

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

PLANNING AND ZONING CASELAW UPDATE: 2012

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Legislation

Disclosure of Records Discussed at Open Meetings

A new Section 103(e) has been added to the Open Meetings Law (Public Officers Law Article 7) for the purpose of requiring public bodies to make records that would be the subject of discussion at open meetings (i.e., proposed and amended resolution, law, rule, regulations) available to the public before or at any such scheduled meeting, to the extent that it is practicable for the public body to do so. The public may request that copies of such records be made, and the public body may charge a reasonable fee for any requested copies. If the public body maintains a regularly and routinely updated website with high speed internet connection, the records subject to disclosure must be posted there, to the extent that it is practicable for the public body to do so.

The law was signed into law on January 3, 2012 and became effective February 2, 2012.¹ For additional information about this new law, you may contact the Committee on Open Government at (518) 474-2518 or through its website at <http://www.dos.ny.gov/coog/index.html>.

Conditional Subdivision Approval

Town, village and city planning boards are now authorized to grant more than two additional 90-day extensions for conditional approval of a final plat. Chapter 522 of the Laws of 2010 made the change applicable in towns (Town Law §276(7) (c)). Chapter 561 of the Laws of 2011 made the change applicable in villages (Village Law §7-728(7) (c)) and cities (General City Law §32(7) (c)).

Agriculture and Farm Operations

Chapter 497 of the Laws of 2011 amended sections 305-a and 308 of the Agriculture and Markets Law (AML), pertaining to agricultural practices.

Now, under AML §305-a(1)(b) a municipality, farm owner, or farm operator may request that the Commissioner of the Department of Agriculture and Markets (Commissioner) render an opinion as to whether proposed changes in local land use regulations, pertaining to agricultural practices, would unreasonably restrict or regulate farm operations. The requested opinion would be rendered to the appropriate local officials and those charged with enforcing and administering local land use regulations.

Chapter 497 also amended AML § 308 (the State Right to Farm Law). After an opinion is

rendered by the Commissioner and the opinion is based on information acquired from the New York State College of Agriculture and Life Services, and the U.S.D.A. Natural Resources Conservation Service, the Commissioner may provide any such information to the municipality whose land use regulations were evaluated for consistency with AML § 305-a.

Cases

De Facto Taking

A property owner who challenges land use regulations on the ground that they affect a constitutional taking of property must demonstrate by dollars and cents evidence that under no permissible use, would the parcel as a whole be capable of producing a reasonable return. The evidence must show that the economic value, or all but a bare residue of the economic value, of the parcels must have been destroyed by the regulations at issue. The extent of monetary diminution necessary to support a conclusion that there was indeed a taking of property requires a loss in value of “one step short of complete.”

In *Adrian v. Town of Yorktown*,² it was alleged that actions of the Town resulted in the diminution in value of the approximately 15 acre parcel of property sought to be developed. Starting in or around 1988 and continuing until December 2000, the property owners said that the Town denied them permits to build a car wash and an auto body shop, denied wetland permits, imposed onerous environmental regulations on a supermarket project that they hoped to construct, and refused permission for the property to be included in a sewer district. In 2000, the property owners sold 11.07 of the 15 acres for the sum of \$3.6 million, instead of the appraised value of \$10,000,000. The court granted summary judgment to the Town, finding no de facto taking.

Administrative Review

Deference to a determination made by a zoning board of appeals is not required when a court reviews interpretation of a term in local zoning regulations.

In *Erin Estates, Inc. v. McCracken*,³ Petitioner’s property manager inquired of the Town of Erin Building Inspector whether the Petitioner could place on a lot within the manufactured home park it owned and operated, an unoccupied manufactured home it would like to sell to the

public. The Town Building Inspector advised the Petitioner that such a proposal would constitute a commercial use and was not allowed under the Zoning Code. The Petitioner applied for an interpretation of the Code by the Town Zoning Board of Appeals, which determined that the use prohibited since it would have the effect of transforming the said residential lot into a dedicated lot or area for the commercial sale of a mobile home. The ZBA added that “casual sales” of mobile homes by individual owners in anticipation of moving did not violate the Code. Petitioner filed an Article 78 Proceeding to annul this determination.

The Appellate Division reversed the Supreme Court’s dismissal of the Article 78 Proceeding, stating that there was no reason for the Supreme Court to accord deference to the decision of the ZBA. While a fact-based interpretation of a zoning regulation that determines the regulations’ application to a particular use or property is entitled to “great deference”, no such deference is required for a purely legal interpretation.

This case, the Court determined, presented a purely legal question, as its resolution would depend on and interpretation of the Town Zoning provision entitled “Commercial Sale of Mobile and/or Manufactured Homes”. Under that provision, commercial sales within manufactured home parks are identified and prohibited based upon the purpose of the contemplated use of the land in the park. The first sentence states that manufactured home parks are permitted for the purpose of “habitation”. The next sentence prohibits the use of a “sales lot or area” within the manufactured home park for the “purpose of selling mobile and/or manufactured homes.” Taken as a whole, the provision looks to the future and distinguishes between permissible and impermissible uses based upon whether the home was placed in the park to be inhabited or to be sold. Since the subject manufactured home was to be placed on a lot within the park for the purpose of “habitation” in the park after sale, the Court held that the Petitioner’s proposal did not fall within the use prohibited under the Zoning Code.

Exhaustion of Administrative Remedies

A court has the discretion to dismiss a declaratory judgment action filed under circumstances where, the Plaintiff fails to exhaustion all administrative remedies. A party need not pursue and exhaust all asserted administrative remedies, if to do so would be an exercise in futility.⁴ In *Subdivisions, Inc. v. Town of Sullivan*,⁵ the Plaintiffs (Subdivision, Inc. and J.B.

Quarry, Inc.) filed a declaratory judgment action for a determination that its 80-acre parcel of property, presently being used for the growing of hay, was a nonconforming mining use.

The 80 acres is one part of a larger parcel of property upon which quarry mining occurs. In the 1800s limestone used to construct the Erie Canal and local churches was mined there until, at the turn of the century, mining ceased and the 80-acre parcel was used for timber production, the site of a sawmill, and the site for housing persons who mined at an adjacent quarry, also owned by Plaintiffs. In 1977, the Department of Environmental Conservation issued a mining permit,⁶ under which the 8-acre parcel was referenced as “reserve land being farmed” to the adjacent quarry. The quarry was twice sold to different owners who continued the mining operations. The 80-acre parcel was separately conveyed to Plaintiff Subdivision, Inc., and Plaintiff J.B. Quarry applied in 2004 and was granted in 2006 a permit to mine the 80-acre parcel.⁷

The Town sought to dismiss the declaratory action on the ground that the Plaintiffs failed to exhaust their administrative remedies. The Appellate Division upheld the Supreme Court’s finding that Plaintiffs demonstrated an exception to the exhaustion requirement. The Appellate Division stated that the requirement of exhaustion of administrative remedies assumes that adequate relief may be obtained under the challenged zoning ordinance. The Court further stated that there was doubt that adequate relief may indeed be obtained in this case. Moreover, the Court added that, although factual determinations must be made to resolve the matter here, such determinations are best addressed in the context of a declaratory judgment action. Even if Plaintiffs would be afforded a legitimate opportunity to submit proof of their entitlement to a nonconforming use status, the asserted administrative remedy that includes applying to the Town Zoning Board of Appeals for a certificate of nonconformity would be an exercise in futility *since Plaintiffs have asserted that they have a constitutionally protected right to mine the subject parcel*. To this point, the Court reasoned that there was consistent demonstration by the Town that they opposed Plaintiffs’ desired use of the 80-acre parcel and thwarted each and every attempt made to engage in their desired mining operations. Under these circumstances, the Court reasoned that it was readily apparent that the Plaintiffs are unlikely to receive an unbiased evaluation from the Town.

Enforcement: Citizen Suits in Towns

Town (city and village) officials are not required to undertake enforcement actions against individuals who may be out of compliance with local zoning regulations. If town officials decide not to enforce such regulations, Town Law § 268(2)⁸ provides for citizen enforcement of the applicable zoning provisions. Under this statutory provision, citizens are given the right to sue in the name of the town to stop an alleged zoning violation. Under Section 268 (2), an avenue for direct court action by resident taxpayers is created for citizens who are jointly and severally aggrieved by a zoning violation, where town officials fail to enforce the zoning laws within 10 days after receiving written notice.

In *Thilberg v. Mohr*,⁹ the Appellate Division upheld the Supreme Court's grant of a motion for preliminary injunction to enjoin an alleged zoning violator from using property for nonresidential purposes while the matter is being litigated in court. The Court further held that the resident taxpayers were not required to show irreparable harm before a preliminary injunction could be obtained.

Stipulation of Settlement

— The case of *Fox Ridge Motor Inn, Inc. v. Town of Southeast*,¹⁰ involves a so-ordered stipulation of settlement between the Petitioner and certain parties of the Town of Southeast.

The owner and operator of Fox Ridge Motor Inn (Petitioner) applied for a building permit to reconstruct the hotel, because it was torn down after it was destroyed by an explosion. The Town Building Department denied the application, Petitioner appealed this denial to the Town Zoning Board of Appeals (ZBA), and the ZBA confirmed the denial. An Article 78 Proceeding was filed by Petitioner to challenge the ZBA's determinations. During this time, the Town rezoned the parcel upon which the hotel stood; under the rezoning plan, a hotel was no longer a permitted use. On February 23, 2005, the Supreme Court approved a stipulation of settlement executed between the ZBA and Petitioner, and "to which the Town was a party."

Thereafter, in 2006, the Petitioner applied for and was issued a building permit. On June 25, 2009, that building permit was revoked by the building inspector on the ground that the Petitioner failed to obtain approval of the Town Architectural Review Board. Petitioner filed an Article 78 against the Town challenging the building inspector's determinations, and filed a

declaratory judgment action for a declaration that the building permit issued in 2006 was valid. The Supreme Court granted Fox Ridge's requests for relief.

The Appellate Division upheld the Supreme Court's determination stating that a "so-ordered stipulation is a contract between the parties thereto and, as such, is binding on them and will be construed in accordance with contract principles and the parties' intent." The Court further reasoned that the terms of the stipulation of agreement here, when read as a whole, did not require the Petitioner to obtain the approval of the Architectural Review Board prior to applying for a building permit.

Another case that was resolved, at least in part, because of a so-ordered stipulation was *Duchmann v. Town of Hamburg*.¹¹ There, the Petitioners and certain billboard advertisers executed a perpetual easement that granted the advertisers the "right to service, maintain, improve or replace any outdoor advertising structure" on Petitioner's property (billboard owners). In 2004, a federal court order and settlement between the Town of Hamburg and the billboard owners permitted the placement of up to two billboards measured 14 feet by 48 feet on Petitioners property. In 2010, the billboard owners applied to the Town for a permit to convert part of the billboard to a digital display screen. The Petitioners asserted several objections to the 2010 permit application, including that they did not consent to the modification, and that billboard exceeded the dimensional requirements set forth in the Town Code.

The Appellate Division affirmed the Supreme Court, which upheld the zoning board of appeals grant of the 2010 permit. The Appellate Court stated that it was not arbitrary and capricious for the zoning board of appeals to conclude that the land of the easement provided the necessary written consent of the Petitioners. Whether the change in format for the billboard is viewed as an improvement or a replacement under the terms of the perpetual easement, further consent from Petitioners was not required. The Court also stated that the federal court order and settlement are controlling with respect to whether the billboard at issue could be erected and what its dimensions could be, reasoning that stipulations of settlement are judicially favored and may not be lightly set aside.

Zoning: Uniformity Requirement

New York zoning statutes require local zoning regulations to be "uniform for each class or kind of buildings throughout each district".¹² In *Tupper v. City of Syracuse*,¹³ the Appellate

Division, Fourth Department, invalidated two ordinances holding that they violated the uniformity requirements of General City Law Section 20(24). The two ordinances imposed parking requirements for one and two-family residences that were owned by absentee owners. Those properties were required to have one off-street parking space for each potential bedroom; properties of absentee-owners held or acquired before passage of the ordinances were exempt, but would be required to meet the new requirements if any “material changes” were made to such properties. The Court stated that the uniformity provisions are intended to protect against local legislative overreaching by requiring zoning regulations to be passed without reference to the particular owners. The distinction made in the ordinances treated buildings within the same class differently based solely on the status of the property owner (i.e., absentee property owners as opposed to owners who occupy the property). Such a distinction, according to the Court, “may be constitutionally valid, but is invalid under the uniformity requirements of the General City Law and City of Syracuse Charter.”

The next ground for invalidation of the two ordinances was that they violated Section 35 of the Second Class City Law, which requires in part that no ordinance may be passed by the common council on the same day in which it is introduced, except by “unanimous consent.”¹⁴ The Court established that the requirement for unanimous consent can on one of two meanings: (1) that the common council must consent to the merits of the ordinance, or (2) consent to the procedure for taking the vote on the same date on which the ordinances were introduced. But, because it was undisputed that three of the nine council members voted “nay” to the ordinances, the Court held that the requirement of “unanimous consent” under any interpretation of Section 35 was not met. Accordingly, the City of Syracuse ordinances were invalidated on this ground.

Re-Zoning

A jurisdictional defect occurs if a governing board makes changes to its zoning regulations but fails to comply with the applicable requirements under General Municipal Law § 239-m. In *EMB Enterprises, LLC v. Town of Riverhead*,¹⁵ the Appellate Division, Second Department, invalidated an attempted rezoning of Petitioner’s property for failure of the Town Board of Riverhead to comply with the referral requirement of General Municipal Law § 239-m. Additionally, the proposed change to the zoning ordinance conflicted with the comprehensive plan for the Town, violating Town Law § 272-a(11)(a) which requires zoning as well as other

land use regulations to be in accordance with a comprehensive plan.

Comprehensive Plan

The procedures to be followed by a special board appointed to develop a comprehensive plan are not advisory, and must be followed as prescribed. Section 272-a (4) of the Town Law¹⁶ provides that a board directed by the town board to prepare a comprehensive plan make its recommendations to the town board by resolution. Section 272-a (6) (c) also requires any board that prepares a comprehensive plan to hold a public hearing upon (at least) 10 days notice of such hearing published in a newspaper of general circulation in the town. During time allotted for notice of the public hearing, the proposed comprehensive plan must be made available for public review at the town clerk's office, as well as at any other public place like a public library.

In *Troy Sand & Gravel Co v. Town of Nassau*,¹⁷ the Appellate Division, Third Department, nullified a comprehensive plan adopted by the Town Board of Nassau, because the special board the Nassau Town Board directed to prepare the Town's comprehensive plan, failed to follow these preparation and public hearing procedures during development of such plan.

State Environmental Quality Review Act (SEQRA)

SEQRA regulations set forth in 6 NYCRR 617.7(c) the criteria for determining environmental significance. A negative declaration may not be issued in relation to a Type I action or an Unlisted action until after the agency takes the requisite "hard look" at any relevant environmental criteria.

In *Prand Corp v. Town Board of Town of East Hampton*,¹⁸ Petitioners challenged two local laws adopted in the Town of East Hampton. One challenge was to Local Law 16 of 2007. Local Law 16 upzoned or required more area for development of Petitioners' lots. The Supreme Court dismissed the challenge to Local Law 16 as untimely. The Appellate Division, Second Department, upheld the Supreme Court's holding.

The other challenge was to Local Law 25 of 2007 that amended the Town of East Hampton Open Space Preservation Law, based on recommendations made under a 2005 comprehensive plan for the Town. When adopted, Local Law 25 would require the set aside and preservation of a larger percentage of open space as a condition of subdivision approval in three

residential zones, while, at the same time, relax the land-clearing restrictions on the resultant subdivided lots.

For purposes of SEQRA, Local Law 25 was classified as an Unlisted action. A short environmental assessment form (EAF) was prepared. Three days later a negative declaration was issued on the EAF.

Although the Appellate Division, specifically noted that the 2005 Comprehensive Plan was adopted after 5 years of surveys, studies, and extensive community input, it affirmed the Supreme Court holding that Local Law 25 should be annulled. It found that the more liberal land-clearing allowances permitted under Local Law 25 implicated several of the environmental criteria in 6 NYCRR 617.7(c) used to determine whether a particular agency action would have a significant adverse impact on the environment. These criteria were specifically identified by the Appellate Division to be relevant here: (1) a substantial increase in the potential for soil erosion, flooding and drainage problems; (2) the removal of large quantities of vegetation; (3) substantial interference with natural resources in the area; (4) the creation of a material conflict with the community's comprehensive plan; (5) impairment of the existing character of the community; and (6) a substantial increase in the intensity of the land use. Because the Town Board failed to take the requisite hard look for each relevant environmental criterion, Local Law 25 was invalidated.

Certificate of Occupancy (NYS Uniform Code)

The New York State Uniform Fire Prevention and Building Code (Uniform Code) establishes minimum standards for both fire prevention and building construction.¹⁹ The Uniform Code is a separate body of regulations from a municipality's zoning regulations. The Uniform Code is generally administered by a local code enforcement officer (CEO), who may also locally be designated as the administrative official charged to enforce a municipality's zoning regulations. Challenges to orders or determinations made by a CEO are reviewed under the dual process for obtaining variances from Uniform Code provisions. First, cases which involve a *de minimus* variance or modification that does not substantially affect the code's provisions for health, safety or security are classified as routine cases and are processed administratively by the Department of State.²⁰ Next, substantive variance requests are reviewed and decided by one of seven regional boards of review.²¹

In *Matter of Raymond Hadley Corp. v. New York Department of State*,²² a Storage Group S-1 (moderate hazard storage) building permit was issued by a local code enforcement officer (CEO) for petitioner to construct a 40,000 square foot warehouse to store products related to its food packaging business. After the permit was issued, the CEO consulted the Division of Code Enforcement and Administration at the Department of State and was advised that, without firewalls the warehouse would exceed the maximum floor area for Storage Group S-1 permit occupancy, and, as such, a certificate of occupancy under the Uniform Code could not be issued.

The Petitioner appealed to the Capital Region – Syracuse Board of Review for the Department of State arguing that the CEO should have classified the warehouse in Storage Group S-2 (low hazard storage). The Syracuse Board of Review held a public hearing in 2009, and thereafter classified Petitioner’s building as Storage Group S-1 (moderate hazard storage) for purposes of the Uniform Code. The Syracuse Board of Review’s determination was then challenged by Petitioner in a Civil Practice Law and Rules Article 78 Proceeding.

The court upheld the determination of the Syracuse Board of Review. The court stated that Storage Group S-2 structures are building used for storage of noncombustible materials. Petitioner presented evidence that it repackaged food products into paper cartons that are stored on wood pallets and wrapped in plastic. The Board consulted with the International Building Code, the code upon which the Building Code of New York State (2007) is based, and then concluded that since the food products are packaged in more than one layer of combustible packaging material a Storage Group S-1 classification was proper.

Certificate of Occupancy (Zoning)

In *Haberman v. Zoning Board of Appeals of Town of East Hampton*,²³ a certificate of occupancy, issued pursuant to the Town’s Zoning Code, was upheld despite claims by neighbors that the subject structure violated several height restrictions set forth in the Code.

The Town building inspector issued a certificate of occupancy to owners of land upon which a single-family residence was constructed. A neighboring property owner (approximately 50 feet away) appealed the certificate’s issuance to the Town Zoning Board of Appeals (ZBA). The ZBA upheld the building inspector’s determination, finding that the certificate was properly issued.²⁴

The Appellate Division held that the Petitioner failed to meet his burden of demonstrating that the certificate of occupancy was improperly issued.²⁵ The party who seeks to have a certificate of occupancy revoked carries the burden at the public hearing before the zoning board of appeals of demonstrating that the certificate was improperly issued. The Petitioner supported his application before the ZBA with an elevation report from an engineer that alleged that the single-family residence had height restriction violations ranging from .66 feet to four feet.

Based on the ZBA record, the Court concluded that the Petitioner did not meet his burden and upheld the ZBA's decision as rational. The Petitioner's engineering expert testified and conceded that one aspect of nonconformity would not actually exceed the zoning law when the relevant distance for comparison is measured from the nearest property line, as the law expressly dictates. The expert also acknowledged that measurements he took in connection with at least one other alleged nonconformity may be less than accurate.

Variances

In the case of *Friedman v. Board of Appeals of the Village of Quogue*²⁶ it was held that a zoning board of appeals is not required to justify its determination on an area variance application, with supporting evidence on each of the five factors, if its ultimate determination balancing the relevant considerations is rational. In making an area variance determination, the court also stated that the personal observations of members of the zoning board of appeals may be considered.

In *Friedman*, owners of an oceanfront property requested two area variances in order to construct a conforming one family frame house with a pool, and a new 385 foot deck; the construction would replace a nonconforming house and an 885 square foot nonconforming deck. The first variance would setback the pool 15.7 feet (of the 25 feet required setback) from the toe of the sand dunes. The second variances would allow the deck to be built within the 200 feet setback for sand dunes. The Village ZBA granted the area variance application to permit construction of a swimming pool within the required setback, and the construction of a 300 square foot deck. Neighboring property owners challenged the granting of these variances, arguing that the project could be designed to fully comply with land use regulations, and the Village ZBA failed to consider the factors set forth under Village Law section 7-712-b(3).²⁷

The Appellate Division upheld the two variances granted, finding that there was

sufficient evidence in the record to support the ZBA's determinations, and the Board's ultimate determination after balancing the relevant considerations was rational. For example, the Court stated that the Board considered an alternative proposal, but rejected the alternative because it would have a detrimental effect on the ocean views of the neighboring property owners. The area variance for the deck was determined to be substantial, so the Board reduced the size from 385 to 300 square feet upon the justification that removal of the existing nonconforming house and existing nonconforming deck provided some relief under the Village Zoning Code. In addition, the new 300 ft deck was noted to be constructed "within the footprint of the existing house and deck to be removed."

Another interesting case is *Witkovich v. Zoning Board of Appeals of Town of Yorktown*.²⁸ In that case, the Appellate Division reversed the Supreme Court's dismissal of an Article 78 Proceeding, and annulled the decision of the Town ZBA, which confirmed the Town Building Inspector's issuance of a building permit for the construction of a garage.

In *Witkovich*, the Town ZBA determined that the proposed garage would constitute an accessory use to the primary residential structure (located on the same site where the garage would be built), and no area variance would be required for construction of the garage. The Appellate Division found that the design of the proposed garage could not support a rational determination that it would be a "subordinate building... the use of which is customarily incidental to that of a main building on the same lot." Of particular note to the Court was that the proposed garage would house at least eight or nine automobiles and would have nearly twice the square footage of the subject residential structure. As the Town Code requires the height of accessory buildings to be no more than 15 feet, it was arbitrary and capricious for the ZBA to not require an area variance for the proposed garage which would be over 15 feet. Moreover, the record did not support a finding that the use of such a large sized garage is "customarily incidental" to residential structures in the applicable neighborhood.

Variances: Uniqueness

In *Vomero v. City of New York*,²⁹ the Court of Appeals reversed the Appellate Division and found that the zoning board's decision to grant a use variance for construction of a commercial structure in a residentially-zoned area was an abuse of discretion.³⁰

The Court of Appeals held that proof of “uniqueness” in order to grant a use variance must be “peculiar to and inherent in the particular zoning lot” rather than “common to the whole neighborhood.”³¹ Thus, a residentially zoned corner property, situated on a major thoroughfare in a predominantly commercial area, does not suffice to support a finding of uniqueness since other nearby residential parcels share similar conditions.

Variations: Self-Created Hardship

The record before a zoning board of appeals must reasonably support a finding that the variance applicant’s hardship was self-created. In *Cacsire v. City of White Plains Zoning Board of Appeals*,³² the Petitioners purchased a two-family residence property built in 1904. No certificate of occupancy was ever issued for the residences, because in the City of White Plains the first certificate of occupancy regulations was enacted in 1927. For nine years after purchase, the Petitioners rented the property and paid taxes as a two-family residence. In 2002, the Petitioners also applied to the DOB for permits to renovate the upstairs kitchen of the two-family dwelling, and a permit was issued. Nonetheless, after the renovations were completed the DOB refused to issue the certificates of completion of the work, stating that the recorded classification for the building was not a two-family residence. The Petitioners were also advised that six area variances would be required to convert the property into a legal two-family residence.

In invalidating the ZBA’s denial of applications for six area variances, the Appellate Division, Second Department, stated that the record showed that the Petitioners reasonably believed that the property was legally being used as a two-family residence at the time of purchase, because of the following reasons: 1) the property was located in an area zoned for one- and two-family houses; 2) it was being taxed by the City as a two-family house; 3) and the property did not have a certificate of occupancy because the house was built in 1904 before any such certificates were issued. Based on a review of the record before the ZBA, the Appellate Division held that the ZBA’s determination that the Petitioners’ hardship was self-created lacked a rational basis, and was arbitrary and capricious.

Zoning Board of Appeals: Procedures

In *Haberman v. Zoning Board of Appeals of City of Long Beach*,³³ the Court of Appeals held that where a zoning board of appeals has voted to grant a variance, the ZBA’s legal

counsel, acting with actual or apparent authority, may agree to extend the time to build the improvements permitted by the variance without the issue being considered and voted on at another board meeting. Thus, the same formality is not required to extend a variance once it has been issued. In addition, an application for an extension need not be treated as a new application necessitating a new hearing or vote.³⁴

Failure of a zoning board of appeals to file its decision within five days after the decision is rendered, as set forth in state law, did render such decision invalid. In *Frank v. Zoning Board of Town of Yorktown*,³⁵ neighboring property owners challenged the ZBA's grant of an area variance that would legalize an existing fence which was taller than the zoning required, and variances for two sheds that did not meet required setbacks.

The neighbors argued that the ZBA failed to file its determination within five days after it rendered its decision, as set forth in Town Law § 267-a(9) (analogous provisions in Village Law § 7-712-a(9); General City Law § 81-a(9)). The court held that failure of the ZBA to file its final determination with the town clerk within five business days after the Board rendered its decision did not mandate annulment of the determination. One reason provided by the court was that Town Law § 267-a(9)³⁶ did not specify a sanction for failure of a ZBA to comply with the five-day filing requirement. The neighbors next argued that, since the ZBA failed to make factual findings as to each of the relevant statutory factors in Town Law § 267-b(3)(b), its decision should be annulled. In rejecting this argument the court stated: "The Board's decision specified the evidentiary basis upon which its determination relied, and is sufficient to permit an informed judicial review."

Non-Conforming Use: Vested Rights

Nonconforming uses or structures are afforded constitutional protection from discontinuance in spite of contrary provisions in new or amended zoning regulations if the owner has acquired vested rights.³⁷ Generally, vested rights would be acquired when an owner makes substantial expenditures and undertakes substantial construction in relation to a use or structure that is in conformance with any applicable zoning provisions then in effect.³⁸ Nonconforming uses that are classified as unique acquire vested rights differently, as illustrated in the *Jones v. Town of Carroll* case.³⁹

In that case, the Court of Appeals considered whether the Joneses acquired vested rights to operate a construction and demolition debris landfill under the zoning law in effect before 2005. The subject property contained 50 acres, of which the Department of Environmental Conservation (DEC) issued a permit to conduct landfill operations on only 3 acres.⁴⁰ The Court determined that the landfill operations could be expanded to the remaining 47 acres held in reserve for future expansions, and the 50-acre parcel as a whole was not subject to the Town of Carroll 2005 zoning law, which prohibited future expansions of any landfill beyond the area and scope allowed under a then-held DEC permit.

The Court of Appeals reasoned that land used for landfill purposes is unique and it is envisioned that the land itself is a resource to be consumed over time. Additionally, the owner of any landfill property could reasonably expect to not actively develop a portion of the land and hold such portion in reserve for future expansion. The Court based its decision in *Jones v. Town of Carroll* on its extractive mining operations, which are also subject to DEC regulation under Article 27 of the Environmental Conservation Law.⁴¹

In another case, *Mar-Vera Corp. v. Zoning Board of Appeal of the Village of Irvington*,⁴² the Petitioner did not meet the *Jones v. Town of Carroll* standard.

The Petitioner received approval of a subdivision plan in 1979 to construct 27 single family houses and 14 attached townhouses on 37 acres of land (12 acres were to be dedicated to the Village for park use). The single family houses were built, but the townhouses were not. In 2000, the Petitioner applied for a building permit to construct the 14 townhouses. The Village Building Inspector denied the application on the ground that, since the 1979 approval, new zoning regulations had been passed and, thus, the Petitioner would have to comply with them. The Petitioner appealed the building permit denial to the ZBA, and the ZBA confirmed the Village Building Inspector's determination. Upon court review of the local determinations in an Article 78 Proceeding, the Appellate Division affirmed the Supreme Court's dismissal of the Proceeding.

The Appellate Division reasoned that the construction of the 14 townhouses was not a nonconforming use, but rather a contemplated use. The Petitioner did not establish its entitlement to nonconforming use status for the 14 townhouse, and the lot designated on the 1979 plan for the townhouses was never developed or used for the townhouses.

Non-Conforming Use: Amortization

In *Town of Plattekill v. Ace Motocross, Inc.*,⁴³ failure to comply with a local zoning provision concerning amortization of non-conforming uses caused Ace Motocross, and the owner of the property upon which Ace's commercial motocross racetrack was operated (collectively, Petitioners), their nonconforming use protection.

In 2005, the Town enacted a zoning provision to generally prohibit the commercial use of land for the operation of off-road motorized vehicles. One exception was that property owners who permitted any commercial operation of off-road motorized vehicles could apply to the Town Zoning Board of Appeals (ZBA) within 90 days of the 2005 law's enactment for a determination, if such a commercial operation occurred on their property prior to February 18, 1987. Any owner applying to the ZBA could receive authorization to continue the nonconforming operations for up to 10 years.

Beginning in 2006, the Town Code Enforcement Officer (CEO) documented the continuing operation by Petitioners of the commercial motocross racetrack in violation of the zoning law. The CEO also issued zoning citations for such violations. After Petitioners failed to cease their activities, the Town sought an injunction to permanently enjoin the commercial operation of any off-road motorized vehicles on the subject property. At a certain point during the court action, Petitioners sought to amend their answer and include a counterclaim for the court to declare that the operation of the commercial motocross racetrack was a preexisting nonconforming use, and that such operation could continue for at least 10 years from the passage of the 2005 law.

The Appellate Division upheld the Supreme Court's grant of the Town's motion for a permanent injunction to permanently stop the defendants from operating the commercial motocross racetrack, and any other similar types of uses, in violation of the zoning law.

The court compared the Town's nonconforming use provision, under which Petitioners could have applied and gain authorization for continued racetrack operation for up to 10 years, to that of an "amortization period" adopted to allow a party to recoup expenditures by continuing the nonconforming use for a designated period of time. The then court reaffirmed the rule that a municipality may enact zoning laws that would eliminate prior nonconforming uses in a "reasonable fashion". Because the defendants failed to avail themselves of this local zoning remedy, they were foreclosed from seeking such relief in court.

Subdivision

The 2007 Court of Appeals case of *O'Mara v. Town of Wappinger*⁴⁴ held that an open space restriction placed on a final subdivision plat, when filed in the Office of the County Clerk as required under Real Property Law § 334, is enforceable against a subsequent purchaser. The Appellate Division, Second Department, now states in the case of *Fuentes v. Planning Board of the Village of Woodbury*,⁴⁵ without must explanation, that, for the open space restrictions to be enforceable, the language recorded on the plat filed with the County Clerk must adequately convey a perpetual restriction on development.

The Petitioner in *Fuentes* purchased two undeveloped lots at a tax sale. After the purchase, it was discovered that the lots were designated as open area under a previously approved cluster subdivision plan, and subject to a map notation of “not approved for building lots.” Petitioner applied to the Planning Board requesting removal of the two open space restrictions, and was denied. Petitioner filed an Article 78 to have this determination invalidated. The Appellate Division upheld the Supreme Court’s decision to annul the Planning Board denial and remit the matter to the Board for a new determination.

The Court seemed to invalidate the open space restriction on several grounds. Based on writings on the approved subdivision map that stated “cluster plan”, the Appellate Division first determined that the map was for a cluster subdivision. The Court then held that the Planning Board did not approve the “cluster plan” in accordance with State law, citing to Town Law § 278 (3)(b) and (c).⁴⁶ Next, the Court held that the Planning Board could not enforce the notation on the map which was in the Petitioner’s chain of title, because the language contained therein did not adequately convey a perpetual restriction on development of these lots.⁴⁷ Finally, the Court held that the Planning Board’s finding that removing of the restriction would be detrimental to the public welfare was conclusory and not supported by the record, and thus lacked a rational basis.

*Town of Huntington v. Beechwood Carmen Building Corp*⁴⁸ is another subdivision case. In that case, one portion of a 382-acre parcel, formerly owned and occupied by the State of New York, was sold. SBJ Associates purchased the parcel from the State. Respondents acquired the parcel from SBJ Associates after SBJ had obtained a zoning change for the parcel in 2000 (from a R-80 to a R-PUD zoning district), and had proposed and submitted a master development plan for one portion of the property to develop a senior residential community, known as The

Greens at Half Hollow, and a community of single-family homes, known as Country Pointe at Dix Hills (master plan). The Town Board adopted a Final Generic Environmental Impact Statement (FGEIS) for the master plan, indicating therein that SBJ proposed a recreation area that would include the location of a community center and swimming pool in the single-family dwelling portion of the district. In 2002, the Huntington Planning Board approved the final subdivision map that designated and noted Lot 73 as the “Future Community Recreation Facility, Common Area”. Respondents developed Lot 73 with a recreational facility that consisted of a tennis court, playground, and a gazebo.

The Town sued to have the community center and swimming pool constructed. Both the Supreme Court and the Appellate Division, Second Department, dismissed on the ground that the FGEIS merely permitted and did not mandate the construction of a community center and swimming pool. Moreover, the Appellate Division stated that the Town Code provision establishing the R-PUD that required the development of a swimming pool and community center not to exceed 5,000 square feet was void as a matter of law, holding that the Planning and Zoning Enabling Laws (Town Law Article 16) do not permit towns to enact zoning regulations which mandate the construction of a specific kind of building or amenity.

Mandamus to compel is a remedy used to require the taking of a ministerial act. The remedy is not allowed to compel a body to perform a discretionary act. A planning board’s grant of final subdivision approval, following conditional subdivision approval, is a discretionary act, thus, mandamus was not available to compel the board to perform that action.

In *Rose Woods, LLC v. Weisman*,⁴⁹ the Petitioners proposed to develop a four lot residential subdivision development with individual sewer pumps on each lot. The individual sewer pump proposal was deemed unacceptable by the Town Engineer and the Town Sewer Department, because similar pumps had presented maintenance problems in the past. The Town of Poughkeepsie Planning Board thus granted conditional subdivision approval, subject to 24 conditions, including a condition that one sewer pump serve the four lots. The conditional approval was filed on June 20, 2008, and, thereafter, two additional 90-day extensions for final subdivision approval were granted. Sometime during this period, the Petitioners requested final subdivision approval in a letter that specifically stated that the subdivision had been designed with individually owned pump stations and force mains. On June 9, 2009, the Town Sewer

Department reiterated that the individual pump station proposal was unacceptable as similar pumps had presented maintenance problems in the past. The day before the last 90-day extension was to expire, June 16, 2009, the Petitioners filed an Article 78 Proceeding seeking to compel, by mandamus, the Chair of the Planning Board to grant final subdivision approval. The Appellate Division affirmed the Supreme Court's dismissal of the Proceeding.

The Courts reasoned that a mandamus to compel a party is an extraordinary remedy available under limited circumstances to compel the performance of a ministerial act. The party requesting the issuance of a mandamus must clearly demonstrate the legal right to the relief sought. Where the circumstances involve the exercise of official discretion or judgment, a mandamus to compel is not the proper action to file in court. The grant of conditional subdivision approval was a determination of the Town Planning Board that became final and binding on the Petitioners upon adoption of the resolution of the Board on June 19, 2008.

Special Use Permit

Town Law § 274-b(9)⁵⁰ imposes a 30-day statute of limitations period within which a person aggrieved by a decision of the local body authorized to review a special use permit application may file a Civil Practice Law and Rules (CPLR) Article 78 Proceeding with the Supreme Court. In the two recent cases of *Royal Management, Inc v. Town of West Seneca*,⁵¹ and *Young Development, Inc. v. Town of West Seneca*,⁵² where the Town Board retained the authority to review and approve special use permits, it was held that the four-month statute of limitations period in CPLR 217 rather than the 30-day period in Section 274-b(9) applies when an aggrieved person seeks judicial review of the governing board's special use permit decision.

Site Plan

In *Greencove Associates v. Town Board of North Hempstead*,⁵³ a 1999 site plan application approved expansion of a commercial shopping center and imposed certain conditions, such as improvements to a landscaped buffer. (The shopping center was constructed on a parcel of property under a 1979 zoning change that conditioned the maintenance of a landscaped buffer along the area adjacent to a residential neighborhood, which borders Town Path Road.) In 2010, another site plan application proposed expansion of the shopping center to

10,000 square feet, in the area of the landscaped buffer. Under the 2010 application, it was proposed that the existing landscaped buffer, which measured 22 feet in width, would be reduced to four or five feet in width. The 2010 application was referred to the Nassau County Planning Commission pursuant General Municipal Law § 239-m, and it was recommended that the structure be reduced from 10,000 to 6,800 square feet, allowing the landscaped buffer width of 22 feet to be maintained; the Town Board granted approval to the 2010 site plan application with this proposed modification. The owner of the shopping center challenged the condition requiring the maintenance of the 22-foot landscaped buffer.

The Court found that the Town Board had authority to impose the condition, as it was a reasonable means of assuring that the existing landscaped buffer – which was designed to screen the adjacent residential neighborhood from the effects of the shopping center – would be preserved. The Court further noted that, although the 10,000 foot structure would be dimensionally compliant with the Town Code, the structure could not be constructed without encroaching on the existing buffer.

Conditions

Conditions imposed on an amended site plan application by the Town of Geddes Town Board were annulled as arbitrary and capricious by the Appellate Division, Fourth Department in Kempisty v. Town of Geddes.⁵⁴ The Petitioners owns two contiguous parcels of property zoned as “Commercial C: Heavy Commercial District”, one parcel is developed and contains various family businesses including a motor vehicle dealership and an automotive repair business, and the second parcel is vacant and undeveloped.

Uses in a Commercial C zoning district are permitted after site plan review. The developed property was used for motor vehicle sales and other services prior to adoption of the then applicable Town Code, and, as such, was not subject to site plan review. The Petitioners submitted a site plan review application in order to establish a vehicle and equipment sales and repair facility on the undeveloped property, however, while review was ongoing, the Town Board concluded that the site plan review process should include the developed property as well.

The Town Board forwarded the site plan application to the Town Planning Board for review and recommendation. The Planning Board voted to recommend approval, subject to four conditions, and the Town Board subsequently passed a resolution approving the amended site

plan subject to 12 conditions.

In response to the Petitioners' objection that the developed parcel should not be subject to site plan review, the Court disagreed for two reasons: 1) The Town Code required for any expansion or enlargement of a nonconforming use to be done in conformity with applicable zoning provisions; 2) the Petitioners acknowledged the undeveloped property was purchased in order to expand the motor vehicle sales and repair operation. Accordingly, the Town Board and the Town Planning Board did not abuse their discretion in requiring Petitioners to include both properties in their amended site plan review application.

On the other hand, the Court determined that the Town Board abused its discretion when it imposed six of the 12 conditions. Those conditions essentially required the Petitioners to comply with certain special use permit standards, even though uses in a Commercial C zoning district was only subject to site plan review and approval. The Court found it apparent from the record that the long history between the Town Board and the Petitioners regarding the developed property was the real reason the Town Board imposed the six invalid conditions. Such conditions, according to the Court, ran afoul to the fundamental principle that conditions imposed on the approval of a site plan must relate only to the use of the property without regard to the person who owns and occupies that property.

Open Meetings Law

Decisions made in violation of the Open Meetings Law do not always warrant annulment or invalidation.

After receiving site plan approval for a new home, Petitioner in *Cunney v. Board of Trustees of the Village of Grand View*⁵⁵ began and completed construction in accordance with the approved plan. However, due to an error in the topographical data used by Petitioner's architect, the completed home exceeded the zoning law's height restrictions by approximately three feet. The building inspector for the Village denied the issuance of a certificate of occupancy (zoning) for the home, so Petitioner applied for an area variance from the ZBA. The ZBA granted the area variance and imposed the condition that the accessory pool house was to be removed and an unobstructed view was to remain on the northerly side of the property. Petitioner then brought an Article 78 proceeding to review the ZBA determination, on the grounds that the conditions were unreasonable and inconsistent with the spirit and intent of the

zoning law and that the ZBA violated the Open Meetings Law.

The Supreme Court did not find that the condition imposed was unreasonable. On the other hand, the Supreme Court did find that the ZBA violated the Open Meetings Law when it failed to vote on the area variance application and render its determination in a session open to the public. The Appellate Court reversed stating: “[a]lthough the Legislature has granted the courts the discretionary power, upon good cause shown, to declare void any action taken by a public body in violation of the Open Meetings Law, the Petitioner failed to establish such good cause here.”⁵⁶

On the other hand, in *Thorne v. Village of Millbrook Planning Board*,⁵⁷ the Appellate Division did not invalidate the Village Planning Board’s decision of November 12, 2008, since Petitioners were not aggrieved by the asserted violations of the Open Meetings Law.

The Village Planning Board approved a development plan to build 91 homes in accordance with the conservation density development special permit, preliminary site plan and sketch-plan subdivision plat provisions applicable within the Bennett Campus District, a new district established in 2005 to encourage development of the 27.6 acre site of the former Bennett College. The Petitioners sought invalidation of the Planning Board’s approvals on several grounds, including that the Open Meetings Law was violated due to insufficient notice of meeting and failure to provide reasonable physical access to the November 12 meeting for persons with disabilities. The Appellate Division affirmed the Supreme Court’s rejection of Petitioners’ challenges under the Open Meetings Law. It found that the Petitioners were not aggrieved by any insufficiency in the notice of the November 12 meeting, and that the Petitioners were not aggrieved by the inaccessibility of the meeting to those with disabilities.

Endnotes

¹ Chapter 603 of the Laws of 2011, enacted January 3, 2012 and effective February 2, 2012.

² 83 A.D.3d 746 (2d Dept. 2011, April 12).

³ 84 A.D.3d 1487 (3d Dept. 2011, May 5).

⁴ See, e.g., *Town of Oyster Bay v. Kirkland*, 81 A.D.3d 812 (2d Dept. 2011, February 15), appeal dismissed, 17 N.Y.3d 778 (June 23, 2011)(requiring town to exhaust administrative remedies prior to bringing its claim in court, because no substantial constitutional question was directly involved).

⁵ 86 A.D.3d 830 (3d Dept. 2011, July 21); see also, *Subdivisions, Inc. v. Town of Sullivan*, 75 A.D.3d 978 (3d Dept. 2010, July 22) (granting motion by the Town Zoning Board of Appeals to intervene in the case, and denying summary judgment motion by landowners, because there was a genuine issue of material fact as to what use was in existence on the subject parcel when the zoning regulations were adopted).

⁶ Under the Mined Land Reclamation Law (MLRL), N.Y. Environmental Conservation Law, Article 23, Title 27, the Department of Environmental Conservation (DEC) issues permits for mining operations throughout the State.

⁷ Note: In the mining industry, prior nonconforming use status may be extended to portions of real property not quarried if the landowner can sufficiently demonstrate that, prior to the passage of a restrictive zoning law, it or its predecessors engaged in substantial quarrying activities on a portion of the property with the intention to do the same on other portions of the property not quarried. *Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88 (N.Y. 2009); see also, *Glacial Aggregates, LLC v. Town of Yorkshire*, 14 N.Y.3d 127 (N.Y. 2010); *People v. Miller*, 304 N.Y. 105 (N.Y. 1952).

⁸ It provides in relevant part: "...upon the failure or refusal of the proper local officer, board or body of the town to institute...appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the town so to proceed, any three taxpayers of the town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the town is authorized to do."

⁹ 74 A.D.3d 1055 (2d Dept. 2010, June 15).

¹⁰ 85 A.D.3d 785 (2d Dept. 2011, June 7).

¹¹ 90 A.D.3d 1642 (4th Dept. December 30, 2011).

¹² General City Law § 20(24); Town Law § 262; Village Law § 7-702.

¹³ 2012 WL 975614 (4th Dept. March 23, 2012).

¹⁴ Cities having a population ranging from 50,000 to 250,000 are classified as second class cities and each are generally governed under, individual city charters, and the Second Class Cities Law.

¹⁵ 70 A.D.3d 689 (2nd Dept. February 2, 2010).

¹⁶ Analogous provision for cities is General City Law § 28-a, and for villages is Village Law § 7-722.

¹⁷ 82 A.D.3d 1377 (3d Dept. 2011), 82 A.D.3d 1377 (3d Dept. 2011), affirming, 18 Misc.3d 1130(A) (Rensselaer County Sup. Ct. 2008)(upholding most of the special use permit/site plan review provisions in Town of Nassau Local Law 2 for 1986 regulates property use rather than mining acting, and as such is not preempted by the Mined Land Recreation Law [Environmental Conservation Law Article 27], but invalidating the "Additional Specific Standards" applicable to special use permit applications for commercial mining as preempted by the MLRL;

holding that Troy Sand and Gravel needed to exhaust available administrative remedies before challenging a stop work order issued under the general special use permit/ site plan approval provisions in Local law 2 for 1986); 80 A.D.3d 199 (3d Dept. 2010, December 16) (granting motion to quash Troy Sand and Gravel subpoena duces tecum and ad testificandum issued to Katherine Bader, a Town of Nassau resident over whose land the Town allegedly passed to reach the quarry).

¹⁸ 78 A.D.3d 1057 (2d Dept. 2010, Nov. 23), app. den., 17 N.Y.3d 703 (June 14, 2011).

¹⁹ The Uniform Code consists of several subunits, each based on a model code developed by the International Code. They are: *Residential Code of New York State* (RCNYS); *Building Code of New York State* (BCNYS); *Plumbing Code of New York State* (PCNYS); *Mechanical Code of New York State* (MCNYS); *Fuel Gas Code of New York State* (FGNYS); *Fire Code of New York State* (FCNYS); and the *Property Maintenance Code of New York State* (PMCNYS).

In addition, Article 11 (sections 11-101 through 11-110) of the Energy Law, sets forth the process by which the **State Energy Conservation Construction Code** (Energy Code) is to be developed, maintained, administered, and enforced for the conservation of energy in buildings in New York State. The Energy Code is based on a model energy code, developed by the International Code Council.

The Uniform Code is applicable in every municipality of the State except the City of New York; the Energy Code is applicable in every municipality of the State including the City of New York. An individual city, town, or village cannot choose to exclude itself from the provisions of the Uniform Code and Energy Code. Under Executive Law § 381 however, the municipality may adopt a local law stating that it will not enforce the code and thereafter responsibility for enforcement will pass to the county in which the particular city, town, or village is located. If a county declines to enforce the code, it may likewise adopt a local law to that effect and responsibility for code enforcement will immediately pass to the Department of State. Consequently, if a municipality adopts a local law declining to administer and enforce the Uniform Code, the result is that the municipality will also relinquish responsibility for administering and enforcing the Energy Code.

²⁰ The code enforcement officer and fire official have the opportunity to comment on the request for variance prior to a variance being issued.

²¹ The regulations establishing regional boards of review authorize them to hear appeals of orders or determinations made by an official responsible for enforcing the Uniform Code. An “aggrieved person” may petition the appropriate board of review for relief, and, in cases involving an appeal of a code official’s determination, the regulations authorize the board of review to “fashion suitable remedies so as to do justice among the parties.” A person filing an appeal to the board of review has the burden of proving that he or she is entitled to relief. Requests for variances from the Uniform Code are initiated by contacting the regional offices of the Codes Division.

²² 86 A.D.3d 899 (3d Dept. 2011, July 28).

²³ 85 A.D.3d 1170 (2d Dept. 2011, June 28).

²⁴ The Appellate Division heard the merits of the case here, because the case was transferred to it by the Supreme Court. On this point of procedure, the Court stated that if an Article 78 petition does not raise a question of substantial evidence no transfer to the Appellate Division is warranted. Determinations of a ZBA are reviewed by a court to see whether each had a rational basis and were not illegal, arbitrary and capricious, or an abuse of discretion. See, for example, Campbell v. Town of Mount Pleasant Zoning, 84 A.D.3d 1230 (2d Dept. 2011)(quoting “the substantial evidence standard of review is inapplicable to a zoning board’s determination of an application for an area variance, since such a determination is not made after a hearing at which evidence is taken pursuant to direction of law” citing to Matter of Matejko v. Board of Zoning Appeals of Town of Brookhaven, 77 A.D.3d at 949; see CPLR 7803(4). Rather, “when review the determinations of a Zoning Board, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the Board’s determination”...).

²⁵ Citing to Hariri v. Keller, 34 A.D.3d 583 (2d Dept. 2006).

²⁶ 84 A.D.3d 1083 (2d Dept. 2011, May 17).

²⁷ (i.e., the variance grant would produce an undesirable change; benefit achievable by a more feasible method other than a variance; variance request is substantial; adverse effect or impact on the environmental conditions of the neighborhood or district; the hardship was self created).

²⁸ 84 A.D.3d 1101 (2d Dept. 2011, May 17).

²⁹ 13 N.Y.3d 840 (N.Y. November 19, 2009).

³⁰ Pecoraro v. Board of Appeals of Town of Hempstead, 2 N.Y.3d. 608, 613 (N.Y. 2004).

³¹ Quoting Clark v. Board of Zoning Appeals of Town of Hempstead, 301 N.Y. 86, 91 (N.Y. 1950).

³² 87 A.D.3d 1135 (2d Dept. 2011), lv app den, 18 N.Y.3d 802 (December 20, 2011).

³³ 9 N.Y. 3d 268 (2007).

³⁴ Citing Matter of New York Life Insurance Co. v. Galvin, 35 N.Y.2d 52 (1974).

³⁵ 82 A.D.3d 764 (2d Dept. 2011, March 1).

³⁶ Analogous provisions in Village Law § 7-712-a(9) ;General City Law § 81-a(9).

³⁷ People v. Miller, 304 N.Y. 105 (N.Y. 1952).

³⁸ Ellington Construction v. ZBA of the Village of Hempstead, 77 N.Y.2d 114, 122 (N.Y. 1990).

³⁹ 15 N.Y.3d 139 (N.Y. June 17, 2010).

⁴⁰ The Joneses obtained a permit issued pursuant to Article 27 of the Environmental Conservation Law (ECL) and Part 360 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).

⁴¹ See, Syracuse Aggregate v. Weise, 51 N.Y.2d 278 (1980); Buffalo Crushed Stone v. Town of Cheektowaga, 13 N.Y.3d 88 (2009); Glacial Aggregates v. Town of Yorkshire, 14 N.Y.3d 127 (2010).

⁴² 84 A.D.3d 1238 (2d Dept. 2011, May 24).

⁴³ 87 A.D.3d 788 (3d Dept. 2011, August 4).

⁴⁴ 9 N.Y.3d 303(2007).

⁴⁵ 82 A.D.3d 883 (2d Dept. 2011, March 8).

⁴⁶ 3. Conditions....(b) A cluster development shall result in a permitted number of building lots or dwelling units which shall in no case exceed the number which could be permitted, in the planning board's judgment, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning ordinance or local law applicable to the district or districts in which such land is situated and conforming to all other applicable requirements. Provided, however, that where the plat falls within two or more contiguous districts, the planning board may approve a cluster development representing the cumulative density as derived from the summing of all units allowed in all such districts, and may authorize actual construction to take place in all or any portion of one or

more of such districts. (c) The planning board as a condition of plat approval may establish such conditions on the ownership, use, and maintenance of such open lands shown on the plat as it deems necessary to assure the preservation of the natural and scenic qualities of such open lands. The town board may require that such conditions shall be approved by the town board before the plat may be approved for filing.

⁴⁷ Citing to... Pattern Corp v. Association of Prop. Owners of Sleepy Hollow Lake, 12 A.D.2d 996, 999-1000 (3d Dept. 1991).

⁴⁸ 82 A.D.3d 1203 (2d Dept. 2011, March 29).

⁴⁹ 85 A.D.3d 801 (2d Dept. 2011, June 7).

⁵⁰ Similar provisions in General City Law § 27-b(9); Village Law § 7-725-b(9).

⁵¹ 2012 WL 975609 (4th Dept., March 23, 2012).

⁵² 91 A.D.3d 1350 (4th Dept. January 31, 2012).

⁵³ 2011 WL 4389752 (2d Dept. 2011, September 20).

⁵⁴ 2012 WL 896220 (4th Dept. March 16, 2012).

⁵⁵ 72 A.D.3d 960 (2nd Dept. April 20, 2010).

⁵⁶ Citing to N.Y. University v. Whalen, 46 N.Y.2d 734; Wilson v. Bd. of Ed. Of Harborfields Cent. School Dist., 65 A.D.3d 1158.

⁵⁷ 83 A.D.3d 723 (2d Dept 2011, April 5), app. den., 17 N.Y.3d 711 (September 22, 2011).