Zoning/Land Use

Bonefish Grill, LLC v. Zoning Bd. of Rockville Centre, 153 A.D.3d 1394 (2d Dep't 2017).

Petitioner Bonefish Grill, LLC sought to demolish the existing structure on its property and build a 5,400 square foot restaurant. The Village's Zoning Code required the petitioner to have 54 off-street parking spaces. Since the property did not have any off-street parking spaces, petitioner proposed to merge the subject property's lot with the adjoining property it also owned. This merger would allow it to utilize an exception to the Zoning Code's off-street parking requirement for "interior restaurants that abut municipal parking fields," as the adjoining property was adjacent to a municipal parking lot. When the petitioner's restaurant was substantially completed, the Building Department discovered that the proposed merger between the subject property and the adjoining property had never taken place. Because of this, before issuing a certificate of occupancy, the Building Department directed the petitioner to apply for a parking variance. The petitioner applied, relying on a license agreement which allowed the petitioner access to the adjoining property's 40 exclusive parking spaces between 4:00 p.m. and 12:30a.m. on Mondays through Fridays. The Village's Zoning Board of Appeals (ZBA) granted the parking variance but imposed the conditions that the restaurant's operating hours be restricted to the times set forth in the lease agreement, and that valet parking be mandatory. The petitioner commenced a CPLR article 78 proceeding to annul these conditions, and the Supreme Court granted petitioner's request.

On appeal, the court found the ZBA's conditions were proper because they "related directly to the use of the land and were intended to protect the neighboring commercial properties from the potential adverse effects of the petitioner's operation, such as the anticipated increase in traffic congestion and parking problems." The ZBA's rationale was supported by empirical and testimonial evidence, as petitioner's own expert stated that there was a high demand for parking in the area of the subject restaurant. Accordingly, the petition to annul the conditions restricting hours of operation and requiring valet parking was denied.

Mamaroneck Coastal Env't Coalition, Inc. v Mamaroneck Bd. of Appeals, 152 A.D. 3d 771 (2d Dep't. 2017).

Hampshire Recreation, LLC, owned a 216–acre property between the Marine Recreation District and a residential district in which the Hampshire Country Club, a membership golf and tennis club, was located. Pursuant to Village of Mamaroneck Zoning Code regulations, a membership club must be operated by a not-for-profit corporation or organization. Hampshire Recreation, LLC, incorporated Hampshire Club, Inc., as a not-for-profit corporation and leased the property to Hampshire Club, Inc., to operate the Hampshire Country Club. Thereafter, Hampshire Club, Inc., applied for a special use permit to host nonmember events at the Country Club. After a public hearing, the Zoning Board of Appeals of the Village of Mamaroneck voted to grant the special use permit to Hampshire Club, Inc. The petitioners commenced this CPLR article 78

proceeding to review the Zoning Board's determination and to annul the grant of the special use permit. The Supreme Court denied the petition and dismissed the proceeding.

Here, there was substantial evidence that Hampshire Club, Inc.'s contemplated use comported with the requirements of Village of Mamaroneck Zoning Code §§ 342–3 and 342–35(B)(9)(a), and there were no reasonable grounds for denying the special use permit. Accordingly, the court found that the special use permit to host nonmember events at the Country Club should have been granted. As such, the court held that the Supreme Court properly denied the petition and dismissed the proceeding.

Blanchfield v. Town of Hoosick, 149 A.D.3d 1380 (3d Dep't 2017).

Petitioner operated a dog training and handling business. In 2015, a code enforcement officer for the town of Hoosick determined that petitioner's use of the property was in violation of the Town's Land Use Law and that a special use permit and site plan approval were required. After petitioner applied for a special use permit the Town Zoning Board denied petitioner's application. Petitioner commenced an Article 78 proceeding, which the Supreme Court dismissed. This appeal followed.

The Third Department reversed the Supreme Court, finding that the Zoning Board's decision was not supported by substantial evidence. The Court found that under that petitioner had submitted evidence that she had taken steps to mitigate the noise level of her business but that the Zoning Board "bowed to generalized objections of two neighbors" rather than considering the evidence presented by petitioner. The Court accordingly granted the petition.

Westhampton Beach Assocs, LLC v. Incorp. Vill. of Westhampton, 151 A.D.3d 793 (2d Dep't 2017).

Plaintiff, owner of a 6.59–acre tract of real property in the Village of Westhampton Beach, submitted an application to the Village Planning Board seeking site plan approval for the construction of a 39–unit condominium development. The Planning Board adopted a resolution approving the site plan on the condition that the plaintiff pay to the Village a recreation or park fee pursuant to Village Law § 7–725–a(6) and Code of the Village of Westhampton Beach § 197–63(Q)(2). After an appraisal of the plaintiff's property, the defendant Village of Westhampton Beach Board of Trustees adopted a resolution establishing the amount of the Park Fee to be $776,307. In 2012, the plaintiff sold the property to a nonparty. When the plaintiff brought suit, the Supreme Court granted the Village defendants' motion to dismiss for lack of standing.

On appeal, the court determined that although the plaintiff subsequently sold the property before it paid any portion of the Park Fee, a rider to the contract of sale indicated that the sale price was reduced by the amount of the Park Fee that the purchaser was required to pay. Specifically, the rider provided that if any or all of the Park Fee was waived by the Village or "ceased to be in

effect" for any reason, the purchaser would pay that amount to the plaintiff. Thus, the court found that the plaintiff demonstrated a sufficient interest in the claim at issue to establish standing.

The court next addressed plaintiff's claim that it was entitled to judgment as a matter of law that Village Code § 197–63(Q)(2) was unconstitutionally vague. Here, the Village Code set forth that the formula for the fee "shall be the appraisal amount at the time of the application of the land area on the application as vacant land divided by the total area shown on the plan in square feet times 2,178 square feet of reserved area per dwelling times the number of dwelling units proposed on the plan." This formula was applied by the Board of Trustees after their receipt of an appraisal for plaintiff's former property. Accordingly, the court found that the Village defendants were entitled to a declaration that the subject code provision was not unconstitutionally vague.

Carnelian Farms, LLC v. Vill. of Muttontown Building Dep't, 151 A.D. 3d 847 (2d Dep't 6/14/2017).

Petitioners, Carnelian Farms, LLC, and Hunter's Moon Farm, LLC, were the owner and lessee of an approximately 60–acre commercial horse boarding and training facility. The facility was being renovated and upgraded to include an indoor riding arena and other site improvements, which had been approved by the Village of Muttontown Board of Trustees. Specifically, the petitioners were in the process of widening and re-paving the driveway on the premises when the Village of Muttontown Building Inspector issued a stop work order. The stop work order was made on the basis that the petitioners had failed to obtain a permit. Petitioners then brought article 78 proceeding against the village, village building department, and other related individuals. The Supreme Court, Nassau County, granted the petition.

Here, the record reflected that the Building Inspector determined that the work being performed on the driveway required a separate building permit. Even though the driveway work was approved by the Village of Muttontown Board of Trustees and the subject work was covered under a building permit issued with respect to the erection of the indoor riding arena and attached structure, the court found that the Building Inspector's determination that an additional permit was necessary was not made in violation of lawful procedure, was not affected by an error of law, was not arbitrary and capricious, and did not constitute an abuse of discretion. Accordingly, the court held that the petition should have been denied and the proceeding should have been dismissed.

Hahn v Hager, 153 A.D.3d 105 (2d Dep't 2017).

Plaintiffs Thomas G. Hahn, Jr., Jeanne Halstead, and Barbara Butts, and the defendant, Johanne Hagar, were siblings, who owned a 101–acre farm, known as the "Hahn Farm," located in the Town of Pleasant Valley, Dutchess County. The property, had been in the parties' family for more than 240 years, and was owned jointly by their parents until their father's death in 1995, and then solely by the parties' mother, Edna Hahn, until her death. Edna Hahn's will conferred a

qualified life estate in the property upon Thomas G. Hahn, Jr., and left the remainder interest to her four children in equal shares. The plaintiff Thomas G. Hahn, Jr., who holds a qualified life estate in the property, and two of his sisters, who hold remainder interests, sought authorization pursuant to RPAPL 1602 to sell the development rights to the property in order to preserve its future use as a farm.

The court held that development rights, as defined by the parties, constituted "real property, or a part thereof," for purposes of RPAPL 1602. Despite this, the court affirmed the dismissal of the cause of action because the plaintiffs failed to establish that the proposed sale of development rights would be expedient. Specifically, the plaintiffs failed to present any evidence of a proposed buyer for the development rights or the value of the underlying property with and without the development rights. Additionally, plaintiffs failed to present evidence of any other tangible or intangible benefit that could be achieved by a sale of the development rights, or that the sale of the development rights was necessary to preserve the property as an asset.

Avella v. City of New York, 29 N.Y.3d 425 (2017).

Plaintiffs – a State Senator, not-for-profit organizations, businesses, taxpayers, and users of Flushing Meadows Park -brought a CPLR article 78 proceeding and declaratory judgment action to enjoin the proposed development of parkland in Queens. The proposed development, "Willets West," involved the construction of a shopping mall and movie theater on Citi Field's parking lot, where Shea Stadium once stood. The Supreme Court denied the petition for declaratory and injunctive relief and dismissed the proceeding. The Appellate Division unanimously reversed and granted the petition "to the extent of declaring that construction of Willets West on City parkland without the authorization of the state legislature violates the public trust doctrine, and enjoining any further steps toward its construction."

Here, there was no dispute that the Willets West development was proposed to be constructed entirely on city parkland. On appeal, defendants argued that the 1961 legislation concerning Shea Stadium, which the City constructed on parkland, constituted legislative authorization for the Willets West development. That legislation, codified in section 18–118 of the Administrative Code of the City of New York, was titled: "Renting of stadium in Flushing Meadow Park; exemption from down payment requirements." In reviewing the plain language of that section, the court found that interpreting the phrase "improvement of trade or commerce" to grant authorization for the construction of anything that might improve trade or commerce, would lead to an absurd result. Instead, the court found that the 1961 legislation limited the City's legislation to "appurtenant grounds, parking areas and other facilities," and that no difference between "appurtenant" and "stadium related" in the context of these statutes existed. Furthermore, the legislative history demonstrated that the statute was intended to authorize the lease, rental or licensing of the stadium, not the construction of unrelated facilities. While the court acknowledged that the remediation of Willets Point was a laudable goal, it nevertheless held that the statutory language and legislative history demonstrated the legislation did not authorize further developments on the tract of parkland. As such, the order of the Appellate Division was affirmed.

Quentin Rd. Development, LLC v. Collins, 150 A.D.3d 859 (2d Dep't 2017).

In 2014, the Department of Buildings of the City of New York ("DOB") found that, pursuant to New York City Zoning Resolution (" ZR") § 113–11, the maximum permitted floor-to-area ratio for the portion of the subject building located in a C4–2 zoning district was governed by ZR Article II, Chapter 3, and that it was proper to refer to ZR § 34–112 in order to determine how to apply ZR Article II, Chapter 3 within a C4–2 zoning district. Following an administrative appeal, the Board of Standards and Appeals of the City of New York ("BSA") upheld the determination of the DOB.

On appeal, the court applied the "arbitrary and capricious" standard, and found that, according proper deference to the interpretation given to ZR § 113–11 by the DOB, the BSA's determination in upholding the determination of the DOB had a rational basis. Accordingly, the court held that the Supreme Court of New York properly denied the petition and dismissed the proceeding.

Blanchfield v. Town of Hoosick, 149 A.D.3d 1361 (3d Dep't 2017).

Petitioner was the owner of property in the Town of Hoosick, Rensselaer County on which she operated a dog training and handling business. Following a noise complaint from a neighbor, the Code Enforcement Officer of the Town of Hoosick determined that petitioner's use of her property was in violation of the Town's Land Use Law and that a special use permit and site plan approval were required. Petitioner submitted an application for a special use permit and for site plan approval and, citing the current and foreseeable impact of dog noise on the neighbors, the ZBA denied petitioner's applications. Petitioner then commenced a CPLR article 78 proceeding. The Supreme Court dismissed the petition, and petitioner appealed.

The court found that, in reaching its decision, In reaching its the ZBA found that petitioner failed to offer measures that would sufficiently mitigate the dog noise impact from her business; however, petitioner offered scientific measurement of the noise level and there was no other objective measure of the noise offered at the public hearing. Additionally, the court found the neighbor's recording of the noise was subject to an unreliable interpretation of its level based upon the ability to control the volume of the recording, and reliance on the recording would be unreasonable. Without evidence rebutting petitioner's offer of her measurement of the sound level and her offer of measures to address any noise concerns, the court found that there was no basis in the record to determine that petitioner did not meet the conditions imposed by the Land Use Law. Accordingly, the judgment was reversed and the matter was remitted to the Zoning Board of Appeals of the Town of Hoosick to grant a special use permit and site plan approval to petitioner.

Astoria Landing v NYC Envtl Control Bd., 148 A.D.3d 1141 (2d Dep't. 2017).

In 2011, the Department of Buildings of the City of New York (hereinafter "DOB") issued multiple notices of violation to the petitioner in connection with an advertising sign painted on the wall of the petitioner's four story apartment building in Astoria, Queens. The sign at issue had become a nonconforming advertising sign governed by New York City Zoning Resolution §

52–731. The building owner commenced this Article 78 proceeding to review city environmental control board's (ECB) determination affirming an administrative law judge's finding that the advertising sign painted on building violated the City administrative code and zoning resolution. The Supreme Court, Queens County, denied the petition, and the owner appealed.

The ECB noted in its decision that New York City Zoning Resolution § 52–731 expressly set forth a 10–year time restriction for any nonconforming advertising sign such as the sign at issue, which time restriction had long since expired. The court determined that the ECB was within its discretion in rejecting the petitioner's equitable estoppel argument that the DOB's issuance of a permit for the sign in 1981 exempted the sign from the time limitation of New York City Zoning Resolution § 52–731 and that it had purchased the subject property in reliance on the validity of the 1981 permit. Here, the court noted that "vested rights cannot be acquired in reliance upon an invalid permit." As such, the court found that the ECB had a rational basis for rejecting the petitioner's contention that the sign was valid. Accordingly, the court affirmed the holding of the Supreme Court, which denied the petition and held that the ECB's determination had a rational basis.

Pyne v Vill. of Southampton Bd. of Historic Preservation, 148 A.D. 3d 1155 (2d Dep't 2017).

In May 2014, the Incorporated Village of Southampton Board of Historic Preservation and Architectural Review granted the application of the respondents Farrell Building Company and F.A. East End, LLC, for a certificate of appropriateness for the construction of a single-family residence in the Southampton Village Historic District. The Supreme Court, Suffolk County, dismissed the proceeding, and the petitioners appealed. The court found that this appeal had been rendered academic, as the construction of the dwelling at issue, which was not undertaken in bad faith, was complete, a certificate of occupancy had been issued to the respondent property owner, and the case did not present an exception to the mootness doctrine. Accordingly, the appeal was dismissed as moot.

Hoffman v. Town of Shandaken, 147 A.D.3d 1275 (3d Dep't 2017).

Plaintiffs installed a privacy fence near the edge of the paved portion of Fox Hollow Road, which ran along the front of their property in the Town of Shandaken, Ulster County. For two years in a row, a snow plow operated by defendant Town of Shandaken allegedly damaged part of their fence, and plaintiffs commenced this action as a result. Plaintiffs asserted two causes of action, each alleging trespass and negligence related to the damage to the fence, and a third cause of action alleging that the Town widened Fox Hollow Road in 2010, taking their property without compensation and, in the process, altering the drainage that caused run-off from the road to contaminate their well. This case was an appeal from an order of the Supreme Court in Ulster County, which granted defendants' motion for summary judgment dismissing the complaint. On appeal, Plaintiffs argued that the Town's easement as limited to the width of the paved portion of Fox Hollow Road prior to the 2010 expansion because that is the only portion of the road that had been used by the Town for the statutory period of 10 years. However, the court noted that pursuant to Highway Law § 189, once a roadway is established as a highway by use, a town is permitted to maintain and improve it in furtherance of the public's right of travel, to the width of "at least three rods." Here, it was undisputed that plaintiffs' fence and the widening of the

roadway were within the three-rod width that defendants were statutorily authorized to open. Given that the Town was engaging in permissible uses of its easement, the court found no error in Supreme Court's dismissal of the second cause of action.

On the third cause of action, the court held that the Supreme Court erred in granting defendants' motion for summary judgment to the extent that it alleged a de facto taking based upon the contamination of plaintiffs' well. The court found that the record established that defendants proffered no proof and, accordingly, did not meet their initial burden concerning this claim.

Take Two Outdoor Media LLC v. Bd. of Standards and Appeals of the City of New York, 146 A.D.3d 715 (1st Dep't 2017).

This case arose from Respondent's determination that the United States Bulkhead Line running along the Bronx shoreline of the Harlem River did not constitute a "boundary of the City of New York" within the meaning of New York City Zoning Resolution § 42–55(d) and therefore that petitioner's outdoor advertising sign did not fall within the exception to the Zoning Resolution. The Supreme Court, New York County, denied the petition to annul this determination of respondent, which denied the appeal from the Department of Buildings' denial of registration for petitioner's outdoor advertising sign, and dismissing the proceeding brought pursuant to CPLR article 78.

On appeal, the court found that the respondent's determination was not arbitrary and capricious. Here, even though the Department of Buildings previously granted a permit based on a finding that the sign fell within the above exception to the Zoning Resolution, the court determined it was entitled to correct the mistake that led to its approval of the permit. Furthermore, the record reflected the reasons for this change in course so as to allow for meaningful appellate review.

Amdurer v. Vill.of New Hempstead Zoning Bd., 146 A.D.3d 878 (2d Dep't 2017).

The Hampstead zoning board of appeals permitted an applicant to subdivide a parcel he owned into two substandard lots, and to construct a two-family residence on each lot. Petitioners commenced a proceeding to review the determination on the ground that it was arbitrary and capricious, alleging that the Board failed to properly distinguish the subject application from a substantially similar prior application, made as to the same parcel, which the Board had denied earlier in in 2010. The trial court agreed and granted the petition.

The Second Department held that administrative agencies must adhere to their own prior precedent or indicate their reason for reaching a different result on essentially the same facts. When, as here, the zoning board reached a contrary result on substantially similar facts, the Court said that an explanation is required. Therefore, the Court found that the court below properly granted the petition and annulled the determination.

Lemmon v. Seneca Meadows, Inc., 147 A.D.3d 1348 (4th Dep't 2017).

Petitioners commenced this CPLR article 78 proceeding against Seneca Meadows, Inc. and James Cleere in his capacity as the Town of Waterloo Code Enforcement Officer, and the Town

of Waterloo Zoning Board of Appeals. Petitioners sought to annul the determination of the Zoning Board confirming Cleere's issuance of a zoning permit allowing Seneca Meadows to traverse an access road over a residentially zoned parcel in connection with its clay mining operations.

The Fourth Department held that Seneca Meadows failed to carry its heavy burden of establishing before the Zoning Board that it could not gain a "reasonable return" on its property under the existing zoning requirements. The Court therefore held that the Zoning Boards decision was in error and irrational

Cleere v. Frost Ridge Campground, LLC, 155 A.D.3d 1645 (4th Dep't 2017).

The Frost Ridge Campground, which is located in the town of LeRoy applied for a petition to continue the performance of concerts on its premises in 2013. The Town Zoning Board determined that a special use application was not necessary because the concerts constituted a pre-existing non-conforming use.

A group of property owners challenged this determination by the Zoning Board, alleging that the Board refused to follow its own precedent, acted arbitrarily and capriciously, and that the use of the property to host live mustic ws either abandoned or illegally expaneded. The Fourth Department rejected all of these contentions and found that the Zoning Board acted with a rational basis and followed its own precedent. The petition filed against the campground and the Zoning Board was dismissed.

Sullivan v. Albany Bd. of Zoning, 144 A.D.3d 1480 (3d Dep't 2016).

Bethany Reformed Church owned property adjacent to the petitioner's property, both of which are located within zoning district R-1B, zoned for single family medium density residencies. In the R-1B district, the principal permitted uses are single family detached dwelling and houses of worship. The Code of City of Albany § 357-63(A)(1), (2) defines a house of worship as "a structure or part of a structure used for worship or religious ceremonies." The church advised the City of its desire to partner with a not-for-profit corporation to establish a "home base" for up to 14 homeless individuals. The church inquired whether it needed a use variance to establish the home base. The church's counsel was informed that a use variance and/or special use permit would be required. Following the church's application and public hearings by the Board of Zoning Appeals, the Board found that the "proposed use is consistent with mission and actions of a house of worship," and that no additional zoning exemptions were necessary. Petitioner Sullivan filed an action to annul the Board's determination. The Supreme Court granted the petitioner's application, annulling the Board's determination, and this appeal followed.

The Appellate Division stated that a zoning board's interpretation of a zoning law is afforded great deference and will only be disturbed if it is irrational, unreasonable, or where there is an issue of pure legal interpretation of the underlying zoning law. The court found that none of these reasons were present here and the Board's determination should be upheld. Furthermore,

the court cited to prior decisions that held services to the homeless were judicially recognized as religious conduct and the acts of charity are an essential part of religious worship. The Court reversed the decision below and reinstated the decision of the Zoning Board of Appeals.

Terrilee 97th Street LLC v. New York City Envt'l. Bd., 146 A.D.3d 716 (1st Dep't 2017).

The New York City Environmental Control Board imposed civil penalties on a building owner for allegedly violating the New York City Administrative Code, New York City Building Code, and New York City Zoning Resolution. The building owner challenged the penalty and the determination that he had violated the City's Zoning Resolutions.

Under the multiple dwelling law, none of the building owner's units, which were classified as Class A multiple dwellings, could have been used for occupancy periods shorter than 30 days. The Court found that the transient use of the units violated the applicable residential zoning code and the ECB was affirmed on those grounds.

However, the ECB was overturned on its finding that the exit doors of the building violated New York City's Building Code. The ECB failed to substantiate the alleged violation of the building code provision requiring exit doors to swing in direction of egress. According to the Court, while the building code required doors to swing in the direction of egress for spaces with an occupant load of 50 or more persons, and the building's certificate of occupancy provided for 28 persons on each of seven floors, the building code also provided that only the occupant load of each floor considered individually would be used in computing required capacity for exits serving multiple floors.

Bruenn v. Town Bd. of Town of Kent, 2016 WL 7380923 (2d Dep't 2016).

Petitioners sought a review of two resolutions of the Town Board of the Town of Kent authorizing the construction and operation of a 150–foot monopole wireless communications tower. The trial court denied the petition, dismissed the proceeding, and declared that the resolutions are not null and void. The petitioners appealed. The respondent Homeland Towers, LLC moved to dismiss on the ground that the appeal has been rendered academic by the completion of the tower.

The Court noted that the petitioners never requested a preliminary injunction to prevent the work. Their claim that they did not do because of monetary constraints was "unavailing under the circumstances of this case." The Court found that Homeland "established that the construction of the tower was not performed in bad faith or without authority, that the work could not be readily undone without substantial hardship, and that this appeal does not present any recurring novel or substantial issues that are sufficiently evanescent to evade review otherwise." Therefore the Court granted homeland's motion to dismiss the appeal as academic.

Tri-Serendipity, LLC v. City of Kingston, 2016 WL 7125406 (3d Dep't 2016).

Petitioner applied to respondent City of Kingston Building Safety Division for a building permit to conduct certain renovations to an existing building on the property so that it could continue to operate as a boarding house. The Corporation Counsel informed petitioner that the property's use as a boarding house was not a lawful preexisting nonconforming use and denied the petition. This case was an appeal from the judgment of the Supreme Court, which partially dismissed petitioner's application to review the determination of respondent City of Kingston Zoning Board of Appeals.

The property at issue operated as a boarding house. In determining that this constituted a change from the prior nonconforming use in violation of the City's zoning law, which expressly prohibited the substitution of nonconforming uses, the ZBA relied in part on the affidavit of a relative of the owner and operator of the property from the 1950s through the 1970s, a woman who also lived on the premises with her family. This woman stated that the property was operated as "Garry's Nursing Home," which was corroborated by other documents in the record. She further stated that nurses, assisted residents with dressing, bathing and shaving, and dispensed medication. Additionally, a 1958 compliance letter established that the property was subject to regulation under the Social Welfare Law, and advised Garry's Nursing Home that it was required to provide around-the-clock coverage by a licensed nurse, maintain appropriate medical records and dispose of narcotics properly.

Accordingly, the court found there was sufficient evidence in the record for the ZBA to have rationally concluded that the property was no longer being used as a nursing home as it had been when the City's zoning law first came into existence in 1963.

Panevan Corp. v. Town of Greenburgh, 2016 WL 6604718 (2d Dep't 2016).

Petitioners/plaintiffs, Panevan Corporation, the owner of property at 784 Central Park Avenue in the Town of Greenburgh, and 784 SCPA Rest. Corp. (hereinafter Rest. Corp.), an entity which leased that property, where it operated a diner, challenged a determination of the Greenburgh Planning Board which granted site plan approval and special permits to the respondent/defendant Dimitri Ostashkin, doing business as 788 Central Park Avenue. These special permits allowed for the development of Ostashkin's property, which was located adjacent to 784 Central Park Avenue. The Town and the Planning Board moved to dismiss the proceeding on the ground that Panevan and Rest. Corp. lacked standing. The Supreme Court granted this motion to dismiss, and determined that the Planning Board properly granted site plan approval and the special parking permits to Ostashkin.

On appeal, the court first noted that "a local planning board has broad discretion in deciding applications for site-plan approvals, and judicial review is limited to determining whether the board's action was illegal, arbitrary and capricious, or an abuse of discretion." Here, the court found that contrary to Rest. Corp.'s contention, the determination regarding site plan approval had a rational basis, and was not illegal, arbitrary and capricious, or an abuse of discretion. Additionally, The Supreme Court properly determined that Panevan failed to establish standing.

Bartolacci v Village of Tarrytown Zoning Board of Appeals, 2016 WL 6773977 (2d Dep't 2016).

Following a determination of the zoning board of appeals that the Village Planning Board had authority to review the petitioner's application for a building permit, the petitioner appealed to the trial court which upheld the determination. The appellate court affirmed noting, "Pursuant to the plain language of the Code of the Village of Tarrytown § 305–67, the Village of Tarrytown Planning Board had the authority to review the petitioner's application for a building permit, which sought to construct a retaining wall, given that the proposed construction involved the disturbance of "steep slopes" on the subject property. Contrary to the petitioner's contention, the ZBA either reasonably determined that the circumstances of the prior applications for building permits were distinguishable from those of the instant application, or otherwise provided a valid and rational explanation for its departure from its prior precedent." Reiterating that the ZBA's determination is entitled to deference, the appellate Court found that the lower court properly upheld the ZBAs determination.

Monte Carlo 1, LLC v. Weiss, 142 A.D.3d 1173 (2d Dep't 2016).

Petitioner owns a two-story brick building with accessory parking located in East Meadow. When originally constructed in 1962, the building comprised three offices on the first floor and five residential apartments on the second floor. In 2006, the petitioner applied for a use variance to convert two of the offices on the first floor into three residential apartments, and for an area variance in relation to the off-street parking requirements. The Zoning Board of Appeals of the Town of Hempstead granted the applications temporarily until July 11, 2012, with conditions. In 2009, the petitioner applied for another use variance to convert the remaining office on the first floor into two residential apartments, and for an area variance with respect to the off-street parking requirements. The ZBA denied both of those applications.

In December 2012, the petitioner sought rehearing of its 2009 applications, and to renew the use and area variances that had expired on July 11, 2012, but was denied again. Thereafter, the petitioner commenced the instant CPLR article 78 proceeding to annul the ZBA's determination. The Supreme Court granted the petition to annul the ZBA's determination to deny the petitioner's applications to renew the use and area variances previously granted by the ZBA in 2007.

The court found that contrary to the Supreme Court's determination, the ZBA's findings of fact provided a rational basis for denying the petitioner's application. The ZBA found that the petitioner failed to demonstrate "unnecessary hardship" in accordance with Town Law § 267-b (2) (b). Specifically, the court reasoned that the fact that the ZBA previously temporarily approved the same application in 2007 did not relieve the petitioner of its evidentiary burdens in demonstrating "unnecessary hardship" for purposes of renewal of the use variance, or for purposes of seeking an additional use variance. Here, the petitioner failed to show, by dollars and cents proof, that it could not yield a reasonable rate of return absent the requested use variances. Thus the ZBA's determination denying the petitioner's applications to renew the use variance previously issued in 2007, and for a new use variance, was not illegal, arbitrary, or an abuse of discretion.

The court next found that the ZBA's determination denying the petitioner's applications to renew the area variance previously issued in 2007,and for a new area variance, was not illegal, arbitrary, or an abuse of discretion. In its review, the ZBA properly considered the benefit to the petitioner if the variances were granted as weighed against the detriment to the neighborhood by such grant. Based on its weighing of the evidence, the ZBA's findings that the area variances were substantial and would adversely impact the nearby residential neighborhood by creating a "disruptive additional demand for on-street parking in the residential area to the south" of the property. The court found that this finding was also rational and supported by the record.

Citrin v. Board of Zoning Appeals of North Hempstead, 2016 WL 6089178 (2 Dep't 2016).

The petitioners own property on a split-zone lot in the Town of North Hempstead on which was located a restaurant within the Town's business district, and an adjoining parking lot that extends into the Town's residence district. The Zoning Board of Appeals granted the petitioners a permit pursuant to Code of the Town of North Hempstead (hereinafter Town Code) § 70–225(E) to continue the use of the parking lot in the residence district for a period of five years. The petitioners then commenced an action to annul the five-year durational limit. The Supreme Court denied the petition and dismissed the proceeding. The appellate court reversed, finding that the Board did not have the authority to impose a durational limit on a permit granted pursuant to Town Code § 70–225(E). The Court found that the Town Code does not explicitly provide the Board with the authority to impose durational limits upon permits granted pursuant to that section, and therefore it was improper for the Board to include a five-year durational limit on a permit granted pursuant to that provision. As a result, the Court annulled the condition.

730 Eq. Corp. v. New York State Urb. Dev. Corp., 37 N.Y.S.3d 599 (2d Dep't 2016).

The claimant, 730 Eq. Corp., owned a 20,738 square foot, irregularly shaped, vacant parcel of real property at 730–740 Atlantic Avenue in Brooklyn, located in an M1–1 manufacturing district, which had previously been improved with a gas station. The property was subject to a long-term lease with Amoco, which had intended to construct a gas station on the property. In December 2009, New York State Urban Development Corporation, doing business as Empire State Development Corporation (hereinafter ESDC), commenced an eminent domain proceeding to take numerous properties, including the subject parcel, as part of the Atlantic Yards project. The trial court granted condemnation, and awarded the claimant the principal sum of $6,906,000 as just compensation for the taking of the claimant's real property. Claimant appealed on the ground of inadequacy, from so much of the same judgment as awarded it the principal sum of only $6,906,000 as just compensation for the taking of its property.

The trial court determined that the claimant had established that, in the absence of the project, there was a reasonable probability that the property would have been rezoned to C6–2A. The court found that many of the buildings in the immediate area had been converted to commercial and residential use, that New York City policy was to rezone underutilized industrial sites to allow for commercial or residential development, and that a zoning district with a FAR of 6 would be in scale to this portion of Atlantic Avenue were supported by the record. Furthermore, contrary to ESDC's contention, the Amoco lease on the property did not prohibit a finding of a different highest and best use than contemplated in the lease, since the property must be valued

at "its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time."

The court's determination that a 12–story budget hotel would be legally and physically possible and financially feasible on the property was supported by the record, including testimony by ESDC's own expert regarding alternate designs for such a hotel which would meet the zoning requirements, and the evidence of an increased demand for and development of hotels in Brooklyn around the vesting date. Moreover, the court was not required to accept the opinions of ESDC's experts on the financial feasibility issue. Accordingly, the court held that the Supreme Court properly rejected ESDC's appraisal and based its award on the claimant's appraisal with such adjustments as the evidence supported.

Lavender v Zoning Board of Bolton, 2016 WL 3919056 (3d Dep't 2016).

Petitioner owned a parcel of real property overlooking Lake George in the Town of Bolton, Warren County, known as Highlands Castle. Beginning in 2010, petitioner advertised Highlands Castle on the Internet as a venue for weddings, corporate meetings, social gatherings and other special events. In its online media, the property was described as a "perfect setting for a special gathering with family and friends" or "any other meaningful 'experience' you can envision." In response to complaints from neighboring homeowners regarding petitioner's use of the property, the Town's Zoning Administrator issued a determination in March 2012 finding that petitioner's rental activities did not violate the Town Code. An appeal ensued and, following a public hearing in June 2012, respondent Zoning Board of Appeals of the Town of Bolton overturned the determination. Petitioner thereafter commenced this proceeding seeking to annul the ZBA's determination.

The ZBA found that, given the manner in which petitioner utilized and marketed Highlands Castle as a venue for weddings and other large social gatherings, the challenged use was neither subordinate nor customarily incidental to the primary single-family residential use of the property. The marketing of Highlands Castle evinced a clear intent to target a rental audience that sought more than just residential use of the property, and no evidence was presented that Highlands Castle had ever been rented out for use as a single-family residence. Furthermore, during the public hearing, neighboring property owners testified that events held at Highlands Castle generated increased traffic, created overcrowded private roadways and often involved amplified music and announcements, which interfered with their enjoyment of their own nearby homes. Accordingly, the court found the ZBA's determination to be neither irrational nor unreasonable.

Exeter Bldg. Corp. v. Town of Newburgh, 26 N.Y.3d 1129 (2016).

Developers brought hybrid proceeding pursuant to article 78 against town, town board members, planning board, zoning board of appeals, and town code enforcement officer, seeking review of determination by board of appeals that developers had not established vested right to develop real property in accordance with prior zoning regulations and seeking declaratory judgment that they had such vested right. The Supreme Court, Orange County, Elaine Slobod, J., granted petition to review determination by board of appeals and granted declaratory judgment.

Defendants appealed. The Supreme Court, Appellate Division, 114 A.D.3d 774, 980 N.Y.S.2d 154, reversed and remitted. Leave to appeal was granted.

The Court of Appeals held that:

1. developers did not have vested right to develop property in accordance with prior zoning regulations, and

2. limited permits did not amount to approval of proposed development.

SEQRA

WIR Assocs. LLC v. Town of Mamakating, 2018 WL 280820 (3d Dep't 2018).

Following a SEQRA review of proposed changes to a town's zoning laws, the Town Board issued a negative declaration and the amendments were adopted.

Petitioner, an owner of approximate 530 acres of real property in the Town commenced an Article 78 proceeding against the Town and Town Board. Petitioner sought to annul the rezoning of the subject property on the grounds that it conflicted with the Town's comprehensive plan and occurred after a deficient SEQRA review. Petitioner further demanded a declaration that the rezoning constituted illegal spot zoning and demanded damages pursuant to 42 USC § 1983 for a purported regulatory taking wrought by the rezoning. The Town and Town Board moved to dismiss the petition/complaint on various grounds.

The Third Department affirmed the lower court's ruling that petitioner's claim made pursuant to § 1983 was not ripe for review, because petitioner did not exhaust administrative remedies.

The court held that the petitioner had stated a cognizable claim as to whether the zoning amendments comported with the Town's comprehensive plan and whether the subject property was arbitrarily singled out so as to constitute discriminatory spot zoning. However, the Court held petitioner's claim that the Board's SEQRA process was deficient was "flatly contradicted by the documentary evidence." Furthermore, the court held that the Board took the necessary hard look at the environmental impacts of the zoning changes in determining that a negative declaration was appropriate. Accordingly, the court affirmed the lower court's dismissal of the petitioner's SEQRA claim in its entirety.

Sierra Club v. Martens, 2018 WL 343744 (2d Dep't 2018).

The DEC had continually interpreted the issuance of an "initial permit" for making water withdrawals pursuant to New York's Environmental Conservation Law as a ministerial act excluded from the definition of "action" under SEQRA. A group of not-for-profit organizations

commenced an Article 78 proceeding challenging this interpretation. The Second Department held that the issuance of an initial permit is not excluded from the definition of "action," and that SEQRA review is necessary in the issuance of these permits.

Green Earth Farms Rockland, LLC v Haverstraw Planning Board, 153 A.D.3d 823 (2d Dep't 2017)

Developer, Davies Farm, LLC, applied for site plan approval and a zoning amendment in connection with proposed residential and commercial development of a 53.3–acre parcel of land located in the adjacent towns of Haverstraw and Ramapo. After a positive declaration under SEQRA and the production of a DEIS and a SEIS, the town's planning board found that the proposed development plan minimized or avoided adverse environmental impacts to the maximum extent practicable.

In 2012, the property's new owner, Mt. Ivy Partners, LLC, applied to the Planning Board for preliminary and final site plan approval for the Haverstraw and Ramapo commercial phases of the project, which included a deli/coffee shop with gas pumps. The Planning Board determined that a second SEIS was not required, and granted the requested preliminary and final site plan approval subject to certain conditions.

On appeal, the court found that although a lead agency's determination whether to require a SEIS, or a second SEIS, is discretionary, the lead agency must "consider the environmental issues requiring permits" and must make "an independent judgment that they would not create significant environmental impact." The court held that the Planning Board failed to take the requisite hard look at the project change adding the gas station to make a reasoned elaboration of its basis for determining that a second SEIS was not required.

Shapiro v Torres, 153 A.D.3d 835 (2 Dep't 2017)

Petitioners sought to review a determination of the City of Long Beach to award contracts for the construction of comfort stations along the city boardwalk as part of a plan to reconstruct the boardwalk and restroom facilities that had been destroyed by Hurricane Sandy. The comfort station at issue would be installed adjacent to the petitioners' condominium complex. The petitioners alleged that the City violated (SEQRA), article 17 of The Charter of the City of Long Beach, and interfered with their easement of light, air, and access. The Supreme Court, denied the petitioners' motion for a preliminary injunction, determined that the construction was not a prohibited use of a public street, and dismissed the hybrid proceeding and action.

On appeal, the court found that the proposed construction would neither completely block the petitioners' ocean view nor prevent the petitioners from using the public street. Instead, the construction would only shorten the length of the dead-end street, and remove several public parking spaces. Furthermore, the turnaround on the street would still be intact, although moved 23 feet to the north, and access to the petitioners' driveway and building's entrance would not be impeded. Accordingly, the Supreme Court's determination that the construction was not a prohibited use of a public street, was upheld.

Miranda Holdings, Inc. v Town Bd. of Orchard Park, 152 A.D.3d 1234 (4th Dep't 2017).

This appeal arose from the request of plaintiff-petitioner for the approval of defendant-respondent for a proposed commercial structure that included a Tim Horton's restaurant with a drive-through window. The property owner commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking a declaration that Orchard Park Local Law No. 9–2014 was invalid, and a judgment annulling defendant's determination that the project was a Type I action, and determining that the project was a Type II action.

The Fourth Department held that, although 6 NYCRR 617.5(c)(7) did not explicitly include the construction of a restaurant with a drive-through window as a Type II action, the Department of Environmental Conservation contemplated restaurants with drive-through windows as Type II actions when it promulgated that regulation. As such, the court determined that the lower court properly annulled defendant's classification of the project as a Type I action on the ground that the classification was affected by an error of law: as Local Law No. 9–2014 was inconsistent with SEQRA. Regardless, however, the court held that the lower court should have declined to accept, without a revised review by defendant, plaintiff's contention that the project be classified as a Type II action. The court therefore annulled the determination that the project was a Type II action, and remitted the matter to defendant for a new determination.

Rochester Eastside Residents for Appropriate Development, Inc. v City of Rochester, 150 A.D.3d 1678 (4th Dep't 2017).

Petitioners, Rochester Eastside Residents for Appropriate Development, Inc. (RERAD), commenced an Article 78 proceeding seeking to annul the negative declaration issued by respondent City of Rochester Director of Planning and Zoning under the State Environmental Quality Review Act (SEQRA) with respect to the proposed construction of an ALDI supermarket. On appeal, petitioners contended that the Supreme Court erred in determining that they lacked standing to bring the proceeding.

The court found that the record established that petitioner Igatopsfy, LLC owned property that was less than 300 feet from the property line of the proposed construction project, and was therefore "arguably within the zone of interest to be protected by SEQRA," and had standing to seek judicial review without pleading and proving special damage. Additionally, the court found that petitioner RERAD had "associational or organizational standing", and that two members of RERAD owned property that was less than 500 feet from the property line of the proposed construction project, and thereby had standing.

Respondent next argued that the negative declaration did not contain a "reasoned elaboration of the basis for the determination." Here, the record indicated that despite the undisputed presence of preexisting soil contamination on the project site, the negative declaration set forth no findings with respect to that contamination. Moreover, the document containing the purported reasoning for the lead agency's determination of significance was prepared after the issuance of the negative declaration, and did not fulfill the statutory mandate. The court further found that the developer's promise to remediate the contamination before proceeding with construction did not

absolve the lead agency from its obligations under SEQRA. Accordingly, the court reversed, and annulled the negative declaration and vacated the variances granted by respondent City of Rochester Zoning Board of Appeals and the special use permit granted by respondent Rochester City Planning Commission.

Beekman Delamater Props., LLC v. Vill. of Rhinebeck Zoning Bd., 150 A.D.3d 1099 (2d Dep't 2017).

Petitioner challenged the development, by the respondent Rhinebeck Village Place, of a lodging facility on a lot owned by the respondent Mirbeau of Rhinebeck, LLC, which was adjacent to the petitioner's hotel. The petitioner sought to invalidate the issuance of a negative declaration of adverse environmental impact pursuant to the State Environmental Quality Review Act (SEQRA), an area variance relieving the applicant from the 5–foot maximum front-yard setback requirement of section 120–8 of the Village of Rhinebeck Zoning Law, and site plan and special permit approvals for the project. The area variance was of 296.7 feet to permit a front-yard setback of approximately 302 feet. The amended petition alleged that the project failed to comport with the Village Center principles pursuant to section 120–19 of the Village of Rhinebeck Zoning Law and would have a negative impact on the character of the community. The Supreme Court denied the amended petition and dismissed the proceeding.

On appeal, the petitioner argued that the Village of Rhinebeck Planning Board erred in determining that the project would not result in the creation of a material conflict with the community's current plans or goals. Here, the Planning Board found that the project would not result in the creation of a material conflict with the community's current plans or goals as officially approved or adopted and that the project "would not result in the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or existing community or neighborhood character." The court found that the record established that the review conducted by the Planning Board comported with the procedural and substantive requirements of SEQRA. While the area variance was substantial, there was no evidence that granting the variance would: produce an undesirable change in the character of the neighborhood; have an adverse effect or impact on the physical and environmental conditions in the neighborhood or district; that the benefit to the applicant could be achieved by other means; or that the applicant's difficulty was self-created. As such, the court held that the Supreme Court properly denied the amended petition and dismissed the proceeding.

Vill. of Munsey Park v. Manhasset-Lakeville Water District, 150 A.D.3d 969 (2d Dep't 2017).

Defendant Manhasset–Lakeville Water District was a special district of the Town of North Hempstead, which was created for the purpose of providing and selling potable water to consumers within its boundaries. The Water District required the use of water storage tanks to provide water and maintain water pressure, including elevated water storage tanks. One of these elevated water storage tanks was located on a lot owned by the Water District in the plaintiff, Incorporated Village of Munsey Park. The current tank was not permitted as of right by the Village's zoning code, which prohibits buildings in excess of 30 feet in height. In 2014, the Water District developed a plan to replace the current tank, which included an antennae being

placed on the replacement tank to provide a means of wireless communication between Water District facilities and for dispatching the employees and volunteer firemen of the Fire District. The Nassau County Department of Health approved the proposed construction plan. The Water District also determined that the proposed construction plan was a replacement-in-kind Type II action not subject to further environmental review under the State Environmental Quality Review Act (SEQRA). The Village commenced this action for a judgment declaring that the Water District must comply with the Village Code, for a permanent injunction enjoining the Water District from commencing any demolition, construction, or alterations until the Water District complies with the Village Code, and directing the Water District to act in strict compliance with SEQRA. The Supreme Court granted the Water District's motion for summary judgment.

On appeal, the court found that the Water District's determination that the proposed construction plan was for a "replacement, rehabilitation or reconstruction of a structure or facility, in kind", and was therefore a Type II action under SEQRA that presumptively did not have a significant impact upon the environment and did not require the preparation and circulation of an environmental impact statement. As such, the Water District's determination was not irrational, arbitrary or capricious, affected by error of law, or an abuse of discretion. Accordingly, the court affirmed the Supreme Court's holding that the Water District was entitled to summary judgment.

Wooster v Queen City Landing, 150 A.D.3d 1689 (4th Dep't 2017).

Petitioners Margaret Wooster, Clayton S. "Jay" Burney, Jr., Lynda K. Stephens, and James E. Carr (collectively, Wooster petitioners) and Buffalo Niagara Riverkeeper, Inc. commenced these CPLR article 78 proceedings seeking to annul the negative declaration issued by respondent City of Buffalo Planning Board under the State Environmental Quality Review Act (SEQRA) with respect to the proposed construction of Queen City Landing in Buffalo's Outer Harbor area. Respondent Queen City Landing, LLC (QCL), the developer of the project, intended to construct a mixed-use facility that will include a 23–story tower containing nearly 200 residential units. In appeal No. 1, petitioners appealed and QCL cross-appealed from a judgment dening respondents' motions to dismiss Riverkeeper's petition and the Wooster petitioners' amended petition for lack of standing, and granted respondents' motions to dismiss the petition and amended petition except insofar as the Wooster petitioners claimed that respondents violated the performance bond provisions of General City Law §§ 27–a (7) and 33(8)(a). In appeal No. 2, the Wooster petitioners appealed from the dismissal of their performance bond claim.

The Fourth Department found that, despite the petitioner's contentions, the Planning Board was properly designated as the lead agency. Furthermore, although members of the strategic planning department from respondent City of Buffalo filled out part of the full environmental assessment form and prepared the negative declaration, the Planning Board was entitled to rely on the information provided by such experts, and the record established that it "fully retained and exercised its role as the lead agency assessing the environmental impact of the project" Accordingly, the court rejected petitioners' contention that the Planning Board improperly deferred its review of site contamination to other agencies.

The court next found that the record established that the Planning Board took the requisite hard look and provided a reasoned elaboration of the basis for its determination regarding the potential impacts of the project on aesthetic resources and community character, particularly with respect to the height of the building, migratory birds, especially in light of the project's conformance with accepted governmental guidelines to mitigate bird impact. Moreover, the Planning Board's consideration of the contaminant remediation and storm water management components of the project, which would minimize pollutants running off into the lake, supported its determination that "no other potentially significant impacts to plants or animals were identified," which would include impacts on aquatic wildlife. Additionally, to the extent that the project's potential impacts on aquatic wildlife were not specifically discussed in the negative declaration, the court noted that it was "well established that the lead agency need not consider every conceivable environmental impact." Thus, the record established that the Planning Board complied with the requirements of SEQRA in issuing the negative declaration. Lastly, the court held that the court properly dismissed the petitioner's claim that respondents violated the performance bond provisions of General City Law §§27–a (7) and 33(8)(a).

Cor Route 5 Co. LLC v Vill. of Fayetteville, 147 A.D.3d 1432 (4th Dep't 2017).

Petitioner commenced a proceeding seeking to annul the decision of respondent Village of Fayetteville Board of Trustees to enact Local Law No. 1 of 2015, which amended the zoning district classification of two parcels Respondent Village of Fayetteville and the Board of Trustees filed a joint motion seeking the dismissal of the petition. The Supreme Court granted the motion, concluding that the petitioner's proceeding was "premature" and that the Board of Trustee's action under SEQRA was "not ripe for judicial review."

On appeal, the court found that the Board of Trustees' simultaneous issuance of a negative declaration and adoption of the zoning amendment rendered petitioner's challenges to the Board of Trustees' action ripe for review. Furthermore, the fact that the zoning amendment "was conditioned upon successful reviews and approvals by other agencies did not alter the fact that it became final and binding as to petitioner on the date it was filed." Moreover, although "rezoning is an 'action' subject to SEQRA", and the future site plan approval process could also constitute an action under SEQRA, the court determined that the fact that petitioner might be aggrieved by a future SEQRA action did not affect the judicial ripeness of the SEQRA challenge relating to a prior action. Accordingly, the court found that when the Board of Trustees issued the negative declaration and amended the zoning laws, the Board of Trustees' "decision-making process with respect to those issues was complete and petitioner became aggrieved by the SEQRA violation. As such, the court reversed the judgment, and remitted the matter to Supreme Court.

Youngewirth v. Ramapo Town Board, 155 A.D.3d 755 (2d Dep't 2017).

Petitioner commenced an article 78 proceeding seeking review of determinations of town board resolving to approve a findings statement pursuant to the State Environmental Quality Review Act (SEQRA) in connection with a proposed development project, to amend the Comprehensive Plan of the town so as to permit the development project, and to rezone the real property on which the development project was proposed to be constructed. The Supreme Court, Rockland County, Walsh II, J., denied petition. Petitioner appealed.

The Second Department held that the town board failed to take a hard look at environmental impact of placing proposed development in close proximity to an existing gas pipeline. The court did rule, however, that the petitioner did not establish that rezoning of property was in clear conflict with the town's comprehensive plan.

Troy Sand & Gravel Co., Inc. v. Fleming, 156 A.D.3d 1295 (3d Dep't 2017).

Here, a company sought a mining permit to operate an open pit, hard rock quarry in a rural residential land-use district. DEC went through its own SEQRA review and, after an EIS, granted the permit. The Town Board of Nassau however, went through its own administrative review, and after holding a series of public hearings denied the company's application to mine in the rural-residential area.

The company raised various challenges in an Article 78 proceeding as to the legitimacy of the Town Board's denial of their application. The Supreme Court denied the company's petition and this appeal followed. On appeal, the Third Department held that the Town Board correctly applied Town Law § 274-b, that the Board did not violate the court's previous ruling in an earlier iteration of this litigation by holding its own public hearings, and that the Board's denial of the application was not arbitrary or capricious. Finally, the court rejected the company's contention that the Supreme Court erred in upholding the Town Board's determination despite the alleged conflicts of interest and bias of respondent David F. Fleming Jr., the Town Supervisor. The location of real property owned by Fleming and his family near the site of the proposed quarry was an interest that Fleming had in common with many other citizens of the Town.

Bd. of Fire Commissioners of Fairview v. Town of Poughkeepsie Bd., 156 A.D.3d 621 (2d Dep't 2017).

Here, a State Fire District challenged a Town Board's approval of a proposed project which would include the construction of a multifamily residential structure. The Fire District filed a hybrid Article 78 petition asserting five causes of action. The causes of action involving allegations that the Board's determination was invalid under SEQRA were dismissed because of the doctrine of res judicata. This appeal followed.

The Second Department determined that the Supreme Court properly dismissed the Fire District's SEQRA claims on res judicata grounds. Furthermore, even if res judicata did not apply, the court found that the Board took the requisite hard look in issuing its SEQRA determination.

Shapiro v. Planning Bd. of Ramapo, 155 A.D. 741 (2d Dep't 2017).

Here, the Second Department held that the petitioners were correct in arguing that a SEIS needed to be conducted because the relevant Board was presented with new evidence that no jurisdictional determination had been issued by the United States Army Corps of Engineers validating the respondent's delineation of wetlands on the subject property. Because the planning board failed to do an SEIS after this new evidence was presented to it after the initial

EIS, the court found that the board abused its discretion in declining to conduct an SEIS. The case was remitted back to the planning board with instructions to conduct an SEIS.

Village of Woodbury v. Seggos, 154 A.D.3d (3d Dep't 2017).

A group of organizations, landowners, and municipalities recently challenged a decision by the DEC to issue a water withdrawal permit the Village of Kiryas Joel. Kiryas Joel has been building, in the face of legal challenges, a 13-mile long pipeline that would allow it to tap into an aqueduct owned and operated by the City of New York for additional water. Authorization to withdraw water from the aqueduct will not be granted unless Kiryas Joel demonstrates, among other things, that it has "an adequate backup water supply source" in the event water from the aqueduct is unavailable.

The Third Department held, among other things, that the DEC's decision to issue the water withdrawal permit was valid. The Court found that the DEC did not abuse its discretion in deciding that an adjudicatory hearing was unnecessary. The court emphasized that the DEC considered comments made at a legislative hearing, evaluated the results of a 72-hour water pumping test, and ensured that any negative impacts of water withdrawals would be detected by monitoring and addressed.

Next, the court found that DEC's issuance of the permit had a rational basis and was therefore appropriate. DEC reviewed the significant documentation submitted with the application, conducting a public hearing and considered both the submitted comments and the responses offered by Kiryas Joel. DEC largely agreed with Kiryas Joel's responses and, indeed, "accepted and incorporated" the bulk of them into its own responses.

Friends of P.S. Inc. v. Jewish Home Lifecare, 146 A.D.3d (Div. 1st Dep't 2017).

In this case, an organization of parents and teachers of children attending a public school brought an Article 78 proceeding sought to annul the New York State Department of Health's approval of a 20 story nursing home next to the school.

Petitioners raised various challenges to the new building. They argued that the air-conditioning system chosen by the school was an inadequate means of noise mitigation. They argued that the DOH should not approved of the new building because of the potential contaminant of hazardous dust at the site. Finally, the petitioners argued that the DOH failed to consider or address reports submitted by their experts and should have set forth measures to prevent, not merely mitigate, migration of lead dust from the project site.

The First Department overturned the ruling of the lower court and held that the DOH took the requisite hard look at the environmental impact the new building's construction would have. The Court took a very deferential approach to the findings of the DOH and criticized the lower court for erroneously substituting its analysis for the judgment of the lead agency.

Note: The Court of Appeals affirmed this decision in December. *Matter of Friends of P.S. 163, Inc. v. Jewish Home Lifecare,* 30 N.Y.3d 416 (2017).

Town of Marilla v. Travis, 151 A.D.3d 1588 (4th Dep't 2017).

The Town of Marilla commenced an article 78 proceeding seeking to annul the DEC's negative declaration of environmental significance. The Town also challenged DEC's determination to grant an energy company a permit to store wastewater end product in an existing million gallon manure storage tank on a farm until it could be transported and used as fertilizer.

The Fourth Department held that DEC complied with procedural requirements of SEQRA in determining that the issuance of the permit would have no significant adverse environmental impacts. The Court further held that DEC's determination was not arbitrary or capricious and the determination was upheld.

Save the View Now v. Brooklyn Bridge Park Corp., 156 A.D.3d 928 (2d Dep't 2017).

These appeals involve the development of buildings upland of Pier 1 in Brooklyn Bridge Park containing a hotel, restaurant, and residential units. In 2005, Brooklyn Bridge Park Development Corporation and Empire State Development Corporation adopted a General Project Plan for the park which would override local zoning regulations. They conducted an environmental review of the plan under the State Environmental Quality Review Act during which community members expressed concern that the new development not block the views of the Brooklyn Bridge from the Brooklyn Promenade. The final environmental impact statement (hereinafter FEIS) limited the northern building to a height of 100 feet, and the southern building to a height of 55 feet. The northern building would be substantially similar in height to the existing Cold Storage buildings it would replace and would not significantly block existing views of the Brooklyn Bridge from the Brooklyn Promenade. The FEIS provided that "[a]ny required parapet and mechanical equipment would be included in the proposed building envelope." BBPD and ESD approved the plan and thereafter adopted a Modified General Project Plan (hereinafter MGPP), which stated that "[t]he residential and hotel uses would be located in two buildings, one of approximately 55 feet and one of approximately 100 feet in height."

Plaintiffs/petioners commenced this action seeking a judgment declaring that the buildings were being constructed in excess of their height limitations in, permanently enjoining construction of any portion of the buildings that violated height limitations, and directing the defendants to remove any parts of the buildings were in violation.

The defendants moved to dismiss the claims as untimely because the claims should have been brought as an Artile 78 proceeding which has a shorter statute of limitations. The Supreme Court granted those motions.

On appeal the Appellate Division affirmed finding that the Supreme Court was correct in its determination that the claims should have been brought as an Article 78 proceeding and were therefore untimely.

Pittsford Canalside Props, LLC v. Vill. of Pittsford, 137 A.D.3d 1566, 1566 (4th Dep't 2016).

Petitioner was the owner and developer of a proposed mixed-use development in the Village of Pittsford (Village). After conducting a SEQRA environmental review, the Board of Trustees ("Board") declared that the project would not have a significant environmental impact and issued the requisite permits to the Petitioner. However, after the Board later approved a preliminary site plan, it determined that "substantive changes" had arisen creating a "potential significant adverse impact" on the environment. Petitioner commenced an Article 78 proceeding to reinstate the negative declaration. It argued that several members of the Board were biased against of project and should have been recused from the meetings and decision-making process.

The Appellate Court noted that two of the Board members had expressed opposition to the project before and after they were elected to the Board. However, the court held that their personal opinions were not a basis for finding a conflict of interest and thus they were allowed to participate in the deliberations and vote on the resolutions. In fact, the court suggested that public officials should be encouraged to voice their opinions in matters of public concern.

Lucente v. Terwilliger, 144 A.D.3d 1223 (2016).

Petitioner, owner of vacant property in the Town of Ithaca, submitted an application to the Town Planning Board seeking approval to subdivide the property into 50 parcels consisting of 47 residential lots, two parcels to be donated to Cornell University as wildlife open space and a parcel to be dedicated to the Town and added to an existing park. In July 2006, the Planning Board issued a negative declaration of environmental significance pursuant to the State Environmental Quality Review Act (SEQRA), and granted preliminary subdivision approval with various conditions. On September 10, 2007, petitioner applied for final subdivision approval, submitting a proposed final plat that made several changes in the proposed project, particularly with reference to drainage and stormwater management. However, on the day the final application was submitted, the Town Board adopted a 270–day moratorium that prohibited the Planning Board from issuing "acceptance, consideration, preliminary approval or final approval … of any plan or application for subdivision of" petitioner's property. With petitioner's consent, the Town Board then extended the moratorium for two additional 270–day periods. No further action was taken on petitioner's application until September 2014, when petitioner demanded that respondent issue a certificate establishing default approval of his application based upon the Planning Board's failure to take action on his 2007 final application within the statutory time limit. Respondent denied petitioner's request on the ground that additional SEQRA review, which was required due to the modifications in the final application, had never been completed.

The court found that even if Petitioner's contention was correct that it was the Planning Board's burden to initiate additional SEQRA review of his final application rather than his responsibility to request it, the narrow language of Town Law § 276(8) limited the remedy of default approval to failures to comply with statutory time limits that occur "after completion of all requirements under SEQRA". Here, as all SEQRA requirements were never completed, the court determined that the time period within which the Planning Board was required to act on the final subdivision

application had never begun. Accordingly, the court held that the Supreme Court properly found that Petitioner was not entitled to default approval.

Ramapo Pinnacle Properties, LLC v. Village of Airmont, 2016 WL 7109131 (2d Dep't 2016).

The petitioner owned a medical office building in the Village of Airmont, which had one means of ingress and egress on the south side of the premises. Petitioner sought approval of an amended site plan to add additional parking spaces, improve drainage, and add another means of ingress and egress on the north side of the premises. The Board denied the petitioner's application for approval of its amended site on April 24, 2014. However, upon reconsideration of the application on May 8, 2014, the Board approved the petitioner's amended site plan, but the access to DeBaun Avenue was eliminated from the plan. The petitioner commenced this proceeding pursuant to CPLR article 78 to review the April 24, 2014, determination or, alternatively, to review so much of the May 8, 2014, determination as eliminated the access to DeBaun Avenue. The Supreme Court denied the petition and dismissed the proceeding.

Here, the court found the only evidence in the record concerning the traffic and safety issues cited by the Board in the determinations was the conclusory opposition of neighboring residents, which was not supported by any of the Village's consultants and was contradicted by the negative SEQRA declaration adopted by the Board. Accordingly, the court agreed with the petitioner that the record lacked sufficient evidence to support the rationality of the Board's determinations denying the petitioner's application for site plan approval. It therefore remitted the matter to the Board for the approval of the petitioner's amended site plan, with the condition that it would provide an amended site plan with a one-way, entrance-only access via DeBaun Avenue.

Hudson River Sloop Clearwater, Inc v Town Board of the Town of Coeymans, 2016 WL 6636927 (3d Dep't 2016).

Following a reclassification by the Town of the permitted use of nine contiguous parcels from residential-agricultural use to industrial use, petitioners commenced a proceeding seeking to annul the local law based on, among other things, allegations that the procedures used to adopt the ordinance violated the State Environmental Quality Review Act. The Respondents moved to dismiss the petition/complaint on the basis that petitioners failed to join necessary parties, namely, the property owners of all of rezoned parcels whose property rights were affected by the ordinance. The trial court denied the motion but determined that the other property owners were necessary parties and ordered petitioners to serve those property owners with a notice of petition and petition. Petitioners filed an amended petition/complaint that added as respondents the additional parcel owners (hereinafter the newly-added respondents). Thereafter, respondents and several of the newly-added respondents, separately moved to dismiss petitioners' amended petition/complaint on the ground that the amended petition/complaint was time-barred as to the newly-added respondents under the four-month statute of limitations (see CPLR 217 [1]). Petitioners conceded that they did not timely add the necessary parties, but reserved their right to challenge on appeal the prior determination that the newly-added respondents were necessary

parties. The trial court then dismissed the amended petition/complaint on the ground that it was time-barred.

On appeal, the Court reversed, finding that the newly-added respondents were not necessary parties merely because the ordinance at issue affected their property rights. The court stated, "it is notable that the Court of Appeals and this state's appellate courts, including this Court, have long entertained challenges to municipalities' legislative actions in regard to zoning ordinances without requiring the joinder of every property owner whose rights are affected by the ordinance at issue." (citations omitted) The Court continued, "Although this Court has, in limited cases, found property owners to be necessary parties in regard to legal challenges to municipal ordinances that affect the property owners' rights, it has only done so in cases where the owners had obtained an actual approval pursuant to the challenged zoning ordinance that would be adversely impacted by a judgment annulling that ordinance." (citations omitted) The Court agreed with the petitioner's argument that "the newly-added respondents do not fall into that previously recognized category and that those cases do not stand for the principle that persons affected by a municipality's ordinances are de facto necessary parties when those ordinances are challenged." Since the record did not establish that the newly-added parties are in the limited category that this Court has previously recognized as necessary parties, the Court declined the opportunity to adopt a new rule that those affected by an ordinance are necessary parties when that ordinance is challenged, and that therefore the newly-added respondents are not necessary parties and the petition was not time-barred.

Alper Restaurant Inc. v. Copake Planning Bd., 149 A.D.3d 1336 (3d Dep't 2017).

Town zoning board was not equitably estopped from asserting statute of limitations defense in neighboring landowners' Article 78 proceeding, challenging board's environmental, site plan, and subdivision approvals for developer's project, on basis of an alleged misrepresentation by board; erroneous statement by board did not rise to level necessary to implicate exception where estoppel may be invoked against a municipality, and record demonstrated any reliance by landowners on misstatement was not reasonable or justified.

DeFeo v. Zoning Bd. of Bedford, 137 A.D.3d 1123 (2d Dep't 2016).

Property owner commenced article 78 proceeding, seeking to annul resolution of town Zoning Board, adopting negative declaration of New York State Environmental Quality Review Act (SEQRA) and resolution of town Zoning Board of Appeals, granting applications of owners of nearby property that was partly commercially zoned, and partly residentially owned, for use and area variances and a special permit. The Supreme Court, Westchester County, Zambelli, J., entered judgment granting branch of owner's petition, which was to annul resolution granting use and area variances and special permit, and denying branch of owner's petition, which was to annul resolution adopting negative declaration. Town Zoning Board, town Planning Board, and owners of nearby property appealed, and owner cross-appealed.

The Supreme Court, Appellate Division, held that:

1. Zoning Board's determination that owners of neighboring property established unnecessary hardship was arbitrary and capricious, and

2. Planning Board took hard look at issue of traffic that would be generated by proposed project.

Ranco Sand & Stone Corp. v. Vecchio, 27 N.Y.3d (2016).

Property owner brought article 78 proceeding against town board, seeking review of board's resolution issuing a positive declaration under State Environmental Quality Review Act (SEQRA) that required owner to prepare a draft environmental impact statement (DEIS) in connection with its application to rezone its property from residential to heavy industrial. The Supreme Court, Suffolk County, Daniel M. Martin, J., dismissed owner's petition, holding that board's decision was not ripe for judicial review. Owner appealed. The Supreme Court, Appellate Division, 124 A.D.3d 73, 998 N.Y.S.2d 68, affirmed. Owner was granted leave to appeal.

The Court of Appeals held that the Town Board's decision was not ripe for judicial review.

Entergy Nuclear Operations, Inc. v. Dept. of State, 28 N.Y.3d 279 (2016).

Owners and operators of nuclear power plants applied, in combined proceeding pursuant to article 78 and action for declaratory judgment, to review determination by Department of State which denied their request for a declaration that power plants were exempt from New York's Coastal Management Program. The Supreme Court, Albany County, Michael C. Lynch, J., dismissed the application. Owners and operators appealed. The Supreme Court, Appellate Division, 125 A.D.3d 21, 999 N.Y.S.2d 207 reversed. Department of State was granted leave to appeal.

The Court of Appeals held that:

1. power plants were not excluded from Program consistency review under grandfathered exclusion;

2. power plants were not excluded from Program consistency review under prior environmental impact statement exclusion; and

3. plants' re-licensing triggered Program consistency review.

Meyer v. Zoning Bd. of Utica, 138 A.D.3d 1406 (2d Dep't 2016).

Petitioner brought article 78 proceeding seeking to annul determination of city zoning board of appeals which granted property owner's application for use variance to construct a vehicle service station with an accessory retail establishment on property. The Supreme Court, Oneida County, David A. Murad, J., dismissed petition. Petitioner appealed.

The Second Department held that evidence supported determination of board, and board complied with requirements of SEQRA.

Turner v. County of Erie, 136 A.D. 1297 (4th Dep't 2016).

Petitioners brought article 78 proceeding seeking to annul county's negative declaration under the (SEQRA) with respect to a community college's proposed construction of a new academic building. The Supreme Court, Erie County, Deborah A. Chimes, J., dismissed the petition for lack of standing, and petitioners appealed.

The Fourth Department affirmed, holding that the petitioners lacked standing to challenge the construction of the building under SEQRA.

Petitioners failed to establish that they had suffered an environmental injury. In opposition to the motion to dismiss, each petitioner submitted an affidavit discussing how he had been allegedly harmed. One petitioner stated that, as a student at ECC, he would be harmed by the proposed construction because he did not own a motor vehicle, and it would be both expensive and inconvenient for him and other similarly situated students to use public transportation to attend classes at the Amherst Campus. Another petitioner, the former County Executive of Erie County, stated that, if the proposed facility were constructed on the Amherst Campus instead of within the City of Buffalo, "[he] would be harmed in that all of the work [he had] done and all of the procedures [he had] fought for would be shown to have been useless." Finally, another petitioner, a City Council member for the City of Buffalo (City), stated that he would be harmed because of the "unfavorable decision on the placement of the facility" inasmuch as his "constituents [would] certainly judge [him] according to how well he accomplished [his] tasks," such as safeguarding the City from "adverse economic decisions" and "promot[ing] the expansion of business and economic opportunity within the City." None of those alleged injuries constitutes an environmental injury under SEQRA.

Variance Cases

Leone v Jamestown Zoning Bd of Appeals, 151 A.D. 3d 1828 (4 Dep't. 2017).

Petitioners, residents of the City of Jamestown, challenged the determination of respondent City of Jamestown Zoning Board of Appeals (ZBA) to grant a use variance to respondents Jamestown Community College (JCC) and Lynn Development, Inc., permitting the use of Sheldon House mansion for commercial purposes. The Supreme Court dismissed the petition, holding that JCC and Lynn had "presented substantial evidence, especially regarding the four-pronged hardship test, providing the ZBA with a rational basis upon which to issue a variance." On appeal,

Petitioners argued that JCC and Lynn failed to satisfy the four requirements for the issuance of a use variance based on unnecessary hardship, and that the court erred in deferring to the ZBA.

On appeal, the court determined that JCC and Lynn failed to present any evidence to the ZBA to satisfy the first requirement of unnecessary hardship: that they could not realize a reasonable return on the property by any conforming use. Specifically, the court held that in the absence of any evidence in dollars and cents form, there was no rational basis for the ZBA's finding that the premises would not yield a reasonable return in the absence of the requested use variance. Accordingly, the court held that the ZBA's determination should be annulled.

Conway v. Van Loan, 152 A.D.3d 768 (2d Dep't 2017).

Petitioners commenced an Article 78 proceeding contending that the determination of the Town of Oyster Bay Zoning Board of Appeals to deny their applications for area variances lacked a rational basis, and was arbitrary and capricious. The Supreme Court denied the petition and dismissed the proceeding, holding that the ZBA had balanced and weighed the statutory factors enumerated in Town Law § 267–b(3)(b), and that its determination to deny the requested variances had a rational basis and was not arbitrary or capricious.

On appeal, the court found that the record indicated that the ZBA's conclusion that the detriment to the surrounding neighborhood posed by granting the requested variances outweighed the benefit to the petitioners had a rational basis and was not arbitrary or capricious. Furthermore, it found the ZBA rationally concluded that the requested variances were substantial in nature, that the petitioners had feasible alternatives which did not require variances, and that the requested variances would cause an undesirable change in the character of the neighborhood. As such, the court held that the Supreme Court properly denied the petition and dismissed the proceeding.

Nataro v DeChance, 149 A.D.3d 1081 (2d Dep't 2017).

The Board of Zoning Appeals of the Town of Brookhaven denied petitioner's application for area variances. The decision was upheld by the lower court and this appeal ensued.

The court first noted that in determining whether to grant an application for an area variance, a zoning board is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted. Here, the court found the Board of Zoning Appeals of the Town of Brookhaven performed the requisite balancing test, and its conclusion that the detriment to the surrounding neighborhood posed by granting the requested variances outweighed the benefit to the petitioner had a rational basis and was supported by the record. Specifically, the BZA concluded that the requested variances were substantial in nature, that the petitioner had feasible alternatives that did not require such variances, and that the granting of the variances could set a negative precedent within the neighborhood. Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding.

Gilbert v Planning Board of Town of Irondequoit, 148 A.D.3d 1587 (4 Dep't 2017).

Gilbert owned property located within a Woodlot Overlay Protection District in the Town of Irondequoit. As applicable to this case, Section 235–44 Irondequoit Town Code provides that the "Town Department of Planning and Zoning shall be responsible for interpreting EPOD boundaries based on an interpretation of the Official Town of Irondequoit EPOD Maps, as well as the use of various criteria set forth in this article for determining such district boundaries." Section 235–44 of the Town Code provides that "appeals from a determination of the Town Department of Planning and Zoning regarding boundaries of overlay districts shall be made to the Town Planning Board in accordance with the public hearing procedures." Here, pursuant to Town Code § 235–44, petitioner appealed to respondent regarding the boundaries of the Woodlot EPOD that encompassed his property, and submitted evidence in support of his assertion that his property did not meet the criteria for a Woodlot EPOD as set forth in section 235–53(B). Respondent, Planning Board of Town of Irondequoit, denied the appeal, and petitioner commenced this CPLR article 78 proceeding.

On appeal, the court found that the plain language of the Town Code did not prohibit respondent from changing the boundary lines of an EPOD as shown on the EPOD maps, and respondent's authority to make such changes was not limited to those situations in which the property was located near the existing boundary as shown on the EPOD map. As to respondent's contention that the appeal was untimely, the court found that the applicable section of the Town Code did not set forth any time limitation for when property owners could seek an interpretation of overlay district boundaries. As such, the Planning Board's denial of the appeal was reversed, and the petition was reinstated.

Cohen v. Town of Ramapo Building, Planning & Zoning Department 150 A.D.3d 993 (2d Dep't 2017).

Divrei Chaim, a yeshiva, sought several area variances to construct and operate a religious school on its property in Monsey. The Zoning Board of Appeals of the Town of Ramapo granted the application for the area variances after hearing testimony for and against the requested variances. Two individuals who lived in the vicinity of the proposed religious school commenced this proceeding pursuant to CPLR article 78, seeking to annul the ZBA's determination. The Supreme Court, Rockland County, denied the amended petition to annul the ZBA's determination.

The court first noted that a zoning board is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations is rational" Here, the court found contrary to the petitioners' contention, the ZBA engaged in the required balancing test and considered the five relevant statutory factors in granting the application for area variances. As such, the record indicated that the ZBA's determination had a rational basis and was not arbitrary or capricious. Accordingly, the judgment of the Supreme Court, Rockland County, was affirmed.

Decarr v. Zoning Bd. of Appeals for Town of Verona, 154 A.D.3d 1311 (4th Dep't 2017).

Objectors brought article 78 proceeding seeking to annul determination of town's zoning board of appeals, which granted special use permit and area variance to telecommunications provider for construction of wireless telecommunications facility.

The Fourth Department found that the Zoning Board's determination had a rational basis and was supported by substantial evidence and that the Zoning Board's chairman did not improperly predetermine the outcome of the telecommunication provider's application.

Wenz v. Brogan, 149 A.D.3d 970 (2d Dep't 2017).

A couple owned residential property in the Village of Lloyd Harbor. They applied to make improvements to their property but the Village building inspector denied their application because improvements would not be in compliance with a Village zoning ordinance. The couple then filed an application for a variance, which were granted. The petitioner, a person, who was an owner of a contiguous property, commenced an Article 78 proceeding seeking to annul the granting of the variances. The Supreme Court dismissed the petition and this appeal followed.

On appeal the Second Department affirmed. The Court ruled that the village was not preempted from regulating issues of form or timing of ZBA decisions; ZBA's failure to file written decision to village clerk within requisite five-day period did not mandate annulment of its determination; ZBA's failure to record vote of each member in minutes of hearing did not render decision a nullity; and ZBA's determination to grant area variances had rational basis and was not arbitrary and capricious.

Bray v. Town of Yorktown Zoning Bd., 151 A.D.3d 720 (2d Dep't 2017).

Faith Bible Church, a religious school, sought a variance allowing it to have vehicles parked in the front yard of property owned by a church. The York Town Zoning Board of Appeals decided that a variance was not necessary. Petitioner, unhappy with this decision, commenced an Article 78 action seeking to annul the Board's decision. The petition was dismissed by the Supreme Court.

On appeal, the Second Department determined that the Board's determination that parking vehicles on property was permitted as "residential use" within the meaning of the town's zoning code was, to a great extent, fact-based, not illegal, and not arbitrary or capricious. The ruling of the Supreme Court was affirmed.

Crowell v. Zoning Bd. of Queensbury, 151 A.D.3d 1247 (3d Dep't 2017).

A couple sought to reconstruct two single family dwellings. In order to carry out this work the couple needed to apply for variances. Petitioner, an owner of a neighboring property wrote a letter to the Town Zoning Board of Appeals suggesting that the couple needed a use variance, not an area variance which they had applied for. The ZBA granted the requested area variances from **620 the minimum setback requirements and the applicable density requirement of one single-family dwelling per lot. The resolution approving such variances was filed in the office of the Town Clerk on January 23, 2014.

On November 26, 2014, the Town's Code Enforcement Officer issued building permits for the proposed reconstruction. On January 16, 2015, petitioner filed an appeal with the ZBA challenging the issuance of the building permits, again arguing that the construction of two single-family homes on the Robertses' lot requires a use, rather than an area, variance pursuant to the Town's zoning code. At the conclusion of a public hearing, the ZBA adhered to its prior determination that an area variance was required for relief from the Town's density requirement and upheld the issuance of the building permits.

Petitioner thereafter commenced this combined CPLR article 78 proceeding and action for declaratory judgment seeking, among other things, to annul the ZBA's determination upholding the issuance of the building permits and to enjoin the Robertses from further construction of the two single-family dwellings. Respondents separately moved to dismiss the petition/complaint asserting, among other things, that petitioner's claims were time-barred. By order entered in June 2015, Supreme Court denied respondents' respective motions and declined to preliminarily enjoin construction on the property. Ultimately the petition was granted at the Supreme Court level.

On appeal, the Second Department reversed, holding that petitioner's challenge to the variance was untimely. The crux of petitioner's challenge to the issuance of the building permits was that a use variance, not an area variance, was required. That issue was squarely resolved by the ZBA in January 2014, when it considered and rejected petitioner's claim that a use variance was required for the project and granted the an area variance from the density requirement of the Town's zoning code. To test that determination, petitioner was required to commence a CPLR article 78 proceeding within 30 days after the filing of the resolution granting the variance. The Supreme Court was accordingly reversed and the petition was denied.

Jenkins v. Leach Properties LLC, 151 A.D.3d 1419 (3d Dep't 2017).

Article 78 proceeding was brought challenging decision of town Zoning Board of Appeals issuing use variance to allow property owner to build access road and add additional parking for its trash services facility. A trash services company entered into an agreement to purchase a parcel of property adjacent to the property it already owned. A condition precedent to the purchase was that the property be granted a use variance from the Town of Cortlandville. The use variance was ultimately granted.

Petitioners challenged the issuance of the variance on the grounds that the trash facility did not present evidence that the property could not realize a reasonable return as currently permitted

and that it failed to meet its burden of establishing that any hardship was not self-created. The Supreme Court granted the petition.

On appeal that Third Department affirmed the Supreme Court's decision. In short, because the Supreme Court granted the petition on multiple grounds, and the trash company only challenged one on appeal, and affirmance was necessary.

Haverstraw Owners v. Town of Ramapo Zoning Bd., 151 A.D.3d 724 (2d Dep't 2017).

At a public meeting held on October 25, 2012, the Town of Ramapo Zoning Board of Appeals, after two public hearings, adopted a resolution granting the application of Mt. Ivy Partners, LLC for several area variances. Thereafter, the petitioners commenced this proceeding pursuant to CPLR article 78 to review the determination, alleging that because there was no public discussion, deliberation, or consideration by the Board at the meeting before it adopted the proposed resolution, the Board violated the Open Meetings Law. The Supreme Court denied that petition and this appeal followed.

The Second Department affirmed the Supreme Court, holding that the Board did not violate the Open Meetings Law. The Court based this ruling on the fact that the Board conducted to public hearings on the subject of the area variances. Between the close of the public hearing and the next public meeting when the determination was made, the Board's counsel prepared a draft written determination. At the public meeting that draft determination was ultimately adopted. Petitioners failed to introduce any evidence that the Board met or consulted with counsel outside of a public meeting or that any discussions were part of an effort to thwart public scrutiny of the Board's process.

In re. Expressview Develop. Corp., 2017 WL 460597 (4th Dep't 2017).

Petitioner-plaintiff Canandaigua National Bank, the trustee of the Max M. Farash Declaration of Trust, owned real property in the Town of Gates adjacent to Interstate 390. Developer Max M. Farash purchased the parcels and a sixth adjacent parcel in 1986, but never developed the property in accordance with the original industrial park plan. The Trust tried to sell the property in 2009, and the only offer came from petitioner-plaintiff Expressview Development, Inc., contingent upon its receipt of variances that would allow it to construct billboards that would be visible from the highway. The billboard would violate the Town of Gates Code § 190–22(E) which, prohibited commercial signs not located on the site of the business for which they advertise. Following an initial application that was denied without prejudice, petitioners-plaintiffs sought use and area variances permitting the installation of the billboards, but respondent-defendant Town of Gates Zoning Board of Appeals (ZBA) denied their application. Petitioners sought to annul the determination of the ZBA, and they argued that the Town of Gates Code § 190–22(E) was unconstitutional. The lower court dismissed the amended petition-complaint.

On appeal, the court found that petitioners' primary contention that the ZBA failed to adhere to its precedent was without merit because petitioners failed to establish the existence of earlier determinations by the ZBA that were based on essentially the same facts as petitioners' present

application. Here, the settlement of a federal lawsuit in 1999 by the executive and legislative branches of the Town permitting the installation of certain billboards along the highway by a pair of outdoor advertisers was not a determination made by the ZBA as a result of its administrative variance process, and therefore did not constitute precedent from which the ZBA was required to explain any departure.

Furthermore, while subsequent changes in economic conditions might have rendered the industrial park plan financially infeasible, the record reflected that the extent of the limitations on the property of which Farash knew or should have known at the time of his purchase remained. The court found that Farash purchased the property after the approval of the industrial park plan, the adoption of applicable zoning restrictions, and the construction of the highway adjacent to the property. Accordingly there was substantial evidence supporting the ZBA's determination that the hardship was self-created.

Petitioners' final contention was that the Town of Gates Code § 190–22(E) was an unconstitutional restraint of freedom of speech under the First Amendment on the ground that it improperly distinguished between on-site and offsite commercial signs. However, the court rejected this claim under the intermediate scrutiny test for restrictions on commercial speech set forth in Central Hudson Gas & Elec. Corp. v Public Serv. Commn. of N.Y. (447 U.S. 557, 561–566).

Leitner v. Town of Oyster Bay Planning Dept, 2016 WL 6270096 (2d Dep't. 2016).

This case arose from an Article 78 petition review of a determination of the Zoning Board of Appeals of the Town of Oyster Bay, which granted the application of the respondent Karen Malamud for a use variance, and to vacate a permit issued by the respondent Town of Oyster Bay Department of Planning and Development. In this case, petitioners appealed from an order and judgment of the Supreme Court, Nassau County, which granted the respondents' separate motions to dismiss the petition as time-barred and denied the petition and dismissed the proceeding.

The court found that contrary to the petitioners' contention, the CPLR article 78 challenge to the ZBA's issuance of the use variance was not timely, since the petition was required to have been instituted within 30 days after the ZBA's determination was filed in the office of the Town Clerk. Here, that filing occurred on July 18, 2012, and this proceeding was commenced on June 13, 2013. Additionally, the petitioners' administrative appeal challenging the issuance of the building permit also was untimely, as the Planning Department issued the building permit on August 7, 2012, and the 60–day statutory period began to run on that date. As such, the petitioners' December 20, 2012, filing of their administrative appeal to the ZBA was untimely.

Soldatenko v Vil. of Scarsdale Zoning Bd. of Appeals, 2016 (2d Dep't 2016).

Petitioners/plaintiffs, Gregory Soldatenko, et al, acquired property that included what was once Lot 117 and was now Lots 217 and 217A on the Village of Scarsdale, New York tax map. The plaintiffs' lots did not have street frontage. Lot 215A, owned by the Village, sits between the plaintiffs' lots and the end of Farragut Road. Plaintiffs applied to the Zoning Board of Appeals for a variance from the frontage requirements so that they could build a single-family residence on Lots 217 and 217A. The Board granted the variance in a resolution with a condition of obtaining an access easement to cross Lot 215A. Plaintiffs maintained that despite its depiction on the official Village map, Farragut Road actually was paved and extended further than was shown on the map providing more than 20 feet of actual street access to Lot 217. The Board, however, took the position that the subject area was not part of Farragut Road, but instead was part of Tax Lot 215A, and thus an easement would be required before the plaintiffs could connect a driveway to Farragut Road. The plaintiffs commenced this hybrid proceeding pursuant to CPLR article 78 to review the determination. The Supreme Court found that the plaintiffs had established that the strip of land was a public street by prescription, and that the public street included the public right-of-way that ran with the remainder of Farragut Road. The respondents/defendants appealed.

The appellate court affirmed stating that the supreme court did not err in holding that the plaintiffs had established that the subject strip of land was a public street pursuant to Village Law § 6–626. That statute provides, "all lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such" "Naked use by the public is not enough, and plaintiffs must further demonstrate that the village has continuously maintained and repaired the alleged street and, thus, assumed control thereof during the period of time in question." Here, the land at issue was a portion of pavement indistinguishable to the eye from the pavement that constitutes Farragut Road. It was only by referencing survey maps that it was apparent that the pavement was a portion of Village-owned Lot 215A. It was paved by the Village with Farragut Road more than 10 years prior, and the public used it in a manner indistinguishable from the surrounding roadway.

The defendants argued that the plaintiffs were required to produce evidence that the Village had made recent repairs to the section of the pavement at issue. The court disagreed that such proof was required stating that while the pavement was cracked in places and the curbing that is there had not been refreshed in some time, the surrounding roadway was in the same condition. The record was clear that the Village maintained the area in the same manner as the remainder of Farragut Road. Accordingly, the area was a public street.

Furthermore, the appellate court held that the supreme court did not err in directing that the width of the prescriptive portion of Farragut Road included the public right-of-way that runs with the remainder of Farragut Road. The Village Law directs that the prescriptive lands "shall be a street with the same force and effect as if it had been duly laid out and recorded as such." A prescriptive street "carries with it the usual width of the street in the locality or such width as is reasonably necessary for the safety and convenience of the traveling public and for ordinary repairs and improvements."

Takings/Eminent Domain

399 Exterior Street Assos., LLC v. City of New York, 66 N.Y.S.3d 116 (1st Dep't 2018).

The First Department affirmed a decision finding that the City of New York fully satisfied the requirements of New York's Eminent Domain Procedure Law. The court emphasized that the City does not need to address every objection raised at a public hearing in its determination and findings. In any event, the city had fully addressed petitioner's objections in its determination.

In re. New Creek Bluebelt, 156 A.D.3d 163 (2d Dep't 2017).

The majority of claimant's property was designated as wetlands after he acquired it. In 2006, the City acquired the property from the claimant as part of a multi-phase project to manage storm water along the New Creek Bluebelt. The claimant then commenced this proceeding seeking compensation for the taking. Following the nonjury trial, the court awarded the claimant the principal sum of $382,190.25, plus interest, as just compensation for the taking.

On appeal, the City argued that the claimant should not have been awarded any increment above the $57,000 market value of the property as restricted by wetlands regulations, since no knowledgeable buyer would be willing to purchase the subject property at a price above its regulated value in the hope of successfully challenging the wetlands regulations as a taking.

The court rejected this contention, finding that a subsequent buyer of the property would not be precluded from bringing a successful regulatory takings claim. Therefore, the court declined to follow the City's argument that no knowledgeable buyer would be willing to pay a premium for the probability of a successful judicial determination. Accordingly, the court held that the reasonable probability incremental increase rule still could be applied in valuing regulated wetlands properties taken in condemnation. The court also held that a property's diminution in value, together with the effective prohibition of any development on the property by wetlands regulations, established that there was a reasonable probability that the imposition of those regulations constituted a regulatory taking.

The court did, however, lower the damages awarded to the claimant because the lower court had relied on a figure produced by the claimant's lawyer and not the City's appraiser who based his figure on market data.

Citibank, N.A. v. Village of Tarrytown, 149 A.D.3d 931 (2d Dep't 2017).

Property owner brought action seeking review of village's determination that it was necessary to acquire portion of owner's property by eminent domain.

The Supreme Court, Appellate Division, held that owner's assertion that alternate sites would better serve purposes of village, which determined that it was necessary to acquire portion of owner's property for public parking, was not a basis for relief under judicial review provision of eminent domain law. Village, as condemnor, had broad discretion to decide which land was necessary to fulfill its stated purpose.

In re. Oyster Bay, 156 A.D.3d 704 (2d Dep't 2017).

Landowners filed claim for just compensation for direct and consequential damages resulting from a Town's condemnation of one of three contiguous parcels of land. Following a bench trial, the Supreme Court awarded the landowners 20,700,00 as just compensation for the taking. The Town appealed.

On appeal, the Second Department reversed. The Court held that no unity existed between the parcel which was condemned by the Town and the parcel the owned by the property owners. The Court held that no unity of use existed between the western parcel, which was condemned by the town, and the eastern parcel, which was located to the east of middle parcel, and thus eastern parcel could not be valued as one economic parcel with other parcels in landowners' action to recover direct and consequential damages due to condemnation.

The court stated that the measure of damages in a condemnation case must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time. The Court emphasized that the the determination of highest and best use of a parcel of land, for purposes of damages in a condemnation case, must be based upon evidence of a use which reasonably could or would be made of the property in the near future. The Court accordingly remitted the case to the Supreme Court to determine the proper amount of damages that should have been awarded.

Kellner v. Town of Wappinger, 42 N.Y.S.3d 326 (2 Dep't 2016).

The owner of a vacant property, located at the end of a private road traversing a bridge in the Town of Wappinger, whose application for a building permit to construct a new house on the property was denied, brought an action against the Town of Wappinger, town's code enforcement officer of the town, and the town zoning board of appeals, seeking a declaration that state law and an analogous local code provision requiring legal access to the property did not apply to the proposed construction. The Town denied the application on the ground that there was no legal access to the property as required by Town Law § 280–a, and an analogous local code provision, Code of the Town of Wappinger § 240–20, since the road and the bridge were in disrepair and virtually impassable. The lower court denied the owner's motion for summary judgment and granted defendants' cross motion for summary judgment and determined that the

proposed construction of a new dwelling on the property in plaintiff's permit application was governed by Town Law § 280–a(1).

On appeal, the court found that, contrary to the plaintiff's contention, the application of the statute did not produce a result that was absurd or unjust or at odds with its facially evident purpose. The court determined that the plain language of section 280–a was unambiguous and, therefore, there was no basis to consider extrinsic materials to determine the legislature's intent in enacting the statute. It further found that the legislative history did not support plaintiff's contention that his proposed construction was excluded from the intended purposes of the statute. Moreover, the court held that the plaintiff failed to make a prima facie showing that the application of Town Law § 280–a, deprived him of a vested right to construct the new house. As such, plaintiff could not show damages for a categorical regulatory taking based on the denial of all economically beneficial use of the property without just compensation.

Accordingly, the court remitted the matter to the Supreme Court, Dutchess County, for a declaration that the provisions of Town Law § 280–a and Code of the Town of Wappinger § 240–20 applied to the proposed construction of a dwelling on the subject property.

Monroe Equities, LLC v. State, 43 N.Y.S.3d 103 (2 Dep't 2016).

In 2005, the claimant acquired title to an undeveloped parcel of real property in the Village and Town of Monroe, in the RR 1.5 ac zoning district, for which permissible uses included, "Single Family detached dwellings on lots of 3 or more acres in size." In 2006, the claimant applied for approval to develop the property by subdividing it into three lots and then constructing a single-family dwelling on each lot, and included installation of a septic system for each of the three dwellings. The property was located within the Lake Mombasha watershed, and was therefore subject to watershed protection regulations promulgated by the New York State Department of Health ("DOH") pursuant to article 11 of the Public Health Law. These watershed regulations prohibited the placement of a subsurface sewage disposal system within 300 feet of Lake Mombasha. The claimant's subdivision application was denied by the Town Planning Board in November 2008 because the necessary septic systems would violate the watershed regulations. The landowner brought an action against the State, alleging that the application of the watershed regulations constituted a per se taking that required compensation under the Takings Clause. The Court of Claims denied landowner's motion for summary judgment and granted summary judgment in favor of the State.

On appeal, the court found the claimant failed to establish that the subject property had suffered a complete elimination of value as a result of the watershed regulations. Here, the claimant acquired title to the subject parcel of land 85 years after the watershed regulations first went into effect. Additionally, the defendant submitted evidence that the claimant's parcel was once joined with abutting lands that were split into separate parcels in 1989. Therefore, the court found that the right to install a septic system was never part of the "bundle of rights" the claimant acquired with title to the property and the claimant could not succeed on its takings claim. Accordingly, the court held the Court of Claims properly denied the claimant's motion for summary judgment and dismissed the claim.

Miscellaneous

Gedney Ass'n v. City of White Plains, 147 A.D.3d 938 (2d Dep't 2017).

Petitioners challenged a resolution of the Common Council of the City of White Plains that adopted a findings statement pursuant to the State Environmental Quality Review Act. The lower court denied the petition to annul the resolution based on alleged violations of the Open Meetings Law. On appeal, petitioners alleged that revisions to a draft findings statement which were made between a noticed public meeting held on December 9, 2013, and a noticed public meeting held on December 19, 2013, violated the Open Meetings Law. Here, the record indicated that the revisions were based upon discussions between members of the Common Council, individually, and the Corporation Counsel for the City. Furthermore, no quorum of the Common Council was present at the time of these discussions, and the revisions to the draft findings statement were posted on the website for the City in advance of the December 19, 2013 public meeting. A quorum of the Common Council then met at the public meeting held on December 19, 2013, and publicly voted upon the resolution adopting the findings statement. Accordingly, the court held that no violation of the Open Meetings Law took place.

Fanizzi v. Planning Bd. of Patterson, 2016 WL 7224820 (2d Dep't 2016).

Petitioner Ann Fanizzi was the chairperson of a local land preservation organization, the Putnam County Coalition to Preserve Open Space, Inc. Petitioner had been monitoring the proposed development of a large shopping center in Putnam County. Fanizzi commenced this hybrid proceeding and action, primarily seeking to compel the production, under the Freedom of Information Law, of architectural renderings that the shopping center developer left at the office of the Town Planner of the Town of Patterson for several days so that the Town Planner could give informal advice to the developer regarding the developer's plan. In an order dated April 4, 2013, the Supreme Court granted the motion of the Town respondents and the separate motion of the developer.

It was undisputed that Camarda, the developer's owner, left the subject architectural renderings in the possession of Williams, the Town Planner, for a number of days, and that Williams displayed the renderings at the meeting of the Planning Board that took place on May 31, 2012. Thus, the renderings were "kept" and "held" by an agency, and were "records" within the meaning of FOIL. The court found it was unclear whether the renderings were still in the possession of the Town Planner when the petitioner made her FOIL request on June 4, 2012; if they had been, the petitioner would have a meritorious FOIL claim. Accordingly, the court held the Supreme Court should have denied the motions of the Town respondents and the developer to dismiss the petition/complaint.

Stein v. Town of New Castle, 2016 WL 6304979 (2d Dep't 2016).

In this small claims action, plaintiff sought to recover the $2,500 that he had placed into an escrow account, at the Town's request. These escrow monies were to be used to "reimburse the Town for the cost of professional consultant review services incurred" in connection with the review of plaintiff's application to the Zoning Board of Appeals to annul a certificate of occupancy which plaintiff claimed was improperly approved by a building inspector. Defendant counterclaimed to recover monies that plaintiff owed in excess of the amount deposited into escrow. By decision and order, the Justice Court dismissed plaintiff's cause of action and awarded defendant the principal sum of $1,667 on its counterclaim.

In the case at bar, contrary to plaintiff's contention, the record supported the determination of the Justice Court that New Castle Town Code § 60–560(A)(3) was not ambiguous and that, besides the types of applications to the ZBA listed in New Castle Town Code, the application plaintiff filed with the ZBA to annul a certificate of occupancy fell within the "other applications" referred to in New Castle Town Code § 60–560(A)(3). As such, the applicable New Castle Town Code § 60–560(A)(7)(b) and (d) stated that an applicant "shall reimburse the Town for the costs of professional staff services upon the Town's submission of an invoice and that the costs shall be limited to those that are reasonable in amount and necessary for the Town's review of the application." Accordingly, the court held that plaintiff was properly instructed to deposit monies into an escrow account from which the Town could be reimbursed for the costs it incurred in the review of plaintiff's application.

For People Theatres of N.Y. Inc. v. City of New York, 29 N.Y.3d 340 (2017).

The Court of Appeals recently held that certain New York City zoning regulations, targeted at the adult entertainment industry, do not violate certain adult establishment's First Amendment rights. These establishments have filed a petition for the Supreme Court of the United States to review this decision.