Capital District Regional Planning Commission
Local Government Workshop
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Planning Case Law Update

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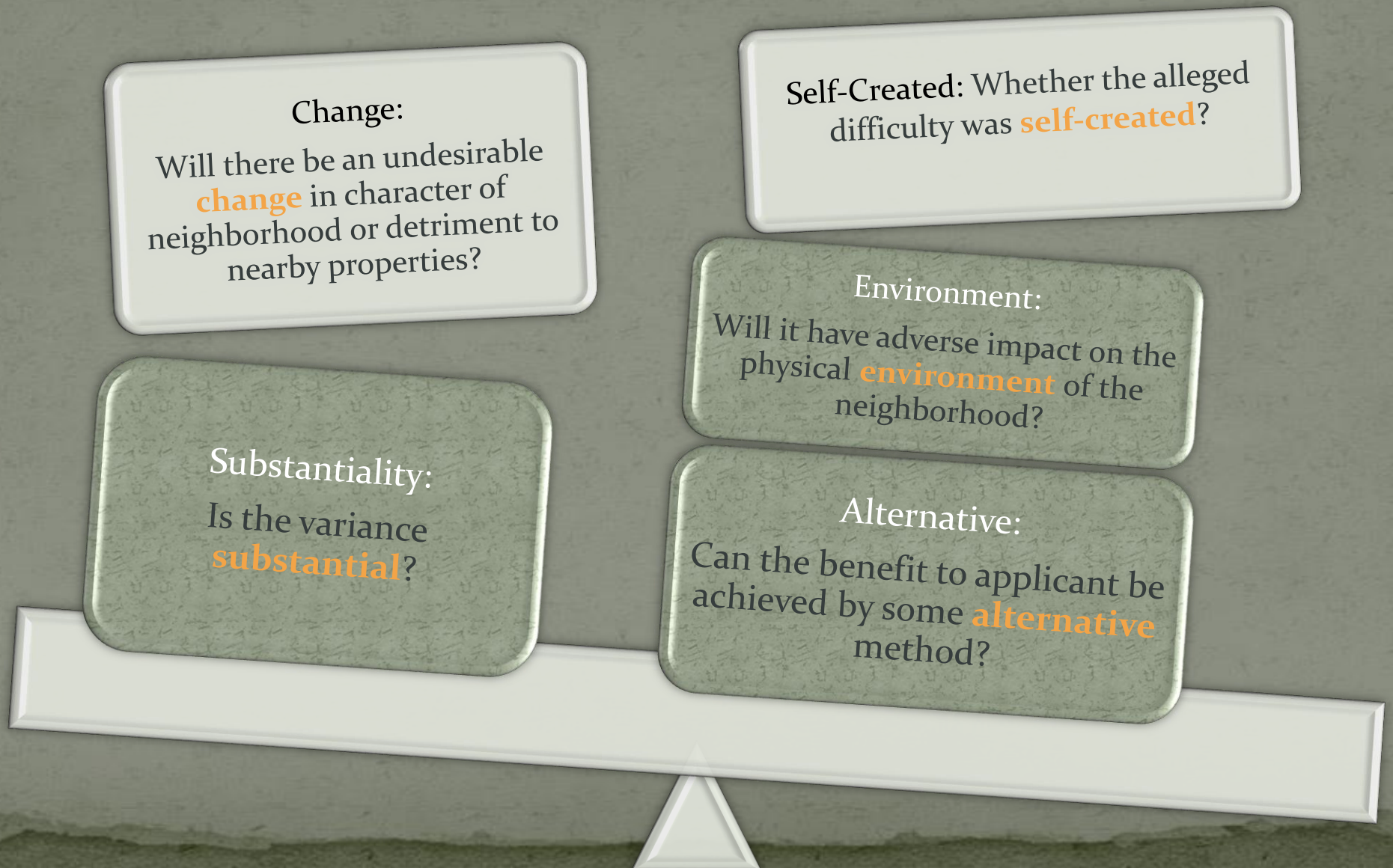
What are we discussing today?

- Area Variances
- Use Variance
- ZBA Interpretation Cases
- Special Use Permits
- Site Plan
- Subdivision
- SEQRA
- Open Meetings Law
- Other

TEST FOR AREA VARIANCE ("Balancing Test")



AREA VARIANCE CASES

- **<u>Bellridge, LLC v. Zoning Board of Appeals of the Inc. Village of Bellport</u>**
- Owners' house is a nonconforming structure but a conforming use in the zone. The proposed addition required total side yard and single side yard area variance relief. Their neighbors objected on two grounds: (1) that the nonconformance could not be extended under a nonconforming use provision of the code; and (2) that the legal test for an area variance was not met.
- OUTCOME: The Court agreed with the ZBA that the nonconforming limitations of the code apply only when a nonconforming use is present. The Court also sustained the application of "credible evidence" by the ZBA to the area variance test and provided an excellent summary of the reason why courts are limited in their review of zoning board decisions:

QUOTE OF THE DAY:

"The crux of the matter is that the responsibility for making zoning decisions has been committed primarily to quasi-legislative, quasi-administrative board composed of representatives from the local community. Local officials generally possess the familiarity with local conditions necessary to make the often sensitive planning decisions which affect the development of their community. Absent arbitrariness, it is for the locally selected and locally responsible officials to determine where the public interest in zoning lies. Judicial review of local zoning decisions is limited; not only in our court but in all courts. Where there is a rational basis for a local decision, that decision should be sustained."

AREA VARIANCE CASES

- **Matter of Bonefish Grill, LLC v. ZBA of Village of Rockville Center**
- When Bonefish Grill achieved its approval, its building permit required that the lot next door be merged with the restaurant lot; otherwise a parking variance would be required.
- At certificate of occupancy, the Building Department noted that the merger of the lots had not taken place. Bonefish instead had a licensing agreement which allowed the adjoining lot to be used for parking from the hours of 4:00 pm to 12:30 am Monday through Friday.
- The Building Department referred the application to the ZBA for a hearing on the parking variance. The ZBA imposed, as conditions, the terms of the licensing agreement by limiting the hours of operation of Bonefish and required valet parking..
- **OUTCOME**: The Court, upon review, found that the conditions were reasonable because of the expert traffic engineer's comments, the ZBA members' knowledge of a high parking demand in that area, and the impact to surrounding businesses

- **Feinberg-Smith Associates, Inc. v. Town of Vestal Zoning Board of Appeals**
- Applicant wanted to expand its student housing development by adding 220-240 one to two bedroom apartments near the Binghamton University Campus and requested variances from the ZBA to reduce the lot size requirement, reduce minimum living space, reduce the number of required parking spaces, and increase the allowable building height.
- The ZBA received over 80 written submissions and expansive public comment in opposition. The ZBA denied the variances on the grounds that (1) there would be a deleterious impact on the character of the neighborhood; (2) the relief was too substantial; and (3) there are less impactful alternatives available. The applicant challenged the determination as based purely on community pressure.
- **OUTCOME**: The Court did not agree; instead finding that, while there was evidence to support the approval of the variance, there was equal evidence to support the denial. In such circumstances, the courts will not supplant their opinion for that of the ZBA's.
- NOTE: The Court specifically noted that the denial of the variances would not render the property "unusable." Additionally, there was a way to build the project code compliant – 5 bedroom units.

TEST FOR USE VARIANCES

Applicant cannot realize a reasonable **return** if used for permitted purpose in the zone.

Hardship results from the **unique** characteristics of the property.

Must Meet All Four

The variance will not alter the **essential character** of the neighborhood.

The hardship has not been **self-created**.

USE VARIANCE CASES

- **Leone v. City of Jamestown ZBA**
- Jamestown Community College obtained an old mansion as part of a dedication in 1977.
- In 2015, a developer sought a use variance to convert the mansion to its corporate headquarters.
- The ZBA granted the use variance and neighbors appealed. The record establishes that the ZBA heard the application but did not make specific findings of fact or conclusions of law.
- **OUTCOME**: The Court agreed and reversed the grant of the variance stating, in part, that the ZBA had failed to require any proof of JCC's inability to obtain a return on its investment from any lawful use in the zone. Failure to present evidence on this prong of the test invalidated the use variance.

- **Matter of Jenkins v. Leach Properties, LLC**
- Leach wanted to expand its trash service facility and needed a use variance for an access road and additional parking which was granted by the ZBA.
- Adjoining neighbors petitioned to have the use variance annulled on the grounds that no evidence was submitted on a return on investment, the hardship was self-created, and the lack of competent financial data.
- **OUTCOME**: The Court agreed with the petitioners that the ZBA failed to request any financial data to support the finding and that sole issue raised by the appellant was that of self-created hardship.
- NOTE: Even assuming that the Court was incorrect on the hardship, the rule in NY is that every single element of the use variance test must be met.

PRACTICE TIP

Applicant is entitled to a reasonable return on investment;
not the most profitable one.

ZBA INTERPRETATIONS

- NEW YORK TOWN LAW" 267-b:
- The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

ZBA INTERPRETATION CASES

- **Chenango Valley Central School District v. Town of Fenton PB**
- The applicant is a natural gas company wishing to construct a natural gas compressor facility in the Town of Fenton.
- The Town's designated engineer is also a member of the Planning Board who reviewed the application on behalf of the Board.
- During the meetings, it became clear that there was dispute as to the description and definition of the use proposed by the gas company. It started as natural gas compressor station and was apparently determined to be a truck transfer station which was permitted in the zone.
- **OUTCOME**: The Court found that, during site plan review, the Planning Board was confused by the definition and proposed use which caused it to guess and speculate as to the appropriate classification. Such action usurps ZBA jurisdiction improperly.
- NOTE: Time to Appeal - Formal findings as to the determination of use from the code enforcement officer are required and only such findings trigger the 60-day statute of limitations.

- **Matter of Tomosino v. Board of Trustees of the Inc. Village of Islandia**
- Delaware North sought a special use permit for the operation of video lottery terminals and OTB within the Islandia Marriott on Long Island as principal accessory use.
- The Village Board granted the permit and it was challenged by neighbors on the ground that VLTs and OTB are not necessary and customary accessory uses to a hotel.
- Several experts testified that such uses are rarely, if ever, found within hotels in New York.
- **OUTCOME**: While more common in Upstate, there are none on Long Island and, since zoning is a local concern, the Court declined to extend consideration to far flung examples all over the state.

ZBA INTERPRETATION CASES

- **Cleere v. Frost Ridge Campground, LLC**
- Owner has operated a campground since the early 1950s and recently wanted to sell tickets to its summer concert series.
- The ZBA determined that no special use permit was required because the use predated the zoning code – thereby making it a pre-existing non-conforming use.
- The petitioners own adjacent property and challenged the ZBA's determination.
- **OUTCOME**: The Court, in affirming the ZBA, set forth the standard of review for interpretation of non-conforming uses: "*A determination by a ZBA must be sustained if it has a rational basis and is supported by substantial evidence. A record contains substantial evidence to support an administrative determination when reasonable minds could adequately accept the conclusion or ultimate fact based upon relevant proof. Where there is conflicting evidence, it is the role of the administrative agency to weigh the evidence and make a choice, and the courts will not reject a choice based upon substantial evidence*." In the case, the owner produced substantial evidence in the form affidavits from former employees confirming activities back decades. No evidence to the contrary was submitted.

HELPFUL TIPS ON GRANFATHERED & INTERPRETATION CASES

1. Preexisting nonconforming use (PENCU): a use of property that existed before the enactment of the zoning restriction that prohibits the use, which includes the right to maintain but not to expand.
2. ZBA's determine extent of preexisting nonconforming use (grandfathered uses) at a hearing with evidence taken and assessed.
3. Purely legal interpretation: No deference given to ZBA as it is a legal inquiry. (Think: What does this language mean?")
4. Fact-based interpretation: Deference is given to ZBA as finder of fact in a particular situation. (Think: Does this language apply in this situation and how?)

Town Law " 274-b: "Special use permit" shall mean an authorization of a particular land use which is permitted in a zoning ordinance . . .[which] is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.

Special Use Permit

- A special use permit validates a use permitted in the zone but not permitted as of right. Standards for reviewing special use permits are generally found in the local laws.
- The classification of a use as specially permitted in the zone is "tantamount to a finding that the permitted use is in harmony with the zoning plan and will not adversely affect the neighborhood."
- It is essentially a presumption of harmony.

SAMPLE STANDARD FOR SPECIAL USE PERMIT

P	• Extent of harmony with zoning code and Comprehensive Plan
E	• Overall compatibility with neighborhood
R	• Impact on vehicular congestion, parking and traffic
M	• Impact on infrastructure, services, utilities, and public facilities
I	• Impact on the environmental and natural resources
T	• Impact on long-term economic stability and community character

Saratoga Springs Zoning Code (240-6.4)

SPECIAL USE PERMIT CASES

- **Matter of Blanchfield v. Hoosick**
- Dog trainer received a notice from the Town that her business violated the Town Code and that a special use permit/site plan approvals were necessary.
- The local ordinance provided that noise coming from her property could not exceed 80 decibels. The owner, also a registered nurse, provided daily sound readings taken in a one month, during daily intervals, which showed decibels of no more than 70 dbl.
- One of her neighbors produced an audio recording he alleged was taken from his house with the sounds coming from the applicant's property. Another neighbor, who operates a horse training business, supplied letters from her clients who complained of dog noise. The applicant offered to move her pens so they would be blocked by a building and erect a sound blocking stockade fence. The ZBA denied the application for a special use permit – citing insufficient mitigation measures.
- **OUTCOME**: The Court reversed the ZBA because the applicant's scientific evidence when uncontroverted in the record and the Board improperly relied upon the unsubstantiated sound recordings.

- **Matter of Troy Sand & Gravel Co., Inc. v. Fleming**
- The applicant's request to mine its property in the Town pursuant to a special use permit.
- While a specially permitted use is tantamount to a presumption of harmony in the zone, the applicant still bears the burden of demonstrating compliance with the special permit criteria set forth in the local zoning code.
- OUTCOME: Here, the Court found that the Town Board engaged in an extensive review of the history of the residential zone and its historic character.
  - The Town noted that it is home to a significant number of wildlife attributes including the fifth largest unfragmented forest in the state. The application calls for the blasting of 79 acres of land in six phases over a period of 100 to 150 years.
  - The operation would run from sunrise to sunset 6 days a week with blasting occurring between 10am and 5pm. The result would be a 275 foot high 3000 foot long rock face running parallel to the main route through the Town.
  - Ultimately, the Town Board stated that 3 of the 5 special use permit criteria were not met: (1) a sizeable quarry operation is not in harmony with the orderly development of district; (2) expert testimony was provided during the hearing that an operation of such a size would have a deleterious effect on surrounding property values; and (3) the mining operation would be out of character and appearance of the surrounding neighborhood. If only one criterion is not met, it is rational to deny an application for a special use permit.

STANDARDS FOR SITE PLAN

Statutory law gives municipalities the right to set specifications for site plan review and lists some common inclusions.

S	• Parking
I	• Means of Access
T	• Screening
E	• Signs
P	• Landscaping
L	• Architectural Features
A	• Location and Dimensions of Buildings
N	• Adjacent Land Uses

SITE PLAN CASES

- **Matter of 7-Eleven Inc. v. Town of Babylon**
- In the precedent of Matter of 7-11 Inc v. Village of Mineola, a proposed convenience store was denied site plan approval due to the Planning Board's finding that the proposal could not protect health, safety and welfare of pedestrians, site access, and neighboring properties.
- A review of the facts of the case reveals no less than four separate site plan revisions to address concerns about traffic, access, truck deliveries, and limited delivery hours.
- The Town received a letter from a competing 7-11 franchise owner who owned a store less than a mile away indicating that 7-11 could not restrict truck deliveries to box truck only no matter what deed restrictions were signed. There was significant neighbor outcry about the impacts to the surrounding neighborhood and traffic increases.
- The applicant agreed to deed restrictions concerning the timing and size of trucks making deliveries, submitted expert traffic study, and engineering studies to support the project.
- The Planning Board voted to deny the site plan as revised, citing to the letter from the other franchise owner and that the site could not be developed safely without impact to health and safety.
- **OUTCOME**: The Second Department reversed and cited the Mineola case as precedent concerning the denial of a special use permit largely based on generalized community objection.

- NOTES: A few points the Court made deserve note: (1) the Planning Board failed to articulate *HOW this permitted use would be any more impactful of a site than any other use permitted in the commercial zone*: (2) Mineola involved a special use permit which is an even more intensive municipal review than a site plan which means there must be even more compelling data as to why it cannot be approved; (3) the use of a competitor's subjective unsworn assessment was not sufficient to counter the volumes of empirical data submitted by the applicant; and (4) reliance on conclusory and speculative concerns will not be sustained.

NYS REQUIREMENTS FOR SUBDIVISION

- Plat can be safely used for building purposes
- Adequate width and grade of roads
- Map contains suitable marks and block corners
- Character of the development
- Compliance with all other zoning regulations
- If required by Board, suitable parks and parkland

LOCAL LAWS OFTEN SUPPLEMENT

SUBDIVISION CASES

- **Matter of Willow Glen Cemetery Assn. v Dryden Town Board**
- A large solar project was proposed for lands leased by a farmer which required an application to subdivide the farm into 5 separate parcels.
- Adjacent to the farm is the Willow Glen Cemetery which took the position that the installation of the solar panel project would destroy its scenic value and peaceful purpose.
- Pursuant to the local code, the Town Board reviewed the request for a special use permit and site plan while the Planning Board simultaneously reviewed the subdivision application. All applications were granted and the project was approved.
- The cemetery challenged the approvals on multiple grounds including an argument that site plan and subdivision review cannot occur on the same project, or if they can, that subdivision must precede site plan review. The basis of the contention is that the Town Board's review of the site plan was inappropriate because it was based upon 5 parcels which did not exist yet due to the continuing Planning Board review.
- **OUTCOME**: The Court noted that the only provision in the NYS Town Law which speaks to subdivision and site plan together is the Section 274-a(6)(d) which discuss the inability of boards to set multiple fees for monies paid in lieu of parkland dedication. While undertaking subdivision first may necessarily make practical sense, there is no NYS requirement that a municipality conduct its subdivision review first.

STANDARD FOR SEQRA ("ILR")

I

- Identify areas of environmental concern

L

- Take a "hard look" at those identified areas

R

- Make a "reasoned elaboration" thereon in reaching a decision

SEQRA CASES

- **Chenango v. Valley Central School District v. Town of Fenton PB**
- The applicant is a natural gas company wishing to construct a natural gas compressor facility in the Town of Fenton.
- The Town's designated engineer is also a member of the Planning Board who reviewed the application on behalf of the Board. He also sent the application to Broome County Planning Board as part of the GML 239 referral.
- The SEQRA "review" was conducted in a single meeting when the Planning Board declared itself lead agency and also issued a negative declaration – prior to the receipt of the County response to the referral (which ended up recommending denial).
- The engineer/planning board member then filled out Parts 2 and 3 by himself after the meeting.
- OUTCOME:
- **Timing of Classification**: "as early as possible in an agency's formulation of an action it proposed to undertake, or as soon as an agency received an application it should determine the type – Type I, Type II or unlisted.
- **Type**: Should have been a Type I because of the proximity to the Port Dickinson Community Park. NYSDEC Handbook says that if there is a question on "substantially contiguous" – better to err on the side of contiguous.
- **Lead Agency/Coordinated Review**: Multiple involved agencies – Town of Fenton ZBA, NYSDEC, Village of Port Dickinson, etc. – should have received a Part I immediately with an intent to seek lead agency status under a coordinated review which is mandatory for a Type I.
- **Hard Look**: Truck traffic was the primary objection in the petition and the petitioners allege no analysis was done by the Planning Board as to impacts. County made note that the option selected by the planning Board was not feasible due to a weight limit. No traffic studies were required and the decisions directly impacted the intersection of the elementary school.

SEQRA CASES

- **Shinnecock Neighbors v. Town of Southampton**
- Town of Southampton created a PDD by rezoning three parcels of land to allow for the rehabilitation of an inn, the creation of a waterfront luxury townhouse complex, and a waste water treatment facility.
- In reviewing the impacts of the project under SEQRA, both parties admit that the engineers noted that the existing water district cannot meet the needs of the project and that new facilities would be required.
- The new water line would need to cross the canal which was not addressed under the SEQRA review. Rather, the Town Board stated that all necessary approvals would be handled by the Water District – which deferred its responsibilities under SEQRA.
- **OUTCOME**: The Court found that instead, the Town Board should have sought the comments and concerns from the agency – not abdicate its review power to the Water District.

- **Matter of Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Board**
- Between 2004 and 2009, the Town Planning Board reviewed a residential and commercial development on 54 acres which included a "deli/coffee shop" use.
- The Planning Board issued a positive declaration and the process of preparing an EIS began.
- In 2009, the project was approved pursuant to a Statement of Findings under SEQRA. In 2012, a new owner of the project proposed to build a convenience store with 16 gas pumps under the existing SEQRA Statement of Findings.
- **OUTCOME**: The Court invalidated the Planning Board approval on the grounds that it failed to require a Supplemental EIS due to a project change. The 16 gas pumps and convenience store use had not been reviewed as part of the original SEQRA findings and therefore the Planning Board failed to take a hard look.

NY OPEN MEETINGS LAW

OPEN MEETINGS LAW

- **Chenango v. Valley Central School District v. Town of Fenton PB**
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- The Town's designated engineer is also a member of the Planning Board who reviewed the application on behalf of the Board. He also sent the application to Broome County Planning Board as part of the GML 239 referral.
- The SEQRA "review" was conducted in a single meeting when the Planning Board declared itself lead agency and also issued a negative declaration – prior to the receipt of the County response to the referral.
- The engineer/planning board member then filled out Parts 2 and 3 by himself after the meeting.

- **OUTCOME**: The Court found that Parts 2 and 3 of the EAF being completed outside the formal meeting is not a flagrant violation – but technical in nature. It reflected cavalier attitude but not malice. No award of fees or costs.

- **Matter of Haverstraw Owners Professionals & Entrepreneurs v. Town of Ramapo**
- In considering area variances that were ultimately granted, the ZBA received a resolution drafted by counsel after the first meeting and presented it at the second meeting.
- The ZBA reviewed the resolution and adopted it – thereby granting the area variances.
- Opponents claimed that the drafting of a resolution approving the variances by counsel outside of the public meeting constituted a violation of the Open Meetings Law.

- **OUTCOME**:
- The Second Department disagreed and found that there was no evidence of any meeting of the Board which deliberated on the issue outside of the public view.
  - NOTE: See also Matter of Gedney Assn v. City of White Plains (147 A.D.3d 938) for a similar finding by the Second Department on the draft of a SEQRA Findings Statement.

OTHER: SPOT ZONING

- **Matter of Heights of Lansing Development LLC v. Village of Lansin**
- Developer sought to rezone 19 acres from Business and Technology District to High Density Residential.
- Neighboring landowners charged the Village with spot zoning after the rezoning petition was approved. Spot zoning is the act of singling out a specific parcel of land for favorable land use classification which is different than all other surrounding land areas.
- Courts routinely look at the Comprehensive Plan to determine whether the rezoning is consistent with a defined land use plan.
- **OUTCOME**: Here, the HDR was extended to the parcel, rather than wholly inconsistent with surrounding land uses. Moreover, the Comprehensive Plan called for greater buffer zones around the BTD. Homeless and low-income housing needs were a primary concern in the revised Comprehensive Plan and there was no undeveloped lands left in the HDR zones existing in the Village.

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