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Patricia E. Salkin

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Table of Contents

Table of Cases	5
Accessory Uses	11
Agricultural Uses	11
Annexation	12
Climate Change	12
Condemnations/Eminent Domain	14
Conditions on Approval	19
Declaratory Relief	20
Disaster Preparedness Plans	20
Due Process	20
Enforcement	23
Equal Protection	24
Ethics	25
Exemption from Zoning	25
FOIL	26
Home Occupations	26
Injunctive Relief	27
Intergovernmental Authority	27
Mandamus	27
Mining	28
Moratoria	28
Necessary Parties	29
Non-Conforming Uses	29
Notice	33
Prior Precedent	33

Table of Contents

Procedural Issues	34
Protest Petition	35
Regional Planning	35
Rezoning	36
Ripeness	37
RLUIPA	37
Signs	38
Site Plan Review	40
Special Use/Exception	42
Standing	44
Statute of Limitations	45
Subdivision Regulation	46
Takings	47
Variances – Area	48
Variances – Use	55
Vested Rights	58
Wind Development	58
Wireless Communications	60
Zoning Administration	64
Zoning - Interpretation	64

Table of Cases

- 225 Front Street, LTD v. City of Binghamton*, 61 A.D.3d 1155, 877 N.Y.S. 2d 486 (3 Dept. 4/9/2009), 16
- Abrams v. City of Buffalo Zoning Board of Appeals*, 61 A.D.3d 1387, 877 N.Y.S.2d 550 (4d Dept. 4/24/2009), 56
- Adams v. Zoning Board of Appeals of the Town of East Fishkill*, 65 A.D.3d 1139, 886 N.Y.S.2d 410 (2d Dept. 9/15/2009), 50
- Alcantra v. Zoning Board of Appeals of the Village of Ossining*, 64 A.D.3d 774, 883 N.Y.S.2d 303 (2d Dept. 7/28/2009), 53
- Alzamora v. Village of Chester*, 2009 WL 578630 (2nd Cir. (N.Y.) 3/6/2009), 22, 43, 58
- Anayati v. Board of Zoning Appeals of the Town of North Hempstead*, 65 A.D.3d 681, 885 N.Y.S.2d 300 (N.Y.A.D. 2 Dept. 8/25/2009), 24, 53
- Association for the Protection of the Adirondacks, Inc., et al. v. Town Board of Tupper Lake et al.*, 64 A.D.3d 825, 882 N.Y.S.2d 534 (3d Dept. 7/2/2009), 36
- Bais Yoel Ohel Feige v. Congregation Yelew Lev D'Satmar of Kirya Yoel*, 65 A.D.3d 1176, 885 NYS 2d 741 (2d Dept. 9/22/2009), 64
- Benson Point Realty v. Town of East Hampton*, 62 A.D.3d 989, 880 N.Y.S.2d 144 (2 Dept. 5/26/2009), 33
- Bikur Cholim, Inc. v. Village of Suffern*, 2009 WL 1819136 (S.D.N.Y. 6/25/2009), 37
- Blum & Bellino v. Town of Greenburgh*, 58 A.D.3d 835, 872 N.Y.S.2d 172 (2d Dept. 1/27/2009), 39, 51
- Brady v. Town of Islip Zoning Board of Appeals*, 65 A.D.3d 1337, 886 N.Y.S.2d 465 (2d Dept. 9/29/2009), 48
- Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 913 N.E.2d 394 (NY 6/30/2009), 31
- Caspian Realty, Inc. v. Zoning Board of Appeals of the Town of Greenburgh*, 886 N.Y.S.2d 442 (2d Dept. 9/29/2009), 49
- Catskill Regional Off-Track Betting Corporation v. Village of Suffern*, 2009 WL 3135811 (N.Y.A.D. 2 Dept.9/29/2009), 23
- Celentano v. Board of Zoning Appeals of the Town of Brookhaven*, 63 A.D.3d 1156, 882 N.Y.S.2d 448 (2d Dept. 6/30/2009), 53
- Christian v Town of Riga*, 649 F.Supp.2d 84 (W.D.N.Y.8/17/2009), 59
- Clear Channel Outdoor Inc. v. City of New York*, 06 Civ 8193 (S.D.N.Y.3/31/2009), 39
- Congregation Adas Yerim v. City of New York*, 2009 WL 4643230 (E.D.N.Y. 12/8/2009), 16, 37
- Crilly v Karl*, 67 A.D.3d 793, 888 N.Y.S.2d 189 (2d Dept. 11/10/2009), 49

Table of Cases

- Custom Topsoil, Inc. v. City of Buffalo*, 63 A.D.3d 1511, 879 N.Y.S.2d 854 (4d Dept. 6/5/2009), 20, 45
- DeVito v Zoning Board of Appeals of City of Poughkeepsie*, 889 N.Y.S.2d 482 (2 Dept. 12/8/2009), 26
- DiPaolo v. Zoning Board of Appeals of the Town/Village of Harrison*, 62 A.D.3d 792, 879 N.Y.S.2d 507 (2d Dept. 5/12/2009), 52
- Dolphin v. Zoning Board of Appeals of the Town of Shelter Island*, 64 A.D.3d 777, 882 N.Y.S.2d 716 (2 Dept. 7/28/2009), 30
- Donovan Realty, LLC. v. Davis*, 2009 WL 1473479 (N.D.N.Y. 5/27/2009), 20, 37
- Dudley v. Town Board of Prattsburgh*, 59 A.D.3d 1103, 872 N.Y.S.2d 614 (4d Dept. 2/6/2009), 16, 58
- East Fishkill Home & Land v. Town of East Fishkill*. 54 A.D.3d 950, 864 N.Y.S.2d 524 (2 Dept. 9/23/2008), 64
- East Moriches Property Owners' Assoc., Inc. v. Planning Board of the Town of Brookhaven*, 66 A.D.3d 895, 887 N.Y.S.2d 638 (2d Dept. 10/20/2009), 41
- East Suffolk Development Corp. v. Town Board of Riverhead*, 59 A.D.3d 661, 874 N.Y.S.2d 216 (2d Dept. 2/24/2009), 45
- Emmerling v. Town of Richmond Zoning Board of Appeals*, 67 A.D.3d 1467, 888 N.Y.S.2d 703 (4d Dept. 11/20/2009), 41
- Emrey Properties, Inc. v. Baranelo*, 61 A.D.3d 866, 877 N.Y.S.2d 215 (2d Dept. 4/21/2009), 43
- Franklin Square Donut System, LLC v. Wright*, 63 A.D.3d 927, 881 N.Y.S.2d 163 (2d Dept. 6/16/2009), 42
- Foti v. Town of East Hampton*, 60 A.D.3d 1057, 876 N.Y.S.2d 137 (2d Dept. 3/31/2009), 54
- G & P Investing Company v. Foley*, 61 A.D.3d 684, 877 N.Y.S.2d 143 (2d Dept. 4/7/2009), 42
- Gebbie v. Mammina*, 13 N.Y.3d 728, 885 N.Y.S.2d 450 (NY 8/27/2009), 52
- Genser v Zoning Board of Appeals of the Town of North Hempstead*, 65 A.D.3d 1144, 885 N.Y.S.2d 327 (2d Dept. 9/15/2009), 47, 57
- G.I. Home Developing Corp. v. Weis*, WL 962696 (E.D.N.Y. 3/31/2009), 32
- Girard v. Town of East Hampton*, 63 A.D.3d 835, 880 N.Y.S.2d 502 (2 Dept. 6/9/2009), 19
- Goldberg v. Incorporated Village of Roslyn Estates*, 61 A.D.3d 756, 877 N.Y.S.2d 199 (2 Dept. 4/14/2009), 34
- Golden Horizon Terryville Corp. v. Prusinowski*, 63 A.D.3d 930, 882 N.Y.S.2d 174 (2 Dept. 6/16/2009), 28
- Goldstein v. New York State Urban Development Corp.*, 2009 WL 4030939 (NY 11/24/2009), 17

Table of Cases

Gosier v. Aubertine, 2009 WL 5128540 (N.Y.A.D. 4 Dept. 12/30/2009), 35

Granger Group v. Zoning Board of Appeals of the town of Taghkanic, 62 A.D.3d 1102, 879 N.Y.S.2d 604 (3 Dept. 5/14/2009), 27

Grasso v. Town of West Seneca, 63 A.D.3d 1629, 881 N.Y.S.2d 247 (4d Dept. 6/5/2009), 65

Hamlin Preservation Group v. Town Board of the Town of Hamlin, Index No. 2008/11217 (Monroe County Supreme Court, Jan. 5, 2009), 59

Harrington v. New York State Adirondack Park Agency, 876 N.Y.S.2d 605 (Supreme Court, Franklin Co. 2009), 25

Hillside Avenue Preservation Association v. Board of Trustees for the Village of Airmont, et. al., 2009 WL 1857167 (S.D.N.Y. 6/23/2009), 36

Home Depot, U.S.A. v. Town Board of the Town of Hempstead, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2 Dept., 6/16/2009), 19, 40

Ip v. Village of North Hills, 61 A.D.3d 688, 875 N.Y.S.2d 915 (2d Dept. 4/7/2009), 45

J & M Harriman Holding Corp. v. Zoning Board of Appeals of the Village of Harriman, 62 A.D.3d 705, 879 N.Y.S.2d 494 (2d Dept. 5/5/2009), 40

Jones v. Zoning Board of Appeals of the Town of Oneonta, 61 A.D.3d 1299, 879 N.Y.S.2d 592 (3d Dept. 4/30/2009), 55

Kaur v. New York State Urban Development Corporation, 2009 WL 4348472 (1 Dept. 12/3/2009), 14

Kearney v. Kita, 2 A.D.3d 1000, 879 N.Y.S.2d 584 (2d Dept. 5/26/2009), 46

King v Town of Islip Zoning Board of Appeals, 2009 WL 4985235 (N.Y.A.D. 2 Dept. 12/22/2009), 55

Kogel v. Zoning Board of Appeals of the Town of Huntington, 2008 WL 93271 (N.Y.A.D. 2 Dept., 1/13/2009), 31

Lagin v. Village of Kings Point Committee of Architectural Review, 62 A.D.3d 709, 879 N.Y.S.2d 491 (2d Dept. 5/5/2009), 46

Laidlaw Energy & Environmental, Inc. v. Town of Ellicottville, 59 A.D.3d 1084, 873 N.Y.S.2d 814 (4 Dept. 2/6/2009), 12

Lamar Central Outdoor, LLC v. State of New York et al., 2009 WL 195561164 A.D.3d 944, 882 N.Y.S.2d 743 (3d Dept. 7/9/2009), 38

Lewis Family Farm, Inc. v. NYS Adirondack Park Agency, 64 A.D.3d 1009, 882 N.Y.S.2d 762 (3d Dept. 7/16/2009), 11

Libolt v. Town of Irondequoit Zoning Board of Appeals, 66 A.D.3d 1393, 885 N.Y.S.2d 806 (4d Dept. 10/2/2009), 38

Table of Cases

Lockport Smart Growth, Inc. v. Town of Lockport, 63 A.D.3d 1549, 880 N.Y.S.2d 412 (4d Dept. 6/5/2009), 42, 51

Lodge Hotel, Inc. v. Town of Erwin Planning Board, 62 A.D.3d 1257, 877 N.Y.S.2d 803 (4d Dept. 5/1/2009), 64

Marcus v. Village of Wesley Hills, 62 A.D.3d 799, 878 N.Y.S.2d 779 (2 Dept. 5/12/2009), 35, 46

Marino v. Town of Smithtown, 61 A.D.3d 761, 877 N.Y.S.2d 183 (2d Dept. 4/14/2009), 11, 29

Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven, 12 N.Y.3d 735, 904 N.E.2d 816, 876 N.Y.S.2d 680 (N.Y. 2/17/2009), 17

Matter of Pro Home Builders v. Greenfield, 67 A.D.3d 803, 888 N.Y.S. 2d 182 (2d Dept. 11/10/2009), 46

McLiesh v. Town of Western, 2009 WL 5126605 (N.Y.A.D. 4 Dept. 12/30/2009), 54

Menachem Realty, Inc. v. Meenakshi Srinivasan, 60 A.D.3d 854, 875 N.Y.S.2d 237(2 Dept. 3/17/2009), 33

Millennium Custom Homes, Inc. v. Young, 58 A.D.3d 740, 873 N.Y.S.2d 91 (2d Dept. 1/20/2009), 54

Mimassi v. Town of Whitestown Zoning Board of Appeals, 67 A.D.3d 1454, 889 N.Y.S.2d 337 (4 Dept. 11/13/2009), 30

Mirabile v. City of Saratoga Springs, 67 A.D.3d 1178, 888 N.Y.S.2d 325 (3 Dept. 11/12/2009), 25

Moy v. Board of the Town Trustees of Town of Southold, 61 A.D.3d 763, 877 N.Y.S.2d 186 (2 Dept. 4/14/2009), 34

NYS Committee on Open Government, FOIL – AO – 17478 (1/2/2009), 26

New York City v. 330 Continental, 60 A.D.3d 226, 873 N.Y.S.2d 9 (1d Dept. 1/29/2009), 65

New York SMSA Limited Partnership d/b/a Verizon Wireless v. Town of Clarkstown, No. 07 Civ. 7637 (S.D.N.Y. Mar. 26, 2009), 60

O'Connell Machinery Co., Inc. v. City of Buffalo Zoning Board of Appeals, 60 A.D.3d 1353, 875 N.Y.S.2d 715 (4d Dept. 3/20/2009), 57

Olson v Scheyer, 67 A.D.3d 914, 889 N.Y.S.2d 245 (2d Dept. 11/17/2009), 57

Omnipoint Communications, Inc. v. Town of LaGrange, 2009 WL 2878010 (S.D.N.Y. 8/31/2009), 62

Parkhouse v. Stringer, 12 N.Y.3d 660, 912 N.E.2d 48, 884 N.Y.S.2d 216 (NY 6/25/2009), 25

Petruso v. Schlaefer, 312 Fed. Appx. 397 (C.A. 2 (N.Y.) 2/26/2009), 21

Puckett v. City of Glen Cove, 631 F.Supp.2d 226 (E.D.N.Y.6/30/2009), 21, 24

Rautenstrauch v. Bakhru, 64 A.D.3d 554, 884 N.Y.S.2d 77(2 Dept. 7/7/2009), 26

Table of Cases

Residents Against Wal-Mart v. Planning Board of Town of Greece, 60 A.D.3d 1343, 875 N.Y.S.2d 691 (4d Dept. 3/20/2009), 41, 45

Residents Involved in Community Action (RICA) v. Town/Village of Lowville Planning Board and MJL Crushing, 61 A.D.3d 1422, 876 N.Y.S.2d 824 (4 Dept. 4/24/2009), 28, 43

Ribeiro v. Town of Brookhaven, No. 07-20844, 6 (NY Sup. Ct., Suffolk Mar. 16, 2009), 34

Russia House and Kings Point, Inc. v. Zoning Board of Appeals of Village of Kings Point, 67 A.D.3d 1019 (2d Dept. 11/24/2009), 54

Ruston v Town Board for the Town of Skaneateles 2009 WL 3199194 (N.D.N.Y.) (9/30/09), 21, 24

Salzano v. Zoning Board of Town of Wallkill, 63 A.D.3d 850, 880 N.Y.S.2d 518 (2d Dept. 6/9/2009), 48, 50

Save the Pine Bush v. Common Council of the City of Albany, 2009 WL 3425317 (NY 10/27/2009), 44

Scarsdale Shopping Center Associates, LLC v. Board of Zoning Appeals for the City of New Rochelle, 64 A.D.3d 604, 882 N.Y.S.2d 308 (2d Dept. 7/7/2009), 56

Serota Brown Court II, LLC v. Town of Hempstead, 62 A.D. 3d 715, 879 N.Y.S.2d 486 (2d Dept. 5/5/2009), 30

Sherwood Ridge, LLC. v. Town of Greenville, 65 A.D.3d 580, 883 N.Y.S.2d 719 (2d Dept. 8/1/2009), 40

Sonne v. Board of Trustees of Village of Suffern, 67 A.D.3d 192, 887 N.Y.S.2d 145 (2 Dept. 9/29/2009), 25

State of Connecticut v. American Electric Power Co., Inc. 05-5104-cv, 05-5119-cv (2 Cir. Ct. App. 9/21/2009), 13

Sufflok Asphalt Supply, Inc. v. Board of Trustees of Village of Westhampton, 59 A.D.3d 429, 872 N.Y.S.2d 516 (2 Dept. 2/3/2009), 32

T-Mobile Northeast LLC v. Town of Ramapo, 2009 WL 3075637 (S.D.N.Y. 9/30/2009), 60

Town Board of the Town of Parma v. Board of Trustees of Village of Hilton, 888 N.Y.S.2d 332 (4 Dept. 10/9/2009), 12

Town of Caroga v. Herms, 62 A.D.3d 1121, 878 N.Y.S.2d 834(N.Y.A.D. 3 Dept. 5/14/2009), 23

Town of Riverhead v County of Suffolk, 66 A.D.3d 1004, 887 N.Y.S.2d 650 (2 Dept. 10/27/2009), 27

Town of Riverhead v. Gezari, 63 A.D.3d 1042, 881 N.Y.S.2d 172 (2d Dept. 6/23/09), 65

Tsunis v. Zoning Board of Incorporated Village of Poquott, 59 A.D.3d 726, 873 N.Y.S.2d 733 (2d Dept. 2/24/2009), 52

TZ Manor v. Daines, 2009 WL 2242436 (S.D.N.Y 7/29/2009), 22, 47

Table of Cases

Vomero v. City of New York, 13 N.Y.3d 840 (N.Y. 11/19/2009), 57

Waidler v. Young, 63 A.D.3d 953, 882 N.Y.S.2d 153 (2d Dept. 6/16/2009), 52, 53

Weber v. Baranello, 63 A.D.3d 955, 880 N.Y.S.2d 531 (2d Dept. 6/16/2009), 43

Westbury Laundromat, Inc. v. Mamma, 62 A.D.3d 888, 879 N.Y.S.2d 188 (2d Dept. 5/19/2009), 58

Wind Power Ethics Group v. Zoning Board of Appeals of the Town of Cape Vincent, 60 A.D.3d 1282, 875 N.Y.S.2d 359 (4d Dept. 3/20/2009), 59

Yaeger v. Town of Lockport Planning Board, 62 A.D.3d 1250, 877 N.Y.S.2d 800 (4d Dept. 5/1/2009), 29

Yilmaz v. Foley, 63 A.D.3d 955, 881 N.Y.S.2d 154 (2 Dept. 6/16/2009), 34

Zaniewski v. Zoning Board of Appeals of the Town of Riverhead, 64 A.D.3d 720, 883 N.Y.S.2d 279 (2d Dept. 7/21/2009), 50

Zupa v. Zoning Board of Appeals of the Town of Southold, 64 A.D. 3d 723, 888 N.Y.S.2d 139 (2d Dept. 7/21/2009), 27, 45

Accessory Uses

The petitioners own and operate out of their home in a residential district “Angels’ Gate,” a hospice and rehabilitation center for approximately 200 terminally ill and disabled animals. Following the issuance of a notice of violation, the petitioners applied to the zoning board of appeals for a certification of existing use on the ground that the animal hospice was a preexisting nonconforming use. Their application was denied, and an appeal ensued. The trial court denied the Town’s motion to dismiss. The appeals court found that the trial court improperly substituted its judgment for that of the zoning board after the board rationally concluded that the animal hospice did not constitute a customary, accessory use nor was it a lawful preexisting nonconforming use. The Court noted that the zoning board relied on Table of Use Regulations in the Town’s zoning ordinance which both expressly prohibited animal hospitals, veterinarians and kennels in the residential district, and further the ordinance provided that any uses not specifically listed were not permitted in the district (and an animal hospice was not specifically listed). Since the existing use of the land was commenced and maintained in violation of zoning ordinance, the petitioners cannot claim legal nonconforming use status. Further, the fact that the petitioners had maintained the use for 13 years prior to the notice of violation did not prevent the zoning board from enforcing the code now. *Marino v. Town of Smithtown*, 61 A.D.3d 761, 877 N.Y.S.2d 183 (2d Dept. 4/14/2009).

Agricultural Uses

In determining whether dwellings constructed on a farm for purposes of farmworker housing are exempt from regulation by the Adirondack Park Agency because they are agricultural uses, or not exempt because they do not meet the definition of agricultural uses, the Court looked to the plain meaning of the statute, examining the definition section which defines a “single family dwelling” as “any detached building containing one dwelling unit, not including a mobile home.” See, Executive Law sec. 802[58]. The statute defines an “agricultural use structure” as “any barn, stable, shed, silo, garage, fruit and vegetable stand, *or other building or structure* directly and customarily associated with agricultural use.” See, Executive Law sec. 802[8] The Court noted that the implementing regulations for the applicable River Systems Act used the same definition for “agricultural use structure.” The appeals court agreed with the court below that the Court is not required to defer to the APA’s interpretation of the APA Act or of the River Systems Act since pure legal interpretation of clear and unambiguous statutory terms requires no reliance on any special expertise on the Agency’s part, The court went on to agree with the court below that the disputed housing units on the property were “agricultural use structures” within the meaning of the APA Act. The Court explained that since a “single family dwelling” is included within the statutory definition of “structure” and since an “agricultural use structure” includes any building primarily associated with agricultural use, it was rational to conclude that a single family dwelling that is directly and customarily associated with agricultural use fits the statutory definition of agricultural use structure and is therefore exempt from regulation by the APA. The Court noted further that the Agriculture and Markets Law provides that farmworker residences contribute to agricultural operations, and that the state high court had determined that farmworker housing was part of farming operations exempt from

local zoning. Even though the farmworker residences here are single family dwellings, the Court said that they are also agricultural structures exempt from APA jurisdiction. *Lewis Family Farm, Inc. v. NYS Adirondack Park Agency*, 64 A.D.3d 1009, 882 N.Y.S.2d 762 (3d Dept. 7/16/2009).

Annexation

The owners of a 45-acre undeveloped parcel in the Town of Parma, located adjacent to the Village of Hilton submitted a petition to the legislative bodies of both municipalities requesting approval of annexation of their property by the Village. The owners intended to construct a 117-unit senior citizen housing development on the land. At the time of the requested annexation, the applicable zoning in the Town would have only allowed for 20 to 30 single family homes on the lot, whereas the zoning in the Village would have allowed for the higher density senior housing. The Town Board sought a determination that its failure to file a determination on the annexation petition did not amount to a default approval, and that no annexation had occurred. The appeals court found that the Town Board's failure to adhere to the statutory filing requirements "did not result in default approval of the annexation, an, in any event, such default approval, under the facts presented, would violate the New York State Constitution." The Constitution requires consent of both municipalities as well as a finding that the annexation is in the over-all public interest, and this is repeated in the Municipal Annexation Law (GML sec. 702). Further, the Court found that notwithstanding the "deemed...approved" language of the statute, in the circumstances presented, the Town Board did not approve the annexation by default and that inaction is not tantamount to consent. The Court explained that a default approval where the Town specifically voted to deny the approval could not be reconciled with the constitutional rights of each municipality. Nothing in the Town's inaction evinced an intent to forego its constitutional rights. The Court further concluded that the Town's failure to file was a mere clerical error and an inadvertent clerical error could not produce a result so at odds with the Constitution and the Municipal Annexation Law. None of the parties were misled as to the Town's position, and neither the Town nor the Village desired the proposed annexation at the time of the litigation. *Town Board of the Town of Parma v. Board of Trustees of Village of Hilton*, 888 N.Y.S.2d 332 (4 Dept. 10/9/2009).

Climate Change

Laidlaw Energy and Environmental, Inc. acquired a lumber drying kiln and natural gas fired cogeneration electric power plant in the Town of Ellicottville. Shortly after its purchase, the facility was shut down. According to its owner, this was due to the inability to generate electricity profitably due to the rising price of natural gas. Several years later the owner applied to the Town to convert the cogeneration facility from natural gas to a biomass facility using clean woodchips as a fuel source. The Planning Board was named as lead agency for the coordinated review under the State Environmental Quality Review Act, and issued a positive declaration. The applicant prepared a DEIS, and after a public hearing, two draft FEISs. After requesting additional information, the Planning Board issued its FEIS, held an additional public

hearing, and subsequently denied the site plan approval for the new power plant based on both SEQRA and provisions of the local zoning law. The most significant issue in the SEQRA review was the increase in hazardous air emissions, including greenhouse gas emissions, that would result from the reconstruction of the natural gas fired plant with a new fuel source. The applicants' submissions admitted there would be an increase in 19 hazardous air pollutants, and there was no dispute as to the level of emissions, only their impact. Laidlaw asserted that since no EPA permit threshold was violated, the Town was required to issue the permit. The Town rejected this claim on the basis that it was entitled to reach its own conclusions as to the impacts, and, as to carbon dioxide, the claim of compliance was misleading because there was no EPA standard. See *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). The key dispute was over Laidlaw's claim that the woody biomass plant would be carbon neutral. Laidlaw asserted that carbon released by burning is taken up again by new plant life, and thus the cycle equals zero emissions. The Board rejected the argument for two main reasons. First, biomass plants can be carbon neutral, but only if the plan provides for sustainable fuel source management. The Planning Board specifically asked Laidlaw if it would be operating a companion wood growth management plan and was told it would not. Second, Laidlaw failed to consider the impacts of transporting the fuel source over the 100 mile harvest area. Based on EPA estimates, the Board calculated the carbon dioxide emissions from bringing fuel to the plant will be approximately 450 pounds of carbon dioxide emissions per delivery, or a total of 1,890,000 pounds per year. Coupled with other increases in hazardous air emissions, the Board found the impacts unacceptable. On appeal the applicant challenged the SEQRA determination, including the quality of the evidence gathered by the Town. The court rejected the attack by Laidlaw on the Town's experts and its record, and specifically held that the Board had taken the requisite hard look at the evidence, and made a reasonable elaboration for its determination. *Laidlaw Energy & Environmental, Inc. v. Town of Ellicottville*, 59 A.D.3d 1084, 873 N.Y.S.2d 814 (4 Dept. 2/6/2009).

The Court of Appeals for the Second Circuit ruled today that "public nuisance" law can be used to sue power companies based upon injuries from global warming. Eight states of the US, New York City, and three nonprofit (NGO) "land trusts" that seek to preserve environmentally sensitive land all sued power companies that own and operate fossil fuel (coal, etc.) power plants in 20 states of the US. (1) The Court decided that this dispute about harm from global warming emissions presents legal issues that can be decided by a court, rather than merely political questions that are exclusively the area for legislatures or the President. (2) One important issue was "standing to sue." The Court decided that because the NGOs own property interests that can be harmed by weather events as a result of global warming, they clearly have standing to sue. (In addition, the states have standing to sue private power companies because the states can represent the interest of their citizens.) (3) The Court decided that the standing of the NGO land trusts can be based on future injury because injuries are "*already in process*" as a result of the ongoing emissions by defendants that contribute to increasing temperatures." (4) The Court decided that it was proper to bring an injunctive relief action based on the common law of "public nuisance." This legal doctrine was imported from England, the Court pointed out. A public nuisance is "an unreasonable

interference with a right common to the general public.” (5) The Court decided that some entities that are “non-state” (private parties) have the right to file lawsuits against a public nuisance—not only state governments. The Second Circuit had not previously decided this issue. It cited cases taking the same position on the issue from the Seventh Circuit (in the Midwest of the US) and the Third Circuit (mid-Atlantic). (6) The Court decided that the NGO land trusts were among the entities that could file this particular public nuisance case. The law requires that only private parties (including NGOs) who are specially injured—in a manner different from the general public—can file public nuisance cases. Not every private person could bring a public nuisance case. Not even every private landowner could do so. But these particular land trusts can because they own ecologically sensitive land, which they have invited the public to visit and enjoy, and their charter, purpose, and mission is to preserve land for public enjoyment. (7) The Court decided that the passage of legislation by the US Congress did not eliminate the federal common law of public nuisance when it adopted the Clean Air Act. This issue is crucial. It is also an issue that could eventually bring an end to the importance of this case for greenhouse gas lawsuits. The Court stated that the Clean Air Act has not yet displaced (eliminated) the federal common law of public nuisance for greenhouse gas emissions cases. That is because the US Environmental Protection Agency has not (yet) ruled that greenhouse gases are a pollutant—and even if it does so, it has not yet even started the process of doing so for greenhouse gas emissions from stationary sources like power plants. Also, Congress could act separately. *State of Connecticut v. American Electric Power Co., Inc.* 05-5104-cv, 05-5119-cv (2 Cir. Ct. App. 9/21/2009).

Condemnation/Eminent Domain

In a case of first impression, an appeals court in New York dealt a blow to the expansion plans of Columbia University which include the use of eminent domain to acquire the last batch of properties in the project footprint. Proposed in 2003, the project will expand the University’s 36-acre campus by building an additional 6.8 million square feet of space for classrooms, research facilities, administration, housing, and parking, including redeveloping 17-acres in the West Harlem neighborhood of “Manhattanville” from W. 125th to W. 133rd streets. The expansion plan, which will also include 2 acres of public open space, is estimated to cost Columbia University approximately \$6.3 billion, and is scheduled to take place in two phases, with Phase 1 scheduled for completion by 2015 and Phase two scheduled for completion by 2030. While Columbia now owns or controls almost all of the parcels in the project area, the owners of a gas station and the owner of a self-storage business challenged the State’s exercise of eminent domain on behalf of the private university. The appellate division handed down a 3-2 decision that held, among other things, that the government’s use of eminent domain in this case was unconstitutional under both the federal and state constitutions. Referring to Columbia as an “elite private university,” the Court said that the proposed expansion did not have the required “civic purpose” to support the government’s exercise of eminent domain for what the Empire State Development Corporation labeled as a “mixed use development land use improvement and civic project.” The Court explains that the statutory definition of “civic use” does refer to educational uses, but that the final clause, “or other civic purposes,” restricts the educational purposes qualifying for a “civic purpose.” Acknowledging that this is a case

of first impression in New York, the Court has no problem distinguishing this project from other, non-educational civic projects such as the New York Stock Exchange project that showed substantial public benefits, as opposed to the benefits here directed at Columbia which the Court believes to be the sole beneficiary. The Court basically challenges the State Legislature to address this issue by stating, “Where we to grant civic purpose status to a private university for purposes of eminent domain, we are doing that which the Legislature has explicitly failed to do...” The Court found the Urban Development Corporation Act unconstitutional as applied since the law contains no standards for determining what constitutes “substandard and insanitary” conditions to support a finding of blight. The Court acknowledged that although the words are not necessarily unconstitutionally vague, that alone does not end the inquiry, and that here, the application of the standard has resulted in “ad hoc and selective enforcement.” Labeling the blight designation in this case “mere sophistry,” after reviewing the studies and reports that had been commissioned since 2002 to examine the conditions of properties in the project area, the Court concluded that there was no independent credible proof of blight, and that the City and the State engineered a blight finding in an effort to claim a public purpose. In fact, the Court goes through detail pointing out inconsistencies in the blight findings and specifically focuses on one consultant study that “led to the preposterous summary of building and sidewalk defects...” which “...reveals the idiocy of considering things like unpainted block walls or loose awning supports as evidence of a blighted neighborhood. Virtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor.” The Court also points to “the folly of underutilization” and urges that “The time has come to categorically reject eminent domain takings solely based on underutilization.” The Court explains that using underutilization as a blight condition, “transforms the purpose of blight removal from the elimination of harmful social and economic conditions in a specific area to a policy affirmatively requiring the ultimate commercial development of all property regardless of the character of the community subject to urban renewal.” Perhaps the most important aspect of the decision is the Court’s careful examination of Justice Kennedy’s concurring opinion in *Kelo*, and the finding that this case is an example of what Kennedy warned about – situations where “improper motive in transfers to private parties with only discrete secondary benefits to the public.” Judge Catterson recounts Justice Kennedy’s test for pretext: 1) city’s awareness of a depressed condition; 2) formulation of a comprehensive development plan; 3) substantial commitment of public funds; 4) city’s review of a variety of development plans; and 5) city’s choice of a private developer from a group of applicants rather than picking a particular transferee beforehand. While all of these elements were present in the *Kelo* case, in the Columbia case, Judge Catterson finds that: 1) when the City and State started to look at the expansion project, the area was not depressed; 2) there was no comprehensive development plan to address area-wide economic depression; 3) no public funds were being used to support the project – Columbia is paying for 100% of the project; 4) no competing plans were submitted – although the community board submitted a 197-a plan that acknowledged the importance of the expansion project, the plan clearly indicated no support for the use of eminent domain; and 5) the ultimate beneficiary of the project was predetermined from the beginning – Columbia University. *Kaur v. New York State Urban Development Corporation*, 2009 WL 4348472 (1 Dept. 12/3/2009).

Following a study for a reconstruction project to “improve traffic mobility for vehicles, pedestrians, and bicyclists and improve truck access...”, the City of Binghamton (NY) condemned .54 acres of Plaintiff’s property needed to alleviate an inadequate turning radius that existed at the intersection. After of the proposed condemnation and during the public hearing the Petitioner voiced objections to the project, and claimed, among other things, that the connector road and the taking of his property would serve a private, not public, purpose. The City disagreed, adopting a resolution declaring that the project, if implemented, would benefit the public, and authorized the use of eminent domain. The Petitioner appealed. The appeals court disagreed with the Petitioner’s allegation that the taking was for a private purpose and therefore unconstitutional. The Court noted that public purpose is broadly defined and encompasses “any use which contributed to the health, safety, general welfare, convenience or prosperity of the community.” The Court said that the proposed project seeks to address serious traffic concerns, commenting on the large number of traffic accidents in the area as a result of the existing configuration of the intersection. The Court disagreed with the allegation that the connector road would mainly serve commercial vehicles that travel in the area and that therefore there was no public benefit. In concluding that the project has a public purpose, the Court commented, “Putting aside the fact that commercial use of public highways has obvious public benefits, there can be no doubt but that where an intersection of two public roadways is constructed in such a way that some vehicles cannot safely negotiate it, all vehicular traffic that utilizes the area is obviously affected.” *225 Front Street, LTD v. City of Binghamton*, 61 A.D.3d 1155, 877 N.Y.S. 2d 486 (3 Dept. 4/9/2009).

Following a condemnation of a portion of the petitioners’ property by the Town Board to create easements to enable the placement of underground electricity lines for a wind farm project, the petitioners challenged the action alleging that the Town Supervisor, who cast the deciding vote on both the resolution commencing the condemnation proceedings and the resolution approving the condemnation had a conflict of interest that required recusal. The Court, however, said that since the appeal was made pursuant to the State Eminent Domain Procedure Law (Section 207(c)) (EDPL) their review was “limited to whether the proceeding was in conformity with constitutional requirements, whether the proposed acquisition is within the statutory jurisdiction or authority of the condemnor, whether the condemnor’s determination and findings were made in accordance with the procedures set forth in EDPL article 2 and ECL article 8, and whether a proposed [public] use, benefit or purpose will be serviced by the acquisition.” (citing to *Matter of Pfohl v. Village of Sylvan Beach*, 26 A.D. 3d 820, 809 N.Y.S.2d 367 (4 Dept. 2/3/2006)). *Dudley v. Town Board of Prattsburgh*, 59 A.D.3d 1103, 872 N.Y.S.2d 614 (4 Dept. 2/6/2009).

In 2001, Congregation Adas Yerim a religious organization, sought to build a religious complex (a religious school and residential units) on undeveloped property it owned that was zoned for manufacturing use. The Congregation applied for a special use permit at around the same time that the Sanitation Department of the City of New York had plans for the same site and the Department had filed an application with the Department of

City Planning for site selection and acquisition of the property of the project site for a sanitation garage. Following an environmental review, proceedings began to acquire the property pursuant to New York City's Uniform Land Use Review Procedures (ULURP), and the community board recommended approval of the Sanitation Department's project. The Congregation contended that the vote was motivated by anti-semitism, and constituted a de facto denial of their special use permit application. Litigation ensued in state court regarding the acquisition proceeding pursuant to the state Eminent Domain Procedure Law, and for a permanent injunction barring the City from the condemning the site. The matters were consolidated and the state courts found for the plaintiff (trial and appellate courts). The instant proceeding was then brought in federal court where the Congregation has alleged that the City has violated their rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Court stated that that even if they had jurisdiction to hear the claim, it still would dismiss the RLUIPA claim that flows from the taking of the Congregation's property since "RLUIPA does not apply to eminent domain proceedings." The Court explained, that eminent domain is not a "land use regulation" and that under RLUIPA, "the government implements a 'land use regulation'... only when it acts pursuant to a zoning or landmarking law that limits the manner in which a claimant may develop or use property in which claimant has an interest." Here, the Court concluded that no landmarking or zoning law was being implemented or applied. The Court also commented that, "Had Congress wished to bring the distinct, longstanding, well-know, and important governmental power of eminent domain within the ambit of RLUIPA, it surely could have said so. That it did not is compelling." *Congregation Adas Yerim v. City of New York*, 2009 WL 4643230 (E.D.N.Y. 12/8/2009).

The Court of Appeals upheld the condemnation of land for farmland preservation without addressing the Plaintiff's *Kelo* argument, finding that the challenged taking was constitutionally proper even assuming a preexisting farmland plan was necessary. The Court found that the Town had legislatively evidenced its policy of farmland preservation through the Town's master plans supporting this goal. The Court also noted that Town voters had approved the issuance of \$130 million of bonds to acquire rights in undeveloped land in the Town, and among areas identified for possible use of the funds was the tract of land in question. The Court concluded, "In short, the public benefits of the taking in this case were not incidental or pretextual in comparison with benefits to particular, favored private entities; petitioner's remaining arguments likewise lack merit." The Court also noted that since the parties did not argued whether the New York Constitution (see NY Const, art I, § 7[a]) imposes a more stringent standard for takings than does the Fifth Amendment as interpreted by *Kelo*, they would not address that issue. *Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven*, 12 N.Y.3d 735, 904 N.E.2d 816, 876 N.Y.S.2d 680 (N.Y. 2/17/2009).

Basing its holding on State constitutional authority that accords government "broad power to take and clear substandard and insanitary areas for redevelopment," The New York Court of Appeals upheld the use of eminent domain by the New York State Empire State Development Corporation to acquire parcels that the project developer for the Atlantic Yards project was unable to secure through voluntary negotiation with property owners. The proposed project, which consists of a sports arena to house a major

league basketball franchise as well as various infrastructure improvements in phase one, would include numerous high rise buildings along with approximately eight acres of open, publically accessible landscaped space planned for phase two. The project sponsor asserts that the high rise buildings will serve both commercial and residential purposes, containing between 5,325 and 6,430 dwelling units, of which more than one third are to be affordable for either low and or moderate income families. The Empire State Development Corporation has sponsored the project, proposed by private developer Forest City Ratner, as a "land use improvement project" under the New York State Urban Development Corporation Act, finding that the area in which the project is to be situated is "substandard and insanitary." Although part of the footprint had been previously designated as blighted, areas that the developer had not been successful in acquiring were the subject of recent commissioned blight studies which found "sufficient indicia of actual or impending blight to warrant their condemnation for clearance and redevelopment" and that such blight removal would allow for the above-described mixed-use development that would serve a "public use, benefit or purpose." Following an unsuccessful effort to halt the eminent domain in federal court (see, *Goldstein v. Pataki*, 488 F Supp 2d 254 (EDNY 2007), *aff'd* 516 F3d 50 (2008), *cert. den.* 128 S.Ct. 2964 (2008)), the remaining property owners challenged the use of eminent domain under two provisions in the New York State Constitution. After finding that the appellants did timely file their appeal in State Court despite the fact that the State Court action was not filed until after federal court remedies were exhausted, the Court turned to the merits. Examining first the question of whether the condemnation is constitutional under the State constitution's requirement that, "[p]rivate property shall not be taken for public use without just compensation," (the same language as found in the U.S. Constitution), the Court found that it clearly is constitutional since "the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain." Further, the Court noted that Art. XVIII, sec. 1 of the Constitution grants to the Legislature the power to provide specificity with respect to defining blight and blight conditions, and that sec. 2 of that Article authorizes the Legislature to grant the power of eminent domain to any public corporation. Here, the Court said, the Empire State Development Corporation exercised the power for the constitutionally recognized public purpose or "use" of rehabilitating a blighted area. With respect to the finding of blight, the Court noted that while the conditions that supported the blight finding may not "approach in severity the dire circumstances of urban slum dwelling..." which had prompted the adoption of Art. XVIII, the Court has "never required that a finding of blight by a legislatively designated public benefit corporation be based upon conditions" replicating blight during the Great Depression. The court also acknowledged that the precise definition of "blight" is not for the judicial branch to articulate, but rather something left to the Legislature. And here, the Legislature has left the actual specification to quasi-legislative administrative agencies whose decisions will be upheld where, as here, "those bodies have made their finding, not corruptly or irrationally or baselessly." So, although the Court said it is possible to make a finding otherwise with respect to blight, it is not for the Court to overturn the decision under the circumstances. Lastly, the Court turned to Section 6 of Article XVIII of the Constitution and concluded, based on constitutional history, that the section was meant to apply where housing is created in connection with an urban renewal slum clearance project and where such is aided by state loans or subsidies, the new housing must replace the low rent housing lost during the clearance. The present situation, explained the Court, is

different since the current project is not aimed at the wholesale eradication of slums, but rather at alleviating “minor conditions of urban blight” attributable not to housing but rather to an uninhabitable subgrade rail cut. Further, the Court noted that at the time of the environmental impact statement only 146 people still resided in the project footprint and not all of those people were low-income. The Court said, “While the creation of low income housing is a generally worthy objective, it is not constitutionally required under Article XVIII, sec. 6 as an element of a land use improvement project that does not entail substantial slum clearance.” *Goldstein v. New York State Urban Development Corp.*, 2009 WL 4030939 (NY 11/24/2009).

Conditions on Approval

An appeals court determined that a number of conditions imposed on the approval of a site plan application for the remodeling of a commercial building in order to open a retail store were arbitrary and hence impermissible. Specifically, the Town Board’s attempt to restrict the hours during which Home Depot could operate its business and clean the parking area, was arbitrary and capricious since the Town offered no findings or rationale to support the imposition of such restrictions. The Court acknowledged that although time restrictions could be used to effectively reduce traffic and noise during certain hours, the Town made no specific findings as applied to this application. Further, the Court also found arbitrary the Board’s condition requiring the installation of a closed circuit television recording system since no findings were made to support the conclusion that this system would affect the “safety and general welfare of the adjacent areas.” The Court did uphold two other conditions, however. The first required that relocation of a loading zone from the east side of the property to the west side of the property to prohibit truck from entering the premises from one of the roadways. The Court noted that Town Law specifically vests the Board with authority to review and approve site plans related to “parking, means of access, screening, signs, landscaping, architectural features, adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law.” Here, the local zoning ordinance provided that in reviewing site plan applications, the Town Board is to consider, among other things, “[t]he effect of the proposed use on the movement of the vehicular traffic in the vicinity, including consideration of the provisions for access of such traffic between the premises and public highways.” Another condition, which required the installation of a 12-foot solid PVC fence was also upheld as the Court found it was “rationally related to Home Depot’s inclusion of a similar 12-foot fence in the site plan, and the Town Board’s desire to ‘protect the just interest of nearby residents in the preservation of a peaceful and pleasant residential environment.’” *Home Depot, U.S.A. v. Town Board of the Town of Hempstead*, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2 Dept., 6/16/2009).

An appeals court upheld the invalidation of a scenic and conservation easement imposed by a Town as a condition to the issuance of a natural resources special permit. In annulling the condition, the Court agreed with the trial court that it was arbitrary and capricious, and the zoning board of appeals was ordered to issue the special permit

without the subject condition. *Girard v. Town of East Hampton*, 63 A.D.3d 835, 880 N.Y.S.2d 502 (2 Dept. 6/9/2009).

Declaratory Relief

Following a letter from the City in 2006 notifying the property owner and tenant that the amended use permit for the operation of a portable concrete mixing plant had expired, and the issuance of a Stop Work Order in 2007, the Petitioners (owner/tenant) challenged the determination more than a year after the initial letter was issued. The appellate court first noted that the Petitioners erroneously commenced the proceeding as a declaratory judgment action, and that such is not the appropriate procedural vehicle since the constitutionality of the underlying regulation is not at issue. Therefore, the Court said that the appropriate action is one pursuant to NY CPLR Article 78, which has a four-month statute of limitations. The Court found that since the Petitioners failed to commence their challenge within this timeframe, and given the fact that the 2006 letter provided sufficient notice of the final determination that the amended permit had expired, the 2007 Order did not renew or revive the statute of limitations period. *Custom Topsoil, Inc. v. City of Buffalo*, 63 A.D.3d 1511, 879 N.Y.S.2d 854 (4 Dept. 6/5/2009).

Disaster Preparedness Plans

Introduced as A. 5025 (Brodsky), Chapter 415 of the NY Laws of 2009 adds §23-c to the Executive Law and requires that local disaster preparedness plans of a county, city, town, or village not conflict with those of others; disputes with a county are to be resolved by the county; disputes crossing county lines are to be resolved by the state emergency management office; provides that New York city is to be treated as a county for such purposes. According to the sponsor's memo, "The coordination of plans between neighboring municipalities and agencies is an essential component to disaster planning. The problem of evacuation routes crossing paths could cause serious congestion and confusion in the time of great emergency. Given the failures of FEMA in New Orleans, and the failures of SEMO and FEMA with respect to the Indian Point Evacuation Plans, municipalities must clarify and coordinate evacuation plans." Signed on August 26, 2009, the new law takes effect in February 2010 (180 days after signing), however, the law provides that the State Emergency Management Office "is authorized to promulgate any and all rules and regulations and take any other measures necessary for the timely implementation of this act on its effective date on or before such date."

Due Process

Since the planning board has wide discretion to approve or deny modifications to site use plans, the Plaintiff cannot be said to be entitled to an approval on their amendment proposal because the discretion is too wide to "virtually assure" approval. Therefore, the Plaintiff did not possess a constitutionally protected property interest for purposes of

a Substantive Due Process claim. *Donovan Realty, LLC. v. Davis*, 2009 WL 1473479 (N.D.N.Y. 5/27/2009)

To support a claim of due process a party must assert a valid property interest within the meaning of the constitution and must demonstrate that the defendant acted in an arbitrary or irrational manner in depriving him of that property interest. The court found that the Rustons had failed to allege a property interest because under New York law, planning boards have discretion to approve or deny applications for subdivisions. Also, the Town Board did not do anything that shocked that conscious in denying the sewage system. *Ruston v Town Board for the Town of Skaneateles* 2009 WL 3199194 (N.D.N.Y.) (9/30/09).

Puckett also claimed, among other things, that the defendants' actions violated both her procedural and substantive due process rights. Here the court examined the plaintiffs claimed right as either: (1) the right to an unobstructed view of the water, or (2) the right to prohibit a neighboring landowner from building on his land. The court rejected outright the possibility that there might be a right to unobstructed views under the Constitution. The court was also not persuaded that the plaintiff may have a right to prohibit the granting of a building permit to a neighbor. This is because of the amount of discretion the defendants had in regards to the issue. The plaintiff cannot be said to have been "virtually assured" of getting the neighbors' permit applications rejected. *Puckett v. City of Glen Cove*, 631 F.Supp.2d 226 (E.D.N.Y.6/30/2009)

Plaintiffs alleged that actions taken by zoning board of appeals and the village board of trustees in connection with Plaintiffs' residential building permit violated their civil rights. Plaintiffs owned a one family home and decided to add a rear addition to be used as a family room that would result in the house covering 26% of the property, violating the Village Code's maximum 25% coverage. Plaintiffs applied for a variance, which was granted, then filed an amendment to add a roof deck, which was approved, and construction began. Plaintiff's neighbors then filed an appeal of the granting of the variance 6 months later when construction was almost complete. In a prior CPLR Article 78 proceeding, it was found that the neighbors' appeal was time barred. Plaintiffs then commenced this action, claiming that the ZBA violated their rights under the due process and equal protection clauses, asserting claims pursuant to Sections 1983 and 1986 that defendant deprived them of their building permit. The District Court noted that to demonstrate a violation of due process rights based upon a zoning decision, a plaintiff must first demonstrate the possession of a federally protected property right to the relief sought, and if that is satisfied, then the court will look to see if the zoning decision was arbitrary and capricious. Plaintiffs' argument would prevail only if the near completion of construction would somehow divest the ZBA of discretion to revoke a building permit. This estoppel argument, however, has no foundation in New York law because New York law is clear that estoppel cannot be invoked against a municipality to prevent the revocation of a permit. Thus if a zoning board finds that a permit was issued in error that permit may be revoked, even in cases where construction has taken place and harsh results would occur. The district court found that since New York law clearly allows for the revocation and/or modification of a building

permit, even in cases where construction is essentially complete, Plaintiffs cannot show the lack of discretion to revoke their permit, hence, they cannot show a constitutional entitlement to a permit sufficient to support a due process violation. The Second Circuit Court of Appeals affirmed. *Petruso v. Schlaefer*, 312 Fed. Appx. 397 (C.A. 2 (N.Y.) 2/26/2009).

The Second Circuit affirmed a decision of the Southern District of New York finding that the Plaintiffs procedural due process rights were not violated when the zoning ordinance changed preventing them from constructing a senior-citizens dwelling. Although the plaintiffs alleged that they had secured a special use permit, the Circuit Court concluded that vested rights did not attached since they failed to complete substantial construction. Therefore, the plaintiffs had no constitutionally protected property right in the zoning status of their land, nor did they have a constitutional right to receive actual notice of the proposed change in the zoning status. The Court explained that they have long rejected the argument that an un-exercised right to develop land confers a due process right in the existing zoning status. *Alzamora v. Village of Chester*, 2009 WL 578630 (2nd Cir. (N.Y.) 3/6/2009).

The State Defendants contend that Plaintiffs fail to state a claim for a due process violation because they have not alleged a cognizable property interest in an operating certificate and because they failed to take advantage of State Procedures to challenge DOH's denial of an operating certificate to TZ Manor. Plaintiffs alleged that various government officials affected a taking of their property without just compensation and deprived them of due process of law in violation of the Fifth and Fourteenth Amendments resulting from a variety of actions in connection with the operation of an Adult Home in Nyack, New York. Specifically, the Plaintiffs claim that the State gave possession, occupation, and control over the Adult Home and its revenue and profits to Long Hill, in violation of their property rights. The government moved to dismiss for lack of subject matter jurisdiction, or in the alternative for failure to state a claim. Specifically, the State argued that the takings claim is unripe under the second prong of *Williamson County* since Plaintiffs' failed to avail themselves of State remedies when they chose not to file an action either under Article 1, Section 7 of the New York State Constitution, or through an Article 78 proceeding. The court agreed, and granted the motion to dismiss. The State also argued that the Plaintiffs failed to state a claim for a due process violation as they do not possess a cognizable property interest in an operating certificate, and because they failed to take advantage of State Procedures to challenge DOH's denial of an operating certificate to TZ Manor. The Court agreed as the Plaintiffs did not allege that the State actually took possession of any of their property, nor that they ever gave Long Hill anything other than an operating certificate. In the absence of an allegation of any cognizable property interest, Plaintiffs' due process claim was dismissed, for failure to state a claim. *TZ Manor v. Daines*, 2009 WL 2242436 (S.D.N.Y 7/29/2009).

Enforcement

After the Town determined that the property owner constructed a residential camp on his property in violation of the local zoning regulations, the Town commenced an enforcement action, and following a three week bench trial, the court found for the Town and ordered the property owner to remove the structure and pay a \$50,000 civil penalty. The property owner appealed. The Court agreed that the structure built on the subject property was not a boathouse (as was the subject of the issued permit), but rather a residential camp, which violates the zoning regulations. Under the application zoning definition, a boathouse was defined as “a structure with direct access to a navigable body of water (1) which is used for the storage of boats and associated equipment and (2) which does not have bathroom or kitchen facilities and is not designed or used to lodging or residency.” The Court found that the structure built did not comply with this definition, first and foremost, it did not have direct access to the Lake. Further, the Court noted testimony at trial indicating that had the Town not issued a stop work order, the structure likely would have had a kitchen and/or bathroom. Further, the Court said, “That the structure was intended for residential use is also demonstrated by the structure’s various amenities, including sheet-rocked interior partition walls forming interior rooms, mattresses in the uppermost level of the structure, a chest of drawers, an entertainment center with a television and video player, a microwave oven, extensive electrical wiring, casement windows, glass doors, a gas stove and telephone service.” Further, the Court noted that the size of the structure was beyond what had been authorized by the building permit.

With respect to the penalty, the Court acknowledged that removal of offending structures is among the most appropriate remedies. In this case, the Court said that the property owner was well aware, after three unsuccessful applications, that the Town would not permit him to build a camp residence on the property because of setback requirements. However, while his third application was pending, he commenced construction without a permit. Subsequently, he applied for permission to build a single-story one-room boathouse – yet he continued to construct the existing structure with no provision for the storage of a boat. Further, when the building permit expired, the property owner did not apply for an extension, he simply continued building what he had initially desired. The Court further took note of testimony from an acquaintance of the property owner who said that the owner “intended to use his extensive real estate and political experience to outmatch the “local yokels” who were trying to prevent him from building a residence on the property.” Since the Court was persuaded that the property owner intended to disregard the applicable regulations, the Court concluded that the penalty imposed was not an abuse of the trial court’s discretion. With respect to the civil penalty, the Court noted that under state statute (Town Law 135), civil liability can be imposed for each week the structure is in violation of the zoning regulations. *Town of Caroga v. Herms*, 62 A.D.3d 1121, 878 N.Y.S.2d 834(N.Y.A.D. 3 Dept. 5/14/2009).

A village has authority to issue appearance tickets for alleged violations of the Village Code, irrespective of the fact that the county has authority to enforce the State Uniform Fire Prevention Code. The Court stated that the Fire Code permits municipalities to enforce their own building regulations so long as they do not “supersede, void, repeal or make more or less restrictive” any provisions of the State Fire Code. The Court said

that while OTB claimed that provisions of the Village Code violated this prescription, the Court found that OTB failed to carry its burden of proof. *Catskill Regional Off-Track Betting Corporation v. Village of Suffern*, 2009 WL 3135811 (N.Y.A.D. 2 Dept.9/29/2009).

A zoning board has jurisdiction to review the building inspector's determination that the house was in violation of the Town Code as articulated through the appearance ticket. Further, the zoning board does have authority to grant area variances resulting from an appeal of the building inspector's determination, and the petitioners were not required to file a separate application. *Anayati v. Board of Zoning Appeals of the Town of North Hempstead*, 65 A.D.3d 681, 885 N.Y.S.2d 300 (N.Y.A.D. 2 Dept. 8/25/2009).

Equal Protection

The Rustons own 27 acres of property in the Town of Skaneateles which they have been trying to subdivide and develop for some time. The Rustons filed an amended complaint asserting, among other things, a class-of-one equal protection claim. The Town moved to dismiss. With respect to the class-of-one equal protection claim, the Court explained that in order to state an equal protection claim of one a person must allege that they were treated differently from others similarly situated in all relevant respects, that the defendant had no rational basis for the differential treatment and that the treatment resulted from a non-discretionary state action. The allegation of the equal protection claim stems from the denial of Ruston's sewer-system access to the property. The court had held prior when discussing the Ruston's claim of substantive due process that the Rustons lacked a property interest because the Village had discretion to grant or deny sewer access. Under the equal protection claim the Rustons allege that they had been paying an ad valorem sewer tax, which they had not alleged in their original complaint. In their amended complaint the Rustons give no facts in support of this added tax. The Town however produced the sewage bills of the Rustons and no additional charges were made that would show this tax. The court held that because of the lack of evidence by the Rustons the claim was dismissed. *Ruston v Town Board for the Town of Skaneateles*, 2009 WL 3199194 (N.D.N.Y.) (9/30/09).

Alleged selective enforcement of zoning laws to the benefit of the developer and detriment of the plaintiff was dismissed as the court held that the plaintiff was unable to show any group of similarly situated individuals receiving different treatment. The facts showed no homeowners that had been treated differently than the plaintiff, or even a developer that had been treated differently by the city. Further, even if the plaintiff could find information showing similarity, the Equal Protection claim was still doomed because she could not point to any treatment based on maliciousness or bad faith. To the contrary, the record showed that the defendants investigated the plaintiff's complaints and acted on the legal advice of the town attorney. *Puckett v. City of Glen Cove*, 631 F.Supp.2d 226 (E.D.N.Y.6/30/2009)

The court found merit to plaintiff's allegation that her building was singled out from other downtown buildings that were similarly situated because she exercised her right to free speech when complaining about the treatment of her variance application for the fence. The Court's finding was based on the absence of similar enforcement actions against other properties as part of the downtown "sweep." *Sonne v. Board of Trustees of Village of Suffern*, 67 A.D.3d 192, 887 N.Y.S.2d 145 (2 Dept. 9/29/2009).

Ethics

The New York Court of Appeals upheld the City of New York Department of Investigation's authority to subpoena private citizens during an investigation regarding a public hearing before the City Landmarks Commission. The Court of Appeals said, "We recognize the importance of protecting citizens who speak publicly to their government from intrusion and harassment that may result from official displeasure with what they say. In this case, therefore, we apply with special stringency the general rule that an investigative subpoena will be upheld only where sufficient facts are shown to justify the inquiry. We nevertheless hold that DOI has made a sufficient showing here, and that its subpoena is valid." The Court noted that the DOI seeks to question the plaintiff about alleged deceptive conduct and whether she knew of the deception. In affirming the decision below the Court said, "We cannot say that DOI is forbidden to investigate what seems to have been a knowingly false statement of fact to a city agency, even one made at a public hearing. 'Spreading false information in and of itself carries no First Amendment credentials.'" [citations omitted] *Parkhouse v. Stringer*, 12 N.Y.3d 660, 912 N.E.2d 48, 884 N.Y.S.2d 216 (NY 6/25/2009).

Property owners petitioned for Article 78 review of determination of Adirondack Park Agency's enforcement committee, which held that rock structure installed on property constituted a prohibited structure. They alleged that bias was demonstrated by the Agency's attorney (Van Cott) in his interpretation and application of regulatory provisions. The Court ruled that there were no specific factual allegations or proof of bias and that the fact that Van Cott's family members own a nearby property was not sufficient to demonstrate bias. Also, Van Cott himself was not a litigant therefore cases which involved a transfer of venue to avoid any suspicion of bias does not apply.

Therefore, the Court held that the involvement of the Agency's attorney "in this enforcement proceeding did not constitute a conflict of interest arising from any personal bias. Specifically, there is no proof or allegation that VanCott's participation in the administrative proceeding resulted in a decision which was premised upon such bias. A decision which is unfavorable to Petitioners may not, alone, substantiate claims of prejudice or bias." *Harrington v. New York State Adirondack Park Agency*, 876 N.Y.S.2d 605 (Supreme Court, Franklin Co. 2009).

Exemption from Zoning

With respect to the claim that the City violated its own zoning ordinance by not obtaining approval from the City's own zoning board of appeals, the Court noted that the zoning

ordinance provides in relevant part that zoning board approval is not required by any action “proposed by any agency, department, branch or division of New York State...which involves the exercise of direct governmental function, consistent with the purposes and jurisdiction of such agency, department branch or division of the New York State.” In agreeing with the trial court, the appeals court held that the City constitutes a political subdivision of the State and was therefore exempt from the requirements of its own zoning ordinance. *Mirabile v. City of Saratoga Springs*, 67 A.D.3d 1178, 888 N.Y.S.2d 325 (3 Dept. 11/12/2009).

FOIL

A Freedom of Information Law request was submitted to a town board seeking the names of all applicants requesting for appointment to the Master Plan Comprehensive Committee. The town denied the request, asserting that it was an unwarranted invasion of personal privacy. The NY Committee on Open Government opined that there is a distinction in the effects of disclosure between situations in which persons apply for employment and those in which they volunteer to serve in uncompensated positions. Disclosure of applications of employment would, in fact, constitute an unwarranted invasion of privacy, inasmuch as the applicant’s employer may not be aware that such employee is seeking other employment and learning of such could lead to retribution. Such retribution is unlikely when a person seeks to volunteer to be appointed to an unpaid position on a committee. Therefore, although certain personal information regarding the applicants for voluntary committees may be withheld, the names of such persons must be disclosed. *NYS Committee on Open Government, FOIL – AO – 17478* (1/2/2009)

Home Occupations

An appeals court upheld the City’s determination that the petitioner was conducting a fuel oil delivery business at her residence in violation of the City Code. The Court found that the determination of the zoning board of appeals was not arbitrary and capricious as there was ample evidence in the record to support their conclusion that the fuel oil business she owned had been unlawfully extended to her nearby residential premises, and that the use of an oil delivery truck at her home, in conjunction with the neighboring commercial business, constituted an unauthorized business use in the district. *DeVito v Zoning Board of Appeals of City of Poughkeepsie*, 889 N.Y.S.2d 482 (2 Dept. 12/8/2009).

The defendant, a medical doctor, uses her primary residence – where she resides with her husband and children – to see zero to two patients per day in her family room. She has no professional listing in the telephone book and no signs advertising her practice. Although she received a special permit from the municipality to see patients, a neighbor brought an action to enjoin the activity based on applicable restrictive covenants, which, if clear and unambiguous would trump local zoning. The appeals court held that the covenants are ambiguous and do not unequivocally prohibit the subject use of the residence. The Court noted that while covenant 8 specifically excluded businesses and

commercial enterprises that would have a significant impact on traffic and noise in the neighborhood, it does not specifically exclude professional work. The Court reasoned that the inclusion of covenant 8 would have been unnecessary if covenant 1 were to be read as excluding all nonresidential activity. Since covenant 8, while excluding a hospital, does not specifically exclude a limited medical practice, the Court resolved the ambiguity in favor of the free use and enjoyment of the property, thereby allowing the use to continue. *Rautenstrauch v. Bakhrui*, 64 A.D.3d 554, 884 N.Y.S.2d 77(2 Dept. 7/7/2009).

Injunctive Relief

While that court found that the appeal was filed timely, they determined that the relief sought by the petitioners was barred by laches and by the petitioner's failure to seek injunctive relief before construction of the storage building was complete. The Court noted that the building had been completed at significant cost to the owner, and that it is being used for its intended purpose. Therefore, the petitioners' failure to seek injunctive relief rendered the action moot. *Granger Group v. Zoning Board of Appeals of the town of Taghkanic*, 62 A.D.3d 1102, 879 N.Y.S.2d 604 (3 Dept. 5/14/2009).

Intergovernmental Authority

The Town of Riverhead sought to prevent the County of Suffolk from constructing and using a new fueling facility in the Town which would be located on property inside a county park. Among other things, the Town claimed that the County was subject to local zoning requirements. The Court noted that it was too early in the proceeding to address this issue on summary judgment since in New York where two governmental entities are in conflict over zoning, the matter is resolved according to the balancing of interests test set forth in *Matter of County of Monroe (City of Rochester)*, 72 N.Y.2d 338. The Town had conducted a public hearing to assess the factors set forth in the balancing test and concluded that the County must comply with the Town Code and again the Town filed for summary judgment on this issue. The appeals court affirmed a second denial of this motion, finding that such request is still premature and that "Whether the County is subject to the Town's zoning provisions in this case is ultimately a judicial determination that must be made according to the balancing of public interest test...a more complete record...must be developed to inform that inquiry." *Town of Riverhead v County of Suffolk*, 66 A.D.3d 1004, 887 N.Y.S.2d 650 (2 Dept. 10/27/2009).

Mandamus

The Court held that the refusal of a zoning board to hear and determine an appeal concerning a building permit application is subject to a four-month statute of limitations under CPLR 217(1). The Court said that the statute of limitations on Petitioner's right to demand that the zoning board hear and determine her appeal as originally presented began when she received the zoning board's letter on April 9, 2007. Since she waited until August 23, 2007 to act, the Court found that she unreasonably delayed in making her demand, and concluded that the proceeding was barred by laches. *Zupa v. Zoning*

Board of Appeals of the Town of Southold, 64 A.D. 3d 723, 888 N.Y.S.2d 139 (2 Dept. 7/21/2009).

Mining

Following the granting of a special use permit by the planning board to allow a limestone mining operation in an agricultural zone, neighbors challenged the determination claiming that the Board's determination that the proposed use was not in conformance with the standards in the zoning ordinance. The trial court dismissed the petition and the appeals court affirmed. The Court noted that the classification of a particular use 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." Since the record supported the Board's determination that the proposed mining operation was in conformance with the zoning ordinance, the Court concluded that the application was properly granted. *Residents Involved in Community Action (RICA) v. Town/Village of Lowville Planning Board and MJL Crushing*, 61 A.D.3d 1422, 876 N.Y.S.2d 824 (4 Dept. 4/24/2009).

Moratoria

Six months following the filing of a commercial site plan application with the Town Department of Planning, Environment and Land Management to develop a retail building which was a permitted use under the applicable zoning ordinance then in effect, the Department responded with a number of conditions that had to be met before the application would be submitted to the planning board. A year later, the Petitioner submitted a revised site plan to the Town which met all of the conditions except the requirement that the Petitioner meet with a local civic organization (because the group refused to schedule the meeting). During the year prior to the second submission, the Town had designated the area where the Petitioner's property was located as a historic district, now requiring project approval from the Historic District Advisory Committee. The Committee held a hearing on the application which was never completed, and ten months after the second application was submitted the Petitioner made a written demand to have his application placed on the planning board's agenda. In response, the Petitioner was notified that the Town was contemplating a moratorium on site plan applications in the area where his property was located, and the following month a moratorium was enacted. A month later, the Petitioner brought a mandamus action to compel the processing and consideration of his site plan application. Among other things, the petition alleged that the Planning Board acted wrongfully by delaying its processing and consideration of the application so that the Town could enact the moratorium to prevent the review. The appeals court determined that while the allegations in the petition stated a valid cause of action for mandamus relief, the trial court erred in determining as a matter of law that the moratorium did not apply to the petitioner's real property and in directing the Planning Board to apply the zoning in effect prior to the moratorium. Since the applicable zoning laws are those that existed at the time the decision was rendered, the Petitioner would have to show that the Town prevented him from obtaining vested rights through "some misconduct or extraordinary

delay.” Meaning, the Petitioner had to demonstrate proof of “special facts” indicating that the Town acted in “bad faith” in delaying the processing and consideration of his site plan. Therefore, the appeals court remanded the matter to the trial court for a hearing on this issue. *Golden Horizon Terryville Corp. v. Prusinowski*, 63 A.D.3d 930, 882 N.Y.S.2d 174 (2 Dept. 6/16/2009)

Necessary Parties

Petitioners sought to annul the approval of various applications submitted by McDonald’s USA, LLC for the construction of a restaurant. The trial court dismissed the petition because the petitioners failed to name all of the owners of the subject property, these were necessary parties, and at that point in the proceeding, the statute of limitations had expired with respect to these necessary parties. The appeals court first noted that although by the time of the appeal the restaurant had been built, this fact would not render the matter moot since the petitioners were not seeking injunctive relief to prevent construction, but rather they sought modifications that would not require demolition of the restaurant. While the appeals court agreed that at the time of the initial petition, the property owners in question were indeed necessary parties, the trial court should have ordered that they be part of the proceeding, rather than granting the motion to dismiss. The court noted that, “the expiration of the statute of limitations...is not the equivalent of a jurisdictional defect...” and that under New York law, the trial court was required to summon the necessary parties (see, N.Y. CPLR 1001(b)). However, since the parties have now conveyed their interest in the property to McDonald’s, the appeals court said they are no longer a necessary party. The court reinstated the petition. *Yaeger v. Town of Lockport Planning Board*, 62 A.D.3d 1250, 877 N.Y.S.2d 800 (4d Dept. 5/1/2009).

Non-Conforming Uses

The petitioners own and operate out of their home in a residential district “Angels’ Gate,” a hospice and rehabilitation center for approximately 200 terminally ill and disabled animals. Following the issuance of a notice of violation, the petitioners applied to the zoning board of appeals for a certification of existing use on the ground that the animal hospice was a preexisting nonconforming use. Their application was denied, and an appeal ensued. The appeals court found that the trial court improperly substituted its judgment for that of the zoning board after the board rationally concluded that the animal hospice did not constitute a customary, accessory use nor was it a lawful preexisting nonconforming use. The Court noted that the zoning board relied on Table of Use Regulations in the Town’s zoning ordinance which both expressly prohibited animal hospitals, veterinarians and kennels in the residential district, and further the ordinance provided that any uses not specifically listed were not permitted in the district (and an animal hospice was not specifically listed). Since the existing use of the land was commenced and maintained in violation of zoning ordinance, the petitioners cannot claim legal nonconforming use status. Further, the fact that the petitioners had maintained the use for 13 years prior to the notice of violation did not prevent the zoning board from enforcing the code now. *Marino v. Town of Smithtown*, 61 A.D.3d 761, 877 N.Y.S.2d 183 (2 Dept. 4/14/2009).

An appeals court held that the denial by the zoning board of appeals of petitioner's application to restore more than 50% of the floor area of a residence and semi-detached garage was arbitrary and capricious. The Court noted that the residence and garage had been lawfully connected since 1992 by an enclosed breezeway and that the fact that the garage did not comply with applicable side-yard restrictions predates the zoning ordinance. The Court held that the lack of compliance did not create an undesirable or detrimental effect on the neighborhood, noting that the surrounding neighbors supported the application to restore the structures. Further, the Court noted that the proposed restoration would take place within the existing footprint of both structures. *Dolphin v. Zoning Board of Appeals of the Town of Shelter Island*, 64 A.D.3d 777, 882 N.Y.S.2d 716 (2 Dept. 7/28/2009).

Prior to the purchase of the property by the petitioner and prior to the current zoning code, a farmhouse located on the subject property had been converted into a three-family dwelling, and thus was allowed to continue as a pre-existing nonconforming use as multifamily housing is no longer permitted in the district. After the adoption of the current zoning code, the petitioner converted a barn on the subject property into eight apartment units. The code enforcement officer issued an order to remedy violation, ordering the removal of the tenants from the barn since the petitioner was in violation of the zoning code and that the petitioner had failed to obtain a building permit before the multifamily units were constructed. On appeal, the zoning board of appeals affirmed the order to remedy a violation, determining that the barn apartment units violated the Code and were not entitled to nonconforming use status. The appellate court agreed, finding that the use of the barn as a multifamily dwelling constituted a violation of the zoning code which prohibits the expansion of a pre-existing nonconforming use. Although the petitioner alleged selective enforcement of the zoning code, the Court rejected this allegation since the petitioner merely made "vague and conclusory statements" that other property owners had violated the Code but had not been subjected to enforcement. The Court found that the petitioner failed to make a clear showing by extrinsic evidence to support the claim. *Mimassi v. Town of Whitestown Zoning Board of Appeals*, 67 A.D.3d 1454, 889 N.Y.S.2d 337 (4 Dept. 11/13/2009).

While a municipality does have authority pursuant to its police powers to impose conditions on certain uses, even pre-existing nonconforming uses, for purposes of protecting the public health, safety and welfare, in this case, the town zoning ordinance did not in this case does not regulate the operation of construction and demolition debris facilities it only regulates the location of certain facilities within zoning districts. Therefore, the Court concluded that the petitioners did not need a special use permit to continue processing and recycling operations at their facility. Further, the Court concluded that the zoning board's denial of the appeal from the administrative denial of the building permit application was arbitrary and capricious and not supported by substantial evidence in the record. *Serota Brown Court II, LLC v. Town of Hempstead*, 62 A.D. 3d 715, 879 N.Y.S.2d 486 (2d Dept. 5/5/2009).

The zoning board of appeals granted Tino's a use variance in 1983 for a nonconforming motel to enable him to "erect an addition to [the] existing motel including 15 new units" based in part on a finding that the particular addition would not alter the essential character of the neighborhood. In 2003, the zoning board denied the Tino's request for a permit seeking to expand the motel from 46 units to 71 units, rejecting the petitioner's assertion that the 1983 variance converted the nonconforming motel use into a permitted use. The zoning board determined that the 1983 use variance was limited to the addition of 15 units. In 2006, the zoning board of appeals determined, among other things, that the Tino's was not required to obtain a use variance to increase the number of units on the property from 46 to 61. The appeals court held that the zoning board of appeals improperly reached this determination, noting that the board's 2003 determination that Tino's was required to obtain a use variance should have been given preclusive effect under the doctrine of collateral estoppels. The Court further explained, "although the grant of an unconditional use variance renders a nonconforming use conforming, such that a further use variance is not required to expand the use...the use variance granted to Tino's in 1983 was clearly limited to the addition of 15 rooms." Therefore, the Court said that even if the most recent zoning board determination was not barred by the doctrine of collateral estoppel, the board's conclusion that a use variance was not required for the proposed expansion was irrational and contrary to the law. *Kogel v. Zoning Board of Appeals of the Town of Huntington*, 2008 WL 93271 (N.Y.A.D. 2 Dept., 1/13/2009).

Concluding that due to the peculiar nature of quarrying, it is unrealistic and unreasonable to require the owner of a large tract of land used for quarrying to have actively mined all areas of the parcel prior to the enactment of a zoning ordinance for purposes of acquiring vested rights in a nonconforming use to protect its mining operation, the New York Court of Appeals found that the owner did demonstrate evidence to support a vested right to a nonconforming use over some of the parcels, and that questions of fact remained to be resolved over the two remaining subparcels.

In modifying the appellate decision, the New York Court of Appeals noted that courts and municipal officials have a "grudging tolerance" for the law of nonconforming uses which generally protects uses in existence at the time a zoning ordinance is adopted, while viewing nonconforming uses as detrimental to the zoning scheme and favoring reasonable restrictions over such uses and their eventual elimination. The Court of Appeals noted that while every inch of the land need not have been used for stated purpose for vested nonconforming rights to attach, utilizing just a small portion of the land may not be enough to trigger nonconforming status. In explaining that with respect to quarrying operations, a prior nonconforming use cannot be limited solely to the land that was actually excavated before the zoning law went into effect, the Court said that mining is a unique industry since landowners commonly leave portions of their land as mineral reserves to be excavated at a future time. Therefore, owners may establish a nonconforming use extending to boundaries of their property notwithstanding the fact that quarrying may not have actually taken place in particular areas. However, the Court said that this does not give quarrying companies "carte blanche" to engage in future quarrying operations on the property. Rather, as here, the owners and its predecessors acquired the property exclusively for mining and quarrying operations, noting that no part of the land was used for any other purpose. Further, the a processing structure

was constructed in the center of the property where bulk materials had been removed for decades, and service roads had been constructed to move the materials after processing. The court also noted that the processing plant contains a building for packaging materials, a repair shop and offices. Similar to their analysis in *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, the Court said the nonconforming use extends throughout the property even though the principal excavation was limited in geographic area. *Buffalo Crushed Stone, Inc. v. Town of Cheektowaga*, 13 N.Y.3d 88, 913 N.E.2d 394 (NY 6/30/2009).

In 1994, the Plaintiff acquired property that included an asphalt plant that had been in existence since 1945. In 1985, the Village Board of Trustees amended the zoning code making the use of the property for an asphalt plant nonconforming. In 2000, the Board of Trustees adopted a local law to amortize the nonconforming asphalt plant, calling for the use to terminate within one year unless the plaintiff applied to the zoning board of appeals for an extension not to exceed five years from the date of the adoption of the amortization local law. The Plaintiff applied for an extension and the maximum extension allowed for under the local law was granted, requiring the termination of the asphalt operation by July 2, 2005. The Plaintiff also challenged the local law as invalid and unconstitutional, arguing that the amortization period was unreasonably short. The appellate court acknowledged that there is no fixed formula in New York to determine what constitutes a reasonable amortization period, rather the court said that the local law will be presumed valid, and the owner carries the burden of demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the amortization local law. To determine reasonableness, courts will make a fact specific inquiry and consider the length of the amortization period in relation to the investment and the nature of the use. Improvements made to the property, the character of the neighborhood, and the detriment caused to the property owner will also be considered. With respect to ability to recoup investment, the court explained that while this will factor into a reasonableness determination, an owner is not guaranteed to recoup the full cost of the investment, but the amortization period should not be so short that it would result in a substantial loss. Since the plaintiff did not submit any evidence as to the amount it actually invested in the business, the court said a question of fact remained as to whether the amortization period set forth in the local law is reasonable and constitutional as applied to the plaintiff. The plaintiff's motion for summary judgment was therefore denied. *Sufflok Asphalt Supply, Inc. v. Board of Trustees of Village of Westhampton*, 59 A.D.3d 429, 872 N.Y.S.2d 516 (2 Dept. 2/3/2009).

In 2004, the plaintiff purchased land containing an auto repair facility and parking garage located in Long Island, New York. The previous owner obtained a certificate zoning compliance as a preexisting, non-conforming use in 1982. Since that time the property has been used continuously as an auto repair facility/parking garage. In June 2007, the Chief Zoning Inspector for the Town sent a letter to the plaintiff. The letter revoked the Certificate of Zoning Compliance due to unspecified violations. The letter also stated that the nonconforming use as a public garage was rescinded and that the plaintiff could appeal to the Zoning Board of Appeals. In response the plaintiff commenced a § 1983 action against the town and several town officials. The plaintiff

claimed possession of a vested property interest in the certificate of compliance which was revoked by the town in a manner which violated the plaintiff's procedural due process rights. The plaintiff also sought legal fees and declaratory and injunctive relief. The Court pointed out that precedent clearly establishes that in New York a non-conforming use that predates a zoning ordinance is a vested right entitled to protection. Here it was not disputed that the plaintiff had obtained the title to the property with such a right attached. The Town claimed that the previously discussed second letter (revoking the letter from the inspector) showed that the plaintiff's right had never actually been deprived. According to the Town, the second letter was issued because under town code inspectors do not have the authority to revoke zoning compliance certificates. The Court concluded that, based on the allegations in the complaint, due process required the town to give the plaintiff notice and an opportunity to be heard before revoking the zoning compliance certificate. *G.I. Home Developing Corp. v. Weis*, WL 962696 (E.D.N.Y. 3/31/2009)

Notice

Following a public hearing on proposed amendments to a local zoning ordinance, the town board made modifications to the proposed amendment based upon, in part, the Petitioner's objections. The modifications actually made the ultimate zoning classification more favorable to the Petitioner's interests than what was originally proposed. Generally, where changes are made to a proposed zoning amendment after the close of a required and properly noticed public hearing, a new public hearing is not required if the "amendment as adopted is embraced within the public notice," or where the amendment ultimately adopted is not substantially different from the amendment as noticed. In this case, the Town originally noticed a rezoning of Petitioner's property from a one acre minimum lot size to a five acre minimum lot size. Ultimately, following the public hearing, rather than the zoning amendment providing for a 5-acre minimum lot size, the Board lowered it to a 3-acre minimum requirement. The appeals court said that this action was embraced within the original notice, and that the amendment as adopted was not substantially different from the amendment as noticed. Therefore, the notice requirements of Town Law sec. 264 were satisfied. Further, the appeals court disagreed with the trial court's interpretation of the notice requirements set forth in the Town Code. The appeals court concluded that the language does not require notice and hearing on every modification to a proposed zoning amendment made after the conclusion of the properly noticed public hearing. *Benson Point Realty v. Town of East Hampton*, 62 A.D.3d 989, 880 N.Y.S.2d 144 (2 Dept. 5/26/2009).

Prior Precedent

The Board of Standards and Appeals acted in an arbitrary and capricious fashion when they failed to follow their prior precedent and failed to indicate any reason for reaching a different result on essentially the same facts. *Menachem Realty, Inc. v. Meenakshi Srinivasan*, 60 A.D.3d 854, 875 N.Y.S.2d 237(2 Dept. 3/17/2009).

Procedural Issues

When reviewing a decision of the Town Board which determined that the Petitioner's proposed uses of the subject property were not permitted under the zoning code, and which after a hearing denied the application for extraordinary hardship relief (*to wit*, an extension of time in which to obtain site plan approval for a proposed open air car lot), the substantial evidence standard does not apply since the decision was made after informational public hearings as opposed to a quasi-judicial evidentiary hearing. The proper standard of review is whether the Board's decision was illegal, arbitrary or capricious, or an abuse of discretion. Here, the Court upheld the Board's decision as rational since the applicable zoning code did not allow the intended use, so even if the Board had granted the application for extraordinary hardship relief, the Petitioner would still not have been permitted to use the lot as an auto dealership. *Yilmaz v. Foley*, 63 A.D.3d 955, 881 N.Y.S.2d 154 (2 Dept. 6/16/2009).

A New York Appellate Court reaffirmed that a Town Board, when reviewing a complex and difficult application, has the discretion to hire an outside consultant and require the applicant to pay the consultant's fee. The Town Code authorized the action when the Board determines that the "complexity of the activity, the difficulty on determining the threat to the resource areas or the size of the request or project involves or requires more information and analysis than can reasonably be supplied to the Board without independent technical professional assistance." (See, Town of Southold Code §275-7[d]). The Court, however, ultimately annulled the determination of the Board since the Board relied on the recommendation of the Local Waterfront Revitalization Coordinator who stated that the application was inconsistent with the local waterfront revitalization plan. The Board had made a previous determination that this staff member was not qualified to perform the required review, and therefore their reliance on his recommendation was misplaced. Further, the Court concluded that rather than relying on the reports of the experts, the Board improperly succumbed to community pressure to deny the application. *Moy v. Board of the Town Trustees of Town of Southold*, 61 A.D.3d 763, 877 N.Y.S.2d 186 (2 Dept. 4/14/2009).

Following the denial of their application for a certificate of occupancy and for a certificate of completion for certain residential property, the petitioners brought an action seeking to review the determination of the building department and to compel the Village to issue the certificates. In affirming the trial court's dismissal of the petition for failure to exhaust administrative remedies, the appeals court noted that the petitioners failed to seek or obtain administrative review of the determination of the superintendent of the building department which denied their applications. *Goldberg v. Incorporated Village of Roslyn Estates*, 61 A.D.3d 756, 877 N.Y.S.2d 199 (2 Dept. 4/14/2009).

The court found that the Town of Brookhaven's ("Brookhaven") policy requiring applicants to the Town's Department of Planning, Environment and Development ("Planning Department") to contact and meet with local civic organizations and supply the civic organizations with proposed project plans as a pre-condition the application process was not Constitutionally sustainable. "[T]o go before a Civic Association, a nongovernmental body, which does not keep records and makes no Findings cannot be

constitutionally supported.” *Ribeiro v. Town of Brookhaven*, No. 07-20844, 6 (NY Sup. Ct., Suffolk Mar. 16, 2009)

Protest Petition

Where a wind energy company sought to construct a facility in the Town of Lyme, the planning board drafted a proposed local law to amend the zoning ordinance to regulate wind energy facilities. A number of residents, including the petitioners, were opposed to the proposed local law based on a belief that it required excessive setback requirements and would make it difficult to site the wind facilities. The residents opposed to the proposed new law signed a protest petition. The Town determined that the property included in the proposed law consisted of 35,920 acres and that 20% of the total area would be 7,184 acres. The Town further determined that the petition included valid signatures covering 5,301.61 acres, and invalid signatures for an additional 4,308.56 acres. The Town based their determination of invalid signatures on the fact that the land for the 4,308.56 acres was held by husband and wife as tenants by the entirety, and as such, signatures of both property owners were required, and here, only one spouse signed the petition. The town board then voted to approve the new law by a 3-2 simple majority vote.

In a case of first impression to interpret the word “owners” in Town Law 265(1)(a), specifically as to whether it requires both signatures or just one where the land is held as tenants by the entirety, the New York appellate court held that one signature is all that is required. Citing to a prior holding that held that only one signature was required where the assessment rolls listed just one name, although noting that in this case, the assessment rolls listed both names, the Court found the reasoning in *Reister v Town Bd. of Town of Fleming*, 18 N.Y.2d 92, 94 persuasive, as well as opinions from the Attorney General (e.g., see 1987 Op Atty Gen No. 87-85 – “Because a joint tenant has a full, undivided interest in the property, a vote for a challenge...would count for the entire parcel of land and not some fraction based on the number of joint tenants.”) Since the court held it was sufficient for only one spouse to sign the protest petition, it affirmed the holding below validating the petition and invalidating the local law. *Gosier v. Aubertine*, 2009 WL 5128540 (N.Y.A.D. 4 Dept. 12/30/2009).

Regional Planning

The trial court improperly dismissed the cause of action relating to alleged failure to comply with General Municipal Law (GML) 239-m(6), requiring the Village to refer a proposed zoning action to a county planning agency for review, and that within 30 days after the final action, the referring body is required to file a report of the final action it has taken with the county planning agency. The appeals court noted that while the Board did submit evidence that it did make the initial referral before adopting the resolution for the local law, no evidence was proffered that the Village complied with the filing requirement of GML 239-m(6). *Marcus v. Village of Wesley Hills*, 62 A.D.3d 799, 878 N.Y.S.2d 779 (2 Dept. 5/12/2009).

The Hillside Avenue Preservation Association sought an order vacating the settlement agreement entered into between the Village Board of Trustees, the Planning Board, the Building Inspector and the County Planning Department with Congregation Mischkinois Lavier Yakov, on the grounds that it violates State law. Specifically, the settlement required the County Planning Department to issue a recommendation to the Village, pursuant to General Municipal Law sec. 239-m, regarding the Mischkinois land use application, and further prohibits the Planning Department from issuing a recommendation disapproving the land-use application on the grounds that the application did not comply with the Village Zoning Code. Hillside argued that the stipulation of settlement itself constitute a recommendation “reversing” the County Planning Department’s previous recommendation without issuing a concomitant “statement of the reasons” for its recommendation. The Court noted that GML 239-m and interpretative case law is far from clear as to whether reasons must be stated along with the recommendation, but that regardless, the plain language of the stipulation of settlement does not reverse or modify the Planning Department’s previous decision. Rather, the Court explained, the stipulation sets forth a timeline and parameters for the issuance of a recommendation reversing or modifying its prior decision. The Court pointed out additional language in the stipulation of settlement that provides, “Defendant Planning Commission shall after said due consideration of Plaintiff’s Application pursuant to law promptly transmit its appropriate report, recommendation or other transmittal as required to the Village Defendants and the Plaintiff Yeshiva as well as other appropriate entities or individuals.” Therefore, the Court concluded that contrary to the Plaintiff’s argument, the stipulation of settlement did not violate the statute since the County Planning Department did not concomitantly issue a statement of reasons. *Hillside Avenue Preservation Association v. Board of Trustees for the Village of Airmont, et. al.*, 2009 WL 1857167 (S.D.N.Y. 6/23/2009).

Rezoning

Town rezoning is not subject to SEQRA since the APA is responsible for environmental review standards in the Park. The court noted that the APA is responsible for ensuring that certain projects within its jurisdiction would not have an “adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park.” (Executive Law §§ 809). This mandate predates SEQRA and is more protective of the environment than SEQRA. To avoid unnecessary repeated reviews, the legislature excluded actions subject to the APA’s review from the requirements of SEQRA. Because the zoning enacted by the Board was only for (and coextensive with) the proposed project, the Board acted correctly when viewing it as one step in a single action which is subject to the APA’s review. The APA refused to reconsider the application until the rezoning occurred, so the Board acted practically by conditioning the rezoning on a finding of no adverse impacts by the APA. *Association for the Protection of the Adirondacks, Inc., et al. v. Town Board of Tupper Lake et al.*, 64 A.D.3d 825, 882 N.Y.S.2d 534 (3d Dept. 7/2/2009).

Ripeness

The first prong of the *Williamson County* ripeness test requires the plaintiff to demonstrate that the regulatory entity has rendered a final decision on the matter. The Second Circuit has recognized a futility exception to this rule. Here, the Plaintiff provided two affidavits that a planning board member stated that the board would not consider the Plaintiff's site plan amendment under any circumstance. Although the Defendants denied such a statement was made at the meeting, the Court found that the Plaintiff's showing was beyond conclusory allegations and sufficient to survive a motion for summary judgment. To satisfy the second prong of the ripeness test the plaintiff must have sought just compensation by means of an available state procedure. Plaintiff had not sought compensation in New York State courts, therefore the court found the Fifth Amendment taking claim to be not ripe. Accordingly the court granted the defendants' motion for summary judgment on the Fifth Amendment takings claim. *Donovan Realty, LLC. v. Davis*, 2009 WL 1473479 (N.D.N.Y. 5/27/2009)

RLUIPA

"RLUIPA does not apply to eminent domain proceedings." The Court explained, that eminent domain is not a "land use regulation" and that under RLUIPA, "the government implements a 'land use regulation'...only when it acts pursuant to a zoning or landmarking law that limits the manner in which a claimant may develop or use property in which claimant has an interest." Here, the Court concluded that no landmarking or zoning law was being implemented or applied. The Court also commented that, "Had Congress wished to bring the distinct, longstanding, well-know, and important governmental power of eminent domain within the ambit of RLUIPA, it surely could have said so. That it did not is compelling." The District Court also addressed the remaining claim as to whether the City's actions, at a time when the Congregation had a pending special use permit application, constituted a violation of RLUIPA. The Court concluded that even if some part of the City's conduct could constitute a land use regulation within the meaning of RLUIPA, "It is undisputed that the four-year catch-all federal statute of limitations, codified at 28 U.S.C. 1658(a)...governs claims brought under RLUIPA." As a result, the claims that arise from actions in 2001 are barred by the statute of limitations. Even if, said that Court, if it were to adopt the date as the time when the harm accrued to the Congregation, the RLUIPA claim the claim was stale by more than a year. *Congregation Adas Yerim v. City of New York*, 2009 WL 4643230 (E.D.N.Y. 12/8/2009).

The District Court rejected the Village's argument that facilitating visiting the sick on the Sabbath was not "religious exercise" for purposes of triggering the protections of RLUIPA. The court held that "religious exercise" under RLUIPA is intended "to be defined broadly," and "covers most activity that is tied to a religious group's mission." Thus, the court held, Bikur Cholim's facilitation of Sabbath observance for Jews visiting the hospital or being discharged from the hospital constitutes religious exercise under the statute. The court held, however, whether the Village's actions were a "substantial burden" on that religious exercise, and whether the Village had a compelling interest for

the restriction that was pursued in the least restrictive means, were issues for trial. *Bikur Cholim, Inc. v. Village of Suffern*, 2009 WL 1819136 (S.D.N.Y. 6/25/2009).

With respect to the claim that the Town violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Court found that there was no substantial burden on the exercise of religion when the zoning board denied permission to operate a “transitional housing” facility under contract with clients who pay \$25 per day for a room. *Libolt v. Town of Irondequoit Zoning Board of Appeals*, 66 A.D.3d 1393, 885 N.Y.S.2d 806 (4d Dept. 10/2/2009).

Signs

The subject property in an R2B zone (one and two family medium-density residential) is located less than 660 feet from an interstate highway and within a “Billboard Zone” created by the City in 2003 as part of a comprehensive zoning plan. As part of a litigation settlement in 2006, the City issued a permit to petitioner, Lamar Advertising, to place a billboard on the property. Petitioner then entered into a lease with the property owner and applied to the New York State Department of Transportation (“DOT”) for a permit. DOT denied the permit on the ground that the property was in an area zoned for residential purposes and was not located in a commercial or industrial zone which is required by Highway Law §§ 88 and 17 NYCRR 150.5(b)(1). DOT was sent a copy of the City’s stipulation allowing the billboard and again denied the petition. The property was rezoned from R2B to C-1, a neighborhood commercial district in 2007. Lamar Advertising submitted a new application to DOT with a copy of the ordinance, which was again denied because DOT refused to recognize the zoning change for purposes of outdoor advertising control, stating that the action was not part of a comprehensive zoning plan and the parcels were rezoned for the purposes of permitting Lamar Advertising’s requested sign. The appeals court held that DOT’s determination was reasonable based on the fact that the zoning of the surrounding area was unchanged and that under applicable federal regulations, it could not recognize the rezoning as valid for outdoor purposes based upon the original application stating that the property was residentially zoned, the lease agreement for a proposed billboard, the City building permit for the billboard, the litigation stipulation permitting the billboard, and the petitioner’s letter responding to the first denial by inquiring whether it would be necessary to return to the City “for them to change the zoning classification.” Specifically, the Court noted that although “it is undisputed that the proposed billboard complies with federal, state, and city requirements in that it is located within 660 feet of an interstate highway and in the City’s “Billboard Zone” (see 23 USC § 131 [b]; Highway Law § 88 [5]; 17 NYCRR 150.5 [b] [1]),” the City’s actions did not comply with 23 CFR 750.708 (b), promulgated by the Secretary of Transportation pursuant to the Federal Highway Beautification Act which provides: “State and local zoning actions must be taken pursuant to the State’s zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes” The Court also explained that the legislative

history of 23 U.S.C. §§ 131(d) indicates that it was not the purpose of the regulation to give states unfettered authority in permitting billboards along state highways. The Court observed, “Courts in other jurisdictions that have examined this issue have concluded that Congress did not intend to cede full authority over zoning with respect to outdoor advertising control to state and local governments.” *Lamar Central Outdoor, LLC v. State of New York et al.*, 2009 WL 195561164 A.D.3d 944, 882 N.Y.S.2d 743 (3d Dept. 7/9/2009).

The City of New York Zoning Resolution’s arterial highway signage restrictions directly advance New York City’s interests in traffic control and aesthetics, and are no more extensive than necessary to serve those interests. The Court held that “the City’s zoning regulations, which restrict the location of commercial advertising signs immediately adjacent to its arterial highway system, satisfy the constitutional test for commercial speech restriction and are not unconstitutionally underinclusive.” The Southern District reasoned that “New York City has substantial interests in restricting outdoor advertising signs near highways, its zoning ordinance will directly advance those interests, and the regulations are not more extensive than necessary” and concluded that exceptions to the ban on off-site commercial arterial advertising do not undermine the constitutionality of the Zoning Resolution. The Court stated that the registration and documentation requirements challenged by the Clear Channel plaintiffs are constitutional. The Court also ruled that “there is no constitutional infirmity with the Zoning Resolution’s location and illumination restrictions that affect Metro Fuel [because the] City has a substantial interest in protecting neighborhood aesthetics, the regulations directly advance that interest, and they are not more extensive than necessary.” The City’s street furniture contract did not undermine the constitutionality of these provisions. *Clear Channel Outdoor Inc. v. City of New York*, 06 Civ 8193 (S.D.N.Y.3/31/2009).

After the building inspector issued a permit for a sign in a residential district allowing a lawn sign to advertise the petitioners’ real estate business that was operated out of their home, he revoked the permit and ordered the sign removed upon determining that the sign did not comply with the Town’s Sign and Illumination Law as to size. Upon appeal to the zoning board, the petitioner’s challenged the building inspector’s determination and in the alternative sought an area variance. The zoning board denied both requests finding that the sign did in fact violate the Sign and Illumination Law with respect to maximum size. The appellate court upheld the denial finding that it was neither unreasonable nor irrational, that the local law was not preempted by Real Property Law sec. 441-a and that the variance denial was not illegal, arbitrary, nor an abuse of discretion as it had a rational basis. *Blum & Bellino v. Town of Greenburgh*, 58 A.D.3d 835, 872 N.Y.S.2d 172 (2d Dept. 1/27/2009).

Site Plan Review

The Plaintiffs brought an action seeking to declare that their application for site plan approval is deemed approved by operation of the local zoning law. The Court held that since the application was not complete, the planning board was not required to act upon it. Therefore, the application could not be deemed approved for failure to act. *Sherwood Ridge, LLC. V. Town of Greenville*, 65 A.D.3d 580, 883 N.Y.S.2d 719 (2d Dept. 8/1/2009).

After finding that the trial court incorrectly determined that the petitioner lacked standing to challenge the determination of the zoning board of appeals which, after a hearing, upheld the issuance of a building permit by the building inspector to allow the installation of a 48-foot by 20-foot fence for purposes of creating an impound lot, the appeals court determined that the building inspector lacked authority to issue a permit for the construction of a fence on commercial property without site plan approval by the planning board. In reaching this conclusion, the Court looked at the plain language of the Village zoning code which it found clearly states that the site plan approval by the planning board for all special permitted uses is required prior to the issuance of a building permit for the construction of any structure. In this case, the property is used as an auto repair shop pursuant to a special use permit, and under the zoning code, a fence is defined as a structure. *J & M Harriman Holding Corp. v. Zoning Board of Appeals of the Village of Harriman*, 62 A.D.3d 705, 879 N.Y.S.2d 494 (2d Dept. 5/5/2009).

An appeals court determined that a number of conditions imposed on the approval of a site plan application for the remodeling of a commercial building in order to open a retail store were arbitrary and hence impermissible. Specifically, the Town Board's attempt to restrict the hours during which Home Depot could operate its business and clean the parking area, was arbitrary and capricious since the Town offered no findings or rationale to support the imposition of such restrictions. The Court acknowledged that although time restrictions could be used to effectively reduce traffic and noise during certain hours, the Town made no specific findings as applied to this application. Further, the Court also found arbitrary the Board's condition requiring the installation of a closed circuit television recording system since no findings were made to support the conclusion that this system would affect the "safety and general welfare of the adjacent areas." The Court did uphold two other conditions, however. The first required that relocation of a loading zone from the east side of the property to the west side of the property to prohibit truck from entering the premises from one of the roadways. The Court noted that Town Law specifically vests the Board with authority to review and approve site plans related to "parking, means of access, screening, signs, landscaping, architectural features, adjacent land uses as well as any additional elements specified by the town board in such zoning ordinance or local law." Here, the local zoning ordinance provided that in reviewing site plan applications, the Town Board is to consider, among other things, "[t]he effect of the proposed use on the movement of the vehicular traffic in the vicinity, including consideration of the provisions for access of such traffic between the premises and public highways." Another condition, which

required the installation of a 12-foot solid PVC fence was also upheld as the Court found it was “rationally related to Home Depot’s inclusion of a similar 12-foot fence in the site plan, and the Town Board’s desire to ‘protect the just interest of nearby residents in the preservation of a peaceful and pleasant residential environment.’” *Home Depot, U.S.A. v. Town Board of the Town of Hempstead*, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2d Dept., 6/16/2009).

Following a determination by the zoning board of appeals that petitioners were required to apply for a site plan review prior to erecting a fence on their property, the petitioners appealed. The appellate court concluded, that while the zoning board is typically entitled to deference in their interpretation of the local zoning law, such is not the case where as here, the Board’s determination was contrary to the “clear wording” of the zoning law. The applicable section of the zoning law provides that a site plan is required prior to the issuance of a zoning permit “except for single-family residences, accessory buildings or uses and agricultural buildings or uses.” The zoning law further provides that fences are permitted accessory uses in the zoning district wherein the subject property is located. Therefore, the Court concluded that a plain reading of the law reveals that petitioners are not required to undergo a site plan review. The Court dismissed the Board’s arguments that the fence should be subject to site plan review because its purpose is to change the flow of traffic on the subject property and because the fence was not included as part of the original site plan review of the property in 1998. The Court noted that the zoning law contemplates that a purpose of a fence may be to alter traffic flow and that no provision in the zoning law requires property owners to return to the planning board for site plan review each time they wish to add an accessory use. *Emmerling v. Town of Richmond Zoning Board of Appeals*, 67 A.D.3d 1467, 888 N.Y.S.2d 703 (4d Dept. 11/20/2009).

Reiterating that planning boards are not authorized to interpret provisions of local zoning laws, an appeals Court found that nothing in the board’s resolution approving a site plan purported to evaluate the proposed use in light of the zoning code. The allegation that the board made an implicit interpretation by merely approving the site plan was found by the Court to be both unsound and unsupported by the record. *East Moriches Property Owners’ Assoc., Inc. v. Planning Board of the Town of Brookhaven*, 66 A.D.3d 895, 887 N.Y.S.2d 638 (2d Dept. 10/20/2009)

The appeals court upheld the Planning Board’s site plan approval for a Wal-Mart, finding that it was neither arbitrary nor capricious. Additionally, the court rejected the petitioner’s contention that the project was inconsistent with the comprehensive plan. The Court also found that the planning board complied with the statutory referral requirements to the county planning department and all required environmental reviews. *Residents Against Wal-Mart v. Planning Board of Town of Greece*, 60 A.D.3d 1343, 875 N.Y.S.2d 691 (4d Dept. 3/20/2009).

Special Use/Exception

The Town Board impermissibly denied an application for a special use permit to allow a single-family residence in a J2 Business District on the basis that a draft revitalization plan existed for the area since the plan had not been adopted and it was uncertain whether it would ever be adopted. In addition, the draft plan had not been provided to the petitioner. Further, the Court found the Board's reasons for the denial to be vague, conclusory and unsupported by factual data and empirical evidence presented at the hearing. The Court noted that the petitioner presented evidence that a single-family residence was permitted in the business district, that their application met all of the relevant criteria for the issuance of a special use permit, and that their proposed use was consistent with existing development in the surrounding area and that it would have fewer impacts than an as-of-right commercial use in the district. *G & P Investing Company v. Foley*, 61 A.D.3d 684, 877 N.Y.S.2d 143 (2d Dept. 4/7/2009).

While a municipality does have authority pursuant to its police powers to impose conditions on certain uses, even pre-existing nonconforming uses, for purposes of protecting the public health, safety and welfare, in this case, the town zoning ordinance did not in this case does not regulate the operation of construction and demolition debris facilities it only regulates the location of certain facilities within zoning districts. Therefore, the Court concluded that the petitioners did not need a special use permit to continue processing and recycling operations at their facility. Further, the Court concluded that the zoning board's denial of the appeal from the administrative denial of the building permit application was arbitrary and capricious and not supported by substantial evidence in the record. *Serota Brown Court II, LLC v. Town of Hempstead*, 62 A.D.3d 715, 879 N.Y.S.2d 486 (2d Dept. 5/5/2009).

Although the burden of proof is lighter for an applicant seeking a special permit as opposed to a variance, compliance with local standards must still be met. The Court found that the Board properly considered the standards set forth in the zoning ordinance, and that the Board appropriately determined that the proposed use prevented "the orderly and reasonable use of adjacent properties" and that its location adversely affected "the safety, health, welfare, comfort, convenience or order of the town." *Franklin Square Donut System, LLC v. Wright*, 63 A.D.3d 927, 881 N.Y.S.2d 163 (2d Dept. 6/16/2009).

Where the Town Code provided, with respect to special uses, that "[a]ny of the following uses may be permitted upon obtaining a special use permit, provided such complies with all applicable dimensional and other requirements of this chapter..." the Court said that this means that dimensional requirements could be satisfied after obtaining a variance, noting that N.Y. Town Law sec. 274-b (3) expressly provides for the issuance of a special use permit in conjunction with an area variance. Further, the Court said that the Planning Board, in their discretion, properly granted lot coverage waivers for the requirements in the Commercial Corridor Overlay District. The Planning Board has authority under the Town Code to grant waivers from the Town's site development standards where an applicant can demonstrate "extreme difficulties" would be encountered with strict compliance. The Court found that the "extreme difficulties"

standard is “capable of a reasonable application,” it sufficiently limits and defines that planning board’s discretion, and that it is not an impermissible delegation of legislative power. Additionally, the appeals court agreed with the court below that the Planning Board took a “rational, measured approach to the reality of the project” and that the record showed that the Board’s determination had a rational basis. Further, the Court said that since Wal-Mart obtained the dimensional waivers, they did not need to seek additional variances for that purpose. In addition, the Court said that Town Law 274-a(3) dealing with variances, does not preempt the waiver provisions in the local Code. *Lockport Smart Growth, Inc. v. Town of Lockport*, 63 A.D.3d 1549, 880 N.Y.S.2d 412 (4d Dept. 6/5/2009).

Following the granting of a special use permit by the planning board to allow a limestone mining operation in an agricultural zone, neighbors challenged the determination claiming that the Board’s determination that the proposed use was not in conformance with the standards in the zoning ordinance. The trial court dismissed the petition and the appeals court affirmed. The Court noted that the classification of a particular use 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.” Since the record supported the Board’s determination that the proposed mining operation was in conformance with the zoning ordinance, the Court concluded that the application was properly granted. *Residents Involved in Community Action (RICA) v. Town/Village of Lowville Planning Board and MJL Crushing*, 61 A.D.3d 1422, 876 N.Y.S.2d 824 (4d Dept. 4/24/2009).

Although the plaintiffs alleged that they had secured a special use permit, the Circuit Court concluded that vested rights did not attached since they failed to complete substantial construction. Therefore, the plaintiffs had no constitutionally protected property right in the zoning status of their land, nor did they have a constitutional right to receive actual notice of the proposed change in the zoning status. The Court explained that they have long rejected the argument that an un-exercised right to develop land confers a due process right in the existing zoning status. *Alzamora v. Village of Chester*, 2009 WL 578630 (2nd Cir. (N.Y.) 3/6/2009).

A denial by the zoning board of appeals for a special use permit to allow the applicant to maintain a home business was not arbitrary and capricious nor contrary to law since the board rationally determined that the Petitioner did not meet the requirement of the Town Code that he reside on the subject premises. *Weber v. Baranello*, 63 A.D.3d 955, 880 N.Y.S.2d 531 (2d Dept. 6/16/2009)

An appeals court determined that the zoning board of appeals improperly denied an application for a special use permit to allow the owners of property on which a gas station and auto repair shop existed to convert the shop into a convenience store. The Court explained that since the use was allowable under the current zoning, the board had to show reasonable grounds for the denial of the application. The Court found no evidence to support the board’s conclusion that an intensification of use of the subject

property would exist, and noted that the Town failed to provide and proof to contradict the prior “no adverse impact” determination. Lastly, the court noted the lack of evidence to support the belief that the proposed use would have a greater impact upon traffic that would other unconditionally permitted uses. *Emrey Properties, Inc. v. Baranelo*, 61 A.D.3d 866, 877 N.Y.S.2d 215 (2d Dept. 4/21/2009).

Standing

In a victory for those who have long believed that the New York Court of Appeals needed to open the courthouse door wider for advocates seeking standing in environmental disputes, a decision last week by the Court delivered. The court began its decision, “We hold that a person who can prove that he or she uses and enjoys a natural resource more than most other members of the public has standing under the State Environmental Quality Review Act (SEQRA) to challenge government actions that threaten that resource. Applying that rule to this case, we hold that the individual petitioners who are members of petitioner Save the Pine Bush, Inc., and the organization itself, have standing to challenge an action alleged to threaten endangered species in the Pine Bush area.” Following the required environmental review and subsequent rezoning of a 3.6 acre parcel adjoining the Pine Bush Preserve to accommodate a parking lot for a proposed hotel, nine members of Save the Pine Bush commenced challenging the City’s action under the State Environmental Quality Review Act, alleging that they “live near the site of the hotel project” and they “use the Pine Bush for recreation and to study and enjoy the unique habitat found there.” The trial court denied a motion to dismiss the proceeding for lack of standing, vacated the City’s SEQRA determination, and annulled the rezoning. The trial court determined that the environmental impact statement was flawed because while it gave “considerable attention” to the Karner Blue Butterfly, it did not contain “a hard look” at the potential impact on other rare plant and animals. The Appellate Division affirmed (with two judges dissenting), finding, with respect to standing, that the plaintiffs could show evidence that “they regularly use the Preserve” and that “at least one of the petitioners resides in sufficient proximity to the Preserve to facilitate that use.” Applying *Society of Plastics Industry v. Suffolk County* (77 N.Y.2d 761), the Court said that “In land use matters... the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large,” and that standing of an organization could be “established by proof that the agency action will directly harm the association members in their use and enjoyment of the affected natural resources.” The Court of Appeals agreed, finding it was likely that members of the Save the Pine Bush organization would frequent and enjoy the Pine Bush. They referred to the finding by the United States Supreme Court in *Sierra Club v Morton* 405 U.S. 727 (1972), agreeing that a “generalized interest in the environment could not confer standing to challenge environmental injury, but that injury to a particular plaintiff “[a]esthetics and environmental well being” would be enough.” Here, the City did not challenge the injuries the petitioners asserted and the court found that the petitioners were able to prove the direct harm to the organization members. *Save the Pine Bush v. Common Council of the City of Albany*, 2009 WL 3425317 (NY 10/27/2009)

The petitioner, Residents Against Wal-Mart, had standing to sue because they met their burden of demonstrating that at least one of its members had standing and that it is representative of the organizational purposes it asserts. *Residents Against Wal-Mart v. Planning Board of Town of Greece*, 60 A.D.3d 1343, 875 N.Y.S.2d 691 (4d Dept. 3/20/2009).

Statute of Limitations

Following a letter from the City in 2006 notifying the property owner and tenant that the amended use permit for the operation of a portable concrete mixing plant had expired, and the issuance of a Stop Work Order in 2007, the Petitioners (owner/tenant) challenged the determination more than a year after the initial letter was issued. The appellate court first noted that the Petitioners erroneously commenced the proceeding as a declaratory judgment action, and that such is not the appropriate procedural vehicle since the constitutionality of the underlying regulation is not at issue. Therefore, the Court said that the appropriate action is one pursuant to NY CPLR Article 78, which has a four-month statute of limitations. The Court found that since the Petitioners failed to commence their challenge within this timeframe, and given the fact that the 2006 letter provided sufficient notice of the final determination that the amended permit had expired, the 2007 Order did not renew or revive the statute of limitations period. *Custom Topsoil, Inc. v. City of Buffalo*, 63 A.D.3d 1511, 879 N.Y.S.2d 854 (4d Dept. 6/5/2009).

The statute of limitations for challenging the adoption of an amendment to a local zoning code is six years. Since a zoning amendment is a legislative act, the proper vehicle to challenge this action is through a declaratory judgment action, not a CPLR Article 78. Therefore, the instant claim was timely having been brought within the longer six year statute of limitations. *East Suffolk Development Corp. v. Town Board of Riverhead*, 59 A.D.3d 661, 874 N.Y.S.2d 216 (2d Dept. 2/24/2009).

The refusal of a zoning board to hear and determine an appeal concerning a building permit application is subject to a four-month statute of limitations under CPLR 217(1). The Court said that the statute of limitations on Petitioner's right to demand that the zoning board hear and determine her appeal as originally presented began when she received the zoning board's letter on April 9, 2007. Since she waited until August 23, 2007 to act, the Court found that she unreasonably delayed in making her demand, and concluded that the proceeding was barred by laches. *Zupa v. Zoning Board of Appeals of the Town of Southold*, 64 A.D. 3d 723, 888 N.Y.S.2d 139 (2d Dept. 7/21/2009).

An appellate court in New York held that where the village zoning board of appeals granted a set-back variance in June of 2003 and the adjacent property owners waited until September of 2007 to challenge the board's action, the challenge was time-barred. In New York, a CPLR Article 78 proceeding to challenge a zoning board determination must be commenced within 30 days after the determination. *Ip v. Village of North Hills*, 61 A.D.3d 688, 875 N.Y.S.2d 915 (2d Dept. 4/7/2009).

A Neighbor objected to the approval by the Committee of Architectural Review for the design of a single family house. The petitioner challenged the determination in an Article 78 proceeding, and did not join the property owners who received the approval. The Architectural Review Committee moved to dismiss for failure to join a necessary party and the neighbor moved to withdraw the petition (without prejudice) as premature on the ground that the Committee's decision was not final. The Appeals Court agreed with the Architectural Review Committee that the Committee's determination was final. Relying on the Village Code in effect at the time, the Committee had exclusive authority to issue architectural approval of the plans for the proposed residence, and no avenue of appeal for aggrieved persons other than the applicant existed to review a determination of the Committee. Because the petitioner had no avenue of additional review under the Village Code, and therefore subsequent determinations by other Village agencies would not have affected the Committee's determination, the Court said that the Committee's determination was final for purposes of CPLR article 78 review, and that the four month statute of limitations had begun to run. *Lagin v. Village of Kings Point Committee of Architectural Review*, 62 A.D.3d 709, 879 N.Y.S.2d 491 (2d Dept. 5/5/2009).

The cause of action alleging that the Board violated the State Environmental Quality Review Act in enacting the local law was not time-barred, since it was filed within the four-month statute of limitations for when the law took effect. The Court pointed out that local laws do not become effective until they are filed with the Secretary of State. In this case, while the law was adopted in June, it was not filed until July 3, 2006. The action was commenced on October 27, 2006 – within the four month time period. For the same reason, the Court reinstated two other causes of action which the trial court had ruled were time barred. *Marcus v. Village of Wesley Hills*, 62 A.D.3d 799, 878 N.Y.S.2d 779 (2d Dept. 5/12/2009).

Subdivision Regulation

The planning board denied Petitioner's application for a subdivision since the petitioner failed to satisfy the required minimum lot size under local law. The Petitioner relied on a subsequent local law that provides an exemption for lots held in single or separate ownership on the effective date or for an unimproved building lot adjacent to said improved residential lot or parcel. The planning board, however, determined that the Petitioner did not meet the requirements of that local law. The trial court disagreed with the planning board and directed that the Petitioner's application be approved. On appeal, the Court reversed, noting that a local planning board has broad discretion in reaching determinations on subdivision applications, and that here the actions of the planning board had a rational basis, were not arbitrary or capricious, and were not illegal. *Kearney v. Kita*, 2 A.D.3d 1000, 879 N.Y.S.2d 584 (2d Dept. 5/26/2009).

Petitioners, who wanted to subdivide their property, applied to the county planning commission for a ruling that the proposed subdivision was subject to the "old filed map exception" (Real Property Law sec. 334-a(1)(b)), which, among other things, dispenses with the requirement that alterations be filed for a subdivision map that was filed before

January 12, 1945 where the alterations do not involve any changes or extensions to streets previously laid out, and where the lot boundaries are made solely to comply with applicable zoning requirements. The planning commission denied the request since they determined that the lot currently complied with all applicable zoning laws, and that the subdivision was not necessary to bring the lot into compliance therewith. The Petitioners challenged the commission's interpretation of the statute, asserting that proper statutory construction requires the commission to determine whether the lines filed in connection with the old map (filed prior to 1/12/1945) must be altered to comply with current zoning. Disagreeing with the planning commission's interpretation, the appellate court concluded that the language of the statute, "alterations made thereon" logically refers to alterations made or proposed to be made on the old subdivision map, and that the next phrase in the statute, "and where the only alterations or changes in lot boundaries which are made solely for the purpose of adhering to applicable zoning regulations" must also refer to the old filed subdivision map and the lot boundaries on that map in order for the statute to be read without contradiction. *Matter of Pro Home Builders v. Greenfield*, 67 A.D.3d 803, 888 N.Y.S. 2d 182 (2d Dept. 11/10/2009).

Takings

The county planning commission agreed to allow Gesner to subdivide his property into two parcels – one of which has a preexisting house on a lot 109.02 feet wide, and other, a vacant parcel about 73.04 feet wide. On the same date, the county commission was sent a proposed zoning amendment from the town where the subject property was located. The proposed amendment, which was made public more than two weeks earlier, and which was subsequently adopted, provided that the minimum lot width in the district where the subject parcels were located must be either 65 feet or the average width of the lots within a 200-foot radius, whichever was greater, but in no event would the width need to be more than 100 feet. So, although the average lot width in the subject area was 129.47 feet, the 100-foot cap would apply. After Gesner sold the lot with the home on it, he applied for a permit to construct a dwelling on the second lot, and was denied since that had a width of only 73.04 feet and not the required 100 feet. He then applied for an area variance which was also denied based upon the zoning board's conclusions that the variance would cause a substantial change in the character of the neighborhood and that the hardship was self-created. The appellate court found that the trial court erroneously concluded that Gesner has a vested right to divide his property and to sell and/or develop it. Applying the rule in *Town of Orangetown v. Magee*, 88 N.Y.2d 41 which sets forth that a property owner acquires vested rights when, "pursuant to a legally issued permit, he demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development," the court said such was not the situation here. *Genser v Zoning Board of Appeals of the Town of North Hempstead*, 65 A.D.3d 1144, 885 N.Y.S.2d 327 (2d Dept. 9/15/2009).

The State Defendants contend that Plaintiffs fail to state a claim for a due process violation because they have not alleged a cognizable property interest in an operating certificate and because they failed to take advantage of State Procedures to challenge

DOH's denial of an operating certificate to TZ Manor. Plaintiffs alleged that various government officials affected a taking of their property without just compensation and deprived them of due process of law in violation of the Fifth and Fourteenth Amendments resulting from a variety of actions in connection with the operation of an Adult Home in Nyack, New York. Specifically, the Plaintiffs claim that the State gave possession, occupation, and control over the Adult Home and its revenue and profits to Long Hill, in violation of their property rights. The government moved to dismiss for lack of subject matter jurisdiction, or in the alternative for failure to state a claim. Specifically, the State argued that the takings claim is unripe under the second prong of *Williamson County* since Plaintiffs' failed to avail themselves of State remedies when they chose not to file an action either under Article 1, Section 7 of the New York State Constitution, or through an Article 78 proceeding. The court agreed, and granted the motion to dismiss. The State also argued that the Plaintiffs failed to state a claim for a due process violation as they do not possess a cognizable property interest in an operating certificate, and because they failed to take advantage of State Procedures to challenge DOH's denial of an operating certificate to TZ Manor. The Court agreed as the Plaintiffs did not allege that the State actually took possession of any of their property, nor that they ever gave Long Hill anything other than an operating certificate. In the absence of an allegation of any cognizable property interest, Plaintiffs' due process claim was dismissed, for failure to state a claim. *TZ Manor v. Daines*, 2009 WL 2242436 (S.D.N.Y 7/29/2009)

Variances - Area

In upholding the zoning board's denial of an area variance, the Court noted that when the Town amended its zoning code, it specifically eliminated the option for a special exception for aboveground swimming pools, and by so doing, "the Town board signaled that no swimming pool on a lot smaller than 12,000 square feet was consistent with the general zoning plan." The Court found that with respect to the zoning board's review, the Board properly applied the required balancing test, considered the relevant statutory factors, and that its decision had a rational basis and was not arbitrary and capricious. The Court pointed to evidence in the record including the fact that there were no swimming pools on substandard lots within 600 feet of the petitioners' property, and out of the 300 homes in the community, there were only seven permanent aboveground swimming pools on substandard lots. Further, the record reveals that four of the pools were erected prior to the amended zoning code, one was on an 11,645 square foot lot, and only two were allowed pursuant to a variance. The court stated that the fact that two variances had been granted, neither of which involved lots located near the subject property, did not constitute precedent requiring the zoning board to explain a departure. The Court concluded that given the unique nature of the community (Fire Island), the zoning board's determination that the proposed pool would constitute an overintensification of the development on the property and produce an undesirable change in the neighborhood was not irrational. *Brady v. Town of Islip Zoning Board of Appeals*, 65 A.D.3d 1337, 886 N.Y.S.2d 465 (2d Dept. 9/29/2009).

Where the zoning board of appeals weighed the relevant statutory factors and determined that the requested area variance would produce an undesirable change in

the character of the neighborhood, that the requested variance was substantial, and that the petitioner's alleged hardship was self-created, its denial of the variance had a rational basis and was not arbitrary and capricious. *Salzano v. Zoning Board of the Town of Wall Kill*, 63 A.D.3d 850, 880 N.Y.S.2d 518 (2d Dept. 6/9/2009).

An appeals court upheld the zoning board's denial of an area variance where the board properly engaged in the required statutory balancing test weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance were to be granted. The Court found that the denial had a rational basis and was not arbitrary or capricious since the requested variances were substantial, the petitioner's hardship was self-created, there were feasible alternatives to the requested area variances, and there was basis in the record to support the board's determination that the proposed development would have an adverse impact on the physical or environmental conditions in the neighborhood, specifically with respect to surface water and groundwater quality. While the petitioner also claimed that the zoning board had granted other area variances within a 500 foot radius of the subject property, the Court said that this alone is not sufficient to establish that the difference in result is either due to impermissible discrimination or to arbitrary action. The Court found that the petitioner failed to establish that the zoning board reached a different result on essentially the same facts. *Crilly v Karl*, 67 A.D.3d 793, 888 N.Y.S.2d 189 (2d Dept. 11/10/2009).

The petitioner had applied for site plan approval in 2000 for a proposed furniture store, which described the premises as having a main floor and a cellar. The proposed showroom was to be 6,208 square feet, equal to the square footage of the main floor. The petitioner represented to the planning board that the cellar would only be used for storage and mechanicals. This was significant since any use of the cellar for retail purposes would cause the use to exceed the maximum floor area ratio in the zoning code and would create a problem with the number of required parking spaces which is tied to square footage used for retail. Upon inspection of the property by the building inspector who noticed the installation of partitions, walls, moldings, finishes and carpeting in the cellar, the petitioner again expressly designated on revised plans that the area of the cellar was for storage. Thereafter, temporary and permanent certificates of occupancy were issued based on the designation of the cellar area for storage. Months later, the Town charged the petitioner with violating the zoning code for operating a display area in the cellar of the premises contrary to the certificate of occupancy, and further charges were made for failure to abate the violation. In response to the zoning charges, the petitioner filed an application with the zoning board of appeals for two area variances to permit an increase in the allowable floor area ratio so that the cellar could be used as showroom space, and to permit a reduction in the required off-street parking from 62 spaces (required if the cellar space is used) to 33 spaces. In support of the variance requests, the petitioner said it was "unaware that it could not utilize the basement for retail sales." During a series of hearings, neighbors also said that the petitioner failed to comply with conditions of an earlier site plan approval such as landscaping, noise and overnight parking. Thereafter, the variance

applications were denied, and the written decision of the zoning board of appeals determined that the petitioner has continuously deceived the Town as to the intended use of the cellar, such that the granting of the variances was outweighed by the detriment that would be caused to the Town, the board also found that the use of the cellar burdened neighboring property owners, that the variance requests were substantial, and that the need for the variances was self-created by the petitioner's deceptive conduct. The appeals court agreed that the petitioner acted with intent to deceive the Town with respect to the intended use of the cellar. The Court, in determining whether common law that pre-dates the enactment of Town Law 267-b(3) is valid, noted that their interpretation of the Court of Appeals decision in *Sasso v. Osgood*, 86 N.Y. 2d 374 is that the new statute is "merely referring to the preexisting case law that pertains to the various factors which the Legislature saw fit to expressly include within the scope of Town Law 267-b(3)." To the extent that the zoning board relied on the applicant's misrepresentations as the sole basis for denial of the variances, that is no longer good law/precedent since only the statutory factors enumerated in the Town Law may now be considered. However, the court found that the zoning board did consider and balance the required factors in denying the request for area variances, and that the deception was one factor related to the self-created hardship factor. *Caspian Realty, Inc. v. Zoning Board of Appeals of the Town of Greenburgh*, 886 N.Y.S.2d 442 (2d Dept. 9/29/2009).

Pursuant to a building permit, the owner of the subject property had largely completed an addition to her house when the permit was revoked. She then applied for a permit for an expansion of her nonconforming use and a 28-foot side yard variance in accordance with the work already done. At the public hearing, the appellants, adjacent property owners, contended that the addition had an adverse impact on them. Both of the properties were built prior to the adoption of the zoning laws and the buildings on both properties are positioned close to the property line they share. The zoning board of appeals granted the requested area variance, and the neighbors commenced the proceeding claiming that the board's determination was arbitrary, capricious and an abuse of discretion. The appellate court upheld the determination since the zoning board engaged in the appropriate balancing test pursuant to the five enumerated statutory factors, and that the record revealed that the decision to grant the variance had a rational basis and was not arbitrary, capricious or an abuse of discretion. *Adams v. Zoning Board of Appeals of the Town of East Fishkill*, 65 A.D.3d 1139, 886 N.Y.S.2d 410 (2d Dept. 9/15/2009).

An appellate court upheld the zoning board's denial of an area variance, finding that the board properly weighed the relevant statutory factors. The Court noted that the board determined that the requested variance would produce an undesirable change in the character of the neighborhood, that the variance was substantial, and that the alleged difficulty was self-created. Further, the Court found that the board's decision was rational and not arbitrary. *Salzano v. Zoning Board of Town of Wallkill*, 63 A.D.3d 850, 880 N.Y.S.2d 518 (2d Dept. 6/9/2009)

Seven years after purchasing property in the Town, the owners applied to the zoning board for area variances to allow them to subdivide the property into two separate lots. The board denied the request. Twelve years after the denial, the owners, a husband

and wife, conveyed a portion of property that was improved with a single-family residence to the husband, and they conveyed a smaller unimproved portion to the wife. The wife then applied for, and was denied, a building permit for the unimproved lot. She appealed to the zoning board for area variance to enable her to build a residence on the lot. The zoning board denied the application and an appeal ensued. In upholding the denial, the Court found that the board properly considered the statutory factors for the granting of an area variance and that the denial had a rational basis in the record and was not illegal, arbitrary nor an abuse of discretion. *Zaniewski v. Zoning Board of Appeals of the Town of Riverhead*, 64 A.D.3d 720, 883 N.Y.S.2d 279 (2d Dept. 7/21/2009).

Where the Town Code provided, with respect to special uses, that “[a]ny of the following uses may be permitted upon obtaining a special use permit, provided such complies with all applicable dimensional and other requirements of this chapter...,” the Court said that this means that dimensional requirements could be satisfied after obtaining a variance, noting that N.Y. Town Law sec. 274-b (3) expressly provides for the issuance of a special use permit in conjunction with an area variance. Further, the Court said that the Planning Board, in their discretion, properly granted lot coverage waivers for the requirements in the Commercial Corridor Overlay District. The Planning Board has authority under the Town Code to grant waivers from the Town’s site development standards where an applicant can demonstrate “extreme difficulties” would be encountered with strict compliance. The Court found that the “extreme difficulties” standard is “capable of a reasonable application,” it sufficiently limits and defines that planning board’s discretion, and that it is not an impermissible delegation of legislative power. Additionally, the appeals court agreed with the court below that the Planning Board took a “rational, measured approach to the reality of the project” and that the record showed that the Board’s determination had a rational basis. Further, the Court said that since Wal-Mart obtained the dimensional waivers, they did not need to seek additional variances for that purpose. In addition, the Court said that Town Law 274-a(3) dealing with variances, does not preempt the waiver provisions in the local Code. Lastly, the Court agreed that the variances sought were necessary since strict compliance with the Code’s area requirements was impractical based upon the proximity of the project to existing retail and commercial businesses, and that the granting of the variances by the Zoning Board of Appeals did not “invade the zoning province of the legislative body.” *Lockport Smart Growth, Inc. v. Town of Lockport*, 63 A.D.3d 1549, 880 N.Y.S.2d 412 (4d Dept. 6/5/2009).

After the building inspector issued a permit for a sign in a residential district allowing a lawn sign to advertise the petitioners’ real estate business that was operated out of their home, he revoked the permit and ordered the sign removed upon determining that the sign did not comply with the Town’s Sign and Illumination Law as to size. Upon appeal to the zoning board, the petitioner’s challenged the building inspector’s determination and in the alternative sought an area variance. The zoning board denied both requests finding that the sign did in fact violate the Sign and Illumination Law with respect to maximum size. The appellate court upheld the denial finding that it was neither unreasonable nor irrational, that the local law was not preempted by Real Property Law sec. 441-a and that the variance denial was not illegal, arbitrary, nor an abuse of

discretion as it had a rational basis. *Blum & Bellino v. Town of Greenburgh*, 58 A.D.3d 835, 872 N.Y.S.2d 172 (2d Dept. 1/27/2009).

The denial of area variances to allow the petitioner to create two nonconforming lots had a rational basis and was not arbitrary and capricious. Since the zoning board properly applied and balanced the statutory factors, the Court of Appeals held that the court below erroneously substituted its judgment for that of the zoning board. *Gebbie v. Mammina*, 13 N.Y.3d 728, 885 N.Y.S.2d 450 (NY 8/27/2009).

Respondent was granted area variances to allow the subdivision of a parcel into two substandard lots to relocate a single-family residence currently located mid-parcel on one lot, and to construct a new single-family residence on the other. Petitioners appealed, alleging that the granting of the variances was arbitrary and capricious since the board failed to properly distinguish the application from a substantially similar prior application for the same parcel that was denied three years earlier. Noting that boards must adhere to their own precedent unless they provide a rational explanation for reaching a different result based on similar facts, the Court held that it was within the Board's discretion to determine whether modifications to the application as submitted presented changed facts or circumstances. The Court said that the Board did note several differences between the applications including modifications to the location of the two dwellings, an increase in side yard distances, preservation of a mature tree, and an agreement to a restrictive covenant that would keep the homes owner-occupied with no accessory apartments. Therefore, the Court held that the board of appeals acted rationally and did not abuse their discretion in approving the applications. *Waidler v. Young*, 63 A.D.3d 953, 882 N.Y.S.2d 153 (2d Dept. 6/16/2009).

In upholding the determination of the zoning board of appeals denying an area variance for a dock permit where the plans did not meet the minimum side yard setback requirements in the zoning ordinance, the appeals court noted that zoning boards have broad discretion when reviewing variance applications and that decisions will be set aside only where the board acts illegally, arbitrarily or abuses its discretion. State statute requires the zoning board to engage in a balancing test of five factors, including consideration of whether the applicant's alleged difficulty was self-created. The Court concluded that the Board's determination that the hardship was self-created was supported by evidence in the record and that the Board's determination was not otherwise illegal, arbitrary or an abuse of discretion. *Tsunis v. Zoning Board of Incorporated Village of Poquott*, 59 A.D.3d 726, 873 N.Y.S.2d 733 (2d Dept. 2/24/2009).

An appeals court upheld the zoning board's denial of an area variance for a rear-yard setback where the board engaged in the required statutory balancing test and considered the relevant statutory factors. Specifically, the Court determined that the Board's findings that the requested variance was substantial, that it would produce an undesirable change in the character of the neighborhood, and that the hardship was self-created, were supported in the record by testimony of local residents as well as by objective and factual documentary evidence. In addition, the Court noted that there was evidence that construction on the subject property could adversely affect protected

wetlands and cause drainage problems. The Court concluded that the Board's determination was not illegal, that it had a rational basis, and that it was not arbitrary or capricious. *DiPaolo v. Zoning Board of Appeals of the Town/Village of Harrison*, 62 A.D.3d 792, 879 N.Y.S.2d 507 (2d Dept. 5/12/2009).

On appeal challenging the granting of area variances, the appellate court reminded that local zoning boards have a wide discretion in considering applications for area variances, and that judicial review is limited to determining whether the action taken by the board was illegal, arbitrary and capricious, or an abuse of discretion. Relying on Town Law § 267-b(3)(b) and *Matter of Sasso v. Osgood*, which put forth and explained the criteria a zoning board must balance when determining whether or not an area variance should be granted, the Court concluded that the zoning board properly engaged in the required balancing test, and that its determination to grant the variances had a rational basis and was not arbitrary and capricious. *Celentano v. Board of Zoning Appeals of the Town of Brookhaven*, 63 A.D.3d 1156, 882 N.Y.S.2d 448 (2d Dept. 6/30/2009).

The zoning board appeals denied an area variance for parking that was associated with a mixed use residential and commercial property after the applicant requested the variance to allow for a dentist's office in the commercial area. The appeals court found that the board properly applied the statutory factors in the balancing test for consideration of an area variance and that their decision had a rational basis and was not arbitrary or capricious. *Alcantra v. Zoning Board of Appeals of the Village of Ossining*, 64 A.D.3d 774, 883 N.Y.S.2d 303 (2d Dept. 7/28/2009).

The zoning board does have authority to grant area variances resulting from an appeal of the building inspector's determination, and the petitioners were not required to file a separate application. *Anayati v. Board of Zoning Appeals of the Town of North Hempstead*, 65 A.D.3d 681, 885 N.Y.S.2d 300 (2d Dept. 8/25/2009).

The Respondent requested area variances to permit him to subdivide a parcel into two substandard lots where he intended to relocate a single-family residence currently located on mid-parcel onto one lot, and to construct a new single family residence on the other lot. The zoning board granted the variances, and neighbors appealed, alleging that the Board's decision was arbitrary and capricious as it failed to distinguish this application from a substantially similar prior application made for the same parcel three years earlier. The appeals court upheld the zoning board's decision, noting that a zoning board is required to adhere to its prior precedent, where it "provides a rational explanation for reaching a different result on similar facts, the determination will not be viewed as either arbitrary or capricious." (citing *Matter of Berk v. McMahon*, 29 A.D.3d 902) Further, a board may change its views as to what is in the best interests of the municipality and the board may give weight to slight differences not easily discernable. (See, *Knight v. Amelkin*, 150 A.D.2d 528) The Court noted that it was within the discretion of the board to determine whether the modifications to the submitted application presented changed facts and circumstances and to weigh such accordingly. Here, the Court found that the board specifically noted several changes from the prior application, including modifications to the locations of the two dwellings, an increase in

side yard setbacks, preservation of a mature tree, and an agreement to a restrictive covenant keeping the dwellings owner occupied with no accessory apartments. Further, the board noted that the current application differed from the prior one in that it contained substantial evidence of prior, similar variances and of the presence of other neighboring, substandard lots. *Waidler v. Young*, 63 A.D.3d 953, 882 N.Y.S.2d 153 (2d Dept. 6/16/2009).

An appeals court upheld the denial of area variances by the zoning board of appeals finding the board's determination supported by the record which, among other things, shows that the board properly conducted the balancing test required under NYS Village Law sec. 7-712-b(3) including properly considering whether the requested variances would have an adverse impact on the community. The court also noted that board members may base their decision upon, among other things, their personal knowledge and familiarity with the community. *Russia House and Kings Point, Inc. v. Zoning Board of Appeals of Village of Kings Point*, 67 A.D.3d 1019 (2d Dept. 11/24/2009).

An appellate court upheld the zoning board's denial of requested area variances finding that the Board properly weighted the five statutory factors set forth in Town Law 267-b. Specifically, with respect to the issue of whether the requested variances would cause an undesirable change in the character of the community or have an adverse impact on the physical or environmental conditions on the neighborhood, the Court determined that the zoning board did not improperly rely on mere generalized community opposition, but that the board properly considered oral statements from area residents that were based on personal knowledge. Additionally, the board considered a memorandum from the Town's Planning Division and Department of Environmental Control that objected to the development on a lot of the size proposed due to area congested. The memo also noted that most lots in the area were larger and that any existing smaller lots were developed prior to the effective date of the zoning code. The Court also noted that the board determined that the variances were substantial as they requested significant deviations from the zoning code requirements as well as the cumulative effect of the multiple variances requested. Lastly, the court agreed that the hardship was self-created since the petitioner knew the provisions of the zoning codes and that there was no guarantee that the property could be developed. *Millennium Custom Homes, Inc. v. Young*, 58 A.D.3d 740, 873 N.Y.S.2d 91 (2d Dept. 1/20/2009).

The zoning board's denial of an application for a natural resources special use permit and three area variances was upheld where the record supported a finding that the Board considered all of the relevant factors enumerated in Town Law §267-b(3)(b). Further, although the applicant alleged that the denial was irrational because it failed to comply with prior precedent, the Court concluded that the Board's explanation as to why they denied the application despite having granted the prior owner a permit to construct a home on the property was rational and satisfactory. *Foti v. Town of East Hampton*, 60 A.D.3d 1057, 876 N.Y.S.2d 137 (2d Dept. 3/31/2009).

The town zoning ordinance provided regulations in an appendix governing lot area and lot width, front, side and rear yard requirements. In addition, setback requirements for accessory buildings not attached to principal buildings, which differ from those in the

appendix where also contained in another section of the ordinance. The zoning board determined that the setback requirements set forth in the appendix applied to accessory buildings, such as the petitioner's detached garage. Since the zoning board's interpretation of the ordinance nullified the existence of the section dealing with accessory buildings, and the board's determination that any hardship suffered by the petitioner's was self-created was arbitrary and capricious, the appellate court remitted the matter to the zoning board for a de novo determination pursuant to the statutory balancing test set forth in Town Law 267-b(3) utilizing the set-back requirements for accessory uses contained in the zoning ordinance. *McLiesh v. Town of Western*, 2009 WL 5126605 (N.Y.A.D. 4 Dept. 12/30/2009).

Petitioner's purchased an 8,400 square foot parcel in a "barrier beach area" on Fire Island where there are no roads or cars. The zoning ordinance prohibits in-ground swimming pools in the area, but allows for above-ground swimming pools only on lots that are 12,000 square feet or larger. The applicable regulations has been in effect prior to 1991 when the petitioner's purchased the parcel. The Town Code had provided for a renewable temporary special exception applicable to parcels less than 12,000 square feet, which permitted people with neurological or muscular diseases to erect and maintain above the ground swimming pools for physical therapy purposes. This provision was repealed on December 12, 2006. After the petitioners' building permit application to construct an above-ground pool was denied, they applied for an area variance which was also denied. The appeals court concluded that the zoning board properly based its denial on the balancing test and consideration of relevant factors set forth in Town Law sec. 267-b(3)(b). The Court found that the evidence before the zoning board supported a rational conclusion that granting the variance would produce an undesirable change in the neighborhood or a detriment to nearby properties. The Court also said that the board was entitled to consider the effect its decision would have as precedent, and that the board properly concluded that the hardship was self-created. Further, the Court said that the board properly rejected the argument that since the proposed pool would meet the relevant property setback requirements it would no greater impact than a pool on a standard lot, since such argument would render meaningless the town board's legislative decision to prohibit above ground swimming pools on all lots less than 12,000 square feet. *King v Town of Islip Zoning Board of Appeals*, 2009 WL 4985235 (N.Y.A.D. 2 Dept. 12/22/2009).

Variations - Use

Following a denial of a special use permit, the Zoning Board of Appeals granted the respondent a use variance to allow him to use property he inherited in an RA-40 zone (permitted uses are residential and agriculture) for mining purposes. Petitioners, neighboring property owners, challenged the variance on the grounds that they did not receive adequate notice under both state statute and under the applicable zoning ordinance. The appellate court agreed, and annulled the variance. The Court explained that to satisfy notice requirements, the notice must not be misleading, and it must be clear and unambiguous. In this case, the published notice contained the tax parcel

address of the subject property but not the property address. This, said the court, at the very least rendered the notice ambiguous. With respect to the issue of personal notice, the Town zoning ordinance provides that at least 10 days before the hearing the applicant shall serve notice of the hearing and an explanation of the variance to all property owners within 200 feet of the subject property either by certified mail (return receipt) or by personal service (with a receipt signed by the property owner). If the notice is mailed, it is to be sent to the last known address as shown by the most recent tax records. In this case, notice was mailed to the petitioner and returned as undeliverable, since the Town sent it to the last address known to the code enforcement officer, but not to the current address as was accurately reflected in the municipal tax records. Therefore, the Court said, notice was not provided as required under the law. Further, the fact that the petitioner found out about the hearing two hours before it was scheduled and the petitioner did show up and voice objection and concerns, this did not cure the notice failure since the lack of adequate notice deprived the petitioner of the “opportunity to meaningfully participate in the hearing and frustrated the purpose and intent of the hearing requirement.” *Jones v. Zoning Board of Appeals of the Town of Oneonta*, 61 A.D.3d 1299, 879 N.Y.S.2d 592 (3d Dept. 4/30/2009).

Following the granting of a use variance to convert a parcel in a primarily residential zoning district into a commercial parking lot, neighbors appealed. Although they waited until after the parking lot was completed, the Court noted at the outset that this did not moot the petitioner’s appeal. The Court did reject their claim, however, that the zoning board lacked jurisdiction to grant the application. The Court found that the granting of a variance did not intrude on the City Council’s authority by “destroying the general scheme” of the zoning law. In fact, the Court noted that the zoning code specifically granted to the zoning board the authority to issue use variances. Further, the court noted that the board’s decision was rational and supported by substantial evidence. The applicant, said the Court, met its burden of demonstrating that it could not realize a reasonable return with respect to the property, that the hardship was unique, it was not self-created, and that the requested variance would not alter the essential character of the neighborhood. *Abrams v. City of Buffalo Zoning Board of Appeals*, 61 A.D.3d 1387, 877 N.Y.S.2d 550 (4d Dept. 4/24/2009).

In describing the difference between a nonconforming use and a use made lawful pursuant to a variance, the Court said, “a use for which a use variance has been granted is a conforming use and, as a result, no further use variance is required for its expansion, unlike a use that is permitted to continue only by virtue of its prior lawful, nonconforming status.” The Court found that here the evidence was unequivocal that the Board had granted permission to erect additions over the years without requiring another use variance, and that therefore, the only reasonable interpretation is that the 1956 variance did not limit the use to only 10 retail stores. However, the Court said that just because the variance is not so limited, it does not mean that there can be no constraints on further development of the property. The Court noted that an area variance may be required as well as site plan approval should the proposed expansion exceed the applicable dimensional constraints. The Court remanded the matter to the zoning board of appeals, for remittal to the Building Official, to determine whether an area variance is required. *Scarsdale Shopping Center Associates, LLC v. Board of*

Zoning Appeals for the City of New Rochelle, 64 A.D.3d 604, 882 N.Y.S.2d 308 (2d Dept. 7/7/2009).

Following the approval of a use variance application to allow the use of two parcels in an M-1 light industrial district for a mixed use development project that will include student housing, other residential uses, a hotel, and commercial uses, petitioners appealed seeking to annul the variances. In upholding the trial court's dismissal, the appeals court agreed that the applications met the requirements for a use variance pursuant to General City Law §81-b[3]. Concluding that the determination of the zoning board of appeals had a rational basis and was supported by substantial evidence, the Court explained that the applicants demonstrated that the restrictions on the property caused an "unnecessary hardship." The Court determined that the applicants established by dollars and cents proof that they could not realize a reasonable return on their investment since the property had been vacant for 30 years and only 10% to 15% of the space was occupied at the time of applicant, and further, that the prospects for expanding occupancy and generating revenue to cover necessary maintenance, repairs and improvements was marginal. The applicant further established that the hardship was the result of the unique characteristics of the property, and that the variance would not alter the essential character of the neighborhood since the types of mixed uses proposed already exist in close proximity to the property. Lastly, the Court found no reason to disturb the zoning board's finding that the hardship was not self-created. *O'Connell Machinery Co., Inc. v. City of Buffalo Zoning Board of Appeals*, 60 A.D.3d 1353, 875 N.Y.S.2d 715 (4d Dept. 3/20/2009).

In reversing the trial court and upholding the variance denial, the appellate court noted that evidence before the board indicated that the granting of the variance would produce an undesirable change in the neighborhood, and that the board had the right to consider the effect of its decision on precedent and the extent to which such would impair the effectiveness of the zoning ordinance. Additionally, the Court agreed that the hardship was self-created as the plaintiff had at least constructive notice of the proposed zoning change. While noting that this alone would not be sufficient to deny the variance, the Court said that the board's consideration of the five statutory factors supported a finding that their decision was neither arbitrary nor capricious nor irrational. *Genser v Zoning Board of Appeals of the Town of North Hempstead*, 65 A.D.3d 1144, 885 N.Y.S.2d 327 (2d Dept. 9/15/2009).

An appeals court upheld a variance denial by the zoning board of appeals finding that the board's interpretation of the language in the local zoning ordinance was reasonable, and that its determination had a rational basis and was not arbitrary and capricious.

Although the property owners, who desired to erect a wall on their property line, claimed that the board had previously granted similar variances under substantially similar facts and hence had to follow precedent, the Court found that the Board had a rational explanation for reaching a different result. *Olson v Scheyer*, 67 A.D.3d 914, 889 N.Y.S.2d 245 (2d Dept. 11/17/2009).

The New York Court of Appeals holds that the zoning board's decision to grant a use variance for the construction of a commercial structure in a residentially zoned area was

an abuse of discretion. The Court said that the zoning board failed to establish that the property was “unique” since according to the City’s zoning law, proof of uniqueness must be “peculiar to and inherent in the particular zoning lot” and not something that is “common to the whole neighborhood.” The Court concluded that, “The fact that this residentially-zoned corner property is situated on a major thoroughfare in a predominantly commercial area does not suffice to support a finding of uniqueness since other nearby residential parcels share similar conditions.” *Vomero v. City of New York*, 13 N.Y.3d 840 (N.Y. 11/19/2009).

Vested Rights

Vested rights cannot be acquired in reliance on an invalid permit. With respect to nonconforming uses, the Town Code provides that “[n]o building which has been damaged by fire...shall be repaired, rebuilt or used except in conformity with the provisions” of the zoning law. Since the use was terminated by the fire in 2005, there was no nonconforming use in existence at the time of the enactment of the new ordinance. Therefore, since laundromats were not permitted uses when the petitioner sought the building permit, he could not acquire vested rights in reliance on a permit issued in error. The Court said that the “special facts” exception did not apply here since the petitioner failed to show evidence that the Town acted in bad faith or unduly delayed action on his permit until after the new zoning law was in effect. As a result, the petitioner had no vested right and had to apply for the use variance. *Westbury Laundromat, Inc. v. Mammina*, 62 A.D.3d 888, 879 N.Y.S.2d 188 (2d Dept. 5/19/2009).

Although the plaintiffs alleged that they had secured a special use permit, the Circuit Court concluded that vested rights did not attached since they failed to complete substantial construction. Therefore, the plaintiffs had no constitutionally protected property right in the zoning status of their land, nor did they have a constitutional right to receive actual notice of the proposed change in the zoning status. The Court explained that they have long rejected the argument that an un-exercised right to develop land confers a due process right in the existing zoning status. *Alzamora v. Village of Chester*, 2009 WL 578630 (2nd Cir. (N.Y.) 3/6/2009).

Wind Development

Following a condemnation of a portion of the petitioners’ property by the Town Board to create easements to enable the placement of underground electricity lines for a wind farm project, the petitioners challenged the action alleging that the Town Supervisor, who cast the deciding vote on both the resolution commencing the condemnation proceedings and the resolution approving the condemnation had a conflict of interest that required recusal. The Court, however, said that since the appeal was made pursuant to the State Eminent Domain Procedure Law (Section 207(c)) (EDPL) their review was “limited to whether the proceeding was in conformity with constitutional requirements, whether the proposed acquisition is within the statutory jurisdiction or authority of the condemnor, whether the condemnor’s determination and findings were

made in accordance with the procedures set forth in EDPL article 2 and ECL article 8, and whether a proposed [public] use, benefit or purpose will be serviced by the acquisition.” (citing to *Matter of Pfohl v. Village of Sylvan Beach*, 26 A.D. 3d 820). The Court determined that conflicts of interest allegations should be raised in a proceeding pursuant to CPLR Article 78, and that the EDPL is not the proper procedural vehicle to resolve that allegation. The Court also concluded that the Petitioners failed to meet their burden of establishing that the Town Board’s determination was “without foundation and baseless,” since the Board findings stated that the condemnation for the purpose of creating easements would, “create jobs, provide infrastructure, and possibly stimulate new private sector economic development.” These, said the Court, demonstrate the requisite public use or public benefit. *Dudley v. Town Board of Prattsburgh*, 59 A.D.3d 1103, 872 N.Y.S.2d 614 (4d Dept. 2/6/2009).

The District court upheld the dismissal of a complaint regarding a permit for a windmill after the pro se plaintiff had been given time to file an amended complaint. The Plaintiff, who had claimed, among other things, that the Town and Town officials had violated his rights under the Fourteenth Amendment by denying his application to build and operate a residential windmill, only alleged in his initial complaint that the building inspector denied the permit application and that the plaintiff simply disagreed with the denial. The Court gave him time to amend the complaint to state a claim upon which relief could be granted, but following the filing of the amended complaint the Town moved to dismiss since the plaintiff failed to file a required notice of claim against the municipality or its employees. The Court agreed with the Town, and further, the Court found as to the equal protection and due process claims, the Plaintiff failed to demonstrate that he was treated differently from similarly situated individuals and he failed to demonstrate that he had a valid property interest in a building permit for the windmill. *Christian v Town of Riga*, 649 F.Supp.2d 84 (W.D.N.Y.8/17/2009).

Appellate Court holds that the zoning board’s classification of a series of wind-powered generators as a utility was neither irrational nor unreasonable, and that such determination was supported by substantial evidence. The Court noted that the zoning ordinance defined utilities as “telephone dial equipment centers, electric or gas substations, water treatment or storage facilities, pumping stations and similar facilities.” This decision is significant because public utilities are entitled to a relaxed standard of review in zoning matters. *Wind Power Ethics Group v. Zoning Board of Appeals of the Town of Cape Vincent*, 60 A.D.3d 1282, 875 N.Y.S.2d 359 (4d Dept. 3/20/2009)

The trial court invalidated the Town of Hamlin (NY) wind turbine law due to an improper Negative Declaration under SEQRA. The Court concluded that even though the Board identified “the relevant areas of environmental concern” in arriving at its Determination of Non-Significance/Negative Declaration, the Board did not take a “hard look” at them, nor did the Board set forth a “reasoned elaboration” for its determination. Moreover, the Court disagrees with respondent’s characterization that the wind facilities that were allowed prior to the enactment of Local Wind Law 3-2008 are public utilities.” The petitioners appear to have been concerned about proposed setback and noise standards. The Court ruled that it is not appropriate to issue a negative declaration

based merely on the fact that the new law is more restrictive than existing law (which does not set forth any set standards); or that the zoning law does not constitute a decision on a specific wind turbine application. Although the decision is not clear on this, another apparent defect in process was treating action as Unlisted Action, when the SEQRA regulations define Type I action as including change in permissible uses for 25 or more acres of land. *Hamlin Preservation Group v. Town Board of the Town of Hamlin*, Index No. 2008/11217 (Monroe County Supreme Court, Jan. 5, 2009)

Wireless Communications

The Telecommunications Act of 1996 (the "TCA") effectively preempted the Town's Wireless Communications Ordinance ("Town Ordinance"). The Court determined that the wireless carriers' (the "Carriers") claims of federal preemption were valid with respect to the Town Ordinance where the Town Ordinance: (i) required Radio Frequency ("RF") information for use in the Town's zoning point scoring system, and (ii) favored "preferred alternative technologies." The Court found that these aspects of the Town Ordinance impermissibly attempted to regulate in the area of communications technology, an area of significant federal presence. The Court disagreed with the Carriers' claims that the Town Ordinance was facially unconstitutional due to express preemption by the TCA. The Carriers attempted to demonstrate that, contrary to FCC regulations prohibiting Town regulation of environmental effects, the Town prohibition against the placement of cellular towers near schools and day care centers was impermissibly related to RF emission concerns, rather than other factors, such as fall zone safety. The Court found otherwise stating that the Town is entitled to a presumption against preemption and accepted the Town's justification that the distance requirements for site locations were necessary for safety reasons – thereby falling within the Town's traditional police powers in this regard. The carriers also claimed that, because there was an unduly burdensome application process, unlimited delays and the prohibition of new facilities in large parts of the Town, the Town Ordinance had the effect of making it impossible to provide communications services, contrary to the express requirements in the TCA. The Court rejected these arguments and determined that there was no express preemption of the Town Ordinance in connection with these claims. The Court also found that severing the unconstitutional portions of the Town Ordinance would cause the entire Ordinance to become unworkable because the point scoring and sorting scheme would be rendered meaningless and confusing by the severance of the scheme's express and pervasive preference for alternative technologies. Accordingly, the Court held the Town Ordinance unconstitutional and ordered the Town to redraft the entire wireless ordinance within six months from the date of the decision. The Court further held that the Town's failure to do so within the six-month period will "result in an impermissible total ban on the provision of personal wireless services." *New York SMSA Limited Partnership d/b/a Verizon Wireless v. Town of Clarkstown*, No. 07 Civ. 7637 (S.D.N.Y. Mar. 26, 2009).

In 2005 the Town of Ramapo enacted a moratorium on wireless facilities in the Town for the purpose of considering amendments to its zoning code that already regulates wireless communications facilities. The moratorium, in effect for none months,

precluded final approval of a special use permit or building permit for wireless facilities. To date, the Town has not proposed changes in its zoning law. T-Mobile sought to remedy a gap in service by applying to the Town in 2005 for a waiver from the moratoria to allow it to locate a wireless facility. The request was denied. After the moratorium expired, T-Mobile filed an application for a special use permit and site plan approval to install the facility. After negotiations over the height of the tower, the zoning board eventually granted other area variances. The planning board asked T-Mobile to submit a list of alternate sites that were investigated for placement of the tower. An engineer for T-Mobile explained how the site was selected, and at the same July 2006 meeting members of the public voiced concerns about how the tower would look, concerns that it would lower property values, and that it could create health hazards. The Town attorney noted that the Board was precluded under the TCA from considering possible health impacts, and the hearing was adjourned until the Board's September 2006 meeting. T-Mobile submitted requested information about alternate sites, explaining why each of the three sites was not suitable, and agreed to use a tree-pole at the request of a planning board member. Members of the public still expressed concern over property values and health issues and the planning board adjourned the matter to the October 2006 meeting so that the applicant could consider co-locating the tower in another spot as well as the possibility of using alternate technologies such as cell towers on wheels ("COW"). Both of these were later determined by T-Mobile to not be feasible. At the October meeting, the planning board issued a negative declaration under the State Environmental Quality Review Act, and members of the public still expressed opposition for reasons including health concerns. In March, T-Mobile asked the local fire department whether it would be interested in leasing it space for the construction of the tower, but the fire company declined (however, in September 2007 they reconsidered and changed their minds). The zoning board granted T-Mobile area variances in April 2007, and in June 2007 the Town's planning consultant notified the planning board that the application was now ready for final site plan approval. At a November 2007 planning board meeting, residents again expressed their concerns over adverse effects the tower would have on property values. The meeting was continued to December 2007 where the Board announced that they would retain their own consultant to study the use of alternate sites and the possibility of a District Antenna System (DAS) to remedy the gap in coverage, and they adjourned the meeting until January 2008. At the end of January, the Town's consultant reported that use the use of a DAS was not feasible. At the meeting in February 2008, the planning board reserved decision until their March meeting to allow members to think about the record. At the request of T-Mobile, who submitted an appraiser's findings that the tower would not adversely affect property values, the hearing was kept open until March. A resident submitted a counter opinion from another appraiser. At the March 2008 meeting, the Board denied the application by a vote of 4-2. The two reasons articulated by the Town Planning Board for the denial were: 1) the Tower would be an eyesore; and 2) it would lower property values of the surrounding homes near the proposed Tower. On audio tape of the meeting, however, was a statement by one board member that stated that one of the reasons for denial was that the facility posed a health risk. Just before the decision, T-Mobile initiated the present lawsuit alleging that the Town's refusal to make a decision on its application for 22 months amounted to unreasonable delay under Section 332(c)(7)(b)(ii) of the TCA; and that the Town's eventual denial of the application was a prohibition on wireless services under Section 332(c)(7)(b)(i)(II). Additionally, it alleged

that the denial was unlawfully grounded in concerns about “environmental effects” under Section 332(c)(7)(B)(iv). Before the Court was a motion for summary judgment on all claims and for permanent injunctive relief. The District Court for the Southern District of New York agreed, finding that the Town’s denial of the permit had the effect of prohibiting service in violation of Section 332(c)(7)(B)(i)(II), and that the Town further violated Section 332(c)(7)(B)(iv) in basing its decision partly on the health risks from the proposed facility. In addition, the District Court held that the Town violated Section 332(c)(7)(B)(ii) for failing to support its decision with substantial evidence, and that the Town violated New York’s Article 78 for the same reason.

The Court revisited the Second Circuit’s holding in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (1999) noting that it has remained unsettled as to whether the gap in service is to be measured from the perspective of the individual provider or from the perspective of users. Courts have reached different conclusions as to whether *Willoth* established a provider-based or a user-based rule. After reviewing the holdings in other circuits, the District Court said that “the provider-based approach is consistent with *Willoth* and sits more easily with the goals the TCA was designed to advance.” Under this approach, the Court found that T-Mobile presented overwhelming evidence of a significant gap in service and that the proposed tower was the least intrusive means to close the gap. As to the environmental claims, the Court noted that the Town did admit that the third reason for denial was concern over potential health impacts, and that is not a valid consideration under the TCA as the facility and site otherwise complies with FCC regulations. The Court said that “any decision actually based on environmental effects is a violation, whether other legitimate reasons factored into the decision or not.” With respect to the substantial evidence, although both aesthetic and property value concerns can each be a valid basis for zoning decision, the record reveals little support for the Planning Board’s conclusion that the tower would be an “eyesore.” The Court also found the Town’s determination that the tower would lower neighboring property values to be almost entirely conclusory. The Court relied on precedent holding that localities should not accord weight to small, unspecific, unsupported statements that towers adversely affect property values. The Court found nothing more than generalized community expressions of concern. Finally, noting that the TCA does not specify a remedy for violations of Section 332(c)(7), the Court said that the appropriate remedy is injunctive relief. *T-Mobile Northeast LLC v. Town of Ramapo*, 2009 WL 3075637 (S.D.N.Y. 9/30/2009).

In 2002, Nextel (an Omnipoint/T-Mobile competitor) commenced litigation against the Town of LaGrange after the Town had denied Nextel’s application to replace an existing radio tower with new tower. The Nextel/Town lawsuit was settled in 2004, with the Town agreeing to allow Nextel to construct a new 150 foot monopole tower to replace the radio tower. But that was as far as the settlement would go – the settlement agreement explicitly required that any future modifications or alterations at what is referred to in the opinion as the “ATC tower” must comply with the Town Zoning Code (and reserved all rights to challenge the Zoning Code as applied to any such modifications or alterations). In 2003, T-Mobile attended a pre-application meeting with the Town to discuss three potential options for curing a gap in coverage by the

installation of new wireless facilities: (1) collocation on the ATC tower (which was then the subject of ongoing litigation between Nextel and the Town); (2) construction of a new monopole tower at different site; and (3) collocation on a Con Ed transmission tower. T-Mobile's engineers analyzed each potential option using sophisticated propagation tools, and determined that the ATC tower furnished the most complete remedy for the service gap. Nevertheless, and principally due to the ongoing litigation between Nextel and the Town, T-Mobile submitted an application to construct a new tower, which met with significant resistance.

After the Nextel/Town settlement, T-Mobile shifted its focus to the ATC tower, based on the Town Zoning Code's expressed preference for collocation over new tower construction (the Zoning Code contains a hierarchical structure which compels collocation whenever possible). Notably, the Zoning Code also contains a provision, section 240-49(G)(5)(b), which prohibits "all communications facilities . . . within 500 feet of any occupied residential dwelling unless expressly permitted, in writing, by all the inhabitants of the dwelling within a radius of 500 feet of the proposed communication facility." As observed by Judge McMahon, this section of the Code "literally requires an applicant to obtain even the signatures of children (some of whom may not be able to write), or else to receive a variance [from the signature requirement] from the ZBA." On April 3, 2006, the Town Building Inspector informed T-Mobile that, since it had no chance of obtaining all the signatures required to authorize its collocation on the ATC tower, it must obtain a variance from the signature requirement. T-Mobile applied for the variance under protest. After a series of public hearings in which the public comment centered on the failed (from the Town's perspective) Nextel litigation, and the alleged health impacts of RF emissions (a prohibited concern under the Telecom Act), the Town denied the variance request. In other words, T-Mobile was precluded from collocating on the ATC pole as required by the Zoning Code, and was sent back to the new tower proposal. The instant litigation ensued. Judge McMahon ruled (1) the Town acted appropriately in requiring T-Mobile to apply for an area variance to authorize its proposed co-location of wireless facilities (antennae) on an existing monopole tower; but further held that the Town's decision (2) was not supported by substantial evidence in the administrative record when measured under the Telecommunications Act of 1996 (TCA) or Article 78 (The Town failed to give written reasons for its denial as required by the Section 332(c) (7)(B)(iii) of the TCA, and the court found that every statutory factor required to be considered in the decision of whether to grant a variance pointed in the direction of granting the request. The Court further noted that "...public officials are supposed to carry out the mandate of the TCA and state law in face of community opposition...", and that here there was unsubstantiated general community opposition that could not form the basis of evidence to support denial of the variance.); and (3) would have the effect of prohibiting T-Mobile's provision of wireless service and causing unreasonable discrimination, both in violation of the TCA (the Court agreed that the evidence demonstrated a significant gap in T-Mobile's wireless network; that co-location at the ATC site would be the least intrusive means for closing the gap; and that the denial of the application has the effect of unreasonably discriminating among providers of functionally equivalent services and that providers were treated unequally in violation of Section 332(c) (7)(B)(i)(I) of the TCA.). *Omnipoint Communications, Inc. v. Town of LaGrange*, 2009 WL 2878010 (S.D.N.Y. 8/31/2009).

Zoning Administration

An appellate court upheld a determination of the Town Board denying the developer's application to close a road in the Town in connection with a residential development. Although the developer argued that the road was "useless" which would allow the Town to close the road pursuant to State Highway Law section 171, the Court found that the Board's decision was rational and not arbitrary and capricious, since the subject road is still in active use. *East Fishkill Home & Land v. Town of East Fishkill*. 54 A.D.3d 950, 864 N.Y.S.2d 524 (2 Dept. 9/23/2008).

Best described as a property dispute between two houses of worship, with the plaintiff congregation alleging claims of trespass by the defendant congregation and the defendant congregation alleging the plaintiff was violating applicable zoning. The appeals court concluded that the trial court incorrectly applied a former provision in the village code that was in effect prior to the action that had required a special use permit for the operation of a place of worship within a residential district. The amended code had reclassified the operation of a place of worship in a residence district as a permitted principal use subject only to site plan review. Therefore, the appeals court concluded, that while the trial court correctly enjoined the plaintiffs from using the subject premises without municipal approval, the appeals court noted it is site plan and not special use permit approval that is required. As to the trespass claims over use of parking spaces, the appeals court found insufficient evidence to support the claims. Lastly, the court found an implied easement for use and control of the basement and roof of the adjacent premises by the defendant since evidence demonstrated that both buildings were once in unitary ownership and that the defendant's use of the property prior to the separation was "continued, obvious, manifest, and meant to be permanent, and that such an easement is a reasonable necessity, rather than a mere convenience." *Bais Yoel Ohel Feige v. Congregation Yelev Lev D'Satmar of Kirya Yoel*, 65 A.D.3d 1176, 885 NYS 2d 741 (2d Dept. 9/22/2009)

Zoning-Interpretation

The planning board denied petitioner's application for a site plan approval on the grounds that the proposal includes impermissible sidewalk retail pursuant to the town's zoning law. However, the Court found that the term "sidewalk retail" was not defined in the zoning law and concluded that its meaning is ambiguous. The Court noted that while a planning board's interpretation of a zoning ordinance is entitled to great deference, where there is ambiguity it is to be resolved in favor of the property owner. Further, the Court concluded that there was no basis in the record to support the board's denial on the ground that certain outdoor storage and display areas constituted a "building" in excess of the size permitted in the District. Since the areas were neither roofed nor intended for shelter, the Court determined that they do not constitute buildings within the

meaning of the town zoning law. Additionally, the Court noted that the Board's denial on the ground that those areas would create an appearance inconsistent with the surrounding area was irrational since the proposed landscaping would screen the objectionable features from public view. The Court also commented that to the extent that the Board's denial was based on the belief that the use was nonconforming, the Board was obligated to honor the use variance that attached to the property. *Lodge Hotel, Inc. v. Town of Erwin Planning Board*, 62 A.D.3d 1257, 877 N.Y.S.2d 803 (4d Dept. 5/1/2009).

An appeals court overturned a preliminary injunction against three residential buildings in the Upper West Side of New York City that had ordered them to stop using the SROs (single room occupancy) as transient hotels. The Court determined that the City did not show it would ultimately succeed in proving that the transient use actually constitutes a violation of either the City Zoning Resolution or the certificates of occupancy. The rental of a small number of units for non-permanent use does not, said the court, violate the Zoning Resolution or the certificate, since there is no requirement that the buildings be used exclusively for permanent occupancy. Further, the Court noted that the definition of the words "transient" and "permanent" contained in the Zoning Resolution are vague. *New York City v. 330 Continental*, 60 A.D.3d 226, 873 N.Y.S.2d 9 (1d Dept. 1/29/2009).

The Town who sought to enjoin the defendants from using the two parcels they owned for purposes aircraft takeoffs and landings without a special permit. The Town Code defines "airport" as "[a]ny landing area used regularly by aircraft for receiving or discharging passengers or cargo or for the landing and takeoff of aircraft being used for personal or training purposes." The defendants argued that since they used a helicopter for personal transportation purposes and they didn't take off and land on a "regular" basis, the definition did not apply to them. Although the Court agreed that the definition of "airport" in the Code was ambiguous, and that ambiguity is to be resolved in favor of the property owners, the Court found that here the defendant acknowledged that he purchased one of the two parcels specifically to facilitate takeoffs and landings, and for no other purpose. Further, he stated that his use of the helicopter was "tantamount to a homeowner driving his vehicle to and from his property." As a result, the Court concluded that there was an indicia of "regularity" of use, and this, combined with the town's concerns about safety hazards and noise, demonstrated a likelihood of success on the merits for purposes of a preliminary injunction. *Town of Riverhead v. Gezari*, 63 A.D.3d 1042, 881 N.Y.S.2d 172 (2d Dept. 6/23/09).

An appeals court determined that the zoning board of appeals properly determined that proposed high school athletic facilities constituted a permissible use under the applicable zoning code, finding that such determination was neither unreasonable nor irrational. In addition, the Court concluded that the Town did comply with the required environmental review. *Grasso v. Town of West Seneca*, 63 A.D.3d 1629, 881 N.Y.S.2d 247 (4d Dept. 6/5/2009).