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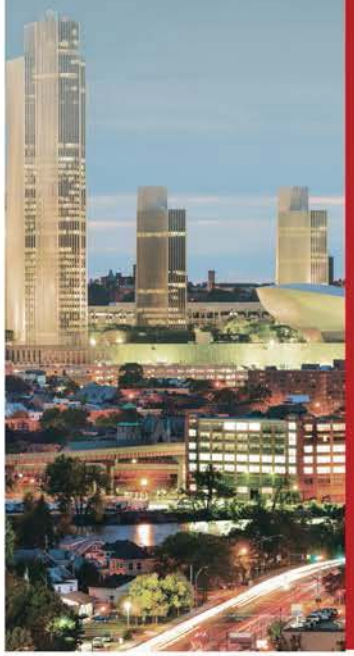

Case Law Update

CDRPC and NYPF Fall Local Government Workshop
October 23, 2019

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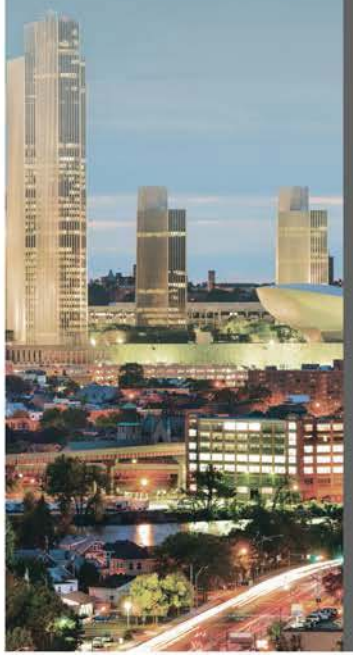

SEQRA

City of Rye v. Westchester County Board of Legislators, 169 A.D.3d 905 (3d Dep't 2019).

- Facts:
  - City of Rye and other petitioners challenged Playland Park Negative Declaration for development
  - Playland Park in the City of Rye but owned by Westchester County

City of Rye v. Westchester County Board of Legislators, 169 A.D.3d 905 (3d Dep't 2019). CONT'D

- Holding/Rationale:
  - Does a SEQRA Lead Agency always have standing? It Depends…
  - City Zoning Preempted → Monroe Balancing Test
  - City did not have standing related to community character impacts
  - Individual petitioners → No injury

Peterson v. Planning Board of City of Poughkeepsie, 163 A.D.3d 577 (3d Dep't 2018)

- Facts:
  - A historic neighborhood association commenced an Article 78 proceeding against the City of Poughkeepsie Planning Board challenging the City's determination that a proposed condominium development would not have significant impact on the environment.
  - Proposed construction site was adjacent to a historic district in the City.
  - City issued negative declaration with respect to developers application for site plan approval.
  - Historic neighborhood association claimed that the City took various procedural shortcuts and failed to assess relevant environmental concerns.
  - Supreme Court denied the petition and dismissed the proceeding.

Peterson v. Planning Board of City of Poughkeepsie, 163 A.D.3d 577 (3d Dep't 2018) CONT'D

- Holding:
  - Appellate court acknowledged that courts "may review the record to determine whether the agency identified the relevant areas of concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.
  - Appellate court found that the City failed to fulfil the reasoned elaboration requirement by solely relying on a letter from NYS SHPO which stated only that the proposed project would not adversely affect the historic district
  - Appellate Division also found that level of deforestation (reduction of forestation from 2.75-.3 acres) to be significant; where the negative declaration stated that "the proposed action will not result in the removal or destruction of large quantities of vegetation or fauna."
  - Appellate court remitted the matter back to the Planning board so that an EIS may be prepared.

Lakeview Outlets, Inc. v. Town of Malta, 166 A.D.3d 1445 (3d Dep't 2018).

- Facts:
  - In 2006, the Town adopted the findings of a GEIS that provided for the assessment of mitigation fees to developers.
  - In 2014, the Town ZBA, determined that the plaintiff's proposed restaurant and hotel were consistent with the GEIS, no further SEQRA review was necessary and consistent with the GEIS and findings statement, plaintiff was assessed mitigation fees for the projects totaling roughly $268,406.00.
  - Plaintiff commenced an action against the Town seeking, among other things, a declaration that the mitigation fees are illegal and directing defendant to refund the fees paid.
  - Town moved to dismiss the complaint on statute of limitations grounds.

Lakeview Outlets, Inc. v. Town of Malta, 166 A.D.3d 1445 (3d Dep't 2018). CONT'D

- Issue:
  - Whether the Town's statute of limitations defense is governed by the four-month statute of limitations applicable to CPLR article 78 proceedings or the six-year statute of limitations period applicable to declaratory judgment actions.

- Holding:
  - Appellate Court explained that "the court must look at the underlying claim and nature of the relief sought and determine whether such claim could have been properly made in another form."

  - In other words, if the claim could have been brought under Article 78, then the shorter, 4-month statute of limitations that governs Article 78 proceedings governs.

  - Court concluded that the plaintiff's claims in substance "are a direct attack on the mitigation fee scheme established in the GEIS, which is properly viewed an "administrative act of defendant's Town Board under the circumstances of the case…such that any challenge thereto should have been the subject of a CPLR article 78 proceeding."

Miranda Holdings, Inc. v Town Bd. of Town of Orchard Park, __ AD3d __, 2017 NY Slip Op 05554 (4th Dept July 7, 2017)

- Facts
  - Tim Horton's with a drive-through window
  - Lead Agency (Town Board) → Unlisted / Pos Dec
  - Project Revised → Type II Under SEQRA
  - New Local Law → Revised Project Type I

Miranda Holdings, Inc. v Town Bd. of Town of Orchard Park, __ AD3d __, 2017 NY Slip Op 05554 (4th Dept July 7, 2017) CONT'D

- Rationale / Holding
  - 6 Year Statute of Limitations (compare 4 months for procedural defects)
  - Local law creating restaurants with drive through window type I → Invalid
  - Local laws cannot be inconsistent with SEQRA……..?
  - USE THE HANDBOOK!!!!!
  - What can a Town/Village/City dc

Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v City of Rochester, 150 AD3d 1678 (4th Dept 2017)

- Facts
  - SQRA Negative Declaration → ALDI's
- Issues
  - Do Petitioners have standing?
  - Can a negative declaration be supported by written reasoning after it is adopted?

Matter of Rochester Eastside Residents for Appropriate Dev., Inc. v City of Rochester, 150 AD3d 1678 (4th Dept 2017) CONT'D

- Holding/Rationale
  - 300 to 500 feet from property line presumed standing
  - Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo, 112 AD3d 726, 728 (2d Dept 2013) (standing measured from construction).
  - Written Negative Declaration → Post Hoc Rationale Invalid
  - Developer promised to clean clean contamination → No Effect
  - EVERYTHING IN WRITING

Sierra Club v. New York Department of Environmental Conservation, 169 A.D.3d 1485 (4th Dep't 2019)

- **Facts:**
  - Proposed project to renovate inactive coal power plant to use natural gas and biomass;
  - In June 2016 NYSDEC, as lead agency, issued a negative declaration;
  - In October 2016, petitioners commenced Article 78 alleging deficiencies in the SEQRA process but did not seek a temporary restraining order;
  - Before the court rendered a decision, respondents notified the court that construction was completed and that the plant had resumed operation;
  - Supreme Court dismissed petition and petitioners appealed but did not seek to enjoin operation of power plant;

Sierra Club v. New York Department of Environmental Conservation, 169 A.D.3d 1485 (4th Dep't 2019) CONT'D

- **Issue:**
  - Whether the petitioner's challenge is now moot in light of the fact that the proposed construction is complete.
- **Holding**:
  - Factors:
    - Whether the party challenging construction sought injunctive relief
      - Petitioners waiting until the last minute to seek TRO, failed to pursue injunctive relief with any urgency and waiting until the last possible day to take an appeal
    - Whether work was undertaken without authority or in bad faith
      - No, SEQRA was completed and all necessary approvals were issued prior to commencing construction
    - Whether substantially completed work can be undone without undue hardship
      - No, respondents spent $12 million and long ago passed the point where the plant was operational.
  - Petitioner's challenge is moot.

David Gibson, et. al. v. Planning Board of the Town of Ballston and Heritage Development Holdings, LLC, Index No. 20171195 (Sup. Ct. Saratoga Co. 2017)

- Issue
  - Whether the Petitioner was time barred to challenge the Neg Dec and whether subdivision was in violation of the Town's Subdivision Regulations.
- Facts
  - Respondent sought to subdivide approximately 96 acres of land and rezone into the PUDD district.
  - On July 31, 2014, the Planning Board issued a negative declaration, after considering a wide range of submission including multiple reports and recommendations from the Town's engineering consultant and after reviewing a full EAF.
  - On October 28, 2015 the Planning Board held a public hearing on the plan, which was revised and resubmitted with another public hearing on January 20, 2016.
  - On January 20, 2016 the Planning Board approved the preliminary subdivision plan.
  - On January 13, 2017, Petitioners submitted written environmental concerns related to the project prior to final subdivision approval.
  - Final subdivision approval was granted on March 29, 2017 and the Planning Board assured Petitioners their concerns were already addressed.

David Gibson, et. al. v. Planning Board of the Town of Ballston and Heritage Development Holdings, LLC, Index No. 20171195 (Sup. Ct. Saratoga Co. 2017) CONT'D

- Facts
  - Petitioners filed suit claiming that:
    - The plan violated the Town's lighting requirements under the Subdivision Regulations;
    - The plan violated the Town's tree preservation requirements under the Subdivision Regulations; and
    - A hard look was not taken and the negative declaration should have been rescinded based on Petitioner's comments, which were submitted after the preliminary approval was granted.

David Gibson, et. al. v. Planning Board of the Town of Ballston and Heritage Development Holdings, LLC, Index No. 20171195 (Sup. Ct. Saratoga Co. 2017) CONT'D

- Holding
  - For subdivisions, the statute of limitations begins to run "where the preliminary approval is final as to a particular issue and thus ripe for judicial review by an aggrieved party".
  - The Court held that the causes of action were considered by the Planning Board before the negative declaration was issued and before the preliminary approval was granted, therefore its challenge to the negative declaration is time-barred.
  - The Planning Board considered lighting, tree preservation, and other environmental impacts before the preliminary approval and therefore the preliminary approval made a determination on these issues final.
  - Petitioners needed to commence the action within 30-days of the preliminary subdivision approval, not the final subdivision approval.
  - The record did not evidence any violations of the Town's subdivision regulations.

City of Hudson v. Town of Greenport, Index No. 17-05620 (Sup. Ct. Albany Co. 2019)

- **Facts:**
  - Owner of quarry and asphalt plant applied to the Town of Greenport for site plan approval for proposed improvements on a trucking route which connected their dock in Hudson, NY to their quarry in Greenport, NY;
  - Planning Board, classified proposed project as Type I action and, subsequently, passed an eight-page resolution adopting the negative declaration as well as a 25-page report evaluating the potential impacts;
  - City of Hudson commenced an Article 78 proceeding to annul the negative declaration alleging that the Planning Board failed to take a "hard look" at the significant environmental impacts of the project;

City of Hudson v. Town of Greenport, Index No. 17-05620 (Sup. Ct. Albany Co. 2019) CONT'D

- **Holding:**
  - Court acknowledged the decision law that "the role of the court is limited to determining whether the lead agency identified the relevant areas of environmental concern, took a "hard look at them, and made a "reasoned elaboration" of the basis for its determination.
  - Court noted:
    - Sixteen meetings, including special public information meeting;
    - Consultation with state agencies, including NYSDEC regarding wetlands, plants, wildlife, and dust;
    - Consultation with NYSDOT regarding traffic;
    - Careful consideration and response to more than 400 comments raised during the comment period and review of all written documentation filed with the Planning Board;
  - Court held that Planning Board's decision was rationally based and dismissed the petition.

Brunner v. Town of Schodack Planning Board, Index No. 2018-260429 (Sup. Ct. Rensselaer Co. 2019).

- Facts:
  - Proposed 1,015,740 square foot sales distribution center in Town of Schodack
  - Proposed building to include 93 loading docks, 1,077 employee and 300 truck parking spots;
  - Planning Board → "Type I"
  - Expanded Environmental Assessment → No Adverse Impacts
  - 30 Page Negative Declaration

Brunner v. Town of Schodack Planning Board, Index No. 2018-260429 (Sup. Ct. Rensselaer Co. 2019). CONT'D

- **Article 78 → Hard Look**
  - Stormwater and groundwater (salt);
  - Traffic coming to and from the project (exit 12);
  - Public safety (fire protection).

- **Holding:**
  - Court found that Planning Board took a "hard look" at stormwater and groundwater, traffic, and public safety
  - Type 1 EIS → Rebuttable Presumption
  - Planning Board Discretion → Traffic

Brunner v. Town of Schodack Planning Board, Index No. 2018-260429 (Sup. Ct. Rensselaer Co. 2019). CONT'D

Why some cases a Expanded EAF is not enough?

- Look at the Property → Impacts directly related
- How was the information submitted?
- Who is requiring mitigation?
- Are potential impacts coming to light throughout the process?
- Public Participation?

Tresselt, et. al. v. Town of Guilderland ZBA, Index No. 2019-903531 (Sup. Ct. Albany Co. 2019).

- **Facts**
  - Special use Permit / Building Height Are variance → Assisted living senior community → 256 rooms with related parking 46 feet in height
  - 20 acres to be preserved as open space and dedicated to the Town
  - State Farm Road in the Town of Guilderland
  - Town of Guilderland sought traffic mitigation on State Farm Road (NY Rt 155) however NYSDOT said it was not warranted.
  - ZBA issues special use permit and area variance, Planning Board recommendation
  - ZBA Lead Agency → SEQRA Type 1 → Negative Declaration

Tresselt, et. al. v. Town of Guilderland ZBA, Index No. 2019-903531 (Sup. Ct. Albany Co. 2019).

- **Holding /Rationale**
  - Article 78 → SEQRA Hard Look, Special use Permit, Area variance challenges
  - SEQRA Challenge → Not a hard look at traffic → Three experts reviewed
  - NYSDOT Jurisdiction → NO traffic calming measures required
  - SEQRA Holding → Impacts vs. Significant impacts
  - Special Use Permit Holding → "Tantamount to a legislative finding that it is in harmony with the general zoning plan and will not adversely impact the neighborhood."
    - Compliance with the comprehensive plan
    - Similar to other uses in the area
    - Fire Department noted its satisfaction with the plan
    - Traffic in the area, with proposed growth, was considered.
  - Area Variance – Alterative more detriment to petitioners

Matter of the Hgts. Of Lansing, LLC. v Village of Lansing, 2018 NY Slip Op 02520 (3rd Dep't 2018)

- Issue
  - Whether rezoning a single parcel was illegal spot zoning and whether the related Negative Declaration violated of SEQRA?
- Facts
  - Since 1989 the subject property was zoned Business Technology district ("BTD").
  - The BTD district remained in effect and in compliance with the 2015 Comprehensive Plan.
  - In 2016 the Village rezoned the subject property from BTD to High Density Residential ("HDRD").
  - Petitioners claimed that this rezone was not incompliance with the Comprehensive Plan, which supported the BTD district, and violated SEQRA.

Matter of the Hgts. Of Lansing, LLC. v Village of Lansing, 2018 NY Slip Op 02520 (3rd Dep't 2018) CONT'D

- Holding

  - Village Board took the required SEQRA "hard look"
    - Held a number of public meetings and received public comment;
    - Reviewed a traffic study, engineering report, and rental housing needs study;
    - Completed Short EAF; and
    - Determined that such "down zoning" is in compliance with the Village's Comprehensive Plan.

  - Court held that the Town "need not investigate every conceivable environmental problem" including anticipated, but not yet proposed, residential development.

Matter of the Hgts. Of Lansing, LLC. v Village of Lansing, 2018 NY Slip Op 02520 (3rd Dep't 2018) CON'T

- Holding
  - Rezoning the 19 acre parcel was NOT spot zoning:
    - The Court held that if the rezoning is consistent with Comprehensive Plan it is not spot zoning, despite its size.
    - The rezoning was consistent with the Comprehensive Plan, although not specifically recommended, because it:
      - Created a better transition of uses;
      - Comported with general need for rental housing (although not affordable); and
      - Encouraged a broad range of housing options.
    - Therefore, the rezone benefitted the community as a whole and not just an individual or group of individuals.

Schmidt v. City of Buffalo Planning Board 2019 WL 3437659 (4th Dep't 2019)

- Facts:
  - The project was the demolition and reconstruction of an apartment complex.
  - Negative declaration was issued for the project.
  - The issue here was standing, the Court did not get into many facts.

- Holding/ Rationale
  - Petitioner Lacks Standing
  - Interest Different than the public at large → Interests in historic preservation alone not enough
  - Local preservation board does not confer standing

Frontier Stone, LLC v. Town of Shelby, 2019 NY Slip Op. 05852 (4th Dep't 2019)

- Facts:
  - 2006 local mining permit application in the AR zoning district
  - Moratorium → Leads to an eventual prohibition of mining on the property → Wildlife Refuge Overlay District
  - Mining Permit Applicant files Article 78
    - SEQRA Negative Declaration Invalid
    - Compliance with Town Comprehensive Plan
    - Preempted by New York State MLRL

Frontier Stone, LLC v. Town of Shelby, 2019 NY Slip Op. 05852 (4th Dep't 2019)

- Holding/ Rationale
  - SEQRA → Town board made specific findings in the negative declaration
  - SEQRA → The Town Board had "the discretion to select the environmental impacts most relevant to its determination and to overlook those of doubtful relevance".
  - Comprehensive Plan → Law required direct conflict
  - New York MLRL Preemption → Applies to only process not land use

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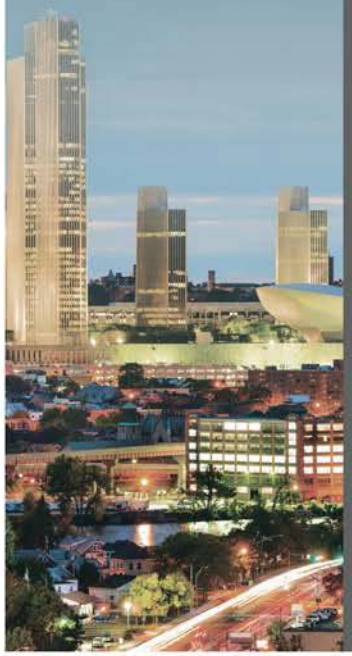

Town Boards

Gedney Association, et. al. v. City of White Plains, 2017 WL 600519 (2d Dep't 2017)

- Issue
  - Whether it was a violation of the Open Meetings Law to make revisions to a SEQRA Findings Statement outside of a publicly noticed meeting.

- Facts & Holding
  - Revisions to the SEQRA Findings Statement were made between a publicly noticed meeting held on December 9, 2013 and a publicly noticed meeting held on December 19, 2013.

Gedney Association, et. al. v. City of White Plains, 2017 WL 600519 (2d Dep't 2017)

- Holding/Rationale:
  - The SEQRA Findings Statement was adopted at the December 19, 2013 meeting.
  - No violation of the Open Meetings Law because:
    - Revisions were based upon discussions between members of the Common Council, individually, and the Corporation Counsel for the City.
    - No quorum of the Common Council was present at the time of these discussions.
    - Revisions were posted on the website for the City in advance of the December 19, 2013 meeting, where they were approved.

Matter of Harriman Estates at Aquebogue, LLC v Town of Riverhead, 151 AD3d 854 (2d Dept June 14, 2017)

- Facts
  - Developer obtained approval for an 87-lot subdivision, and paid the Town more than $778,000 in professional and other fees
  - Developer never began construction and eventually abandoned project. After it sold its rights, developer asked the Town for an audit pursuant to Town Law §§ 118 and 119, seeking to recover the unexpended portion of the fees.
  - The Town Board denied the refund.

Matter of Harriman Estates at Aquebogue, LLC v Town of Riverhead, 151 AD3d 854 (2d Dept June 14, 2017) CONT'D

- Holding
  - Fees charged must be reasonably necessary for the review, can't be used to generate revenue or offset other expenses
  - Town Law §§ 118 and 119 claim and audit procedures are available to assure that only reasonably necessary fees are charged
  - Town's evidence in support of summary judgment had not established that all of the fees charged to the developer were reasonably necessary to review of the application, and that the developer was entitled to any refund
  - Question left to decide was how much of a refund was owed.

Matter of Ravena-Coeymans-Selkirk Cent. Sch. Dist v Town of Bethlehem, 156 AD3d 179 (3rd Dep't 2017)

- Issue
  - RCS Schools wanted to replace an existing school sign with an electronic sign. Town zoning code prohibited electronic signs.
- Holding

  - Court held that the *Cornell Univ.* standards applied, not *County of Monroe*, even though the school district is a governmental unit.

  - The *Cornell Univ.* standard allows for local review of educational uses, but with a flexible approach in light of their presumed beneficial nature.

  - The Court held, for the first time, that the *County of Monroe* balancing test does not apply to educational uses.

  - Whether the *County of Monroe* balancing test applies to educational uses appears to be an issue of first impression in New York.

WIR Assoc., LLC v. Town of Mamakating, 157 A.D.3d 1040 (3rd Dep't 2018)

- Issue
  - Whether zoning changes, contrary to the Comprehensive Plan, were reverse spot zoning, a violation of SEQRA, and a regulatory taking.

- Facts & Holding

  - In 2001, the Town Board enacted a comprehensive plan noting that 530 acres of land was ripe for planned resort development. Simultaneously, the Town board rezoned the property Planned Resort Office ("PRO").

  - In 2014, in anticipation of pending development, the Town placed a moratorium on all residential development to reconsider, among other things, the PRO.

  - The Town rezoned the property "Mountain Greenbelt" ("MG"), prohibiting the pending commercial development.

WIR Assoc., LLC v. Town of Mamakating, 157 A.D.3d 1040 (3rd Dep't 2018), CONT'D

- Holding
  - Regulatory Taking Claim → NOT RIPE → Must seek compensation for the rezoning prohibitions
  - Comprehensive Plan /Reverse Spot Zoning → Allegations accepted as truth → Claim Survives
  - SEQRA Claims → Dismissed because the EAF, although not perfectly drafted, was complete and contained "enough information to describe the proposed actions, its location, its purpose and its potential impacts on the environment."
  - The Court also held that a "hard look" was taken and the Town Board need not "investigate every conceivable environmental problem"

Matter of Cobleskill Stone Products, Inc. v. Town of Schoharie, 2019 WL 758533 (3d Dep't 2019)

- Facts:
  - Mining is permitted with special use permit.
  - In 2000, Quarry owner purchases additional land to be used for mining;
  - In 2005, before quarry owner applies for a special use permit for additional land, Town adopted Local Law prohibiting mining where land is located.
  - Quarry owner commences article 78 and declaratory judgment action that his mining is a preexisting nonconforming use under the 2005 Local Law.
  - In 2014, the 2005 Local Law is annulled.
  - In 2015, while the declaratory judgment case is pending appeal, Town adopts another Local Law prohibiting mining where the land is located.

Matter of Cobleskill Stone Products, Inc. v. Town of Schoharie, 2019 WL 758533 (3d Dep't 2019) CONT'D

- Facts (cont'd):
  - Town files motion in limine to exclude from trial any evidence relating to the efforts undertaken or expenses incurred by petitioner after the date that the Town adopted the 2005 Local Law.

- Holding:
  - The Appellate Division rejected the Town's argument that considering the efforts undertaken and expenses incurred by the petition after 2005 would be inequitable for two reasons:
    - First – since the law was annulled, the court refused to give it any affect even for evidentiary purposes in the present case; and
    - Second – court found that the equitable considerations argued by the Town, have no place in the applicable preexisting nonconforming use analysis.

Dodson v. Town Board of the Town of Rotterdam and Lecce Senior Living, LLC, Index No. 2018-2199 (Sup. Ct. Schenectady Co. 2019).

- **Facts:**
  - Town of Rotterdam adopted a local law amending zoning code and zoning map re-zoning land from "agricultural-rural" to "senior living";
  - A group of 33 separate landowners each of whom own property either adjacent to or opposite acreage which was re-zoned as "senior living" commenced an action against the Town seeking to invalidate the Town's adoption of the local law
  - Town Law 267

Dodson v. Town Board of the Town of Rotterdam and Lecce Senior Living, LLC, Index No. 2018-2199 (Sup. Ct. Schenectady Co. 2019). CONT'D

- Plaintiff's two primary theories:
  - Super-majority vote was required
  - Local Law constitutes "spot zoning"
- Holding:
  - Super majority vote was not required
    - The Rule –100ft from boundary of re-zoned acreage;
    - Only 10% of affected land was within 100ft of the boundary
    - No impropriety in setting 100ft set-backs;
  - Re-Zone was not spot zoning
    - Comp plan expressly recognized the importance of safe affordable senior housing;
    - It was the duty of the Town Board members to view the amendments in light of the Town's ageing population and capacity to foster economic growth.

Rifenburg Construction, Inc. v. Town of Sand Lake, Index No. 257384 (Sup. Ct. Rensselaer Co. 2019)

- **Facts**:
  - Town adopted a local law amending zoning code to include new rules regulating commercial mining in the Town by creating an overlay district that grandfathered existing operations and a Natural Resource PDD for all future mining.
  - Several mining and farming interests filed a lawsuit against the Town alleging that the actions taken by the Town in adopting the local law were arbitrary and capricious or otherwise unlawful.

Rifenburg Construction, Inc. v. Town of Sand Lake, Index No. 257384 (Sup. Ct. Rensselaer Co. 2019) CONT'D

- Holding → Upheld the Town zoning and dismissed the complaint
  - SEQRA Review → Negative Declaration
    - The Town Board took a "hard look" by:
      - » Extensive written environmental review
      - » Inviting and receiving public comment
      - » Creating an extensive record and adopting findings based on that record outside of the EAF

Rifenburg Construction, Inc. v. Town of Sand Lake, Index No. 257384 (Sup. Ct. Rensselaer Co. 2019) CONT'D

Holding → Zoning NOT Preempted by MLRL

- Setbacks were not preempted by MLRL
- Provisions regarding ingress and egress were not preempted by state VTL

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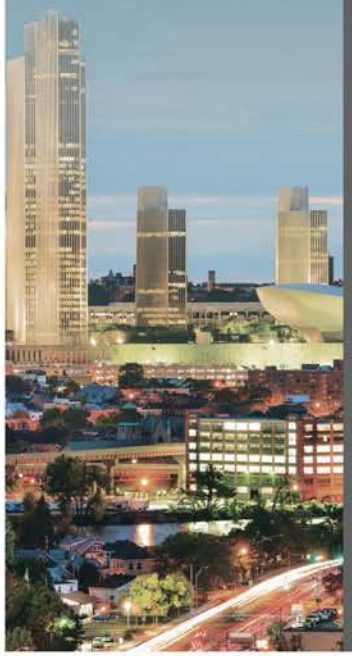

Planning Boards

Matter of Sullivan v Planning Bd. of Town of Mamakating, 151 AD3d 1518 (3d Dept June 29, 2017)

- Facts
  - AT&T applied to Planning Board for special use permit and site plan approval to build a cell tower on land owned by Edward Hart. Planning Board granted approvals
  - Petitioners challenged approvals in Article 78, naming Planning Board and AT&T, but not Hart
  - AT&T and Planning Board moved to dismiss for failure to name necessary party, Hart.
  - Supreme Court held Hart was a necessary party, and ordered him joined. Petitioners filed an amended petition, and all respondents again moved to dismiss

Matter of Sullivan v Planning Bd. of Town of Mamakating, 151 AD3d 1518 (3d Dept June 29, 2017) CONT'D

- Issue
  - May property owner be added as a necessary party respondent to a challenge to a land use approve after expiration of limitations period where petition was initially timely commenced?
- Holding
  - Not unless petitioners can satisfy the relation back doctrine, which requires showing: "(1) that the claims arose out of the same occurrence, (2) that the later-added respondent is united in interest with a previously named respondent, and (3) that the later-added respondent knew or should have known that, but for a mistake by petitioners as to the later-added respondent's identity, the proceeding would have also been brought against him or her"

Matter of Sullivan v Planning Bd. of Town of Mamakating, 151 AD3d 1518 (3d Dept June 29, 2017) CONT'D

- Holding
  - Here, Court held Hart was not united in interest with AT&T (AT&T's interest is in providing cell coverage, Hart's was in use of his property), so didn't satisfy second prong of relation back doctrine
  - Court also held that because Petitioners knew Hart was the owner of the property, their failure to join him was not a mere mistake that could be excused under the third prong.
  - So, the entire case was dismissed for failure to join necessary party. Decision puts some teeth back into the doctrine.

Micklas v. Town of Halfmoon Planning Board, 170 A.D.3d 1483 (3d Dep't 2019)

- Facts:
  - Town approved special use permit and site plan for proposed brew pub to be built as an addition to an existing golf course club house.
  - Adjacent property owner wrote a letter to the CEO inquiring whether a brewpub could be built in an A-R district under the Town's Building Code.
  - The CEO replied:
    - Building Code does not speak to where a building could be constructed; and such inquiry must be directed at the Planning Board
  - ZBA upheld the CEO's interpretation.
  - Article 78 proceedings → challenging the Planning Board determination regarding the permit **and** the other challenging the ZBA's determination

Micklas v. Town of Halfmoon Planning Board, 170 A.D.3d 1483 (3d Dep't 2019) CONT'D

- Holding:
  - Compliance with SEQRA
    - the Town conducted a review process in which it solicited input from neighbors, public safety officials and other interested agencies, and that
    - review established the that project was limited in scope and confided to already disturbed areas around the clubhouse.
    - the few potential environmental impacts arising from the brewpub were addressed, including parking and access issues and concerns as to the disposal of brewing by products.

Micklas v. Town of Halfmoon Planning Board, 170 A.D.3d 1483 (3d Dep't 2019) CONT'D

- Holding:
  - The ZBA determination had no bearing on the on the prior approval of the brewpub by the Planning Board or the building permit issued thereafter.
  - The question posed to the CEO, whether a generic brewpub could be located in the AR district is not applicable to the case.

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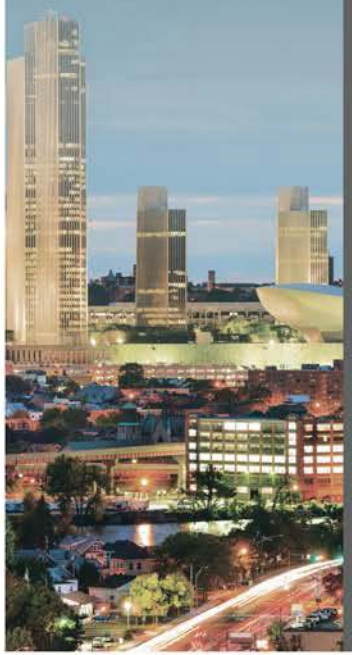

Zoning Board of Appeals

Matter of Wenz v Brogan, 149 AD3d 970 (2d Dept 2017)

- Facts
  - Petitioners challenged the grant of area variances on ground, among others, that ZBA failed to file decision with Village Clerk within 5 business days

- Holding
  - "Village Law § 7–712–a(9) does not specify a sanction for the failure to comply with the five-day filing requirement," and Petitioner failed to show prejudice from delay. No basis to annul area variances.

Stengel v. Town of Poughkeepsie Zoning Board of Appeals, 167 A.D.3d 754 (2d Dep't 2018).

- Facts:
  - Town ZBA grants eight area variances and a special use permit in connection with a proposed motor vehicle service facility
  - Residential neighbors commenced an Article 78 proceeding seeking to nullify the area variances and special use permit.

Stengel v. Town of Poughkeepsie Zoning Board of Appeals, 167 A.D.3d 754 (2d Dep't 2018). CONT'D

- Holding:
  - Area Variances
    - Court acknowledged that a ZBA's determination should be sustained if it is not illegal, has a rational basis, and is not arbitrary and capricious.
    - Court found that the ZBA engaged in the required balancing test and considered the relevant statutory factors
  - Special Use Permit
    - The court acknowledged that the burden of proof on an applicable seeking special use permit is lighter than that carried by an applicable for a zoning variance.
    - The court noted "where substantial evidence exists a court may not substitute its own judgment for that of the board even if such a contrary determination is itself supported by the record."
  - Appellate Court upheld lower court's decision to deny the petition and dismiss the proceeding.

Winterton Props., LLC v. Town of Mamakating ZBA, 132 A.D.3d 1141 (3rd Dep't 2015)

- Issue
  - Whether a "Mikvah," used in accordance with the Jewish religion, constitutes a "neighborhood place of worship" under the Zoning Code.

- Facts & Holding
  - Petitioners sought to build a Jewish Mikvah in a zone that permitted a "neighborhood place of worship."
  - "Neighborhood place of worship" was not defined by the Zoning Code.
  - Petitioners submitted literature from Jewish scholars and others that a Mikvah was a "neighborhood place of worship."
  - The Town's ZBA determined that such a use must be "communal" and therefore the "Mikvah" is not permitted as a "neighborhood place of worship."

Winterton Props., LLC v. Town of Mamakating ZBA, 132 A.D.3d 1141 (3rd Dep't 2015) CONT'D

- Facts & Holding
  - The Town Code provided that undefined terms shall be defined by their ordinary dictionary meaning.
  - As such, the Court defined "neighborhood place of worship" as "a building or location set aside in a certain area for any form of religious devotion, ritual or service showing reverence, especially for a divine being or supernatural power"
  - The Court refused to insert a "communal" requirement in this definition holding that a ZBA "may not insert conditions or criteria into a zoning ordinance governing allowable uses in a zoned district that are not contained in the statutory language adopted."
  - The Mikvah thus constituted a "neighborhood place of worship" and was permitted on the property.

Matter of Alper Rest. Inc. v Town of Copake Zoning Bd. of Appeals, 149 AD3d 1337 (3d Dept 2017)

- Facts
  - Special use permit to build a resort hotel.
  - ZBA vacancy → Only 4 members
  - September 2014→ ZBA members voted 2-2 on issue whether to grant the special use permit.
  - November → November 2014 (after a new member was appointed) the ZBA granted the permit on a 3-2 vote.
  - Challenge → The 2-2 tie vote resulted in a default denial of the special use permit application

Matter of Alper Rest. Inc. v Town of Copake Zoning Bd. of Appeals, 149 AD3d 1337 (3d Dept 2017)

- Issue: When does a tie vote of a ZBA result in a default denial?

- Holding
  - Sept. 2014 tie vote → non-action not a default denial
  - Appellate Jurisdiction vs. Original Jurisdiction
  - Here, the ZBA was exercising original jurisdiction over the special use permit application, not appellate jurisdiction.

Matter of Crowell v Zoning Bd. of Appeals of Town of Queensbury, 151 AD3d 1247 (3d Dept June 8, 2017)

- Facts
  - Applicant sought Zoning Administrator determination of what approvals were necessary for a project. Demolish and rebuild two cottages on a single lot on Lake George
  - Zoning Administrator said: 1) area variance for setback requirements; and 2) "a variance" to construct the second dwelling on one lot, which was prohibited by the Zoning Code

Matter of Crowell v Zoning Bd. of Appeals of Town of Queensbury, 151 AD3d 1247 (3d Dept June 8, 2017)

- Facts
  - Applicants applied to the ZBA for the variances, which granted only an area variance to alter both the setback and the density requirements
  - Petitioner did not challenge that determination, but challenged the issuance of building permits without first obtaining a use variance

Matter of Crowell v Zoning Bd. of Appeals of Town of Queensbury, 151 AD3d 1247 (3d Dept June 8, 2017)

- Holding
  - The challenge was time-barred
  - The ZBA previously determined that only an area variance was required to alter the prohibition on building more than one dwelling on a single lot.
  - Petitioner could not use the building permits to revive the challenge

Matter of Brophy v. Town of Olive Zoning Bd. Of Appeals, 166 A.D.3d 650 (3d Dep't 2018).

- Facts:
  - Since 1998, respondent's owned and operated a Bed and Breakfast in the Town.
  - In 2007, respondents started hosting weddings on the property.
  - In 2015, the Town's ZEO notified respondents that site plan review was required because "the wedding department has grown to affect the health , safety and welfare of the neighbors and the remedy would seem to be a site plan review to put some limitations on the wedding activities."
  - Respondents submitted a site plan application to the Town Planning Board which referred the matter to the ZEO and the Town Zoning Board of Appeals.
  - ZBA determined that weddings were a special use to a Bed and Breakfast that required a site plan review under the Town Code.
  - ZBA remitted the matter to the Planning Board for a determination of the appropriate site plan conditions.
  - Neighboring property owners and a neighborhood association brought an Article 78 seeking to annul the ZBA's determination.
  - Supreme Court determined that ZBA correctly concluded that weddings were an accessor use, but erred because it "legislated a new use subject to a special permit requirement."

Matter of Brophy v. Town of Olive Zoning Bd. Of Appeals, 166 A.D.3d 650 (3d Dep't 2018). CONT'D

- Holding:
  - Court acknowledged that a "zoning board's interpretation of a local zoning ordinance is afforded deference and will only be disturbed if irrational or unreasonable."
  - Resolution of the accessory use question "depends on an analysis of the nature and character of the principal use of the land in question in relation to the accessory use, taking into consideration the over-all character of the particular area in question."
  - ZBA properly considered the incidental uses customarily undertaken by similar businesses.
  - The facts provide a rational basis for characterizing the weddings as an accessory use.
  - Court also found that because Town code required site plan review for principle uses – this requirement should attend to accessory uses.
  - Court upheld ZBA's decision.

Catskill Heritage Alliance, Inc. v. Crossroads Venture, LLC, 161 A.D.3d 1413 (3d Dep't 2018)

- **Facts:**
  - Town issues special use permit and site plan approval for a vacation resort, partially located in the Town of Shandanken
  - Environmental Group commences article 78 claiming Town Board improperly resolved an ambiguity in the zoning code as to whether detached duplexes and multiple unit buildings were permitted uses under the Town's Zoning Code.
  - Supreme Court grants petition, annulling Planning Board's determination and remitted to ZBA for determination.
  - ZBA issues determination that detaches structures are permitted as "lodges"
  - Planning Board again issues a special use permit and site plan approval
  - Environmental Group commences a second article 78 proceeding challenging both the ZBA's interpretation and Planning Board decision.

Catskill Heritage Alliance, Inc. v. Crossroads Venture, LLC, 161 A.D.3d 1413 (3d Dep't 2018) CONT'D

- **Holding:**
  - Upheld Supreme Court's decision to remit interpretation to ZBA;
    - "to the extent there were pertinent ambiguities in the Zoning Code, the Planning Board was obliged to request and interpretation from the ZBA before rendering a decision."
  - ZBA's determination that the detached duplexes were permitted as "lodges" under the Zoning Code was rational;
  - Planning Board's decision based on ZBA's interpretation was also rational; and
  - Violation of Open Meeting's Law by ZBA would not justify invalidating ZBA determination; and
  - Chair of ZBA was not disqualified from participating in rendering interpretation.

Comments or Questions?

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