SEQRA and Land Use Case Law

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I. SEQRA

A. Standing

1. *Schmidt v. City of Buffalo Planning Bd.*, 174 A.D.3d 1413 (4th Dep't 2019). Petitioner commenced an Article 78 proceeding seeking to annul the City of Buffalo Planning Board's negative declaration with respect to the demolition and reconstruction of an apartment complex in the City of Buffalo. Respondents moved to dismiss the petition on standing grounds. Supreme Court dismissed the petition and the Fourth Department affirmed. Petitioner alleged he had standing based upon (1) his interest in historic preservation generally; (2) his position as a member of a City advisory board dealing with historic preservation; (3) his interest in photographing the complex; (4) his visits to the complex; and (5) his status as a member of a protected class. The Fourth Department quoted its prior decision in *Niagara Preserv. Coalition, Inc. v. New York Power Auth.*, 121 A.D.3d 1507 (4th Dep't 2014), holding that "interest and injury are not synonymous . . . . A general — or even special — interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public . . . ." "Appreciation for historical and architectural sites does not rise to the level of injury different from that of the public at large for standing purposes." The Fourth Department also cited its prior holding in *Turner v. County of Erie*, 136 A.D.3d 1297 (4th Dep't 2016) in holding that petitioner does not have an injury by virtue of his position on a City advisory board, which is "at most a political impact . . . which does not establish environmental harm."

2. *Tilcon New York, Inc. v. Town of New Windsor*, 172 A.D.3d 942 (2d Dep't 2019). Standing in SEQRA cases requires a petitioner to identify an environmental injury that it has or will suffer which differs from the alleged injury to the public at large. Here, an asphalt company challenged a Town's lease of property to a competing asphalt business and approval of related land use applications. The Court held that petitioner lacked standing — it did not allege any actual or potential injury to itself or the public at large. Increased business competition was not a sufficient interest to confer standing, the company wasn't a party to the ZBA proceedings, and the approval wasn't adverse to the company. On the environmental claims, the company failed to establish that any injuries that were environmental in nature, rather than purely economic, nor did it show injuries distinct from those of the public at large. The company also did not have any type of taxpayer standing, which is limited to cases that alleged fraud, illegality, or a waste of public funds. Alleged violations of leasing and building laws did not meet that level of misconduct, nor was the leasing/land use process an issue of public importance where traditional standing rules would otherwise create a barrier to judicial review.

3. *Sheive v. Holley Volunteer Fire Company, Inc.*, 170 A.D.3d 1589 (4th Dep't 2019). Petitioner commenced an Article 78 proceeding to enjoin any future "Squirrel Slam" hunting contests conducted by the fire company. Petitioner lives 50 miles from the area where the hunting contests are held. She alleged an environmental injury based on her fondness for squirrels and the possibility that the contests may result in the killing of squirrels that she sees near her residence. Supreme Court dismissed the petition for lack of standing and the Fourth Department affirmed.

4. *City of Rye v. Westchester County Bd. of Legislators*, 169 A.D.3d 905 (2d Dep't 2019). Petitioner challenged Westchester County Board of Legislators' negative declaration related to several proposed development projects at Playland Park, an amusement park located in the City of Rye and owned by the County of Westchester. The Supreme Court denied the petition and dismissed the proceeding, holding that the petitioner lacked standing. The Second Department found that the trial court properly used the "balancing of public interests" test and determined that these projects were immune from local zoning and land use laws. The City of Rye did not have standing based on its status as an "involved agency," and it failed to demonstrate any interest in the potential environmental impacts on the City of Rye's community character. Individual petitioner Mecca failed to demonstrate entitlement to a presumption of standing based on proximity, and neither individuals Mecca nor Sack demonstrated their entitlement to standing by showing an injury-in-fact that fell within the zone of interests protected by SEQRA.

5. *Star Property Holding, LLC v. Town of Islip*, 164 A.D.3d 799 (2d Dep't 2018). Nearby business opposing an application have SEQRA standing where they allege sufficient harm other than merely an increase in competition that they would sustain as a result of the proposed development.

6. *Real Estate Bd. of New York, Inc. v. City of New York*, 165 A.D.3d 1 (1st Dep't 2018). Advocacy organization does not have SEQRA standing where it failed to demonstrate that environmental issues were germane to its purpose.

7. *Pilot Travel Centers, LLC v. Town Bd. of the Town of Bath*, 163 A.D.3d 1409 (4th Dep't 2018). Petitioner lacked standing to challenge the repeal of a procedural statute concerning environmental review requirements because it "does not create an injury unique to petitioner."

8. *Lakeview Outlets, Inc. v. Town Malta*, 166 A.D.3d 1445 (3d Dep't 2018). Town Board adopted findings after a final GEIS. The findings imposed mitigation fees upon developers. In July and August 2014, the ZBA determined that plaintiff's plans to develop a restaurant and hotel were

consistent with the GEIS and findings statement and no further SEQRA review was required. Plaintiff was assessed and paid the mitigation fees totaling $268,406. In February 2016, plaintiff commenced this action seeking a declaration that the mitigation fees are illegal and directing defendant to refund the fees paid. The question was whether the 4-month statute of limitations or 6-year statute of limitations applied to the claim. "Although declaratory judgment actions are typically governed by a six-year statute of limitations, a court must look to the underlying claim and the nature of the relief sought and determine whether such claim could have been properly made in another form. 'If that examination reveals that the rights of the parties sought to be stabilized in the action for declaratory relief are, or have been, open to resolution through a form of proceeding for which a specific limitation period is statutorily provided, then that period limits the time for commencement of the declaratory judgment action.'" "Plaintiff's claims are thus, in substance, a direct attack on the mitigation fee scheme established in the GEIS, which is properly viewed as 'an administrative act of defendant's [T]own [B]oard under the circumstances of this case, as opposed to a legislative act, such that any challenge thereto should have been the subject of a CPLR article 78 proceeding.' Indeed, it is settled that dissatisfaction with an agency's mitigation measures imposed pursuant to SEQRA is redressable by way of a CPLR article 78 proceeding." Thus, the claims are time-barred as they were brought more than 4-months from the determination.

B. Lead Agency Jurisdiction

1. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019). Developer sought approval for a townhouse complex. The Village Board of Trustees — as the SEQRA lead agency — issued SEQRA findings. Thereafter, the Village Planning Board adopted its SEQRA findings and granted subdivision and site plan approval for the project. By intermunicipal agreement, the Village Planning Board's authority was transferred to the Town Planning Board. The Town Planning Board rescinded the prior subdivision and site plan approval. The intermunicipal agreement was then terminated and the review authority over the project was transferred back to the Village. The developer submitted an amended application addressing the Town Planning Board's concerns and asked that the Village Board of Trustees reaffirm its prior SEQRA findings. The Town sued to challenge the decision to reaffirm the prior SEQRA findings and reaffirm the prior subdivision and site plan approval. The Third Department rejected the Town's argument that the Village Board of Trustees lacked jurisdiction to act as the SEQRA lead agency because it "served as the original lead agency and, therefore, had a continuing duty to evaluate the new evidence presented by [the developer]." In determining that a SEIS was not necessary the Board of Trustees "took the requisite hard look at the relevant areas of concern and satisfied the requirements of SEQRA . . . ."

C. Agency Discretion

1. Battle of the experts. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019). Where there are competing expert opinions, the agency may credit the information of one over the other.

2. *Frontier Stone, LLC v. Town of Shelby*, 174 A.D.3d 1382 (4th Dep't 2019). SEQRA lead agency has "the discretion to select the environmental impacts most relevant to its determination and to overlook those of doubtful relevance."

3. *Uncle Sam Garages, LLC v. Capital Dist. Transp. Auth.*, 171 A.D.3d 1260 (3d Dep't 2019). Agency's classification of an action as Type II is entitled to deference. The Capital District Transportation Authority (CDTA) wanted to build a bus transit center adjacent to a parking garage owned by Uncle Sam Garages. Negotiations fell through, and the CDTA used eminent domain to acquire a sufficient portion of the property to construct the terminal and facilitate bus traffic. There were multiple aspects to this challenge, but one was a SEQRA challenge regarding the decision to classify the action as Type II. The project involved replacing but not expanding paved surfaces; minor work within the parking garage; and the construction of a new nonresidential structure with a floor area of less than 4,000 sq. ft. Based on the applicable environmental review regulations, the court upheld the Type II classification with presumptively no significant environmental impacts.

4. *Village of Ballston Spa v. City of Saratoga Springs*, 163 A.D.3d 1220 (3d Dep't 2018). City sought to acquire property owned by the Village via eminent domain for the installation of a continuous non-motorized trail to improve pedestrian and bicycle travel along Geyser Road. The City issued a negative declaration under SEQRA, but failed to properly comply with the reasoned elaboration requirement. Upon being alerted to this, before issuing its condemnation decision, the City reaffirmed its negative declaration and set forth its rationale in more detailed form. Petitioners argued that the City lacked the ability to cure the defect without amending or rescinding the prior negative declaration. The Third Department rejected that argument, holding that the City complied with SEQRA and had the power to remedy its prior failure to complete the reasoned elaboration. This was not an after-the-fact situation as the revised resolution was adopted prior to the determination being made.

D. Failure to Take a Hard Look/Reasoned Elaboration Requirement

1. *Frank J. Ludovico Sculpture Trail Corp. v. Town of Seneca Falls*, 173 A.D.3d 1718 (4th Dep't 2019). EDPL § 207 proceeding challenging the determination to acquire an easement along a nature trail commemorating the women's rights movement in order to install a sewer line. DEC called

attention to the potential presence of several endangered and threatened species at the site, and indicated an inland salt marsh habitat in the area. The town did not survey these populations (as recommended by DEC) and did not modify the project to minimize impacts on them. Rather, the town listed the species as present on the EAF and said impacts to bats were mitigated by engaging in land clearing only during cold weather (hibernation) months. No similar explanations were provided for the other species, the marsh habitat, or the surface waters to satisfy the "hard look" and "reasoned elaboration" requirements.

2. *Micklas v. Town of Halfmoon Planning Bd.*, 170 A.D.3d 1483 (3d Dep't 2019). A golf course with a pro shop, clubhouse, restaurant, bar, and banquet house applied for an amendment to its site plan and special permit to allow an addition to its bar and restaurant that would be operated as a brewpub. Several nearby property owners, including the petitioners, complained that a brewpub wasn't a permitted use in the Agriculture-Residence district and that it would have negative effects on the character of the neighborhood. The planning board granted the application and was challenged. The planning board characterized it as a Type II, but in the approving resolution, it was called an unlisted action and given a negative declaration. The Court identified this as a possible clerical error but still found that the planning board sufficiently reviewed the proposal's environmental impacts and the negative declaration was reasonable, even if it might have provided a **more** reasoned elaboration for the basis of its determination. Zoning allegations were dismissed because the ordinance permitted "[p]rivate or public recreation or playground area[s], golf club[s], country club[s], or other open recreation uses" as special uses, including accessories to the same, and there was already a restaurant, bar, and banquet facility operating under a special permit.

3. *Peterson v. Planning Bd. of City of Poughkeepsie*, 163 A.D.3d 577 (2d Dep't 2018). Historic preservation association brought an Article 78 proceeding to challenge the City Planning Board's negative declaration. The Court noted that the EAF indicated that the proposed action would affect aesthetic and historic resources and the character of the existing community and that the parcel's forestation would be reduced from 2.75 acres to .3 acres. In issuing its negative declaration, the Planning Board listed approximately 29 reasons supporting its determination. The Planning Board stated that there would be no significant impact on the adjacent historic district. However, in doing so, the Planning Board merely relied on a letter from SHPO, which stated only that the proposed action would not have an adverse impact on the historic district. "Such a conclusory statement fails to fulfill the reasoned elaboration requirement of SEQRA." With respect to impact on vegetation, the negative declaration "inexplicably stated that '[t]he proposed action will not result in the removal or destruction of large quantities of vegetation or fauna.' In the context of this project, the level of deforestation is significant." The

Court found that the proposed action may have a significant adverse impact on the environment and remanded the matter back to the Planning Board for the preparation of an EIS.

4. *Adirondack Historical Ass'n v. Village of Lake Placid*, 161 A.D.3d 1256 (3d Dep't 2018). In furtherance of its Lake Placid Main Street Reconstruction Project, the Village issued a negative declaration and a resolution authorizing condemnation of two vacant parcels of real property owned by petitioner. Petitioner challenged the SEQRA negative declaration. The Third Department held that concerns were voiced about the potential traffic impacts, but the record did not contain any evidence that the lead agency took the requisite hard look at these potential traffic implications. "[T]he sum total of the proof of the Village Board's 'hard look' is its negative response to the question on the EAF as to whether there would be a substantial increase in traffic above present levels—made without articulating a reasoned elaboration for the basis of such determination—and the wholly conclusory statement in its resolution that '[t]here is no significant environmental impact that could not be mitigated with reasonable measures.'" "In light of this, and given the wholesale failure on the part of the Village Board to set forth a record-based elaboration for its conclusion that the identified traffic concerns were not significant, the SEQRA findings and determinations made in connection with the condemnation of the subject property must be vacated."

E. Rescission of Negative Declaration

1. *Leonard v. Planning Bd. of the Town of Union Vale*, 164 A.D.3d 662 (2d Dep't 2018). Property owners seeking to subdivide their parcel of land for a development project commenced a hybrid action/proceeding challenging the planning board's decision to rescind a 30-year-old prior negative declaration. "The record supports the Planning Board's conclusion that changes in the regulatory landscape for environmental matters constituted new information or a change in circumstances. Moreover, in determining that the project may result in significant adverse environmental impacts, the Planning Board identified specific environmental concerns relevant to the criteria for determining significance. The petitioners argue that the Planning Board's conclusion was incorrect. However, 'it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively.'"

F. Statute of Limitations

1. *Campaign for Buffalo History Architecture & Culture, Inc. v. Zoning Bd. of Appeals of City of Buffalo*, 174 A.D.3d 1304 (4th Dep't 2019). 30-day statute of limitations for challenge to ZBA's decision applied to petitioner's challenge to the negative declaration. Petition dismissed.

2. *Rimler v. City of New York*, 172 A.D.3d 868 (2d Dep't 2019). Petitioners commenced an Article 78 proceeding challenging the City's negative declaration for a 36-story development project. The 4-month statute of limitations began to run upon the final determination of environmental issues. Here, that occurred upon the City Council's approval of the project. CPLR § 306-b requires, where the statute of limitations is four months or less, service to be made not later than 15 days after the expiration of the statute of limitations. While that may be extended for good cause shown, that is a discretionary determination, and good cause does not exist if service is not timely attempted. Here, the Court affirmed dismissal for failure to timely serve, finding that good cause for an extension did not exist where there was no attempt to timely serve and the merits of the petition did not warrant such relief.

3. *Janiga v. Town of West Seneca Zoning Bd. of Appeals*, 174 A.D.3d 1401 (4th Dep't 2019). Petitioner commenced an Article 78 proceeding challenging a determination of the ZBA interpreting the meaning of the required buffer area between their proposed properties and a proposed subdivision. The ZBA moved to dismiss on the ground that petitioners failed to timely serve them. The Fourth Department rejected petitioners' contention that they demonstrated that the time for service should be extended for good cause shown or in the interest of justice. To establish good cause, "reasonable diligence in attempting service must be shown. Here, petitioners failed to show that any attempt to serve the ZBA [or other respondents] was made during the applicable statutory period." Nor would the interests of justice be served by extending the period of time for service.

4. *Berg v. Planning Bd. of the City of Glen Cove*, 169 A.D.3d 665 (2d Dep't 2019). A redevelopment project to redevelop 56 acres of land along the waterfront of Glen Cove Creek was proposed. In 2005, the planning board, as the SEQRA lead agency, issued a positive declaration and, on December 19, 2011, issued a findings statement and decision approving the developer's PUD site plan and subdivision application. On June 11, 2015, the developer submitted an application to amend the PUD master development plan to decrease the overall footprint and density. The planning board determined that no SEIS was necessary and approved the modifications on October 6, 2015. Nearby residents commenced an Article 78 proceeding challenging both the December 19, 2011 determination and the October 6, 2015 determinations. Supreme Court dismissed the challenges to the December 19, 2011 determination as time-barred and found that the respondents were not estopped from asserting the defense. "Estoppel is generally not available against a governmental agency in the exercise of its governmental functions. While there exists a 'rare exception' to this general rule in exceptional cases where there is fraud, misrepresentation, or other affirmative misconduct upon which the other party relies to its detriment, here, the petitioners failed to

demonstrate any such improper conduct that would warrant the application of the doctrine of estoppel." The Court otherwise upheld the October 6, 2015 decision not to require a SEIS.

5. *Stengel v. Town of Poughkeepsie Planning Bd.*, 167 A.D.3d 752 (2d Dep't 2018). Statute of limitations began to run on SEQRA claims when the negative declaration was issued. "Here, the statute of limitations began to run with the issuance of the negative declaration for the project on February 19, 2015, as this constituted the Planning Board's final act under SEQRA and, accordingly, any challenge to the negative declaration had to be commenced within four months of that date."

II. Zoning/Planning

A. County Referral

1. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019) (*quoting Benson Point Realty Corp. v. Town of E. Hampton*, 62 A.D.3d 989 (2d Dep't 2009). Referral of revised plan are not necessary where "'the particulars of the amendment [are] embraced within the original referral.'"

B. Procedures

1. *Frontier Stone, LLC v. Town of Shelby*, 174 A.D.3d 1382 (4th Dep't 2019). Zoning laws adopted by the local law, following the procedures of the Municipal Home Rule Law, are not required to comply with the procedural requirements of the Town Law. Moreover, changes in a proposed local law do not require another public hearing if they do not result in a substantially different law or one that is not embraced within the prior public notice.

2. *Corrales v. Zoning Bd. of Appeals of Village of Dobbs Ferry*, 164 A.D.3d 582 (2d Dep't 2018). Village Board's site plan approval was jurisdictionally defective and void because no public hearing was held as required by the Village's code.

C. Conditions

1. *McFadden v. Town of Westmoreland Zoning Bd.*, 175 A.D.3d 1098 (4th Dep't 2019). Petitioners wanted to lease their residentially zoned land as a dog training facility (not specifically permitted). ZBA conditionally granted a use variance, prohibiting overnight boarding and limiting the number of dogs on the property at any one time to six. Lower Court upheld and Petitioners appealed, arguing that they did not need a use variance and that conditions were therefore improper. The Fourth Department found that the use was not permitted, nor could it be classified as a customary "home occupation," because the Petitioners were leasing

land – not their residence – for the training facility. Town Law § 267–b empowers the ZBA to place reasonable conditions on variance recipients, and these conditions were appropriate.

2. *Rock of Salvation Church v. Village of Sleepy Hollow Planning Bd.*, 166 A.D.3d 985 (2d Dep't 2018). Planning Board imposed certain conditions on its approval of petitioner's site plan for an off-street parking lot. Petitioner challenged those conditions, which included that petitioner remove the planned implementation of a vehicular gate and that an access and drainage easement be recorded between certain parcels consistent with historical uses and practices. The Court found the Planning Board had broad discretion to impose reasonable conditions. The decision approving the site plan subject to conditions had a rational basis.

D. Spot Zoning

1. *Star Property Holding, LLC v. Town of Islip*, 164 A.D.3d 799 (2d Dep't 2018). Rejecting petitioners' allegations of illegal spot zoning. "Spot zoning is the singling out of a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. In evaluating a claim of spot zoning, the inquiry focuses on whether the rezoning is part of a well-considered and comprehensive plan calculated to serve the general welfare of the community. Here, the petitioners failed to establish that the rezoning of the property from Business One District to Business Three District is inconsistent with the Town's comprehensive plan and incompatible with the surrounding."

2. *Johnson v. Town of Hamburg*, 167 A.D.3d 1539 (4th Dep't 2018). Allegations of spot zoning should be dismissed because "petitioners failed to demonstrate that a 'clear conflict' exists between the Town's comprehensive plan and the rezoning determination."

E. Nonconforming Uses

1. *Nabe v. Sosis*, 175 A.D.3d 500 (2d Dep't 2019). Petitioner purchased a gas station and auto repair shop that operated as a legal nonconforming use. A year and a half later, Petitioner wanted to renovate the gas station and convert the repair shop to a convenience store. Upon denial, Petitioner asked the ZBA for permission to switch to a different nonconforming use, and for an area variance pertaining to the convenience store's solid waste disposal. ZBA denied, but the lower court annulled the denial. The Second Department reversed because nonconforming uses are seen as detrimental and the laws are intended to eventually eliminate those uses. The City code provided that a nonconforming use could be changed to a different nonconforming use, if there is "a finding that the proposed use is more consistent with the character of the surrounding neighborhood

and having less adverse impacts," but the ZBA determined that the change would have an adverse impact upon traffic. The ZBA's denial was rational and supported by evidence in the record, and was reinstated.

2. *New York HV Donuts, LLC v. Town of LaGrange Zoning Bd. of Appeals*, 169 A.D.3d 678 (2d Dep't 2019). A nonconforming gas station that was closed for more than a year due to a tanker truck accident and subsequent gasoline spill remediation activities was allowed to reestablish its nonconforming use. Remediation period was not a "discontinuance" of the nonconforming use. The Building Inspector initially granted the permits under the zoning code's allowance for rebuilding after casualties, and it granted the gas station a year from the date of its request to reestablish operations. The Dunkin' Donuts across the street appealed. The ZBA affirmed and the court agreed, because the remediation work was sufficient to show that the nonconforming use was never discontinued.

F. Variances

1. *Route 17K Real Estate, LLC v. Zoning Bd. of Appeals of Town of Newburgh*, 168 A.D.3d 1065 (2d Dep't 2019). Hotel developer applied to the ZBA for area variances, which were granted. One aspect of the request was for a variance related to a provision of the zoning law which required that a hotel have its principal frontage on a state or county highway. Petitioners challenged, arguing that the ZBA improperly classified the variance request as for an area variance as opposed to a use variance. The Second Department found that the ZBA properly classified the variances as area variances. The Town Law defines an area variance as authorization for the use of land in a manner which is not allowed by the dimensional ***or physical*** requirements of the applicable zoning regulations. The Court found the "principal frontage" requirement to be a physical requirement. The Court repeated the test for area variances and noted the "a zoning board need not justify its determination with supporting evidence with respect to each of the five statutory factors as long as its ultimate determination balancing the relevant considerations is rational." The Second Department determined that the record demonstrated consideration of all factors and that the decision to grant the variances was rational.

2. *Schweig v. City of New Rochelle*, 170 A.D.3d 863 (2d Dep't 2019). Petitioners sold their home and then were denied a building permit to construct a new home on an adjacent vacant lot they owned, on the grounds that it did not comply with the 15,000 sf. lot required by the zoning ordinance. They applied for a variance, which was also denied by the ZBA because the variances were substantial (almost 5,000 sf., or a third, below requirement), there were no compelling or unique circumstances weighing in favor, and the proposed construction would be

inconsistent with the density and character of the neighborhood. The Court upheld the ZBA's decision for weighing appropriate factors and making a reasonable determination. Petitioners' takings claim was likewise denied, because the minimum lot size had been increased ten years earlier, meaning Petitioners had notice of the lot regulations and could have included the lot in the sale of their home.

3. *Feinberg-Smith Associates, Inc. v. Town of Vestal Zoning Bd. of Appeals*, 167 A.D.3d 1350 (3d Dep't 2018). Petitioner applied to the ZBA for 5 area variances to construct additional student housing on its property. During the hearing process, petitioner withdrew two of its requests, but retained requests to increase the number of dwelling units, decrease the minimum living area per unit, and decrease the required number of parking spaces. The ZBA denied the variances and petitioner commenced this Article 78 proceeding. Supreme Court dismissed the petition. The Second Department held that the ZBA's determination was supported by the record and had a rational basis.

4. *Mengisopolous v. Bd. of Zoning Appeals of City of Glen Cove*, 168 A.D.3d 943 (2d Dep't 2019). A ZBA's denial of an application for area variances was annulled because the ZBA failed to meaningfully consider the relevant statutory factors. Even though the proposed variances were substantial and the alleged difficulty was self-created, the ZBA's failure to cite to particular evidence regarding the questions of undesirable effect on the character of the neighborhood, adverse impact to physical and environmental conditions, or other detriments to the health, safety, and welfare of the community was enough to annul its action. All factors must be weighed, and the Court remanded the matter for reconsideration.

5. *Matter of D'Souza v. Board of Appeals of the Town of Hempstead*, 173 A.D.3d 738 (2d Dep't 2019). A lower court dismissed an Article 78 challenge to a zoning variance denial because Petitioner did not submit copies of his variance applications, transcripts from any of the proceedings, or an affidavit from a person with knowledge in support of his petition. The Second Department reinstated the suit, finding that there is no requirement that pleadings must include affidavits or other written proof, and that the respondent, not the petitioner, was responsible for filing the certified transcript of the record.

6. *Abbatiello v. Town of North Hempstead Bd. of Zoning Appeals*, 164 A.D.3d 785 (2d Dep't 2018). Petitioner's house was constructed in 1920 and is a two-family residence. It is located in what later became a business district, where all residential uses are prohibited. Two-family residences were permitted prior to the 1945 zoning code, which rezoned the property to business. Petitioner purchased the property in 1977 believing the house to be a legal 2-family residence. Since he bought the property, he had been renting out the two units and has obtained various

permits from the Town allowing him to do so. In 2013, petitioner applied to the ZBA for a use variance to permit him to continue renting the property as a 2-family. The ZBA denied the application. "Contrary to the Board's conclusion, the petitioner presented evidence, including affidavits from neighbors and others who had lived in the community for many years, which was sufficient to establish that the property was a legal two-family residence prior to the 1945 amendments to the Town Zoning Code. By contrast, there was no evidence presented at the hearing to demonstrate that the property had been converted into a two-family dwelling after the 1945 amendments. Accordingly, the record does not contain evidence to support the rationality of the Board's determination denying the proposed use variance. Since the Board's determination was irrational, and arbitrary and capricious, the Supreme Court should have granted the petition, annulled the Board's determination, and remitted the matter to the Town for the issuance of the requested use variance."

7. *White Plains Rural Cemetery Ass'n v. City of White Plains*, 168 A.D.3d 1068 (2d Dep't 2019). Court overturned the denial of a use variance, finding that the record demonstrated that the cemetery met each of the required factors.

8. *54 Marion Avenue LLC v. City of Saratoga Springs*, 2019 WL 4307913 (3d Dep't 2019). The Third Department upheld a denial of a use variance where the record supported the conclusion that the hardship was not unique and was self-created.

G. Interpretation Appeals

1. *Northwood School, Inc. v. Zoning Bd. of Appeals for the Town of North Elba and Village of Lake Placid*, 171 A.D.3d 1292 (3d Dep't 2019). A group of boarding school students and their faculty advisor didn't qualify as a "family," and their school's request to house them in a single-family residence donated to the school was therefore properly denied. The home's zoning district permits only 1-2 family dwellings, and the ZBA determined that the proposed use did not meet the ordinance's definition of single-family residential use, nor did the group qualify as a family. The Court found these conclusions to be reasonable and supported by the record (different students would be housed each year, it would only be used during the school year, there would be a separate dwelling area for the faculty advisor, and students wouldn't be expected to share meals or household chores). The Court went over the standard of review. "This Court does not defer to a zoning board's 'pure legal interpretation of terms in an ordinance.' However, 'that body is accorded reasonable discretion in interpreting an ordinance that addresses an area of zoning where it is difficult or impractical for a legislative body to lay down a rule which is both definitive and all-encompassing. Moreover, '[a zoning board's] fact-based interpretation of a zoning ordinance that determines its application

to a particular use or property is entitled to great deference.' Whether petitioner's proposed use of the property falls within the Code's definition of a family 'is essentially a factual question'; thus, we will defer to respondent's determination unless it was irrational or unreasonable." The court found no merit in the school's argument for special treatment, finding that a balancing of interests would be required if the school had sought a special use permit to expand into a residential neighborhood, but not for an interpretation of specifically defined terms included in the zoning ordinance.

2. *Casey v. Town of Arietta Zoning Bd. of Appeals*, 169 A.D.3d 1231 (3d Dep't 2019). Petitioners owned a 2.6–acre parcel in a residential zone with a 3,200 sf. residence, a detached 1,200 sf. garage, and a boathouse. Petitioners applied for a building permit to construct a 2,016 sf. pole barn for storage. The Zoning Officer determined the barn was a principal building as defined by the Town Code because it exceeded 1,250 sf., so he denied the application because the house (principal) and garage already existed. The ZBA affirmed. The lower court dismissed the petition. The Third Department found that although the Zoning Officer's conclusion implicitly held that it was not an accessory structure, he did not follow the proper pathway to reach that conclusion. Under the Code's definitions, it would be impossible to determine that a structure was a principal building without first determining whether it was an accessory structure. Accordingly, the court remitted the ZBA's December 2015 determination to the Zoning Officer to render a determination regarding whether the proposed pole barn was an accessory structure under the former Town Code and, dependent on the answer to that question, whether a permit should be granted. The court did not remand so much of the ZBA's denial of petitioners' most recent application, which proposed a new building rather than an accessory building, because it would expand a nonconforming use on the property.

3. *Yeshiva Talmud Torah Ohr Moshe v. Zoning Bd. of Appeals of The Town of Wawarsing*, 170 A.D.3d 1488 (3 Dep't 2019). Two synagogues, classroom facilities, on-site residential space for the rabbi, and student dormitory and dining facilities were proposed. Although "places of worship" were a permitted use in the zoning district where the property was located, the town's municipal code officer and ZBA denied it as more similar to a school or camp, which were not permitted uses. The Town conceded that the synagogue and rabbi residences were permissible, but the Court overturned the denial because places of worship were defined in the ordinance to expressly include not only traditional religious spaces such as churches and synagogues, but also related religious education uses such as schools and student housing. In fact, the zoning ordinance included school halls in its definition of a place of worship, and the Court found that the proposal for an on-site school hall to provide religious education attendant to the site's use for synagogue worship, and the

student housing was similar to the examples of permissible "related on-site facilities" provided in the ordinance.

4. *Chestnut Ridge Associates, LLC v. Village of Chestnut Ridge ZBA*, 169 A.D.3d 995 (2d Dep't 2019). The ZBA had no jurisdiction to interpret whether a landscaping business was permitted in the laboratory-office zoning district absent a prior determination from the building inspector.

5. *Brophy v. Town of Olive Zoning Bd. of Appeals*, 166 A.D.3d 1123 (3d Dep't 2018). The Third Department found that weddings were properly approved as an accessory use to a bed and breakfast located in a residential zoning district. The B&B started out small when it was originally approved in 1998, but grew from 1 room to 3 and began offering wedding events. In 2015, neighbors complained after there were 12 weddings with tents, music, and food service. The ZBA required site plan approval for these events to continue as an accessory use, and approved four wedding events annually with up to 75 guests each. The Court upheld this determination, finding that the record showed that the owners resided on the property and rented guestrooms on a year-round basis, but only offered the property as a wedding venue during warmer months. The Court also upheld the ZBA's authority to require site plan approval because the town code required site plan review for all principal uses, and this requirement "necessarily should attend to an approved accessory use." The Code required the ZBA to impose "conditions and safeguards as may be required to protect the public health, safety, morals and general welfare," and so it was reasonable to require a site plan, even if the bed and breakfast had originally been approved without conditions.

6. *Vineland Commons, LLC v. Building Dep't of Town of Riverhead*, 165 A.D.3d 808 (2d Dep't 2018). Petitioner purchased the subject property in 2001. In 2004, the Town amended its zoning classification for the property, placing it in a rural zoning district where retail was not a permitted use. In 2014, petitioner applied for a use permit to operate a convenience store on the property. The building department denied the application. The petitioner then commenced an Article 78 proceeding. The Second Department held that the petition should have been dismissed for failure to exhaust administrative remedies, which would be an appeal to the ZBA.

H. Mootness

1. *Sierra Club v. New York State Dep't of Envtl. Conserv.*, 169 A.D.3d 1485 (4th Dep't 2019). Petitioners challenged the issuance of permits related to a renovation of a power plant that burned coal to generate electricity for nearly 80 years. The plant was temporarily inactive, sold, and the purchaser sought to resume operations using natural gas and biomass rather than coal. The DEC issued an amended negative declaration and

issued revised air permits. The DPS issued a notice to proceed with the construction of the gas pipeline necessary to operate the plant in October 2016. Petitioners commenced the lawsuit in October 2016, but failed to request a TRO to stop repowering or construction of the pipeline. Petitioners waited to serve motion papers until the end of December. Oral argument occurred in January 2017 on the motion to dismiss for lack of standing and mootness. In March 2017, respondents informed the court that construction was completed and that the plant had resumed operations. In April 2017, Supreme Court issued a decision denying petitioners' motion for temporary injunctive relief and granting respondents' motions to dismiss. Judgment was entered in June 2017 and petitioners filed a notice of appeal in July 2017. Petitioners did not seek an order from the Fourth Department to enjoin operation of the plant. They perfected the appeal in April 2018. The Fourth Department determined that the appeal should be dismissed as moot. "The primary factor in the mootness analysis is a challenger's failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation. Generally, a petitioner seeking to halt a construction project must "move for injunctive relief at each stage of the proceeding." Petitioners failed to attempt to preserve the status quo. The respondents did not undertake the project in bad faith.

I. Eminent Domain

1. *United Refining Co. of Pennsylvania v. Town of Amherst*, 173 A.D.3d 1810 (4th Dep't 2019). Proceeding under EDPL § 207 to annul the determination to condemn certain real property in the Town. The Fourth Department upheld the determination noting that judicial review is "very limited" and "confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with the [State Environmental Quality Review Act ([SEQRA] ECL art 8)] and EDPL article 2; and (4) the acquisition will serve a public use." The burden is on the petitioner. The Fourth Department reaffirmed that what qualifies as a public purpose or use is broad. Redevelopment and urban renewal are valid public uses.

J. Special Use Permits

1. *Edwards v. Zoning Bd. of Appeals of Town of Amherst*, 163 A.D.3d 1511 (4th Dep't 2018). Petitioners commenced an Article 78 proceeding challenging the ZBA's determination granting a special use permit for a telecommunications tower. They argued that the ZBA's determination to grant the special use permit was inconsistent with the Town's comprehensive plan. The Fourth Department rejected this argument. "It is well settled that the inclusion of a permitted use in a zoning code is tantamount to a legislative finding that the permitted use is in harmony

with the general zoning plan and will not adversely affect the neighborhood." Petitioner also argued that the ZBA improperly granted certain "variances" without analyzing the statutory factors. "Town Law § 274–b(3) provides that where, as here, 'a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to [Town Law § 267–b].' Additionally, Town Law § 274–b (5) provides that a town 'may further empower the authorized board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of special use permits submitted for approval.' 'In effect, subdivision (5) allows a town ... to establish one-stop special use permitting if it so chooses.' Thus, 'where a town ... exercises its discretion under subdivision (5), an applicant may have two avenues to address an inability to comply with a given ... requirement in connection with a special use permit, but this overlap does not create discord in the Town Law or render either [subdivision (3) or subdivision (5)] superfluous.'"

2. *Quickchek Corp. v. Town of Islip*, 166 A.D.3d 982 (2d Dep't 2018). Town Board denied an application for a special use permit to operate a gasoline service station. The property is located in a zoning district where gas stations are allowed as a special use. The Second Department noted that the burden on a special use permit applicant is lighter than an applicant for a variance. A denial of a special use permit must be supported by evidence in the record. Here, the alleged reason for denial — increased traffic — was not supported by the record.

K. Site Plan Review

1. Petitioner owned a 43.5-acre parcel in an agricultural overlay district, faced the ocean on its southern side and a public highway to the north. After a series of abandoned applications to construct four single-family homes, in 2013, the petitioner applied to build one 13,000 square foot house on the northwest corner. The planning board rejected this plan in 2015 based on a determination that the northwest part of the property was unsuitable for development. The court affirmed the denial because local planning boards are accorded broad discretion in land use decisions, and this determination was reasonable - the board considered the factors and criteria for site plan applications that were set out in the village code, and its determination was based on findings that the proposed development would reduce agricultural soils, impair views and farmland vistas, and negatively impact future subdivisions of the property.

2. *Fildon, LLC v. Planning Bd. of the Incorporated Village of Hempstead*, 164 A.D.3d 501 (2d Dep't 2018). Petitioner own two parcels of property in the industrial zoning district in the Village. They submitted an application to the Planning Board for site plan approval of a green waste

and construction debris transfer station. The Planning Board denied the application due to concerns about traffic and congestion. "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. 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. Contrary to the petitioners' contentions, the Planning Board's determination had a rational basis, was not illegal, and was not arbitrary and capricious."

3. *Sagaponack Ventures, LLC v. Board of Trustees of the Village of Sagaponack*, 171 A.D.3d 762 (2d Dep't 2019). Petitioner submitted a site plan application to the Village Board of Trustees. The Board denied the application and determined that the portion of the property proposed to be developed was not a suitable location for development. The petitioner challenged, Supreme Court dismissed the petition, and the Second Department affirmed. "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. 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 have a negative impact on any future subdivision of the property."

L. Subdivisions

1. *Perkins v. Town of Dryden Planning Bd.*, 172 A.D.3d 1695 (3d Dep't 2019). Community solar developer applied to the planning board for a subdivision to construct projects on 5 separate lots. A common driveway would serve the parcels as part of the plan. Petitioners sought to amend their petition to allege that the subdivision violated Town Law § 280-a because there was no frontage on a public street. Supreme Court denied the motion to amend and the Third Department affirmed, holding the claim to be without merit. Town Law § 280-a applies to buildings and, under the local zoning law, a building was defined as an enclosure.

M. Preemption

1. *Frontier Stone, LLC v. Town of Shelby*, 174 A.D.3d 1382 (4th Dep't 2019). The Mined Land Reclamation Law does not preempt a town's authority to determine that mining should not be a permitted use of land within the town.

N. Historic Preservation/Architectural Review

1. *Save America's Clocks Inc. v. City of New York*, 33 N.Y.3d 198 (N.Y. 2019). There is a historic building in NYC with a clock tower and gallery space overlooking the mechanism, which are designated as an "interior landmark" under NYC Landmarks Preservation Law, meaning the owner needed approval from the Landmarks Preservation Commission ("LPC") prior to any changes or modifications. A developer submitted a request for a certificate of appropriateness ("COA") to convert it into luxury housing. LPC held two public hearings and conducted a site visit, eventually concluding that planned restoration investments would outweigh any negative impacts. Among other things, Petitioners challenged LPC's authority to approve changes that would restrict public access to an interior landmark. Lower Court ruled for Petitioners, and the Appellate Division affirmed. The Court of Appeals, by majority with a dissent, reversed, finding that LPC's decision was rational and entitled to deference based on the extensive deliberative process, and its findings that "the main lobby, stair hall, clock tower rooms and banking hall w[ould] be fully restored, and the clock mechanism and faces w[ould] be retained, thereby preserving these significant features." Regarding closing the area to public access (the law states that an interior landmark "is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value"), the court agreed with LPC that "public access is a threshold condition, not an ongoing one." Further, alteration and even demolition were inherently contemplated by the COA process.

2. *Livingston Development Group, LLC v. Zoning Bd. of Appeals of the Village of Dobbs Ferry*, 168 A.D.3d 847 (2 Dep't 2019). An application for a condominium development had been approved by the planning board, but was denied by the architectural review board and the zoning board of appeals. Following a viewshed analysis conducted by the planning board, the village board granted the developer's application for site plan review, subject to a requirement that the developer obtain approval from the village Architectural and Historic Review Board. The review board denied the application based on its finding that the condominiums would be excessively out of character with the surrounding area. The zoning board of appeals affirmed the denial. The lower court annulled the ZBA and AHRB, but the Second Department held that the review board's denial was appropriate. The trial court's decision was

based on its belief that site planning issues were delegated to the jurisdiction of the planning board only, but the review board and the zoning board of appeals did not rely on the site plan viewshed requirements, so their denial did not actually "usurp" the planning board's authority but was both reasonable and within the authority delegated to the review board and to the zoning board of appeals.

O. Enforcement

1. *Village of Sharon Springs v. Barr*, 165 A.D.3d 1445 (3d Dep't 2018). The Village established the material facts of zoning violations through its code enforcement officer. The affidavit was supported by documentary and photographic evidence. Defendant submitted no opposition to raise a material question of fact. While the complaint did not state a cause of action or identify the basis for the relief requested, the Third Department determined that summary judgment may be granted on an unpleaded cause of action "where the proof supports such a cause of action and the opposing party has not been misled to its prejudice."

III. <u>Conflicts</u>

A. *Town of Mamakating v. Village of Bloomingburg*, 174 A.D.3d 1175 (3d Dep't 2019). Third Department found no conflict of interest for members of the Village Board of Trustees where they were residents of a development project that was under review by the Board. "In determining whether a disqualifying conflict exists, the extent of the interest at issue must be considered and[,] where a substantial conflict is inevitable, the public official should not act." Applying this standard to the facts, the Court found that "[t]his mere relationship . . . does not give rise to an instance where a substantial conflict would be inevitable." "Moreover, petitioners failed to tender any proof indicating how the subject members gained any benefit or advantage by their votes."