



No. 202.1

### EXECUTIVE ORDER

#### Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York;

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue; and

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the laws of the State of New York, do hereby continue Executive Order 202, dated March 7, 2020, and I hereby continue any suspension or modification of law made by Executive Order 202 for thirty days until April 11, 2020, except that such Executive Order is amended to read as follows:

FURTHER, pursuant to the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 11, 2020 the following:

**Suspension of laws and regulations to allow for expansion of services and temporary facilities for health and human service providers:**

- Subdivisions (a) and (e) of section 401.3 and section 710.1 of Title 10 of the NYCRR, to the extent necessary to allow hospitals to make temporary changes to physical plant, bed capacities, and services provided, upon approval of the Commissioner of Health, in response to a surge in patient census;
- Parts 709 and 710 of Title 10 of the NYCRR, to the extent necessary to allow construction applications for temporary hospital locations and extensions to be approved by the Commissioner of Health without considering the recommendation of the health systems agency or the Public Health and Health Planning Council, and to take such further measures as may be necessary to expedite departmental reviews for such approval;
- Sections 34-2.6 and 58-1.7 of Title 10 of the NYCRR, to the extent necessary to permit clinical laboratories to operate temporary collecting stations to collect specimen from individuals suspected of suffering from a COVID-19 infection;
- Section 41.34 of the Mental Hygiene law and Part 620 and section 686.3 of Title 14 of the NYCRR, to the extent necessary to allow facilities certified pursuant to Article 16 of the Mental Hygiene law to increase and/or exceed certified capacity limits without following site selection procedures and/or without providing notification to the appropriate local governmental unit upon approval of the commissioner of OPWDD;

- Section 33.17 of the Mental Hygiene Law and associated regulations to the extent necessary to permit providers to utilize staff members in the most effective means possible to transport individuals receiving services from the Office of Mental Health or a program or provider under the jurisdiction of the Office of Mental Health during the emergency, provided such facilities take all reasonable measures to protect the health and safety of such individuals;
- Sections 29.11 and 29.15 Mental Hygiene Law and section 517 of Title 14 of the NYCRR to the extent necessary to permit mental health facilities licensed pursuant to Article 31 of the Mental Hygiene Law that are treating patients during the emergency to rapidly discharge, including conditionally discharge, transfer, or receive such patients, as authorized by the Commissioner of the Office of Mental Health, provided such facilities take all reasonable measures to protect the health and safety of such patients and residents, including safe transfer and discharge practices;
- Section 29.13 of the Mental Hygiene Law and associated regulations to the extent individuals in areas affected by the emergency are temporarily receiving services from different providers, whose immediate priority is to stabilize the individual, address acute symptoms, and provide supports including medication and stress relief, such that it is impossible to comply with development, assessment, scope and frequency, and documentation requirements for treatment plans;
- Sections 131, 132 and 349-a of the Social Services Law to the extent necessary to allow screenings to be conducted by telephone;
- Sections 2510 and 2511 of the Public Health Law, to the extent necessary to waive or revise eligibility criteria, documentation requirements, or premium contributions; modify covered health care services or the scope and level of such services set forth in contracts; increase subsidy payments to approved organizations, including the maximum dollar amount set forth in contracts; or provide extensions for required reports due by approved organizations in accordance with contracts;
- Subdivision 4 of section 6909 of the Education Law, subdivision 6 of section 6527 of the Education Law, and section 64.7 of Title 8 of the NYCRR, to the extent necessary to permit physicians and certified nurse practitioners to issue a non-patient specific regimen to nurses or any such other persons authorized by law or by this executive order to collect throat or nasopharyngeal swab specimens from individuals suspected of suffering from a COVID-19 infection, for purposes of testing, or to perform such other tasks as may be necessary to provide care for individuals diagnosed or suspected of suffering from a COVID-19 infection;
- Section 400.9 and paragraph 7 of subdivision h of section 405.9 of Title 10 of the NYCRR, to the extent necessary to permit general hospitals and nursing homes licensed pursuant to Article 28 of the Public Health Law ("Article 28 facilities") that are treating patients during the disaster emergency to rapidly discharge, transfer, or receive such patients, as authorized by the Commissioner of Health, provided such facilities take all reasonable measures to protect the health and safety of such patients and residents, including safe transfer and discharge practices, and to comply with the Emergency Medical Treatment and Active Labor Act (42 U.S.C. section 1395dd) and any associated regulations;
- Subdivision 3 of section 2801-a of the Public Health Law and section 600.1 of Title 10 of the NYCRR, to the extent necessary to permit the Commissioner of Health to approve the establishment of temporary hospital locations and extensions without following the standard approval processes and to take such further measures as may be necessary to expedite departmental reviews for such approval;
- Section 2999-cc of the Public Health Law and any regulatory provisions promulgated thereunder by the Department of Health, the Office of Mental Health, the Office of Addiction Services and Supports, and the Office for People with Developmental Disabilities, to the extent necessary to allow additional telehealth provider categories and modalities, to permit other types of practitioners to deliver services within their scopes of practice and to authorize the use of certain technologies for the delivery of health care services to established patients, pursuant to such limitations as the commissioners of such agencies may determine appropriate;

**Suspension of laws and regulations relating to child care to allow flexibility for providers while continuing to protect the health and safety of children:**

- Sections 414.7, 416.7, 417.7, 418-1.7, 418-2.7, 414.8, 416.8, 417.8, 418-1.8, and 418-2.8 of Title 18 of the NYCRR insofar as that regulation sets the ages of children who can be served and the standards for care; Sections 414.13, 416.13, 417.13, 418-1.13, 418-2.13 of Title 18 of the NYCRR suspending requirements for staff qualifications; Section 390 of the Social Services law suspending provisions setting capacity limits for family and group family day care programs and standards for staff/child ratios in all child care modalities; Sections 390(3) and 390-a of the Social Services Law and regulations at 18 NYCRR Sections 413(g), 414.14, 415.13, 416.14, 417.14, 418-1.14, 418-2.14, allowing for the waiver of certain provisions establishing training and inspection requirements for

child day care; and Section 424-a of the Social Services Law insofar as allowing for the waiver of fees paid for statewide central register of child abuse and maltreatment database check;

- Section 410-w of the Social Services Law and sections 404.1, 404.7, 415.2, 415.3, 415.6 of Title 18 of the NYCRR insofar as that statute and those regulations establish financial eligibility standards, the reimbursement requirements, and set timeliness requirements for the provision of services including payment for absences due to COVID-19 abatement processes;

**Suspension of regulations to prevent delays in providing home delivered meals and in providing services under the Expanded In-Home Services for the Elderly Program (EISEP) to older adults:**

- Clause (d) of subparagraph (ii) of paragraph (3) of subdivision (a) of section 6654.10 of Title 9 of the NYCRR, insofar as it requires an assessment be conducted prior to or within 10 days of the initiation of home delivered meals;
- Subdivision (h) of section 6654.16 of Title 9 of the NYCRR, insofar as it requires an assessment be conducted within 10 working days after the completion of the screening intake and prior to the initiation of services under the Expanded In-Home Services for the Elderly Program (EISEP);
- Subdivision (n) of section 6654.16 of Title 9 of the NYCRR, to allow for a care plan to remain in effect for a period exceeding 12 months under the Expanded In-Home Services for the Elderly Program (EISEP) when such care plan would otherwise expire during the period in which a disaster emergency is declared;
- Subdivision (x) of section 6654.16 of Title 9 of the NYCRR, modifying requirements for reassessments to be conducted every 12 months or within 5 days of becoming aware of a change in circumstance under the Expanded In-Home Services for the Elderly Program (EISEP);

**Suspension of law to allow waiver of requirements necessary for apportionment of school aid:**

- Section 3604(7) of the Education Law, to the extent consistent and necessary to allow the commissioner to disregard such reduction in the apportionment of public money due to a failure by a school to meet the instructional requirements proscribed within this section due to the properly executed declaration of a local state of emergency as defined within sub-section (i), a school is directed to close by a state or local health official or following a properly executed declaration of a state of emergency as defined within sub-section (i), limited to the extent that those specified schools are unable to make up missed instructional days;

**Suspension of laws and regulations relating to emergency procurement:**

- Sections 553(22), 559, 1209, and 1265-a of the Public Authorities Law, and 21 NYCRR Part 1002, to the extent necessary to purchase necessary equipment, materials, supplies, or services, without following the standard procurement processes, including the standard prompt payment policy;

**Suspensions of law relating to appearances by defendants:**

- Notwithstanding any other provision of law and except as provided in section 182.30 of Article 182 of the Criminal Procedure Law, the court, in its discretion, may dispense with the personal appearance of the defendant, except an appearance at a hearing or trial, and conduct an electronic appearance in connection with a criminal action pending in any county in New York State, provided that the chief administrator of the courts has authorized the use of electronic appearance due to the outbreak of COVID-19, and the defendant, after consultation with counsel, consents on the record. Such consent shall be required at the commencement of each electronic appearance to such electronic appearance.

**Suspension of law relating to waiting periods for unemployment insurance claimants whose claims arise directly out of COVID-19 outbreak:**

- Subdivision 7 of Section 590 of the Labor Law, so far as it relates to the waiting period for unemployment insurance claimants whose claims for unemployment insurance arise directly out of closings of schools or other workplaces in which claimants were employed, or out of claimants' isolation or quarantine in connection with COVID-19; and

**Suspension of law allowing the attendance of meetings telephonically or other similar service:**

- Article 7 of the Public Officers Law, to the extent necessary to permit any public body to meet and take such actions authorized by the law without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed;

Suspension of law allowing residents of nursing homes to vote with modified visitor policies in place:

- Subdivision 8 of section 8-407 of the Election Law to allow individuals not employed by the Board of Elections to assist residents of nursing homes or adult care facilities in the completion of absentee ballot applications and voting;

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of Executive Order through April 11, 2020:

- Any guidance issued by the New York State Department of Health related to prevention and infection control of COVID-19 at nursing homes and adult care facilities, including but not limited to guidance on visitation, shall be effective immediately and shall supersede any prior conflicting guidance issued by the New York State Department of Health and any guidance issued by any local board of health, any local department of health, or any other political subdivision of the State related to the same subject.
- Any large gathering or event for which attendance is anticipated to be in excess of five hundred people shall be cancelled or postponed for a minimum of thirty days.
- Any place of business or public accommodation, and any gathering or event for which attendance is anticipated to be fewer than five hundred people, shall operate at no greater than fifty percent occupancy, and no greater than fifty percent of seating capacity, for thirty days effective on Friday, March 13, 2020, except that any theater seating five hundred or more attendees for a live performance located in a city of one million or more shall not hold any further performances after 5pm on March 12, 2020.
- The two preceding directives shall not apply to a school, hospital, nursing home, other medical office or facility as determined by the Commissioner of Health, mass transit or mass transit facility, governmental facility, law enforcement facility, or retail establishments including grocery stores. The Commissioner of Health may allow for businesses that are not public gathering spaces to exceed five hundred persons if the occupancy is less than fifty percent capacity subject to public health review.



GIVEN under my hand and the Privy Seal of the

State in the City of Albany the twelfth

day of March in the year two

thousand twenty.

BY THE GOVERNOR

A handwritten signature in dark ink, appearing to be "Mr. C" followed by a stylized flourish.

Secretary to the Governor

A handwritten signature in dark ink, appearing to be "Andrew Cuomo" in a cursive style.



No. 202.15

### EXECUTIVE ORDER

#### Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to be continue;

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through May 9, 2020 the following:

- Paragraph (4) of subdivision (a) of Section 5-6.12 of Title 10 of the NYCRR, governing bottled or bulk water products sold or distributed in New York, to allow bottled and bulk water product facilities currently certified in New York to temporarily, if their stock of regularly used labels has been depleted, distribute bottled or bulk water products without an assigned New York State Department of Health certificate number shown on the product label and use labels authorized in any other state. Once labels showing the assigned certificate number have been obtained, their use must be resumed;
- Section 6808 of the Education Law and any regulations promulgated thereunder, to the extent necessary to permit a manufacturer, repacker, or wholesaler of prescription drugs or devices, physically located outside of New York and not registered in New York, but licensed and/or registered in any other state, may deliver into New York, prescription drugs or devices;
- Section 6808 of the Education Law, Article 137 of the NYCRR to the extent necessary to allow that a New York-licensed pharmacy may receive drugs and medical supplies or devices from an unlicensed pharmacy, wholesaler, or third-party logistics provider located in another state to alleviate a temporary shortage of a drug or device that could result in the denial of health care under the following conditions:
  - The unlicensed location is appropriately licensed in its home state, and documentation of the license verification can be maintained by the New York pharmacy.
  - The pharmacy maintains documentation of the temporary shortage of any drug or device received from any pharmacy, wholesaler, or third-party logistics provider not licensed in New York.
  - The pharmacy complies with all record-keeping requirements for each drug and device received from any pharmacy, wholesaler, or third-party logistics provider not licensed in New York.
  - All documentation and records required above shall be maintained and readily retrievable for three years following the end of the declared emergency.
  - The drug or device was produced by an authorized FDA registered drug manufacturer;

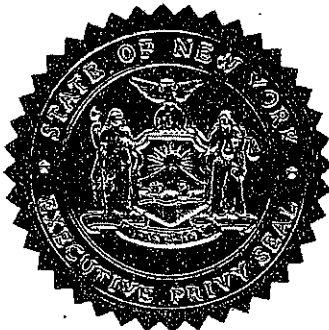
- Sections 6512 through 6516, and 6524 of the Education Law and Part 60 of Title 8 of the NYCRR, to the extent necessary to allow individuals, who graduated from registered or accredited medical programs located in New York State in 2020, to practice medicine in New York State, without the need to obtain a license and without civil or criminal penalty related to lack of licensure, provided that the practice of medicine by such graduates shall in all cases be supervised by a physician licensed and registered to practice medicine in the State of New York;
- Subparagraphs (ii) and (iii) of paragraph (b) and paragraph (c) of subdivision (4) of section 2801-a of the Public Health Law, and subparagraph (ii) of paragraph (c) of subdivision (1) and paragraph (c) of subdivision (2) of section 3611-a of the Public Health Law, to the extent necessary to limit the Department of Health's review functions to essential matters during the pendency of the COVID-19 health crisis, and to toll any statutory time limits for transfer notices pertaining to operators of Article 28 and Article 36 licensed entities for the duration of this declaration of disaster emergency, and any subsequent continuation thereof;
- Sections 43 and 45 of the Religious Corporations Law to the extent necessary to allow Protestant Episcopal parishes to postpone any annual election and notice to the parish of such election during the state disaster emergency absent formal resolution and ratification by meeting;
- Environmental Conservation Law Articles 3, 8, 9, 13, 15, 17, 19, 23, 24, 25, 27, 33, 34, 35, 37, and 75, and 6 NYCRR Parts 552, 550, 601, and 609 to the extent necessary to suspend the requirement that public hearings are required, provided that public comments shall still be accepted either electronically or by mail, to satisfy public participation requirements;
- State Administrative Procedures Act Section 202(2)(a) to the extent necessary to extend the expiration date of notices of proposed rulemakings until 90 calendar days after this Executive Order, as it may be continued, terminates;
- Environmental Conservation Law Article 70, as implemented by 6 NYCRR Parts 621 and 624, and Environmental Conservation Law Article 17, as implemented by 6 NYCRR Parts 704 and 750 for processing permit applications, to the extent necessary to suspend public hearings provided that public comments may be accepted as written submissions, either electronically or by mail, or that any required appearances may be done so by teleconferencing or other electronic means;
- 6 NYCRR Part 375 and Environmental Conservation Law Article 27 to the extent necessary to suspend for the duration of this Executive Order public meetings prior to a selection of a final remedy at inactive hazardous waste disposal sites and public meetings at certain brownfield cleanup program sites, provided that written comments on proposed remedies may be continue to be submitted and will be evaluated in remedial decision;
- Section 3635 of the Education law, to the extent necessary to delay the April 1 requirement that parents must file transportation requests with their school district in order to obtain transportation for their children for the following school year;
- Sections 6512 through 6516 and 8510 of the Education Law and 8 NYCRR Subpart 79-4 to the extent necessary to allow respiratory therapy technicians licensed and in current good standing in any state in the United States to practice in New York State without civil or criminal penalty related to lack of licensure;
- Sections 6512 through 6516, 8402, 8403, 8404, 8405 of the Education Law and 8 NYCRR Sub Parts 79-9, 79-10, 79-11 and 79-12 to the extent necessary to allow mental health counselors, marriage and family therapists, creative arts therapists and psychoanalysts licensed and in current good standing in any state in the United States to practice in New York State without civil or criminal penalty related to lack of licensure;
- Sections 3400, 3420 through 3423, and 3450 through 3457 of the Public Health Law, to the extent necessary to permit funeral directors licensed and in good standing in any state or territory of the United States to practice as a funeral director in New York State upon the approval of, and pursuant to such conditions as may be imposed by, the Commissioner of Health, without civil or criminal penalty related to lack of licensure in New York State, provided that such funeral director shall practice under the supervision of a funeral director licensed and registered in New York State;
- Section 3428 of the Public Health Law to the extent necessary to permit a funeral director licensed in New York State, but not registered in New York State, to practice in New York State upon the approval of, and pursuant to such conditions as may be imposed by, the Commissioner of Health, without civil or criminal penalty related to lack of registration in New York State,

provided that such funeral director shall practice under the supervision of a funeral director licensed and registered in New York State;

- Section 1517 of the Not for Profit Corporation Law, Sections 203.3, 203.6 and 203.13 of Title 19 of the NYCRR and Section 77.7(a)(1) of Title 10 of the NYCRR, to the extent necessary to allow persons deputized by the Commissioner of Health to be agents authorized by a funeral director or undertaker to be present and personally supervise and arrange for removal or transfer of each dead human body;
- Section 1517 of the Not for Profit Corporation Law, Sections 203.3, 203.6 and 203.13 of Title 19 of the NYCRR and Section 77.7(a)(4) of Title 10 of the NYCRR, to the extent necessary to allow persons deputized by the Commissioner of Health to be agents authorized by a funeral director or undertaker, or a county coroner, coroner physician and/or medical director for those deceased human bodies within their supervision, to personally supervise and arrange the delivery of a deceased person to the cemetery, crematory or a common carrier, with a copy of the filed death certificate;
- Sections 4140 and 4144 of the Public Health Law, Sections 1502, 1517 of the Not for Profit Corporation Law and Sections 203.1, 203.4, 203.8 and 203.13 of Title 19 of the NYCRR and Section 13.1 of Title 10 of the NYCRR, to the extent necessary to permit the State Registrar to register death certificates and issue burial and removal permits, upon the request of a local registrar and upon approval of the Commissioner of Health;

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I hereby issue the following directives for the period from the date of this Executive Order through May 9, 2020:

- Any local official, state official or local government or school, which, by virtue of any law has a public hearing scheduled or otherwise required to take place in April or May of 2020 shall be postponed, until June 1, 2020, without prejudice, however such hearing may continue if the convening public body or official is able to hold the public hearing remotely, through use of telephone conference, video conference, and/or other similar service.
- For the period from the date of this Executive Order through May 9, 2020, the Department of Taxation and Finance is authorized to accept digital signatures in lieu of handwritten signatures on documents related to the determination or collection of tax liability. The Commissioner of Taxation and Finance shall determine which documents this directive shall apply to and shall further define the requirements for accepted digital signatures.
- Section 8-400 of the Election Law is temporarily suspended and hereby modified to provide that due to the prevalence and community spread of COVID-19, an absentee ballot can be granted based on temporary illness and shall include the potential for contraction of the COVID-19 virus for any election held on or before June 23, 2020.
- Solely for any election held on or before June 23, 2020, Section 8-400 of the Election Law is hereby modified to allow for electronic application, with no requirement for in-person signature or appearance to be able to access an absentee ballot.



GIVEN under my hand and the Privy Seal of  
the State in the City of Albany this  
ninth day of April in the year two  
thousand twenty.

BY THE GOVERNOR

Secretary to the Governor

McKinney's Consolidated Laws of New York Annotated  
Public Officers Law (Refs & Annos)  
Chapter 47. Of the Consolidated Laws  
Article 7. Open Meetings Law (Refs & Annos)

McKinney's Public Officers Law § 100

§ 100. Legislative declaration

Currentness

<[See Executive Order 202 (NY LEGIS EXEC ORDER 202 (2020)), related to the COVID-19 State of Emergency, and Executive Orders issued subsequent thereto for suspension or modification of this section.]>

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.

**Credits**

(Formerly § 90, added L.1976, c. 511, § 1. Renumbered § 95, L.1977, c. 933, § 2. Renumbered § 100, L.1983, c. 652, § 1.)

McKinney's Public Officers Law § 100, NY PUB OFF § 100

Current through L.2019, chapter 758 & L.2020, chapters 1 to 56, 58 to 89. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated  
Public Officers Law (Refs & Annos)  
Chapter 47. Of the Consolidated Laws  
Article 7. Open Meetings Law (Refs & Annos)

McKinney's Public Officers Law § 102

§ 102. Definitions

Effective: August 23, 2000  
Currentness

<[See Executive Order 202 (NY LEGIS EXEC ORDER 202 (2020)), related to the COVID-19 State of Emergency, and Executive Orders issued subsequent thereto for suspension or modification of this section.]>

As used in this article:

1. "Meeting" means the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.
2. "Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.
3. "Executive session" means that portion of a meeting not open to the general public.

**Credits**

(Formerly § 92, added L.1976, c. 511, § 1. Renumbered § 97, L.1977, c. 933, § 2. Amended L.1979, c. 704, § 1. Renumbered § 102, L.1983, c. 652, § 1. Amended L.2000, c. 289, § 2, eff. Aug. 23, 2000.)

McKinney's Public Officers Law § 102, NY PUB OFF § 102

Current through L.2019, chapter 758 & L.2020, chapters 1 to 56, 58 to 89. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated  
Public Officers Law (Refs & Annos)  
Chapter 47. Of the Consolidated Laws  
Article 7. Open Meetings Law (Refs & Annos)

McKinney's Public Officers Law § 103

§ 103. Open meetings and executive sessions

Effective: March 8, 2017  
Currentness

<[See Executive Order 202 (NY LEGIS EXEC ORDER 202 (2020)), related to the COVID-19 State of Emergency, and Executive Orders issued subsequent thereto for suspension or modification of this section.]>

- (a) Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section ninety-five<sup>1</sup> of this article.
- (b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.
- (c) A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.
- (d) [As added by L.2010, c. 40. See, also, subd. (d) below.] Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.
- (d) [As added by L.2010, c. 43. See, also, subd. (d) above.] 1. Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means. As used herein the term "broadcast" shall also include the transmission of signals by cable.
2. A public body may adopt rules, consistent with recommendations from the committee on open government, reasonably governing the location of equipment and personnel used to photograph, broadcast, webcast, or otherwise record a meeting so as to conduct its proceedings in an orderly manner. Such rules shall be conspicuously posted during meetings and written copies shall be provided upon request to those in attendance.
- (e) Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a

reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

(f) Open meetings of an agency or authority shall be, to the extent practicable and within available funds, broadcast to the public and maintained as records of the agency or authority. If the agency or authority maintains a website and utilizes a high speed internet connection, such open meeting shall be, to the extent practicable and within available funds, streamed on such website in real-time, and posted on such website within and for a reasonable time after the meeting. For the purposes of this subdivision, the term "agency" shall mean only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor. For purposes of this subdivision, the term "authority" shall mean a public authority or public benefit corporation created by or existing under any state law, at least one of whose members is appointed by the governor (including any subsidiaries of such public authority or public benefit corporation), other than an interstate or international authority or public benefit corporation.

#### Credits

(Formerly § 93, added L.1976, c. 511, § 1. Amended L.1977, c. 368, § 1. Renumbered § 98, L.1977, c. 933, § 2. Renumbered § 103, L.1983, c. 652, § 1. Amended L.2000, c. 289, § 3, eff. Aug. 23, 2000; L.2010, c. 40, § 1, eff. April 14, 2010; L.2010, c. 43, § 2, eff. April 1, 2011; L.2011, c. 603, § 1, eff. Feb. 2, 2012; L.2015, c. 519, § 1, eff. Jan. 10, 2016; L.2016, c. 319, § 1, eff. March 8, 2017.)

#### Footnotes

1 See Public Officers Law § 105.

McKinney's Public Officers Law § 103, NY PUB OFF § 103

Current through L.2019, chapter 758 & L.2020, chapters 1 to 56, 58 to 89. Some statute sections may be more current, see credits for details.

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77 A.D.3d 954

Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of Victoria  
**PETERSEN**, et al., respondents,  
v.

**INCORPORATED VILLAGE OF  
SALTAIRE**, etc., et al., appellants.

Oct. 26, 2010.

### Synopsis

**Background:** Owners of homes in village located on island that was inaccessible by car brought Article 78 proceeding, in the nature of mandamus, seeking, inter alia, to compel village's board of trustees to conduct public meetings and public hearings within village's geographical boundaries. The Supreme Court, Suffolk County, Cohalan, J., granted such relief. Village and board appealed.

**[Holding:]** The Supreme Court, Appellate Division, held that owners did not have clear legal right to compel board to conduct all public meetings and public hearings within village's geographical boundaries.

Reversed.

West Headnotes (4)

- [1] **Mandamus** ⇐ Nature of acts to be commanded

Remedy of mandamus is used to compel the performance of a statutory duty that is ministerial in nature and does not involve the exercise of judgment or discretion.

- [2] **Mandamus** ⇐ Nature and existence of rights to be protected or enforced

As a general rule, mandamus to compel is available only when the petitioner's right to

performance is so clear as to admit of no doubt or controversy.

- [3] **Mandamus** ⇐ Meetings and proceedings of boards or other bodies

**Municipal Corporations** ⇐ Rules of procedure and conduct of business

Owners of homes in village located on island that was inaccessible by car did not have clear legal right to compel village board of trustees to conduct all public meetings and public hearings within village's geographical boundaries, as required for homeowners to be entitled to mandamus relief; no provision in Village Law or other statute mandated that official village meetings take place within village borders, and open meeting statutes permitted use of videoconferencing. McKinney's Statutes §§ 94, 240; McKinney's Village Law § 4-412(2); McKinney's General Construction Law § 41; McKinney's Public Officers Law §§ 102(1), 103(c), 104(4).

- [4] **Statutes** ⇐ Language and intent, will, purpose, or policy

Court's role in interpreting a statute is to ascertain the legislative intent from the words and language that are used, and a court should not extend a statute beyond its express terms or the reasonable implications of its language.

1 Cases that cite this headnote

### Attorneys and Law Firms

**\*\*751** Hamburger, Maxson, Yaffe, Knauer & McNally, LLP, Melville, N.Y. (David N. Yaffe, Richard Hamburger, and Lane T. Maxson of counsel), for appellants.

Barry A. Kamen, PLLC, Stony Brook, N.Y., for respondents.

JOSEPH COVELLO, J.P., FRED T. SANTUCCI, RUTH C. BALKIN, and LEONARD B. AUSTIN, JJ.

## Opinion

\*954 In a proceeding pursuant to CPLR article 78, *inter alia*, in the nature of mandamus to, in effect, compel the Board of Trustees of the Incorporated Village of **Saltaire** to conduct public meetings and public hearings within the geographical boundaries of the Incorporated Village of **Saltaire**, the Incorporated Village of **Saltaire** and the Board of Trustees of the Incorporated Village of **Saltaire** appeal, as limited by their brief, from so much of a \*955 judgment of the Supreme Court, Suffolk County (Cohalan, J.), dated September 3, 2009, as, in effect, granted that branch of the petition which was to, in effect, compel the Board of Trustees of the Incorporated Village of **Saltaire** to conduct public meetings and public hearings within the geographical boundaries of the Incorporated Village of **Saltaire**.

ORDERED that the judgment is reversed insofar as appealed from, on the law, with costs, and that branch of the petition which was to, in effect, compel the Board of Trustees of the Incorporated Village of **Saltaire** to conduct public meetings and public hearings within the geographical boundaries of the Village of **Saltaire** is denied, and that portion of the proceeding is dismissed.

The Incorporated Village of **Saltaire** is a small seasonal community located on Fire \*\*752 Island off the coast of Long Island. Since the Village is inaccessible by car, the residents depend on ferry service, which is extremely limited during the winter and often cancelled or delayed because of adverse weather conditions. On February 4, 2006, the Board of Trustees of the Village (hereinafter the Board) amended Chapter 34 of the Code of the Incorporated Village of **Saltaire**, *inter alia*, to permit them to conduct official meetings outside the Village under certain circumstances.

On February 3, 2009, the Board, which consists of the Mayor of the Village and four trustees, conducted a public meeting and a public hearing in a conference room located within an office building in midtown Manhattan. The meeting was simultaneously broadcast by means of a two-way video conference hook-up to the main room on the first floor of the Village Hall. The petitioners, who own homes in the Village, commenced this proceeding pursuant to CPLR article 78 in the nature of mandamus, *inter alia*, to compel the Board to conduct all public meetings and public hearings within the geographical boundaries of the Village.

[1] [2] [3] The remedy of mandamus is used to compel the performance of a statutory duty that is ministerial in

nature and does not involve the exercise of judgment or discretion (*see Klostermann v. Cuomo*, 61 N.Y.2d 525, 539, 475 N.Y.S.2d 247, 463 N.E.2d 588). A ministerial act amenable to mandamus has been defined as “a specific act which the law requires a public officer to do in a specified way on conceded facts without regard to his [or her] own judgment” (*Matter of Posner v. Levitt*, 37 A.D.2d 331, 332, 325 N.Y.S.2d 519). As a general rule, mandamus to compel is available only when the petitioner's right to performance is “so clear as to admit of no doubt or controversy” (*Matter of Coastal Oil N.Y. v. Newton*, 231 A.D.2d 55, 57, 660 N.Y.S.2d 428).

\*956 In the case at bar, the petitioners failed to establish that they have a clear legal right to compel the Board to conduct all public meetings and public hearings within the geographical boundaries of the Village. In 1972, the New York State Legislature (hereinafter the Legislature) repealed the former Village Law and enacted the current Village Law, which allows villages throughout the State more freedom to adopt local laws to meet their individual needs (*see* L. 1972, ch. 892, § 57). Among other changes, the current Village Law omitted § 87 of the former Village Law, which required the board of trustees to hold meetings “at such time and places in the village as it shall, by resolution, provide.”

The Latin maxim “*expressio unius est exclusio alterius*,” which means the expression of one thing implies the exclusion of others, is a “standard canon of [statutory] construction” (*Morales v. County of Nassau*, 94 N.Y.2d 218, 224, 703 N.Y.S.2d 61, 724 N.E.2d 756). Accordingly “where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded” (McKinney's Statutes § 240; *see Morales v. County of Nassau*, 94 N.Y.2d 218, 703 N.Y.S.2d 61, 724 N.E.2d 756; *Matter of Town of Eastchester v. New York State Bd. of Real Prop. Servs.*, 23 A.D.3d 484, 485, 808 N.Y.S.2d 90). Moreover, since the prior statute referred to two provisions and, upon re-enactment, the new statute only includes one of those provisions, the inference is that the Legislature intended to omit the absent provision (*see* McKinney's Statutes § 240). Specifically, the former Village Law included both § 87 (which required trustees to conduct public meetings in the village) and § 88 (which permitted trustees to arrest an absent board member and take him or her before the board), but the revised Village Law \*\*753 only included § 88, which was transferred verbatim to Village Law § 4-412(2).

[4] The Supreme Court's reliance on the latter statute (i.e., Village Law § 4-412[2]) as one of the reasons for restraining the Board from holding meetings outside the Village was misplaced. A court's role in interpreting a statute is to ascertain the legislative intent from the words and language that are used, and a court should not extend a statute beyond its express terms or the reasonable implications of its language. Therefore, a court should construe a statute according to its "natural and most obvious sense, without resorting to an artificial or forced construction" (McKinney's Statutes § 94). Here the natural and most obvious interpretation of the current Village Law is to permit meetings outside the geographical limits of a village where circumstances \*957 warrant, irrespective of the provisions of Village Law § 4-412(2), which give the Board the right to "direct [ ] any peace officer ... or police officer residing in the village to arrest such absent member and take him [or her] before the board."

Additionally, in 2000, the Legislature specifically added "videoconferencing" to several provisions of the Open Meetings Law (see L. 2000, ch. 289, §§ 2-4). For example, Open Meetings Law § 102(1) currently defines the word "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the

use of videoconferencing for attendance and participation by the members of the public body" (see also Open Meetings Law § 103[c]; § 104[4]). At the same time, General Construction Law § 41 was amended to define a quorum in terms of a majority of a board "gathered together in the presence of each other or through the use of videoconferencing" (L. 2000, ch. 289, § 5).

Accordingly, inasmuch as there is no provision in the Village Law or any other statute which mandates that official Village meetings must take place within the Village borders, and since the relevant statutes permit the use of videoconferencing (see *Matter of Town of Eastchester v. New York State Bd. of Real Prop. Servs.*, 23 A.D.3d 484, 808 N.Y.S.2d 90; *Matter of City of White Plains v. New York State Bd. of Real Prop. Servs.*, 18 A.D.3d 549, 795 N.Y.S.2d 292), it was error for the Supreme Court to grant that branch of the petition which was to, in effect, compel the Board to conduct public meetings and public hearings within the geographical boundaries of the Village.

#### All Citations

77 A.D.3d 954, 909 N.Y.S.2d 750, 2010 N.Y. Slip Op. 07767

# Conducting Meetings and Public Hearings During the COVID-19 Pandemic

**Updated April 10, 2020**

The following guidance is for conducting meetings and public hearings during the COVID-19 pandemic. **PLEASE READ THE ENTIRE DOCUMENT BEFORE CONTACTING NYCOM WITH QUESTIONS REGARDING CONDUCTING MEETINGS AND PUBLIC HEARINGS.**

## An Overview of Meetings During the COVID-19 Pandemic

Local officials are finding themselves in situations where conducting business that is essential for the continuation of municipal operations and complying with the technical procedural requirements of State law is impossible in light of public health considerations. Particularly problematic, given the nature of the current crisis, is the in-person requirement of the NYS Open Meetings Law.

On March 13, 2020, Governor Cuomo issued Executive Order No. 202.1 in an effort to address the conflict between the requirements of the Open Meetings Law and the Governor's emergency orders limiting gatherings. Specifically, Executive Order No. 202.1 suspends Article 7 of the Public Officers Law (also known as the Open Meetings Law) to the extent necessary to permit any public body to meet and take such actions authorized by law without allowing the public to be physically present at the meeting. The order also authorizes public bodies to meet remotely by conference call or similar service. If a public body restricts in-person access to its meetings or conducts a meeting remotely by conference call or similar service, the public body must provide the public the ability to view or listen to such meetings live and must record and later transcribe such meetings.

On April 9, 2020, Governor Cuomo issued Executive Order No. 202.15, which, in relevant part, postponed until June 1, 2020 at the earliest, all in-person public hearings scheduled for April and May of 2020. Local officials may continue to hold public hearings remotely through the use of telephone conference, video conference, and/or other similar service.

Consequently, if a public body is unable to conduct its public hearings pursuant to Executive Order 202.1, then, pursuant to Executive Order 202.15, such public hearings are postponed until at least June 1, 2020.

Local officials are strongly encouraged to consult with their municipal attorney to ensure that they are complying with the New York State Open Meetings Law and the Governor's Executive Orders 202.1 and 202.15.

## The Open Meetings Law

### General Requirements

The Open Meetings Law, Article 7 of the Public Officers Law (§§ 100-111), outlines the basic requirements for public bodies to conduct meetings.

The Open Meetings Law defines a "public body" as any entity consisting of two or more members who perform a governmental function and for which a quorum is required to conduct public business.<sup>1</sup> This definition encompasses local legislative bodies<sup>2</sup> such as village boards of trustees and city councils, as well as planning boards<sup>3</sup> and zoning boards of appeals.<sup>4</sup>

Public Officers Law § 102[1] defines a "meeting" as "the official convening of a public body for the purpose of conducting public business." Historically, this meant that the members of the public body physically gathered to conduct business, but in 2000, Section 102 was amended to allow public body members to attend and participate in meetings via videoconferencing. Pursuant to Public Officers Law § 103, any time a quorum of a public body gathers (either in person or via videoconference) for the purpose of discussing public business, the meeting must be open to the general public, whether or not

the body intends to take action.<sup>5</sup> This includes “workshops,” “work sessions,” and “agenda sessions.”<sup>6</sup> Chance meetings or social gatherings are not covered by the law since these are not official meetings; however, public officials should not discuss public business at chance meetings or social gatherings.<sup>7</sup>

In addition, Public Officers Law § 104 requires public bodies to notify the public of the time and place of every meeting. The OML requires notice of every meeting to be:

1. Conspicuously posted in one or more public locations;
2. Given to the news media (television, radio and newspaper); and
3. Conspicuously posted on the village’s website, if it has the ability to do so.

Moreover, Open Meetings Law § 104(4) provides that if videoconferencing is used to conduct the meeting, the notice of the meeting must indicate that members of the public body will be participating via videoconferencing technology. Additionally, the notice must identify the locations from which the members will be participating and state that the public has the right to attend the meeting at any of the meeting locations.

The OML does NOT require public bodies to pay for an official advertisement in a newspaper. Rather, the OML merely requires that the news media be notified. NYCOM recommends that public bodies fax or email meeting notices to the news media.

The timing for the notice requirement in Public Officers Law § 104 is written in a rather confusing way. In essence, the OML provides that, if notice of a public body’s meeting is given at least 72 hours prior to the meeting, then the meeting may be held for any reason.<sup>8</sup> However, if notice of a meeting can only be given less than 72 hours in advance of that meeting, then it may be held only if there is an exigent/emergency need for conducting the meeting on less than 72 hours’ notice.<sup>9</sup> What constitutes an emergency in purposes of the OML is not defined in law.

Dealing with the Open Meeting Law’s In-Person Requirement During the Pandemic  
Obviously there is a natural tension between the Open Meeting Law’s requirement that meetings be open to the general public and the government’s interest in protecting the public’s health, safety, and welfare by actually limiting such gatherings of individuals.

The first recommendation to public bodies dealing with this issue is that they should consider postponing all meetings that are not necessary to conduct essential government business. Unfortunately, city councils and village boards of trustees are frequently faced with situations that demand immediate action, such as the adoption of the budget or the approval of payments that local businesses are relying on during these trying economic times. Additionally, ZBAs and planning boards may have time sensitive applications before them for work that may be considered essential.

On March 13, 2020, Governor Cuomo issued Executive Order No. 202.1 in an effort to address the conflict between the requirements of the Open Meetings Law and the Governor’s emergency orders limiting gatherings. Specifically, Executive Order No. 202.1 suspends Article 7 of the Public Officers Law (also known as the Open Meetings Law), to the extent necessary to permit any public body to meet and take such actions authorized by law without allowing the public to be physically present at the meeting. The order also authorizes public bodies to meet remotely by conference call or similar service. If a public body restricts in-person access to its meetings or conducts a meeting remotely by conference call or similar service, the public body must provide the public the ability to view or listen to such meetings and must record and later transcribe such meetings.

#### A Summary of Meeting Options During the COVID-19 Pandemic

As a result of Executive Order 202.1, public bodies, such as city councils, village boards of trustee, planning boards, and zoning boards of appeals now have three options for conducting meetings:

1. Members of the public body are physically present but the general public is not allowed to physically attend the meeting location; the public must be allowed to view or listen to such meetings and the public body must record and later transcribe such meetings (Note that while

Executive Order 202.15 prohibits in-person public hearings, it is silent with respect to in-person meetings);

2. Members of the public body meet via conference call or videoconference, with no in-person location; the public must be allowed to listen to or view such meetings and the public body must record and later transcribe such meetings; or
3. Members of the public body are either physically present or participating via videoconferencing and the general public is allowed to physically attend the meeting location(s) in person as is provided for under the Open Meetings Law. Note that it is not clear whether Governor Cuomo's Executive Order 202.10 prohibits meetings that allow in-person attendance. Multiple factors could determine whether in-person attendance at a meeting of a public body is necessary. For example, the ability of the public body to employ videoconference or teleconference technology to conduct their meetings and hearings, the public's access to the videoconference or teleconference technology to be used by the public body, the number of individuals that are expected to attend in person, the ability of the public body to hold in-person meetings while maintaining appropriate social distancing, and the subject matter of the meeting or hearing are all factors that local officials should consider when determining whether to hold in-person meetings. Public bodies are strongly encouraged to use the method authorized pursuant to Executive Order 202.1 if at all possible.

The Executive Order does not indicate by when the recordings must be transcribed. Local officials are encouraged to have the meetings transcribed within a reasonable time, given the circumstances.

Moreover, the public bodies must still prepare the meeting minutes within two weeks of the meeting, and within one week of an executive session.

The notice for these meetings must clearly state the specifics of the meeting:

1. The name of the public body meeting;
2. The date and time of the meeting;
3. Whether the meeting is being conducted in accordance with Executive Order 202.1;
4. The method that the public body will be using to conduct the meeting (e.g., videoconference or teleconference);
5. How the public can view or listen to the meeting;
6. If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting; and
7. If the meeting will have a public comment period or if a public hearing is being conducted, the noticed should indicate that individuals may submit comments via email or regular mail, whether such written comments must be received prior to the commencement of the meeting or whether the meeting/public hearing will be held open for a specific number of days for the receipt of such written comments, and that the written comments will be made part of the record.

Note that under normal Open Meetings Law rules, the public has a right to attend in person at any location where a videoconference meeting is taken place. However, if a public body is conducting a meeting pursuant to Executive Order 202.1, the public does not have a right to attend the meeting at the videoconferencing locations and the meeting notice does not need to include the location of the public members.

If a public body intends to conduct an executive session, it must still notice and enter into an open meeting before entering into the executive session, even if it is invoking Executive Order 202.1 to conduct the meeting via videoconference or teleconference.

Practical Considerations for Conducting Meetings Via Videoconference or Teleconference  
Local officials should consider implementing the following practices if they intend to conduct their meetings and public hearings via videoconference or teleconference:

- Practice with the technology before the actual meeting.
  - Make sure that every member can connect, share their screen (if necessary), and use their microphone and video camera;
  - Make sure that the meeting host knows how to mute individuals who are logging on to view the meeting or hearing;
  - Test the recording function so that the video/audio can be recorded and later transcribed in accordance with the requirements of Executive Order 202.1;
  - Practice having a mock public comment, including having people sign up to speak and queue to make their comments so that individuals are not talking over each other;
- Have people identify themselves before speaking so that it is clear who is saying what;
- Conduct roll call votes so that the clerk can accurately record how each member voted, as is required by the Freedom of Information Law.

What if the Public Body Cannot Conduct the Meeting In Accordance with the Governor's Executive Order 202.1?

If a public body lacks the technology to comply with the requirement of Executive Order 202.1, the public body should follow the guidance below.

On March 9, 2020, the New York State Committee on Open Government issued guidance regarding the "Open Meetings Law 'In-Person' Requirement and the Novel Coronavirus." The guidance acknowledges that there is no process in State law for local governments to waive the Open Meetings Law's "in-person" requirement for conducting meetings.

Furthermore, the Committee conceded that there is no jurisprudence regarding the ability of local governments to forego or waive the "in-person" meeting requirement. Nonetheless, the Committee opined that judicial review of alleged violations of the Open Meetings Law will likely take into consideration the public body's desire to protect the public health while continuing to perform necessary government functions. However, the Committee urges that if a public body determines that limiting public in-person access to an open meeting is necessary in response to the COVID-19 virus, that the public body limit discussions and actions taken to those matters for which harm would be caused by delay in order to mitigate potential impact of constituents.

Stated differently, while State law does not expressly allow public bodies to conduct a meeting without allowing the public to be actually present, if local officials deem that conducting in-person meetings would threaten public health, they should limit non-in-person meetings to discussions and actions of business which must be conducted to keep the local government operating and to protect the public's health, safety, and welfare. Moreover, public bodies should consider implementing technology that allows the public to observe such meetings via web-based video technology. Alternatively, public bodies may wish to consider minimizing the number of attendees at meetings or holding meetings in larger venues so that the recommended minimum social distancing of 6 feet may be maintained by members of the public who do attend the meeting. See below for more recommendations for conducting in-person meetings.

## Public Hearings During the COVID-19 Pandemic

What Is A Public Hearing?

Many statutes require the holding of a public hearing before a public body may take a specific action. Perhaps the most well-known public hearing requirement is for enacting local laws and adopting budgets. There are, however, many other instances when public hearings must be held, including but not limited to: establishing reserve funds, granting a franchise, adopting a comprehensive plan, changing an official map, reviewing site plans, and approving special use permits and subdivision proposals.

***Despite the myriad requirements to hold a public hearing, there is practically no statutory guidance and very little case law as to what a public hearing is or how to conduct one.*** Moreover, while there are many statutory references to public hearings, each reference must be read and interpreted individually to determine if there are special requirements for noticing and conducting that particular public hearing.

#### Why Are Public Hearings Required?

When attempting to divine the requirements for conducting public hearings, it is necessary to consider the two most important reasons for requiring public hearings:

- To insure that the public body or agency charged with taking action on a particular issue is fully aware of the public's sentiment about the proposed action;
- To give the public an opportunity to voice their concerns, opposition, or support for the proposed action and to bolster the public's confidence in the public body's decision; and
- For administrative proceedings such as applications for zoning variances or special use permits, to allow applicants to present their case for the requested relief and to create a record upon which the public body's determination must be based.

Stated differently, public hearing requirements have frequently been interpreted to mean that the public must be given a "meaningful opportunity" to be heard. It is with these overriding justifications in mind that public hearings must be addressed.

#### Public Hearings Compared To "Meetings"

Pursuant to the Public Officers Law, a meeting is the convening of a quorum of a public body for the purpose of conducting business. A public hearing is a meeting of the public body, at which the public must be allowed to comment on the matter that is the subject of the public hearing. This comment requirement differs from regular meetings of public bodies. Pursuant to the Open Meetings Law, the public must be allowed to attend "meetings" of public bodies but has no right to speak or comment at such "meetings," although any public body may allow the public to speak at its meetings.

Another distinction between meetings and public hearings is the notice requirement. The Open Meetings Law merely requires public bodies to notify the news media of a meeting. The Open Meetings Law does not require the publication of an official advertisement. By contrast, most public hearing requirements mandate the publication of an official legal advertisement in a local newspaper. Local officials must refer to each statute which mandates a public hearing for the specific notice requirements mandated.

#### Public Hearings During the COVID Pandemic

On April 9, 2020, Governor Cuomo issued Executive Order 202.15, which, in relevant part, postponed until June 1, 2020 at the earliest, all in-person public hearings scheduled for April and May of 2020. Local officials may continue to hold public hearings remotely through the use of telephone conference, video conference, and/or other similar service. To satisfy the requirements of both the statute that mandates that public hearing and Executive Order 202.15, the method of conducting the public hearing must allow the public to comment before the public board via video conference or teleconference.

Consequently, if a public body is unable to conduct its public hearings pursuant to Executive Order 202.1, then, pursuant to Executive Order 202.15, such public hearings are postponed until at least June 1, 2020.

Local officials are strongly encouraged to consult with their municipal attorney before undertaking any course of action that is not expressly set forth in State law or one of the Governor's Executive Orders.

## Considerations if a Public Body is Conducting an In-Person Meeting

1. Public bodies should encourage individuals to submit comments in writing or to participate via videoconference or teleconference as an alternative to in-person attendance or participation if that technology is available.
2. Public bodies should encourage individuals who are not feeling well, who are showing symptoms of COVID-19, or who are members of the population who are particularly susceptible to COVID-19 to not attend the meeting.
3. Public bodies should limit the number of individuals allowed to enter the meeting room in order to maximize social distance.
4. Meeting rooms should be configured so that chairs are spaced out to comply with recommended minimum social distances.
5. Meeting rooms should be thoroughly cleaned before and after each meeting and public hearing.

## Consult with Your Municipal Attorney

Unfortunately, State law does not provide a clear rule for holding open meetings and conducting public hearings during a pandemic. To a certain degree, conducting public business is antithetical to containing a pandemic and protecting the public's health. However, local officials have to do what is necessary to make sure that the essential functions of local government continue, particularly in times of crisis. City and village officials are strongly encouraged to consult with the attorney before taking action that is not clearly authorized under New York State law.

In addition, NYCOM members should not hesitate to email or call the NYCOM offices if they have any questions about holding meetings or conducting public hearings during this pandemic.

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<sup>1</sup> Public Officers Law § 102(2).

<sup>2</sup> N.Y. St. Comm. Open Gov't. OML-AO-3026.

<sup>3</sup> N.Y. St. Comm. Open Gov't. OML-AO-3048.

<sup>4</sup> N.Y. St. Comm. Open Gov't. OML-AO-2982.

<sup>5</sup> Orange Co. Publications v. City of Newburgh, 60 A.D.2d 409 (2d Dep't. 1978), aff'd. 45 N.Y.2d 947.

<sup>6</sup> N.Y. St. Comm. Open Gov't. OML-AO-4506.

<sup>7</sup> Kissel v. D'Amato, 97 Misc.2d 675 (Sup. Ct. Nassau Co. 1979), mod on other grounds, 72 A.D.2d 790 (2d Dep't. 1979).

<sup>8</sup> Public Officers Law § 104(1).

<sup>9</sup> Public Officers Law § 104(2).

## ZBA PANDEMIC PROCEDURES

1. Publish new guidelines on the Town Website regarding procedures for the general public and applicants.
2. Direct all applicants that their packet must contain a summary of the relief they are seeking and why it should be granted, including expert affidavits if deemed necessary or required as a matter of law. Cases already filed and in line would need to be augmented with the additional submissions.
3. Advise applicants that their application will not be deemed complete or heard unless this information is in the packet.- Minor residential applications could be triaged to determine if added info is needed. If so, a letter would be sent but more likely than not it would be uploaded to the Cloud.
4. The packet for each application would then be uploaded to the Cloud ten days before the hearing - this would be accessible to both Board Members and the general public. Applicants or their counsel would have to do a mail notification to anyone within the Notice radius with an affidavit of service to the Board with written advice concerning these interim modified procedures.
5. The public would have ten days' time from the date of the additional mail Notice to submit written comments to the Board.
6. Upon receipt of the comments from the public the matter would be marked "fully submitted".
7. All comments from the public would be added to the record by adding them to the Cloud as well. If comments contained a question to be answered the applicant would be directed to do so by the board if appropriate to determine the application.
8. Once fully submitted the "hearing" would consist of a conference call or web conference with only Board Members and counsel on the line. No applicant or counsel and no general public. Both applicant and the public would of course have the right to listen.
9. The videographer would be stationed at Town Hall and would simply record the proceeding by dialing into the conference call and carrying the audio on speaker and making a video and audio recording with a sign: " ZBA HEARING 3/26/20" up on the dais.
10. Discussion among Board Members would be limited and a vote taken recorded by Mr Bennett as counsel.
11. Filing of decisions would be done in the ordinary course of business in the office of the Clerk and there will be no second vote on the verbiage of the decisions.
12. The ZBA Court reporter would create a transcript remotely from the broadcast

175 A.D.3d 547  
Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of Grace  
**PANGBOURNE**, et al., Appellants,  
v.  
Stephen **THOMSEN**, etc., et al., Respondents.

2016-07137

(Index No. 205/16)

Argued—January 4, 2019

August 21, 2019

### Synopsis

**Background:** Real estate developer commenced Article 78 proceeding challenging two determinations of the town board of zoning appeals denying their applications for height and coverage area variances. The Supreme Court, Nassau County, Randy Sue Marber, J., denied petition. Real estate developer appealed.

**[Holding:]** The Supreme Court, Appellate Division, held that failure of town board of zoning appeals to explicitly weigh statutory factors for granting area variance required the matter to be remitted.

Reversed and remitted.

### West Headnotes (5)

[1] **Zoning and Planning** ⇨ Right to variance or exception, and discretion

**Zoning and Planning** ⇨ Variances and exceptions in general

Local zoning boards have broad discretion in considering applications for area variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion.

[2] **Zoning and Planning** ⇨ Decisions of boards or officers in general

**Zoning and Planning** ⇨ Determination supported by evidence

Where a zoning board's determination is made after a public hearing, its determination should be upheld if it has a rational basis and is supported by evidence in the record.

[3] **Zoning and Planning** ⇨ Area variances in general

In determining whether to grant an area variance, a village zoning board must weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community. N.Y. Village Law § 7-712-b(3)(b).

[4] **Zoning and Planning** ⇨ Area variances in general

In making determination whether to grant an area variance, the village zoning board must consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance. N.Y. Village Law § 7-712-b(3)(b).

[5] **Zoning and Planning** ⇨ Directing further action by local authority

Failure of town board of zoning appeals to explicitly weigh statutory factors for granting area variance to real estate developer required the matter be remitted to board for new determinations of application of area variances; record did not reflect that town board weighed the benefit to real estate developer against the detriment to the health, safety, and welfare of the neighborhood by considering the statutory factors, and town board's determinations did not reflect that it considered whether there was no feasible method to achieve the benefit sought by real estate developer without height and coverage area variances. N.Y. Village Law § 7-712-b(3)(b).

\*81 In a proceeding pursuant to CPLR article 78, the petitioners appeal from a judgment of the Supreme Court, Nassau County (Randy Sue Marber, J.), dated May 25, 2016. The judgment, insofar as appealed from, denied those branches of the petition which were to review two determinations of the Incorporated Village of Manorhaven Board of Zoning Appeals, both dated December 11, 2015, which, after a hearing, denied the applications of the petitioner Ressa-Cibants for height and coverage area variances.

#### Attorneys and Law Firms

Forchelli Deegan Terrana LLP, Uniondale, N.Y. (Peter R. Mineo, Tara L. Sorensen, and Peter Basil Skelos), for appellants.

Leventhal, Mullaney & Blinkoff, LLP, Roslyn, N.Y. (Steven G. Leventhal of counsel), for respondents.

WILLIAM F. MASTRO, J.P., LEONARD B. AUSTIN, JEFFREY A. COHEN, JOSEPH J. MALTESE, JJ.

#### DECISION & ORDER

ORDERED that the judgment is reversed insofar as appealed from, on the law, without costs or disbursements, those branches of the petition which were to review the determinations of the Incorporated Village of Manorhaven Board of Zoning Appeals denying the applications of the petitioner Ressa-Cibants for height and coverage area variances are granted to the extent that those determinations

are annulled, and the matter is remitted to the Incorporated Village of Manorhaven Board of Zoning Appeals for new determinations of the applications of the petitioner Ressa-Cibants for height and coverage area variances.

The petitioner Grace **Pangbourne** agreed to sell a portion of her property to the petitioner Ressa-Cibants, a real estate development partnership, which owned property adjacent to **Pangbourne's** property. Ressa-Cibants intended to demolish the one-family dwelling on its property and replace it with two new two-family dwellings. In August 2015, Ressa-Cibants applied to the Incorporated Village of Manorhaven Board of Zoning Appeals (hereinafter the Board) for height and coverage area variances to allow the construction of the new houses, and **Pangbourne** applied for a right-side yard variance to allow her to maintain her existing two-family dwelling on a reduced lot.

\*82 In three determinations, all dated December 11, 2015, the Board denied the applications. Thereafter, **Pangbourne** and Ressa-Cibants commenced this CPLR article 78 proceeding to review the determinations. In a judgment dated May 25, 2016, the Supreme Court denied those branches of the petition which were to annul the determinations denying Ressa-Cibants's applications for height and coverage area variances. The court granted that branch of the petition which was to annul the determination denying **Pangbourne's** application for a right-side yard variance and remitted the matter to the Board for the issuance of the right-side yard variance requested by **Pangbourne**. **Pangbourne** and Ressa-Cibants appeal.

[1] [2] Local zoning boards have broad discretion in considering applications for area variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion (*see Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 774 N.E.2d 732; *Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*, 68 A.D.3d 62, 67, 886 N.Y.S.2d 442; *Matter of Hannett v. Scheyer*, 37 A.D.3d 603, 604, 830 N.Y.S.2d 292). Where a zoning board's determination is made after a public hearing, its determination should be upheld if it has a rational basis and is supported by evidence in the record (*see Matter of Sclafani v. Rodgers*, 161 A.D.3d 1084, 1085, 77 N.Y.S.3d 703; *see also Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 384 n 2, 633 N.Y.S.2d 259, 657 N.E.2d 254).

[3] [4] In determining whether to grant an area variance, a village zoning board must weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community (see Village Law § 7-712-b[3] [b]; *Matter of Sclafani v. Rodgers*, 161 A.D.3d at 1085, 77 N.Y.S.3d 703; *Matter of Conway v. Van Loan*, 152 A.D.3d 768, 769, 58 N.Y.S.3d 598; *Matter of Nataro v. DeChance*, 149 A.D.3d 1081, 1082, 53 N.Y.S.3d 156). In making that determination, the board must consider: “(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance” (Village Law § 7-712-b[3][b]; see *Matter of Colin Realty Co., LLC v. Town of N. Hempstead*, 24 N.Y.3d 96, 103, 996 N.Y.S.2d 559, 21 N.E.3d 188; *Matter of Wambold v. Village of Southampton Zoning Bd. of Appeals*, 140 A.D.3d 891, 892–893, 32 N.Y.S.3d 628; *Matter of Kaufman v.*

*Incorporated Vil. of Kings Point*, 52 A.D.3d 604, 608, 860 N.Y.S.2d 573).

[5] Here, the record does not reflect that the Board weighed the benefit to Ressa–Cibants against the detriment to the health, safety, and welfare of the neighborhood by considering the five factors enumerated in the Village Law § 7-712-b(3)(b) (see *Matter of Kaufman v. Incorporated Vil. of Kings Point*, 52 A.D.3d at 608–609, 860 N.Y.S.2d 573; *Matter of Hannett v. Scheyer*, 37 A.D.3d at 605, 830 N.Y.S.2d 292). In particular, the Board’s determinations do not reflect that the Board considered whether there was no feasible \*83 method to achieve the benefit sought by Ressa–Cibants without height and coverage area variances. Accordingly, we annul the determinations denying Ressa–Cibants’s applications and remit the matter to the Board for new determinations (see *Matter of Hannett v. Scheyer*, 37 A.D.3d 603, 830 N.Y.S.2d 292).

MASTRO, J.P., AUSTIN, COHEN and MALTESE, JJ., concur.

#### All Citations

175 A.D.3d 547, 107 N.Y.S.3d 80, 2019 N.Y. Slip Op. 06159

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N.Y. Town Law § 267-b(3)(b); N.Y. General City Law § 81-b(4)(b).

168 A.D.3d 943  
Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of Osia  
MENGISOPOLOUS, Respondent,  
v.  
**BOARD OF ZONING APPEALS OF**  
the **CITY OF GLEN COVE**, Appellant.

2016-09327

|  
Index No. 1427/16

|  
Argued—September 13, 2018

|  
January 23, 2019

### Synopsis

**Background:** Petitioner brought article 78 proceeding seeking to annul determination of **city's board of zoning appeals**, which denied the petitioner's application for area variances to convert her one-family home into two-family home. The Supreme Court, Nassau County, George R. Peck, J., granted the petition, annulled the determination, and remitted the matter to the **board**. **Board** appealed.

**[Holding:]** The Supreme Court, Appellate Division, held that **board** failed to meaningfully consider statutory factors before denying petitioner's application, and thus, reconsideration of the application by the **board** was warranted.

Affirmed.

### West Headnotes (2)

**[1] Zoning and Planning** ➡ Area variances in general

In determining whether to grant an application for an area variance, a **zoning board** must engage in a balancing test weighing the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community by such grant.

**[2] Zoning and Planning** ➡ Directing further action by local authority

**City's board of zoning appeals** failed to meaningfully consider statutory factors before denying petitioner's application for area variances to convert her one-family home into two-family home, and thus, reconsideration of the application by the **board** was warranted; while the proposed variances were clearly substantial and the alleged difficulty was self-created, **board** failed to cite to particular evidence as to whether granting the variances would have undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in detriment to the health, safety, and welfare of the neighborhood or community. N.Y. Town Law § 267-b(3)(b); N.Y. General City Law § 81-b(4)(b).

In a proceeding pursuant to CPLR article 78 to annul a determination of the **Board of Zoning Appeals of the City of Glen Cove** dated January 27, 2016, which, after a hearing, denied the petitioner's application for area variances, the **Board of Zoning Appeals of the City of Glen Cove** appeals from a judgment of the Supreme Court, Nassau County (George R. Peck, J.), dated August 3, 2016. The judgment granted the petition, annulled the determination, and remitted the matter to the **Board of Zoning Appeals of the City of Glen Cove** for reconsideration of the petitioner's application for area variances.

### Attorneys and Law Firms

Chase, Rathkopf & Chase, LLP, Glen Cove, N.Y. (Daren A. Rathkopf of counsel), for appellant.

Sahn Ward Coschignano, PLLC, Uniondale, N.Y. (Christian Browne and Nicholas Cappadora of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., CHERYL E. CHAMBERS,  
LEONARD B. AUSTIN, JEFFREY A. COHEN, JJ.

**\*\*349 DECISION & ORDER**

**\*944** ORDERED that the judgment is affirmed, with costs.

The petitioner lives in the City of Glen Cove in the R-4 zoning district, a neighborhood zoned for one-family and two-family residences (see Code of the City of Glen Cove § 280-59[A]). Most of the houses in the neighborhood, including the petitioner's house, were built before the enactment of the Code of the City of Glen Cove in 1920 and are located on lots that do not comply with the current zoning laws. The petitioner applied for five area variances to convert her one-family home into a two-family home. After a hearing, in a determination dated January 27, 2016, the Board of Zoning Appeals of the City of Glen Cove (hereinafter the Board) denied the application. The petitioner commenced this proceeding pursuant to CPLR article 78 to annul the Board's determination. The Supreme Court granted the petition, annulled the determination, and remitted the matter to the Board for reconsideration of the petitioner's application for area variances. The Board appeals.

[1] In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing "the benefit to the applicant if the variance is granted ... against the detriment to the health, safety and welfare of the neighborhood or community by such grant" (General City Law § 81-b[4][b]; see Town Law § 267-b[3][b]; *Matter of Colin Realty Co., LLC v. Town of N. Hempstead*, 24 N.Y.3d 96, 103, 996 N.Y.S.2d 559, 21 N.E.3d 188; *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 612, 781 N.Y.S.2d 234, 814 N.E.2d 404; *Matter of Steiert Enters., Inc. v. City of Glen Cove*, 90 A.D.3d 764, 766, 934 N.Y.S.2d 475; *Matter of Goldberg v. Zoning Bd. of Appeals of City of Long Beach*, 79 A.D.3d 874, 876, 912 N.Y.S.2d 668). The zoning board must also consider: "(i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (ii) whether the benefit sought by the applicant can be achieved by some method feasible for the

applicant to pursue, other than an area variance; (iii) whether the requested area variance is substantial; (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (v) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude \*\*350 the granting of the area variance" (General City Law § 81-b[4][b]; see Town Law § 267-b[3][b]; *Matter of Steiert Enters., Inc. v. City of Glen Cove*, 90 A.D.3d at 766-767, 934 N.Y.S.2d 475; *Matter of Monroe Beach, Inc. v. Zoning Bd. of Appeals of City of Long Beach, N.Y.*, 71 A.D.3d 1150, 1150-1151, 898 N.Y.S.2d 194).

**\*945** [2] We agree with the Supreme Court that, although the Board engaged in the required balancing test, the Board failed to meaningfully consider the relevant statutory factors. While the proposed variances were clearly substantial and the alleged difficulty was self-created, the Board's failure to cite to particular evidence as to whether granting the variances would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community requires reconsideration of the application, weighing all of these factors (see e.g. *Matter of Sclafani v. Rodgers*, 161 A.D.3d 1084, 1086, 77 N.Y.S.3d 703; *Matter of Quintana v. Board of Zoning Appeals of Inc. Vil. of Muttontown*, 120 A.D.3d 1248, 1249, 992 N.Y.S.2d 332).

Accordingly, we agree with the Supreme Court's determination granting the petition, annulling the Board's determination, and remitting the matter to the Board for reconsideration of the petitioner's application.

LEVENTHAL, J.P., CHAMBERS, AUSTIN and COHEN, JJ., concur.

**All Citations**

168 A.D.3d 943, 92 N.Y.S.3d 348, 2019 N.Y. Slip Op. 00440

174 A.D.3d 901  
Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of Ann L. NOWAK, Appellant,

v.

**TOWN OF SOUTHAMPTON**, et al., Respondents.

2017-04242

|  
Index No. 376/16

|  
Submitted - March 28, 2019

|  
July 31, 2019

### Synopsis

**Background:** Property owner brought article 78 proceeding challenging grant of area variance to merge landlocked lots adjacent to the owner's property in order to construct a single-family dwelling, by town zoning board of appeals. The Supreme Court, Suffolk County, Joseph C. Pastoressa, J., denied the owner's petition and dismissed the proceeding. Property owner appealed

**[Holding:]** The Supreme Court, Appellate Division held that benefit to applicant for area variance outweighed any detriment to health, safety, and welfare of surrounding neighborhood and community.

Affirmed.

### West Headnotes (4)

- [1] **Zoning and Planning** ⇌ Decisions of boards or officers in general  
The general rule is that a determination of a zoning board of appeals should not be set aside unless it is illegal, arbitrary and capricious, or an abuse of discretion.

- [2] **Zoning and Planning** ⇌ Construction by board or agency  
A zoning board's interpretation of its zoning code is entitled to great deference.

- [3] **Zoning and Planning** ⇌ Construction by board or agency  
Where the issue involves pure legal interpretation of statutory terms, deference to zoning board's interpretation of its zoning code is not required.

- [4] **Zoning and Planning** ⇌ Area variances in general  
Benefit to applicant for area variance, to combine two lots and construct a single-family dwelling, outweighed any detriment to health, safety, and welfare of surrounding neighborhood and community, even though the combined lots would remain nonconforming in lot area and width for a single family dwelling, where there was no indication that the requested relief would produce a detrimental effect on the environment or neighborhood health and safety. N.Y. Town Law § 267-b(3)(b).

### Attorneys and Law Firms

Joseph Lombardo, Water Mill, NY, for appellant.

James M. Burke, Town Attorney, Southampton, N.Y. (Kathryn V. Garvin of counsel), for respondents Town of Southampton and Town of Southampton Zoning Board of Appeals.

O'Shea, Marcincuk & Bruyn, LLP, Southampton, N.Y. (Robert E. Marcincuk of counsel), for respondents Insource East Properties, Inc., Joseph Giannini, and Maureen Giannini (no brief filed).

REINALDO E. RIVERA, J.P., MARK C. DILLON, LEONARD B. AUSTIN, SYLVIA O. HINDS-RADIX, JJ.

**\*\*373 DECISION & ORDER**

**\*901** In a proceeding pursuant to CPLR article 78 to review a determination of the **Town of Southampton** Zoning Board of Appeals dated December 17, 2015, which, after a hearing, granted an application for an area variance, the petitioner appeals **\*902** from a judgment of the Supreme Court, Suffolk County (Joseph C. Pastorella, J.), dated February 2, 2017. The judgment denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed, with costs to the respondents **Town of Southampton** and **Town of Southampton** Zoning Board of Appeals, payable by the petitioner.

The respondent Insource East Properties, Inc. (hereinafter Insource), as contract vendee for two adjoining and undeveloped parcels of real property, identified as Lots 6 and 32, in the **Town of Southampton**, sought an area variance that would enable it to merge the parcels and construct one single-family dwelling thereon. The parcels are landlocked lots, which only had access to Old Sag Harbor Road by means of a 50-foot-wide deeded right-of-way, in existence since 1949, over neighboring properties, which was adjacent to Lot 32, the smaller of the two lots. The **Town's** building department had denied an application for a building permit to construct a single-family dwelling on the merged parcels since the parcels did not have proper road frontage. Despite noting that the “[s]eparately owned lots[s] [were] entitled to relief” pursuant to **Town of Southampton** Code (hereinafter **Town Code**) § 330–115(D), the **Town's** building department also requested proof of single and separate ownership for Lot 6.

**Town Code** § 330–82, which pertains to lot width, requires that a lot have a minimum road frontage of at least 40 feet at the street line. Insource requested an area variance to allow for a minimum road frontage of zero feet since, although the right-of-way provided access to Old Sag Harbor Road, it did not provide the parcels with “road frontage.”

The petitioner, a neighbor whose adjoining property is situated to the north of the subject parcels, opposed the application for an area variance on the grounds that the new construction would have a negative impact upon and interfere with her use and enjoyment of her own property and that

the hardship was self-created. The petitioner, noting that the combined area of the parcels, 66,537 square feet, would be less than the current zoning requirement minimum, which had been in effect for more than 20 years, also contended that the parcels were not eligible for a variance as separate nonconforming lots with respect to their lack of road frontage because the parcels had merged for zoning purposes.

Following a hearing at which the petitioner testified, in a determination dated December 17, 2015, the **Town of Southampton** Zoning Board of Appeals (hereinafter the ZBA) granted the application for an area variance to allow zero feet of road frontage **\*903** for the subject parcels. The petitioner thereafter commenced this proceeding **\*\*374** pursuant to CPLR article 78 to annul the determination. The Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

[1] [2] [3] “[T]he general rule is that a determination of a zoning board of appeals should not be set aside unless it is illegal, arbitrary and capricious, or an abuse of discretion” (*Matter of BBJ Assoc., LLC v. Zoning Bd. of Appeals of Town of Kent*, 65 A.D.3d 154, 160, 881 N.Y.S.2d 496; see *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 814 N.E.2d 404; *Matter of 278, LLC v. Zoning Bd. of Appeals of the Town of E. Hampton*, 159 A.D.3d 891, 892, 73 N.Y.S.3d 614). “A zoning board’s interpretation of its zoning code is entitled to great deference” (*Matter of BBJ Assoc., LLC v. Zoning Bd. of Appeals of Town of Kent*, 65 A.D.3d at 160, 881 N.Y.S.2d 496; see *Matter of White Plains Rural Cemetery Assn. v. City of White Plains*, 168 A.D.3d 1068, 1069, 93 N.Y.S.3d 103). “However, where the issue involves pure legal interpretation of statutory terms, deference is not required” (*Matter of BBJ Assoc., LLC v. Zoning Bd. of Appeals of Town of Kent*, 65 A.D.3d at 160, 881 N.Y.S.2d 496; see *Matter of New York Botanical Garden v. Board of Stds. & Appeals of City of N.Y.*, 91 N.Y.2d 413, 419, 671 N.Y.S.2d 423, 694 N.E.2d 424). Here, contrary to the petitioner’s contention that the parcels were not “lot[s]” as that term was defined by **Town Code** § 330–5, upon which building was allowed, the subject parcels were “lot[s]” which became nonconforming at differing points and thus eligible for the relief that the ZBA granted. The term “lot” is defined by the **Town Code** as “[a] parcel of land occupied or capable of being occupied by one or more principal buildings and accessory buildings or uses in accordance with the provisions of this chapter” (**Town Code** § 330–5). Further, a “nonconforming lot” is defined as “[a]ny lot lawfully existing in single and separate ownership

at the effective date of this chapter *or* any amendment thereto affecting such lot, which does not conform to the dimensional regulations of this chapter for the district in which it is situated. If such lot shall thereafter be held in the same ownership as an adjoining parcel, it shall lose its status as a nonconforming lot, except to the extent that the lot created by the merger of the two parcels shall remain nonconforming in the same respect” (Town Code § 330–5 [emphasis added] ).

[4] At the time of the area variance application, the parcels were located in the CR–200 residential zoning district, which requires a minimum lot area of 200,000 square feet and a lot width of 200 feet. In 1957, when the Town Code was enacted, the parcels were designated as being in a C residential zoning district, which required a minimum lot area of 15,000 square \*904 feet and a lot width of 100 feet to be conforming. Lot 32 has a lot area of approximately 12,495 square feet and, thus, was nonconforming upon the enactment of the Town’s zoning ordinance but had been a “lot” prior thereto (see *Matter of Louchheim v. Zoning Bd. of Appeals of Town of Southampton*, 44 A.D.3d 771, 773, 843 N.Y.S.2d 180). The zoning requirement was changed in 1972 so that the parcels were considered to be in an R–40 zoning district, requiring a minimum lot area of 40,000 square feet and a lot of width of 150 feet to be conforming. Lot 6 remained in conformance with the Town Code despite this change and would have been considered a “lot.” In 1983, the area was upzoned to its present CR–200 designation. As a result, Lot 6, which is comprised of 54,042 square feet, was rendered nonconforming at that time, thereby \*\*375 changing its status from a “lot” to a nonconforming lot.

Town Code § 330–115(D) provides, in pertinent part, that “[a] nonconforming lot separately owned and not adjoining any lot or land in the same ownership at the effective date of this chapter and not adjoining any lot or land in the same ownership at any time subsequent to such date may be used, or a building or structure may be erected on such lot for use ... provided that proof of such separate ownership is submitted in the form of an abstract of title showing the changes of title to said lot.” The ZBA rationally concluded based on the evidence submitted in support of the application that the parcels were held in single and separate ownership from 1954 through the present (see Town Code §§ 330–5, 330–115[D] ). In addition, the ZBA has the power to grant area variances to those parcels and is “specifically empowered to grant [a] variance” “modifying the yard requirements of a nonconforming lot which qualified under the terms of § 330–115D as to ownership, but where

compliance with the dimensional provisions of this chapter is not feasible” (Town Code § 330–167[C]; see Town Code § 330–166[C] ). Moreover, upon merger of the two parcels as proposed by Insource, the new merged parcel would remain nonconforming “in the same respect” in that it would continue to be nonconforming as to lot width and lot area (Town Code § 330–5).

Furthermore, the ZBA’s determination to grant the application for an area variance to allow zero feet of road frontage for the subject parcels had a rational basis. In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing “the benefit to the applicant if the variance is granted ... against the detriment to the health, safety and welfare of the neighborhood or \*905 community by such grant” (Town Law § 267–b(3)(b); see *Matter of Colin Realty Co., LLC v. Town of N. Hempstead*, 24 N.Y.3d 96, 103, 996 N.Y.S.2d 559, 21 N.E.3d 188; *Matter of Stengel v. Town of Poughkeepsie Zoning Bd. of Appeals*, 167 A.D.3d 754, 755, 90 N.Y.S.3d 205). A zoning board “shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance” (Town Law § 267–b[3][b] ).

Here, the ZBA engaged in the required balancing test and considered the relevant statutory factors (see *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d at 612–615, 781 N.Y.S.2d 234, 814 N.E.2d 404). Contrary to the petitioner’s contentions, the evidence before the ZBA supported its findings that the requested relief would not produce an undesirable change in the character of the neighborhood, have an adverse impact on the physical or environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community, even if the proposed variance was arguably substantial and the alleged difficulty was self-created (see *Matter of Stengel v. Town of Poughkeepsie Zoning Bd. of Appeals*, 167 A.D.3d at 756, 90 N.Y.S.3d 205; \*\*376 *Matter of Wantagh Woods Neighborhood Assn. v. Board of Zoning*

*Appeals of Town of Hempstead*, 208 A.D.2d 935, 936–937, 617 N.Y.S.2d 532). There was no evidence before the ZBA to show that granting the application would adversely affect environmental conditions (see *Matter of L & M Graziose, LLP v. City of Glen Cove Zoning Bd. of Appeals*, 127 A.D.3d 863, 865, 7 N.Y.S.3d 344). Moreover, the ZBA rationally concluded that the benefit sought, specifically a variance that would enable the construction of a single-family dwelling on a lot without road frontage, could not be achieved by a feasible alternative method which would not require an area variance (see *Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 929–930, 841 N.Y.S.2d 650).

Accordingly, we agree with the Supreme Court that the ZBA's determination granting the application for an area variance was not irrational or arbitrary and capricious.

In light of our determination, the petitioner's remaining \*906 contention need not be addressed.

RIVERA, J.P., DILLON, AUSTIN and HINDS–RADIX, JJ.,  
concur.

**All Citations**

174 A.D.3d 901, 106 N.Y.S.3d 372, 2019 N.Y. Slip Op. 05984

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168 A.D.3d 1068

Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of **WHITE  
PLAINS RURAL CEMETERY  
ASSOCIATION**, Respondent-Appellant,  
v.  
**CITY OF WHITE PLAINS**, Appellant-  
Respondent, et al., Respondents.

2017-04482

(Index No. 3003/16)

Argued—October 4, 2018

January 30, 2019

#### Synopsis

**Background:** City cemetery association brought an article 78 proceeding and an action for declaratory judgment seeking to annul a determination by the city zoning board of appeals declaring that proposed construction of a crematory on cemetery premises was not a part of the cemetery's existing legal nonconforming use and denying association's application in the alternative for a use variance to construct the crematory. The Supreme Court, Westchester County, Helen M. Blackwood, J., denied association's petition as to nonconforming use and granted association's petition as to the use variance. The zoning board appealed and cemetery association cross-appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] proposed crematory was not part of existing nonconforming cemetery use and, therefore, required a use variance, and

[2] zoning board's denial of cemetery association's use variance application was arbitrary and capricious.

Affirmed.

#### West Headnotes (9)

- [1] **Zoning and Planning** ⇌ Particular prior or nonconforming uses

Proposed crematory on cemetery premises was not part of existing nonconforming cemetery use and, therefore, required a use variance; city cemetery association relied on definition of "cemetery corporation" as found in not-for-profit corporation law, but zoning board was not required to import a definition from other statutes or sources having purposes different from zoning concerns, and accordingly board's decision to rely on a narrower definition of the terms "cemetery" and "crematory" was neither irrational nor unreasonable. N.Y. Not-for-Profit Corp. Law § 1502(a).

- [2] **Zoning and Planning** ⇌ Construction by board or agency

Great deference is accorded to a board's interpretation of a zoning ordinance, and courts will uphold its reasonable construction of a term that is not otherwise defined in the zoning code.

1 Cases that cite this headnote

- [3] **Zoning and Planning** ⇌ Right to variance or exception, and discretion

**Zoning and Planning** ⇌ Variances and exceptions in general

Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion.

- [4] **Zoning and Planning** ⇌ Decisions of boards or officers in general

The rationale for the rule that judicial review of decisions by local zoning boards is limited to whether the action taken by the board was illegal, arbitrary, or an abuse of discretion is that

local officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community.

[5] **Zoning and Planning** ⇌ Decisions of boards or officers in general

A zoning board's determination will generally be set aside only if the zoning board acted illegally, arbitrarily, abused its discretion, or succumbed to generalized community opposition.

1 Cases that cite this headnote

[6] **Zoning and Planning** ⇌ Decisions of boards or officers in general

Determinations by local zoning boards will be sustained if they have a rational basis in the record.

[7] **Zoning and Planning** ⇌ What constitutes in general

To qualify for a use variance premised upon unnecessary hardship there must be a showing that (1) the property cannot yield a reasonable return if used only for permitted purposes as currently zoned, (2) the hardship resulted from unique characteristics of the property, (3) the proposed use would not alter the character of the neighborhood, and (4) the alleged hardship was not self-created. N.Y. General City Law § 81-b(3)(b).

[8] **Zoning and Planning** ⇌ Mortuaries, cemeteries, and mausoleums

City zoning board's denial of cemetery association's application, which satisfied all statutory criteria, seeking a use variance to construct a crematory on cemetery premises was arbitrary and capricious; cemetery association submitted financial analyst's projections and profit and loss statements demonstrating that it had operated at a loss for five-year period preceding filing of its application, un rebutted evidence demonstrated that crematory would

be shielded from view, odorless, and would not impact air quality or historical resources, and board's concerns that surrounding home values would decrease and that cemetery association would build additional crematoriums on cemetery premises were predicated on speculation and appeared to be the product of generalized community opposition. N.Y. Not-for-Profit Corp. Law § 1507(a); N.Y. General City Law § 81-b(3)(b).

[9] **Zoning and Planning** ⇌ Profit or disadvantage; financial considerations

A landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses.

**Attorneys and Law Firms**

**\*\*105** John G. Callahan, Corporation Counsel, **White Plains**, N.Y. (Doreen Lusita Rich of counsel), for appellant-respondent.

McCullough, Goldberger & Staudt, LLP, **White Plains**, N.Y. (Patricia Wetmore Gurahian of counsel), for respondent-appellant.

MARK C. DILLON, J.P., BETSY BARROS, ANGELA G. IANNACCI, LINDA CHRISTOPHER, JJ.

**DECISION & ORDER**

**\*1068** In a hybrid proceeding pursuant to CPLR article 78 and action for a declaratory judgment, the **City of White Plains** appeals, and the petitioner cross-appeals, from a judgment of the Supreme Court, Westchester County (Helen M. Blackwood, J.), dated March 15, 2017. The judgment, insofar as appealed from, granted those branches of the petition which were to annul so much of a determination of the Zoning Board of Appeals of the **City of White Plains** dated November 2, 2016, as denied so much of the petitioner's application as sought a use variance to construct a crematory on premises the petitioner uses as a cemetery and remitted the matter to the Zoning Board of Appeals of the **City of White**

**Plains** with a direction to, in effect, grant the use variance and issue a building permit. The judgment, insofar as cross-appealed from, in effect, declared that the proposed crematory is not a part of the existing nonconforming **cemetery** use and, therefore, requires a use variance.

ORDERED that the judgment is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

In March 2016, the **White Plains Rural Cemetery Association**, a nonprofit public **cemetery** (hereinafter the **Cemetery**), applied to the Zoning Board of Appeals of the **City of White Plains** (hereinafter the Board) seeking an interpretation that a crematory the **Cemetery** proposed to construct on premises the **Cemetery** uses as a **cemetery** is a permitted use under the **cemetery's** legal nonconforming use. In the alternative, the **\*1069 Cemetery** requested a use variance for the crematory. On November 3, 2016, after a hearing, the Board denied the application. Thereafter, the **Cemetery** commenced this hybrid proceeding pursuant to CPLR article 78 to review the determination and action for a judgment declaring, in effect, that the proposed crematory is a part of the existing nonconforming **cemetery** use. The Supreme Court denied those branches of the petition which were to annul the Board's interpretation that the proposed crematory is not a part of the existing nonconforming **cemetery** use, in effect, declared that the proposed crematory is not a part of the existing nonconforming **cemetery** use and, therefore, requires a use variance, and granted those branches of the petition which were to annul so much of the determination as denied so much of the application as sought a use variance. The Board appeals and the **Cemetery** cross-appeals.

[1] [2] Great deference is accorded to a board's interpretation of a zoning ordinance (see **\*106 Appelbaum v. Deutsch**, 66 N.Y.2d 975, 977–978, 499 N.Y.S.2d 373, 489 N.E.2d 1275; *Matter of Witkovich v. Zoning Bd. of Appeals of Town of Yorktown*, 133 A.D.3d 679, 680, 19 N.Y.S.3d 327), and courts will uphold its reasonable construction of a term that is not otherwise defined in the zoning code (see *Appelbaum v. Deutsch*, 66 N.Y.2d at 977–978, 499 N.Y.S.2d 373, 489 N.E.2d 1275). Here, the **Cemetery** relies on the definition of “**cemetery corporation**” as found in Not-For-Profit Corporation Law § 1502(a), to support its contention that the Board could not rationally have interpreted a crematory to be separate and distinct from **cemetery** use. However, the Board was not required to import a definition from other statutes or sources having purposes different from

zoning concerns (see *Appelbaum v. Deutsch*, 66 N.Y.2d at 978, 499 N.Y.S.2d 373, 489 N.E.2d 1275). Accordingly, the Board's decision to rely on a narrower definition of the term **cemetery** and crematory, such as are defined in the Mirriam-Webster dictionary, was neither irrational or unreasonable (see *id.* at 977, 499 N.Y.S.2d 373, 489 N.E.2d 1275; *Matter of Oakwood Cemetery v. Village/Town of Mt. Kisco*, 115 A.D.3d 749, 751–752, 981 N.Y.S.2d 786). Thus, we agree with the Supreme Court's declaration that the proposed crematory is not a part of the existing nonconforming **cemetery** use and, therefore, requires a variance.

[3] [4] [5] [6] “ ‘Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion’ ” (*Matter of Daneri v. Zoning Bd. of Appeals of the Town of Southold*, 98 A.D.3d 508, 509, 949 N.Y.S.2d 180, quoting *Matter of Matejko v. Board of Zoning Appeals of Town of Brookhaven*, 77 A.D.3d 949, 949, 910 N.Y.S.2d 123; see **\*1070 Matter of Borrok v. Town of Southampton**, 130 A.D.3d 1024, 1024, 14 N.Y.S.3d 471). The rationale for this rule is that “ ‘[l]ocal officials, generally, possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community’ ” (*Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 814 N.E.2d 404, quoting *Matter of Cowan v. Kern*, 41 N.Y.2d 591, 599, 394 N.Y.S.2d 579, 363 N.E.2d 305). Therefore, a zoning board's determination will generally be set aside “only if the zoning board acted illegally, arbitrarily, abused its discretion, or succumbed to generalized community opposition” (*Matter of DAG Laundry Corp. v. Board of Zoning Appeals of Town of N. Hempstead*, 98 A.D.3d 740, 950 N.Y.S.2d 389). The determinations will be sustained if they have a rational basis in the record (see *Edwards v. Davison*, 94 A.D.3d 883, 941 N.Y.S.2d 873).

[7] “To qualify for a use variance premised upon unnecessary hardship there must be a showing that (1) the property cannot yield a reasonable return if used only for permitted purposes as currently zoned, (2) the hardship resulted from unique characteristics of the property, (3) the proposed use would not alter the character of the neighborhood, and (4) the alleged hardship was not self-created” (*Matter of Westbury Laundromat, Inc. v. Mammina*, 62 A.D.3d 888, 891, 879 N.Y.S.2d 188[internal quotation marks omitted]; see General City Law § 81–b[3][b] ).

[8] [9] With regard to the first element, “[i]t is well settled that ‘a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses’ ” ( \*\*107 *Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 287 A.D.2d 453, 456, 731 N.Y.S.2d 54, quoting *Matter of Village Bd. of Vil. of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 256, 440 N.Y.S.2d 908, 423 N.E.2d 385). Contrary to the Board's determination, the Cemetery submitted evidence consisting of projections from a financial analyst and profit and loss statements which demonstrated that it had operated at a loss for the five-year period preceding the filing of its application. In finding that this evidence was contradictory and conflicted with a 2014 tax document indicating that the Cemetery had a positive income that year, the Board failed to differentiate investment income accrued in the Cemetery's statutorily required permanent maintenance fund (see Not-for-Profit Corporation Law § 1507[a] ) from the net losses the Cemetery incurred as a result of its decline in revenue. As such, there was no rational basis for the Board's finding that the Cemetery was not experiencing a financial hardship.

As to the third element, the Board improperly determined that the 1,800-square-foot crematory would alter the essential \*1071 character of the neighborhood. The un rebutted evidence demonstrated that the crematory would be shielded

from view, would be odorless and not emit visible smoke, and had passed all necessary emissions and air quality testing. Other evidence indicated that the structure would not have an impact on any nearby historical resources and the crematory was not visible from the nearest residence, which is 400 feet away and across a major interstate highway. The Board's other concerns that surrounding home values would decrease and that granting the variance would allow for additional crematoriums to be constructed on the subject property are predicated on nothing more than speculation and appear to be the product of generalized community opposition (see *Matter of DAG Laundry Corp. v. Board of Zoning Appeals of Town of N. Hempstead*, 98 A.D.3d 740, 950 N.Y.S.2d 389).

It is undisputed that the Cemetery satisfied the remaining statutory criteria for the grant of a use variance (see General City Law § 81-b[3][b] ). Therefore, we agree with the Supreme Court's determination annulling the Board's denial of so much of the petitioner's application as sought a use variance on the ground that it was arbitrary and capricious.

DILLON, J.P., BARROS, IANNACCI and CHRISTOPHER, JJ., concur.

#### All Citations

168 A.D.3d 1068, 93 N.Y.S.3d 103, 2019 N.Y. Slip Op. 00606

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179 A.D.3d 1058  
Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of Lisa **CRADIT**, appellant,  
v.  
**SOUTHOLD TOWN ZONING**  
**BOARD OF APPEALS**, respondent.

2017-04066  
|  
(Index No. 7056/16)  
|  
Argued—September 3, 2019  
|  
January 29, 2020

**Synopsis**

**Background:** Landowner brought petition pursuant to article 78 and action for declaratory relief against city zoning board of appeals seeking review of board's determination, that landowner's use of property was not a legal nonconforming use. Board filed motion to dismiss for failure to state a cause of action. The Supreme Court, Suffolk County, Arthur G. Pitts, J., granted board's motion, and entered order denying landowner's petition. Landowner appealed.

**[Holding:]** The Supreme Court, Appellate Division, held that landowner's use of residence for rentals on a short-term basis was not a legal nonconforming use.

Affirmed as modified.

West Headnotes (4)

- [1] **Zoning and Planning** ⇌ Construction by board or agency
- Zoning and Planning** ⇌ Decisions of boards or officers in general
- In an article 78 proceeding to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference, and judicial review is generally limited to

ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion. N.Y. CPLR § 7801 et seq.

- [2] **Zoning and Planning** ⇌ Legality or illegality of use
- A legal nonconforming use may not be established through the existing use of land that was commenced or maintained in violation of a prior zoning ordinance.

- [3] **Zoning and Planning** ⇌ Legality or illegality of use
- To establish a legal nonconforming use, a property owner must demonstrate that the allegedly preexisting use was legal prior to the enactment of the zoning ordinance that purportedly rendered it nonconforming.

- [4] **Zoning and Planning** ⇌ Legality or illegality of use
- Landowner's use of residence for rentals on a short-term basis prior to amendment to city zoning code prohibiting transient rental properties was not a legal nonconforming use on property, which was located in low-density residential zoning district for one-family dwellings; landowner was not using residence as a one-family dwelling, but rather, use was similar to hotel or motel use, which was never a permissible use in landowner's zoning district.

**Attorneys and Law Firms**

Salem M. Katsh, Orient, NY, for appellant.

Sinnreich Kosakoff & Messina, LLP, Central Islip, N.Y. (Vincent Messina and Lisa A. Perillo of counsel), for respondent.

RUTH C. BALKIN, J.P., CHERYL E. CHAMBERS, LEONARD B. AUSTIN, HECTOR D. LASALLE, JJ.

## DECISION &amp; ORDER

**\*1058** In a hybrid proceeding pursuant to CPLR article 78 to review **\*1059** a determination of the Southold Town Zoning Board of Appeals dated June 16, 2016, made after a hearing, that the petitioner/plaintiff's use of the subject property is not a legal nonconforming use, and an action for declaratory relief, the petitioner/plaintiff appeals from an order and judgment (one paper) of the Supreme Court, Suffolk County (Arthur G. Pitts, J.), dated January 30, 2017. **\*\*676** The order and judgment granted the respondent/defendant's motion pursuant to CPLR 7804(f) and 3211(a)(7) to dismiss the petition/complaint for failure to state a cause of action, denied the petition, and, in effect, dismissed the proceeding/action.

ORDERED that the order and judgment is modified, on the law, by deleting the provision thereof, in effect, dismissing the action, and adding thereto a provision declaring that the petitioner/plaintiff's use of the subject property is not a legal nonconforming use; as so modified, the order and judgment is affirmed, with costs payable to the defendant-respondent.

In 2006, the petitioner/plaintiff Lisa Cradit purchased certain real property located in an R-40 low-density residential zoning district in the Town of Southold. In 2014, Cradit began using the residence on the property for short-term rentals. In 2015, Southold amended its zoning code to prohibit "[t]ransient rental properties" in all districts (Southold Town Code §§ 280-4[B]; 280-111[J]). Subsequently, Cradit received a notice of violation which stated that on December 17, 2015, she had violated Southold Town Code §§ 280-4 and 280-111(J). Thereafter, Cradit sought a determination from the respondent/defendant, the Southold Town Zoning Board of Appeals (hereinafter the Board), that her use of the property for short-term rentals was a pre-existing and, therefore, legal nonconforming use. At a hearing, Cradit testified that, prior to the amendment of the zoning code, "ninety nine percent" of the rentals had been for seven nights or fewer, "with the majority of that being weekend interest only." Following the hearing, the Board found that Cradit's use of her property for short-term rentals was "similar to a hotel/motel use," which had never been permitted, rather than to the permitted use of a one-family dwelling. The Board concluded that Cradit had, therefore, not established that her use of her property for short-term rentals was a legal nonconforming use.

Cradit then commenced this hybrid CPLR article 78 proceeding and action for declaratory relief by notice of petition, summons, and petition/complaint. The Board moved pursuant to CPLR 7804(f) and 3211(a)(7) to dismiss the petition/complaint for failure to state a cause of action. The Board also contended **\*1060** that Cradit was not entitled to the relief that she sought in this proceeding/action. The Supreme Court granted the Board's motion to dismiss the petition/complaint, denied the petition, and, in effect, dismissed the proceeding/action. Cradit appeals.

[1] [2] [3] "In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, a zoning board's interpretation of its zoning ordinance is entitled to great deference, and judicial review is generally limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion" (*Matter of Bartolacci v. Village of Tarrytown Zoning Bd. of Appeals*, 144 A.D.3d 903, 904, 41 N.Y.S.3d 116 [internal quotation marks omitted]). "A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use" (*Matter of Sand Land Corp. v. Zoning Bd. of Appeals of Town of Southampton*, 137 A.D.3d 1289, 1291-1292, 28 N.Y.S.3d 405 [internal quotation marks omitted]; see *Matter of Abbatiello v. Town of N. Hempstead Bd. of Zoning Appeals*, 164 A.D.3d 785, 785, 84 N.Y.S.3d 250). "A nonconforming use may not be established through the existing use of land that was commenced or maintained in violation of a prior zoning ordinance" (*Matter of Tavano v. Zoning Bd. of Appeals of the Town of Patterson*, 149 A.D.3d 755, 756, 51 N.Y.S.3d 175; see **\*\*677** *Matter of Abbatiello v. Town of N. Hempstead Bd. of Zoning Appeals*, 164 A.D.3d at 786, 84 N.Y.S.3d 250). "Thus, to establish a legal nonconforming use, a property owner must demonstrate that the allegedly preexisting use was legal prior to the enactment of the zoning ordinance that purportedly rendered it nonconforming" (*Matter of Tavano v. Zoning Bd. of Appeals of the Town of Patterson*, 149 A.D.3d at 756, 51 N.Y.S.3d 175; see *Matter of Abbatiello v. Town of N. Hempstead Bd. of Zoning Appeals*, 164 A.D.3d at 786, 84 N.Y.S.3d 250).

[4] Here, we agree with the Board's determination that Cradit's use of her property was not a legal nonconforming use. Contrary to Cradit's argument, in renting out the residence on the property on a short-term basis, she was not using the residence as a one-family dwelling. A one-family dwelling is a building that contains a single dwelling unit (see Southold Town Code § 280-4[B]). Where property is

used as “a boarding- or rooming house, ... hotel, motel, inn, lodging or nursing or similar home or other similar structure[, it] shall not be deemed to constitute a ‘dwelling unit’ ” (*id.*). The Board correctly determined that **Cradit's** use of the residence for short-term rentals was “similar to a hotel/motel use,” which had never been a permissible use in her zoning district. Moreover, prior to the enactment of **Southold Town Code** §§ 280–4 and 280–111(J), **Southold Town Code** § 280–8(E) specifically provided that \*1061 “any use not permitted by this chapter shall be deemed prohibited.” Accordingly, because **Cradit** was using the property in violation of a prior zoning ordinance, she could not establish that her current use is a legal nonconforming use (*see Matter of Abbatiello v. Town of N. Hempstead Bd. of Zoning Appeals*, 164 A.D.3d at 786, 84 N.Y.S.3d 250).

**Cradit's** remaining contention is without merit.

Since this is, in part, a declaratory judgment action, the order and judgment should have included a provision declaring that **Cradit's** use of the subject property is not a legal nonconforming use (*see Lanza v. Wagner*, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670).

BALKIN, J.P., CHAMBERS, AUSTIN and LASALLE, JJ., concur.

#### **All Citations**

179 A.D.3d 1058, 117 N.Y.S.3d 675, 2020 N.Y. Slip Op. 00588

169 A.D.3d 678

Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of **HV DONUTS, LLC**, Appellant,

v.

**TOWN OF LAGRANGE ZONING  
BOARD OF APPEALS**, et al., Respondents.

2016-10184

(Index No. 1464/16)

Submitted - October 19, 2018

February 6, 2019

### Synopsis

**Background:** Donut shop located across the street from gas station and convenience store, which ceased operations after a gasoline spill to commence remediation efforts, but thereafter sought to re-open, brought an article 78 proceeding seeking review of Zoning Board of Appeals decision upholding building inspector's determination that property owner was eligible to invoke Zoning Law provision which allowed re-establishment of nonconforming uses after casualties. The Supreme Court, Dutchess County, James D. Pagones, J., denied petition to review, confirmed determination of the building inspector, and dismissed the proceeding. Donut shop appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] property owner was entitled to invoke prior nonconforming use exception to Zoning Law, and

[2] Zoning Law provision, which required an owner to obtain a building permit for restoration of buildings damaged by casualty within one year and to complete repairs within two years, did not apply to property owner's remediation efforts.

Affirmed.

### West Headnotes (4)

- [1] **Zoning and Planning** ➡ Decisions of boards or officers in general

A court may set aside the determination of a Zoning Board of Appeals only where the record reveals illegality, arbitrariness or abuse of discretion.

1 Cases that cite this headnote

- [2] **Zoning and Planning** ➡ Decisions of boards or officers in general

Where a Zoning Board of Appeal's determination has a rational basis in the record, a court may not substitute its own judgment, even where the evidence could support a different conclusion.

1 Cases that cite this headnote

- [3] **Zoning and Planning** ➡ Discontinuance or Abandonment

Property owner, who operated gas station and convenience store on property, which were nonconforming uses of the property, prior to petroleum spill, was entitled to invoke prior nonconforming use exception, which addressed re-establishment of nonconforming uses after casualties, to town zoning ordinance, which prohibited property owner from resuming nonconforming use, if nonconforming use was discontinued for a period of one year or more, where remediation of petroleum spill amounted to a continuation of the nonconforming use. **Town of LaGrange Zoning Law § 240-29.**

1 Cases that cite this headnote

- [4] **Zoning and Planning** ➡ Architectural and Structural Designs

Town Zoning Law, which required an owner to obtain a building permit for restoration of buildings damaged by casualty within one year and to complete repairs within two years, did not apply to property owner's remediation efforts following petroleum spills on property on which

owner operated a convenience store and gas station, where petroleum spills did not affect the convenience store building. **Town of LaGrange** Zoning Law § 240-29.

**\*\*413** In a proceeding pursuant to CPLR article 78, the petitioners appeal from a judgment of the Supreme Court, Dutchess County (James D. Pagonis, J.), dated September 16, 2016. The judgment denied a petition to review a determination of the **Town of LaGrange** Zoning Board of Appeals dated July 12, 2016, which, after a hearing, confirmed a September 22, 2015, determination of the building inspector, and dismissed the proceeding.

#### Attorneys and Law Firms

Teahan & Constantino LLP, Poughkeepsie, N.Y. (Richard I. Cantor of counsel), for appellant.

Van DeWater & Van DeWater, LLP, Poughkeepsie, N.Y. (Ronald C. Blass, Jr., of counsel), for respondent **Town of LaGrange** Zoning Board of Appeals.

Bleakley Platt & Schmidt, LLP, White Plains, N.Y. (Matthew G. Parisi and Susan E. Galvão of counsel), for respondent Leemilt's Petroleum, Inc.

ALAN D. SCHEINKMAN, P.J., JOHN M. LEVENTHAL, JOSEPH J. MALTESE, VALERIE BRATHWAITE NELSON, JJ.

#### **\*\*414** DECISION & ORDER

**\*678** ORDERED that the judgment is affirmed, with one bill of costs.

Leemilt's Petroleum, Inc. (hereinafter LPI), owned property upon which, until June 3, 2013, its tenant operated a gasoline filling station and convenience store (hereinafter the subject property). These were nonconforming uses under the Zoning Law of the **Town of LaGrange** (hereinafter the Zoning Law), but, pursuant to section 240-29(B) and (F)(4), the nonconforming uses were permitted provided they were not discontinued. The petitioner owned and operated a Dunkin **Donuts** franchise at a property across the street.

On June 4, 2013, a fuel delivery tanker truck delivering fuel hit a light pole and spilled approximately 3,000 gallons of gasoline on the subject property. Immediately after the spill, both the gas station and the convenience store at the subject property ceased operation and remediation efforts commenced. Restoration was completed in October 2014; however, when the gas pump system was tested in anticipation of reopening, LPI discovered a significant leak in the pipes between the underground storage tanks and the pumps. Remediation efforts again commenced in response to this second spill.

LPI sought approval to re-open the gas station from the building inspector for the **Town of LaGrange**. In addition, LPI sought a building permit to upgrade the convenience store building, which had not been damaged by the spill and remediation efforts. In a determination dated September 22, 2015, the **Town's** building inspector concluded that LPI was eligible to invoke section 240-29(E) of the Zoning Law, which addressed re-establishment of nonconforming uses after casualties, and granted LPI one year from the date of its letter to **\*679** re-establish the nonconforming use, subject to all permitting requirements.

The petitioner challenged the building inspector's determination before the **Town of LaGrange** Zoning Board of Appeals (hereinafter the ZBA), contending that LPI had discontinued its nonconforming use and that, pursuant to Zoning Law § 240-29(E) and (F), it could not re-establish that use. In a July 12, 2016, determination, the ZBA confirmed the building inspector's determination. The petitioner thereafter sought review of the ZBA's July 12, 2016, determination pursuant to CPLR article 78. The Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

[1] [2] A court may set aside the determination of a ZBA "only where the record reveals illegality, arbitrariness or abuse of discretion" (*Matter of Cowan v. Kern*, 41 N.Y.2d 591, 598, 394 N.Y.S.2d 579, 363 N.E.2d 305; see *Matter of Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 613, 781 N.Y.S.2d 234, 814 N.E.2d 404; *Matter of Corrales v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 164 A.D.3d 582, 585, 83 N.Y.S.3d 265; *Matter of Sclafani v. Rodgers*, 161 A.D.3d 1084, 1085, 77 N.Y.S.3d 703; *Matter of 278, LLC v. Zoning Bd. of Appeals of the Town of E. Hampton*, 159 A.D.3d 891, 892, 73 N.Y.S.3d 614). Thus, where a ZBA's determination has a rational basis in the record, a court may not substitute its own judgment, even where the evidence could support a different conclusion

(see \*\*415 *Matter of Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson*, 5 N.Y.3d 236, 241, 800 N.Y.S.2d 535, 833 N.E.2d 1210; *Matter of Mamaroneck Coastal Envt. Coalition, Inc. v. Board of Appeals of the Vil. of Mamaroneck*, 152 A.D.3d 771, 773, 59 N.Y.S.3d 118; *Matter of Conway v. Van Loan*, 152 A.D.3d 768, 769, 58 N.Y.S.3d 598).

[3] The Town's Zoning Law provides, inter alia, that if a property owner discontinues a nonconforming use of land for a period of one year or more, the owner may not thereafter resume the nonconforming use (see *Town of LaGrange Zoning Law* § 240–29[F][4]; see also *Jones v. Town of Carroll*, 15 N.Y.3d 139, 143, 905 N.Y.S.2d 551, 931 N.E.2d 535; *Glacial Aggregates LLC v. Town of Yorkshire*, 14 N.Y.3d 127, 135, 897 N.Y.S.2d 677, 924 N.E.2d 785; *People v. Miller*, 304 N.Y. 105, 107, 106 N.E.2d 34). Here, the ZBA's determination included a statement that there was “more to maintaining a gasoline filling station than pumping gas.” The ZBA rationally concluded that remediation of the petroleum spills amounted to a continuation of the nonconforming use and that the provisions of Zoning Law § 240–29(F)(4) regarding discontinuation were rationally applied (see *Matter of Piesco v. Hollihan*, 47 A.D.3d 938, 940, 849 N.Y.S.2d 671; *Greentree Realty, LLC v. Village of Croton-on-Hudson*, 46 A.D.3d 511, 513, 846 N.Y.S.2d 381).

[4] The ZBA also rationally concluded that because neither casualty \*680 affected the convenience store building, Zoning Law § 240–29(E), which requires an owner to obtain

a building permit for restoration of buildings damaged by casualty within one year and to complete repairs within two years, did not apply to LPI's remediation efforts. Because the ZBA's determinations involved interpretation of its own zoning ordinances and because its conclusions were supported by the record presented to it, we defer to its conclusions (see *Matter of Bray v. Town of Yorktown Zoning Bd. of Appeals*, 151 A.D.3d 720, 720–721, 56 N.Y.S.3d 246; *Matter of Bartolacci v. Village of Tarrytown Zoning Bd. of Appeals*, 144 A.D.3d 903, 904, 41 N.Y.S.3d 116; *Matter of Stone Indus., Inc. v. Zoning Bd. of Appeals of Town of Ramapo*, 128 A.D.3d 973, 974, 13 N.Y.S.3d 92).

The petitioner's remaining contentions are improperly raised for the first time on appeal (see *Matter of Klapak v. Blum*, 65 N.Y.2d 670, 672, 491 N.Y.S.2d 615, 481 N.E.2d 247; *Matter of Bray v. Town of Yorktown Zoning Bd. of Appeals*, 151 A.D.3d at 721, 56 N.Y.S.3d 246; *Matter of Kearney v. Village of Cold Spring Zoning Bd. of Appeals*, 83 A.D.3d 711, 713, 920 N.Y.S.2d 379; *Matter of Emrey Props., Inc. v. Baranello*, 76 A.D.3d 1064, 1067, 908 N.Y.S.2d 255).

SCHEINKMAN, P.J., LEVENTHAL, MALTESE and BRATHWAITE NELSON, JJ., concur.

#### All Citations

169 A.D.3d 678, 93 N.Y.S.3d 412, 2019 N.Y. Slip Op. 00874

177 A.D.3d 1331

Supreme Court, Appellate Division,  
Fourth Department, New York.

In the Matter of Susan DAVIS and  
Sandra Girage, Petitioners-Appellants,

v.

**ZONING BOARD OF APPEALS OF CITY  
OF BUFFALO**, Planning Board of **City of  
Buffalo**, and Affinity Elmwood Gateway  
Properties, LLC, Respondents-Respondents.

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18-01597

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Entered: November 8, 2019

### Synopsis

**Background:** Individuals commenced article 78 proceeding seeking to annul determinations of **city's zoning board of appeals** and planning board to grant variances, and site plan and minor subdivision approval, for mixed-use, multistory building construction project. The Supreme Court, Erie County, Timothy J. Walker, J., entered judgment denying and dismissing petition. Individuals **appealed**.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] notices of public hearings held by **zoning board of appeals** had been adequate;

[2] **zoning board of appeals** had provided adequate opportunity to members of public to express their opinions during those hearings;

[3] determination of **zoning board of appeals** to grant variances was proper; and

[4] planning board had complied with substantive requirements of State Environmental Quality Review Act (SEQRA).

Affirmed.

### West Headnotes (6)

[1] **Zoning and Planning** ⇌ Notice

Notices of public hearings held by **city's zoning board of appeals** on applications for variances for mixed-use, multistory building construction project were sufficient to fairly apprise public of variances sought, and thus were adequate notices, where notices listed dates and times of hearings, indicated that they were for variances or variance applications regarding construction of mixed use building at relevant property address, and listed website address, telephone number, and email address for public to obtain further information. N.Y. General City Law § 81-a(7).

[2] **Zoning and Planning** ⇌ Hearings in general

Restrictions imposed by **city's zoning board of appeals** in public hearings on applications for variances for mixed-use, multistory building construction project were reasonable in nature and allowed public opportunity to be heard, and thus **zoning board of appeals** provided adequate opportunity to members of public to express their opinions during hearings; because hearings were heavily attended, **zoning board of appeals** imposed three-minute time limit per speaker, and it closed one hearing before every member of public was able to speak, but **zoning board of appeals** indicated that it would accept all written comments. N.Y. General City Law § 81-a(7).

[3] **Zoning and Planning** ⇌ Residential uses in general

**Zoning and Planning** ⇌ Business, commercial, and industrial uses in general

Determination of **city's zoning board of appeals** to grant variances for mixed-use, multistory building construction project had rational basis, was supported by substantial evidence, and was not illegal, arbitrary, or abuse of discretion; **zoning board of appeals** rendered its determination after considering appropriate

factors and properly weighed benefit to applicant for variances against detriment to health, safety, and welfare of neighborhood or community if variances were granted. N.Y. General City Law § 81-b(4).

[4] **Zoning and Planning** ⇌ Right to variance or exception, and discretion

The determination whether to grant or deny an application for an area variance is committed to the broad discretion of the applicable local zoning board.

[5] **Environmental Law** ⇌ Land use in general

Determination of city's planning board, that mixed-use, multistory building construction project was in compliance with State Environmental Quality Review Act's (SEQRA) mandates and therefore site plan and minor subdivision approval for project would be granted, was not arbitrary, capricious, or unsupported by substantial evidence; board conducted lengthy, detailed review of project, including evaluation of potential impacts to historic resources, and provided reasoned elaboration for its determination, with board preparing final environmental impact statement and addressing concerns raised by State Office of Parks, Recreation, and Historic Preservation, but ultimately disagreeing with that agency and concluding that project would not have significant adverse impact on historic resources. N.Y. ECL § 8-0101 et seq.

[6] **Environmental Law** ⇌ Assessments and impact statements

Judicial review of an agency determination under the State Environmental Quality Review Act (SEQRA) is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination. N.Y. ECL § 8-0101 et seq.

**\*\*401 Appeal** from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 20, 2017 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the amended petition.

**Attorneys and Law Firms**

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (JESSICA M. LAZARIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ZONING BOARD OF APPEALS OF CITY OF BUFFALO AND PLANNING BOARD OF CITY OF BUFFALO.

BOND SCHOENECK & KING PLLC, BUFFALO (STEVEN J. RICCA OF COUNSEL), FOR RESPONDENT-RESPONDENT AFFINITY ELMWOOD GATEWAY PROPERTIES, LLC.

PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

**MEMORANDUM AND ORDER**

**\*1331** It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Respondent Affinity Elmwood Gateway Properties, LLC (Affinity) proposed to construct a mixed-use, four-story building at the corner of Elmwood Avenue and Forest Avenue in the City of Buffalo. The project called for the demolition of 14 existing structures within a district listed on the National Register of Historic Places. Respondent Zoning Board of Appeals of City of Buffalo (ZBA) granted eight variances for the project. Respondent Planning Board of City of Buffalo (Planning Board) was the lead agency for purposes of the State Environmental Quality Review Act (SEQRA) and, after determining that the project was in compliance with SEQRA's mandates, it granted site plan and minor subdivision approval for the project. Petitioners commenced this CPLR article 78 proceeding seeking to annul the determinations of the ZBA and the Planning Board. Supreme Court denied and dismissed the amended petition, and we now affirm.

[1] [2] Contrary to petitioners' contention, the notices of the public hearings held by the ZBA were adequate (*see* General City Law § 81-a [7]). The notices listed the dates and times of the hearings; indicated that they were for "variances" or "variance applications" regarding the construction of a "mixed use building" at the relevant property address; and listed a website address, telephone number, and email address for the public to obtain \*1332 further information. The notices were thus sufficient to "fairly apprise[ ] the public" of the variances sought by Affinity (*Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 678, 642 N.Y.S.2d 164, 664 N.E.2d 1226 [1996]; *see Dawley v. Town of Tyre*, 43 Misc.3d 1222(A), 2014 N.Y. Slip Op. 50752[U], \*5, 2014 WL 1910168 [Sup. Ct., Seneca County 2014]). Also contrary to petitioners' contention, the ZBA provided an adequate opportunity to members of the public to express their opinions during those hearings. Because the hearings were heavily attended, the ZBA imposed a three-minute time limit per speaker, and it closed one hearing before every member of the public was able to speak. Nevertheless, the ZBA indicated that it would accept all written comments. We conclude that those restrictions were reasonable in nature and allowed the public an opportunity to be heard (*see generally* § 81-a [7]).

\*\*402 [3] [4] Petitioners further contend that the ZBA did not comply with General City Law § 81-b (4) in granting the variances. "[T]he determination whether to grant or deny an application for an area variance is committed to the broad discretion of the applicable local zoning board" (*Matter of People, Inc. v. City of Tonawanda Zoning Bd. of Appeals*, 126 A.D.3d 1334, 1335, 6 N.Y.S.3d 817 [4th Dept. 2015]). Here, the ZBA's determination to grant the variances has a rational basis and is supported by substantial evidence, and it is not illegal, arbitrary, or an abuse of discretion (*see generally id.*). The ZBA "rendered its determination after considering the appropriate factors and properly weigh[ed] the benefit to [the applicant] against the detriment to the health, safety and welfare of the neighborhood or community if the variances were granted" (*Matter of DeGroote v. Town of Greece Bd. of Zoning Appeals*, 35 A.D.3d 1177, 1178, 825 N.Y.S.2d 878 [4th Dept. 2006]; *see* § 81-b [4][b]).

[5] [6] Petitioners next contend that the Planning Board did not comply with the substantive requirements of SEQRA inasmuch as it neither took the requisite hard look at identified historic resources as an area of environmental concern nor provided a reasoned elaboration for its determination. We reject that contention. It is well settled that "[j]udicial

review of an agency determination under SEQRA is limited to whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*Matter of Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 231-232, 851 N.Y.S.2d 76, 881 N.E.2d 172 [2007] [internal quotation marks omitted]; *see Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 494 N.E.2d 429 [1986]). The record establishes that the Planning Board complied with those requirements (*see* \*1333 *Matter of Eisenhower v. County of Jefferson*, 122 A.D.3d 1312, 1313, 996 N.Y.S.2d 441 [4th Dept. 2014]). The Planning Board initially issued a positive declaration pursuant to SEQRA inasmuch as the project "has the potential to result in a substantial impact on the neighborhood character." The Planning Board informed the New York State Office of Parks, Recreation and Historic Preservation (SHPO) of the project as an interested agency. SHPO responded and noted that the project involves, inter alia, the demolition of various structures, and it recommended that the "impacts to important historic resources be considered in your review." SHPO also subsequently responded that the project would "significantly and negatively alter[ ] the character of the surrounding historic districts." The Planning Board prepared a final environmental impact statement and addressed the concerns raised by SHPO, but ultimately disagreed with that agency and concluded that the demolition of the structures would not have a significant adverse impact on the historic resources on or adjacent to the site. The record reflects that the Planning Board conducted a lengthy and detailed review of the project, including its evaluation of the potential impacts to historic resources, and its written findings demonstrate that it provided a reasoned elaboration for its determination. Its determination must be upheld inasmuch as it is not arbitrary, capricious, or unsupported by substantial evidence (*see Jackson*, 67 N.Y.2d at 417, 503 N.Y.S.2d 298, 494 N.E.2d 429).

We have considered petitioners' remaining contentions and conclude that none warrants reversal or modification of the judgment.

#### All Citations

177 A.D.3d 1331, 112 N.Y.S.3d 399, 2019 N.Y. Slip Op. 08074

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174 A.D.3d 1304

Supreme Court, Appellate Division,  
Fourth Department, New York.

In the **Matter of the CAMPAIGN FOR  
BUFFALO HISTORY ARCHITECTURE**

**& CULTURE, INC.**, Derek Bateman and  
Lorna C. Hill, Petitioners-Appellants,

v.

**ZONING BOARD OF APPEALS OF CITY OF  
BUFFALO**, Planning Board of **City of Buffalo**,

Rachel Heckl, Individually and as Principal Member  
of 467 Richmond Avenue, LLC, and 467 Richmond  
Avenue, LLC, Respondents-Respondents.

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CA 18-01406

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Entered: July 5, 2019

**Synopsis**

**Background:** Local cultural organization sought review of decision by city zoning board of appeals granting two area variances and use variance allowing construction of three-storey building to contain arts center and multi-family housing. The Supreme Court, Erie County, Mark J. Grisanti, A.J., granted variance applicants' motion to dismiss. Cultural organization appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] cause of action for State Environmental Quality Review Act (SEQRA) violation accrued, and thirty-day limitations period for appeals from city decisions began to run, when board issued decision granting variances, and

[2] decision to grant variances was supported by detailed findings with respect to statutory factors.

Affirmed.

## West Headnotes (4)

- [1] **Environmental Law** ⇌ Accrual, computation, and tolling  
Cause of action for violation of State Environmental Quality Review Act (SEQRA) accrued, and thirty-day limitations period for appeals from city decisions began to run, when board of zoning appeals issued decision granting use variant and area variants allowing construction of three-story building for use as arts center and multi-family housing; board's decision committed board to a course of action which could affect the environment. N.Y. ECL § 8-0101 et seq.; N.Y. General City Law § 81-c(1).
- [2] **Zoning and Planning** ⇌ Findings, reasons, conclusions, minutes or records  
Decision by city zoning board of appeals to grant area and use variances for construction of building, which would be used as arts center and multi-family housing, was supported by detailed findings with respect to relevant factors in statute governing such variances, and, thus, was not illegal, arbitrary, or an abuse of discretion, even if substantial evidence in the record supported denial of the variances. N.Y. General City Law § 81-b(3) and (4).
- [3] **Zoning and Planning** ⇌ Right to variance or exception, and discretion  
**Zoning and Planning** ⇌ Variances and exceptions in general  
A zoning board of appeals is afforded broad discretion in determining whether to grant variances, and a court's review is limited to whether its determination was illegal, arbitrary, or an abuse of discretion.
- [4] **Zoning and Planning** ⇌ Substantial evidence in general

Where there is substantial evidence in the record to support the rationality of a determination by a **zoning board of appeals**, the determination should be affirmed upon judicial review.

**\*\*732 Appeal** from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 13, 2018 in a CPLR article 78 proceeding. The judgment dismissed the petition.

#### Attorneys and Law Firms

LIPPES & LIPPES, **BUFFALO** (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS–APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, **BUFFALO** (CARIN S. GORDON OF COUNSEL), FOR RESPONDENTS–RESPONDENTS **ZONING BOARD OF APPEALS OF CITY OF BUFFALO AND PLANNING BOARD OF CITY OF BUFFALO**.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, **BUFFALO** (MARK C. DAVIS OF COUNSEL), FOR RESPONDENTS–RESPONDENTS RACHEL HECKL, INDIVIDUALLY AND AS PRINCIPAL MEMBER OF 467 RICHMOND AVENUE, LLC, AND 467 RICHMOND AVENUE, LLC.

PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

#### MEMORANDUM AND ORDER

**\*1305** It is hereby ORDERED that the judgment so **appealed** from is unanimously affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of respondent **Zoning Board of Appeals of City of Buffalo** (ZBA) granting two area variances and a use variance to respondents Rachel Heckl, individually and as a principal member of 467 Richmond Avenue, LLC, and 467 Richmond Avenue, LLC (collectively, Heckl respondents), and to annul the determination of respondent Planning Board of **City of Buffalo** (Planning Board) approving the Heckl respondents' site plan. The project in question involves demolishing a residence and garage behind a former church building in a

residential neighborhood and constructing, in place of the garage, a three-story building that would house an art gallery on the first floor and eight apartments on the second and third floors. The Heckl respondents previously obtained approvals to renovate the former church building for use as a visual and performing arts center. Petitioners **appeal** from a judgment that granted the motion of the Heckl respondents to dismiss the petition against them and granted the motion of the ZBA and Planning Board for summary judgment dismissing the petition against them, thereby dismissing the petition in its entirety. We affirm.

[1] As a preliminary matter, we note that petitioners' claim that the ZBA failed to conduct the requisite review pursuant to the State Environmental Quality Review Act ( [SEQRA] ECL art 8] ) is untimely (*see* General City Law § 81–c[1]; *Matter of Cor Rte. 5 Co., LLC v. Village of Fayetteville*, 147 A.D.3d 1432, 1433–1434, 46 N.Y.S.3d 765 [4th Dept. 2017]; *see also* **\*733 Matter of Young v. Board of Trustees of Vil. of Blasdell**, 89 N.Y.2d 846, 849, 652 N.Y.S.2d 729, 675 N.E.2d 464 [1996]). The ZBA made its determination with respect to the subject variances on July 19, 2017 (*see Matter of 92 MM Motel, Inc. v. Zoning Bd. of Appeals of Town of Newburgh*, 90 A.D.3d 663, 663–664, 933 N.Y.S.2d 881 [2d Dept. 2011]; *see also Matter of Kennedy v. Zoning Bd. of Appeals of Vil. of Croton-on-Hudson*, 78 N.Y.2d 1083, 1084–1085, 578 N.Y.S.2d 120, 585 N.E.2d 369 [1991]), and that determination “committed the ZBA to a course of action which could affect the environment” (*Matter of Crepeau v. Zoning Bd. of Appeals of Vil. of Cambridge*, 195 A.D.2d 919, 921–922, 600 N.Y.S.2d 821 [3d Dept. 1993]; *see Cor Rte. 5 Co., LLC*, 147 A.D.3d at 1433–1434, 46 N.Y.S.3d 765). The petition was not filed, however, until November 22, 2017, months after the 30–day limitations period set forth **\*1306** in General City Law § 81–c(1) had expired. We therefore do not consider petitioners' contention regarding the ZBA's alleged noncompliance with SEQRA.

[2] [3] [4] Even assuming, arguendo, that petitioners' substantive contentions with respect to the variances granted by the ZBA are timely (*see generally Matter of County of Niagara v. Daines*, 79 A.D.3d 1702, 1704, 917 N.Y.S.2d 779 [4th Dept. 2010], *lv denied* 17 N.Y.3d 703, 2011 WL 2473241 [2011]), we conclude that they are without merit. The ZBA is afforded broad discretion in determining whether to grant variances, and our review is limited to whether its determination was illegal, arbitrary, or an abuse of discretion (*see Matter of Conway v. Town of Irondequoit Zoning Bd. of Appeals*, 38 A.D.3d 1279, 1280, 831 N.Y.S.2d 818 [4th Dept.

2007]). Where there is substantial evidence in the record to support the rationality of the ZBA's determination, the determination should be affirmed upon judicial review (see *Matter of Ifrah v. Utschig*, 98 N.Y.2d 304, 308, 746 N.Y.S.2d 667, 774 N.E.2d 732 [2002]; *Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 384 n 2, 633 N.Y.S.2d 259, 657 N.E.2d 254 [1995]; *Matter of Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals*, 147 A.D.3d 1427, 1428–1429, 46 N.Y.S.3d 725 [4th Dept. 2017]). Here, the ZBA properly took into account the relevant factors set forth in General City Law § 81–b(3) and (4) and made detailed findings with respect to those factors, and we conclude that its determination to grant the variances is not illegal, arbitrary, or an abuse of discretion (see *Conway*, 38 A.D.3d at 1280, 831 N.Y.S.2d 818). Although there may be substantial evidence in the record to support the rationality of a contrary determination, we note that we may not substitute our own judgment for that of the ZBA (see *id.*).

Contrary to petitioners' further contention, we conclude that the Planning Board's determination to issue a negative declaration pursuant to SEQRA is not in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion (see *Matter of Dunk v. City of Watertown*, 11 A.D.3d 1024, 1025–1026, 784

N.Y.S.2d 753 [4th Dept. 2004]; *Matter of Forman v. Trustees of State Univ. of N.Y.*, 303 A.D.2d 1019, 1020, 757 N.Y.S.2d 180 [4th Dept. 2003]; see also CPLR 7803[3]). Petitioners additionally contend that the Planning Board's determination to approve the site plan violated General City Law § 28–a(12) inasmuch as the site plan is inconsistent with the comprehensive plan adopted by the City of Buffalo in 2006. We reject that contention. Indeed, upon our review of the record, we conclude that the Planning Board's determination to approve the site plan is supported by substantial evidence and has a rational basis (see \*\*734 *Matter of Dietrich v. Planning Bd. of Town of W. Seneca*, 118 A.D.3d 1419, 1420–1421, 988 N.Y.S.2d 760 [4th Dept. 2014]; see generally \*1307 *Matter of Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 306 N.E.2d 155 [1973], *rearg. denied* 34 N.Y.2d 668, 355 N.Y.S.2d 1027, 311 N.E.2d 655 [1974]).

We have examined petitioners' remaining contentions and conclude that they lack merit.

#### All Citations

174 A.D.3d 1304, 105 N.Y.S.3d 731, 2019 N.Y. Slip Op. 05443



166 A.D.3d 985, 89 N.Y.S.3d  
208, 2018 N.Y. Slip Op. 08138

**\*\*1** In the Matter of **Rock of  
Salvation Church**, Appellant,

v

**Village of Sleepy Hollow  
Planning Board** et al., Respondents.  
139 Cortlandt Street, LLC,  
Intervenor Respondent-Respondent.

Supreme Court, Appellate Division,  
Second Department, New York  
2016-06415, 442/15  
November 28, **2018**

CITE TITLE AS: Matter of **Rock  
of Salvation Church v Village  
of Sleepy Hollow Planning Bd.**

#### HEADNOTE

Municipal Corporations

Planning

Site **Plan** Approval—Rational Basis

George W. Echevarria, Ossining, NY, for appellant.  
McCarthy Fingar LLP, White Plains, NY (Anna L. Georgiou  
of counsel), for respondents-respondents **Village of Sleepy  
Hollow Planning Board** and **Village of Sleepy Hollow**.  
Daniel J. Pennessi, Bronxville, NY, for intervenor respondent-  
respondent.

In a proceeding pursuant to CPLR article 78 to review a  
determination of the **Planning Board** of the **Village of Sleepy  
Hollow** dated April 16, 2015, which, after a hearing, imposed  
certain conditions on the petitioner's application for approval  
of a site **plan**, the petitioner appeals from a judgment of the  
Supreme Court, Westchester County (Rolf M. Thorsen, J.),  
dated April 29, 2016. The judgment denied the petition and  
dismissed the proceeding.

Ordered that the judgment is affirmed, with one bill  
of costs payable to the respondents-respondents and the

intervenor respondent-respondent appearing separately and  
filing separate briefs.

The petitioner, **Rock of Salvation Church** (hereinafter the  
**church**), is located at 131 Cortlandt Street, in the **Village  
of Sleepy Hollow**. The **church** purchased the adjoining  
property, located at 135 Cortlandt Street, in July 2012. The  
premises located at 135 Cortlandt Street, and the premises  
located at 139 Cortlandt Street, located on the other side of  
135 Cortlandt Street, formerly had a common ownership.  
In July 1998, while the parcels were still under common  
ownership, the **Village** approved a site **plan** for 139 Cortlandt  
Street. The 1998 site **plan** reflected use of a common  
driveway, certain shared parking spaces, and contemplated  
certain shared drainage facilities between 135 Cortlandt Street  
and 139 Cortlandt Street. On July 23, 1999, in accordance  
with the conditional site **plan** approval, the former owners  
signed a Declaration of Easement dedicating five parking  
spaces on 135 Cortlandt Street to benefit the tenants and/  
or occupants of 139 Cortlandt Street, and an easement over  
135 Cortlandt Street necessary to accomplish that dedication.  
The Declaration of Easement was not filed with the office  
of the Westchester County Clerk, although it was allegedly  
filed with the **Village**. Currently, the premises located at 139  
Cortlandt Street are owned by the intervenor, 139 Cortlandt  
Street, LLC.

**\*986** In June 2013, the **church** submitted an application  
to the **Village's Planning Board** (hereinafter the **Planning  
Board**) for site **plan** approval of an off-street parking lot to be  
located at 131 and 135 Cortlandt Street to provide parking to  
its parishioners. After public hearings, the **Planning Board**  
granted the application with certain conditions, including  
that the **church** remove the **planned** implementation of a  
vehicular gate for the parking lot, and that the **church** record  
an access and drainage easement upon 135 Cortlandt Street  
for the benefit of 139 Cortlandt Street, "consistent with  
historical uses and practices." The petitioners commenced  
this proceeding pursuant to CPLR article 78 to review the  
determination. The Supreme Court denied the petition and  
dismissed the proceeding. The **church** appeals.

"The authority to approve or deny applications for site  
development **plans** is generally vested in local **planning  
boards**" (*Matter of Valentine v McLaughlin*, 87 AD3d 1155,  
1157 [2011], citing Town Law § 274-a [2] [a]). Town Law §  
274-a (4) provides that a **planning board**, where authorized  
by ordinance or local law, "shall have the authority to impose  
such reasonable conditions and restrictions as are directly

related to and incidental to a proposed site **plan**.” Here, the **Planning Board** has that authority pursuant to Code of **Village of Sleepy Hollow** § 450-68 (A). Thus, “[i]n conducting . . . site **plan** review, the **Planning Board** is required to set appropriate conditions and safeguards which are in harmony with the general purpose and intent of the Town’s zoning code . . . To this end, a **planning board** may properly consider criteria such as whether the proposed project is consistent with the use of surrounding properties, whether it would bring about a noticeable change in the visual character of the area, and whether the change would be irreversible” (*Matter of Valentine v McLaughlin*, 87 AD3d at 1157 [internal quotation marks and citations omitted]).

“In applying these criteria to proposed site **plans**, ‘[a] local **planning board** has broad discretion . . . and judicial review is limited to determining whether the action taken by the **board** was illegal, arbitrary, or an abuse of discretion’ ” (*Matter of Valentine v McLaughlin*, 87 AD3d at 1157-1158, quoting *Matter of In-Towne Shopping Ctrs., Co. v Planning Bd. of the Town of Brookhaven*, 73 AD3d 925, 926 [2010] [internal quotation marks omitted]). “Where a **planning board**’s

decision has a rational basis in the record, a court may not substitute its own judgment, even where the evidence could support a different conclusion” (*Matter of Valentine v McLaughlin*, 87 AD3d at 1158; see *Matter of \*987 Metro Enviro Transfer, LLC v Village of Croton-on-Hudson*, 5 NY3d 236, 241 [2005]; *Matter of MLB, LLC v Schmidt*, 50 AD3d 1433, 1435-1436 [2008]; *Matter of Centennial Hill Partnership v Town of Warwick Planning Bd.*, 221 AD2d 529 [1995]).

We agree with the Supreme Court’s determination that the **Planning Board**’s approval of the **church**’s application, subject to the conditions at issue herein, had a rational basis, was not illegal, and was not arbitrary and capricious (see *Matter of Fildon, LLC v Planning Bd. of the Inc. Vil. of Hempstead*, 164 AD3d 501, 503 [2018]; *Matter of Ostojic v Gee*, 130 AD3d 927, 929 [2015]). Dillon, J.P., Duffy, Connolly and Christopher, JJ., concur.

Copr. (C) 2020, Secretary of State, State of New York



171 A.D.3d 762, 98 N.Y.S.3d  
90, 2019 N.Y. Slip Op. 02527

**\*\*1 In the Matter of Sagaponack  
Ventures, LLC, Appellant,**

v

**Board of Trustees of the Village of  
Sagaponack, Acting as the Planning Board of  
the Village of Sagaponack, et al., Respondents.**

Supreme Court, Appellate Division,  
Second Department, New York  
2016-02828, 2284/15  
April 3, 2019

CITE TITLE AS: Matter of **Sagaponack  
Ventures, LLC v Board of  
Trustees of the Vil. of Sagaponack**

#### HEADNOTE

Municipal Corporations  
Planning  
Site Plan Approval—Review of Determination

Oved & Oved, LLP, New York, NY (Aaron J. Solomon of counsel), for appellant.  
Anthony B. Tohill, P.C., Riverhead, NY, for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination of the respondent **Board of Trustees of the Village of Sagaponack** dated January 12, 2015, denying the petitioner's site plan application, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated February 8, 2016. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

The petitioner is the owner of a 43.5-acre property located in the **Village of Sagaponack**. The southern end of the property faces the ocean and the northern end of the property is on Daniels Lane, a public highway. The property is located within \*763 the **Village's** agricultural overlay district. In February 2007, the petitioner, under a different corporate

name, submitted an application to build four single-family residences on the property, three on the oceanfront portion of the property (lots one through three), and one on the northwestern corner of the property (lot four). After several months of discussion, in 2008, the respondent **Board of Trustees of the Village of Sagaponack** (hereinafter the **Board**) conditionally approved a site plan where lot four was located on the southern end of the property, north of and next to lot one, rather than on the northwestern part of the property. This site plan was abandoned. On May 16, 2013, the petitioner submitted another application to develop the property, again seeking to build lots one through three facing the ocean and lot four on the northwestern corner. After the **Board** made it clear that any consideration of the 2013 application would involve comparison with the 2008 conditional approval, the petitioner withdrew the application. On August 9, 2013, the petitioner submitted the application at issue in this proceeding, seeking to develop a more than 13,000 square foot single-family residence on the northwestern corner of the property. On January 12, 2015, the **Board** rejected the application and determined that the northwestern corner of the property was not a suitable location for development. The petitioner then commenced this proceeding pursuant to CPLR article 78. The Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

A local planning **board** has broad discretion in considering applications involving the use of land, and judicial review is limited to determining whether the action taken by the **board** was illegal, arbitrary and capricious, or an abuse of discretion (see CPLR 7803 [3]; *Matter of Gebbie v Mammina*, 13 NY3d 728, 729 [2009]; *Matter of Daneri v Zoning Bd. of Appeals of the Town of Southold*, 98 AD3d 508, 509 [2012]; *Matter of Fuentes v Planning Bd. of the Vil. of Woodbury*, 82 AD3d 883 [2011]; *Matter of Shuttle Contr. Corp. v Planning Bd. of the Inc. Vil. of Great Neck*, 73 AD3d 789 [2010]; *Matter of Home Depot, U.S.A. v Town Bd. of Town of Hempstead*, 63 AD3d 938, 938-939 [2009]). Here, the determination of the **Board** that the northwestern corner of the property was not a suitable location for development was not illegal, arbitrary and capricious, or an abuse of discretion. The **Board** properly considered the factors set forth in the **Village Code** governing site plan applications and it determined that development in the northwestern corner of the property would contribute to the loss of agricultural soil, that such development would negatively impact the views and vistas of farmland areas, and that such development would \*764 have a negative impact on any future subdivision of the property (see Code of **Village of Sagaponack** § 245-67 [M]). Accordingly, we agree with

the Supreme Court's denial of the petition and dismissal of the proceeding. Austin, J.P., Leventhal, Duffy and Iannacci, JJ., concur.

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178 A.D.3d 926, 115 N.Y.S.3d  
72, 2019 N.Y. Slip Op. 09003

**\*\*1** In the Matter of Leonard  
**L. Germain, Jr.**, Appellant,

v

**Town of Chester Planning  
Board** et al., Respondents.

Supreme Court, Appellate Division,  
Second Department, New York  
12/16, 2018-08761, 2018-14585  
December 18, **2019**

CITE TITLE AS: Matter of **Germain**  
v **Town of Chester Planning Bd.**

#### HEADNOTE

Limitation of Actions

Defendants United in Interest

Relation Back Doctrine—Challenge to Site **Plan** Approval  
Allowing Construction of Sports Complex—Failure to  
Timely Join Landowner

Sussman and Associates, Goshen, NY (Jonathan R. Goldman  
and Michael H. Sussman of counsel), for appellant.

Dickover, Donnelly & Donovan, LLP, Goshen, NY (David  
A. Donovan of counsel), for respondent **Town of Chester  
Planning Board**.

Drake Loeb PLLC, New Windsor, NY (Ralph L. Puglielle,  
Jr., of counsel), for respondent Primo Sports.

In a proceeding pursuant to CPLR article 78 to review a  
determination of the respondent **Town of Chester Planning  
Board** dated December 2, 2015, granting the application of  
the respondent Primo Sports for site **plan** approval of the  
subject property, the petitioner appeals from (1) an order of  
the Supreme Court, Orange County (Elaine Slobod, J.), dated  
May 8, 2018, and (2) a judgment of the same court dated  
October 29, 2018. The order granted the respondents' separate  
motions to dismiss the petition insofar as asserted against each  
of them. The judgment, upon the order, in effect, denied the  
petition and dismissed the proceeding.

Ordered that the appeal from the order is dismissed; and it is  
further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the respondents  
**Town of Chester Planning Board** and Primo Sports.

The appeal from the intermediate order must be dismissed,  
**\*927** since an order made in a CPLR article 78 proceeding  
is not appealable as of right (*see* CPLR 5701 [b] [1]), and  
any possibility of taking a direct appeal therefrom terminated  
with the entry of the judgment in the proceeding (*see Matter  
of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the  
appeal from the order are brought up for review and have been  
considered on the appeal from the judgment (*see* CPLR 5501  
[a] [1]).

The respondent Primo Sports applied to the respondent  
**Town of Chester Planning Board** (hereinafter the **Planning  
Board**) for site **plan** approval allowing the construction of a  
sports complex on property owned by the respondent Chill  
Factor Cooling, LLC (hereinafter Chill Factor). The **Planning  
Board** granted the application. The petitioner commenced  
this CPLR article 78 proceeding against Primo Sports and  
the **Planning Board**, seeking annulment of the **Planning  
Board's** determination. Thereafter, Primo Sports and the  
**Planning Board** separately moved to dismiss the petition  
insofar as asserted against each of them on the ground that  
the petitioner failed to join Chill Factor, a necessary party.  
Subsequently, Chill Factor was joined as a respondent. The  
respondents then separately moved to dismiss the petition  
insofar as asserted against each of them on the ground that the  
statute of limitations had expired with respect to Chill Factor.  
The Supreme Court granted the motions and, in effect, denied  
the petition and dismissed the proceeding. The petitioner  
appeals.

We agree with the Supreme Court's determination to grant  
dismissal of the petition for failure to timely join the  
landowner, Chill Factor (*see Matter of Karmel v White  
Plains Common Council*, 284 AD2d 464 [2001]; *Matter of  
Baker v Town of Roxbury*, 220 AD2d 961 [1995]). The  
applicable statute of limitations had expired with respect  
to Chill Factor, and the petitioner could have joined Chill  
Factor only if the relation-back doctrine applied (*see Buran v  
Coupal*, 87 NY2d 173, **178** [1995]; *Matter of Karmel v White  
Plains Common Council*, 284 AD2d at 464). Contrary to the  
petitioner's contention, however, the relation-back doctrine

does not apply here because Chill Factor was not united in interest with Primo Sports. The respective interests of Primo Sports and Chill Factor are not such that they “stand or fall together and that judgment against one will similarly affect the other” (*Matter of Ferruggia v Zoning Bd. of Appeals of Town of Warwick*, 5 AD3d 682, 683 [2004] [internal quotation marks omitted]; see *Matter of Sullivan v Planning Bd. of the Town of Mamakating*, 151 AD3d 1518 [2017]).

Moreover, the petitioner failed to demonstrate a mistake as \*928 to the identity of the proper party or parties at the time of the original pleading (see *Matter of Ayuda Re Funding*,

*LLC v Town of Liberty*, 121 AD3d 1474 [2014]; *Windy Ridge Farm v Assessor of Town of Shandaken*, 45 AD3d 1099 [2007], *affd* 11 NY3d 725 [2008]). The petitioner's mistake was one of law, which is not the type of mistake contemplated by the relation-back doctrine (see *Matter of Ferruggia v Zoning Bd. of Appeals of Town of Warwick*, 5 AD3d at 683). Austin, J.P., Duffy, Brathwaite Nelson and Christopher, JJ., concur.

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166 A.D.3d 982

Supreme Court, Appellate Division,  
Second Department, New York.In the Matter of **QUICKCHEK**  
**CORPORATION**, et al., respondents,

v.

**TOWN OF ISLIP**, et al., appellants.

2016-05332

|

2016-05335

|

(Index No. 3577/15)

|

Argued—October 9, 2018

|

November 28, 2018

**Synopsis**

**Background:** Article 78 proceeding was brought to review town board's determination denying corporation's application for special use permit to operate a gasoline service station. The Supreme Court, Suffolk County, Ralph T. Gazzillo, J., granted petition, annulled determination, and remitted matter to town board. Town appealed.

**[Holding:]** The Supreme Court, Appellate Division, held that substantial evidence did not support town board's denial of application for special use permit.

Affirmed and remitted.

West Headnotes (5)

- [1] **Zoning and Planning** ⇌ Permit, variance and alteration of regulations distinguished

Unlike a variance, a special use permit does not entail a use of the property forbidden by the zoning ordinance but, instead, constitutes a recognition of a use which the ordinance permits under stated conditions.

- [2] **Zoning and Planning** ⇌ Evidence and fact questions

The burden of proof on an applicant seeking a special use permit is lighter than that required for a hardship variance.

- [3] **Zoning and Planning** ⇌ Permits, certificates, and approvals in general

**Zoning and Planning** ⇌ Substantial evidence in general

In reviewing a town board's determination on special use permit applications, the appellate court is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion, and the court considers substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the board's determination.

- [4] **Zoning and Planning** ⇌ Grounds for grant or denial in general

**Zoning and Planning** ⇌ Findings, reasons, conclusions, minutes or records

A denial of a special use permit must be supported by evidence in the record and may not be based solely upon community objection.

- [5] **Zoning and Planning** ⇌ Sales and service

Substantial evidence did not support town board's denial of corporation's application for special use permit to operate gasoline service station, based on alleged increase in traffic volume, where there was no showing that the proposed use of a gasoline service station would have had a greater impact on traffic than would other uses unconditionally permitted.

**Attorneys and Law Firms**

**\*\*211** John R. DiCioccio, Town Attorney, Islip, N.Y. (Michael A. Brandi of counsel), for appellants.

Harris Beach PLLC, Melville, N.Y. (Keith P. Brown of counsel), for respondents.

LEONARD B. AUSTIN, J.P., SHERI S. ROMAN, SANDRA L. SGROI, HECTOR D. LASALLE, JJ.

### DECISION & ORDER

**\*982** In a proceeding pursuant to CPLR article 78 to review a determination of the **Town Board** of the **Town of Islip** dated January 29, 2015, denying an application for a special use permit to operate a gasoline service station, the appeals are from (1) a decision of the Supreme Court, Suffolk County (Ralph T. Gazzillo, J.), dated March 9, 2016, and (2) a judgment of the same court dated April 11, 2016. The judgment, upon the decision, granted the petition, annulled the determination, and remitted the matter to the **Town Board** of the **Town of Islip** for the issuance of the requested special use permit.

**\*983** ORDERED that the appeal from the decision is dismissed, without costs or disbursements, as no appeal lies from a decision (*see Schicchi v. J.A. Green Constr. Corp.*, 100 A.D.2d 509, 472 N.Y.S.2d 718); and it is further,

ORDERED that the judgment is affirmed, without costs or disbursements.

The subject two-acre parcel of land, upon which is located a used auto sales dealership, an automotive repair shop, and an area for the storage of cars and boats, is located in a business district in which gasoline service stations are a permitted use with a special permit. In 2013, the petitioner **QuickChek Corporation** applied to the **Town of Islip Planning Board** (hereinafter the Planning Board) and the **Town Board** of the **Town of Islip** (hereinafter the **Town Board**) for special permits to use the subject property as a convenience market, a minor restaurant, and a gasoline service station.

After a public hearing, the Planning Board granted special use permits for the **\*\*212** convenience store and minor restaurant. After a second public hearing, the **Town Board** denied the application for a special permit to operate a gasoline service station. The petitioners then commenced this CPLR article 78 proceeding to review the **Town Board's** determination. The Supreme Court, upon finding, among other things, that the proposed use would not adversely affect the neighborhood or traffic, granted the petition, annulled the

**Town Board's** determination, and remitted the matter to the **Town Board** for the issuance of the requested special use permit.

[1] [2] [3] [4] Unlike a variance, a special permit does not entail a use of the property forbidden by the zoning ordinance but, instead, constitutes a recognition of a use which the ordinance permits under stated conditions (*see Matter of Retail Prop. Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 195, 746 N.Y.S.2d 662, 774 N.E.2d 727). Thus, the burden of proof on an applicant seeking a special permit is lighter than that required for a hardship variance (*see Matter of M & V 99 Franklin Realty Corp. v. Weiss*, 124 A.D.3d 783, 784–785, 3 N.Y.S.3d 51). In reviewing a **town board's** determination on special permit applications, we are “limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion,” and we “consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination” (*Matter of Beekman Delamater Props., LLC v. Village of Rhinebeck Zoning Bd. of Appeals*, 150 A.D.3d 1099, 1103, 57 N.Y.S.3d 57 [internal quotation marks omitted] ). “A denial of a special ... permit must be supported by evidence in the record **\*984** and may not be based solely upon community objection” (*Matter of White Castle Sys., Inc. v. Board of Zoning Appeals of Town of Hempstead*, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159).

[5] Here, the material findings of the **Town Board** were not supported by substantial evidence. With regard to the alleged increased volume of traffic, there was no showing that the proposed use of a gasoline service station would have a greater impact on traffic than would other uses unconditionally permitted (*see Matter of Robert Lee Realty Co. v. Village of Spring Val.*, 61 N.Y.2d 892, 894, 474 N.Y.S.2d 475, 462 N.E.2d 1193). While there was evidence that traffic would be increased by 3%, there was no evidence indicating that the proposed use would have any greater impact than would other permitted uses. Thus, the alleged increase in traffic volume was an improper ground for the denial of the special permit.

The other reasons set forth by the **Town Board** in support of its denial of the application for a special permit were conclusory and unsupported by factual data and empirical evidence (*see Matter of Framike Realty Corp. v. Hinck*, 220 A.D.2d 501, 632 N.Y.S.2d 177).

Accordingly, we agree with the Supreme Court's determination to grant the petition, annul the Town Board's determination, and remit the matter to the Town Board for the issuance of the requested special permit.

AUSTIN, J.P., ROMAN, SGROI and LASALLE, JJ., concur.

**All Citations**

166 A.D.3d 982, 89 N.Y.S.3d 210, 2018 N.Y. Slip Op. 08136

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164 A.D.3d 501  
Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of **FILDON, LLC**, et al., appellants,  
v.

**PLANNING BOARD OF the INCORPORATED  
VILLAGE OF HEMPSTEAD**, et al., respondents.

2016-07067

(Index No. 1121/16)

Argued—April 27, 2018

August 1, 2018

### Synopsis

**Background:** Property owners, who owned land in industrial zone that they used for storage of construction material and equipment, brought action under article 78, seeking review of determination by **village** and **village planning board** denying owners' application for site **plan** approval of green waste and construction debris transfer station. The Supreme Court transferred proceeding to the Supreme Court, Appellate Division.

**[Holding:]** The Supreme Court, Appellate Division, held that the Court would deny property owners' petition.

Determination confirmed, petition denied, and proceeding dismissed, with costs.

West Headnotes (5)

- [1] **Zoning and Planning** ⇌ Legislative, administrative, judicial, or quasi-judicial power  
**Zoning and Planning** ⇌ Substantial evidence in general  
Municipal land use agencies are quasi-legislative, quasi-administrative bodies, and the public hearings they conduct are informational in nature and do not involve the receipt of sworn testimony or taking of evidence within the

meaning of rule providing that the only questions raised under article 78 are those regarding whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. N.Y. CPLR § 7803(4).

- [] **Zoning and Planning** ⇌ Decisions of boards or officers in general

**Zoning and Planning** ⇌ Substantial evidence in general

Determinations of municipal land use agencies are reviewed under the arbitrary and capricious standard, not the substantial evidence standard. N.Y. CPLR §§ 7803(3), 7803(4).

- [3] **Zoning and Planning** ⇌ Determination  
**Zoning and Planning** ⇌ Decisions of boards or officers in general

A local **planning board** has broad discretion in reaching its determination on applications and judicial review is limited to determining whether the action taken by the **board** was illegal, arbitrary, or an abuse of discretion.

1 Cases that cite this headnote

- [4] **Zoning and Planning** ⇌ Substantial evidence in general

When reviewing the determinations of a local **planning board**, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the **board's** determination.

- [5] **Zoning and Planning** ⇌ Landfills and waste disposal; junkyards

The Supreme Court, Appellate Division, would deny property owners' article 78 petition seeking review of determination by **village** and **village planning board** denying owners' application for site **plan** approval of green waste and construction debris transfer station on their

land, which was located in industrial zone that owners used for storage of construction material and equipment, where **planning board's** determination had rational basis, was not illegal, and was not arbitrary and capricious. N.Y. CPLR § 7803(3).

1 Cases that cite this headnote

#### Attorneys and Law Firms

**\*\*506** White, Cirrito & Nally, LLP, Hempstead, N.Y. (Christopher M. Lynch of counsel), for appellants.

Debra Urbano-DiSalvo, Village Attorney, Hempstead, N.Y. (Keisha N. Marshall of counsel), for respondents.

WILLIAM F. MASTRO, J.P., MARK C. DILLON, FRANCESCA E. CONNOLLY, ANGELA G. IANNACCI, JJ.

#### DECISION & JUDGMENT

**\*501** Proceeding pursuant to CPLR article 78 to review a determination of the **Planning Board** of the **Incorporated Village of Hempstead**. The determination denied an application for site **plan** approval.

ADJUDGED that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, with costs.

**\*502** The petitioners own two contiguous parcels of property in the industrial zone in the **Incorporated Village of Hempstead**, which they currently use for storage of construction material and equipment. The petitioners submitted an application to the **Village's Planning Board** (hereinafter the **Planning Board**) for site **plan** approval of a "green waste and construction debris transfer station." After a public hearing, the **Planning Board** denied the petitioners' application due to concerns about traffic and congestion. The petitioners commenced this proceeding pursuant to CPLR article 78 to review the determination. The Supreme Court transferred this proceeding to this Court pursuant to CPLR 7804(g).

[1] [2] Initially, the Supreme Court should not have transferred this proceeding to this Court pursuant to CPLR 7804(g) because the determination to be reviewed was "not made after a trial-type hearing held pursuant to direction of law at which evidence was taken" (*Matter of M & V 99 Franklin Realty Corp. v. Weiss*, 124 A.D.3d 783, 784, 3 N.Y.S.3d 51; see CPLR 7803[4]; **Village Law** § 7-725-a[11]; *Matter of Navaretta v. Town of Oyster Bay*, 72 A.D.3d 823, 824, 898 N.Y.S.2d 237; *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d 768, 769, 809 N.Y.S.2d 98). Municipal land use agencies are "quasi-legislative, quasi-administrative bodies," and "the public hearings they conduct are informational in nature and [do] not involve the receipt of sworn testimony or taking of evidence within the meaning of CPLR 7803(4)" (*Matter of Halperin v. City of New Rochelle*, 24 A.D.3d at 770, 809 N.Y.S.2d 98 [internal quotation marks and citations omitted] ). "Accordingly, determinations of such agencies are reviewed under the 'arbitrary and capricious' standard of CPLR 7803(3), and not the 'substantial **\*507** evidence' standard of CPLR 7803(4)" (*id.*; see *Matter of M & V 99 Franklin Realty Corp. v. Weiss*, 124 A.D.3d at 784, 3 N.Y.S.3d 51). In the interest of judicial economy, this Court will nevertheless decide the petition on the merits, as the full administrative record is before this Court (see *Matter of M & V 99 Franklin Realty Corp. v. Weiss*, 124 A.D.3d at 784, 3 N.Y.S.3d 51; *Matter of Halperin v. City of New Rochelle*, 24 A.D.3d at 772-773, 809 N.Y.S.2d 98).

[3] [4] " 'A local **planning board** has broad discretion in reaching its determination on applications ... and judicial review is limited to determining whether the action taken by the **board** was illegal, arbitrary, or an abuse of discretion' " (*Matter of In-Towne Shopping Ctrs., Co. v. Planning Bd. of the Town of Brookhaven*, 73 A.D.3d 925, 926, 901 N.Y.S.2d 331, quoting *Matter of Kearney v. Kita*, 62 A.D.3d 1000, 1001, 879 N.Y.S.2d 584; see *Matter of Ostojic v. Gee*, 130 A.D.3d 927, 928, 14 N.Y.S.3d 117; *Matter of Kaywood Props., Ltd. v. Forte*, 69 A.D.3d 628, 892 N.Y.S.2d 182; **\*503** *Matter of Davies Farm, LLC v. Planning Bd. of Town of Clarkstown*, 54 A.D.3d 757, 864 N.Y.S.2d 84). " 'When reviewing the determinations of a local **planning board**, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination' " (*Matter of In-Towne Shopping Ctrs., Co. v. Planning Bd. of the Town of Brookhaven*, 73 A.D.3d at 926, 901 N.Y.S.2d 331, quoting *Matter of Kearney v. Kita*, 62 A.D.3d at 1001, 879 N.Y.S.2d 584 [internal quotation marks omitted] ).

[5] Contrary to the petitioners' contentions, the **Planning Board's** determination had a rational basis, was not illegal, and was not arbitrary and capricious (*see Matter of Ostojic v. Gee*, 130 A.D.3d at 929, 14 N.Y.S.3d 117; *Matter of Fairway Manor, Inc. v. Bertinelli*, 81 A.D.3d 821, 823, 916 N.Y.S.2d 630).

MASTRO, J.P., DILLON, CONNOLLY and IANNACCI, JJ.,  
concur.

**All Citations**

The petitioners' remaining contentions are without merit.

164 A.D.3d 501, 83 N.Y.S.3d 505, 2018 N.Y. Slip Op. 05591

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175 A.D.3d 1537

Supreme Court, Appellate Division,  
Second Department, New York.

In the Matter of **WB KIRBY  
HILL, LLC**, Respondent,  
v.  
**INCORPORATED VILLAGE OF  
MUTTONTOWN**, et al., Appellants.

2017-00489

(Index No. 10774/14)

Argued—April 5, 2019

September 25, 2019

### Synopsis

**Background:** Developer brought hybrid article 78 proceeding and action for declaratory relief from decisions by **village** planning board and board of trustees reducing amount of performance bond discharged to developer, after trial court, in prior action involving developer's same application for discharge of performance bond, ordered planning board to reconsider amount of reductions of performance bond. The Supreme Court, Nassau County, Karen Veronica Murphy, J., granted developer's petition, annulled decision by **village** board of trustees, remitted matter to planning board, and declared that developer was not responsible for further fees or costs related to discharge of performance bond. **Village** entities appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] doctrines of res judicata and collateral estoppel precluded relitigation of whether costs of completed improvements could be included in performance bond reduction, but

[2] a municipality may charge reasonably necessary fees in conjunction with a subdivision application.

Affirmed as modified.

### West Headnotes (2)

[1] **Zoning and Planning** ➡ Res judicata and collateral estoppel

Doctrines of res judicata and collateral estoppel precluded **village** planning board and **village** board of trustees from relitigating whether costs of completed improvements could be included in amount by which to reduce performance bond discharged to developer, where trial court annulled **village** entities' initial determination to reduce bond by the cost of completed items and remanded for reconsideration of proper amount by which to reduce performance bond.

[2] **Zoning and Planning** ➡ Fees and charges

A municipality may charge reasonably necessary fees in conjunction with a subdivision application.

### Attorneys and Law Firms

**\*\*368** Harris Beach, PLLC, Uniondale, N.Y. (Keith M. Corbett of counsel), for appellants.

Meister Seelig & Fein LLP, New York, N.Y. (Stephen B. Meister and Michael B. Sloan of counsel), for respondent.

MARK C. DILLON, J.P., ROBERT J. MILLER, SYLVIA O. HINDS-RADIX, FRANCESCA E. CONNOLLY, JJ.

### DECISION & ORDER

**\*1537** In a hybrid proceeding pursuant to CPLR article 78 and action for declaratory relief, the respondents/defendants appeal from a judgment of the Supreme Court, Nassau County (Karen V. Murphy, J.), entered June 13, 2016. The judgment, upon an order of the same court dated April 12, 2016, (1) granted the second amended petition, (2) annulled the determination of the respondent/defendant Board of Trustees of the **Incorporated Village of Muttontown** dated July 9, 2014, which approved a decision of the respondent/

defendant Planning Board of the **Incorporated Village of Muttontown** dated May 12, 2014, made upon remittal from the Supreme Court, Nassau County, reducing a performance bond in the sum of \$3,126,524 to the sum of \$1,911,557, (3) remitted the matter to the respondent/defendant Planning Board of the **Incorporated Village of Muttontown** for further proceedings in accordance therewith, and (4) declared that the petitioner/plaintiff is not responsible for any further fees or costs related to the discharge of the performance bond.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof declaring that the petitioner/plaintiff is not responsible for any further fees or costs related to the discharge of the **\*\*369** performance bond, and substituting therefor a provision declaring that the petitioner/plaintiff is responsible for fees or costs in connection with the discharge of the performance bond as permitted by law; as so modified, the judgment is affirmed, without costs or disbursements, and the order is modified accordingly.

In 2004, the respondent/defendant Planning Board of the **Incorporated Village of Muttontown** (hereinafter the Planning Board) approved the application of the petitioner/plaintiff, **WB Kirby Hill LLC** (hereinafter the petitioner), for subdivision plat approval provided, inter alia, that the petitioner post a performance bond in the sum of \$14,000,565 for the completion of certain public improvements. In 2008, the amount of the performance bond was reduced to \$7,215,059.

Upon the petitioner's application for discharge of the performance bond, in a decision dated September 19, 2012, the Planning Board recommended that the amount of the performance bond be reduced to \$3,126,524. This amount included the **\*1538** costs of 3 uncompleted public improvements, as well as 10% of the costs of 28 completed public improvements. In a determination dated November 13, 2012, the respondent/defendant Board of Trustees of the **Incorporated Village of Muttontown** (hereinafter the Board of Trustees) approved the Planning Board's decision. In March 2013, the petitioner commenced a proceeding pursuant to CPLR article 78 seeking to review the determination. In a judgment dated December 6, 2013, the Supreme Court granted the petition, annulled the determination, finding that there was no rational basis to include completed items in calculating the amount by which the performance bond should be reduced, and remitted the matter to the Planning Board for reconsideration of the amount by which to reduce the performance bond.

In a decision dated May 12, 2014, after a hearing, the Planning Board recommended that the amount of the performance bond be reduced to \$1,911,557. This amount included the costs of 4 uncompleted public improvements, as well as 10% of the costs of 12 completed public improvements. In a determination dated July 9, 2014, the Board of Trustees approved the Planning Board's decision.

In November 2014, the petitioner commenced the instant hybrid proceeding pursuant to CPLR article 78 and action for declaratory relief against the **Incorporated Village of Muttontown**, the Board of Trustees and the Planning Board (hereinafter collectively the **Village** respondents). In an order dated April 12, 2016, the Supreme Court granted the second amended petition, annulled the determination on the ground that it failed to comply with the December 6, 2013, judgment, and remitted the matter to the Planning Board to determine the amount of the performance bond, which amount was to include only the costs to complete the public improvements. Additionally, the court determined that the **Village** respondents were not entitled to further fees from the petitioner in connection with the discharge of the performance bond. The **Village** respondents appeal from the judgment subsequently entered upon the order.

[1] We agree with the Supreme Court's determination to grant the second amended petition and to annul the determination of the Board of Trustees (*see* CPLR 7803[3]; *Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758, 570 N.Y.S.2d 474, 573 N.E.2d 562; *Matter of Glyka Trans, LLC v. City of New York*, 161 A.D.3d 735, 740, 76 N.Y.S.3d 585; *Matter of Rossi v. Trustees of Vil. of Bellport*, 63 A.D.3d 846, 847, 880 N.Y.S.2d 499). The **Village** respondents were barred by the **\*\*370** doctrines of res judicata and collateral **\*1539** estoppel from relitigating whether the costs of completed items could be included in the amount by which the performance bond should be reduced (*see Matter of Trump Vil. Apts. One Owner v. New York State Div. of Hous. & Community Renewal*, 143 A.D.3d 996, 999, 40 N.Y.S.3d 157; *Matter of S & R Dev. Estates, LLC v. Feiner*, 132 A.D.3d 772, 774, 18 N.Y.S.3d 390; *Matter of Coalition to Save Cedar Hill v. Planning Bd. of Inc. Vil. of Port Jefferson*, 68 A.D.3d 764, 766, 891 N.Y.S.2d 116). Further, the court did not exceed its authority in directing specified action by the **Village** respondents (*see* CPLR 7806).

[2] However, we do not agree with the Supreme Court's determination declaring that the petitioner is not responsible for any further fees or costs related to the discharge of the performance bond (*see Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147–148, 464 N.Y.S.2d 392, 451 N.E.2d 150; *Matter of Hyde Park Landing, Ltd. v. Town of Hyde Park*, 130 A.D.3d 730, 732, 15 N.Y.S.3d 52). A municipality may charge reasonably necessary fees in conjunction with a subdivision application (*see Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 108, 769 N.Y.S.2d 445, 801 N.E.2d 821; *Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Vil. of Roslyn Harbor*, 40 N.Y.2d 158, 163, 386 N.Y.S.2d 198, 352 N.E.2d 115; *Matter of Landstein v. Town of LaGrange*, 166 A.D.3d 100, 108, 86 N.Y.S.3d 155; *Matter of Harriman Estates at Aquebogue, LLC v. Town of Riverhead*,

151 A.D.3d 854, 856, 58 N.Y.S.3d 63). We express no opinion as to whether the fees charged to the petitioner in connection with the instant application were reasonable.

We decline the petitioner's request to impose sanctions against the Village respondents in connection with this appeal (*see* 22 NYCRR 130–1.1).

DILLON, J.P., MILLER, HINDS–RADIX and CONNOLLY, JJ., concur.

#### All Citations

175 A.D.3d 1537, 109 N.Y.S.3d 367, 2019 N.Y. Slip Op. 06778

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776 Fed.Appx. 1

This case was not selected for

publication in West's Federal Reporter.

RULINGS BY SUMMARY ORDER DO NOT HAVE  
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WHEN CITING A SUMMARY ORDER IN A  
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MUST CITE EITHER THE FEDERAL APPENDIX  
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A SUMMARY ORDER MUST SERVE A COPY OF IT  
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United States Court of Appeals, Second Circuit.

**LIBERTY SACKETS HARBOR  
LLC, River North, LLC, Philip  
J. Simao, Plaintiffs-Appellants,**

v.

**VILLAGE OF SACKETS HARBOR, its  
Village Board, and its Planning Board, Janet  
Quinn, Planning Board Chairperson, David  
B. Geurtsen, individually, Conboy, McKay,  
Bachman & Kendall, LLP, Defendants-Appellees.**

18-3261-cv

|  
May 24, 2019

### Synopsis

**Background:** Property owners brought action in state court alleging constitutional violations arising from **village's** denial of owners' application to subdivide certain real property. **Village** removed action. The United States District Court for the Northern District of New York, Suddaby, Chief Judge, 2018 WL 4609129, dismissed action for lack of subject matter jurisdiction and for failure to state claim upon which relief may be granted. Owners appealed.

**Holdings:** The Court of Appeals held that:

[1] owners could not be excepted from seeking final determination on subdivision application on basis that doing so would be futile;

[2] shareholder lacked standing to pursue his First Amendment retaliation claim against **village**;

[3] owners were not entitled to discovery to determine if law firm was state actor on conclusory allegation that law firm acted in concert with state actor; and

[4] district court was not required to exercise jurisdiction over remaining state law claims.

Affirmed.

West Headnotes (4)

[] **Zoning and Planning** ⇌ Exhaustion of administrative remedies; primary jurisdiction  
Members of **village** zoning board did not dig in their heels and make clear that all subdivision applications would be denied, and therefore property owners could not be excepted from seeking final determination on subdivision application on basis that doing so would be futile before bringing claims under First, Fifth, and Fourteenth Amendments; complaint did not allege that plaintiffs had applied for variance from new zoning regulation or that board lacked discretion to grant variance, and complaint alleged that zoning dispute was resolved with owners agreeing to reduce number of subdivisions in their application. U.S. Const. Amends. 1, 5, 14.

[2] **Constitutional Law** ⇌ Zoning and land use  
Shareholder did not suffer direct individual injury from way that **village** handled company's subdivision applications, and therefore shareholder lacked standing to pursue his First Amendment retaliation claim against **village**. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[3] **Federal Civil Procedure** ⚖️ Grounds and Objections

Property owners were not entitled to discovery in action under § 1983 to determine if law firm was state actor on owners' conclusory allegation that law firm acted in concert with state actor. 42 U.S.C.A. § 1983.

[4] **Federal Courts** ⚖️ Effect of dismissal or other elimination of federal claims

District court was not required to exercise jurisdiction over remaining state law claims after dismissing federal law claims at pleading stage for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).

\*2 Appeal from the United States District Court for the Northern District of New York (Suddaby, C.J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

**Attorneys and Law Firms**

FOR PLAINTIFFS-APPELLANTS: David C. Temes, Lynn D'Elia Temes & Stanczyk, Syracuse, New York.

FOR DEFENDANTS-APPELLEES **VILLAGE OF SACKETS HARBOR**, ITS **VILLAGE BOARD** and **PLANNING BOARD**, JANET QUINN, and DAVID B. GUERTSEN: David H. Walsh IV, Barth Sullivan Behr, Syracuse, New York.

FOR DEFENDANT-APPELLEE CONBOY, McKAY, BACHMAN & KENDALL, LLP: Peter L. Walton, Conboy, McKay, Bachman & Kendall, LLP, Watertown, New York.

PRESENT: DENNY CHIN, SUSAN L. CARNEY, Circuit Judges, BRENDA K. SANNES, District Judge. \*

**SUMMARY ORDER**

Plaintiffs-appellants **Liberty Sackets Harbor LLC** ("Liberty") and its members **River North LLC** and **Philip Simao** (collectively, "plaintiffs") appeal from a judgment of the district court entered September 25, 2018, in favor of defendants-appellees **Village of Sackets Harbor** (the "Village"), its board, planning board, planning board chairperson, and counsel, as well as its counsel's law firm, Conboy, McKay, Bachman & Kendall, LLP ("CMBK," and collectively, "defendants"). By decision and order dated September 26, 2018 (but entered September 25, 2018), the district court granted defendants' motions to dismiss the complaint, which alleged constitutional violations arising from the Village's denial of plaintiffs' application to subdivide certain real property, for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We review *de novo* a district court's dismissal of a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), *Sunrise Detox V, LLC v. City of White Plains*, 769 F.3d 118, 121 (2d Cir. 2014), and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), *Sherman v. Town of Chester*, 752 F.3d 554, 560 (2d Cir. 2014). Upon such review, we conclude that the district court properly granted defendants' motions to dismiss for substantially the reasons set forth in its September 26, 2018 decision and order.

[[[1]]] First, plaintiffs' federal constitutional claims are not ripe for adjudication. Under the two-pronged test for determining whether a takings claim is ripe, which has also been applied to due process, equal protection, First Amendment, and discrimination claims in the context of land-use disputes, a plaintiff must first show that the government entity charged with enforcing \*3 the regulations at issue has rendered a final decision. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-87, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (takings); *see also Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 96-97 (2d Cir. 1992) (substantive due process); *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 352 (2d Cir. 2005) (First Amendment); *Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 516 (2d Cir. 2014) (procedural due process); *Sunrise Detox V, LLC*, 769 F.3d at 122 (discrimination).<sup>1</sup>

Here, plaintiffs essentially concede that the **Village** has not rendered a final decision on their subdivision application as they contend that they are excepted from seeking a final determination because doing so would be futile. We disagree. Plaintiffs fail to allege facts demonstrating that the defendants had “dug in [their] heels and made clear that all such applications will be denied.” *Sherman*, 752 F.3d at 561 (internal quotation marks omitted). Indeed, as the district court noted, the complaint does not allege that plaintiffs had applied for a variance from the new zoning regulation or that the **Village** lacked discretion to grant a variance. Moreover, the complaint alleges that the zoning dispute was resolved in January 2015 with plaintiffs agreeing to reduce the number of subdivisions in their application. Accordingly, we conclude that plaintiffs’ federal constitutional claims are premature.

[2] Second, **Simao** lacks standing to pursue his First Amendment retaliation claim because, absent a direct individual injury, a company’s member lacks standing to sue for an injury to the company. See *Jones v. Niagara Frontier Transp. Auth.*, 836 F.2d 731, 736 (2d Cir. 1987) (although a shareholder may be personally aggrieved or suffer financial loss as a result of injuries to a corporation, “[a] shareholder -- even the sole shareholder -- does not have standing to assert claims alleging wrongs to the corporation”). Therefore, because **Simao**’s emotional distress and legal expenses indirectly stem from the alleged harm to **Liberty**, the owner of the land at issue, and because he does not allege an injury independent of **Liberty**’s injuries, **Simao** does not have standing to assert his retaliation claim.

[3] Third, the district court properly dismissed plaintiffs’ claims against CMBK on the ground that the complaint fails to plausibly allege that CMBK is a state actor. Indeed, in the trial court, plaintiffs conceded that the complaint failed to allege that CMBK was a state actor, as it acknowledged that the question “cannot be determined upon the Pleadings,” and instead it argued that discovery was required to determine the extent of CMBK’s collaboration with the **Village**. App’x

at 80 (quoting Docket No. 13 at 18). We, however, do not “unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). We therefore conclude that plaintiffs’ claims against CMBK fail as a matter of law. See *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) (“A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a [42 U.S.C.] § 1983 claim against the private entity.”).<sup>2</sup>

\*4 [4] Finally, with the exception of plaintiffs’ state claims against CMBK, the district court declined to exercise supplemental jurisdiction over their state constitutional claims. As we have affirmed the dismissal of plaintiffs’ federal law claims, we agree that the district court did not err in declining to exercise jurisdiction over the remaining state law claims. See *Cohen v. Postal Holdings, LLC*, 873 F.3d 394, 399 (2d Cir. 2017) (“[W]hen a district court correctly dismisses all federal claims for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the district court is thereby precluded from exercising supplemental jurisdiction over related state-law claims.”); *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 170 (2d Cir. 2014) (per curiam) (“In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well.” (internal quotation marks omitted)). As to the state constitutional claims against CMBK, we agree that the district court properly dismissed those claims for substantially the reasons set forth in its decision.

\* \* \*

We have considered plaintiffs’ remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

#### All Citations

776 Fed.Appx. 1

#### Footnotes

- \* Judge Brenda K. Sannes, of the United States District Court for the Northern District of New York, sitting by designation.
- 1 Because defendants removed plaintiffs’ takings claim from state court to federal court, the second prong of the ripeness inquiry requiring state compensation is waived, *Sherman*, 752 F.3d at 563-64, and thus we need not consider its applicability here.
- 2 We decline to consider plaintiffs’ allegation that CMBK is responsible for the actions of its employee under the theory of respondeat superior as it was raised for the first time on appeal. See *Greene v. United States*, 13 F.3d 577, 586 (2d

Cir. 1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.").

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179 A.D.3d 1496

Supreme Court, Appellate Division,  
Fourth Department, New York.

In the Matter of **SAVE MONROE AVE.,**  
**INC., 2900 Monroe Ave., LLC,** Cliffords of  
Pittsford, L.P., Elexco Land Services, Inc., Julia  
D. Kopp, Mark Boylan, Anne Boylan and Steven  
M. Deperrior, Petitioners-Plaintiffs-Appellants,

v.

**TOWN OF BRIGHTON, Town Board of**  
**Town of Brighton, Town of Brighton**  
Planning Board, Daniele Management, LLC,  
Daniele SPC, LLC, Mucca Mucca, LLC, Mardanth  
Enterprises, Inc., M&F, LLC, the Daniele  
Family Companies, Respondents-Defendants-  
Respondents, et al., Respondents-Defendants.

1109

CA 19-00292

Entered: January 31, 2020

Appeal from an order and judgment (one paper) of the  
Supreme Court, **Monroe County** (Daniel J. Doyle, J.), entered  
February 7, 2019 in a CPLR article 78 proceeding and  
declaratory judgment action. The order and judgment, among  
other things, granted the motions of respondents-defendants  
**Town of Brighton, Town Board of Town of Brighton,**  
**Town of Brighton Planning Board, Daniele Management,**  
**LLC, Daniele SPC, LLC, Mucca Mucca, LLC, Mardanth**  
**Enterprises, Inc., M & F, LLC, and the Daniele Family**  
**Companies for partial dismissal of the petition-complaint.**

#### Attorneys and Law Firms

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MALCOMB OF COUNSEL), FOR PETITIONERS-  
PLAINTIFFS-APPELLANTS.

WEAVER MANCUSO FRAME PLLC, ROCHESTER  
(JOHN A. MANCUSO OF COUNSEL),  
FOR RESPONDENTS-DEFENDANTS-RESPONDENTS  
**TOWN OF BRIGHTON, TOWN BOARD OF TOWN OF**  
**BRIGHTON AND TOWN OF BRIGHTON PLANNING**  
**BOARD.**

WOODS OVIATT GILMAN LLP, ROCHESTER  
(WARREN B. ROSENBAUM OF COUNSEL),  
FOR RESPONDENTS-DEFENDANTS-RESPONDENTS  
DANIELE MANAGEMENT, LLC, DANIELE SPC, LLC,  
MUCCA MUCCA, LLC, MARDANTH ENTERPRISES,  
INC., M & F, LLC AND THE DANIELE FAMILY  
COMPANIES.

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND  
WINSLOW, JJ.

#### MEMORANDUM AND ORDER

**\*1496** It is hereby ORDERED that the order and judgment  
so appealed from is unanimously affirmed without costs.

Memorandum: Petitioners-plaintiffs (petitioners)  
commenced this hybrid CPLR article 78 proceeding and  
declaratory judgment action to, inter alia, annul the  
determination of respondent-defendant **Town Board of Town**  
**of Brighton (Town Board)** approving an incentive zoning  
application submitted by respondents-defendants Daniele  
**\*\*916** Management, LLC, Daniele SPC, LLC, Mucca  
Mucca, LLC, Mardanth Enterprises, Inc., M & F, LLC, and  
the Daniele Family Companies (collectively, developers) in  
connection with a proposed Whole Foods store in respondent-  
defendant **Town of Brighton (Town)**. Petitioners appeal from  
an order and judgment that, inter alia, granted the motions  
**\*1497** of the developers and the **Town, Town Board,** and  
respondent-defendant **Town of Brighton Planning Board**  
(Planning Board) to dismiss certain causes of action in the  
petition-complaint.

Contrary to petitioners' contention regarding the seventh  
cause of action, the **Town Board's** determination to authorize  
certain deviations from the applicable zoning regulations in  
exchange for incentive contributions from the developers (*see*  
*generally Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121,  
129, 531 N.Y.S.2d 782, 527 N.E.2d 265 [1988]) did not  
effectively amend the zoning regulations without the requisite  
referral to the Planning Board (*see Brighton Town Code*  
ch 225). Indeed, the incentive zoning mechanism utilized in  
this case was already part of the **Town's** preexisting zoning  
regulations developed in consultation with the Planning  
Board, and the application of that mechanism to a particular  
property did not thereby amend those regulations.

For the reasons stated in our decision in *Matter of Brighton Grassroots, LLC v. Town of Brighton*, 179 A.D.3d 1500, — N.Y.S.3d —, 2020 WL 501545 (Jan. 31, 2020) (4th Dept. 2020), petitioners' remaining contentions do not require modification or reversal of the order and judgment.

**All Citations**

179 A.D.3d 1496, 114 N.Y.S.3d 915 (Mem), 2020 N.Y. Slip Op. 00752

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160 A.D.3d 1102

Supreme Court, Appellate Division,  
Third Department, New York.

In the Matter of Andrew **BOVEE**, Respondent,  
v.

**TOWN OF HADLEY PLANNING**

**BOARD** et al., Appellants.

(Proceeding No. 1.)

In the Matter of Larry **Bovee** et al., Respondents,  
v.

**Town of Hadley Planning**

**Board** et al., Appellants.

(Proceeding No. 2.)

525388

Calendar Date: February 16, **2018**

Decided and Entered: April 5, **2018**

#### Synopsis

**Background:** Landowners commenced article 78 proceedings and declaratory judgment actions challenging town's conditional approvals of their site plan applications regarding processing and storing firewood for sale. After joinder of issue, the Supreme Court, Saratoga County, Chauvin, J., granted the petitions and complaints, finding the town's site plan review law invalid. Town appealed.

**Holdings:** The Supreme Court, Appellate Division, Devine, J., held that:

- [1] town's site plan review law was valid, and
- [2] conditions on approvals were not arbitrary or capricious.

Reversed.

West Headnotes (7)

- [1] **Zoning and Planning** ⇌ Maps, Plats, and Plans; Subdivisions

Town's site review plan law satisfied state statute requiring town land use regulations to be in accordance with comprehensive plan, where law stated its goals of promoting town's health, safety, and general welfare, explained that those goals were furthered by regulating land use through review and approval of site plans without need for restrictions such as zoning that would prohibit per se certain uses, set forth details required on site plan review applications, and specified factors planning board would consider in reviewing applications. N.Y. Town Law § 272-a(11)(a).

- [2] **Zoning and Planning** ⇌ Purpose

The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land.

- [3] **Zoning and Planning** ⇌ Maps, Plats, and Plans; Subdivisions

Site plan review reflects public interest in environmental and aesthetic considerations, the need to increase the attractiveness of commercial and industrial areas in order to invite economic investment, and the traditional impulse for controls that might preserve the character and value of neighboring residential areas; site plan review furthers those ends by permitting municipalities to regulate the development and improvement of individual parcels in a manner not covered under the usual provisions of building and zoning codes which establish specific standards for construction of buildings, provide for specific limitations on use, and fix definite numerical criteria for density, building set backs, and frontage and height requirements.

- [4] **Zoning and Planning** ⇌ Aesthetic considerations

Municipalities may enact a wide range of land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of the community.

## MEMORANDUM AND ORDER

**[5] Zoning and Planning** ⇌ Comprehensive or general **plan**

A **town** comprehensive **plan** need not be contained in a single document; indeed, it need not be written at all. N.Y. **Town** Law § 272-a(11) (a).

**[6] Zoning and Planning** ⇌ Comprehensive or general **plan**

A court may satisfy itself that a municipality has a **town** comprehensive **plan** and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality's land use policies. N.Y. **Town** Law § 272-a(11)(a).

**[7] Zoning and Planning** ⇌ Business, commercial, and industrial uses in general  
**Zoning and Planning** ⇌ Warehousing and storage

Conditions **town** imposed on its approvals of landowners' site **plan** applications regarding processing and storing firewood for sale were not arbitrary or capricious; conditions, including requirements that fencing be installed, limitations on firewood storage, and restrictions on where and when firewood could be processed and sold, were directly responsive to neighbors' complaints regarding the business operations. N.Y. **Town** Law § 274-a(4).

**Attorneys and Law Firms**

**\*\*635** Miller, Mannix, Schachner & Hafner, LLC, Glens Falls (Leah Everhart of counsel), for appellants.

Muller & Mannix, PLLC, Glens Falls (Michael J. Muller of counsel), for respondents.

Before: McCarthy, J.P., Egan Jr., Devine, Clark and Rumsey, JJ.

Devine, J.

**\*1102** Appeals (1) from a judgment of the Supreme Court (Chauvin, J.), entered October 11, 2016 in Saratoga County, which granted petitioners' applications, in two combined proceedings pursuant to CPLR article 78 and actions for declaratory judgment, to annul determinations of respondent **Town of Hadley Planning Board** conditionally approving petitioners' site **plan** applications, and (2) from an order of said court, entered May 5, 2017 in Saratoga County, which denied respondents' motion to renew.

Petitioner Andrew **Bovee** (hereinafter **Bovee**) owns real property in the **Town of Hadley**, Saratoga County adjacent to that of his parents, petitioners Larry **Bovee** and Marjorie **Bovee** (hereinafter collectively referred to as the parents). **Bovee** has consistently processed, stored and sold firewood on his property. **\*1103** In 2008, he applied for site **plan** development approval to conduct additional business activities there as required by chapter 132 of the Code of the **Town of Hadley** (hereinafter the Site **Plan** Review Law). Respondent **\*\*636 Town of Hadley Planning Board** approved the application upon the understanding that **Bovee** would, among other things, store 7 to 10 cords of firewood on the property.

Following enforcement proceedings commenced due to the excessive amount and disruptive location of firewood on **Bovee's** property, **Bovee** and his parents separately applied for site **plan** approval pursuant to the Site **Plan** Review Law. **Bovee** sought approval to, among other things, process and store additional firewood on his property for sale. His parents sought authorization for the delivery of firewood to their property that would then be processed and sold by **Bovee**. The **Planning Board** conducted a public hearing on the applications, after which it conditionally approved them.

**Bovee** and his parents separately commenced the present combined CPLR article 78 proceedings and declaratory judgment actions to challenge the conditional approvals and sought, as is relevant here, a judgment annulling those conditional approvals upon the basis that the **Planning Board** lacked the authority to issue them. Following joinder of issue, Supreme Court granted the petitions/complaints and annulled the challenged determinations on those grounds. Respondents

appeal from that judgment, as well as an order denying their subsequent motion for renewal.

[1] [2] [3] We initially disagree with Supreme Court that any deficiency in the Site **Plan** Review Law deprived the **Planning Board** of authority to issue the conditional approvals. Respondent **Town of Hadley** has the Site **Plan** Review Law without having adopted any zoning regulations. Zoning and site **plan** review both regulate land use in a municipality, but are not identical and serve different goals. “The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town’s available land” (*Berenson v. Town of New Castle*, 38 N.Y.2d 102, 109, 378 N.Y.S.2d 672, 341 N.E.2d 236 [1975] [citation omitted]; see *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 683, 642 N.Y.S.2d 164, 664 N.E.2d 1226 [1996] ). In contrast, site **plan** review reflects “public interest in environmental and aesthetic considerations, the need to increase the attractiveness of commercial and industrial areas in order to invite economic investment, and the traditional impulse for controls that might preserve the character and value of neighboring residential areas” ( \*1104 *Moriarty v. Planning Bd. of Vil. of Sloatsburg*, 119 A.D.2d 188, 190, 506 N.Y.S.2d 184 [1986], *lv denied* 69 N.Y.2d 603, 512 N.Y.S.2d 1026, 504 N.E.2d 396 [1987] ). Site **plan** review furthers those ends by “permit[ing] municipalities to regulate the development and improvement of individual parcels in a manner not covered under the usual provisions of building and zoning codes which establish specific standards for construction of buildings, provide for specific limitations on use, and fix definite numerical criteria for density, building set backs and frontage and height requirements” (*id.* at 191, 506 N.Y.S.2d 184).

[4] There is no statutory directive that a municipality employ both zoning and site **plan** review as mechanisms of land-use control. Municipalities may, in fact, enact a wide range of “land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of the community” (*Matter of Wallach v. Town of Dryden*, 23 N.Y.3d 728, 743, 992 N.Y.S.2d 710, 16 N.E.3d 1188 [2014] [internal quotation marks, brackets and citation omitted] ). A town is empowered to implement site **plan** review by **Town Law** § 274-a, which allows \*\*637 a town **board** to, “as part of a zoning ordinance or local law ..., authorize [a] **planning board** ... to review and approve, approve with modifications or disapprove site **plans** prepared to specifications set forth in the ordinance or local law and/or

in regulations of [the **planning**] **board**” (**Town Law** § 274-a [2][a] [emphasis added]; see **Town Law** § 271[1] ). The **Town of Hadley** does not have a “zoning ordinance,” but its **Town Board** took the other permissible route by adopting the Site **Plan** Review Law, a “local law” that authorized the **Planning Board** “to review and approve, approve with modifications or disapprove site **plans**” (**Town Law** § 274-a [2][a] ). The Site **Plan** Review Law also requires that review for all but a few enumerated land uses, sets forth the requirements for any site **plan** approval application and lists factors that may be considered by the **Planning Board** in reviewing one. As such, it meets the statutory requirements that it “specify the land uses that require site **plan** approval and the elements to be included on **plans** submitted for approval” (**Town Law** § 274-a [2][a]; see **Town Law** § 274-a [1] ).

[5] [6] Supreme Court correctly noted that the Site **Plan** Review Law “could be enacted by local ordinance and not necessarily as part of an overall zoning ordinance.” The trial court seemingly, however, relied upon the absence of zoning or other land use policies to determine that the Site **Plan** Review Law ran afoul of the requirement that “[a]ll town land use regulations must be in accordance with a comprehensive **plan**” (**Town Law** § 272-a [11][a]; see **Town Law** §§ 263, 272-a [2][b]; \*1105 *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d at 684–685, 642 N.Y.S.2d 164, 664 N.E.2d 1226). A comprehensive **plan** “need not be contained in a single document; indeed, it need not be written at all” (*Asian Ams. for Equality v. Koch*, 72 N.Y.2d 121, 131, 531 N.Y.S.2d 782, 527 N.E.2d 265 [1988]; see *Matter of Skenesborough Stone v. Village of Whitehall*, 254 A.D.2d 664, 666, 679 N.Y.S.2d 727 [1998], *appeal dismissed* 95 N.Y.2d 902, 716 N.Y.S.2d 641, 739 N.E.2d 1146 [2000] ). Rather, “[t]he court may satisfy itself that the municipality has a [comprehensive] **plan** and that authorities are acting in the public interest to further it by examining all available and relevant evidence of the municipality’s land use policies” ( \*\*638 *Asian Ams. for Equality v. Koch*, 72 N.Y.2d at 131, 531 N.Y.S.2d 782, 527 N.E.2d 265; see *Matter of Lazore v. Board of Trustees of Vil. of Massena*, 191 A.D.2d 764, 767, 594 N.Y.S.2d 400 [1993] ).

The Site **Plan** Review Law stated its goals, namely, “to promote the health, safety and general welfare of the **Town**” by creating “[a] clean, wholesome, attractive environment” that protects the citizenry and ensures “the maintenance and continued development of the economy of the **Town**.” Those goals are furthered, the Site **Plan** Review Law explains, by “ensur[ing] the optimum overall conservation, protection,

preservation, development and use of the natural and people-related resources of the **Town**, [and] by regulating land use activity within the **Town** through review and approval of site **plans**" without the need for restrictions (such as zoning) that would "prohibit per se any land use activity." The Site **Plan** Review Law, as noted above, also sets forth the details required on a site **plan** review application and specifies the factors that the **Planning Board** should consider in reviewing one (see **Town Law** § 274-a [2][a]). The Site **Plan** Review Law therefore contains within it "a comprehensive **plan** ... aimed at addressing fundamental land use issues and regulating future development" (*Matter of Skeneshorough Stone v. Village of Whitehall*, 254 A.D.2d at 666, 679 N.Y.S.2d 727; see *Asian Ams. for Equality v. Koch*, 72 N.Y.2d at 131, 531 N.Y.S.2d 782, 527 N.E.2d 265; *Udell v. Haas*, 21 N.Y.2d 463, 472, 288 N.Y.S.2d 888, 235 N.E.2d 897 [1968]; *Dur-Bar Realty Co. v. City of Utica*, 57 A.D.2d 51, 53-54, 394 N.Y.S.2d 913 [1977], *aff'd for reasons stated below* 44 N.Y.2d 1002, 408 N.Y.S.2d 502, 380 N.E.2d 328 [1978]). Thus, its "strong presumption of validity" having not been overcome (*Matter of Birchwood Neighborhood Assn. v. Planning Bd. of the Town of Colonie*, 112 A.D.3d 1184, 1185, 977 N.Y.S.2d 454 [2013] [internal quotation marks and citation omitted]), the Site **Plan** Review Law is valid, and the **Planning Board** had authority to determine the complained-of site **plan** review applications.

[7] Supreme Court, in light of its erroneous conclusion that the Site **Plan** Review Law was invalid, did not reach the challenges of **Bovee** and his parents to the conditional approvals themselves. Addressing those arguments in the interest of judicial \*1106 economy (see *Matter of Cobleskill Stone Prods., Inc. v. Town of Schoharie*, 126 A.D.3d 1094, 1096, 6 N.Y.S.3d 305 [2015]), we find them to be without merit. **Bovee** sought approval to store more firewood on his property than had previously been approved, a "change[ ] in or expansion[ ] of [an] existing use[ ]" that was correctly treated as a new land use subject to site **plan** review (see *Matter of*

*Harbison v. City of Buffalo*, 4 N.Y.2d 553, 559, 176 N.Y.S.2d 598, 152 N.E.2d 42 [1958]). As for the conditions imposed in both approvals, the **Planning Board** was free "to impose such reasonable conditions and restrictions as are directly related to and incidental to a proposed site **plan**" (**Town Law** § 274-a [4]). The **Planning Board** imposed a number of conditions in approving the applications, including requirements that fencing be installed, limitations on firewood storage and restrictions on where and when firewood could be processed and sold by **Bovee**. We cannot say that any of these conditions, which were directly responsive to the complaints of neighbors regarding **Bovee's** business operations, were arbitrary or capricious (see *Matter of Edscott Realty Corp. v. Town of Lake George Planning Bd.*, 134 A.D.3d 1288, 1291, 21 N.Y.S.3d 447 [2015]; *Matter of Home Depot, U.S.A. v. Town Bd. of Town of Hempstead*, 63 A.D.3d 938, 938-940, 881 N.Y.S.2d 160 [2009]; *Matter of Twin Town Little League v. Town of Poestenkill*, 249 A.D.2d 811, 813, 671 N.Y.S.2d 831 [1998], *lv denied* 92 N.Y.2d 806, 677 N.Y.S.2d 781, 700 N.E.2d 320 [1998]).

Respondents' challenge to the order denying their motion to renew is academic in light of the foregoing.

ORDERED that the judgment entered October 11, 2016 is reversed, on the law, without costs, that portion of the petition/complaint seeking CPLR article 78 relief is dismissed, and it is declared that chapter 132 of the Code of the **Town of Hadley** is valid.

ORDERED that the appeal from the order entered May 5, 2017 is dismissed, as academic, without costs.

McCarthy, J.P., Egan Jr., Clark and Rumsey, JJ., concur.

#### All Citations

160 A.D.3d 1102, 74 N.Y.S.3d 634, 2018 N.Y. Slip Op. 02387