



When a municipal board enters into an agreement with respect to a zoning determination, the term limits rule provides that that agreement may not bind successor boards following a change in administration. The Court of Appeals addressed that interesting issue recently. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

## COURT OF APPEALS

### MUNICIPAL LAW, TERM LIMITS RULE, CONTRACT ZONING

*Hudson View Park Co. v Town of Fishkill, 2025 NY Slip Op 07080 (Ct App Dec. 18, 2025)*

**Issue:** Is the term limits rule violated by a memorandum of understanding entered into by a private developer and a municipality and its boards, which is binding on their successors, where the municipality agreed not to terminate its review of the developer's rezoning petition, and a proposed project, until it reached a final determination on the merits in its legislative judgment regarding the best interests of the municipality based upon "empirical data and other objective factual bases"?

**Facts:** The plaintiff, a developer, owns approximately 50 acres of unimproved property in the Town of Fishkill where it proposed to build a mixed-use residential and commercial project. To obtain approvals for the project, the plaintiff required a rezoning of an approximately 16-acre portion of the property to multi-family residential. In December 2017, the development, the Town Board, and the Planning Board entered into a memorandum of understanding, in which the Town agreed to review the zoning change application diligently and in good faith, and would not terminate its review until it reached a final determination on the merits of the application. The MOU specifically provided that the Town could not commit to any particular outcome, and the Boards would undertake their review in accordance with governing law. Notably, the MOU also provided that it was binding on the parties' successors.

The developer then submitted its zoning petition, and the Town's review proceeded for more than a year and a half before a new Town Board was elected. The new Town Board in April 2020 terminated its review of the zoning petition, concluding that it was "in the best interest of the Town to cease further review of the [plaintiff's] Petition." The developer sued for breach of the MOU, and for breach of the covenant of good faith and fair dealing. The Town moved to dismiss, and Supreme Court dismissed the case, holding that "the MOU is not a valid or enforceable contract as the Town Board could not contract away its legislative discretion concerning the proposed zoning amendment, and the term limits rule prohibits a prior town board from binding future town boards with respect to governmental functions" and that the MOU was illegal contract zoning.

The Appellate Division, Second Department affirmed, holding held that the MOU bound successive Town Boards' exercise of their legislative functions as to zoning, which was unquestionably one of their governmental powers, and thus violated the term limits rule, which prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions. The court rejected the developer's argument that the term limits rule had not been violated because the MOU merely required the Town to follow the process to reach a decision on the zoning petition, but did not commit the Town to any particular decision.

**Holding:** The Court of Appeals affirmed. The Court explained that "[t]he term limits rule prohibits one municipal body from contractually binding its successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so. It recognizes that elected officials must be free to exercise legislative and governmental powers in accordance with their own discretion and ordinarily may not do so in a manner that limits the same discretionary right of their successors to exercise those powers."

Zoning is one such legislative power that a municipal board may not contract away, the Court held. And the MOU purported to do precisely that. The Court reasoned, "[t]he MOU requires the 2017 Town Board's successors to resolve the Town's review of plaintiff's zoning petition, and the project in general, by reaching a final determination on the merits. This contractual restriction impermissibly constrains successor Town Board members' legislative authority over zoning as conferred by Town Law § 265 (1), which broadly empowers town boards to amend their towns' zoning restrictions from time to time, and Statute of Local Governments § 10 (6), which broadly empowers localities to adopt, amend and repeal zoning regulations. We have long recognized—and plaintiff concedes—that localities exercise plenary authority over local zoning matters and bear no obligation to consider and vote upon every zoning application they receive." Furthermore, the Court held, the provision of the MOU that required the Town Board to base its determination of the zoning petition only on "empirical data and other objective factual bases""impermissibly precludes successor legislators from considering any other valid fac-

tor, such as community opposition.” In a representative democracy, the Court held, political considerations often are at play in legislative decisions, and zoning decisions are no different. Thus, the Court held, the MOU was unenforceable.

## SECOND DEPARTMENT

### CIVIL PROCEDURE, STATUTE OF LIMITATIONS REVIVAL, ADULT SURVIVORS ACT

*Aguilar v Wishner*, 2025 NY Slip Op 07265 (2d Dept Dec. 24, 2025)

**Issue:** For purposes of a claim under the Adult Survivors Act, is “forcible touching (see Penal Law § 130.52[1]) or sexual abuse in the third degree (id. § 130.55) . . . limited to the nonconsensual touching of actual sexual or intimate parts of the body in the classic sense or, alternatively, [may] the touching of other parts of the body . . . qualify under Penal Law article 130 as forcible touching or sexual abuse in the third degree if related to the actors’ sexual gratification or where the overall circumstances are sufficiently intimate in nature?”

**Facts:** In January 2004, Plaintiff Mavis Aguilar saw Defendant Steven Wishner for a medical appointment to investigate her back pain. During the appointment, Wishner directed Mavis to remove all of her clothes and put on a gown with the opening to the front. She complied and removed everything except for her underwear. “Once Wishner returned to the room minutes later, he told her to stand. Mavis stood on the little stepstool used for climbing onto the examination table. Wishner told her to remove the gown, which she did, and to turn around, which she did. At Wishner’s instruction, Mavis bent forward over the examination table. Mavis’s buttocks was facing Wishner’s direction. Wishner, sitting in a chair, placed his hands around Mavis’s waist and applied pressure on her lower back with his thumbs. Wishner’s head was ‘basically on Mavis’s behind.’ Wishner said that he was checking to see if Mavis’s pain was related to her kidneys. Mavis, who had attended some medical school in her native Guatemala, knew what a kidney examination looked like, and that was not it, she testified. Mavis turned around and her mood changed from being upset because Wishner’s pressing on her back with his thumbs hurt her to being disgusted. Mavis testified that ‘in my perception, he just looked like as if he was enjoying something.’” Wishner told Mavis that he believed the back pain was just random and not related to her kidneys, after which she promptly left the office and told her husband and a coworker about Wishner’s conduct during the appointment.

In December 2022, Mavis commenced this action against defendants “to recover damages for personal injuries pursuant to the ASA as a result of the January 4, 2004 examination. The complaint alleged, among other things, that at the January 4, 2004 examination, Wishner made offensive, nonconsensual bodily contact with Mavis that included nonprivileged touching of a sexual nature. The complaint further alleged that Wishner preyed on female patients, including Mavis, with sexually abusive misconduct that included performing medically inappropriate and sexually abusive ‘examinations’ of patients for no medical purpose, performing medically inappropriate and sexually abusive ‘examinations’ so that he could leer for his own sexual gratification, engaging in inappropriate touching and/or rubbing with ungloved hands and with no medical purpose on patients’ bodies during ‘examinations,’ instructing patients to be fully or partially naked, without chaperones present, during routine physical examinations, and engaging in other inappropriate sexually abusive misconduct,” in violation of Penal Law § 130.52 (forcible touching) and § 130.55 (sexual abuse in the third degree).

Wishner moved to dismiss, arguing that the complaint failed to state a claim because it did not allege that he ever touched any of Mavis’s intimate body parts. Supreme Court granted the motion, holding that “the transcript of Mavis’s testimony during the October 2014 deposition established that Wishner did not commit acts against Mavis during the January 4, 2004 examination that constituted forcible touching or sexual abuse in the third degree, as Mavis described Wishner touching her waist and his head as being ‘[b]asically’ on her buttocks. The court determined that although Mavis’s buttocks are an ‘intimate part’ for the purposes of establishing forcible touching and sexual abuse in the third degree under the Penal Law article 130 statutes, Mavis’s testimony failed to establish that Wishner made bodily contact involving the application of some level of pressure to her buttocks.”

**Holding:** The Appellate Division, Second Department reversed, explaining that the ASA is a revival statute, much like its counterpart the Child Victims Act, that allowed otherwise time-barred claims to be revived for a period of one year beginning on November 24, 2022, for sexual abuse victims who were 18 years old or older, and where the claim arose “from conduct constituting incest as defined in the Penal Law or one or more sexual offenses under Penal Law article 130.” Under the two Penal Law sections at issue in this ASA action, both offenses require “some form of physical contact between the abuser and the victim and that the contact at issue involves sexual or intimate parts of the body.” Noting that the case was on a pre-answer motion to dismiss, with evidentiary submissions, the Court held that Mavis had a cause of action against Wishner, even if the complaint only conclusorily stated one.

The Court explained, in other cases across the state, including under the “Penal Law, the ASA, the CVA, and the Sex Offender Registration Act,” “the nonconsensual touching of a neck and feet, the licking of a neck, the kissing of the back of a neck, the kissing of a mouth, the placement of lips to feet, the rubbing of an 11-year-old victim’s leg after she asked the defendant to stop, the touching of a navel, the touching of a 6-year old’s thigh in a dark theater, and the rubbing or touching of the victim’s buttocks have been found to constitute forcible touching (Penal Law § 130.52[1]), sexual abuse in the third degree (id. § 130.55), and other sexual offenses under Penal Law article 130.” This, the Court held, “demonstrate[s] that Penal Law §§ 130.52(1) and 130.55 apply not only to the nonconsensual touching of parts of the body that are unquestionably sexual, intimate, or erogenous but also to other parts of the body contacted in an intimate way or in a manner that gratifies the actor’s sexual desire. The touching of nonsexual body parts, like the feet and neck, standing alone, may not

qualify as ‘sexual contact’ (id. § 130.00[3]) unless the touching is accompanied by circumstances that elevate the conduct to that of a non-consensual act of intimacy or that involve the sexual gratification of the actor. Intimacy, after all, is a function not just of anatomy but also of behavior. As a result, the broader nature, manner, and circumstances of a touching of the body should be considered in determining whether such conduct constitutes a Penal Law article 130 predicate to commence an action pursuant to the ASA.” Here, the Court held, the allegations could not be viewed solely as the touching of Mavis’s back, but in the overall context included sufficient allegations that that nonconsensual touching was for Wishner’s sexual gratification. That was enough to state a claim, the Court held.

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