

CDRPC Local Government Workshop
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Planning & Zoning 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”)

Change:

Will there be an undesirable **change** in character of neighborhood or detriment to nearby properties?

Self-Created: Whether the alleged difficulty was **self-created**?

Environment:

Will it have adverse impact on the physical **environment** of the neighborhood?

Substantiality:

Is the variance **substantial**?

Alternative:

Can the benefit to applicant be achieved by some **alternative** method?

AREA VARIANCE CASES

- **Duff v. Bowers** (Sup Ct. Suffolk Co.)
- Owner hires Dunrite Pools (oh the irony, right?) to install a “free form” pool on its parcel and was 8 feet off.
- As-built survey shows side yard setback violation was noted. The ZBA heard the application and denied the area variance request on multiple grounds.
- **Decision:** ZBA had no explanation or support from the evidence that the constructed pool would produce an undesirable change in the character of the neighborhood (there were pools all over the place), be a detriment to nearby properties (there was ample screening and neighbors were in support), negatively impact the health, safety and welfare of the neighborhood or community, or create an “unwarranted precedent” (this was only one of four oversized lots in the subject area where a pool could exist). Finally, the court noted that condition was not self-created, as it was the excavator hired by the contractor who created the zoning violation.
- **Matter of Harn Food, LLC v. DeChance** (2d Dept)
- In 1948, two rear-adjointed lots were merged into a single tax parcel and current owner applied to two homes on the joined lot and requested an area variance to accomplish it.
- BZA denied the relief because the owner had the alternative of building one home instead of two.
- **Decision:** The Second Department says no evidence that there were still two lots. On the merits of the area variance, the court also found that the BZA properly relied on the evidence that only 5 (12%) of the 42 improved lots conformed to the lot area requested by the owner and only 7 (17%) of the 42 conformed to the lot frontage requested by the owner.
- Court also noted that an identical application for relief was made in 2007 by an immediate neighbor and denied. Additionally, the court determined that the construction of one house instead of two was a feasible alternative use of the property and the relief was substantial. Decision by BZA to deny the area variances was sustained.

AREA VARIANCE CASES

- Matter of DeFrancesco v. Perlmutter (Sup Ct Richmond Co.)

- Owner purchased an vacant lot in 1987 which had once contained a single family home destroyed in a fire in 1978.
- Now the lot is undersized due to zoning passed in 2005 which requires area variance.
- ZBA denies because: owner held title to the lot next door and that he could combine the lots, expand his existing home, or build a second adjoining home – like an in-law apartment.
- **Decision:** ZBA focused solely on feasible alternatives and did not consider any of the other elements of the balancing test. ALSO, the owner's hardship was clearly not self-created as the 2005 restrictions post-date his purchase of the parcel. As such, there was no evidence that the variance would have an undesirable effect on the character of the neighborhood, would adversely impact the physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood. Therefore, the court held that the variance denial was arbitrary and unsupported by substantial evidence.

- Matter of Voutsinas v. Schenone (2d Dept)

- Owner applied for a building permit to alter a one-story restaurant to construct a second story, and a variance to the off-street parking requirement.
- ZBA denied the application and Owner filed a second application seeking to utilize valet parking to satisfy the off-street parking requirements. However, the covenants and restrictions on the other properties precluded their use for valet parking and the second application was denied.
- The Zoning board noted that absent the valet parking provisions, the second application was "not materially different" from the first
- **Decision:** The Second Department held that they were time-barred from reviewing the first application and as the second application was "not materially different" the zoning board did not err in determining that they were bound by the first application decision.

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

- Wen Mei Lu v. City of Saratoga Springs (3d Dept)
- Owners wanted to construct a pet boarding facility on six parcels which happen to be in two different zoning districts.
- Neighbors requested an interpretation of the zoning code concerning the requirement of a use variance for the entry road.
- ZBA confirmed the code enforcement officer's determination that no use variance was required, it granted the area variances and the neighbors challenged.
- **Decision:** Court found (1) zoning provision of "split zones" allows property owner to elect to extend either district into the remaining portion of the property and thus no use variance was required (2) Court held that the parcel was surrounded by other commercial establishments and would not produce an undesirable change in the character of the neighborhood (3) after reviewing letters from other pet lodge kennels, there would not be excess noise, smell or the presence of loose dogs. Affirmed.
- 54 Marion Ave., LLC v City of Saratoga Springs (3d Dept)
- Owner has a vacant parcel in urban residential district which has a buyer for use as dental practice – not a permitted use in the zone
- ZBA denied the application on the grounds that the alleged hardship was not unique and was self-created.
- Owners challenge denial on grounds that commercial development of the adjacent intersection and increased traffic over the past 30 years rendered the property unsuitable for permitted residential use because of unique safety and noise problems.
- **Decision:** Court held (1) that the ZBA had found that "the location of this property on a corner may impact its value," and thus, a conclusion that the financial hardship was not unique was contrary to their observation (2) **need** for a use variance only arose decades after the property was acquired due to a gradual shift in the character of the area that rendered the permitted residential use onerous and obsolete, and thus, the hardship was not self-created.

USE VARIANCE CASES

- Matter of Sullivan v. Board of Appeals of Town of Hempstead (Sup. Ct. Nassau Co)
- Property was converted to a two-family in 1956 pursuant to a renewable use variance every 5 years. The renewals were applied for and granted until a lapse occurred in 1996.
- Current owner attempted to renew the use variance after the lapse period and the ZBA instituted a condition that one of the units must be owned occupied no later than 2020.
- **Decision:** Court found that "a zoning board may impose conditions in conjunction with granting a variance, as long as the conditions are reasonable and relate only to the real estate involved, without regard to the person who owns or occupies it." The Court determined that the ZBA imposed an improper condition because it related "to the person who owns and occupies the subject premises and not the real estate itself. Conditions which relate not to the real estate involved, but to the person who owns or occupies the subject real estate, are invalid." Condition was declared invalid and annulled.
- Matter of Abbatiello v. Town of North Hempstead Board of Zoning Appeals (2d Dept)
- Property was built in 1920 and was converted a two-family dwelling legally in 1945.
- Zoning changed to business district and the use was prohibited.
- Town refused to issue a permit to the owner without a use variance but the ZBA denied the use variance in finding that there was insufficient evidence that the two-family was created before the zoning changed.
- **Decision:** Court disagreed with ZBA, instead finding that evidence was presented, "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." As a result, there was nothing to support the denial of the use variance.

PRACTICE TIP

A reasonable return on investment includes the existing use AND any other permitted use in the zone.



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

- Matter of Brophy v. Town of Olive Zoning Board of Appeals (3d Dept)
- Owners of a bed and breakfast began hosting weddings on the premises and advised that a site plan review was required after the code enforcement officer had determined that it was accessory use.
- Neighbors appeal to the ZBA concerning the interpretation of the code enforcement officer that while “bed and breakfast” was not used as term within the zone “tourist home” and “boarding house” are – which encapsulate the spirit of a bed and breakfast use. ZBA agreed and then granted site plan approval.
- **Decision:** Court held that the evidence before the ZBA (marketing of the property as a bed and breakfast and a wedding venue, the lodging and use of the property year-round but weddings only on a limited basis during warmer months) was a rational basis for weddings as an accessory use to the principal use as an owner-occupied bed and breakfast. Also, the Third Department held that the ZBA reasonably imposed a site plan as a condition of continued accessory use.
- Grodinsky v. City of Cortland (3d Dept)
- Owners who rent to college students challenged a local ordinance that limits the occupancy of dwelling units to a “family” on the grounds that it is unconstitutionally vague and is not related to a legitimate governmental purpose.
- ZBA applied the definition in the Code to the Owners’ application and denied it on the grounds that students were not a “family.”
- **Decision:** Court held that the city ordinance appropriately defined “family” and set forth a detailed criteria to assess whether a group of four or more unrelated individuals occupying a dwelling unit are the functional equivalent of a traditional family in a way that is readily discernable from the plain language of the ordinance allowing a person of ordinary intellect to understand the meaning. Also, the Court held that the rental occupancy restrictions serve a legitimate governmental interest in diminishing public nuisances created from the overcrowding of dwelling units occupied by transient residents. As such, the court held that plaintiffs failed to establish that the ordinance was unconstitutional.

ZBA INTERPRETATION CASES

- Matter of Corrales v. Zoning Bd. Of Appeals of the Village of Dobbs Ferry (2d Dept)
- In 2013, Livingston Development Group received Village approvals for the construction of two residential buildings with six condominium units but missed a step in noticing design review to the neighborhood. Design review denies but overturned by ZBA.
- Neighbor challenges ZBA approval and included grounds that the Village approvals from 2013 were invalid as the project was not zoning compliant. Appeal dismissed by ZBA as untimely (not within 30 days of the Village building inspector's determination that the proposed use of the property was zoning-compliant in 2012).
- **Decision:** Court held that any determination by the building inspector in November 2012 was not "filed" anywhere at that time and that referral to the planning board for review is not an "inherent" determination. Appeal was timely. Court also found that no duly noticed public hearing was held pursuant to the Village Code because of the failure to send notices of the hearing to the owners of properties within 200 feet of the subject property. Thus, the site plan approval was void. Ouch!
- OTR Media Group, Inc. v. Board of Stds. & Appeals of the City of New York (Sup. Ct. NY Co)
- An outdoor advertising company wants to continue use of the sign as a non-conforming advertisement sign based upon prior use since 1979.
- Appeal to BSA denied because owner failed to establish the signs establishment prior to November 1, 1979 and Phillip Morris was a tenant in the 1990s – so it was accessory use.
- **Decision:** Court held that (1) there was no evidence of operations that would substantiate the BSA's finding that the warehouse was used for storage or distribution as an accessory to Phillip Morris' tenancy and thus unsubstantiated speculation. (2) precedent existed of historically recognized sham accessory sign arrangements and credited them as advertising signs. (3) BSA failed to cite to any prior cases to support their position and showed a pattern of failures to address and explain their inconsistent decisions. As such, the court held that the BSA's findings regarding the accessory use of the sign together with its unsubstantiated contention that the resolution is consistent with prior BSA determinations is arbitrary and capricious.

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 Catskill Heritage Alliance, Inc. v. Crossroads Ventures, LLC (3d Dept)

- Developer applied to the planning board for a special use permit and site plan review to build a vacation resort following an extensive SEQRA review.
- Neighbors challenged on the grounds that the planning board improperly resolved a vagueness in the zoning code – whether detached duplexes were a permitted use in the zone.
- **Decision:** Court ruled planning boards are without authority to interpret zoning codes, and “to the extent there were pertinent ambiguities in the zoning code, the planning board was obliged to request an interpretation from the ZBA before rendering a determination.” Here, the Town has a specific provision which allows the request of an interpretation from any board to the ZBA and the Court remitted the case to the ZBA for further findings pursuant to that provision. Upon remittal, the zoning board interpreted the zoning code and made clear that the detached residential units were permitted “lodges.” The planning board subsequently issued a special use permit and approved the site plan with conditions. After a second attempt to challenge, both the ZBA interpretation and the special use permit/site plan approvals were affirmed.

- Matter of QuickChek Corp. v. Town of Islip (2d Dept)

- Owner has a two-acre parcel with a used car dealership, car repair shop, and storage for boats and vehicles. In order to redevelop the site, QuickChek applied for a special use permit to use the site as a convenience market, a minor restaurant, and a gasoline service station.
- After conducting two public hearings, the planning board granted a special use permit for the convenience store and minor restaurant and denied the application for a special permit to operate a gasoline service station. QuickChek challenged.
- **Decision:** Court held there was no showing use of a gasoline service station would have a greater impact in traffic than would other uses that were unconditionally permitted. Thus, the court held that the alleged increase in traffic volume was an improper ground for the denial of the special use permit and any other reasons set forth by the town board in support of the denial were conclusory and unsupported by factual data and empirical evidence. As such, the court held that the material findings of the town board were not supported by substantial evidence and upheld the Supreme Court's decision to grant the special use permit.

SPECIAL USE PERMIT CASES

- Matter of Landstein v. Town of LaGrange (2d Dept)
- An amateur radio hobbyist applied for a special use permit and an area variance to construct a radio antenna structure on his property after receiving a license to operate an amateur radio station from the FCC.
- In review, town incurred \$17,000 in legal consulting fees and demanded reimbursement. The resolution conditioned that any future proceedings before town agencies would not proceed unless petitioner paid the reduced price. Owner challenged.
- **Decision:** Court held town did not limit the consulting fees charged to the petitioner to those reasonable and necessary to the decision-making function of the planning board and zoning board, and as such, exceeded their State-granted authority by requiring the payment of them. Also, town does not have ability to collect a minimum continuing escrow balance of at least \$1,000 as there is no regard to the nature of the application and the burden placed upon the applicant, the necessity for consultants or the reasonableness of charges in light of comparable charges in connection with similar applications. The town's actions went beyond the minimum practicable regulation to accomplish their legitimate purpose, and could be used as a financial barrier to thwart federal communication law.
- Matter of Edwards v. Zoning Board of Appeals of Town of Amherst (4th Dept)
- Challenge to a grant for a special use permit a wireless telecommunications tower primarily on the grounds that it was inconsistent with the Town's Comprehensive Plan.
- **Decision:** Court ruled that "the inclusion of a specially 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." The Court also noted the landowner's burden in a special use permit application which is that he "need only show that the use is contemplated by the ordinance and that it complies with the conditions imposed to minimize impact on the surrounding area . . . The zoning authority is required to grant a special use permit unless it has reasonable grounds for denying the application." Here, the zoning board received an advisory report from the planning department recommending approval of the permit if "stealth" design was utilized, and a public hearing was conducted. As such, the Fourth Department held that the petitioners' contention that the special use permit was inconsistent with the town's comprehensive plan was without merit.

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

- Matter of Calverton Manor, LLC v Town of Riverhead
 - Beginning in 2001, Calverton Manor LLC worked with the Town on a site plan to develop a vacant parcel and, by 2003, a final submission was made.
 - During this same time, Calverton worked with town officials in an attempt to ensure zoning compliance in its submission for a revised site plan for a proposed commercial and residential project on an undeveloped parcel of land.
 - While the revised site plan was pending before the Planning Board, the Town Board adopted a new comprehensive plan with a goal of protecting open space and farmland, while concentrating development into specific areas and eliminated certain permitted uses on the Calverton's parcel critical to the site plan application.
 - Calverton challenged the zoning amendments that implemented agricultural protection zone component of the comprehensive plan, as well as whether the "special facts" exception should apply.
- **Decision:**
 - The Court ruled that because the town board referred the zoning amendments to the county planning board who held a hearing, voted and reported their recommendations to the town board, the comprehensive board was properly referred.
 - The Town Board's use of the GEIS in preparing the comprehensive plan satisfied the procedural and substantive requirements of SEQRA.
 - The Court held that there were triable issues of fact as to whether the "special facts" exception applied – where undue delay and unjustifiable actions from the Town requires an exception to the general rule that the Planning Board must apply the law at the time of the decision.

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

- Joy Builders, Inc. v. Town of Clarkstown (2d Dept)
- A combined subdivision approval for two parcels resulted in a total of 77 lots in the Town.
- The planning board provided the condition that the developers build all the infrastructure (roads, curbs, sidewalks, etc) which was secured by a performance bond.
- A Town Code provision also required that the Town may hold back the issuance of 10% of the building permits until the infrastructure improvements had been completed and dedicated to the Town.
- In 2015, the Town attempted to enforce the hold back provision against the builder and it challenged the validity of the law itself.
- **Decision:** In overturning the Supreme Court, the Second Department determined that Town Law 277 (9) is a NYS law which authorizes the towns to collect security for full infrastructure costs and required improvements in the event the developer fails to complete the work. The Town's local law which is **in addition** to that provision which is inconsistent with the State's statutory framework for subdivision approvals. The hold back provision was deemed void as a matter of law.



Town of Clarkstown Dog Control Officer's homepage

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

- Lakeview Outlets, Inc. v. Town of Malta

- Town approved owner's application for the construction of a restaurant and hotel after determining that the project was within a previously-established business park that was consistent with a previously conducted generic environmental impact statement (GEIS) and finding statement.
- Town planning board determined that no further SEQRA review was required and assessed mitigation fees for the projects totaling roughly \$268,406.
- Owner commenced an action seeking a declaration that the mitigation fees are illegal and directing the Town to refund the fees paid.
- **Decision:** Court held that the owner's attack on the mitigation fee scheme established in the GEIS was an attack on an administrative act by the Town, and as such, the claim is subject to the four-month statute of limitations applicable to Article 78 proceedings. Additionally, the Third Department held that the request for a refund of any mitigation fees already paid were incidental to the primary relief sought, and thus, is likewise subject to the four-month limitations period.

- Matter of Star Property Holding, LLC v. Town of Islip

- Owners of nearby businesses challenged the approval of an application for a zone change and a special use permit to use the property as a gasoline service station and convenience store.
- In order to be approved, the property had to be rezoned by the town board from Business 1 to Business 3 and the Town undertook a SEQRA review for the entirety of the project under a Short EAF.
- Planning board determined that there would not be significant environmental impacts and the Town rezoned the parcel and issued the special use permits for the proposed convenience store and "minor restaurant."
- **Decision:** Court held that the record did not support the petitioners' contention that the planning board improperly delegated its responsibilities as lead agency under SEQRA and held that the town complied with SEQRA's requirements before making their determination. Finally, the court held that the petitioners failed to establish that the rezoning of the property was "spot zoning" - or inconsistent with the town's comprehensive plan and incompatible with the surrounding uses.

SEQRA CASES

- Matter of Adirondack Historical Assn. v. Village of Lake Placid
- Village of Lake Placid attempted to acquire two vacant parcels from the Historical Association to construct a public parking garage as a part of a larger reconstruction project.
- After attempts to negotiate failed, the Village attempted to acquire the property through the power of eminent domain.
- **Decision:** While the Court held that the Village Board's detailed review as required by SEQRA was not impermissibly segmented, it did find that the Board's failure to specifically address the repeated concerns regarding increased traffic congestion that were raised during the public hearing and written comment period was not a meaningful investigation into environmental concerns. As such, the court held that the Village Board failed to take the required hard look at potential traffic implications, and thus, the condemnation of the property violated SEQRA and must be vacated.



NY OPEN MEETINGS LAW

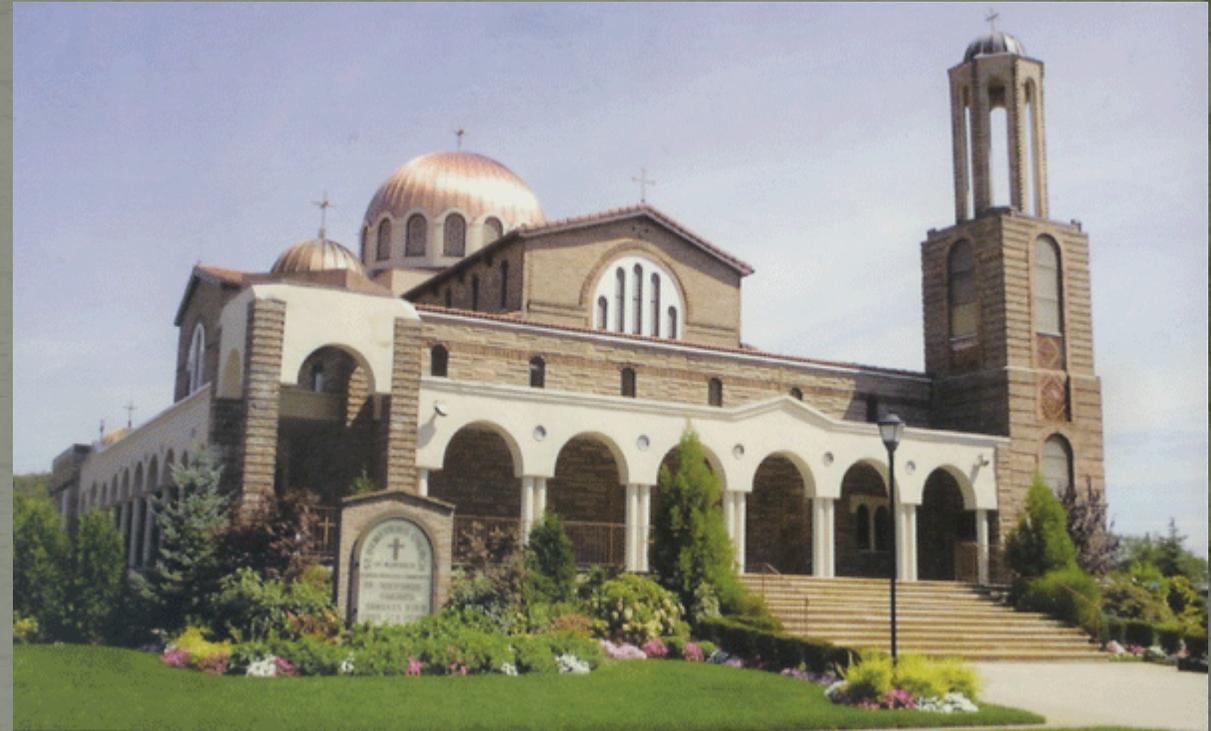


OPEN MEETINGS LAW

- Matter of Voutsinas v. Schenone (2d Dept)
- Owners sought a parking variance from the Village of Rockville ZBA and later commenced a proceeding to compel the ZBA to file "corrected" minutes of two meetings related to the variance grant.
- The allegation was that the minutes of the meetings violated the Open Meetings Law, because they included a provision which (apparently falsely) that the parking variance was conditioned upon the ZBA's "counsel's review of certain covenants and restrictions, but that no such condition was discussed at the time the vote was taken."
- **Decision:** The Second Department held that the owners had no legal right to compel the ZBA to amend its meeting minutes to affect a particular result from the recorded vote on the application for a parking variance. The Court held that the ZBA's meeting minutes, which included a summary of the motion to approve the application
- Matter of Fichera v. NYSDEC (4th Dept)
- DEC and the Town of Sterling had authority to issue permits and variances related to a mining project within the Town.
- While the case involved the consequences of not properly making a General Municipal Law 239-m referral, there was also a challenge to certain violations of the Open Meetings Law within the municipal process.
- **Decision:** The Fourth Department determined that "[a]n unintentional failure to fully comply with the notice provisions required by the Open Meetings Law shall not alone be grounds for invalidating any action taken at a meeting of a public body' . . . Thus, not every violation of the Open Meetings Law automatically triggers its enforcement sanctions." Here, the Court saw no evidence of which rose to the level necessary to void the Town's actions (failure to fully comply with notice or lack of information on the Town website).

OPEN MEETINGS LAW

- Healy v. Town of Hempstead Board of Appeals
- A church needed a special exception and variances to build a 25,806 square foot 2-story cultural center directly adjacent to the church.
- After an extensive public hearing, neighbors challenged the granting of the permit, among other things, due to an alleged conflict of interest of one of the members of the Board.
- Apparently, a member of the ZBA had a sister-in-law who used to work for the law firm representing the Church. Also, the managing partner of that law firm was a campaign manager for the ZBA member's estranged husband.
- **Decision:** The Court noted that (1) there no specific violation of General Municipal Law Article 18; (2) there was no identified pecuniary or material interest in the application by the Board member; and (3) since the vote was unanimous, the Board member did not cast the deciding vote – so no impact.



OTHER: VESTED RIGHTS

- Matter of Bartz v. Village of LeRoy (4th Dept)
- Owner obtains approval for duplexes in a zoning district that permitted multifamily dwellings and obtained permission to develop a subdivision in 1989.
- Upon request for building permits, multi-family residences are no longer permitted in the district either as a regular use or by special permit.
- Neighbors challenge the issuance of the permits.
- **Decision:** The Fourth Department held that, where a more restrictive zoning ordinance is enacted, an owner will be permitted to complete a structure or a development which an amendment has rendered a nonconforming structure only where the right to do so vested.
- If improvements would be equally useful under the new zoning requirements, a vested right in the already approved subdivision may not be claimed based on the alterations.
- The court held that the ZBA determined that multiple structures had already been erected but failed to address whether the improvements on the vacant lots were equally useful under the amended zoning laws.
- As such, the Fourth Department held that this failure rendered the determination arbitrary, capricious and irrational.
- The court held that any improvements on the property would be equally useful to single family residences, and thus, the right to build duplexes had not vested.
- As such, the determination affirming the issuance of the building permit on Lot 18 was annulled and the court declared that new duplexes may not be permitted or constructed in the subdivision without a use variance.

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