning board to refer such issues to the zoning board of appeals.[336] In such instances, a planning board, which lacks the authority to interpret the zoning law, must refer the question to the zoning board of appeals (or building inspector) if there is ambiguity as to the permissibility of a use.[337]

The decision in *Smith v. Town of Thompson Planning Board* demonstrates the application of these concepts.[338] A developer in *Smith* had applied to the planning board for site plan and special permit approval for a "warehouse," a use which was permitted in the zoning

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N.Y.S.3d 598, 599 (App. Div. 4th Dep't 2021); Barron v. Getnick, 486 N.Y.S.2d 528, 529 (App. Div. 4th Dep't 1985).

331. *See* O'Malley v. Town of New Windsor Plan. Bd., 212 N.Y.S.3d 126, 128 (App. Div. 2d Dep't 2024) (quoting *Swantz*, 824 N.Y.S.2d at 782); Carr v. Vill. of Lake George Vill. Bd., 102 N.Y.S.3d 404, 416 (Sup. Ct. Warren Cty. 2019) (quoting *Swantz*, 824 N.Y.S.2d at 782); BBJ Assocs. v. Zoning Bd., 881 N.Y.S.2d 496, 502 (App. Div. 2d Dep't 2009) (citing TOWN §§ 267-a(4), 267-b(1); *Jamil*, 808 N.Y.S.2d at 261).

332. *See Maidstone WJM*, 198 N.Y.S.3d at 134; *Capetola*, 144 N.Y.S.3d at 206; *Webster Citizens for Appropriate Land Use*, 159 N.Y.S.3d at 599.

333. *See BBJ Assocs.*, 881 N.Y.S.2d at 502.

334. *See* N.Y. VILLAGE LAW § 7-712-a(4) (McKinney 2025); TOWN § 267-a(4).

335. VILLAGE § 7-712-a(4); TOWN § 267-a(4).

336. *See* Woodland Cmty. Ass'n v. Plan. Bd., 860 N.Y.S.2d 653, 655 (App. Div. 3d Dep't 2008).

337. *See id.* (citing Eastport All. v. Lofaro, 787 N.Y.S.2d 346, 348–49 (App. Div. 2d Dep't 2004), *lv. dismissed*, 839 N.E.2d 900 (N.Y. 2005)).

338. *See* Smith v. Town of Thompson Plan. Bd., 223 N.Y.S.3d 356, 358–60 (App. Div. 3d Dep't 2024).

district in which the property was located.[339] Project opponents argued that the use actually was a "distribution center," which was prohibited, and contended that the planning board should refer the question to the zoning board of appeals to determine whether the proposal constituted a permitted or prohibited use.[340] Nonetheless, the planning board granted approval without referring the issue of the permissibility of the use to the zoning board of appeals.[341]

The court related that although the jurisdiction of a zoning board of appeals generally is appellate in nature, a municipality possesses the authority to authorize its zoning board of appeals with original jurisdiction, including interpretation of provisions of the zoning law.[342] The zoning law in *Smith* explicitly provided that the zoning board of appeals may interpret "whether a proposed use is permitted under the zoning law either '[o]n appeal from a[ ] . . . determination made by an administrative official, or on request by an official, board or agency of the Town.'"[343]

The zoning law defined a "warehouse" as a "building or structure utilized for the storage of various goods," while a distribution center was defined as an "area and building where trucks load and unload cargo and freight, and where the cargo and freight may be transferred to other vehicles or modes of transportation. Storage facilities such as warehouses, incidental to the principal use, may also be part of a distribution center."[344] The court found that a genuine issue existed as to whether the use was permitted or prohibited, and that the planning board inappropriately determined the question on its own.[345] "Planning boards are without power to interpret the local zoning law, as that power is vested exclusively in local code enforcement officials and the zoning board of appeals."[346] Hence, the issue should have been determined either by the building inspector, or by the zoning board of appeals upon

339. *See id.* at 358.

340. *See id.*

341. *See id.*

342. *See id.*

343. *Smith*, 223 N.Y.S.3d at 358 (alterations in original) (quoting TOWN OF THOMPSON, N.Y., CODE § 250-46(A) (2020)).

344. *Id.* at 359 (quoting TOWN OF THOMPSON, N.Y., CODE § 250-2(B) (2020)).

345. *See id.*

346. *Id.* (quoting Swantz v. Plan. Bd., 824 N.Y.S.2d 781, 782 (App. Div. 3d Dep't 2006)).

referral from the planning board.[347] The planning board could not approve a site plan or special permit in the absence of an interpretation from the building inspector of zoning board of appeals as to the permissibility of the use.[348] Hence, the court annulled the approvals.[349]

IV. SPECIAL PERMITS

A. Religious Uses

The law is well-settled that designation of a use as a special permit use in a zoning law is "tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan [of the community] and will not adversely affect the neighborhood."[350] Although there is no entitlement to a special permit, once an applicant has established that a use complies with the pertinent special permit criteria, a special permit must be granted unless there are reasonable grounds for denying it that are supported by substantial evidence.[351]

Applying these principles in the context of a special permit necessary for the establishment of a religious use, the appellate division confirmed the issuance of a special permit to construct a small chapel in *Acker v. Village of Head of the Harbor*.[352] A monastery consisting of Russian Orthodox monks owned a 4.6-acre property which "contain[ed] a two-story residential structure built in the nineteenth century known as the Timothy House."[353] Timothy House was the residence for nine monks and "ha[d] limited space available for them to pray and conduct services."[354] Timothy House and the entire property were "listed on the State and National Registers of Historic Places."[355] The

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347. *See id.* (citing Catskill Heritage All., Inc. v. Crossroads Ventures, LLC, 77 N.Y.S.3d 728, 731 (App. Div. 3d Dep't 2018); Jamil v. Vill. of Scarsdale Plan. Bd., 808 N.Y.S.2d 260, 261 (App. Div. 2d Dep't 2005)).

348. *See Smith*, 223 N.Y.S.3d at 359.

349. *See id.* at 360.

350. N. Shore Steak House, Inc. v. Bd. of Appeals, 282 N.E.2d 606, 609 (N.Y. 1972); Retail Prop. Tr. v. Bd. of Zoning Appeals, 774 N.E.2d 727, 731 (N.Y. 2002) (quoting *N. Shore Steak House*, 282 N.E.2d at 609).

351. *See Retail Prop. Tr.*, 774 N.E.2d at 731; Toys "R" Us v. Silva, 676 N.E.2d 862, 867 (N.Y. 1996); C.B.H. Props. v. Rose, 613 N.Y.S.2d 913, 914–15 (App. Div. 2d Dep't 1994), *lv. denied*, 645 N.E.2d 1217 (N.Y. 1994).

352. *See* Acker v. Vill. of Head of the Harbor, No. 609399/2024, 2025 N.Y. Slip Op. 50418(U), at *2 (Sup. Ct. Suffolk Cty. Apr. 2, 2025).

353. *Id.* at 2.

354. *Id.*

355. *Id.*

property was located in the Residence A zoning district, in which churches and other places of religious worship were special permit uses, and was also within a historic district.[356]

"Churches and other places of religious worship" were uses permitted by special permit in the district upon compliance with general special permit criteria and if:

> [L]ocated on adequate sites and with adequate provision for parking at times of maximum attendance or use of the premises, with landscaping and controls over lighting and signs as may be required so as to protect and not adversely affect adjoining properties and with means of ingress and egress which are properly related to the street system.[357]

Also, village regulations required the preservation of scenic and historic resources.[358] The New York State Office of Parks, Recreation and Historic Preservation opined that the proposed chapel would not adversely impact the Timothy House or the surrounding historic district.[359] In response to Petitioner Acker's objections, the monastery located the chapel farther from her residence, thus making it more distant from her residence than the Timothy House, provided dark sky compliant lighting, and relocated the parking area to the back of the property.[360] The board of trustees adopted a negative declaration and approved the special permit.[361]

The court relayed a number of principles that were applicable to the application.[362] First, religious uses, by their nature, are "presumptively beneficial to the public."[363]

> "So strong is the presumption of public benefit that ordinarily such factors bearing on public health, safety and welfare as neighborhood appearances, adverse

356. *See id.*

357. *Acker*, 2025 N.Y. Slip Op. 50418(U), at *2–3 (quoting VILLAGE OF HEAD OF THE HARBOR, N.Y. CODE § 165-23(B)(1) (2025)).

358. *See id.* at *3 (quoting VILLAGE OF HEAD OF THE HARBOR, N.Y. CODE §§ 165-61(B), 165-62(C)–(E) (2025)).

359. *See id.* at *4.

360. *See id.*

361. *See id.*

362. *See Acker*, 2025 N.Y. Slip Op. 50418(U), at *5–6.

363. *Id.* at *5 (citing Jewish Reconstructionist Synagogue of N. Shore v. Inc. Vill. of Roslyn Harbor, 342 N.E.2d 534, 537 (N.Y. 1975); Westchester Reform Temple v. Brown, 239 N.E.2d 891, 894 (N.Y. 1968); Diocese of Rochester v. Plan. Bd., 136 N.E.2d 827, 836 (N.Y. 1956)).

> effect on property values, loss of tax revenue, decreased enjoyment of neighboring properties and traffic hazards are insufficient to rebut the presumption." "[W]here an irreconcilable conflict exists between a right to erect a religious structure and the potential hazards of traffic or diminutions in value, the latter must yield to the former."[364]

"Every effort must be made to accommodate approval of a religious use [by] the impositions of [ameliorating] conditions" "[e]ven where the 'religious use brings more traffic and congestion than a residential use.'"[365] So significant is the presumption that "[p]otential traffic hazards do not justify the exclusion of a proposed religious use."[366] As a result, "greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made."[367]

Second, "the 'inclusion of the permitted use in the [zoning] ordinance 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.'"[368] Hence, a special permit must be approved if compliance with the standards is demonstrated.[369] Furthermore, any land use approval, including a special permit application, "cannot be denied based on generalized community opposition."[370] The court examined the record and the resolution approving the special permit and found

364. *Id.* (first quoting McGann v. Inc. Vill. of Old Westbury, 719 N.Y.S.2d 803, 804 (Sup. Ct. Nassau Cty. 2000) (*Acker* court erroneously attributing the quote to *Diocese of Rochester*, 136 N.E.2d at 834); then quoting Am. Friends Soc'y of St. Pius, Inc. v Schwab, 417 N.Y.S.2d 991, 994 (App. Div. 2d Dep't 1979) (alteration in original)).

365. *Id.* (quoting Apostolic Holiness Church v. Zoning Bd. of Appeals, 633 N.Y.S.2d 321, 324 (App. Div. 2d Dep't 1995)).

366. *Id.* (quoting Mikveh of S. Shore Congregation, Inc. v. Granito, 432 N.Y.S.2d 638, 639 (App. Div. 2d Dep't 1980)).

367. *Acker*, 2025 N.Y. Slip Op. 50418(U), at *5 (quoting Rosenfeld v. Zoning Bd. of Appeals, 774 N.Y.S.2d 359, 359 (App. Div. 2d Dep't 2004)).

368. *Id.* at *6 (alteration in original) (quoting N. Shore Steak House v. Bd. of Appeals, 282 N.E.2d 606, 609 (N.Y. 1972); Twin Cnty. Recycling Corp. v. Yevoli, 688 N.E.2d 501, 502 (N.Y. 1997)).

369. *See id.* (quoting Peter Pan Games of Bayside, Ltd. v. Bd. of Estimate, 413 N.Y.S.2d 164, 166 (App. Div. 2d Dep't 1979)).

370. *Id.* (citing Chestnut Petroleum Dist., Inc. v. Town of Mt. Pleasant Plan. Bd., 201 N.Y.S.3d 475, 478 (App. Div. 2d Dep't 2023); *Twin Cnty. Recycling*, 688 N.E.2d at 502; Framike Realty Corp. v. Hinck, 632 N.Y.S.2d 177, 178 (App. Div. 2d Dep't 1995)).

that the resolution analyzed every special permit requirement, substantiated its findings, and accordingly affirmed dismissal of the petition.[371]

B. Standing

In *Acker*, discussed above, the court determined that the petitioners, with the exception of Acker, lacked standing.[372] The petitioners possessed the burden to demonstrate standing.[373] A litigant challenging a governmental decision in land use matters possesses standing only if he or she establishes that they would "suffer direct harm or injury-in-fact that is in some way different from that of the public at large," and that "the claimed harm is within the zone of interests protected by the statute or statutes alleged to have been violated."[374]

> "The harm that is alleged must be specific to the individuals who allege it and must be different in kind or degree from the public at large, but it need not be unique."
>
> "'An allegation of close proximity alone may give rise to an inference of damage or injury' that enables a nearby property owner to challenge a land use decision without proof of actual injury." However, "[t]he status of neighbor does not . . . automatically provide the entitlement, or admission ticket, to judicial review in every instance. Petitioner, for example, may be so far from the subject property that the effect of the proposed change is no different from that suffered by the public generally."[375]

The petition in *Acker* was devoid of any specific allegations as to the distance to the chapel from any of the petitioners' homes.[376] It merely asserted that six of the petitioners resided nearby and that

371. *See id.* at *13.

372. *See Acker*, 2025 N.Y. Slip Op. 50418(U), at *8.

373. *Id.* at 6 (citing Crown Castle NG E., LLC v. City of Rye, 173 N.Y.S.3d 13, 16 (App. Div. 2d Dep't 2022); Ass'n for a Better Long Island Inc. v. N.Y. State Dep't of Env't Conservation, 11 N.E.3d 188, 192 (N.Y. 2014)).

374. *See id.* at *7; *see also* Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1041–42 (N.Y. 1991).

375. *Acker*, 2025 N.Y. Slip Op. 50418(U), at *7 (first quoting Sierra Club v. Vill. of Painted Post, 43 N.E.3d 745, 749 (N.Y. 2015); then quoting Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, 508 N.E.2d 130, 134 (N.Y. 1987); and then quoting *Sun-Brite Car Wash*, 508 N.E.2d at 134)).

376. *See id.*

Acker resided on a contiguous parcel.[377] Consequently, absent allegations regarding the distances of the residences from the chapel or purported harm different than those of the public at large, with the exception of Acker, the petition failed to allege facts sufficient to satisfy the petitioners' burden to demonstrate standing.[378]

Similarly, in *Friends of Coecles Harbor, Inc. v. Town Board*, a challenge to the issuance of a permit to replace an existing dock with a new one, the appellate division affirmed the dismissal of the action because the petitioner lacked standing.[379] Restating the well-known standard, the court related that "to establish standing . . . , a petitioner must [demonstrate] that it will suffer an injury-in-fact and that the claimed injury falls within the zone of interest sought to be protected by the laws alleged to have been violated."[380] Notably, "[c]lose proximity to the project may give rise to an inference of harm, but standing requires a showing that this close proximity exposes the petitioners to a harm different from the harm to the public generally"[381]

The petitioner in *Friends of Coecles Harbor* had "alleged only vague and hypothetical injuries arising from the proposed construction," which was "insufficient to confer standing, and [they also had] failed to [assert] any harm distinct from that of the community at large.[382] Accordingly, the petitioner lacked standing to prosecute the claims.[383]

C. Preliminary Injunction—Summary Judgment

The petitioners in *Friends of Coecles Harbor*, discussed above, instituted an Article 78 proceeding challenging the town board's approval of a permit and moved for a preliminary injunction, and the

377. *See id.*

378. *See id.*

379. *See* Friends of Coecles Harbor, Inc. v. Town Bd., 233 N.Y.S.3d 678, 681 (App. Div. 2d Dep't 2025).

380. *See id.* at 680–81 (citing Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk, 573 N.E.2d 1034, 1040–42 (N.Y. 1991)).

381. *Id.* at 681 (first quoting Green v. Town of Ramapo, 212 N.Y.S.3d 161, 163 (App. Div. 2d Dep't 2024); then citing 159-MP Corp. v. CAB Bedford, LLC, 122 N.Y.S.3d 59, 62 (App. Div. 2d Dep't 2020); and then citing CPD N.Y. Energy Corp. v. Town of Poughkeepsie Plan. Bd., 32 N.Y.S.3d 275, 278 (App. Div. 2d Dep't 2016)).

382. *See id.* (citing *Green*, 212 N.Y.S.3d at 163; *159-MP Corp.*, 122 N.Y.S.3d at 62; *CPD N.Y. Energy*, 32 N.Y.S.3d at 278).

383. *See id.*

supreme court denied the injunction and dismissed the proceeding.[384] The appellate division affirmed the dismissal, but on different grounds.[385] "A motion for a preliminary injunction 'opens the record and gives the court authority to pass upon the sufficiency of the underlying pleading.'"[386] "However, 'the court's power does not extend to an evaluation of conflicting evidence.'"[387] Consequently, a court "may not . . . convert a motion for a preliminary injunction into one for summary judgment without giving adequate notice to the parties and affording them an opportunity" to provide evidence.[388] The appellate division held that the supreme court had incorrectly assessed the evidence and decided the merits of the proceeding in ruling on the motion for a preliminary injunction.[389]

384. *See Friends of Coecles Harbor*, 233 N.Y.S.3d at 679.

385. *See id.* at 681.

386. *Id.* at 680 (first quoting Carroll v. Dicker, 80 N.Y.S.3d 69, 71 (App. Div. 2d Dep't 2018); then citing Alexandre v. Duvivier, 946 N.Y.S.2d 238, 239 (App. Div. 2d Dep't 2012)).

387. *Id.* (first quoting *Carroll*, 80 N.Y.S.3d at 71; then citing *Alexandre*, 946 N.Y.S.2d at 239; and then citing 68 Burns New Holding, Inc. v. Burns St. Owners Corp., 796 N.Y.S.2d 677, 678 (App. Div. 2005)).

388. *See id.* at 680 (quoting *Carroll*, 80 N.Y.S.3d at 71 (internal quotation marks omitted); *Alexandre*, 946 N.Y.S.2d at 239; *68 Burns New Holding, Inc.*, 796 N.Y.S.2d at 678).

389. *See Friends of Coecles Harbor, Inc.*, 233 N.Y.S. at 680.